No. 17-_____

IN THE SUPREME COURT OF THE UNITED STATES

CALVIN MCMILLAN,

Petitioner,

v.

STATE OF ALABAMA,

Respondent.

On Petition for Writ of Certiorari
to the Alabama Court of Criminal Appeals

PETITION FOR WRIT OF CERTIORARI

TABLE OF APPENDICES

APPENDIX A

IN THE SUPREME COURT OF ALABAMA

February 23, 2018

1170215

Ex parte Calvin McMillan. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Calvin McMillan v. State of Alabama) (Elmore Circuit Court: CC-08-476.60; Criminal Appeals : CR-14-0935).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on February 23, 2018:

Writ Denied. No Opinion. Bryan, J. - Stuart, C.J., and Bolin, Parker, Shaw, Sellers, and Mendheim, JJ., concur. Main and Wise, JJ., recuse themselves.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 23rd day of February, 2018.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

APPENDIX B

2017 WL 3446604
Only the Westlaw citation is currently available.

NOT YET RELEASED FOR PUBLICATION.

Court of Criminal Appeals of Alabama.

Calvin MCMILLAN
v.
STATE of Alabama

CR–14–0935
|
August 11, 2017

Synopsis

Background: Defendant was convicted of capital murder and sentenced to death, following jury trial in the Circuit Court, Elmore County, No. CC–08–476, John B. Bush, J. Defendant appealed, and the conviction and death sentence were affirmed, 139 So. 3d 184. Defendant filed a petition for postconviction relief. The Circuit Court, Elmore County, CC–08–496.60, denied defendant's motion, and he appealed.

Holdings: The Court of Criminal Appeals, Welch, J., held that:

[1] even if *Brady* claim by defendant made in postconviction petition was not procedurally barred, defendant did not establish evidence was suppressed;

[2] counsel was not ineffective for failing to investigate defendant's intellectual deficits or his low IQ;

[3] counsel was not ineffective for failing to argue that defendant was intellectually disabled;

[4] counsel was not ineffective for failing to investigate of defendant's neurological disorders;

[5] defendant did not show prejudice to support ineffective assistance claim based on counsel's failure to present evidence of defendant's young age as a mitigating circumstance;

[6] counsel was not ineffective for failing to present rebuttal evidence at sentencing concerning defendant's prior conviction for assault;

[7] defendant could not demonstrate prejudice to support ineffective assistance claim by counsel's failure to object to court's alleged reliance on other cases when sentencing defendant to death;

[8] defendant did not receive ineffective assistance by counsel failing to present evidence of defendant's intellectual defects in support of a motion to suppress; and

[9] sentencing of defendant to death was not a violation of *Atkins*.

Affirmed.

Windom, P.J., recused herself.

West Headnotes (59)

[1] Criminal Law
Interlocutory, Collateral, and Supplementary Proceedings and Questions

If the circuit court is correct for any reason, even though it may not be the stated reason, the Court of Appeals will not reverse a denial of a postconviction relief petition. Ala. R. Crim. P. 32.

Cases that cite this headnote

[2] Criminal Law
Post-conviction relief

The plain-error standard of review does not apply when the Court of Appeals evaluates the denial of a collateral petition attacking a death sentence.

Cases that cite this headnote

[3] Criminal Law
Matters which either were or could have been adjudicated previously, in general

The procedural bars in the postconviction relief rule, apply to all cases, even those involving the death penalty. Ala. R. Crim. P. 32.

Cases that cite this headnote

[4] **Criminal Law**
Petition or Motion

The burden of pleading under the rules governing postconviction relief is a heavy one; conclusions unsupported by specific facts will not satisfy the requirements of the rules, and the full factual basis for the claim must be included in the petition itself. Ala. R. Crim. P. 32.3, 32.6(b).

Cases that cite this headnote

[5] **Criminal Law**
Petition or Motion

If, assuming every factual allegation in a postconviction petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under the rule. Ala. R. Crim. P. 32.3, 32.6(b).

Cases that cite this headnote

[6] **Criminal Law**
Necessity for Hearing

An evidentiary hearing on a coram nobis petition, now a postconviction relief petition, is required only if the petition is meritorious on its face; a petition is "meritorious on its face" only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon, as opposed to a general statement concerning the nature and effect of those facts, sufficient to show that the petitioner is entitled to relief if those facts are true. Ala. R. Crim. P. 32.

Cases that cite this headnote

[7] **Criminal Law**
Necessity for Hearing

Where a simple reading of a petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court may summarily dismiss that petition. Ala. R. Crim. P. 32.7(d).

Cases that cite this headnote

[8] **Criminal Law**
Petition or Motion

The sufficiency of pleadings in a postconviction petition is a question of law. Ala. R. Crim. P. 32.

Cases that cite this headnote

[9] **Criminal Law**
Review De Novo

The standard of review for pure questions of law in criminal cases is de novo.

Cases that cite this headnote

[10] **Criminal Law**
Constitutional obligations regarding disclosure

Criminal Law
Diligence on part of accused;availability of information

Even if *Brady* claim by defendant made in postconviction petition was not procedurally barred, defendant did not establish evidence was suppressed to support claim that State erred in failing to disclose that a witness, who was stabbed by defendant, assaulted defendant before the stabbing; by his own admission, defendant would have been present at the time of the alleged assault by witness, and defendant's amended petition admitted that there were no incident reports describing an attack on defendant by witness, and thus there was no allegation that any documents were suppressed. Ala. R. Crim. P. 32.3, 32.6(b).

Cases that cite this headnote

[11] **Criminal Law**
Constitutional obligations regarding disclosure

Suppression is a necessary element of a *Brady* claim.

Cases that cite this headnote

[12] **Criminal Law**
Argument and conduct of prosecutor

To adequately plead a *Brady* claim in a postconviction petition, a petition must allege facts that, if true, would establish that the prosecution suppressed evidence that was favorable to the defendant and material. Ala. R. Crim. P. 32.6(b).

Cases that cite this headnote

[13] **Criminal Law**
Argument and conduct of prosecutor

A postconviction petitioner has no burden to plead facts in his or her petition negating the preclusions in the postconviction rules in order to sufficiently plead a *Brady* claim. Ala. R. Crim. P. 32.2(a)(3), (a)(5).

Cases that cite this headnote

[14] **Criminal Law**
Diligence on part of accused;availability of information

There is no *Brady* violation where the information in question could have been obtained by the defense through its own efforts.

Cases that cite this headnote

[15] **Criminal Law**
Diligence on part of accused;availability of information

Evidence is not suppressed, for purposes of a *Brady* claim, if the defendant either knew or should have known of the essential facts permitting him to take advantage of any exculpatory evidence.

Cases that cite this headnote

[16] **Criminal Law**
Use of False or Perjured Testimony

To prove a *Giglio* violation the postconviction petitioner must show that: (1) the State used the testimony; (2) the testimony was false; (3) the State knew the testimony was false; and (4) the testimony was material to the guilt or innocence of the accused.

Cases that cite this headnote

[17] **Criminal Law**
Use of False or Perjured Testimony

To prove a *Giglio* violation,a defendant must show that the statement in question was indisputably false, rather than merely misleading.

Cases that cite this headnote

[18] **Criminal Law**
Use of False or Perjured Testimony

Criminal Law
What constitutes perjured testimony

The burden is on a defendant claiming a *Giglio* violation to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony; it is not enough that the testimony is challenged by another witness or is inconsistent with prior statements, and not every contradiction in fact or argument is material.

Cases that cite this headnote

[19] **Criminal Law**
Right to counsel

A bare allegation that prejudice occurred without specific facts indicating how a postconviction petitioner was prejudiced is

not sufficient to support an ineffective assistance of counsel claim. U.S. Const. Amend. 6.

Cases that cite this headnote

[20] **Criminal Law**
Right to counsel

A postconviction petitioner claiming ineffective assistance of counsel, who alleges a failure to investigate on the part of his counsel, must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial. U.S. Const. Amend. 6.

Cases that cite this headnote

[21] **Criminal Law**
Adequacy of investigation of sentencing issues

Criminal Law
Presentation of evidence regarding sentencing

The inquiry of whether trial counsel failed to investigate and present mitigating evidence turns upon various factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the mitigation evidence that could have been presented. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[22] **Criminal Law**
Presentation of evidence regarding sentencing

The failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation for ineffective assistance of counsel. U.S. Const. Amend. 6.

Cases that cite this headnote

[23] **Criminal Law**
Adequacy of investigation of mitigating circumstances

Criminal Law
Presentation of evidence in sentencing phase

Capital murder defendant's counsel was not ineffective for failing to investigate and present evidence regarding defendant's intellectual deficits or his low IQ, where counsel hired a mitigation expert, moved that defendant be mentally evaluated to determine his IQ and his mental condition at the time of the offense, and defendant was examined by a state psychologist and a forensic psychologist, and thus counsel presented a meaningful concept of mitigation. U.S. Const. Amend. 6.

Cases that cite this headnote

[24] **Criminal Law**
Experts;opinion testimony

Counsel cannot be found deficient for relying on the evaluations of qualified mental health experts, even if those evaluations may not have been as complete as others may desire. U.S. Const. Amend. 6.

Cases that cite this headnote

[25] **Criminal Law**
Strategy and tactics in general

Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable, and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. U.S. Const. Amend. 6.

Cases that cite this headnote

[26] **Criminal Law**
Preparation for trial

In any ineffectiveness of counsel case, a particular decision not to investigate must be directly assessed for reasonableness in all the

circumstances, applying a heavy measure of deference to counsel's judgments. U.S. Const. Amend. 6.

Cases that cite this headnote

[27] **Criminal Law**
Adequacy of Representation
Criminal Law
Standard of Effective Assistance in General

An accused is entitled not to errorless counsel, and not to counsel judged ineffective by hindsight, but to counsel reasonably likely to render and rendering reasonably effective assistance. U.S. Const. Amend. 6.

Cases that cite this headnote

[28] **Criminal Law**
Presentation of evidence regarding sentencing

When counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[29] **Criminal Law**
Presentation of witnesses
Criminal Law
Presentation of evidence in sentencing phase

Most capital appeals include an allegation that additional witnesses could have been called; however, the standard of review of ineffective assistance of counsel on appeal is deficient performance plus prejudice. U.S. Const. Amend. 6.

Cases that cite this headnote

[30] **Criminal Law**
Argument and comments

Defense counsel was not ineffective in capital murder prosecution for failing to argue that defendant was intellectually disabled and therefore it was unconstitutional for him to be sentenced to death, pursuant to *Atkins*, where defendant underwent a mental evaluation before trial by a psychologist who found that defendant was not mildly mentally retarded and that he had an IQ of 76, and counsel acted reasonably in relying on those findings concerning defendant's mental health. U.S. Const. Amend. 6.

Cases that cite this headnote

[31] **Sentencing and Punishment**
Mentally retarded persons

To be deemed mentally deficient, and so ineligible for death sentence, a defendant must: (1) have significantly subaverage intellectual functioning, an IQ of 70 or below; (2) have significant defects in adaptive behavior; and (3) the two factors must have manifested themselves before the defendant attained the age of 18 years old; not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus.

Cases that cite this headnote

[32] **Criminal Law**
Defense counsel

A postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial. U.S. Const. Amend. 6; Ala. R. Crim. P. 32.

Cases that cite this headnote

[33] **Criminal Law**
Experts;opinion testimony

Counsel is not ineffective for failing to shop around for additional experts, and counsel is not required to continue looking for experts

just because the one he has consulted gave an unfavorable opinion. U.S. Const. Amend. 6.

Cases that cite this headnote

[34] Criminal Law

Experts;opinion testimony

Defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire. U.S. Const. Amend. 6.

Cases that cite this headnote

[35] Criminal Law

Adequacy of investigation of mitigating circumstances

Defense counsel was not ineffective for failing to investigate capital murder defendant's alleged neurological disorders of fetal alcohol syndrome and traumatic brain injury; defendant did not plead in either his original postconviction petition or his amended petition that he actually suffered from fetal alcohol syndrome or that he had been diagnosed with traumatic brain injury. U.S. Const. Amend. 6.

Cases that cite this headnote

[36] Criminal Law

Adequacy of Representation

Ineffective assistance of counsel claims are not built on retrospective speculation. U.S. Const. Amend. 6.

Cases that cite this headnote

[37] Criminal Law

Presentation of evidence in sentencing phase

Capital murder defendant did not show prejudice to support claim counsel was ineffective for failure to present evidence of defendant's young age as a mitigating circumstance and of how his age affected his mental capabilities; court did find as a statutory mitigating circumstance that defendant was only 18 years of age at the time of the murder, and there was a great deal of mitigating evidence offered at sentencing. U.S. Const. Amend. 6.

Cases that cite this headnote

[38] Criminal Law

Adequacy of investigation of mitigating circumstances

Criminal Law

Presentation of evidence in sentencing phase

Capital murder defendant's counsel was not ineffective for failing to investigate and to present rebuttal evidence at sentencing concerning defendant's prior conviction for assault in the third-degree, where counsel attempted to obtain the file of the case but it could not be located, counsel then obtained State's records on the conviction, and also obtained law-enforcement records relating to the conviction. U.S. Const. Amend. 6.

Cases that cite this headnote

[39] Criminal Law

Adequacy of investigation of sentencing issues

Criminal Law

Presentation of evidence regarding sentencing

Strickland requires that defense attorneys make a reasonable investigation into possible mitigating factors and make a reasonable effort to present mitigating evidence to the sentencing court. U.S. Const. Amend. 6.

Cases that cite this headnote

[40] Criminal Law

Election or pendency of other proceeding

The filing of a petition for a writ of mandamus does not preclude an appellant from raising the same issue on appeal.

Cases that cite this headnote

[41] **Criminal Law**
Right to counsel
Mandamus
Criminal prosecutions

Trial court was not required to extend scope of postconviction counsel's appointment to the filing of petitions for a writ of mandamus, in capital murder prosecution. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[42] **Mandamus**
Remedy by Appeal or Writ of Error
Mandamus
Discretion as to grant of writ
Mandamus
Exercise of judicial powers and functions in general

"Mandamus" is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal.

Cases that cite this headnote

[43] **Criminal Law**
Right to counsel

The right to counsel does not extend to postconviction proceedings. U.S. Const. Amend. 6.

1 Cases that cite this headnote

[44] **Criminal Law**
Presentation of evidence in sentencing phase

Capital murder defendant's counsel was not ineffective for allegedly failing to present evidence in penalty phase regarding the instability of defendant's childhood, where a great deal of testimony was presented concerning defendant's unstable home environment through several witnesses that testified that defendant had been in 25 or 26 different foster homes, and testimony that his home environment was marked by neglect, abuse, and instability. U.S. Const. Amend. 6.

Cases that cite this headnote

[45] **Criminal Law**
Introduction of and Objections to Evidence at Trial

Even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence. U.S. Const. Amend. 6.

Cases that cite this headnote

[46] **Criminal Law**
Particular Cases and Issues

Effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. U.S. Const. Amend. 6.

Cases that cite this headnote

[47] **Criminal Law**
Objections to prosecution evidence at trial in general

Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer. U.S. Const. Amend. 6.

Cases that cite this headnote

[48] **Criminal Law**
Statements as to Facts, Comments, and Arguments

To constitute error, a prosecutor's argument must have so infected the trial with unfairness as to make the resulting verdict a denial of due process. U.S. Const. Amend. 14.

Cases that cite this headnote

[49] **Criminal Law**
Objections to prosecution evidence at trial in general

Merely because a trial counsel failed to object to everything objectionable, does to equate to incompetence; in many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes. U.S. Const. Amend. 6.

Cases that cite this headnote

[50] **Criminal Law**
Objections to argument or conduct of counsel

The failure to object to argument that is not improper does not constitute ineffective assistance of counsel; even the failure to object to improper jury argument does not ordinarily reflect ineffective assistance. U.S. Const. Amend. 6.

Cases that cite this headnote

[51] **Criminal Law**
Objections to argument or conduct of counsel

Capital murder defendant could not show prejudice from counsel's failure to object to prosecutor's comments that defendant claimed implied that jury's finding on a mitigating circumstance must be unanimous, where prosecutor's argument, taken as a whole, did not imply that all the jurors had to agree in order for a mitigating circumstance to be applied, and prosecutor urged the jury to follow court's instruction. U.S. Const. Amend. 6.

Cases that cite this headnote

[52] **Criminal Law**
Objections to argument or conduct of counsel

Capital murder defendant's counsel was not ineffective for failure to object to prosecutor's argument that State was limited to the number of aggravating circumstances it was permitted to pursue at the penalty phase; the comment of the prosecutor was not objectionable in any way, and court's instructions further indicated that it was only allowed to consider the murder during the course of a robbery aggravating circumstance. U.S. Const. Amend. 6.

Cases that cite this headnote

[53] **Criminal Law**
Objections to argument or conduct of counsel

Capital murder defendant's counsel was not ineffective for failure to object to prosecutor's comments that defendant was "dangerous," where the prosecutor's argument was not improper, but rather was an argument against application of the statutory mitigating circumstance that defendant had no significant history of prior criminal activity. U.S. Const. Amend. 6.

Cases that cite this headnote

[54] **Criminal Law**
Objections to argument or conduct of counsel

Capital murder defendant's counsel was not ineffective for failing to object to prosecutor's reference to his own military service in Iraq; prosecutor's reference was to remind the jury that 18 or 19 year olds can be called upon to serve in extremely adverse, life-threatening conditions and can do so remarkably well, which was a fair rebuttal to the proffered statutory mitigating circumstance of defendant's age. U.S. Const. Amend. 6.

Cases that cite this headnote

[55] **Criminal Law**
Objections to argument or conduct of counsel

Capital murder defendant's counsel was not ineffective for failing to object to prosecutor's

comment that the district attorney's office, the victim's family, and the police all had agreed with the State's decision to seek the death penalty; comment served as a reminder to the jury members of their duty in making the decision as to the sentencing recommendation. U.S. Const. Amend. 6.

Cases that cite this headnote

[56] Criminal Law

Other particular issues in death penalty cases

Capital murder defendant was not prejudiced by counsel's failure to object to the trial court's alleged reliance on other cases when deciding to disregard jury's recommendation and sentence defendant to death; court did not consider "other cases" that deprived defendant of an individualized sentencing determination, but rather the aggravating circumstance in the case outweighed the mitigation proffered at sentencing. U.S. Const. Amend. 6.

Cases that cite this headnote

[57] Criminal Law

Declarations, confessions, and admissions

Capital murder defendant's counsel was not ineffective for failing to present evidence of defendant's intellectual defects in support of a motion to suppress defendant's statement to police; defendant was examined by psychologists, and based on those experts, counsel had no reason to doubt defendant's mental health or to argue that ground in the motion to suppress the statement. U.S. Const. Amend. 6.

Cases that cite this headnote

[58] Criminal Law

Admissions or concessions

Capital murder defendant's counsel was not ineffective for remarking that a witness was close enough to see defendant commit the offense, which defendant claimed was a concession that defendant was the perpetrator of the murder; counsel's remark was merely a misstatement, and was not a concession of guilt, and counsel repeatedly argued in closing that there was no one who could identify defendant as the person at scene at the time of the murder. U.S. Const. Amend. 6.

Cases that cite this headnote

[59] Sentencing and Punishment

Mentally retarded persons

Sentencing of defendant to death following conviction for capital murder was not a violation of *Atkins*; defendant was evaluated and his IQ was measured at 76, which was above the generally accepted score of 70, and other evaluations concluded that defendant functioned in the classification range immediately above the classification of mild mental retardation as well as in the range of low average intellectual functioning.

Cases that cite this headnote

Appeal from Elmore Circuit Court (CC–08–476.60)

Opinion

WELCH, Judge.

***1** The appellant, Calvin McMillan, an inmate on death row at Holman Correctional Facility, appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief attacking his capital-murder conviction and sentence of death.

In 2009, McMillan was convicted of murdering James Bryan Martin during the course of a robbery. The jury recommended, by a vote of eight to four, that McMillan be sentenced to life imprisonment without the possibility of parole. The circuit court chose not to follow the jury's recommendation and sentenced McMillan to death. This Court affirmed McMillan's conviction and sentence of death on direct appeal. See McMillan v. State, 139 So.3d 184 (Ala. Crim. App. 2010). On August 23, 2013, this Court issued its certificate of judgment.

In August 2014, McMillan filed a timely petition for postconviction relief attacking his capital-murder conviction and death sentence. He filed an amended petition in December 2014 and an amendment to one claim in his petition in February 2015. In March 2015, the circuit court issued a 72–page detailed order summarily dismissing all the claims in McMillan's amended postconviction petition. This appeal followed.

On direct appeal, this Court set out the following facts surrounding McMillan's conviction:

> 3245 "The State's evidence tended to show that on August 29, 2007, Calvin McMillan and Rondarrell Williams drove to the Wal–Mart discount retail store in Millbrook in a white Nissan Sentra automobile belonging to Williams's girlfriend, in order for McMillan 'to get him a ride' (R. 1046.) Williams testified that he knew that McMillan had a gun. The men parked the vehicle by a truck on the outskirts of the parking lot and Williams went into the Wal–Mart store. He purchased some speakers and returned to the vehicle, where McMillan, despite opening and closing the vehicle's front passenger door several times, had remained. After a few minutes, Williams again got out of the vehicle and returned to the store.
>
> "While Williams was in the store, McMillan got out of the vehicle and began walking around the parking lot, eventually standing by the entrance to the store. He subsequently returned to the vehicle and sat in the front passenger seat with the door open. He then got out of the vehicle quickly, wearing a different shirt than he was wearing when he and Williams had entered the parking lot, and approached a man later identified as the victim.
>
> "That same evening, the victim, James Bryan Martin, had driven to the Wal–Mart store in Millbrook following a Montgomery Biscuits minor-league baseball game. He had parked his Ford F–100 pickup truck in the parking lot a few rows from the vehicle driven by Williams and had entered the store. Inside, he had purchased diapers, a Vault brand beverage, and Reese's brand candy. After checking out, he put his bags in his truck.
>
> "The victim was then approached by a man later identified as McMillan. Video surveillance of the parking lot of the Wal–Mart store, which was admitted into evidence as a DVD, shows that Martin walked several feet toward McMillan, and then turned and walked back to his truck. The surveillance video also shows that Martin got into his truck and that a few seconds later the brake lights on the truck came on. The video further shows that McMillan also walked toward Martin's truck, hesitated when another vehicle drove down the aisle, and then, when that vehicle passed, McMillan went to the driver's side door of the truck. The video demonstrates that McMillan appeared to shoot Martin and then pull him out of his truck. Martin collapsed on the concrete and McMillan shot him two more times. McMillan got into the truck and started to drive away. He then placed the truck into park, got out of the truck, and appears to have shot Martin again. At that point, McMillan quickly got back into the truck and sped out of the parking lot. Several witnesses who were present in the parking lot or who were in the entrance of the Wal–Mart store approached the victim and called for help.
>
> ***2** "....
>
> "Two disposable cameras were found in the truck. The film from those cameras was subsequently developed[;] one of the pictures was a photograph of McMillan pointing a pistol resembling the murder weapon at the camera, a photograph of a 9mm High Point pistol positioned on a pile of money, another photograph of the pistol placed on a pillow or bedding, and two photographs of McMillan making hand gestures at the camera. There was also a photograph of a closet containing a striped shirt and a camouflage hat that matched the description of the shirt and hat worn by the man who had shot Martin. Among the clothing found in the truck was a black shirt with a neon skull that resembled the shirt worn by the man in Williams's girlfriend's vehicle the first time he had gotten out of the vehicle. The officers also found a pair of black Dickie brand shorts like those worn by the man who shot Martin; in the pocket of those shorts was a 9mm shell casing and a Reese's brand candy wrapper.
>
> > "McMillan gave a statement indicating that he had been given a ride to Montgomery in the truck belonging to Martin by a man named Melvin Ingram Browning and that Browning had driven away with McMillan's possessions in the

> truck. The State introduced evidence at trial indicating that McMillan had a Social Security card for a Melvin Eugene Browning in his wallet. (R. 1240.) Melvin Eugene Browning testified that his wallet had been lost years before this incident and that he was in the Lee County jail at the time of the offense. The State presented evidence to substantiate Browning's whereabouts at the time of the offense."

McMillan, 139 So.3d at 191–93 (footnotes omitted).

Standard of Review

McMillan appeals the circuit court's ruling dismissing a Rule 32, Ala. R. Crim. P., petition. "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Rule 32.3, Ala. R. Crim. P.

[1] [2] [3] "If the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition." Reed v. State, 748 So.2d 231, 233 (Ala. Crim. App. 1999). The plain-error standard of review does not apply when this Court evaluates the denial of a collateral petition attacking a death sentence. See Ex parte Dobyne, 805 So.2d 763 (Ala. 2001), and Rule 45A, Ala. R. App. P. Moreover, the procedural bars in Rule 32, Ala. R. Crim. P., apply to all cases, even those involving the death penalty. Hooks v. State, 822 So.2d 476 (Ala. Crim. App. 2000).

[4] [5] [6] [7] [8] [9] Here, the circuit court summarily dismissed McMillan's petition based on the pleadings. In discussing the pleading requirements related to postconviction petitions, this Court has stated:

> "Although postconviction proceedings are civil in nature, they are governed by the Alabama Rules of Criminal Procedure. See Rule 32.4, Ala. R. Crim. P. The 'notice pleading' requirements relative to civil cases do not apply to Rule 32 proceedings. 'Unlike the general requirements related to civil cases, the pleading requirements for postconviction petitions are more stringent....' Daniel v. State, 86 So.3d 405, 410–11 (Ala. Crim. App. 2011). Rule 32.6(b), Ala. R. Crim. P., requires that full facts be pleaded in the petition if the petition is to survive summary dismissal See Daniel, supra. Thus, to satisfy the requirements for pleading as they relate to postconviction petitions, Washington was required to plead full facts to support each individual claim."

***3** Washington v. State, 95 So.3d 26, 59 (Ala. Crim. App. 2012).

> "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So.2d 724 (Ala. Crim. App. 2003)."

Hyde v. State, 950 So.2d 344, 356 (Ala. Crim. App. 2006).

> "An evidentiary hearing on a coram nobis petition [now Rule 32 petition] is required only if the petition is 'meritorious on its face.' Ex parte Boatwright, 471 So.2d 1257 (Ala. 1985). A petition is 'meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true. Ex parte Boatwright, supra; Ex parte Clisby, 501 So.2d 483 (Ala. 1986)."

Moore v. State, 502 So.2d 819, 820 (Ala. 1986).

> "[A] circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein. Rule 32.7(d), Ala. R.Crim. P., provides:
>
> > " 'If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition.

> Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.'
>
> " ' "Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition." ' Bishop v. State, 608 So.2d 345, 347–48 (Ala. 1992) (emphasis added) (quoting Bishop v. State, 592 So.2d 664, 667 (Ala. Crim. App. 1991) (Bowen, J., dissenting)). See also Hodges v. State, 147 So.3d 916, 946 (Ala. Crim. App. 2007) (a postconviction claim is 'due to be summarily dismissed [when] it is meritless on its face')."

Bryant v. State, 181 So.3d 1087, 1102 (Ala. Crim. App. 2011). "The sufficiency of pleadings in a Rule 32 petition is a question of law. 'The standard of review for pure questions of law in criminal cases is de novo. Ex parte Key, 890 So.2d 1056, 1059 (Ala. 2003).' " Ex parte Beckworth, 190 So.3d 571, 573 (Ala. 2013).

With these principles in mind, we review the claims raised by McMillan in his brief to this Court.

I.

***4** **[10]** McMillan first argues that the circuit court erred in summarily dismissing his Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), and Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), claims. Specifically, he argues that the State failed to disclose that the inmate McMillan stabbed while McMillan was incarcerated, Winston Lucas, Jr., had assaulted McMillan before the stabbing. This error was compounded, he argues, by the State knowingly presenting Lucas's allegedly false testimony.

McMillan pleaded the following in his amended postconviction petition:

> "[Winston] Lucas and the other inmates attacked McMillan at the direction of Elmore County jail officers. This was a routine practice in 8–pod, the section of the jail in which Lucas was housed. Officers arranged for Lucas and other inmates to beat up certain inmates in exchange for items such as food from McDonald's [fast-food restaurant] or tobacco. This was why Lucas and other inmates attacked McMillan.
>
> > "At the time of McMillan's judicial sentencing proceeding, the State knew that Lucas and other inmates had attacked and physically injured McMillan prior to the incident on March 1, 2008. The State knew this information in at least three independent ways. First, the incident occurred at the Elmore County jail, a government agency operated by government agents.... A jail record notes that McMillan, from 8–pod, received treatment for a headache and swollen right eye on February 16, 2008; the nurse noted that it '[a]ppears that someone hit him.' However, the jail records which were produced to McMillan by the Elmore County jail contain no incident report describing the attack on McMillan. Second, jail officers had directed Lucas and the others to attack McMillan.... Third, prior to McMillan's judicial sentencing proceeding, Lucas told prosecutor James Houts during an interview at the Staton Correctional Facility that he and other inmates had attacked McMillan prior to the incident that occurred on March 1, 2008. Houts told Lucas that he did not have to mention that in court. As stated above, Lucas later testified that he and McMillan had never been involved in a physical altercation before March 1, 2008."

(C. 526–27.)

The State argued in its motion to dismiss the postconviction petition that this claim was procedurally barred because it could have been raised at trial or on direct appeal, but was not. (C. 1064.) McMillan moved to amend this claim (C. 1243.), and the circuit court granted that motion. (C. 1248.) However, McMillan failed to plead in his amendment to this claim why the claim

could not have been raised at trial or on direct appeal. (C. 1249–53.)

The record of McMillan's judicial sentencing hearing shows that Lucas testified that he had been incarcerated with McMillan at the Elmore County jail and that in March 2008, McMillan attacked him with a "shank." On cross-examination Lucas was questioned as to whether he and other inmates had attacked McMillan before McMillan attacked Lucas. The following occurred:

"[Defense counsel]: Okay. Back to this particular incident. You're saying that [McMillan] just walked up out of the blue and for absolutely no reason attacked you; is that what you're saying?

"[Lucas]: We had a little argument.

"[Defense counsel]: You had a little argument before this, correct?

"[Lucas]: Yeah.

"[Defense counsel]: Okay. That's in about December of last year, is that when the argument was?

***5** "[Lucas]: I guess, I don't know. I guess.

"[Defense counsel]: Okay. Shortly before this incident occurred at the jail, correct?

"[Lucas]: Yes, sir.

"[Defense counsel]: All right. And in that little argument isn't it true that you and about four other inmates jumped on [McMillan] and attacked him?

"[Lucas]: No, sir.

"[Defense counsel]: Okay. There was some type of physical altercation between you and [McMillan] and some other folks before this alleged stabbing, correct.

"[Lucas]: No. It was just me and him talking. I can't speak on behalf of others, you know what I'm saying, because it was just me and him had a little argument ourselves about respect.

"[Defense counsel]: Okay. About him not respecting you?

"[Lucas]: General respect to the cell.

"[Defense counsel]: To the cell. Okay. And that got a little physical, correct?

> "[Lucas]: No, we never did have any type of physical contact at that time. It was just talk and it never escalated to that point."

(Trial Record, R. 1957–58.)

[11] The circuit court made the following findings when dismissing this claim:

"This claim, however, could have been raised during post-trial motions or on direct appeal. Accordingly, it is procedurally barred. Ala. R. Crim. P., Rule 32.2(a)(3) and (5).

"Alternatively, this claim is dismissed for failure to allege a material issue of law or fact. The amended petition claims that Winston Lucas, a witness for the State at the judicial sentencing hearing, lied about having physically assaulted McMillan in the months prior to McMillan stabbing Lucas in the eye and hand while he was incarcerated and awaiting trial. McMillan alleges that he was kicked and punched by Winston Lucas, Herbert Buchanan, and two other inmates many weeks prior to McMillan's attack on Lucas with a deadly weapon. McMillan further alleges that Lucas was the 'ringleader' of the attack and that it had been arranged by jailers as part of a 'routine practice.' McMillan alleges 'suppression' of the evidence because the alleged assault against him (by Lucas) was done at the behest of jailers and the sheriff and because Lucas allegedly told a prosecutor of this fact during a pre-trial interview.

"McMillan cannot establish 'suppression' of this evidence as a matter of law. By his own admission, McMillan would have been present at the time of the alleged assault by Lucas, Buchannon and the other inmates. Also, McMillan's amended petition further admits that there are no incident reports describing such an attack on McMillan, so there is no allegation that such documents were suppressed.

"As noted by the State in its motion to dismiss, 'suppression' is a necessary element of a Brady claim. Because McMillan would have been present at the scene he alleges in his amended petition, he cannot prevail on

this aspect of his claim.... Here, McMillan was certainly aware of these alleged facts and could have testified to these facts is he had so desired.

"The State is also correct that the facts McMillan claims were suppressed are not material for purposes of Brady [v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)]. That is, there is no reasonable probability of a different result had evidence that Lucas assaulted McMillan weeks or months prior to McMillan's stabbing Lucas in the hand and eye been presented to the Court. See Kyles v. Whitley, 514 U.S. 419[115 S.Ct. 1555, 131 L.Ed.2d 490] (1995).

***6** "....

> "This claim would be dismissed due to a lack of specificity. As McMillan's amended petition notes, Lucas denied (under oath) having any physical altercation with McMillan prior to McMillan's stabbing Lucas with a shank. The amended petition further admits that there is no incident report describing an attack on McMillan by Lucas. The State, represented by the attorney who is alleged to have had knowledge of Lucas's false testimony, has filed an answer denying this claim, with the ethical and professional implications that go along with such an action. Yet, the petition is silent as to any evidence that McMillan was assaulted by Lucas prior to McMillan's shanking of Lucas. McMillan could have offered testimony in support of such a claim at the sentencing hearing, but did not do so. McMillan, then, has failed to carry his burden of pleading facts (as opposed to conclusory statements), which, if proven, would establish he is entitled to relief in light of the record of trial. Ala. R. Crim. P., Rule 32.3. See also Ala. R. Crim. P., Rule 32.6(b)."

(C. 1497–1501.)

[12] **[13]** To adequately plead a Brady claim in a postconviction petition

> "[A] petition must allege facts that, if true, would establish that the prosecution suppressed evidence that was favorable to the defendant and material. Cf. Rule 32.6(b), Ala. R. Crim. P.; Williams [v. State], 710 So.2d [1276] at 1296–97 [(Ala. Crim. App. 1996)]. Additionally, 'a Rule 32 petitioner has no burden to plead facts in his or her petition negating the preclusions in Rules 32.2(a)(3) and (a)(5) in order to sufficiently plead a [Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] claim....' Mashburn v. State, 148 So.3d 1094, 1119 n. 5 (Ala. Crim. App. 2013) (citing Ex parte Beckworth, [Ms. 1091780, July 3, 2013] —— So.3d ——, —— (Ala. 2013)). Rather, the State has the burden to plead any ground of preclusion it believes applies to bar review of a Brady claim. Ex parte Beckworth, [190 So.3d 571, 574 (Ala. 2013)]. However, once the State has pleaded a ground of preclusion, that ground is presumed to apply until the petitioner meets his 'burden of disproving its existence by a preponderance of the evidence.' Rule 32.3, Ala. R. Crim. P."

Reynolds v. State, [Ms. CR–13–1907, September 18, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015).

Here, McMillan failed to plead in the amendment to his petition why this claim was not procedurally barred in this postconviction proceeding. Indeed, Lucas's cross-examination reflects that defense counsel questioned Lucas about whether he had been attacked by McMillan before McMillan attacked him. Accordingly, the circuit court correctly found that this claim was barred pursuant to Rules Rule 32.2(a)(3) and (5), Ala. R. Crim. P.

[14] **[15]** Alternatively, the circuit court found that this claim lacked merit.

> " 'There is no Brady [v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)] violation where the information in question could have been obtained by the defense through its own efforts.' Johnson [v. State], 612 So.2d [1288] at 1294 [(Ala. Crim. App. 1992)]; see also Jackson v. State, 674 So.2d 1318 (Ala. Cr. App. 1993), aff'd in part and rev'd in part on other grounds, 674 So.2d 1365 (Ala. 1995). ' "Evidence is not 'suppressed' if the defendant either knew ... or should

have known ... of the essential facts permitting him to take advantage of any exculpatory evidence." United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982)[, cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983)].' Carr v. State, 505 So.2d 1294, 1297 (Ala. Cr. App. 1987) (noting, 'The statement the appellant contends was suppressed in this case was his own, and no reason was set forth to explain why he should not have been aware of it.'). Where there is no suppression of evidence, there is no Brady violation. Carr, 505 So.2d at 1297.

***7** Freeman v. State, 722 So.2d 806, 810–11 (Ala. Crim. App. 1998).

[16] **[17]** **[18]** Also,

"[t]o prove a Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), violation [or a Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959), violation], the petitioner must show that: (1) the State used the testimony; (2) the testimony was false; (3) the State knew the testimony was false; and (4) the testimony was material to the guilt or innocence of the accused. Williams v. Griswald, 743 F.2d [1533] at 1542 [(11th Cir. 1984)]. '[T]he defendant must show that the statement in question was "indisputably false," rather than merely misleading.' Byrd v. Collins, 209 F.3d 486, 517 (6th Cir. 2000) (quoting United States v. Lochmondy, 890 F.2d 817, 823 (6th Cir. 1989)). 'The burden is on the defendants to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony.' Lochmondy, 890 F.2d at 822. '[I]t is not enough that the testimony is challenged by another witness or is inconsistent with prior statements, and not every contradiction in fact or argument is material.' United States v. Payne, 940 F.2d 286, 291 (8th Cir. 1991) (citing United States v. Bigeleisen, 625 F.2d 203, 208 (8th Cir. 1980)). '[T]he fact that a witness contradicts himself or herself or changes his or her story does not establish perjury.' Malcum v. Burt, 276 F.Supp.2d 664, 684 (E.D. Mich. 2003) (citing Monroe v. Smith, 197 F.Supp.2d 753, 762 (E.D. Mich. 2001))."

Perkins v. State, 144 So.3d 457, 469–70 (Ala. Crim. App. 2012).

We agree with the circuit court that McMillan would have personal knowledge of the information he alleges was suppressed; therefore, there was no suppression of evidence. See Freeman, supra. Also, McMillan candidly admits that there was no incident report of the alleged attack. McMillan failed to plead that the State suppressed any evidence, much less material evidence, or that the State knowingly used false testimony. Thus, this claim was correctly summarily dismissed pursuant to Rule 32.7(d), Ala. R. Crim. P., because no material issue of fact or law exists that would entitle McMillan to relief.

II.

McMillan next argues that the circuit court erred in summarily dismissing his claim that his trial counsel was ineffective for failing to present certain evidence in mitigation during the penalty phase of his capital-murder trial.

[19] **[20]** To prevail on a claim of ineffective assistance of counsel, the petitioner must satisfy the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The petitioner must show: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by the deficient performance.

"To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S.Ct. 2052, 80 L.Ed.2d. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

***8** Hyde v. State, 950 So.2d 344, 356 (Ala. Crim. App. 2006).

" 'A defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it

would have altered the outcome of the trial.' Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (quoting United States v. Green, 882 F.2d 999, 1003 (5th Cir. 1989)). '[C]laims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.' Thomas v. State, 766 So.2d 860, 892 (Ala. Crim. App. 1998) (citing Nelson, supra), aff'd, 766 So.2d 975 (Ala. 2000), overruled on other grounds by Ex parte Taylor, 10 So.3d 1075 (Ala. 2005)."

Mashburn v. State, 148 So.3d 1094, 1133 (Ala. Crim. App. 2013).

[21] Initially,

"The inquiry of whether trial counsel failed to investigate and present mitigating evidence turns upon various factors, including the reasonableness of counsel's investigation, the mitigation evidence that was actually presented, and the mitigation evidence that could have been presented."

Commonwealth v. Simpson, 620 Pa. 60, 100, 66 A.3d 253, 277 (2013).

Here, trial counsel presented a plethora of evidence in mitigation. In fact, the evidence convinced the jury, by a vote of 8 to 4, to recommend a sentence of life imprisonment without the possibility of parole. "[T]he jury's recommendation of life imprisonment without parole negates [the appellant's] showing that he was prejudiced by counsel's performance." Boyd v. State, 746 So.2d 364, 389 (Ala. Crim. App. 1999).

McMillan was represented at trial by attorneys W. Kendrick James and Bill W. Lewis. Counsel presented the following evidence in mitigation at McMillan's sentencing hearing: [1]

Ella Torrence, McMillan's older sister, testified that their father was a drug dealer and that their mother was a prostitute. She said that while she was living in New York her father was "locked up" in 1987, and her aunt, Carol Weaver, came to New York and took her and her sibling to live with her in Shorter, Alabama. Torrence said that, when her mother eventually came to Alabama her mother was pregnant with McMillan who was born in 1988. Torrence said that, during her mother's pregnancy, she continued to use drugs, she continued to smoke marijuana, she continued to drink alcohol, and she continued to smoke cocaine. Torrence said that McMillan was placed in foster care shortly after his birth. In 1991, Torrence said, she and McMillan moved in with their mother in Waugh, Alabama, and at that time their mother's boyfriend, Willie Ford, was living with them. Torrence said that Ford was a "street hustler" and that Ford was violent and had a bad temper. They lived in a trailer, she said, that had no electricity and no water, and there was never any food. Ford frequently was abusive, Torrence said, and had even pulled a gun on them. He frequently beat their mother in front of them. Torrence said that Ford's son sexually abused McMillan. She said that she and her siblings often stayed with their mother in shelters for battered women. When Torrence got to high school, she said, she started talking to counselors, and the Department of Human Resources ("DHR") got involved. In 1998 Ford and her mother were arrested and charged with child endangerment after Ford beat McMillan with a pool stick and put McMillan in the hospital. McMillan, she said, was placed in different foster-care homes after his mother was arrested in 1998.

***9** Carol Weaver, McMillan's maternal aunt, testified that in 1987 she went to New York to pick up her sister's children and bring them to live with her in Shorter, Alabama. She said that sometime later that year when McMillan's mother, Kimberly McMillan, came to Alabama Kimberly was pregnant with McMillan. McMillan was placed in foster care not long after his birth, Weaver said. At that time, she said, Kimberly was living with Willie Ford, who was a drug dealer. Weaver testified that in 1998 Kimberly and Ford were arrested, that Kimberly was charged with child endangerment and that Ford was charged with assaulting McMillan. Weaver said that in 1996, when McMillan was approximately 10 years old, she first learned that McMillan had been molested. McMillan, Weaver said, was aggressive and angry and she had to place him in foster care because she could not handle his behavior.

Teal Dick, director of the Alabama Family Resource Center in Chilton County, testified that he was retained by defense counsel to review all DHR records related to McMillan, that he reviewed "a pile of them," and that he spoke to former social workers and a psychologist about McMillan. Dick said that Ford had a history of violent behavior, that in 1995 there were allegations of

child abuse, and that McMillan and his siblings had been beaten with extension cords and punched in their stomachs. During Dick's testimony various DHR reports that detailed abuse and neglect by McMillan's mother and her boyfriend were admitted into evidence. DHR records, Dick said, showed that Kimberly McMillan and her children were in protective shelters for 16 days in 1995 and 92 days in 1997. Dick read the following from one report:

> "When we arrived at the home both Kimberly and Willie were there. One of the officers kept Willie Ford outside while Kimberly showed us the trailer they lived in. It was dark and Kimberly explained that they had blown a fuse last night. They had electricity, but no water, no phone, and only a small space heater to keep them warm. There was a stove that didn't work and she explained that they cooked on a small grill that was on the porch. The refrigerator was empty and the only visible sign of food was a loaf of bread. There was no kitchen sink and the only water is what they got from the gas station. To take a bath, Kimberly explained that they have to rent a hotel room. The room where Ella and her brother sleep had a couple of old mattresses on the floor with a sheet and a blanket thrown loosely over the mattresses. There didn't appear to be clothes and other necessities in the home. The officer took pictures of the trailer. Mr. Ford had a rifle that was under the pool table.
>
> > "We were all in agreement that the children were being neglected and both Kimberly McMillan and Willie Ford were arrested. Mr. Ford was visibly irritated by the arrest. I talked privately with Ms. McMillan and explained when she got out of jail I would be glad to help her get shelter if she was willing to get the help she needs for her drinking problem. I talked with her about Willie's anger and the danger this might put her in if she goes back to the trailer after getting out of jail."

(Trial Record, p. 1597–98.) Dick further detailed the numerous times the children were given emergency vouchers for food while they were in foster care, that McMillan had had five different social workers in a five—or seven-year period, and that in that same period he had been placed in 25 or 26 different homes.

Emma Stacy Cosby, the clinical director for SafetyNet Youth Systems, testified that SafetyNet is a residential psychiatric-treatment facility for individuals under the age of 21 and that it recruits, trains, and licenses foster homes. She said that McMillan was one of the children under her care in 2001 when he was placed in a foster home. Cosby testified concerning an incident that occurred in 2001 when she was in the neighborhood and McMillan threatened her and his foster mother and McMillan was arrested. Cosby further testified that McMillan had been treated by Dr. Daniel Mejer in 2001. Dr. Mejer felt strongly that McMillan needed residential treatment and that if he did not get help he would end up in prison. (R. 1660.) She detailed one foster home in which McMillan had been placed where he had been physically abused. (R. 1665.)

***10** Eddie Tucker, McMillan's father, testified that he came into contact with Kimberly McMillan in 1987 when he was driving a tractor-trailer cross country and was in New York. He told her that he was driving to Montgomery and she asked for a ride to Montgomery. They got married and Kimberly had McMillan soon after the marriage. He said that child support had been taken out of his check and sent to mcMillan's autn, with whom he lived for a while. Tucker said that DHR never contacted him about McMillan and that he would have taken McMillan into his home had he known what had been happening to him.

Dr. Kimberly Ackerson, a forensic psychologist, testified that she examined McMillan and spoke with several of his family members and reviewed various records relating to McMillan. It was her opinion that McMillan had a conduct disorder which, she said, is an "onset psychiatric disorder and it's manifested by behavioral problems." (R. 1701.) She also testified that McMillan has an "oppositional defiance disorder." (Trial Record, R. 1702.) Specifically, she said, McMillan was defiant and resisted and rejected authority. McMillan's counselor recommended that he get residential treatment. She testified:

> "One of the things that the records show is that [McMillan] demonstrated academic problems early on. And over the course of time he has been subjected to psychological testing primarily looking at intellectual

testing and achievement testing. And one of the things that the achievement testing has consistently shown is that [McMillan] had functioned well below his same age peers in the areas of reading, math, English.

"And so what you do have is you have a young man who in my opinion has been affected by numerous factors starting from when he was in utero. We have a mother that was using drugs and alcohol. He is then born to a mother who cannot, because of her own personal issues, provide the trust, the relationship and the attachment that this child needs.

"The next step down we now have a child who is subjected to abuse. And not just slapped around, he is having guns pointed at him, he is being sodomized. He continues to learn and understand that the world is a hostile negative place.

"What happens at this juncture when he's about six, seven, eight years of age, especially after I believe when he was sodomized, is he develops a way of coping with this world. And his way of coping with this world is to remain in what is commonly referred to as a fight or flight response. In other words, he is prepared to either fight or flight from the situation. He doesn't know how else to react. He hasn't been given the tools, he hasn't been given the environment to learn how to react in a normal environment.

"So this coping mechanism, which is an adaptive coping mechanism for him in the home, is obviously a maladaptive coping mechanism for him within the foster home and within the different facilities that he goes to. So it is not surprising to me that a young individual who already has a learning problem, so he has difficulty learning as it is, what he has learned is a very maladaptive way of coping, is put—simply put into a residential or is put into a foster home and is expected to behave. That really was not an appropriate or fair expectation of this young man. And, in my opinion, given that he was tossed to all of these different homes, a couple of facilities here and there, what happened was there was a failure to really look and see what was driving these behaviors. Why was he continuing to act in such a maladaptive way?

"And one of the reasons that I think he continued to act in this manner is that he does have symptoms of posttraumatic stress disorder. And one of the symptoms of posttraumatic stress disorder in particular is hyperarousal and hypervigilance. And that goes back to that fight or flight response. He has to be hypervigilant, he has to be aroused, he has to be on his guard all the time because he never knows what's going to happen.

***11** "Over time as a result of being in that mode, there can be neurological changes. And what happens is the brain basically, for lack of a—you know, for ease of understanding, it's that the brain is always prepared to be that way, always prepared to be hyperaroused, always prepared to be on guard. And when you simply put them into a healthy environment, hopefully a safe home, it doesn't just turn off. The brain continues to function that way. He doesn't know how to engage appropriately. He doesn't understand that people are really trying to reach out and help him, because he's never experienced that before. And instead he is constantly put from one place to another because of his behavior problems and the true crux of the issue was never addressed.

"And I think from years of this, this is why, just over the years of all of this, we continue to have behavior problems, which he meets the antisocial personality disorder. He's got symptoms of an anxiety disorder which I mentioned is posttrauma stress disorder. He certainly has learning disabilities. And all of this really prepared him to not be able to function in the average everyday community. And, in fact, Calvin, during our interview, I don't know if you knew this, but he made a very insightful comment. And what he stated to me was 'all of these years prepared me to be here in jail.' And that really is what I find through the records, that he really never had an opportunity to learn how to behave and function in society as you and I know it. Rather he knows how to function in a society where there's control, where there are people that tell you what to do and how to do it."

(Trial Record, R. 1706–09.) Dr. Ackerson testified that Dr. Kirkland had diagnosed McMillan with borderline intellectual functioning, which, she said, is "just above mental retardation or mild mental retardation." (Trial Record, R. 1722.)

After Dr. Ackerson testified, defense counsel asked for it to be a part of the record that McMillan's mother was present and ready to testify but that it was agreed by counsel and McMillan's mother that it would be best if she

did not testify. She was questioned on the record about this decision and indicated that it was her decision not to testify at McMillan's trial. (Trial Record, R. 1728.)

At sentencing, the jury recommended a sentence of life imprisonment without the possibility of parole. The circuit court found two statutory mitigating circumstances: the fact that McMillan had no significant history of prior criminal activity and McMillan's young age at the time of the murder. As nonstatutory mitigating circumstances the circuit court found that

> "[McMillan] was raised in extreme poverty; that he was abandoned by his mother; that he was physically abused as a child; that he was raped as a child, that he was a witness to his mother's and sister's abuse; that he was raised in the home of an alcoholic/drug addict; that he did not get the treatment he needed; that he had no positive male role models; that he suffered from psychological and emotional difficulties; and that his intellectual functioning was in the borderline range."

(Trial Record, C. 20.)

[22] The United States Supreme Court in Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), stated, when reviewing the sufficiency of a claim that counsel was ineffective for failing to present mitigating evidence:

> " 'In Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)], we made clear that, to establish prejudice, a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' Id., at 694. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

***12** 539 U.S. at 534, 123 S.Ct. 2527.

> " ' " '[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007)(quoting Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006))." Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010). 'This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel.' United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005)."

Daniel v. State, 86 So.3d 405, 429–30 (Ala. Crim. App. 2011).

We now consider the claims raised by McMillan in his brief to this Court.

A.

[23] McMillan first argues that his trial counsel was ineffective for failing to investigate and to present evidence regarding his intellectual deficits or his low IQ. Specifically, McMillan pleaded that his trial counsel should have investigated and presented evidence indicating that his school records revealed that he had learning problems at a young age, that testing revealed serious intellectual and adaptive deficits, that his family members noticed his mental deficits, that McMillan's mother is intellectually disabled, and that McMillan's stepfather is also intellectually disabled.

The circuit court made the following findings on this claim:

> "In preparing for trial, McMillan and his defense had the services of Dr. Kimberly Ackerson, a board certified forensic examiner in psychology with a great deal of experience testifying as an expert in numerous courts. As part of her expertise, Dr. Ackerson had extensive experience with the Alabama Department of Mental Health and Mental Retardation. Prior to McMillan's trial, Dr. Ackerson had served on the Blue Ribbon Committee on Mental Health Testimony in Alabama Capital Cases. In this case, Dr. Ackerson met with McMillan, his family members and reviewed the records obtained by defense counsel and did not express any opinion that McMillan suffered from mental retardation. Dr. Ackerson's invoice, contained in the fee declaration of [Kendrick] James [one of McMillan's trial counsel,] which is contained in the Court's files and of which the Court takes judicial notice, reflects that she spent three (3) hours conducting psychological and forensic assessments in this case. As noted above, Dr. Ackerson did not take issue with Dr. Kirkland's opinion that McMillan was functioning one level above mild mental retardation.

"Recently, the Supreme Court noted, 'The selection of an expert witness is a paradigmatic example of the type of "strategic choice" that, when made "after thorough investigation of the law and facts," is "virtually unchallengeable." ' Hinton v. Alabama, [571 U.S. ——,] 134 S.Ct. 1081, 1089, 188 L.Ed.2d 1 (2014) (quoting Strickland [v. Washington], 466 U.S. [668] at 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 [(1984)]). In this case, the defense's use of highly qualified, board-certified forensic psychological who interviewed McMillan, spoke to his family, reviewed the records collected about McMillan's life and who did not dispute Dr. Kirkland's assessment regarding McMillan's classification of borderline intellectual functioning insulates them from the second-guessing contained in the petition. Counsel for McMillan could have reasonably relied on Dr. Ackerson's assessment of McMillan and her acceptance of Dr. Kirkland's findings in choosing not to pursue a mental retardation sentencing defense.

***13** "....

"[McMillan's] videotaped interview with Millbrook police officers would also provide a reasonable basis for a competent lawyer to determine that efforts to prove deficits in adaptive functioning, in the face of an expert's standardized instrument saying that such deficits do not exist, would be a fruitless endeavor.... In the light of McMillan's demeanor in his statement to police, including his goal-directed activity of attempting to deceive police and shift blame to a third party based on an actual person, and the existence of standardized testing suggesting that [McMillan's] adaptive functioning was not impaired, trial counsel could have reasonably determined that the strategy now advocated in the post-conviction petition would be a waste of defense resources.

"....

"By the penalty phase of trial, the jury had seen McMillan, his demeanor, and his ability to interact and communicate with police during his videotaped interview. The jury knew that McMillan was living on his own and had previously worked at Hyundai, based on McMillan's employee identification card being admitted into evidence. The jury further saw McMillan undertake goal-directed activity in that he decided he wanted a truck, got transportation to a busy shopping area to find someone's truck he could steal, he laid in wait for the right victim, and he fled from the police (twice). McMillan was the primary instigator of the crime and the crime was not the result of McMillan being a 'follower.' The jury also knew about the presence of all of McMillan's worldly possessions in the victim's truck, meaning they knew McMillan was able to take possession of, and keep up with, tangible goods without assistance from others. This evidence also showed McMillan was able to understand the need to engage in flight from the area following his commission of the offense of murder. Other goal-directed activity evidence included McMillan's attempts to alter legal and financial documents pertaining to the truck in order to make it appear he had a possessory interest in the truck. At a minimum, that activity reflected McMillan's knowledge about the concepts of ownership and documentary evidence of ownership, financial matters and title documents. In addition, McMillan was astute enough to attempt to misdirect police toward a third-party suspect named Melvin Browning. Against this backdrop, defense counsel could have reasonably decided that arguing their client was mentally retarded was a lost cause, especially in the light of the findings of Dr. Kirkland and no findings by Dr. Ackerson to the contrary....

> "Trial counsel obtained the valuable services of multiple experts and the record establishes that they conducted a thorough investigation, with the records they uncovered used by McMillan's postconviction counsel at present. It cannot be said that the facts alleged in the amended petition, if true, would establish deficient performance on the part of trial counsel. Quite simply, they did enough to investigate and uncover issues pertaining to McMillan's mental health and mental status to present a reasonable and effective mitigation strategy. There are no 'red flags' alleged in the amended petition or contained in the record that would have required defense counsel to pursue mental retardation as a defense to the

> imposition of capital punishment in this case."

***14** (C. 1445–52.)

When addressing a counsel's duty to investigate, this Court has stated:

> " '[T]his duty only requires a reasonable investigation.' Singleton v. Thigpen, 847 F.2d 668, 669 (11th Cir. [(Ala.)] 1988), cert. denied, 488 U.S. 1019, 109 S.Ct. 822, 102 L.Ed.2d 812 (1989) (emphasis added). See Strickland, 466 U.S. at 691, 104 S.Ct. at 2066; Morrison v. State, 551 So.2d 435 (Ala. Cr. App. 1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990). Counsel's obligation is to conduct a 'substantial investigation into each of the plausible lines of defense.' Strickland, 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added). 'A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made.' Id., 466 U.S. at 686, 104 S.Ct. at 2063."

James v. State, 61 So.3d 357, 363–64 (Ala. Crim. App. 2010).

The record of McMillan's trial shows that his counsel moved for funds to hire a mitigation expert. That motion was granted in an amount not to exceed $20,000. (Trial Record, C. 130.) Counsel also moved that McMillan be mentally evaluated to determine his IQ and his mental condition at the time of the offense. (Trial Record, C. 135–36.) That motion was also granted. (Trial Record, C. 141.) McMillan was examined by Dr. Karl Kirkland, a state psychologist. Defense counsel also retained the services of Dr. Kimberly Ackerson, a forensic psychologist. Counsel also moved for discovery of all institutional records related to McMillan's life, including all school records

> "[g]enerated or maintained by Dannelly Elementary, Opelika Elementary, Tuskegee Public School, Lee High School, Sydney Lanier High School, Lee County Board of Education, Macon County Board of Education, Montgomery County Board of Education or any other educational facility or entity in Alabama."

(Trial Record, C. 137–39.) The circuit court granted that motion. (Trial record, C. 146–47.)

The report complied by Dr. Kirkland is contained in the trial record. (Trial Record, C. 1006–15.) In that report Dr. Kirkland states that he spoke to some of McMillan's family members. He said that Carol Weaver, McMillan's aunt, told him that McMillan had "lifelong learning problems but [she] would have never characterized him as being mentally retarded." (Trial Record, C. 1008.) Dr. Kirkland found that McMillan had an IQ of 76, and it was his opinion that "[McMillan] is not mildly retarded, but functions in the classification range immediately above the classification of mild mental retardation as well as in the range of low average intellectual functioning." (Trial Record, C. 1014.) Also, it is clear from the record that McMillan's mother was present at the sentencing hearing but chose not to testify based on her discussion with McMillan's counsel.

[24] **[25]** **[26]** **[27]** **[28]** **[29]** "This case does not present the situation where counsel completely failed to investigate mental health mitigation." Carter v. State, 175 So.3d 761, 772 (Fla. 2015). "Counsel cannot be found deficient for relying on the evaluations of qualified mental health experts, 'even if ... those evaluations may not have been as complete as others may desire.' " 175 So.3d at 775.

> ***15** " '[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'

"466 U.S. at 690–91. 'An accused is entitled " 'not [to] errorless counsel, and not [to] counsel judged ineffective by hindsight, but [to] counsel reasonably likely to render and rendering reasonably effective assistance.' " ' Bui v. State, 717 So.2d 6, 27 (Ala. Crim. App. 1997), quoting Thompson v. State, 615 So.2d 129, 134 (Ala. Crim. App. 1992), quoting in turn Haggard v. Alabama, 550 F.2d 1019, 1022 (5th Cir. 1977)."

Adkins v. State, 930 So.2d 524, 534–35 (Ala. Crim. App. 2001) (on return to third remand).

> " ' "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007)(quoting Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006))." Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010). 'This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel.' United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005)."

Daniel v. State, 86 So.3d 405, 429–30 (Ala. Crim. App. 2011).

> " '[W]hen, as here, counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance.' State v. Combs, 100 Ohio App. 3d 90, 105, 652 N.E.2d 205, 214 (1994). 'Most capital appeals include an allegation that additional witnesses could have been called. However, the standard of review on appeal is deficient performance plus prejudice.' Malone v. State, 168 P.3d 185, 234–35 (Okla. Crim. App. 2007).

State v. Gissendanner, [Ms. CR–09–0998, October 23, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015).

The circuit court did not err in summarily dismissing McMillan's claim that his trial counsel was ineffective for failing to present more evidence of his low IQ. There was no material issue of law or fact that would entitle McMillan to relief; therefore, the circuit court correctly summarily dismissed this claim pursuant to Rule 32.7(d), Ala. R. Crim. P.

B.

[30] McMillan next argues that his trial counsel was ineffective for failing to argue that he is intellectually disabled and that, therefore, pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), it is unconstitutional for him to be sentenced to death.

[31] In Ex parte Perkins, 851 So.2d 453 (Ala. 2002), the Alabama Supreme Court adopted the most liberal definition of mental retardation as that term had been defined by states that had enacted legislation on the issue. In Alabama, to be deemed mentally deficient the defendant must: (1) have significantly subaverage intellectual functioning (an IQ of 70 or below); (2) have significant defects in adaptive behavior; and (3) the two factors must have manifested themselves before the defendant attained the age of 18 years old. "Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national consensus." Atkins v. Virginia, 536 U.S. at 317, 122 S.Ct. 2242.

***16** In addition to the circuit court's findings quoted in Part II.A of this opinion, the circuit court stated:

> "As part of the court-ordered evaluation in this case, McMillan was evaluated for the presence of mental retardation. McMillan's full-scale IQ was measured at 76, above the 75 'cut-off' that explicitly was not addressed in Hall v. Florida, [—— U.S. ——], 134 S.Ct. 1986[188 L.Ed.2d 1007] (2014) (finding unconstitutional a bright-line cutoff of a 70 IQ score that does not take into account the standard error of measurement). Here, even taking into account the standard error of measurement, McMillan's score would have remained above the generally accepted score of 70 (two standard deviations below 100) that constitutes the intelligence quotient portion of a mental retardation analysis. And that would assume the largest standard error of measurement operating such as to overestimate McMillan's intelligence (i.e., even if McMillan's IQ was overstated by the maximum 5 points of the ordinary standard error of measurement, his IQ would still be 71). The fact that McMillan's full-scale IQ score placed him higher than a 70, even taking into account the standard error of measurement, constituted a reasonable basis for competent attorneys to conclude that pursuing a mental retardation defense would have been unfruitful, especially in the face of the evidence in this case providing an alternative mitigation strategy."

(C. 1443–44.)

[32] **[33]** **[34]** As stated above, McMillan underwent a mental evaluation before trial by Dr. Karl Kirkland. Dr. Kirkland found that McMillan was not mildly mentally retarded and that he had an IQ of 76. Counsel

acted reasonably in relying on Dr. Kirkland's findings concerning McMillan's mental health.

> "[T]rial counsel had no reason to retain another psychologist to dispute the first expert's findings. 'A postconviction petition does not show ineffective assistance merely because it presents a new expert opinion that is different from the theory used at trial.' State v. Combs, 100 Ohio App.3d 90, 103, 652 N.E.2d 205, 213 (1994). See also State v. Frogge, 359 N.C. 228, 244–45, 607 S.E.2d 627, 637 (2005). 'Counsel is not ineffective for failing to shop around for additional experts.' Smulls v. State, 71 S.W.3d 138, 156 (Mo. 2002). 'Counsel is not required to "continue looking for experts just because the one he has consulted gave an unfavorable opinion." Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir. 1995).' Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998)."

Waldrop v. State, 987 So.2d 1186, 1193 (Ala. Crim. App. 2007). "[D]efense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been as complete as others may desire." Darling v. State, 966 So.2d 366, 377 (Fla. 2007).

The circuit court did not abuse its discretion in summarily dismissing this claim because it failed to state a material issue of fact or law that would entitle McMillan to relief. See Rule 32.7(d), Ala. R. Crim. P.

C.

[35] McMillan further argues that his trial counsel was ineffective for failing to investigate and to present evidence of, his neurological disorders. Specifically, he argues that his trial counsel should have investigated and presented evidence that he suffered from fetal alcohol syndrome and a traumatic brain injury.

***17** The circuit court made the following findings on this claim:

> "First, counsel provided reasonable, competent professional assistance in this case by obtaining school records, DHR records, court records pertaining to the abuse and neglect suffered by McMillan and by obtaining a board-certified forensic psychologist with whom to consult. Counsel also located and consulted with a social worker who twice worked with McMillan during his time with DHR. Counsel also utilized the services of a licensed professional counselor who was familiar with DHR's operating procedures and was well-equipped to review and interpret the records obtained during the mitigation investigation.
>
> "While the amended petition faults trial counsel for not researching fetal alcohol syndrome, it was the expert mental health professionals whose responsibility it was to determine what conditions might be present and to determine an appropriate course of action. Here, the record establishes that Dr. Ackerson did not refer McMillan to a neurologist or psychiatrist for further testing, even though she had previously done so in other cases when it was appropriate. If Dr. Ackerson, a trained board-certified psychologist and Alabama forensic examiner, did not believe further referrals were necessary in this case, trial counsel were not deficient if they relied on that fact. Dr. Ackerson's invoice indicates she spent three hours conducting psychological and forensic assessments of McMillan and two hours of collateral interviews and ten hours of document review in this case. Further, Dr. Kirkland's court-ordered examination did not contain any suggestion that further testing would be needed; thus, that source of information did not put counsel on notice of any need to undertake further action. See Pooler v. Secretary, Florida Dept. of Corrections, 702 F.3d 1252, 1273 (11th Cir. 2012) (In some instances, defense counsel can reasonably rely on court-appointed experts even where they do not seek a defense expert for a second opinion).
>
> "....
>
> "Unlike the situation in Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), this claim does not plead facts describing a situation where counsel failed to obtain and review a file that contained readily, usable information. None of the files introduced at trial describe McMillan as having been diagnosed with fetal alcohol syndrome, nor does the petition allege that documents existed containing such a diagnosis. Instead, the petition alleges trial counsel were ineffective for failing to cobble together bits of information in order to try and create a medical diagnosis that the court-appointed expert did not note and which the defense expert did not feel was significant enough to warrant referral to a neuropsychologist.

> "Based on the record before this Court, McMillan cannot prevail even if the facts in his amended petition are taken as true. Trial counsel obtained records, spoke to family members, hired a mitigation investigator, obtained the services of Dr. Ackerson, spoke to a former social worker who knew McMillan during his time with DHR and obtained the benefit of a court-ordered evaluation. The penalty phase of trial shows that a great deal of effort went into preparing for the penalty phase and crafting an appropriate strategy. Trial counsel's performance in this matter was within the level of reasonable performance that is required by Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)].... The petition does not uncover the existence of documents which went undiscovered by trial counsel or that clearly document the existence of medical conditions that were overlooked by defense counsel. Instead, McMillan asserts his defense team should have been more creative in coming up with new diagnosis previously unmade during his life. Such a claim, in this case, does not constitute ineffectiveness under either prong of the Strickland analysis. As such, this claim is dismissed.

***18** (C. 1465–69.)

[36] As the State correctly argues, McMillan's entire pleading on this claim is based on speculation. McMillan did not plead in either his original petition or his amended petition that he actually suffered from fetal alcohol syndrome or that he had been diagnosed with traumatic brain injury. Indeed, the entire argument is premised on the fact that counsel "should have investigated" and "might have found" that McMillan suffered from those conditions. "[B]y presenting pure speculation and failing to plead any specific facts regarding [this issue] ... [the appellant] failed to plead facts supporting a general claim of prejudice." Morris v. State, [Ms. CR–11–1925, April 29, 2016] — So.3d ——, —— (Ala. Crim. App. 2016). "Ineffective assistance of counsel claims are not built on retrospective speculation ...." Bone v. State, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002). "It is well established that, in a claim of ineffective assistance of counsel, '[m]ere conjecture and speculation are not enough to support a showing of prejudice.' " Elsey v. Commissioner of Corr., 126 Conn.App. 144, 166, 10 A.3d 578, 593 (2011)(citation omitted). This circuit court properly dismissed this claim because no material issue of law or fact exists that would entitle McMillan to relief. See Rule 32.7(d), Ala. R. Crim. P.

D.

[37] McMillan further argues that his trial counsel was ineffective for failing to present evidence of his young age as a mitigating circumstance and of how his age affected his mental capabilities.

The circuit court made the following findings on this claim:

> "Based on the record of trial, it is clear that defense counsel adopted a reasonable mitigation strategy that argued that the abuse and neglect suffered during McMillan's childhood likely caused him to suffer from behavioral problems; for example, from lack of attachment and nurturing. Counsel further adopted a strategy that then shifted the focus to DHR as a culpable party for failing to provide for treatment for McMillan's behavioral problems. Explaining McMillan's behavioral problems as a result of his incomplete frontal lobe development due to age, as is alleged by McMillan in his petition, could have shifted focus away from the neglect and abuse that was highlighted in the mitigation case as the likely culprit, and would have lessened the culpability defense counsel sought to assign to DHR, as treatment and counseling arguably would have done little to speed along McMillan's brain's development. Under the circumstances and considering the strategy actually employed by defense counsel, reasonably competent counsel could have elected to forgo seeking to argue age and 'frontal lobe development' in this case.
>
> > "This is not to say that the mitigation theory advanced by McMillan through the facts averred in his amended petition is not reasonable. Another set of attorneys, with the same competencies of Mr. [Bill] Lewis and Mr. [Kendrick] James, could reasonably decide that an argument such as that set forth in McMillan's amended petition is the proper way forward if this case were to be tried again. But this does not mean that

> defense counsel's failure to advance this theory at trial was deficient. Again, the question is whether the approach taken by McMillan's trial counsel falls within the wide range of professionally reasonable assistance that is permitted (or acceptable) under the Sixth Amendment. Here, it does. Accordingly, the facts in the petition, if true, would not result in a finding that counsel were deficient for not seeking out MRI studies or hiring a different psychologist. For this reason, this claim is dismissed."

***19** (C. 1463–65.)

The circuit court did find as a statutory mitigating circumstance that McMillan was only 18 years of age at the time of the murder. Also, there was a great deal of mitigating evidence offered at sentencing. As did the circuit court, we agree that McMillan could establish no prejudice in regard to this claim.

> " '[W]hen, as here, counsel has presented a meaningful concept of mitigation, the existence of alternate or additional mitigation theories does not establish ineffective assistance.' State v. Combs, 100 Ohio App.3d 90, 105, 652 N.E.2d 205, 214 (1994)."

State v. Gissendanner, [Ms. CR–09–0998, October 23, 2015] —— So.3d ——, —— (Ala. Crim. App. 2015).

The circuit court committed no error in summarily dismissing this claim because there was no material issue of fact or law that would entitle McMillan to relief. See Rule 32.7(d), Ala. R. Crim. P.

E.

[38] McMillan next argues that counsel was ineffective for failing to investigate and to present rebuttal evidence at sentencing concerning his prior conviction for assault in the third-degree. McMillan asserts that trial counsel was aware that the State intended to rely on that conviction in the penalty phase of McMillan's capital-murder trial to negate the mitigating circumstance that McMillan had no significant history of prior criminal activity. McMillan cites Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005), in support of his argument.

The record shows that at the penalty phase the State presented testimony that McMillan had one prior misdemeanor conviction for assault in the third degree for assaulting Carlton Raspberry. At the penalty phase, the jury recommended, by a vote of 8 to 4, that McMillan be sentenced to life imprisonment without the possibility of parole, and the circuit court found as a statutory mitigating circumstance that McMillan had no significant history of prior criminal activity.

[39] The circuit court made the following findings related to this claim:

> "This claim can be dismissed for failing to state a material issue of law or fact under Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),] as to either deficient performance or prejudice.
>
> "As to deficient performance, the record establishes that McMillan's counsel did, in fact, take steps to investigate McMillan's prior assault conviction. Defense counsel represented to the Court that he intended to go to Dallas County and obtain the file well before the trial began. Counsel further noted he was concerned with determining whether McMillan had been represented by counsel. The record shows that ultimately counsel spoke to the court clerk on the phone and sent his investigator to Dallas County to obtain the file, but that it could not be located. That same day, the State provided the documents in its possession regarding that conviction. Defense counsel further participated in a hearing held to determine whether [McMillan] was the person named in the court records pertaining to the assault conviction. During that hearing, defense counsel reviewed sheriff's department documents (arrest report and offense report) pertaining to McMillan's assault case in open court. Counsel for McMillan also saw his booking photograph from that arrest during the hearing. McMillan's counsel were also in court, prior to trial, when a certified copy of McMillan's Assault III conviction was introduced.
>
> ***20** "Counsel's closing argument establishes that the Assault III case file was reviewed prior to trial. As counsel for McMillan argued, 'One assault conviction, misdemeanor, not represented by an attorney, no jail

time, no court costs, no fine.' This statement establishes that McMillan's counsel were paying attention when these materials were reviewed and discussed in open court prior to trial.

"McMillan's actual claim is specific: he alleges defense counsel were ineffective for failing to seek out and contact McMillan's victim from the assault case for which he was convicted. McMillan's claim goes too far. Strickland required that McMillan's attorneys make a reasonable investigation into 'possible mitigating factors and ma[k]e a reasonable effort to present mitigating evidence to the sentencing court.' Anderson v. Secretary, Fla. Dept. Of Corrections, 752 F.3d 881, 904 (11th Cir. 2014) (quoting Henyard v. McDonough, 459 F.3d 1217, 1242 (11th Cir. 2006)). McMillan's attorneys went beyond satisfying this duty as noted by the record of his trial. Further, seeking out the victim of a crime of violence committed by one's client, a capital murder suspect, for mitigation purposes cannot be said to be an act that all reasonable attorneys would undertake in the hope of finding mitigating evidence, especially where promising avenues of mitigation investigation already exist. McMillan offers no reason counsel would have seen any potential mitigating value in seeking out this particular victim of McMillan's conduct. Instead, the petition treats the issue as if counsel had a duty to automatically seek and find the victim of McMillan's assault case yet the prevailing norms in Elmore County, Alabama in 2008 and 2009 simply did not require such an act. See also, Cullen v. Pinholster, [563 U.S. 170,] 131 S.Ct. 1388, 1406–1407, 179 L.Ed.2d 557 (2011) ('Strickland itself rejected the notion that the same investigation will be required in every case.').

"Further, [Carlton] Raspberry was the victim of the assault for which McMillan was convicted, but another victim exists whose assault case was dismissed as part of a plea agreement. Thomas Grasso was violently assaulted by McMillan, with the police report noting: 'Grasso advised me that McMillan hit him in the head and back several times because McMillan said that he stabbed him in the leg with a crocheting needle. Grasso said he did not do what McMillan said he did and McMillan had no reason to strike him with his fists and [illegible] McMillan is a bully.' Had McMillan gone beyond the mere fact of the conviction, to which the state was limited by the Alabama Rules of Evidence, the State could have rebutted any testimony by Raspberry through testimony by Grasso. The existence of two assaults at the SafetyNet program, instead of only one as indicated by admissible convictions, would have been very prejudicial to McMillan. Obviously, reasonable trial counsel could decide that any strategy that could open the door to such damaging testimony should be avoided.

"McMillan's amended petition, even if the facts are accepted as true, does not establish that his counsel had a duty to seek out and interview the victim of a violent assault committed by McMillan in the hopes of findings mitigating evidence. This is doubly so where there is a second victim and calling one would make the other's testimony relevant as rebuttal.

"This claim is nothing like Rompilla v. Beard, 545 U.S. 374 (2005), were counsel failed to obtain readily available information from a public file knowing that such information would be used by the prosecution against their client. Here, the record plainly establishes that McMillan's counsel satisfied that duty as set forth in Rompilla. Instead, McMillan faults counsel for not squandering investigative resources on what most reasonable attorneys would conclude is a useless endeavor as far as uncovering mitigation evidence goes. Further, the amended petition ignores the fact that even had they found Raspberry a favorable witness, calling him to testify would expose McMillan to rebuttal testimony regarding a second assault he committed at the SafetyNet program. Even Rompilla discounts the theory advanced by McMillan. See Rompilla, 545 U.S. at 389 ('Questioning a few more family members and searching for old records can promise less than looking for a needle in a haystack, when a lawyer truly has reason to doubt there is any needle there.'). This claim, then, is dismissed."

***21** (C. 1458–63.)

In Rompilla, the United States Supreme Court held that counsel was ineffective for failing to review the file of the defendant's prior conviction when that conviction formed the basis of an aggravating circumstance that supported the death penalty:

> "It is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation. The prosecution

> was going to use the dramatic facts of a similar prior offense, and Rompilla's counsel had a duty to make all reasonable efforts to learn what they could about the offense. Reasonable efforts certainly included obtaining the Commonwealth's own readily available file on the prior conviction to learn what the Commonwealth knew about the crime, to discover any mitigating evidence the Commonwealth would downplay and to anticipate the details of the aggravating evidence the Commonwealth would emphasize."

545 U.S. at 385–86, 125 S.Ct. 2456. The Supreme Court did not hold that an attorney's conduct was unreasonable if that attorney did not personally interview the victim of the defendant's prior conviction. Indeed, the Supreme Court noted that reasonable efforts would have included obtaining the court file on the prior conviction. 545 U.S. at 386, 125 S.Ct. 2456.

The facts of this case are similar to the facts presented to the Indiana Supreme Court in Ward v. State, 969 N.E.2d 46, 56–57 (Ind. 2012). The Indiana Supreme Court discussed Rompilla and subsequent decisions by the United States Supreme Court and stated:

> "In Rompilla v. Beard, [545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005),] trial counsel failed to examine the court file on Rompilla's prior convictions despite the fact that they knew that the prosecution planned to seek the death penalty by proving Rompilla had a significant history of felony convictions. 545 U.S. 374, 383–86, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). In Porter v. McCollum, trial counsel did not interview any witnesses or gather any records and thereby failed to uncover any evidence of Porter's mental health or mental impairment, his family background, or his military service. 558 U.S. 30, 130 S.Ct. 447, 453, 175 L.Ed.2d 398 (2009) (per curiam). And in Sears v. Upton, trial counsel failed to uncover horrific aspects of Sears's family and social life, that he was learning disabled, and that he suffered frontal lobe abnormalities that resulted in substantial cognitive deficits. 561 U.S. 945, 130 S.Ct. 3259, 3262–64, 177 L.Ed.2d 1025 (2010) (per curiam) (5–4).
>
> "Unlike these cases, it is clear from the record here that trial counsel conducted a reasonable mitigation investigation. They interviewed Ward, his family members, and others who knew him to gain insight into his background and to develop his history; they also gathered records related to his education, his time in prison, and his mental health. Using the ABA [American Bar Association] standards as a guide, we think that the scope of counsel's investigation was reasonable. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases 10.7 cmt. (rev. ed. 2003) (noting that among the topics counsel should explore are medical history, family and social history, religious and cultural influences, educational history, military service, employment and training history, and prior adult and juvenile correctional experience); see also Bobby v. Van Hook, 558 U.S. 4, 130 S.Ct. 13, 16–17, 175 L.Ed.2d 255 (2009) (per curiam) (restatements of professional standards can be useful guides as to what is reasonable); cf. Nix v. Whiteside, 475 U.S. 157, 165, 106 S.Ct. 988, 89 L.Ed.2d 123 (1986) (cautioning courts not to 'constitutionalize particular standards of professional conduct'). And although they may have wanted to uncover certain mitigating evidence or may have intended to interview one potential mitigation witness in particular, they were not constitutionally deficient for failing to do so on this record. Cf. Yarborough v. Gentry, 540 U.S. 1, 8, 124 S.Ct. 1, 157 L.Ed.2d 1 (2003) ('[E]ven if an omission is inadvertent, relief is not automatic. The Sixth Amendment guarantees reasonable competence, not perfect advocacy judged with the benefit of hindsight.' (citations omitted)). Ward's trial counsel simply did not make 'errors so serious that [they were] not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment.' Strickland [v. Washington], 466 U.S. [668] at 687, 104 S.Ct. 2052 [(1984)]."

***22** Ward v. State, 969 N.E.2d 46, 56–57 (Ind. 2012).

Here, the record clearly shows that counsel investigated McMillan's prior conviction, that counsel attempted to obtain the file of the case but it could not be located, that counsel then obtained the State's records on the prior conviction, and that counsel also obtained law-enforcement records relating to the conviction. Trial counsel was well versed on the facts surrounding McMillan's prior conviction before his trial and their actions in investigating the prior conviction were reasonable. See Rompilla, supra. Moreover, the circuit court found that McMillan had no significant history of prior criminal activity. Clearly, McMillan failed to plead how he was prejudiced by counsel's failure to go

even further and interview the victim of McMillan's prior assault conviction.

The circuit court correctly summarily dismissed this claim pursuant to Rule 32.7(d), Ala. R. Crim. P., because there was no material issue of fact or law that would entitle McMillan to relief, and any further proceedings on this issue would have been futile.

III.

McMillan next argues that his due-process rights were violated because, he says, his postconviction petition was considered by a judge whose "impartiality might reasonably be questioned." (McMillan's brief at p. 71.) Specifically, he argues that the circuit judge, the Honorable John Bush, had already prejudged the issue of ineffectiveness of counsel and that Judge Bush had "close ties with McMillan's trial counsel." (McMillan's brief, p. 71.)

The record shows that McMillan moved that Judge Bush recuse himself from considering McMillan's postconviction petition and that he transfer the case to another judge in that circuit. (R. 536–50.) In the motion, McMillan argued that Judge Bush had stated in McMillan's sentencing order that "McMillan's attorneys provided effective assistance" before, he says, the issue of the effectiveness of counsel was even presented to that court. He further argued that both of McMillan's trial attorneys "are linked with Judge Bush by professional and political ties" because, he says, they gave "significant financial contributions to his contested election campaign." It appears that one attorney gave Judge Bush a campaign contribution of $1,000 for his reelection campaign and the other attorney gave him $500. McMillan then filed a motion for a "fair procedure" in disposing of the motion to recuse by transferring that motion to another judge for that judge to consider. (C. 590–602.) The State filed a motion opposing McMillan's motion to recuse. (C. 604–14.) Judge Bush denied the motion to recuse. (C. 622.) In the order Judge Bush stated:

> "The preferred procedure in Alabama is for the trial judge to hear and decide petitions for postconviction relief in cases that were initially heard by the trial judge. This Court finds no reasonable basis from deviating from that procedure. The issues raised by the petitioner in no way affect the undersigned's ability to be fair and impartial in evaluating the claims raised in the instant 'Rule 32' petition nor do they show any prejudice by this court against this petition."

***23** (C. 622.)

The United States Supreme Court in Caperton v. A.T. Massey Coal Co., 556 U.S. 868, 129 S.Ct. 2252, 173 L.Ed.2d 1208 (2009), considered whether an appellate judge should have recused himself from a case after one of the parties had contributed $3,000,000 to his election campaign. The Supreme Court held:

> "[T]here is a serious risk of actual bias—based on objective and reasonable perceptions—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent. The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election."

556 U.S. at 884, 129 S.Ct. 2252. "The [Caperton] Court's holding, however, was narrow. See id. at 2265. It noted the 'extreme facts' of that case and limited its holding to the 'extraordinary situation' where the 'probability of actual bias rises to an unconstitutional level.' Id." United States v. Rodriguez, 627 F.3d 1372, 1382 (11th Cir. 2010). See also Williams–Yulee v. Florida Bar, —— U.S. ——, 135 S.Ct. 1656, 191 L.Ed.2d 570 (2015).

This Court's records reflect that in January 2015 McMillan filed a petition for a writ of mandamus requesting that this Court direct Judge Bush to recuse himself from McMillan's postconviction proceedings. In our order declining to issue the writ, we stated:

> "Rule 32.6(d), Ala. R. Crim. P., provides that a Rule 32 petition 'shall be assigned to the sentencing judge where possible, but for good cause the proceeding may be assigned or transferred to another judge.' See also H. Maddox, Alabama Rules of Criminal Procedure, § 32.6(d), p. 988 (3d ed. 1999). When reviewing a recusal motion: 'The question is not whether [Judge Bush] was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably

question the judge's impartiality—whether there is an appearance of impropriety.' Ex parte Duncan, 638 So.2d 1332, 1334 (Ala. 1994). The mere fact that Judge Bush made a comment in his sentencing order on the performance of trial counsel does not mean that Judge Bush is incapable of rendering a fair decision on McMillan's claims of ineffective assistance of counsel in his postconviction proceeding. This Court has previously denied a petition for a writ of mandamus alleging this identical ground for recusal. See Ex parte Harris, (CR–10–1651, September 16, 2011) [114 So.3d 176 (Ala.Crim.App. 2011)].[1] McMillan failed to establish good cause for Judge Bush's recusal on this basis.

"Second, the United States Supreme Court in Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009), addressed the circumstances that warrant a judge recusing when a defendant or attorney have worked on or contributed to that judge's campaign. In Caperton, one of the parties contributed a total of $3,000,000 to the judge's campaign. The court stated: '[T]here is a serious risk of actual bias—based on objective and reasonable perception—when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent.' 556 U.S. at 884. (Emphasis added.) 'The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election.' Caperton, 556 U.S. at 884. McMillan alleges that in the 2006 judicial election in Elmore County one of his trial attorneys contributed $1,000 to Judge Bush's campaign and the other attorney contributed $500. The exhibits attached to this petition reflect that Judge Bush received $59,000 in contributions. We do not consider the contributions at issue in this case to meet the threshold recognized in Caperton—the contributions were not 'significant.' "

> ***24** "[1] A similar mandamus petition was filed in the Alabama Supreme Court and also denied. See Ex parte Harris, (Ms. 1101486, October 13, 2011)."

Ex parte McMillan (No. 14-0498, 207 So.3d 854 (Ala. Crim. App. 2015) (table).

[40] This Court recognizes that the filing of a petition for a writ of mandamus does not preclude an appellant from raising the same issue on appeal. See Ex parte Crawford, 686 So.2d 196, 198 (Ala. 1996) ("While a mandamus petition is a proper method for obtaining appellate review on this issue, it is not the sole method for obtaining it."). Indeed, this is true because the burden of establishing the prerequisites for the issuance of a writ of mandamus are higher than those that warrant relief on appeal. However, under any standard of review, we hold that McMillan is due no relief on this claim. We affirm the grounds for denial set out in the above-quoted order. For these reasons, McMillan is due no relief on this claim.

IV.

[41] McMillan next argues that the circuit court erred in declining to extend his right to counsel to the filing of the petitions for the writ of mandamus McMillan's postconviction counsel filed in both this Court and the Alabama Supreme Court.

McMillan's postconviction counsel moved that the scope of his appointment of counsel includes counsel's work on the mandamus petitions filed in the two appellate courts. (C. 1648.) The circuit court denied that motion. (C. 1668.) The record shows that the circuit court issued the following order regarding the appointment of counsel in the postconviction proceedings.

> "Upon consideration of petitioner Calvin McMillan's motion for appointment of counsel, the motion is hereby granted....
>
> > "This appointment shall apply to the filing, argument and representation on the Rule 32 petition and amended Rule 32 petition only and any appeal from this Court's ruling(s) thereon. It does not apply to the Motion to recuse and/or petitions for writ of mandamus."

(C. 1676.)

[42] **[43]** " 'Mandamus is a discretionary writ that is appropriate where a court has exceeded its jurisdiction or authority and where there is no remedy through appeal.' " State ex rel. Joyce v. Mullen, 503 S.W.3d 330, 334 (Mo. Ct. App. 2016) (quoting State ex rel. Poucher v. Vincent, 258 S.W.3d 62, 64 (Mo. banc 2008)). The United States Supreme Court has "rejected suggestions that [it] establish a right to counsel on discretionary appeals." Pennsylvania v. Finley, 481 U.S. 551, 555, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987). The right to counsel does not extend to postconviction proceedings. See Pennsylvania v. Finley, supra.

Because there is no right to counsel for the filing of a mandamus petition, a discretionary review, the circuit court did not abuse its discretion in declining to extend the scope of McMillan's appointment of counsel to include the filing of extraordinary writs. For these reasons, McMillan is due no relief on this claim.

V.

[44] McMillan next argues that the circuit court erred in summarily dismissing his claim that his trial counsel was ineffective for failing to investigate and to present evidence in the penalty phase regarding the instability of his childhood. Specifically, he argues that trial counsel failed to conduct a thorough investigation and present an even more detailed account of his childhood.

***25** McMillan pleaded the following in his amended postconviction petition:

> "Here, counsel's investigation and presentation of McMillan's instability was objectively unreasonable. Counsel did not interview the vast majority of McMillan's former foster parents.... Trial counsel also failed to interview most of the social workers who worked with McMillan and staff of the facilities where McMillan lived. If they had done those things, they could have developed a far more detailed and vivid presentation demonstrating that McMillan grew up in a constant state of instability and without any steady, positive influences."

(C. 472–73.) McMillan argued that more detailed testimony should have been presented concerning the 25 different foster residences he lived in and the numerous programs he participated in while in the custody of DHR.

The circuit court made the following findings of fact on this claim:

> "At trial, McMillan's sister Ella Torrence testified about McMillan's family situation at the time of his birth in 1988. This included testimony that she moved in with her aunt Carol Weaver, who she testified she calls 'Momma'—because her mother was going to give the children up to foster care. She further testified that her mother moved from New York to Shorter, Alabama, shortly after becoming pregnant with McMillan. She further testified that because of her mother's drug and alcohol use, her siblings (including McMillan) were moved into foster care shortly after his birth and while he was still an infant. This lasted until 1991 when McMillan returned to his mother in Waugh, Alabama. She testified this living arrangement included the presence of Willie Ford. Ella Torrence further testified that the children went to abuse shelters during this time, but that they would always go back to Ford's home. Torrence stated that this back-and-forth arrangement continued until about 1998.
>
> "Torrence testified that in 1998 her mother and Ford were arrested and the children were removed from the home. At this point, McMillan began going into different foster homes. Torrence also stated that McMillan lived with her in 2006 and 2007 in Montgomery, Alabama, but that he was not living with her at the time of the murder of Martin. At the time of the murder Torrence testified McMillan was living on his own.
>
> "McMillan's Aunt Carol Weaver repeated much of the information provided by Torrence, including the stays at the battered women's shelter with the children. Weaver also testified that she raised the children for a period of time during the 1990's with the assistance of [the Department of Human Resources].
>
> "Teal Dick was a major defense mitigation witness on the issue of the instability in McMillan's childhood living arrangements. Dick also confirmed that the children lived in a trailer with Ford in Waugh, Alabama, from 1992 through 1998. He also discussed the stays at the Sunshine Center (battered women's shelter), including a stay during July 1995. Dick noted that during the time the children stayed at the Waugh residence, they would periodically have to stay with

Carol Weaver. Dick discussed one occasion in June 1997 when the children had to stay at a motel because the shelter was full. Teal also pointed out references in a DHR record showing that the children stayed with their mother at a shelter for 92 days between May and August 1997.

***26** "Dick testified that McMillan was moved from 'place to place to place to place' during his childhood, going through five social workers during the time period. He noted that McMillan went through 25 or 26 placements, 'based on how you count.' The first placement was with Carol Weaver after the arrests of Ford and McMillan. Dick testified that the placement with Weaver lasted ten months. After Weaver, McMillan was placed with Macon County DHR. Next, Dick referenced McMillan's placement in the State Alternatives for Families and Youth Center in 2001. McMillan went through approximately twenty homes after that placement. Finally, Dick noted that McMillan was emancipated in January 2007.

"Emma Cosby testified that she was a social worker who supervised McMillan during a placement in the home of [W.B.] in the 2000–2001 time frame. Cosby testified that prior to the placement with [W.B.], McMillan had been placed in another home by social worker Jamie Fulton. Cosby again came into contact with McMillan in approximately 2007 when he was placed in the SafetyNet residential program.

"....

> "In this case, the record establishes that defense counsel and their experts investigated and familiarized themselves withe McMillan's 25 or 30 placements, 'depending on how you count.' Afterwards, counsel chose to present two family members, two experts, McMillan's estranged biological father, and a social worker who had been the victim of McMillan's behavioral problems in the form of an explicit, violent threat. In essence, the defense used Emma Cosby to 'soften' the impact of McMillan's behavioral problems evidence in a document that they needed to carry out their strategy of shifting the focus of the penalty phase from McMillan to what they asserted were failings and shortcomings by DHR. Here, as in [Bobby v. Van Hook, 558 U.S. at 13, 130 S.Ct. 13 (2009)], it was not unreasonable for defense counsel to not identify every single person with whom McMillan was placed and no facts averred in the amended petition, if true, would establish otherwise."

(C. 1469–74.)

[45] Here, a great deal of testimony was presented concerning McMillan's unstable home environment. Testimony was admitted through several witnesses that McMillan had been in many different foster homes and that his home environment was marked by neglect, abuse, and instability. Teal Dick testified that McMillan had been assigned five different social workers in a 5– or 7–year period and in that same time he had been placed in 25 or 26 different foster homes. Emma Cosby testified concerning several of the foster homes. McMillan's sister also detailed McMillan's unstable childhood.

> " ' "[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007) (quoting Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006)).' Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010). 'This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel.' United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005). 'Although as an afterthought this [defendant's father] provided a more detailed account with regard to the abuse, this Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.' Darling v. State, 966 So.2d 366, 377 (Fla. 2007).

Daniel v. State, 86 So.3d 405, 430 (Ala. Crim. App. 2011). "It is true that counsel will not be held to be ineffective for failing to present evidence that is duplicative of evidence presented at the penalty phase." Robinson v. State, 95 So.3d 171, 180 (Ala. 2012). "That the lawyers ... did not track down every possible expert or piece of evidence

available, does not render their assistance ineffective." Parrish v. Commonwealth, 272 S.W.3d 161, 170 (Ky. 2008).

***27** As the United States Supreme Court stated in Bobby v. Van Hook, 558 U.S. at 13, 130 S.Ct. 13 (2009):

> "Despite all the mitigating evidence the defense did present, Van Hook and the Court of Appeals fault his counsel for failing to find more. What his counsel did discover, the argument goes, gave them 'reason to suspect that much worse details existed,' and that suspicion should have prompted them to interview other family members—his stepsister, two uncles, and two aunts—as well as a psychiatrist who once treated his mother, all of whom 'could have helped his counsel narrate the true story of Van Hook's childhood experiences.' [Van Hook v. Anderson,] 560 F.3d [523] at 528 [(6th Cir. 2009)]. But there comes a point at which evidence from more distant relatives can reasonably be expected to be only cumulative, and the search for it distractive from more important duties. The ABA Standards prevailing at the time called for Van Hook's counsel to cover several broad categories of mitigating evidence, see 1 ABA Standards 4–4.1, comment., at 4–55, which they did. And given all the evidence they unearthed from those closest to Van Hook's upbringing and the experts who reviewed his history, it was not unreasonable for his counsel not to identify and interview every other living family member or every therapist who once treated his parents. This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, cf. Wiggins [v. Smith], 539 U.S., [510] at 525, 123 S.Ct. 2527 [(2003)], or would have been apparent from documents any reasonable attorney would have obtained, cf. Rompilla v. Beard, 545 U.S. 374, 389–393, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005). It is instead a case, like Strickland itself, in which defense counsel's 'decision not to seek more' mitigating evidence from the defendant's background 'than was already in hand' fell 'well within the range of professionally reasonable judgments.' 466 U.S. at 699, 104 S.Ct. 2052."

558 U.S. at 11–12, 130 S.Ct. 13.

The circuit court correctly found that this issue was due to be summarily dismissed because no issue of law or fact exists that would entitle McMillan to relief. See Rule 32.7(d), Ala. R. Crim. P.

VI.

[46] [47] [48] [49] [50] McMillan next argues that the circuit court erred in summarily dismissing his claim that his trial counsel was ineffective for failing to object to allegedly improper arguments made by the prosecutor in opening and closing statements.

> " '[E]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer.' Brooks v. State, 456 So.2d 1142, 1145 (Ala. Crim. App. 1984)."

Hooks v. State, 21 So.3d 772, 789 (Ala. Crim. App. 2008).

> " '[I]nterruptions of arguments, either by opposing counsel or the presiding judge, are matters to be approached cautiously.' United States v. Young, 470 U.S. 1, 13, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985). 'A decision not to object to a closing argument is a matter of trial strategy.' Drew v. Collins, 964 F.2d 411, 423 (5th Cir. 1992). To constitute error a prosecutor's argument must have 'so infected the trial with unfairness as to make the resulting [verdict] a denial of due process.' Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d. 144 (1986)."

***28** Benjamin v. State, 156 So.3d 424, 454 (Ala. Crim. App. 2013). "Merely because a trial counsel failed to object to everything objectionable, does to equate to incompetence.... 'In many instances seasoned trial counsel do not object to otherwise improper questions or arguments for strategic purposes.' " Greer v. State, 406 S.W.3d 100, 104 (Mo. Ct. App. 2013). "To justify postconviction relief the failure to object must have been of such character as to deprive the movant substantially of his right to a fair trial." State v. Kennedy, 842 S.W.2d 937, 946 (Mo. Ct. App. 1992). "[T]he failure to object to argument that is not improper does not constitute ineffective assistance of counsel. Even the failure to object to improper jury argument does not ordinarily reflect ineffective assistance." Davis v. State, 830 S.W.2d 762, 766 (Tex. Ct. App. 1992).

More importantly, "[T]he jury's recommendation of life imprisonment without parole negates [the appellant's] showing that he was prejudiced by counsel's performance." Boyd v. State, 746 So.2d 364, 389 (Ala. Crim. App. 1999).

A.

[51] First, McMillan argues that the circuit court erred in dismissing his claim that his trial counsel was ineffective for failing to object to the prosecutor's argument in closing in the penalty phase. Specifically, McMillan challenges the following argument:

> "So I just want to remind you that we're at the point now where the decision you make is not a personal one. As you sit as a court of law you are a jury of 12, a fair cross-section of this community, you are the conscience of this community. You are not an individual. You're 12 people who represent the residents of Elmore County, Alabama."

(Trial Record, R. 1732.) McMillan argues that the argument violates the United States Supreme Court's holding in Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988).

"The United States Supreme Court in Mills v. Maryland, held that if there was a substantial probability that jury instructions in the penalty phase implied that a finding on a mitigating circumstance must be unanimous, then the death sentence is due to be vacated." Blackmon v. State, 7 So.3d 397, 437 (Ala. Crim. App. 2005).

The circuit court stated the following concerning this claim:

> "This claim is summarily dismissed because the arguments of the State were appropriate calls for law enforcement and justice and not objectionable....
>
> "Further, McMillan cannot establish prejudice under Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984),] as to this claim. When the complained of comments are considered in the context of the entire argument of the State, McMillan's prejudice argument evaporates. The State began its penalty phase closing argument by 'emphasizing' to the jury that the 'decision is a legal and a factual one in accordance with the instructions of the Court.' Counsel for the State then reminded the jury that their decision required a weighing of the aggravating and mitigating circumstances. Counsel told the jurors that the amount of weight they gave the proven aggravating circumstance 'is solely yours.' Counsel for the State informed the jury that they were required to consider any mitigation offered by McMillan, but that only they could determine whether it was mitigating or the weight to be assigned to such circumstances. In conclusion, the State argued:
>
> > " 'And the law says, as we talked about earlier, if the aggravation outweighs the mitigation, it is your role, as duly impaneled jurors who have sworn an oath, to follow the instructions of the Court, follow the law, and apply it to the facts and return a verdict based on that. And if the aggravation outweighs the mitigation, it's death. Like I said, it's not an emotional or a political issue, it is a legal issue that will be resolved solely by your determination of the facts.'
>
> ***29** "(R. 1755.) Importantly, the prosecutor asserted to the jury, 'I'm just going to ask you to listen to the instructions of the Judge. This isn't a personal issue, it's not a political issue, it's a legal issue and a factual issue that you must discuss amongst yourselves and you must deliberate. Deliberate means that you consider everyone's views and review the evidence, you don't shut yourselves off from everybody else, because that turns into a court of men and women and of individuals and not a court of law.' In context, it cannot be said that the failure to object to the argument identified by McMillan was prejudicial under Strickland."

(C. 1477–78.)

We agree with the circuit court that the prosecutor's argument, taken as a whole, did not imply that all the jurors had to agree in order for a mitigating circumstance to be applied. In fact, the prosecutor urged the jury to follow the circuit court's instruction. "Because the substantive claim underlying the claim of ineffective assistance of counsel has no merit, counsel could not be ineffective for failing to raise this issue." Lee v. State, 44 So.3d 1145, 1173 (Ala. Crim. App. 2009). The circuit court correctly summarily dismissed this claim pursuant to Rule 32.7(d), Ala. R. Crim. P.

B.

[52] Second, McMillan argues that his trial counsel was ineffective for failing to object when the prosecutor argued that the State was limited to the number of aggravating circumstances it was permitted to pursue at the penalty phase.

McMillan challenges the following argument:

> "By law we're limited to one aggravating circumstance, the fact that Calvin McMillan killed Bryan Martin during a robbery in the first degree. And by your verdict you have already established this aggravating circumstances beyond a reasonable doubt."

(Trial Record, R. 1733.) He argues that the above argument "created the false impression that the case involved one aggravator because the law only allowed the State to select one, rather than because the case not highly aggravated." (McMillan's brief at p. 82.)

The circuit court made the following findings on this claim:

> "The comment of the prosecutor was not objectionable in any way. As such, McMillan's counsel were not deficient for failing to object and McMillan was not prejudiced by the remark.... [T]he Court's instructions further indicated that it was only allowed to consider the murder during the course of a robbery aggravating circumstance. Inasmuch as the trial court stated: 'This aggravating circumstance is included in the list of enumerated statutory aggravating circumstances permitting you to consider death as an available punishment,' any possible error in the 'misstatement' McMillan avers the prosecution made was cured."

(C. 1479–80.) We agree with the circuit court. "[T]he failure to object to argument that is not improper does not constitute ineffective assistance of counsel." Davis v. State, 830 S.W.2d 762, 766 (Tex. Ct. App. 1992). "Because the substantive claim underlying the claim of ineffective assistance of counsel has no merit, counsel could not be ineffective for failing to raise this issue." Lee v. State, 44 So.3d 1145, 1173 (Ala. Crim. App. 2009).

The circuit court did not err in summarily dismissing this claim pursuant to Rule 32.7(d), Ala. R. Crim. P., because there was no material issue of fact or law that would entitle McMillan to relief.

C.

[53] McMillan next argues that his trial counsel was ineffective for failing to object when the prosecutor argued that he was "dangerous." Specifically, he asserts that the prosecutor argued that his prior conviction for assault in the third degree was a violent crime and that McMillan was a dangerous person. He asserts that the argument was improper because, he says, under Alabama law future dangerousness is not a proper aggravating factor at the penalty phase of a capital-murder trial.

***30** The circuit court stated the following concerning this claim:

> "Here, the context of the prosecutor's arguments reveal that the state never once argued future dangerousness as an aggravating circumstance. In fact, as noted in the State's motion to dismiss, the absurdity of [McMillan's] position is most apparent when compared to the previous claim in the petition criticizing the State for truthfully informing the jury that they could only consider a single aggravating circumstance.
>
> "In context, it is clear the State was arguing that the statutory mitigating circumstance of lack of 'significant history of criminal activity' was either diminished or negated by the referenced evidence. Further, the State's intent in offering this argument is self-evident from the argument preceding the comments contested by McMillan:
>
> > "Mitigating. He is permitted to offer for your consideration any aspect of his character or any circumstances of the offense he chooses to offer ... but only you can determine whether or not he has established it as mitigating or whether it's mitigating and how much weight to give it in view of all of the evidence presented by both the state and the defense.
> >
> > "I'm going to go through the mitigation I've heard and kind of give you my thoughts about mitigation ....
> >
> > " 'Now, DHR is blamed for all of this, yet the evidence shows that every time someone tried to reach out to Calvin McMillan, whether it be Carol

> Weaver, Emma Cosby, whoever, Calvin McMillan tried his best to hurt them. Calvin McMillan had the same choice, personal choice, as Ella and Adella, his siblings, to accept what the State and DHR could offer and take personal responsibility for his future. He chose not to take personal responsibility for his future, but he had a choice. He knows the difference between right and wrong. He can control his behavior and does not need medication to do so.'

"(R. 1738–1740.) The State then asserted 'DHR did not fail Calvin McMillan' but rather 'Calvin McMillan failed DHR.' As part of this, the State highlighted that McMillan's choices to misbehave caused each and every problem he encountered in the DHR system. As such, counsel for the state questioned 'whether DHR is even mitigating.'

> "Because the prosecutor's arguments were not objectionable, McMillan's counsel were not deficient in their performance for failing to object and McMillan was not prejudiced by such failure.... [T]he Court properly instructed the jury that it could only consider a single aggravating circumstance in this case and the jury is presumed to have followed that instruction."

(C. 1481–82.) We agree with the circuit court, the prosecutor's argument was not improper; rather, it was an argument against application of the statutory mitigating circumstance that McMillan had no significant history of prior criminal activity. "[T]he circuit court correctly found that 'no purpose would be served by any further proceedings' in regard to this claim.' " Washington v. State, 95 So.3d 26, 60 (Ala. Crim. App. 2012).

D.

[54] McMillan further argues that counsel was ineffective for failing to object when the prosecutor injected his personal opinion by referencing his service in Iraq during closing argument in the penalty phase. Specifically, McMillan challenges the following argument:

> ***31** "When I hear age, he's 18, he's 19, I think back to my tour in Iraq and the 18– and 19–year-old privates and specialists and corporals who are undertaking responsibilities and performing tasks that are just awe-inspiring. Eighteen and nineteen year olds are capable of doing some amazing and truly wonderful things."

(Trial record, R. 1780–81.)

The circuit court made the following findings:

> "As with McMillan's previous claims regarding alleged improper argument, the prosecutor's remarks were not objectionable when the arguments are reviewed in context as required by law. In context, the prosecutor's reference to service in Iraq was to remind the jury that 18 or 19 year olds can be called upon to serve in extremely adverse, life-threatening conditions and can do so remarkably well. This observation was a fair rebuttal to the proffered statutory mitigating circumstance of McMillan's age, showing that simply being 18 years old is not a handicap or condition that automatically results in lessened culpability. Further, the arguments concerning overcoming adversity 'were used to rebut McMillan's mitigating evidence concerning the hardships of his childhood.' The arguments highlighted by McMillan were proper rebuttal arguments and were not objectionable.
>
> > "Because the prosecutor's arguments were not objectionable, McMillan's counsel were not deficient in their performance for failing to object and McMillan was not prejudiced by such failure."

(C. 1482–83.) We agree with the circuit court. "Because the substantive claim underlying the claim of ineffective assistance of counsel has no merit, counsel could not be ineffective for failing to raise this issue." Lee v. State, 44 So.3d 1145, 1173 (Ala. Crim. App. 2009).

E.

[55] McMillan argues that his counsel was ineffective for failing to object when the prosecutor argued that the district attorney's office, the victim's family, and the police all had agreed with the State's decision to seek the death penalty in his case.

McMillan challenges the following statements by the prosecutor in his opening statement:

> "Now, ladies and gentlemen, several months ago my office decided that this case justified our seeking the death penalty. The family agreed with us, as did law enforcement, but none of that means anything. It doesn't matter what my office wants to do. It doesn't matter what I want to do. It doesn't matter what the family wants to do. The only thing that matters is what the 12 of you decide. The 12 of you will represent the conscience and convictions of Elmore County. Only you can decide what is true and just."

(Trial Record, R. 690–91.)

The circuit court made the following findings on this claim:

> "In reviewing this precise argument, the Alabama Court of Criminal Appeals determined, 'this argument by the State in favor of the death penalty was properly waged, as a prosecutor is allowed to do in a capital case. Moreover, it ultimately served as a reminder to the jury members of their duty in making the decision as to the sentencing recommendation.' McMillan [v. State], 139 So.3d [184] at 239 [(Ala. Crim. App. 2010)]. Noting that the prosecutor's comments, in context, did not in any way urge the jury to ignore its penalty-phase role, the Alabama Court of Criminal Appeals found that '[t]here was no error by the prosecutor in this argument.' McMillan, 139 So.3d at 240.
>
> ***32** "The ruling of the Alabama Court of Criminal Appeals was not that any error was harmless, not 'plain' or not affecting substantial rights of the appellant, but that there was no error. That finding is the law of this case. As such, counsel could not have been deficient in their performance for failing to object to this argument and McMillan did not suffer Strickland prejudice."

(C. 1483–84.)

On direct appeal, this Court held that the above argument did not constitute error. "Because the substantive claim underlying the claim of ineffective assistance of counsel has no merit, counsel could not be ineffective for failing to raise this issue." Lee, 44 So.3d at 1173.

VII.

[56] McMillan next argues that the circuit court erred in dismissing his claim that his trial counsel was ineffective for failing to object to the trial court's reliance on other cases when deciding to disregard the jury's recommendation and sentence McMillan to death. Specifically, McMillan challenges the following statements in the circuit court's sentencing order in the section entitled "Justifications for Override":

> "This Court is aware of many cases in Alabama over the years where the death penalty has been upheld as the appropriate punishment for the capital offense of an intentional murder during the course of committing a robbery 1st degree.... No juror is in a position to compare this case with other capital cases as they do not have the resources and benefit of the decisions from the appellate courts nor the personal experience received by trying and deciding these types of cases. When this Court compares the facts of this case to similar cases there is little question that, when compared to other cases with similar facts, a sentence of death is not in any way a disproportionate sentence."

(Trial Record, C. 572–73.) McMillan argues that the above comments reflect that the circuit court deprived McMillan of an individualized sentencing determination.

The circuit court made the following findings on this claim:

> "In sentencing McMillan to death, the Court noted 'that a proper weighing of the aggravating circumstances and mitigating circumstances does not support a sentence of life without parole.' That finding came at the end of a detailed sentencing order that established conclusively that the Court provided McMillan the individualized sentencing determination required by the Constitution and under Alabama law. This Court emphasized that it was required to 'weigh the aggravating circumstances against the mitigating circumstances' including the jury's recommendation and, ultimately, found that the aggravating circumstance outweighed the mitigating circumstances requiring a sentence of death.

"McMillan cannot establish prejudice as to this claim. The Alabama Court of Criminal Appeals performed a proportionality review (required by law) during the direct appeal and concluded that '[t]he penalty in this case is neither disproportionate nor excessive when compared to the penalties imposed in similar cases, considering the circumstances surrounding both the crime and McMillan.' McMillan [v. State], 139 So.3d [184] at 269 [(Ala. Crim. App. 2010)]. That court determined that 'death is the proper sentence in this case' and concluded that the sentence imposed by this Court was supported by '[a]n independent weighing of the aggravating and mitigating circumstances.' Id. Thus, assuming arguendo that the Court's order can be read as encompassing improper 'other case' considerations, such considerations were harmless, as determined by the Court of Criminal Appeals who performed an independent reweighing of the aggravating circumstances and mitigating circumstances. Thus, it can be fairly said that any error by counsel was harmless and did not constitute prejudice under Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)].

***33** "....

> "Even today, McMillan would be unable to establish prejudice. The Court did not consider 'other cases' considerations such as to deprive McMillan an individualized sentencing determination. Quite simply, the aggravating circumstance outweighs the mitigation proffered at sentencing. These factors are unique to the facts of McMillan's crime and the facts and circumstances of his life relevant to sentencing. This Court thoroughly and completely considered all factors required in reaching the decision to impose the most severe punishment allowable under the law. As such, McMillan cannot establish prejudice under Strickland as to this claim."

(C. 1486–87.)

On direct appeal, this Court addressed, in depth, the circuit court's decision to override the jury's recommendation. McMillan, 139 So.3d at 207–21. On appeal, McMillan argued that when overriding the jury's recommendation the circuit court improperly considered evidence the jury was not privy to. In finding that the circuit court's decision was consistent with Alabama law, this Court specifically quoted the above comments in the sentencing order that McMillan now argues are improper. We stated: "The trial court's sentencing order and the record support its findings as to the jury override, as does the holding in Ex parte Carroll[, 852 So.2d 833 (Ala. 2002)]." 139 So.3d at 221.

A review of the circuit court's sentencing order clearly shows that the circuit court properly applied existing law when it overrode the jury's recommendation. "Because the substantive claim underlying the claim of ineffective assistance of counsel has no merit, counsel could not be ineffective for failing to raise this issue." Lee, 44 So.3d at 1173. The circuit court correctly summarily dismissed this claim.

VIII.

[57] McMillan next argues that the circuit court erred in summarily dismissing his claim that his trial counsel was ineffective for failing to adequately argue his motion seeking to suppress his statements to police. Specifically, he argues that trial counsel should have presented evidence of his intellectual defects in support of the motion to suppress.

The circuit court made the following findings on this claim:

> "Here, the forensic examination revealed that McMillan suffered from no thought disorder and his thought processes were coherent and goal-directed. McMillan further understood the charges against him and was found able to assist his counsel against the charges and 'has the capacity to understand his legal situation.' McMillan also possessed both understanding and appreciation for his legal situation. Overall, McMillan was found 'capable of understanding his legal situation, assisting his attorneys, and proceeding to disposition and/or trial' and 'capable of retaining and comprehending basic

concepts of the trial process.' The court-appointed examiner further noted, 'McMillan appears to be capable of understanding his legal situation and assisting his attorneys.' McMillan is not mentally retarded, and performs at a level above mental retardation.

***34** "....

"Finally, McMillan's attorneys had the benefit of the assistance of a licensed mental health professional, Dr. Kimberly Ackerson. Dr. Ackerson's opinion was that McMillan's behavioral problems sprang from a lack of attachment when McMillan was an infant as well as the after-effects of an alleged sexual assault. Rather than suffering from mental retardation, Dr. Ackerson noted that McMillan had been diagnosed with conduct disorder. Dr. Ackerson further noted a diagnosis of oppositional defiance disorder. Dr. Ackerson further found the presence of symptoms of post traumatic stress disorder and antisocial personality disorder. Dr. Ackerson's testimony also revealed that she relied, in part, on the court-ordered evaluation performed by Dr. Kirkland.

> "Accordingly, the evidence before the Court is sufficient to establish that defense counsel provided reasonably competent assistance of counsel (i.e., were not deficient) in that their strategy was consistent with the opinions of multiple experts, including several who appeared on behalf of McMillan. Not a single expert for the defense found evidence of mental retardation. Indeed, the experts presented by the defense all concluded that McMillan suffered from behavioral disorders consistent with the documentation from DHR and somewhat consistent with the findings of the court-appointed expert."

(C. 1489–93.)

The trial record shows that counsel moved to suppress McMillan's statement to police. (Trial Record, C. 219–20.) A hearing was held on the motion. McMillan argued that his statement was unconstitutionally procured because he was submitted to interrogation after invoking his right to counsel. On appeal, this Court held that McMillan had waived his right to counsel and that the statement was properly admitted into evidence. See McMillan, 139 So.3d at 196–98.

Based on the experts who evaluated McMillan, counsel had no reason to doubt McMillan's mental health or to argue that ground in the motion to suppress his statement. Therefore, McMillan could not show that counsel's conduct was deficient. The circuit court correctly summarily dismissed this claim pursuant to Rule 32.7(d), Ala. R. Crim. P.

IX.

[58] McMillan next argues that his trial counsel was ineffective for conceding in closing argument that McMillan was the perpetrator of the murder. McMillan challenges the following statement made by his defense counsel in closing: "We have an eyewitness that got closer to Calvin McMillan than I am to you and that is Robbie Lusk." (Trial Record, R. 1414.)

The circuit court made the following findings on this claim:

> "During closing argument, counsel observed, 'The first thing that is consistent is nobody in that parking lot can say that Calvin McMillan was there that night and committed this offense. Nobody, nobody could say it when they were sitting on that witness stand four feet away from Mr. McMillan. Nobody could look at him and say that's the guy that was there that night.' Later, defense counsel again emphasized that no eyewitnesses could point out McMillan. Even later, counsel stated, '... the State has to prove that it was Mr. McMillan that was out there that day, that evening, and committed the robbery.' This is another point where the State basically wants you to disregard the eyewitness testimony. Toward the end of his argument, counsel again argued, 'And they haven't shown that was Calvin McMillan there at the scene that night committing that offense.' Again, counsel argued there was nothing linking McMillan to being at Wal–Mart on the night of the offense. Continuing on his theme, defense counsel again asserted that there was not sufficient evidence

to prove that McMillan was the person in the parking lot of Wal–Mart on the night of the murder. In conclusion, counsel described the only person that put McMillan in the parking lot, codefendant [Rondarrell] Williams, as a liar and reminded the jury that the other eyewitnesses could not pick McMillan out of a lineup or otherwise identify him, reminding them that [Robert] Lusk suggested the person might have long hair. Counsel then stated, 'Just because Mr. Martin was shot doesn't mean Mr. McMillan did it. The State has to prove that he did.'

***35** "All in all, it is clear that defense counsel did not concede that McMillan shot Martin. In context, it appears that counsel misspoke during the heat of battle. In fact, counsel immediately corrected himself by changing his misstatement to 'or extremely close to the black male on that night.' The context of the overall argument regarding Lusk's testimony centered on the fact that Lusk described hair coming out from beneath the hat worn by the shooter, something defense counsel stated would be impossible for McMillan because of his short cropped hair. He concluded his argument about Lusk's testimony by reminding the jury that Lusk could not pick McMillan out of a lineup, concluding 'Calvin wasn't the guy.' In context, therefore, counsel's misstatement did not affect the thrust or overall defense theme as stated in the closing argument.

> "The Court finds that the inadvertent misstatement by defense counsel, immediately corrected, does not constitute deficient performance and, in any event, McMillan was not prejudiced by the closing argument of counsel."

(C. 1496–97.)

As the circuit court correctly noted, it appears that the challenged remark by counsel was merely a misstatement and was not a concession of McMillan's guilt. Counsel repeatedly argued in closing that there was no one who could identify McMillan as the person in the parking lot at the time of the murder. Counsel cannot be deemed ineffective for making a misstatement similar to the one that occurred in this case. "Effective counsel does not mean errorless counsel." Birt v. Montgomery, 709 F.2d 690, 705 (11th Cir. 1983). There was no material issue of fact or law that would entitle McMillan to relief; therefore, the circuit court correctly summarily dismissed this claim. See Rule 32.7(d), Ala. R. Crim. P.

X.

[59] McMillan last argues that he cannot be sentenced to death because, he says, he is intellectually deficient and imposing a death sentence on him violates the United States Supreme Court's holding in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002).

The circuit court made the following findings in regard to this claim:

> "This claim is dismissed because it could have been, but was not, raised at trial, nor was it raised on appeal. Ala. R. Crim. P., Rule 32.2(a)(3)(5).
>
> "Alternatively, the Court dismisses this claim because the record establishes that it is without merit. As part of the court ordered evaluation in this case, McMillan was evaluated for the purpose of mental retardation. McMillan's full-scale IQ was measured at 76, above the 75 'cut-off' that was not addressed in Hall v. Florida, [572 U.S. ——,] 134 S.Ct. 1986 (2014)(finding unconstitutional a bright-line cutoff of a 70–IQ score that does not take into account the standard error of measurement). Here, even taking into account the standard error of measurement McMillan's score would have remained above the generally accepted score of 70 (two standard deviations below 100) that constitutes the intelligence-quotient portion of a mental-retardation analysis. And that would assume the largest standard error of measurement operating such as to overestimate McMillan's intelligence. As a result, McMillan's full-scale IQ score placed him higher than 70—even taking into account the standard error of measurement; thus, he cannot satisfy the intelligence-quotient aspect of a mental-retardation diagnosis.
>
> "Nor is this a case where McMillan's adaptive functioning was not considered. As part of the court-ordered assessment, McMillan was administered the Adaptive Behavior Assessment System 2 (ABAS2). Thus, the evaluation in this case did not depend solely on McMillan's IQ scores, but also on a test of adaptive behaviors. The expert concluded that McMillan 'is not mildly retarded, but functions in the classification range immediately above the classification of mild mental

retardation as well as in the range of low average intellectual functioning.' As to adaptive functioning, this Court took notice in its sentencing order of Dr. Kirkland's finding that McMillan's 'intellectual functioning and social adaptive functioning were on a high borderline to low average intellectual level.' Again, this finding by a court-ordered expert provides a basis for determining that McMillan does not meet the adaptive functioning aspect of a mental retardation diagnosis.

***36** "Further, Carol Weaver, McMillan's aunt who testified on McMillan's behalf at trial, was 'interviewed in depth concerning McMillan's developmental history and symptom picture' by the court appointed expert. Weaver indicated that she 'would have never characterized McMillan as being mentally retarded.' Ultimately, the examiner noted that McMillan's history revealed problems with his behavior, a lifetime of being subjected to neglect and abandonment, and a history of multiple foster-home placements. The picture of McMillan painted by the court-appointed expert is very similar to that painted by the defense expert who testified at trial. Again, this information supports a findings that McMillan is not mentally retarded."

(C. 1501–1502.)

First, McMillan was tried and convicted in 2009. The Atkins decision was released in 2002. Clearly, counsel could have raised this issue at trial or on direct appeal, but did not; therefore, this claim is procedurally barred in this postconviction proceeding. [2]

Alternatively, the circuit court found that the record clearly showed that McMillan is not mentally deficient as that term had been defined by the Alabama Supreme Court in Ex parte Perkins. Based on this Court's review of the trial record and this record, we agree with the circuit court's findings set out above. McMillan does not meet the definition of mentally deficient as set out by the Alabama Supreme Court in Ex parte Perkins.

For the foregoing reasons, we affirm the circuit court's summary dismissal of McMillan's petition for postconviction relief attacking his capital-murder conviction and sentence of death.

AFFIRMED.

Kellum, Burke, and Joiner, JJ., concur. Windom, P.J., recuses herself.

All Citations

--- So.3d ----, 2017 WL 3446604

Footnotes

1 This Court has taken judicial notice of the record of McMillan's direct appeal. See Nettles v. State, 731 So.2d 626 (Ala. Crim. App. 1998).

2 In Part II of this opinion, this Court determined that McMillan's trial counsel was not ineffective for failing to raise an Atkins claim at trial. Therefore, there is nothing that would preclude this Court from applying this procedural bar in this case. "[The appellant] has not established that counsel's conduct was ineffective, and his substantive claim remains procedurally barred." Mitchell v. State, 934 P.2d 346, 350 (Okla. Crim. App. 1997).

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

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Clerk
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Assistant Clerk

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December 8, 2017

CR-14-0935 **Death Penalty**

Calvin McMillan v. State of Alabama (Appeal from Elmore Circuit Court: CC08-476.60)

NOTICE

You are hereby notified that on December 8, 2017, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Bill Lewis, Circuit Judge
Hon. Brian Justiss, Circuit Clerk
Katherine Chamblee, Attorney - Pro Hac
Patrick Mulvaney, Attorney
James Roy Houts, Asst. Attorney General

APPENDIX C

THE STATE OF ALABAMA - - JUDICIAL DEPARTMENT

THE ALABAMA COURT OF CRIMINAL APPEALS

CR-14-0498

Ex parte Calvin McMillan

PETITION FOR WRIT OF MANDAMUS

(In re: State of Alabama v. Calvin McMillan)

Elmore Circuit Court Nos. CC-08-476.60

ORDER

Calvin McMillan filed this petition for a writ of mandamus requesting that this Court direct Judge John B. Bush to recuse himself from presiding over the postconviction proceedings related to Calvin McMillan's capital-murder conviction and sentence of death. In June 2009, McMillan was convicted of murdering James Bryan Martin during the course of a robbery. He was sentenced to death. In August 2014, McMillan filed a postconviction petition attacking his conviction and sentence of death. McMillan argued, in part, that his trial counsel's performance at his capital murder trial was ineffective. In December 2014, McMillan moved that Judge Bush recuse himself from the postconviction proceedings because, he argued, Judge Bush had prejudged the case when he commented in his sentencing order that McMillan's trial attorneys provided effective assistance.[1] McMillan also argued in support of the motion to recuse that both of his trial attorneys had given to Judge Bush's campaign in 2006, that both attorneys were members of the Executive Committee for the Elmore County Republican Party, and that one of his attorneys had been a former law clerk for Judge Bush. Judge Bush denied the motion to recuse. McMillan then filed this petition for a writ of mandamus in this Court.

First, Rule 32.6(d), Ala. R. Crim. P., provides that a Rule 32 petition "shall be assigned to the sentencing judge where possible, but for good cause the proceeding may be assigned or transferred to another judge." See also H. Maddox, Alabama Rules of Criminal Procedure, § 32.6(d), p. 988 (3d ed. 1999). When reviewing a recusal motion: "The question is not whether [Judge Bush] was impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality -- whether there is an appearance of impropriety." Ex parte Duncan, 638 So. 2d 1332, 1334 (Ala. 1994). The mere fact that Judge Bush made a comment in his sentencing order on the performance of trial counsel does not mean that Judge Bush is incapable of rendering a fair decision on McMillan's claims of ineffective assistance of counsel in his postconviction proceeding. This Court has previously denied a petition for a writ of mandamus

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[1]Judge Bush stated the following in his sentencing order at the conclusion of the facts surrounding the murder/robbery: "Finally, this Court notes that Mr. Kenny James and Mr. Bill Lewis ably represented McMillan. McMillan's attorneys were well prepared, diligent, and performed admirably in their defense of McMillan."

alleging this identical ground for recusal. See Ex parte Harris, (CR-10-1651, September 16, 2011).[2] McMillan failed to establish good cause for Judge Bush's recusal on this basis.

Second, the United States Supreme Court in Caperton v. A.T. Massey Coal Co., Inc., 556 U.S. 868 (2009), addressed the circumstances that warrant a judge recusing when a defendant or attorney have worked on or contributed to that judge's campaign. In Caperton, one of the parties contributed a total of $3,000,000 to the judge's campaign. The court stated: "[T]here is a serious risk of actual bias -- based on objective and reasonable perception -- when a person with a personal stake in a particular case had a significant and disproportionate influence in placing the judge on the case by raising funds or directing the judge's election campaign when the case was pending or imminent." 556 U.S. at 884. (Emphasis added.) "The inquiry centers on the contribution's relative size in comparison to the total amount of money contributed to the campaign, the total amount spent in the election, and the apparent effect such contribution had on the outcome of the election." Caperton, 556 U.S. at 884. McMillan alleges that in the 2006 judicial election in Elmore County one of his trial attorneys contributed $1,000 to Judge Bush's campaign and the other attorney contributed $500. The exhibits attached to this petition reflect that Judge Bush received $59,000 in contributions. We do not consider the contributions at issue in this case to meet the threshold recognized in Caperton -- the contributions were not "significant."

Third, "[i]t is common knowledge in the profession that former law clerks practice regularly before judges for whom they once clerked." In re Martinez-Catala, 129 F.2d 213, 221 (1st Cir. 1997). "Although a law clerk enjoys a unique position and is often privy to a judge's thought, it is not a general rule that a former law clerk may never practice before the judge for whom he or she clerked." In re Mitan, 579 Fed. Appx. 67, 71 (3rd Cir. 2014). McMillan makes no claim that his trial attorney had any involvement in McMillan's case while working for Judge Bush. There is no appearance of impropriety in Judge Bush remaining on McMillan's case because one of his trial attorneys had previously clerked for Judge Bush.

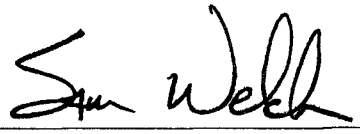
To satisfy the prerequisites for the issuance of a writ of mandamus the petitioner must establish: (1) a clear legal right in the petitioner to the order sought; (2) an imperative duty upon the respondent to perform, accompanied by a refusal to do so; (3) the lack of another adequate remedy; and (4) properly invoked jurisdiction of the court. Ex parte Gates, 675 So. 2d 371, 374 (Ala. 1996). This Court does not find that the combined facts warrant Judge Bush's recusal in McMillan's postconviction proceedings. McMillan failed to meet his heavy burden of establishing the prerequisites for the issuance of a writ of mandamus. Accordingly, this petition is hereby **DENIED.**

Welch, Kellum, Burke, and Joiner, JJ., concur.
Windom, P.J., recuses herself.

---

[2]A similar mandamus petition was filed in the Alabama Supreme Court and also denied. See Ex parte Harris, (Ms. 1101486, October 13, 2011).

Done this 29th day of January, 2015.



SAMUEL HENRY WELCH, JUDGE[3]

cc: Hon. John B. Bush, Circuit Judge
Hon. Brian Justiss, Circuit Clerk
Randall V. Houston, District Attorney
Patrick Mulvaney, Esq.
Office of the Attorney General

[3]Presiding Judge Mary Becker Windom has recused herself in this case.

APPENDIX D

IN THE CIRCUIT COURT OF ELMORE COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-2008-000476.60
	)	
MCMILLAN CALVIN	)	
Defendant.	)	

ORDER DENYING MOTION TO RECUSE

MOTION FOR RECUSAL OF JUDGE BUSH AND TRANSFER OF THIS RULE 32 CASE filed by MCMILLAN CALVIN is hereby DENIED.\

The Petitioner was present with counsel, Patrick Mulvaney, for hearing on the Motion to Recuse. The State of Alabama was represented by Assistant Attorney General James Houts.

The preferred procedure in Alabama is for the trial judge to hear and decide Petitions for Post-Conviction Relief in cases that were initially heard by the trial judge. This Court finds no reasonable basis for deviating from that procedure. The issues raised by the Petitioner in no way affect the undersigned's ability to be fair and impartial in evaluating the claims raised in the instant "Rule 32" Petition nor do they show any prejudice by this Court against this Petitioner.

DONE this 5th day of January, 2015.

/s/ JOHN B. BUSH
CIRCUIT JUDGE

APPENDIX E

IN THE CIRCUIT COURT OF ELMORE COUNTY, ALABAMA

CALVIN MCMILLAN, Petitioner, v. STATE OF ALABAMA, Respondent.	No. CC-2008-476.60

MOTION FOR RECUSAL OF JUDGE BUSH AND TRANSFER OF THIS RULE 32 CASE

Petitioner Calvin McMillan respectfully requests that the Honorable John B. Bush be recused or disqualified from this Rule 32 case and that the case be transferred to a different judge. A key issue in McMillan's Rule 32 petition is the effectiveness of his appointed trial counsel, W. Kendrick James and Bill W. Lewis. However, Judge Bush has already prejudged the issue of ineffective assistance of counsel in this case. While presiding over McMillan's capital trial, Judge Bush stated in his sentencing order that "McMillan's attorneys provided effective assistance." (C. 16). Because Judge Bush drew this conclusion even though this issue was not before the

court at that time, it is reasonable to question whether he can impartially assess McMillan's ineffectiveness claim now.

In addition, both James and Lewis are linked with Judge Bush by professional and political ties. James and Lewis were significant financial contributors to Judge Bush's most recent contested election campaign. Moreover, Lewis served as a law clerk for Judge Bush. These connections raise reasonable concerns as to whether Judge Bush can impartially evaluate these attorneys' performance.

Taken together, these circumstances create an appearance of bias that is simply too great, particularly in a proceeding intended to ensure the fairness of the death sentence that was imposed on McMillan.

Therefore, under Alabama law and the United States Constitution, McMillan is entitled to the recusal or disqualification of Judge Bush and a transfer of this case to a different judge.

In support of this motion, McMillan states as follows:

1. Judge John B. Bush presided over the capital murder trial of Calvin McMillan in 2009. On June 23, 2009, the jury convicted McMillan of two counts of capital

murder. (R. 1488-89). On June 30, that same jury voted 8-4 to recommend a sentence of life in prison without the possibility of parole. (R. 1799-1800). On August 7, 2009, Judge Bush overrode the jury's sentencing recommendation and sentenced McMillan to death. (R. 1911).

2. On August 21, 2014, McMillan timely filed a Rule 32 petition. The petition alleges that McMillan was denied his right to the effective assistance of counsel under *Strickland v. Washington*, 466 U.S. 688 (1984).[1]

3. Rule 32.6(d) of the Alabama Rules of Criminal Procedure states that although a Rule 32 case "shall be assigned to the sentencing judge where possible," the case may be assigned to another judge "for good cause." The meaning of "good cause" in this context is informed by the recusal requirements of the United States Constitution and Alabama law.

4. A motion for recusal or disqualification is governed by Canon 3.C(1) of the Alabama Canons of Judicial Ethics. *See Lee v. State*, 44 So. 3d 1145, 1172 (Ala. Crim.

[1] The Rule 32 petition was the appropriate vehicle for McMillan's ineffective assistance of counsel claim. *See Ex parte Ingram*, 675 So. 2d 863, 866 (Ala. 1996) ("[When] a claim of ineffective assistance of trial counsel . . . cannot reasonably be presented [to the trial court] . . . the proper method for presenting that claim for appellate review is to file a Rule 32 petition for post-conviction relief.").

App. 2009); *Ex parte Knotts*, 716 So. 2d 262, 264 (Ala. Crim. App. 1998). Under that provision, disqualification is required where a judge's "impartiality might reasonably be questioned." Alabama Canons of Judicial Ethics, Canon 3.C(1). That test is an objective one; its focus is not on divining the mindset of the judge, but instead on determining "whether a reasonable person knowing everything that the judge knows would have a 'reasonable basis for questioning the judge's impartiality.'" *Ex parte Bryant*, 682 So. 2d 39 (Ala. 1996) (quoting *Ex parte Cotton*, 638 So. 2d 870, 872 (Ala. 1994)).

5. Recusal is also at times required by the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). In order to secure this requirement, it is critical that a judge be impartial. *Id.* at 134 (recognizing "the due process requirement of an impartial tribunal"). Moreover, because "our system of law has always endeavored to prevent even the probability of unfairness," due process may "sometimes [require the

recusal of] judges who have no actual bias and would do their very best to weigh the scales of justice equally between contending parties." *Id.* at 134, 136 (1955); *see also In re Sheffield*, 465 So.2d 350, 357 (Ala. 1984) (quoting same).

I. Prejudgment of Ineffective Assistance of Counsel Claim

6. Judge Bush has issued formal findings of fact respecting the performance of trial counsel in this case. In his sentencing order, Judge Bush stated as follows:

> Finally, this Court notes that Mr. Kenny James and Mr. Bill Lewis ably represented McMillan. McMillan's attorneys were well prepared, diligent, and performed admirably in their defense of McMillan. Based on the overwhelming evidence against McMillan in this case and the eventual outcome, this Court finds that McMillan's attorneys provided effective assistance throughout these entire proceedings.

(C. 16).

7. Because James and Lewis represented McMillan throughout his capital trial proceedings, McMillan did not have an opportunity to raise an ineffective assistance claim in the trial court. Therefore, Judge Bush concluded that trial counsel "provided effective assistance throughout [the] entire proceedings" before McMillan even

had an opportunity to allege that his trial counsel were ineffective.

8. Moreover, it is not possible for a judge to make a meaningful determination about the effectiveness of trial counsel in investigating and presenting evidence merely from observing the trial. The U.S. Supreme Court has made clear that a court's focus must be on the reasonableness of an attorney's underlying investigation, and not merely on what the attorney presents at trial. As the Court explained in *Strickland*, "counsel has a duty to make reasonable investigations;" thus, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 691; *see also Wiggins v. Smith*, 539 U.S. 510, 522 (2003) (explaining that the core focus of the court's inquiry is "whether the investigation" underlying counsel's decisions about what evidence to present in mitigation "*was itself reasonable*"). Because it is impossible to make this assessment without any evidence about trial counsel's investigation, Judge Bush's

statements in his sentencing order reflect a premature conclusion on the issue.

9. Due process requires recusal where a judge has prejudged a claim. *See State Tenure Commission v. Page*, 777 So. 2d 126, 131 (Ala. Civ. App. 2000) (holding that a school board denied an employee due process because it "pre-decided [her] contract cancellation before [a] hearing"); *see also Thompson v. State*, 134 S.W.3d 168, 174 n.4 (Tenn. 2004), *overruled on other grounds by State v. Irick*, 320 S.W.3d 284, 295 n.9 (Tenn. 2010) (explaining that the trial judge was disqualified because "his earlier remarks showed that he had 'prejudged' the issue of ineffective assistance of counsel."). The Alabama Supreme Court addressed a similar issue in *Ex parte Harris*, No. 1101486 (Ala. Oct. 13, 2011), and decided over a dissent from Justice Murdock that prejudgment alone was not sufficient to require recusal.[2] However, unlike in *Ex parte Harris*, the prejudgment issue in this case does not stand alone; it is combined with Judge Bush's political and professional ties to Lewis and James. When compounded by

[2] *See Ex parte Harris*, CR-10-1651 (Ala. Crim. App. Sept. 16, 2011) (the order of the Court of Criminal Appeals).

these additional factors, recusal is required, particularly because prejudgment is a concern that Alabama courts have taken very seriously when evaluating questions of recusal. *See, e.g.*, *Ex parte White*, 300 So. 2d 420, 432 (Ala. Crim. App. 1974) (granting writ of mandamus ordering circuit judge to recuse where judge had written letter to higher court that "smack[ed] of the air of prejudgment"); *see also Ex parte Fowler*, 863 So. 2d 1136, 1138-41 (Ala. Crim. App. 2001) (per curiam) (granting writ of mandamus ordering circuit judge to recuse where judge stated prior to trial or sentencing hearing his intent to impose greater sentence than had been imposed by district court); *cf. Ex parte Eubank*, 871 So. 2d 862, 863 (Ala. Crim. App. 2003) (per curiam) (granting writ of mandamus ordering circuit judge to recuse from trial of attorney's DUI case where judge had filed bar complaint asserting attorney was impaired and unfit to practice law); *Ex parte Brooks*, 847 So. 2d 396, 397 (Ala. Crim. App. 2002) (per curiam) (granting writ of mandamus ordering circuit judge to recuse where judge had personal knowledge of whether he signed a search warrant that was material to the prosecution's case).

II. Professional and Political Relationship with Trial Counsel

10. Judges in Alabama are elected. Ala. Const. Art. VI §152. The most recent election during which Judge Bush faced an opponent was in 2006, when he ran against Jason McCartha in the Republican primary.[3] *See* Circuit Judge Primary Results, Certified Primary Election Results-Republican Party, at 26, http://www.sos.state.al.us/down-loads/election/2006/primary/RepublicanPrimary-OfficialCertification-06-06-2006.pdf (June 6, 2006). James contributed $1000 to Judge Bush's campaign, which placed him among Judge Bush's top six individual donors. Appendix A (Judge Bush's 2006 campaign filings), at 20.[4] James's $1000 contribution was exceeded by only two other individual contributors. Lewis contributed $500, which placed him in the top third of Judge Bush's contributors.

[3] After defeating McCartha in the primary, Judge Bush ran in the general election unopposed. *See* Circuit Court Judge-General Election Results, State of Alabama, Canvass of Results, General Election, Nov. 7, 2006, at 172, http://www.sos.state.al.us/downloads/election-/2006/general/statecert-2006-general-election-11-29-2006-complete.pdf. In Judge Bush's next election in 2012, he ran unopposed in both the primary and the general election. *See* Elmore County, 2012 General Election, For Circuit Judge, 19th Judicial Circuit, http://results.-enr.clarityelections.com/AL/El-more/44320/110162/en/summary.html# (last visited Dec. 9, 2014).

[4] The names and addresses of contributors other than James and Lewis have been redacted from Appendix A for privacy reasons. However, McMillan can present the complete document to the Court at the hearing on the motion.

Appendix A, at 28. James and Lewis also both serve on the Executive Committee of the Elmore County Republican Party, which supports local Republican candidates for public office, including Judge Bush, in general elections.

11. Financial contributions to judicial elections can compromise due process. The U.S. Supreme Court has admonished that a judge who has received a substantial donation may "feel a debt of gratitude" to his contributor for his "efforts to get him elected." *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 882 (2009). Given this risk, "Due process requires an objective inquiry into whether the contributor's influence on the election under all the circumstances 'would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear and true." *Id.* at 885 (quoting *Tumey v. Ohio*, 273 U.S. 510, 532 (1927)). Where that risk is "sufficiently substantial," due process requires recusal. *Id.*

12. The appearance of bias stemming from trial counsel's financial contributions to Judge Bush is compounded by the fact that Lewis is Judge Bush's former law clerk. There is reason to question a judge's

impartiality when assessing the professional conduct of his own mentee. This is not a situation in which a former law clerk simply appears before a judge representing another party, and the judge must treat his former clerk's advocacy fairly. Instead, in this ineffective assistance of counsel claim, McMillan is asking Judge Bush to conclude that an attorney that Judge Bush personally mentored has provided a level of advocacy that falls below constitutional standards. It is reasonable to question Judge Bush's impartiality in this situation. Even less substantial relationships to a judge can require recusal. *See, e.g.*, Ala. Jud. Inquiry Comm'n, Advisory Op. 04-832 (2004) (concluding judge should recuse where case would involve testimony of attorney who regularly appeared before the court); Ala. Jud. Inquiry Comm'n, Advisory Op. 03-814 (2003) (same conclusion where prosecutor was sued for student loan debt in same court where she regularly appeared).

III. The Totality of the Circumstances Requires Recusal

13. While each of the circumstances enumerated above raises reasonable concerns about Judge Bush's impartiality, recusal turns on the "totality of the facts." *Matter of*

Sheffield, 465 So. 2d 350, 356 (Ala. 1984). Here, the judge has already made a written determination of the issue of whether James and Lewis were effective, before McMillan ever had the opportunity to raise or argue it. Further still, this is a case in which a judge is tasked with evaluating the professional performance of two of his biggest campaign contributors, one of whom served as his law clerk.

14. In addition to these factors, the need to safeguard the fairness of these proceedings is heightened in this case for three reasons. First, this proceeding will review the process that resulted in McMillan's sentence of death. Courts have consistently "stressed the 'acute need' for reliable decisionmaking when the death penalty is at issue," as it is in this case. *See, e.g.*, *Deck v. Missouri*, 544 U.S. 622, 632 (2005).

15. Second, the issue of effective assistance of counsel is intertwined with the reliability of a conviction and death sentence. "Indeed, the right to counsel is the foundation for our adversary system. Defense counsel tests the prosecution's case to ensure that the proceedings serve the function of adjudicating guilt or innocence, while

protecting the rights of the person charged." *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012). Because the question of effective assistance of counsel is so important to evaluating the fairness of McMillan's trial and the death sentence that resulted, it is critical that the decision-maker tasked with this assessment is untainted by bias or even by the appearance of bias.

16. The third factor is that the presiding judge in this case will serve as trier of fact. *See* Ala. R. of Crim. P. 32.9(d). Courts have indicated that a judge's impartiality takes on greater significance under such circumstances. *See, e.g.*, *Acromag-Viking v. Blalock*, 420 So. 2d 60, 62 (Ala. 1982) ("Because this case was heard without a jury, the trial judge was required to exercise fair and impartial judgment in determining whether [the defendant] was actually a corporation. The Court concludes from the facts presented that there were substantial facts for [the plaintiff] to question the trial judge's impartiality.").

17. Thus, under the totality of the circumstances, recusal is required to protect McMillan's right to due process. See *In re Murchison*, 349 U.S. 133, 134 (1955).

Moreover, because it is "reasonable ... to question [Judge Bush's] impartiality" in this case, Alabama law requires recusal as well. *State v. Moore*, 988 So. 2d 597, 599 (Ala. Crim. App. 2007); *see also id.* ("The question is not whether the judge [can be] impartial in fact, but whether another person, knowing all of the circumstances, might reasonably question the judge's impartiality."); Alabama Canons of Judicial Ethics, Canon 3.C(1) ("A judge should disqualify himself in a proceeding in which . . . his impartiality might reasonably be questioned . . . .").

18. As a practical matter, granting McMillan's motion for recusal would not complicate this case for the judicial system; in the words of the Alabama Supreme Court, "it would be a simple matter to transfer this Rule 32 petition to another judge." *Ex parte Adkins*, 687 So. 2d 155, 156 (Ala. 1996). Indeed, many Rule 32 cases have been transferred to different judges in recent years. *See*, *e.g.*, *Davis v. State*, CR-10-0224, 2014 WL 1744088, at *1 (Ala. Crim. App. May 2, 2014) (explaining that a Rule 32 case was transferred to a different judge); *Ex parte Ingram*, 51 So. 3d 1119, 1125 n.2 (Ala. 2010) (explaining the recusal of the original circuit court judge in a Rule

32 case); *Evans v. State*, 722 So. 2d 778, 779 (Ala. Crim. App. 1997) (same).

For the foregoing reasons and any other reasons that may appear to this Court, McMillan respectfully requests that Judge Bush be recused or disqualified from this Rule 32 case and that the case be transferred to the next senior judge in the 19th Judicial Circuit for reassignment. This motion is made pursuant to Alabama law and the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Respectfully submitted,

/s/ Patrick Mulvaney
PATRICK MULVANEY, MUL-027
83 Poplar Street, NW
Atlanta, GA 30303
Tel: 404-688-1202
Fax: 404-688-9440
pmulvaney@schr.org

Counsel for Calvin McMillan

APPENDIX A

JIM BENNETT
SECRETARY OF STATE

ALABAMA STATE CAPITOL
MONTGOMERY, AL 36130

STATE OF ALABAMA

I, Jim Bennett, Secretary of State of the State of Alabama, having custody of the Great and Principal Seal of said State, do hereby certify that

the pages hereto attached contain true, accurate, and literal copies of the following documents on file in this office:

- 2006 Annual Report of John Benjamin Bush, Circuit Judge-19th Judicial Circuit, dated January 2, 2007;
- General Election 10-5 Day Pre-Election Waiver of Report of John Benjamin Bush, Circuit Judge-19th Judicial Circuit, dated October 27, 2006;
- General Election 45 Day Pre-Election Report of John Benjamin Bush, Circuit Judge- 19th Judicial Circuit, dated September 19, 2006;
- Primary Election 10-5 Day Pre-Election Report of John Benjamin Bush, Circuit Judge-19th Judicial Circuit, dated May 26, 2006;
- Primary Election 45 Day Pre-Election Report of John Benjamin Bush, Circuit Judge- 19th Judicial Circuit, dated April 19, 2006;

In Testimony Whereof, I have hereunto set my hand and affixed the Great Seal of the State, at the Capitol, in the City of Montgomery, on this day.

October 31, 2014
Date

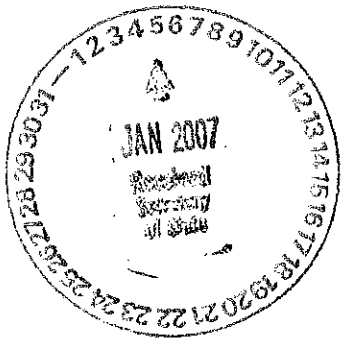
Jim Bennett **Secretary of State**

ALABAMA FAIR CAMPAIGN PRACTICES ACT

CANDIDATE / ELECTED OFFICIAL ANNUAL REPORT

SUMMARY FORM 1A

THIS AREA FOR OFFICIAL USE ONLY



Please Print in Ink or Type.

Name of Candidate or Elected Official	Political Party/Ballot Affiliation
John B. Bush	Republican

Office Sought or Held (include district or circuit number, if applicable)
Circuit Judge, 19th Judicial Circuit

Address ☐ Check box if reporting new address
500 Cahaba Park Dr

City	State	ZIP Code	Telephone Number
Titus	AL	36080	(334) 514-0704

Type of Report (check one)
- ☑ Annual Report for Year 2006
- ☐ Termination Report
- ☐ Amended Annual Report for Year _____

SECTION I - Summary of activity from last filed report through December 31 of reporting year

1	Beginning balance (ending balance from previous filing)			1	14092.61
	Cash Contributions				
2a	Itemized cash contributions (total from Form 2)	2a			
2b	Non-itemized cash contributions	2b			
2c	Total cash contributions (add lines 2a and 2b)			2c	0
	In-Kind Contributions				
3a	Itemized in-kind contributions (total from Form 3)	3a			
3b	Non-itemized in-kind contributions	3b			
3c	Total in-kind contributions (add lines 3a and 3b)	3c	0		
	Receipts from Other Sources				
4	Total receipts from other sources (total from Form 4)			4	640.78
	Expenditures				
5a	Itemized expenditures (total from Form 5)	5a			
5b	Non-itemized expenditures	5b			
5c	Total expenditures (add lines 5a and 5b)			5c	0
6	Ending balance (add lines 1, 2c, & 4, then subtract line 5c)			6	14733.39

SECTION II - Summary of activity for entire reporting year - January 1st through December 31st

7	Beginning balance (as of January 1 of reporting year)			7	621.16
8	Total cash contributions for year			8	59325.00
9	Total in-kind contributions for year	9	2650.00		
10	Total receipts from other sources for year			10	1608.43
11	Total expenditures for year			11	47286.51
12	Ending balance (add lines 7, 8, & 10, then subtract line 11)			12	14,268.08
13	Total campaign debt (total debt owed as of December 31)	13			

Sworn to and subscribed before me this 2nd day of Jan of the year 07. My commission expires the 7 day of July of the year 2010.

Susan B. Sommerlin
Signature of Notary Public

Susan B. Sommerlin
Print Notary's Name

As required by the Alabama Fair Campaign Practices Act, I hereby swear or affirm to the best of my knowledge and belief that the attached report(s) and the information contained herein are true and correct and that this information is a full and complete statement of all contributions, expenditures, and other required information during the applicable period of time.

Signature of Candidate or Elected Official

1/4/07
Date

ANNUAL REPORT

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 4: RECEIPTS FROM OTHER SOURCES

LOANS/INTEREST/OTHER SOURCES OF INCOME TO CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John E Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** cash or in-kind contributions on this form. Use Forms 2 and 3 for those listings.

SOURCE OF RECEIPT (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	FORM OF RECEIPT			COMPLETE THIS BLOCK IF RECEIPT IS A LOAN	RECEIPT SOURCE (CHECK ONE)					DATE RECEIVED (mo./day/yr.)	AMOUNT OF RECEIPT
		Interest	Loan	Other	GUARANTORS [FCPA REQUIRES FULL NAME AND COMPLETE ADDRESS OF INDIVIDUAL(S) ENDORSING OR GUARANTEEING LOAN]	Lending Institution	PAC	Individual	Business	Other		
[redacted]											4/3/07	640.78
FORM REVISED 10.29.99					TOTAL RECEIPTS THIS PAGE							640.78

THIS AREA FOR OFFICIAL USE ONLY

ALABAMA FAIR CAMPAIGN PRACTICES ACT

WAIVER OF REPORT

FOR ELECTED OFFICIALS, CANDIDATES, AND POLITICAL COMMITTEES

(OPTIONAL FORM)

Please Print in Ink or Type.

Name of Candidate or Elected Official, or Political Committee	Political Party/Ballot Affiliation
John T. Rush	Republican
Office Sought or Held (include district or circuit number, if applicable)	
Circuit Judge, 19th Judicial Circuit Place #1	
Address ☐ Check box if reporting new address	
500 Cathedral Dr.	
City / **State** / **ZIP Code**	**Telephone Number**
Tiger AL 36080	(334) 514-0704

Type of Election (if applicable, check one)

- ☐ Primary Election
- ☐ Primary Runoff
- ☑ General Election
- ☐ Special Election

Election Date: Nov 7, 2006

Type of Report (check one)

- ☑ 10-5 Day Pre-Election Report
- ☐ 45 Day Pre-Election Report
- ☐ Annual Report
- ☐ Termination Report

In any reporting period, the filing of the required report is waived: when there has been no activity in the campaign or PAC account for the upcoming election; the appropriate filing threshold has not been reached by the candidate ($25,000 for statewide candidates, $5,000 for district or circuit candidates, $5,000 for State House of Representative candidates, $10,000 for State Senate candidates, or $1,000 for local candidates); or the candidate has no opposition during the primary election cycle.

This **OPTIONAL** form gives notice that no contribution/expenditure report will be submitted.

☑ There has been no activity in campaign or PAC account for the reporting period of August 1, 2006 through October 27, 2006

☐ I have not reached the filing threshold amount as set forth in the Fair Campaign Practices Act.

☐ I do not have opposition in the primary election.

☐ I do not have opposition in the primary run-off election.

John B Rush — Oct 27, 2006

Signature of Candidate or Elected Official, or Chairperson or Treasurer of Political Committee — Date

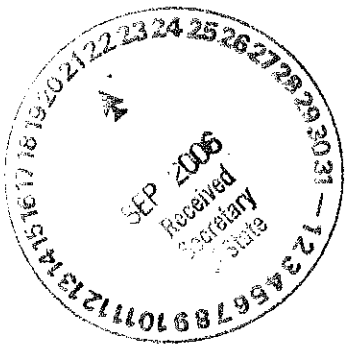
FORM REVISED 7.18.2001

THIS AREA FOR OFFICIAL USE ONLY

ALABAMA FAIR CAMPAIGN PRACTICES ACT

CANDIDATE / ELECTED OFFICIAL PRE-ELECTION REPORT

SUMMARY FORM 1



Please Print in Ink or Type.

Name of Candidate or Elected Official	Political Party/Ballot Affiliation
John B. Bush	Republican
Office Sought or Held (include district or circuit number, if applicable)	
Circuit Judge, 19th Circuit, Place #1	
Address ☐ Check box if reporting new address	
500 Lakeshore Dr	
City / **State** / **ZIP Code**	**Telephone Number**
Titus AL 36080	(334) 514-0704

Type of Election (check one)
- ☐ Primary Election
- ☐ Primary Runoff
- ☑ General Election
- ☐ Special Election

Election Date: Nov 7, 2006

Type of Report (check one)
- ☐ 10-5 Day Pre-Election Report
- ☑ 45 Day Pre-Election Report
- ☐ Amended Pre-Election Report

CHECK ONE OF THE ABOVE BOXES TO INDICATE WHICH TYPE OF REPORT IS BEING AMENDED

Summary of activity since last filed report			
1	Beginning balance (ending balance from previous filing)		1 14716.53
	Cash Contributions		
2a	Itemized cash contributions (total from Form 2)	2a 4750.00	
2b	Non-itemized cash contributions	2b	
2c	Total cash contributions (add lines 2a and 2b)		2c 4750.00
	In-Kind Contributions		
3a	Itemized in-kind contributions (total from Form 3)	3a 500.00	
3b	Non-itemized in-kind contributions	3b	
3c	Total in-kind contributions (add lines 3a and 3b)	3c 500.00	
	Receipts from Other Sources		
4	Total receipts from other sources (total from Form 4)		4 614.19
	Expenditures		
5a	Itemized expenditures (total from Form 5)	5a 5988.11	
5b	Non-itemized expenditures	5b	
5c	Total expenditures (add lines 5a and 5b)		5c 5988.11
6	Ending balance (add lines 1, 2c, & 4, then subtract line 5c)		6 14092.61

Sworn to and subscribed before me this 19 day of Sept of the year 2006. My commission expires the 10 day of July of the year 2010.

Susan B. Summerlin
Signature of Notary Public

Susan B. Summerlin
Print Notary's Name

As required by the Alabama Fair Campaign Practices Act, I hereby swear or affirm to the best of my knowledge and belief that the attached report(s) and the information contained herein are true and correct and that this information is a full and complete statement of all contributions, expenditures, and other required information during the applicable period of time.

John B Bush — 9/19/06
Signature of Candidate or Elected Official — Date

FORM REVISED 12.10.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: JOHN B. BUSH

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				5/28/06	500.00
[redacted]	[redacted]			✓			5/30/06	250.00
[redacted]	[redacted]		✓				6/2/06	250.00
[redacted]	[redacted]		✓				6/2/06	250.00
[redacted]	[redacted]		✓				6/6/06	500.00
[redacted]	[redacted]		✓				6/6/06	2500.00
[redacted]	[redacted]	✓					7/5/06	500.00
FORM REVISED 10.29.99		TOTAL CASH CONTRIBUTIONS THIS PAGE						4750.00

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 3: IN-KIND CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John R. Rush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** cash or loans on this form. Use Forms 2 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	NATURE OF CONTRIBUTION (CHECK ONE)								SOURCE (CHECK ONE)				DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Administrative	Advertising	Consultants/ Polling	Equipment	Food	Rent	Transportation	Other	Business/ Corporation	Individual	PAC	Other		
[redacted]	[redacted]							✓		✓				4/2/06	500.00

TOTAL IN-KIND CONTRIBUTIONS THIS PAGE 500.00

Appendix 7

FORM REVISED 10.29.99

THE FAIR CAMPAIGN PRACTICES ACT

FORM 4: RECEIPTS FROM OTHER SOURCES

LOANS/ INTEREST/ OTHER SOURCES OF INCOME TO CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE OR ELECTED OFFICIAL: JOHN B. BUSH

THE FCPA REQUIRES THAT THOSE CONTRIBUTIONS GREATER THAN $100 BE ITEMIZED. DO NOT LIST CASH OR IN-KIND CONTRIBUTIONS ON THIS FORM. USE FORMS 2 AND 3 FOR THOSE LISTINGS.

SOURCE OF RECEIPT (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	FORM OF RECEIPT: INTEREST	FORM OF RECEIPT: LOAN	FORM OF RECEIPT: OTHER	COMPLETE THIS BLOCK IF RECEIPT IS A LOAN — GUARANTORS [FCPA REQUIRES FULL NAME AND COMPLETE ADDRESS OF INDIVIDUAL(S) ENDORSING OR GUARANTEEING LOAN]	RECEIPT SOURCE (CHECK ONE): LENDING INSTITUTION	RECEIPT SOURCE: PAC	RECEIPT SOURCE: INDIVIDUAL	RECEIPT SOURCE: BUSINESS	RECEIPT SOURCE: OTHER	DATE RECEIVED (mo./day/yr.)	AMOUNT OF RECEIPT
[redacted]	[redacted]			✓	[redacted]				✓		6/16/06	566.19
[redacted]	[redacted]			✓	[redacted]				✓		7/24/06	48.00

FORM REVISED 6/93

TOTAL RECEIPTS THIS PAGE 614.19

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 5: EXPENDITURES

BY CANDIDATE OR ELECTED OFFICIAL - INCLUDING CONTRIBUTIONS TO OTHER CANDIDATES, POLITICAL PARTIES, AND POLITICAL COMMITTEES

NAME OF CANDIDATE / ELECTED OFFICIAL: John B Bush

The FCPA requires that expenditures over $100 be itemized.

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)										DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/ Polling	Contribution	Food	Fundraising	Loan Repayment	Lodging	Transportation	OTHER GIVE BRIEF EXPLANATION		
[redacted]	[redacted]	✓										5/26/06	5.12
[redacted]	[redacted]		✓									6/6/06	100.00
[redacted]	[redacted]					✓						6/6/06	244.61
[redacted]	[redacted]							✓				6/6/06	350.00
[redacted]	[redacted]		✓									6/12/06	1700.00
[redacted]	[redacted]		✓									6/12/06	201.50
[redacted]	[redacted]		✓									6/14/06	456.75
[redacted]	[redacted]					✓						6/14/06	518.40
[redacted]	[redacted]										Entertainment	6/16/06	300.00
											TOTAL EXPENDITURES THIS PAGE		3876.38

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 5: EXPENDITURES

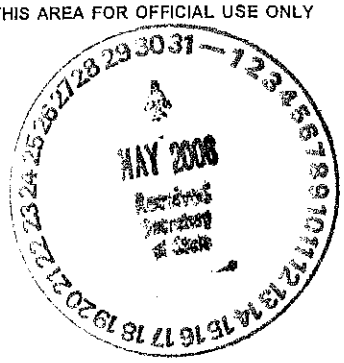
BY CANDIDATE OR ELECTED OFFICIAL - INCLUDING CONTRIBUTIONS TO OTHER CANDIDATES, POLITICAL PARTIES, AND POLITICAL COMMITTEES

NAME OF CANDIDATE / ELECTED OFFICIAL: John B Bush

The FCPA requires that expenditures over $100 be itemized.

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)										DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/ Polling	Contribution	Food	Fundraising	Loan Repayment	Lodging	Transportation	OTHER GIVE BRIEF EXPLANATION		
[redacted]	[redacted]					✓				✓	w/gm Food, Gas	6/20/06	362.35
[redacted]	[redacted]		✓									6/29/06	75.00
[redacted]	[redacted]		✓									7/6/06	195.00
[redacted]	[redacted]		✓									7/6/06	75.00
[redacted]	[redacted]		✓									7/6/06	30.00
[redacted]	[redacted]		✓									7/13/06	354.38
[redacted]	[redacted]		✓									7/24/06	120.00
[redacted]	[redacted]		✓									7/24/06	900.00
FORM REVISED 10.29.99		TOTAL EXPENDITURES THIS PAGE											2111.73

THIS AREA FOR OFFICIAL USE ONLY



ALABAMA FAIR CAMPAIGN PRACTICES ACT

CANDIDATE / ELECTED OFFICIAL PRE-ELECTION REPORT

SUMMARY FORM 1

Please Print in Ink or Type.

Name of Candidate or Elected Official	Political Party/Ballot Affiliation
John B. Bush	Republican

Office Sought or Held (include district or circuit number, if applicable)
Circuit Judge, 19th Circuit, Place #1

Address ☐ Check box if reporting new address
500 Lakeshore Dr

City	State	ZIP Code	Telephone Number
Titus	AL	36080	(334) 514-0704

Type of Election (check one)
- ☑ Primary Election
- ☐ Primary Runoff
- ☐ General Election
- ☐ Special Election

Election Date: June 6, 2006

Type of Report (check one)
- ☑ 10-5 Day Pre-Election Report
- ☐ 45 Day Pre-Election Report
- ☐ Amended Pre-Election Report

CHECK ONE OF THE ABOVE BOXES TO INDICATE WHICH TYPE OF REPORT IS BEING AMENDED

Summary of activity since last filed report				
1	Beginning balance (ending balance from previous filing)			1 34,481.61
	Cash Contributions			
2a	Itemized cash contributions (total from Form 2)	2a	7050.00	
2b	Non-itemized cash contributions	2b	0	
2c	Total cash contributions (add lines 2a and 2b)			2c 7050.00
	In-Kind Contributions			
3a	Itemized in-kind contributions (total from Form 3)	3a	750.00	
3b	Non-itemized in-kind contributions	3b	0	
3c	Total in-kind contributions (add lines 3a and 3b)	3c	750.00	
	Receipts from Other Sources			
4	Total receipts from other sources (total from Form 4)			4 7800.00
	Expenditures			
5a	Itemized expenditures (total from Form 5)	5a	26815.08	
5b	Non-itemized expenditures	5b	0	
5c	Total expenditures (add lines 5a and 5b)			5c 26,815.08
6	Ending balance (add lines 1, 2c, & 4, then subtract line 5c)			6 14716.53

Sworn to and subscribed before me this 26 day of May of the year 2006. My commission expires the 30 day of July of the year 2006.

Susan B. Summerlin
Signature of Notary Public

Susan B. Summerlin
Print Notary's Name

As required by the Alabama Fair Campaign Practices Act, I hereby swear or affirm to the best of my knowledge and belief that the attached report(s) and the information contained herein are true and correct and that this information is a full and complete statement of all contributions, expenditures, and other required information during the applicable period of time.

John B. Bush — Signature of Candidate or Elected Official

5/26/06 — Date

FORM REVISED 12.10.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				5/15/06	100.00
[redacted]	[redacted]	✓					4/22/06	500.00
[redacted]	[redacted]		✓				4/28/06	200.00
[redacted]	[redacted]		✓				5/1/06	500.00
[redacted]	[redacted]		✓				5/1/06	100.00
[redacted]	[redacted]		✓				5/1/06	50.00
[redacted]	[redacted]		✓				5/1/06	500.00
[redacted]	[redacted]	✓					5/13/06	500.00
[redacted]	[redacted]		✓				5/7/06	300.00
							TOTAL CASH CONTRIBUTIONS THIS PAGE	2750.00

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]				✓		5/15/06	500.00
[redacted]	[redacted]		✓				5/15/06	100.00
[redacted]	[redacted]		✓				5/16/06	200.00
[redacted]	[redacted]		✓				5/22/06	500.00
[redacted]	[redacted]				✓		5/23/06	500.00
[redacted]	[redacted]			✓			5/24/06	500.00
[redacted]	[redacted]			✓			5/24/06	1500.00
[redacted]	[redacted]				✓		5/26/06	500.00
FORM REVISED 10.29.99							TOTAL CASH CONTRIBUTIONS THIS PAGE	4300.00

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 3: IN-KIND CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush PAGE 1 OF 1

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** cash or loans on this form. Use Forms 2 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	NATURE OF CONTRIBUTION (CHECK ONE)								SOURCE (CHECK ONE)				DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Administrative	Advertising	Consultants/ Polling	Equipment	Food	Rent	Transportation	Other	Business/ Corporation	Individual	PAC	Other		
[redacted]	[redacted]		✓							✓				5/22/06	500.00
[redacted]	[redacted]			✓					✓	✓				5/15/06	250.00

FORM REVISED 10.29.99

TOTAL IN-KIND CONTRIBUTIONS THIS PAGE 750.00

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ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 5: EXPENDITURES

BY CANDIDATE OR ELECTED OFFICIAL - INCLUDING CONTRIBUTIONS TO OTHER CANDIDATES, POLITICAL PARTIES, AND POLITICAL COMMITTEES

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that expenditures over $100 be itemized.

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)										DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/ Polling	Contribution	Food	Fundraising	Loan Repayment	Lodging	Transportation	OTHER GIVE BRIEF EXPLANATION		
[redacted]	[redacted]		✓									4/19/06	250.00
[redacted]	[redacted]		✓									4/21/06	1006.85
[redacted]	[redacted]		✓								sign frame materials	4/24/06	49.38
[redacted]	[redacted]		✓									4/29/06	804.91
[redacted]	[redacted]									✓	Gas Expense + sign materials	4/30/06	467.53
[redacted]	[redacted]	✓										5/1/06	39.00
[redacted]	[redacted]		✓									5/2/06	50.00
[redacted]	[redacted]		✓									5/5/06	579.38
[redacted]	[redacted]		✓									5/8/06	252.00
											TOTAL EXPENDITURES THIS PAGE		3499.05

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 5: EXPENDITURES

BY CANDIDATE OR ELECTED OFFICIAL - INCLUDING CONTRIBUTIONS TO OTHER CANDIDATES, POLITICAL PARTIES, AND POLITICAL COMMITTEES

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that expenditures over $100 be itemized.

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)										DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/ Polling	Contribution	Food	Fundraising	Loan Repayment	Lodging	Transportation	OTHER GIVE BRIEF EXPLANATION		
[redacted]	[redacted]		✓									5/8/06	290.00
[redacted]	[redacted]		✓									5/8/06	302.34
[redacted]	[redacted]		✓									5/8/06	1220.00
[redacted]	[redacted]		✓									5/10/06	456.75
[redacted]	[redacted]		✓									5/10/06	1500.00
[redacted]	[redacted]		✓	✓								5/15/06	244.95
[redacted]	[redacted]		✓									5/16/06	4785.00
[redacted]	[redacted]		✓									5/16/06	210.00
[redacted]	[redacted]									✓	Meals on Gas	5/18/06	299.10
											TOTAL EXPENDITURES THIS PAGE		9308.14

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 5: EXPENDITURES

BY CANDIDATE OR ELECTED OFFICIAL - INCLUDING CONTRIBUTIONS TO OTHER CANDIDATES, POLITICAL PARTIES, AND POLITICAL COMMITTEES

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that expenditures over $100 be itemized.

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)										DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/ Polling	Contribution	Food	Fundraising	Loan Repayment	Lodging	Transportation	OTHER GIVE BRIEF EXPLANATION		
[redacted]	[redacted]									✓		5/18/06	154.50
[redacted]	[redacted]		✓									5/18/06	500.00
[redacted]	[redacted]		✓									5/18/06	3599.00
[redacted]	[redacted]		✓									5/18/06	4992.00
[redacted]	[redacted]		✓									5/19/06	1600.00
[redacted]	[redacted]		✓									5/19/06	200.00
[redacted]	[redacted]		✓									5/19/06	354.38
[redacted]	[redacted]		✓									5/19/06	292.50
[redacted]	[redacted]		✓									5/24/06	2007.50
											TOTAL EXPENDITURES THIS PAGE		13699.88

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 5: EXPENDITURES

BY CANDIDATE OR ELECTED OFFICIAL - INCLUDING CONTRIBUTIONS TO OTHER CANDIDATES, POLITICAL PARTIES, AND POLITICAL COMMITTEES

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that expenditures over $100 be itemized.

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)										DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/ Polling	Contribution	Food	Fundraising	Loan Repayment	Lodging	Transportation	OTHER GIVE BRIEF EXPLANATION		
[redacted]	[redacted]		✓									5/24/06	178.20
[redacted]	[redacted]									✓	Reuben Gas	5/24/06	129.81

TOTAL EXPENDITURES THIS PAGE 308.01

FORM REVISED 10.29.99

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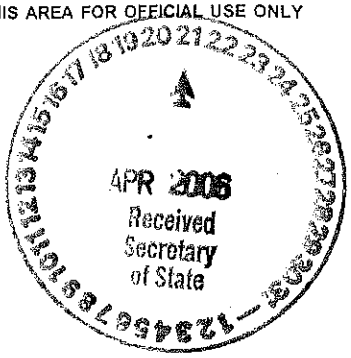

ALABAMA FAIR CAMPAIGN PRACTICES ACT

CANDIDATE / ELECTED OFFICIAL PRE-ELECTION REPORT

SUMMARY FORM 1

Please Print in Ink or Type.

Name of Candidate or Elected Official	Political Party/Ballot Affiliation
John B. Bush	Republican
Office Sought or Held (include district or circuit number, if applicable)	
Circuit Judge, 19th Circuit, Place #1	
Address ☐ Check box if reporting new address	
500 Lakeshore Dr	
City / **State** / **ZIP Code**	**Telephone Number**
Titus AL 36080	(334) 514-0704

Type of Election (check one)
- ☑ Primary Election
- ☐ Primary Runoff
- ☐ General Election
- ☐ Special Election

Election Date: June 6, 2006

Type of Report (check one)
- ☐ 10-5 Day Pre-Election Report
- ☑ 45 Day Pre-Election Report
- ☐ Amended Pre-Election Report

CHECK ONE OF THE ABOVE BOXES TO INDICATE WHICH TYPE OF REPORT IS BEING AMENDED

Summary of activity since last filed report					
1	Beginning balance (ending balance from previous filing)			1	2871.16
	Cash Contributions				
2a	Itemized cash contributions (total from Form 2)	2a	45275.00		
2b	Non-itemized cash contributions	2b			
2c	Total cash contributions (add lines 2a and 2b)			2c	45275.00
	In-Kind Contributions				
3a	Itemized in-kind contributions (total from Form 3)	3a	1400.00		
3b	Non-itemized in-kind contributions	3b			
3c	Total in-kind contributions (add lines 3a and 3b)	3c	1400.00		
	Receipts from Other Sources				
4	Total receipts from other sources (total from Form 4)			4	350.00
	Expenditures				
5a	Itemized expenditures (total from Form 5)	5a	14,014.55		
5b	Non-itemized expenditures	5b			
5c	Total expenditures (add lines 5a and 5b)			5c	14,014.55
6	Ending balance (add lines 1, 2c, & 4, then subtract line 5c)			6	34,481.61

Sworn to and subscribed before me this 19th day of April of the year 2006. My commission expires the 9th day of April of the year 2009.

Dawn B. Wilder
Signature of Notary Public

DAWN B. WILDER
Print Notary's Name

As required by the Alabama Fair Campaign Practices Act, I hereby swear or affirm to the best of my knowledge and belief that the attached report(s) and the information contained herein are true and correct and that this information is a full and complete statement of all contributions, expenditures, and other required information during the applicable period of time.

John B. Bush — 4/19/06
Signature of Candidate or Elected Official — Date

FORM REVISED 12.10.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John R. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				1/9/06	500.00
[redacted]	[redacted]		✓ (E)				1/3/06	100.00
W. Kendrick James	109 Company St/Suite 230 Wetumpka AL 36092		✓				1/5/06	1000.00
[redacted]	[redacted]		✓ (E)		✓		1/9/06	250.00
[redacted]	[redacted]		✓				1/9/06	250.00
[redacted]	[redacted]		✓ (E)		✓		1/9/06	200.00

FORM REVISED 10.29.99

TOTAL CASH CONTRIBUTIONS THIS PAGE 2300.00

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]	✓					1/9/06	500.00
[redacted]	[redacted]		✓				1/9/06	500.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	500.00
[redacted]	[redacted]		(2) ✓		✓		1/9/06	250.00
[redacted]	[redacted]		(2) ✓				1/9/06	150.00
[redacted]	[redacted]		✓				1/9/06	500.00
[redacted]	[redacted]	✓					1/9/06	250.00
							TOTAL CASH CONTRIBUTIONS THIS PAGE	2850.00

Appendi

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]	✓					1/9/06	250.00
[redacted]	[redacted]		(2) ✓		✓		1/9/06	250.00
[redacted]	[redacted]		✓				1/9/06	250.00
[redacted]	[redacted]		✓				1/9/06	250.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	250.00
[redacted]	[redacted]		(2) ✓		✓		1/9/06	500.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	500.00
							TOTAL CASH CONTRIBUTIONS THIS PAGE	2450.00

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John R. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				1/9/06	200.00
[redacted]	[redacted]		(2) ✓		✓		1/9/06	50.00
[redacted]	[redacted]		✓				1/9/06	250.00
[redacted]	[redacted]		(2) ✓				1/9/06	250.00
[redacted]	[redacted]		✓				1/9/06	250.00
[redacted]	[redacted]		✓				1/9/06	50.00
[redacted]	[redacted]		✓				1/9/06	250.00
[redacted]	[redacted]		(2) ✓				1/9/06	100.00
[redacted]	[redacted]		(3) ✓		✓		1/9/06	500.00

FORM REVISED 10.29.99

TOTAL CASH CONTRIBUTIONS THIS PAGE 1900.00

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	250.00
[redacted]	[redacted]		✓				1/9/06	500.00
[redacted]	[redacted]		✓				1/9/06	1000.00
[redacted]	[redacted]		✓				1/9/06	300.00
[redacted]	[redacted]		(2) ✓				1/9/06	500.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	75.00
[redacted]	[redacted]		✓				1/9/06	100.00

Appendix 31

FORM REVISED 10.29.99

TOTAL CASH CONTRIBUTIONS THIS PAGE 2925.00

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE) Business or Corporation	Individual	PAC	Other	Returned	DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		(2) ✓		✓		1/9/06	250.00
[redacted]	[redacted]		(3) ✓		✓		1/9/06	1000.00
[redacted]	[redacted]		✓				1/9/06	200.00
[redacted]	[redacted]		✓				1/9/06	500.00
[redacted]	[redacted]		(2) ✓		✓		1/9/06	500.00
[redacted]	[redacted]		✓				1/9/06	500.00
[redacted]	[redacted]		(2) ✓		✓		1/9/06	500.00
FORM REVISED 10.29.99	TOTAL CASH CONTRIBUTIONS THIS PAGE							3650.00

Appendix 32

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE) Business or Corporation	Individual	PAC	Other	Returned	DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		(2) ✓		✓		1/9/06	500.00
[redacted]	[redacted]				✓		1/9/06	300.00
[redacted]	[redacted]			✓			1/9/06	500.00
[redacted]	[redacted]			✓			1/9/06	500.00
[redacted]	[redacted]			✓			1/9/06	1000.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	100.00
							TOTAL CASH CONTRIBUTIONS THIS PAGE	3200.00

FORM REVISED 10.29.99

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ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John R. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	100.00
[redacted]	[redacted]		✓				1/9/06	500.00
[redacted]	[redacted]		✓				2/8/06	100.00
							TOTAL CASH CONTRIBUTIONS THIS PAGE	1300.00

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE) Business or Corporation	Individual	PAC	Other	Returned	DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
[redacted]	[redacted]		✓				2/8/06	50.00
[redacted]	[redacted]		(3) ✓		✓		2/8/06	500.00
Bill Lewis	P.O. Box 81 Wetumpka, Al 36092		✓				2/8/06	500.00
[redacted]	[redacted]		✓				2/8/06	2500.00
[redacted]	[redacted]		✓				2/8/06	250.00
[redacted]	[redacted]		(3) ✓		✓		2/8/06	500.00
[redacted]	[redacted]		✓				2/8/06	100.00
[redacted]	[redacted]		✓				2/8/06	1000.00
[redacted]	[redacted]		✓				2/8/06	500.00
	TOTAL CASH CONTRIBUTIONS THIS PAGE							5900.00

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

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CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]				✓		2/8/06	500.00
[redacted]	[redacted]		✓				2/8/06	200.00
[redacted]	[redacted]		✓				2/8/06	100.00
[redacted]	[redacted]		✓				2/8/06	250.00
[redacted]	[redacted]		✓				2/8/06	200.00
[redacted]	[redacted]		✓				2/8/06	200.00
[redacted]	[redacted]		(2) ✓		✓		2/8/06	100.00
[redacted]	[redacted]		(2) ✓		✓		2/15/06	250.00
[redacted]	[redacted]		✓				2/16/06	200.00
FORM REVISED 10.29.99		TOTAL CASH CONTRIBUTIONS THIS PAGE						2000.00

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John R. Rush

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CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				2/16/06	100.00
[redacted]	[redacted]		✓				2/22/06	500.00
[redacted]	[redacted]		✓				2/23/06	300.00
[redacted]	[redacted]			✓			2/24/06	500.00
[redacted]	[redacted]		✓				2/28/06	100.00
[redacted]	[redacted]		✓				3/3/06	50.00
[redacted]	[redacted]		✓				3/8/06	1000.00
[redacted]	[redacted]		✓				3/15/06	500.00
[redacted]	[redacted]		✓				3/15/06	250.00
	TOTAL CASH CONTRIBUTIONS THIS PAGE							3300.00

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FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓ (2)				3/16/06	5000.00
[redacted]	[redacted]		✓				3/17/06	800.00
[redacted]	[redacted]		✓				3/29/06	500.00
[redacted]	[redacted]		✓				3/27/06	250.00
[redacted]	[redacted]		✓				4/4/06	1500.00
[redacted]	[redacted]		✓				4/7/06	500.00
[redacted]	[redacted]	✓					4/7/06	500.00
[redacted]	[redacted]		✓				4/5/06	500.00
[redacted]	[redacted]		✓				3/30/06	250.00
							TOTAL CASH CONTRIBUTIONS THIS PAGE	9800.00

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				4/7/06	500.00
[redacted]	[redacted]		✓				4/5/06	200.00
[redacted]	[redacted]		✓				4/7/06	1000.00
[redacted]	[redacted]		✓				4/10/06	300.00
[redacted]	[redacted]		✓				4/12/06	100.00
[redacted]	[redacted]		✓				4/11/06	100.00
[redacted]	[redacted]		✓				4/11/06	100.00
[redacted]	[redacted]		✓				4/14/06	100.00
[redacted]	[redacted]		✓				4/15/06	1000.00
FORM REVISED 10.29.99	TOTAL CASH CONTRIBUTIONS THIS PAGE							3400.00

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 2: CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John R. Tesh

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** in-kind contributions or loans on this form. Use Forms 3 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	SOURCE OF CONTRIBUTION (CHECK ONE)					DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Business or Corporation	Individual	PAC	Other	Returned		
[redacted]	[redacted]		✓				4/15/06	200.00
[redacted]	[redacted]		✓				4/19/06	100.00
	TOTAL CASH CONTRIBUTIONS THIS PAGE							300.00

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FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 3: IN-KIND CONTRIBUTIONS RECEIVED BY CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that those contributions greater than $100 be itemized. **DO NOT LIST** cash or loans on this form. Use Forms 2 and 4 for those listings.

CONTRIBUTOR (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	NATURE OF CONTRIBUTION (CHECK ONE)								SOURCE (CHECK ONE)				DATE CONTRIBUTION RECEIVED (mo./day/yr.)	AMOUNT OF CONTRIBUTION
		Administrative	Advertising	Consultants/ Polling	Equipment	Food	Rent	Transportation	Other	Business/ Corporation	Individual	PAC	Other		
[redacted]	[redacted]		✓								✓			4/12/06	1400.00

TOTAL IN-KIND CONTRIBUTIONS THIS PAGE 1400.00

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FORM REVISED 10.29.99

THE FAIR CAMPAIGN PRACTICES ACT

FORM 4: RECEIPTS FROM OTHER SOURCES

LOANS/ INTEREST/ OTHER SOURCES OF INCOME TO CANDIDATE OR ELECTED OFFICIAL

NAME OF CANDIDATE OR ELECTED OFFICIAL: John B. Bush

THE FCPA REQUIRES THAT THOSE CONTRIBUTIONS GREATER THAN **$100** BE ITEMIZED. **DO NOT LIST** CASH OR IN-KIND CONTRIBUTIONS ON THIS FORM. USE FORMS 2 AND 3 FOR THOSE LISTINGS.

SOURCE OF RECEIPT (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	FORM OF RECEIPT: INTEREST	FORM OF RECEIPT: LOAN	FORM OF RECEIPT: OTHER	COMPLETE THIS BLOCK IF RECEIPT IS A LOAN — GUARANTORS [FCPA REQUIRES FULL NAME AND COMPLETE ADDRESS OF INDIVIDUAL(S) ENDORSING OR GUARANTEEING LOAN]	RECEIPT SOURCE (CHECK ONE): LENDING INSTITUTION	RECEIPT SOURCE: PAC	RECEIPT SOURCE: INDIVIDUAL	RECEIPT SOURCE: BUSINESS	RECEIPT SOURCE: OTHER	DATE RECEIVED (mo./day/yr.)	AMOUNT OF RECEIPT
[redacted]	[redacted]		✓		same			✓			4/6/06	350.00

TOTAL RECEIPTS THIS PAGE 350.00

FORM REVISED 6/93

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ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 5: EXPENDITURES

BY CANDIDATE OR ELECTED OFFICIAL - INCLUDING CONTRIBUTIONS TO OTHER CANDIDATES, POLITICAL PARTIES, AND POLITICAL COMMITTEES

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that expenditures over $100 be itemized.

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)										DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/ Polling	Contribution	Food	Fundraising	Loan Repayment	Lodging	Transportation	OTHER GIVE BRIEF EXPLANATION		
[redacted]	[redacted]					✓	✓					1/9/06	4280.00
[redacted]	[redacted]	✓										1/11/06	39.00
[redacted]	[redacted]	✓									Qualifying fee	1/18/06	2239.46
[redacted]	[redacted]		✓									3/14/06	792.18
[redacted]	[redacted]	✓										3/16/06	25.11
[redacted]	[redacted]	✓									Sign Supplies	3/23/06	451.19
[redacted]	[redacted]		✓								Signs, Purchases	3/23/06	3595.18
[redacted]	[redacted]		✓								Signs Fees	3/31/06	1722.00
[redacted]	[redacted]									✓	Gas Reimb	4/5/06	220.15
											TOTAL EXPENDITURES THIS PAGE		13364.27

FORM REVISED 10.29.99

ALABAMA FAIR CAMPAIGN PRACTICES ACT

FORM 5: EXPENDITURES

BY CANDIDATE OR ELECTED OFFICIAL - INCLUDING CONTRIBUTIONS TO OTHER CANDIDATES, POLITICAL PARTIES, AND POLITICAL COMMITTEES

NAME OF CANDIDATE / ELECTED OFFICIAL: John B. Bush

The FCPA requires that expenditures over $100 be itemized.

PERSON/GROUP/BUSINESS RECEIVING EXPENDITURE (INCLUDE FULL NAME)	ADDRESS (ADDRESS SHOULD INCLUDE STREET OR P.O. BOX, CITY, STATE, AND ZIP)	PURPOSE OF EXPENDITURE (CHECK ONE)										DATE OF EXPENDITURE (mo./day/yr.)	AMOUNT OF EXPENDITURE
		Administrative	Advertising	Consultants/ Polling	Contribution	Food	Fundraising	Loan Repayment	Lodging	Transportation	OTHER GIVE BRIEF EXPLANATION		
[redacted]	[redacted]	✓									Sign supplies	4/5/06	69.68
[redacted]	[redacted]		✓									4/6/06	40.00
[redacted]	[redacted]		✓								Citytest Booth	4/6/06	65.00
[redacted]	[redacted]		✓									4/14/06	100.00
[redacted]	[redacted]		✓									4/14/06	75.00
[redacted]	[redacted]									✓	Gas reimb	4/14/06	300.60

TOTAL EXPENDITURES THIS PAGE 650.28

FORM REVISED 10.29.99

CERTIFICATE OF SERVICE

I hereby certify that a copy of this motion has been served through the Alafile electronic filing system on the following counsel for the State:

James Houts
Assistant Attorney General
Office of the Attorney General
501 Washington Avenue
Montgomery, AL 36130

This 19th day of December, 2014.

/s/ Patrick Mulvaney
PATRICK MULVANEY

APPENDIX F

IN THE NINETEENTH JUDICIAL CIRCUIT

IN AND FOR ELMORE COUNTY

WETUMPKA, ALABAMA

CALVIN MCMILLAN,

Petitioner,

Vs. CASE NO. CC-08-476.60

STATE OF ALABAMA.

COURT REPORTER'S TRANSCRIPT OF PROCEEDINGS

Proceedings taken in the above-styled cause in the Elmore County Courthouse, Wetumpka, Alabama, on Monday, January 5, 2015 and Tuesday, March 10, 2015, before the Honorable John B. Bush, commencing at 10:30 a.m.

APPEARANCES

FOR THE STATE:

JAMES HOUTS, ESQ.

Assistant Attorney General

FOR THE PETITIONER:

PATRICK MULVANEY, ESQ.

KATHERINE CHAMBLEE, ESQ.

Attorneys at Law

OFFICIAL COURT REPORTER:

RICKY L. TYLER, CCR

INDEX

PROCEEDINGS

THE COURT: Case Number CC-08-476.60, Calvin McMillan versus State of Alabama. This is a Rule 32 Petition that was filed on Mr. McMillan's behalf. The petition was filed several months ago.

The State of Alabama had asked for additional time in which to file a response. The Court granted that time basically giving the State of Alabama about 60 days to response. The State filed their response to the initial petition. And the Petitioner's counsel had requested additional time in which to respond to the State's response, which the Court granted, giving them the same amount of time as I had given the State.

The time for the Petitioner to file his response to the State of Alabama's response, which was a motion -- or is a Motion to Dismiss basically, the last day was December 19th.

In response to this Court allowing additional time to respond to the State's answer and Motion to Dismiss, counsel for Mr. McMillan filed several pleadings on December the 19th. Those being an Amended Rule 32 Petition, a motion for this Court to recuse itself from any further proceedings in this case, and also a motion entitled a Motion for

Fair Procedure for Resolving Petitioner's Motion to Recuse. Those two motions, that being the Motion for a Fair Procedure and a Motion to Recuse is what we are set for hearing on today.

Mr. McMillan is present with his counsel, Mr. Patrick Mulvaney. The State of Alabama is represented by Assistant Attorney General James Houts, who just also happened to be trial counsel for the State of Alabama in this instant case when he was serving as an Assistant District Attorney for the 19th Judicial Circuit.

All right. Having laid that foundation, Mr. Mulvaney, you have the floor.

MR. MULVANEY: Good morning, Your Honor, Patrick Mulvaney on behalf of Mr. McMillan.

As the Court noted, there are two motions that are set for today. One is the Motion to Recuse Your Honor from this Rule 32 case and the other is regarding the procedures for the resolution of that motion.

I want to emphasize at the outset that in making these motions I don't mean any disrespect towards Your Honor. These motions are not about Your Honor's ability to serve as a judge generally, they're about the unique -- the very unique

circumstances of this Rule 32 death penalty case and the attorneys who represented Mr. McMillan in his capital trial.

I'm -- I'm happy to take guidance from the Court as to the order in which to address the motions, but the parts of the procedure's motion have to do -- there are three parts to the procedure's motion. The first was to transfer the motion itself, the recusal motion itself, to a different judge. Now, this Court can, of course, recuse itself if it feels that there's a -- that a reasonable person would have a reasonable basis for questioning Your Honor's impartiality.

In the event though that the Court is not inclined to recuse, we -- we believe that it would be appropriate for the Motion for Recusal or Disqualification to be considered by a different judge. And the reason for that is that -- well, first of all, that this practice has been done in other cases. We cited in our motion the Monsanto case and the Tarver case. Tarver is another Rule 32 case in which a Motion to Recuse the judge was filed and the motion itself was transferred to a different judge to handle that motion.

I think the circumstances -- you know, the

Motion for Recusal or Disqualification involves some particularly important and sensitive issues in this death penalty case, including an allegation of prejudgment by Your Honor from the Sentencing Order; also including your relationships with Mr. McMillan's trial counsel, Bill Lewis, as the Court knows, is a former law clerk to Your Honor; and also that both of the trial attorneys contributed to Your Honor's last contested election campaign.

The Adkins case, ex parte Adkins, an Alabama Supreme Court case, is a case that I think suggests that it would be appropriate to transfer the issue of recusal/disqualification to a different judge. In Adkins there was -- it was a Rule 32 case and there was an allegation that the original trial judge was biased at the trial and it was raised in the Rule 32 Petition. And when the case went to the Alabama Supreme Court, the Alabama Supreme Court said that the best course of action would be to transfer the Rule 32 case to a different judge, because the issue was whether that particular judge was biased against the defendant, who was then the Rule 32 petitioner.

And I think that the point of Adkins is just

that if -- where a judge is -- where a question is whether a judge should be recused from a case, that decision about whether to recuse in certain circumstances is more appropriate for another -- another judge to decide. So we would ask, I think, initially that the Court, if it's not inclined to recuse on its own, to transfer this motion for hearing by another judge. That's the first part of that motion.

I think the other -- the other two parts of that motion -- of the procedure's motion, one was just to address this issue first. And I appreciate the Court setting -- setting this for today, I think that's been done. And the third part was just that in the event of a ruling adverse to Mr. McMillan, just that the Court would stay the proceedings in this Rule 32 case so that we could seek immediate -- immediate review of the decision. Because that's what the appellate courts have said, that the way to challenge the denial of a Motion to Recuse is by immediate mandamus review. So we would ask that in the event of an adverse ruling that we be given an opportunity to pursue -- to pursue review by appellate courts.

So I think that those are the three -- the

three issues in the procedure's motion. And so we would just ask the Court to follow those in addressing this Motion to Recuse.

THE COURT: All right. Any response on that first motion, Mr. Houts?

MR. HOUTS: Just as to the first motion, the so-called fair procedure, we didn't file a response. Because by setting this hearing, the State felt like that was moot, that the Court had determined that it was capable of deciding the issue in an impartial and unbiased manner. Which is the standard for Alabama, you know, the judge makes the determination as to recusal issues.

As to the disqualification, we don't presume that -- lack of qualification or bias or prejudice is not presumed under Alabama law; yet that's what the Petitioner is saying, is you should presume that you're incapable of doing this and find somebody else to do it for you and put the cart before the horse. And that's not the status of the law in Alabama. Therefore, we think that the Court setting the hearing today, so long as the Court is convinced that it does not have any prejudice or partiality in this matter, is appropriate.

And finally, I think it's important, certainly

when we start looking at other cases in Alabama such as Tarver, there is no allegation of this Court having particularized prejudice against this petitioner. There is no allegation that this Court has had prior experience with Calvin McMillan and thus the Court just has it out for Calvin McMillan. In fact, it's quite different. It's saying that the Court has disqualifying factors relating to a Sentencing Order and to potential witnesses, but not to the petitioner, which is a much different situation than what you have when someone says this judge has had a history with this particular petitioner and therefore should be recused.

So that's where it bleeds into the second issue. And I'm going to sit down so we can talk about the second issue. But since we're not talking about particularized prejudice by the Court against the petitioner, but only as to disqualifying factors or potential witnesses, there's no need for this safety net provision of let's call in another judge and presume prejudice when the law says we don't presume prejudice. And therefore we think that the issue is moot by the setting of this and otherwise due to be denied.

Thank you, Your Honor.

THE COURT: Any response?

MR. MULVANEY: Your Honor, I think I would just say, and I think that Mr. Houts is right, that in some ways that this does bleed into the second issue, but that a personal vendetta against the defendant or petitioner is not the only way that a reasonable basis for a partiality can infer -- questioning a judge's impartiality can arise. And I think that the many circumstances of this case, particularly in a death penalty case where heightened reliability is required, that they do present a very serious recusal issue. And I think that they are, again, involving the judge's -- Your Honor's relationships and also the Sentencing Order in this capital case. And so that's why I think that it is appropriate for a different judge to hear the recusal issue. And as Mr. Houts said, I agree that some of these then kind of bleed over into the second motion.

THE COURT: Do you have any evidence whatsoever that this Court has in any way shown bias, prejudice or anything of that resort with regard to your client?

MR. MULVANEY: Well, Your Honor, I think that the prejudgment issue that's in the recusal motion

is a problem. And --

THE COURT: Well, we'll get to that later. I'm talking about this motion right now where you're asking me to recuse myself from hearing the Motion to Recuse. Under Alabama law it's my responsibility to hear and determine the Motion to Recuse. It's my job. And, you know, the only way up front that I can possibly see that I'm not supposed to do what the law says I'm supposed to do would be if you have some evidence that I cannot be fair, that I have -- you know, not only that I cannot be, but I haven't been fair with regard to your client and that there's some -- there is no presumed prejudice that I'm aware of. So if you've got it, more than what you've raised in your Motion to Recuse, then this is your opportunity to show it, because I'm not aware that I'm not supposed to hear the motion quite honestly.

MR. MULVANEY: Your Honor, I think on the question of whether the Court can hear the motion, we would just point to the situation in ex parte Adkins and just make the point that because the question is -- because the question is about, and particularly in a death penalty case, whether the Court, for all of the reasons in the Motion to

Recuse, should recuse, that that question would be better, you know, considered by another judge. But I think that we would otherwise just rest on the motion on that point, Your Honor.

THE COURT: Well, I find that there has been no showing that this Court is disqualified from being able to do it's responsibility and it's job to hear the motions. So as far as your Motion for Fair Procedure, it's granted, we've done it. And as far as you wanting me to assign another judge, which parenthetically I would be interested who might be qualified to hear the motion if I'm not, but we don't have to go there, I'm not assigning it to another judge.

MR. MULVANEY: Thank you, Your Honor.

THE COURT: Okay. So we will move on with the Motion to Recuse.

MR. MULVANEY: Thank you, Your Honor.

Your Honor, before we -- well, actually, I'm sorry, Your Honor, just the one other thing that we didn't come back to, and I'm fine if the Court would prefer to hold off on this issue for the moment, is just the part of the procedure's motion that's about in the event of an adverse ruling that we be given an opportunity to seek immediate

review. And if the Court would rather take that up later if we get there, that's okay with me. But that was also a part of that motion.

THE COURT: I'm not ruling on whether you want to mandamus me. That's your call. You can do what you want to do, but honestly, I don't -- never mind. It's your call. You want to take me up right now, I guess you can, but that doesn't make sense to me.

MR. MULVANEY: Well, I just mention it, Your Honor. We can address that. We'll just come back to that point, if necessary, later on.

Judge, on the second motion, on the Motion to Recuse, we just have two documentary exhibits that I would move into evidence for purposes of the motion. The first is a certified copy of campaign election records. This is the same document that was attached to the recusal motion. However, in the document that was attached to the recusal motion, it concerns Your Honor's 2006 campaign finance records, we redacted -- I redacted nearly all of the information that was in those records except for the parts that were relevant that Kenny James and Bill Lewis had contributed to Your Honor's 2006 --

THE COURT: It would seem to me that -- have you got the full and complete records here?

MR. MULVANEY: Yes.

THE COURT: Okay.

MR. MULVANEY: And I have a certified copy of the full and complete records. So I've marked them as Petitioner's Exhibit 1 for purposes of this hearing. And this just, for purposes of the record, is -- the documents that are certified here by the Secretary of State are the 2006 Annual Report of Judge Bush dated January 2nd, 2007; the General Election Pre-Election Waiver of Report dated October 27th, 2006; the General Election Pre-Election Report dated September 19th, 2006; the Primary Election Pre-Election Report dated May 26th, 2006; and the Primary Election Report dated April 19th, 2006. And the Secretary of State has certified these and we would just move to admit this document.

This is the complete unredacted document, Your Honor. So we would move to admit this for purposes of this hearing; however, if the Court would prefer, we would be fine with admitting this document under seal. The reason that we had redacted so much of the document -- of the original

document was that it includes things like names and peoples' home addresses and other information like that. So we would be fine with moving this into evidence for purposes of this hearing under seal if the Court would prefer.

THE COURT: As far as I know it's all public record, I don't see any --

MR. HOUTS: The State would ask that it be under seal because to file it otherwise requires redaction of home addresses under rule of the Alabama Supreme Court because that's personal identifiable information about third parties. So since peoples' addresses haven't been redacted in this document, we would ask the Court to keep it under seal.

THE COURT: All right. Well, I will admit it and we will file it under seal then.

(Petitioner's Exhibit 1 admitted.)

MR. MULVANEY: Thank you, Your Honor. The second document, which I've marked as Petitioner's Exhibit 2, the stickers actually say Defendant's Exhibit 2, is another certified document from the Secretary of State of Alabama. And this document is the -- it's the certified election results from the 2006 Republican Party Primary for the Circuit

Judge elections; the Canvas of Results for the offices of Circuit and District Judges in the 2006 General Election; the Canvas of Results for Circuit and District Judges in the 2012 General Election; and the Certified candidate list for the Republican Party in the 2012 Primary Election. And the Motion to Recuse that we will get to in a moment does deal with campaign finance issues and Your Honor's elections, so we would just offer this exhibit into evidence for purposes of this hearing as Petitioner's Exhibit 2.

THE COURT: All right. 2 will be admitted.

(Petitioner's Exhibit 2 admitted.)

MR. MULVANEY: Thank you, Your Honor.

Judge, before outlining the facts that support the Motion to Recuse, I want to emphasis two points. The first is that the Court should resolve any doubt in favor of recusal. The State notes in it's pleading that a judge shouldn't just recuse when there's no basis at all, and we would agree with that; however, when there is any doubt, a judge should recuse. And I think that this is particularly true in a death penalty case where the Eighth Amendment requires heightened reliability.

The second point is that a Motion to Recuse

like this is a -- it's a totality of the circumstances analysis. So we're not asking Your Honor to recuse for this one fact or that one fact. We're asking the Court to look at all of the facts together to determine the question, the objective question, of whether when you put it all together a reasonable person would have a reasonable basis for questioning Your Honor's impartiality in this Rule 32 case.

Now, as the Court is aware, Mr. McMillan was sentenced to death. He was represented at trial by Bill Lewis and Kenny James. One of the primary claims in the Rule 32 Petition is that Mr. Lewis and Mr. James were ineffective at Mr. McMillan's capital trial.

Your Honor wrote in the Sentencing Order in which the Court sentenced Mr. McMillan that, quote, this Court finds that McMillan's attorneys provided effective assistance throughout these entire proceedings, end quote. That statement is -- it's not -- with all due respect, it's not an observation about the evidence presented. It's a conclusion about counsel's performance. And it's made in the precise language of Strickland versus Washington, provided effective assistance. It was

made before Mr. McMillan raised an issue of ineffective assistance of counsel and, more importantly, before Mr. McMillan could raise an issue about ineffective assistance of counsel, because he was still being represented by the same attorneys.

And again, with all due respect to Your Honor, I think that this is what prejudgment is. It's deciding an issue before a party even has a chance to raise it, to argue it, or to present evidence on it. So I don't think that there was a good reason for that statement to be in the Sentencing Order. And I think that it presents a serious problem in a Rule 32 case in which ineffective assistance of counsel is a major issue.

THE COURT: Well, let me just note that just as prejudice of the Court is not presumed, neither, and I've read no cases in all my life, is it presumed that trial counsel is ineffective. Just because you say it's so don't make it so. It's not presumed that trial counsel is ineffective, okay.

MR. MULVANEY: I agree, Your Honor.

THE COURT: I just wondered if maybe I missed something out there.

MR. MULVANEY: No, I agree with that, Your

Honor. I think though that there's a big difference between the general presumption of reasonable performance and a written conclusion of finding in the language of Strickland that counsel were effective. I think that those are two different things. I think a presumption is one thing and a written conclusion in a Sentencing Order that specifically addresses the Strickland standard is a different thing entirely. I think that that's a conclusion before Mr. McMillan even had an opportunity to raise the issue. So that prejudgment is the first major area of concern.

The second is that Bill Lewis, one of Mr. McMillan's trial attorneys, was a law clerk for Your Honor.

THE COURT: The last one I had, as a matter of fact.

MR. MULVANEY: And since Mr. Lewis clerked for Your Honor and Your Honor was a mentor to Lewis in that capacity, I think it could lead a reasonable person to question Your Honor's impartiality. You know, when --

THE COURT: Are there cases out there that say that a trial court is presumed to be prejudiced if a former law clerk handles a case in front of them?

MR. MULVANEY: No, Your Honor. And I think that this is a really -- it's a really unique situation. And the State cites a number of cases in which -- cases and ethics opinions that say that, you know, judges can sit on cases where a former clerk is appearing as an attorney or something like that. I think that this is a really unique situation though when in a capital case the issue becomes whether the attorney met the standards -- the professional norms and performed reasonably under professional norms.

THE COURT: Wait a minute. You're getting ahead of yourself. You've alleged those things.

MR. MULVANEY: Yes, sir.

THE COURT: Just because you've alleged those things doesn't make them true, right?

MR. MULVANEY: I --

THE COURT: Don't you have a burden with -- assuming this Court, or any Court for that matter, gets to the point of looking at your Rule 32 Petition, you've alleged ineffective assistance of counsel.

MR. MULVANEY: Yes, Your Honor.

THE COURT: Ineffective -- as I said a minute ago, the law in this country is not that trial

counsel is presumed to be ineffective, correct?

MR. MULVANEY: Yes, Your Honor. But --

THE COURT: Okay. You see, that's where I'm having a disconnect with you, because you continue to be stating this as the gospel when in fact these are things that you allege.

MR. MULVANEY: Oh, absolutely, Judge.

THE COURT: Okay.

MR. MULVANEY: At this point, no. And I apologize if I misspoke on that. There are allegations of ineffective assistance of counsel. But that is what we are attempting to prove in this Rule 32 case. You know, that is -- I agree with Your Honor that they are allegations at this point. And when we get into the different pleading stages in the Motion to Dismiss there are points where we will assume that the facts are true and so on. And then, you know, at an evidentiary hearing stage we would seek to prove that those facts are true.

And I think though that that's -- that the point is that the issue that is before the Court in the Rule 32 case is whether -- you know, one of the key issues is whether counsel were effective or ineffective. That's a decision that will have to be made. And the judge/clerk relationship is, as I

mentioned, very much a mentor/mentee relationship.

THE COURT: I don't remember. Do you have any testimony or any evidence of when Mr. Lewis clerked for me? Because honestly I don't remember when it was.

MR. MULVANEY: Your Honor, I believe it was 2003 to 2004. Mr. Lewis graduated from Cumberland Law School in 2003. I believe he clerked for Your Honor after that and then went on from there.

THE COURT: Okay. I just wondered.

MR. MULVANEY: And the -- you know, we're not saying that just because Mr. Lewis clerked for Your Honor that he can't appear as an attorney before Your Honor. We're not saying that at all. What we're saying is that when Mr. Lewis' professional competence is at issue, when his -- whether he performed reasonably under prevailing professional norms is at issue --

THE COURT: Just by way of -- have you done any research and seen other cases where any of my prior law clerks practiced in front of me, tried cases in front of me, and then after those cases were disposed of were put in a position of defending an ineffective assistance claim?

MR. MULVANEY: Your Honor, I'm not aware of --

I'm not aware of any cases --

THE COURT: Well, I am.

MR. MULVANEY: -- with the same fact pattern with a death penalty case and I'm not aware of published decisions on them.

THE COURT: I just wondered.

MR. MULVANEY: But the point -- the issue -- I guess the point is if a -- if Your Honor's former law clerk, a mentee, is -- his professional competence is at issue, then his former mentor shouldn't be the person deciding it. That, I think, is what --

THE COURT: Once again, you're presuming that I can't do my job.

MR. MULVANEY: Well, no, Your Honor.

THE COURT: To make that argument you're presuming that I can't do my job.

MR. MULVANEY: No, Your Honor. This is an objective test.

THE COURT: Well, let me just -- historically who was my first law clerk?

MR. MULVANEY: I don't know, Your Honor.

THE COURT: Okay. Parker Johnston. He's also -- I just looked on here, he also contributed a small amount of money, as most of all of these are,

to my campaign. He was my first law clerk. Represented many criminal defendants before me. After one was over one filed a petition and said he was ineffective. It may not have been a Rule 32; it was probably a Rule 20 actually. He responded, Judge, this is what I told him. Parker, you were wrong, you rendered ineffective -- my order, my former law clerk, my first one, you rendered ineffective assistance of counsel, conviction set aside, let's do it again with somebody else. Now, that's the facts. Those are facts.

So assuming I hadn't totally lost my mind and assuming what I just told you is true, based on my experience of 28 years on the bench, does that support your argument that I am presumptively prejudiced and I can't do my job?

MR. MULVANEY: Well, Your Honor, I think --

THE COURT: When I tell you -- under what you're telling me now I'm supposed to presume that I'm prejudiced and I can't do this case, when I'm telling you that I've done it with a former law clerk and held that he was ineffective and set aside a conviction, that I can't do my job?

MR. MULVANEY: Your Honor, I think that what we're saying though is that there is a reasonable

basis or a reasonable person would have a reasonable basis to question Your Honor's impartiality.

THE COURT: After -- with those facts they would?

MR. MULVANEY: I think they would, yes, Your Honor. I think they would because of all of the facts. Again, this is -- I don't think it can be a piecemeal analysis where we look at just a clerkship here or just a contribution here or just a prejudgment.

THE COURT: Well, that's what you're doing.

MR. MULVANEY: No, Your Honor. I think what we're asking for is a totality analysis. And I think that the prejudgment issue is critical.

THE COURT: I'm flipping through this campaign form, which honestly I have not looked at or considered in any way since whenever early in 2007 that I filed it.

MR. MULVANEY: Yes, sir.

THE COURT: And I'm looking at a lot of people that contributed, a lot of lawyers, as a matter of fact, that contributed to my campaign. And that presumes prejudice?

MR. MULVANEY: Well, again, in most cases I

don't think it does. But in the --

THE COURT: On a $250 contribution, a $500 contribution, a $1,000 contribution, that does not presume prejudice. There is no -- there has been no finding that I'm aware of that that presumes any prejudice, that somebody contributes to a campaign where, in a state like Alabama, we're required to run contested elections.

MR. MULVANEY: Yes, sir. And I think that that's what makes it particularly important when unique circumstances come up where there's contributions, there's a clerkship, there's a prior order of prejudgment, when all of these come together in a death penalty case that it's particularly important because judges are required to run and everything like that. I think it's particularly important that these recusal issues be considered very seriously.

There's -- you know, looking at any one of these issues, I think what we're asking the Court to do is look at the totality. And, you know, the opinions -- the ethics opinions all discuss, and the State cites an ethics opinion where someone -- an attorney contributed a $100 and they say, yeah, there's no presumption there that the judge can't

be fair in that case, but if there were other special factors. Our point, Judge, is that there are a lot of special factors in this case.

THE COURT: Okay. One of Mr. McMillan's lawyers clerked for me in 2003, maybe somewhat into 2004, and I hadn't found Mr. Lewis' contribution yet, but I found Mr. James where it says he contributed $1,000.

MR. MULVANEY: Your Honor, I believe that Mr. Lewis' contribution was $500.

THE COURT: I was looking for it.

MR. MULVANEY: And I can pull up the page number on that.

THE COURT: Okay. So you've got those factors and the fact that I made the finding in my Sentencing Order that they had rendered effective assistance to Mr. McMillan?

MR. MULVANEY: Yes, Your Honor. I think the --

THE COURT: Okay. Got you.

MR. MULVANEY: I think all of these factors have to be considered together as a totality of the circumstances assessment. I think that mentors -- I understand Your Honor's discussion of the one prior case, but I don't think that that one prior case, from an objective standard -- under the

objective standard, means that there's not -- that a reasonable person wouldn't have a reasonable basis to question Your Honor's impartiality under the totality of the circumstances of this particular death penalty case.

So for all of those reasons we would respectfully request that the Court recuse from this Rule 32 case. As the Court said in ex parte -- as the Alabama Supreme Court said in ex parte Adkins, it would be a simple matter to transfer this Rule 32 case to a different judge. And we would ask the Court to do that under Alabama law and the United States Constitution.

THE COURT: All right.

MR. HOUTS: Judge, we would ask you to start by remembering that the State has an administrative right as determined by the Alabama Supreme Court to have this case assigned to the sentencing judge. The reason we have that right is because of what the sentencing judge in this case noted in its order and that is that Mr. James and Mr. Lewis, by all appearances, appeared to have rendered effective assistance of counsel.

Why is a judge, certainly a sentencing judge, who presided over the trial allowed in some cases

to summarily dispose of a petition? Because the judge was present, saw what the cold record doesn't reveal, can possibly have memories or possibly have recorded recollections of what was observed, such as from what I saw, the presumption that counsel is entitled to, they rendered effective assistance of counsel is valid. I saw quality legal assistance being provided in this case.

Now, the Petitioner calls that prejudging. However, prejudging is before the case is ever assigned to Your Honor, before the case ever exists, before the first piece of evidence comes into court, Your Honor says, well, I heard at the corner store that that boy was going 90 miles an hour on the wrong side of the road, so I know what I'm going to do in that case. That's prejudginging.

Every case that you can look at regarding whether a judge should recuse because of orders entered in a case says information that comes to the judge from a trial, from what happens inside the courtroom, that's not extrajudicial by definition, is not disqualifying. It's not a basis for saying the Court prejudged. Just as I believe that the Court probably looks at Mr. McMillan in a

much different light today, as he did look at Mr. McMillan when the case first started, now that the record is clear what Mr. McMillan is. But the law says that that's okay for the judge to look at him as a convicted murderer, because the Court heard the evidence, saw the evidence, saw the trial and knows that Mr. McMillan is a cold blooded killer. That's not prejudging, that's just cold hard fact.

You do have a duty to sit, because if you recuse unnecessarily, then a judge who only has the cold hard record must come in and take your place, read the record, get up to speed. It costs the State of Alabama money, it costs the State of Alabama time and there's no necessity for it.

If Mr. Lewis was your law clerk in 2003 and 2004, we're ten years beyond that fact now. The only cases really on point that the State could find involved Federal Courts adopting a voluntary practice of a year, recuse for a year after a law clerk leaves the employ of a judge. We're nine to ten years beyond that now, Your Honor.

So what is the something extra? And Mr. McMillan says it's got to be a totality of the circumstances, a totality of all of the facts. But the facts themselves have to matter. If I came in

and said Your Honor sat one day in the trial with his rob unzipped, one day of the trial he wore black shoes, one day of the trial he took three bathroom breaks, and one day of the trial he took two bathroom breaks, if you consider all of those facts, Judge, you should recuse, you would laugh me out of this Courtroom, Your Honor, because those facts don't mean anything.

And that's why we pointed out Mr. Lewis and Mr. James' contributions, again ten years ago or eight years ago, don't even come close to what would be a presumed basis for recusal under the new statute passed by the Alabama Legislature. It's not even in the same ballpark. There is nothing extra to add to this case to even create a doubt.

And when you were talking about Mr. Johnston, I remember, Judge, I don't know if you remember, one of my first trials with Your Honor involved a man who had pleaded guilty to non-sex assault, just straight assault, in Tallapoosa County. We actually tried him for the sex assault here, didn't plea it out. He said on the stand I would never hurt that little girl, I would never touch that little girl that way. And I tried three or four different ways to get in the fact that he pleaded

guilty to that in Tallapoosa County. And finally the Court called me up and said if you do that one more time, you're going to jail today, sit down.

Now, under the rationale of Mr. McMillan, I should be filing a Motion to Recuse, because you were pretty -- pretty straightforward, angry and threatening with me, Judge, that day. And yet here I sit, I guess eight years later, seven years later, understanding the Judge's role in the trial and what happened in that case.

So, again, what's the something extra? He has not shown any additional facts that would cause a reasonable person to suspect that the Court in this case cannot be impartial and cannot be unbiased. And he certainly has not shown any disqualifying factor that would require recusal.

Thank you, Your Honor.

THE COURT: Thank you.

MR. MULVANEY: Your Honor, may I respond briefly?

THE COURT: Yes.

MR. MULVANEY: First, on the point of the -- on the first point, the prejudgment issue, I think that it's really important that -- the State is correct that Alabama law holds that a judge who sat

at trial and then sits at a Rule 32 proceeding can rely on personal observations from the trial. That's completely different though than reaching -- making a finding in the language of Strickland before a Rule 32 proceeding even commences when Alabama law has told defendant/petitioners that the proper time to raise ineffective assistance of counsel is in a Rule 32 proceeding. I mean the issue of ineffective assistance of counsel we're told is supposed to be raised in a Rule 32 Petition, yet here in a Sentencing Order at trial there's a finding -- a finding in the language of Strickland about that.

That's different from just having observations at a trial that, oh, this evidence was compelling or something like that. It's a finding about the issue of effective assistance of counsel and it's being made before the Rule 32 proceeding even commenced.

I mean, in a way it's kind of like if you had a trial and one party presents it's evidence and then after that the judge says, okay, well, I find that that party wins. The other party is going to say, well, wait a minute, we didn't get to even raise the -- you know, raise our defense yet or make our

issues or anything like that. And I think that's kind of what's going on here. The ineffective assistance of counsel issue isn't properly raised until Rule 32. It wasn't raised at the time of the Sentencing Order and it couldn't have been raised at the time of the Sentencing Order, yet that finding was made in the Sentencing Order.

With respect to the clerkship issue, I think that this is -- these issues turn on their unique facts. And the assessment of performance in a capital case is one that the judge/clerk relationship is simply different than the regular judge/attorney relationship. It is a mentor/mentee relationship. And I don't think that a former mentor is the appropriate person for evaluating the performance of his mentee.

And the contributions, I think that the amount of the contributions is -- first of all, they are some of the larger contributions in the campaign, but I think that the amount is not even as significant as, you know, just the fact that they are contributors and then Your Honor would be tasked with deciding whether they -- these attorneys met the standard of reasonableness under Strickland. I don't think that that's a good

setup.

And I think that the totality -- when you look at it all together in a death penalty case and you have this prejudgment problem where the issue has already been -- there's already a conclusion before any evidence was presented, before it's issued, before it's argued, you have a former clerk, and you have campaign contributors, in a death penalty case, I think when you look at it all together and resolve all doubts in favor of recusal, that this is a case in which a reasonable person would have a reasonable basis for questioning Your Honor's impartiality in this case. Thank you.

MR. HOUTS: Just a quick servo, Your Honor. I did not donate to Your Honor's campaign in 2006 or 2012. Under the rationale espoused by Mr. McMillan, that should balance out the equities, I guess, because you should be very angry at me, Judge, for not supporting your -- I mean, even though I have a policy against --

THE COURT: I should.

MR. HOUTS: -- that I've only violated once, you should be very angry at me for not donating to your campaign. And, again, I would also point out that we're focusing on Mr. Lewis and we're talking

about mentorship of which there has been no evidence. And I'm not aware of a legal clerkship being a how to practice law versus how to do research and make copies and learn by watching a judge do his job. We're forgetting about Mr. James, who was the lead counsel in this case. Because one thing that occurred to me is Mr. Lewis, as I recall, had less than the five years required experience at the time of his appointment. I think he had just reached the five years when the trial started, which is why Mr. James was the senior counsel on the case. But the Court cannot be overly skewed by the fact that Mr. Lewis, the junior attorney, was a law clerk ten years ago when Mr. James had no such connection and was the senior attorney in the case responsible for directing the legal team in this case.

So, again, we haven't heard that extra, you know, fact that would cause a reasonable -- what we've heard is that the Court took two bathroom breaks today and three bathroom breaks yesterday and wore black shoes and a red tie and stuff that really when you put it all together doesn't make sense. And, again, we would just ask the Court to find that -- again, it's a personal decision for

the Court whether the Court can be impartial and unbiased. But once the Court makes that determination, it's our job to, you know, butt out of that process unless there's disqualifying factors. The State is aware of no disqualifying factors. The disqualifying factors put forth by Mr. McMillan are bogus. So at that point we just ask the Court to remain on the case as envisioned by Rule 32.

THE COURT: Okay.

MR. MULVANEY: Judge, just very briefly. I think there is a big difference between bathroom breaks and a judge assessing the effectiveness of two attorneys whom he has already concluded were effective before the proceeding started. One was a former clerk and both were substantial campaign contributors. I don't think that's bathroom breaks, I think it's serious stuff in a death penalty case. And I think this is serious --

THE COURT: I've got a question.

MR. MULVANEY: Yes, sir.

THE COURT: How much money did I raise during that last contested election? What was the total number?

MR. MULVANEY: Your Honor, I think it was about

59,000, but I can check.

THE COURT: My memory was about 60, so that's pretty close. So out of 59,000, just in rough numbers, a contribution of 1,000 and a contribution of 500 are supposed to affect me in what way?

MR. MULVANEY: Well --

THE COURT: I couldn't even tell you, and I never have been able to, that's not what we do here. I mean, where is the probable prejudice under any Alabama law, under any ethics opinions? I haven't run the numbers, but let's take -- you know, let's do the numbers. We're talking $1,500 against $59,000 and that's supposed to affect the way that I evaluate a claim?

MR. MULVANEY: Well, Your Honor, I think in the unique circumstances --

THE COURT: Even if money mattered, which money doesn't matter to me honestly, but, you know, this is how we work and I don't like it. Also, if you had done more research on me, you would also notice, but you probably have no history of this, that I've been supporting nonpartisan judicial elections where you don't have to run for campaign stuff since -- I came on the bench in '86, since 1988. I have drafted legislation on behalf of the

Alabama Circuit Judges Association. I think it's a terrible way to do business, but this is the way that our Legislature has given us to do it. And because I'm an elected official and I have to run in contested primaries does not mean that I can't evaluate what the people of this circuit have elected me to do.

And that's where I'm having a problem with your probable prejudice. I mean, even -- let's just say I'm an idiot and like Mr. Houts pointed out, which I didn't remember either, he did not contribute to my campaign, it's got nothing to do with anything. Absolutely nothing to do with anything. I appreciate people that contributed to my campaign. It has allowed me to continue to serve the people of this circuit. It's got nothing to do with what I do and how I do my job.

Have you found any cases in all of your wealth of research on me where you've ever seen any case where any court in this state has said that I didn't have the ability and I didn't do my job like I'm supposed to?

MR. MULVANEY: No, Your Honor.

THE COURT: How many cases have I been reversed in? Just throw that one out there. Have you got

those numbers?

MR. MULVANEY: Your Honor, I don't.

THE COURT: Well, do some research.

MR. MULVANEY: Your Honor, I don't think though that those -- those questions go to the objective assessment here of whether a reasonable person would have a reasonable basis for disqualifying Your Honor. And the political issue --

THE COURT: The question is whether the Court --

MR. MULVANEY: Yes, Your Honor.

THE COURT: -- can evaluate the claims fairly, impartially and apply the law, that is the question, right?

MR. MULVANEY: Yes, Your Honor. And I think that the issues that you were talking about about wanting the election process to work differently just highlight the need for recusal in cases where issues arise like this.

THE COURT: Every Circuit Judge and every District Judge and unfortunately every Appellate Judge in this state is elected.

MR. MULVANEY: Yes, Your Honor.

THE COURT: I can't fix it.

MR. MULVANEY: Right. And --

THE COURT: So therefore, if you carry that forward, none of us -- we're all presumed to not be able to do our job that we're elected to do because we all had to run?

MR. MULVANEY: No, Your Honor. I think, as I said at the outset, this is not about -- this is not a general motion about Your Honor's ability to do your job for any one specific one of these reasons, it's just that when you look at it all together that there's too much here. And these are separate --

THE COURT: Okay. This is what you've got, one more time, to make sure I understand you.

MR. MULVANEY: Yes, sir.

THE COURT: Mr. James, who was one of the attorneys that I appointed to represent Mr. McMillan, contributed $1,000 to my campaign in 2006. Mr. Lewis, who was the other lawyer that I appointed to represent him, contributed $500 to my campaign. My total campaign receipts were $59,000 roughly. And Mr. Lewis served as my law clerk in 2003 and 2004. And those three factors indicate that I can't do my job.

MR. MULVANEY: And respectfully, Your Honor, you issued a legal finding in the language of

Strickland.

THE COURT: Thank you, because I was going to mention that. I can only make decisions and I can only write orders based on what I see, okay. I only know -- well, I know a lot actually. I ruled on a plethora of motions and pleadings in the underlying case here. I held numerous hearings, evidentiary and otherwise. We had a trial. We had the guilt phase, we had the sentencing phase and then we had a sentencing hearing after that. Now, that's what I know about.

These things that you're alleging in your petition where you say they were ineffective, I don't know whatever in the world you say, I only know what I see. That doesn't mean for the purposes of your Rule 32 Petition that I have prejudged whether or not they rendered effective assistance of counsel, because I don't have the benefit of whatever -- all of this stuff you've raised in your petition.

Let's assume that everything that you've alleged in your Rule 32 Petition is true. And let's further assume that that rises to the level of ineffective assistance of counsel. I haven't done the breakdown. I've read everything that

y'all filed except for the amended petition, because you didn't want me to until I rule on this motion, so I haven't looked at it yet. But I can only speak to what I see, okay. Looks like a duck, sounds like a duck, I can say it's a duck. That doesn't mean that I'm prejudging something that I don't know about.

And what you're alleging in your Rule 32 Petition is that there are things they should have done that they didn't do. And I can't remember this, but I'm thinking there's some things, an instance where you've said that they should have done things differently, that they should have a called a witness to testify that they didn't call. How do I know that when I write that order? I don't know that. Nobody has raised it yet.

So what I'm telling you is just because I make an observation based on what I see doesn't mean that I don't have the ability to look at the whole and make a decision. And that's what you're saying here in this Motion to Recuse. And it was really nice of you, you're telling me you're not talking about my ability to serve, but, yes, you are. You're talking about my ability to perform my constitutional -- my obligation to the people of

this circuit.

MR. MULVANEY: Well, Judge, what I meant is I certainly don't mean to question your ability to serve generally. What I meant is that this a, you know, very specific inquiry on this specific case.

THE COURT: You're dang right. And these are the most -- these are the most intense cases that any trial court ever handles. Do you know how many I've done, by the way?

MR. MULVANEY: Not the exact number, Your Honor.

THE COURT: I figured you did.

MR. MULVANEY: Your Honor, but I think that the -- what you said about not knowing about the other evidence that happens outside court, I think that's what's so problematic about the statement this Court finds that McMillan's attorneys provided effective assistance throughout these entire proceedings, because that is our point. You know, that's a decision --

THE COURT: Well, that's good. Then we don't even have to have a Rule 32 proceeding then, do we? We could just rest on that comment and that statement and that finding in that Sentencing Order and I could dismiss this petition based on that, is

that the law?

MR. MULVANEY: Well, no, that's not the law, but that's the concern, Judge.

THE COURT: Well, that's what you're telling me.

MR. MULVANEY: No, that is the concern, that there was no reason for -- there was no reason at that point in time for a finding about the provision of effective assistance throughout the --

THE COURT: Did you read the Sentencing Order in this case?

MR. MULVANEY: Yes, Your Honor.

THE COURT: What, did I do a two-liner?

MR. MULVANEY: No, Your Honor. It's a lengthy 17 page Sentencing Order.

THE COURT: It sure is. It sure is. And it's got all different kind of things in it, doesn't it? It's got facts, it's got law, it's got observations, it's got all of that, doesn't it?

MR. MULVANEY: Well, and it has a finding about effective assistance of counsel.

THE COURT: Doesn't it have all of that other stuff, too?

MR. MULVANEY: Yes, Your Honor.

THE COURT: So you're pulling one sentence and

you're saying that shows that I can't rule on the case?

MR. MULVANEY: Well, I think it's an important sentence. I think it's an important paragraph, Your Honor.

THE COURT: I think it's an important paragraph, too. But once again -- and I'm going to quit arguing with you, because that's all I'm doing now is I'm arguing with you. I cannot rule on, I cannot write to anything that I haven't seen. I don't recall, and you maybe can tell me this, very many things in your petition, when we get to that, where you're alleging that things in the Courtroom were wrong. Although you probably, and I think you did, because most of these do, say, well, they should have objected to this and they didn't or they should have argued this and they didn't, they should have objected to the DA saying this and they didn't. You've probably got some of that in there.

MR. MULVANEY: There is a small -- there are objection allegations.

THE COURT: There's a small part in there, but my memory is most of your petition is based on things that were not -- that I did not observe with my own eyeballs.

MR. MULVANEY: Yes, Your Honor. And that's why the broad conclusion in the Sentencing Order is so troubling, that it's -- that they provided effective assistance --

THE COURT: Okay. One more time and I'm going to shut up and we're going to go home today. That is -- if what you're saying is true, we can dismiss this Rule 32 Petition, just take my Sentencing Order. I don't know how you do it on the second round of appeal, although I was affirmed on the first round, we don't need this. We don't need Rule 32 because the judge has already ruled. We can just let it go. And the defendant has no right to file a petition for post-conviction relief after they've been convicted raising ineffective assistance of counsel, the trial court did it at the front end, so we don't need this proceeding, is that what you're telling me?

MR. MULVANEY: No, that would be improper.

THE COURT: Why? You're telling me that I'm supposed to assign all of this weight to that limited question or that limited statement, yet it would be wrong if we didn't have this in place, wouldn't it?

MR. MULVANEY: No, I think what's proper,

Judge, is for there not to be a ruling about effective assistance in the trial court when the issue hasn't been raised.

THE COURT: Did appellate counsel raise that on direct appeal?

MR. MULVANEY: No, Your Honor.

THE COURT: You're raising it now.

MR. MULVANEY: Yeah, I'm raising it in the Rule 32 proceeding.

THE COURT: There you go. That's why we have it.

MR. MULVANEY: Well, no. I'm not raising it as an error, Your Honor. I'm raising it as the -- that because Your Honor made this conclusion in its Sentencing Order that --

THE COURT: Well, after I rule on this petition you can argue it all you want to for whatever it's worth.

MR. MULVANEY: But, Your Honor, I think that the -- back to what you were saying a moment ago that is it proper for -- you know, can we just end the proceedings? I think the answer is no, because the proper place to put on all of this new evidence is in Rule 32. But that's why --

THE COURT: You can raise it on direct appeal

if you have different counsel than trial counsel. Appellate counsel can raise it on direct appeal if they so choose. And honestly I cannot remember what the appellate brief is in this case right now, so I don't know if it was raised or not. I would imagine Judge Main would have addressed it if it had been.

MR. MULVANEY: But there has to be an opportunity in an evidentiary court to -- as Your Honor mentioned, to present the evidence that was not presented at trial. And because that is properly reserved for Rule 32, that's what we find problematic about the Sentencing Order and why I think it suggests that the Court including this statement in it's Sentencing Order when -- is a problem.

THE COURT: Got it, you disagree. And I disagree with you. I don't think that me including that language in there affects my ability to rule on the evidence and on the law in a Rule 32 Petition. As Mr. Houts pointed out, the rules in this state provide that Rule 32 petitions should go back to and be heard by the original trial judge and sentencing judge when -- if at all practicable. In the event that it's not practicable, then it

would go to the presiding judge, which I'm it, too, of the circuit, or another judge specifically assigned by the presiding judge. Now, that's the law in Alabama.

MR. MULVANEY: Yes, Your Honor. And the rule also provides for a transfer for good cause and we respectfully submit that all of these grounds, again the prejudgment issue doesn't stand alone, all of these together we respectfully request that there's good cause.

THE COURT: Once again, I'm going to say it the last time, I disagree with your statement that I have prejudged the issues in this petition because I have not. I have not.

MR. MULVANEY: I understand, Your Honor.

THE COURT: Very simple.

MR. MULVANEY: I understand, Your Honor. I understand Your Honor's position.

THE COURT: All right. Thank y'all.

MR. MULVANEY: And, Your Honor, I guess -- well, Judge, the one other thing I wanted to just come back to was the issue that I had mentioned earlier about in the event that the Court were to deny the Motion to Recuse, whether -- we had requested in the procedure's motion that in the

event that the Court were to deny the Motion to Recuse that we would respectfully request that the Court just stay the proceedings in the Circuit Court now, because the appeallate courts have held that immediate mandamus review is the way to challenge a ruling like that as opposed to -- in fact, there's a case called Blue versus State where a Rule 32 petitioner tried to appeal after the Rule 32 case and the Court of Criminal Appeals held that he couldn't do that, that he had to seek mandamus review, that was the only way that he could proceed. So we would just -- I know the Court -- in the event that the Court decides not to recuse, you know, we had the hearing also set for January 20th and we would just ask that in the event the Court decides not to recuse that the Court just postpone that proceeding and other actions in the case so that we can seek review.

THE COURT: Once I enter an order on the two issues before me today, I will enter any other further orders based on what you do next.

MR. MULVANEY: Okay.

THE COURT: You know, if I deny your motions and you file a mandamus, I will deal with it. If I deny your motions and you don't, we'll proceed with

the hearing. That's basically the way I try to run court.

MR. MULVANEY: Thank you, Your Honor.

THE COURT: Okay. Thank y'all.

MR. HOUTS: Since he did speak to it, Your Honor, there is nothing that says that you cannot have a mandamus and proceedings at trial. I mean, it's his choice to file a mandamus. If he does it, great, it's extra work for him, it's probably a little extra work for me, but he's going to have to show you something on paper, Your Honor, or show the appellate court something on paper that shows that a stay, an extraordinary remedy is appropriate. And we would like a chance to address that on paper as opposed to in open Court when the time comes, Your Honor.

THE COURT: Well, if that were to occur, I would certainly -- and a petition is filed, I would certainly give -- and he files a motion to stay, then I would certainly give y'all an opportunity to respond to it before I rule on it. All right. Thank y'all.

(Hearing recessed at 11:33 a.m. until Tuesday, March 10, 2015 at 9:10 a.m.)

THE COURT: This is Case Number CC-08-476.60,

APPENDIX G

IN THE CIRCUIT COURT OF ELMORE COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-2008-000476.60
	)	
MCMILLAN CALVIN	)	
Defendant.	)	

Order Granting Motion for Appointment of Counsel

Upon consideration of Petitioner Calvin McMillan's Motion for Appointment of Counsel, the motion is hereby GRANTED. Attorney Patrick Mulvaney, a member of the Alabama bar in good standing, is appointed to represent McMillan in this Rule 32 case.

This appointment shall apply to the filing, argument and representation on the Rule 32 Petition and Amended Rule 32 Petition only and any appeal from this Court's ruling(s) thereon. It does not apply to the Motion to Recuse and/or Petitions for Writ of Mandamus.

DONE this 10th day of March, 2015.

/s/ JOHN B. BUSH
CIRCUIT JUDGE

APPENDIX H

IN THE CIRCUIT COURT OF ELMORE COUNTY, ALABAMA

STATE OF ALABAMA,

Plaintiff,

vs. **CASE NO. CC-08-476**

CALVIN MCMILLAN,

Defendant.

SENTENCING ORDER

Calvin McMillan was indicted by the Elmore County Grand Jury on July 25, 2008 for two counts of capital murder; an intentional murder during the course of a robbery 1st degree and an intentional murder while the victim was inside a vehicle. On June 26, 2009, after approximately an hour and twenty minutes of deliberation, the jury returned verdicts finding McMillan guilty of both counts of capital murder.

The penalty phase was presented to the same jury, beginning on June 29, 2009. On June 30, 2009, after approximately three hours of further deliberation, the jury recommended a sentence of life without parole by a vote of eight to four.

A pre-sentence investigation report was ordered and has been received and considered by this Court. The Court has also considered the additional testimony and evidence offered at the sentencing hearing on August 7, 2009.

After considering the evidence presented at trial, the evidence presented at the sentencing hearing, the pre-sentence investigation report and after having independently weighed the aggravating and mitigating circumstances this Court has determined that McMillan should be sentenced to death.

General Findings Concerning the Crime

After a Montgomery Biscuit's baseball game on August 29, 2007, James Bryan Martin started home to be with his wife and two children; a son two years old and a daughter three months old. After speaking with his wife on his cell phone, he stopped at the new Millbrook Wal-Mart in Elmore County, Alabama just off of I-65 and Alabama Highway 14. After purchasing some diapers, a soft drink and some

Reese's candy he returned to his pick-up truck, a four door 2004 Ford F-150 with custom wheels and rims, to be confronted by Calvin McMillan. Martin got in his truck and attempted to leave. McMillan shot Martin with a 9 mm High Point pistol while Martin was seated in his truck. McMillan then pulled Martin out of the truck, threw him to the ground in the parking lot and shot him again. After he had shot James Bryan Martin four times, McMillan got in the truck and left the scene.

Earlier in the day McMillan had asked Rondarrell Williams to take him from Montgomery to the Millbrook Wal-Mart so that he could "peel a ride". Williams and McMillan took Williams' girlfriend to her home in Coosada, dropped her off and later, in her car, arrived at the Millbrook Wal-Mart. While Williams knew that McMillan intended to steal a car and knew that McMillan had a pistol, he did not know that McMillan intended to kill someone that night.

While Williams was inside the store, McMillan was scoping out the parking lot searching for his prey. He walked through the parking lot several times in a black t-shirt with a fluorescent green skull figure on front and skeleton likeness on back. He even propped himself at the front door and watched vehicles come and go. After having done this for several minutes and after having observed James Bryan Martin pull into the parking lot and go into the store, McMillan put on a red striped pullover shirt and waited for James Bryan Martin to come back out into the parking lot. After Martin returned to his truck he was shot four times and left in the parking lot to die in a pool of blood while McMillan fled from Millbrook in Martin's truck.

During the course of the night several BOLO's were issued by the Millbrook Police Department after having talked to witnesses and viewed the security video from the store.

The next morning, at approximately 9:30 a.m., Corporal Manora of Montgomery Police Department spotted and pulled in behind James Bryan Martin's truck. The driver of the truck pulled into a parking lot at Bridgecroft Apartments in Montgomery, jumped out of the truck and took off running.

Millbrook police were contacted and the truck was transported to the Alabama Bureau of Investigation where it was processed for fingerprints. Later, the

truck was turned over to Millbrook Police Department and it was driven to Millbrook where it was inventoried.

The truck was filled with Calvin McMillan's belongings. It contained bags with his clothes, shoes and hats; a karaoke machine and iron; and the black shorts that he had on at the time of the murder that contained an empty 9 mm shell casing in one pocket and a Reese's candy wrapper in another pocket. The black shirt with the fluorescent green skull on front and skeleton on back was located in the back floorboard of the truck. A "Wild Hogs" DVD that James Bryan Martin had rented and not yet returned to Movie Gallery was found in Calvin McMillan's bag with his other belongings as well as Martin's ownership and loan documents for the truck, one now containing Calvin McMillan's signature.

A High Point 9 mm pistol was located in the pocket behind the driver's seat under some of McMillan's clothes. The pistol contained four unfired rounds which, when tested, matched the shell casings located at the scene of the murder and the shell casing which was found in the pants. Also recovered were disposable cameras which contained pictures of Calvin McMillan with the gun and money lying on a bed as well as pictures of McMillan glaring into the camera, pointing the gun directly at it and making some kind of sign with his hand. Additionally, the photographs, among other things, showed the red striped shirt in a closet behind McMillan.

The same day that the truck was located on August 30, 2009, Calvin McMillan was arrested. After being confronted with the presence of his fingerprints in and around the truck during interrogation by Investigators Evans and Pelham at the Millbrook Police Department, McMillan stated that an individual named Melvin Browning had let him ride in the truck and was going to take him to Hardaway with all of his worldly possessions. He further stated that Browning had run off with all of his possessions and that he had intended to report that theft to the authorities. Melvin Eugene Browning was later located by investigators and testified and proved that he was in the Lee County Jail from August 28, 2007 through August 31, 2007.

Procedural History

As stated earlier, McMillan was indicted by an Elmore County Grand Jury in July 2008 for two counts of capital murder. The first count was the intentional murder of James Bryan Martin during the course of a robbery 1st degree in violation of Section 13A-5-40(a)(2). The second count was the intentional murder of James Bryan Martin while James Bryan Martin was inside a vehicle in violation of Section 13A-5-40(a)(17).

The guilt phase of this case began on June 23, 2009 after jury selection on June 22 and continued through June 26 when, after deliberating for approximately an hour and twenty minutes, the jury returned verdicts finding McMillan guilty on both counts of capital murder.

The State's case consisted of the evidence as outlined above as well as other evidence. The Defense called only one witness, Private Investigator Shannon Fontaine, who testified that there is a good supply of High Point 9 mm pistols in the Montgomery area available for purchase and similar to the one that was used to commit the murder in this case.

The penalty phase portion of this case was presented to the same jury on June 29 and 30.

The State presented evidence of the defendant's assault 3rd degree conviction out of Dallas County from December 20, 2006 and further presented testimony from James Bryan Martin's father and wife.

Thereafter, McMillan presented his penalty phase evidence consisting of testimony from his sister, his aunt, a social worker and his natural father. Additionally, the Defense called two expert type witnesses who testified regarding McMillan's background from a review of the Department of Human Resources' records, the forensic evaluation performed by Dr. Karl Kirkland pursuant to this Court's order for a mental evaluation, and interviews with McMillan's family. These witnesses testified regarding McMillan's poor and abusive upbringing and his history. After approximately three hours of deliberation on June 30, 2009, the jury

recommended a sentence of life imprisonment without the possibility of parole by an eight to four vote.

A final sentencing hearing was held on August 7, 2009 wherein additional witnesses testified on behalf of the State and Defense.

Finally, this Court notes that Mr. Kenny James and Mr. Bill Lewis ably represented McMillan. McMillan's attorneys were well prepared, diligent, and performed admirably in their defense of McMillan. Based on the overwhelming evidence against McMillan in this case and the eventual outcome, this Court finds that McMillan's attorneys provided effective assistance throughout these entire proceedings.

Aggravating and Mitigating Circumstances

I. Aggravating Circumstances

The State raised and this Court has considered only one statutory aggravating circumstance during the penalty phase of this case; that being that the capital offense was committed while the defendant was engaged in the commission of a robbery under Section 13A-5-49(4). Since this aggravator is identical to the capital murder conviction returned by the jury under count I, this Court treated it as "self-proved", meaning that the jury did not have to find that the State proved its existence beyond a reasonable doubt for a second time during the penalty phase.

Of all the aggravating and mitigating circumstances in this case, this Court places the most weight on the fact that McMillan intentionally killed James Bryan Martin while in the course of robbing him of his truck. Not only is the intentional murder of a human being in order to take their property from them morally and legally reprehensible, but also the commission of such an offense is so reprehensible that it is "double counted" under our law as a reason to make a murder capital and weigh as an aggravating circumstance in favor of the death penalty.

The facts in this case clearly establish that McMillan set out not only to take another person's vehicle but also to take their life as well. He calmly and coldly observed unsuspecting citizens while deciding which vehicle he wanted to take.

James Bryan Martin just happened to be in the wrong place at the wrong time while running an errand for his family and having a nice truck.

Not only did McMillan intentionally murder James Bryan Martin in the parking lot of the Millbrook Wal-Mart and drive away in his truck, but he also later signed his name to ownership documents attempting to convert the ownership of the truck to himself. McMillan even ate James Bryan Martin's Reese's candy and put James Bryan Martin's rented DVD with his own belongings.

Facts such as or very similar to these have supported the application of the death penalty many, many times. As a result, this Court weighs the fact that McMillan killed James Bryan Martin while robbing him of his truck and McMillan's actions leading up to and following the murder as weighing most heavily in favor of imposing the death penalty.

II. The Remaining Statutory Aggravators

As required by Section 13A-5-47(d), this Court must state the absence of the remaining statutory aggravating circumstances. This Court finds that the following aggravating circumstances do not exist and were not alleged by the State: 1) the capital offense was not committed by a person under sentence of imprisonment; 2) McMillan had not been previously convicted of another capital offense or a felony involving the use or threat of violence to the person; 3) McMillan did not knowingly create a great risk of death to many persons; 4) the capital offense was not committed for the purpose of avoiding or preventing a lawful arrest or affecting an escape from custody; 5) the capital offense was not committed for pecuniary gain; 6) the capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of the law; 7) the capital offense was not especially heinous, atrocious, or cruel compared to other capital offenses; 8) the defendant did not intentionally cause the death of two or more persons by one act or pursuant to one scheme or one course of conduct; and 9) the capital offense was not one of a series of intentional killings committed by the defendant. Since these aggravating circumstances were neither alleged nor proven, this Court assigns no weight to these factors.

The Mitigating Circumstances

As required by Section 13A-5-47(d), the Court must also consider and discuss each of the statutory mitigating circumstances, as well as the non-statutory mitigating circumstances alleged by McMillan. Because this case also involves a jury recommendation of life without parole, the Court must also discuss in detail its reason for overriding this mitigating factor.

I. Statutory Mitigating Circumstances

This Court finds the existence of two statutory mitigators. Those are that the defendant had no significant history of prior criminal activity and the age of the defendant at the time of the crime.

During the trial of this case the jury was informed that the defendant had been convicted of assault 3rd degree in December of 2006. The law of this state generally requires that misdemeanor convictions may not be considered for the purposes of negating this mitigator. However, the misdemeanor offense of assault 3rd degree can be used to negate the mitigating circumstance of "no significant history of prior criminal activity" because it is a crime of violence. Stallworth v. State, 868 So.2d 1128 (Ala. Crim. App. 2001).

Accordingly, even though McMillan has no prior felony convictions, the Court finds that this statutory mitigator is significantly diminished by his assault 3rd degree conviction.

Additionally, the Court may use a defendant's juvenile record to diminish the weight to be accorded the mitigating circumstance of that defendant's lack of significant history of prior criminal activity as well as the mitigating circumstance of that defendant's age at the time he committed the capital offense. Ex parte Carroll, 852 So.2d 833 (Ala. 2002). As stated elsewhere in this order, McMillan has a significant juvenile record consisting of adjudications of guilt in two cases of domestic violence 3rd degree, one case of assault 3rd degree, one case of menacing, one case of reckless endangerment, one case of theft 3rd degree and one case of burglary 3rd degree.

With regard to the statutory mitigator dealing with the age of the defendant at the time of the crime, the evidence has established that McMillan was 18 years of age at the time that he murdered James Bryan Martin. Therefore, this Court finds that this statutory mitigator does exist. However, based upon his juvenile record and other factors this Court assigns little weight to this factor.

Not only did McMillan have a juvenile record of violence, but he also possessed the pistol that the used to kill James Bryan Martin as well as ammunition for other weapons. McMillan also had been emancipated prior to committing this crime, had an adult conviction for assault 3rd degree and had obtained a job.

II. Remaining Statutory Mitigating Circumstances

In accordance with Section 13A-5-47(d), this Court must state that it finds that the remaining statutory mitigators do not exist in this case. Accordingly, based upon the evidence presented in this case, the Court finds that there is no evidence that the defendant was under the influence of extreme mental or emotional disturbance at the time that this capital offense was committed. To the contrary, it is clear that the defendant did have the ability to distinguish between right and wrong and was able to control his actions. The victim in this case, James Bryan Martin, was not a participant in the defendant's conduct nor did he consent to it in any way. McMillan was not an accomplice in this capital offense as he committed it. His participation was not relatively minor as he planned and carried out this murder robbery. There is no evidence that McMillan acted under extreme duress or under the substantial domination of another person. Further, McMillan clearly had the capacity to appreciate the criminality of his conduct and his ability to conform his conduct to the requirements of the law was not substantially impaired. Testimony provided from previous written reports of Dr. Karl Kirkland and Dr. Majure establish that McMillan does in fact know the difference between right and wrong and that he was aware of and in control of his behavior.

Non-Statutory Mitigating Circumstances

Under Section 13A-5-47(d), this Court must also consider each of the non-statutory mitigating circumstances argued by McMillan. In accordance with Section

13A-5-52, this Court recognizes that a non-statutory mitigating circumstance can include evidence concerning the defendant's character, life, or record; the facts of the crime; mercy for the defendant and any other relevant information for sentencing purposes.

This Court has considered all of the non-statutory mitigating evidence presented by McMillan. As outlined below, McMillan submitted testimony and argument to the jury on the following non-statutory mitigating circumstances: that he was raised in extreme poverty; that he was abandoned by his mother; that he was physically abused as a child; that he was raped as a child; that he was a witness to his mother's and sister's abuse; that he was raised in the home of an alcoholic/drug addict; that he did not get the treatment he needed; that he had no positive male role models; that he suffered from psychological and emotional difficulties; and that his intellectual functioning was in the borderline range.

As stated earlier, the Defense called a number of witnesses who testified during the penalty phase of this trial. McMillan's sister, Ella Torrance, testified that she, her sister and McMillan were basically left to fend for themselves by their alcoholic and drug addicted mother. Although Ms. Torrance and her sister were born while their mother lived in New York and abandoned them there, McMillan was not born until after they arrived in the Montgomery and Macon County area. They lived with her mother's abusive boyfriend and it was claimed that he physically abused the children as well as their mother by beating them and threatening to shoot them with a pistol. The mobile home that they resided in often did not have electricity nor did it have running water. Further, there was very little food available for the children to eat while they were growing up.

Ms. Torrance also reported that McMillan had been sexually abused by the son of their mother's boyfriend. It is noted however, that this report of sexual abuse is not documented in any record until McMillan reported it to Dr. Karl Kirkland during Dr. Kirkland's mental evaluation for the purposes of determining whether this case should proceed to trial.

McMillan's aunt, Carol Weaver Christian, testified to facts similar to those as testified by McMillan's sister, Ella Torrance. Ms. Christian took temporary custody

of these three children and attempted to raise them with her four children. However, the children had to go back into the custody of the Department of Human Resources, as Ms. Christian was unable to care for all of them. Since the trial, this Court has learned, based upon its review of McMillan's juvenile records, that his aunt also requested to be relieved of her temporary custody agreement because she could not govern McMillan's negative behavior

Mr. Teal Dick, a licensed professional counselor and director of the Alabama Family Resource Center, testified as well based upon his review of the records of the Department of Human Resources and his interviews with McMillan and some of McMillan's family members. Mr. Dick's testimony revealed that McMillan and his family's contact with the Department of Human Resources began in 1995. These records confirmed many of the same reports as testified to by McMillan's sister with regard to the living conditions and threats and abuse suffered by McMillan, his sisters and his mother.

By the time that McMillan was committed to foster care by the Department of Human Resources he was already aggressive and angry. Within a six-year period McMillan was in and out of twenty-five different homes and placements. At one point, one of his foster parents even tried to get him involved in YMCA basketball but he refused to do so.

Emma Cosby, also known as Emma Peoples, a social worker who had contact with McMillan through her work with SAFY, a therapeutic foster care organization, testified on McMillan's behalf as well. She stated that it was her opinion that "the system" had failed McMillan while he was growing up. However, in 2001 she tried to take steps to control his rebellious and aggressive behavior but was unsuccessful. She reported that McMillan had threatened she and a foster parent with what she later found out was an electric toothbrush. After seeking the intervention of law enforcement, in April 2001, McMillan further threatened Ms. Cosby by telling her that she would find her new born baby's head lying in a pool of blood when she got home. As a result of this behavior, McMillan was placed in the HIT program, which is a detention type setting. McMillan was enrolled in special education classes while

in school due to his tendency to threaten others and he was in fact removed from the Safety Net Residential Program after he assaulted another student.

Eddie Tucker, McMillan's biological father testified during the penalty phase as well. He established that he had very little contact with McMillan but would have been willing to take him in and raise him in his home if he had had the opportunity.

Dr. Kimberly Ackerson also testified on behalf of the Defense. Dr. Ackerson is a forensic psychologist with a private practice in Birmingham, Alabama. Dr. Ackerson reviewed the DHR records, met with the defendant and spoke with his aunt and sister. Dr. Ackerson did not do any testing of McMillan although she did review the report that was generated by Dr. Karl Kirkland who did. Dr. Kirkland, in his evaluation prepared for this Court, conducted a number of tests in arriving at his diagnostic impressions and an IQ score of 76 for McMillan.

Dr. Ackerson's testimony was basically a recap of the testimony of the other witnesses. She did, however, testify from the records that it had been determined by other professionals that McMillan knew the difference between right and wrong and that in 2001 Dr. Majure had reported that there was no evidence that McMillan was suffering from psychosis and that McMillan was aware of and in control of his behavior. She further acknowledged that her review of the records revealed that McMillan's alleged sexual abuse was first reported to Dr. Kirkland by McMillan at the time of his interview.

With regard to the Defense's claim of borderline intellectual functioning the Court notes that Dr. Kirkland's report established that McMillan has an IQ of 76. McMillan is not mildly retarded, but functions in the classification range immediately above the mild mental retardation as well as in the range of low average intellectual functioning. Dr. Kirkland, in his report, further stated that while McMillan functions on a fourth grade reading level, his intellectual functioning and social adaptive functioning were on a high borderline to low average intellectual level.

In reviewing and considering the non-statutory mitigating circumstances, as a whole, this Court assigns very little weight to them.

McMillan's sister, Ella Torrance, was raised in the same home and under the same conditions as he was. She graduated from school, owns her own car, has a good job, supports herself and has not been involved in any criminal conduct.

Jury's Recommendation

Finally, under Ex parte Carroll, 852 So.2d 833 (Ala. 2002), this Court addresses the mitigating factor of the jury's recommendation of a life sentence without the possibility of parole. In Carroll, the Supreme Court outlined the factors for judging the propriety of a jury's recommendation of life imprisonment without the possibility of parole:

> "the weight to be given that mitigating circumstance should depend upon the number of jurors recommending a sentence of life imprisonment without parole, and also upon the strength of the factual basis for such a recommendation in the form of information known to the jury, such as conflicting evidence concerning the identity of a "trigger man" or a recommendation of leniency by the victim's family; the jury's recommendation may be overridden based upon information known only to the trial court and not to the jury, when such information can properly be used to undermine a mitigating circumstance."

Additionally, the Supreme Court in Carroll took notice of "the circumstances of the crime (particularly that the defendant made no attempt to kill the witnesses to the crime)". Using these factors, this Court distinguishes this case and Carroll and will explain its decision for overriding the jury's recommendation.

Distinguishing Ex Parte Carroll

Carroll and Martin and the cases decided after them, mandate this Court to address its reasons for overriding the jury's advisory sentencing recommendation. Using the factors outlined in Carroll, the following distinctions are made:

A) Number of Jurors Recommending Life:

In Carroll, ten jurors recommended life without parole. Here, eight jurors made such a recommendation, one number greater than the statutory minimum to allow a life without parole recommendation.

Just as this Court is unable to read the minds of any witnesses or parties, likewise it is unable to read the minds of the jury. However, the Court had an opportunity to work with and observe these jurors for almost a week and a half.

Based on the overwhelming evidence in this case and the unanimous verdicts on both counts of capital murder, it is not easy to determine why eight members of the jury voted against the death penalty in this case. It is highly possible that fewer than eight jurors initially voted for life without parole and that the number of those jurors voting for life without parole only increased as they grew tired of the process and dealt with the weight that a death recommendation would have on each of them.

In the end, this Court is unable to specifically say why the jury was unable to follow the law to make a recommendation of death in this case. The only fact that is known, is that two more jurors ultimately voted for the death penalty in this case than in Carroll. The Court finds that that weighs in favor of an override of the jury's recommendation in this case; at least in comparison to Carroll.

B) Conflicting Evidence of the "Trigger Man":

While the facts in Carroll may have left some doubt as to the identity of the of the "trigger man", all of the evidence in this case points to McMillan as the perpetrator. As outlined in great detail earlier in this order, the State's evidence established beyond all reasonable doubt that McMillan intentionally murdered James Bryan Martin while robbing him of his truck. The jury unanimously returned a verdict in approximately an hour and twenty minutes finding that McMillan killed James Bryan Martin. If there was any residual doubt as to any other person's involvement in these murders, as there apparently was in Carroll, it is not founded upon the evidence presented at trial or in the jury's guilt phase verdicts. Accordingly, in comparison to Carroll, judicial override is proper in this case.

C) Recommendation of Victim's Family:

In Carroll, the victim's family recommended Carroll not receive the death penalty. No person from the Martin family has made any such recommendation in this case. In fact, members of James Bryan Martin's family were properly precluded from giving any testimony with regard to their recommendation of McMillan's sentence in one way or another. Accordingly, in comparison to Carroll, judicial override is proper in this case.

D) Facts of the Crime/Not Killing the Witnesses:

Although in Carroll, the defendant did not kill all the witnesses and the Supreme Court found that that factor weighed in favor of a life without parole sentence that is not the case here. The main witness to McMillan's robbery was James Bryan Martin and McMillan killed him so he could escape in Martin's truck. The surrounding circumstances of this crime did not afford McMillan with an opportunity to kill or not kill other potential witnesses. Accordingly, in comparison to Carroll, judicial override is proper in this case.

E) Additional Facts Unknown to the Jury:

Finally, Carroll also allows this Court to consider information known only to the trial court and not to the jury, when such information can properly be used to undermine a mitigating circumstance. This Court places substantial weight on this factor in this case.

This Court has had the benefit of working on this case since shortly after the Grand Jury returned the indictment. It has held numerous evidentiary hearings in preparation for the trial of this case. This Court has had an opportunity to observe McMillan's demeanor and conduct throughout these proceedings. He has shown no emotion nor has he indicated any remorse whatsoever.

In the course of preparing the mental evaluation Dr. Karl Kirkland interviewed McMillan. McMillan concocted a story about a "drug deal gone bad" when relating the facts of this case to Dr. Kirkland. Obviously, the evidence presented in this case including the video evidence in no way support such a story.

During the penalty phase of this case the jury was informed that McMillan had been convicted of assault 3rd degree on December 20, 2006 in Dallas County. The jury was not told that the facts supporting this crime to which McMillan pled

guilty, established that McMillan was chasing another student at the Safety Net Program, caught up with him and pushed him to the ground injuring his knee because the other student had told on McMillan for choking him.

Additionally, McMillan has a substantial juvenile record dating back to the age of 12. During the almost six years between December 8, 2000 and November 1, 2006 McMillan was adjudicated guilty in two cases of domestic violence 3rd degree, one case of assault 3rd degree, one case of menacing, one case of reckless endangerment, one case of theft 3rd degree and one case of burglary 3rd degree. Of these seven offenses, only two of them are non-violent offenses.

McMillan's domestic violence adjudications both involved altercations that he had with one of his foster parents, Wilhemenia Boykin. On two occasions he hit her in the head and shoulder and in another he threatened to kill her. Twenty-nine months later he was adjudicated guilty of reckless endangerment, menacing and assault 3rd degree arising out of him shooting a "BB" gun at students at Loachapoka High School, shooting at one young man specifically and shooting a young lady in the thigh.

McMillan has been incarcerated in the Elmore County Jail since his arrest in this case. During this time he has assaulted at least two different inmates. One of those has been assaulted with a bar of soap inside a sock and a second one was cut on his right eye, shoulder and hand using a jail made "shank". During the trial of this case and on July 8, 2009, jail made handcuff keys were found in McMillan's constructive possession. Additionally, a few weeks before trial the lock on McMillan's cell door was found bent so that the door would not close and lock correctly.

In addition to these facts, shortly after McMillan and his co-defendant Rondarrell Williams were arrested, McMillan sent a letter to Williams telling him to lie about what happened. In September 2008 McMillan threatened Williams' life and the life of his family if Williams testified against him in this case.

Since none of the factors listed by the Alabama Supreme Court in Carroll "tips the scales in favor of following the jury's recommendation" this Court finds no legal prohibition for overriding the jury's recommendation.

These facts significantly diminish the statutory and non-statutory mitigating circumstances that have been presented in this case.

Justification For Override

Under Alabama Law the trial judges are required to make the ultimate determination with regard to sentencing. In Harris v. Alabama, 513 US 504 (1995), the Supreme Court of the United States held:

> "the Constitution permits a trial judge, acting alone, to impose a capital sentence. It is thus not offended when a state further requires a sentencing judge to consider a jury's recommendation and trust a judge to give it the proper weight."

This responsibility of making this decision has been placed upon the trial judge's of this state in general and this Court in particular by the legislature through the Alabama Criminal Code.

This Court has had the opportunity to try and impose the sentence in a number of capital murder cases over the last twenty-two years and eight months. In some of these cases, this Court has imposed death. In others, it has imposed a sentence of life without parole. In each of these cases this Court has followed the recommendation of the jury. In this case however, the Court finds that a proper weighing of the aggravating circumstance and mitigating circumstances does not support a sentence of life without parole.

The Court is aware of many cases in Alabama over the years where the death penalty has been upheld as the appropriate punishment for the capital offense of an intentional murder during the course of committing a robbery 1st degree. In fact, this Court has been affirmed most recently on direct appeal of Charlie Washington v. State of Alabama, 922 So.2d 145(Ala. Crim. App. 2005) cert denied June 16, 2005 Ala. S. Ct., cert denied, Washington v Alabama, 546 US 1142(2006) in its imposition of a death sentence after Washington was convicted of an intentional murder during a robbery 1st degree. Additionally, the Court of Criminal Appeals in Bush v. State,

2009 WL 1496826 (Ala. Crim. App. 2009) again affirmed the trial court in ruling on a Rule 32 appeal when the trial court sentenced the defendant to death after having received a life without parole recommendation from the jury with a twelve to nothing vote. Further, in Ferguson v. State, 2008 WL 902901 (Ala. Crim. App. 2008) the trial court was again affirmed on a review of a Rule 32 appeal on a robbery murder when the trial judge sentenced the defendant to death after receiving a jury recommendation of life without parole by a vote of eleven to one.

No juror is in a position to compare this case with other capital cases as they do not have the resources and benefit of the decisions from the appellate courts nor the personal experience received by trying and deciding these types of cases. When this Court compares the facts of this case to similar cases there is little question that "when compared to other cases with similar facts, a sentence of death is not in any way a disproportionate sentence".

Conclusion

This Court has sworn an oath to uphold the law of this state, and this is a duty that it does not take lightly. This Court will continue, to best of its ability, follow the law of this state and of this country.

The law as it applies to this case requires the Court to weigh the aggravating circumstance against the mitigating circumstances, which includes the jury's recommended sentence of life without parole.

This Court has fulfilled that duty and has considered each of McMillan's mitigating factors as set forth above and all the evidence presented by McMillan at trial, during the penalty phase of this case and at the final sentencing hearing. This Court has also given great consideration to the jury's recommendation and considers it to be the heaviest mitigator in this case. After taking all of these factors into consideration this Court cannot find that the mitigating circumstances outweigh the aggravating circumstance of the intentional killing of an innocent victim while in the course of robbing him for his truck. Facts similar to these have led to a sentence of death in many cases. Accordingly, this Court finds that the sentence in this case should be death.

It is therefore ORDERED, ADJUDGED and DECREED that the defendant, Calvin McMillan, is adjudged guilty of one count of capital murder pursuant to Section 13A-5-40(a)(2) of the intentional murder of James Bryan Martin during the course of a robbery 1st degree and the defendant, Calvin McMillan is further adjudged guilty of one count of capital murder under Section 13A-5-40(a)(17) capital offense of the intentional murder of James Bryan Martin while James Bryan Martin was inside a vehicle.

It is further ORDERED, ADJUDGED and DECREED that pursuant to Section 15-18-68 Code of Alabama, 1975, as amended in Act #2009-632, the Defendant shall pay restitution in the amount of $100,000.00.

It is further ORDERED, ADJUDGED and DECREED that for the capital offenses for which he has been adjudicated guilty, the defendant, Calvin McMillan, is hereby sentenced to death by lethal injection. Pursuant to Alabama Rules of Appellate Procedure 8(b)(1), the date of execution is to be set by the Alabama Supreme Court at the appropriate time. The Defendant is to be remanded to the custody of the Alabama Department of Corrections to await execution of his sentence.

DONE and ORDERED this 7th day of August 2009.

JOHN B. BUSH
Circuit Judge