No. 18-_____

IN THE
SUPREME COURT OF THE UNITED STATES

DAVID WILSON,
Petitioner,
v.

STATE OF ALABAMA,
Respondent.

On Petition for Writ of Certiorari
to the Alabama Supreme Court

PETITION FOR WRIT OF CERTIORARI

CAPITAL CASE
NO EXECUTION DATE SET

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QUESTIONS PRESENTED

1. In December 2007, David Wilson was tried for the beating death of Dewey Walker, a crime that occurred in 2004 when Mr. Wilson was twenty years old. The prosecution sought the death penalty.

At trial, the prosecution presented a statement from Mr. Wilson, admitting to hitting the victim only once. However, the prosecution presented forensic evidence of numerous other injuries Mr. Walker suffered and argued that Mr. Wilson alone was responsible. Mr. Wilson was convicted of capital murder and sentenced to death.

But the prosecution failed to provide two key items of evidence to the defense: (1) a confessional letter written by a co-defendant, admitting she struck the victim with a baseball bat until he fell; and (2) a handwriting expert's report validating this confession. Although the letter was discussed in a police report provided to the defense, Mr. Wilson's trial attorneys did not make efforts to obtain it.

In *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, this Court has established that a co-defendant's confession must be provided to the defense even absent a request. Nevertheless, the Alabama Court of Criminal Appeals ("CCA") denied Mr. Wilson relief, ruling that trial counsel should have sought the confession at the time of trial, but also ruling that they were not ineffective for failing to do so.

These circumstances present the following questions to this Court:

> Whether the prosecution's failure to provide *Brady* evidence is excused by trial counsel's lack of diligence in pursuing that evidence, and whether Mr. Wilson's counsel were ineffective in failing to obtain the evidence.

2. In *Kaupp v. Texas*, this Court found that the defendant had been illegally arrested in his home, where the police had no warrant and no probable cause, but entered his home *en masse* in the early morning hours when he was asleep, told him he "needed to talk," and removed him to the police station in handcuffs in a police vehicle. 538 U.S. 626, 628 (2003). Probable cause was absent because the only information inculpating Kaupp at the time of arrest was a co-defendant's confession implicating him in a murder. *Id.* at 628 n.1. The decision in *Kaupp* relied in part on this Court's prior decision in *Wong Sun v. United States*, in which this Court also found a lack of probable cause where two co-defendants of Wong had both implicated him in drug dealing. 371 U.S. 471, 491 (1963).

Despite the virtual identity of facts surrounding Mr. Wilson's arrest and the basis for probable cause, or lack thereof, with Kaupp's as detailed above, his counsel failed to attack the admissibility of his statement on this ground. The CCA found Mr. Wilson's counsel not ineffective because, it held, co-defendant statements, standing alone, supply probable cause.

Thus, the question presented here is:

> Where a defendant is arrested in circumstances indistinguishable from those described in *Kaupp*, can probable cause to excuse the illegality of the arrest be supplied by the uncorroborated, unsworn statement of a co-defendant, where the co-defendant's veracity is unknown to the police and the co-defendant, while admitting some culpability, shifts the blame for the most egregious conduct to the defendant? And is defense counsel ineffective for failing to argue the applicability of *Kaupp* where the circumstances of the arrest and probable cause are virtually identical?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner David Wilson respectfully requests that this Court grant his petition for a writ of certiorari to review the judgment of the Alabama Supreme Court denying certiorari of the ruling by the Alabama Court of Criminal Appeals, denying his petition for post-conviction relief from his unconstitutionally obtained convictions and sentence.

OPINIONS BELOW

The judgment of the Alabama Supreme Court denying Mr. Wilson's petition for a writ of certiorari to the Alabama Court of Criminal Appeals was entered on August 24, 2018, and is attached as App. A. The last reasoned state court decision was that of the Alabama Court of Criminal Appeals, which denied Mr. Wilson relief on March 9, 2018. That decision is attached as App. B.

JURISDICTION

The Alabama Court of Criminal Appeals issued its initial judgment on March 9, 2018. *See* App. B. That court overruled a timely application for rehearing on May 4, 2018. *See* App. C. Mr. Wilson timely petitioned the Alabama Supreme Court for a writ of certiorari, and that court affirmed the judgment of the Alabama Court of Criminal Appeals by denying certiorari on August 24, 2018. *See* App. A. Petitioner applied for an extension of time to file a petition for writ of certiorari in this Court until January 21, 2019, which Justice Thomas granted on November 9, 2018. *See* App. D. Petitioner invokes this Court's jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person ... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law ....

The Sixth Amendment to the United States Constitution provides in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right ... to have the assistance of counsel for his defense.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall ... deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On April 13, 2004, Dewey Walker was found dead in his home. (Tr. R. 239, 245.)[1] A van with valuable audio equipment was missing. (Tr. R. 222, 228-29.) Police questioned Matthew Marsh as a suspect that night (C. 707), as an associate of Mr. Walker's son (C. 706-7) and the driver of a blue GEO Metro (*id.*), the model of car a neighbor had seen at Mr. Walker's house during the past week (C. 706).

Marsh admitted having Mr. Walker's van and some audio equipment, but denied involvement in the killing. (C. 707.) He implicated three others: Michael Jackson, David Wilson, and Catherine Nicole Corley. (*Id.*) The police arrested Marsh and Jackson before Mr. Wilson and Corley after. (C. 611-12) (police reports recording times of arrest).

Police arrested David Wilson the following morning at about 4 a.m. in his home without a warrant. (Tr. R. 375; Tr. R-Supp. 7.) At least five officers entered his home. (Tr. R-Supp. 9.) He was rousted out of bed and told "we needed to talk ... he needed to come ...." (Tr. R-Supp. 12.) He was brought to the police station in a police vehicle and in handcuffs within minutes of being awakened (Tr. R-Supp. 12, 14, 31) and interrogated by Sergeant Luker and Corporal Etress (Tr. R. 400; Tr. R-Supp. 15). A

[1] "C." refers to the clerk's record in state post-conviction proceedings. "R." refers to the hearing on the State's Motion to Dismiss held on November 8, 2016. "Tr. C." and "Tr. R." refer to the clerk's trial record and the trial transcript prepared on direct appeal respectively. "Tr. R-Supp." refers to the transcript of the suppression hearing held on October 9, 2007, and "Tr. R-Sent." refers to the judicial sentencing hearing held on January 8, 2008.

bare minute was spent administering the *Miranda*[2] warnings. (Tr. R-Supp. 18.) Police did not record the first hour. (Tr. C. 412, 498). They then interrogated Mr. Wilson on tape for half an hour, but the recording stopped ten to fifteen minutes before the interrogation ended. (Tr. R-Supp. 20-22.)

In the recorded portion of his statement, Mr. Wilson said that Marsh instigated the crime by begging him to go to Mr. Walker's house to steal things. (Tr. C. 500.) Mr. Wilson stated that while he was in the house, Mr. Walker unexpectedly came home. (Tr. C. 504.) Mr. Walker heard Mr. Wilson in the house and grabbed a knife. (Tr. C. 505.) Mr. Wilson swung at Mr. Walker's arm with a bat attempting to dislodge the knife, but missed and hit him in the back of the head. (*Id.*) Mr. Walker struck a corner of the wall as he fell. (Tr. C. 505-6.) Mr. Walker stood up, still with the knife in hand. (Tr. C. 506.) Mr. Wilson choked Mr. Walker to get him to drop the knife. (Tr. C. 506-7.) Mr. Wilson called Marsh and then retreated. (Tr. C. 507-8.) At least one of Mr. Wilson's co-defendants, Corley, came to Mr. Walker's house shortly after the struggle. (Tr. C. 510.) She went to look at Mr. Walker in the kitchen, but Mr. Wilson refused to accompany her. (Tr. C. 510-11.)

Sgt. Luker obtained a search warrant based on Mr. Wilson's statement, his own observations during the arrest, and information purportedly from Corley. (Tr. C. 402-3.) The statement attributed to Corley in the search warrant affidavit signed by Sgt. Luker (Tr. C. 403) does not agree with her recorded statement (C. 624-32). Sgt.

[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

Luker did not participate in Corley's interrogation. (C. 624.) The search recovered some of the audio equipment. (Tr. C. 405.)

On June 18, 2004, a Houston County, Alabama, grand jury indicted David Wilson on two counts of capital murder: Murder during a Burglary, Ala. Code 1975, § 13A-5-40(a)(4), and Murder during a Robbery, *id.*, § 13A-5-40(a)(2). (Tr. C. 20, 22.)

Some months after the arrests, the District Attorney ("DA") obtained a letter from Corley in which she confessed that she "hit Mr. Walker with a baseball bat until he fell." (C. 615.) Sgt. Luker seized other handwriting samples from Corley's cell (*id.*), and the DA submitted these to a handwriting expert with the United States Postal Service ("USPS") (C. 634-37). The expert opined the letter and materials from Corley's cell were probably written by the same person. (C. 636.) This investigation was recorded in a police report disclosed to defense counsel. (C. 615.) However, the letter itself and expert reports were not turned over to the defense. Neither did defense counsel investigate Corley's culpability by pursuing disclosure of the letter from the DA or by searching her casefile in the clerk's office.

Counsel filed two suppression motions lifted from a trial handbook without supplying any facts from Mr. Wilson's case. *Compare* (C. 691-94) *with* (C. 696-704) *and* (C. 722-25) *with* (C. 727-30). The motion to suppress Mr. Wilson's statement never mentioned that the police had no warrant. (C. 691-94.) *Kaupp* was cited only for the principle that a consensual encounter can become coercive. (*Id.*) There was no application of *Kaupp*, to the facts here. A suppression hearing was held two months

before trial. (Tr. R-Supp. 2) (date of suppression hearing, Oct. 9, 2007) and (Tr. R. 2) (date of trial, Dec. 3, 2007). Sgt. Luker testified at length to the facts surrounding the arrest of Mr. Wilson, but gave virtually no evidence concerning probable cause, such as police familiarity with Mr. Wilson's co-defendants or any details of their statements. *See* (Tr. R-Supp. 6-65). He also provided no reason for omitting to obtain an arrest warrant. Defense counsel presented no evidence respecting characteristics of Mr. Wilson, even though they had a Youthful Offender Report, showing he had just turned twenty at the time of the crime and had no prior criminal history. (Tr. C. 34-40.) At the conclusion of the evidence, they made no argument at all. (Tr. R-Supp. 67.) The trial court denied both motions without explanation. (*Id.*)

Trial began on December 3, 2007. (Tr. R. 2.) At trial, the State's theory was that Mr. Wilson went to Mr. Walker's house alone and that, when Mr. Walker returned home, Mr. Wilson hit him with a bat and choked him. (Tr. R. 191-96.) The evidence supporting this theory was Mr. Wilson's statement to police (Tr. R. 383) and the audio equipment seized from his residence (Tr. R. 206-07). A pathologist described a multitude of injuries sustained by Mr. Walker. (Tr. R. 497.) None of the co-defendants testified. Corley's letter was not mentioned.

Defense counsel did virtually nothing during trial. They gave a brief opening setting out no theory of defense. (Tr. R. 208-15.) They asked potentially relevant questions, but failed to follow up. They either made no objection or made objections on unsupported grounds against unqualified testimony of Sgt. Luker and otherwise

failed to counter a proliferation of "facts" not in evidence. They called no witnesses (Tr. R. 593-94) and gave no closing (Tr. R. 625-28).

The jury convicted Mr. Wilson of both counts of capital murder on December 5, 2007. (Tr. C. 354-55.) Following a 15-minute break (Tr. R. 673-74), a penalty phase was held during which defense counsel presented only two lay witnesses (Tr. R. 689-796). The jury returned a 10-2 verdict in favor of death. (Tr. C. 356.) On January 8, 2008, the judge held a sentencing hearing and sentenced Mr. Wilson to death. (Tr. R-Sent. 15.)

Mr. Wilson fared no better on appeal. Appellate counsel raised no *Brady* issue. They raised issues related to his arrest and the admissibility of his statement, *see* (C. 532-34) and (C. 527-31), but again failed to argue a lack of probable cause for the arrest or the involuntariness of the statement arising from the conditions of the arrest and characteristics of Mr. Wilson. They did not cite to *Kaupp*. All relief was denied by the CCA, *Wilson v. State*, 142 So. 3d 732 (Ala. Crim. App. 2010), and the Alabama Supreme Court denied certiorari, *Ex parte Wilson*, No. 1111254 (Ala. Sept. 20, 2013).

Mr. Wilson filed a timely petition for post-conviction relief pursuant to Rule 32, Ala. R. Crim. P., on September 19, 2014. (C. 2.) That petition contained a claim under *Brady v. Maryland* based on the failure to produce Corley's confessional letter and the expert reports related to it; a companion claim of trial counsel ineffective assistance for failing to investigate the Corley letter and her culpability; a claim of trial counsel ineffectiveness for failing to challenge the legality of his arrest, the

absence of probable cause, and the inadmissibility of his confession and all items seized in the search of his residence as fruit of the poisonous tree, or alternatively the involuntariness of his confession, on the grounds set out in his Rule 32 petition; and related claims of appellate counsel ineffectiveness on the arrest and voluntariness issues. (*Id.*) The State filed a motion to dismiss all the claims on various pleading grounds. (C. 93-132.) The court held oral argument on the State's Motion to Dismiss on November 8, 2016 (R. 1), and denied the petition in its entirety on February 24, 2017 (C. 1524).

Mr. Wilson timely appealed on April 6, 2017 (C. 1862), raising all of the above issues. The CCA denied all relief on March 9, 2018. *See* App. B. The court held the *Brady* claim procedurally barred because the existence of Corley's letter was disclosed in a police report included in discovery, though the letter itself was not, such that the claim could have been raised at trial or on direct appeal. *Id.* at 9. The court wrapped the expert report into the issue of non-disclosure of the Corley's letter, even though it was not mentioned in the police report. The court further denied the related ineffective assistance of counsel claim by holding, contrary to *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Holmes v. South Carolina*, 547 U.S. 319 (2006), that the letter would not be admissible, because it would not fully exonerate Mr. Wilson from all criminal responsibility. App. B at 21. The claim of ineffectiveness for failing to challenge the legality of Mr. Wilson's arrest and the admissibility of his statement and the evidence seized from his home was denied based on the CCA's

finding that counsel could not be ineffective for failing to argue the applicability of *Kaupp*, since the police had probable cause based on the co-defendants' statements alone, obtained by police before Mr. Wilson's arrest. *Id.* at 13-16.

Mr. Wilson applied for rehearing, which was denied on May 4, 2018. *See* App. C. He then sought certiorari in the Alabama Supreme Court on May 17, 2018, again on all of the above issues, but the writ was denied on August 24, 2018, *see* App. A.

GROUNDS SUPPORTING THE WRIT

I. The prosecution violated *Brady v. Maryland* by withholding a co-defendant's confession, and the expert report validating that confession.

At Mr. Wilson's trial, the prosecution presented a statement he had given to police. (Tr. R. 419-21.) In the statement, Mr. Wilson admitted striking Mr. Walker in the head by accident, while aiming to disarm him of a knife, and choking him until he "passed out." (Tr. C. 505-7.) Mr. Wilson acknowledged that Mr. Walker had struck his head on a jutting corner of the wall when he fell. (Tr. C. 505-6.)

Mr. Wilson did not confess to any other assaults. However, the State's pathologist testified that numerous other injuries were inflicted on Mr. Walker. (Tr. R. 497.) The prosecution argued that Mr. Wilson alone inflicted all of these injuries. (Tr. R. 606-7, 609-10, 612, 623.)

The prosecution violated Mr. Wilson's constitutional right to exculpatory evidence by (1) withholding a confessional letter written by his friend and co-defendant, Catherine Corley, in which she admitted striking Mr. Walker with a

baseball bat; and (2) withholding a handwriting expert's report validating the letter. (C. 241-54.)

In the letter, Corley stated that she "hit Mr. Walker with a baseball bat until he fell."[3] (C. 615.) This confession explains the multiple blunt-force injuries to Mr. Walker, and is consistent with Mr. Wilson's statement that he struck a single blow, but then withdrew. The existence of the letter and the circumstances under which the State obtained it were described in a police report included in discovery. (*Id.*) The letter itself was not produced.

The State submitted the letter to a handwriting expert with the U.S. Postal Service, who confirmed that the letter was most likely written by Corley. (C. 634-37.) No mention was made of this report in any discovery materials; it was discovered years later by post-conviction counsel, in Corley's casefile in the Houston County clerk's office.

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), this Court held that a defendant's constitutional rights were violated by the prosecution's failure to disclose his co-defendant's confession. The State's failure to disclose this very evidence in this case is a clear violation of the three-part test for *Brady* claims. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999) ("There are three components of a true *Brady* violation: The evidence at issue must be favorable to the accused, either because it is

[3] According to Mr. Wilson, he was not present while Corley went to see Mr. Walker. (Tr. C. 510.)

exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued.").

A. In denying relief to Mr. Wilson, the state court improperly shifted the onus of *Brady* from the prosecution to the defense.

The CCA rejected Mr. Wilson's *Brady* claim, concluding that Mr. Wilson was procedurally obligated to have raised this claim at trial or on direct appeal. App. B at 9. However, as noted above, Mr. Wilson was not aware of the existence of the handwriting expert's report at the time of trial. This critical evidence, which authenticated his co-defendant's admission to beating Mr. Walker, was discovered by post-conviction counsel during collateral proceedings.

Likewise, Corley's letter was never turned over to the defense. The CCA faulted Mr. Wilson for his trial attorneys' failure to request the letter, but under this Court's *Brady* precedents, such exculpatory evidence must be provided whether the defense requests it or not. *See United States v. Agurs*, 427 U.S. 97, 110 (1976) ("[T]here are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to be disclosed even without a specific request."); *see also Kyles v. Whitley*, 514 U.S. 419, 432 (1995) (noting that prosecutors have an "affirmative duty to disclose evidence favorable to a defendant").

The state court's analysis, which places the burden on the defendant to pursue the *Brady* evidence, is contrary to this Court's guidance. As this Court has recognized, defendants have no "procedural obligation to assert constitutional error on the basis

of mere suspicion that some prosecutorial misstep may have occurred." *Strickler*, 527 U.S. at 286. "A rule thus declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." *Banks v. Dretke*, 540 U.S. 668, 696 (2004).

B. The state court's ruling conflicts with the decisions of other courts applying *Brady*.

In denying Mr. Wilson's claim, the CCA effectively added a fourth element to the *Brady* standard: that the defendant must have been diligent in seeking the favorable evidence in order to obtain relief. However, since this Court announced the three-part test for *Brady* claims in *Strickler*, numerous courts have convincingly rejected diligence as a requirement for *Brady* claims.

For instance, in *People v. Chenault*, 845 N.W.2d 731 (Mich. 2014), the Michigan Supreme Court overruled its prior precedent and rejected a diligence requirement. The court reasoned that a diligence requirement was not "consistent with or implied by United States Supreme Court precedent[,]" and was not "consistent with the *Brady* doctrine generally." 845 N.W.2d at 737. "The *Brady* rule is aimed at defining an important prosecutorial duty; it is not a tool to ensure competent defense counsel. Adding a diligence requirement to this rule undermines the fairness that the rule is designed to protect." *Id.* at 738.

In *State v. Reinert*, 419 P.3d 662, 665 n.1 (Mont. 2018), the Montana Supreme Court also "abandoned the diligence factor ...." *State v. Ilk*, 422 P.3d 1219, 1226

(Mont. 2018). The court explained that "the diligence factor was inconsistent with federal law and unsound public policy." *Id.* at 1226.

Similarly, in *Dennis v. Secretary, Pennsylvania Department of Corrections*, 834 F.3d 263 (3d Cir. 2016), the *en banc* Third Circuit refused to impose a diligence requirement with respect to a habeas petitioner's *Brady* claim. Citing *Agurs*, the court noted that "the duty to disclose under *Brady* is absolute – it does not depend on defense counsel's actions." 834 F.3d at 290. "Requiring an undefined quantum of diligence on the part of defense counsel ... would dilute *Brady*'s equalizing impact on prosecutorial advantage by shifting the burden to satisfy the claim onto defense counsel." *Id.*

In light of this Court's decisions in *Strickler* and *Banks*, other federal circuit courts have reached the same conclusion. *See Amado v. Gonzalez*, 758 F.3d 1119, 1135 (9th Cir. 2014) ("The prosecutor's obligation under *Brady* is not excused by a defense counsel's failure to exercise diligence with respect to suppressed evidence."); *United States v. Tavera*, 719 F.3d 705, 712 (6th Cir. 2013) ("declin[ing] to adopt the due diligence rule[,]" although "[p]rior to *Banks*, some courts, including the Sixth Circuit ... were avoiding the *Brady* rule and favoring the prosecution with a broad defendant-due-diligence rule").

And in a much earlier case, *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995), the Tenth Circuit also rejected the due diligence argument. The court determined that "the fact that defense counsel 'knew or should have known' about the [evidence,]

is irrelevant to whether the prosecution had an obligation to disclose the information." 54 F.3d at 1517.

As these cases reflect, the imposition of a diligence requirement on the defendant – as the CCA has ruled in this case, and as other courts have ruled[4] – is simply inconsistent with this Court's three-prong *Brady* test, which requires no such diligence. Instead, the focus of *Brady* is always on the prosecutor's duty to disclose favorable evidence, not defense counsel's pursuit of such evidence.

C. In the alternative, Mr. Wilson's trial attorneys were ineffective in failing to investigate and obtain his co-defendant's confession.

In addition to his substantive *Brady* claim, Mr. Wilson also asserted that he was deprived of effective assistance of counsel under the Sixth Amendment by his trial attorneys' failure to investigate and obtain Corley's confession. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984). As the CCA noted on direct appeal, "[t]he results of the autopsy conflicted with Wilson's account of a single, accidental blow to Walker's head." *Wilson v. State*, 142 So. 3d 732, 750 (Ala. Crim. App. 2010). Corley's

[4] *See, e.g., United States v. Parker*, 790 F.3d 550, 561-562 (4th Cir. 2015) ("[W]hen exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine." (internal citation omitted)); *Commonwealth v. Spotz*, 896 A.2d 1191, 1248 (Pa. 2006) ("It is well established that no *Brady* violation occurs where the parties had equal access to the information or if the defendant knew or could have uncovered such evidence with reasonable diligence." (internal citation omitted)); *Maharaj v. Sec'y for Dept. of Corr.*, 432 F.3d 1292, 1315 (11th Cir. 2005) ("Our case law is clear that where defendants, prior to trial, had within their knowledge the information by which they could have ascertained the alleged *Brady* material, there is no suppression by the government." (internal citation omitted)).

confession was therefore critical to Mr. Wilson's defense, as it provided an alternative explanation for the additional injuries presented at trial.

As discussed above, Corley's confession was never provided to the defense. The defense was given police reports, including one which discussed her letter. Mr. Wilson's trial attorneys failed to follow up on this information, never obtained a copy of Corley's letter, and never discovered the handwriting expert's report validating the letter.

In evaluating the reasonableness of counsel's investigation, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins v. Smith*, 539 U.S. 510, 527 (2003). Here, the police report should have prompted Mr. Wilson's trial attorneys to obtain Corley's confession and present this crucial evidence at his capital murder trial.

As with Mr. Wilson's *Brady* claim, the CCA also denied this ineffective assistance claim. App. B at 17-21. The state court ruled that Corley's confession would be inadmissible because it "would not exclude Wilson as the perpetrator of capital murder." *Id.* at 21. This ruling directly contradicts this Court's decisions in *Chambers v. Mississippi*, 410 U.S. 284 (1973), and *Holmes v. South Carolina*, 547 U.S. 319 (2006), which establish that mechanistic procedural rules cannot preclude evidence that another person committed the crime.

The state court's ruling is also contrary to *Brady*. In *Brady*, as in this case, both defendants were participants in the crime. *See* 373 U.S. at 84 ("At his trial Brady took the stand and admitted his participation in the crime, but he claimed that Boblit did the actual killing. And, in his summation to the jury, Brady's counsel conceded that Brady was guilty of murder in the first degree, asking only that the jury return that verdict 'without capital punishment.'"). Nevertheless, this Court held that evidence that the co-defendant was *more culpable* should have been provided to Brady, as it was favorable to his defense. *Id.* at 87.

In this case, the co-defendant's confession evinces greater culpability and is likewise favorable to Mr. Wilson's defense. Corley's admission to striking Mr. Walker numerous times with a bat bolsters Mr. Wilson's defense of striking only a single blow and casts doubt on the question of his specific intent to kill, a necessary element of capital murder. *See* Ala. Code 1975 §§ 13A-5-40(b), 13A-6-2(a)(1) (requiring specific intent to cause death). The confession would also have been relevant to the jury's determination of the appropriate punishment for Mr. Wilson: death or life imprisonment.

The exclusion of a co-defendant's confession, unless the co-defendant was the sole participant in the crime, is plainly unconstitutional under this Court's precedents. *See, e.g., Washington v. Texas*, 388 U.S. 14 (1967) (holding that a defendant cannot be precluded from calling as a witness a more culpable co-conspirator, who had been charged and previously convicted of committing the same

murder). Accordingly, the state court's denial of Mr. Wilson's ineffective assistance claim on this basis is improper.

2. This Court should grant the writ because Alabama courts have established a basis for probable cause which is contrary to this Court's precedents, both long-standing (*Wong Sun v. United States*[5]) and recent (*Kaupp v. Texas*[6]), by rejecting any requirement of reliability or corroboration where the informant is a co-defendant, contrary to *Illinois v. Gates*,[7] *Alabama v. White*,[8] and *Maryland v. Pringle*.[9] Additionally, other courts, using imprecise language, have also given some credence to this standard.

In denying Mr. Wilson's claim of ineffectiveness for deficiently challenging the legality of his arrest, the CCA side-stepped the identity of facts between Mr. Wilson's case and *Kaupp*. App. B at 13. Instead, the court denied his claim based on a finding that probable cause existed and, so, under *New York v. Harris*, 495 U.S. 14 (1990),[10] excused any illegality in the circumstances of his arrest at his home. App. B at 13-16. The sole information available to police at the time of Mr. Wilson's arrest were statements from two co-defendants, Marsh and Jackson. (C. 284-87.) The State has

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[5] 371 U.S. 471 (1963).

[6] 538 U.S. 626 (2003).

[7] 462 U.S. 213 (1983).

[8] 496 U.S. 325 (1990).

[9] 540 U.S. 366 (2003). Mr. Wilson argued in both his petition and his briefs on appeal that these standards applied to co-defendants as well as other informants.

[10] The crime in *Harris* did not involve co-defendants. Probable cause was supplied from multiple sources, including that Harris was a former boyfriend of the murder victim and had a key to her apartment and that the victim reported to her daughter that Harris had kidnaped and raped her shortly before she was murdered. *People v. Harris*, 124 A.D. 2d 472, 473-74 (N.Y. App. Div. 1986) (Asch, J., concurring), *rev'd*, 532 N.E. 2d 1229 (N. Y. 1988), *rev'd sub nom. New York v. Harris*, 495 U.S. 14 (1990).

never either alleged or proved that either statement was corroborated by any independent police investigation or that the police had any prior basis of knowledge for judging either co-defendant's veracity. The "totality of the circumstances" here were the unsupported statements of Marsh and Jackson, each of whom confessed only to receiving stolen property. The CCA did not discuss any reasons for assuming the statements were reliable, but simply declared that they had previously held co-defendant statements sufficient to establish probable cause. App. B at 16.

The CCA's opinion gives law enforcement authority to invade citizens' homes and arrest without a warrant not on "reasonably trustworthy information," but on any allegation by an informant who admits any quantum of culpability, no matter how minimal. This Court should address the erroneous finding of probable cause in this case, since it expands the scope of *Harris* to such a degree that Alabama citizens' Fourth Amendment rights to be free from unreasonable searches and seizures are virtually eradicated.

A. This Court has never exempted co-defendants from the rules established in *Illinois v. Gates*, *Alabama v. White*, and *Maryland v. Pringle*, requiring a showing of trustworthiness in the information police rely on to support probable cause.

This Court has drawn an equation between probable cause to search and probable cause to arrest, *Pringle*, 540 U.S. at 371-72 (adopting the probable cause to search analysis from *Illinois v. Gates*, 462 U.S. 213 (1983), for an arrest claim); therefore, the requirements to establish probable cause in each instance are the same. Repeatedly, this Court has defined probable cause as requiring "reasonably

trustworthy information": "Probable cause exists where 'the facts and circumstances within their [the officers'] knowledge and of which they had reasonably trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that' an offense has been or is being committed."[11] *Pringle*, 540 U.S. at 372 n.2 (quoting *Brinegar v. United States,* 338 U.S. 160, 175–176 (1949)). That is, "they had reasonably trustworthy information ... sufficient to warrant a prudent man in believing that *the petitioner* had committed or was committing an offense." *Beck v. Ohio*, 379 U.S. 89, 91 (1964) (emphasis added). Probable cause "is dependent upon both the content of information possessed by police and its degree of reliability." *White*, 496 U.S. at 330.

This Court has never excepted co-defendants from the requirement that information known to the police must be trustworthy to supply probable cause. Instead, this Court has explicitly said that a co-defendant's statement does not supply probable cause where the police have no familiarity with the co-defendant and, so, no basis upon which to make a credibility determination. *Wong Sun*, 371 U.S. at 491. In *Wong Sun*, the Court stated: "We turn now to the case of the other petitioner, Wong

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[11] Rule 2.4, Ala. R. Crim. P., provides: "If the judge or magistrate is reasonably satisfied from the complaint and the evidence, if any, submitted that the offense complained of has been committed *and that there is probable cause to believe that the defendant committed it*, the judge or magistrate shall proceed under Rule 3.1." (Emphasis added.) *See also United States v. Rice*, 652 F.2d 521, 525 (5th Cir. 1981) ("Thus, we also must assure ourselves a reasonable man, standing in the shoes of the arresting officer, could have believed in light of the facts and circumstances an offense had been committed and that a particular defendant committed it.").

Sun. We have no occasion to disagree with the finding of the Court of Appeals that his arrest, also, was without probable cause or reasonable grounds." *Id.* The court below found as follows:

> The basis for going to Wong Sun's residence to arrest him was the statement of Johnnie Yee that he had obtained the narcotic found in his residence from Wong Sun and Toy. As was the case with Hom Way, there is no showing that Johnnie Yee was a reliable informer; in fact, the evidence is entirely negative as to whether the agents had ever heard of him before that day. We hold, likewise, that the arrest of Wong Sun was not made with probable cause or with reasonable grounds to believe that he had committed or was committing a crime. Therefore his arrest was illegal.

Wong Sun v. United States, 288 F.2d 366, 370 (9th Cir. 1961), *rev'd on other grounds*, 371 U.S. 471 (1963). Johnnie Yee and Blackie Toy were co-defendants of Wong Sun. Yet their statements, even in combination, were not sufficient to supply probable cause to arrest.

Tellingly, in *Kaupp*, where the only information known to police inculpating Kaupp was contained in the statement of his co-defendant, Texas conceded that no probable cause existed and this Court agreed. 538 U.S. at 630-31. This Court recounted that the trial court held no probable cause existed because "the detectives had no evidence or motive to corroborate the brother's allegations of Kaupp's involvement …." *Id.* at 628 n.1. This Court accepted Texas' concession and premised its ruling on it. *Id.* at 632.

No evidence was presented in this case showing that the police had any basis for *trusting* the statements of Mr. Wilson's co-defendants. There was no testimony of

any prior communications with the co-defendants in which they had demonstrated veracity, and there was no evidence presented of any police investigation that corroborated any of their statements respecting Mr. Wilson or his involvement in any crime. The CCA never addressed this lack. Instead, that court asserted, without explanation other than its own prior holdings (and even these it misrepresented), that the co-defendants' statements supplied probable cause. App. B at 13-16.

B. This Court has repeatedly explained why co-defendants' statements are inherently unreliable, a quality which justifies maintaining the requirements of known reliability and/or independent corroboration.

As explained above, this Court has never excepted co-defendants from the rule of *Gates*, *White*, and *Pringle* or accorded any special reliability to their statements. In fact, this Court has held that the statement of a co-defendant, even if self-inculpatory, "as the confession of an accomplice, [is] *presumptively unreliable*." *Lee v. Illinois*, 476 U.S. 530, 539 (1986) (emphasis added). Indeed, "a co-defendant's statements about what the defendant said or did are less credible than ordinary hearsay evidence." *Id.* at 541 (citation omitted). *See also Bruton v. United States*, 391 U.S. 123, 135-36 (1968) ("[T]heir credibility is inevitably suspect … given the recognized motivation to shift blame onto others."); *Lilly v. Virginia*, 527 U.S. 116 (1999) ("[T]he mere fact that one accomplice's confession qualifie[s] as a statement against his penal interest d[oes] not justify its use as evidence against another person."). So, far from finding co-defendants' statements inherently reliable, this Court instead *presumes their unreliability*.

Although *Lee*, *Bruton*, and *Lilly* considered co-defendants' lack of reliability in the context of evidentiary demands at trial, there is no reason such inherent unreliability is transformed in the probable cause analysis to a presumption of reliability. Certainly, co-defendants have as much reason to depict themselves as less culpable at the beginning of criminal proceedings as they do later in the day. The CCA gave no reason for its presumption.

C. Other courts, even when purporting to find probable cause based on a co-defendant's statement, have in fact relied on some degree of corroboration.

The Tennessee Supreme Court, in *State v. Bishop*, stated that other courts have allowed for a finding of probable cause without corroboration, while itself rejecting that standard as too lax. 431 S.W. 3d 22, 40 (Tenn. 2014). But the cases cited, *id.* at 40 n.7, by and large, do not support that contention.

In *United States v. Brown*, the court found probable cause not only because the co-defendant "provided specific information naming Mr. Brown and identifying his role in the robberies," 366 F.3d 456, 459 (7th Cir. 2004), but also because the co-defendant's information was corroborated by police work:

> Moreover, Dill's statements are not uncorroborated. The short time frame between his confession and the robbery of the bank at Jewel gave police the opportunity to verify details of Dill's statements in order to ensure that he was trustworthy. Dill gave the officers Mr. Brown's location, the color and make of the getaway car and the fact that he would be alone in the car. When the police found the Tahoe in the location that Dill specified and were thus able to verify these important details, the entirety of Dill's story, including his statements about Mr. Brown's role in the robberies, assumed a high degree of reliability.

Id. at 460. In *Brown*, the co-defendant supplied the police not just with purported details of the crime, but with predictive information: "Dill gave the officers Mr. Brown's location, the color and make of the getaway car and the fact that he would be alone in the car." *Id.* This is comparable to the kind of information which this Court found sufficient in *White*, 496 U.S. at 328,[12] but is also exactly the kind of information which the police **did not have** in this case. The police did not corroborate any fact which would have incriminated Mr. Wilson.

In *Craig v. Singletary*, although the court purported to hold that the uncorroborated statement of Craig's co-defendant could establish probable cause, the court qualified that statement: "the co-defendant's *admission of guilt to the core crime* is enough indication of 'reasonably trustworthy information' to satisfy probable cause." 127 F.3d 1030, 1045 (11th Cir.1997) (*en banc*) (citation omitted) (emphasis added). Craig was identified as one of two perpetrators of a murder through an anonymous tip. *Id.* at 1032. Police first came into contact with Craig at the co-defendant's house, *id.*, thus establishing a connection between them which is lacking here. Before Craig gave the statement at issue in his case, the surviving victim had told police that she and her boyfriend were attacked by two men, one of whom she was able to identify as Craig's co-defendant. *Id.* at 1034. The co-defendant was also arrested and gave a confession consistent with the surviving victim's account,

[12] *White* involved an anonymous tip, not a co-defendant's confession, but the need to establish reliability is the same. In *White*, as in *Gates*, the police confirmed details of the tip before arresting the suspect. *White*, 496 U.S. at 327.

admitting his own participation, but implicating Craig as the shooter. *Id.* Of greatest significance to the Eleventh Circuit was the fact that the co-defendant implicated himself in "the core crime," i.e., the murder. *Id.* at 1045. That is not the case with the co-defendants' statements here. Mr. Wilson's co-defendants implicated themselves in the thefts, but not in the murder. Therefore, even if a co-defendant's statement were rendered reliable in circumstances such as the Eleventh Circuit found sufficient in *Craig* (though contrary to *Lee* and *Wong Sun*), Mr. Wilson's co-defendants' statements do not meet that standard.

In *United States v. Leppert*, probable cause was based not only on the statement of a co-defendant of unknown reliability, but also on the corroborative statements of a confidential informant previously shown to be reliable, 408 F.3d 1039, 1042 (8th Cir. 2005),which is not the case here.

Even in cases where a court has purported to find probable cause based on a co-defendant's statement alone, the court has identified some additional element providing an indication of reliability. For example, in *United States v. Soriano*, the Ninth Circuit based its sufficient reliability finding on the fact that the co-defendant admitted guilt not only in the crime being investigated, but also to culpability in a host of other criminal activity with Soriano which the police would have known nothing about without the co-defendant's admissions. 361 F.3d 494, 505–07 (9th Cir. 2004). Because the co-defendant admitted to guilt, and to much greater guilt than the police had accused him of, the court found it unlikely that these self-inculpatory

statements would be untrue. *Id.* That also is not the case here. The statements of Marsh and Jackson denied any responsibility for the murder of Mr. Walker and attempted to minimize each suspect's role in any criminal activity.

Similarly, in *State v. Valenzuela*, the court based its finding of probable cause on something more than the co-defendant's statement alone:

> Additionally, Gonzales's implication of Valenzuela and Hernandez did not serve to deflect blame from Gonzales. Investigating officers already knew that more than one person had participated in these crimes and would have sought Gonzales's cohorts even had he not revealed their identities. *Cf.* [*State v.*] *Edwards*, 111 Ariz. [357] at 360, 529 P.2d [1174] at 1177 [(Ariz. 1974)] (statement did not create probable cause when it served to vindicate speaker and shift blame to another).

2010 WL 626694, at *8 (Ariz. App. Div. 2 2010). Again, the circumstances of *Valenzuela* are not present here, where the co-defendants' statements **did** shift the blame to Mr. Wilson.

Thus, even where co-defendants' statements have been deemed reliable in part, that reliability was premised on the co-defendant admitting to presence at the scene of the crime and participation in the crime itself. That is not the case here. Marsh and Jackson did not admit even to presence during the murder, much less to participation in it. Therefore, none of these cases is apposite here.

D. The CCA's holding misinterprets even its own precedents.

The CCA relied on several Alabama state cases to support its assertion that a co-defendant's statement, standing alone, supplies probable cause, App. B at 16, but

that reliance is misplaced because it misinterprets or misrepresents the circumstances detailed in the cited cases.

The finding of probable cause in *Vincent v. State* was made by a juvenile *court* on a transfer motion, 349 So. 2d 1145, 1145 (Ala. 1977). This Court has repeatedly explained that different standards apply to review of a *court's* issuance of a warrant, versus an arrest where police failed to obtain one. *Ornelas v. United States*, 517 U.S. 690, 699 (1996); *United States v. Leon*, 468 U.S. 897, 913-14 (1984); *Aguilar v. Texas*, 378 U.S. 108, 110-11 (1964). In *Vincent*, the co-defendant himself testified before the judge and was subject to cross-examination. 349 So. 2d at 1145. This presents a far different scenario from a police officer taking a suspect's statement and relying on that statement to arrest another individual.

In *McWhorter v. State*, police had information from more sources than a co-defendant. 781 So. 2d 257, 265-66 (Ala. Crim. App. 1999). One person from whom police obtained information about the crime is nowhere called a co-defendant in the opinion, though his actions would make him an accessory both before and after the fact. Marcus Carter testified that he dropped McWhorter off before the murder occurred and picked him up afterwards, but not that he participated in the murder itself. *Id.* at 265. But the trial court's recounting of the facts also mentions the testimony of an uninvolved individual, to whose house McWhorter took the stolen goods and to whom he purportedly confessed. *Id.* at 265-66. The CCA's account indicates that this individual had spoken to police at some point before McWhorter

was interrogated to inform them of his attempted suicide. *Id.* at 283. The CCA did not say whether this individual provided information about McWhorter's confession before his arrest. The analysis is, in fact, lacking in detailing the steps at which the arresting officer arrived at probable cause. McWhorter was arrested *before* the detective who took his statement arrived at the hospital, *id.* at 283 and 288, yet the CCA based the existence of probable cause on facts within the knowledge of the detective, *id.* at 288, not the arresting officer. In any event, the detective had visited the crime scene and interviewed Carter, who gave details about planning the crime and "what had transpired following the murder." Law enforcement also had information from the other, unassociated individual. Without knowing what the details were – for instance, whether the uninvolved informant reported McWhorter's confession or turned over stolen property or whether details Carter provided about "what had transpired following the murder" had been confirmed by law enforcement – it cannot be concluded that Carter's statement was uncorroborated.[13] The *McWhorter* opinion does not clearly propound that principle.

In *R.J. v. State*, the CCA concluded, without discussion of the surrounding facts, that the statement of a co-defendant supplied probable cause to arrest the defendant. 627 So. 2d 1163, 1165 (Ala. Crim. App. 1993). However, the one case to which *R.J.* cites as support, *Ball v. State*, demonstrates why *R.J.* itself must be

[13] McWhorter's claim was reviewed for plain error, *id.* at 287, which is not the case here, and the CCA nowhere cited to any federal caselaw in its discussion, *id.* at 287-88.

qualified: in *Ball*, the police had information from an informant of known reliability who had provided accurate information in the past, and the victim of the robbery, who knew the defendant, identified him as her assailant. 409 So. 2d 868, 874-75 (Ala. Crim. App. 1979). Thus, it is evident that *Ball* does not support the conclusion that the bald accusation of a co-defendant of unknown reliability can provide the basis for probable cause.

R.J. is distinguishable from this case, even if there were no other supporting facts, because the co-defendant admitted his own participation in the "core crime," a murder. 627 So. 2d at 1165. *See also Craig*, 127 F.3d at 1045 (co-defendant confessed to participation in a murder). That was not the case here. As the suppression hearing transcript shows, the trial court did not have before it any specifics of what the co-defendants admitted. The police arrested Marsh and Jackson before Mr. Wilson. In their recorded statements, which were not before the court, neither admitted to participating in the murder of Mr. Walker, but only to taking some of his property. *See*, *e.g.* (C. 707). Such self-absolving statements are not the sort upon which probable cause can be premised.

The CCA's present interpretation of the above cases conflicts with its own decision in *Carter v. State*, where it held that a co-defendant's statement alone **did not** supply probable cause. 435 So. 2d 137, 139 (Ala. Crim. App. 1982). The court summarized applicable law:

> The existence of probable cause must be determined from the particular facts of each case. Consequently, courts have found that the veracity

> prong of *Aguilar* was satisfied and the informant credible where the accomplice-informant's information was not vague but contained a particular description of the "utmost precision," *Bernard v. United States,* 360 F.2d 300 (5th Cir. 1966); where the accomplice-informer related the "underlying circumstances" of the offense which were *corroborated by information obtained from eyewitnesses*, *United States v. Mendoza,* 441 F.2d 1107 (9th Cir. 1971); where the participant's tip was against his penal interest and was *substantially corroborated by other informants*, [*United States v.*] *Martin* [615 F.2d 318 (5th Cir.1980)], *supra*; and where the participant's information was *independently corroborated* and verified, [*United States v.*] *Ashley* [569 F.2d 975 (5th Cir.1978)], *supra*; *United States v. Sporleder,* 635 F.2d 809 (10th Cir. 1980); *United States v. Hampton,* 633 F.2d 927 (10th Cir. 1980), *cert. denied*, 449 U.S. 1128, 101 S. Ct. 950, 67 L. Ed.2d 116 (1981); *see* 70 Georgetown L.J. 467, 479, n. 61 (1981).

Id. at 139 (emphases added). Applying this law to the facts, the CCA found probable cause only because the police had information from sources other than the co-defendant:

> In this case there are three "indicia of credibility," [*United States v.*] *Harris*, [403 U.S. 573, 91 S. Ct. 2075,] 91 S. Ct. at 2082 [(1971)], which, when combined, are sufficient to support the finding of probable cause. First is the fact that the accomplice-informant's information constituted a clear admission against his penal interest. Second are the facts that the information itself was not only highly detailed, but corroborated and independently verified by the victim's account of the robbery. Third is the fact that the informant already had a track record of sorts for honesty with Detective Smith. While *no single factor would be sufficient when divorced from the others to establish the veracity of the accomplice-informant*, the combination is sufficient to lead a reasonable and prudent man to believe that Manning was telling the truth.

Id. (emphasis added). This analysis in *Carter* adheres to this Court's precedent by requiring some corroboration of the co-defendant's accusation of the defendant. Although Mr. Wilson cited to *Carter* in his briefing, Reply Br. at 16-18, the CCA did not discuss this case at all.

It is clear from the foregoing that the CCA's blanket exception of co-defendant statements from the requirements of *Gates*, *White*, and *Pringle* is a novel development which vitiates citizens' Fourth Amendment rights.

E. Because the CCA misinterpreted its own precedents, its "standard" was not established until release of its decision in Mr. Wilson's appeal; therefore, state law cannot excuse counsel's deficient performance, even ignoring this Court's contrary standard.

As shown above, none of the cases relied on by the CCA as establishing that a co-defendant's statement, standing alone, supplies probable cause actually stand for that proposition. And the year before Mr. Wilson's arrest in this case, this Court issued its opinion in *Kaupp*. The facts of Mr. Wilson's warrantless arrest and the lack of information available to the police beforehand are the closest to *Kaupp* present counsel has been able to find.

Counsel are ineffective under the Sixth Amendment where they fail to research the applicable law: "[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." *Strickland*, 466 U.S. at 690-91 (emphasis added).[14] *See also Hinton v. Alabama*, 571

[14] *See also Ex parte Felton*, 815 S.W. 2d 733, 736 (Tex. Crim. App. 1991) (footnote omitted) (state post-conviction) ("Under the totality of the circumstances, we find that the failure of applicant's counsel to adequately investigate and to know the applicable law denied applicant reasonably effective assistance of counsel."); *State v. Charles F.G.*, 2006 WI App. 244, ¶ 4, 2006 WL 3007533, at *1 (Wis. App. 2006) (*per curiam*)

U.S. 263, 274 (2014) ("An attorney's ignorance of a point of law that is fundamental to his case combined with his failure to perform basic research on that point is a quintessential example of unreasonable performance under *Strickland*.") (citation omitted). Here, neither trial nor appellate counsel brought the *Kaupp* case to the attention of the courts. Thus, the facts and law supporting Mr. Wilson's present ineffectiveness claim are quite different from those raised on direct appeal.

Because the underlying Fourth Amendment challenge had merit, counsel performed deficiently in failing to raise it fully. *Kimmelman v. Morrison*, 477 U.S. 365, 374-75 (1986). Had they done so, Mr. Wilson's statement and the evidence seized from his home would all have been suppressed. Absent that illegally obtained evidence, the State's case against Mr. Wilson would have been reduced to nothing, since no other evidence linked him to the death of Mr. Walker. Thus, there is more than a reasonable probability of a different outcome at trial. This is more than the showing of prejudice required to succeed on a *Strickland* claim. 466 U.S. at 694. Mr. Wilson is entitled to reversal of his convictions and sentence and a new trial where

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(unpub. op.) ("The State's arguments that trial counsel's strategic choice defeats claims of ineffective assistance of counsel and plain error fails because the decision was made without a correct understanding of the law. In *Strickland v. Washington,* 466 U.S. 668, 690-91 ... (1984), the Court held that strategic decisions made by counsel who is fully aware of the facts and law are virtually unchallengeable. Here, counsel misread *Sorenson* [*State v. Sorenson*, 449 N.W. 2d 280 (Wis. Ct. App. 1989)], believing that a videotaped interview was admissible even if the witness was available. That was not the holding in *Sorenson* and was not the law at the time counsel failed to challenge admissibility of the videotape. Trial counsel was ineffective for making a strategic decision while completely misconstruing the applicable law.").

his statement and the seized evidence will be excluded. Therefore, Mr. Wilson respectfully asks this Court to grant certiorari, reverse his convictions and sentence, and remand for a new trial.

CONCLUSION

For the forgoing reasons, this Petition for Writ of Certiorari should be granted, the judgment of the Alabama Supreme Court vacated, and the cause remanded for further proceedings.

Respectfully submitted,

s/ David Schoen
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APPENDIX A

IN THE SUPREME COURT OF ALABAMA

August 24, 2018

1170747

Ex parte David Phillip Wilson. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: David Phillip Wilson v. State of Alabama) (Houston Circuit Court: CC-04-1120.60; CC-04-1121.60; Criminal Appeals : CR-16-0675).

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 August 24, 2018:

Writ Denied. No Opinion. Main, J. - Stuart, C.J., and Bolin, Parker, Bryan, and Sellers, JJ., concur. Shaw, Wise, and Mendheim, 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 24th day of August, 2018.

Julia Jordan Weller

Clerk, Supreme Court of Alabama

APPENDIX B

REL: March 9, 2018

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
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MEMORANDUM

CR-16-0675 Houston Circuit Court CC-04-1120.60; CC-04-1121.60

David Phillip Wilson v. State of Alabama

WINDOM, Presiding Judge.

David Phillip Wilson appeals the dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his January 2008 convictions for capital murder. See §§ 13A-5-40(a)(2) and 13A-5-40(a)(4), Ala. Code 1975. By a vote of 10-2, the jury recommended that Wilson be sentenced to death. The trial court accepted the jury's recommendation and sentenced Wilson to death.

On November 5, 2010, this Court remanded the case to the trial court with instructions for that court to hold a hearing during which it was to require the State to provide its reasons for striking African-American veniremembers and to provide Wilson with an opportunity to offer evidence showing that the State's reasons were merely a sham or pretext. See Wilson v. State, 142 So. 3d 732, 747-48 (Ala. Crim. App. 2010). See also Batson v. Kentucky, 476 U.S. 79 (1986). The trial court issued an order on March 15, 2011, finding that the State had articulated clear, specific, and legitimate reasons for each peremptory strike of an African-American veniremember, and that Wilson had failed to prove that the State's reasons were merely a sham or pretext. On March 23, 2012, this Court affirmed Wilson's convictions and sentence of death. See Wilson v. State, 142 So. 3d 732 (Ala. Crim. App. 2012) (opinion on return to remand). The certificate of judgment was issued on September 20, 2013. On May 19, 2014, the Supreme Court of the United States denied his petition for writ of certiorari. See Wilson v. Alabama, 134 S. Ct. 2290 (2014).

On September 19, 2014, Wilson, through counsel, filed this, his first, Rule 32 petition, in which he raised numerous claims of ineffective assistance of trial counsel. On November 3, 2014, the State filed a motion to dismiss in which it argued Wilson's claims were insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., or without merit. On December 11, 2015, Wilson filed an amended petition in which he alleged that the State had withheld evidence favorable to the defense, in violation of Brady v. Maryland, 373 U.S. 83 (1963), and that he had received ineffective assistance of trial and appellate counsel. On February 24, 2016, the State filed an amended motion to dismiss, and on June 16, 2016, Wilson filed a response. On August 17, 2016, the State filed a second amended motion to dismiss in order to correct an error in its previous filing, and Wilson's amended response was filed on September 7, 2016. That same day, Wilson filed an amendment to his previous petition, asserting that Alabama's death-penalty sentencing scheme is unconstitutional, see Hurst v. Florida, 136 S. Ct. 616 (2016), and the State filed a motion to dismiss Wilson's amendment on October 6, 2016. On February 24, 2017, the circuit court issued an order dismissing Wilson's petition. On March 24, 2017, Wilson filed a motion to reconsider.

In this Court's opinion on direct appeal, it set out the following facts surrounding Wilson's convictions:

> "After [Dewey] Walker, a 64-year-old man suffering from cancer, failed to show up for work for several consecutive days in April 2004, his supervisor, Jimmy Walker, went to his house to check on him. After two trips to check on Walker were unsuccessful, Jimmy Walker spoke with Walker's neighbor, and the neighbor telephoned the police. On April 13, Officer Lynn Watkins and Officer Rhett Davis of the Dothan Police Department responded to the call and conducted a 'welfare check' at Walker's house.
>
> "During the welfare check, Officer Watkins walked around to the back of the house. The back of the house had two doors, a wooden door and a sliding-glass door. Officer Watkins noticed that the door knob to the wooden door was missing. She entered through that doorway and found herself in a storage area, separated from the primary residence by a panel of drywall. The wall had a hole in it leading to a bedroom. It appeared to Officer Watkins that someone had created the hole from the outside because there was broken drywall on the bedroom floor. Officer Watkins entered the bedroom through the hole in the drywall. She testified at trial that, in her opinion, the hole was large enough for Wilson. Officer Watkins and Officer Davis conducted a search of Walker's residence. Walker's body was found in the kitchen with a large amount of dried blood surrounding his head.
>
> "Investigator Tony Luker of the Dothan Police Department was assigned to investigate Walker's death. In addition to the blood found near Walker's body, Investigator Luker discovered blood droplets throughout the house. He also discovered that the doors to multiple bedrooms, which apparently had been locked, were pried open and that there were holes in the walls of several rooms. Investigator Luker testified that it appeared as though someone had been searching for something hidden in the

walls.

"In the kitchen, Investigator Luker recovered an extension cord and a computer-mouse with the attached cord snapped into two pieces, which, based on the ligature marks on Walker's neck and the dried blood on the cords, appeared to have been used to strangle Walker. Investigator Luker also found a screwdriver and a portion of the computer-mouse cord in the refrigerator.

"Investigator Luker also noticed that Walker's custom van, replete with stereo equipment estimated to be worth $20,000, was missing. A search for the van and the stereo equipment led investigators to Matthew Marsh. Investigator Luker interviewed Marsh, and then interviewed Catherine Corley and Michael Jackson. These interviews led Investigator Luker to Wilson.

"Officers arrived at Wilson's home in the early morning hours of April 14. Wilson voluntarily went with the officers to the Dothan Police Department. After waiving his Miranda [v. Arizona, 384 U.S. 436 (1966)] rights, Wilson gave a statement to Investigator Luker and Sergeant Mike Etress.

"Wilson told the officers that he went to Walker's house around 3 p.m. on April 6. Walker was home, and Wilson spoke to him about Walker's son Chris. Wilson left, but came back a few hours later. Wilson said that the front door was partially open when he returned, so he walked into the house. Walker was not home when Wilson arrived. While Wilson was inside Walker's house, he received a telephone call from Marsh, asking him to steal the keys to Walker's van. Wilson explained to the officers that he, Marsh, Jackson, and Corley had previously discussed 'hitting Mr. Walker and knocking him out and taking the keys.' (C. 517.) Wilson took the keys and went to Marsh's house.

"According to Wilson, he returned to Walker's house the next evening to steal a laptop computer.

He went to the back of the house and entered the storage area. Wilson stated that there was a small crack in the wall and that he made it large enough to enter the main house. Wilson took a metal baseball bat with him because, according to him, he was scared of Walker's dog. Once inside, he again received a telephone call from Marsh asking him to search for items in addition to the laptop that would be worth stealing. Wilson used a screwdriver to pry open several doors in the house.

"After approximately 20 minutes, Walker returned home and went to the kitchen. Wilson assumed that Walker heard him because he picked up a knife. Wilson said that he approached Walker from behind with the baseball bat and attempted to disarm Walker by striking him on his right shoulder. According to Wilson, he missed and accidentally struck Walker in the back of his head. Walker fell into the wall, cutting his head, but stood back up. Wilson grabbed a nearby computer-mouse cord and wrapped it around Walker's neck in an attempt to make Walker drop the knife. The computer-mouse cord snapped, so Wilson grabbed a nearby extension cord. Wilson stated that he wrapped the extension cord around Walker's neck and held it until Walker passed out. He estimated that he choked Walker for six minutes. Wilson told the officers that he threw the extension cord down in front of the refrigerator and placed the computer-mouse cord inside the refrigerator. Wilson was scared, so he left the house, taking with him Walker's laptop and one of Walker's baseball hats. Wilson further indicated that he did not telephone an ambulance for Walker because he was in a state of panic. According to Wilson, Walker was still breathing when he left.

"Wilson went back to Marsh's house where he, Marsh, and Corley unsuccessfully attempted to login to Walker's password-protected laptop. The three individuals then went back to Walker's house in order to steal the van. During their first attempt to take the van, however, the alarm on the van went off, so they left.

"Wilson made similar attempts to steal Walker's van on Thursday and Friday, but was foiled both times by the alarm on the van. Wilson spoke with Corley, who was familiar with alarm systems, about disabling the alarm in Walker's van. Wilson returned to the van on Sunday morning. He lifted the hood of the van to access the alarm system, and the alarm again sounded. Wilson left and drove around for about 20 minutes before returning. When he returned, he was able to disable the alarm system by cutting two wires. Wilson drove to Marsh's house, picked up Marsh, and drove back to Walker's house. Wilson drove the van to Marsh's house. At Marsh's house, they removed the stereo equipment from the van and split it among Wilson, Marsh, Jackson, and Corley. Then they hid the van on Marsh's property located outside the city limits of Dothan.

"Dr. Kathleen Enstice, who at the time of Walker's death was a forensic pathologist with the Alabama Department of Forensic Sciences, performed Walker's autopsy. The results of the autopsy conflicted with Wilson's account of a single, accidental blow to Walker's head. Dr. Enstice testified that Walker had fresh defensive wounds on his hands and arms. She gave a conservative estimate of 114 contusions and abrasions on Walker's body, 32 of which were on his head. Additionally, Walker had multiple skull fractures and three separate lacerations on his scalp. Walker also suffered eight broken ribs and a fracture to his sternum. Dr. Enstice ruled out the possibility that these injuries could have been sustained by a single blow to the head and a subsequent fall."

Wilson, 142 So. 3d at 748-50 (opinion on return to remand).

Standard of Review

Wilson appeals the circuit court's summary dismissal of his petition for postconviction relief attacking his capital-murder conviction and sentence of death. According to Rule 32.3, Ala. R. Crim. P., Wilson has the sole burden of

pleading and proving that he is entitled to relief. Rule 32.3, Ala. R. Crim. P., provides:

> "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. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."

When it reviewed Wilson's claims on direct appeal, this Court applied a plain-error standard of review and examined every issue regardless of whether the issue was preserved for appellate review. See Rule 45A, Ala. R. App. P. However, the plain-error standard does not apply when evaluating a ruling on a postconviction petition, even when the petitioner has been sentenced to death. See Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008); Waldrop v. State, 987 So. 2d 1186 (Ala. Crim. App. 2007); Hall v. State, 979 So. 2d 125 (Ala. Crim. App. 2007); Gaddy v. State, 952 So. 2d 1149 (Ala. Crim. App. 2006). "The standard of review this Court uses in evaluating the rulings made by the trial court is whether the trial court abused its discretion." Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005) (citing Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, "[t]he 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) (quoting Ex parte Lamb, 113 So. 3d 686, 689 (Ala. 2011)). Last, "[t]his Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court." Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

With these principles in mind, this Court reviews the claims raised by Wilson in his brief to this Court.[1]

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[1]The claims that Wilson has failed to reassert on appeal are deemed abandoned. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995).

I.

Wilson argues that the circuit court erred in dismissing his claim that the State committed a Brady violation. In his petition, Wilson pleaded that the State suppressed exculpatory evidence in the form of a letter written by Catherine Corley, one of his codefendants, and an expert report generated in conjunction with the State's investigation of this letter. On April 14, 2004, Corley gave a statement to law enforcement in which she admitted to entering Walker's residence after he had been killed and to rummaging through his property. (C. 612.) Wilson pleaded, however, that the State was made aware of Corley's admitting to a more significant role in Walker's murder. Specifically, Wilson pleaded that on September 2, 2004, the district attorney and Investigator Luker met with an attorney representing an inmate who was incarcerated with Corley. During that meeting, the attorney presented the men with a "handwritten letter [that] contained details of the murder of Dewey Walker which only the perpetrators would have known." (C. 615.) The letter "described how the writer hit Mr. Walker with a baseball bat until he fell." (C. 615.) The letter was signed "Nicole" and also stated that the writer's nickname was "Kittie." Investigator Luker's report indicated that Corley's middle name was "Nicole" and that her nickname was "Kittie."

The State initiated an investigation into the letter. The State sought an order for Corley to provide palm prints to be compared to those found on the letter, and Investigator Luker executed a search warrant on Corley's jail cell during which he collected writing samples. The State employed the use of a handwriting expert who determined, based on the known samples, that the letter had "probably" been written by Corley. (C. 36.)

Wilson pleaded that neither the letter nor the expert report have ever been produced to him and that the evidence was favorable and material. The circuit court dismissed this claim as being procedurally barred by Rules 32.2(a)(3) and 32.2(a)(5), Ala. R. Crim. P., and without merit.

Wilson argues that the instant petition provided him with the first opportunity to raise this Brady claim. Although the State does not contest Wilson's claim that neither the letter

nor the expert report were produced, the State does assert that the existence of the evidence was disclosed to Wilson.

The State's position is supported by Wilson's own petition. Wilson attached to his petition a copy of the police report in which Investigator Luker described the letter allegedly authored by Corley and his efforts to investigate the matter. (C. 615-16.) Each page of the police report bears the initials of one of Wilson's trial counsel, and Wilson acknowledges in his petition that the police report was included in discovery. (C. 249, n.5.)

Even if the State failed to disclose the letter and the expert report, Wilson was aware of the State's failure to disclose the evidence prior to trial. In other words, Wilson could have raised this Brady claim at trial or on appeal. As such, this claim is procedurally barred by Rules 32.2(a)(3) and 32.2(a)(5), and the circuit court did not err in dismissing this claim.

II.

Wilson argues that the circuit court erred in dismissing his claims of ineffective assistance of counsel. When pleading claims of ineffective assistance of counsel, this Court has stated:

> "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 674. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

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). Further,

> "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, 950 So. 2d at 356.

A.

Wilson first asserted that trial counsel were ineffective at the guilt phase.[2] Wilson pleaded that he received

[2]The circuit court dismissed any claims of ineffective assistance of counsel that related solely to pretrial counsel as being procedurally barred pursuant to Rule 32.2(a)(3) and 32.2(a)(5). To the extent any of these claims are reasserted on appeal, the circuit court did not err in dismissing them.

ineffective assistance of counsel because trial counsel: 1) failed to adequately challenge the legality of his arrest or the admissibility of his statement; 2) failed to investigate Corley's confession; 3) failed to object adequately to the voluntariness of Wilson's custodial statement; 4) failed to present an adequate opening statement; 5) failed to object to numerous instances of prosecutorial misconduct; 6) waived closing argument; and 7) failed to protect his right to a fair and honest jury determination.

1.

Wilson asserted in his petition that he received ineffective assistance of counsel because trial counsel failed to adequately challenge the legality of his arrest or the admissibility of his statement. Wilson gave an inculpatory statement to law enforcement on the morning of April 14. Officers had arrived at the mobile home of Wilson's mother at 3:47 a.m. Wilson's mother allowed the officers inside while she roused Wilson. Wilson came into the living room where Investigator Luker "told him that we needed to talk with him, that he needed to come -- if he would come with us to talk with us about an incident." (Trial R. 12.) According to Investigator Luker, Wilson voluntarily agreed to go with the officers to the Dothan Police Department. There, Wilson was informed of and waived his Miranda rights. Wilson then gave a detailed statement to Investigator Luker and Sergeant Etress in which he admitted to striking Walker with a bat, to choking him with a computer-mouse cord and an extension cord, and to stealing various items of Walker's property. Investigator Luker obtained a search warrant for the mobile home of Wilson's mother, which led to the discovery of Walker's car-stereo equipment in Wilson's bedroom.

Trial counsel for Wilson filed a motion to suppress Wilson's statement and all evidence gathered as a result thereof in which he challenged the legality of Wilson's

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See Moody v. State, 95 So. 3d 827, 837-38 (Ala. Crim. App. 2011) ("We agree with the circuit court that Moody's claims of ineffective assistance of pretrial counsel were precluded by Rules 32.2(a)(3) and (a)(5), because they could have been, but were not, raised and addressed at trial and on appeal.").

arrest. (Trial C. 59-61.) Nonetheless, Wilson pleaded in his petition that trial counsel were ineffective because they failed to argue the issue adequately. Specifically, Wilson pleaded that trial counsel should have argued that he was illegally arrested in his home under the holding of the Supreme Court of the United States in Kaupp v. Texas, 538 U.S. 626 (2003). Although trial counsel briefly cited to Kaupp in their motion to suppress, Wilson pleaded that the facts in his case mirrored those in Kaupp and that trial counsel failed to draw parallels to Kaupp to make the motion meritorious. Instead, trial counsel merely copied a sample motion from a capital-defense handbook and failed to tailor the motion to Wilson's case. Wilson further pleaded that had trial counsel effectively drafted and argued his motion to suppress, his statement would have been suppressed as well as all the evidence obtained from the search of his mother's mobile home. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

In Kaupp, the Supreme Court considered whether Kaupp's confession should be suppressed under the following facts:

> "After a 14-year-old girl disappeared in January 1999, the Harris County Sheriff's Department learned she had had a sexual relationship with her 19-year-old half brother, who had been in the company of petitioner Robert Kaupp, then 17 years old, on the day of the girl's disappearance. On January 26th, deputy sheriffs questioned the brother and Kaupp at headquarters; Kaupp was cooperative and was permitted to leave, but the brother failed a polygraph examination (his third such failure). Eventually he confessed that he had fatally stabbed his half sister and placed her body in a drainage ditch. He implicated Kaupp in the crime.
>
> "Detectives immediately tried but failed to obtain a warrant to question Kaupp. Detective Gregory Pinkins nevertheless decided (in his words) to 'get [Kaupp] in and confront him with what [the brother] had said.' ... In the company of two other plainclothes detectives and three uniformed officers, Pinkins went to Kaupp's house at approximately 3 a.m. on January 27th. After Kaupp's

> father let them in, Pinkins, with at least two other officers, went to Kaupp's bedroom, awakened him with a flashlight, identified himself, and said, '"we need to go and talk."' ... Kaupp said '"Okay."' ... The two officers then handcuffed Kaupp and led him, shoeless and dressed only in boxer shorts and a T-shirt, out of his house and into a patrol car. The State points to nothing in the record indicating Kaupp was told that he was free to decline to go with the officers.
>
> "They stopped for 5 or 10 minutes where the victim's body had just been found, in anticipation of confronting Kaupp with the brother's confession, and then went on to the sheriff's headquarters. There, they took Kaupp to an interview room, removed his handcuffs, and advised him of his rights under Miranda v. Arizona, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966). Kaupp first denied any involvement in the victim's disappearance, but 10 or 15 minutes into the interrogation, he was told of the brother's confession, he admitted having some part in the crime. He did not, however, acknowledge causing the fatal wound or confess to murder, for which he was later indicted."

Kaupp, 538 U.S. at 627-29 (footnote omitted). The Supreme Court held that "[s]ince Kaupp was arrested before he was questioned, and because the State [did] not even claim that the sheriff's department had probable cause to detain him at that point, well-established precedent require[d] suppression of the confession." Id. at 632.

Although the facts in Kaupp share some similarities to those present here, trial counsel's reliance on Kaupp would have been unavailing. The circuit court noted several points on which to distinguish the facts in the present case from those in Kaupp, see (C. 1538-39), but most significant is this: here, the officers here had probable cause to arrest Wilson. As this Court stated on direct appeal:

> "Here, Investigator Luker had probable cause to arrest Wilson for Walker's murder.[FN 11] See Dixon v. State, 588 So. 2d 903, 906 (Ala. 1991) ('Probable

> cause exists if facts and circumstances known to the arresting officer are sufficient to warrant a person of reasonable caution to believe that the suspect has committed a crime.'). Prior to Investigator Luker's contact with Wilson, each of Wilson's accomplices had confessed, and one of his accomplices had informed Investigator Luker that 'Wilson was to get half of the audio equipment from the van because he had taken all of the chances in [the] burglary, theft and murder.' (C. 419.) Based on the accomplice's confession implicating Wilson in the murder, Investigator Luker had probable cause to arrest Wilson for Walker's murder. See Vincent v. State, 349 So. 2d 1145, 1146 (Ala. 1977) (holding that the uncorroborated testimony of accomplice is a sufficient basis for a finding of probable cause).
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> "[FN 11] Wilson rightly does not argue that Investigator Luker lacked probable cause to arrest him; instead, Wilson argues only that the State failed to establish exigent circumstances to justify his warrantless, in-home arrest."

Wilson, 142 So. 3d at 767. This Court did not address the existence of an exigent circumstance that would justify Wilson's arrest in his home, see Payton v. New York, 445 U.S. 573, 588-602 (1980), instead holding that Wilson "voluntarily left his home and was in a public place where he could be arrested based on probable cause alone." Id. (citing State v. Solberg, 122 Wash. 2d 688, 861 P.2d 460, 465 (1993)). This Court went on to hold that even if Wilson had been "illegally arrested in his home based on probable cause alone, Payton, 445 U.S. at 587-88, the exclusionary rule would not require suppression of his confession because his confession was given at the police station as opposed to in his home." See New York v. Harris, 495 U.S. 14, 21 (1990). Consequently, trial counsel's analogizing Wilson's case to Kaupp would have been meritless. See Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001) (trial counsel cannot be ineffective for failing to raise meritless claim).

Wilson also challenged trial counsel's effectiveness in litigating the existence of probable cause to arrest him.

Wilson pleaded that the State's evidence at the suppression hearing was insufficient to show the existence of probable cause because the State did not present the contents of the co-defendants' statements and because the statements of co-defendants are inherently unreliable.[3] Wilson alleged that trial counsel were ineffective because they failed to object to the State's failure to meet its burden of proof at the suppression hearing.

As Wilson pleaded, the State did not offer extensive detail of the statements made by Wilson's co-defendants. There was evidence, however, from which the contents of the statements could have been inferred. Investigator Luker testified that he had interviewed Wilson's co-defendants first, that all had confessed, and that there was nothing in their statements to indicate that Wilson was innocent in the killing of Walker. (Trial R. 25-26, 63-64.) Importantly, Wilson has not pleaded the contents of the co-defendants' statements. It appears, based on the record, that the co-defendants implicated Wilson in Walker's murder.[4] Had Wilson's trial counsel raised the objection Wilson now asserts they should have made, the State could have offered the statements. Because Wilson has failed to plead the contents of the statement, and, more specifically, that the statements did not implicate him in Walker's murder, there are insufficient facts pleaded to show prejudice in trial

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[3]Wilson also challenges this Court's stating on direct appeal that each of Wilson's co-defendants had confessed prior to Investigator Luker's contact with Wilson, arguing that Corley was arrested after Wilson. Investigator Luker was asked at the suppression hearing whether Wilson was "the last defendant involved in the killing of Mr. Walker you had interviewed?" (Trial R. 26.) Investigator Luker answered, "Yes, sir, it was." Id.

Even assuming Wilson's allegation to be true -- that Corley's confession occurred subsequent to Wilson's -- Wilson's other two co-defendants confessed prior to Investigator Luker's contact with Wilson.

[4]Wilson attached to his petition the police report of Marsh's statement. The report indicates that Marsh "named David Wilson as the person who killed Mr. Walker." (C. 707.)

counsel's failing to make the objection.

In support of his pleading that co-defendant statements are insufficient to create probable cause to arrest, Wilson has cited to a number of federal and Alabama cases and an Alabama statute that directly or indirectly discuss the reliability of such evidence. See, eg., Lee v. Illinois, 476 U.S. 530 (1986); Bruton v. United States, 391 U.S. 123 (1968); Lilly v. Virginia, 527 U.S. 116 (1999); Wong Sun v. United States, 371 U.S. 471 (1963); Bone v. State, 706 So. 2d 1291 (Ala. Crim. App. 1997); Steele v. State, 512 So. 2d 142 (Ala. Crim. App. 1987); and § 12-21-222, Ala. Code 1975. Not one of these sources supports Wilson's argument that a co-defendant's statement cannot create probable cause to arrest. There is, however, precedent in Alabama to the contrary. In McWhorter v. State, 781 So. 2d 257, 287-88 (Ala. Crim. App. 1999), this Court held that the arresting officer had probable cause to arrest McWhorter based on a statement given by his accomplice. See also Vincent v. State, 349 So. 2d 1145, 1146 (Ala. 1977) and R.J. v. State, 627 So. 2d 1163, 1165 (Ala. Crim. App. 1993). Consequently, Wilson has failed to show that trial counsel's objecting to the sufficiency of the State's evidence at the suppression hearing would have had merit.

Wilson has made a number of other related claims, such as alleging that Investigator Luker failed to testify at the suppression hearing to exigent circumstances, that Wilson's waiver of his Miranda rights did not cure an illegal arrest, and that the search warrant for the mobile home of Wilson's mother was invalid as it relied on false information and a statement that should have been suppressed. Wilson pleaded that trial counsel were ineffective for failing to raise each of these claims.

These related claims are all reliant on a finding that Wilson's statement should have been suppressed based on a lack of probable cause to arrest Wilson at his mother's mobile home. For instance, Wilson pleaded that the search warrant for his mother's mobile home was defective because the warrant's affidavit relied on his illegally-obtained statement and a false statement made by Investigator Luker. In the affidavit, Investigator Luker stated that, according to Corley, Wilson was going to hide Walker's stereo equipment in and under his mother's mobile home. (Trial C. 403.) Because

Investigator Luker was not listed as being present during Corley's statement and because the alleged location of the stereo equipment did not appear in the transcript of Corley's statement, (C. 631), Wilson asserted that the assertion was false. Even if Wilson could prove that Investigator Luker was not present during Corley's statement and/or that Corley did not make the assertion during her recorded statement, Wilson would still not be entitled to relief. At most, the statement would be taken out of consideration for making a determination of probable cause, and the affidavit would still support the search warrant based on Wilson's confession. See Moore v. State, 570 So. 2d 788, 789-90 (Ala. Crim. App. 1990) ("[W]e must delete that information and 'determine whether the rest of the information contained in the affidavit was sufficient to support a finding of probable cause.'" (quoting Villemez v. State, 555 So. 2d 344, 344 (Ala. Crim. App. 1989))); Franks v. Delaware, 438 U.S. 154, 155-56 (1978) (same). Wilson's remaining related claims must likewise fail. This Court held on direct appeal that there was probable cause to arrest Wilson and that, even in the absence of exigent circumstances, Wilson's statement was not due to be suppressed. Wilson, 142 So. 3d at 767-68. Although Wilson has identified a number of arguments trial counsel could have raised, he has failed to plead sufficient facts to show that any of these arguments would have been meritorious. See Bearden, 825 So. 2d at 872 (trial counsel cannot be ineffective for failing to raise meritless claim). As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

2.

Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to investigate Corley's confession. Wilson admitted in his petition that trial counsel received police reports that referenced a letter -- allegedly written by Corley, in which the author admitted to striking Walker with a bat until he fell -- and details of the investigation into the letter. Wilson pleaded that a confession by a co-defendant would have been critical evidence at trial, yet trial counsel failed to obtain the letter, which could have been located in Corley's case file. Wilson further pleaded that had trial counsel investigated the letter, they would have learned of the State's investigation into the letter, which determined that the letter was likely authored

by Corley. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

"'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ala. R. Evid. "Hearsay is not admissible except as provided by these rules, or by other rules adopted by the Supreme Court of Alabama or by statute." Rule 802, Ala. R. Evid. The letter, which would be offered to prove that Corley was responsible for Walker's death, i.e., the truth of the matter asserted, would certainly be hearsay and inadmissible under Rule 802. Even so, Wilson pleaded that this State's rules of evidence must yield to his constitutional right to present a defense. See Chambers v. Mississippi, 410 U.S. 284 (1973) and Holmes v. South Carolina, 547 U.S. 319 (2006).

> "In Chambers, the United States Supreme Court held that 'where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.' 410 U.S. at 302. In Chambers, the trial court's application of the rules of evidence prohibited Leon Chambers, the defendant, from presenting evidence of a third party's culpability. Chambers was charged with killing Aaron Liberty. At trial, Chambers maintained that he did not shoot Liberty. In support of his defense, Chambers presented testimony from Gable McDonald, who had given a sworn statement to Chambers's counsel, that McDonald had shot Liberty. On cross-examination by the State, McDonald repudiated his confession and testified that he did not shoot Liberty and that he confessed to the crime in order to receive favorable treatment from law enforcement.
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> "When Chambers attempted to challenge McDonald's renunciation of his confession by having him declared an adverse witness, the trial court, applying Mississippi's rules of evidence, denied Chambers's request. Additionally, the trial court, applying Mississippi's rules of evidence, refused to admit testimony from individuals to whom McDonald

had admitted that he shot Liberty. In reaching its conclusion that the trial court's application of the rules of evidence prevented Chambers from developing his defense that another, not he, shot Liberty, the United States Supreme Court stated that the evidence the trial court refused to admit was critical to Chambers's defense. The United States Supreme Court reasoned that because the strict application of Mississippi's rules of evidence had prohibited the admission of critical evidence in Chambers's defense, the trial court's strict application of those rules to exclude the critical evidence denied Chambers a trial that complied with due process. 410 U.S. at 302, 93 S. Ct. 1038.

"In Ex parte Griffin, 790 So. 2d 351 (Ala. 2000), this Court applied Chambers. In Ex parte Griffin, the State charged Louis Griffin with the murder of Christopher Davis after he had admitted, while pleading guilty to various offenses in federal court, that he had participated in the murder. At trial, Griffin's defense was that he did not kill Davis and that he had lied to the federal court in his allocution to receive favorable treatment. To support this defense, Griffin attempted to present evidence indicating that two other men had been charged with killing Davis; that one of the men, Anthony Embry, had admitted under oath in court that he had killed Davis; that Embry had been convicted of Davis's murder; that Embry had been incarcerated for the conviction; and that a state court had dismissed Embry's conviction ex mero motu. The trial court, applying the Alabama Rules of Evidence, refused to admit the evidence of Embry's culpability. This Court, recognizing that the evidence of Embry's confession and conviction was critical in establishing Griffin's defense that another, not he, killed Davis, held that the trial court's ruling excluding the evidence with regard to Embry's confession and conviction prohibited Griffin from presenting his defense to the jury and violated his due-process rights under the 5th and 6th Amendments.

"The holdings in both Chambers and Griffin rest upon the fact that the trial court's strict application of the rules of evidence excluded critical evidence proffered by the defense, and the exclusion of the critical evidence resulted in the defendants' being denied their constitutional right to a fair trial and due process. Critical evidence is defined as '[e]vidence strong enough that its presence could tilt a juror's mind.' Black's Law Dictionary 674 (10th ed. 2014). In both Chambers and Griffin, the excluded evidence was critical to the defense because each defendant had denied participation in the offense and the excluded evidence indicated that another individual had admitted to committing the offense. When a defendant denies participation in an offense, evidence indicating that someone else has admitted to committing the offense and that that admission excludes the defendant as the offender, as it did in Chambers and Griffin, may be strong enough to influence a juror. Thus, depending on the facts of the case, the strict application of the rules of evidence to exclude critical evidence may render a trial fundamentally unfair."

Acosta v. State, 208 So. 3d 651, 655-56 (Ala. 2016).

"Like the federal courts, Alabama courts have long recognized the right of a defendant to prove his innocence by presenting evidence that another person actually committed the crime. See Ex parte Walker, 623 So. 2d 281 (Ala. 1992); Thomas v. State, 539 So. 2d 375 (Ala. Crim. App. 1988) .... In addition, Alabama courts have also recognized the danger in confusing the jury with mere speculation concerning the guilt of a third party:

> "It generally is agreed that the defense, in disproving the accused's own guilt, may prove that another person committed the crime for which the accused is being prosecuted.... The problem which arises in the application of this general rule, however, is the degree of strength

> that must be possessed by the exculpatory evidence to render it admissible. The task of determining the weight that must be possessed by such evidence of another's guilt is a difficult one.'
>
> "Charles W. Gamble, McElroy's Alabama Evidence § 48.01(1) (5th ed. 1996). To remove this difficulty, this Court has set out a test intended to ensure that any evidence offered for this purpose is admissible only when it is probative and not merely speculative. Three elements must exist before this evidence can be ruled admissible: (1) the evidence 'must relate to the "res gestae" of the crime'; (2) the evidence must exclude the accused as a perpetrator of the offense; and (3) the evidence 'would have to be admissible if the third party was on trial.' See Ex parte Walker, 623 So. 2d at 284, and Thomas, 539 So. 2d at 394-96.

Griffin, 790 So. 2d at 353-54 (some citations omitted).

Here, Wilson's claim is insufficiently pleaded because he failed to plead facts to satisfy the elements for admissibility established in Griffin. Specifically, Corley's admitting that she hit Walker "with a baseball bat until he fell," (C. 615), would not exclude Wilson as the perpetrator of capital murder. Dr. Enstice "gave a conservative estimate of 114 contusions and abrasions on Walker's body, 32 of which were on his head." Wilson, 142 So. 3d at 750. Corley's confession would not show that Wilson did not strike or kill Walker, or that he lacked the intent to kill Walker.

Because Wilson failed to plead sufficient facts to satisfy the test established in Griffin, he has failed to show that the letter would have been admissible. Consequently, even assuming trial counsel were deficient in failing to investigate the letter and the expert reports generated in conjunction with its investigation, Wilson has failed to show that he was prejudiced by the deficiency. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

3.

Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to object adequately to the voluntariness of Wilson's custodial statement. Although trial counsel filed a motion challenging the voluntariness of his custodial statement, Wilson pleaded that the motion was a sample motion from a capital-defense handbook that lacked any relevant facts. Wilson pleaded that trial counsel should have presented the following relevant facts in his motion and at the suppression hearing:

> "[T]he timing of the initial encounter early in the morning with Mr. Wilson being roused from his bed, the show of force by the presence of at least five officers in his home, the quick transport to the police station in handcuffs and in a police vehicle, the proximity of the interrogation to his arrival, the location in isolation in a 'conference' room at the police station, the deliberate decision not to tape the beginning of the questioning, the continuity of the questioning (with off-the-record preliminaries and conclusion), as well as Mr. Wilson's youth, somewhat limited intellectual capabilities, emotional instability, and inexperience with the criminal justice system -- show that Mr. Wilson was in no frame of mind to 'volunteer' a statement to police, with knowledge and understanding of what rights he was forgoing, notwithstanding Sgt. Luker's self-serving assertions to the contrary."

(C. 334.) According to Wilson's petition, had the trial court been presented with these facts, the trial court would have found, under the totality of the circumstances, that his statement was involuntary. The circuit court dismissed this claim as being without merit.

None of the facts Wilson claims his trial counsel should have presented to the trial court were outside the record on direct appeal. Consequently, these facts were already considered by this Court on direct appeal when it engaged in a totality-of-the-circumstances analysis:

"Considering the totality of the circumstances, the State presented sufficient evidence to establish the prerequisites to the admission of Wilson's statement. Investigator Luker testified that before Wilson gave his statement, Investigator Luker read Wilson his Miranda rights. Wilson did not appear to be under the influence of alcohol or drugs and appeared to understand his rights. Wilson signed the waiver-of-rights form. The form Wilson signed stated that he had read his rights, that he understood his rights, and that he waived those rights without being offered any promises or receiving any threats. (C. 428.) Investigator Luker further testified that no one offered Wilson any promises or made any threats before or during Wilson's statement.

In addition to Investigator Luker's testimony, this Court has listened to the recorded portion of Wilson's statement. On the recording, Wilson states that he was read his rights and that he understood those rights. Wilson does not sound as though he was under the influence of any intoxicant. Further, Wilson states that he has voluntarily waived his rights. Finally, Wilson states that no one made any promises or threatened him in an attempt to force him to give his statement.

"Based on the foregoing evidence indicating that Wilson was read his Miranda warnings, that he understood and voluntarily waived his Miranda rights, and that he chose to make a statement without any promises or threats, Wilson has not established that the admission of his statement resulted in any error, plain or otherwise. Therefore, Wilson is entitled to no relief on this claim."

Wilson, 142 So. 3d at 763-64 (emphasis added).

Although this Court conducted a plain-error analysis, it held that no error occurred in the admission of Wilson's statement. Trial counsel cannot be held ineffective for failing to raise meritless arguments. See Bearden, 825 So. 2d

at 872. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

4.

Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to present an adequate opening statement. Wilson pleaded that trial counsel failed to present any defense theory during his opening statement and instead merely cautioned the jury that what the lawyers said was not evidence and asked the jurors to listen closely to the testimony. According to Wilson's petition, trial counsel should have told the jury that Marsh had a specific reason for revenge against Walker's son, that the murder weapon was found in Jackson's vehicle, that the gloves used in the murder were found in Marsh's vehicle, and that the State had failed to conduct sufficient forensic testing. Wilson added that trial counsel should have explained to the jury that he was highly impressionable with low self-esteem, that he could have been talked into taking the blame for a crime he did not commit, and that law enforcement shaped his statement to make it incriminating. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

Initially, this Court holds that this portion of Wilson's brief fails to comply with Rule 28(a)(10), Ala. R. App. P., because he has failed to cite any legal authority in support of this claim of ineffectiveness. See (Wilson's brief, at 53-54.) "'Rule 28(a)[(10)], Ala. R. App. P., ... requires parties to include in their appellate briefs an argument section with citations to relevant legal authorities and to portions of the record relied on in their claims for relief.'" Hooks v. State, 141 So. 3d 1119, 1123-24 (Ala. Crim. App. 2013) (quoting Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002)). "'Authority supporting only "general propositions of law" does not constitute a sufficient argument for reversal.'" Hooks, 141 So. 3d at 1124 (quoting Hodges v. State, 926 So. 2d 1060, 1074 (Ala. Crim. App. 2005)). As a result, this claim is deemed waived.

Moreover, even if this claim were not waived, Wilson would still not be entitled to relief. First, Wilson's claim that trial counsel "simply cautioned the jury that what the lawyers said was not evidence and to listen closely to the

testimony," is factually inaccurate. Trial counsel also discussed with the jury factors he believed affected the credibility of Wilson's confession, arguably the most damning evidence against Wilson, and he pointed out that the State had failed to have a number of items submitted for forensic testing. (Trial R. 211-15.) Second, Wilson failed to plead sufficient facts to support his claim. For instance, Wilson failed to plead what admissible evidence trial counsel should have offered to support a claim regarding Marsh's motive. Also, Wilson failed to plead the significance of discussing with the jury the location of the gloves or the baseball bat, given that the State had a taped confession from Wilson in which he told officers that the gloves he had used were in Marsh's vehicle and he identified the baseball bat found in Jackson's vehicle as the one with which he had struck Walker. (Trial C. 501, 504.) Wilson's claim that trial counsel did not alert the jury to deficiencies in the State's forensic testing is refuted by the record.

This claim is insufficiently pleaded. See Rules 32.3 and 32.6(b), Ala. R. Crim. P. As such, the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

5.

Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to object to numerous instances of prosecutorial misconduct. Specifically, Wilson pleaded that trial counsel was ineffective for failing to object: a) to testimony from an unqualified State witness as a purported serologist and blood-spatter expert; b) to the false testimony of Investigator Luker elicited by the State; and c) to repeated introduction at the guilt phase of evidence relating to the "especially heinous, atrocious, or cruel" aggravating factor. Wilson also pleaded: d) that he was prejudiced by the cumulative effect of trial counsel's failures to object to prosecutorial misconduct.

a.

Wilson pleaded that trial counsel were ineffective for failing to object to testimony from an unqualified State witness as a purported serologist and blood-spatter expert. Here, Wilson referred to Investigator Luker's testimony in

which he drew "conclusions about what certain reddish spots he observed in areas of the house away from Mr. Walker's body were, i.e., blood, and what the shape and location of these purported blood droplets meant about the course of the attack on Mr. Walker." (C. 358.) Wilson pleaded that Investigator Luker's testimony "impermissibly assumed what needed to be proved as the foundation for everything else he said about blood droplets, i.e., that the droplets were, in fact, blood." (C. 360.) Additionally, Wilson pleaded that Investigator Luker concluded "that Mr. Walker must have been in other parts of the house than the kitchen after being struck because of the blood found in other areas." (C. 361.) The circuit court dismissed this claim as being insufficiently pleaded and without merit.

This Court addressed on direct appeal the substantive argument at issue here:

> "This Court has held:
>
> > "'In general, blood-spatter analysis is the process of examining the size, location, and configuration of bloodstains at a crime scene and using the general characteristics of blood to determine the direction, angle, and speed of the blood before it impacts on a surface in order to recreate the circumstances of the crime. See generally Danny R. Veilleux, Annotation, Admissibility, in Criminal Prosecution, of Expert Opinion Evidence as to "Blood Sp[l]atter" Interpretation, 9 A.L.R.5th 369 (1993), and the cases cited therein. Blood-spatter analysis is typically used to determine the position of the victim and the assailant at the time of a crime.'
>
> "Gavin v. State, 891 So. 2d 907, 969 (Ala. Crim. App. 2003).
>
> "Here, Investigator Luker did not analyze the blood spatter to determine the positions of Walker and Wilson at the time of the crime. Rather, his

> testimony related to his identification of blood at the scene and his common-sense observation that there would be some indication if blood had flowed from one area of the scene to another. Thus, Investigator Luker did not offer expert scientific testimony, and the State was not required to establish his qualifications as an expert in blood-spatter analysis. See Leonard v. State, 551 So. 2d 1143, 1146 (Ala. Crim. App. 1989) (reaffirmance that lay witnesses may identify a substance as blood); Gavin, 891 So. 2d at 967-70 (holding that it was not error to allow lay testimony that 'the blood flow coming from the body ran away from the area of the seat that [defendant] would have been seated in'). Accordingly, this issue does not entitle Wilson to any relief."

Wilson, 142 So. 3d 804-05.

Although this Court conducted a plain-error review on this issue, it examined Investigator Luker's testimony and determined that he "did not offer expert scientific testimony, [thus,] the State was not required to establish his qualifications as an expert in blood-spatter analysis." Id. at 804. As part of that analysis, this Court recognized that lay witnesses may identify substances as blood. Id. (citing Leonard, 551 So. 2d at 1146).

Trial counsel's objecting to this testimony would have been meritless, and trial counsel cannot be held ineffective for failing to raise a meritless objection. See Bearden, 825 So. 2d at 872. As such, this claim is without merit, and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

b.

Wilson pleaded that trial counsel were ineffective for failing to object to the false testimony of Investigator Luker elicited by the State. In his petition Wilson cited Investigator Luker's testimony in which he stated that he did not send for forensic testing blood droplets he found down the hallway, in the living room, or bedrooms. Wilson then pleaded:

> "But the 'other droplets' in 'the bedrooms' were not sent off for testing, because they did not exist. The evidence log from the crime scene lists fourteen swabs of 'red stain.' ... The 'location' column of the log shows that all of these were taken from the kitchen or areas immediately contiguous to it."

(C. 364-65.) Wilson pleaded that he was prejudiced by this false testimony because it rebutted his defense that he struck Walker only in the kitchen while trying to disarm him and because it was used to support the aggravating circumstance that the murder was especially heinous, atrocious, or cruel. The circuit court dismissed this claim as being insufficiently pleaded.

Wilson predicated his claim that Investigator Luker presented false testimony based on his conclusion that the other blood droplets did not exist. This conclusion, in turn, was based on his asserting that the evidence log showed only that swabs were taken from red stains in the kitchen or areas immediately contiguous to it. This assertion, even if proven, would not support the conclusion that the other blood droplets did not exist. At most, it would show that the investigators did not take swabs from those other blood droplets.[5]

Wilson has failed to plead sufficient facts to show that Investigator Luker testified falsely. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

c.

Wilson pleaded that trial counsel were ineffective for failing to object to repeated introduction during the guilt phase of evidence relating to the "especially heinous, atrocious, or cruel" aggravating factor. Specifically, Wilson pleaded that trial counsel was ineffective for failing to object to Dr. Enstice's testimony during the guilt phase

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[5]Again, Investigator Luker was competent to identify the red stains he observed as blood. See Leonard, 551 So. 2d at 1146. His testimony on this issue is evidence that the blood droplets existed.

regarding the pain suffered by Wilson. Wilson asserted that the testimony was irrelevant and highly prejudicial. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

On direct appeal, this Court stated:

> "To the extent Wilson argues that the prosecutor improperly injected into the guilt phase of the trial issues relating to the pain Wilson caused Walker, this Court disagrees. In McCray v. State, 88 So. 3d 1, 38 (Ala. Crim. App. 2010), this Court rejected the premise underlying Wilson's argument -- that the pain a capital-murder victim suffers is irrelevant and inadmissible during the guilt phase of a capital-murder trial. Specifically, this Court held that '[t]he pain and suffering of the victim is a circumstance surrounding the murder -- a circumstance that is relevant and admissible during the guilt phase of a capital trial.' Id. (citing Smith v. State, 795 So. 2d 788, 812 (Ala. Crim. App. 2000) (no error in trial court's questioning witness regarding the number of wounds on the murder victim's body during guilt phase of capital-murder trial despite appellant's argument that the number of wounds was relevant only to the penalty-phase issue of whether the murder was especially heinous, atrocious, or cruel)).
>
> "More importantly, victim-impact statements typically 'describe [only] the effect of the crime on the victim and his family' and, although relevant to the penalty-phase, are inadmissible in the guilt-phase. Payne v. Tennessee, 501 U.S. 808, 821, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). However, statements relating to the effect of the crime on the victim 'are admissible during the guilt phase of a criminal trial ... if the statements are relevant to a material issue of the guilt phase.' Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993) (emphasis in original); see also Gissendanner v. State, 949 So. 2d 956, 965 (Ala. Crim. App. 2006) (holding that victim-impact type evidence is admissible in the guilt phase if it is relevant to guilt-phase

issues). Rule 401, Ala. R. Evid., provides that '"[r]elevant evidence" [is any] evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence.'

"Here, the State's theory of the case was that Wilson broke into Walker's house, attacked him, and tortured him in an attempt to force Walker to relinquish his property. During his guilt-phase closing argument, the prosecutor reminded the jury that Wilson was charged with murder committed during the course of a robbery and of a burglary. The prosecutor then argued that it had proved the force element of robbery by establishing that Wilson tortured Walker and caused him a great deal of pain. Because the pain Wilson caused Walker was relevant and admissible to show the force Wilson used against Walker during the robbery, the prosecutor's argument did not constitute error."

Wilson, 142 So. 3d at 773-74 (footnote omitted); see also Wilson, 142 So. 3d at 792-93 ("Wilson next argues that the circuit court erroneously allowed the State to elicit testimony in the guilt phase establishing that Walker felt pain while being murdered. ... Because the pain Wilson caused Walker was relevant and admissible to show the force Wilson used against Walker during the robbery, Dr. Enstice's testimony relating to the pain Walker suffered did not constitute error.").

This Court has already considered the testimony offered by Dr. Enstice during the guilt phase and the argument based upon it and determined that no error occurred. Trial counsel's objecting to this testimony would have been meritless, and trial counsel cannot be held ineffective for failing to raise a meritless objection. See Bearden, 825 So. 2d at 872. As such, this claim is without merit, and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

d.

Wilson also pleaded that he was prejudiced by the cumulative effect of trial counsel's failures to object to prosecutorial misconduct. The circuit court dismissed this claim as being without merit.

Here, Wilson has failed to plead sufficiently any claims of ineffective assistance of counsel related to trial counsel's failure to object to prosecutorial misconduct. See Mashburn v. State, 148 So. 3d 1094, 1117 (Ala. Crim. App. 2013) (quoting Taylor v. State, 157 So. 3d 131, 140 (Ala. Crim. App. 2010)). As a result, there is no cumulative effect to consider. The circuit court did not err in dismissing this claim.

6.

Wilson asserted that he received ineffective assistance of counsel because trial counsel waived closing argument. Wilson characterized the State's closing argument as a "full and dramatic closing argument that presented the State's theory and detailed each piece of evidence." (C. 377.) Wilson pleaded that trial counsel should have argued that he "could be found guilty only of a lesser offense because of the absence of evidence." (C. 378, emphasis in original.) Also, Wilson asserted that trial counsel should have argued his statement's "unreliability, given both the circumstances of his arrest and its incompleteness," and that, even if the jury viewed his statement as uncoerced, Wilson admitted only to striking Walker in the head and to choking him. (C. 378.) Other lines of argument Wilson advanced in his petition were that trial counsel should have pointed out to the jury that the State failed to put on evidence that it was not Corley who had subjected Walker to more than 100 injuries, that Marsh benefitted the most from the crimes and was the instigator, and that the baseball bat was found in Jackson's vehicle. Finally, Wilson pleaded that trial counsel could have refuted some of the State's interpretations of the blood evidence and his confession. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

Following the State's closing argument, trial counsel requested a bench conference:

Defense: "I am getting my exercise this week. On the record, but away from the hearing of the jury, Your Honor, it's my understanding, and correct me if I'm wrong -- procedurally, okay -- Mr. Valeska has given the opening part of his closing statement. If I waive my portion and don't do a closing statement, I believe that that precludes Mr. Valeska from doing the closing part, because he has already had the last say. That's my understanding."

State: "That's fine. I agree. But if they are going to do that, that's their choice. All I want to ask the Court is, once again, this is a capital. And once again, you know, if that's the defense counsel strategy, both of them, as well as their client's --"

Defense: "I have already talked to my client. I will put that on the record. And you are right. I mean, you're absolutely right."

State: "That's fine."

Defense: "Let me just touch bases with Ms. Emfinger. We have talked to my client. And let me just touch base with her that that's for sure what we're going to do. That is what I am anticipating."

Court: "While you do that, I may just send [the jury] out for a minute."

Defense: "That would be great. That would be great. Thank you."

"(Whereupon, at this time , Mr. Hedeen is conferring with the defendant, Mr. Wilson.)"

"...

"(Whereupon, the trial jury is excused from the

courtroom, to which the following occurred outside the hearing and presence of the trial jury, to wit:)"

Court: "Mr. Hedeen, as I understand, the defense proposes to waive their closing argument; is that correct?"

Defense: "Yes, Your Honor. I have talked with Ms. Emfinger and with my client, Your Honor. And particularly after consulting with the Court and Mr. Valeska, it is my understanding that if the defendant waives his closing statement, then that precludes the prosecution from going before the jury again and giving what essentially would have been the closing closing argument or the second part of the closing --"

Court: "The rebuttal."

Defense: "Right. The rebuttal -- and you are right, Your Honor. That is a better way to phrase it. I have talked to Ms. Emfinger. I have talked to my client. They are in agreement that that is what we would like to do."

Court: "Okay. Mrs. Emfinger, is that the way you feel about it, also?"

Defense: "Yes, Judge."

Court: "And, Mr. Wilson, are you agreeable to that?"

Wilson: "Yes, sir."

Court: "You know, this is a little different, but it is done sometimes. But you are in agreement with that?"

Wilson: "Yes, sir."

(Trial R. 625-28.)

In his petition Wilson relied on the holding of the Alabama Supreme Court in Ex parte Whited, 180 So. 3d 69 (Ala. 2015), in which the Court held trial counsel ineffective for failing to present a closing argument. Whited, however, is factually distinguishable from the instant case. Most significant is that the trial counsel in Whited could not articulate a strategic reason for waiving closing argument. The portion of the record quoted above shows that trial counsel made a strategic decision to waive closing argument to prevent the State's rebuttal. "This is exactly the sort of strategic decision which the United States Supreme Court has held to be virtually unchallengeable in Strickland v. Washington." Floyd v. State, 517 So. 2d 1221, 1227 (Ala. Crim. App. 1989), rev'd on other grounds, Ex parte Floyd, 571 So. 2d 1234 (Ala. 1990). Notably, trial co-counsel and Wilson himself agreed with this strategic decision. "Even if [trial counsel's] failure to make a closing argument is ultimately viewed as a mistake unfavorable to [their] client, that alone is not sufficient to demonstrate inadequate representation." Behel v. State, 405 So. 2d 51, 53 (Ala. Crim. App. 1981) (citing Robinson v. State, 361 So. 2d 1172, 1174 (Ala. Crim. App. 1978)). Further, in Whited, trial counsel had strong arguments against guilt; Wilson has not identified them here. Wilson suggests that arguing an absence of evidence could have garnered him a conviction on a lesser offense, but he has failed to identify the offense or to explain how any of his other arguments would have accomplished a conviction other than capital murder. For instance, arguing an increased culpability on the part of his co-defendants would not have relieved Wilson of his own culpability, see, e.g., Sneed v. State, 1 So. 3d 104, 125-26 (Ala. Crim. App. 2007), and there was scant evidence from which trial counsel could have argued that Wilson's statement was coerced. With respect to the statement, the State asserted in closing that Wilson's deciding to "change[] it all up" indicated he decided to abandon the co-defendants' plan to knock Walker unconscious and to kill him.[6] Wilson pleaded that trial counsel should

[6]Wilson stated that he, Marsh, and Corley had a "sarcastic conversation" about "knocking [Walker] out" and stealing his van; Wilson added, however, "when I got there, I changed it all up cause I didn't want to you know just knock him out." (Trial C. 516.)

have challenged this interpretation because "none of what Mr. Wilson said in the recorded parts of his statement correspond[ed] with changing the 'plan' to a murderous one." (C. 379.) This argument ignores, of course, Wilson's admission that he struck Walker in the head with a baseball bat and choked him for six minutes. More importantly, the counter-argument Wilson suggested trial counsel should have made -- that Wilson decided not to harm Walker -- is dubious given that Wilson entered Walker's home with a bat and the only explanation Wilson offered was that he was afraid of Walker's dog -- a two-pound Chihuahua.

Trial counsel's decision to waive closing argument was a strategic decision and Wilson failed to plead sufficient facts otherwise. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

7.

Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to protect his right to a fair and honest jury determination. Specifically, Wilson pleaded that trial counsel failed: a) to argue for the removal of a biased juror and b) to object to inappropriate contact between the prosecutor and the jury.

a.

Wilson asserted that trial counsel were ineffective because they failed to argue for the removal of a biased juror. Specifically, Wilson pleaded that trial counsel were ineffective for failing to take juror L.K. under voir dire after she revealed to the trial court that she knew Wilson and his mother. The admission, which came during the guilt phase, was that L.K. realized she attended church with Wilson's mother and had not disclosed the information during voir dire. L.K. was asked if her familiarity with Wilson's mother would affect her consideration of the case and L.K. answered, "I don't believe it would." (Trial R. 237.) L.K. remained on the jury. Wilson pleaded that L.K.'s response was equivocal and that effective counsel would have questioned L.K. further to ensure that she could be impartial. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

Wilson failed to plead the questions trial counsel should have asked or what L.K.'s answers would have been. See Bryant v. State, 181 So. 3d 1087, 1107 (Ala. Crim. App. 2011). As such, this claim is insufficiently pleaded and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

b.

Wilson asserted that trial counsel were ineffective because they failed to object to inappropriate contact between the prosecutor and the jury. Wilson pleaded that his mother "observed the prosecutor carrying documents into the jury room during their deliberations. When defense counsel was informed of this highly improper conduct, they did not bring it to the attention of the trial court." (C. 386.) Wilson asserted that trial counsel's failure to raise this issue to the trial court and to request a mistrial permitted the prosecution to have undue influence over the jury and create bias in favor of the State. The circuit court dismissed this claim as being insufficiently pleaded.

Here, Wilson failed to plead when trial counsel was notified of the alleged contact, and, more importantly, failed to describe any contact at all. Even taking Wilson's assertions as true, there is nothing in this claim to suggest that any jurors even noticed the prosecutor's entering the jury room. As such, this claim is insufficiently pleaded and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

B.

Wilson next asserted that trial counsel were ineffective at the penalty phase. Specifically, Wilson asserted in his petition that he received ineffective assistance of counsel because trial counsel: 1) failed to investigate and to present available and compelling mitigation evidence; 2) failed to investigate Corley's letter for evidence of reduced culpability; 3) failed to object to prosecutorial misconduct; 4) failed to present any evidence at the sentencing hearing; and 5) failed to protect his right to a fair and honest jury determination.

1.

Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to investigate and to present available and compelling mitigation evidence. Wilson pleaded that had trial counsel conducted a sufficient mitigation investigation, they would have discovered and could have presented to the jury that Wilson suffered from generational poverty, familial mental illness and abandonment, neglect and abuse, and mental and learning difficulties. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

> "'"'[F]ailure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment.' Coleman [v. Mitchell], 244 F.3d [533] at 545 [(6th Cir. 2001)]; see also Rompilla v. Beard, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003). Our circuit's precedent has distinguished between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation where the presumption of reasonable performance is more difficult to overcome:
>
> > "'"'[T]he cases where this court has granted the writ for failure of counsel to investigate potential

> mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by Strickland will be hard to overcome.'
>
> """Campbell v. Coyle, 260 F.3d 531, 552 (6th Cir. 2001) (quotation omitted) ...; see also Moore v. Parker, 425 F.3d 250, 255 (6th Cir. 2005).

In the present case, defense counsel did not completely fail to conduct an investigation for mitigating evidence. Counsel spoke with Beuke's parents prior to penalty phase of trial (although there is some question as to how much time counsel spent preparing Beuke's parents to testify), and presented his parents' testimony at the sentencing hearing. Defense counsel also asked the probation department to conduct a presentence investigation and a psychiatric evaluation. While these investigatory efforts fall far short of an exhaustive search, they do not qualify as a

> complete failure to investigate. See Martin v. Mitchell, 280 F.3d 594, 613 (6th Cir. 2002) (finding that defense counsel did not completely fail to investigate where there was 'limited contact between defense counsel and family members,' 'counsel requested a presentence report,' and counsel 'elicited the testimony of [petitioner's] mother and grandmother'). Because Beuke's attorneys did not entirely abdicate their duty to investigate for mitigating evidence, we must closely evaluate whether they exhibited specific deficiencies that were unreasonable under prevailing professional standards. See Dickerson v. Bagley, 453 F.3d 690, 701 (6th Cir. 2006)."

"'Beuke v. Houk, 537 F.3d 618, 643 (6th Cir. 2008). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments." Wiggins, 539 U.S. at 521-22. "A defense attorney is not required to investigate all leads ...." Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994). "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." Atkins v. Singletary, 965 F.2d 952, 960 (11th Cir. 1992). "The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness." Mitchell v. Kemp, 762 F.2d 886, 889 (11th Cir. 1985).

> "'"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information."
>
> "'Strickland v. Washington, 466 U.S. at 691. "The reasonableness of the investigation involves 'not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.'" St. Aubin v. Quarterman, 470 F.3d 1096, 1101 (5th Cir. 2006), quoting in part Wiggins, 539 U.S. at 527.'

"Ray [v. State], 80 So. 3d [965,] 984 [(Ala. Crim. App. 2011)]. In addition,

> "'"[W]e 'must recognize that trial counsel is afforded broad authority in determining what evidence will be offered in mitigation.' State v. Frazier (1991), 61 Ohio St.3d 247, 255, 574 N.E.2d 483. We also reiterate that post-conviction proceedings were designed to redress denials or infringements of basic constitutional rights and were not intended as an avenue for simply retrying the case. [Laugesen] v. State, [(1967), 11 Ohio Misc. 10, 227 N.E.2d 663]; State v. Lott, [

(Nov. 3, 1994), Cuyahoga App. Nos. 66338, 66389, 66390]. Further, the failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel. State v. Combs (1994), 100 Ohio App. 3d 90, 105, 652 N.E.2d 205."

"'Jells v. Mitchell, 538 F.3d 478, 489 (6th Cir. 2008).

"'"'[C]ounsel is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Counsel must be permitted to weed out some arguments to stress others and advocate effectively.' Haliburton v. Sec'y for the Dep't of Corr., 342 F.3d 1233, 1243-44 (11th Cir. 2003) (quotation marks and citations omitted); see Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1348-50 (11th Cir. 2005) (rejecting ineffective assistance claim where defendant's mother was only mitigation witness and counsel did not introduce evidence from hospital records in counsel's possession showing defendant's brain damage and mental retardation or call psychologist who evaluated defendant pre-trial as having dull normal intelligence); Hubbard v. Haley, 317 F.3d 1245, 1254 n.16, 1260 (11th Cir. 2003) (stating this

> Court has 'consistently held that there is "no absolute duty ... to introduce mitigating or character evidence"' and rejecting claim that counsel were ineffective in failing to present hospital records showing defendant was in 'borderline mentally retarded range') (brackets omitted) (quoting Chandler [v. United States], 218 F.3d [1305] at 1319 [(11th Cir. 2000)]).'
>
> "'Wood v. Allen, 542 F.3d 1281, 1306 (11th Cir. 2008). "The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy." Hill v. Mitchell, 400 F.3d 308, 331 (6th Cir. 2005).'

"Dunaway [v. State, 198 So. 3d 530, 547 (Ala. Crim. App. 2009)].

"Likewise,

> "'"When claims of ineffective assistance of counsel involve the penalty phase of a capital murder trial the focus is on 'whether "the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."' Jones v. State, 753 So. 2d 1174, 1197 (Ala. Crim. App. 1999), quoting Stevens v. Zant, 968 F.2d 1076, 1081 (11th Cir. 1992). See also Williams v. State, 783 So. 2d 108 (Ala. Crim. App. 2000). An attorney's performance is not per se ineffective for failing to present mitigating evidence at

> the penalty phase of a capital trial. See State v. Rizzo, 266 Conn. 171, 833 A.2d 363 (2003); Howard v. State, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197 (2004); Battenfield v. State, 953 P.2d 1123 (Okla. Crim. App. 1998); Conner v. Anderson, 259 F.Supp.2d 741 (S.D.Ind. 2003); Smith v. Cockrell, 311 F.3d 661 (5th Cir. 2002); Duckett v. Mullin, 306 F.3d 982 (10th Cir. 2002), cert. denied [538 U.S. 1004], 123 S. Ct. 1911 (2003); Hayes v. Woodford, 301 F.3d 1054 (9th Cir. 2002); and Hunt v. Lee, 291 F.3d 284 (4th Cir.), cert. denied, 537 U.S. 1045 (2002).'

"'Adkins v. State, 930 So. 2d 524, 536 (Ala. Crim. App. 2001) (opinion on return to third remand). As we also stated in McWilliams v. State, 897 So. 2d 437, 453-54 (Ala. Crim. App. 2004):

> "'"'Prejudicial ineffective assistance of counsel under Strickland cannot be established on the general claim that additional witnesses should have been called in mitigation. See Briley v. Bass, 750 F.2d 1238, 1248 (4th Cir. 1984); see also Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990). Rather, the deciding factor is whether additional witnesses would have made any difference in the mitigation phase of the trial.' Smith v. Anderson, 104 F.Supp. 2d 773, 809 (S.D.Ohio 2000), aff'd, 348 F.3d 177 (6th Cir. 2003). 'There has never

> been a case where additional witnesses could not have been called.' State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App. 1993)."'
>
> "Hunt v. State, 940 So. 2d 1041, 1067-68 (Ala. Crim. App. 2005)."

McWhorter v. State, 142 So. 3d 1195, 1245-47 (Ala. Crim. App. 2011).

"Although [Wilson]'s claim is that his trial counsel should have done something more, we first look at what the lawyer[s] did in fact." Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000). Trial counsel presented two witnesses at the penalty phase -- Linda Wilson and Bonnie Anders -- and introduced into evidence Wilson's school records.

Linda Wilson testified that Wilson was the second of three children, all boys, she had with her then-husband, Roland Wilson. Linda Wilson touched on her own emotional problems, describing an attempted suicide that occurred when Wilson was three years old. Linda Wilson overdosed on medication and then carried her youngest son next door, where her in-laws lived. Linda Wilson lost consciousness in her in-laws' backyard. Wilson, who was outside, witnessed the event. Linda Wilson testified that she later discussed her suicide attempt with Wilson when he was 13 years old.

Linda Wilson's marriage to Roland Wilson ended in divorce the next year. The boys stayed in Milton, Florida, with their father and Linda Wilson moved to Dothan, Alabama. Linda Wilson visited her children when she could, but admitted that visits were sporadic due to a lack of transportation. Even so, Linda Wilson spoke to Wilson on the telephone once a week. Linda Wilson stated that Wilson began a regimen of medication and therapy in kindergarten. Wilson lived with his father for approximately 10 years before moving to Dothan, where he lived with his mother at the house of his uncle Angelo Gabrielli. Linda Wilson stated that Wilson had no friends during this stay in Dothan and that he was on various medications. According to Linda Wilson, Wilson was taking three drugs --

Prozac, a second that was likely Ritalin, and a third that she described only as a "psychotic drug." (Trial R. 725.) Without consulting a doctor, Wilson's mother took him off these medications because she believed he could not function on them. Wilson's stay in Dothan lasted less than two years because he was unhappy; Linda Wilson identified her brother Gabrielli as the source of Wilson's unhappiness. Linda Wilson testified that when Wilson "would come home from school with an off-task mark, my brother would want to take the belt and tear his butt up with it. And [Wilson] got tired of it." (Trial R. 723.) "Off-task" could mean something as insignificant as dropping a pencil on the floor or looking up in class.

Wilson moved back to Milton to live with his father. There his medications were resumed. Wilson returned to Dothan, however, after a couple of years because his father was planning to remove him from high school and enroll him in a trade school. Wilson completed high school in Dothan, graduating with a vocational diploma. Linda Wilson testified that Wilson stayed in his room and was not social with others. Linda Wilson repeatedly characterized Wilson as a follower.

Bonnie Anders, who was a neighbor of Wilson in Dothan, testified that she was a volunteer with the American Red Cross and that Wilson had aided her, without pay, in her disaster-relief work approximately a dozen times.

Wilson first asserted trial counsel should have investigated and presented evidence of the generational poverty from which Wilson's family suffered. For instance, Wilson asserted that trial counsel should have presented evidence of his mother's impoverished background -- Wilson pleaded that she was raised in a shack with a leaky roof and that the family subsisted on a mixture of cornmeal and powdered milk -- and the severe abuse she suffered at the hands of her alcoholic father and, after her parents' divorce, her older brother. Wilson also pleaded that his mother was overwhelmed as a caregiver to three young boys and that she and his father fought frequently.

Wilson pleaded that trial counsel should have investigated and presented evidence of familial mental illness and abandonment. Here, Wilson asserted that trial counsel

should have presented evidence of his mother's suicide attempt and that his father was fearful that his mother was a danger to Wilson and his brothers. Two years after Wilson's parents' divorce, Linda Wilson moved to Dothan and rarely saw Wilson until he moved to Dothan years later. Wilson asserted that Roland Wilson would have testified that Wilson's separation from his mother was traumatic as were the occasions when Linda Wilson failed to see her sons as she had promised. Also, Wilson pleaded that trial counsel should have offered evidence that Linda Wilson's mother suffered from a mental illness, was abusive and neglectful, and had threatened suicide.

Wilson asserted that trial counsel should have investigated and presented evidence of the neglect and abuse he suffered. Specifically, Wilson pleaded that he was often left in the care of his grandparents and that they had to devote much of their attention to his younger brother, who suffered from cystic fibrosis. Wilson was neglected by his father and grandparents and rarely saw his mother. Family members recall Wilson's grandmother screaming at him, telling him that he was stupid and that he would never amount to anything. Wilson's father remarried when Wilson was seven years old, but this did not lead to increased attention -- Wilson's step-mother showed preference for her own children over Wilson and his brothers. Wilson's step-mother would not prepare food for Wilson or his brothers and she isolated Wilson from the rest of his family. In contrast to her own children, Wilson's step-mother would not allow Wilson to have friends visit him or to visit his friends. Wilson's aunt Pamela Tankersley would have testified that she could tell Wilson was unhappy with his living situation in Milton. Wilson pleaded that moving to Dothan in sixth grade provided little relief. Although his uncle Gabrielli became a surrogate father to him -- taking him fishing and allowing him to leave his room -- Gabrielli was physically abusive. Linda Wilson would have testified that Gabrielli often beat Wilson, usually with a belt, and on one occasion dumped a pot of hot water on him. Wilson moved back to Milton to escape Gabrielli.

Wilson pleaded that trial counsel should have investigated and presented evidence of Wilson's mental health and learning deficiencies. Wilson pleaded that he was diagnosed with Attention Deficit Hyperactivity Disorder in

kindergarten and declared eligible for exceptional education in fourth grade. At that time, Wilson was taking Ritalin and the antidepressant Pamelor. In sixth grade, Wilson's psychologist noted that he seemed unhappy and isolated, and Wilson's fourth-grade teacher would have testified that Wilson had difficulty communicating and lacked friends. Wilson's school records from Dothan indicated that he had social difficulties and that his reading, writing, and math skills lagged several grade levels behind. Linda Wilson would have testified that on two occasions she saw Wilson banging his head on a car and punching himself in the face while upset. Wilson pleaded that he had to repeat tenth grade, which led to his father's wanting Wilson to enroll in a trade school. In response, Wilson returned to Dothan to live with his mother. During this stay in Dothan, Gabrielli's physical abuse of Wilson abated and Wilson, according to a number of family members, felt wanted and loved. Wilson began to open up socially and his grades and behavior at school improved. Nevertheless, Wilson was classified as having an emotional disturbance and placed in special-needs classes. Wilson's special-needs teacher, Donna Arieux, would have testified that she wished she had had more students like Wilson -- although quiet, she felt he cared for others, and she never saw him bully other students.

In the context of mental health, Wilson pleaded that trial counsel should have retained Dr. Robert Shaffer, a forensic and neuropsychologist who would have testified that Wilson suffers from Asperger's Syndrome, a constituent of autism spectrum disorder. Those that suffer from autism spectrum disorder often lack social abilities and are prone to anxiety, depression, and self-harm. Wilson pleaded that had trial counsel spent more time interviewing him, his family, and his caregivers, and reviewing his school records, they would have identified red flags that could have alerted them to his disorder. Further, had trial counsel discovered his disorder, they would have learned that those who suffer from Asperger's Syndrome are susceptible to influence, which would have allowed them to place Wilson's offense in context for the jury. Wilson pleaded that individuals with his disorder are typically gullible, naive, and vulnerable to manipulation. Wilson specifically cited Marsh and Jackson, who were also taught by Arieux, as sources of trouble. If trial counsel had interviewed Arieux, Wilson asserted, they would have learned

that Marsh had stolen from her three times, that she considered Jackson to be a liar, and that Jackson had self-destructive tendencies. Gabrielli would have testified that he believed Marsh and Jackson influenced Wilson to smoke and drink and to skip work. Gabrielli also could have testified to an incident between Marsh and Walker in which Walker forced Marsh to pay for tire rims that Walker's son had installed on Marsh's vehicle. Wilson pleaded that this incident precipitated Marsh's planning to rob Walker to get his money back.

Wilson asserted that trial counsel was ineffective in failing to present the foregoing mitigation evidence and in failing to retain the assistance of experts. Wilson pleaded that experts would have been valuable in diagnosing and explaining to the jury Wilson's mental deficiencies, and in explaining Wilson's school records to the jury. Wilson stated that "[h]ad the mitigating evidence described above been presented fully, there is a reasonable probability that David Wilson would not have been sentenced to death, especially as two jurors already voted for life." (C. 425, emphasis in original.)

However, a review of the evidence that was presented shows that much of what Wilson pleaded trial counsel should have investigated and presented to the jury would have been cumulative. For instance, Linda Wilson testified to her own emotional issues, including her attempted suicide, and her leaving her children after divorcing Wilson's father. Linda Wilson admitted to seeing her children infrequently and presented testimony about Wilson's taking Ritalin and other prescription medication from a young age. Linda Wilson also testified to Gabrielli's whipping Wilson for even minor transgressions at school and to Wilson's desire to move back to Milton to get away from Gabrielli. Finally, Linda Wilson testified on multiple occasions that Wilson was a follower. Bonnie Anders offered testimony to the jury about Wilson's willingness to volunteer, which showed Wilson's concern for others and his potential for rehabilitation if spared. "[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." Daniel v. State, 86 So. 3d 405, 429-30 (Ala. Crim. App. 2011). Certainly, trial counsel could have offered additional witnesses during the

penalty phase, but this Court has recognized that "[t]here has never been a case where additional witnesses could not have been called." State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App. 1993). "'[E]ven 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, 86 So. 3d at 430.

Further, the mitigating effect of much of this evidence is difficult to assess because of the dearth of specific facts pleaded in support. For instance, Wilson pleaded that Gabrielli "often beat [him], usually with a belt, but sometimes with other things." (C. 402.) There are no specific facts to indicate the actual frequency of these alleged beatings or, significantly, to indicate their severity. The only injury pleaded by Wilson is that on one occasion Gabrielli "took a switch and beat [Wilson] until he had welts all over his legs." (C. 402.) Likewise, Wilson pleaded only a few instances of verbal abuse. With respect to Wilson's alleged affliction with Asperger's Syndrome, Wilson pleaded that he was diagnosed with the condition by Dr. Shaffer, who was retained by postconviction counsel. Wilson pleaded that Asperger's Syndrome is a "constituent of autism spectrum disorder," and then pleaded the typical symptoms of autism spectrum disorder, as opposed to the specific symptoms of Wilson's alleged affliction. (C. 411.) Asperger's Syndrome, though, "is essentially a mild form of autism." United States v. Lange, 445 F.3d 983, 985 (7th Cir. 2006) (emphasis added).

It is important to note that Wilson's diagnosis of Asperger's Syndome came well after his trial had concluded. "'Trial counsel cannot be ineffective for failing to present evidence that did not exist at the time of trial.' Clark v. State, 35 So. 3d 880, 888 (Fla. 2010)." Wade v. State, 156 So. 3d 1004, 1030 (Fla. 2014). Wilson pleaded, though, that had "trial counsel met with [Wilson] more regularly, and interviewed him about his behavioral and social history, they would have learned that David exhibited several 'red flags' for autism spectrum disorder, including poor social and communicative skills, consistently flat affect, and a history of depression and self-harming behavior." (C. 413.) Yet, it would be unreasonable to expect trial counsel to recognize these traits as red flags for Wilson's alleged disorder when

the disorder had gone undiagnosed despite Wilson's seeing psychologists since he was a small child.

Indeed, Wilson pleaded evidence that was not presented by trial counsel and may or may not have been investigated, such as evidence regarding his suffering from generational poverty, familial mental illness, abandonment, and neglect. This Court has recognized, though, that evidence of a troubled childhood may be a double-edged sword. Davis v. State, 44 So. 3d 1118, 1141 (Ala. Crim. App. 2009). This is so because many jurors have had difficult childhoods, but have not turned to criminal conduct. Id. (quoting Card v. Dugger, 911 F.2d 1494, 1511 (11th Cir. 1990)); see also Johnson v. Cockrell, 306 F.3d 249, 253 (5th Cir. 2002) (evidence of brain injury, abusive childhood, and drug and alcohol abuse was 'double edged' because it would support a finding of future dangerousness).

After reweighing the omitted mitigation evidence that was sufficiently pleaded along with the mitigation evidence presented by trial counsel, this Court holds that there is no reasonable probability that the balance of aggravating and mitigating circumstances that led to the imposition of the death penalty would have been different. Although the facts pleaded in Wilson's petition depict a troubled childhood, the depiction is not compelling enough to overcome the circumstances of Wilson's crime and the three strong aggravating factors proven by the State -- that the capital offense was committed while Wilson was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit a burglary; that the capital offense was committed while Wilson was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit a robbery; and that the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. Wilson has failed to allege sufficient facts to show that he was prejudiced by trial counsel's alleged ineffectiveness. As such, this claim is insufficiently pleaded and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

2.

Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to investigate

Corley's letter for evidence of reduced culpability. Again, Wilson refers to the letter, allegedly written by Corley, in which the author admitted to striking Walker with a bat until he fell. Wilson pleaded in his petition that had trial counsel discovered and presented this evidence, it would have called into question Wilson's cruelty and responsibility for all of Wilson's injuries. The circuit court dismissed this claim as being insufficiently pleaded.

As discussed in Part II(A)(2) of this memorandum opinion, Corley's admitting that she struck Walker "with a baseball bat until he fell," (C. 615), would not exclude Wilson as the perpetrator of capital murder. Specifically, it does not negate Wilson's intent to kill Walker or that the murder was committed in a heinous, atrocious, or cruel manner. See Ex parte Bankhead, 585 So. 2d 112, 125 (Ala. 1991), rev'd on other grounds, 625 So. 2d 1146 (Ala. 1993) (holding that the application of the especially heinous, atrocious, or cruel aggravating circumstance focuses on the manner of the killing and not the defendant's actual participation in the murder). Corley's admission, if true, would establish at most that Wilson had an accomplice in his beating and strangling Walker to death. Evidence that an accomplice was involved is not mitigating. Consequently, even assuming trial counsel were deficient in failing to investigate and to offer the letter as evidence during the penalty phase, Wilson has failed to show that he was prejudiced by the deficiency. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

3.

Wilson asserted that he received ineffective assistance of counsel because trial counsel failed to object to prosecutorial misconduct. Specifically, Wilson pleaded that trial counsel should have objected to the following instances of prosecutorial misconduct: a) the prosecutor's presenting the aggravator of escape; b) the prosecutor's presenting an argument based on an unqualified witness's expert testimony; and c) the prosecutor's repeated questioning and arguments

based on facts not in evidence.[7]

a.

Wilson asserted that trial counsel were ineffective for failing to object to the prosecutor's presenting to the jury the aggravator of escape. Ten months after Wilson's arrest for capital murder, Wilson was charged with second-degree escape. Wilson pleaded guilty to the charge before his trial. Prior to the commencement of the penalty phase, Wilson's trial counsel filed a motion in limine to prohibit evidence of Wilson's jail records and the escape charge. The prosecutor argued that evidence of Wilson's escape was admissible to prove the aggravating circumstance that the capital offense was committed while the person was under a sentence of imprisonment. See § 13A-5-49(1), Ala. Code 1975. Trial counsel conceded the point but argued that the prosecutor could not offer details of the conviction. The trial court agreed that the prosecutor could not offer details of the conviction unless Wilson opened the door.

During opening arguments in the penalty phase, the prosecutor stated that he was relying on four aggravating factors. The first was that

> "[t]he capital offense was committed by a person, David Wilson, who was under a sentence of imprisonment. I expect the evidence to be, after David Wilson was arrested and charged with the capital murder and the burglary, that while he was pending trial, that he did, to wit, escape or attempt to escape from the penal facility, the Houston County Jail, and he was convicted of that

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[7]Wilson alleged other instances of prosecutorial misconduct, but they were not specifically reasserted by Wilson in his brief on appeal. Instead, Wilson merely pleaded, "Wilson pled other instances of misconduct, which counsel failed to counter, intensified [sic] the prejudice." (Wilson's brief, at 81.) Because he has failed to specifically reassert these other claims on appeal, they are deemed abandoned. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995).

offense in May of 2006 and received a sentence for five years pending trial."

(Trial R. 691.) Following opening arguments the trial court excused the jury and held a bench conference. The trial court explained to the parties that after further research he had determined that the aggravating circumstance that the capital offense was committed while the person was under a sentence of imprisonment would be inapplicable. The trial court stated, "So I think we have got a problem with that first one. And I think that will be a reversible problem." (Trial R. 705.) The trial court called the jury back into the courtroom and instructed them as follows:

> "Ladies and gentlemen, there was a legal issue that we had to address in regard to which aggravating circumstances the State will be relying on. The Court was of the opinion and [the prosecutor] had also pointed out that the State -- one of the aggravating circumstances would be that Mr. Wilson was under a sentence of imprisonment at the time. That was the first one the State mentioned. But under the legal definition and requirements of conviction at the time of the imprisonment, the conviction that was referred to -- the escape conviction will not be presented, because it will not be an aggravating circumstance in the case. But the State will still be relying on the three they mentioned, that the offense was committed while the defendant was engaged in a burglary, and then, that the offense was comitted while he was engaged in a robbery, and that the offense was especially heinous, atrocious or cruel compared to other capital cases. So those will be presented, but not the one about being under a prior conviction at the time of the offense in this case."

(Trial R. 708-09.) The prosecutor asked for an instruction that the jury disregard that circumstance, and the trial court agreed: "Yeah. You should disregard that. And that ground is stricken from your consideration in the case, that ground about being previously convicted of escape." (Trial R. 709.)

Wilson asserted that trial counsel was ineffective for

failing to argue the law correctly during his motion in limine and for failing to object to the prosecutor's argument. Wilson acknowledged the trial court's instruction but pleaded that the instruction did not erase the prejudice he had suffered. The circuit court dismissed this claim as being insufficiently pleaded and without merit.

The prosecutor's reference to Wilson's conviction for escape was brief and he related no details of the offense to the jury. As discussed above, the trial court instructed the jury that evidence of Wilson's escape could not form the basis of an aggravating circumstance and that the prosecutor's mentioning of it should be disregarded. Also, the trial court properly instructed the jury only on the three relevant, aggravating circumstances. "'[A]n appellate court "presume[s] that the jury follows the trial court's instructions unless there is evidence to the contrary."'" Thompson v. State, 153 So. 3d 84, 158 (Ala. Crim. App. 2012) (quoting Ex parte Belisle, 11 So. 3d 323, 333 (Ala. 2008)). Even assuming trial counsel were deficient in failing to argue the law correctly during the motion in limine and for failing to object to the prosecutor's argument, Wilson was not prejudiced by the alleged deficiency. As such, this claim is without merit and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

b.

Wilson asserted that trial counsel were ineffective because trial counsel failed to object to the prosecutor's presenting an argument based on an unqualified witness's expert testimony. Here, Wilson referred again to Investigator Luker's testimony regarding blood evidence found in Walker's house, on which the prosecutor relied to argue to the jury that Wilson dragged and beat Walker throughout the house. This evidence was used by the State in the penalty phase to support the aggravating circumstance that the offense was especially heinous, atrocious, or cruel compared to other capital offenses. Wilson pleaded that had trial counsel objected to the evidence, it would have been excluded and the State would have lost its basis for its argument that Walker was dragged and beaten throughout the house.

In part II(A)(5)(a) of this memorandum opinion, this

Court noted that it had held on direct appeal that Investigator Luker "did not offer expert scientific testimony, [thus,] the State was not required to establish his qualifications as an expert in blood-spatter analysis." Id. at 804. Consequently, trial counsel's objecting to this evidence would have been meritless. Trial counsel cannot be held ineffective for failing to raise a meritless objection. See Bearden, 825 So. 2d at 872. As such, this claim is without merit, and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

c.

Wilson asserted that trial counsel were ineffective for failing to object to the prosecutor's repeated questioning and arguments based on facts not in evidence. Specifically, Wilson referred to the prosecutor's arguing that Wilson changed his plan from knocking out Walker to beating him to death.

During his statement to Investigator Luker, Wilson stated that he, Marsh, and Corley had a "sarcastic conversation" about "knocking [Walker] out" and stealing his van; Wilson added, however, "when I got there, I changed it all up cause I didn't want to you know just knock him out." (Trial C. 516.) Wilson's statement contained no further explanation on what he meant by "changed it all up."[8] The prosecutor argued during the penalty phase that Wilson had changed his plan to a murderous one. The prosecutor also used his interpretation of Wilson's statement to challenge on cross-examination Wilson's mitigation witnesses' testimony that Wilson was a follower. Wilson pleaded that the prosecutor's interpretation was an unsupported extrapolation to which trial counsel should have objected. Wilson asserted that a more reasonable interpretation was that Wilson changed the plan to one in which he would avoid making contact with Walker. Wilson also reasserted his earlier claim that the prosecutor's argument was based on false testimony from Investigator Luker regarding blood being found throughout the house. The circuit court dismissed this claim as being without merit.

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[8]Unbeknownst to Investigator Luker, the tape recorder he was using ceased recording before he asked further questions.

The prosecutor, as well as defense counsel, has a right to present his or her reasonable impressions from the evidence and may argue every legitimate inference. Reeves v. State, 807 So. 2d 18, 45 (Ala. Crim. App. 2000) (citations and quotations omitted). Here, the prosecutor's argument was a reasonable inference from the evidence. Any objection based on prosecutorial misconduct would have been meritless. Trial counsel cannot be ineffective for failing to raise meritless objection. Jackson v. State, 133 So. 3d 420, 453 (Ala. Crim. App. 2009) (citations omitted). Further, as this Court held earlier in this memorandum opinion, Wilson has failed to plead sufficient facts to show that Investigator Luker testified falsely. As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

4.

Wilson asserted that trial counsel were ineffective for failing to present any evidence at his sentencing hearing. During the hearing, the prosecutor revisited the facts of the case and asked the trial court to follow the jury's recommendation of a death sentence. Trial counsel presented some argument to the trial court regarding mitigating evidence -- that Wilson's parents were divorced when he was four years old; that Wilson's school records indicated he was emotionally handicapped, that Wilson was a loving son and brother; that he was under 21 years old at the time of the offense; that he graduated from high school; that Wilson voluntarily gave a statement to law enforcement; that Walker may not have been conscious during the entire assault; that Wilson had been on several behavior-regulating medications for many years; that his psychological evaluations indicated he had significant self-blame, which caused an exaggerated need to accept responsibility; that Wilson performed volunteer work; that Wilson had been respectful during trial; and that there had been two jurors who had voted to recommend a sentence of life in prison without the possibility of parole. The prosecutor responded by mentioning Wilson's escape, and trial counsel objected to the argument. The trial court sustained the objection. The prosecutor then revisited Dr. Enstice's findings, and while acknowledging some of Wilson's mitigating evidence, argued that the aggravating circumstances outweighed Wilson's mitigating evidence.

With respect to what evidence Wilson pleaded should have been presented at the sentencing hearing, Wilson incorporated by reference the mitigating evidence addressed in Part II(B)(1). The circuit court dismissed this claim as being insufficiently pleaded.

Based on this Court's reasoning in Part II(B)(1), this Court holds that Wilson has failed to show that he was prejudiced by trial counsel's alleged ineffectiveness. As such, this claim is insufficiently pleaded and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

5.

Wilson asserted that trial counsel were ineffective during the penalty phase for failing to protect his right to a fair and honest jury determination. Wilson incorporated by reference his claims addressed in Part II(A)(7) in which he asserted that trial counsel were ineffective in failing: a) to argue for the removal of a biased juror and b) to object to inappropriate contact between the prosecutor and the jury. The circuit court dismissed this claim as being insufficiently pleaded.

Based on this Court's reasoning in Part II(A)(7), this Court holds that Wilson has failed to show that he was prejudiced by trial counsel's alleged ineffectiveness. As such, this claim is insufficiently pleaded and the circuit court did not err in dismissing it. See Rule 32.7(d), Ala. R. Crim. P.

C.

Wilson asserted that the cumulative effect of trial counsel's ineffectiveness at both phases of trial requires the reversal of his conviction and sentence of death. The circuit court dismissed this claim as being without merit.

In Taylor v. State, 157 So. 3d 131, 140 (Ala. Crim. App. 2010), this Court held:

> "[W]hen a cumulative-effect analysis is considered, only claims that are properly pleaded and not

> otherwise due to be summarily dismissed are considered in that analysis. A cumulative-effect analysis does not eliminate the pleading requirements established in Rule 32, Ala. R. Crim. P. An analysis of claims of ineffective assistance of counsel, including a cumulative-effect analysis, is performed only on properly pleaded claims that are not summarily dismissed for pleading deficiencies or on procedural grounds."

In Part II(B)(1) of this memorandum opinion, this Court held that even if trial counsel were ineffective in failing to present the mitigation evidence sufficiently pleaded by Wilson, there was no reasonable probability that the balance of aggravating and mitigating circumstances that led to the imposition of the death penalty would have been different. The remaining claims of ineffective assistance of counsel at the guilt phase and the penalty phase asserted by Wilson were insufficiently pleaded or without merit. As a result, there is no cumulative effect to consider. Id. The circuit court did not err in dismissing this claim.

III.

Wilson asserted that the cumulative effect of all trial-level errors violated his right to due process and require the reversal of his conviction and sentence of death. The circuit court dismissed this claim as being without merit.

Again, there is no cumulative effect of trial counsel's ineffectiveness to consider. Because the substantive Brady claim raised by Wilson was procedurally barred, there is nothing to add to this analysis. Id. The circuit court did not err in dismissing this claim.

IV.

Wilson argues that the circuit court erred in dismissing his claims of ineffective assistance of appellate counsel. Specifically, Wilson asserted that appellate counsel were ineffective: a) for failing to argue adequately that his arrest was illegal; and b) for failing to argue adequately that his statement was involuntary.

With respect to a claim that a petitioner received ineffective assistance of appellate counsel, this Court has stated:

> "'The standards for determining whether appellate counsel was ineffective are the same as those for determining whether trial counsel was ineffective.' Jones v. State, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), overruled on other grounds by Brown v. State, 903 So. 2d 159 (Ala. Crim. App. 2004). 'The process of evaluating a case and selecting those issues on which the appellant is most likely to prevail has been described as the hallmark of effective appellate advocacy.' Hamm v. State, 913 So. 2d 460, 491 (Ala. Crim. App. 2002). As this Court explained in Thomas v. State, 766 So. 2d 860 (Ala. Crim. App. 1998), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005):
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> > "'As to claims of ineffective appellate counsel, an appellant has a clear right to effective assistance of counsel on first appeal. Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830, 83 L. Ed. 2d 821 (1985). However, appellate counsel has no constitutional obligation to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S. Ct. 3308, 77 L. Ed. 2d 987 (1983). The United States Supreme Court has recognized that "[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues." Jones v. Barnes, 463 U.S. at 751-52, 103 S. Ct. 3308. Such a winnowing process "far from being evidence of incompetence, is the hallmark of effective advocacy." Smith v. Murray, 477 U.S. 527, 536, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (1986). Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford

> relief on appeal. Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993), cert. denied, 510 U.S. 984, 114 S. Ct. 487, 126 L. Ed. 2d 437 (1993). One claiming ineffective appellate counsel must show prejudice, i.e., the reasonable probability that, but for counsel's errors, the petitioner would have prevailed on appeal. Miller v. Keeney, 882 F.2d 1428, 1434 and n.9 (9th Cir. 1989).'
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> "766 So. 2d at 876."

Whitson v. State, 109 So. 3d 665, 671-72 (Ala. Crim. App. 2012).

A.

Wilson asserted that he received ineffective assistance of counsel because appellate counsel failed to argue adequately that his arrest was illegal. Appellate counsel challenged his arrest on appeal, but Wilson pleaded that appellate counsel were ineffective because their discussion of the facts in their appellate brief omitted important details. For example, Wilson pleaded that appellate counsel should have pointed out that the five officers who took him into custody all entered his home, that Investigator Luker was close enough to Wilson's bedroom to make observations about the clothing inside it, and that Wilson was placed in handcuffs before being transported to the police station. Wilson also pleaded that appellate counsel were ineffective because they failed to mention Kaupp v. Texas to demonstrate the lack of consent and absence of probable cause, and failed to challenge adequately in their application for rehearing this Court's holding regarding the existence of probable cause to arrest Wilson. The circuit court dismissed this claim as being without merit.

This Court has already addressed in Part II(A)(1) of this memorandum opinion the substance of this claim as it related to trial counsel, holding that Wilson had failed to plead sufficient facts to show that any of these arguments would have been meritorious. This claim of ineffective assistance of appellate counsel must likewise fail. See Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001) (trial

counsel cannot be ineffective for failing to raise meritless claim). As such, the circuit court did not err in dismissing this claim. See Rule 32.7(d), Ala. R. Crim. P.

B.

Wilson asserted that he received ineffective assistance of counsel because appellate counsel failed to argue adequately that his statement was involuntary. Appellate counsel challenged the admissibility of Wilson's statement, arguing that its being incomplete rendered the statement unreliable. Wilson asserted in his petition that this argument was doomed to failure because appellate counsel failed to demonstrate harm. Wilson pleaded that appellate counsel should have instead challenged the voluntariness of the statement, and should have called this Court's attention to the relevant circumstances surrounding Wilson's waiver -- the time of day, the invasion of Wilson's home by multiple officers, his transport to the police station while wearing handcuffs, the immediate commencement of interrogation, the isolation created by his removal to an interrogation room, his age, his emotional stability, and his special-education status. The circuit court dismissed this claim as being without merit.

As discussed in Part II(A)(3) of this memorandum opinion, "[n]one of the facts Wilson claims his [appellate] counsel should have presented [on direct appeal] were outside the record on direct appeal. Consequently, these facts were already considered by this Court on direct appeal when it engaged in a totality-of-the-circumstances analysis." Further, "[a]lthough this Court conducted a plain-error analysis, it held that no error occurred in the admission of Wilson's statement." Appellate counsel cannot be held ineffective for failing to raise meritless arguments. See Bearden, 825 So. 2d at 872. As such, the circuit court did not err in dismissing this claim.

V.

Wilson asserted in an amendment to his petition that the holding of the Supreme Court of the United States in Hurst v. Florida, 136 S. Ct. 616 (2016), rendered Alabama's capital-sentencing scheme unconstitutional. In Hurst, the Supreme

Court of the United States held Florida's capital-sentencing scheme unconstitutional. Wilson asserted that Alabama's capital-sentencing scheme is indistinguishable from Florida's on the salient components. According to Wilson, neither Florida nor Alabama require the jury to make the critical findings necessary to impose the death penalty, but rather leave such findings to the trial judge; Florida and Alabama utilize an advisory jury verdict; and neither Florida nor Alabama juries make specific factual findings with regard to the existence of mitigating or aggravating circumstances. Also, Wilson pleaded that there were case-specific reasons his sentence of death was unconstitutional under Hurst. Specifically, Wilson pleaded that there was no evidence in the record to prove that the jury found the existence of the aggravator that the murder was especially heinous, atrocious, or cruel compared to other capital offenses. As a result, Wilson asserted, the aggravator was invalid and, because the trial court considered it, his sentence of death is likewise invalid. The circuit court dismissed this claim as being without merit.

The constitutionality of Alabama's sentencing scheme in light of Hurst was squarely addressed by the Alabama Supreme Court:

> "Bohannon contends that, in light of Hurst, Alabama's capital-sentencing scheme, like Florida's, is unconstitutional because, he says, in Alabama a jury does not make 'the critical findings necessary to impose the death penalty.' 577 U.S. ___, 136 S. Ct. at 622. He maintains that Hurst requires that the jury not only determine the existence of the aggravating circumstance that makes a defendant death-eligible but also determine that the existing aggravating circumstance outweighs any existing mitigating circumstances before a death sentence is constitutional. Bohannon reasons that because in Alabama the judge, when imposing a sentence of death, makes a finding of the existence of an aggravating circumstance independent of the jury's fact-finding and makes an independent determination that the aggravating circumstance or circumstances outweigh the mitigating circumstance or circumstances found to exist, the resulting death

sentence is unconstitutional. We disagree.

"Our reading of Apprendi [v. New Jersey, 530 U.s 466 (2000)], Ring [v. Arizona, 536 U.S. 584 (2002)], and Hurst leads us to the conclusion that Alabama's capital-sentencing scheme is consistent with the Sixth Amendment. As previously recognized, Apprendi holds that any fact that elevates a defendant's sentence above the range established by a jury's verdict must be determined by the jury. Ring holds that the Sixth Amendment right to a jury trial requires that a jury 'find an aggravating circumstance necessary for imposition of the death penalty.' Ring, 536 U.S. at 585. Hurst applies Ring and reiterates that a jury, not a judge, must find the existence of an aggravating factor to make a defendant death-eligible. Ring and Hurst require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty -- the plain language in those cases requires nothing more and nothing less. Accordingly, because in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.

"Moreover, Hurst does not address the process of weighing the aggravating and mitigating circumstances or suggest that the jury must conduct the weighing process to satisfy the Sixth Amendment. This Court rejected that argument in Ex parte Waldrop, holding that the Sixth Amendment 'do[es] not require that a jury weigh the aggravating circumstances and the mitigating circumstances' because, rather than being 'a factual determination,' the weighing process is 'a moral or legal judgment that takes into account a theoretically limitless set of facts.' 859 So. 2d at 1190, 1189. Hurst focuses on the jury's factual finding of the existence of an aggravating circumstance to make a defendant death-eligible; it does not mention the jury's weighing of the

aggravating and mitigating circumstances. The United States Supreme Court's holding in Hurst was based on an application, not an expansion, of Apprendi and Ring; consequently, no reason exists to disturb our decision in Ex parte Waldrop with regard to the weighing process. Furthermore, nothing in our review of Apprendi, Ring, and Hurst leads us to conclude that in Hurst the United States Supreme Court held that the Sixth Amendment requires that a jury impose a capital sentence. Apprendi expressly stated that trial courts may 'exercise discretion -- taking into consideration various factors relating both to offense and offender -- in imposing a judgment within the range prescribed by statute.' 530 U.S. at 481. Hurst does not disturb this holding.

"Bohannon's argument that the United States Supreme Court's overruling in Hurst of Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), and Hildwin v. Florida, 490 U.S. 638, 109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989), which upheld Florida's capital-sentencing scheme against constitutional challenges, impacts the constitutionality of Alabama's capital-sentencing scheme is not persuasive. In Hurst, the United States Supreme Court specifically stated: 'The decisions [in Spaziano and Hildwin] are overruled to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty.' Hurst, 577 U.S. ___, 136 S. Ct. at 624 (emphasis added). Because in Alabama a jury, not a judge, makes the finding of the existence of an aggravating circumstance that makes a capital defendant eligible for a sentence of death, Alabama's capital-sentencing scheme is not unconstitutional on this basis."

Ex parte Bohannon, 222 So. 3d 525, 532-33 (Ala. 2016).

Here, by virtue of its verdict in the guilt-phase the jury unanimously found the existence of aggravating circumstances that made Wilson eligible for imposition of the

death penalty. "[T]he plain language in [Ring and Hurst] requires nothing more and nothing less." Bohannon, 222 So. 3d 532. As such, Wilson's claim is without merit and the circuit court did not err in dismissing it. Rule 32.7(d), Ala. R. Crim. P.

VI.

Wilson asserted in his motion for reconsideration that the circuit court erred by denying him permission to amend his petition. At the conclusion of the circuit court's order dismissing Wilson's petition, it considered Wilson's general requests to amend his petition and denied them. The circuit court chronicled the history of the pleadings in the case and found that allowing additional amendments would cause undue delay.

"Amendments to pleadings may be permitted at any stage of the proceedings prior to the entry of judgment." Rule 32.7(b), Ala. R. Crim. P.

> "'"'[A]mendments should be freely allowed and ... trial judges must be given discretion to allow or refuse amendments .... The trial judge should allow a proposed amendment if it is necessary for a full determination on the merits and if it does not unduly prejudice the opposing party or unduly delay the trial.' Record Data International, Inc. v. Nichols, 381 So. 2d 1, 5 (Ala. 1979) (citations omitted). 'The grant or denial of leave to amend is a matter within the sound discretion of the trial judge ....' Walker v. Traughber, 351 So. 2d 917 (Ala. Civ. App. 1977)."
>
> "'Cochran v. State, 548 So. 2d 1062, 1075 (Ala. Crim. App. 1989).'

"[Talley v. State,] 802 So. 2d [1106,] 1107-08 [(Ala. Crim. App. 2001)] (emphasis added)."

Ex parte Rhone, 900 So. 2d 455, 458 (Ala. 2004).

The record does not contain a formal motion to amend. In his brief on appeal, Wilson cited to two portions of the record as being requests for permission to amend. The first was in his reply to the State's motion to dismiss, in which Wilson generally asserted that leave to amend must be freely granted. See (C. 1314-19.) The second was in his motion for reconsideration, which, obviously, was filed after the circuit court had entered its judgment.[9] See (C. 1779-81.)

In his brief on appeal, Wilson states that he should have been allowed to amend his petition to cure any claims that lacked sufficient specificity on the ground "that some easily fixed omission had been made." (Wilson's brief, at 99.) Wilson did not specifically move the circuit court for permission to amend. In effect, Wilson is seeking an open-ended opportunity to plead sufficient facts in support of his claims. This Court agrees with the State that such an allowance would "swallow Rule 32.7(d)'s provision for summary dismissal of insufficiently pleaded claims." (State's brief, at 89.) To the extent a timely request to amend was even asserted, the circuit court did not abuse its discretion in denying the request.

Accordingly, the judgment of the circuit court is

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[9]Although not mentioned in his brief on appeal, Wilson stated during the hearing on the State's motion to dismiss:

> "To the extent the Court finds an impediment to our petition that we didn't name names, specific names of the people who could have been called at that time, certainly the preferred practice from the Court of Criminal Appeals would be to allow us to amend the petition on that point to name the names of people who were around. That shouldn't be a bar, frankly."

(Supp. R. 40.)

affirmed.

AFFIRMED.

Welch, Kellum, Burke, and Joiner, JJ., concur.

APPENDIX C

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk

P. O. Box 301555
Montgomery, AL 36130-1555
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May 4, 2018

CR-16-0675 **Death Penalty**

David Phillip Wilson v. State of Alabama (Appeal from Houston Circuit Court: CC04-1120.60; CC04-1121.60)

NOTICE

You are hereby notified that on May 4, 2018, 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. J. Kevin Moulton, Circuit Judge
Hon. Carla Woodall, Circuit Clerk
David I Schoen, Attorney
Richard D Anderson, Asst. Attorney General

APPENDIX D

Search documents in this case: Search

No. 18A501 *** CAPITAL CASE ***

Title:	**David Phillip Wilson, Applicant** **v.** **Alabama**
Docketed:	November 8, 2018
Lower Ct:	Court of Criminal Appeals of Alabama
Case Numbers:	(CR-16-0675)

DATE	PROCEEDINGS AND ORDERS
Nov 05 2018	Application (18A501) to extend the time to file a petition for a writ of certiorari from November 22, 2018 to January 21, 2019, submitted to Justice Thomas. **Main Document** **Proof of Service**
Nov 09 2018	Application (18A501) granted by Justice Thomas extending the time to file until January 21, 2019.

NAME	ADDRESS	PHONE
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