No. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL BRANDON SAMRA,
Petitioner
- vs -
STATE OF ALABAMA,
Respondent

On Petition for Writ of Certiorari to the
Alabama Supreme Court

APPENDIX
Volume 1

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Appendix A

Order of the Alabama Supreme Court setting execution date of May 16, 2019
(April 11, 2019)

IN THE SUPREME COURT OF ALABAMA
April 11, 2019

1982032

Ex parte Michael Brandon Samra. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Michael Brandon Samra v. State of Alabama) (Shelby Circuit Court: CC-97-384; Criminal Appeals: CR-97-1543).

ORDER

The State of Alabama having filed a motion to set an execution date, and the same having been submitted and duly considered by the Court, it is considered that the motion to set an execution date is due to be GRANTED.

IT IS NOW ORDERED that May 16, 2019, be fixed as the date for the execution of the convict, Michael Brandon Samra who is now confined in the William C. Holman Unit of the prison system at Atmore, Alabama.

IT IS, THEREFORE, ORDERED that the Warden of the William C. Holman Unit of the prison system at Atmore in Escambia County, Alabama, execute the order, judgment and sentence of law on May 16, 2019, in the William C. Holman Unit of the prison system, by the means provided by law, causing the death of such convict.

IT IS FURTHER ORDERED that the Marshal of this Court shall deliver, within five (5) days from this date, a certified copy of this order to the Warden of the William C. Holman Unit of the prison system at Atmore, in Escambia County, Alabama, and make due return thereon to this Court.

IT IS FURTHER ORDERED that the Clerk of this Court shall transmit forthwith a certified copy of this order to the following: the Governor of Alabama, the Clerk of the Court of Criminal Appeals, the Attorney General of Alabama, the Commissioner of the Alabama Department of Corrections, the attorney of record for Michael Brandon Samra, the Clerk of the United States District Court for the Northern District of Alabama, the Clerk of the United States Court of Appeals for the Eleventh Circuit, the Clerk of the United States Supreme Court, and the Clerk of the Circuit Court of Shelby County, Alabama, electronically or by United States mail, postage

prepaid.

Parker, C.J., and Bolin, Bryan, Shaw, Sellers, Mendheim, Stewart, and Mitchell, JJ., concur.

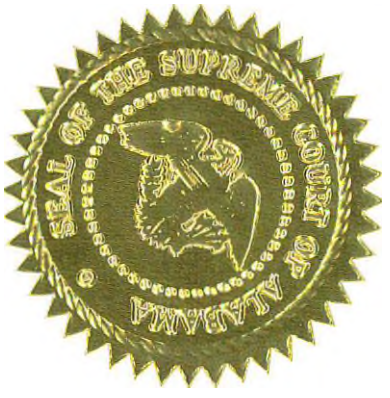
* * * * * * * * *

I, Julia Jordan Weller, Clerk of the Supreme Court of Alabama, do hereby certify the foregoing is a full, true and correct copy of the judgment and order of the Supreme Court of Alabama directing the execution of the death sentence of Michael Brandon Samra as the same appears of record in this Court.

Given under my hand and the seal of this Court on this date, April 11, 2019.

Julia Jordan Weller

Julia Jordan Weller
Clerk
Supreme Court of Alabama



Appendix B

State of Alabama's motion to set an execution date
(March 20, 2019)

IN THE SUPREME COURT OF ALABAMA

EX PARTE: MICHAEL BRANDON SAMRA	)	
	)	
State of Alabama,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. _____
	)	
Michael Brandon Samra,	)	
	)	
Respondent.	)	

STATE OF ALABAMA'S MOTION TO SET AN EXECUTION DATE

Pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the State of Alabama respectfully moves this Honorable Court to set an execution date for carrying out Michael Brandon Samra's lawfully imposed sentence of death.

Samra has been on death row since 1998 for the capital murders of Randy Gerald Duke, Dedra Mims Hunt, Chelisa Nicole Hunt, and Chelsea Marie Hunt. Samra v. State, 771 So. 2d 1108, 1111 (Ala. Crim. App. 1999). The murders, which were committed with a gun and kitchen knives and were as brutal as they come, were made capital because Samra committed them by one act or pursuant to one scheme or course of conduct, in violation of section 13A-5-40(a)(10) of the Code of Alabama (1975). Id. at 1111-12.

As set out more fully below, Samra's conviction and sentence are final because he has completed his direct appeal, state postconviction review, and federal habeas review; his habeas proceedings ended in 2016. Samra v. Price, 136 S. Ct. 1668 (2016) (mem.). Accordingly, the State seeks an order from this Court permitting it to carry out his death sentence.

I. The procedural history indicates that Samra has fully exhausted his appeals.

A. Trial and direct appeal; facts of the crime.

On March 23, 1997, Samra and his friend Mark Duke executed a plan to murder Duke's father, Randy Duke. Vol. 29 at 128.[1] In order to cover up the murder, the two also killed Randy Duke's girlfriend, Dedra Hunt, and her two daughters, six-year-old Chelisa Hunt and seven-year-old Chelsea Hunt. Vol. 29 at 133.

The murders stemmed from Randy Duke's refusal to allow his son to borrow his truck the day before. Vol. 29 at 130. Following a planning session with two other codefendants, David Collum and Michael Ellison, Duke and Samra obtained

1. The references to the record in this motion are from the state-court record that was filed in the United States District Court for the Northern District of Alabama.

two pistols and returned to Randy Duke's house. Vol. 29 at 130-32. Duke shot his father in the head, killing him. Vol. 29 at 128. Samra shot Dedra Hunt in the face, but she managed to flee upstairs with her daughters. Vol. 29 at 128-29. Hunt and her daughter Chelisa sought shelter in an upstairs bathroom, while Hunt's other daughter, Chelsea, hid under a bed. Vol. 29 at 128-29. The two men pursued them, and Duke shot and killed Hunt after kicking in the bathroom door. Vol. 29 at 128.

The two girls remained, but the men were out of bullets. Duke retrieved two kitchen knives. Vol. 29 at 130. First, he killed six-year-old Chelisa, who was hiding behind a shower curtain, cutting her throat. Vol. 29 at 128. The two men then went after seven-year-old Chelsea, who was still hiding under a bed. Vol. 29 at 133. After she fought back, Duke held her down and ordered Samra to kill her. Vol. 29 at 133. Chelsea begged for mercy. Vol. 29 at 133. Instead of listening to her pleas, Samra slit her throat, and she drowned in her own blood. Vol. 29 at 134.

The killing done, Samra and Duke emptied drawers and displaced items in the home to make it appear that the house had been burglarized. Vol. 29 at 136. But the police

quickly zeroed in on the two men. After being questioned by the police, Samra admitted to his part in the crime. Vol. 29 at 127-28.

Samra was charged with the capital offense of murdering two or more persons by one act or pursuant to one scheme or course of conduct, in violation of section 13A-5-40(a)(10) of the Code of Alabama (1975). Samra, 771 So. 2d at 1111. Shelby County Circuit Court Judge J. Michael Joiner presided over Samra's trial. On March 16, 1998, a jury found Samra guilty of capital murder as charged in the indictment. Vol. 14 at 7. Following the presentation of evidence, closing arguments, and instructions from the trial court, the jury unanimously recommended that Samra be sentenced to death. Vol. 14 at 113.

The trial court agreed. The court found that the defense had shown two statutory and seven non-statutory mitigating factors:

> the age and maturity of Defendant, the learning difficulties and disabilities of Defendant, the family history and background and caring nature of Defendant, the effect of gang or group involvement upon Defendant, the immediate and continuing truthfulness and cooperation of Defendant with law enforcement officers, the remorse of Defendant expressed in statements to law enforcement officers and, the fact that there are no other

> aggravating circumstances, other than [that the offense was heinous, atrocious, and cruel].

Vol. 3 at 116-17.

But these were outweighed by the existence of a single aggravating circumstance: that the capital offense was heinous, atrocious, and cruel when compared to other capital offenses. In supporting that finding, the trial court stated:

> Evidence showed at trial that the victims in this case were killed in a very cruel and heinous manner. The minor children's throats were actually cut and according to testimony of the medical examiner, they drowned in their own blood. The photographs and other demonstrative evidence in this case leads to one and only one conclusion, that the manner in which the victims were killed was much more heinous and atrocious and cruel than would be necessary in any killing.
>
> This case stands out as particularly heinous, atrocious and cruel when it is considered that at least one victim, according to the admission of Defendant, begged not to be killed. All of the victims died very painful and brutal deaths. The victims apparently struggled for life and breath and that very struggle caused one or more of the victims to drown in their own blood.

Vol. 3 at 118.

The Alabama Court of Criminal Appeals affirmed Samra's capital murder conviction and death sentence. Samra v. State, 771 So. 2d 1108 (Ala. Crim. App. 1999). The court noted that "[t]he sentencing order shows that the trial

court weighed the aggravating and mitigating circumstances and correctly sentenced [Samra] to death." Samra, 771 So. 2d at 1121.

This Court affirmed the decision of the Court of Criminal Appeals, holding in part:

> We have found no error in either the guilt phase of the trial or the sentencing phase of the trial that adversely affected the defendant's rights. Furthermore, we conclude that the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence and that the death sentence was proper under the circumstances.

Ex parte Samra, 771 So. 2d 1122, 1122 (Ala. 2000) (citing ALA. CODE § 13A-5-53(a) and (b)). Samra then filed a petition for writ of certiorari in the United States Supreme Court, which was denied. Samra v. Alabama, 531 U.S. 933 (2000).

B. Samra's first Rule 32 proceeding.

Having failed to obtain relief on direct appeal, Samra filed a Rule 32 petition for postconviction relief in the Shelby County Circuit Court on October 1, 2001. Vol. 32, C. 1-25. He filed his first amended Rule 32 petition on January 17, 2002, his second amended petition on June 14, 2002, and his third amended petition on August 16, 2002. Vol. 32, C. 94-113; Vol. 34-35, C. 389-403. On November 3-

5, 2003, the circuit court conducted an evidentiary hearing regarding Samra's claim that his trial and appellate counsel were ineffective for failing to investigate and present evidence of his alleged "brain dysfunction." Vol. 38-41, R. 1-510. On January 12, 2005, the Shelby County Circuit Court denied all relief on Samra's third amended Rule 32 petition. Vol. 36-37, C. 755-831.

The Court of Criminal Appeals affirmed the circuit court's judgment in an unpublished memorandum opinion. Vol. 49, Tab #R-82. The Alabama Supreme Court denied Samra's petition for writ of certiorari. Vol. 49, Tab #R-83.

C. Samra's second or successive Rule 32 proceeding.

On September 25, 2007, Samra filed a successive Rule 32 petition for postconviction relief in the Shelby County Circuit Court. He filed this petition while his appeal from the denial of his first Rule 32 petition was pending in the Court of Criminal Appeals awaiting a ruling on his application for rehearing.

In his successive petition, Samra raised two claims. Vol. 44, C. 5-13. First, Samra argued that his death sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment because his juvenile

codefendant, Mark Duke, was resentenced to life without parole under Roper v. Simmons, 543 U.S. 551 (2005). Id. Second, Samra contended that his sentence was excessive and disproportionate under section 13A-5-53(b)(3) of the Code of Alabama because Duke was resentenced to life without parole. Id.

After hearing oral argument, see Vol. 44, C. 103-120, the circuit court denied Samra's successive Rule 32 petition. Vol. 44, C. 72-73. On August 29, 2008, the Court of Criminal Appeals issued an order directing the circuit court to set aside that order and hold the case in abeyance until a certificate of judgment was issued concerning Samra's pending appeal from his first Rule 32 petition. Vol. 45, C. 257. Accordingly, the circuit court vacated its July 23, 2008, order and held Samra's successive Rule 32 petition in abeyance until the Court of Criminal Appeals issued the certificate of judgment on the first Rule 32 petition. Vol. 45, C. 259. Samra's appeal from his first Rule 32 petition became final when a certificate of judgment was issued on September 19, 2008. Vol. 45, C. 364.

The State then moved the circuit court to summarily dismiss Samra's successive Rule 32 petition. Vol. 45,

C. 330-57. After considering briefs from the parties, the circuit court granted the State's motion and dismissed Samra's successive Rule 32 petition. Vol. 46, C. 426-27.

The Court of Criminal Appeals affirmed the circuit court's ruling in an unpublished memorandum opinion. Vol. 49, Tab #R-87. The Alabama Supreme Court denied Samra's petition for writ of certiorari. Vol. 49, Tab #R-88.

D. Federal habeas litigation.

On October 26, 2007, Samra filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Alabama. See Doc. 1.[2] On that same date, Samra filed a motion to hold his habeas petition in abeyance to allow him to exhaust one claim in the state courts. See Doc. 3. The court granted that motion and required Samra to "advise the court when the state court proceedings have concluded so that the stay may be lifted and the matter may proceed in this court." See Doc. 9. The court subsequently lifted the stay and issued an order setting deadlines for the filings of briefs and an amended petition. See Doc. 30. In compliance with that order, Samra filed an amended petition on February 21,

2. Samra v. Jones, No. 2:07-cv-01962-LSC-HGD.

2014. See Doc. 31. The State, in compliance with the court's scheduling order, see Doc. 30, filed an answer to Samra's amended petition, a supporting brief, and the state court record. See Docs. 33-36.

The district court issued a final order denying Samra's amended habeas petition on September 5, 2014, and denying his certificate of appealability on October 27, 2014. See Docs. 53, 60. The Eleventh Circuit Court of Appeals then granted a certificate of appealability on two issues. That court affirmed the judgment of the district court. Samra v. Warden, Donaldson Correctional Facility, 626 F. App'x 227 (11th Cir. Sept. 8, 2015). Once again, the United States Supreme Court denied certiorari review. Samra v. Price, 136 S. Ct. 1668 (2016) (mem.).

II. Samra has no current litigation that would prevent his execution.

There currently are no pending challenges to the validity of Samra's duly adjudicated conviction and death sentence. Samra has exhausted his direct appeal, his state postconviction remedies, and his federal habeas remedies. As such, it is time for his death sentence to be carried out. Pursuant to Rule 8(d)(1) of the Alabama Rules of

Appellate Procedure, the State respectfully requests that this Honorable Court "enter an order fixing a date of execution" for Michael Brandon Samra.

Respectfully submitted,

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Attorney General

s/ Beth Jackson Hughes
Beth Jackson Hughes
Assistant Attorney General
Counsel of Record *

Lauren A. Simpson
Assistant Attorney General

Henry M. Johnson
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on March 20, 2019, a copy of the foregoing was served on counsel for Michael Brandon Samra by e-mail:

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Appendix C

Samra's objection to the State's motion to set an execution date
(March 26, 2019)

IN THE SUPREME COURT OF ALABAMA

EX PARTE: MICHAEL BRANDON SAMRA	)	
	)	
State of Alabama,	)	
Petitioner,	)	
	)	
v.	)	No. 1982032
	)	
Michael Brandon Samra,	)	
Respondent.	)	

OBJECTION TO STATE OF ALABAMA'S MOTION TO SET AN EXECUTION DATE

Respondent Michael Brandon Samra, respectfully objects to the State of Alabama's motion to set an execution date for carrying out Samra's sentence of death. Respondent, who was 19 years old at the time of the crimes, will file a second successor Rule 32 petition for post-conviction relief in order to litigate the constitutionality of executing persons who were under 21 at the time of their offense simultaneously with this objection. (Petition attached as Exhibit A) Respondent has not filed his claim sooner because the United States Supreme Court has only recently granted certiorari in *Mathena v. Malvo*, 18-217 (cert. granted on March 18, 2019), in which the Court is set to decide important Eighth Amendment questions involving the sentencing of young people. This case also involves the

percolating issue of whether people should be executed when their crimes were committed under the age of 21. After a Kentucky trial court ruled that the Eighth Amendment bars the execution of offenders under 21, the Kentucky Supreme Court is set to hear arguments on that issue. *See Commonwealth v. Efrain Diaz*, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-000536) (Order attached as Exhibit B)

Legal Argument

There is newly emerging legal authority for Samra's intended claim of whether 18- to 21-year-olds may be sentenced to death. A Kentucky trial court, hearing evidence on the issue, has held that the Eighth Amendment prohibits the death penalty for offenders under 21. Legal scholars have also recently written that the logic that supported a ban of executing juvenile offenders is equally applicable to persons who were under 21 at the time of their crimes.

In *Roper*, the United States Supreme Court held that the execution of a juvenile offender violates the Eighth Amendment because the severity of the punishment is categorically disproportionate to the offender's diminished personal responsibility for the crime. *Roper*, 543 U.S. at

571-73. In its analysis, the Court first looked to whether there was a national consensus on this form of punishment. The court found there was a consensus against the execution of offenders under 18, upon considering "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice." *Id.* at 567.

The Court then exercised its own independent judgment on whether the death penalty was disproportionate for juveniles. It considered the unique characteristics of juvenile offenders that diminish their culpability, regardless of the offense: Specifically, (1) they have a "lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and decisions"; (2) they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) their characters are "not as well formed" and their personalities "more transitory, less fixed" than those of adults. *Id.* at 569-70. Given these differences, the penalogical objectives

of the death penalty apply to juveniles with lesser force than to adults. *Id.* at 570-71.

Since *Roper* was decided, new scientific research has called into question the line drawn by the Court—18 years of age—as too low. *See* Elizabeth C. Victor & Ahmad R. Hariri, A Neuroscience Perspective on Sexual Risk Behavior in Adolescence and Emerging Adulthood, 28 DEVELOPMENTAL & PSYCHOPATHOLOGY 471, 472 (2016) ("In the last decade[,] remarkable research has been conducted in the field of developmental neuroscience to provide a richer understanding of brain function and development during adolescence and emerging adulthood."). This research has shown people under 21 share the same traits that the Court identified as diminishing culpability and undermining the penalogical justifications for the death penalty. Accordingly, at least one court and legal scholars have concluded that the ban on executing offenders under 18 should be extended to offenders to the age of 21.

In Kentucky, a trial court heard expert testimony on the issue and evaluated the scientific studies. *See Commonwealth v. Efrain Diaz*, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-000536). The

studies showed that during a person's late teens and early 20's, the brain continues to undergo rapid changes in self-regulation and higher-order cognition. Compared to adults, persons in their late teens and early 20's are: (1) more likely to poorly assess risk, (2) more likely to engage in sensation-seeking, (3) less able to control their impulses and consider the consequences of their actions, (4) have underdeveloped basic cognitive abilities as compared to emotional abilities, (5) are more affected by peer pressure. The research also demonstrated that like juveniles, young adults had heightened plasticity of the brain. That is, young adults, even those who have committed violent crimes, have a strong potential for behavioral change. *Diaz*, Order at 6-10 (citing studies).

Legal scholars synthesizing the neuroscientific research recently explained that people under 21 share two defining class-wide characteristics: "On the one hand, their brains are physiologically like those of younger children, unable to fully regulate emotion or evaluate risk. On the other hand, they are experiencing rapid changes in social control, with the end of high school and the beginning of college or employment." Blume, et. al, *Death by Numbers: Why*

Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles From 18 to 21, Texas L. Rev. at 14 (forthcoming 2019) (electronic copy available at: https://ssrn.com/abstract=3341438).

These are precisely the qualities of youthfulness that led the *Roper* Court to find the penalogical justifications for the death penalty to be categorically inapplicable to persons under 18. The post-*Roper* research confirms that the reduced culpability of young offenders extends to the age of 21.

Turning to the national consensus, since *Roper*, the number of offenders under 21 who have been sentenced to death has declined each year. Blume et, al, *Death by Numbers*, at 20. Only 13 states have handed down new death sentences to offenders under 21 since *Roper*. *Id.* at 23. Those death sentences were concentrated in five states and in a few counties. *Id.* at 21-22. The state with the largest number of youthful offenders sentenced to death—California, with 34—recently imposed a statewide moratorium on the death penalty. *Id.* at 22. Considering the downward trend in the number of states with the death penalty, a majority of states, 30, would not permit the execution of a youthful

offender. That number is 10 more than in *Roper*, 17 more than in *Graham v. Florida*, 560 U.S. 48, 69 (2010) (barring life without parole for non-homicide offenses), and nine more than in *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (barring mandatory life without parole for homicide). Blume, *Death by Numbers*, at 23.

The American Bar Association has also urged jurisdictions to categorically prohibit death sentences for offenders under the age of 21 at the time of their offense. An ABA resolution detailed legislative developments that reflected society's increased understanding of adolescent brain development. For instance, many child welfare and education systems extend their services to persons through age 21. American Bar Association Report 111, p. 8-9 (adopted February 5, 2018) (available at https://www.americanbar.org/news/reporter_resources/midyear-meeting-2018/house-of-delegates-resolutions/111/). Importantly, 45 states allow youth up to age 21 to remain under the jurisdiction of the juvenile criminal justice system. *Id.* at 9.

There is therefore a very clear national consensus trending toward the prohibition of the death penalty for

those under 21. *See Diaz*, Order at 4-5 (finding such a national consensus). This is the same direction of change that the Court found in *Roper*.

In a forthcoming law review article, legal scholars concluded that *Roper*'s reasoning extends to persons under 21. As the scholars wrote:

> In the fifteen years since *Roper*, the country has witnessed dramatic developments in neuroscience, social attitudes, and most significantly, the law and attendant sentencing practices. The same considerations that motivated the Court to extend *Thompson* to apply to people under 21: their reduced moral culpability—embodied by an increased reluctance by sentencing bodies to inflict the ultimate punishment—removes them from the category of people who can be considered the worst of the worst.

Blume et. al, *Death by Numbers*, at 31.

The recent findings by the scientific community and the emerging national consensus compel the conclusion that the execution of offenders who were under 21 at the time of their offense is barred by the Eighth Amendment. In light of this recent authority supporting this constitutional claim, this Court should allow Samra to litigate his claim.

The United States Supreme Court's grant of certiorari in *Mathena* v. *Malvo*, 18-217 (cert. granted March 18, 2019), is set to shed light on the questions in this case. The

issues in that case surround the scope of *Miller* and *Montgomery* – the Court's watershed decisions involving the Eighth Amendment principles as applied to youthful offenders.[1]

Samra's Case

The facts of Samra's case perfectly illustrate why *Roper*'s teachings should apply with equal force to those just over the age 18. At the time of the offenses in this case, Samra was 19 years old – just over *Roper*'s bright line age of 18. Mark Duke, the co-defendant and the more culpable

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[1] The question presented in that case is:

> In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Id.* at 465. Four years later, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court held that "*Miller* announced a substantive rule of constitutional law" that, under *Teague v. Lane*, 489 U.S. 288 (1989), must be given "retroactive effect" in cases where direct review was complete when Miller was decided. *Montgomery*, 136 S. Ct. at 736.
>
> The question presented is:
>
> Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

offender, was 16 years old. Duke was sentenced to death, but his death sentence was ruled unconstitutional in light of *Roper*.

The State has already admitted that Duke was the "mastermind" behind the offense, while Samra was merely a "minion." Brief of the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia as Amici Curiae in Support of Petitioner, *Roper v. Simmons*, 2004 WL 865268, *7 (U.S. Apr. 20, 2004) (No. 03-633). Indeed, while Samra bore responsibility for the death of one person, his culpability paled in comparison to that of his co-defendant who plotted, planned, and killed three of the victims for revenge.

Duke hatched the plan to kill his father after he refused to let Duke use his truck. Duke enlisted Samra and two other friends to help with the killing. When Duke and Samra entered the house, Duke shot his father and then pursued his father's girlfriend, Dedra Hunt, and her two children. Samra shot Hunt once, and then Duke pursued her and shot her once more. Duke grabbed one of the children and slit her throat, killing her as well. As Duke struggled with the second child, he was unable to hold her still and demanded that Samra help him kill her. Samra refused to help

until Duke yelled at him, and caving into Duke's demands, Samra killed her by slitting her throat while Duke held the child down. *Duke v. State*, 889 So. 2d 1, 3-6 (Ala. Crim. App. 2002), vacated by 544 U.S. 901 (2005); Brief of the States of Alabama, et. al, *Roper v. Simmons*, 2004 WL 865268, *6.

Samra's lesser role in this crime evinces the diminished culpability of youthful offenders as recognized by the Supreme Court. Youth are "vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 567 U.S. at 471. Samra was undoubtedly influenced by his friend, a fellow gang member who planned this crime for his own personal revenge and further pressured Samra to kill the last victim. Youth are uniquely susceptible to such pressure – even past the age of 18. *See* Blume et. al, *Death by Numbers*, at 11-12 (citing studies).

Furthermore, the significance of young persons' continuing brain development is particularly salient in this case. Evidence from the trial and sentencing hearing

revealed that Samra fell within the "borderline range of intelligence," meaning below low average intelligence. The post-conviction hearing included testimony from experts who examined Samra and concluded that he had impaired brain functioning. Samra's developmental difficulties, exacerbated by his young age, show that his culpability is far less than that of an adult offender.

Conclusion

For the reasons described above, this Court should deny the State's motion to set an execution date and should not set a date until Samra's second successor Rule 32 petition for post-conviction relief is fully resolved in the Alabama state courts.

Respectfully submitted,

s/ Steven R. Sears
Steven R. Sears
One of Petitioner's Counsel

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CERTIFICATE OF SERVICE

I, Steven Sears, certify that I have served a copy of the foregoing upon Beth Jackson Hughes, attorney for the opposing party, at bhughes@ago.state.al.us according to Rule 5(b) on electronic process.

Done this 26 March, and revised with new font, 28 March 2019, at Montevallo.

Steve Sears

Steven Sears, SEA001

Appendix A Unable to change font ex post facto

AFFIDAVIT

I, Michael Brandon Samra, state the following under oath:

1. That I have been informed by my attorneys that the State of Alabama is seeking an execution date.

2. I want my attorneys to ask the Alabama Supreme Court to not set an execution date. I desire to challenge my death sentence in a second successor post conviction petition before the Alabama trial and appellate courts and the United States Supreme Court based on the fact that I was 19 years old at the time of the crime.

Date: 3-25-19

Michael Brandon Samra

Michael Brandon Samra,

I, a notary public in and for the State of Alabama at Large, hereby certify that Michael Brandon Samra, whose name is signed to the above affidavit and who is known to me, acknowledged before me this day that, being informed of the contents of the affidavit, he executed it willingly and without constraint. Done this 25 March 2019.

Notary public

My commission expires 22 March 2022.

Appendix B. Unable to change font from Kentucky standard

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
SEVENTH DIVISION
CASE NO. 15-CR-584-001

COMMONWEALTH OF KENTUCKY — PLAINTIFF

v.

EFRAIN DIAZ — DEFENDANT

ORDER DECLARING KENTUCKY'S DEATH PENALTY STATUTE AS UNCONSTITUTIONAL

This matter comes before the Court on Defendant Efrain Diaz's Motion to declare the Kentucky death penalty statute unconstitutional insofar as it permits capital punishment for those under twenty-one (21) years of age at the time of their offense. Mr. Diaz argues that the death penalty would be cruel and unusual punishment, in violation of the Eighth Amendment, for an offender under twenty-one (21) at the time of the offense. The defense claims that recent scientific research shows that individuals under twenty-one (21) are psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty, in *Roper v. Simmons*, 543 U.S. 551 (2005). The Commonwealth in turn argues that Kentucky's death penalty statute is constitutional and that there is no national consensus with respect to offenders under twenty-one (21). Having the benefit of memoranda of law, expert testimony, and the arguments of counsel, and being otherwise sufficiently advised, the Court sustains the Defendant's motion.

FINDINGS OF FACT

Efrain Diaz was indicted on the charges of Murder, First Degree Robbery, Theft by Unlawful Taking $10,000 or More, and three Class A Misdemeanors for events which occurred on April 17, 2015, when Mr. Diaz was eighteen (18) years and seven (7) months old.

On July 17, 2017, the Court heard testimony from Dr. Laurence Steinberg, an expert in adolescent development, testified to the maturational differences between adolescents (individuals ten (10) to twenty-one (21) years of age) and adults (twenty-one (21) and over). The most significant of these differences being that adolescents are more impulsive, more likely to misperceive risk, less able to regulate behavior, more easily emotionally aroused, and, importantly, more capable of change. Additionally, Dr. Steinberg explained how these differences are exacerbated in the presence of peers and under emotionally stressful situations, whereas there is no such effect with adults. Dr. Steinberg related these differences to an individual's culpability and capacity for rehabilitation and concluded that, "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*."[1] Dr. Steinberg supplemented his testimony with a report further detailing the structural and functional changes responsible for these differences between adolescents and adults, as will be discussed later in this opinion.[2]

CONCLUSIONS OF LAW

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A.

[1] Hearing July 17, 2017 at 9:02:31.
[2] Affidavit of Kenneth B. Benedict, July 14, 2017.

Const. amend. VIII. This provision is applicable to the states through the Fourteenth Amendment. The protection flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Eighth Amendment jurisprudence has seen the consistent reference to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The two prongs of the "evolving standards of decency" test are: (1) objective indicia of national consensus, and (2) the Court's own determination in the exercise of independent judgment. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551 (2005).

I. Objective Indicia of National Consensus Against Execution of Offenders Younger than 21

Since *Roper*, six (6) states[3] have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute. Additionally, the governors of four (4) states[4] have imposed moratoria on executions in the last five (5) years. Of the states that do have a death penalty statute and no governor-imposed moratoria, seven[5] (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age, including Kentucky. Taken together, there are currently thirty states in which a defendant who was under the age of

[3] The states that have abolished the death penalty since *Roper* and year of abolition: Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), and New York (2007).

[4] The governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively. The governor of Oregon extended a previously imposed moratorium in 2015. The governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013.

[5] Kansas and New Hampshire have not executed anyone since 1977. Montana and Wyoming have never executed anyone who was under twenty-one (21) years of age at the time of their offenses, and they currently have no such offenders on death row. Utah has not executed anyone who was under twenty-one (21) years of age at the time of their offense in the last fifteen (15) years, and no such offender is currently on Utah's death row. Idaho and Kentucky have not executed anyone who was under twenty-one (21) years old at the time of their offense in the last fifteen (15) years.

twenty-one (21) at the time of their offense would not be executed – ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005.

Of the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.[6] Those nine (9) states have executed a total of thirty-three (33) defendants under the age of twenty-one (21) since 2011 – nineteen (19) of which have been in Texas alone.[7] Considering Texas an outlier, there have only been fourteen (14) executions of defendants under the age of twenty-one (21) between 2011 and 2016, compared to twenty-nine (29) executions in the years 2006 to 2011, and twenty-seven (27) executions in the years 2001 to 2006 (again, excluding Texas).[8] In short, the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods.

Looking at the death penalty as practically applied to all defendants, since 1999 there has been a distinct downward trend in death sentences and executions. In 1999, 279 offenders nationwide were sentenced to death, compared to just thirty (30) in 2016 – just about eleven (11) percent of the number sentenced in 1999.[9] Similarly, the number of defendants actually executed spiked in 1999 at ninety-eight (98), and then gradually decreased to just twenty (20) in 2016 – only two of which were between the ages of eighteen (18) and twenty (20).

Contrary to the Commonwealth's assertion, it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants

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[6] Chart of Number of People Executed Who Were Aged 18, 19, or 20 at Offense from 2000 to Present, By State [current as of February 29, 2016]
[7] *Id.*
[8] *Id.*
[9] Death Penalty Information Center, Facts About the Death Penalty (Updated May 12, 2017), downloaded from https://deathpenaltyinfo.org/documents/FactSheet.pdf.

are eighteen (18) to twenty-one (21) years of age. Not only have six more states abolished the death penalty since *Roper* in 2005, four more have imposed moratoria on executions, and seven more have *de facto* prohibitions on the execution of defendants eighteen (18) to twenty-one (21). In addition to the recent legislative opposition to the death penalty, since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to twenty-one (21. "[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles ... as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Given this consistent direction of change, this Court thinks it clear that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).

2. The Court's Independent Judgment

As the Supreme Court in *Roper* heavily relied on scientific studies to come to its conclusion, so will this Court. On July 17, 2017, this Court heard expert testimony on this topic. Dr. Laurence Steinberg testified and was also allowed to supplement his testimony with a written report. The report cited multiple recent studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable. It is based on those studies that this Court has come to the conclusion that the death penalty should be excluded for defendants who were under the age of twenty-one (21) at the time of their offense.

If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling.

Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late teens.[10] Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.[11]

Recent psychological research indicates that individuals in their late teens and early twenties (20s) are less mature than their older counterparts in several important ways.[12] First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.[13] Second, they are more likely to engage in "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. This tendency is especially pronounced among individuals between the ages of eighteen (18) and twenty-one (21).[14] Third, individuals in their late teens and early twenties (20s) are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions because

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[10] B. J. Casey, et al., *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104-110 (2005).

[11] N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358-1361 (2011); D. Fair, et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); A. Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies*, 33 HUM. BRAIN MAPPING 1987-2002 (2012); A. Pfefferbaum, et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176-193 (2013); D. Simmonds, et al., *Developmental Stages and Sex Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*. 92 NEUROIMAGE 356-368 (2014); L. Somerville, et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN & COGNITION 124-133 (2010).

[12] For a recent review of this research, see: LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

[13] T. Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-363 (2003).

[14] E. Cauffman, et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193-207 (2010); L. Steinberg, et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. Advance online publication. doi: 10.1111/desc.12532. (2017).

gains in impulse control continue to occur during the early twenties (20s).[15] Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the ability to exercise self-control, to properly consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.[16] As a consequence of this gap between intellectual and emotional maturity, these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.[17] The presence of peers also amplifies these differences because this activates the brain's "reward center" in individuals in their late teens and early twenties (20s). Importantly, the presence of peers has no such effect on adults.[18] In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).[19]

Recent neurobiological research parallels the above psychological conclusions. This research has shown that the main cause for psychological immaturity during adolescence and the early twenties (20s) is the difference in timing of the maturation of two important brain systems. The system that is responsible for the increase in sensation-seeking and reward-seeking—

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[15] L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28-44 (2009); D. Albert, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764-1778 (2008).

[16] L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[17] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOLOGICAL SCIENCE 549-562 (2016); L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[18] D. Albert, et al., *The Teenage Brain: Peer Influences on Adolescent Decision-Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114-120 (2013).

[19] B. Braams, et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 J. OF NEUROSCIENCE 7226-7238 (2015); E. Shulman & E. Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167-177 (2014).

sometimes referred to as the "socio-emotional system"—undergoes dramatic changes around the time of puberty, and stays highly active through the late teen years and into the early twenties (20s). However, the system that is responsible for self-control, regulating impulses, thinking ahead, evaluating the risks and rewards of an action, and resisting peer pressure—referred to as the "cognitive control system"—is still undergoing significant development well into the mid-twenties (20s).[20] Thus, during middle and late adolescence there is a "maturational imbalance" between the socio-emotional system and the cognitive control system that inclines adolescents toward sensation-seeking and impulsivity. As the cognitive control system catches up during an individual's twenties (20s), one is more capable of controlling impulses, resisting peer pressure, and thinking ahead.[21]

There are considerable structural changes and improvements in connectivity across regions of the brain which allow for this development. These structural changes are mainly the result of two processes: synaptic pruning (the elimination of unnecessary connections between neurons, allowing for more efficient transmission of information) and myelination (insulation of neuronal connections, allowing the brain to transmit information more quickly). While synaptic pruning is mostly complete by age sixteen (16), myelination continues through the twenties (20s).[22] Thus, while the development of the prefrontal cortex (logical reasoning, planning, personality) is largely finished by the late teens, the maturation of connections between the prefrontal cortex and regions

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[20] B. J. Casey, et al., *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 DEV. PSYCHOL. 225-235 (2010); L. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78-106 (2008); L. Van Leijenhorst, et al., *Adolescent Risky Decision-making: Neurocognitive Development of Reward and Control Regions*, 51 NEUROIMAGE 345-355 (2010).

[21] D. Albert & L. Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211-224 (2011); S-J Blakemore & T. Robbins, *Decision-Making in the Adolescent Brain*, 15 NAT. NEUROSCIENCE 1184-1191 (2012).

[22] S-J, Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397-406 (2012); R. Engle, *The Teen Brain*, 22(2) CURRENT DIRECTIONS IN PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions*, 72(2) BRAIN & COGNITION (whole issue) (2010).

which govern self-regulation and emotions continues into the mid-twenties (20s).[23] This supports the psychological findings spelled out above which conclude that even intellectual young adults may have trouble controlling impulses and emotions, especially in the presence of peers and in emotionally arousing situations.

Perhaps one of the most germane studies to this opinion illustrated this development gap by asking teenagers, young adults (18-21), and mid-twenties adults to demonstrate impulse control under both emotionally neutral and emotionally arousing conditions.[24] Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control their impulses just as well as those in their mid-twenties (20s). However, under emotionally arousing conditions, eighteen– (18) to twenty-one– (21) year–olds demonstrated levels of impulsive behavior and patterns of brain activity comparable to those in their mid-teens.[25] Put simply, under feelings of stress, anger, fear, threat, etc., the brain of a twenty– (20) year–old functions similarly to a sixteen– (16) or seventeen– (17) year–old.

In addition to this maturational imbalance, one of the hallmarks of neurobiological development during adolescence is the heightened plasticity—the ability to change in response to experience—of the brain. One of the periods of the most marked neuroplasticity is during an individual's late teens and early twenties (20s), indicating that this group has strong potential for behavioral change.[26] Given adolescents' ongoing development and heightened plasticity, it is difficult to predict future criminality or delinquent behavior from antisocial behavior during the

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[23] L. Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescents' Criminal Culpability*, 14 NAT. REV. NEUROSCIENCE 513-518 (2013).
[24] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOL. SCI. 549-562 (2016).
[25] *Id.*
[26] LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

teen years, even among teenagers accused of committing violent crimes.[27] In fact, many researchers have conducted studies finding that approximately ninety (90) percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.[28]

Justin Diaz was eighteen (18) years and seven (7) months old at the time of the alleged crime. According to recent scientific studies, Mr. Diaz fits into the group experiencing the "maturational imbalance," during which his system for sensation-seeking, impulsivity, and susceptibility to peer pressure was fully developed, while his system for planning and impulse control lagged behind, unable to override those impulses. He also fits into the group described in the study above which was found to act essentially like a sixteen– (16) to seventeen– (17) year–old under emotionally arousing conditions, such as, for example, robbing a store. Most importantly, this research shows that eighteen– (18) to twenty-one– (21) year–olds are categorically less culpable for the same three reasons that the Supreme Court in *Roper* found teenagers under eighteen (18) to be: (1) they lack maturity to control their impulses and fully consider both the risks and rewards of an action, making them unlikely to be deterred by knowledge of likelihood and severity of punishment; (2) they are susceptible to peer pressure and emotional influence, which exacerbates their existing immaturity when in groups or under stressful conditions; and (3) their character is not yet well formed due to the neuroplasticity of the young brain, meaning that they have a much better chance at rehabilitation than do adults.[29]

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[27] T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, 3(2) DEV. & PSYCHOPATHOLOGY (2016).
[28] K. Monahan, et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093-1105 (2013); E. Mulvey, et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453-475 (2010).
[29] *Roper*, 543 U.S. at 569-70.

Further, the Supreme Court has declared several times that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("the death penalty must be reserved for 'the worst of the worst'"). Given Mr. Diaz's young age and development, it is difficult to see how he and others his age could be classified as "the most deserving of execution."

Given the national trend toward restricting the use of the death penalty for individuals under the age of twenty-one (21), and given the recent findings by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age. Accordingly, Kentucky's death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense.

So ORDERED this the 6 day of September, 2017.

JUDGE ERNESTO SCORSONE
FAYETTE CIRCUIT COURT

Alabama Supreme Court

EX PARTE: MICHAEL BRANDON SAMRA	)	
	)	
State of Alabama, Petitioner,	)	
	)	
v.	)	Case No. 19892032
	)	
Michael Brandon Samra, Respondent.	)	

Notice of Appearance

Come now

Steven R. Sears
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to enter an appearance on behalf of defendant Michael Brandon Samra to assist in obtaining postconviction relief.

Done this 28 March 2019 at Montevallo.

Steve Sears

Steven Sears, SEA001

CERTIFICATE OF SERVICE

I, Steven Sears, certify that I have served a copy of the foregoing upon Beth Jackson Hughes, attorney for the opposing party, at bhughes@ago.state.al.us according to Rule 5(b) on electronic process.

Done this 28 March 2019, at Montevallo.

Steve Sears

Steven Sears, SEA001

Alabama Supreme Court
Case number 1982032

State of Alabama
petitioner

v

Michael Brandon Samra
respondent

Declaration of Technology Difficulties and Motion to Accept as Timely filed

Please take notice that the undersigned registered user was unable to efile the attached Successor Rule 32 petition and objection to State of Alabama's motion to set an execution date in a timely manner due to technology difficulties. The deadline for filing the said document is 26 March 2019. The reason that I was unable to efile the abovementioned document in a timely manner and the good faith efforts I made prior to the filing deadline to both filed in a timely manner and to inform the Court and the other parties that I could not do so are set forth below:

Password rejected by ACIS login. Password reset procedure led to blank screen. Notified of account lockout.

I hereby move that the Court accept the above document as being timely filed.

I certify that a copy of this declaration and the attached pleading will this date be served on counsel for each party to the case.

Done this 25 March 2019, revised in new font, and redone 28 March 2019.

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No. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL BRANDON SAMRA,
Petitioner
- vs -
STATE OF ALABAMA,
Respondent

On Petition for Writ of Certiorari to the
Alabama Supreme Court

APPENDIX
Volume 2

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Appendix D

State of Alabama's response to Samra's objection to the State's motion to set an execution date

(April 1, 2019)

IN THE SUPREME COURT OF ALABAMA

EX PARTE: MICHAEL BRANDON SAMRA	)	
	)	
State of Alabama,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 1982032
	)	
Michael Brandon Samra,	)	
	)	
Respondent.	)	

STATE OF ALABAMA'S RESPONSE TO SAMRA'S OBJECTION TO STATE'S MOTION TO SET EXECUTION DATE

Comes now the State of Alabama and opposes Respondent Michael Brandon Samra's objection to the State's motion to set an execution date for carrying out Samra's duly adjudicated sentence of death. In opposition to Samra's objection, the State asserts the following:

The State moved this Court to set Samra's execution date on March 20, 2019. Less than a week later, Samra filed a time-barred, successive, and meritless "Petition For A Second Successor Rule 32 Petition For Relief in a Capital Case" in the Circuit Court of Shelby County (hereinafter "the second successive petition).[1] Samra contends that his death sentence

1. Samra filed his second successive Rule 32 petition using the wrong case number. After talking with the clerk's office in Shelby County, it is the State's understanding that Samra's second successive petition will be rejected

violates the Eighth Amendment because he was under twenty-one when he murdered Randy Gerald Duke, Dedra Mims Hunt, Chelisa Nicole Hunt, and Chelsea Marie Hunt.

As soon as Samra refiles his second amended successive petition, the State will file its Answer and Motion to Summarily Dismiss the Second Successive Petition (attached hereto as "Exhibit A"). The State's motion to dismiss shows that Samra's petition was filed beyond Rule 32.2(c)'s statute of limitations, is barred by Rule 32.2(b)'s successive petition rule, and is, in any event, meritless. Id.

Samra's second successive petition is untimely because it was not brought within a year after this Court issued its certificate of judgment in this case. This Court affirmed Samra's capital murder conviction and death sentence on March 3, 2000, and denied the application for rehearing on May 5, 2000. Ex parte Samra, 771 So. 2d 1122 (Ala. 2000). The certificate of judgment issued on May 23, 2000 (eighteen days after this Court affirmed Samra's conviction and death

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by the clerk's office and Samra will be required to refile his second successive petition. Based on this information and because of the exigencies of the situation, the State has not yet filed the attached answer and motion to dismiss the second successive petition but has attached what the State will file in the Shelby County Circuit Court as soon as Samra has refiled his second successive petition.

sentence). Samra is raising his claim almost nineteen years after his conviction because final, well beyond the statute of limitations.

Moreover, Samra does not attempt to prove that his claim is based on newly discovered evidence and that he brought the claim within six months of discovering the new evidence. Samra does not allege that the statute of limitations does not apply to him because the facts supporting this claim could not have been raised in his first successive Rule 32 petition.

Samra's claim is also barred by Rule 32.2(b)'s successive petition rule. Samra has not attempted to show that the trial court was without jurisdiction to render a judgment or impose sentence on him or that good cause exists why the new claim could not have been raised in his first successive Rule 32 petition, and he has not shown that the failure to entertain the claim will result in a miscarriage of justice. ALA. R. CRIM. P. 32.2(b); Ex. A at 14-17. There is no reason why Samra could not have argued when he filed his successive petition that the Supreme Court's holding in Roper v. Simmons, 543 U.S. 551 (2005), should be extended to offenders who were younger than twenty-one. Nor could Samra seriously argue that failure to entertain his claim will result in a miscarriage

of justice. The evidence against him was overwhelming. Ex. A at 17. In fact, Samra confessed to his participation in the four murders, which involved slitting the throats of six- and seven-year-old girls. The failure to consider his time-barred second successive petition will not result in a miscarriage of justice.

Finally, Samra is not entitled to relief on his claim that his death sentence violates the Eighth Amendment. Neither the United States Supreme Court nor this Court have extended Roper to apply to defendants who were under twenty-one when they committed their crimes. There has also been no indication that the Supreme Court will extend Roper. In fact, the Supreme Court stated the following in Roper: "The age of eighteen is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest." 543 U.S. at 574. As Samra admits, he was nineteen when he committed the murders in the instant case. Therefore, Samra is not entitled to relief on his claim.

In addition, the Supreme Court's grant of certiorari in Mathena v. Malvo and the Kentucky trial court's order do not entitle Samra to relief. The Kentucky trial court's order has

no precedential value in Alabama, and the Supreme Court's grant of certiorari concerning the scope of Miller and Montgomery in Malvo do not require this Court to hold Samra's case in abeyance. Those cases deal with youthful offenders who were eighteen or younger. Again, Samra was nineteen when he committed the murders in the instant case. The Supreme Court's grant of certiorari in Malvo, therefore, has no application to Samra's case.

CONCLUSION

For the foregoing reasons, and pursuant to Rule 8(d)(1) of the Alabama Rules of Appellate Procedure, the State requests that this Court "enter an order fixing a date of execution, not less than 30 days from the date of the order of execution."

Respectfully submitted,

Steve Marshall
Attorney General

s/ Beth Jackson Hughes
Beth Jackson Hughes
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April 2019, I served a copy of the foregoing on the attorneys for the Petitioner by electronic mail addressed as follows:

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IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

MICHAEL BRANDON SAMRA,	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. _____
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

STATE OF ALABAMA'S ANSWER AND MOTION TO SUMMARILY DISMISS PETITIONER SAMRA'S SECOND SUCCESSIVE RULE 32 PETITION FOR POSTCONVICTION RELIEF

Comes now the State of Alabama, Respondent in the above-styled cause, and denies that Michael Brandon Samra's death sentence violates the Eighth Amendment because he was under twenty-one when he brutally murdered Randy Gerald Duke, Dedra Mims Hunt, Chelisa Nicole Hunt, and Chelsea Marie Hunt. The State answers and respectfully moves this Honorable Court to summarily dismiss Samra's second successive petition for postconviction relief, filed pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.

Introduction

Samra was tried and convicted for the brutal capital murders of Randy Gerald Duke, Dedra Mims Hunt, Chelisa Nicole Hunt, and Chelsea Marie Hunt during one act or pursuant to one scheme or course of conduct, in violation of section 13A-5-40(a)(10) of the Code of Alabama (1975). The murders, which were committed with a gun and kitchen knives, as set out more fully below, were as brutal as they come. At the penalty phase of the trial, the jury unanimously recommended that Samra be sentenced to death, and the court followed the jury's recommendation.

On March 20, 2019, after Samra's conviction and death sentence were final, the State of Alabama moved the Alabama Supreme Court to set an execution date for Samra. Only after this motion was filed did Samra file his second successive Rule 32 petition. For the reasons set forth below, the State respectfully requests that this Court summarily dismiss Samra's time-barred, successive, and meritless Rule 32 petition.

Facts of the Crime

On March 23, 1997, Samra and his friend Mark Duke executed a plan to murder Duke's father, Randy Duke. Vol. 29 at 128.[1] In order to cover up the murder, the two also killed Randy Duke's girlfriend, Dedra Hunt, and her two daughters, six-year-old Chelisa Hunt and seven-year-old Chelsea Hunt. Vol. 29 at 133.

The murders stemmed from Randy Duke's refusal to allow his son to borrow his truck the day before. Vol. 29 at 130. Following a planning session with two other codefendants, David Collum and Michael Ellison, Duke and Samra obtained two pistols and returned to Randy Duke's house. Vol. 29 at 130-32. Duke shot his father in the head, killing him. Vol. 29 at 128. Samra shot Dedra Hunt in the face, but she managed to flee upstairs with her daughters. Vol. 29 at 128-29. Hunt and Chelisa sought shelter in an upstairs bathroom, while Chelsea hid under a bed. Vol. 29 at 128-29. The two men pursued them, and Duke shot and killed Hunt after kicking in the bathroom door. Vol. 29 at 128.

1. The references to the record in this motion are from the state-court record that was filed in the United States District Court for the Northern District of Alabama.

The two girls remained alive, but the men were out of bullets. Duke retrieved two kitchen knives. Vol. 29 at 130. First, he killed six-year-old Chelisa, who was hiding behind a shower curtain, by cutting her throat. Vol. 29 at 128. The two men then went after seven-year-old Chelsea, who was still hiding under a bed. Vol. 29 at 133. When she fought back, Duke held her down and ordered Samra to kill her. Vol. 29 at 133. Chelsea begged for mercy. Vol. 29 at 133. Instead of listening to her pleas, Samra slit her throat, and she drowned in her own blood. Vol. 29 at 134.

The killing done, Samra and Duke emptied drawers and displaced items in the home to make it appear as though the house had been burglarized. Vol. 29 at 136. But the police quickly zeroed in on the two men. After being questioned, Samra admitted to his part in the crime. Vol. 29 at 127-28.

Procedural History of the Case

I. Trial and direct appeal

Samra was charged with the capital offense of murdering two or more persons by one act or pursuant to one scheme or course of conduct, in violation of section 13A-5-40(a)(10) of the Code of Alabama (1975). Samra v. State, 771 So. 2d 1108, 1111 (Ala. Crim. App. 1999). Shelby County Circuit Court Judge J. Michael Joiner presided over Samra's trial. On March 16, 1998, a jury found Samra guilty of capital murder as charged in the indictment. Vol. 14 at 7. Following the presentation of evidence, closing arguments, and instructions from the trial court, the jury unanimously recommended that Samra be sentenced to death. Vol. 14 at 113.

The trial court agreed. The court found that the defense had shown two statutory and seven non-statutory mitigating factors:

> the age and maturity of Defendant, the learning difficulties and disabilities of Defendant, the family history and background and caring nature of Defendant, the effect of gang or group involvement upon Defendant, the immediate and continuing truthfulness and cooperation of Defendant with law enforcement officers, the remorse of Defendant expressed in statements to law enforcement officers and, the fact that there are no other aggravating

> circumstances, other than [that the offense was heinous, atrocious, and cruel].

Vol. 3 at 116-17.

But these were outweighed by the existence of a single aggravating circumstance: that the capital offense was especially heinous, atrocious, and cruel when compared to other capital offenses. In supporting that finding, the trial court stated:

> Evidence showed at trial that the victims in this case were killed in a very cruel and heinous manner. The minor children's throats were actually cut and according to testimony of the medical examiner, they drowned in their own blood. The photographs and other demonstrative evidence in this case leads to one and only one conclusion, that the manner in which the victims were killed was much more heinous and atrocious and cruel than would be necessary in any killing.
>
> This case stands out as particularly heinous, atrocious and cruel when it is considered that at least one victim, according to the admission of Defendant, begged not to be killed. All of the victims died very painful and brutal deaths. The victims apparently struggled for life and breath and that very struggle caused one or more of the victims to drown in their own blood.

Vol. 3 at 118.

The Alabama Court of Criminal Appeals affirmed Samra's capital murder conviction and death sentence. Samra v. State,

771 So. 2d 1108 (Ala. Crim. App. 1999). The court noted that "[t]he sentencing order shows that the trial court weighed the aggravating and mitigating circumstances and correctly sentenced [Samra] to death." Id. at 1121.

The Alabama Supreme Court affirmed the decision of the Court of Criminal Appeals, holding in part:

> We have found no error in either the guilt phase of the trial or the sentencing phase of the trial that adversely affected the defendant's rights. Furthermore, we conclude that the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence and that the death sentence was proper under the circumstances.

Ex parte Samra, 771 So. 2d 1122, 1122 (Ala. 2000) (citing ALA. CODE § 13A-5-53 (a) and (b) (1975)). Samra then filed a petition for writ of certiorari in the United States Supreme Court, which was denied. Samra v. Alabama, 531 U.S. 933 (2000).

II. Samra's first Rule 32 proceeding

Having failed to obtain relief on direct appeal, Samra filed a Rule 32 petition for postconviction relief in the Shelby County Circuit Court on October 1, 2001. Vol. 32 at C. 1-25. He filed his first amended Rule 32 petition on

January 17, 2002, his second amended petition on June 14, 2002, and his third amended petition on August 16, 2002. Vol. 32 at C. 94-113; Vol. 34-35 at C. 389-403. On November 3-5, 2003, the circuit court conducted an evidentiary hearing regarding Samra's claim that his trial and appellate counsel were ineffective for failing to investigate and present evidence of his alleged "brain dysfunction." Vol. 38-41 at R. 1-510. On January 12, 2005, the Shelby County Circuit Court denied relief on Samra's third amended Rule 32 petition. Vol. 36-37 at C. 755-831.

The Court of Criminal Appeals affirmed the circuit court's judgment in an unpublished memorandum opinion. Vol. 49, Tab #R-82. The Alabama Supreme Court denied Samra's petition for writ of certiorari. Vol. 49, Tab #R-83.

III. Samra's second or successive Rule 32 proceeding

On September 25, 2007, Samra filed a successive Rule 32 petition for postconviction relief in the Shelby County Circuit Court. He filed this petition while his appeal from the denial of his first Rule 32 petition was pending in the Court of Criminal Appeals awaiting a ruling on his application for rehearing.

In his successive petition, Samra raised two claims. Vol. 44 at C. 5-13. First, Samra argued that his death sentence violated the Eighth Amendment's prohibition against cruel and unusual punishment because his juvenile codefendant, Mark Duke, was resentenced to life without parole under Roper v. Simmons, 543 U.S. 551 (2005). Id. Second, Samra contended that his sentence was excessive and disproportionate under section 13A-5-53(b)(3) of the Code of Alabama because Duke was resentenced to life without parole. Id.

After hearing oral argument, see Vol. 44 at C. 103-20, the circuit court denied Samra's successive Rule 32 petition. Vol. 44 at C. 72-73. On August 29, 2008, the Court of Criminal Appeals issued an order directing the circuit court to set aside that order and hold the case in abeyance until a certificate of judgment issued concerning Samra's pending appeal from his first Rule 32 petition. Vol. 45 at C. 257. Accordingly, the circuit court vacated its July 23, 2008, order and held Samra's successive Rule 32 petition in abeyance until the Court of Criminal Appeals issued the certificate of judgment on the first Rule 32 petition. Vol. 45 at C. 259. Samra's appeal from his first Rule 32 petition became final

when a certificate of judgment issued on September 19, 2008. Vol. 45 at C. 364.

The State then moved the circuit court to summarily dismiss Samra's successive Rule 32 petition. Vol. 45 at C. 330-57. After considering briefs from the parties, the circuit court granted the State's motion and dismissed Samra's successive Rule 32 petition. Vol. 46 at C. 426-27.

The Court of Criminal Appeals affirmed the circuit court's ruling in an unpublished memorandum opinion. Vol. 49, Tab #R-87. The Alabama Supreme Court denied Samra's petition for writ of certiorari. Vol. 49, Tab #R-88.

IV. Federal habeas litigation

On October 26, 2007, Samra filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Alabama. See Doc. 1.[2] On that same date, Samra filed a motion to hold his habeas petition in abeyance to allow him to exhaust one claim in the state courts. See Doc. 3. The court granted that motion. See Doc. 9. The court subsequently lifted the stay and issued an order setting deadlines for the filings of

2. Document numbers refer to filings in Samra v. Jones, 2:07-cv-01962-LSC-HGD (N.D. Ala.).

briefs and an amended petition. See Doc. 30. In compliance with that order, Samra filed an amended petition on February 21, 2014. See Doc. 31. The State, in compliance with the court's scheduling order, see Doc. 30, filed an answer to Samra's amended petition, a supporting brief, and the state court record. See Docs. 33-36.

The district court issued a final order denying Samra's amended habeas petition on September 5, 2014, and denying his certificate of appealability on October 27, 2014. See Docs. 53, 60. The Eleventh Circuit Court of Appeals then granted a certificate of appealability on two issues. That court affirmed the judgment of the district court. Samra v. Warden, Donaldson Correctional Facility, 626 F. App'x 227 (11th Cir. Sept. 8, 2015). Once again, the United States Supreme Court denied certiorari review. Samra v. Price, 136 S. Ct. 1668 (2016) (mem.).

Response to Grounds for Relief

Samra's claim that his death sentence violates the Eighth Amendment because it is cruel and unusual punishment to execute offenders who were under twenty-one at the time of their crime does not entitle Samra to relief because the claim is procedurally barred from this Court's review and is also without merit.

Samra contends that this Court should grant him an evidentiary hearing on his claim that his death sentence violates the Eighth Amendment because he was under twenty-one when he brutally murdered four people. He argues that Roper v. Simmons, 543 U.S. 551, 578 (2005), should be extended to prevent the execution of offenders who were under twenty-one when they committed their offenses. Samra relies on a Kentucky trial court's order, one article, and the Supreme Court's grant of certiorari in Mathena v. Malvo, No. 18-217 (cert granted on March 18, 2019), to support his argument. As set forth below, there are at least three reasons this Court should refuse to grant an evidentiary hearing and should summarily dismiss Samra's time-barred, second successive Rule 32 petition.

A. Samra's claim is barred by the statute of limitations.

Samra's claim is barred from review by the statute-of-limitations procedural bar. Rule 32.2(c) of the Alabama Rules of Criminal Procedure provides as follows:

> (c) LIMITATIONS PERIOD. Subject to the further provisions hereinafter set out in this section, the court shall not entertain any petition for relief from a conviction or sentence on the grounds specified in Rule 32.1(a) and (f), unless the petition is filed: (1) In the case of a conviction appealed to the Court of Criminal Appeals within one (1) year after the issuance of the certificate of judgment by the Court of Criminal Appeals under Rule 41, Ala. R. App. P. . . . The court shall not entertain a petition based on the grounds specified in Rule 32.1(e) unless the petition is filed within the applicable one-year period specified in the first sentence of this section, or within six (6) months after the discovery of the newly discovered material facts, whichever is later; provided, however, that the one-year period during which a petition may be brought shall in no case be deemed to have begun to run before the effective date of the precursor of this rule, i.e., April 1, 1987.

See also Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002) ("Because only nonjurisdictional claims for relief were contained in Cogman's first . . . petition, which was filed more than two years after the certificate of judgment was issued, those issues were precluded by Rule 32.2(c), Ala. R. Crim. P.").

The Alabama Supreme Court affirmed Samra's capital murder conviction and death sentence on March 3, 2000, and denied the application for rehearing on May 5, 2000. Ex parte Samra, 771 So. 2d 1122 (Ala. 2000). The certificate of judgment issued on May 23, 2000. Thus, Samra is raising this claim almost nineteen years after his conviction became final, well beyond the statute of limitations.

Samra does not attempt to prove that his claim is not time-barred. He does not allege, nor can he, that his claim is based on newly discovered evidence that was discovered within the last six months. In fact, there is no reason that this claim could not have been raised in Samra's first successive Rule 32 petition. As this claim is being presented well beyond the statute of limitations, this Court should dismiss Samra's time-barred second successive petition.

B. Samra's claim is procedurally barred because he raised it in a second successive Rule 32 petition.

Samra's claim is also barred by the successive petition bar of Rule 32.2(b) of the Alabama Rules of Criminal Procedure, which provides as follows:

> If a petitioner has previously filed a petition that challenges any judgment, all subsequent petitions by that petitioner challenging any judgment arising

> out of that same trial or guilty-plea proceeding shall be treated as successive petitions under the rule. The Court shall not grant relief on a successive petition on the same or similar grounds of behalf of the same petitioner. A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.

This claim is barred from review under the second part of the successive petition rule. See, e.g., Whitt v. State, 827 So. 2d 869, 875 (Ala. Crim. App. 2001) ("Under the second part of Rule 32.2(b), any new claim in a 'second or successive petition' is precluded as successive unless the petitioner can 'show[] both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice.'").

Samra's claim is barred from review by the successive-petition bar unless he can establish either: (1) that the trial court was without jurisdiction to render a judgment or

impose sentence on him, or (2) that the grounds could not have been ascertained through reasonable diligence when his first petition was filed and that a miscarriage of justice would result if his claim is not entertained. See Ala. R. Crim. P. 32.2(b). His petition meets neither of those exceptions.

As an initial matter, "jurisdiction" is "[a] court's power to decide a case or issue a decree." Ex parte Seymour, 946 So. 2d 536, 538 (Ala. 2006) (quoting BLACK'S LAW DICTIONARY 867 (8th ed. 2004)). A circuit court possesses jurisdiction over capital offenses. Id. Further, Alabama's current death penalty statute, under which Samra was sentenced, has never been struck down by the United States Supreme Court. Harris v. Alabama, 513 U.S. 505 (1995). Thus, Samra cannot seriously maintain that death was not an available punishment to be imposed by a circuit court at the time he was sentenced.

Second, Samra has fallen far short of showing that his argument could not have been ascertained through reasonable diligence when his first successive petition was filed and that a miscarriage of justice would result if his claim is not entertained. There is no reason that Samra could not have made this argument when he filed his successive petition after

Roper was decided. Samra certainly could have argued that Roper should be extended to cover offenders who were younger than twenty-one.

Nor can Samra seriously argue that the failure to entertain his claim will result in a miscarriage of justice. As set forth above, the evidence against Samra is overwhelming. Not only did he assist Mark Duke in planning this crime, but he was also an active, willing participant in the crime. When Samra and Duke entered the house, Samra shot Dedra Hunt in the face. Samra and Duke then pursued Dedra and Chelisa upstairs, where Duke shot and killed Dedra after kicking in the bathroom door. After watching Duke cut six-year-old Chelisa's throat, Samra and Duke went after seven-year-old Chelsea, who was hiding under a bed. Chelsea fought back when Duke attempted to murder her. Duke then held Chelsea down while Samra slit her throat, and she drowned in her own blood. Samra has failed to show that the failure to consider his petition will result in a miscarriage of justice, and this Court should summarily dismiss his second successive Rule 32 petition.

C. Samra is not entitled to relief on his claim.

Samra argues that he is entitled to relief on his claim that his death sentence violates the Eighth Amendment because he was under twenty-one when he committed the brutal murders in this case. Samra asks this Court to extend the holding in Roper to include defendants who were under twenty-one when they committed their crimes. Neither the United States Supreme Court nor any court in Alabama has extended Roper in such fashion. In fact, contrary to Samra's argument, there has not been any indication from the Supreme Court that it will so extend its holding in Roper. Roper held that the Eighth Amendment forbids the imposition of the death penalty on offenders who were under the age of eighteen when their crimes were committed. As the Court explained:

> Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. The qualities that distinguish juveniles from adults do not disappear when an individual turns 18. By the same token, some under 18 have already attained a level of maturity some adults will never reach. For the reasons we have discussed, however, a line must be drawn. . . . The age of 18 is the point where society draws the line for many purposes between childhood and adulthood. It is, we conclude, the age at which the line for death eligibility ought to rest.

Roper, 543 U.S. at 574. As Samra admits, he was nineteen when he committed the murders in the instant case. Therefore, Samra is not entitled to relief on his claim.

Moreover, the Supreme Court's grant of cert in Mathena v. Malvo and the Kentucky trial court's order do not entitle Samra to relief. The alleged question concerning the scope of Miller and Montgomery in Malvo do not require this Court to hold Samra's case in abeyance. Those cases deal with youthful offenders who are eighteen or younger. As with Roper, those cases have no application to Samra because Samra was nineteen when he committed the murders in this case. In addition, the Kentucky trial court's decision has no precedential value in Alabama.

Based on the above, Samra is not entitled to relief on his claim that his death sentence violates the Eight Amendment. This Court should, therefore, summarily dismiss Samra's claim.

Conclusion

Samra's second successive Rule 32 petition is merely an attempt to stop the Alabama Supreme Court from setting his execution date. This Court should refuse to allow Samra to game the system in this manner.

Samra's claim is barred by the statute of limitations and by the successive petition rule, and is without merit. The State, therefore, respectfully requests that this Court summarily deny Samra's time-barred second successive Rule 32 petition.

Respectfully submitted,

Steve Marshall
Attorney General

s/ Beth Jackson Hughes
Beth Jackson Hughes
Assistant Attorney General

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of April 2019, I served a copy of the foregoing on the attorneys for the Petitioner by electronic mail addressed as follows:

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Appendix E

Samra's reply to the State's motion to set an execution date
(April 2, 2019)

IN THE SUPREME COURT OF ALABAMA

EX PARTE: MICHAEL BRANDON SAMRA	)	
	)	
State of Alabama,	)	
Petitioner,	)	
	)	
v.	)	No. 1982032
	)	
Michael Brandon Samra,	)	
Respondent.	)	

RESPONDENT MICHAEL BRANDON SAMRA'S REPLY TO THE STATE OF ALABAMA'S MOTION TO SET EXECUTION DATE

Respondent Michael Brandon Samra maintains that this Court should not set an execution date to allow Samra to litigate the issue of whether the Eighth Amendment prohibits the execution of persons who were under 21 years old at the time of their offense. The State of Alabama's response offers no persuasive justification for carrying out Samra's execution before resolving this issue, which is currently percolating in the courts.

The State makes no attempt to address the merits of Samra's Eighth Amendment claim, other than to re-state the obvious fact that the Supreme Court, in *Roper v. Simmons*, 543 U.S. 551, 574 (2005), drew the line for death eligibility at age 18. Instead, it argues that Samra's claim is barred from review because he cannot show good

cause exists for not raising the claim in his previous Rule 32 petition. The State also argues that the failure to rule on his claim will not result in a miscarriage of justice. Both of the State's arguments lack merit.

The State argues that Samra cannot show good cause for failing to raise this claim earlier. But the Eighth Amendment question of whether a punishment is cruel and unusual, by definition, involves an assessment of standards that are evolving. *See Trop v. Dulles*, 356 U.S. 86, 100–101 (1958) (plurality opinion) (analyzing the "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be cruel and unusual). A punishment that was once deemed valid under the Eighth Amendment can soon become invalid in light of society's changing standards.

For evidence of how rapidly society's standards can evolve, one needs to look no further than *Roper*, where the Supreme Court began its opinion by observing that it was addressing the constitutionality of executing 15- to 17-year-old offenders "for the second time in a decade and a half." *Roper*, 543 U.S. at 555. Only 16 years earlier, the

Court had reviewed the relevant data and found "no modern societal consensus" forbidding the imposition of capital punishment on juvenile offenders. *Stanford v. Kentucky*, 492 U.S. 361, 380 (1989). But by the time the Court decided *Roper*, the "objective indicia of consensus" had changed, and the execution of juvenile offenders was no longer consistent with the standards of decency that inform Eighth Amendment analysis. *Roper*, 543 U.S. at 574.

The rapid pace of evolving standards can also be seen in the Supreme Court's evaluation of capital punishment for mentally retarded offenders. In *Penry v. Lynaugh*, 492 U.S. 302, 335 (1989), the Court examined the data and found that "at present, there is insufficient evidence of a national consensus against executing mentally retarded people convicted of capital offenses." A mere 13 years later, the Court re-examined the data in *Atkins v. Virginia*, 536 U.S. 304 (2002), and found that "[m]uch has changed" since *Penry* was decided. During that time, "the American public, legislators, scholars, and judges [] deliberated over the question whether the death penalty should ever be imposed on a mentally retarded criminal," and those deliberations informed the Court's conclusion that such executions had

come to violate the Eighth Amendment. *Atkins*, 536 U.S. at 307.

The Supreme Court's Eighth Amendment jurisprudence therefore demonstrates how rapidly society's standards of decency can evolve. In the 14 years since the *Roper* Court drew the line on executing young offenders at 18 years of age, there has been a great deal of scientific research and legislative developments pertaining to the culpability of youthful offenders over the age of 18. Most significantly, recent scientific findings have shown that a young people's brains continue developing far beyond their 18th birthday—into their mid-20's, in fact. See Blume, et. al, *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles From 18 to 21*, Texas L. Rev. at 10-15 (forthcoming 2019) (compiling scientific research).[1]

It is noteworthy that at the time *Roper* was decided, Alabama's death row had 13 juvenile offenders.[2] The co-defendant in this case, 16-year-old Mark Duke, was among

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[1] This article is available online at https://ssrn.com/abstract=3341438.

[2] *See* https://deathpenaltyinfo.org/juvenile-offenders-who-were-death-row (last visited April 1, 2019).

those juveniles who had been sentenced to death. Before their sentences of death could be carried out, however, society's standards of decency had evolved to categorically invalidate their punishments. In light of this recent history, Samra deserves a chance to litigate whether standards of decency now forbid the execution of a 19-year-old offender.

The State also argues that Samra cannot "seriously argue that the failure to entertain his claim will result in a miscarriage of justice." (St. Response, Exhibit A, at 17) But it is the State who cannot seriously take this position. It would, of course, be a grave injustice to execute Samra without resolving the issue of whether his death sentence is categorically forbidden by the Eighth Amendment. This precise issue is percolating in the courts and is supported by newly emerging legal scholarship and scientific research. And one court has examined the national trends and scientific evidence and concluded that that *Roper*'s Eighth Amendment ban on executing young offenders must be extended to persons under 21 years old.[3]

[3] See Commonwealth v. Efrain Diaz, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-

The Supreme Court has long recognized the unique nature of the death penalty and Eighth Amendment's demand for heightened reliability and fairness. *See, e.g., Sumner v. Shuman*, 483 U.S. 66, 72 (1987); *Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976). As the Court has explained, "The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. 701, 724 (2014). Thus, at a minimum, Samra's execution date should not be set until he is afforded the opportunity to litigate his Eighth Amendment claim and have it resolved by the United States Supreme Court.

000536) (Order attached as Exhibit B to Respondent's Objection to the State's Motion to Set an Execution Date).

CONCLUSION

Accordingly, this Court should deny the State's motion to set an execution date until Samra is afforded the opportunity to fully litigate his claim that the Eighth Amendment prohibits a death sentence for offenders who were under 21 at the time of their offense.

Respectfully submitted,

/s/ Steven R. Sears
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Appendix F

Samra's second successive state Rule 32 post-conviction petition, which raises Eighth Amendment claim

(March 26, 2019)

IN THE SHELBY COUNTY CIRCUIT COURT

EX PARTE: MICHAEL BRANDON SAMRA	)	
	)	
State of Alabama,	)	
Petitioner,	)	
	)	
v.	)	Case No. CC 1997 000384.60
	)	
Michael Brandon Samra,	)	
Respondent.	)	

PETITION FOR A SECOND SUCCESSOR RULE 32 PETITION FOR POST-CONVICTION RELIEF IN A CAPITAL CASE

Petitioner was convicted of capital murder on March 16, 1998, and subsequently, the jury recommended that he be sentenced to death. The trial court imposed a death sentence. The Court of Criminal Appeals and the Alabama Supreme Court affirmed Samra's conviction and sentence. *Samra v. State*, 771 So. 2d 1108 (Ala. Crim. App. 1999); *Ex Parte Samra*, 771 So. 2d 1122 (Ala. 2000). The United States Supreme Court denied Samra's petition for writ of certiorari on October 10, 2000. *Samra v. Alabama*, 531 U.S. 933 (2000).

On October 1, Samra filed a petition for post-conviction relief pursuant to Rule 32 of the Alabama Code of Criminal Procedure. The third amended petition was filed on August 16, 2002.

An evidentiary hearing was held on one portion of the claim of ineffective assistance of trial counsel, the failure to adequately investigate and introduce evidence of organic brain damage and brain dysfunction. Following the evidentiary hearing in November 2003, the Circuit Court denied the Rule 32 petition on January 12, 2005.

On February 9, 2005, Samra filed an appeal in the Alabama Court of Criminal Appeals, which was denied on August 24, 2007. *Samra v. State*, 14 So. 3d 196 (Ala. Crim. App. 2007). Rehearing was denied on September 28, 2007. The Alabama Supreme Court denied certiorari on September 19, 2008. *Ex Parte Samra*, 34 So.3d 737 (Ala. 2008).

On September 27, 2007, Samra filed a petition for a successor Rule 32 petition for post-conviction relief. The petition was summarily dismissed on September 19, 2011. The Court of Criminal Appeals affirmed on August 10, 2012. *Samra v. State*, 152 So.3d 456 (Ala. Crim. App. 2012) (table). The Alabama Supreme Court affirmed on September 20, 2013. *Ex Parte Samra*, 170 So.3d 720 (Ala. 2013).

On October 26, 2007, Samra filed a a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Northern District of Alabama. The petition was held in abeyance pending the conclusion of the state court proceedings. Samra filed an amended habeas petition on February 21, 2014. The district court denied the petition on September 5, 2014. The Eleventh Circuit Court of Appeals granted a certificate of appealability on two issues and then affirmed the judgment of the district court. *Samra v. Warden, Donaldson Correctional Facility*, 626 F. App'x 227 (11th Cir. Sept. 8, 2015). On April 18, 2016, the United States Supreme Court denied certiorari review. *Samra v. Price*, 136 S. Ct. 1668 (2016) (mem.).

CLAIM

PETITIONER'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE IT IS CRUEL AND UNUSUAL TO EXECUTE OFFENDERS WHO WERE UNDER 21 AT THE TIME OF THEIR CRIME.

In *Roper v. Simmons*, 543 U.S. 551, 578 (2005), the United States Supreme Court held that the Eighth Amendment forbids the imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed. The science and logic of *Roper* extends to those who were under the age of 21. Accordingly, the "the evolving standards of decency that mark the progress of a maturing society," *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958), should no longer permit the execution of offenders who, like Samra, were under 21 years old at the time of their crime.

In *Roper*, the United States Supreme Court held that the execution of a juvenile offender violates the Eighth Amendment because the severity of the punishment is categorically disproportionate to the offender's diminished personal responsibility for the crime. *Roper*, 543 U.S. at 571-73. In its analysis, the Court first looked to whether there was a national consensus on this form of punishment. The court found there was a consensus against the execution of offenders under 18, upon considering "the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice." *Id.* at 567.

The Court then exercised its own independent judgment on whether the death penalty was disproportionate for juveniles. It considered the unique

characteristics of juvenile offenders that diminish their culpability, regardless of the offense: Specifically, (1) they have a "lack of maturity and an underdeveloped sense of responsibility" that "often result in impetuous and ill-considered actions and decisions"; (2) they are "more vulnerable or susceptible to negative influences and outside pressures, including peer pressure"; and (3) their characters are "not as well formed" and their personalities "more transitory, less fixed" than those of adults. *Id.* at 569-70. Given these differences, the penalogical objectives of the death penalty apply to juveniles with lesser force than to adults. *Id.* at 570-71.

Since *Roper* was decided, new scientific research has called into question the line drawn by the Court—18 years of age—as too low. This research has shown people under 21 share the same traits that the Supreme Court identified as diminishing culpability and undermining the penalogical justifications for the death penalty. Accordingly, at least one court and legal scholars have concluded that the ban on executing offenders under 18 should be extended to offenders to the age of 21.

In Kentucky, a trial court found that the execution of offenders who were under the age of 21 violates the Eighth Amendment. *See Commonwealth v. Efrain Diaz*, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-000536) (Order attached as Exhibit A). The court heard expert testimony on the issue and evaluated the scientific studies. The studies showed that during a person's late teens and early 20's, the brain continues to undergo rapid changes in self-regulation and higher-order cognition. Compared to adults, persons in their late

teens and early 20's are: (1) more likely to poorly assess risk, (2) more likely to engage in sensation-seeking, (3) less able to control their impulses and consider the consequences of their actions, (4) have underdeveloped basic cognitive abilities as compared to emotional abilities, (5) are more affected by peer pressure. The research also demonstrated that like juveniles, young adults had heightened plasticity of the brain. That is, young adults, even those who have committed violent crimes, have a strong potential for behavioral change. *Diaz*, Order at 6-10 (citing studies). The court therefore concluded that the research shows that 18- to 21-year-olds are categorically less culpable for the same reasons identified in *Roper*. *Id.* at 10.

Legal scholars synthesizing the neuroscientific research recently explained that people under 21 share two defining class-wide characteristics: "On the one hand, their brains are physiologically like those of younger children, unable to fully regulate emotion or evaluate risk. On the other hand, they are experiencing rapid changes in social control, with the end of high school and the beginning of college or employment." Blume, et. al, *Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles From 18 to 21*, Texas L. Rev. at 14 (forthcoming 2019) (electronic copy available at: https://ssrn.com/abstract=3341438).

These are precisely the qualities of youthfulness that led the *Roper* Court to find the penalogical justifications for the death penalty to be categorically

inapplicable to persons under 18. The post-*Roper* research confirms that the reduced culpability of young offenders extends to the age of 21.

Turning to the national consensus, since *Roper*, the number of offenders under 21 who have been sentenced to death has declined each year. Blume et, al, *Death by Numbers*, at 20. Only 13 states have handed down new death sentences to offenders under 21 since *Roper*. *Id.* at 23. Those death sentences were concentrated in five states and in a few counties. *Id.* at 21-22. The state with the largest number of youthful offenders sentenced to death—California, with 34—recently imposed a statewide moratorium on the death penalty. *Id.* at 22. Considering the downward trend in the number of states with the death penalty, a majority of states, 30, would not permit the execution of a youthful offender. That number is 10 more than in *Roper*, 17 more than in *Graham v. Florida*, 560 U.S. 48, 69 (2010) (barring life without parole for non-homicide offenses), and nine more than in *Miller v. Alabama*, 567 U.S. 460, 489 (2012) (barring mandatory life without parole for homicide). Blume, *Death by Numbers*, at 23.

The American Bar Association has also urged jurisdictions to categorically prohibit death sentences for offenders under the age of 21 at the time of their offense. An ABA resolution detailed legislative developments that reflected society's increased understanding of adolescent brain development. For instance, many child welfare and education systems extend their services to persons through age 21. American Bar Association Report 111, p. 8-9 (adopted Feb. 5, 2018) (available at https://www.americanbar.org/news/reporter_resources/midyear-meeting-

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There is therefore a very clear national consensus trending toward the prohibition of the death penalty for those under 21. *See Diaz*, Order at 4-5 (finding such a national consensus). This is the same direction of change that the Court found in *Roper*.

In a forthcoming law review article, legal scholars concluded that *Roper*'s reasoning extends to persons under 21. As the scholars wrote:

> In the fifteen years since *Roper*, the country has witnessed dramatic developments in neuroscience, social attitudes, and most significantly, the law and attendant sentencing practices. The same considerations that motivated the Court to extend *Thompson* to apply to people under 21: their reduced moral culpability—embodied by an increased reluctance by sentencing bodies to inflict the ultimate punishment—removes them from the category of people who can be considered the worst of the worst.

Blume et. al, *Death by Numbers*, at 31.

The recent findings by the scientific community and the emerging national consensus compel the conclusion that the execution of offenders who were under 21 at the time of their offense is barred by the Eighth Amendment. In light of this recent authority supporting this constitutional claim, this Court should allow Samra to litigate his claim.

The United States Supreme Court's grant of certiorari in *Mathena* v. *Malvo*, 18-217 (cert. granted March 18, 2019), is set to shed light on the questions in this case. The issues in that case surround the scope of *Miller* and *Montgomery* – the

Court's watershed decisions involving the Eighth Amendment principles as applied to youthful offenders.[1]

Samra's Case

The facts of Samra's case perfectly illustrate why *Roper*'s teachings should apply with equal force to those just over the age 18. At the time of the offenses in this case, Samra was 19 years old – just over *Roper*'s bright line age of 18. Mark Duke, the co-defendant and the more culpable offender, was 16 years old. Duke was sentenced to death, but his death sentence was ruled unconstitutional in light of *Roper*.

The State has already admitted that Duke was the "mastermind" behind the offense, while Samra was merely a "minion." Brief of the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia as Amici Curiae in Support of Petitioner, *Roper v. Simmons*, 2004 WL 865268, *7 (U.S. Apr. 20, 2004) (No. 03-633). Indeed, while Samra bore responsibility for the death of one person, his

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[1] The question presented in that case is:

> In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Id.* at 465. Four years later, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court held that "*Miller* announced a substantive rule of constitutional law" that, under *Teague v. Lane*, 489 U.S. 288 (1989), must be given "retroactive effect" in cases where direct review was complete when Miller was decided. *Montgomery*, 136 S. Ct. at 736.
>
> The question presented is:
>
> Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

culpability paled in comparison to that of his co-defendant who plotted, planned, and killed three of the victims for revenge.

Duke hatched the plan to kill his father after he refused to let Duke use his truck. Duke enlisted Samra and two other friends to help with the killing. When Duke and Samra entered the house, Duke shot his father and then pursued his father's girlfriend, Dedra Hunt, and her two children. Samra shot Hunt once, and then Duke pursued her and shot her once more. Duke grabbed one of the children and slit her throat, killing her as well. As Duke struggled with the second child, he was unable to hold her still and demanded that Samra help him kill her. Samra refused to help until Duke yelled at him, and caving into Duke's demands, Samra killed her by slitting her throat while Duke held the child down. *Duke v. State*, 889 So. 2d 1, 3-6 (Ala. Crim. App. 2002), vacated by 544 U.S. 901 (2005); Brief of the States of Alabama, et. al, *Roper v. Simmons*, 2004 WL 865268, *6.

Samra's lesser role in this crime evinces the diminished culpability of youthful offenders as recognized by the Supreme Court. Youth are "vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 567 U.S. at 471. Samra was undoubtedly influenced by his friend, a fellow gang member who planned this crime for his own personal revenge and further pressured Samra to kill the last victim. Youth are uniquely susceptible to such pressure – even past the age of 18. *See* Blume et. al, *Death by Numbers*, at 11-12 (citing studies).

Furthermore, the significance of young persons' continuing brain development is particularly salient in this case. Evidence from the trial and sentencing hearing revealed that Samra fell within the "borderline range of intelligence," meaning below low average intelligence. The post-conviction hearing included testimony from experts who examined Samra and concluded that he had impaired brain functioning. Samra's developmental difficulties, exacerbated by his young age, show that his culpability is far less than that of an adult offender.

THIS SECOND SUCCESSOR PETITION MERITS AN EVIDENTIARY HEARING AND RULING BECAUSE IT MEETS THE CRITERIA FOR A PROPERLY FILED SUCCESSOR PETITION.

Under Rule 32(b)(2), a successor petition is proper where "the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice." Good cause exists in this case.

The primary basis for the Eighth Amendment claim is the emerging scientific research showing that 18- to 21- year-olds are categorically less culpable for the same reasons that the Supreme court in *Roper* found with respect to teenagers under 18. *See* Blume et. al, *Death by Numbers*, at 10-15; Elizabeth C. Victor & Ahmad R. Hariri, *A Neuroscience Perspective on Sexual Risk Behavior in Adolescence and Emerging Adulthood*, 28 DEVELOPMENTAL & PSYCHOPATHOLOGY 471, 472 (2016) ("In the last decade[,] remarkable research has been conducted in the field of developmental neuroscience to provide a richer understanding of brain

function and development during adolescence and emerging adulthood."). The recent developments in neuroscience are necessary to prevail on this claim and therefore provide good cause for Samra's failure to raise this issue earlier.

Furthermore, the national consensus has trended away from the execution of youthful offenders under 21. Due to actions by state legislatures and governors, a solid majority of states (30) no longer permit the execution of those between 18 and 21. *See* Blume et. al, *Death by Numbers*, at 23. Also, one court, considering the identical claim at issue here, has concluded that the Eighth Amendment bans the execution of those under 21, and that decision is currently under review by a state supreme court. *See Commonwealth v. Efrain Diaz*, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-000536). These recent legal developments also show good cause for raising this claim now.

In addition, the United States Supreme Court, only a week ago, granted certiorari in *Mathena v. Malvo*, 18-217 (cert. granted on March 18, 2019), a case that will decide important Eighth Amendment questions involving the sentencing of young people.[2]

---

[2] The question presented in that case is:

> In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Id.* at 465. Four years later, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court held that "*Miller* announced a substantive rule of constitutional law" that, under *Teague v. Lane*, 489 U.S. 288 (1989), must be given "retroactive effect" in cases where direct review was complete when Miller was decided. *Montgomery*, 136 S. Ct. at 736.
>
> The question presented is:
>
> Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as

The legal issue in this case goes to the core of the Eighth Amendment's ban on cruel and unusual punishment. It would be a miscarriage of justice to uphold Samra's death sentence in the face of scientific research and a national consensus condemning the execution of offenders under the age of 21.

modifying and substantively expanding the very rule whose retroactivity was in question?

REQUEST FOR RELIEF

For these reasons and other such reasons that may appear to the Court, Samra respectfully requests the following relief:

A. A full evidentiary hearing at which Samra may offer evidence supporting the allegations in this petition;

B. The grant of sufficient funds to Samra, who is indigent, so that he may present witnesses and other evidence in support of the allegations in this petition;

C. The vacatur of Samra's unconstitutional death sentence; and

D. Any other relief as may seem just, equitable and proper.

Respectfully submitted,
s/ Steven R. Sears
Steven R. Sears
One of Petitioner's Counsel

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No. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL BRANDON SAMRA,
Petitioner
- vs -
STATE OF ALABAMA,
Respondent

On Petition for Writ of Certiorari to the
Alabama Supreme Court

APPENDIX
Volume 3

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Counsel for Petitioner

Appendix G

Order of the Shelby County Circuit Court dismissing Samra's second successive state Rule 32 post-conviction petition

(April 10, 2019)

AlaFile E-Notice

58-CC-1997-000384.00

Judge: COREY B MOORE

To: SEARS STEVEN RALPH
Montevallo@Charter.net

NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA V. SAMRA MICHAEL BRANDON/Z635
58-CC-1997-000384.00

The following matter was FILED on 4/10/2019 1:14:21 PM

Notice Date: 4/10/2019 1:14:21 PM

MARY HARRIS
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COLUMBIANA, AL, 35051

205-669-3760
mary.harris@alacourt.gov

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	)	Case No.: CC-1997-000384.00
	)	
SAMRA MICHAEL BRANDON/Z635	)	
Defendant.	)	

ORDER

The Petition for a Second Successor Rule 32 Petition for Post-Conviction Relief in a Capital Case e-filed on March 26, 2019, is hereby dismissed for being improperly filed. Defendant must pay filing fee or file for In Forma Pauperis. In addition, the Petition must be properly filed in .62 and paper filed with the Clerk of Court.

DONE this 10th day of April, 2019.

COREY B. MOORE, CIRCUIT JUDGE

Appendix H

Samra's re-filed second successive state Rule 32 post-conviction petition, which raises Eighth Amendment claim

(April 29, 2019)

IN THE SHELBY COUNTY CIRCUIT COURT

EX PARTE: MICHAEL BRANDON SAMRA	)	
	)	
State of Alabama,	)	
Petitioner,	)	
	)	
v.	)	Case No. CC 1997 000384.60
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Michael Brandon Samra,	)	
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PETITION FOR A SECOND SUCCESSOR RULE 32 PETITION FOR POST-CONVICTION RELIEF IN A CAPITAL CASE

Petitioner was convicted of capital murder on March 16, 1998, and subsequently, the jury recommended that he be sentenced to death. The trial court imposed a death sentence. The Court of Criminal Appeals and the Alabama Supreme Court affirmed Samra's conviction and sentence. *Samra v. State*, 771 So. 2d 1108 (Ala. Crim. App. 1999); *Ex Parte Samra*, 771 So. 2d 1122 (Ala. 2000). The United States Supreme Court denied Samra's petition for writ of certiorari on October 10, 2000. *Samra v. Alabama*, 531 U.S. 933 (2000).

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Court's watershed decisions involving the Eighth Amendment principles as applied to youthful offenders.[1]

Samra's Case

The facts of Samra's case perfectly illustrate why *Roper*'s teachings should apply with equal force to those just over the age 18. At the time of the offenses in this case, Samra was 19 years old – just over *Roper*'s bright line age of 18. Mark Duke, the co-defendant and the more culpable offender, was 16 years old. Duke was sentenced to death, but his death sentence was ruled unconstitutional in light of *Roper*.

The State has already admitted that Duke was the "mastermind" behind the offense, while Samra was merely a "minion." Brief of the States of Alabama, Delaware, Oklahoma, Texas, Utah, and Virginia as Amici Curiae in Support of Petitioner, *Roper v. Simmons*, 2004 WL 865268, *7 (U.S. Apr. 20, 2004) (No. 03-633). Indeed, while Samra bore responsibility for the death of one person, his

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[1] The question presented in that case is:

> In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Id.* at 465. Four years later, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court held that "*Miller* announced a substantive rule of constitutional law" that, under *Teague v. Lane*, 489 U.S. 288 (1989), must be given "retroactive effect" in cases where direct review was complete when Miller was decided. *Montgomery*, 136 S. Ct. at 736.
>
> The question presented is:
>
> Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as modifying and substantively expanding the very rule whose retroactivity was in question?

culpability paled in comparison to that of his co-defendant who plotted, planned, and killed three of the victims for revenge.

Duke hatched the plan to kill his father after he refused to let Duke use his truck. Duke enlisted Samra and two other friends to help with the killing. When Duke and Samra entered the house, Duke shot his father and then pursued his father's girlfriend, Dedra Hunt, and her two children. Samra shot Hunt once, and then Duke pursued her and shot her once more. Duke grabbed one of the children and slit her throat, killing her as well. As Duke struggled with the second child, he was unable to hold her still and demanded that Samra help him kill her. Samra refused to help until Duke yelled at him, and caving into Duke's demands, Samra killed her by slitting her throat while Duke held the child down. *Duke v. State*, 889 So. 2d 1, 3-6 (Ala. Crim. App. 2002), vacated by 544 U.S. 901 (2005); Brief of the States of Alabama, et. al, *Roper v. Simmons*, 2004 WL 865268, *6.

Samra's lesser role in this crime evinces the diminished culpability of youthful offenders as recognized by the Supreme Court. Youth are "vulnerable . . . to negative influences and outside pressures, including from their family and peers; they have limited control over their own environment and lack the ability to extricate themselves from horrific, crime-producing settings." *Miller*, 567 U.S. at 471. Samra was undoubtedly influenced by his friend, a fellow gang member who planned this crime for his own personal revenge and further pressured Samra to kill the last victim. Youth are uniquely susceptible to such pressure – even past the age of 18. *See* Blume et. al, *Death by Numbers*, at 11-12 (citing studies).

Furthermore, the significance of young persons' continuing brain development is particularly salient in this case. Evidence from the trial and sentencing hearing revealed that Samra fell within the "borderline range of intelligence," meaning below low average intelligence. The post-conviction hearing included testimony from experts who examined Samra and concluded that he had impaired brain functioning. Samra's developmental difficulties, exacerbated by his young age, show that his culpability is far less than that of an adult offender.

THIS SECOND SUCCESSOR PETITION MERITS AN EVIDENTIARY HEARING AND RULING BECAUSE IT MEETS THE CRITERIA FOR A PROPERLY FILED SUCCESSOR PETITION.

Under Rule 32(b)(2), a successor petition is proper where "the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice." Good cause exists in this case.

The primary basis for the Eighth Amendment claim is the emerging scientific research showing that 18- to 21- year-olds are categorically less culpable for the same reasons that the Supreme court in *Roper* found with respect to teenagers under 18. *See* Blume et. al, *Death by Numbers*, at 10-15; Elizabeth C. Victor & Ahmad R. Hariri, *A Neuroscience Perspective on Sexual Risk Behavior in Adolescence and Emerging Adulthood*, 28 DEVELOPMENTAL & PSYCHOPATHOLOGY 471, 472 (2016) ("In the last decade[,] remarkable research has been conducted in the field of developmental neuroscience to provide a richer understanding of brain

function and development during adolescence and emerging adulthood."). The recent developments in neuroscience are necessary to prevail on this claim and therefore provide good cause for Samra's failure to raise this issue earlier.

Furthermore, the national consensus has trended away from the execution of youthful offenders under 21. Due to actions by state legislatures and governors, a solid majority of states (30) no longer permit the execution of those between 18 and 21. *See* Blume et. al, *Death by Numbers*, at 23. Also, one court, considering the identical claim at issue here, has concluded that the Eighth Amendment bans the execution of those under 21, and that decision is currently under review by a state supreme court. *See Commonwealth v. Efrain Diaz*, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-000536). These recent legal developments also show good cause for raising this claim now.

In addition, the United States Supreme Court, only a week ago, granted certiorari in *Mathena v. Malvo*, 18-217 (cert. granted on March 18, 2019), a case that will decide important Eighth Amendment questions involving the sentencing of young people.[2]

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[2] The question presented in that case is:

> In *Miller v. Alabama*, 567 U.S. 460 (2012), this Court held that "mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment's prohibition on 'cruel and unusual punishments.' " *Id.* at 465. Four years later, in *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), the Court held that "*Miller* announced a substantive rule of constitutional law" that, under *Teague v. Lane*, 489 U.S. 288 (1989), must be given "retroactive effect" in cases where direct review was complete when Miller was decided. *Montgomery*, 136 S. Ct. at 736.
>
> The question presented is:
>
> Did the Fourth Circuit err in concluding—in direct conflict with Virginia's highest court and other courts—that a decision of this Court (*Montgomery*) addressing whether a new constitutional rule announced in an earlier decision (*Miller*) applies retroactively on collateral review may properly be interpreted as

The legal issue in this case goes to the core of the Eighth Amendment's ban on cruel and unusual punishment. It would be a miscarriage of justice to uphold Samra's death sentence in the face of scientific research and a national consensus condemning the execution of offenders under the age of 21.

modifying and substantively expanding the very rule whose retroactivity was in question?

REQUEST FOR RELIEF

For these reasons and other such reasons that may appear to the Court, Samra respectfully requests the following relief:

A. A full evidentiary hearing at which Samra may offer evidence supporting the allegations in this petition;

B. The grant of sufficient funds to Samra, who is indigent, so that he may present witnesses and other evidence in support of the allegations in this petition;

C. The vacatur of Samra's unconstitutional death sentence; and

D. Any other relief as may seem just, equitable and proper.

Respectfully submitted,
s/ Steven R. Sears
Steven R. Sears
One of Petitioner's Counsel

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Appendix I

Samra's motion for a stay of execution in the Alabama Supreme Court
(April 29, 2019)

IN THE SUPREME COURT OF ALABAMA

EX PARTE: MICHAEL BRANDON SAMRA	)	
	)	
Michael Brandon Samra,	)	
Petitioner,	)	
	)	
v.	)	No. 1982032
	)	
State of Alabama,	)	
Respondent.	)	

PETITIONER'S MOTION TO STAY EXECUTION DATE PENDING RESOLUTION OF UNITED STATES SUPREME COURT PROCEEDINGS

Petitioner Michael Brandon Samra, respectfully moves this Court, pursuant to Ala. R. App. Pro. 8(d) and Alabama Code § 12-2-2, to stay the execution, ordered by this Court to take place on May 16, 2019, pending the resolution of proceedings in the United States Supreme Court.

On March 20, 2019, the State moved in this Court to set an execution date. On March 26, 2019, Samra filed an objection to the State's motion, arguing that it would violate the Eighth Amendment to execute Samra because society's evolving standards of decency prohibit the imposition of the death penalty of offenders up to the age of 21. On the same day, Samra filed a second successor Rule 32 petition for post-conviction relief in the Shelby County circuit court, also raising the Eighth Amendment claim.

The State, on April 1, 2019, responded in this Court to the merits of Samra's Eighth Amendment claim. Samra replied to the State's response on April 2, 2019.

On April 10, 2019, the circuit court dismissed Samra's Rule 32 petition as improperly filed.

On April 11, 2019, this Court ordered Samra's execution to take place on May 16, 2019.

On this day, Samra is refiling the second successor Rule 32 petition for post-conviction relief, arguing that the Eighth Amendment categorically bans the execution of offenders who were under 21 at the time of their crime.

Also on this day, Samra is filing a petition for a writ of certiorari in the United States Supreme Court, raising the Eighth Amendment claim that was rejected by this Court by means of setting an execution date following the parties' briefing on the merits of the claim.

Samra is also filing a petition for an original writ of habeas corpus in the United States Supreme Court. The petition argues that if this Court's execution order did not serve as a ruling on the merits of the Eighth Amendment claim, the United States Supreme Court should exercise its authority to grant the writ.

Samra's petitions in the United States Supreme Court and state circuit court present an issue that is percolating in the courts. One Kentucky court has already held that the reasoning of *Roper v. Simmons*, 543 U.S. 551 (2005), banning the execution of offenders under 18, has now been shown to apply to those offenders under 21 years old. *Commonwealth v. Efrain Diaz*, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-000536). Samra's Eighth Amendment claim is also supported by legal scholars and the American Bar Association." Blume, et. al, Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles From 18 to 21, Texas L. Rev. at 14 (forthcoming 2019) (electronic copy available at: https://ssrn.com/abstract=3341438); American Bar Association Report 111, p. 8-9 (adopted Feb. 5, 2018) (available at https://www.americanbar.org/news/reporter_resources/midyear-meeting-2018/house-of-delegates-resolutions/111/).

Samra's constitutional claim would, of course, be moot if this Court permits the execution to proceed before his claim has been litigated. And where the Eighth Amendment

claim goes to the core of the Eighth Amendment's evolving standards of decency in determining who is eligible for the death penalty, it would be a grave injustice to preclude Samra from the opportunity to fully litigate this claim.

This Court should therefore grant a stay of execution until his Eighth Amendment claim is resolved in the United States Supreme Court.

Respectfully submitted,

s/ Steven R. Sears
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Appendix J

Samra's motion for a stay of execution in the Shelby County Circuit Court
(April 29, 2019)

IN THE CIRCUIT COURT OF SHELBY COUNTY

EX PARTE: MICHAEL BRANDON SAMRA	)	
	)	
Michael Brandon Samra,	)	
Petitioner,	)	
	)	
v.	)	No. CC-1997-000384.62
	)	
State of Alabama,	)	
Respondent.	)	

PETITIONER'S MOTION TO STAY STATE RULE 32 POST-CONVICTION PROCEEDINGS PENDING RESOLUTION OF UNITED STATES SUPREME COURT PROCEEDINGS

Petitioner Michael Brandon Samra, respectfully moves this Court, pursuant to Ala. Code. § 12-22-150 and Ala. R. Civ. Pro. 62, to stay the proceedings on Samra's state Rule 32 post-conviction proceedings pending the resolution of proceedings in the United States Supreme Court.

On March 20, 2019, the State moved in the Alabama Supreme Court to set an execution date. On March 26, 2019, Samra filed an objection to the State's motion, arguing that it would violate the Eighth Amendment to execute Samra because society's evolving standards of decency prohibit the imposition of the death penalty of offenders up to the age of 21. On the same day, Samra filed a second successor Rule 32 petition for post-conviction relief in the Shelby County circuit court, also raising the Eighth Amendment

claim.

The State, on April 1, 2019, responded in the Alabama Supreme Court to the merits of Samra's Eighth Amendment claim. Samra replied to the State's response on April 2, 2019.

On April 10, 2019, the circuit court dismissed Samra's Rule 32 petition as improperly filed.

On April 11, 2019, the Alabama Supreme Court ordered Samra's execution to take place on May 16, 2019.

On this day, Samra is refiling the second successor Rule 32 petition for post-conviction relief in the circuit court, arguing that the Eighth Amendment categorically bans the execution of offenders who were under 21 at the time of their crime.

Also on this day, Samra is filing a petition for a writ of certiorari in the United States Supreme Court, raising the Eighth Amendment claim that was rejected by this Court by means of setting an execution date following the parties' briefing on the merits of the claim.

Samra is also filing on this day a petition for an original writ of habeas corpus in the United States Supreme Court. The petition argues that if this Court's execution

order did not serve as a ruling on the merits of the Eighth Amendment claim, the United States Supreme Court should exercise its authority to grant the writ.

Samra's petitions in the United States Supreme Court and state circuit court present an issue that is percolating in the courts. One Kentucky court has already held that the reasoning of *Roper v. Simmons*, 543 U.S. 551 (2005), banning the execution of offenders under 18, has now been shown to apply to those offenders under 21 years old. *Commonwealth v. Efrain Diaz*, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-000536). Samra's Eighth Amendment claim is also supported by legal scholars and the American Bar Association." Blume, et. al, Death by Numbers: Why Evolving Standards Compel Extending Roper's Categorical Ban Against Executing Juveniles From 18 to 21, Texas L. Rev. at 14 (forthcoming 2019) (electronic copy available at: https://ssrn.com/abstract=3341438); American Bar Association Report 111, p. 8-9 (adopted Feb. 5, 2018) (available at https://www.americanbar.org/news/reporter resources/midyear-meeting-2018/house-of-delegates-resolutions/111/).

Samra's constitutional claim would, of course, be moot if this Court permits the execution to proceed before his claim has been litigated. And where the Eighth Amendment claim goes to the core of the Eighth Amendment's evolving standards of decency in determining who is eligible for the death penalty, it would be a grave injustice to preclude Samra from the opportunity to fully litigate this claim.

This Court should therefore stay the proceedings on Samra's state Rule 32 post-conviction proceedings until the resolution of proceedings in the United States Supreme Court.

Respectfully submitted,

s/ Steven R. Sears
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Appendix K

Opinion of the Alabama Court of Criminal Appeals affirming Samra's conviction and sentence, *Samra v. State*, 771 So. 2d 1108 (Ala. Crim. App. 1999)

771 So.2d 1108
Court of Criminal Appeals of Alabama.

Michael Brandon SAMRA
v.
STATE.

CR–97–1543.
|
June 18, 1999.
|
Rehearing Applications Denied Aug. 6, 1999.

Synopsis

Defendant was convicted in the Shelby Circuit Court, No. CC–97–384, J. Michael Joiner, J., of capital murder. Defendant appealed. The Court of Criminal Appeals, Baschab, J., held that: (1) defendant was not entitled to change of venue due to pretrial publicity; (2) photographs of victims and crime scene and videotape of crime scene were admissible; (3) defense counsel were not ineffective based on failure to present insanity defense; and (4) death penalty was appropriate.

Affirmed.

Certiorari granted, Ala., 771 So.2d 1122.

Attorneys and Law Firms

***1111** Richard W. Bell, Birmingham; Joe W. Morgan, Jr., Birmingham; Richard W. Vickers, Pelham; and John H. Wiley III, Birmingham, for appellant.

Bill Pryor, atty. gen., and J. Clayton Crenshaw, asst. atty. gen., for appellee.

Opinion

BASCHAB, Judge.

The appellant, Michael Brandon Samra, was convicted of capital murder for the killings of Randy Gerald Duke, Dedra Mims Hunt, Chelisa Nicole Hunt, and Chelsea Marie Hunt. The murders were made capital because the appellant committed them by one act or pursuant to one scheme or course of conduct. *See* § 13A–5–40(a)(10), Ala.Code 1975. After a sentencing hearing, the jury recommended, by a vote of 12–0, that the appellant be sentenced to death. The trial court accepted the jury's recommendation and sentenced the appellant to death by electrocution.

Because the appellant does not challenge the sufficiency of the evidence to support his conviction, a lengthy recitation of the facts of the case is not necessary. However, we have reviewed the evidence, and we find that it is sufficient to support the appellant's conviction. The evidence showed that the appellant, along with three codefendants, planned to kill Randy Gerald Duke. To conceal the murder of Randy Gerald Duke, they also killed Dedra Mims Hunt, Chelisa Nicole Hunt, and Chelsea Marie Hunt, who were present at the scene. The four codefendants obtained two handguns to carry out the plan. The appellant and one codefendant then went to the home of Randy Gerald Duke, and the codefendant shot Randy Gerald Duke. The appellant shot Dedra Mims Hunt in the face, but the shot did not immediately kill her. Dedra Mims Hunt and her two minor children, Chelisa Nicole Hunt and Chelsea Marie Hunt, ran upstairs, and the appellant and his codefendant followed them and killed them. After shooting Dedra Mims Hunt several times, ***1112** they ran out of ammunition for the handguns. Therefore, they used kitchen knives to cut the throats of Chelisa Nicole Hunt and Chelsea Marie Hunt. The evidence showed that the appellant actually cut the throat of one of the minor children. They tried to make it look like the murders had occurred during a robbery, and then they left to dispose of the weapons. Upon being questioned by law enforcement officials, the appellant helped locate the weapons and made a statement in which he admitted his involvement in the murders.

I.

The appellant first challenges the validity of §§ 15–12–21 and 15–12–22, Ala.Code 1975, as applied to attorneys who represent indigent defendants. [1] Specifically, he contends that the limitations of $1,000 for out-of-court work in a capital trial, based on an hourly rate of $20, and $1,000 for work performed on appeal to this court, based on an hourly rate of $40, "curtail this court's inherent power to insure the adequate representation of the criminally accused" and should be declared unconstitutional. (Appellant's brief at p. 9.)

These limitations on compensation have withstood repeated challenges that they violate the separation of powers doctrine, constitute a taking without just compensation, deprive indigent capital defendants of the effective assistance of counsel, and deny equal protection in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama state law. *See Ex parte Smith,* 698 So.2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997); *May v. State,* 672 So.2d 1310 (Ala.1995); *Ex parte Grayson,* 479 So.2d 76 (Ala.), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985); *Sparks v. Parker,* 368 So.2d 528 (Ala.), appeal dismissed, 444 U.S. 803, 100 S.Ct. 22, 62 L.Ed.2d 16 (1979); *Stewart v. State,* 730 So.2d 1203, 1212 (Ala.Cr.App.1997), aff'd, 730 So.2d 1246 (Ala.1999); *Boyd v. State,* 715 So.2d 825 (Ala.Cr.App.1997), aff'd, 715 So.2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S.Ct. 416, 142 L.Ed.2d 338 (1998); *Slaton v. State,* 680 So.2d 879 (Ala.Cr.App.1995), aff'd, 680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997); *Barbour v. State,* 673 So.2d 461 (Ala.Cr.App.1994), aff'd, 673 So.2d 473 (Ala.1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996); *Johnson v. State,* 620 So.2d 679 (Ala.Cr.App.1992), rev'd on other grounds, 620 So.2d 709 (Ala.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993); *Smith v. State,* 581 So.2d 497 (Ala.Cr.App.1990), rev'd on other grounds, 581 So.2d 531 (Ala.1991). Because this court is bound by the decisions of the Alabama Supreme Court, we are not in a position to reverse that court's approval of the current compensation system.

> "The decisions of the Supreme Court shall govern the holdings and decisions of the courts of appeals, and the decisions and proceedings of such courts of appeals shall be subject to the general superintendence and control of the Supreme Court as provided by Constitutional Amendment No. 328."

§ 12–3–16, Ala.Code 1975. *See also Barbour,* supra.

Furthermore, in addition to the $1,000 for out-of-court work, § 15–12–21(d) provides that counsel shall be paid $40 per hour for all hours spent in court and shall be reimbursed for any expenses reasonably incurred, as long as the trial court approves them in advance. With regard to ***1113** appellate work, § 15–12–22(d) provides that counsel may be paid up to $1,000 for services performed on an appeal to this court and up to $1,000 for services performed on an appeal to the Alabama Supreme Court, in addition to reimbursement for any expenses approved in advance by the appellate court. Such expenses may include overhead expenses reasonably incurred in representing an indigent defendant. *May v. State,* 672 So.2d 1307 (Ala.Cr.App.1993), cert. quashed as improvidently granted, 672 So.2d 1310 (Ala.1995). Finally, in certain circumstances, an indigent defendant may be entitled to expert assistance at the expense of the State. *Ex parte Moody,* 684 So.2d 114 (Ala.1996).

In this case, the trial court approved approximately $11,800 in expenses for expert assistance for the defense —$5,300 for Dr. Natalie Davis to conduct a statistical investigation regarding pretrial publicity; $5,000 for an investigator; and $1,500 for Dr. George Twente, who provided expert testimony about gangs. At the appellant's request, the trial court also approved the payment of expenses for an MRI examination to help evaluate the appellant's mental condition. (C.R.462.) For these reasons, the appellant's argument is not well taken.

II.

The appellant's second argument is that the trial court erroneously denied his motion for a change of venue due to allegedly prejudicial pretrial publicity.

> " 'A trial court is in a better position than an appellate court to determine what effect, if any, pretrial publicity might have in a particular case. The trial court has the best opportunity to evaluate the effects of any pretrial publicity on the community as a whole and on the individual members of the jury venire. The trial court's ruling on a motion for a change of venue will be reversed only when there is a showing that the trial court has abused its discretion. *Nelson v. State,* 440 So.2d 1130 (Ala.Cr.App.1983).'
>
> "*Joiner v. State,* 651 So.2d 1155, 1156 (Ala.Cr.App.1994)."

Clemons v. State, 720 So.2d 961, 977 (Ala.Cr.App.1996), aff'd, 720 So.2d 985 (Ala.1998), cert. denied, 525 U.S. 1124, 119 S.Ct. 907, 142 L.Ed.2d 906 (1999). "The mere fact that publicity and media attention were widespread is not sufficient to warrant a change of venue. Rather, *Ex parte Grayson* [, 479 So.2d 76 (Ala.1985),] held that the appellant must show that he suffered actual prejudice or that the community was saturated with prejudicial publicity." *Slagle v. State,* 606 So.2d 193, 195 (Ala.Cr.App.1992). " 'Moreover, the passage of time cannot be ignored as a factor in bringing objectivity to trial.' " *Whisenhant v. State,* 555 So.2d 219, 224 (Ala.Cr.App.1988), aff'd, 555 So.2d 235 (Ala.1989), cert. denied, 496 U.S. 943, 110 S.Ct. 3230, 110 L.Ed.2d 676 (1990) (citations omitted) (quoting *Dannelly v. State,* 47 Ala.App. 363, 254 So.2d 434, cert. denied, 287 Ala. 729, 254 So.2d 443 (1971)).

> "In connection with pretrial publicity, there are two situations which mandate a change of venue: 1) when the accused has demonstrated 'actual prejudice' against him on the part of the jurors; 2) when there is 'presumed prejudice' resulting from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected. *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966); *Rideau* [*v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963)]; *Estes v. Texas,* 381 U.S. 532, 85 S.Ct. 1628, 14 L.Ed.2d 543 (1965); *Ex parte Grayson,* 479 So.2d 76, 80 (Ala.), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985); *Coleman v. Zant,* 708 F.2d 541 (11th. Cir.1983)."

Hunt v. State, 642 So.2d 999, 1042–43 (Ala.Cr.App.1993), aff'd, 642 So.2d 1060 (Ala.1994).

The appellant first contends that there was prejudicial pretrial publicity that resulted in "presumptive prejudice," thus ***1114** depriving him of his right to be tried by an impartial jury. For prejudice to be presumed under this standard, the defendant must show: 1) that the pretrial publicity was prejudicial and inflammatory and 2) that the prejudicial pretrial publicity saturated the community where the trial was held. *Coleman v. Kemp,* 778 F.2d 1487 (11th Cir.1985), cert. denied, 476 U.S. 1164, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986). Under this standard, a defendant carries an extremely heavy burden of proof.

> "Hunt relies on the 'presumed prejudice' standard announced in *Rideau,* and applied by the United States Supreme Court in *Estes* and *Sheppard* [*v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966)]. This standard was defined by the Eleventh Federal Circuit Court of Appeals in *Coleman v. Kemp,* 778 F.2d 1487 (11th Cir.1985), cert. denied, 476 U.S. 1164, 106 S.Ct. 2289, 90 L.Ed.2d 730 (1986). The court stated: 'Prejudice is presumed from pretrial publicity when *pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community* where the trials were held.' 778 F.2d at 1490 (emphasis added [in *Hunt*]). See also *Holladay v. State,* 549 So.2d 122, 125 (Ala.Cr.App.1988), affirmed, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989).
>
> "In determining whether the 'presumed prejudice' standard exists the trial court should look at 'the totality of the surrounding facts.' *Patton v. Yount,* 467 U.S. 1025, 104 S.Ct. 2885, 81 L.Ed.2d 847 (1984); *Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975); *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961). The presumptive prejudice standard is 'rarely' applicable, and is reserved for only 'extreme situations'. *Coleman v. Kemp,* 778 F.2d at 1537. 'In fact, our research has uncovered only a very few ... cases in which relief was granted on the basis of presumed prejudice.' *Coleman v. Kemp,* 778 F.2d at 1490.
>
> "Hunt had the burden of showing that 'prejudicial pretrial publicity' saturated the community. *Sheppard,* supra. '[T]he burden placed upon the petitioner to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one.' *Coleman v. Kemp,* 778 F.2d at 1537. 'Prejudicial' publicity usually must consist of much more than stating the charge, and of reportage of the pretrial and trial processes. 'Publicity' and 'prejudice' are not the

same thing. Excess publicity does not automatically or necessarily mean that the publicity was prejudicial.

"....

"... In order to meet the burden of showing the necessity for a change of venue due to pretrial publicity on the grounds of community saturation, 'the appellant must show more than the fact "that a case generates even widespread publicity." ' *Oryang v. State,* 642 So.2d 979, 983 (Ala.Cr.App.1993), quoting, *Thompson v. State,* 581 So.2d 1216, 1233 (Ala.Cr.App.1991), cert. denied, 502 U.S. 1030, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992).

" ' "Newspaper articles alone would not necessitate a change in venue unless it was shown that the articles so affected the general citizenry through the insertion of such sensational, accusational or denunciatory statements, that a fair and impartial trial was impossible. *Patton v. State,* 246 Ala. 639, 21 So.2d 844 [1945]." '

"*Thompson,* 581 So.2d at 1233, quoting *McLaren v. State,* 353 So.2d 24, 31 (Ala.Cr.App.), cert. denied, 353 So.2d 35 (Ala.1977).

"A review of the media coverage contained in the record on appeal demonstrates that the majority of print media coverage was reasonably factual and more or less objective. We find that the reportage by the news media did not result in the community being so 'pervasively ***1115** saturated' with prejudicial publicity so as to make the court proceedings nothing more than a 'hollow formality.' *Rideau,* supra."

Hunt, 642 So.2d at 1043–44. "To justify a presumption of prejudice under this standard, the publicity must be both extensive *and* sensational in nature. If the media coverage is factual as opposed to inflammatory or sensational, this undermines any claim for a presumption of prejudice." *United States v. Angiulo,* 897 F.2d 1169, 1181 (1st Cir.), cert. denied, 498 U.S. 845, 111 S.Ct. 130, 112 L.Ed.2d 98 (1990).

In support of his motion for a change of venue, the appellant introduced testimony concerning a telephone poll of 305 Shelby County citizens about the case. Of the people responding to the poll, 83.9 percent indicated that they had heard of the case. Of the 83.9 percent who had heard of the case, 20 percent indicated that they thought the appellant was guilty, 6.6 percent thought the appellant was probably guilty, 2.3 percent thought the appellant was probably not guilty, and 5.9 percent thought the appellant was not guilty. However, a majority, 65.2 percent, were uncertain as to the appellant's guilt at that time. Also, the people conducting the poll did not ask the respondents whether they could set aside what they had heard about the case and decide it based solely on the evidence presented in court. The appellant also introduced numerous newspaper articles from local newspapers and portions of newscasts by local television stations covering the case from its inception through the trial, including information as to the area covered by the media.

Although the appellant presented evidence that indicated that many of the citizens of Shelby County had heard about the case through the media, he has not shown that the information presented by the media was prejudicial. We have examined the media materials presented to the trial court, and we find that most of the reports were factual and relatively objective rather than accusatory, inflammatory, or sensational. Therefore, we conclude that the materials did not contain prejudicial information. Further, the appellant did not prove that the media attention inflamed or saturated the community so that there was an emotional tide against him. Thus, he has not shown that the pretrial publicity in this case was so inherently or presumptively prejudicial as to constitute one of those "extreme situations" that warrant a presumption of prejudice from pretrial publicity.

The appellant also contends that the jury was actually prejudiced against him.

"The 'actual prejudice' standard is defined as follows:

" 'To find the existence of actual prejudice, two basic prerequisites must be satisfied. First, it must be shown that one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty. *Irvin v. Dowd,* 366 U.S. [717,] 727, 81 S.Ct. [1639,] 1645, [6 L.Ed.2d 751, 758–59 (1961)]. Second, these jurors, it must be determined, could not have laid aside these preformed opinions and "render [ed] a verdict based on the evidence presented in court." *Irvin v. Dowd,* 366 U.S. at 723, 81 S.Ct. at 1643 [6 L.Ed.2d at 756].'

"*Coleman v. Zant,* 708 F.2d at 544."

Hunt, 642 So.2d at 1043.

> "Furthermore, in order for a defendant to show prejudice, the ' "proper manner for ascertaining whether adverse publicity may have biased the prospective jurors is through the voir dire examination." *Anderson v. State,* 362 So.2d 1296, 1299 (Ala.Crim.App.1978).' *Ex parte Grayson,* 479 So.2d 76, 80 (Ala.1985), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985)."

Oryang v. State, 642 So.2d 979, 983 (Ala.Cr.App.1993).

***1116** The appellant has not shown any actual prejudice resulting from the pretrial publicity. Through the use of a jury questionnaire and individual voir dire, the trial court and the attorneys extensively questioned the veniremembers about their knowledge about the case and any effect pretrial publicity may have had on their ability to be fair and impartial. Many of the veniremembers were familiar with the facts of, and the circumstances surrounding, this offense. However, only three indicated that they were biased against the appellant based on information they obtained from the media, and the trial court excused those veniremembers for cause. The remainder of the jurors who had become familiar with the case through the media indicated, upon further questioning, that they could set aside anything they had read or heard about the case and render a fair and impartial verdict based solely upon the evidence presented at trial. In denying the appellant's motion, the trial court specifically stated:

> "With that said, the court will deny the motion for change of venue. Specifically, the court finds the best standard by which to measure that question or that issue is the standard of the statement of the jurors. We have had 70 some-odd jurors who have told us that they can decide this without regard to what they may have seen or heard.
>
> "There is no evidence from which the court can infer that any of those jurors are being anything other than completely truthful. And, in fact, the court finds that there is a basis to infer that they are being truthful.
>
> "With that said, the motion for change of venue is denied."

(R. 1391–92.) Thus, the appellant has not shown that any of the jurors were actually prejudiced against him.

For these reasons, the appellant did not show that the jurors were either presumptively or actually prejudiced against him. Therefore, the trial court did not abuse its discretion in denying the appellant's motion for a change of venue.

III.

The appellant's third argument is that, because the trial judge has the ultimate sentencing authority in capital cases in Alabama, the trial court erred in propounding *Witherspoon* questions to the veniremembers during voir dire examination. In *Johnson v. State,* 502 So.2d 877 (Ala.Cr.App.1987), this court addressed a similar claim as follows:

> "The appellant also argues that because the trial court is the actual sentencing authority under the capital murder statute, the State has no interest in excluding venire members because of their inability to sentence a defendant to death. Under the *Code of Alabama* (1975), § 13A–5–46, in cases of capital offenses, the jury shall return an advisory verdict recommending a sentence. Although this advisory verdict is not binding upon the court, it is nevertheless to be given consideration under § 13A–5–47(e) of the *Code of Alabama* (1975). Furthermore, this court has held that '*Witherspoon* jurors, those irrevocably committed to vote against the death penalty, are appropriately dismissed to insure a fair and impartial jury.' *Callahan v. State,* 471 So.2d 447, 453 (Ala.Cr.App.1983), *reversed on other grounds,* 471 So.2d 463 (Ala.1985). The jury plays a key role in the sentencing phase of a capital case, as is clear in the Alabama Supreme Court's discussion of the jury's role in such sentencing in *Beck v. State,* 396 So.2d 645, 662–63 (Ala.1980). The trial court's exclusion from the jury panel of jurors opposed to the death penalty was proper."

502 So.2d at 879–80. Alabama's statutory provisions for advisory verdicts and judicial overrides of those verdicts have been approved by the United States Supreme Court. *See Harris v. Alabama,* 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995). Furthermore, in *Witherspoon v.* ***1117** *Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), the Supreme Court recognized that veniremembers who have strong opinions about the death penalty may not be able to make an impartial decision as to the defendant's *guilt* because of those views. Because

a juror's views about the death penalty, whether for or against it, may affect that juror's decision during the guilt phase of a capital trial, the appellant's argument that *Witherspoon* questions are irrelevant is without merit.

We further note that, during voir dire examination, the appellant submitted questions to the veniremembers about their feelings about the death penalty and challenged certain veniremembers based on their views about the death penalty. Even in capital cases, a party cannot assume inconsistent positions at trial and on appeal. *Williams v. State,* 710 So.2d 1276 (Ala.Cr.App.1996), aff'd, 710 So.2d 1350 (Ala.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998); *Taylor v. State,* 666 So.2d 36 (Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996).

For the above-stated reasons, we reject the appellant's argument that the trial court erred in propounding *Witherspoon* questions to the veniremembers.

IV.

The appellant's fourth argument is that the commutation of Judith Ann Neelley's [2] death sentence denied him equal protection of the law. However, the record does not indicate that the appellant has petitioned the governor for a commutation of his sentence and had his petition rejected. Therefore, this claim is not ripe for review. *United States v. Smith,* 96 F.3d 1350 (11th Cir.1996); *McKleroy v. Wilson,* 581 So.2d 796 (Ala.1990); *Williams v. State,* 548 So.2d 584 (Ala.Cr.App.1988); *Adams v. Farlow,* 516 So.2d 528 (Ala.1987), cert. denied, 485 U.S. 1010, 108 S.Ct. 1477, 99 L.Ed.2d 705 (1988).

V.

The appellant's fifth argument is that the trial court erroneously admitted into evidence photographs of the victims and the crime scene and a videotape of the crime scene that allegedly served no purpose other than to inflame the passions of the jury. He specifically contends that it was not necessary to introduce these items into evidence because he had confessed to the crime and had described in that confession the injuries to the victims.

> " 'Photographic evidence is admissible in a criminal prosecution if it tends to prove or disprove some disputed or material issue, to illustrate some relevant fact or evidence, or to corroborate or dispute other evidence in the case. Photographs that tend to shed light on, to strengthen, or to illustrate other testimony presented may be admitted into evidence.... Finally [,] photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors.' "

Gaddy v. State, 698 So.2d 1100, 1148 (Ala.Cr.App.1995), aff'd, 698 So.2d 1150 (Ala.), cert. denied, 522 U.S. 1032, 118 S.Ct. 634, 139 L.Ed.2d 613 (1997) (quoting *Ex parte Siebert,* 555 So.2d 780, 783–84 (Ala.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990)).

> " '[P]hotographs depicting the character and location of wounds on a deceased's body are admissible even though they are cumulative and are based on undisputed matters. *Magwood* [*v. State*], 494 So.2d [124, 141 (Ala.Cr.App.1985), affirmed, 494 So.2d 154 (Ala.), cert. denied, 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986)]. The fact that a photograph is gruesome ***1118** is not grounds to exclude it as long as the photograph sheds light on issues being tried. *Id.* Also, a photograph may be gruesome and ghastly, but this is not a reason to exclude it as long as the photograph is relevant to the proceedings, even if it tends to inflame the jury. *Id.*'

"*Ex parte Bankhead,* 585 So.2d 112 (Ala.1991). Accord, *Ex parte Siebert,* 555 So.2d 780, 783–84 (Ala.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990); *McElroy's* at § 207.01(2)."

Parker v. State, 587 So.2d 1072, 1092–93 (Ala.Cr.App.1991), aff'd, 610 So.2d 1181 (Ala.1992), cert. denied, 509 U.S. 929, 113 S.Ct. 3053, 125 L.Ed.2d 737 (1993). Photographs that depict the crime scene are relevant and therefore are admissible. *Aultman v. State,*

621 So.2d 353 (Ala.Cr.App.1992), cert. denied, 510 U.S. 954, 114 S.Ct. 407, 126 L.Ed.2d 354 (1993); *Ex parte Siebert,* 555 So.2d 780, 783–84 (Ala.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990); *Hill v. State,* 516 So.2d 876 (Ala.Cr.App.1987). Also, autopsy photographs, although gruesome, are admissible to show the extent of a victim's injuries. *See Dabbs v. State,* 518 So.2d 825 (Ala.Cr.App.1987).

> "With regard to photographs of the victim taken after he had been shot, even though they are cumulative and pertain to undisputed matters, generally photographs that depict the external wounds on the body of the victim are admissible. *Bankhead,* 585 So.2d at 109. As we held in *Jenkins v. State,* 627 So.2d 1034 [,1045] (Ala.Crim.App.1992), aff'd, 627 So.2d 1054 (Ala.1993), 'the state [has] the burden of proving that the victim [is] dead, and [photographs are] direct evidence on that point. Perpetrators of crimes that result in gruesome scenes have reason to expect that photographs of those gruesome scenes will be taken and admitted into evidence.' "

Sockwell v. State, 675 So.2d 4, 21 (Ala.Cr.App.1993), aff'd, 675 So.2d 38 (Ala.1995), cert. denied, 519 U.S. 838, 117 S.Ct. 115, 136 L.Ed.2d 67 (1996). "There is irony in a convicted murderer's contending on appeal that pictures of the corpse of his victim might have inflamed the jury. That risk 'comes with the territory.' " *Grice v. State,* 527 So.2d 784, 787 (Ala.Cr.App.1988). Finally,

> " ' "photographic evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors." *Ex parte Siebert,* 555 So.2d 780, 784 (Ala.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990). See generally C. Gamble, *McElroy's Alabama Evidence,* § 207.01(2) (4th ed.1991). "The photographs of the victim were properly admitted into evidence. Photographic exhibits are admissible even though they may be cumulative, ... demonstrative of undisputed facts, ... or gruesome...." *Williams v. State,* 506 So.2d 368, 371 (Ala.Cr.App.1986), cert. denied, 506 So.2d 372 (Ala.1987).'
>
> "*DeBruce v. State,* 651 So.2d 599, 607 (Ala.Cr.App.1993). See also *Ex parte Bankhead,* 585 So.2d 112 (Ala.1991)."

Hutcherson v. State, 677 So.2d 1174, 1200 (Ala.Cr.App.1994), rev'd on other grounds, 677 So.2d 1205 (Ala.1996). *See also Giles v. State,* 632 So.2d 568 (Ala.Cr.App.1992), aff'd, 632 So.2d 577 (Ala.1993), cert. denied, 512 U.S. 1213, 114 S.Ct. 2694, 129 L.Ed.2d 825 (1994); *Haney v. State,* 603 So.2d 368 (Ala.Cr.App.1991), aff'd, 603 So.2d 412 (Ala.1992), cert. denied, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993).

In this case, the trial court thoroughly reviewed each of the photographs and the videotape before admitting them into evidence. It carefully examined each photograph the State intended to introduce and refused to admit several that it determined were duplicative or unduly prejudicial. We have reviewed the photographs and the videotape, and we find that they were ***1119** relevant to depict the crime scene and the injuries suffered by each of the victims. Therefore, the trial court did not err in admitting them into evidence.

VI.

The appellant's sixth argument is that his trial attorneys rendered ineffective assistance because they allegedly did not adequately prepare and present a defense that he was not guilty by reason of mental disease or defect, even though they allowed him to enter such a plea. In an amended motion for a new trial, which was not verified, appellate counsel [3] asserted that his trial attorneys had rendered ineffective assistance because: 1) they did not petition the court for approval to hire a psychiatric expert to examine the defendant and 2) even though the appellant was examined by a psychologist, counsel did not attempt to determine whether the appellant suffered from any neurological or organic mental disease or defect that would have rendered him unable to appreciate the nature and quality or wrongfulness of his acts at the time of the offense. At the hearing on the motion, counsel for this issue reasserted the allegations made in the motion, but he did not present any evidence to support them. At the end of the hearing, the trial court stated:

> "The court is personally familiar with the actions taken by defense counsel not only generally but specifically with regard to the issue raised in this motion. I am familiar that the defendant's family I think paid the initial expert witness in this case, retained them privately, which of course they had the right to do. From having heard discussions by [defense counsel]

and the State's counsel, I believe on the record, they all acknowledged that he did an outstanding job of evaluation and he did a good job.

> "There is no evidence to support from the record defendant's allegation that counsel was ineffective with regard to these issues or any issue. And again I'm reflecting back upon my personal recollection and knowledge of that and the transactions that occurred on the record and all of those did occur on the record. I mean there is not anything I'm relying on that's not part of the record because there was really none of those type discussions or issues or anything like that raised off the record."

(R. 2246–47.) Later, in its written order denying the motion, the trial court found:

> "Defendant's Amended Motion for New Trial alleging ineffective assistance of counsel at trial level is due to be denied. The court specifically finds that there is no evidence that Defendant's counsel was ineffective. In fact, the court is personally familiar with the actions of Defendant's counsel with regard to the specific issues raised in Defendant's amended motion. Defendant's amended motion for new trial is denied."

(C.R.533.)

To prevail on an ineffective-assistance-of-counsel claim, the appellant must show that 1) his counsel's performance was deficient and 2) he was prejudiced by the deficient performance. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). Further, he must present more than bare allegations to support his claim.

> "There is no error in a trial court's denial of a motion for new trial where no evidence is offered in support of that motion. *Tucker v. State,* 454 So.2d 541, 547–48 (Ala.Cr.App.1983), reversed on other grounds, 454 So.2d 552 (Ala.1984); *McKinnis v. State,* 392 So.2d 1266, 1269 (Ala.Cr.App.1980), cert. denied, 392 So.2d 1270 (Ala.1981). The motion itself was unverified and was not accompanied ***1120** by any supporting affidavits. Consequently, the assertions of counsel contained therein 'are bare allegations and cannot be considered as evidence or proof of the facts alleged.' *Thompson v. State,* 444 So.2d 899, 902 (Ala.Cr.App.1984) (quoting *Daniels v. State,* 416 So.2d 760, 762 (Ala.Cr.App.1982)); *Smith v. State,* 364 So.2d 1, 14 (Ala.Cr.App.1978). Similarly, statements made by counsel during a hearing on a motion for new trial cannot be considered evidence in support of the motion. *Vance v. City of Hoover,* 565 So.2d 1251, 1254 (Ala.Cr.App.1990)."

Arnold v. State, 601 So.2d 145, 154–55 (Ala.Cr.App.1992). *See also Blount v. State,* 557 So.2d 1333 (Ala.Cr.App.1989). In this case, the appellant did not present any evidence to support his motion for a new trial on the ground that his trial attorneys had rendered ineffective assistance. New counsel's bare allegations in the unverified amended motion for a new trial and at the hearing on the motion cannot be considered evidence in support of the motion. Thus, the appellant did not satisfy his burden of proof under *Strickland.*

Moreover,

> "[a] distinction must be made between a *failure* to investigate the mental history of an accused and the rejection of insanity as a defense after proper investigation. '[A]n attorney with considerable experience in criminal matters and, therefore, in dealing with a wide range of people ... may be presumed to have some ability to evaluate the mental capacity of his client.' *United States ex rel. Rivera v. Franzen,* 594 F.Supp. 198, 202 (N.D.Ill.1984). 'As a practical matter, when deciding whether to present an insanity defense, the criminal defendant's lawyer is truly the final psychiatrist. It is not the role of a court to doubt his judgment.... Trial counsel may not reject the insanity defense ' "without pursuing the basic inquiries necessary to evaluate its merits intelligently." ' *Rivera,* 594 F.Supp. at 203. See also *Martin v. Maggio,* 711 F.2d 1273, 1280 (5th Cir.1983), rehearing denied, 739 F.2d 184 (5th Cir.), cert. denied, 469 U.S. 1028, 105 S.Ct. 447, 83 L.Ed.2d 373 (1984); *Pickens v. Lockhart,* 714 F.2d 1455, 1467 (8th Cir.1983) ('[I]t is only *after* a full investigation of *all* the mitigating circumstances that counsel can make an informed, tactical decision about which information would be the most helpful to the client's case')."

Dill v. State, 484 So.2d 491, 498 (Ala.Cr.App.1985) (emphasis original). *See also Roy v. State,* 680 So.2d 936 (Ala.Cr.App.1996). In this case, the record shows that trial counsel adequately investigated the appellant's competence and sanity. As the trial court specifically stated, defense counsel did have the appellant evaluated by at least one mental health expert other than the State's expert. Counsel also requested and received permission to have conducted, at the State's expense, an MRI examination of the appellant to evaluate his mental condition. At trial, defense counsel presented the testimony of the psychologist who conducted the court-ordered evaluation of the appellant's competence at the time of the offense and to stand trial. She testified that, when she evaluated him, the appellant exhibited signs of anxiety and depression, insecurity about interpersonal interactions, confusion when under severe stress, and conflicts about wanting to be dependent on others and wanting to distance himself from others. She also testified that his IQ had been measured to be 73, which is on the borderline between low average and mentally retarded. Defense counsel also presented the testimony of an expert on gang activity and one of the appellant's friends to establish that the appellant had been a member of a gang and could have been acting under its influence at the time of the offense. Rather than concentrating on the insanity defense, counsel presented evidence that the appellant exhibited some signs of mental deficiency and had a low IQ and that his actions therefore might ***1121** have been influenced by the gang with which he was associated. We conclude that trial counsel thoroughly investigated the insanity defense and, after determining that it was not a viable defense, chose to pursue another defense. Accordingly, we reject the appellant's ineffective-assistance-of-counsel claim.

VII.

Pursuant to § 13A–5–53, Ala.Code 1975, we must address the propriety of the appellant's conviction and sentence of death. The appellant was indicted and convicted of capital murder because he killed two or more people by one act or pursuant to one scheme or course of conduct. *See* § 13A–5–40(a)(10), Ala.Code 1975.

The record does not reflect that the sentence of death was imposed as a result of the influence of passion, prejudice, or any other arbitrary factor. § 13A–5–53(b)(1), Ala.Code 1975.

The trial court found that the aggravating circumstances outweighed the mitigating circumstances. The trial court found that the State proved only one aggravating circumstance—the capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. *See* § 13A–5–49(8), Ala.Code 1975. The trial court found that two statutory mitigating circumstances existed: 1) the appellant had no significant history of prior criminal activity, § 13A–5–51(1), Ala.Code 1975, and 2) the age of the defendant at the time of the offense, § 13A–5–51(7), Ala.Code 1975. The trial court also found the following nonstatutory mitigating circumstances: 1) the age and maturity of the defendant; 2) the learning difficulties and disabilities of the defendant; 3) the family history and background and caring nature of the defendant; 4) the effect of gang or group involvement upon the defendant; 5) the immediate and continuing truthfulness and cooperation of the defendant with law enforcement officers; 6) the remorse the defendant expressed in statements to law enforcement officers; and 7) the fact that there are no aggravating circumstances other than that the offense was especially heinous, atrocious, or cruel when compared to other capital offenses. The sentencing order shows that the trial court weighed the aggravating and mitigating circumstances and correctly sentenced the appellant to death. Its decision is supported by the record, and we agree with its findings.

Section 13A–5–53(b)(2) requires us to weigh the aggravating and mitigating circumstances independently to determine the propriety of the appellant's death sentence. After independently weighing the aggravating and mitigating circumstances, we find that the death sentence is appropriate.

As required by § 13A–5–53(b)(3), we must determine whether the appellant's sentence was disproportionate or excessive when compared to the penalties imposed in similar cases. The appellant killed four people pursuant to one scheme or course of conduct. Similar crimes are being punished by death throughout this state. *Taylor v. State,* 666 So.2d 36 (Ala.Cr.App.), opinion extended after remand, 666 So.2d 71 (Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996); *Holladay v. State,* 549 So.2d 122 (Ala.Cr.App.1988), aff'd, 549 So.2d 135 (Ala.), cert.

denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989); *Siebert v. State,* 555 So.2d 772 (Ala.Cr.App.), aff'd, 555 So.2d 780 (Ala.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990); *Peoples v. State,* 510 So.2d 554 (Ala.Cr.App.1986), aff'd, 510 So.2d 574 (Ala.), cert. denied, 484 U.S. 933, 108 S.Ct. 307, 98 L.Ed.2d 266 (1987). Thus, we find that the sentence of death was neither disproportionate nor excessive.

Finally, we have searched the entire record for any error that may have adversely affected the appellant's substantial rights, and we have not found any. Rule 45A, Ala. R.App. P.

***1122** Accordingly, we affirm the appellant's conviction and sentence of death by electrocution.

AFFIRMED.

LONG, P.J., and McMILLAN, COBB, and FRY, JJ., concur.

All Citations

771 So.2d 1108

Footnotes

1 The appellant also argues that "this court's limitation of overhead hours to 25 hours should be declared unconstitutional." (Appellant's brief at p. 9.) This claim is not ripe for review because appellate counsel has not yet filed a fee declaration form in this case and, thus, no such limitation has been imposed in this case. Moreover, this claim is without merit because this court has abolished any limitation on overhead hours in cases in which the death penalty has been imposed.

2 In 1983, Judith Ann Neelley was convicted of capital murder and was sentenced to death. *See Neelley v. State,* 494 So.2d 669 (Ala.Cr.App.1985), aff'd, 494 So.2d 697 (Ala.1986). In January 1999, Governor Fob James commuted her sentence to life imprisonment.

3 The attorneys who represented the appellant at trial also represent him on appeal on all issues but his ineffective-assistance claim. However, at their request, the trial court appointed separate counsel to raise the appellant's ineffective-assistance-of-counsel claims in the trial court and to argue those claims on appeal.

Appendix L

Alabama Supreme Court opinion affirming Samra's conviction and sentence, *Ex Parte Samra*, 771 So. 2d 1122 (Ala. 2000)

771 So.2d 1122 (Mem)
Supreme Court of Alabama.

Ex parte Michael Brandon SAMRA.
(In re Michael Brandon Samra
v.
State of Alabama).

1982032 and 1982042.
|
March 3, 2000.
|
Rehearing Denied May 5, 2000.

Petitions for Writ of Certiorari to the Court of Criminal Appeals Shelby Circuit Court, CC–97–384, J. Michael Joiner, Judge; Court of Criminal Appeals, CR–97–1543.

Attorneys and Law Firms

Richard W. Bell, Birmingham; and Richard W. Vickers, Pelham; and John H. Wiley III, Birmingham, for petitioner.

Bill Pryor, atty gen., and J. Clayton Crenshaw, asst. atty. gen., for respondent.

Opinion

HOUSTON, Justice.

The defendant, Michael Brandon Samra, was convicted of capital murder for the killings of Randy Gerald Duke, Dedra Mims Hunt, Chelisa Nicole Hunt, and Chelsea Marie Hunt. The murders were made capital because they were committed by one act or pursuant to one scheme or course of conduct. See Ala.Code 1975, § 13A–5–40(a)(10). The jury unanimously recommended that the defendant be sentenced to death. The trial court accepted the jury's recommendation and sentenced the defendant to death. The Court of Criminal Appeals unanimously affirmed both the conviction and the sentence. See *Samra v. State,* 771 So.2d 1108 (Ala.Crim.App.1999). The defendant filed two petitions for the writ of certiorari, which we granted pursuant to Rule 39(c), Ala. R.App. P.

We have carefully read and considered the briefs and the arguments of counsel, and we have searched the record for any plain error. Rule 39(k), Ala. R.App. P. We have found no error in either the guilt phase of the trial or the sentencing phase of the trial that adversely affected the defendant's rights. Furthermore, we conclude that the trial court's findings concerning the aggravating and mitigating circumstances were supported by the evidence and that the death sentence was proper under the circumstances. Ala.Code 1975, § 13A–5–53(a) and (b). The judgment of the Court of Criminal Appeals is affirmed. [1]

AFFIRMED.

HOOPER, C.J., and MADDOX, COOK, SEE, LYONS, BROWN, JOHNSTONE, and ENGLAND, JJ., concur.

All Citations

771 So.2d 1122 (Mem)

Footnotes

1 We note that we do not necessarily approve of the following statement in the opinion of the Court of Criminal Appeals:

> " 'There is irony in a convicted murderer's contending on appeal that pictures of the corpse of his victim might have inflamed the jury. That risk "comes with the territory." ' "

771 So.2d at 1118. The purpose of appellate review of a criminal case is to determine whether the defendant received a fair trial. This statement appearing in the opinion of the Court of Criminal Appeals seems to assume the very proposition challenged by a defendant on appeal—the validity of his or her conviction.

Appendix M

Order of the Shelby County Circuit Court dismissing Samra's petition for a successor state Rule 32 post-conviction petition

(Sept. 19, 2011)

[redacted]

IN THE CIRCUIT COURT OF SHELBY COUNTY, ALABAMA

MICHAEL BRANDON SAMRA,	*	
Petitioner,	*	
VS	*	CASE NO: CC-1997-384.61
STATE OF ALABAMA,	*	
Defendant.	*	

ORDER

Michael Brandon Samra (Samra) filed a petition for Relief from Conviction or Sentence on January 15, 2008. The Circuit Court per Honorable Michael Joiner subsequently denied the Petition and on August 29, 2008. The Alabama Court of Criminal Appeals set aside that Order and remanded the matter back to the Circuit Court and further directed Judge Joiner to hold the matter in abeyance until the Court of Criminal Appeals issued a Certificate of Judgment on Samra's previous Petition which was then still before the Court of Criminal Appeals. The Court of Criminal Appeals released a memorandum opinion affirming the trial court's denial of Samra's first Petition on August 24, 2007 and published a Certificate of Judgment on September 19, 2008. Judge Joiner was subsequently appointed as a judge on the Court of Criminal Appeals and this matter was thereafter assigned to the present judge.

The present Petition is a successive petition within the meaning of Rule 32.2 of the Alabama Rules of Criminal Procedure. Samra makes two interrelated claims. He first claims that his death sentence is in violation of the 8th Amendment to the Constitution of the United States prohibiting the imposition of cruel and unusual punishment. The second claim is that a ruling by Judge Joiner in another circuit court case would constitute a newly discovered material fact which would require the Court to vacate his death sentence to a avoid a manifest injustice.

Judge Joiner had issued a ruling in an unrelated case setting aside a sentence of death of a defendant where a more culpable co-defendant's death sentence had been commuted to "Life without Parole." The co-defendant had been less than seventeen years of age when the offence was committed and his sentence was reduced as a result of the decision of the United States Supreme Court in *Roper v. Simmons*, 543 U.S. 551 (2005). Judge Joiner found the death sentence of the codefendant disproportional where a more culpable defendant was sentenced to "Life without Parole." The Alabama Court of Criminal Appeals affirmed the trial court's finding of ineffective assistance of counsel during the sentencing phase but declined to recognize a claim that a death sentence

should be set aside if not proportional with a sentence given to a codefendant. *Gamble v. State*, 63 So. 3rd 707. (Ala. Crim. App. 2010).

In the present case Samra is sentenced to death while a younger co-defendant sentence was reduced by the application of the decision in *Roper*.

The State has responded by asserting the applicable procedural bars as well as arguing the facts themselves justify the sentence of death. Samra had an active role in a multiple slayings. He in one instance restrained a small child while his co-defendant cut her throat.

The Court finds that Samra's successive petition is procedurally barred from consideration.

1. A ruling by the trial court in an unrelated matter does not constitute "a Newly discovered material fact" within the meaning of Rule 32.1(e).

2. Even if such a ruling could be construed as a fact it could not meet the requirements of Rule 32.1(e) (1) through (5).

3. Even assuming somehow somewhere a ruling might be found which could be construed as a fact that met the requirements of the Rule 32.1(e) it would have to comply with Rule 32.2 (c) and in this case the further limitation imposed by 32.2(b) for successive petitions. The present petition does not.

The present case overcomes none of the above procedural bars. In addition, as previously noted the Alabama Court of Criminal Appeals rejected the proportionality in sentence argument upon which Samra now seeks to rely. *Gamble v. State*, 63 So. 3rd 707. (Ala. Crim. App. 2010).

For the forgoing reasons the Petition is summarily DENIED.

DONE and **ORDERED** this the 19th day of September, 2011.

s/Dan Reeves
CIRCUIT JUDGE

No. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL BRANDON SAMRA,
Petitioner
- vs -
STATE OF ALABAMA,
Respondent

On Petition for Writ of Certiorari to the
Alabama Supreme Court

APPENDIX
Volume 4

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Appendix N

Order of the Alabama Court of Criminal Appeals affirming dismissal of Samra's petition for a successor state Rule 32 post-conviction petition, *Samra v. State*, 152 So. 3d 456 (Ala. Crim. App. 2012)

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-11-0084 Shelby Circuit Court CC-97-384.61

Michael Brandon Samra v. State of Alabama

WELCH, Judge.

Michael Brandon Samra appeals the circuit court's summary dismissal of his Rule 32, Ala. R. Crim. P., petition for postconviction relief. The petition challenged his March 16, 1998, conviction for capital murder, a violation of § 13A-5-40(a), Ala. Code 1975, and his resulting sentence of death.

On March 16, 1998, Samra was convicted of capital murder. The jury recommended, by a vote of 12 to 0, that Samra be sentenced to death. The circuit court followed the jury's recommendation and sentenced Samra to death. We affirmed Samra's capital-murder conviction and sentence. See Samra v. State, 771 So. 2d 1108 (Ala. Crim. App. 1999). The Alabama Supreme Court affirmed this court's decision. See Ex parte

Samra, 771 So. 2d 1122 (Ala. 2000), and on October 10, 2000, the United States Supreme Court denied certiorari review. See Samra v. Alabama, 531 U.S. 933 (2000).

On October 1, 2001, Samra filed a Rule 32 petition for postconviction relief challenging his conviction and sentence. Samra's petition alleged numerous claims, all asserting that he was denied effective assistance of counsel. On January 12, 2005, after an evidentiary hearing was held, the circuit court denied relief.

This Court affirmed the denial of Samra's postconviction petition in an unpublished memorandum issued on August 24, 2007. See Samra v. State (No. CR-04-0879), 14 So. 3d 196 (Ala. Crim. App. 2007)(table). After Samra's application for rehearing was denied, and his petition for certiorari review was denied by the Alabama Supreme Court, a certificate of judgment was issued on September 19, 2008.

The instant petition, Samra's second, was filed on September 27, 2007, and was untimely.

Samra, through his attorney, filed a petition following the form found in the appendix to Rule 32, Ala. R. Crim. P. Samra claimed that his death sentence[1] violated the Eighth Amendment's prohibition against cruel and unusual punishment, and his sentence must be vacated because it is excessive and disproportionate to the sentence of codefendant, Mark Duke. Samra argues that Duke's degree of culpability was greater than Samra's, but Duke could not be sentenced to death due to the decision in Roper v. Simmons, 543 U.S. 551 (2005). Duke was less than 18 years old at the time of the offense, and Roper prohibits the execution of offenders who were less than 18 years old at the time they committed a capital offense.

Samra argued that these claims were not precluded pursuant to Rule 32.2(b), the rule prohibiting successive petitions, because these claims constituted different grounds from the grounds raised in Samra's first Rule 32 petition. Specifically, according to Samra, Mark Duke, Samra's codefendant, was less than 18 years old and Samra was over the

---

[1]See § 13A-5-53(b)(3), Ala. Code 1975.

age of 18 at the time of the capital murders. Samra was sentenced to death in May 1998. Duke was sentenced to death in November 1998. The United States Supreme Court decided Roper v. Simmons on March 1, 2005. The Roper decision rendered Duke ineligible for the death penalty due to his age. Samra asserts that a decision from the Shelby County circuit court regarding the 2002[2] Rule 32 petition of LaSamuel Lee Gamble v. State, CC-96-813.60, is precedent for granting Samra's Rule 32 petition. Gamble and his codefendant, Marcus Presley, had both received death sentences following a capital murder conviction. Gamble was more than 18 years old and Presley was 16 years old at the time they committed the capital murder. Presley, who was the triggerman, was considered more culpable than Gamble. Nevertheless, based on the 2005 decision in Roper, the circuit court vacated Presley's death sentence and sentenced Presley to life in prison without the possibility of parole. Pursuant to relief sought in Gamble's Rule 32 petition, Gamble's death sentence was vacated and he was sentenced to life in prison without the possibility of parole. Samra contends that his death sentence violates the Eighth and Fourteenth Amendments and, therefore, like Gamble, his death sentence should be vacated and he should be sentenced to life in prison without the possibility of parole.

Samra argued that while his claims were raised in a successive petition, they were not precluded because these grounds were not known at the time his first petition was decided. He argues that prior to Roper there was no difference in the sentences which had been imposed on both Samra and his codefendant. Samra averred that this constituted good cause why the new ground was not known, and the failure to grant relief would result in a miscarriage of justice.

The State filed a motion to dismiss, first asserting that Samra's claims were precluded under two different statutes of limitation. The State averred that the claims were precluded under Rule 32.2(c) because the petition was untimely. The

---

[2]The petition was filed in September 2002 and was amended in March 2003, November 2003, and November 2004. An evidentiary hearing was conducted in June 2006.

State also pleaded that Rule 32.1(e) requires that a petition presenting claims of newly discovered evidence must be filed within six months of the discovery of the new facts and that Samra failed to allege when he discovered the new facts forming the basis of his petition. The State further argued that Roper was decided more than two years before the instant petition was filed, and that the petition was procedurally barred because Samra's claims were based upon Roper, but were not filed within the six months of the Roper decision. Thus, according to the State, the limitation period in 32.1(e) was exceeded. The State also asserted that Samra's claims were precluded as successive under Rule 32.2(b) and they lacked merit, thus, a refusal to entertain the petition on this ground would not result in a miscarriage of justice. The State noted that Gamble was a circuit court decision, had been appealed by the State, and that a final appellate decision had not been rendered.

The State also argued that the premise underlying Samra's claims was based on an incorrect premise. The State argued that an offender who has committed capital murder is only entitled to an individualized determination of his eligibility for the death penalty and that determination does not involve a comparison of the offender's sentence with that of a codefendant.

The circuit court issued the following order denying the petition:

> "Michael Brandon Samra (Samra) filed a petition for Relief from Conviction or Sentence on January 15, 2008. The Circuit Court per [a previous circuit judge] subsequently denied the Petition and on August 29, 2008. The Alabama Court of Criminal Appeals set aside that Order and remanded the matter back to the Circuit Court and further directed [the previous circuit judge] to hold the matter in abeyance until the Court of Criminal Appeals issued a Certificate of Judgment on Samra's previous Petition which was then still before the Court of Criminal Appeals. The Court of Criminal Appeals released a memorandum opinion affirming the trial court's denial of Samra's first Petition on August 24, 2007, and published a Certificate of Judgment on

September 19, 2008. . . . [T]his matter was thereafter assigned to the present judge.

"The present Petition is a successive petition within the meaning of Rule 32.2 of the Alabama Rules of Criminal Procedure. Samra makes two interrelated claims. He first claims that his death sentence is in violation of the 8th Amendment to the Constitution of the United States prohibiting the imposition of cruel and unusual punishment. The second claim is that a ruling by [a circuit judge] in another circuit court case would constitute a newly discovered material fact which would require the Court to vacate his death sentence to avoid a manifest injustice.

"[The previous circuit judge] had issued a ruling in an unrelated case setting aside a sentence of death of a defendant where a more culpable co-defendant's death sentence had been commuted to 'Life without Parole.' The co-defendant had been less than seventeen years of age when the offence was committed and his sentence was reduced as a result of the decision of the United States Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005). [The previous circuit judge] found the death sentence of the codefendant disproportional where a more culpable co-defendant was sentenced to 'Life without Parole.' The Alabama Court of Criminal Appeals affirmed the trial court's finding of ineffective assistance of counsel during the sentencing phase but declined to recognize a claim that a death sentence should be set aside if not proportional with a sentence given to a codefendant, Gamble v. State, 63 So. 3d 707 (Ala. Crim. App. 2010).

"In the present case Samra is sentenced to death while a younger co-defendant['s] sentence was reduced by the application of the decision in Roper.

"The State has responded by asserting the applicable procedural bars as well as arguing the facts themselves justify the sentence of death.

Samra had an active role in a multiple slayings. He in one instance restrained a small child while his co-defendant cut her throat.

"The Court finds that Samra's successive petition is procedurally barred from consideration.

> "1. A ruling by the trial court in an unrelated matter does not constitute 'a Newly discovered material fact' within the meaning of Rule 32.1(e).
>
> "2. Even if such a ruling could be construed as a fact it could not meet the requirements of Rule 32.1(e) (1) through (5).
>
> "3. Even assuming somehow somewhere a ruling might be found which could be construed as a fact that met the requirements of the Rule 32.1(e) it would have to comply with Rule 32.2(c) and in this case the further limitation Imposed by 32.2(b) for successive petitions. The present petition does not.

"The present case overcomes none of the above procedural bars. In addition, as previously noted the Alabama Court of Criminal Appeals rejected the proportionality in sentence argument upon which Samra now seeks to rely. Gamble v. State, 63 So. 3rd 707, (Ala. Crim. App. 2010).

"For the forgoing reasons the Petition is summarily DENIED."

(C. 426-27.)

Samra filed his petition before this court had issued its opinion in Gamble v. State, 63 So. 3d 707 (Ala. Crim. App. 2010). On appeal, Samra reiterates the claims raised in his petition.

As the circuit court found, our holding in Gamble is

dispositive of Samra's claims. In Gamble we discussed whether a circuit court had the authority to conduct a proportionality review and determined that it did not, that function is properly vested in the appellate courts of this state and not in the circuit courts. We further determined that the sentence received by a codefendant was not a factor which could enter a circuit court's determination of the proper sentence in a capital case during its process of weighing aggravating and mitigating circumstances.

> "Alabama recognizes that capital-murder codefendants have a right to an individualized sentencing determination and do not have to be sentenced to the same punishment. 'To determine the appropriate sentence, the sentencer must engage in a "broad inquiry into all relevant mitigating evidence to allow an individualized determination."' Ex parte Smith, [Ms. 1010267, March 14, 2003] ___ So. 3d ___, ___ (Ala. 2003), quoting Buchanan v. Angelone, 522 U.S. 269, 276, 118 S.Ct. 757, 139 L.Ed.2d 702 (1998). As the Alabama Supreme Court stated in Ex parte McWhorter, 781 So. 2d 330 (Ala. 2000):
>
> > "'The law does not require that each person involved in a crime receive the same sentence. Wright v. State, 494 So. 2d 726, 739 (Ala. Crim. App. 1985) (quoting Williams v. Illinois, 399 U.S. 235, 243, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970)). Appellate courts should "examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any." Beck v. State, 396 So. 2d 645, 664 (Ala. 1980). However, the sentences received by codefendants are not controlling per se, Hamm v. State, 564 So. 2d 453, 464 (Ala. Crim. App. 1989), and this Court has not required or directed that every person implicated in a crime receive the same punishment. Williams v. State, 461 So. 2d 834, 849 (Ala. Crim. App. 1983), rev'd on other grounds, 461 So. 2d 852 (Ala. 1984). "'There is not a

> simplistic rule that a co-defendant may not be sentenced to death when another co-defendant receives a lesser sentence.'" Id. (quoting Collins v. State, 243 Ga. 291, 253 S.E.2d 729 (1979)).'

"781 So. 2d at 344. The issue whether codefendants should be sentenced to the same punishment based on Alabama's proportionality review was addressed by the Alabama Supreme Court in Ex parte Thomas, 460 So. 2d 216 (Ala. 1984). The Court stated:

> "'The sentences received by co-defendants must be considered by this court in determining the appropriateness of a death sentence on appeal, Beck v. State, 396 So. 2d [645] 664 [(Ala. 1980)], but they are not controlling per se. (Appellant's contention that the trial court should have expressly considered the sentences received by appellant's co-defendants is answered in Coulter v. State, 438 So. 2d 336 (Ala. Cr. App. 1982), aff'd, 438 So. 2d 352 (Ala. 1983)). In that case, we affirmed the Court of Criminal Appeals holding the disproportionality question involving consideration of co-defendant sentences is something to be addressed by the appellate courts instead of at the trial level. Accord, Miller v. Florida, 459 U.S. 1158, 103 S.Ct. 802, 74 L.Ed.2d 1005 (1983) (Marshall, J., dissenting from denial of certiorari).[7] Were they [sic], there would be no need for us to make the other inquiries we mandated in Beck.'

"460 So. 2d at 226-27. In Coulter v. State, 438 So. 2d 336 (Ala. Crim. App. 1982), we stated: 'In the sentencing phase of the trial, the fact that an alleged accomplice did not receive the death penalty is no more relevant as a mitigating factor for the defendant than the fact that an alleged accomplice did receive the death penalty would be as an aggravating circumstance against him.' 438 So. 2d

at 345. See Ex parte Tomlin, 909 So. 2d 283 (Ala. 2003), citing Coulter, 438 So. 2d at 345: '[Tomlin's codefendant's] sentence cannot properly be used to undermine a mitigating circumstance.' Compare Ex parte Burgess, 811 So. 2d 617 (Ala. 2000) (Supreme Court directed trial court to consider fact that Burgess was the only one of six participants in the murder who was prosecuted for the offense).

"First, we question whether the issue of the proportionality of Gamble's sentence to that of his codefendant's was properly before the Rule 32 court given that the Supreme Court in Thomas held that a proportionality review is conducted by an appellate court and not a trial court. See § 13A-5-53, Ala. Code 1975. Section 13A-5-53(b), Ala. Code 1975, states that the Alabama Court of Criminal Appeals, subject to review by the Alabama Supreme Court, shall determine: '(3) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.'

"Second, in Alabama a defendant convicted of capital murder is entitled to an individualized sentencing determination. 'What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime.' Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). '"Because of 'the need for individualized consideration as a constitutional requirement in imposing the death sentence,' Lockett v. Ohio, 438 U.S. 586, 605 (1978), the focus must be on the defendant."' Gavin v. State, 891 So. 2d 907, 994 (Ala. Crim. App. 2003), quoting Wright v. State, 494 So. 2d 726, 740 (Ala. Crim. App. 1985). Here, the circuit court, when setting aside Gamble's death penalty, based its decision on the fact that his codefendant was sentenced to life imprisonment. As the Florida Supreme Court stated in Farina:

"'The reason [the codefendant] did not

> receive the death penalty, however, had nothing to do with the circumstances of the crime or the presence or absence of aggravating or mitigating factors. The basis was purely legal: we had held in Brennan [v. State], 754 So. 2d [1] at 1 [(Fla.1999)], that the imposition of a sentence of death on a sixteen-year-old defendant constitutes cruel and unusual punishment, and Jeffrey was sixteen years old at the time of these murders. See Farina [v. State], 763 So. 2d [302] at 303 [(Fla.1999)] (citing Brennan, 754 So. 2d at 5-6). Thus, whereas in Scott [v. Dugger, 604 So. 2d 465 (Fla.1992)], a jury analyzed the facts and, considering the aggravating and mitigating circumstances, recommended a sentence of life, in this case, despite a jury recommendation of a sentence of death, and the trial court's imposition of such a sentence, this Court concluded as a matter of law that Jeffery was ineligible for the death penalty. See id. Unlike Scott, Jeffrey's sentence reduction has no connection to the nature or circumstances of the crime or to the defendant's character or record. Under Lockett [v. Ohio], [438 U.S. 586 (1978),] it is irrelevant as a mitigating circumstance in Anthony's case.'

"[Farina v. State,] 937 So. 2d [612] at 620 [Fla. 2006].

"Third, Gamble presented this claim to the circuit court in a motion to amend his petition to allege a 'newly-cognizable constitutional claim' that his death sentence was now disproportionate given that his codefendant's death sentence had been vacated based on Roper v. Simmons, supra.[8] However, there is no constitutional right to a proportionality review in death-penalty cases. As the United States Supreme Court stated in Pulley v. Harris, 465 U.S. 37, 104 S.Ct. 871, 79 L.Ed.2d 29

(1984): 'comparative proportionality review is not constitutionally required in every state court death sentence review.... In fact, the United States Supreme Court has specifically rejected the claim that a capital defendant can prove an Eighth Amendment violation "by demonstrating that other defendants who may be similarly situated did not receive the death penalty."' 465 U.S. at 43, 104 S.Ct. 871. In Alabama, § 13A-5-53(b)(3), Ala. Code 1975, provides that a proportionality review be conducted by the appellate court on every death sentence; however, this statute does not apply to the circuit court.

"[7] In Miller v. Florida, 459 U.S. 1158, 103 S.Ct. 802, 74 L.Ed.2d 1005 (1983), Justice Marshall stated the following in his dissent from the denial of certiorari review:

> "'An appellate court, in the performance of the viewing function which this Court has held indispensable to a constitutionally acceptable capital punishment scheme, must examine the sentences imposed in all capital cases in the jurisdiction in order "to ensure that similar results are reached in similar cases." Proffitt v. Florida, 428 U.S. 242 (1976) (opinion of Stewart, Powell and Stevens, JJ.). See also, e.g., Godfrey v. Georgia, 446 U.S. 420 (1980) (plurality). The sentencer has a different role. The sentencer's duty is to determine the first instance whether a death sentence is warranted for a particular defendant. That determination can only be made on the basis of the evidence that the judge has heard with respect to that defendant, and, under the Florida procedure, on the recommendation made by the jury that heard that evidence. A capital sentencing determination cannot properly be made on the basis of evidence presented in another

trial or a recommendation made by another jury.'

"459 U.S. at 1161, 103 S.Ct. 802.

"[8]In Ex parte Pierce, 851 So. 2d 606, 616 (Ala. 2000), the Alabama Supreme Court recognized that, to survive the procedural bars of Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P., a petitioner's constitutional claim must allege that the evidence was not known or could not reasonably have been discovered in time to raise the issue at trial or on appeal.

"For the reasons stated above, we hold that the circuit court erred in finding that Gamble's death sentence was due to be vacated because it was constitutionally disproportionate and excessive to his codefendant's sentence of life imprisonment without the possibility of parole."

State v. Gamble, 63 So. 3d 707, 726-29 (Ala. Crim. App. 2010).

Rule 32.7(c) provides:

"[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition."

Because Samra's claims do not have merit, they do not impugn the trial court's jurisdiction. Thus, the circuit court correctly applied the preclusive bar of Rule 32.2(c), because the petition was untimely. The circuit court also correctly applied the preclusive bar of Rule 32.2(b), because the claims were raised in a successive petition and were not jurisdictional claims.

Because the petitioner's claims were without merit and were precluded, summary disposition was appropriate.

For the foregoing reasons, the circuit judge exercised sound discretion in dismissing the petition.

AFFIRMED.

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

Appendix O

Order of the Alabama Supreme Court denying certiorari review of the dismissal of Samra's petition for a successor state Rule 32 post-conviction petition, *Ex Parte Samra*, 170 So. 3d 720 (Ala. 2013)

170 So.3d 720 (Table)
This unpublished disposition is referenced in the Southern Reporter.
Supreme Court of Alabama.

Ex parte Michael Brandon Samra

NO. 1120001

September 20, 2013

Opinion

Disposition: Certiorari denied.

All Citations

170 So.3d 720 (Table)

End of Document

Appendix P

Order of the United States District Court for the Northern District of Alabama denying Samra's petition for a writ of habeas corpus (Sept. 5, 2014)

2014 WL 4452676
Only the Westlaw citation is currently available.
United States District Court,
N.D. Alabama,
Southern Division.

Michael Brandon SAMRA, Petitioner,
v.
Cheryl C. PRICE, Warden, Donaldson Correctional Facility, Respondent.

No. 2:07–cv–1962–LSC.
|
Signed Sept. 5, 2014.

Attorneys and Law Firms

Alan Michael Freedman, Evanston, IL, Steven R. Sears, Montevallo, AL, for Petitioner.

James Clayton Crenshaw, Office of the Attorney General, Montgomery, AL, for Respondent.

MEMORANDUM OF OPINION

L. SCOTT COOGLER, District Judge.

***1** Petitioner Michael Brandon Samra ("Samra"), now incarcerated at William E. Donaldson Correctional Facility in Bessemer, Alabama, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Samra challenges the validity of his 1998 capital murder conviction and death sentence on the following grounds:

1) Samra was denied his right to a fair and impartial jury under the Sixth and Fourteenth Amendments to the United States Constitution when the state trial court denied his motion for a change of venue due to pretrial publicity;

2) Samra was denied his Sixth Amendment right to effective assistance of trial and appellate counsel; and

3) Samra's death sentence violates the Eighth and Fourteenth Amendments to the United States Constitution because his codefendant's death sentence was vacated due to the fact that he was less than eighteen years old at the time of the murders.

Upon thorough consideration of the entire record and the briefs submitted by the parties, the Court finds that Samra's petition for habeas relief is due to be denied.

I. THE OFFENSE CONDUCT

The evidence at trial established that on March 23, 1997, Samra, then aged 19, and his friend Mark Anthony Duke ("Duke"), then aged 16, killed Duke's father, Randy Duke; Randy Duke's girlfriend, Dedra Hunt; and Dedra Hunt's two daughters, six-year-old Chelisa Hunt and seven-year-old Chelsea Hunt. Samra and Duke committed these murders pursuant to a plan hatched the day before, after Duke and his father had a heated argument because Randy Duke would not allow Duke to use his truck. Following the argument with his father, Duke told three of his friends—Samra, David Collums, and Michael Ellison—that he wanted to kill his father. According to a statement Samra later gave to police, the four friends then obtained two handguns and began developing a plan to murder Randy Duke. Samra stated that the plan included killing the other members of the household (D ed ra Hunt and her daughters) because Duke did not want to leave any witnesses alive. Having established a plan, Samra and his three friends drove to Randy Duke's house. Samra and Duke got out of the car and entered the house. Michael Ellison and David Collums then left; however, they agreed to meet up with Duke and Samra later at a prearranged location.

After Samra and Duke entered the house, Duke killed his father by shooting him with a .45 caliber pistol. Meanwhile, Samra aimed his gun at Dedra Hunt and pulled the trigger. Although Samra shot Dedra Hunt in the face, she managed to flee upstairs with her daughters. Dedra Hunt and her daughter Chelisa sought shelter in an upstairs bathroom; Dedra Hunt's other daughter, Chelsea, retreated to a bedroom and attempted to hide under the bed. According to Samra's statement to police, Duke chased Dedra Hunt upstairs, kicked in the bathroom door, and shot Hunt, killing her. Samra and Duke then killed Hunt's two daughters. Because they ran out of bullets, however, they used kitchen knives to kill the girls. After shooting Hunt in the bathroom, Duke murdered six-year-old Chelisa, who was hiding behind the shower curtain, by cutting her throat with a knife. Samra killed seven-year-old Chelsea, who had been hiding under a bed. Despite her pleas for mercy, Duke held Chelsea down and Samra cut her throat. Both girls died as a result of their throats being hacked with a dull knife

until, as the trial court found, they "drown[ed] in their own blood." Samra and Mark Duke emptied drawers and displaced items in the home to make it appear that the house had been burglarized; that, too, was part of the plan according to Samra. They then left to dispose of the weapons. Upon being questioned by law enforcement officials, Samra helped locate the weapons and made a statement in which he admitted his involvement in the murders.

II. PROCEDURAL HISTORY

***2** Samra was charged by indictment with capital murder of two or more persons by one act or pursuant to one scheme or course of conduct, under Ala.Code § 13A –5–40(a)(10) (1975). Trial was held before Judge J. Michael Joiner of the Shelby County Circuit Court ("the trial court"). Richard Bell ("Bell"), an experienced criminal defense attorney who had handled numerous capital cases, was appointed to represent Samra at trial and on appeal.

Prior to trial, Bell moved for an order requiring the State to provide him with notice of the statutory aggravating circumstances set forth in Ala.Code § 13A–5–49 (1975) that the State intended to prove at sentencing that would make Samra eligible for the death penalty. At oral argument on the motion, the prosecutor stated that he was not required to provide such notice and stated that the "aggravating circumstances are very straightforward in the indictment." The trial court denied Samra's motion. Samra contends that it was not until the penalty phase of Samra's trial that Bell was notified that the State would be attempting to prove the existence of one aggravating circumstance in order to establish Samra's eligibility for the death penalty: that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses.

Bell also filed a motion for change of venue prior to trial, arguing that the media coverage of the case led to undue prejudice against Samra in the makeup of the venire. The trial court held a hearing on the motion, at which point Bell presented articles from local newspapers and video recordings of portions of local newscasts that covered Samra's case. Bell also presented testimony from Dr. Natalie Davis, a media and statistical expert. Dr. Davis had conducted a pre-trial poll of the citizens of Shelby County to determine the extent of the pre-trial coverage by the media and its effect on potential jury members. Bell requested that the trial court hold judgment on the motion until after voir dire. The trial court ultimately denied Samra's motion for a change of venue.

In light of learning that the statement Samra had given to police recounting his involvement in the murders would be admissible at trial, Bell focused on investigating possible mitigating evidence. Bell decided that his two main areas of concern were to investigate Samra's mental condition and the degree of gang influence exerted upon Samra by Duke. Bell requested funds from the court for a mental health expert to evaluate Samra. He did this on an ex parte basis, to protect the confidentiality of his trial strategy. After researching different psychiatrists based on the recommendations of nationally-known defense attorneys, Bell retained Dr. Charles L. Scott to evaluate Samra and to serve as an expert in developing mitigating evidence relating to Samra's mental state. Bell described Dr. Scott as being "the most preeminent forensic psychiatrist I have ever met." In addition, he said that he settled on Dr. Scott because he believed Dr. Scott was immune from being labeled a "defense-oriented" expert. Dr. Scott performed a forensic psychiatric examination of Samra and wrote a 21–page report detailing his findings. Dr. Scott's report showed that Dr. Scott believed Samra capable of committing a similar crime again; that Samra reported that he did not feel bullied by Duke; that Samra understood that what he had done was wrong; and that he acknowledged trying to cover up the crime. Dr. Scott also recommended that Samra be subjected to "a complete neuropsychological evaluation, neurology consultation and brain imaging (such as MRI or PET scanning)." [1] Bell had an MRI performed on Samra, but the findings were negative for any lesions or pathology. Bell inquired about the possibility of having a PET test performed, but after making inquiries, was told that this kind of test was not available in Birmingham. At one point, Bell prepared an affidavit for Dr. Scott's signature that would have accompanied a motion for funds. Although Dr. Scott's report never recommends that a SPECT scan be done, the affidavit requests funds for a SPECT scan and additional neurological testing. [2] However, the affidavit was never signed nor submitted to the trial court. Bell contacted another expert about conducting neuropsychological testing, but that did not work out for reasons he cannot remember. Bell ultimately decided not to present Dr. Scott's testimony at trial because it would have been harmful to Samra's defense.

***3** Bell's investigation also showed that Samra's grades began to drop when he started hanging out with a bad crowd and that Samra was kicked out of his house by his father because he would not agree to go to a drug rehabilitation clinic. Bell also had access to Samra's school and medical records and to Samra's family and friends who provided details on Samra's background. A forensic evaluation of Samra was also done prior to trial, showing that Samra "fell within the Borderline range of intelligence with a Full Scale IQ of 73."

Upon conclusion of his investigation, and without any evidence that Samra was insane, Bell chose to base his mitigation argument upon the combination of gang influence and Samra's low IQ. Thus, at trial, Bell presented the testimony of Dr. Kathleen Ronan, a clinical psychologist and certified forensic examiner who evaluated Samra at Taylor Hardin Secure Medical Facility, and Dr. George Twente, a psychiatrist who worked primarily with adolescents and had expertise concerning gangs and their influence on young people. At the penalty phase, Bell presented testimony from Samra's family to show that Samra did not have a violent background and that he was loved.

Dr. Ronan testified at trial that she found that Samra appeared to be functioning within the borderline range of intelligence, meaning between low average intelligence and mild mental retardation, which was consistent with the IQ test that he was given during the previous week. On a personality inventory, Samra demonstrated that he was dependent on others and that he was insecure in his interpersonal interactions. Samra's test responses also indicated that he could become confused under times of severe stress. Dr. Ronan asked Samra whether he was affiliated with a gang, and he told her he was affiliated with the FOLKS ("Forever Our Lord King Satan") gang. However, he stated that the murders had nothing to do with a gang, as far as he knew. On cross examination, Dr. Ronan testified that she found no evidence that Samra suffered from a psychiatric impairment or mental disease that would have prevented him from understanding right from wrong; that Samra was polite, cooperative, and did not show a great deal of emotionality; and that the lack of emotionality could be attributed to Samra simply not caring about the fact that the murders occurred.

Dr. Twente testified at trial that most of the adolescents he worked with who were involved in gangs were from broken homes, did not do well in school, and felt they did not fit in, and that the gang offered a sense of identity. He stated that he reviewed the symbols that had been carved into Duke's bedroom walls and stated that they were similar to some he had seen in his work with adolescents involved with the FOLKS gang. Finally, Dr. Twente testified that he had never spoken with Samra, and he had not made any determination as to whether there was any gang involvement in the murders.

Bell also presented the testimony of Sara Woodruff at the trial. Woodruff testified that she knew Samra and his co-defendants. She stated that she had been a member of the FOLKS gang. Woodruff stated that Duke told her that the killings had nothing to do with gangs or gang activity, and that they were the result of a dispute he had with his father. The jury ultimately found Samra guilty of capital murder as charged in the indictment.

***4** At the penalty phase, Bell presented three witnesses on Samra's behalf. The first witness was Theola Babe Samra, Samra's aunt. She testified that she had known Samra all of his life, that he was a loving person who had never displayed any violence, and that there was nothing in his life that would have foretold any violent or deviant behavior on her nephew's part. The second witness was Charles Samra, Samra's father. He testified that Samra was several months behind in development as a child, based on his own opinion from books he had read. He said that his son attended regular classes at school, but did take some "special education" classes. He also said that Samra, until the age of sixteen, was never a behavioral or disciplinary problem. However, after Samra had completed his junior year in high school, he discovered that this son was using marijuana, and after a few incidents involving marijuana use, and after he attempted to assist Samra, he told Samra that he could seek professional help to stop using marijuana, or he could leave the house. Samra chose to leave home and dropped out of high school his senior year. Samra's father testified that, based on the way his son dressed, he suspected that he might be hanging around "gang-type people," but Samra denied this to him. Bell then called Sabrina Samra, Samra's mother. She testified that, during her child's early years, there were no indications of violent tendencies on his part. She stated that Samra was easily frustrated and a little slower than other children and that he was diagnosed with having learning disabilities.

After the penalty phase, the jury recommended that Samra be sentenced to death by a 12–0 vote. The trial court followed the jury's recommendation, finding the existence of the statutory aggravating factor—that the crime was especially heinous, atrocious, or cruel, when compared to other capital offenses—in it sentencing order:

> Evidence showed at trial that the victims in this case were killed in a very cruel and heinous manner. The minor children's throats were actually cut and according to testimony of the medical examiner, they drowned in their own blood. The photographs and other demonstrative evidence in this case leads to one and only one conclusion, that the manner in which the victims were killed was much more heinous and atrocious and cruel than would be necessary in any killing.
>
> This case stands out as particularly heinous, atrocious and cruel when it is considered that at least one victim, according to the admission of Defendant, begged not to be killed. All of the victims died very painful and brutal deaths. The victims apparently struggled for life and breath and that very struggle caused one or more of the victims to drown in their own blood.

(C.R. Vol. 49, at 5.)[3] The trial court's sentencing order also found the existence of six mitigating circumstances:

> Defendant's lack of significant criminal history is a mitigating circumstance, and that the age of Defendant at the time of the crime, that is the age of nineteen(19) is a mitigating circumstance and that no other statutory mitigating circumstances exist ... the Court has considered all additional mitigating circumstances supported by the evidence ... including but not limited to the age and maturity of Defendant, the learning difficulties and disabilities of Defendant, the family history and background and caring nature of Defendant, the effect of gang or group involvement on Defendant, the immediate and continuing truthfulness and cooperation of Defendant with law enforcement officers, the remorse of Defendant expressed in statements to law enforcement officers and, the fact that there are no other aggravating circumstances other than the one listed ...
>
> ***5** (C.R. Vol. 49, at 3–4.) The trial court ultimately determined that the aggravating circumstance outweighed the mitigating factors, and thus imposed the death sentence.

Bell continued to represent Samra on direct appeal[4] and raised, among many other issues, the claim that the motion for change of venue was erroneously denied. On June 18, 1999, the Alabama Court of Criminal Appeals ("ACCA") affirmed Samra's murder conviction and death sentence. *Samra v. State,* 771 So.2d 1108 (Ala.Crim.App.1999). Samra's application for re-hearing was denied on August 6, 1999.

The Alabama Supreme Court granted automatic certiorari and on March 3, 2000, affirmed Samra's conviction and sentence. *Ex parte Samra,* 771 So.2d 1122 (Ala.2000). On May 5, 2000, the Alabama Supreme Court denied Samra's application for rehearing.

Samra sought review from the United States Supreme Court, but on October 10, 2000, the United States Supreme Court denied Samra's petition for writ of certiorari. *Samra v. Alabama,* 531 U.S. 933, 121 S.Ct. 317, 148 L.Ed.2d 255 (2000).

On October 1, 2001, Samra filed a state post-conviction petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure ("Rule 32 Petition") in the Shelby County Circuit Court ("Rule 32 Court"). Samra claimed ineffective assistance of trial and appellate counsel on multiple grounds. On all but one claim—ineffective assistance of trial and appellate counsel for not investigating and presenting evidence of Samra's purported "brain damage and organic brain dysfunction"—Samra conceded that an evidentiary hearing was unnecessary. On that claim, an evidentiary hearing was held on November 3 through 5, 2003, in which Samra's post conviction counsel called three witnesses: Dr. Michael Gelbort, a neuropsychologist who conducted a neuropsychological examination and evaluation of Samra on February 3, 2002; Dr. James Mountz, a radiologist who conducted a court-ordered SPECT brain scan on Samra on August 1, 2002; and Bell, Samra's trial and appellate counsel. The State also called witnesses at the hearing: Dr. Glen King, a clinical psychologist who conducted a neuropsychological test battery on Samra, and Dr. Helen Mayberg, a board-certified neurologist employed at Emory University who reviewed Dr. Mountz's SPECT report.

Dr. Gelbort, who is not board certified by the American Board of Professional Psychology, testified that the results of his tests showed that Samra had a verbal IQ of 79, nonverbal IQ of 87, and a full scale IQ of 81. Dr. Gelbort testified that he did not perform the entire Halstead–Reitan Test Battery on Samra. One of the neuropsychological tests that Dr. Gelbort performed was the Categories Test which measures "whole brain functioning" such as "conceptualization" and "reasoning." Dr. Gelbort found that Samra made 51 errors on this test and that this score placed him in the bottom range of normal or the top range of the brain-impaired population. Dr. Gelbort testified that a brain dysfunction can affect a particular ability and that people with high IQ scores can overcome those dysfunctions while those with lower IQ scores are less adaptive to overcoming those dysfunctions. Dr. Gelbort testified that the variability of Samra's IQ scores shows that there may be brain damage because a normal brain will be consistent throughout, or that Samra is not doing his best on the tests. Dr. Gelbort testified that Samra's scores in the Trail Making Test, which measures the subject's speed and efficiency in processing information, were on the "cusp" between low-normal and mild impairment. Dr. Gelbort testified that Samra's score on the Wechsler Memory Scale was in the borderline-to-mildly-impaired range. In the Minnesota Multiphasic Personality Inventory ("MMPI"), Dr. Gelbort found that Samra showed signs of depression, but no other serious psychiatric problems.

***6** Dr. Gelbort opined that Samra's brain is not normal; that Samra has some kind of brain dysfunction that affects his verbal information processing; that Samra is less able than normal people, although not grossly impaired, to use problem-solving skills and judgment to modify his future behavior based on past experience; that Samra has impaired frontal lobe activity; and, that Samra does not think fast on his feet and needs a controlled environment. Dr. Gelbort reviewed the test results of radiologist Dr. Mountz and found that his findings of low blood flow to the front and middle part of Samra's brain was consistent with the neuropsychological test results derived by Dr. Gelbort.

Dr. Gelbort candidly admitted that he only testifies on behalf of criminal defendants and that he has testified approximately 50 times for criminal defendants. Dr. Gelbort admitted that he had not asked Samra about the crime or read his statement given to law enforcement. Counsel for the State confronted Dr. Gelbort with Samra's school records and childhood medical records which Dr. Gelbort stated he had reviewed. These records showed that Samra had some developmental delays and a tremor at age seven, so his parents took him to a doctor who performed a CT scan and EEG and found the results of those tests to be within the normal range. School records showed where Samra had been in learning disability classes for speech and language, but that he was no longer in those classes after the eighth or ninth grade because these problems got better. Samra's high school grades showed that he made A's, B's, and C's. Samra's work history showed that he held several different jobs, one of which required him to run a cash register. Further, the State showed on cross-examination that Dr. Gel bort gave zero points, rather than partial credit, for questions when Samra substantially answered with an almost complete correct response. Dr. Gelbort, even though testifying that the results he received on the tests he performed were consistent with the results of the SPECT test performed on Samra by Dr. Mountz, candidly admitted that he does not know what a SPECT test is measuring.

Dr. Mountz then testified about the results of the SPECT scan he performed on Samra. He stated that an MRI looks for structural abnormalities in the brain, i.e., gray and white matter, which is different from measuring blood flow to the brain, which is what the SPECT scan does. Dr. Mountz testified that a person may have a normal MRI result because there is no structural abnormality, but still have an abnormal SPECT result because of reduced blood flow in the brain. Dr. Mountz testified that the SPECT test was available in Birmingham in 1990.

In performing a SPECT scan on Samra, Dr. Mountz found two areas of his brain that were receiving diminished blood flow. One of the abnormalities was so mild that Dr. Mountz admitted it was still within the normal range. The second abnormality showed decreased blood flow in the posterior frontal superior temporal region of Samra's brain; Dr. Mountz stated that it was on the low range of normal. Dr. Mountz expressed no opinion on how this could affect Samra's brain function, but nevertheless stated that this result was not inconsistent with Dr. Gelbort's finding of mild impairment.

***7** On cross-examination, Dr. Mountz testified that there has been no research methodology to show how a SPECT scan result can lead to drawing conclusions about what

compels a person to commit murder. Dr. Mountz further testified that this type of brain scan is not relevant to showing whether Samra appreciated the wrongfulness of his actions or whether he planned the murders or whether he tried to hide evidence of the murders. Dr. Mountz testified that reading SPECT scans is a subjective process where you compare the subject's brain scan to that of other known normal scans; Dr. Mountz considers an "abnormal" result to be below one standard deviation of the "normal" scans.

Dr. Mountz testified that the area of Samra's brain that had low blood flow was the area that is normally associated with motor functioning, sensation, perception, and the inputting of visual information; further detailed testing would be required to see what that exact area controls in Samra's brain. Dr. Mountz added that Samra's brain may have looked different in 1998, the time when Samra committed the murder, from how it looked at the time of the SPECT test in 2002. Further, Dr. Mountz testified that he had no idea if Samra consumed caffeine, alcohol, drugs, or nicotine before the test and that those items can affect the results.

Finally, Bell testified about his investigation into the possibility of Samra having a mental defect. In discussing how he came to hire Dr. Scott, Bell testified that he would not have hired an expert such as Dr. Gelbort because he always testified on behalf of criminal defendants and has never testified for a prosecutor. Bell also reviewed Dr. Scott's report while testifying, and stated that Dr. Scott never recommended a SPECT test be done but rather, that a PET test be performed.

The State then called Dr. King, who testified that he is board certified in clinical psychology by the American Board of Professional Psychology, the only board-certification body recognized by the American Psychological Association, and that he testifies in favor of criminal defendants approximately 40% of the time. Unlike Dr. Gelbort who only performed part of the Halstead–Reitan Test Battery, Dr. King performed the entire test battery on Samra. On the Wide Range Achievement Test, 3rd edition, Samra scored an 86 on reading, 97 on spelling, and 79 on math. Dr. King explained that a person with an average IQ would be expected to score approximately 100 in each of those areas, but that the lower scores were expected because Samra was a high school dropout; Dr. King also found that Samra exhibited good literacy skills. In administering the MMPI test, Dr. King stated that Samra showed signs of mild clinical depression, mild anxiety, and immature interpersonal development; but the test detected no psychosis or serious mental illness. Dr. King testified that Samra's depression could affect his neuropsychological test scores because it could slow his response time.

***8** Dr. King testified that the result of Samra's IQ testing —79—put Samra in the low-average to high-borderline category. Dr. King testified that the performance part of the IQ test is a sensitive measure for brain damage; however, Samra scored higher on the performance part than the verbal part. Dr. King testified that Samra's sensory perception functioning was intact, but that he did have some fine motor difficulties. Dr. King testified that Samra had some signs of construction dyscrasia—a term describing difficulty with copying designs—and trouble with arithmetic problems. Dr. King also testified that Samra showed some impairment on the visual spatial test. Dr. King testified that on the categories test, Samra made fifty-two errors. Dr. King testified that he found some impairment overall in Samra's level of abstract reasoning, concept formation, and problem-solving abilities. According to Dr. King, however, this level of impairment is consistent with a person who is in the borderline range of intellectual ability.

Dr. King testified that Samra reported no prior mental health treatment, no serious physical problems, that he did not recall ever having been rendered unconscious; that Samra started drinking at age 17 and smoking marijuana at age 18; that Samra had a stable family history; that Samra reported that he was not really in a gang, but just hung out with a group of four friends; and that Samra appeared remorseful. Dr. King testified that Samra understood the nature and quality of his actions at the time of the crime and that he was not suffering from any mental illness or defect that would have prevented him from such an understanding; Dr. King based his opinion from the police reports and Samra's rendition of the crime.

Based upon his examination, Dr. King found that Samra's neuropsychological test scores showed a level of impairment consistent with a person who has an IQ score in the borderline range of intellectual ability, but that this level of impairment did not adversely affect Samra's ability to appreciate the wrongfulness of his acts. Dr. King further found that Samra's adaptive functioning was

higher than indicated by his test scores because he could hold down jobs; although Samra quit several jobs, he did so out of boredom and not out of a lack of ability. As a result, Dr. King classified Samra's adaptive functioning in the low-average range. Dr. King also testified that Samra's testing indicated no frontal lobe damage and that his overall level of functioning was in the borderline range. Dr. King testified that at the time of the offense, Samra was not suffering from any serious mental illness or mental defect that would render him incapable of understanding the nature and quality of his actions and the consequences of his behaviors.

Dr. Mayberg then testified that the SPECT scan had only been approved by the federal government for the purposes of diagnosing stroke, evaluating patients for dementia, and for identifying abnormalities in those known to have temporal lobe epilepsy. Dr. Mayberg testified that the conditions of administering the test can affect the result and that the analysis of the results is done by looking at it and comparing it with others that are known to be normal. Dr. Mayberg testified that there are no fixed rules for reviewing SPECT results, but it was her opinion that Dr. Mountz's use of only twelve normal scans was not enough to establish a range of normal. Dr. Mayberg testified that a larger control group was needed to establish the range of normal and that a scan should not be considered abnormal unless it falls below two standards deviations of the normal control group. Dr. Mountz had classified one part of Samra's brain as abnormal because the blood flow was one standard deviation below the range of normal. According to Dr. Mayberg, defining those who fall below one standard deviation from the normal as "abnormal" would classify many healthy people as abnormal. Further, Dr. Mayberg testified that even though Samra's SPECT scan may have shown one area of the brain to receive a low-normal amount of blood flow, such an indication of "low-normal" is still within the range of normal.

***9** According to Dr. Mayberg, "brain damage" is a catch-all term and the SPECT scan is too sensitive to minor blood flow variations to be a practical screening test. Additionally, Dr. Mayberg stated that "brain damage does not have a singular identifying pattern." Depending upon the state of the person at the time of the SPECT scan, blood flow levels can deviate amongst healthy subjects, especially if they are anxious or did not have a good night of sleep. Dr. Mayberg testified that the SPECT scan in 2002 does not reflect what Samra's brain looked like at the time of the offense in 1997. Further, Dr. Mayberg testified that a SPECT or PET scan performed one to two years after the commission of a crime should not be used as evidence of what the defendant was thinking at the time of the offense.

Dr. Mayberg testified that she had reviewed Samra's medical records which indicated certain medical tests were performed during Samra's childhood. According to Dr. Mayberg, Samra's parents took him to a childhood neurologist out of concern that Samra was developmentally delayed. In her review of the medical records, Dr. Mayberg stated that one neurologist thought that Samra might have a form of childhood epilepsy, but that the second neurologist disagreed. Dr. Mayberg surmised that Samra may have had some neurological deficits in childhood that improved over time and that, because Samra was under the care of specialists, the condition would have been followed if it had persisted. Because of the CT scans performed on Samra as a child, the normal results of his MRI show that Samra's brain has no old scars, developmental anomalies, or acquired lesions.

Dr. Mayberg testified that the findings made by Dr. Scott, that Samra had attention deficit disorder, alcohol abuse, cannibis abuse, and adult antisocial behavior disorder, cannot be diagnosed by a SPECT scan. Dr. Mayberg testified that Dr. Gelbort's findings, that Samra has borderline intellectual functioning, reading disorders, and math disorders, cannot be diagnosed by a SPECT scan. Dr. Mayberg testified that the area of reduced blood flow found by Dr. Mountz was in the motor sensory cortex, which would have nothing to do with the neuropsychological deficits found by Dr. Gelbort's tests. Dr. Mayberg testified that Samra's difficulty in not performing the neuropsychological tests quickly could be attributed to his depression. Dr. Mayberg concluded that Samra's SPECT scan was normal because it did not fall below two standard deviations from an established norm.

Following the evidentiary hearing, the Rule 32 Court ultimately denied Samra's Rule 32 Petition on January 12, 2005. Samra appealed, and on August 24, 2007, the ACCA affirmed the Rule 32 Court's denial of Samra's Rule 32 Petition. *Samra v. State,* 14 So.3d 196 (Ala.Crim.App.2007) (table decision). Samra filed an application for a rehearing, but it was denied on September 28, 2007. *Samra v. State,* CR–04–0879

(Ala.Crim.App. Sept. 28, 2007). Samra filed a petition for a writ of certiorari in the Alabama Supreme Court, but it was denied on September 19, 2008. *Ex parte Samra,* No. 1070068 (Ala. Sept.19, 2008).

***10** On September 27, 2007, Samra filed a second Rule 32 petition for post-conviction relief in the Shelby County Circuit Court ("Successive Rule 32 Petition"). At the time of this filing, his appeal from the denial of the first Rule 32 Petition was still pending in the ACCA, awaiting a ruling on his application for a rehearing. In the Successive Rule 32 Petition, Samra argued that due to the fact that the death sentence imposed on his more culpable co-defendant, Duke, had been reversed pursuant to *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), Samra's death sentence violated his Eighth and Fourteenth Amendment rights and was excessive and disproportionate. [5] After hearing oral argument the State's motion to dismiss the Successive Rule 32 Petition, the Rule 32 Court granted the motion to dismiss and summarily dismissed the Successive Rule 32 Petition in an order dated July 28, 2008. Samra appealed that order on August 20, 2008. On August 29, 2008, the ACCA issued an order directing the Rule 32 Court to set aside its order and hold the case in abeyance until a certificate of judgment was issued from the ACCA concerning Samra's still-pending appeal from his first Rule 32 Petition. Accordingly, the Rule 32 Court vacated its July 28, 2008 order and held Samra's Successive Rule 32 Petition in abeyance until the ACCA issued the certificate of judgment on the first Rule 32 Petition. Samra's appeal from his first Rule 32 Petition became final when a certificate of judgment was issued on September 19, 2008.

Once the stay was lifted on the Successive Rule 32 Petition, the State again moved to dismiss it, and the Rule 32 Court summarily dismissed the successive petition in an order dated September 19, 2011. The ACCA affirmed that dismissal on August 10, 2012, and denied Samra's application for rehearing. Samra filed a Petition for Writ of Certiorari and Extraordinary Writ in the Supreme Court of Alabama. These petitions were denied on September 20, 2013.

Samra filed the instant federal habeas corpus petition pursuant to § 2254 on October 26, 2007, while his Successive Rule 32 Petition was still pending in the state court. On the same date, Samra filed a motion to hold the instant petition in abeyance to allow him to exhaust his claim in the state courts. This Court stayed the action while Samra exhausted his state remedies, ordering monthly status reports.

After being apprised that Samra had exhausted his state remedies, on January 23, 2014, this Court lifted the stay and issued an order setting deadlines for the filing of briefs and an amended petition. In compliance with that order, Samra filed an amended petition on February 21, 2014, to which the State responded and Samra replied. The petition is now ripe for review.

III. STANDARDS OF FEDERAL HABEAS REVIEW

Because Samra filed his federal habeas corpus petition after April 24, 1996, this action is governed by 28 U.S.C. § 2254, as amended by the Anti–Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). *See Guzman v. Sec'y, Dept. of Corr.,* 663 F.3d 1336, 1345 (11th Cir.2011). Pursuant to § 2254(a), a federal district court is prohibited from entertaining a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court" unless the petition alleges "he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). In other words, this Court's review of habeas claims is limited to federal constitutional questions. Claims pertaining solely to "an alleged defect in a [state] collateral proceeding" or to a "state's interpretation of its own laws or rules" do not provide a basis for federal habeas corpus relief under § 2254. *Alston v. Dept. of Corr., Fla.,* 610 F.3d 1318, 1325–26 (11th Cir.2010) (quotation marks and citations omitted).

A. Exhaustion and Procedural Default

***11** Under § 2254(b) and (c), a federal court must limit its grant of habeas applications to cases where an applicant has exhausted his state remedies. *Cullen v. Pinholster,* —— U.S. ——, ——, 131 S.Ct. 1388, 1398, 179 L.Ed.2d 557 (2011). The purpose of this requirement is to ensure that state courts are afforded the first opportunity to correct federal questions affecting the validity of state court convictions. *See Snowden v. Singletary,* 135 F.3d 732, 735 (11th Cir.1998); *see also Smith v. Newsome,* 876 F.2d 1461, 1463 (11th Cir.1989) ("Federal courts are not forums in which to relitigate state trials .") (citation omitted)). Moreover, "to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues. 'It is not enough that all the facts necessary to support the federal

claim were before the state courts or that a somewhat similar state-law claim was made.' " *Snowden,* 135 F.3d at 735 (quoting *Anderson v. Harless,* 459 U.S. 4, 5–6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982)).

"[A]n issue is exhausted if 'the reasonable reader would understand the claim's particular legal basis and specific factual foundation' to be the same as it was presented in state court." *Pope v. Sec'y for Dept. of Corr.,* 680 F.3d 1271, 1286 (11th Cir.2012) (quoting *Kelley v. Sec'y for Dept. of Corr.,* 377 F.3d 1317, 1344–45 (11th Cir.2004)) (brackets in original omitted). If a petitioner fails to raise his federal claim to the state court at the time and in the manner dictated by the state's procedural rules, the state court can decide the claim is not entitled to a review on the merits, i.e., "the petitioner will have procedurally defaulted on that claim." *Mason v. Allen,* 605 F.3d 1114, 1119 (11th Cir.2010). Moreover, "a state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." *Ward v. Hall,* 592 F.3d 1144, 1156 (11th Cir.2010) (quoting *Judd v. Haley,* 250 F.3d 1308, 1313 (11th Cir.2001)). "Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker,* 501 U.S. 797, 803, 111 S.Ct. 2590, 2594, 115 L.Ed.2d 706 (1991).

Yet as the Eleventh Circuit has noted, a claim will only be procedurally defaulted in the following circumstance:

> [A] state court's rejection of a federal constitutional claim on procedural grounds may only preclude federal review if the state procedural ruling rests upon "adequate and independent" state grounds. *Marek v. Singletary,* 62 F.3d 1295, 1301 (11th Cir.1995) (citation omitted).
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> We have "established a three-part test to enable us to determine when a state court's procedural ruling constitutes an independent and adequate state rule of decision." *Judd,* 250 F.3d at 1313. "First, the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim." *Id.* Second, the state court's decision must rest entirely on state law grounds and not be intertwined with an interpretation of federal law. *See id.* Third, the state procedural rule must be adequate, i.e., firmly established and regularly followed and not applied "in an arbitrary or unprecedented fashion." *Id.*
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> ***12** *Ward,* 592 F.3d at 1156–57 (footnote omitted).

There are also instances where the doctrines of procedural default and exhaustion intertwine. For instance, if a petitioner's federal claim is unexhausted, a district court will traditionally dismiss it without prejudice or stay the cause of action to allow the petitioner to first avail himself of his state remedies. *See Rose v. Lundy,* 455 U.S. 509, 519–20, 102 S.Ct. 1198, 1204, 71 L.Ed.2d 379 (1982). But "if it is clear from state law that any future attempts at exhaustion [in state court] would be futile" under the state's own procedural rules, a court can simply find that the claim is "procedurally defaulted, even absent a state court determination to that effect." *Bailey v. Nagle,* 172 F.3d 1299, 1305 (11th Cir.1999) (citation omitted).

B. Exceptions to the Procedural Default Doctrine

"[A]n adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice." *Coleman v. Thompson,* 501 U.S. 722, 749–50, 111 S.Ct. 2546, 2564–65, 115 L.Ed.2d 640 (1991) (citations and internal quotation marks omitted); *see also Murray v. Carrier,* 477 U.S. 478, 496, 106 S.Ct. 2639, 2649, 91 L.Ed.2d 397 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").

The "cause and prejudice" exception is framed in the conjunctive, and a petitioner must prove both cause and prejudice. To show cause, a petitioner must prove that "some objective factor external to the defense impeded counsel's efforts" to raise the claim previously. *Carrier,* 477 U.S. at 488, 106 S.Ct. at 2645. Examples of such objective factors include:

> ... interference by officials that makes compliance with the State's procedural rule impracticable, and a showing that the factual or legal basis for a claim was not

> reasonably available to counsel. In addition, constitutionally ineffective assistance of counsel ... is cause. Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default.

McCleskey v. Zant, 499 U.S. 467, 493–94, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991) (internal quotation marks and citations omitted). As for prejudice, a habeas petitioner must show "not merely that the errors ... created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady,* 456 U.S. 152, 170, 102 S.Ct. 1584, 1596, 71 L.Ed.2d 816 (1982) (emphasis in original).

A petitioner may also escape a procedural default bar if he "can demonstrate a sufficient probability that [the court's] failure to review his federal claim will result in a fundamental miscarriage of justice." *Edwards v. Carpenter,* 529 U.S. 446, 451, 120 S.Ct. 1587, 1591, 146 L.Ed.2d 518 (2000). To make such a showing, a petitioner must establish that either: (1) "a constitutional violation has probably resulted in the conviction of one who is actually innocent," *Smith v. Murray,* 477 U.S. 527, 537–38, 106 S.Ct. 2661, 2668, 91 L.Ed.2d 434 (1986) (quoting *Carrier,* 477 U.S. at 496, 106 S.Ct. at 2650), or (2) the petitioner shows "by *clear and convincing* evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." *Schlup v. Delo,* 513 U.S. 298, 323, 115 S.Ct. 851, 865, 130 L.Ed.2d 808 (1995) (emphasis in original) (quoting *Sawyer v. Whitley,* 505 U.S. 333, 336, 112 S.Ct. 2514, 2517, 120 L.Ed.2d 269 (1992)).

C. AEDPA Review of State Court Decisions Under § 2254(d)

***13** Because most of the claims upon which Samra seeks habeas relief under § 2254 were adjudicated on the merits in state courts, this Court is restricted in its ability to grant relief on those claims by § 2254(d). The AEDPA "imposes a highly deferential standard for evaluating state-court rulings" and "demands that state-court decisions be given the benefit of the doubt." *Guzman,* 663 F.3d at 1345 (internal quotation marks and citation omitted). To grant Samra's habeas petition, this Court must not only find that his constitutional claims are meritorious, but also that the state court's resolution of those claims:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)(1)-(2); *see also Boyd v. Allen,* 592 F.3d 1274, 1292 (11th Cir.2010) (quoting § 2254(d)). The burden of showing that an issue falls within § 2254(d)(1) or (d)(2) is upon the petitioner. *See Woodford v. Visciotti,* 537 U.S. 19, 25, 123 S.Ct. 357, 360, 154 L.Ed.2d 279 (2002). Section 2254(d)(1)'s "contrary to" and "unreasonable application of" clauses have independent meanings. *See Alderman v. Terry,* 468 F.3d 775, 791 (11th Cir.2006) ("[T]he 'contrary to' and 'unreasonable application' clauses are interpreted as independent statutory modes of analysis.") (citation omitted). A state court's decision is contrary to "clearly established precedents [of the Supreme Court of the United States] if it applies a rule that contradicts the governing law set forth in [the Court's] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of th[e] Court but reaches a different result." *Brown v. Payton,* 544 U.S. 133, 141, 125 S.Ct. 1432, 1438, 161 L.Ed.2d 334 (2005) (citation omitted). On the other hand, to determine whether a state court's decision is an "unreasonable application" of clearly established federal law, the Supreme Court has stated:

> The pivotal question is whether the state court's application of the [relevant constitutional] standard was unreasonable ... For purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law. A state court must be granted a deference and latitude that are not in operation when the case involves review under the [relevant constitutional] standard itself.
>
> A state court's determination that a claim lacks merits precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. And as the [Supreme Court] has explained, evaluating whether a rule application was unreasonable requires considering the rule's specificity.

> The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.

***14** *Harrington v. Richter,* 562 U.S. 86, 131 S.Ct. 770, 785–86, 178 L.Ed.2d 624 (2011) (citation and quotation marks omitted) (emphasis in original); *see also Schriro v. Landrigan,* 550 U.S. 465, 473, 127 S.Ct. 1933, 1939, 167 L.Ed.2d 836 (2007) ("The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."); *Guzman,* 663 F.3d at 1346 ("Ultimately, before a federal court may grant habeas relief under § 2254(d), 'a state prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.' ") (quoting *Harrington,* 131 S.Ct. at 786–77). [6]

D. *De Novo* Review When the State Courts Fail to Resolve the Merits of a Claim Adequately Raised

When a state court does not resolve the merits of a claim that has been adequately presented to it by a petitioner, § 2254(d)(1)'s requirement that the federal court defer to state court decisions that are not contrary to, or an unreasonable application of, clearly established federal law, does not apply. As explained by the Eleventh Circuit:

> As the Florida courts failed to resolve the merits of Davis's claim, the present controversy falls outside of § 2254(d)(1)'s requirement that we defer to state court decisions that are not contrary to, or an unreasonable application of, clearly established federal law. *See* [28 U.S.C. § 2254(d)(1)]; *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 2542, 156 L.Ed.2d 471 (2003) (When a state court denies relief by making an unreasonable application of the first prong of the test for ineffective assistance of counsel and thus never reaches the second prong, application of the second prong in federal habeas proceedings is de novo.); *Wright v. Sec'y for the Dep't of Corr.,* 278 F.3d 1245, 1254 (11th Cir.2002) (interpreting § 2254(d)(1)'s requirement of deference with respect to federal claims "adjudicated on the merits in State court proceedings" (internal quotation marks omitted)), cert. denied, 538 U.S. 906, 123 S.Ct. 1511, 155 L.Ed.2d 225 (2003).
>
> *Davis v. Sec'y for Dept. of Corr.,* 341 F.3d 1310, 1313 (11th Cir.2003) (per curiam). Under these circumstances, this Court's review of such a claim is *de novo. See id.*

The court now turns to Samra's constitutional claims with these principles in mind.

IV. SAMRA'S CLAIMS

A. Samra's claim that he was denied his right to a fair and impartial jury under the Sixth and Fourteenth Amendments when the trial court denied his motion for a change of venue

Samra's first claim is that the trial court's denial of his motion for a change of venue on grounds of prejudicial pretrial publicity deprived him of an impartial jury and a fair trial. Samra raised this claim on direct appeal before the ACCA, and the ACCA denied it on the merits. *See Samra,* 771 So.2d at 1113–16. At the time, the Alabama Supreme Court automatically granted certiorari review, but the Court did not comment further on the venue issue and only made a general statement of affirmance. *See Ex Parte Samra,* 771 So.2d at 1122 ("We have found no error in either the guilt phase of the trial or the sentencing phase of the trial that adversely affected the defendant's rights.").

***15** Because the ACCA's determination was on the merits, the claim is subject to AEDPA review by this Court. *See* 28 U.S.C. § 2254(d). Samra contends that the ACCA's decision is contrary to, or involved an unreasonable application of, the United States Supreme Court's decisions on prejudicial pretrial publicity, particularly *Sheppard v. Maxwell,* 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966), *Rideau v. Louisiana,* 373 U.S. 723, 83 S.Ct. 1417, 10 L.Ed.2d 663 (1963), *Irvin v. Dowd,* 366 U.S. 717, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961), and *Murphy v. Florida,* 421 U.S. 794, 95 S.Ct. 2031, 44 L.Ed.2d 589 (1975). He also argues that the decision involved an unreasonable application of the facts in light of the evidence in the record because the ACCA failed to consider the "totality of the circumstances" of Samra's case and the surrounding media attention.

In analyzing whether a defendant's trial was deprived of fundamental fairness by pretrial publicity or an inflamed community atmosphere, courts consider both an "actual prejudice" standard and a "presumed prejudice"

standard. *See Coleman v. Zant,* 708 F.2d 541, 544 (11th Cir.1983) (citing *Irvin, Sheppard, Rideau,* and *Murphy, supra*). On direct appeal, the ACCA addressed both standards, stating: " 'In connection with pretrial publicity, there are two situations which mandate a change of venue: 1) when the accused has demonstrated "actual prejudice" against him on the part of the jurors; 2) when there is "presumed prejudice" resulting from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected.' " *Samra,* 771 So.2d at 1113 (quoting *Hunt v. State,* 642 So.2d 999, 1042–43 (Ala.Crim.App.1993) (citing, in turn, *Sheppard, Rideau,* and *Coleman, supra*)).

The ACCA first discussed presumed prejudice, noting that under *Sheppard* and *Rideau,* Samra had to meet the "heavy burden" of establishing "1) that the pretrial publicity is sufficiently prejudicial and inflammatory and 2) that the prejudicial pretrial publicity saturated the community where the trials were held." *Id.* at 1114–15. The ACCA held that Samra failed to meet this burden:

> In support of his motion for a change of venue, [Samra] introduced testimony concerning a telephone poll of 305 Shelby County citizens about the case. Of the people responding to the poll, 83.9 percent indicated that they had heard of the case. Of the 83.9 percent who had heard of the case, 20 percent indicated that they thought [Samra] was guilty, 6.6 percent thought [Samra] was probably guilty, 2.3 percent thought [Samra] was probably not guilty, and 5.9 percent thought [Samra] was not guilty. However, a majority, 65.2 percent, were uncertain as to [Samra's] guilt at that time. Also, the people conducting the poll did not ask the respondents whether they could set aside what they had heard about the case and decide it based solely on the evidence presented in court. [Samra] also introduced numerous newspaper articles from local newspapers and portions of newscasts by local television stations covering the case from its inception through the trial, including information as to the area covered by the media.
>
> ***16** Although [Samra] presented evidence that indicated that many of the citizens of Shelby County had heard about the case through the media, he has not shown that the information presented by the media was prejudicial. We have examined the media materials presented to the trial court, and we find that most of the reports were factual and relatively objective rather than accusatory, inflammatory, or sensational. Therefore, we conclude that the materials did not contain prejudicial information. Further, [Samra] did not prove that the media attention inflamed or saturated the community so that there was an emotional tide against him. Thus, he has not shown that the pretrial publicity in this case was so inherently or presumptively prejudicial as to constitute one of those "extreme situations" that warrant a presumption of prejudice from pretrial publicity.

Id. at 1115.

The ACCA next evaluated whether the jury was actually prejudiced against Samra, noting that to establish actual prejudice under *Irvin, supra,* Samra must show that "one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty" and that "these jurors ... could not have laid aside these preformed opinions and rendered a verdict based on the evidence presented in court." *Id.* (citation and internal quotation marks omitted) (brackets in original omitted). The ACCA held that Samra had not established actual prejudice:

> [Samra] has not shown any actual prejudice resulting from the pretrial publicity. Through the use of a jury questionnaire and individual voir dire, the trial court and the attorneys extensively questioned the veniremembers about their knowledge about the case and any effect pretrial publicity may have had on their ability to be fair and impartial. Many of the veniremembers were familiar with the facts of, and the circumstances surrounding, this offense. However, only three indicated that they were biased against [Samra] based on information they obtained from the media, and the trial court excused those veniremembers for cause. The remainder of the jurors who had become familiar with the case through the media indicated, upon further questioning, that they could set aside anything they had read or heard about the case and render a fair and impartial verdict based solely upon the evidence presented at trial. In denying [Samra's] motion, the trial court specifically stated:
>
> "With that said, the court will deny the motion for change of venue. Specifically, the court finds the best standard by which to measure that question or that issue is the standard of the statement of the jurors. We have had 70 some-odd jurors who have told us

that they can decide this without regard to what they may have seen or heard.

There is no evidence from which the court can infer that any of those jurors are being anything other than completely truthful. And, in fact, the court finds that there is a basis to infer that they are being truthful.

***17** With that said, the motion for change of venue is denied."

(R. 1391–92.) Thus, [Samra] has not shown that any of the jurors were actually prejudiced against him.

Id. at 1116.

Nothing in the ACCA's decision is contrary to, or involved an unreasonable application of, clearly established federal law. Samra's invocation of the Supreme Court's landmark cases on prejudicial pretrial publicity falls short, as it was not unreasonable for the ACCA to conclude that the evidence of trial publicity in this case did not rise to the level of the "carnival atmosphere" discussed in *Sheppard,* 384 U.S. at 354, 86 S.Ct. at 1518 ("For months the virulent publicity about Sheppard and the murder had made the case notorious. Charges and countercharges were aired in the news media besides those for which Sheppard was called to trial. In addition, only three months before trial, Sheppard was examined for more than five hours without counsel during a three-day inquest which ended in a public brawl. The inquest was televised live from a high school gymnasium seating hundreds of people."); *Rideau,* 373 U.S. at 725–27, 83 S.Ct. at 1418–20 (describing as a "spectacle" the fact that "[w]hat the people of Calcasieu Parish saw on their television sets was Rideau [the defendant], in jail, flanked by the sheriff and two state troopers, admitting in detail the commission of the robbery, kidnapping, and murder, in response to leading questions by the sheriff" and thus deciding not to examine the voir dire for actual prejudice because the trial was but a "hollow formality"); or *Irvin,* 366 U.S. at 727, 81 S.Ct. at 1645 ("An examination of the 2,783–page voir dire record shows that 370 prospective jurors or almost 90% of those examined on point ... entertained some opinion as to guilt—ranging in intensity from mere suspicion to absolute certainty.... A number admitted that, if they were in the accused's place in the dock and he in theirs on the jury with their opinions, they would not want him on the jury.... [O]f the voir dire examination of a majority of the jurors finally placed in the jury box [,][e]ight out of the 12 thought petitioner was guilty.").

Nor was the ACCA's decision based on an unreasonable determination of the facts in light of the evidence presented. In support of his argument that presumed prejudice existed, Samra argues that the articles from local newspapers, portions of video newscasts covering Samra's case, and the statistical evidence provided by Dr. Davis should have demonstrated to the state courts that an overwhelming number of prospective jurors believed Samra to be guilty before they were even empaneled. With regard to Dr. Davis's poll establishing the existence of presumed prejudice, none of the individuals polled were asked whether they could set aside any preconceived notions and decide the case based only on the evidence before them. With regard to the media exhibits, this Court has examined them and agrees with the ACCA that they are largely objective in nature rather than inflammatory or prejudicial. "T he fact that a case generates widespread publicity does not, in and of itself, warrant a change of venue." *Baldwin v. Johnson,* 152 F.3d 1304, 1314 (11th Cir.1998). Indeed, "the principle of presumed prejudice 'is rarely applicable and reserved for extreme situations.' " *Mills v. Singletary,* 63 F.3d 999, 1010 (11th Cir.1995) (citation omitted). The Supreme Court has recently explained that in each of its cases where it overturned a conviction due to a presumption of prejudice from pretrial publicity, those " 'conviction[s] [had been] obtained in a trial atmosphere that was utterly corrupted by press coverage.' " *Skilling v. United States,* 561 U.S. 358, 380, 130 S.Ct. 2896, 2914, 177 L.Ed.2d 619 (2010) (citation omitted) (alteration in original omitted). The Court reiterated that those decisions, however, " 'cannot be made to stand for the proposition that juror exposure to ... news accounts of the crime ... alone presumptively deprives the defendant of due process.' " *Id.* (citation omitted); *see also Murphy,* 421 U .S. at 800 n. 4, 95 S.Ct. at 2036 n. 4 (distinguishing "largely factual publicity from that which is invidious or inflammatory," and noting that "[t]o ignore the real differences in the potential for prejudice would not advance the cause of fundamental fairness, but only make impossible the timely prosecution of persons who are well known in the community...."). Samra emphasizes that the District Attorney was quoted in news articles stating that he would pursue the death penalty because of the horrific nature of the crime. This fact does not show that the nature of the publicity was inflammatory, so as to lodge this case within the

narrow band of "extreme situations" where prejudice may be presumed. *See Gaskin v. Sec'y, Dept. of Corr.,* 494 F.3d 997, 1005 (11thC ir.2007) (no habeas error in denial of petitioner's motion for change of venue, even though articles published in local paper "may have been somewhat prejudicial or inflammatory").

***18** The Court also finds that the ACCA's conclusion that no actual prejudice existed was not unreasonable in light of the evidence before the state courts. The record reveals that the voir dire proceedings were extensive. The trial court granted Samra's request to have the venire members complete questionnaires. Questioning of the potential jurors lasted four days. The trial court questioned each juror individually about any opinion the juror had of the death penalty, and any knowledge the juror might have had of the facts of the case. Counsel for Samra and for the State were then allowed to question each potential juror. Many of the prospective jurors stated that they had heard something about the murders when they occurred one year earlier, but many did not remember details of the crime. Importantly, despite some being familiar with the media coverage of the case, none of the actual jury members stated that they could not render a verdict based solely on the evidence before them. As discussed by the Supreme Court, such a fact precludes a finding of actual prejudice:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective jurors' impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Irvin, 366 U.S. at 723, 81 S.Ct. at 1642–43; *see also Murphy,* 421 U.S. at 799–800, 95 S.Ct. at 2036 ("Qualified jurors need not [ ] be totally ignorant of the facts and issued involved."). Here, as in *Murphy,* "[t]he voir dire ... indicates no such hostility to petitioner by the jurors who served in his trial as to suggest a partiality that could not be laid aside ." 421 U.S. at 800, 95 S.Ct. at 2036.

Accordingly, habeas relief is unavailable with regard to this claim because the state courts' treatment of the change of venue issue is not contrary to, or an unreasonable application of, Supreme Court precedent; nor was it an unreasonable determination of the facts based on the evidence before it. *See* 28 U.S.C. § 2254(d).

B. Samra's claim that he was denied his Sixth Amendment right to effective assistance of trial and appellate counsel

Samra's second claim is that Bel l's performance was constitutionally ineffective for various reasons. Before addressing these claims, a discussion of the general standard for ineffective assistance of counsel claims is warranted.

1. General Standard for Ineffective Assistance of Counsel Claims

In *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), the Supreme Court established the following two-pronged standard for judging, under the Sixth Amendment, the effectiveness of attorneys who represent criminal defendants at trial or on direct appeal:

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a

> breakdown in the adversary process that renders the result unreliable.

***19** *Id.* at 687, 104 S.Ct. at 2064.

Because *Strickland* 's preceding two-part test is clearly framed in the conjunctive, a petitioner bears the burden of proving both "deficient performance" and "prejudice" by "a preponderance of competent evidence." *Chandler v. United States,* 218 F.3d 1305, 1313 (11th Cir.2000) (en banc); *see also Holladay v. Haley,* 209 F.3d 1243, 1248 (11th Cir.2000) ("Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, [ ] or vice versa."). Further, when assessing ineffective assistance of counsel claims:

> [I]t is important to keep in mind that in addition to the deference to counsel's performance mandated by *Strickland,* the AEDPA adds another layer of deference—this one to a State court's decision—when we are considering whether to grant federal habeas relief from a State court's decision. Thus, [a petitioner] not only has to satisfy the elements of the *Strickland* standard, but he must also show that the State court applied *Strickland* to the facts of his case in an *objectively unreasonable manner.*

Williams v. Allen, 598 F.3d 778, 789 (11th Cir.2010) (brackets in original omitted) (citations and quotation marks omitted) (emphasis in original).

In order to establish deficient performance, a habeas petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064. That reasonableness is judged against "prevailing professional norms." *Id.,* 104 S.Ct. at 2065. Moreover, under *Strickland,* lower federal courts must be "highly deferential" in their scrutiny of counsel's performance. As the *Strickland* court outlined:

> Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

***20** *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065 (citations and quotation marks omitted).

Simply put, a habeas petitioner "must establish that no competent counsel would have taken the action that his counsel did take" to overcome the presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Chandler,* 218 F.3d at 1315. The reasonableness of counsel's performance is judged from

the perspective of the attorney, at the time of the alleged error, and in light of all the circumstances. *See, e.g., Newland v. Hall,* 527 F.3d 1162, 1184 (11th Cir.2008) ("We review counsel's performance 'from counsel's perspective at the time,' to avoid 'the distorting effects of hindsight.' ") (quoting *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065).

To satisfy the prejudice prong, a habeas petition "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. Stated differently, "[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect." *Johnson v. Alabama,* 256 F.3d 1156, 1177 (11th Cir.2001) (citations and quotation marks omitted). Further, the fact that counsel's "error had some conceivable effect on the outcome of the proceeding" is insufficient to show prejudice. *Strickland,* 466 U.S. at 693, 104 S.Ct. at 2067. Therefore, "when a petitioner challenges a death sentence, 'the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Stewart v. Sec'y, Dept. of Corr.,* 476 F.3d 1193, 1209 (11th Cir.2007) (quoting *Strickland,* 466 U.S. at 695, 104 S.Ct. at 2069).

Because *Strickland* and § 2254(d) both mandate standards that are " 'highly deferential' ", "when the two apply in tandem, review is 'doubly' so." *Harrington,* 131 S.Ct. at 788 (citations omitted). The inquiry is not then "whether counsel's actions were reasonable," but is instead "whether there is any reasonable argument that counsel satisfied *Strickland* 's deferential standard." *Id.* The court must determine "whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland* 's standard." *Id.* at 785. This "[d]ouble deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." *Evans v. Sec'y, Fla. Dept. of Corr.,* 699 F.3d 1249, 1268 (11th Cir.2012).

***21** Finally, "[s]tate court findings of historical facts made in the course of evaluating an ineffectiveness claim are subject to a presumption of correctness under 28 U.S.C. § 2254(d)." *Thompson v. Haley,* 255 F.3d 1292, 1297 (11th Cir.2001).

2. Samra's claim that he was denied effective assistance of trial counsel at the penalty phase

Samra raises three sub-claims to support his assertion that he received ineffective assistance of counsel at the penalty phase of his trial. The first of these claims is that Bell failed to investigate and introduce evidence of Samra's purported "brain damage and organic brain dysfunction" for mitigation purposes. The second claim is that Bell presented evidence in mitigation that had the unintended effect of becoming aggravating evidence. The third claim is that Bell failed to object to evidence regarding wall-etchings and gang-type writings on the wall of Duke's bedroom and tattoos on Samra's arm.

Samra presented each of these claims in his Rule 32 Petition and again to the ACCA on appeal from the Rule 32 Court's denial of his petition. The ACCA denied each of the claims on the merits. Accordingly, the claims are subject to AEDPA review by this Court.

a. Samra's claim that Bell failed to adequately investigate and introduce evidence of "brain damage and organic brain dysfunction"

Samra contends that Bell's performance was deficient because he failed to follow the advice of Dr. Scott, the psychiatrist he hired to develop mitigating evidence, to have Samra submit to further neuropsychological testing. Samra argues that further investigation would have revealed that Samra suffers from "organic brain damage" and "brain dysfunction." To support his contention that he was prejudiced by Bel l's alleged ineffectiveness, Samra refers to the testimony of the two doctors he offered as witnesses at the evidentiary hearing on this matter during his Rule 32 proceedings: Dr. Gelbort, who performed neurological testing on Samra, and Dr. Mountz, who performed a SPECT scan. Dr. Gelbort testified at the Rule 32 hearing that Samra was functioning in the bottom range of normal or the top range of the brain-impaired population, and Dr. Mountz testified that Samra had diminished brain flow (that was in the low range of normal) in the posterior frontal superior temporal region of the brain. Samra's position is that if the results of

the neurological testing performed by Dr. Gel bort and of the SPECT scan performed by Dr. Mountz had been available to Dr. Scott at trial, his diagnosis of Samra more likely than not would have been that Samra suffered brain dysfunction, Bell could have then presented the results to the jury in mitigation on behalf of Samra, and the jury would not have imposed the death penalty.

This Court's task under § 2254(d)(1) is to determine whether the ACCA's rejection of this claim was contrary to, or an unreasonable application of, the United States Supreme Court cases on ineffective assistance of counsel offered by Samra, namely *Strickland, supra, Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), *Porter v. McCollum,* 558 U.S. 30, 130 S.Ct. 447, 175 L.Ed.2d 398 (2009) (per curiam), *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), *Tennard v. Dretke,* 542 U.S. 274, 124 S.Ct. 2562, 159 L.Ed.2d 384 (2004), and *Sears v. Upton,* 561 U.S. 945, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010) (per curiam). Thus, the Court first turns to the ACCA's decision.

***22** In considering this claim, the ACCA discussed the *Strickland* standard and applied it to Samra's circumstances, as follows:

> Samra next argues that trial counsel was ineffective for not conducting an investigation on whether he was brain-damaged. Specifically, Samra argues that because an investigation would have established that he suffers from "organic brain damage" and "brain dysfunction," his counsel's failure to investigate this strategy prevented him from introducing this evidence at trial, thereby avoiding imposition of the death penalty. Thus, Samra argues, because trial counsel did not pursue this strategy, counsel rendered ineffective assistance.
>
> Samra's trial counsel, Richard Bell, executed a lengthy affidavit concerning his strategy in preparing Samra's defense. Bell offered additional evidence concerning his trial preparation, investigation, and strategy through testimony presented at the November 2003 evidentiary hearing on Samra's petition. The record indicates that Bell was an experienced criminal defense attorney, and that he had tried a number of capital-murder cases. He was aware that a crucial part of trial preparation was to determine whether Samra had any mental health conditions that could be presented through the testimony of a mental health expert in support of either an affirmative defense during the guilt phase of Samra's trial or as mitigation during the penalty phase. To this end, Bell requested funds for a mental health expert.FN 2 Bell then sought out an experienced mental health expert that would not be subject to an attack as merely a "hired gun." After receiving recommendations from a number of nationally known criminal defense attorneys, Bell contacted Dr. Charles Scott, a forensic neuropsychiatrist affiliated with the Department of Psychiatry and Neurology at Tulane University Medical Center. Bell traveled to New Orleans, Louisiana, to interview Dr. Scott. Based upon that interview, Bell concluded that Dr. Scott would be a highly-qualified expert witness, and one who could not be attacked as simply "a hired gun."
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> FN2. This request was made on an ex parte basis, in order to protect the confidentiality of his trial strategy.
>
> Dr. Scott then performed an extensive evaluation of Samra. He interviewed Samra and his parents; he also reviewed Samra's educational and medical records. Afterwards, Dr. Scott prepared a lengthy written report setting out Samra's social and educational history, alcohol and drug history, medical history, Samra's description of his involvement in the FOLKS gang, and Samra's mental history as it related to the crime. However, Dr. Scott's ultimate conclusion was that Samra was not suffering from any psychiatric condition, and, further, that Samra was capable of assisting in the crime and that he knew the wrongfulness of his conduct. Because Bell believed that Dr. Scott would be a highly credible witness, he concluded that if Dr. Scott were called to testify, his testimony would be very unfavorable testimony to Samra's defense. Accordingly, Bell decided not to call Dr. Scott as a witness.
>
> ***23** During the penalty phase of Samra's trial, Bell attempted to "humanize" Samra, in order to mitigate the atrocious facts of the crime. Bell's aim was to show the jury that Samra had a family and that his parents loved him. Bell presented the testimony of Samra's aunt, mother, and father. Samra's aunt testified that she had known Samra all of his life. According to her, Samra was a loving person who had never displayed any violence. To her knowledge, there was nothing in Samra's life that would have predicted any violent or otherwise deviant behavior.

Samra['s] parents likewise testified as to their son's background. Samra's father testified that although his son attended "regular" schools, he participated in "special education classes" as well, and was "behind" developmentally as a child. Mr. Samra testified that until the age of 16, Samra had no behavioral or disciplinary problems and was a loving and obedient child. However, Mr. Samra testified that after Samra's junior year in high school, he discovered that his son was using marijuana. After several incidents where Mr. Samra attempted to get his son to stop using marijuana, he told Samra that he could either seek professional assistance to stop using marijuana or else he could leave home. Samra elected to leave home, dropping out of high school during his senior year. Mr. Samra suspected that, based on the way his son dressed, he might be hanging around with "gang-type people." Samra, however, denied such involvement.

Samra's mother testified that during her son's early childhood, there were no indications of violence. Mrs. Samra stated that her son was "a little slower" than other children his age, and that he was easily frustrated. Additionally, he was diagnosed with having learning disabilities.

Bell had no evidence that Samra had ever been physically abused or otherwise mistreated by his parents. Based on Bell's investigation of Samra's background, he had a middle-class upbringing and was not subjected to the abject poverty that had been the situation in some of the other capital cases that Bell had handled.

As a result, Bel l's defense strategy at the guilt phase was twofold: (1) to present evidence to show that no sane person could have committed this crime; and (2) to present evidence that Samra was led into this crime by Mark Anthony Duke. Specifically, Bell attempted to show that Samra was led into committing this crime due to his and Duke's involvement with the FOLKS gang. To support this strategy, Bell presented the testimony of (1) Dr. Kathleen Ronan, a psychologist who had examined Samra at Taylor Hardin Secure Medical Facility; (2) Dr. George Twente; and (3) Sara Woodruff, Samra's friend and fellow gang member. Drs. Ronan and Twente's testimony established that Samra functioned at the borderline between low average and mild mental retardation, and that he was led into committing this crime as a result of gang influence. Bell then attempted to use Sara Woodruff's testimony to establish that Duke was the "ringleader" because he was angry with his father, and that Samra was merely influenced by Duke to commit this crime.

***24** As evidenced from the aforementioned legal principles, when reviewing claims of ineffective assistance of counsel, this Court gives counsel's performance a high degree of deference, particularly where trial strategy is involved. *See Ingram v. State,* [Ms. CR–03–1707, September 29, 2006] —— So.2d ——, —— (Ala.Crim.App.2006) (citing *Strickland v. Washington,* 466 U.S. at 690–91); *accord Chandler v. United States,* 218 F.2d 1305, 1314 (11th Cir.2000). A claim that trial counsel was ineffective because he failed to adequately investigate can constitute deficient performance when counsel totally fails to inquire into the defendant's past or present behavior or life history. *See, e.g., Whitehead v. State,* [Ms. CR–04–2251, June 30, 2006] —— So.2d ——, —— (Ala.Crim. A pp.2006) (quoting *Ex Parte Lane,* 775 So.2d 847, 853–54 (Ala.2000)). However, as we made clear in *Ingram v. State:* " 'There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.' " —— So.2d at —— (quoting *Strickland v. Washington,* 466 U.S. at 689).

Notwithstanding Bell's efforts to seek out a qualified expert witness such as Dr. Scott, Samra argues that trial counsel's performance was deficient because he ignored Dr. Scott's recommendations for additional testing. Dr. Scott's report recommended a "complete neuropsychological evaluation, neurology consultation and brain imaging (such as MRI or PET scanning)." (C. 335.) However, Dr. Scott's report did not mention a SPECT test be performed on Samra.FN3 Bell stated, that to the best of his recollection that an MRI was performed on Samra and that it showed no medical abnormalities. Bell also investigated to see if any Birmingham-area hospital had a PET machine and discovered that no hospital had one.

FN 3. Some mention of a SPECT test was made in an unsigned affidavit prepared for Dr. Scott's signature that was to be filed with a motion for funds. However, this request was never made.

Clearly, this is not a case where counsel failed to conduct any investigation into possible mitigating evidence. *See Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). There is absolutely no indication that this case falls within the scope of the Supreme Court's holding in *Wiggins,* or any of the other decisions cited by Samra in brief. Indeed, after applying the factors used by the Supreme Court, we are unable to say that Samra's trial counsel rendered ineffective assistance.

First, we find no instances of attorney error or malpractice in this case. Samra's trial counsel had a coherent, well thought-out defense strategy of showing that Samra was influenced by his co-defendant's more dominant personality and that Samra had no history of violent crime until becoming friends with Mark Anthony Duke. Additionally, none of the public records corroborates Samra's claim that he had "organic brain damage," unlike in *Wiggins,* where public records corroborated the mitigating evidence. Although Samra's medical records suggest some childhood neurological deficits, those records also indicate that, if additional treatment was mandated, he would have received further treatment.

***25** Second, the additional mitigating evidence presented in this case is not as compelling as the evidence presented in *Wiggins.* Samra offered the testimony of Drs. Mountz and Gelbort at his Rule 32 evidentiary [sic]. Both men were retained expert witnesses who had testified on numerous occasions. Dr. Mountz's testimony could only establish that Samra had diminished brain flow that placed him in the low range of normal. Dr. Gelbort testified that the test results placed Samra in the borderline range of low-normal to mildly brain-impaired.

Third, when the gravity of the aggravating circumstances when [sic] reweighed against the additional mitigating evidence presented at the Rule 32 evidentiary hearing, we do not believe that this additional evidence would have influenced the jury's appraisal of Samra's moral culpability. Thus, the facts of this case do not fall within the scope of either *Wiggins v. Smith* or *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). *See also Rutherford v. Crosby,* 385 F.3d 1300, 1315 (11th Cir.2004), cert. denied, 544 U.S. 982, 125 S.Ct. 1847, 161 L.Ed.2d 738 (2005). Quite simply, because the additional mitigating evidence was less than compelling and because it in no way altered the aggravating circumstance that was found by the sentencer, we conclude that there is no reasonable probability that the additional mitigating evidence offered during the Rule 32 evidentiary hearing would have resulted in a different sentence.

In short, this Court can find neither that Samra's trial counsel's performance was deficient nor that his defense was prejudiced as a result of counsel's performance. As previously noted, the fact that Bell chose to pursue a particular trial strategy, rather than the one proposed by Samra's Rule 32 counsel, does not render Bel l's performance deficient. Nor does Bel l's failure to offer additional evidence of Samra's mental capacities establish a level of prejudice that would warrant post-conviction relief. Indeed, given the circumstances of this case, we do not believe that there was any reasonable probability that the sentencer would have concluded that the balance of the aggravating circumstances against the mitigating circumstances would have warranted a sentence other than death. *Strickland v. Washington,* 466 U.S. at 695. Indeed, we note the circuit court's findings as to this matter:

> There is no reasonable probability that the balance of aggravating and mitigating circumstances that led to the imposition of the death penalty in this case would have been different had trial counsel introduced the evidence complied and presented in this Rule 32 proceeding. The aggravating circumstance that was found at the penalty phase was the murder was especially heinous, atrocious, and cruel, especially when compared to other capital felonies. This Court made the following findings regarding the application of this aggravating circumstance:
>
> WHEREAS, the Court hereby finds that the offense was particularly heinous, atrocious and cruel when compared to other capital offenses. Evidence showed at trial that the victims in this case were killed in a very cruel and heinous manner. The minor children's throats were actually cut and according to testimony of the medical examiner, they drowned in their own blood. The photographs and other demonstrative evidence in this case leads to one and only one conclusion, that the manner in which the victims were

killed was much more heinous and atrocious and cruel than would be necessary in any killing.

***26** This case stands out as particularly heinous, atrocious and cruel when it is considered that at least one victim, according to the admission of Defendant, begged not to be killed. All of the victims died very painful and brutal deaths. The victims apparently struggled for life and breath and that very struggle caused one or more of the victims to drown in their own blood.

The record is clear that when compared to other capital cases, the circumstances in this case make it particularly heinous, atrocious and cruel.

Clerk's Record at 516.

In light of the brutal nature of this crime against two adult victims and two children, ages six and seven, who had their throats cut, this Court finds no reasonable probability that the mitigating circumstances gathered and presented in connection with Samra's Rule 32 proceedings would have altered the balance of aggravating and mitigating circumstances. First, none of the evidence developed in connection with these Rule 32 proceedings served to alter in any way the aggravating circumstance of a heinous and atrocious crime that supported the imposition of the death penalty. Samra offered mothering [sic] at the Rule 32 evidentiary hearing to alter the evidence that demonstrated he shot Dedra Hunt in the face and then went upstairs and cut the throat of one of the children while she was begging for her life and fighting for her life by trying to deflect the knife away from her throat.

Second, it is not [at] all clear how the evidence presented at the Rule 32 hearing would have been helpful to Samra's efforts to secure a life without parole sentence. Although the evidence presented at the Rule 32 evidentiary hearing was argued to be mitigating, it is not really clear that it would be accepted in that light. Dr. Mountz admitted that there was no research methodology to show that a SPECT scan result can allow anyone to draw conclusions about the reasons that compel an individual to commit murder. Dr. Mountz also said that the SPECT results are irrelevant to whether Samra appreciated the wrongfulness of his actions or whether he planned the murders or whether he tried to hide evidence in an effort to conceal the murders. Both Dr. Mountz and Dr. Mayberg stated that Samra's brain scan could have looked much different at the time of the crime. There was no evidence presented as to how diminished brain flow contributes to a murderer's judgment or insight.

Third, some of the evidence presented at the Rule 32 evidentiary hearing was known to the jury and the sentencing judge. Samra's trial counsel presented evidence that his IQ scores were in the borderline range of intellectual functioning. Given that the battery of neuropsychological tests only affirms this fact that was already before the jury, Samra's trial counsel's decision not to seek further neuropsychological testing did not prejudice Samra. The trial court rejects the opinion that Samra suffers from organic brain dysfunction because the impairments shown on the neuropsychological testing is further evidence of his IQ and not any brain dysfunction; because the SPECT scan interpretation of Dr. Mayberg shows that the results were normal; because there is no evidence that this alleged condition of reduced blood flow to the brain existed at the time of the offense; and, because even if Dr. Mountz was correct in defining Samra's SPECT scan as abnormal, the abnormality was not in the portion of the brain that controls the functioning that Dr. Gelbort found as impaired.

***27** In conclusion, this Court finds no reasonable probability that the balance of aggravating and mitigating circumstances underlying Samra's death sentence would have been different if the judge and jury had heard the evidence presented at the Rule 32 evidentiary hearing. We note that many death penalty cases involve murders that are carefully planned, or accompanied by torture, rape or kidnapping. *Dobbs v. Turpin,* 142 F.3d 1383, 1390 (11th Cir.1998) (citation omitted). "In these types of cases, this Court has found that the aggravating circumstances of the crime outweigh any prejudice caused when a lawyer fails to present mitigating evidence." *Id.* (citing *Francis v. Dugger,* 908 F.2d 696, 703–04 (11th Cir.1990) (finding that the failure to present mitigating evidence of a deprived and abusive childhood did not prejudice capital defendant at trial for torture-murder of government informant). The less than compelling evidence offered by Samra does

not mitigate this horrific crime that resulted in four murders.

(C. 793–797.)

Based on the foregoing, the circuit court correctly rejected Samra's claim that trial counsel was ineffective for not presenting additional evidence as to Samra's purported brain dysfunction.

(C.R. Vol. 49, at 113–21).

Nothing in the ACCA's well-reasoned opinion is contrary to, or an unreasonable application of, *Strickland* or its progeny. In applying the performance prong first, the ACCA reasonably concluded that Bell's investigation was not deficient. When considering a failure to investigate claim, the Supreme Court has said, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland,* 466 U.S. at 691, 104 S.Ct. at 2066. The investigation conducted by Bell, including his decision not to have Samra submit to a PET scan, satisfied all professional norms. Bell, an experienced capital case attorney, knew that an important part of the pre-trial preparation was to see if Samra had any mental health deficiencies or abnormalities. After searching for a well-regarded mental health expert who would be viewed as credible and not susceptible to attack as a criminal defendant oriented expert, including consulting nationally-known criminal defense attorneys, Bell hired Dr. Scott to evaluate Samra, who reported that Samra was not suffering from any psychiatric condition and that Samra was mentally capable of assisting in the crime and knew the wrongfulness of his conduct. Dr. Scott recommended an MRI *or* a PET scan be done, and although Bell did not have a PET scan done, because Bell could not locate a hospital in the Birmingham area that performed the scans, Bell did follow Dr. Scott's recommendation to have an MRI done on Samra which showed he had no structural abnormalities in his brain. Bell also investigated Samra's school and medical records and spoke with his friends and family. Bell interviewed Samra and found him to be able to carry on an intelligent conversation and determined that he could function in every day society.

***28** Yet Samra contends that his background, which was known to Bell at the time, should have indicated to Bell that the most sophisticated technology and testing possible should be used to test for neurological deficiencies in his client. As an initial matter, Samra does not cite to a Supreme Court case holding that trial counsel is ineffective for failing to follow up on every recommendation that a mental health expert makes. Trial counsel is of course limited by time and financial resources. *See Rogers v. Zant,* 13 F.3d 384, 387 (11th Cir.1994) ("*Strickland* indicates clearly that the ineffectiveness question turns on whether the decision not to make a particular investigation was reasonable. This correct approach toward investigation reflects the reality that lawyers do not enjoy the benefits of endless time, energy or financial resources.") (internal citation omitted); *Atkins v. Singletary,* 965 F.2d 952, 959–60 (11th Cir.1992) ("At some point, a trial lawyer has done enough.... A lawyer can almost always do something more in every case."). In any event, Samra's background does not raise the same kind of "red flags" that were present in other cases where trial counsel was found to be ineffective for failing to investigate. Samra emphasizes that he had been enrolled in special education classes from second through eighth grade and that he had a history of seizures and tremors. However, while Samra's medical records did indicate some developmental delays and seizure activity, Samra was treated by specialists at Emory University who did not note any more problems. Dr. Mayberg, who testified at the Rule 32 evidentiary hearing, stated that she had reviewed Samra's medical records which indicated certain medical tests were performed during Samra's childhood. According to Dr. Mayberg, Samra's parents took him to a childhood neurologist out of concern that Samra was developmentally delayed. Dr. Mayberg, in her review of the medical records, stated that one neurologist thought that Samra might have a form of childhood epilepsy, but that the second neurologist disagreed. Dr. Mayberg surmised that Samra may have had some neurological deficits in childhood that improved over time and that, because Samra was under the care of specialists, the condition would have been followed up on if it had persisted. Because of the CT scans performed on Samra as a child, the normal results of his MRI show that Samra's brain has no old scars, developmental anomalies, or acquired lesions. Samra made A's, B's, and C's in high school. He held several different jobs, one of which required him to use a cash register.

For these reasons, the Court can find no error in the ACCA's determination that this case has no similarities to *Wiggins,* where the Supreme Court determined that trial counsel was constitutionally ineffective for failing to investigate mitigating evidence. *Wiggins* involved a situation where counsel received a one-page description of the defendant's personal history included in the pre-sentence report, which noted the defendant's "misery as a youth" and described his background as "disgusting," as well as a record from the department of social services which revealed that the defendant's mother "was a chronic alcoholic," that the defendant "was shuttled from foster home to foster home," and that "on at least one occasion, [the defendant's] mother left him and his siblings alone for days without food." 539 U.S. at 523, 123 S.Ct. at 2536. Counsel failed to investigate these leads, but if he had, he would have discovered "evidence of the severe physical and sexual abuse [the defendant] suffered at the hands of his mother and while in the care of a series of foster parents." *Id.* at 516, 123 S.Ct. at 2533. The abuse occurred throughout Wiggins's childhood, teenage years, and into early adulthood and was well-documented in medical, school, and social services records. *Id.* at 516–17, 123 S.Ct. at 2533. For example, Wiggins's mother frequently left Wiggins and his siblings home alone for days at a time, which forced them to "beg for food and to eat paint chips and garbage." *Id.* at 517, 123 S.Ct. at 2533. The mother routinely beat the children for breaking into the kitchen, which she often kept locked. *Id.* On one occasion, Wiggins's mother forced his hand against a hot stove burner, which resulted in an injury that required hospitalization. *Id.* When he was six years old, Wiggins was placed in foster care where he was physically abused by his first and second foster mothers. *Id.* Wiggins's second foster father repeatedly molested and raped him. *Id.* To escape the abuse Wiggins ran away from one of his foster homes at age sixteen and was returned to a foster home where he was repeatedly raped by one of the foster mother's sons. *Id.* After leaving the foster care system, Wiggins entered a Job Corps program where he was sexually abused by his supervisor. *Id.* All of this evidence was presented in post-conviction proceedings, but because trial counsel never investigated it, all that he offered in mitigation was that the defendant had no prior convictions. *Id.* The Supreme Court held that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses." *Id.* at 525, 123 S.Ct. at 2537. In Samra's case, there was simply nothing akin to the well-documented evidence of a troubled childhood in *Wiggins* that should have been investigated by counsel.

***29** Nor was the ACCA's decision an unreasonable application of *Porter,* cited by Samra. *Porter* involved a situation where counsel, confronted with a "fatalistic and uncooperative" client, conducted a truncated investigation and presented practically no mitigation evidence at sentencing. 558 U.S. at 40, 130 S.Ct. at 453. Indeed, counsel "had only one short meeting with Porter [the defendant] regarding the penalty phase ... [and] did not obtain any of Porter's school, medical, or military service records or interview any members of Porters's family." *Id.* at 39, 130 S.Ct. at 452. Because counsel ignored "pertinent avenues for investigation of which [counsel] should have been aware," the jury in sentencing "heard almost nothing that would humanize Porter or allow them to accurately gauge his moral culpability." *Id.* at 40–41, 130 S.Ct. at 453–54. Here, Bell conducted an extensive investigation in preparing for the guilt and penalty phases of the trial. His efforts included hiring Dr. Scott to prepare a report, having an MRI done, examining school and medical records, and talking with Samra's friends and family. At the penalty phase, Bell had three witnesses testify, each of whom buttressed the humanization strategy he had chosen to pursue. Bell's performance stands in stark contrast to the performance in *Porter,* where the Supreme Court found counsel deficient for failing "to conduct some sort of mitigation investigation." *See id.* at 40, 130 S.Ct. at 453.

Samra also likens Bell's failure to follow up on all of Dr. Scott's recommendations to the deficient performance by counsel in *Lockett v. Anderson,* 230 F.3d 695 (5th Cir.2000). Of course, to establish a violation of § 2254(d)(1), Samra must cite decisions of the Supreme Court, and not to decision from the courts of appeals. *Renico v. Lett,* 559 U.S. 766, 778–79, 130 S.Ct. 1855, 1865–66, 176 L.Ed.2d 678 (2010). Even if this Court could consider *Lockett* in determining a violation of § 2254(d)(1), it is easily distinguishable for several reasons. In *Lockett,* defense counsel admitted he was overworked and distracted because he was dealing with his mother's illness and hospitalization. 230 F.3d at 711. In addition, defense counsel ignored evidence of "repeated head injuries, black-outs, delusional stories, references to self as another name, family troubles, drug and/or alcohol addiction." *Id.* at 714. Indeed, even Lockett's confession contained several delusional statements. *Id.* at 713. Lockett also

had a history of seizures that was ultimately attributed to temporal lobe epilepsy. *Id.* All of these warning signs were ignored by defense counsel and were not further investigated. In this case, the developmental delays and neurological problems that occurred in Samra's early childhood are not of the same caliber as the warning signs in *Lockett,* such that they should have caused trial counsel to conduct further investigation.

A further distinction with *Lockett* is that the mental health diagnosis in that case was specifically linked to the crime and the ability of the defendant to distinguish between the concepts of right and wrong. The Fifth Circuit, in distinguishing *Lockett* on those grounds, stated "Lockett's experts specifically linked his temporal lobe epilepsy, which was evident in his confessions and through a long paper trail of prior medical problems, to Lockett's crime." *Nixon v. Epps,* 405 F.3d 318, 327 (5th Cir.2005). Further, the Fifth Circuit noted that "[t]wo different experts stated explicitly that they did not believe Lockett would have committed his crimes if he did not have severe mental problems." *Id.* In contrast to the mental health findings in *Lockett,* the *Nixon* Court ruled that the mental health diagnosis would not have "prevented [the defendant] from knowing the difference between right and wrong." *Id.* In the present case, Samra has not presented any evidence that he has a mental illness or any connection between his purported "organic brain damage" and his participation in these murders.

***30** It was also reasonable for the AC CA to conclude that Samra was not prejudiced by Bel l's decision not to have a PET scan done. When assessing prejudice, courts are required to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—in re-weighing it against the evidence in aggravation." *Williams,* 529 U.S. at 397–98, 120 S.Ct. at 1515. "That same standard applies—and will necessarily require a court to 'speculate' as to the effect of the new evidence—regardless of how much or how little mitigation evidence was presented during the initial penalty phase." *Sears,* 130 S.Ct. at 3266–67.

Samra contends that the ACCA did not appreciate the impact of the additional evidence he presented at the Rule 32 hearing, and in so doing violated *Strickland, Williams,* and *Sears.* But Samra's additional mitigating evidence was less than compelling: it consisted of one expert (Dr. Mountz) stating that Samra had diminished blood flow in one area of the brain that placed him in the low range of normal and another expert (Dr. Gelbort), who only testifies on behalf of criminal defendants, stating that the test results he derived indicate that Samra was functioning in the bottom range of normal or the top range of the brain-impaired population. In fact, after hearing this testimony firsthand, which was disputed by the State's experts, Drs. King and Mayberg, the Rule 32 Court ultimately rejected Samra's contention that he suffered from "organic brain dysfunction." (C.R. Vol. 49, at 120.) The Court is convinced that the ACCA, in affirming the Rule 32 Court's ruling, appropriately weighed the mitigating evidence presented at trial and during the post-conviction proceeding against the aggravating evidence.

First, the ACCA found that this additional evidence does not alter in any way the aggravating circumstances of the murders—Samra shooting Dedra Hunt in the face and cutting the throat of the one of the children while she was begging for her life. Indeed, this is not a case where the weight of the aggravating circumstances or the evidence supporting them was weak. The jury heard how Samra and his friends planned the murder of Duke's father and planned to kill Dedra Hunt and her two daughters so as to leave no witnesses. The jury also heard how all of the victims died very painful and brutal deaths, struggling for life and breath such that one or more of the victims drowned in their own blood. Finally, the jury knew that Samra cut one of the young daughter's throats while she begged for her life. There is no reasonable probability that the jury, if only it had heard the testimony of Drs. Gelbort and Mountz, would have concluded that this planned, deliberate, and cruel murder was mitigated to any appreciable extent by the fact that Samra's brain was mildly impaired and had diminished blood flow in one area so as to place him in the low range of normal.

***31** Second, the ACCA determined that it was not clear that the judge and jury would have viewed the additional evidence as truly mitigating because Dr. Mountz admitted that there was no research showing that the results of a SPECT scan can allow anyone to draw conclusions about the reasons that compel a person to commit murder. Samra contends that this conclusion is contrary to law because there is no requirement that mitigation evidence must have a nexus to an individual's mindset in committing a crime before it may be presented. Samra's argument is misplaced because, although the standard

of what constitutes relevant evidence in the mitigation phase of a capital case is indeed expansive, i.e., "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," *Tennard,* 542 U.S. at 284, 124 S.Ct. at 2570 (internal quotation marks and citation omitted), the ACCA was merely stating that, had the testimony of Drs. Gelbort and Mountz, and the results of their additional testing, been before the judge and jury, it is not clear that the judge and jury would have considered the evidence trustworthy enough to outweigh the aggravating circumstances surrounding these murders.

Third, and perhaps most importantly, the ACCA determined that all of the additional tests conducted on Samra during the post-conviction proceedings merely served to reiterate a fact that was already before the jury and judge: that Samra has a low IQ and was intellectually impaired. *See Strickland,* 466 U.S. at 699–700, 104 S.Ct. at 2071 (finding no prejudice when the evidence that petitioner says his trial counsel should have offered at sentencing "would barely have altered the sentencing profile presented to the sentencing judge"). This is not a case where the judge and jury heard no evidence about Samra's mental and emotional state. Drs. Ronan and Twente, along with Samra's father, mother, and aunt, testified about Samra's intellectual difficulties. There was also evidence before the jury of other possible mitigating factors: Samra's age, his lack of significant criminal history, his truthfulness and cooperation with law enforcement officers, and the remorse he expressed in statements to law enforcement officers. Under these circumstances, the ACCA reasonably concluded that the additional mitigating evidence would not have resulted in a sentence other than death.

For the foregoing reasons, the ACCA's decision was not contrary to, or an unreasonable application of, clearly established federal law, and habeas relief is not due to be granted on this claim.

b. Samra's claim that Bell presented mitigating evidence that was actually aggravating

Samra claims that when Bell presented evidence that Samra was a member of the FOLKS gang in an attempt to demonstrate that Samra was easily led by a stronger personality such as that of his co-defendant Duke, this evidence only served to inflame the jury and denigrate Samra. Samra also contends that Bell's performance was deficient for presenting Dr. Ronan's guilt-phase testimony that Samra does not suffer from a psychiatric disorder, understood the difference between right and wrong, and lacked emotionality and a conscience. According to Samra, the ACCA's determination that it was not constitutionally deficient for Bell to present this evidence is contrary to, or an unreasonable application of *Strickland, Wiggins, Williams,* and *Sears, supra.*

***32** In rejecting this claim, the ACCA quoted extensively from the Rule 32 Court's findings, as follows:

> In Paragraph 8(B) of his petition, Samra claimed that his trial counsel was ineffective for presenting evidence at sentencing that had the unintended effect of becoming aggravating evidence. Specifically, Samra claims that his trial counsel acted deficiently by presenting evidence that he was a member of a gang and that he lacked conscience, remorse, or emotionality. In response to this claim, the State presented the affidavit of Richard W. Bell, who explained his trial strategy for introducing evidence of Samra's involvement in the FOLKS ("Forever Our Lord King Satan") gang:
>
> > Going into trial, I knew that the trial judge had determined the confession was admissible, therefore, I could not argue that Samra was innocent of the crime. My defense strategy at the guilt/ innocence phase was to present evidence to show that no sane person could have committed this crime and that Samra was led into this crime by Mark Duke. More importantly, Samra was led into this crime due to his and Duke's involvement with the FOLKS gang.
> >
> > To support this strategy, I called the following witnesses at the guilt phase of the trial: Dr. Kathleen Ronan, a psychologist who had examined Samra at the Taylor Hardin Secure Medical Facility, Dr. George Twente, and Sara Woodruff, Samra's friend and fellow gang member. The testimony of the two experts demonstrated that Samra was functioning in the borderline between low average and mild mental retardation and that he was led into committing this crime because of the gang influence. With the testimony of Sara Woodruff, I tried to demonstrate that Duke was the ringleader because he was angry with his father and that Samra was influenced by Duke to commit this crime.

> Of course, I was limited in my presentation at the guilt phase because I did not have any evidence to show that Samra was insane or that due to mental retardation he could not appreciate the criminality of his conduct. None of the expert witnesses that I consulted stated that Samra was mentally retarded. I did not call Dr. Scott [the psychiatrist that performed an evaluation of Samra before trial] as a witness because he told me Samra was not suffering from any psychiatric condition and that Samra was mentally capable of assisting in the crime and knew the wrongfulness of his conduct. I believed Dr. Scott to be a very credible expert who, if he testified, could have delivered very unfavorable testimony for Samra. In addition to relying on the expert's conclusions, I observed Samra for any information regarding his intelligence. In my discussions with Samra, I found him to be able to carry on an intelligent conversation and determined that he could function in everyday society. Samra worked in fast food restaurants and, to the best of my recollection, had completed the eleventh grade. I had no information to show that Samra was mentally retarded.
>
> ***33** At the penalty phase, I wanted to humanize Samra for the jury. I did not want the jury to be left with the image that the prosecutor had created of Samra. I wanted to show that Samra had a family and that his parents loved him. To that end, I called Samra's aunt, and his father or mother to testify on his behalf. I did not have any information that Samra was physically abused as a child or that his father mistreated him. Samra had a middle [class] upbringing and was not subjected to the abject poverty that has been the situation in some of the other capital cases I have handled. The jury could also consider at the penalty phase all of the defense testimony presented at the guilt phase. In the penalty phase closing argument, I tried to emphasize that Samra was a person who never committed a violent criminal act until he was influenced by his gang activities with Mark Duke.

Richard Bell's affidavit at pp. 8–10. Further, ... Mr. Bell testified at the Rule 32 evidentiary hearing that Samra's gang activity influenced his participation in the crime and that Bell wanted to emphasize that at trial. R. 264. Mr. Bell testified that he was limited to presenting evidence of Samra's gang activity to establish a mental defect defense because he had no other evidence of any other mental defect. R. 289–91.

To establish a claim of ineffective assistance of trial counsel, the petitioner must allege facts and prove them by a preponderance of the evidence that trial counsel's performance was deficient. This Court must objectively and deferentially view counsel's conduct within the context of the facts of the particular case and as of the time of the alleged misconduct without letting hindsight cloud that judgment. *Payne v. State,* 791 So.2d 383, 399–400 (Ala.Crim.App.1999) (internal citations omitted). Further, the Court of Criminal Appeals has recognized that there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See Dobyne v. State,* 805 So.2d at 743 (citing *Strickland v. Washington,* 466 U.S. at 689; *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala.1987)). To prevail on a claim that counsel was deficient in choosing a particular trial strategy, the petitioner must demonstrate the following:

> To uphold a lawyer's strategy, we need not attempt to divine the lawyer's mental processes underlying the strategy. "There are countless ways to provide effective assistance in any given case." *Strickland,* 104 S.Ct. at 2065. No lawyer can be expected to have considered all of the ways. If a defense lawyer pursued Course A, it is immaterial that some other reasonable courses of defense (that the lawyer did not think of at all) existed and that the lawyer's pursuit of Course A was not a deliberate choice between Course A, Course B, and so on. The lawyer's strategy was Course A. And, our inquiry is limited to whether this strategy, that is, Course A, might have been a reasonable one. *See generally Harich v. Dugger,* 844 F.2d 1464, 1470–71 (11th Cir.1988) (en banc) (concluding—without evidentiary hearing on whether counsel's strategy arose from his ignorance of law—that trial counsel's performance was competent because hypothetical competent counsel reasonably could have taken action at trial identical to actual trial counsel).

***34** *See Chandler v. United States,* 218 F.3d 1305, 1316, n. 16 (11th Cir.2000).

The evidence presented in the affidavit and evidentiary hearing shows that attorney Richard Bell was an

> experienced criminal defense attorney; had experience in defending other capital murder defendants; consulted other criminal defense attorneys, experts, investigators, and other defense resources for this case; recruited two other lawyers and a law clerk to assist him in Samra's defense; and, that he spent a large amount of time on Samra's defense. R. 262–98. Under the circumstances of this case, where Mr. Bell had no other evidence that Samra was suffering from any other mental defect and no prior history of violence before his gang involvement, Mr. Bell's choice to present evidence that Samra committed this crime as a result of gang influence was a reasonable strategic decision. As such, this choice did not constitute deficient performance.

(C.R. Vol. 49 at 122–26 (quoting Vol. 49 at 71–76)).

Counsel's "strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland,* 466 U.S. at 690, 104 S.Ct. at 2066. Despite this principle, Samra's position is that Bell's strategy in presenting evidence that Samra was a member of the FOLKS gang was so egregiously unreasonable that it falls outside of the presumption of reasonableness afforded to counsel's strategic choices. In support, Samra cites several decisions from federal and state courts that he contends establish that presentation by defense counsel of aggravating evidence constitutes deficient performance and ineffective assistance. As these are not United States Supreme Court decisions, they do not show that the ACCA's determination was contrary to federal law established by the Supreme Court of the United States. *See Renico,* 559 U.S. at 778, 130 S.Ct. at 1866. This Court can conceive of a situation wherein trial counsel's performance is deficient when he or she presents no evidence in mitigation or presents mitigation evidence that is actually aggravating. For example, in *Horton v. Zant,* 941 F.2d 1449 (11th Cir.1991), cited by Samra, the Eleventh Circuit found that the petitioner/defendant was prejudiced by counsel's performance where he performed no pretrial investigation into mitigating circumstances, introduced no mitigating evidence during the trial, attacked his client's character during closing argument, and "virtually encouraged the jury to impose the death penalty." *Id* . at 1462–63. This is not that instance. Here, after conducting a thorough investigation of Samra's background, which included commissioning an expert to evaluate the viability of a mental health defense, Bell determined that he had no evidence that Samra was insane or that due to mental retardation he could not appreciate the wrongfulness of his conduct. Only then did Bell decide to present information concerning gang activity in an effort to show that Samra was not violent until he became affiliated with the FOLKS gang and that he was led into committing this crime by Duke. It simply cannot be said that Bell abjectly failed to consider his options such that this defense strategy is subject to challenge.

***35** This is also not *Magill v. Dugger,* 824 F.2d 879 (11th Cir.1987), also cited by Samra. In that case, trial counsel met with his capital-defendant client for the first time for fifteen minutes on the morning of trial, utterly failed to prepare the defendant for either direct or cross-examination, did not give the defendant any advice on whether to testify in his own defense (and the defendant then twice admitted that the murder was planned), failed to object when the prosecutor asked the defendant to concede his guilt to capital murder, and conceded guilt in his opening statement without explaining the theory of the defense. *Id.* at 888–91. Then during the penalty phase, counsel inexplicably failed to call a doctor to testify who would have stated that the defendant exhibited serious signs of emotional problems at the age of thirteen, yet decided to present the testimony of a court-appointed psychiatrist who stated on cross-examination that the defendant was not under the influence of an extreme emotional or mental disturbance at the time of the crime. *Id.* at 889. During the habeas proceedings, that psychiatrist testified that he had never been interviewed by counsel or even asked to examine the defendant regarding the applicability of the statutory mitigating circumstances. *Id.* The Eleventh Circuit found that the combined effect of these guilt and penalty phase failures affected the outcome of the penalty phase of the trial such that the defendant was prejudiced by counsel's performance.

Despite Samra's attempts to liken Dr. Ronan's testimony to that of the psychiatrist's in *Magill,* it cannot be said that Bell's performance fell to the level of incompetence as that exhibited in *Magill.* The Eleventh Circuit held that counsel's failure to discover the psychiatrist's opinion prior to calling him to the stand was one deficiency among many committed by counsel in *Magill* . In contrast here, after Dr. Ronan evaluated Samra at Taylor Hardin Secure Medical Facility and Bell examined her report, he decided to present her testimony in an attempt to show that Samra functioned at the borderline between low average intelligence and mild mental retardation and that he was

led into committing the crime as a result of gang influence. Bell's decision to call Dr. Ronan was reasoned in light of the fact that her overall conclusions supported the defense theory. The fact that Dr. Ronan's assessment of Samra was not sufficient to cause the jury to recommend a life sentence does not mean that Bell's performance was ineffective.

For these same reasons, Samra's invocation of the Supreme Court's decisions in *Strickland, Wiggins, Williams,* and *Sears,* without further explanation, does not advance his argument that habeas relief is warranted. Taken together, these cases make clear that once a court is satisfied that counsel conducted a thorough mitigation investigation, the particular strategic choices made by a fully-informed counsel will rarely, if ever, be subject to review. *See Strickland,* 466 U.S. at 690–91, 104 S.Ct. at 2066 (strategic choices made after "less than complete investigation" are reasonable only to the extent that reasonable professional judgment supports the limitations on investigation); *Wiggins,* 539 U.S. at 522, 123 S.Ct. at 2535 ("[C]ounsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision ... because counsel had not 'fulfill[ed] their obligation to conduct a thorough investigation of the defendant's background.' ") (quoting *Williams,* 529 U.S. at 396, 120 S.Ct. at 1514–15); *Sears,* 130 S.Ct. at 3265 (although a specific mitigation "theory might be reasonable, in the abstract, [that fact] does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudiced" the defendant). Because Bell conducted a thorough investigation before deciding to offer evidence of Samra's involvement in the FOLKS gang for mitigation purposes, the ACCA did not violate these precedents in rejecting Samra's claim that Bell's strategy was *per se* unreasonable so as to be constitutionally deficient.

***36** In sum, Samra was not deprived of a fair trial or the counsel guaranteed by the Sixth Amendment, so habeas relief is not warranted on this claim under § 2254(d).

c. Samra's claim that Bell did not adequately object to the trial court's admission of videos and pictures of "gangtype" writings on the walls of Duke's bedroom and photographs of the tattoos on Samra's arms

Samra's argument with regard to this claim begins with the premise that, under Alabama law, evidence of gang membership is presumptively prejudicial and inadmissible at trial where it has nothing to do with any issue in the case. *See Thomas v. State,* 625 So.2d 1149, 1153 (Ala.1992). Samra contends that because his involvement with the FOLKS gang was not in any way relevant to the guilt or sentencing determinations for the murders at issue, the gang-related evidence was wholly irrelevant and inadmissible, and Bell's failure to object to its admission on those grounds was constitutionally deficient. Samra also asserts that Bell should have objected to the introduction of the evidence because, even if Samra's membership in the FOLKS gang was relevant, the prejudicial effect of the visual evidence of gang involvement outweighed its probative value, considering that Samra admitted to involvement in the FOLKS gang and the murders for which Samra and Duke were convicted were not alleged to be gang-related. Samra contends in a conclusory fashion that the ACCA's determination that Bell's performance was not ineffective on this ground was contrary to, or an unreasonable application of, *Strickland, Wiggins, Williams,* and *Sears, supra.*

In rejecting this claim, the ACCA again quoted extensively from the Rule 32 Court's order, as follows:

> In paragraph 8(D) of the petition, Samra claims his trial counsel was ineffective for failing to object to the evidence regarding wall -etchings and gang-type writings on the wall of Mark Duke's bedroom and tattoos on Samra's arm. This claim is wholly without merit because, as discussed above, trial counsel's theory of defense was to show that Samra did not know the difference between right and wrong because of the gang influence exerted upon him by Mark Duke. At the evidentiary hearing, Mr. Bell testified that he was limited to presenting evidence of Samra's gang activity to establish a mental defect defense because he had no other evidence of any other mental defect. [R32 at 289–91.]
>
> This Court recognizes that there are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way. *See Dobyne v. State,* 805 So.2d at 743 (citing *Strickland v. Washington,* 466 U.S. at 689; *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala.1987)). To prevail on a claim that counsel was deficient in choosing a particular trial strategy, the petitioner must demonstrate that the strategy was

unreasonable. *See Chandler v. United States,* 218 F.3d 1305, 1316 n. 16 (11th Cir.2000).

***37** In his affidavit, Mr. Bell stated that he had no other evidence that Samra was suffering from any mental defect and that he had no prior history of violence before his gang involvement. Further, the evidence of gang involvement was used by trial counsel to put more of the blame on Mark Duke and to make Duke look more culpable because he was considered the leader of the gang. Therefore, Mr. Bell's choice to present evidence that Samra committed this crime as a result of gang influence was a reasonable strategic decision. As such, this choice did not constitute deficient performance.

(C.R. Vol. 49, at 126–27 (quoting Vol. 49, at 97–99)).

Bell's decision not to object to the admission of evidence of Samra's gang affiliation was in keeping with his penalty-phase strategy to present Samra as easily-influenced and led into committing the crime by Duke. Bell arrived at this strategy only after conducting a thorough investigation and realizing that he had no evidence that Samra suffered from a mental defect. For the reasons stated in the previous section, the ACCA's determination that Bell's strategy did not deprive Samra of his Sixth Amendment rights is not contrary to clearly established Supreme Court precedent, and habeas relief is not warranted on this ground.

d. Samra's claim that the cumulative effect of the previous ineffective assistance of trial counsel claims prejudiced him

Samra contends that the cumulative effect of the three previously-stated unmeritorious claims "deprived him of a fair sentencing proceeding." In denying this claim, the ACCA noted that there was no support in *Strickland* that requires a cumulative analysis of multiple non-meritorious claims of ineffective assistance of counsel. The ACCA further noted that "if we were to evaluate the cumulative effect of the instances of alleged ineffective assistance of counsel, we would find that Samra's substantial rights had not been injuriously affected, as we have found no error in the instances argued in this petition." (C.R. Vol. 49 at 129.) Samra has not demonstrated that the ACCA's adjudication of this issue is contrary to, or an unreasonable application of, *Strickland.* Therefore, the "cumulative effects" claim is due to be denied.

3. Samra's claim that he was deprived of effective assistance of appellate counsel when Bell failed to raise the argument on direct appeal that due process required the prosecutor to give advance notice of the statutory aggravating factor that made him eligible for the death penalty

Samra argues that Bell's failure to raise on direct appeal the claim that "he was entitled to pre-trial (or at least pre-sentencing hearing) notice of the statutory aggravating circumstances that the state would be relying on in attempting to prove his eligibility for the death penalty," constitutes ineffective assistance.

As an initial matter, although the Rule 32 Court never addressed this claim in its order denying Rule 32 relief, the ACCA stated that it was "reluctant to hold that this claim is procedurally barred because it is being raised for the first time on appeal" and considered the merits of the claim anyway. (C.R. Vol. 49, at 112.) The ACCA's decision to consider the claim was appropriate because the record reveals that Samra did plead this claim in his third amended Rule 32 Petition. (C.R. Vol. 42, at 159–60 ("In addition, in this case the petitioner's sentence of death violates the due process clause of the Fourteenth Amendment because the petitioner did not receive notice of the actual statutory aggravating circumstances used at the sentencing phase, until after he had already been convicted of capital murder.")). Additionally, the Rule 32 Court acknowledged the claim during a hearing held on September 25, 2002, and stated that it would address the claim in its order granting or denying relief, although it never did. (C.R. Vol. 42, at 160–61.)

***38** Although the ACCA correctly held that the claim was not procedurally defaulted, it nonetheless appears to have mi scharacteri zed Samra's claim. The ACCA described the claim as follows: "[Samra] was entitled to have advance notice of the statutory aggravating circumstances that the State intended to prove by including those circumstances in the indictment." (C.R. Vol. 49, at 112.) The ACCA then stated the following in rejecting this claim:

... Samra's claim must fail. In June 2002—at almost the same time as Samra filed his second amended Rule 32 petition—the United States Supreme Court released *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002) and *Atkins v. Virginia,* 536

> U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002)—two cases that dramatically impacted death-penalty cases throughout the United States. In *Ring,* the Court applied its earlier holding in *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), to death-penalty cases and held that "capital defendants ... are entitled to a jury determination on any fact on which the legislature conditions an increase in their maximum punishment." *Ring,* 536 U.S. at 589. However, in subsequent cases, this Court determined that neither *Ring* nor *Apprendi* modified prior Alabama caselaw, "which holds that aggravating circumstances do not have to be alleged in the indictment." *Stallworth v. State,* 868 So.2d 1128, 1186 (Ala.Crim.App.2001) (opinion on return to remand). Thereafter, relying on *Schriro v. Summerlin,* 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442, (2004), we held that the decision in *Ring* did not apply retroactively to cases on collateral review; that is, to cases that were already final at the time that *Ring* was announced. *See, e.g., Hunt v. State,* 940 So.2d 1041, 1057 (Ala.Crim.App.2005). Thus, the decision in *Ring* was not applicable in Samra's case. Accordingly, counsel cannot be ineffective for failing to raise a meritless claim. *See, e.g., Bearden v. State,* 825 So.2d 868, 872 (Ala.Crim.App.2001). Indeed, we note that the appeals stage of Samra's case began in 1998 and continued until 2000, when Samra's conviction and sentence became final—approximately two years before the decision in *Ring* was announced. Counsel is not ineffective for failing to anticipate changes in the law. *See, e.g., Holladay v. State,* 629 So.2d 673, 685 (Ala.Crim.App.1992) ("It is clear that the constitutional guaranty of effective counsel does not require a defense attorney who can foresee future decisions."). Therefore, no basis for relief exists regarding this claim.

(C.R. Vol. 49, at 112–13.)

Samra now asserts that his claim was not and is not based on *Ring* and that he is not arguing that his indictment is defective, but rather, that due process mandates that he be provided with *some form* of pre-trial or pre-sentencing-hearing notice—in the indictment or otherwise—of what the claimed aggravating factors were. *See* Petitioner's Traverse and Reply Brief, Doc. 41, at 35 ("This is not an argument about a defective indictment, its an argument about notice to the defense prior to trial as to what the defense will have to address and respond to at trial.").

***39** Because Samra contends that the ACCA misinterpreted his claim, this Court must first satisfy itself that Samra presented the same constitutional claim to the Rule 32 courts that he is presenting here and is not impermissibly expanding his claim for the first time before this Court. As explained by the Eleventh Circuit:

> The Supreme Court has instructed us that if "the substance of a federal habeas corpus claim [was] first ... presented to the state courts," "despite variations in the ... factual allegations urged in its support," the claim is exhausted. *Picard v. Connor,* 404 U.S. 270, 277–78, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971).
>
> Based on Supreme Court law, we have held that "courts should exercise flexibility in determining whether defendants have met [the exhaustion] requirement." *Cummings v. Dugger,* 862 F.2d 1504, 1507 (11th Cir.1989); *see also Henry v. Dept. of Corr.,* 197 F.3d 1361, 1367 (11th Cir.1999) ("The exact presentation of the claims in the state and federal courts may vary some."). In other words, an issue is exhausted if "the reasonable reader would understand [the] claim's particular legal basis and specific factual foundation" to be the same as it was presented in state court. *Kelley v. Sec'y for Dept. of Corr.,* 377 F.3d 1317, 1344–45 (11th Cir.2004).

Pope, 680 F.3d at 1286.

Considering this standard, the Court is satisfied that Samra exhausted this claim. His brief before the ACCA argued that due process requires that a criminal defendant be entitled to pre-trial notice—"via indictment *or other means* " (C.R. Vol. 42, at 158–59) (emphasis added)) of the charges against him, and he cites the same Supreme Court decisions in support that he cites to this Court. It appears that the ACCA, in focusing on the "defective indictment" argument, never addressed Samra's argument that some form of pre-sentencing hearing notice should have been given.

Because the state courts did not resolve the merits of the claim that Samra adequately presented to them, § 2254(d)(1)'s requirement that the federal courts defer to state court decisions that are not contrary to, or an unreasonable application of, clearly established federal law, does not apply. *Davis,* 341 F.3d at 1313. Under these circumstances, this Court's review of the claim is *de novo. See id.*

Nonetheless, even under a *de novo* review, the cases Samra contends his claim is based on—*In re Ruffalo,* 390 U.S. 544, 88 S.Ct. 1222, 20 L.Ed.2d 117 (1968), *Cole v. Arkansas,* 333 U.S. 196, 68 S.Ct. 514, 92 L.Ed. 644 (1948), *Gray v. Netherland,* 518 U.S. 152, 116 S.Ct. 2074, 135 L.Ed.2d 457 (2002), and *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999), do not help him. Taken together, these cases stand for the unremarkable position that a criminal defendant is entitled to notice of the charges against him so that he may defend against those charges. *In re Ruffalo* was a disbarment proceeding against an attorney accused of soliciting clients. 390 U.S. at 545, 88 S.Ct. at 1223. The original charge enumerated twelve distinct counts of barratry. *Id.* at 546, 88 S.Ct. at 1224. At the hearing, however, a thirteenth count was added after the attorney had presented his defense, and the state board sanctioned the attorney on the thirteenth count. *Id.* The Supreme Court reversed, holding that the disbarred attorney's procedural due process rights had been violated when he was not given notice of the charges against him. *Id.* at 551–52, 88 S.Ct. at 1226. The Court described the disbarment proceedings as "adversary proceedings of a quasi-criminal nature," and stated that the "charge must be known before the proceedings commence. They become a trap when, after they are underway, the charges are amended on the basis of testimony of the accused." *Id.* at 551, 88 S.Ct. at 1226.

***40** In *Cole,* the defendants were found guilty at trial of violating section 2 of Act 193 of the Arkansas legislature for promoting an unlawful assemblage near a labor dispute. 333 U.S. at 198, 68 S.Ct. at 515. The Arkansas Supreme Court affirmed the conviction, finding that defendants violated only section 1 of the same act, which made it unlawful to use force or violence to prevent another person from engaging in an unlawful vocation. *Id.* at 200, 68 S.Ct. at 516. The United States Supreme Court overturned the conviction, finding that the defendants had been tried and convicted on section 2, not section 1, and stated that "[n]o principle of procedural due process is more clearly established than that notice of the specific charge, and a chance to be heard in a trial of the issues raised by the charge, if desired, are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Id.* at 201, 68 S.Ct. at 517.

Finally, *Gray* was a capital habeas case in which the Supreme Court cited *In re Ruffalo* and *Cole* for the proposition that "[a] defendant's right to notice of the charges against which he must defend is well established." 518 U.S. at 167–68, 116 S.Ct. at 2083. The Court in *Gray* found those cases inapplicable, however, because it was dealing with the petitioner's claim that he did not have notice of *additional evidence* that the state planned to use to prove the charges at the sentencing phase, not the charges the state brought against him. *Id.* at 168, 116 S.Ct. at 2083 ("We have said that 'the Due Process clause has little to say regarding the amount of discovery which the parties must be afforded.' ") (citation omitted).

These cases do not aid Samra because the due process clause requires only fair notice of the *charges.* Such notice was given in this case. Samra was also on notice that the State would be seeking the death penalty. Samra has presented no case indicating that a defendant's procedural due process rights are violated when the prosecution does not reveal the specific statutory aggravating circumstances that will be used to support the death penalty until the penalty phase of the trial. Because Samra can cite to no case at the time of his direct appeal recognizing the doctrine he now says Bell had a duty to raise, Bell could not have been ineffective for not raising a novel claim that was not supported by existing law. *See Engle v. Isaac,* 456 U.S. 107, 134, 102 S.Ct. at 1575, 71 L.Ed.2d 783 (1982) ("[T]he Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.").

Nor should the Supreme Court's decision in *Jones* have alerted Bell that he should have raised this argument on direct appeal, contrary to Samra's assertion. Samra relies on *Jones,* in which the Supreme Court considered the relationship between "elements" of a crime and "sentencing enhancements" under the federal car jacking statute, *see* 526 U.S. at 243, 119 S.Ct. at 1224, as well as the Supreme Court's subsequent decision in *Apprendi v. New Jersey,* in which the Court explained that when a fact (other than a prior conviction) increases a sentence beyond the maximum authorized statutory sentence, such fact must be submitted to a jury and proven beyond a reasonable doubt, *see* 530 U.S. 466, 490, 120 S.Ct. 2348, 2362–63, 147 L.Ed.2d 435 (2000), to advance the following argument. According to Samra, because criminal defendants have a procedural due process right

to advance notice of the elements of the crimes for which they are charged, and this advance notice must be provided via indictment in federal prosecutions but, in state prosecutions, may be provided in other ways, and the "elements" of a crime include any fact (other than a prior conviction) that increases the maximum penalty for a crime, then the aggravating circumstances set forth in Ala.Code § 13A –5–49 are "elements" of the crime under Alabama's capital sentencing scheme. As such, Samra insists he was entitled to pre-trial, or at least pre-sentencing hearing, notice of the statutory aggravating circumstances that the State would be relying on in attempting to prove his eligibility for the death penalty. In Samra's view, Bell was ineffective for failing to raise this argument, since the Supreme Court granted certiorari in *Jones* one month before Bell filed Samra's notice of appeal. However, Samra ignores the fact that the Supreme Court in *Jones* was interpreting the construction and constitutionality of the federal car jacking statute and was certainly not establishing a rule that a criminal defendant in a state capital case must be provided notice of the statutory aggravating factors for the death penalty such that he may prepare his defense accordingly. Bell simply cannot be ineffective for failing to raise a novel claim that was not supported by existing law. *See Engle,* 456 U.S. at 134, 120 S.Ct. at 1575.[7] Because the Court finds that Bell's performance was not deficient, it need not reach the prejudice prong. For these reasons, habeas relief is not warranted on this claim.

C. Samra's claim that his death sentence violates the Eighth and Fourteenth Amendments given that, after *Roper* was decided by the Supreme Court, his co-defendant Duke had his death sentence vacated due to his age

***41** Samra's final claim stems from the following facts. On September 27, 2007, Samra filed his Successive Rule 32 Petition, arguing that because Duke's degree of culpability was greater than Samra's, but Duke could not be sentenced to death due to the Supreme Court's decision in *Roper,* Samra's death sentence violates the Eighth Amendment's prohibition against cruel and unusual punishment and is excessive and disproportionate. Samra contended that a decision by the Shelby County Circuit Court granting a 2002 Rule 32 petition of LaSamuel Lee Gamble constituted "newly discovered evidence" under Alabama Rule of Criminal Procedure 32.1(e)[8] and justified the filing of a successive petition. Gamble and his co-defendant, Marcus Presley, had both received death sentences following a capital murder conviction. Gamble was more than 18 years old and Presley was 16 years old at the time they committed their capital murder. Based on the 2005 decision in *Roper* holding that it was unconstitutional to impose the death penalty on a criminal defendant who was less than 18 years of age at the time of the crime, the Shelby County Circuit Court vacated Presley's death sentence and sentenced him to life without the possibility of parole. Gamble requested in his Rule 32 petition that his death sentence likewise be vacated, arguing that Presley, who was the triggerman, was more culpable than he. The Shelby County Circuit Court granted Gamble's Rule 32 petition, vacated his death sentence, and sentenced him to life without the possibility of parole. Samra thus contended in his Successive Rule 32 Petition that, like Gamble, his death sentence should be vacated. However, by the time the Rule 32 Court issued its order denying Samra's Successive Rule 32 Petition, the ACCA had reversed the Shelby County Circuit Court in Gamble's Rule 32 proceeding and reinstated Gamble's death sentence. *See Gamble v. State,* 63 So.3d 707 (Ala.Crim.App.2010). The Rule 32 Court summarily denied Samra's successive petition, holding that it was precluded from considering Samra's claim pursuant to Alabama Rules of Criminal Procedure 32.1(e) and 32.2(b)[9] and (c),[10] and in the alternative, that the claim failed on the merits.

In affirming the Rule 32 Court's decision, the ACCA first quoted extensively from the Rule 32 Court's order, as follows:

> The present Petition is a successive petition within the meaning of Rule 32.2 of the Alabama Rules of Criminal Procedure. Samra makes two interrelated claims. He first claims that his death sentence is in violation of the 8th Amendment to the Constitution of the United States prohibiting the imposition of cruel and unusual punishment. The second claim is that a ruling by [a circuit judge] in another circuit court case would constitute a newly discovered material fact which would require the Court to vacate his death sentence to avoid a manifest injustice.
>
> [The previous circuit judge] had issued a ruling in an unrelated case setting aside a sentence of death of a defendant where a more culpable co-defendant's death sentence had been commuted to "Life without Parole." The co-defendant had been less than seventeen

years of age when the offense was committed and his sentence was reduced as a result of the decision of the United States Supreme Court in *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005). [The previous circuit judge] found the death sentence of the co-defendant disproportional where a more culpable co-defendant was sentenced to "Life without Parole." The Alabama Court of Criminal Appeals affirmed the trial court's finding of ineffective assistance of counsel during the sentencing phase but declined to recognize a claim that a death sentence should be set aside if not proportional with a sentence given to a co-defendant. *Gamble v. State,* 258 Ala. 562, 63 So.2d 707 (A la. Crim. A pp.2010).

***42** In the present case, Samra is sentenced to death while a younger co-defendant's sentence was reduced by the application of the decision in *Roper.*

The State has responded by asserting the applicable procedural bars as well as arguing the facts themselves justify the sentence of death. Samra had an active role in a[sic] multiple slayings....

The Court finds that Samra's successive petition is procedurally barred from consideration.

1. A ruling by the trial court in an unrelated matter does not constitute "a newly discovered material fact" within the meaning of Rule 32.1(e).

2. Even if such a ruling could be construed as a fact it could not meet the requirements of Rule 32.1(e)(1) through (5).

3. Even assuming somehow somewhere a ruling might be found which could be construed as a fact that met the requirements of Rule 32.1(e), it would have to comply with Rule 32.2(c) and in this case the further limitation imposed by 32.2(b) for successive petitions. The present petition does not.

The present case overcomes none of the above procedural bars. In addition, as previously noted the Alabama Court of Criminal Appeals rejected the proportionality in sentence argument upon which Samra now seeks to rely. *Gamble v. State,* 258 Ala. 562, 63 So.2d 707 (Ala.Crim. A pp.2010).

For the foregoing reasons the Petition is summarily DENIED.

(C. 426–27.)

(C.R. Vol. 49, at 141–43 (quoting Vol. 49, at 136–37.))

The ACCA then went on to quote its opinion in *Gamble* extensively, effectively adopting its reasoning in that case as its own. The court first noted that in *Gamble,* it discussed whether a circuit court had the authority to conduct a proportionality review of a defendant's sentence on a Rule 32 petition and determined that it did not because, pursuant to the Alabama Supreme Court's decision in *Ex parte Thomas,* 460 So.2d 216 (Ala.1984), a proportionality review is conducted by an appellate court and not a trial court.[11] The ACCA then noted that in *Gamble,* it determined that the circuit court's setting aside of Gamble's death sentence based on his co-defendant being re-sentenced to life without parole violated the principle that a defendant has a constitutional right to have an individualized sentencing determination made. Third, the ACCA noted that in *Gamble,* it determined that there is no constitutional right to have a proportionality review in death-penalty cases, and in fact, the Supreme Court has specifically rejected a claim that a capital defendant can prove an Eighth Amendment violation by showing that his co-defendant's death sentence was vacated. The ACCA ultimately found that because it had rejected in *Gamble* the same argument Samra was making, i.e., that a defendant's death sentence could be vacated because it was found to be disproportionate in relation to his co-defendant's sentence, Samra's claim was meritless. The ACCA concluded its opinion by stating:

Because Samra's claims do not have merit, they do not impugn the trial court's jurisdiction. Thus, the circuit court correctly applied the preclusive bar of Rule 32.2(c) because the petition was untimely. The circuit court also correctly applied the preclusive bar of Rule 32.2(b), because the claims were raised in a successive petition and were not jurisdictional claims. Because the petitioner's claims were without merit and were precluded, summary disposition was appropriate.

***43** (C.R. Vol. 49 at 149.)

Samra now raises the same Eighth Amendment claim[12] before this Court, and because the ACCA not only ruled that the claim was barred by state procedural rules but also denied the claim on its merits, this Court must determine whether the ACCA's merits determination "(1) resulted in a decision that was contrary to, or involved an

unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding" pursuant to § 2254(d)(1)-(2). *See Ward,* 592 F.3d 1144 (in order for a state court's procedural ruling to constitute an independent and adequate state rule of decision and thus preclude federal court review, "the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim") (internal quotation marks and citation omitted). [13]

To that end, Samra contends that the ACCA's decision affirming the death penalty imposed upon him was an unreasonable application of the principle of proportionality in criminal sentencing pursuant to *Kennedy v. Louisiana,* 554 U.S. 407, 128 S.Ct. 2641, 171 L.Ed.2d 525 (2008); *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002); *Harmelin v. Michigan,* 501 U.S. 957, 111 S.Ct. 2680, 115 L.Ed.2d 836 (1991); *Gregg v. Georgia,* 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Miller v. Alabama,* —— U.S. ——, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012); and *Roper, supra.* As an initial matter, none of the cases cited by Samra holds that a capital murder defendant has an Eighth Amendment right to have his death sentence vacated solely because his co-defendant received a lesser sentence than the death penalty. *See Washington v. Crosby,* 324 F.3d 1263, 1265 (11th Cir.2003) (indicating that a petitioner must cite to Supreme Court precedent that confronts nearly identical facts but reaches the opposite conclusion in order to show that a state court decisions was contrary to law). To the contrary, and as discussed by the ACCA, such a bright-line rule would violate Supreme Court precedent mandating that a defendant is entitled to an *individualized* sentencing determination. *See Lockett v. Ohio,* 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978) ("Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases."); *Williams v. Illinois,* 399 U.S. 235, 243, 90 S.Ct. 2018, 2023, 26 L.Ed.2d 586 (1970) ("[T]here is no requirement that two persons convicted of the same offense receive identical sentences."); *Zant v. Stephens,* 462 U.S. 862, 879, 103 S.Ct. 2733, 2743–44, 77 L.Ed.2d 235 (1983) ("What is important ... is an individualized determination on the basis of the character of the individual and the circumstances of the crime.").

***44** Thus, while "proportionality" in criminal sentence has been described by the Supreme Court as "an abstract evaluation of the appropriateness of a sentence for a particular crime," *Pulley v. Harris,* 465 U.S. 37, 42–43, 104 S.Ct. 871, 875, 79 L.Ed.2d 29 (1984) (internal citations omitted), Samra is not arguing that his sentence is "disproportionate to the crime in the traditional sense." *Id.* at 43; 104 S.Ct. at 875. In other words, he does not deny that he killed four people in the course of one scheme or course of conduct, the penalty for which can be death under Alabama law. The type of proportionality review Samra is seeking is "of a different sort," *see id.,* 104 S.Ct. at 876,—a consideration of the appropriateness of his sentence in light of his co-defendant Duke's lesser sentence. However, and as stated by the ACCA, the Supreme Court has held that "[c]omparative proportionality review is not constitutionally required in every state court death sentence review ." *Id.* at 50–51, 104 S.Ct. at 879 (considering whether the Eighth and Fourteenth Amendments require a state appellate court, before it affirms a death sentence, to compare the sentence in the case before it with the penalties imposed in similar cases if requested to do so by the prisoner, and holding that they do not). [14] Moreover, as also stated by the ACCA, the Supreme Court has rejected a defendant's attempt to "prove a[n] [Eighth Amendment] violation by demonstrating that other defendants who may be similarly situated did *not* receive the death penalty." *McCleskey v. Kemp,* 481 U.S. 279, 306–07, 107 S.Ct. 1756, 1775, 95 L.Ed.2d 262 (1987) (emphasis in original). [15]

This rule is especially appropriate in this case, considering the fact that the reason that Mark Duke did not receive the death penalty had nothing to do with the circumstances of Duke and Samra's crime or the presence or absence of aggravating or mitigating factors. The basis was purely legal. Despite the fact that a jury analyzed the facts and considered the aggravating and mitigating circumstances and recommended that Duke be sentenced to death, and the trial court imposed such a sentence, the court later concluded as a matter of law that Duke was ineligible for the death penalty. Duke's sentence reduction has no connection to the nature or circumstances of the crime or to Samra's character or record. Under *Lockett,* Duke's sentence reduction is irrelevant as a mitigating

circumstance in Samra's case. *See* 438 U.S. at 605, 98 S.Ct. at 2965.

Under the Eighth and Fourteenth Amendments, Samra was entitled to receive an individualized sentencing determination, and the record reflects that he received that. In its sentencing order, the trial court stated the following in support of its finding that the capital offense was especially heinous, atrocious, or cruel when compared to other capital offenses:

> WHEREAS, the Court finds that the evidence at trial was that [Samra], along with one or more co-Defendants planned the murder of Randy Gerald Duke and [Samra] chose to carry out the murder at a time when it would also be necessary, in order [sic] cover up the murder of Randy Gerald Duke, to murder Dedra Mims Hunt, Chelisa Nicole Hunt and Chelsea Marie Hunt. [Samra] carried out the plans and in doing so obtained weapons including two (2) handguns. Defendants then went to the home of Randy Gerald Duke and assisted co-Defendant in the murder of Randy Gerald Duke. [Samra] shot Dedra Mims Hunt in the face which shot did not immediately kill Dedra Mims Hunt and then proceeded to chase Dedra Mims Hunts and the two minor victims upstairs, at which point Dedra Mims Hunt, Chelisa Nicole Hunt and Chelsea Marie Hunt were all killed by means of being cut with a knife. The evidence showed that [Samra] actually cut the throat of at least one of the minor children and was actively involved in killing all victims in this case.
>
> ***45** After the murders took place, [Samra], along with co-Defendants then disposed of the various weapons. [Samra] and/or co-Defendants, after being arrested assisted the police in obtaining the various weapons.
>
> WHEREAS, the Court hereby FINDS that the offense was particularly heinous, atrocious and cruel when compared to other capital offenses. Evidence showed at trial that the victims in this case were killed in a very cruel and heinous manner. The minor children's throats were actually cut and according to testimony of the medical examiner, they drowned in their own blood. The photographs and other demonstrative evidence in this case leads to one and only one conclusion, that the manner in which the victims were killed was much more heinous and atrocious and cruel than would be necessary in any killing.
>
> This case stands out as particularly heinous, atrocious and cruel when it is considered that at least one victim, according to the admission of Defendant, begged not to be killed. All of the victims died very painful and brutal deaths. The victims apparently struggled for life and breath and that very struggle caused one or more of the victims to drown in their own blood.

(C.R. Vol. 49, at 5.) The trial court found that this aggravating circumstance "substantially outweigh[ed]" the mitigating circumstances and accordingly sentenced Samra to death.

In affirming Samra's conviction and death sentence, the ACCA concluded that "[t]he sentencing order shows that the trial court weighed the aggravating and mitigating circumstances and correctly sentenced [Samra] to death." *Samra,* 771 So.2d at 1121. In addition, the ACCA stated as follows:

> Section 13A –5–53(b)(2) requires us to weigh the aggravating and mitigating circumstances independently to determine the propriety of the appellant's death sentence. After independently weighing the aggravating and mitigating circumstances, we find that the death sentence is appropriate.
>
> As required by § 13A –5–53(b)(3), we must determine whether the appellant's sentence was disproportionate or excessive when compared to the penalties imposed in similar cases. The appellant killed four people pursuant to one scheme or course of conduct. Similar crimes are being punished by death throughout this state. *Taylor v. State,* 666 So.2d 71 (Ala.Crim.App.1994), aff'd, 666 So.2d 73 (Ala.1995); *Holladay v. State,* 549 So.2d 122 (Ala.Crim.App.1988), aff' d, 549 So.2d 135 (Ala.1989); *Siebert v. State,* 555 So.2d 772 (Ala.Crim.App.1989), aff'd, 555 So.2d 780 (Ala.1989); *Peoples v. State,* 510 So.2d 554 (Ala.Crim.App.1986), aff'd, 510 So.2d 574 (Ala.1987). Thus, we find that the sentence of death was neither disproportionate nor excessive.

Id. Because the ACCA held that the trial court's finding regarding the aggravating and mitigating circumstances was supported by the evidence and because the court found that Samra's death sentence was neither excessive nor disproportionate to the penalty imposed in similar cases, the court affirmed his death sentence. *Id.* Nothing has happened in Samra's case that alters the state courts'

finding that his death sentence is proportionate to his crime.

***46** In light of his role in the crime and his culpability for the murder of the four victims, Samra's death sentence is proportionate to his crime. Overwhelming evidence established that Samra was a full and active participant in the commission of the crime and that he acted with a clear intent to kill the victims. According to his own statement, Samra shot Dedra Hunt in the face. That bullet entered her cheek, knocking out some of her teeth on both sides of her mouth and grazing the top of her tongue. Despite that gruesome injury, Ms. Hunt was able to flee up the stairs with her daughters, where she and one of her daughters sought shelter in an upstairs bathroom. Mark Duke kicked in the bathroom door, shot and killed Ms. Hunt, and then executed her little girl, by slicing her throat. After the two killings took place in the bathroom, Samra took it upon himself to kill Ms. Hunt's other little girl by slicing her throat while Duke held her down. In sum, the evidence showing that Samra was a full and active participant in the crime, was prepared to kill, intended to kill, was present with the intent to render aid and support to his co-defendant, Mark Duke, in killing the victims, and did, in fact, aid and support Duke in killing them, is overwhelming. Plainly, even if this Court could now re-weigh the aggravating and mitigating circumstances and take Duke's sentence of life without parole into consideration in doing so, which it cannot do, the balance of the aggravating and mitigating circumstances would not change. Nor can it be said that Samra's sentence of death suddenly has become "disproportionate" simply because Duke was re-sentenced to life without parole. Habeas relief is not warranted on this claim.

V. CONCLUSION

For the foregoing reasons, Samra's petition for habeas relief is due to be denied. A final judgment will be entered.

All Citations

Not Reported in F.Supp.3d, 2014 WL 4452676

Footnotes

1 MRI is an acronym that stands for "magnetic resonance imaging." PET is an acronym that stands for "positron emission tomography." A PET scan measures the rate at which different parts of the brain metabolize glucose.

2 "SPECT" stands for "single photon emission computed tomography" and is a test that is used to measure blood flow in the brain.

3 References to the state court record are designated "C.R." The Court will list any page number associated with the court records by reference to the portable document format "pdf" page number within the volume, as those numbers are the most readily discoverable for purposes of expedient examination of that part of the record.

4 Samra raised an ineffective assistance of trial counsel claim in a motion for new trial and on direct appeal. The trial court appointed counsel other than Bell to raise that claim in the trial court and to argue that claim on appeal.

5 Duke was 16 years old and Samra was 19 years old at the time of the murders. Samra was sentenced to death in May 1998. Duke was sentenced to death in November 1998. On March 1, 2005, the United States Supreme Court decided *Roper,* holding that the execution of individuals who were under 18 years of age at the time of their capital crimes is prohibited by the Eighth and Fourteenth Amendments. 543 U.S. at 575, 125 S.Ct. at 1198. Because Duke's case was pending on certiorari to the United States Supreme Court when the *Roper* decision was released, the holding of the case applied to him. *See United States v. Johnson,* 457 U.S. 537, 545, 102 S.Ct. 2579, 2584, 73 L.Ed.2d 202 (1982) ("[A]ll defendants whose cases were still pending on direct appeal at the time of the law-changing decision should be entitled to invoke the new rule."). The Supreme Court granted Duke's petition for certiorari, vacated the judgment of the ACCA upholding the death penalty for Duke, and remanded Duke's case for further consideration in light of *Roper. See Duke v. Alabama,* 544 U.S. 901, 125 S.Ct. 1588, 161 L.Ed.2d 270 (2005) (mem.). On remand, the ACCA upheld Duke's conviction but remanded for the Shelby County Circuit Court to set aside Duke's sentence of death and to re-sentence him to life imprisonment without the possibility of parole, which is the only other sentence available for a defendant convicted of capital murder, *see* Ala.Code § 13A–5–45(a)(1975). *See Duke v. State,* 922 So.2d 179, 180–81 (Ala.Crim.App.2005). Duke's death sentence was ultimately vacated on May 27, 2005.

6 It is also worth noting that a state court's factual determination is entitled to a presumption of correctness under § 2254(e)(1)). And commensurate with the deference accorded to a state court's factual findings, "the petitioner must rebut 'the presumption of correctness [of a state court's factual findings] by clear and convincing evidence.' " *Ward,* 592 F.3d at

1155–56 (alterations in original) (quoting § 2254(e)(1)). However, Samra states that he is not attempting to submit any new evidence in this federal habeas proceeding, so § 2254(e)(1) is not implicated.

7 Samra points out that the Second Circuit has "held that the logic of [Apprendi and Ring] requires that statutory aggravating factors be alleged in the indictments in capital cases." *Matthews v. United States,* 622 F.3d 99, 102 (2d Cir.2010). Notwithstanding the fact that Samra claims not to be making a "defective indictment" argument, the rule announced by the Second Circuit is only applicable to federal capital cases, not state capital cases, and it was not binding precedent when Samra's case was on direct appeal, nor is it now.

8 Rule 32.1(e) allows a petition to be filed on the ground that:

> Newly discovered material facts exist which require that the conviction or sentence be vacated by the court, because:
> (1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
> (2) The facts are not merely cumulative to other facts that were known;
> (3) The facts do not merely amount to impeachment evidence;
> (4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
> (5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received.

Ala. R.Crim. P. 32.1(e).

9 Rule 32.2(b) provides that a successive petition based on different grounds from the initial petition must be denied unless the petitioner shows either that 1) the court was without jurisdiction to render a judgment or impose a sentence or that 2) good cause exists why the new grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard and that failure to entertain the petition will result in a miscarriage of justice. Ala. R.Crim. P. 32.2(b).

10 Rule 32.2(c) sets out the various limitations periods in which a petitioner must file a post-conviction petition. Ala. R.Crim. P. 32.2(c).

11 *See Ex parte Thomas,* 460 So.2d at 226–67 ("the disproportionality question involving consideration of co-defendant sentences is something to be addressed by the appellate courts instead of at the trial level") (citing *Coulter v. State,* 438 So.2d 336 (Ala.Crim.App.1982) and *Miller v. Florida,* 459 U.S. 1158, 103 S.Ct. 802, 74 L.Ed.2d 1005 (1983) (Marshall, J., dissenting from the denial of certiorari)). As explained by Justice Marshall in *Miller:*

> An appellate court, in the performance of the reviewing function which this Court has held indispensable to a constitutionally acceptable capital punishment scheme, must examine the sentences imposed in all capital cases in the jurisdiction in order "to ensure that similar results are reached in similar cases." [ ] The sentencer has a different role. The sentencer's duty is to determine in the first instance whether a death sentence is warranted for a particular defendant. That determination can only be made on the basis of the evidence that the judge has heard with respect to that defendant, and, under the Florida procedure, on the recommendation made by the jury that heard that evidence. A capital sentencing determination cannot properly be made on the basis of evidence presented in another trial or a recommendation made by another jury.

459 U.S. at 1161–62 (Marshall, J., dissenting from denial of certiorari) (internal quotation marks and citations omitted).

12 Samra also adds a Fourteenth Amendment claim for the first time before this Court. Because Samra did not raise a Fourteenth Amendment claim in his Successive Rule 32 Petition nor did he raise such a claim on appeal, this Court is precluded from granting relief on this claim. Any attempt by Samra to return to state court to exhaust this unexhausted claim would be barred under Alabama's procedural rules. It is too late for Samra to raise this claim on direct appeal; *see* Ala. R.Crim. P. 4(a)(1); a third Rule 32 petition would be successive; *see* Ala. R.Crim. P. 32.2(b); and this claim would also be subject to other procedural bars in Rule 32, *see* Ala. R.Crim. P. 32.2(a)(3)-(5). As such, this claim is procedurally defaulted. "It is well established that when a petitioner has failed to exhaust his claim by failing to fairly present it to the state courts and the state court remedy is no longer available, the failure constitutes a procedural bar." *McNair v. Campbell,* 416 F.3d 1291, 1305 (11th Cir.2005). Samra is not entitled to federal habeas review of this claim unless he shows cause for and prejudice from his failure to raise the claim, or that a fundamental miscarriage of justice would result from this Court's failure to review the merits of the claim. Samra makes no showing of cause and prejudice, or a miscarriage of justice, in order to excuse the default. In his reply brief, Samra indicates that his focus is on the Eighth Amendment violation, and states that he "only refers to the Fourteenth Amendment in its function incorporating the Eighth Amendment to the states." (Petitioner's Traverse and Reply Brief, Doc. 41 at 41 n. 4). This statement is not sufficient to

excuse the procedural default. Accordingly, this Court is precluded from granting habeas relief on Samra's claim that his death sentence violates the Fourteenth Amendment to the U.S. Constitution.

13 Because the Court will engage in AEDPA review under § 2254(d), it need not address Samra's argument that this Court should review his claim on the merits because the ACCA erroneously ruled that his Successive Petition was untimely under Ala. R.Crim. P. 32.2(c).

14 Alabama requires a proportionality review to be conducted by the appellate court on every death sentence, in which the court compares the capital defendant's sentence to the sentences imposed in other similar capital cases in the jurisdiction. *See* Ala.Code § 15A–5–53(b)(3) (1975).

15 In *McCleskey,* the defendant argued that his death sentence was disproportionate to the sentences in other murder cases. 481 U.S. at 306, 107 S.Ct. at 1774. The Supreme Court held that, on the one hand, he could not base a constitutional claim on an argument that his case differs from other cases in which defendants *did* receive the death penalty because the Georgia Supreme Court found that his death sentence was not disproportionate to other death sentences imposed in the state, and such proportionality review is not even constitutionally required. *Id.,* 107 S.Ct. at 1774–75 (citing *Pulley,* 465 U.S. at 50–51, 104 S.Ct. at 879). The Court then held that, on the other hand, the only way the defendant could show that his sentence was disproportionate to similarly situated defendants who did *not* receive the death penalty would be by demonstrating that Georgia's capital punishment system operates in an arbitrary and capricious manner. *Id.* at 306–07, 107 S.Ct. at 1775. The Court stated that it had previously rejected a prisoner's claim that the opportunities for discretion and leniency inherent in the processing of a murder case rendered the capital sentence imposed arbitrary and capricious. *Id.* at 307, 107 S.Ct. at 1775 (citing *Gregg,* 428 U.S. at 199, 96 S.Ct. at 2937). Because the defendant's death sentence was imposed under Georgia sentencing procedures that focused discretion "on the particularized nature of the crime and the particularized characteristics of the individual defendant," the Court held that it was not disproportionate "within any recognized meaning under the Eighth Amendment." *Id.* (internal quotation marks omitted).

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No. 19-

IN THE
SUPREME COURT OF THE UNITED STATES

MICHAEL BRANDON SAMRA,
Petitioner
- vs -
STATE OF ALABAMA,
Respondent

On Petition for Writ of Certiorari to the
Alabama Supreme Court

APPENDIX
Volume 5

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Appendix Q

Order of the Eleventh Circuit Court of Appeals affirming the denial of Samra's petition for a writ of habeas corpus, *Samra v. Warden, Donaldson Correctional Facility*, 626 F. App'x 227 (11th Cir. Sept. 8, 2015)

626 Fed.Appx. 227
This case was not selected for publication in West's Federal Reporter.
See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007.
See also U.S. Ct. of App. 11th Cir. Rule 36-2.
United States Court of Appeals, Eleventh Circuit.

Michael Brandon SAMRA, Petitioner–Appellant,
v.
WARDEN, DONALDSON CORRECTIONAL FACILITY, Respondent–Appellee.

No. 14–14869.
|
Sept. 8, 2015.

Synopsis

Background: Following affirmance of his state court conviction for capital murder, 771 So.2d 1108, petitioner sought federal habeas relief. The United States District Court for the Northern District of Alabama, No. 2:07–cv–01962–LSC, L. Scott Coogler, J., 2014 WL 4452676, entered an order denying petition, and petitioner appealed.

Holdings: The Court of Appeals held that:

petitioner was not prejudiced by trial counsel's failure to pursue functional brain testing;

petitioner was not prejudiced by trial counsel's strategy of presenting evidence of his membership in a satanic gang; and

appellate counsel's failure to raise a due process challenge concerning notice of aggravating factors did not amount to deficient performance.

Affirmed.

Attorneys and Law Firms

***228** Alan Michael Freedman, Evanston, IL, Steven R. Sears, Attorney at Law, Montevallo, AL, for Petitioner–Appellant.

James Clayton Crenshaw, Andrew Lynn Brasher, Brett Joseph Talley, Alabama Attorney General's Office, Montgomery, AL, for Respondent–Appellee.

Appeal from the United States District Court for the Northern District of Alabama. D.C. Docket No. 2:07–cv–01962–LSC.

Before ED CARNES, Chief Judge, and HULL and ROSENBAUM, Circuit Judges.

Opinion

PER CURIAM:

Petitioner–Appellant Michael Brandon Samra was convicted and sentenced to death by an Alabama court in 1998 for the murders of four people, including two children. Samra's conviction and sentence were upheld on direct appeal, and the Alabama state courts rejected his claims for postconviction relief. Samra sought federal habeas relief under 28 U.S.C. § 2254, but the district court denied Samra's federal petition. Samra now appeals raising two issues. First, Samra argues that his trial counsel was ineffective for failing to investigate evidence of brain dysfunction and for introducing and emphasizing evidence of Samra's membership in a Satanic gang, which he contends strengthened the state's aggravation case. Second, Samra asserts that his appellate counsel was ineffective for not raising an argument on appeal that Samra was entitled to pretrial notice of the specific statutory aggravating factor that the state intended to rely upon in pursuing the death penalty. After a thorough review of the record, and with the benefit of oral argument, we now affirm the denial of Samra's federal habeas petition.

I.

A. The Criminal Offense

Samra was convicted of capital murder, in violation of ***229** Alabama Code § 13A–5–40(a)(10), and he was sentenced to death for his role in the killings of Randy

Duke, Dedra Hunt, Chelsea Hunt, and Chelisa Hunt. *See Samra v. State* (*Samra Direct Appeal*), 771 So.2d 1108, 1111–12 (Ala.Crim.App.1999); *Samra v. Price* (*Samra § 2254 Proceeding*), No. 2:07–cv–1962–LSC, 2014 WL 4452676, at *1 (N.D.Ala. Sept. 5, 2014). According to the evidence established at trial and by Samra's own confession, Randy Duke's sixteen-year-old son Mark Anthony Duke ("Duke") devised the murder following an argument where Randy Duke refused to allow Duke to use a pickup truck. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. After planning the murder with Samra and two other friends, David Collums and Michael Ellison, the group obtained two guns and returned to Duke's house. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. Samra and Duke entered the house while Collums and Ellison waited nearby. *Id.*

Once inside, Duke went to the living room and shot his father, killing him. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. Meanwhile, Samra shot Dedra [1] non-fatally in the cheek, and she fled upstairs, locking herself in the master bedroom's bathroom with her six-year-old daughter Chelisa. *Samra Direct Appeal,* 771 So.2d at 1111; *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. Duke broke down the bathroom door and shot Dedra to death. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. But because they had run out of bullets, Duke went downstairs to retrieve kitchen knives; he then slit Chelisa's throat with a kitchen knife. *Id.* Dedra's seven-year-old daughter Chelsea was hiding under a bed in another bedroom when Duke found her. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. According to Samra's statement, Chelsea pled with Duke to stop and, as also evidenced by the defensive wounds on her body, vigorously fought for her life. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. Unable to kill her by himself, Duke held Chelsea down while Samra slit her throat. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1; *Samra Direct Appeal,* 771 So.2d at 1112. According to the testimony of the medical examiner, both girls died as a result of drowning in their own blood.

After committing the murders, Samra and Duke ransacked the house to make it appear as though a burglary had gone wrong. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. Duke later returned to his house on March 23, 1997, where he called 911 to report the murders. After a couple of days of investigating, the police determined that Duke, Samra, Collums, and Ellison were the perpetrators. Samra confessed his role in the crime during questioning and assisted police in recovering weapons. *See Samra § 2254 Proceeding,* 2014 WL 4452676, at *1.

B. Trial Proceedings

Samra was indicted for the four murders under § 13A–5–40(a)(10), Ala.Code, which makes it a capital crime when "two or more persons are murdered by the defendant by one act or pursuant to one scheme or course of conduct." *Samra Direct Appeal,* 771 So.2d at 1111. The indictment itself was a single paragraph listing the victims' names and the weapons used to kill them. Later, the indictment was amended to add an aiding-and-abetting component and to clarify that Dedra Hunt was killed with a gun. The indictment did not describe any further details of the ***230** crime, and it did not specify any of the then-existing statutory aggravating circumstances under § 13A–5–49, Ala.Code, that would permit imposition of the death penalty.

Samra was represented at trial and on appeal primarily by appointed counsel Richard Bell, an experienced attorney who devoted approximately 35 to 40 percent of his practice to criminal-defense work and had defended three capital cases prior to Samra's. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *2. Based on his initial investigations and interactions with Samra, Bell decided that his defense strategy needed to focus on Samra's mental condition and the influence of gang membership on Samra's actions. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *2. Bell concluded, though, that Samra had only "a very small chance of winning the guilt phase," and that the sentencing phase would be the main event. *See* Vol. 39 at 183.

Before trial, Bell filed a motion to compel the state to disclose the aggravating circumstances upon which it intended to rely in seeking a death sentence, arguing that Samra needed to be informed of the aggravating factors that the state intended to prove in order to prepare for the sentence hearing. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *2. The state argued that it was not required to reveal this information prior to the sentencing phase but that in any event, "the aggravating circumstances are very straight forward in the indictment." *Samra § 2254 Proceeding,* 2014 WL 4452676, at *2. The court denied Samra's motion, noting that the statute sets forth a very "limited" and "particularized" set of aggravating factors.

With respect to Samra's mental condition, Bell enlisted the expertise of Dr. Charles Scott, a forensic psychiatrist. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *2. Dr. Scott prepared a 21–page report based on a six-hour psychiatric interview with Samra, an interview with Samra's parents, and a review of Samra's school and medical records. *Id.* Based on these interviews and records, Scott concluded that Samra was not suffering from a mental illness or defect that precluded him from distinguishing right from wrong and that he appreciated the wrongfulness of his conduct. In light of Samra's history and Dr. Scott's interactions with Samra, Dr. Scott recommended to Bell that Samra undergo "a complete neuropsychological evaluation, neurology consultation and brain imaging," either through a SPECT or PET [2] scan, or if those tests were unavailable, at least an MRI or x-ray. *See Samra § 2254 Proceeding,* 2014 WL 4452676, at *2. [3] Dr. Scott's report noted that his "preliminary ***231** opinion" of Samra's culpability could change based on the results of these tests.

In accordance with Dr. Scott's recommendation, Bell obtained an MRI of Samra's brain. It showed no structural abnormalities. Bell did not procure a SPECT or PET scan. [4] *Samra § 2254 Proceeding,* 2014 WL 4452676, at *2. Ultimately, Bell chose not to present Dr. Scott as a witness since he believed that Dr. Scott's testimony would be unfavorable to Samra. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *2.

Because Bell had no evidence of brain dysfunction or mental disease and could not suppress Samra's confession, he rested his guilt-phase trial strategy on Samra's gang membership. As Bell explained, "Frankly ... it appeared that that was the only thing I had." Bell began laying the groundwork for this strategy during *voir dire* and in his opening statement, referring to Samra's and Duke's membership in the Forever Our Lord King Satan ("FOLKS") gang.

During trial, the prosecution introduced photos and video recordings of the walls in Duke's bedroom, which had various symbols and words carved into them. These etchings included Samra's nickname, "Baby D." At one point, the prosecutor described Duke's room as having "gang-type writings" in it. During cross-examination of multiple police witnesses at trial, Bell emphasized the etchings and their affiliation with FOLKS and a "gang within a gang" known as the "Insane Gangster Disciples." Photos of Samra's tattoos were also admitted into evidence, although it is not clear if they were ever identified as gang-related.

The defense called three witnesses during the guilt-phase of the trial. Dr. Kathleen Ronan, a clinical psychologist at the state's Taylor Hardin Secure Medical Facility, testified that she had been ordered by the court to evaluate Samra's competency to stand trial and his mental state at the time of the murders. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *3. Dr. Ronan conducted a background interview, a mental status exam, a personality inventory, a discussion of the crime, and a trial-competency assessment. Vol. 13 at 19–20. Although Dr. Ronan did not perform a full IQ test, she testified that Samra possessed borderline intelligence based on her screening and the results of a test performed by another psychologist. She also opined that Samra displayed signs of depression and anxiety, had internal conflicts about being dependent on others, was "insecure in his interpersonal interactions," and could become confused during periods of high stress.

In addition, Dr. Ronan also testified that Samra told her he was affiliated with the FOLKS gang. The prosecutor then interrupted Bell's questioning to point out that the gang question opened the door, allowing the prosecutor to present Dr. Ronan's opinion that the murders had nothing to do with the gang membership, testimony the prosecutor conceded was otherwise inadmissible. Bell acknowledged that he understood that the prosecutor would ask that question, and the court also commented that it "underst[ood] all of that could be very appropriate strategy."

On cross examination, Dr. Ronan testified that she concluded Samra was competent to stand trial and that she found no evidence of any psychiatric disorder or mental disease that rendered him out of ***232** touch with reality or that impaired his sense of right and wrong. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *3. She also testified that there was no evidence that Samra acted under duress or under the substantial domination of anyone at the time of the offense. The prosecutor asked Dr. Ronan what Samra told her about the connection between his gang membership and the murders, to which she answered that Samra said the killings had nothing to with the gang. [5] Dr. Ronan also testified that Samra had

a lack of emotionality when recounting the killings and that, based on the information available, she would "lean towards" that being indicative of antisocial personality disorder rather than emotional repression.

The defense's second witness was Dr. George Twente, a licensed psychiatrist. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *3. Dr. Twente testified that he had studied the FOLKS gang, which he described as a close-knit drug-distribution organization that offered its members a sense of identity, belonging, and excitement. Dr. Twente also testified that to rise in the ranks of the gang, a member had to commit various illegal activities, and to rise to the highest level of "Set King," he had heard a rumor that the member was required to kill his own mother. Dr. Twente confirmed that the symbols found in Duke's bedroom were similar to symbols used by other FOLKS affiliates. According to Dr. Twente, if a member wanted to leave the gang he was told that he or a family member would be killed, but in Dr. Twente's experience, nothing bad ever actually happened to members who left the gang. Dr. Twente asserted that usually gang killings were over territory or drugs, or they were retaliation for insults. Finally, Dr. Twente conceded that he had never spoken with Samra nor made any determination whether these killings were in any way gang related.

Samra's final witness was Sara Woodruff, a FOLKS member and friend of Samra, Duke, Collums, and Ellison. She commented that Samra was her "least favorite" because he wasn't "all there," although he could carry on normal conversations with her. Woodruff testified that Duke told her about the killings. On cross examination, she stated that Samra and Duke were good friends who got along well, and the local "gang" consisted basically of the four boys and her. With respect to the night that Duke told her about the killings, Woodruff observed no indication of hostility or threat between Duke and Samra, and she thought that they were friendly to each other. She also added that Duke said that the killings were about a dispute he had with his father and that he did not tell her it had anything to do with the gang, although Duke did make her swear an oath before he discussed the killings with her.

On March 16, 1998, the jury returned a verdict of guilty on the charges of capital murder. Following a half-hour recess after receiving the verdict, the court began the sentencing phase of the trial. At this point, the state confirmed that it was pursuing the eighth statutory aggravating factor under § 13A–5–49, Ala.Code—that the offense was especially heinous, atrocious, or cruel—to justify imposition of a death sentence.

***233** The evidence introduced during the guilt phase was adopted for the sentencing phase. The state called a single witness, Thomas Hunt, the father of the two girls and ex-husband of Dedra, who testified as to the impact of their murders on him.

During the penalty phase, Bell's strategy shifted towards humanizing Samra. The defense called three members of Samra's family: his aunt, his father, and his mother. The aunt testified that Samra was a loving and non-violent child. Samra's father testified that, as a small child, Samra was developmentally slow and suffered tremors in his hands. His father testified that Samra was a good, obedient child until about 15 or 16 when he started using marijuana. His father then recounted various legal troubles Samra had concerning marijuana, until eventually he gave Samra an ultimatum: attend rehab for the marijuana use or leave the house. Samra moved out. Samra's father stated that he suspected Samra was hanging around "gang-type people." His father also recalled that Samra had been in special education most of his life and eventually dropped out of high school. Finally, he noted that Samra was never really capable of expressing his emotions, but could still be loving. Samra's mother echoed his father's testimony about Samra's developmental difficulties and learning disabilities and his lack of emotionality.

On the same day that the penalty phase began, March 16, 1998, the jury returned a unanimous verdict recommending death. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *4. The court sentenced Samra to death on May 7, 1998. The court found that the sole aggravating circumstance proved was that the crime was especially heinous, atrocious, or cruel as compared to other capital offenses. The court determined that two of seven statutory mitigating factors existed: a lack of significant criminal history and Samra's age (nineteen) at the time of the offense. Ala.Code § 13A–5–51. In addition, the court concluded that the following non-statutory mitigating factors existed "to some degree" and were "worthy of consideration in the weighing of mitigating circumstances and aggravating circumstances": Samra's age and maturity; learning difficulties and disabilities;

"family history and background and caring nature of Defendant"; "the effect of gang or group involvement upon Defendant"; Samra's cooperation and truthfulness with law enforcement; Samra's remorse; and the existence of only a solitary aggravating factor. The court nevertheless found that "when weighed against the many mitigating circumstances, both statutory and non-statutory, the aggravating circumstance substantially outweighs the mitigating circumstances," and imposed a sentence of death by electrocution.

C. Direct Appeals

Samra raised several issues on direct appeal, including a claim of ineffective assistance of trial counsel[6] for failing to investigate whether Samra "suffered from any neurological or organic mental disease or defect that would have rendered him unable to appreciate the nature and quality or wrongfulness of his acts at the time of the offense." *Samra Direct Appeal,* 771 So.2d at 1119. Samra also argued that counsel was ineffective for failing to adequately prepare a defense that Samra was not guilty by reason of mental disease or defect. *Id.* The Alabama Court of Criminal Appeals ("ACCA") rejected the ineffective-trial-counsel ***234** claim, finding that Samra failed to support it with evidence but that, in any event, counsel "adequately investigated the appellant's competence and sanity." *Id.* at 1120.

Samra's counsel did not raise on direct appeal the argument rejected by the trial court that Samra was entitled to advance notice of which statutory aggravating factors the state planned to rely on to support the death penalty.

The ACCA affirmed the death sentence. *Samra Direct Appeal,* 771 So.2d at 1121–22. After finding no plain error and agreeing that the evidence supported the death sentence, the Alabama Supreme Court affirmed. *Ex parte Samra,* 771 So.2d 1122, 1122 (Ala.2000). The United States Supreme Court denied certiorari on October 10, 2000, making Samra's conviction final. *Samra v. Alabama,* 531 U.S. 933, 121 S.Ct. 317, 148 L.Ed.2d 255 (2000) (mem.).

D. State Collateral Proceedings

Samra filed a state petition for postconviction relief under Rule 32 of the Alabama Rules of Criminal Procedure on October 1, 2001. The petition was amended three times, with the final petition being filed on August 16, 2002. Of the claims advanced in his Rule 32 petition, the following ones are relevant here:

(1) Samra was denied effective assistance of trial counsel during the penalty phase because of counsel's "failure to adequately investigate organic brain damage/brain dysfunction."

(2) Trial counsel during the penalty phase "was ineffective for presenting mitigating evidence that was actually aggravating," citing counsel's repeated references to Samra's membership in a Satanic gang.

(3) Trial counsel was ineffective for "failing to adequately object to the admission of pictures of wall etchings, 'gang-type' writings, and tattoos on Mr. Samra's arms."

(4) Appellate counsel was ineffective for arguing that Samra's death sentence "violates the due process clause of the Fourteenth Amendment because the petitioner did not receive notice of the actual statutory aggravating circumstance used at the sentencing phase, until after he had already been convicted of capital murder."

The Rule 32 court held a hearing on the brain-dysfunction claim. *See Samra § 2254 Proceeding,* 2014 WL 4452676, at *5. During the hearing, Samra called two medical witnesses and two attorney witnesses, including Bell. Bell testified that he did not obtain a SPECT test because he was told none were available in Birmingham, Alabama, and the closest machine was located in Nashville, Tennessee. Bell also submitted an affidavit stating that he did not request that Samra be transferred out of state for SPECT or PET testing. Although Bell recognized that a SPECT scan showing abnormalities could have been used as mitigating evidence, he testified that he did not obtain further neuropsychological testing on Samra because, "The neuropsychologist that we had contacted I believe stated that he would not or could not for some reason that I really don't know what the reasons were that he could not do the testing of our client." In addition, Bell attested that no further neuropsychological testing was conducted because Bell "believed Dr. Scott's psychiatric examination covered this area."

Dr. Michael Gelbort, a clinical psychologist specializing in neuropsychology, also testified at the Rule 32 hearing. Dr. Gelbort performed a neuropsychological evaluation

on Samra in 2002. His evaluation established that Samra possessed a verbal IQ of 79 (11–12th percentile), a nonverbal ***235** IQ of 87 (40th percentile),[7] and a full-scale IQ of 81. Dr. Gelbort gave Samra the Categories Test, a test that measures "primarily frontal lobe and whole brain functioning." Samra made 51 errors, placing him on the "cusp" between normal and brain impaired. As for Samra's reading and math abilities, Dr. Gelbort found them to be in the 30th and 19th percentiles, respectively. On the Trailmaking test, which tests "cognitive flexibility and processing speed or efficiency," Samra's scores again placed him on the "cusp" between normal and slightly impaired. Samra's scores on a memory test were also consistent with being on the line between average and mildly impaired. On the MMPI, which tests for gross psychopatholgy, Samra showed signs of mild depression but no signs of psychosis.

Based on his clinical evaluations, Dr. Gelbort opined that Samra's brain "would not be classified as normal or typical," and that Samra possessed "some type of brain dysfunction." Dr. Gelbort observed that this dysfunction "ha [d] more to do with verbally mediated skills as opposed to nonverbal or visual spatial skills." Dr. Gelbort localized the dysfunction to the left side and frontal lobe, although he noted that there was no "focal damage" but "rather a diffuse pattern of dysfunction." Ultimately, Dr. Gelbort concluded that Samra would have a more difficult time functioning than a normal person but that he was not "grossly impaired." Dr. Gelbort also testified that he reviewed the testing results that the state's expert, Dr. Glen King, had obtained and found those to be consistent with his own testing.

Besides these witnesses, Samra presented the testimony of Dr. James Mountz, a specialist in nuclear medicine and radiology. Between 1991 and 2003, Dr. Mountz was at the University of Alabama—Birmingham ("UAB") where he "built up" the "functional brain imaging protocols." Dr. Mountz testified that a dual-head camera SPECT machine was available at UAB at least by the time he arrived there in late 1990, and possibly as early as 1988. A PET scan was not available at UAB, however, until July 2001.

Dr. Mountz testified that a SPECT scan, as relevant to this case, measures blood flow in the brain. As Dr. Mountz explained SPECT scans, a SPECT scan does not distinguish between a normal and an abnormal brain but rather between normal and abnormal blood flow. Dr. Mountz also distinguished a SPECT scan from an MRI, in that an MRI measures anatomical structure while the SPECT scan measures blood flow to those structures; "function as opposed to structure." He further explained that an MRI may show a normal structure, but a decreased blood flow may lead to abnormal brain functioning.

Dr. Mountz conducted a SPECT scan on Samra on August 1, 2002. From the scan, Dr. Mountz concluded that "[t]here were areas of decreased blood flow which were abnormal." Dr. Mountz testified to two basic abnormalities: one that "falls into the milder category" and could just constitute normal variability, and a second "obvious abnormality in blood flow to the posterior frontal superior temporal region" of the right side of Samra's brain. Dr. Mountz did not reach an opinion about Samra's brain function but did opine that his brain blood flow was about one standard deviation below normal. He later characterized the blood flow as "low normal." In a carefully worded answer, Dr. ***236** Mountz testified that the "abnormalities found in [Gelbort's neuropsychological report] are not inconsistent with the brain SPECT scan" conducted on Samra. On cross examination, Dr. Mountz testified that a SPECT scan does not provide any insight into why a person commits murder or whether he can appreciate the wrongfulness of his conduct. He also testified that a more detailed analysis would be required to determine what functions the abnormal area controls in Samra's specific case. Finally, Dr. Mountz also conceded that Samra's brain scan could have looked much different in 1998.

The state called two witnesses. The first, Dr. King, a clinical psychologist and attorney, conducted a neuropsychological evaluation of Samra. Dr. King performed an achievement test with Samra, where he scored Samra as reading at an eighth-grade level, spelling at a high-school level, and completing arithmetic at a sixth-grade level. According to Dr. King, an individual who has dropped out of school can be expected to score lower on these tests, as would an individual with a low IQ.

Dr. King administered an outdated IQ test, but the corrected results placed Samra's full-scale IQ in the high borderline range of around 79 and his verbal and nonverbal IQ scores were consistent with what Dr. Gelbort found. Samra performed well on some perceptual tests but poorly on others. His nondominant hand

was weaker than expected, indicating "some lateralizing effect," and his fine motor control was "below the cutoff." Dr. King also concluded that Samra had some impairment in his visual-spatial area.

Dr. King also administered the MMPI test. Consistent with Dr. Gelbort's MMPI, Dr. King found that Samra suffered from mild depression and anxiety and immature interpersonal development but not any psychosis. Besides these tests, Dr. King administered the Categories Test, and Samra committed 52 errors, consistent with Dr. Gelbort's testing and finding of mild impairment. Similarly, Samra scored slightly impaired on Dr. King's Trailmaking test.

As a result of his examinations, Dr. King concluded that Samra suffers from some impairment in his cognitive functioning. He further opined that at the time of the offense, Samra did not have any serious mental illness or mental defect that would have rendered him incapable of understanding the nature and consequences of his actions. While acknowledging a debate among experts about whether someone with borderline or retarded intellectual ability suffers from brain impairment, Dr. King ultimately concluded that Samra "has impairment of functioning that is consistent with what we would expect in someone who is in the borderline range of intellectual ability" but that this impairment did not impact Samra's ability to appreciate the criminality of his conduct.

Dr. Helen Mayberg, a neurologist, also testified for the state. She stated that the "generally accepted clinical uses of a SPECT technology are extremely limited," and include diagnosing strokes, evaluating dementia, and identifying abnormalities associated with epilepsy, and identifying abnormalities following trauma. Like with any radiological procedure, Dr. Mayberg explained, experience in evaluating SPECT scans is important in determining when a scan is "normal."

Dr. Mayberg reviewed Dr. Mountz's report and found that it contained the typical elements of a SPECT report. According to Dr. Mayberg, though, one standard deviation was not abnormal but rather, still fell within the normal range. In Dr. Mayberg's view, "brain damage" is too generalized a term, and the SPECT scan is too sensitive to blood-flow variation to make a ***237** good screening test for brain damage. Dr. Mayberg also reviewed Samra's childhood records and speculated that he may have had a neurological problem as a child that improved over time. Finally, she agreed that Samra's MRI from 1998 was normal.

On January 12, 2005, the trial court denied Samra's Rule 32 petition. *See Samra § 2254 Proceeding,* 2014 WL 4452676, at *9. With regard to the brain-dysfunction claim, the court held that Bell's performance was not deficient as far as investigating brain damage because he had pursued some investigation and had settled on another strategy. The court also determined that Samra suffered no prejudice because the results of Dr. Gelbort's and Dr. Mountz's testing only affirmed the information of Samra's borderline intellectual abilities already before the jury. The court also rejected the idea that Samra suffered from any organic brain dysfunction. *Id.* Nonetheless, the court added that even if Samra had reduced blood flow to his brain at the time of the offense, no evidence established that it would have affected Samra's culpability, judgment, or insight. Further elaborating on prejudice, the trial court determined that no reasonable probability existed that the jury would have reached a different recommendation if Samra had presented Dr. Gelbort's and Dr. Mountz's evidence during the penalty phase of Samra's trial.

With respect to Samra's argument that the gang evidence was more aggravating than mitigating, the Rule 32 court found that Bell's strategy to portray Samra as gang-influenced was reasonable in light of the fact that Bell had no evidence of any other mental defect or prior history of violence. The court determined that Samra's argument about Bell's failure to object to the admission of gang etchings and tattoos was "wholly without merit" because the evidence complemented Bell's own defense strategy. Apparently, the Rule 32 court did not reach the prejudice prong of the ineffective-assistance analysis with respect to these gang-related claims. The Rule 32 court also did not address the aspect of Samra's due-process claim regarding notice of the aggravating factors; instead, it dealt with Samra's related argument that Alabama's sentencing procedure violated due process because it allows the judge to impose the sentence.

On August 24, 2007, the ACCA affirmed the denial of postconviction relief. With respect to Samra's due-process claim that he had not received notice of the aggravating factors, the ACCA determined that the claim failed on the merits because neither *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000)—decided before Samra's conviction became final—nor

Ring v. Arizona, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)—decided after—"modified prior Alabama caselaw, 'which holds that aggravating circumstances do not have to be alleged in the indictment.' " And to the extent that *Ring* could be read to support Samra's argument, the ACCA noted that it was decided two years after his conviction became final and that appellate counsel could not have been ineffective for failing to anticipate changes in the law.

The ACCA also affirmed the Rule 32 court's ruling on the brain-dysfunction claim, finding that Bell employed a "well thought-out defense strategy," and determining that Bell had no cause to investigate Samra's organic brain function any further than he did. As for the evidence provided by Dr. Gelbort and Dr. Mountz, the ACCA concluded that it was not compelling and that, in any event, this additional evidence would not have "influenced the jury's appraisal of Samra's moral culpability." After quoting the trial court's discussions of whether the evidence was ***238** more aggravating than mitigating and whether Bell was ineffective for not objecting to the gang writings, the ACCA adopted and affirmed those conclusions without discussion. Following the ACCA's affirmance of the denial of Samra's Rule 32 petition, the Alabama Supreme Court denied certiorari on September 19, 2008. *See Ex parte Samra,* 34 So.3d 737, 737 (Ala.2008) (table decision). [8]

E. Federal Habeas Proceedings

Samra filed a petition for habeas corpus under 28 U.S.C. § 2254 in the Northern District of Alabama on October 26, 2007, and an amended petition on February 21, 2014. *See Samra § 2254 Proceeding,* 2014 WL 4452676, at *10. The district court denied Samra's § 2254 petition on September 5, 2014. *Id.* at *46. Applying the doubly deferential standard of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), and § 2254 to Samra's ineffective-assistance-of-counsel claims, the district court determined that the ACCA did not misapply *Strickland* when it held that Bell's investigation of Samra's brain condition was not deficient. *Id.* at *27. The district court noted that Bell had obtained Dr. Scott's evaluation and an MRI, and he had investigated Samra's background (including his tremors) and interacted with Samra. *Id.* Because nothing uncovered by Bell would have raised "red flags" as to an organic brain dysfunction, the district court deemed Bell's investigation to be extensive and not deficient. *Id.* at *28–29.

The district court also distinguished Samra's reliance on the Fifth Circuit case of *Lockett v. Anderson,* 230 F.3d 695 (5th Cir.2000). After observing that was it not a Supreme Court precedent, the district court concluded that "Samra has not presented any evidence that he has a mental illness or any connection between his purported 'organic brain damage' and his participation in these murders." *Id.* at *29. Nor did the district court find that the prejudice determination was contrary to law. As the district court viewed the record, the murders were heinous, the SPECT test was not trustworthy, and all of the Rule 32 testing was merely cumulative of the evidence of Samra's low IQ. *Id.* at *30–31.

The district court similarly found Bell's decision to emphasize Samra's membership in the FOLKS gang as unassailable because Bell reached that decision after concluding that Samra had no mental defect or illness that would serve as a defense. *Id.* at *34. With regard to Bell's presentation of Dr. Ronan's testimony, the district court saw no error because her overall conclusion supported Bell's defense theory, even if her testimony about the lack of gang involvement did not. *Id.* at *35. The district court likewise determined that Bell's failure to object to the photographic gang-related evidence was in keeping with his defense strategy, so the state court did not misapply *Strickland* when it rejected Samra's argument. *Id.* at *37. The district court did not discuss the prejudice prong of *Strickland* with respect to the gang-related claims. *See id.* at *31–37.

***239** Turning to Samra's ineffective-assistance-of-appellate-counsel claim, the district court concluded that the ACCA "mischaracterized" the claim as a defective indictment issue rather than a notice issue. *See id.* at *38. And because the state courts did not address the merits of the notice claim, the district court determined that *de novo* review was appropriate rather than deferential review under § 2254. *Id.* at *39.

Even applying *de novo* review, though, the district court determined that Samra's claim failed. *Id.* at *39–40. The district court held that due process requires that a defendant receive notice of the charges against him only, not notice of the statutory aggravating factors that the state intended to use to justify a death sentence. *Id.* at

*40. Because no due-process right existed, the district court reasoned, Bell was not deficient for failing to raise the argument on appeal. *Id.* Having concluded that Bell's performance was not deficient, the court did not further address the prejudice prong of this inquiry. *See id.*

Following the district court's rejection of his federal habeas petition, Samra sought appellate review. We granted a certificate of appealability with respect to two issues:

> (1) Did the Alabama courts unreasonably apply *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 [80 L.Ed.2d 674] (1984), when they determined that Samra's trial counsel was not ineffective when trial counsel (a) failed to investigate and present evidence of brain impairment in mitigation of the death penalty; (b) introduced evidence during trial of Samra's affiliation with a Satanic gang; and (c) did not object to the introduction at trial of Satanic markings found in his co-defendant's bedroom and Samra's own gang tattoos.
>
> (2) As to the claim that appellate counsel rendered ineffective assistance by failing to raise the issue of whether due process requires pretrial notice to a capital defendant of the specific statutory aggravating circumstances that the State intends to rely on in seeking a death sentence: (a) Is any component of this claim barred by the *Teague*[9] non-retroactivity doctrine? (b) Is 28 U.S.C. § 2254(d) deference due on any component of this claim? (c) Does due process require pre-trial notice to a capital defendant of which specific statutory aggravating circumstances the State intends to rely on in seeking a death sentence? (d) Was it ineffective assistance for the petitioner's appellate counsel not to raise this issue on direct appeal?

II.

A. General Habeas Standards

Federal law permits a prisoner held "in custody pursuant to the judgment of a State court" to seek habeas relief "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a). Generally, a prisoner must first "fairly present" his federal claims to the state court and exhaust his state-court remedies before seeking federal habeas relief. *Snowden v. Singletary,* 135 F.3d 732, 735 (11th Cir.1998).

We review a district court's denial of a § 2254 petition *de novo. Sims v. Singletary,* 155 F.3d 1297, 1304 (11th Cir.1998). If the state courts do not address the merits of a fairly presented claim, a federal court's review of that claim is *de novo. See* ***240** *Davis v. Sec'y for the Dep't of Corr.,* 341 F.3d 1310, 1313 (11th Cir.2003) (per curiam). But when a state court has adjudicated a prisoner's claim on the merits, a federal court may not grant habeas relief with respect to such a claim unless the state court's adjudication

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

These standards are highly deferential and demand that we give state-court decisions the benefit of the doubt. *Evans v. Sec'y, Dep't of Corr.,* 703 F.3d 1316, 1325 (11th Cir.2013) (en banc). A decision "is not 'contrary to' federal law unless it 'contradicts the United States Supreme Court on a settled question of law or holds differently than did that Court on a set of materially indistinguishable facts.' " *Id.* (quoting *Cummings v. Sec'y for Dep't of Corr.,* 588 F.3d 1331, 1355 (11th Cir.2009)). Nor is a state court's decision "an 'unreasonable application' of federal law unless the state court 'identifies the correct governing legal principle as articulated by the United States Supreme Court, but unreasonably applies that principle to the facts of the petitioner's case, unreasonably extends the principle to a new context where it should not apply, or unreasonably refuses to extend it to a new context where it should apply.' " *Id.* The federal court does not ask whether the state decision is correct, but rather whether it is unreasonable. *Id.*

B. Ineffective Assistance of Counsel

To prevail under *Strickland* on a claim of ineffective assistance of trial counsel, a petitioner must show that (1) counsel's performance was so deficient that "counsel

was not functioning as the 'counsel' guaranteed" by the Sixth Amendment and (2) that counsel's performance prejudiced the defense to the extent that the defendant was deprived of a fair, reliable trial. *Strickland,* 466 U.S. at 687, 104 S.Ct. at 2064. A court need not conduct this analysis in a particular sequence, and a court need not address both prongs if a petitioner fails to make a required showing on one of them. *Id.* at 697, 104 S.Ct. at 2069.

Establishing deficient performance requires the petitioner to demonstrate that " 'counsel's representation fell below an objective standard of reasonableness.' " *Harrington v. Richter,* 562 U.S. 86, 104, 131 S.Ct. 770, 787, 178 L.Ed.2d 624 (2011) (quoting *Strickland,* 466 U.S. at 688, 104 S.Ct. at 2064). A court applies a strong presumption that counsel's representation fell within the wide range of reasonable professional conduct. *Id.* To show prejudice, a petitioner "must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' " *Id.* (quoting *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068). We evaluate claims of ineffective assistance of appellate counsel under the same *Strickland* standards. *Philmore v. McNeil,* 575 F.3d 1251, 1264 (11th Cir.2009) (per curiam).

III.

Samra contends that he is entitled to federal habeas relief because his trial counsel was ineffective. Specifically relevant to this appeal, he asserts that his counsel failed to adequately investigate and present evidence of brain dysfunction in mitigation of the death penalty. He also contends that Bell's strategy of emphasizing ***241** Samra's involvement in a satanic gang, including Bell's failure to object to evidence of certain gang-related drawings and tattoos was more aggravating than mitigating. For the reasons discussed in this section, we find that Samra has failed to establish prejudice with respect to his ineffective-trial-counsel claim. And because he has not shown prejudice, we neither reach nor offer any opinion on trial counsel's performance. *See Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069.

A. Bell's Investigation of Samra's Brain Function

Samra argues that the ACCA unreasonably applied federal law when it determined (a) that Bell's investigation of Samra's neuropsychological health was not deficient and (b) that the failure to introduce the evidence developed by Dr. Gelbort and Dr. Mountz during the Rule 32 proceedings did not prejudice Samra. With respect to the deficient-performance prong of the *Strickland* analysis, Samra contends that Bell was deficient for not pursuing functional brain testing, particularly a SPECT test, and also for not pursuing further neuropsychological testing when Bell's own expert, Dr. Scott, had recommended those tests. Samra asserts that the failure to investigate prejudiced him because the postconviction evidence establishes that Samra does suffer from organic brain dysfunction and that such evidence is powerfully mitigating, thus undermining confidence in the death sentence.

The state counters that Bell's investigation of Samra's brain function was adequate. In the state's view, moreover, Samra was not prejudiced because the new evidence is cumulative and consistent with the evidence presented of Samra's borderline intellectual ability, does not undermine Samra's culpability, and would have had no chance of altering the jury's balance of aggravating and mitigating factors in light of the brutal nature of the killings. We agree with the state that Samra has failed to establish that the state courts unreasonably applied *Strickland* when they found no prejudice.

As we have noted, to demonstrate prejudice under *Strickland,* Samra must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland,* 466 U.S. at 694, 104 S.Ct. at 2068. "In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence," including all mitigating evidence produced at trial and developed during the collateral proceedings. *Wiggins v. Smith,* 539 U.S. 510, 534, 123 S.Ct. 2527, 2542, 156 L.Ed.2d 471 (2003); *Williams v. Taylor,* 529 U.S. 362, 397–98, 120 S.Ct. 1495, 1515, 146 L.Ed.2d 389 (2000).

As described above, Dr. Gelbort's examination, which was largely consistent with Dr. King's examination, suggested some mild impairment of Samra's brain's functioning. But Dr. Mountz's SPECT scan indicated just a different blood flow in one region of Samra's brain approximately one standard deviation below the "normal" level of flow.

And while Samra emphasizes what he describes as the abnormal nature of this blood flow, Dr. Mayberg opined that this result still fell within "normal" levels. Nor does Samra present any argument or evidence that his blood-flow level has had any cognitive or behavioral impact. In other words, there is no evidence that the blood flow level was so much an organic brain *problem,* as opposed to merely an organic brain anomaly, to the extent that it was even anomalous. Even Dr. Mountz testified, carefully, that the abnormal blood flow was "not inconsistent" with Dr. Gelbort's diagnosis of mild impairment, ***242** not that the blood flow itself was indicative of impairment. And Dr. Mountz added that further analysis would be required to determine what the section of Samra's brain with the different blood flow actually controls. While we recognize, of course, that any abnormality is admissible mitigation evidence, even assuming that the blood flow was abnormal, in the absence of any evidence explaining its effect on Samra, its mitigating impact is significantly reduced.

Samra cites a number of cases that stand for the proposition that organic brain damage can be a significant mitigating factor in capital sentencing proceedings. And we agree and have recognized in the past that evidence of organic brain damage can be a powerful mitigating factor. *See, e.g., Debruce v. Comm'r, Ala. Dep't of Corr.,* 758 F.3d 1263, 1276 (11th Cir.2014); *Ferrell v. Hall,* 640 F.3d 1199, 1234–35 & n. 17 (11th Cir.2011). But in those cases, the evidence established the existence of impairment —indeed, significant brain impairment. *See Debruce,* 758 F.3d at 1270 (petitioner suffered from "lingering emotional damage and social impairments associated with having been raised in a violent community," as well as "blackout episodes consistent with seizures accompanied by periods of non-responsive staring and loss of memory"); *Ferrell,* 640 F.3d at 1203, 1234 (petitioner suffered from "extensive" and "disabling ... organic brain damage to the frontal lobe, bipolar disorder, and temporal lobe epilepsy"). Even *Lockett,* the Fifth Circuit case upon which Samra heavily relies, dealt with a defendant who likely suffered from temporal-lobe epilepsy and paranoid schizophrenia. 230 F.3d at 713–14. Unlike the cases he cites, Samra possesses mild functional impairments and, based on his MRI scan, suffers from no structural brain abnormalities.

Contrary to Samra's argument on appeal that his counsel presented a paucity of mitigating evidence at his trial, the sentencing jury heard, and the sentencing judge found, several mitigating factors related to Samra's mental health, including his borderline intelligence, schooling problems, substance abuse, childhood hand tremors, and lack of emotionality. And unlike in cases such as *Wiggins, Debruce*, or *Ferrell,* there is absolutely no evidence in Samra's case of an abusive upbringing that could have contributed to a mental disorder.

Ultimately, after weighing the evidence adduced in the postconviction proceedings from Dr. Gelbort and Dr. Mountz along with the evidence introduced during the guilt and sentencing phases, the state court concluded that Samra had not established a reasonable probability that this mitigating evidence undermines confidence in his unanimous death sentence. This was not an unreasonable application of *Strickland's* prejudice analysis. *Harrington,* 562 U.S. at 100–01, 131 S.Ct. at 785.

The fact remains that Samra participated in the gruesome murders of four people—including personally slitting the throat of a seven-year-old girl, causing her to drown in her own blood—all because his friend Duke's father refused to let Duke use a pickup truck. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. None of the brain-impairment evidence Samra has provided leads us to conclude that a jury would have found that the killings were less heinous, atrocious, or cruel, or that Samra's mild brain impairments outweighed the heinousness, atrociousness, or cruelty of the crime, had evidence similar to that presented at the Rule 32 hearing been introduced during the penalty phase of Samra's trial. Absent the required showing of prejudice, we do not consider the sufficiency of Bell's investigation. ***243** Samra's claim that his trial counsel was ineffective for failing to adequately investigate Samra's brain function must be denied.

B. Bell's Gang–Influence Strategy

Samra contends that Bell's strategy of emphasizing Samra's membership in the FOLKS gang—including its connection to Satan, its violent character (including alleged matricide), and its association with drugs and prison—put evidence that was more aggravating than mitigating in front of the jury. In Samra's view, Bell was deficient for choosing and presenting this strategy and for failing to object to the prosecution's introduction of other photographic evidence of FOLKS-related markings found in Duke's room and Samra's tattoos. For its part,

the state contends that Bell's strategic decision to present a "substantial domination" defense is unassailable.

While neither the state courts nor the district court reached the prejudice prong of this analysis, we find under a *de novo* review that, regardless of the competency of Bell's chosen strategy, Samra has failed to establish a reasonable probability that it undermines confidence in the death sentence. We acknowledge, as we have previously, that evidence of gang membership and satanic worship has the potential to unduly prejudice a defendant. *See United States v. Jernigan,* 341 F.3d 1273, 1284–85 (11th Cir.2003) ("[W]e do not wish to understate the prejudicial effect that evidence of a criminal defendant's gang membership may entail. Indeed, modern American street gangs are popularly associated with a wealth of criminal behavior and social ills, and an individual's membership in such an organization is likely to provoke strong antipathy in a jury."); *cf. McCorkle v. Johnson,* 881 F.2d 993, 995 (11th Cir.1989) (per curiam) (recognizing the "violence inherent in Satan worship").

But the facts of this crime belie this prejudice here. Even if we disregard the gang-related evidence and argument, the state presented overwhelming evidence—including Samra's own confession—of the heinousness of this crime. By Samra's own admission, after he assisted in killing three people, he slit the throat of a seven-year-old girl who was pleading and struggling for her life. *Samra § 2254 Proceeding,* 2014 WL 4452676, at *1. We find no reasonable probability that, absent evidence or discussion of Samra's gang involvement, the jury would not have found these murders to be as especially heinous, atrocious, or cruel as it found them. *Harrington,* 562 U.S. at 104, 131 S.Ct. at 787. As a result, Samra's claim that his trial counsel was ineffective for pursing a gang-related strategy and for failing to object to gang-related evidence must be denied. [10]

IV.

Samra also contends that he is entitled to federal habeas relief because his appellate counsel was constitutionally ineffective. Specifically, Samra argues that he had a due-process right to be informed before his trial of the actual aggravating factor or factors upon which the state intended to rely in seeking the death penalty and that his appellate counsel was deficient for not challenging the trial court's rejection of this argument. Without deciding whether such a due-process right exists, we find that Samra's counsel was not deficient ***244** in failing to raise the issue during Samra's direct appeals. [11]

Samra bases his due-process notice argument on two Supreme Court cases that were decided before his conviction became final: *Jones v. United States,* 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999) and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000). In *Jones,* the Supreme Court construed the federal carjacking statute, 18 U.S.C. § 2119, and concluded that the statutory provisions that enhanced a sentence based on a finding of bodily injury or death should not be viewed merely as sentencing factors but as elements of distinct offenses that must be charged in an indictment. *See* 526 U.S. at 251–52, 119 S.Ct. at 1228. Similarly, in *Apprendi,* the Court confirmed the principle expressed in *Jones:* "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi,* 530 U.S. at 490, 120 S.Ct. at 2362–63. Under *Apprendi,* sentencing factors that increase punishment beyond the statutory maximum are "the functional equivalent of an *element of a greater offense* than the one covered by the jury's guilty verdict." *Id.* at 494 n. 19, 120 S.Ct. at 2365 n. 19 (emphasis added).

Because the statutory aggravating factors are required under Alabama law to increase the maximum punishment from life imprisonment to death, in Samra's view, they constitute elements of the capital offense. And because due process generally requires advance notice of offense elements, Samra argues that he had a constitutional entitlement to advance notice of the specific aggravating factors that the state was pursuing in his case. Samra asserts that the performance of his appellate counsel was constitutionally deficient because counsel neglected to challenge the trial court's refusal to provide this notice.

But Samra cannot demonstrate that his appellate counsel was constitutionally deficient for failing to raise this due-process argument. We judge counsel's performance from the perspective of an attorney operating at the time that the challenged decision was made. *Strickland,* 466 U.S. at 689, 104 S.Ct. at 2065. Here, Samra has cited no precedent —and we have found none—existing at the time of his direct appeal that required a state to provide advance

notice of the specific aggravating factor it intended to prove. In fact, in our view, the circumstances existing at that time actually counseled that such an argument lacked merit.

First, the Supreme Court had granted certiorari in *Jones* just a month before Samra filed his notice of direct appeal, and it did not decide *Apprendi* until after the Alabama Supreme Court upheld Samra's death sentence. *See Jones v. United States,* 523 U.S. 1058, 118 S.Ct. 1405, 140 L.Ed.2d 644 (1998) (Mem.) (amending the grant of certiorari to two specific questions); *Apprendi,* 530 U.S. at 466, 120 S.Ct. at 2348; *Ex parte Samra,* 771 So.2d at 1122. Samra suggests that his appellate counsel should have recognized from the grant of certiorari in *Jones*—a case involving the federal carjacking statute—that the issue of whether a state is required to provide capital defendants with ***245** advance notice of specific aggravating factors was an unresolved question of law. Although an exceptionally skilled or creative attorney may have anticipated the arguments and outcome of *Jones* (and later *Apprendi*) and sought to extend that rationale to the capital-sentencing context, we have repeatedly held that an attorney is not required to foresee changes in the law to provide constitutionally sufficient representation. *See, e.g., LeCroy v. Sec'y, Fla. Dep't of Corr.,* 421 F.3d 1237, 1261 n. 27 (11th Cir.2005) ("[A]ppellate counsel was not ineffective for failing to anticipate the change in the law"); *Spaziano v. Singletary,* 36 F.3d 1028, 1039 (11th Cir.1994) ("We have held many times that '[r]easonably effective representation cannot and does not include a requirement to make arguments based on predictions of how the law may develop.' ") (quoting *Elledge v. Dugger,* 823 F.2d 1439, 1443 (11th Cir.) (per curiam), *modified in unrelated part,* 833 F.2d 250, 250 (11th Cir.1987) (per curiam)).

Second, a substantial body of federal and state case law available to his appellate counsel at the time, while not necessarily foreclosing Samra's due-process argument, strongly suggested such an argument would face an uphill battle with little chance of success. *See, e.g., Walton v. Arizona,* 497 U.S. 639, 647–49, 110 S.Ct. 3047, 3054–55, 111 L.Ed.2d 511 (1990) (expressly holding that capital aggravating factors are not elements of the offense, a holding that was specifically affirmed in *Jones* and *Apprendi* and not overruled until *Ring*), *overruled by Ring,* 536 U.S. at 589, 122 S.Ct. at 2432; *Spenkelink v. Wainwright,* 442 U.S. 1301, 1303–06, 99 S.Ct. 2091, 2092–94, 60 L.Ed.2d 649 (Rehnquist, Circuit Justice 1979) (denying stay of execution and asserting belief that no four Justices would agree to hear a claim that due process required advance notice of capital aggravating factors); *Clark v. Dugger,* 834 F.2d 1561, 1566 (11th Cir.1987) (due process satisfied by statute listing potential aggravating factors and particularized notice of specific factors is not required); *Knotts v. State,* 686 So.2d 431, 448–449 (Ala.Crim.App.1995) ("A defendant has no right to advance notice of the state's intention to rely on any of the aggravating circumstances enumerated in § 13A–5–49.").

In light of this case law existing at the time that Samra's appeal was filed, an attorney could not be faulted for declining to pursue the argument that capital sentencing factors were functionally equivalent to the elements of an offense and were required by due process to be disclosed in advance of trial. *Philmore,* 575 F.3d at 1264 ("In assessing an appellate attorney's performance, we are mindful that 'the Sixth Amendment does not require appellate advocates to raise every non-frivolous issue.' Rather, an effective attorney will weed out weaker arguments, even though they may have merit.") (citation omitted) (quoting *Heath v. Jones,* 941 F.2d 1126, 1130–31 (11th Cir.1991)). Thus, even if counsel had foreseen such an argument—and he was not required to have done so—counsel would not have been deficient in declining to pursue that argument. Because Samra's appellate counsel's performance was not deficient, Samra cannot prevail on his ineffective-appellate-counsel claim here. We therefore do not address the prejudice prong and the underlying merits of Samra's due-process argument. *See Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069; *Philmore,* 575 F.3d at 1264–65.

V.

For the reasons set forth above, we find that Samra has failed to make the required showings to prevail on his ineffective-assistance-of-counsel ***246** claims. Accordingly, we affirm the district court's denial of Samra's § 2254 petition.

AFFIRMED.

All Citations

626 Fed.Appx. 227

Footnotes

1 Because three members of the Hunt family were involved in these facts, we refer to each by first name to avoid confusion.

2 "SPECT" stands for single-photon emission computed tomography, a method for imaging the function of internal organs, including blood flow to the brain. *Tests and Procedures: SPECT Scan,* MAYO CLINIC (Feb. 20, 2014), http://www.mayoclinic.org/tests-procedures/spect-scan/basics/definition/prc–20020674. "PET" stands for positron emission tomography, a similar function-imaging procedure. *Tests and Procedures: Positron Emission Tomography (PET) Scan,* MAYO CLINIC (May 6, 2014), http://www.mayoclinic.org/tests-procedures/pet-scan/basics/definition/prc–20014301.

3 Dr. Scott's report listed as examples of types of brain imaging only MRI or PET scanning. Bell testified during the state postconviction hearing that Dr. Scott had also recommended to him obtaining a SPECT scan. The SPECT scan was also mentioned in an affidavit that Bell prepared on Dr. Scott's behalf but was never signed by Dr. Scott. Although the state contends, correctly, that Dr. Scott's report did not mention a SPECT scan, the record supports Samra's claims that Dr. Scott did otherwise recommend a SPECT scan to Bell.

4 An MRI images anatomical structure, while a SPECT or PET scan images the function of organs. *Magnetic Resonance Imaging (MRI),* WEBMD, http://www.webmd.com/a-to-z-guides/magnetic-resonance-imaging-mri (last updated Sept. 9, 2014).

5 Before the prosecutor asked this question, he asked for a bench conference to find out if Bell would object. Bell said he would object because he did not think that asking about Samra's gang affiliation opened the door to Samra's statements about whether the killings were related to that affiliation. The court overruled the objection and permitted the state to ask Dr. Ronan a single question about what Samra told her about the killings' relation to gang membership.

6 Samra was represented by Bell on appeal with respect to all of his claims except the ineffective-assistance claim. The court appointed a separate attorney to argue that claim. *See Samra Direct Appeal,* 771 So.2d at 1119 n. 3.

7 This test was incomplete because the prison would not allow Dr. Gelbort to bring in certain equipment.

8 After Duke's death sentence was vacated in light of the United States Supreme Court's decision in *Roper v. Simmons,* 543 U.S. 551, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005), because Duke was under eighteen at the time of the murders, Samra filed a successive Rule 32 petition arguing that his death sentence should be set aside because, essentially, it was unjust and disproportionate to execute Samra, who, although nineteen years old at the time of the offense, was a less culpable party than Duke. The state courts rejected this argument. The issues raised in Samra's successive Rule 32 petition are not before us.

9 *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

10 As with the brain-dysfunction claim, we do not opine on whether counsel's selection and implementation of this defense strategy was constitutionally sufficient. *See Strickland,* 466 U.S. at 697, 104 S.Ct. at 2069.

11 The state contends that the district court erred in considering this claim *de novo* after determining that the Alabama state courts had mischaracterized Samra's claim. Instead, the state urges that we extend double deference under § 2254 and *Strickland* to the manner in which the state courts did decide this claim. We need not resolve this issue, however, because even under *de novo* review, Samra has failed to demonstrate deficient performance.

Appendix R

Order of the Fayette County Circuit Court finding the Eighth Amendment categorically prohibits the execution of offenders under 21 years old, *Commonwealth v. Efrain Diaz*, 15 CR 584-001 (Fayette Cir. Ct. Order Sept. 6, 2017) (transfer granted, 2017-SC-000536)

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
SEVENTH DIVISION
CASE NO. 15-CR-584-001

COMMONWEALTH OF KENTUCKY — PLAINTIFF

v.

EFRAIN DIAZ — DEFENDANT

ORDER DECLARING KENTUCKY'S DEATH PENALTY STATUTE AS UNCONSTITUTIONAL

This matter comes before the Court on Defendant Efrain Diaz's Motion to declare the Kentucky death penalty statute unconstitutional insofar as it permits capital punishment for those under twenty-one (21) years of age at the time of their offense. Mr. Diaz argues that the death penalty would be cruel and unusual punishment, in violation of the Eighth Amendment, for an offender under twenty-one (21) at the time of the offense. The defense claims that recent scientific research shows that individuals under twenty-one (21) are psychologically immature in the same way that individuals under the age of eighteen (18) were deemed immature, and therefore ineligible for the death penalty, in *Roper v. Simmons*, 543 U.S. 551 (2005). The Commonwealth in turn argues that Kentucky's death penalty statute is constitutional and that there is no national consensus with respect to offenders under twenty-one (21). Having the benefit of memoranda of law, expert testimony, and the arguments of counsel, and being otherwise sufficiently advised, the Court sustains the Defendant's motion.

FINDINGS OF FACT

Efrain Diaz was indicted on the charges of Murder, First Degree Robbery, Theft by Unlawful Taking $10,000 or More, and three Class A Misdemeanors for events which occurred on April 17, 2015, when Mr. Diaz was eighteen (18) years and seven (7) months old.

On July 17, 2017, the Court heard testimony from Dr. Laurence Steinberg, an expert in adolescent development, testified to the maturational differences between adolescents (individuals ten (10) to twenty-one (21) years of age) and adults (twenty-one (21) and over). The most significant of these differences being that adolescents are more impulsive, more likely to misperceive risk, less able to regulate behavior, more easily emotionally aroused, and, importantly, more capable of change. Additionally, Dr. Steinberg explained how these differences are exacerbated in the presence of peers and under emotionally stressful situations, whereas there is no such effect with adults. Dr. Steinberg related these differences to an individual's culpability and capacity for rehabilitation and concluded that, "if a different version of *Roper* were heard today, knowing what we know now, one could've made the very same arguments about eighteen (18), nineteen (19), and twenty (20) year olds that were made about sixteen (16) and seventeen (17) year olds in *Roper*."[1] Dr. Steinberg supplemented his testimony with a report further detailing the structural and functional changes responsible for these differences between adolescents and adults, as will be discussed later in this opinion.[2]

CONCLUSIONS OF LAW

The Eighth Amendment to the United States Constitution states, "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S.C.A.

[1] Hearing July 17, 2017 at 9:02:31.
[2] Affidavit of Kenneth B. Benedict, July 14, 2017.

Const. amend. VIII. This provision is applicable to the states through the Fourteenth Amendment. The protection flows from the basic "precept of justice that punishment for crime should be graduated and proportioned to [the] offense." *Atkins v. Virginia*, 536 U.S. 304, 311 (2002) (quoting *Weems v. United States*, 217 U.S. 349, 367 (1910)). Eighth Amendment jurisprudence has seen the consistent reference to "the evolving standards of decency that mark the progress of a maturing society" to determine which punishments are so disproportionate as to be "cruel and unusual." *Trop v. Dulles*, 356 U.S. 86, 100-101 (1958). The two prongs of the "evolving standards of decency" test are: (1) objective indicia of national consensus, and (2) the Court's own determination in the exercise of independent judgment. *Stanford v. Kentucky*, 492 U.S. 361 (1989); *Atkins*, 536 U.S. 304; *Roper*, 543 U.S. 551 (2005).

I. Objective Indicia of National Consensus Against Execution of Offenders Younger than 21

Since *Roper*, six (6) states[3] have abolished the death penalty, making a total of nineteen (19) states and the District of Columbia without a death penalty statute. Additionally, the governors of four (4) states[4] have imposed moratoria on executions in the last five (5) years. Of the states that do have a death penalty statute and no governor-imposed moratoria, seven[5] (7) have *de facto* prohibitions on the execution of offenders under twenty-one (21) years of age, including Kentucky. Taken together, there are currently thirty states in which a defendant who was under the age of

[3] The states that have abolished the death penalty since *Roper* and year of abolition: Connecticut (2012), Illinois (2011), Maryland (2013), New Jersey (2007), New Mexico (2009), and New York (2007).

[4] The governors of Pennsylvania and Washington imposed moratoria on the death penalty in 2015 and 2014, respectively. The governor of Oregon extended a previously imposed moratorium in 2015. The governor of Colorado granted an indefinite stay of execution to a death row inmate in 2013.

[5] Kansas and New Hampshire have not executed anyone since 1977. Montana and Wyoming have never executed anyone who was under twenty-one (21) years of age at the time of their offenses, and they currently have no such offenders on death row. Utah has not executed anyone who was under twenty-one (21) years of age at the time of their offense in the last fifteen (15) years, and no such offender is currently on Utah's death row. Idaho and Kentucky have not executed anyone who was under twenty-one (21) years old at the time of their offense in the last fifteen (15) years.

twenty-one (21) at the time of their offense would not be executed – ten (10) of which have made their prohibition on the death penalty official since the decision in *Roper* in 2005.

Of the thirty-one (31) states with a death penalty statute, only nine (9) executed defendants who were under the age of twenty-one (21) at the time of their offense between 2011 and 2016.[6] Those nine (9) states have executed a total of thirty-three (33) defendants under the age of twenty-one (21) since 2011 – nineteen (19) of which have been in Texas alone.[7] Considering Texas an outlier, there have only been fourteen (14) executions of defendants under the age of twenty-one (21) between 2011 and 2016, compared to twenty-nine (29) executions in the years 2006 to 2011, and twenty-seven (27) executions in the years 2001 to 2006 (again, excluding Texas).[8] In short, the number of executions of defendants under twenty-one (21) in the last five (5) years has been cut in half from the two (2) previous five- (5) year periods.

Looking at the death penalty as practically applied to all defendants, since 1999 there has been a distinct downward trend in death sentences and executions. In 1999, 279 offenders nationwide were sentenced to death, compared to just thirty (30) in 2016 – just about eleven (11) percent of the number sentenced in 1999.[9] Similarly, the number of defendants actually executed spiked in 1999 at ninety-eight (98), and then gradually decreased to just twenty (20) in 2016 – only two of which were between the ages of eighteen (18) and twenty (20).

Contrary to the Commonwealth's assertion, it appears there is a very clear national consensus trending toward restricting the death penalty, especially in the case where defendants

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[6] Chart of Number of People Executed Who Were Aged 18, 19, or 20 at Offense from 2000 to Present, By State [current as of February 29, 2016]
[7] *Id.*
[8] *Id.*
[9] Death Penalty Information Center, Facts About the Death Penalty (Updated May 12, 2017), downloaded from https://deathpenaltyinfo.org/documents/FactSheet.pdf.

are eighteen (18) to twenty-one (21) years of age. Not only have six more states abolished the death penalty since *Roper* in 2005, four more have imposed moratoria on executions, and seven more have *de facto* prohibitions on the execution of defendants eighteen (18) to twenty-one (21). In addition to the recent legislative opposition to the death penalty, since 1999 courts have also shown a reluctance to impose death sentences on offenders, especially those eighteen (18) to twenty-one (21. "[T]he objective indicia of consensus in this case – the rejection of the juvenile death penalty in the majority of States; the infrequency of its use even where it remains on the books; and the consistency in the trend toward abolition of the practice – provide sufficient evidence that today our society views juveniles ... as 'categorically less culpable than the average criminal.'" *Roper*, 543 U.S. at 567 (quoting *Atkins*, 536 U.S. at 316). Given this consistent direction of change, this Court thinks it clear that the national consensus is growing more and more opposed to the death penalty, as applied to defendants eighteen (18) to twenty-one (21).

2. The Court's Independent Judgment

As the Supreme Court in *Roper* heavily relied on scientific studies to come to its conclusion, so will this Court. On July 17, 2017, this Court heard expert testimony on this topic. Dr. Laurence Steinberg testified and was also allowed to supplement his testimony with a written report. The report cited multiple recent studies supporting the conclusion that individuals under twenty-one (21) years of age are categorically less culpable in the same ways that the Court in *Roper* decided individuals under eighteen (18) were less culpable. It is based on those studies that this Court has come to the conclusion that the death penalty should be excluded for defendants who were under the age of twenty-one (21) at the time of their offense.

If the science in 2005 mandated the ruling in *Roper*, the science in 2017 mandates this ruling.

Through the use of functional Magnetic Resonance Imaging (fMRI), scientists of the late 1990s and early 2000s discovered that key brain systems and structures, especially those involved in self-regulation and higher-order cognition, continue to mature through an individual's late teens.[10] Further study of brain development conducted in the past ten (10) years has shown that these key brain systems and structures actually continue to mature well into the mid-twenties (20s); this notion is now widely accepted among neuroscientists.[11]

Recent psychological research indicates that individuals in their late teens and early twenties (20s) are less mature than their older counterparts in several important ways.[12] First, these individuals are more likely than adults to underestimate the number, seriousness, and likelihood of risks involved in a given situation.[13] Second, they are more likely to engage in "sensation-seeking," the pursuit of arousing, rewarding, exciting, or novel experiences. This tendency is especially pronounced among individuals between the ages of eighteen (18) and twenty-one (21).[14] Third, individuals in their late teens and early twenties (20s) are less able than older individuals to control their impulses and consider the future consequences of their actions and decisions because

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[10] B. J. Casey, et al., *Imaging the Developing Brain: What Have We Learned About Cognitive Development?*, 9 TRENDS IN COGNITIVE SCI. 104-110 (2005).

[11] N. Dosenbach, et al., *Prediction of Individual Brain Maturity Using fMRI*, 329 SCI. 1358-1361 (2011); D. Fair, et al., *Functional Brain Networks Develop From a "Local to Distributed" Organization*, 5 PLOS COMPUTATIONAL BIOLOGY 1-14 (2009); A. Hedman, et al., *Human Brain Changes Across the Life Span: A Review of 56 Longitudinal Magnetic Resonance Imaging Studies*, 33 HUM. BRAIN MAPPING 1987-2002 (2012); A. Pfefferbaum, et al., *Variation in Longitudinal Trajectories of Regional Brain Volumes of Healthy Men and Women (Ages 10 to 85 Years) Measures with Atlas-Based Parcellation of MRI*, 65 NEUROIMAGE 176-193 (2013); D. Simmonds, et al., *Developmental Stages and Sex Differences of White Matter and Behavioral Development Through Adolescence: A Longitudinal Diffusion Tensor Imaging (DTI) Study*. 92 NEUROIMAGE 356-368 (2014); L. Somerville, et al., *A Time of Change: Behavioral and Neural Correlates of Adolescent Sensitivity to Appetitive and Aversive Environmental Cues*, 72 BRAIN & COGNITION 124-133 (2010).

[12] For a recent review of this research, see: LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

[13] T. Grisso, et al., *Juveniles' Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*, 27 LAW & HUM. BEHAV. 333-363 (2003).

[14] E. Cauffman, et al., *Age Differences in Affective Decision Making as Indexed by Performance on the Iowa Gambling Task*, 46 DEV. PSYCHOL. 193-207 (2010); L. Steinberg, et al., *Around the World, Adolescence is a Time of Heightened Sensation Seeking and Immature Self-Regulation*, DEV. SCI. Advance online publication. doi: 10.1111/desc.12532. (2017).

gains in impulse control continue to occur during the early twenties (20s).[15] Fourth, basic cognitive abilities, such as memory and logical reasoning, mature before emotional abilities, including the ability to exercise self-control, to properly consider the risks and rewards of alternative courses of action, and to resist coercive pressure from others. Thus, one may be intellectually mature but also socially and emotionally immature.[16] As a consequence of this gap between intellectual and emotional maturity, these differences are exacerbated when adolescents and young adults are making decisions in situations that are emotionally arousing, including those that generate negative emotions, such as fear, threat, anger, or anxiety.[17] The presence of peers also amplifies these differences because this activates the brain's "reward center" in individuals in their late teens and early twenties (20s). Importantly, the presence of peers has no such effect on adults.[18] In recent experimental studies, the peak age for risky decision-making was determined to be between nineteen (19) and twenty-one (21).[19]

Recent neurobiological research parallels the above psychological conclusions. This research has shown that the main cause for psychological immaturity during adolescence and the early twenties (20s) is the difference in timing of the maturation of two important brain systems. The system that is responsible for the increase in sensation-seeking and reward-seeking—

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[15] L. Steinberg, et al., *Age Difference in Future Orientation and Delay Discounting*, 80 CHILD DEV. 28-44 (2009); D. Albert, et al., *Age Difference in Sensation Seeking and Impulsivity as Indexed by Behavior and Self-Report: Evidence for a Dual Systems Model*, 44 DEV. PSYCHOL. 1764-1778 (2008).

[16] L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[17] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOLOGICAL SCIENCE 549-562 (2016); L. Steinberg, et al., *Are Adolescents Less Mature Than Adults? Minors' Access to Abortion, the Juvenile Death Penalty, and the Alleged APA "Flip-Flop,"* 64 AM. PSYCHOLOGIST 583-594 (2009).

[18] D. Albert, et al., *The Teenage Brain: Peer Influences on Adolescent Decision-Making*, 22 CURRENT DIRECTIONS IN PSYCHOL. SCI. 114-120 (2013).

[19] B. Braams, et al., *Longitudinal Changes in Adolescent Risk-Taking: A Comprehensive Study of Neural Responses to Rewards, Pubertal Development and Risk Taking Behavior*, 35 J. OF NEUROSCIENCE 7226-7238 (2015); E. Shulman & E. Cauffman, *Deciding in the Dark: Age Differences in Intuitive Risk Judgment*, 50 DEV. PSYCHOL. 167-177 (2014).

sometimes referred to as the "socio-emotional system"—undergoes dramatic changes around the time of puberty, and stays highly active through the late teen years and into the early twenties (20s). However, the system that is responsible for self-control, regulating impulses, thinking ahead, evaluating the risks and rewards of an action, and resisting peer pressure—referred to as the "cognitive control system"—is still undergoing significant development well into the mid-twenties (20s).[20] Thus, during middle and late adolescence there is a "maturational imbalance" between the socio-emotional system and the cognitive control system that inclines adolescents toward sensation-seeking and impulsivity. As the cognitive control system catches up during an individual's twenties (20s), one is more capable of controlling impulses, resisting peer pressure, and thinking ahead.[21]

There are considerable structural changes and improvements in connectivity across regions of the brain which allow for this development. These structural changes are mainly the result of two processes: synaptic pruning (the elimination of unnecessary connections between neurons, allowing for more efficient transmission of information) and myelination (insulation of neuronal connections, allowing the brain to transmit information more quickly). While synaptic pruning is mostly complete by age sixteen (16), myelination continues through the twenties (20s).[22] Thus, while the development of the prefrontal cortex (logical reasoning, planning, personality) is largely finished by the late teens, the maturation of connections between the prefrontal cortex and regions

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[20] B. J. Casey, et al., *The Storm and Stress of Adolescence: Insights from Human Imaging and Mouse Genetics*, 52 DEV. PSYCHOL. 225-235 (2010); L. Steinberg, *A Social Neuroscience Perspective on Adolescent Risk-Taking*, 28 DEV. REV. 78-106 (2008); L. Van Leijenhorst, et al., *Adolescent Risky Decision-making: Neurocognitive Development of Reward and Control Regions*, 51 NEUROIMAGE 345-355 (2010).

[21] D. Albert & L. Steinberg, *Judgment and Decision Making in Adolescence*, 21 J. OF RES. ON ADOLESCENCE 211-224 (2011); S-J Blakemore & T. Robbins, *Decision-Making in the Adolescent Brain*, 15 NAT. NEUROSCIENCE 1184-1191 (2012).

[22] S-J, Blakemore, *Imaging Brain Development: The Adolescent Brain*, 61 NEUROIMAGE 397-406 (2012); R. Engle, *The Teen Brain*, 22(2) CURRENT DIRECTIONS IN PSYCHOL. SCI. (whole issue) (2013); M. Luciana (Ed.), *Adolescent Brain Development: Current Themes and Future Directions*, 72(2) BRAIN & COGNITION (whole issue) (2010).

which govern self-regulation and emotions continues into the mid-twenties (20s).[23] This supports the psychological findings spelled out above which conclude that even intellectual young adults may have trouble controlling impulses and emotions, especially in the presence of peers and in emotionally arousing situations.

Perhaps one of the most germane studies to this opinion illustrated this development gap by asking teenagers, young adults (18-21), and mid-twenties adults to demonstrate impulse control under both emotionally neutral and emotionally arousing conditions.[24] Under emotionally neutral conditions, individuals between eighteen (18) and twenty-one (21) were able to control their impulses just as well as those in their mid-twenties (20s). However, under emotionally arousing conditions, eighteen– (18) to twenty-one– (21) year–olds demonstrated levels of impulsive behavior and patterns of brain activity comparable to those in their mid-teens.[25] Put simply, under feelings of stress, anger, fear, threat, etc., the brain of a twenty– (20) year–old functions similarly to a sixteen– (16) or seventeen– (17) year–old.

In addition to this maturational imbalance, one of the hallmarks of neurobiological development during adolescence is the heightened plasticity—the ability to change in response to experience—of the brain. One of the periods of the most marked neuroplasticity is during an individual's late teens and early twenties (20s), indicating that this group has strong potential for behavioral change.[26] Given adolescents' ongoing development and heightened plasticity, it is difficult to predict future criminality or delinquent behavior from antisocial behavior during the

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[23] L. Steinberg, *The Influence of Neuroscience on U.S. Supreme Court Decisions Involving Adolescents' Criminal Culpability*, 14 NAT. REV. NEUROSCIENCE 513-518 (2013).
[24] A. Cohen, et al., *When is an Adolescent an Adult? Assessing Cognitive Control in Emotional and Non-Emotional Contexts*, 4 PSYCHOL. SCI. 549-562 (2016).
[25] *Id.*
[26] LAURENCE STEINBERG, AGE OF OPPORTUNITY: LESSONS FROM THE NEW SCIENCE OF ADOLESCENCE (2014).

teen years, even among teenagers accused of committing violent crimes.[27] In fact, many researchers have conducted studies finding that approximately ninety (90) percent of serious juvenile offenders age out of crime and do not continue criminal behavior into adulthood.[28]

Justin Diaz was eighteen (18) years and seven (7) months old at the time of the alleged crime. According to recent scientific studies, Mr. Diaz fits into the group experiencing the "maturational imbalance," during which his system for sensation-seeking, impulsivity, and susceptibility to peer pressure was fully developed, while his system for planning and impulse control lagged behind, unable to override those impulses. He also fits into the group described in the study above which was found to act essentially like a sixteen– (16) to seventeen– (17) year–old under emotionally arousing conditions, such as, for example, robbing a store. Most importantly, this research shows that eighteen– (18) to twenty-one– (21) year–olds are categorically less culpable for the same three reasons that the Supreme Court in *Roper* found teenagers under eighteen (18) to be: (1) they lack maturity to control their impulses and fully consider both the risks and rewards of an action, making them unlikely to be deterred by knowledge of likelihood and severity of punishment; (2) they are susceptible to peer pressure and emotional influence, which exacerbates their existing immaturity when in groups or under stressful conditions; and (3) their character is not yet well formed due to the neuroplasticity of the young brain, meaning that they have a much better chance at rehabilitation than do adults.[29]

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[27] T. Moffitt, *Life-Course Persistent Versus Adolescent-Limited Antisocial Behavior*, 3(2) DEV. & PSYCHOPATHOLOGY (2016).
[28] K. Monahan, et al., *Psychosocial (im)maturity from Adolescence to Early Adulthood: Distinguishing Between Adolescence-Limited and Persistent Antisocial Behavior*, 25 DEV. & PSYCHOPATHOLOGY 1093-1105 (2013); E. Mulvey, et al., *Trajectories of Desistance and Continuity in Antisocial Behavior Following Court Adjudication Among Serious Adolescent Offenders*, 22 DEV. & PSYCHOPATHOLOGY 453-475 (2010).
[29] *Roper*, 543 U.S. at 569-70.

Further, the Supreme Court has declared several times that "capital punishment must be limited to those offenders who commit 'a narrow category of the most serious crimes' and whose extreme culpability makes them 'the most deserving of execution.'" *Roper*, 543 U.S. at 568 (quoting *Atkins*, 536 U.S. at 319); *Kennedy v. Louisiana*, 554 U.S. 407 (2008) (holding that the Eighth Amendment prohibits the death penalty for the rape of a child where the crime did not result, and was not intended to result, in the death of the victim); *Kansas v. Marsh*, 548 U.S. 163, 206 (2006) (Souter, J., dissenting) ("the death penalty must be reserved for 'the worst of the worst'"). Given Mr. Diaz's young age and development, it is difficult to see how he and others his age could be classified as "the most deserving of execution."

Given the national trend toward restricting the use of the death penalty for individuals under the age of twenty-one (21), and given the recent findings by the scientific community, the death penalty would be an unconstitutionally disproportionate punishment for crimes committed by individuals under twenty-one (21) years of age. Accordingly, Kentucky's death penalty statute is unconstitutional insofar as it permits capital punishment for offenders under twenty-one (21) at the time of their offense.

So ORDERED this the 6 day of September, 2017.

JUDGE ERNESTO SCORSONE
FAYETTE CIRCUIT COURT

CERTIFICATE OF SERVICE

The following is to certify that the foregoing was served this the 7th day of September 2017, by mailing same first class copy, postage prepaid, to the following:

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