No. 19-

IN THE

Supreme Court of the United States

WILLIE B. SMITH, III,

Petitioner,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION APPENDIX

HUGH ABRAMS
SHOOK, HARDY & BACON, LLP
111 South Wacker Drive
Suite 4700
Chicago, IL 60606
(312) 704-5332

STEVEN J. HOROWITZ*
KELLY J. HUGGINS
CAROLINE A. WONG
SIDLEY AUSTIN LLP
One South Dearborn Street
Chicago, IL 60603
(312) 853-7000
shorowitz@sidley.com

TUNG NGUYEN
SIDLEY AUSTIN LLP
2021 McKinney Avenue
Suite 2000
Dallas, TX 75201
(214) 981-3478

Counsel for Petitioner

* Counsel of Record

February 19, 2020

TABLE OF CONTENTS

TABLE OF CONTENTS—continued

"determine the allocation of parental responsibilities ... in accordance with the best interests of the child giving paramount consideration to the child's safety and the physical, mental, and emotional conditions and needs").[3]

Despite Colorado's numerous express statements to the contrary, the panel nonetheless concludes the strong presumption towards treating testimony in a judicial proceeding as a matter of public concern is overcome in the context of character testimony in a child custody proceeding. The holding in this case renders hollow not only the First Amendment's protections for well over one hundred thousand public employees in our circuit, but also the right to call and confront witnesses and fundamental principles of due process. These constitutional protections are the bedrock upon which the sanctity of the judiciary rests.

For the foregoing reasons, I respectfully dissent from the denial of en banc review.

3. The panel argues the content of Butler's testimony did not raise a matter of public concern even if the underlying child custody proceeding presents such a public concern. I disagree that testimony on the suitability of a potential guardian presented by a character witness does not constitute speech on a public concern in light of Colorado's express statements to the contrary regarding the placement of children in custody proceedings. But even accepting the argument of the panel at face value places us at odds with other circuits. See Alpha Energy Savers, Inc. v. Hansen, 381 F.3d 917, 927 (9th Cir. 2004) ("So long as either the public employee's testimony or the underlying lawsuit meets the public concern test, the employee may, in accord with Connick, be afforded constitutional protection against any retaliation that results." (emphasis added)).

Willie B. SMITH, III, Petitioner - Appellant,

v.

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, Respondent - Appellee.

No. 17-15043

United States Court of Appeals, Eleventh Circuit.

(May 22, 2019)

Background: Following affirmance of his capital murder conviction and death sentence, 838 So.2d 413, state inmate filed petition for writ of habeas corpus. The United States District Court for the Northern District of Alabama, No. 2:13-cv-00557-RDP, R. David Proctor, J., 2017 WL 3116937, 2017 WL 1150618, denied petition, and petitioner appealed.

Holdings: The Court of Appeals, Wilson, Circuit Judge, held that:

(1) rule of constitutional law announced in *Moore v. Texas* that states could not disregard current clinical and medical standards in assessing whether capital defendant was intellectually disabled did not apply retroactively;

(2) state court's refusal to fully credit defense expert's IQ score of 64 in determining whether petitioner was intellectually disabled was reasonable;

(3) state court's refusal to average IQ scores or to account for certain statisti-

cal adjustments in determining petitioner's IQ was reasonable;

(4) state court's decision to favor petitioner's adaptive strengths over his adaptive deficits in determining that he did not suffer from intellectual disability was reasonable;

(5) state court's finding that prosecutor's use of 14 of his 15 peremptory strikes to eliminate female venire members based on their church involvement was nondiscriminatory was reasonable; and

(6) determination that prosecutor's use of peremptory challenge to strike venire's only Hispanic member was not result of national origin discrimination was reasonable.

Affirmed.

1. Habeas Corpus ⚿842

Court of Appeals reviews de novo district court's denial of habeas petition. 28 U.S.C.A. § 2254.

2. Habeas Corpus ⚿452

State court's determination is "contrary to" clearly established federal law, thus warranting federal habeas relief, if state court arrives at conclusion opposite to that reached by Supreme Court on question of law or if state court decides case differently than Supreme Court has on set of materially indistinguishable facts. 28 U.S.C.A. § 2254(d).

See publication Words and Phrases for other judicial constructions and definitions.

3. Habeas Corpus ⚿450.1

State court's determination is "unreasonable application" of clearly established federal law, thus warranting federal habeas relief, if state court identifies correct governing legal principle from Supreme Court's decisions but unreasonably applies that principle to facts of prisoner's case. 28 U.S.C.A. § 2254(d).

See publication Words and Phrases for other judicial constructions and definitions.

4. Habeas Corpus ⚿450.1

Federal court may not issue writ of habeas corpus simply because it concludes in its independent judgment that state court was incorrect. 28 U.S.C.A. § 2254.

5. Habeas Corpus ⚿767

Deference accorded to state court's findings of fact requires that federal habeas court more than simply disagree with state court before rejecting its factual determinations; instead, it must conclude that state court's findings lacked even fair support in record. 28 U.S.C.A. §§ 2254(d)(2), 2254(e)(1).

6. Sentencing and Punishment ⚿1642

When adjudicating whether capital defendant has intellectual disability that precludes execution under Eighth Amendment's protection against cruel and unusual punishments, states cannot disregard current clinical and medical standards. U.S. Const. Amend. 8.

7. Sentencing and Punishment ⚿1642

In evaluating state prisoner's adaptive functioning, as factor for determining whether prisoner had intellectual disability that precluded execution, focus of should be prisoner's adaptive deficits—not adaptive strengths, and states cannot weigh prisoner's adaptive strengths against his adaptive deficits. U.S. Const. Amend. 8.

8. Courts ⚿100(1)

New constitutional rules are generally not retroactive for cases on federal habeas review.

9. Courts ⚿100(1)

New rule of constitutional law is applicable retroactively to cases on collateral review if (1) rule places entire category of primary conduct beyond reach of criminal law, or (2) it is watershed rule of criminal procedure that is necessary to fundamental fairness of criminal proceedings.

10. Courts ⚿100(1)

Rule of constitutional law announced in *Moore v. Texas*—that states could not disregard current clinical and medical standards in assessing whether capital defendant was intellectually disabled, such that Eighth Amendment precluded his execution—was procedural, not substantive, for purposes of determining whether it was applicable retroactively to case on federal habeas review; while *Moore* might have had effect of expanding class of people ineligible for death penalty, it merely defined appropriate manner for determining who belonged to that class of defendants ineligible for death penalty. U.S. Const. Amend. 8.

11. Courts ⚿100(1)

Substantive rules of constitutional law for criminal cases, which are not subject to general bar on retroactive application of new constitutional rules of criminal procedure to convictions that were final when the new rule was announced, set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond state's power to impose, while procedural rules that are not applicable retroactively are designed to enhance accuracy of conviction or sentence by regulating manner of determining defendant's culpability.

12. Courts ⚿100(1)

New rule of constitutional law is watershed rule of criminal procedure that is applicable retroactively if infringement of rule seriously diminishes likelihood of obtaining accurate conviction or sentence, and rule alters understanding of bedrock procedural elements essential to fairness of proceeding.

13. Courts ⚿100(1)

Rule of constitutional law announced in *Moore v. Texas*—that states could not disregard current clinical and medical standards in assessing whether capital defendant was intellectually disabled, such that Eighth Amendment precluded his execution—was not watershed rule of criminal procedure that was necessary to fundamental fairness of criminal proceedings, and thus was not applicable retroactively to case on federal habeas review. U.S. Const. Amend. 8.

14. Habeas Corpus ⚿508

State court's refusal to fully credit defense expert's IQ score of 64 in determining whether capital defendant was intellectually disabled, such that Eighth Amendment precluded his execution, was not unreasonable determination of facts warranting federal habeas relief, even if it might have been preferable to average defense expert's IQ score with state's expert's IQ score of 72, where state court used additional IQ score in record—albeit partial score—to corroborate state's expert's test. U.S. Const. Amend. 8; 28 U.S.C.A. §§ 2254(d)(2), 2254(e)(1).

15. Habeas Corpus ⚿508

State court's refusal to average IQ scores or to account for certain statistical adjustments in determining that petitioner's IQ did not meet standard for intellectual disability required to render him ineligible for death penalty was not unreasonable application of clearly established federal law in *Atkins v. Virginia*, and thus did not warrant federal habeas relief; *Atkins* did not define intellectual disability, direct states on how to define

intellectual disability, or provide range of IQ scores that could be indicative of intellectual disability. 28 U.S.C.A. § 2254(d).

16. Habeas Corpus ⚿508

State court's decision to favor petitioner's adaptive strengths over his adaptive deficits in determining that he did not suffer from intellectual disability that rendered him ineligible for death penalty was not unreasonable application of clearly established federal law in *Atkins v. Virginia*, and thus did not warrant federal habeas relief; *Atkins* did not provide definitive guidance to states on how to evaluate petitioner's adaptive functioning. 28 U.S.C.A. § 2254(d).

17. Constitutional Law ⚿3831

Under Equal Protection Clause, criminal defendant has constitutional right to be tried by jury whose members are selected pursuant to nondiscriminatory criteria. U.S. Const. Amend. 14.

18. Jury ⚿33(5.15)

In evaluating claim that prosecution used peremptory strikes in discriminatory manner, in violation of *Batson*: (1) defendant must make out prima facie case by showing that totality of relevant facts gives rise to inference of discriminatory purpose; (2) burden then shifts to state to explain adequately racial exclusion by offering permissible race-neutral justifications for strikes; and (3) if race-neutral explanation is tendered, trial court must then decide whether opponent of strike has proved purposeful racial discrimination.

19. Jury ⚿33(5.15)

Evaluation of prosecutor's race-neutral or gender-neutral explanation for peremptory strike under *Batson* is pure issue of fact peculiarly within trial judge's province.

20. Jury ⚿33(5.15)

Court's role in hearing *Batson* claim is to evaluate whether prosecutor's stated reasons for excluding members of jury are credible and supported by record, not to personally attest to prosecutor's character or to provide its own reasons for why prosecutor could not have discriminated in present case.

21. Habeas Corpus ⚿496

State court's finding that prosecutor's use of 14 of his 15 peremptory strikes to eliminate female venire members in capital murder trial based on their church involvement was nondiscriminatory was not unreasonable determination of facts warranting federal habeas relief, even though prosecutor did not strike male venire member who was member of his church's board, and some women allegedly eliminated because of their church involvement had previously affirmed that their religious beliefs would not preclude them from imposing death penalty; prosecutor's approach in excluding those who were susceptible to mercy arguments was sound trial strategy, and there was no additional evidence about male venire member that might have been used to determine whether there were meaningful differences between him and female venire members. 28 U.S.C.A. § 2254(d)(2).

22. Habeas Corpus ⚿496

State court's determination that prosecution's use of 14 of its 15 peremptory challenges to strike female venire members was not result of gender discrimination was not contrary to, or unreasonable application of, clearly established federal law in *Batson*, and thus did not warrant federal habeas relief, where state court affirmed trial court's credibility determination only after thoroughly documenting prosecutor's reasons for strikes, trial court's corroboration of prosecutor's stated

reasons, and petitioner's arguments for why those reasons were pretextual. U.S. Const. Amends. 6, 14; 28 U.S.C.A. § 2254(d).

23. Habeas Corpus ⚿496

State court's determination that prosecutor's use of peremptory challenge to strike venire's only Hispanic member was not result of national origin discrimination was not contrary to, or unreasonable application of, clearly established federal law in *Batson*, and thus did not warrant federal habeas relief; prosecution's proffered reasons for striking venire member—her youth and lack of participation in voir dire—were sufficiently concrete and permissible reasons for exercising peremptory strike. U.S. Const. Amends. 6, 14; 28 U.S.C.A. § 2254(d).

Appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 2:13-cv-00557-RDP.

Hugh A. Abrams, Shook Hardy & Bacon, LLC, CHICAGO, IL, Dylan Cook Black, Stanley Blackmon, Bradley Arant Boult Cummings, LLP, BIRMINGHAM, AL, Tung T. Nguyen, Sidley Austin, LLP, DALLAS, TX, for Petitioner - Appellant.

Henry M. Johnson, James Clayton Crenshaw, Steven Marshall, Alabama Attorney General's Office, MONTGOMERY, AL, for Respondent - Appellee.

Before WILSON, MARTIN, and JORDAN, Circuit Judges.

WILSON, Circuit Judge:

Willie B. Smith III, a death row inmate, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. The district court granted Smith a certificate of appealability (COA) on whether he is intellectually disabled and thus ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). We granted Smith's request to expand the COA to include whether the prosecutor at Smith's state trial struck jurors on the basis of gender, race, and national origin in violation of the Sixth and Fourteenth Amendments under *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). After careful review of the record and with the benefit of oral argument, we affirm the district court's denial of habeas relief.

I. Factual and Procedural Background

In 1992, an Alabama jury found Smith guilty of capital murder. By a 10-2 vote, the jury recommended that Smith be sentenced to death, which the court imposed.

A. Jury Selection and Batson *Hearing*

During jury selection in Smith's trial, the state prosecutor used 14 of his 15 peremptory strikes on women. The prosecutor also struck several black venire members and the sole Hispanic venire member. Smith's counsel objected, arguing that the prosecutor was discriminating on the basis of gender, race, and national origin. The state trial court held that Smith failed to make a prima facie showing of discrimination, and the trial proceeded. The ultimate jury was comprised of five women and seven men.

On direct appeal, the Alabama Court of Criminal Appeals (Alabama CCA) found that Smith had provided sufficient evidence for a prima facie showing of gender-based discrimination under *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). *See Smith v. State*, 698 So. 2d 1166, 1169 (Ala. Crim. App. 1997).

The Alabama CCA remanded the case for a hearing so that the prosecutor could present his reasons for the strikes.

On remand, the prosecutor offered explanations for each strike; those explanations included employment, marital status, age, knowledge of criminal law, and work with various churches and religious groups. At the hearing, the prosecutor explained:

> I struck a lot of these [venire members] because they worked in the church; Sunday School teachers and Sunday School leaders, and things of that nature, and . . . I knew the defense counsel, if it came to the second phase of the sentencing hearing, would be asking the jurors to show mercy. And, it was my opinion that this argument would be receptive to someone who worked in the church and was well versed in the Bible more than someone who was not; be a female or male juror that was a strong worker in the church. No male jurors that was [sic] left seated on the jury worked in the church.

In response, Smith's counsel argued that the prosecution did not strike everyone who had religious affiliations [1] and questioned why the prosecution had not asked any follow-up questions about the venire members' religious beliefs. Next, the prosecutor explained that he eliminated the sole Hispanic venire member because she was young and did not respond to questions during voir dire; Smith's counsel argued this explanation was insufficient.

The state trial court ultimately found that the prosecutor's reasons for striking the female venire members were gender neutral, that those reasons were credible, and that Smith had failed to prove that the prosecutor had acted in a discriminatory manner. On appeal after remand, the Alabama CCA affirmed. *Smith v. State*, 838 So. 2d 413 (Ala. Crim. App. 2002) (hereinafter *Smith II*). The Supreme Court denied Smith's petition for writ of certiorari. *Smith v. Alabama*, 537 U.S. 1090, 123 S.Ct. 695, 154 L.Ed.2d 635 (2002).

B. Smith's Post-Conviction Hearings

Smith then filed a petition for state post-conviction relief under Alabama Rule of Criminal Procedure 32. The petition included a claim of intellectual disability, and the Rule 32 court conducted an evidentiary hearing on this claim.

At the hearing, Dr. Salekin, Smith's expert, testified that Smith scored a 64 on a full IQ test and exhibited adaptive deficits in several areas. Dr. Salekin also testified, however, that Smith scored relatively well on a separate test that assessed Smith's language, reading, and mathematics skills, and that these particular results were inconsistent with a diagnosis of intellectual disability. Dr. Salekin's final opinion was that Smith was not intellectually disabled. Dr. Salekin also testified that there was no national medical consensus on using the "Flynn Effect" to adjust IQ scores.[2]

1. At the hearing, Smith's counsel did not identify any men with religious affiliations who were not struck by the prosecution. Smith's counsel identified one woman, Ms. Parham, who may have worked in a church but was not struck by the prosecution. In later briefing at the trial court, Smith identified John Hall, who served as a football coach for the Young Men's Christian Association (YMCA), but was not struck by the prosecution. Finally, in his appellate briefing, Smith raised "Mr. Johnson," an unidentified male member of the venire who stated that he served on his church's board, but was not struck by the prosecution.

2. The "Flynn Effect" is a theory that contends that IQ scores have been increasing over time and suggests that IQ scores should be recalibrated in order to reflect this increase.

The state called Dr. King, who testified that Smith scored a 72 on a full IQ test, including verbal score of 75 and nonverbal score of 74.[3] Smith's score on the verbal portion of Dr. King's IQ test matched a previous score he achieved on the verbal portion of a partial IQ test administered by Dr. Blotcky, a court-appointed psychologist.[4] Like Dr. Salekin, Dr. King's final opinion was that Smith was not intellectually disabled, and he agreed that there was no national medical consensus on using the Flynn Effect to adjust IQ scores.

The Rule 32 court denied Smith's Rule 32 petition, and the Alabama CCA affirmed. *Smith v. State*, 112 So. 3d 1108 (Ala. Crim. App. 2012) (*Smith III*), *cert. denied*, *Ex parte Smith*, 112 So. 3d 1152 (Ala. 2012).

C. Further Procedural History

Smith filed his original federal habeas petition in the Northern District of Alabama, which the district court denied. One day after denying Smith's petition, the district court reopened the action for the sole purpose of considering the effect, if any, of *Moore v. Texas*, —— U.S. ——, 137 S. Ct. 1039, 197 L.Ed.2d 416 (2017), on Smith's *Atkins* claim. After supplemental briefing, the district court concluded that *Moore* did not apply retroactively and reaffirmed the denial of Smith's petition. The district court granted Smith a COA on his *Atkins* claim, and we granted him a COA on his *Batson* claim.

II. Standard of Review

[1] We review de novo the district court's denial of a 28 U.S.C. § 2254 petition. *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). Because Smith filed his petition after April 24, 1996, this appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). AEDPA "establishes a highly deferential standard for reviewing state court judgments." *Parker v. Sec'y, Dep't. of Corr.*, 331 F.3d 764, 768 (11th Cir. 2003). Under AEDPA, a federal court may only grant a writ of habeas corpus if the state court's determination of a federal claim was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law" or (2) "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).

The phrase "clearly established Federal law" encompasses only the holdings of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). Section 2254(d) provides two separate bases for reviewing state court decisions—"the 'contrary to' and 'unreasonable application' clauses articulate independent considerations a federal court must consider." *Maharaj v. Sec'y, Dep't of Corr.*, 432 F.3d 1292, 1308 (11th Cir. 2005).

[2–4] A state court's determination is "contrary to" clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413, 120 S.Ct. 1495. A state court's determination is "an unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Su-

3. Dr. King also testified that, using a standard error of measurement, Smith's IQ could have been as low as 68 or as high as 77.

4. Dr. Blotcky never administered a full IQ test, for reasons that remain unexplained.

preme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Reasonableness is objective, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. *Id.* at 410, 120 S.Ct. 1495.

[5] Finally, under § 2254(d)(2), we presume that the state court's findings of fact are correct unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even fair support in the record." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011) (citations omitted).

III. *Atkins* Claim

Smith first argues that the district court erred in holding that the Supreme Court's recent holding in *Moore v. Texas* did not apply retroactively to his intellectual disability claim. We agree with the district court that *Moore* is not retroactive. Smith also argues that the Alabama state courts unreasonably applied *Atkins v. Virginia* in evaluating his intellectual disability claim. After careful review of the state court record and its order, we hold that the state court's denial of his intellectual disability claim was not an unreasonable application of clearly established federal law.

A. *The Non-Retroactivity of* Moore v. Texas

In *Atkins v. Virginia*, the predecessor to *Moore*, the Supreme Court held that the execution of individuals with intellectual disabilities violated the Eighth Amendment. 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002). But the Court did not define what it means to be intellectually disabled, leaving that task to individual state legislatures and courts. *Id.* at 317, 122 S.Ct. 2242. In the years following *Atkins*, states developed different criteria for assessing intellectual disability. Some states delineated a bright line threshold for IQ scores, while others did not.

In *Hall v. Florida*, the Court clarified that a state court's intellectual disability determination should be "informed by the medical community's diagnostic framework." 572 U.S. 701, 721, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014). This meant, among other things, that courts must consider the standard error inherent in IQ tests when a defendant's test scores put him "within the clinically established range for intellectual-functioning deficits." *Moore*, 137 S. Ct. at 1050; *see also Hall*, 572 U.S. at 723, 134 S.Ct. 1986. In those cases, defendants must be allowed to present additional evidence of intellectual disability, including testimony on adaptive deficits. *Hall*, 572 U.S. at 723, 134 S.Ct. 1986.

[6, 7] In *Moore*, the Court expanded on *Hall*, reiterating that state courts do not have "unfettered discretion" in their determination of whether a capital defendant is intellectually disabled. 137 S. Ct. at 1052. Specifically, *Moore* established that states cannot disregard current clinical and medical standards in assessing whether a capital defendant is intellectually disabled. In addition, the Court clarified that under prevailing clinical standards, the focus of the adaptive functioning inquiry should be an individual's adaptive deficits—not adaptive strengths. *Id.* at 1050–51. After *Moore*, states cannot "weigh" an individual's adaptive strengths against his adaptive deficits.

Because *Moore* was decided five years after the Alabama state courts decided Smith's *Atkins* claim, he concedes that

Moore could not have been "clearly established Federal law" at that time. Smith instead argues that *Moore* announced a new rule of constitutional law that should be applied retroactively under *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989).

[8] New constitutional rules are generally not retroactive for cases on federal habeas review. *See id.* To determine whether a rule is retroactive, we first decide if it is a new rule. Under *Teague*, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government," or when "the result was not *dictated* by [prior] precedent." *Id.* at 301, 109 S.Ct. 1060.

[9] If the rule is indeed new, we then decide whether it falls into one of *Teague*'s two exceptions to the general bar on retroactivity. The first exception is for substantive rules of constitutional law that place an entire category of primary conduct beyond the reach of the criminal law, including "rules prohibiting a certain category of punishment for a class of defendants because of their status or offense." *See Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). The second exception is for "watershed rules of criminal procedure" that are necessary to the fundamental fairness of criminal proceedings. *Teague*, 489 U.S. at 311–12, 109 S.Ct. 1060. It is generally very difficult to meet the requirements of the second exception. *See, e.g.*, *Saffle v. Parks*, 494 U.S. 484, 495, 110 S.Ct. 1257, 108 L.Ed.2d 415 (1990) (noting that the rule announced in *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), illustrates the type of rule meeting this second exception).

[10] Smith argues that *Moore* falls under the first *Teague* exception because *Moore* announced a new substantive rule of constitutional law that prohibits "a certain category of punishment for a class of defendants because of their status or offense." *Penry*, 492 U.S. at 330, 109 S.Ct. 2934. Smith argues that *Moore*, which requires states to consider the medical community's current clinical standards to determine intellectual disability, effectively *expands* the class of people who are ineligible for the death penalty. Smith argues that *Moore*'s holding was thus substantive—not procedural. We disagree.

[11] Substantive rules "set forth categorical constitutional guarantees that place certain criminal laws and punishments altogether beyond the State's power to impose," while procedural rules "are designed to enhance the accuracy of a conviction or sentence by regulating the *manner of determining* the defendant's culpability." *Montgomery v. Louisiana*, —— U.S. ——, 136 S. Ct. 718, 729–30, 193 L.Ed.2d 599 (2016) (internal quotation marks omitted). For example, rules that "allocate decisionmaking authority" between judge and jury, or "regulate the evidence that the court could consider in making its decision" are procedural. *Welch v. United States*, —— U.S. ——, 136 S. Ct. 1257, 1265, 194 L.Ed.2d 387 (2016).

Moore established that states cannot disregard current clinical and medical standards in assessing whether a capital defendant is intellectually disabled. *Moore* effectively narrowed the range of permissible methods—the procedure—that states may use to determine intellectual disability. While *Moore* may have the effect of expanding the class of people ineligible for the death penalty, it merely defined the appropriate manner for determining who belongs to that class of defendants ineligible for the death penalty. *Moore* thus announced a new rule, but it is procedural,

not substantive.[5]

[12] Because *Moore* announced a procedural rule, it can only be retroactive if it meets *Teague*'s second exception. Doing so is extraordinarily rare. *See, e.g.*, *Schriro v. Summerlin*, 542 U.S. 348, 351–52, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004). "To fall within this exception, a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction [or sentence], and the rule must alter our understanding of the *bedrock procedural elements* essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656, 665, 121 S.Ct. 2478, 150 L.Ed.2d 632 (2001) (quotation omitted).

Only *Gideon v. Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), which extended the right to counsel to criminal defendants, has been declared the kind of procedural rule that altered the "bedrock procedural elements" essential to the fairness of a proceeding. *See Beard v. Banks*, 542 U.S. 406, 416–18, 124 S.Ct. 2504, 159 L.Ed.2d 494 (2004) (noting that *Gideon*'s holding was sweeping and broke with past precedent). The Supreme Court has continually rejected retroactivity under *Teague*'s second exception for procedural rules that do not have the "primacy" or "centrality" of *Gideon*. *See, e.g.*, *Whorton v. Bockting*, 549 U.S. 406, 421, 127 S.Ct. 1173, 167 L.Ed.2d 1 (2007) (rejecting retroactivity for *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004)); *Schriro*, 542 U.S. at 356–58, 124 S.Ct. 2519 (rejecting retroactivity for *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002)). Both *Crawford*[6] and *Ring*[7] were important holdings

5. In *Kilgore v. Secretary, Florida Department of Corrections*, this Court held that *Hall* is not a substantive rule under *Teague*. 805 F.3d 1301, 1314 (11th Cir. 2015) (relying on *In re Henry*, 757 F.3d 1151, 1161 (11th Cir. 2014)). Alabama argues that we should rely on *Kilgore*'s reasoning to conclude that *Moore* is likewise not a substantive rule under *Teague*. We decline to do so because the Supreme Court's decision in *Montgomery v. Louisiana* undermined a core component of *Kilgore*'s retroactivity analysis, which *Kilgore* borrowed from *In re Henry*. In *Kilgore*, we reasoned that *Hall* was not substantive under *Teague* because it "guaranteed only a chance to present evidence, not ultimate relief." *Kilgore*, 805 F.3d at 1314; *see also In re Henry*, 757 F.3d at 1161. But *Montgomery* later deemed a rule substantive in nature—the rule of *Miller v. Alabama*, 567 U.S. 460, 132 S.Ct. 2455, 183 L.Ed.2d 407 (2012), which prohibited mandatory life without parole sentences for juveniles—even though all that rule guaranteed was "[a] hearing where 'youth and its attendant characteristics' are considered as sentencing factors," not a shorter sentence or parole. *Montgomery*, 136 S. Ct. at 735 (quoting *Miller*, 567 U.S. at 465, 132 S.Ct. 2455). *Montgomery* thus stands for the proposition that a right can be substantive under *Teague* even if it only guarantees the chance to present evidence in support of relief sought, not ultimate relief itself. *See, e.g., In re Sapp*, 827 F.3d 1334, 1340–41 (11th Cir. 2016) (Jordan, Rosenbaum, and Jill Pryor, JJ., concurring). Because *Montgomery* undermined the reasoning of *Kilgore* and *In re Henry*, we do not rely on them to reach our decision. *See Chambers v. Thompson*, 150 F.3d 1324, 1326 (11th Cir. 1998); *see also Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997) ("To the extent of any inconsistency between [our prior] pronouncements and the Supreme Court's supervening ones, of course, we are required to heed those of the Supreme Court.").

6. In *Crawford v. Washington*, 541 U.S. 36, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004), the Supreme Court held that the Sixth Amendment's Confrontation Clause prohibits the state from introducing testimonial hearsay as evidence against criminal defendants unless the declarant is unavailable and the defendant had a prior opportunity to cross-examine the declarant.

7. In *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), the Supreme Court held that the Sixth Amendment guarantees criminal defendants the right to have a jury, not a sentencing judge, find the aggravating circumstances necessary for the imposition of the death penalty.

for the rights of criminal defendants, and yet the Supreme Court held that neither altered the *bedrock procedural elements* essential to the fairness of a criminal proceeding, and thus neither was retroactive.

[13] Similarly, *Moore* is an important development. It provides guidance to states attempting to comply with *Atkins*. But we cannot say that *Moore* altered the bedrock procedural elements essential to the fairness of a criminal proceeding in the way that the *Gideon* rule did. Because *Moore* cannot meet the requirements of *Teague*'s second exception, it cannot be applied retroactively.

B. Analysis of Smith's Atkins *Claim*

Smith argues that, even if *Moore* is not retroactive, the Alabama courts unreasonably applied *Atkins v. Virginia* to his intellectual disability claim.

1. The State Court Record

Shortly after *Atkins*, the Alabama Supreme Court held that to be intellectually disabled under *Atkins*, a defendant must prove by a preponderance of the evidence: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)," (2) "significant or substantial deficits in adaptive behavior," and (3) that both the subaverage intellectual functioning and the deficits in adaptive functioning manifested before the age of eighteen. *Ex Parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002).

Smith raised his *Atkins* claim in his Rule 32 petition shortly after *Perkins*. The Rule 32 court ultimately denied his petition, finding it relevant, but not dispositive, that no expert—not even Smith's own expert—testified that Smith was intellectually disabled. The court then evaluated the *Perkins* factors and concluded that Smith failed to prove by a preponderance of the evidence that he was intellectually disabled.

First, the court determined that Smith failed to satisfy his burden of showing significantly subaverage intellectual functioning. The court noted that the experts had presented conflicting evidence and testimony: Dr. Salekin reported that Smith had an IQ of 64, while Dr. King reported an IQ of 72. The court ultimately credited Dr. King's IQ score as "probably more accurate" than Dr. Salekin's score in part because Dr. King's test resulted in a verbal IQ of 75, the same verbal IQ that Smith received on a prior IQ test. The court also declined to adjust Smith's IQ scores downward because the experts all testified that there was no national medical consensus on using the Flynn Effect to adjust IQ scores.

On the second *Perkins* prong, the court determined that Smith failed to satisfy his burden of showing significant deficits in adaptive behavior. The court concluded that, "[a]lthough [Smith] showed deficits in adaptive functioning based upon test results," Smith did not show many deficits in his adaptive functioning "in everyday life" either before or after his crime. The court noted that Smith showed relatively normal scores in functional academics and communication. And while he did have some possible deficiencies, the court reasoned that those deficits were not so significant that Smith could not succeed in school, work, or society in general. The court also indicated that Smith's ability to plan and conceal his crime "weigh[ed] against [him] in relation to the adaptive functioning requirement."

On appeal, the Alabama CCA affirmed, holding that the Rule 32 court did not abuse its discretion in concluding that Smith had failed to prove that he was intellectually disabled. *Smith III*, 112 So. 3d at 1108. As the Alabama CCA summarized, "[t]he greater weight of the evidence indicated that, although he suffered with

some mental deficiencies, they did not rise to the level at which an impartial mind would conclude from the evidence that he was mentally retarded." *Id.* at 1130.

As to intellectual functioning, the Alabama CCA found that the Rule 32 court did not err in declining to apply the Flynn Effect or standard error to Smith's IQ score. *Id.* at 1131. The Alabama CCA also endorsed the Rule 32 court's approach to examining adaptive functioning, explaining that "[e]ven where there are indications of shortfalls in adaptive behavior, other relevant evidence may weigh against an overall finding of deficiency." *Id.* at 1133. Because the Alabama CCA found that Smith failed to prove both significantly subaverage intellectual functioning and significant deficits in adaptive behavior, the court did not fully address the third prong of *Perkins*—whether those shortfalls in intellectual and adaptive functioning had manifested before the age of eighteen.

2. Analysis Under 28 U.S.C. § 2254(d)(1)

Smith argues that the Alabama state courts unreasonably applied *Atkins v. Virginia* to his intellectual disability claim by (1) determining that Smith's IQ scores did not meet the standard for intellectual disability, (2) failing to consider the standard error and Flynn Effect in assessing Smith's IQ scores, and (3) giving more weight to Smith's adaptive strengths than to his adaptive deficits in assessing his adaptive functioning.

A state court's determination is an unreasonable application of clearly established federal law "if the state court identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the [petitioner's] case." *Williams v. Taylor*, 529 U.S. 362, 413, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). The difficulty for Smith—and other litigants mounting this challenge—is that *Atkins* set forth few legal governing principles for lower courts and states evaluating intellectual disability. The Supreme Court's decision in *Atkins* did not define what it means to be intellectually disabled, instead leaving that task to the states. *See Atkins*, 536 U.S. at 317, 122 S.Ct. 2242. The Supreme Court itself recently explained that "*Atkins* gave no comprehensive definition of 'mental retardation' for Eighth Amendment purposes." *Shoop v. Hill*, —— U.S. ——, 139 S. Ct. 504, 507, 202 L.Ed.2d 461 (2019).

i. Intellectual Functioning

[14] Smith first argues that the Alabama state courts unreasonably applied *Atkins v. Virginia* by refusing to credit Dr. Salekin's testimony that Smith had an IQ of 64 and consequently determining that Smith's IQ scores did not satisfy the first *Perkins* prong of subaverage intellectual functioning. According to Smith, "[t]he refusal to use the IQ score of 64 in an average with the other scores, or otherwise discount [Dr. King's] score of 72 based on the IQ score of 64, was an unreasonable application of *Atkins* to the present case."[8] Smith also argues it was an

8. In his initial brief, Smith does not argue that the Alabama court's decision to refuse to fully credit Dr. Salekin's IQ score was an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). Smith raises this argument only in his reply brief. We generally do not consider issues and arguments raised for the first time in an appellant's reply brief. *See, e.g., United States v. Levy*, 379 F.3d 1241, 1244 (11th Cir. 2004). In any event, it is unlikely that the state court made an unreasonable factual determination in crediting Dr. King's score over Dr. Salekin's score. While we agree that it might have been preferable to average both IQ scores under these circumstances, "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a differ-

unreasonable application of *Atkins* to refuse to account for the Flynn Effect or standard error when the state court evaluated Smith's IQ.

[15] But *Atkins* did not set forth clearly established federal law on how states must evaluate IQ scores in determining intellectual disability. "*Atkins* did not define intellectual disability, nor did it direct the states on how to define intellectual disability, nor, finally, did it provide the range of IQ scores that could be indicative of intellectual disability." *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1311 (11th Cir. 2015); *see also Bobby v. Bies*, 556 U.S. 825, 831, 129 S.Ct. 2145, 173 L.Ed.2d 1173 (2009) ("[*Atkins*] did not provide definitive procedural or substantive guides for determining when a person who claims [intellectual disability] will be so impaired as to fall within [*Atkins*' compass]" (internal citation and quotation marks omitted)). Without clear guidance from *Atkins*, the state court's refusal to average IQ scores or to account for certain statistical adjustments was not an unreasonable application of clearly established federal law.

Smith's specific argument about the state court's failure to consider the standard error is foreclosed by our precedent. As we explained in *Kilgore*, "[n]othing in *Atkins* suggested that a bright-line IQ cutoff of 70 ran afoul of the prohibition on executing the intellectually disabled." 805 F.3d at 1312. In other words, *Atkins* did not require states to consider the standard error in assessing IQ scores. That requirement did not emerge until *Hall v. Florida*, 572 U.S. 701, 134 S.Ct. 1986, 188 L.Ed.2d 1007 (2014), well after the Alabama courts considered Smith's case.

Altogether, Smith's arguments generally conflate what we have previously *permitted* in evaluating intellectual disability with what is *required*. While we have previously said that the Flynn Effect *may* be considered in determining a defendant's IQ, *see Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010), neither this Court nor the Supreme Court has required courts to do so. Similarly, while we have previously permitted district courts to average multiple IQ scores, *see Holladay v. Allen*, 555 F.3d 1346, 1357–58 (11th Cir. 2009), courts are not necessarily required to do so.

ii. Adaptive Functioning

Next, Smith argues that the Alabama courts unreasonably applied *Atkins* by favoring Smith's adaptive strengths over his adaptive deficits. The Supreme Court recently rejected this argument in *Shoop v. Hill*, —— U.S. ——, 139 S. Ct. 504, 202 L.Ed.2d 461 (2019).

[16] In *Hill v. Anderson*, the Sixth Circuit held that *Moore*'s holding about adaptive strengths was clearly established law because *Moore* was "merely an application of what was clearly established by *Atkins*." 881 F.3d 483, 487 (6th Cir. 2018). But the Supreme Court reversed the Sixth Circuit and soundly rejected this argument in *Shoop*, explaining that "*Atkins* did not definitively resolve how [the adaptive functioning prong] was to be evaluated but instead left its application in the first instance to the State." 139 S. Ct. at 508. Because *Atkins* did not provide definitive guidance to states on how to evaluate a petitioner's adaptive functioning, the Alabama courts here could not have unreasonably applied *Atkins* in choosing to weigh

ent conclusion in the first instance.'' *Wood v. Allen*, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Here, the state court used an additional IQ score in the record—albeit a partial score—to corroborate Dr. King's test. We cannot say that the decision to do so was an unreasonable factual determination.

Smith's adaptive strengths against his adaptive weaknesses.

Smith's success on this claim is a matter of timing. After *Moore v. Texas*, it is abundantly clear that states may not weigh a defendant's adaptive strengths against his adaptive deficits. Doing so contradicts the medical community's current clinical standards. *Moore*, 137 S. Ct. at 1050–51. As the Supreme Court explained in *Moore*, many individuals with intellectual disabilities have both adaptive deficits and adaptive strengths, and "significant limitations in conceptual, social, or practical adaptive skills [are] not outweighed by the potential strengths in some adaptive skills." *Id.* at 1050 (citation omitted).

Alabama argues that the state court did not weigh Smith's adaptive strengths against his adaptive deficits. We firmly disagree. Despite concluding that Smith "showed deficits in adaptive functioning based upon test results," the state court considered other factors that weighed against "an overall finding of deficiency," treating the adaptive functioning prong like a balancing test. In particular, the state court considered Smith's ability to conceal his crime, ability to take care of his mother, and his scores on certain mathematics and reading tests as adaptive strengths that outweighed his apparent deficits. This approach was acceptable at the time. But after *Moore*, it no longer is.

IV. *Batson* Claim

Smith argues that the prosecutor at his state trial struck jurors on the basis of gender and national origin [9] in violation of the Sixth and Fourteenth Amendments. *See Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). After careful review, we hold that the state court's denial of Smith's claims was not contrary to *Batson* and its progeny, an unreasonable application of *Batson*, or an unreasonable determination of the facts in light of the evidence presented to the state courts.

A. Clearly Established Law

[17, 18] Under the Equal Protection Clause, a criminal defendant has a constitutional right "to be tried by a jury whose members are selected pursuant to nondiscriminatory criteria." *Batson*, 476 U.S. at 85–86, 106 S.Ct. 1712. In *Batson*, the Supreme Court set out a three-part test to "guide trial courts' constitutional review of peremptory strikes." *Johnson v. California*, 545 U.S. 162, 168, 125 S.Ct. 2410, 162 L.Ed.2d 129 (2005). Under the three-part test,

> [f]irst, the defendant must make out a prima facie case by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. Second ... the burden shifts to the State to explain adequately the racial exclusion by offering permissible race-neutral justifications for the strikes. Third, if a race-neutral explanation is tendered, the trial court must then decide ... whether the opponent of the strike has proved purposeful racial discrimination.

Id. (internal quotation marks, citations, and footnotes omitted). At the first step, a defendant makes a prima facie case of discrimination if the circumstances allow

9. At the district court, Smith also asserted a race discrimination claim because the prosecutor used five of his peremptory strikes to eliminate black venire members. On appeal, however, Smith makes only vague and passing reference to racial discrimination. Therefore, we address only his gender and national origin discrimination claims. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir. 2014) (noting that "an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority").

for a permissible inference of discrimination. *Id.* at 162, 125 S.Ct. 2410. At the second step, the court evaluates only the "facial validity of the prosecutor's explanation," and unless a discriminatory intent is "inherent in the prosecutor's explanation, the reason offered will be deemed race neutral." *Purkett v. Elem*, 514 U.S. 765, 768, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995) (quotation omitted). The third step "involves evaluating the persuasiveness of the justification" proffered by the prosecutor, and "[a]t that stage, implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." *Id.* Inconsistent and disparate treatment of venire members is evidence that the proffered reasons are post-strike excuses and not legitimate race or gender-neutral justifications. *See, e.g.*, *Snyder v. Louisiana*, 552 U.S. 472, 483, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008).

[19] The evaluation of a prosecutor's race-neutral or gender-neutral explanation for a strike under *Batson* is a "pure issue of fact . . . peculiarly within a trial judge's province." *McNair v. Campbell*, 416 F.3d 1291, 1310 (11th Cir. 2005) (quotation omitted). Even on direct review, a trial judge's finding on intentional discrimination is entitled to "great deference." *See Batson*, 476 U.S. at 98 n.21, 106 S.Ct. 1712. At the habeas stage, the burden is even higher; the petitioner must show "it was unreasonable to credit the prosecutor's race-neutral explanations" under § 2254(d)(2). *Rice v. Collins*, 546 U.S. 333, 338, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006).

B. Analysis of Smith's Batson *Claim*

Smith argues that the state court's determination that he failed to prove purposeful discrimination was (1) an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2) and (2) both contrary to and an unreasonable application of *Batson* and its progeny under 28 U.S.C. § 2254(d)(1). Before we address those claims, we briefly review the state court record.

1. State Court Record

[20] On remand, the prosecutor offered explanations for striking each female venire member. Those explanations included employment, marital status, age, knowledge of criminal law, and work with various churches and religious groups. In its order on remand, the state trial court evaluated the prosecutor's reasoning for striking each female venire member. The trial court found that the prosecutor's explanation for each member was supported by the record. The court confirmed, for example, that each woman allegedly struck for her religious affiliations stated during voir dire, or indicated on her questionnaire, that she was active in her church or taught Sunday School. The court noted that excluding potential jurors who were susceptible to mercy arguments was a sound trial strategy. Further, where the prosecutor explained a strike based on a venire member's demeanor, the trial court corroborated the prosecutor's explanation with its own trial notes. The state trial court ultimately held that the prosecutor's reasons for striking the female venire members were gender neutral, that those reasons were credible, and that Smith had failed to prove that the prosecutor had acted in a discriminatory manner.[10]

On appeal, the Alabama CCA concluded that the trial court's determination was not clearly erroneous. *Smith II*, 838 So. 2d at 436, 466. The Alabama CCA focused its

10. At the end of his order, the state trial court judge also noted that the prosecutor was "certainly not a person prone to strike minorities denounced in the *Batson* case and its progeny." The judge based this conclusion on his "extensive in court experience with [the prosecutor] and close acquaintanceship with others that know him." We note that the court's

analysis on four women who, according to the prosecutor, were eliminated because of their religious affiliations. The court noted that three of the four women were Sunday School teachers; the other was a Counselor of Ministry. *See id.* at 426–27.

The Alabama CCA then acknowledged Smith's argument that the prosecutor's stated reason for striking these jurors was pretextual. The court considered, for example, Smith's argument that several women who had been eliminated for church involvement had also previously affirmed that their religious beliefs would not preclude them from imposing a death sentence. The Alabama CCA also considered Smith's argument that the prosecutor had not asked the women follow-up questions about their religious beliefs before striking them. But after taking those arguments into account, the court found that Smith had not shown that the trial court's credibility determination was clearly erroneous. The Alabama CCA thus affirmed the trial court's finding that the prosecutor's reasons for striking the jurors were nondiscriminatory. *Id.* at 436.

2. Analysis Under 28 U.S.C. § 2254(d)(2)

A prosecutor's motive for striking a juror is a factual issue, *Miller-El v. Dretke*, 545 U.S. 231, 240, 125 S.Ct. 2317, 162 L.Ed.2d 196 (2005), and a state court's factual findings are presumed correct on federal habeas corpus review. 28 U.S.C. §§ 2254(d)(2), (e)(1). In seeking habeas relief, Smith bears the burden of rebutting that presumption by "clear and convincing evidence." *Id.* § 2254(e)(1).

Smith first argues that he presented a strong prima facie case of gender discrimination where the prosecutor used 14 of his 15 strikes to eliminate women from the jury. We agree with Smith.[11]

Smith then argues that the state court's determination that the prosecutor's reasons for striking the female venire members were nondiscriminatory was an unreasonable determination of the facts, particularly in light of the prosecutor's inconsistent treatment of male and female venire members. Smith concentrates his argument on one man—misidentified in the trial transcript as "Mr. Johnson"—who stated during voir dire that he was a member of his church's board.[12] The prosecutor did not use a strike on "Johnson," which Smith argues is evidence that the prosecutor's explanation for striking these women was pretextual.

In the years following Smith's trial, no party has been able to determine John-

role in hearing a *Batson* claim is to evaluate whether the prosecutor's stated reasons for excluding members of the jury are credible and supported by the record, not to personally attest to the prosecutor's character or to provide its own reasons for why the prosecutor could not have discriminated in the present case. *See Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1254 & n.11 (11th Cir. 2013) (indicating that, at *Batson*'s third step, it is improper for the trial court to rely on its personal experience with and opinion about the reputation of a prosecutor where those facts are not in evidence).

11. The district court found that Smith presented a relatively weak prima facie case of gender discrimination in part because five women ultimately served on Smith's jury. But the fact that five women remained on the jury after the prosecutor used nearly all his strikes to eliminate women tells us more about the initial composition of the venire pool (and which juror slots in the venire were filled by women) than it does about the prosecutor's state of mind.

12. The venire pool for Smith's trial did not contain any member with the surname of Johnson, and thus we assume this venire member was misidentified in the trial transcript.

son's true identity. Smith was thus unable to provide the state courts with any additional information about Johnson that might have been used to determine whether there were meaningful differences between him and the female venire members. We do not know Johnson's other answers during voir dire, information about his demeanor, or any other potentially relevant factors, such as his occupation. All that we know about Johnson is that he was a board member at his church.

[21] To succeed under § 2254(d)(2), Smith must show that it was unreasonable for the state court to credit the prosecutor's proffered explanations for the strikes. *See Rice*, 546 U.S. at 338, 126 S.Ct. 969. Smith has not met this burden. While Smith's evidence about Johnson could have supported a finding that the prosecutor's strikes were discriminatory, we do not think it mandated such a finding in light of the limited evidence presented to the state court.

The Alabama CCA also grappled with some of Smith's other arguments for pretext. The court considered, for example, that some of the women allegedly eliminated because of their church involvement had previously affirmed that their religious beliefs would not preclude them from imposing the death penalty. But the state court did not find that factor dispositive. Neither do we. The prosecution's explanation at the *Batson* hearing was not that these potential jurors would be unalterably unwilling to impose the death penalty, but that they would be particularly receptive to Smith's counsel's request for mercy at the penalty phase of the trial. This is an acceptable justification for a peremptory strike.

Importantly, the Alabama CCA ultimately affirmed the trial court's credibility determination only after noting that the trial court found that (1) the prosecutor's reasons for striking venire members were supported by the record and (2) the prosecutor's approach in excluding those who were susceptible to mercy arguments was a sound trial strategy. Both factors are relevant in assessing a prosecutor's credibility. *See Miller-El v. Cockrell*, 537 U.S. 322, 324, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) ("Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.").

Ultimately, the record before us does not "compel the conclusion that the trial court had no permissible alternative but to reject the prosecutor's [gender]-neutral justifications." *Rice*, 546 U.S. at 341, 126 S.Ct. 969. Because habeas review does not allow us to "supersede the trial court's credibility determination" where the record does not compel a contrary conclusion, *see id.* at 341–42, 126 S.Ct. 969, we must deny Smith's challenge under § 2254(d)(2).

3. Analysis Under 28 U.S.C. § 2254(d)(1)

[22] Next, Smith argues that the state court's holding was both contrary to *Batson* and its progeny and an unreasonable application of *Batson* under 28 U.S.C. § 2254(d)(1). First, Smith argues that, contrary to *Batson*'s directive, the Alabama CCA simply accepted the prosecutor's proffered explanations at face value. We disagree. The Alabama CCA thoroughly documented the prosecutor's reasons for strikes, the trial court's corroboration of the prosecutor's stated reasons, and Smith's arguments for why those reasons were pretextual. Only after conducting this analysis did the Alabama CCA affirm the

trial court's credibility determination.[13]

[23] Next, Smith argues that the Alabama CCA erred in accepting the prosecution's "arbitrary and vague" reasons for excluding Ms. Ramos, the only Hispanic venire member. While Smith is correct that vague explanations may be legally insufficient to rebut a prima facie case of discrimination, the prosecutor's proffered reasons for striking Ms. Ramos—her youth and lack of participation in voir dire—are relatively concrete and permissible [14] reasons for exercising a peremptory strike. The trial record supports both explanations. And neither explanation rises to the level of vagueness that we condemned in *United States v. Horsley*, 864 F.2d 1543 (11th Cir. 1989), on which Smith relies.[15]

Finally, Smith argues that it was improper for the trial court to consider its own observations about a venire member's behavior. It would be improper for a judge to substitute its own reasoning for striking a venire member where the prosecution's explanations do not suffice. *See Dretke*, 545 U.S. at 252, 125 S.Ct. 2317. But that did not occur here. On remand, the trial court noted its own observations about venire members from voir dire, but it did so to corroborate the prosecutor's own explanations about a venire member's demeanor—a method endorsed by the Supreme Court. *See Snyder v. Louisiana*, 552 U.S. 472, 477, 128 S.Ct. 1203, 170 L.Ed.2d 175 (2008) ("[R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (*e.g.*, nervousness, inattention), making the trial court's firsthand observations of even greater importance. In this situation, the trial court must evaluate ... whether the juror's demeanor can credibly be said to have exhibited the basis for the strike attributed to the juror by the prosecutor.").

In sum, Smith has not established that the state court's denial of his claims was contrary to the standard laid out in *Batson* and its progeny, an unreasonable application of *Batson*, or an unreasonable determination of the facts in light of the evidence presented to the state courts. We therefore affirm the district court's denial of Smith's § 2254 petition.

AFFIRMED.

13. We acknowledge that in its opinion, the Alabama CCA did not specifically discuss Johnson. But the court did analyze whether the prosecutor's explanation about striking jurors based on church affiliation was pretextual. "Under Supreme Court and our Circuit precedent, a state court's written opinion is not required to mention every relevant fact or argument in order for AEDPA deference to apply." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1223 (11th Cir. 2013). Here, we do not think that the Alabama CCA was required to explicitly address Smith's arguments about Johnson given the limited evidence Smith provided about him.

14. The Supreme Court has not extended *Batson* to peremptory challenges based on age. *See, e.g., Weber v. Strippit, Inc.*, 186 F.3d 907, 911 (8th Cir. 1999), *cert. denied*, 528 U.S. 1078, 120 S.Ct. 794, 145 L.Ed.2d 670 (2000).

15. In *United States v. Horsley*, we held that a prosecutor's statement that "I've just got a feeling about [the juror]" was too vague to rebut a prima facie case of discrimination. 864 F.2d at 1544.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIE B. SMITH, III,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 2:13-CV-00557-RDP**
	)	
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	)	
Respondent.	)	

MEMORANDUM OPINION

Petitioner Willie B. Smith, III has petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his 1992 capital murder conviction and death sentence in Alabama state court. Smith alleges various constitutional violations that he asserts require reversal of his convictions or his sentence. The parties have fully briefed Smith's claims. (Docs. # 28, 34). After careful consideration of the record, the pleadings, and the applicable provisions of 28 U.S.C. § 2254, the court finds that Smith has not shown that he is entitled to an evidentiary hearing or to habeas relief. Accordingly, and for the reasons stated below, his petition for a writ of habeas corpus is due to be denied.

I. Background and Procedural History

In order to discuss the issues raised by Smith's federal habeas petition, the court need only briefly recount the crime at issue. Smith was convicted and sentenced to death in Jefferson County, Alabama, for the intentional murder of Sharma Ruth Johnson during the course of a first-degree robbery pursuant to Alabama Code § 13A-5-40(a)(2), and for the intentional killing of Johnson during the course of a first-degree kidnapping pursuant to Alabama Code § 13A-5-

40(a)(1). *Smith v. State*, 838 So. 2d 413, 421 (Ala. Crim. App. 2002) ("*Smith II*"). The evidence at trial showed that Smith and his girlfriend, Angelica Willis, approached Johnson in her car near an automated teller machine. *Id.* at 421-22. Following Smith's instructions, Willis asked Johnson for directions to a restaurant. *Id.* at 422. Then Smith, armed with a shotgun, walked up to Johnson's car and forced Johnson into the trunk. *Id.* After driving to another location, Smith and Willis returned to the automated teller machine. *Id.* There, they located Johnson's dropped bank debit card and directed Johnson, still in the car's trunk, to call out the card's access code. *Id.* At Smith's direction, Willis withdrew $80 from Johnson's bank account. *Id.* A bank video camera captured images of Smith while Willis withdrew money from the machine. *Id.* After driving around the Birmingham area and picking up Smith's brother from a shopping mall, Smith drove Johnson's car to a cemetery. *Id.* Smith told Willis that he would have to kill Johnson because she would report the crime to law enforcement. *Id.* Willis overheard Johnson pleading for her life and promising not to tell the authorities about the kidnapping. *Id.* Willis then heard a gunshot. *Id.* Smith, his brother, and Willis abandoned the vehicle at North Roebuck School. *Id.* Smith later returned to the car and set it on fire to destroy any fingerprints left on it. *Id.*

Police learned about Smith through statements he made to acquaintances and to a police informant. *See id.* at 422-23. The informant later wore a wire and recorded a conversation with Smith. (State Court Record, Vol. 7, at 1118-20, 1133-36). In the recorded conversation with the informant, Smith admitted to abducting and killing Johnson. *See Smith II*, 838 So. 2d at 424-25.[1]

Smith was tried and convicted in Jefferson County Circuit Court on May 7, 1992. (State Court Record, Vol. 34, Tab R-69 at 1). The jury recommended that the Smith be sentenced to death. (*Id.* at 2). Following a sentencing hearing, the trial court sentenced Smith to death on July 17, 1992. (*Id.* at 20).

[1] Additional facts will be discussed as they relate to the individual grounds for relief raised by Smith.

On direct appeal, Smith's case was remanded to the trial court for the prosecutor to provide reasons for using 14 of his 15 peremptory challenges to strike female veniremembers, based on the Supreme Court's intervening opinion in *J.E.B. v. Alabama*, 511 U.S. 127 (1994). *Smith v. State*, 698 So. 2d 1166, 1169 (Ala. Crim. App. 1997) ("*Smith I*"). On remand, the trial court found that the prosecutor provided sufficient non-discriminatory reasons for his strikes of female veniremembers. (State Court Record, Vol. 34, Tab R-71 at 26). On return to remand, the Alabama Court of Criminal Appeals affirmed the trial court's judgment and Smith's convictions and sentence. *Smith II*, 838 So. 2d 413 (Ala. Crim. App.), *cert. denied*, *Ex parte Smith* (Ala. June 28, 2002). The United States Supreme Court denied Smith's petition for writ of certiorari. *Smith v. Alabama*, 537 U.S. 1090 (2002).

Smith filed a petition for state postconviction relief under Alabama Rule of Criminal Procedure 32. (State Court Record, Vol. 34, Tab R-74 at 1). The Jefferson County Circuit Court denied his petition. The Alabama Court of Criminal Appeals affirmed. *Smith v. State*, 112 So. 3d 1108 (Ala. Crim. App. 2012) ("*Smith III"*), *cert. denied*, *Ex parte Smith*, 112 So. 3d 1152 (Ala. 2012).

In March 2013, Smith filed his original federal habeas petition in this court. (Doc. # 1). Respondent Jefferson Dunn,[2] Commissioner of the Alabama Department of Corrections, asserts that each of Smith's claims for relief lacks merit and the petition is due to be denied.

II. Standards of Review

A. General Standard of Review

A federal court may only grant habeas corpus relief to a state prisoner for claims considered on the merits by a state court if the petitioner shows that the state court proceedings

[2] Kim T. Thomas, the Alabama Department of Corrections' Commissioner when the case was filed, has retired. Accordingly, the court has substituted the name of the current commissioner. *See* Fed. R. Civ. P. 25(d).

resulted in a decision that was:

(1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or

(2) "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). *Woodford v. Visciotti,* 537 U.S. 19, 24 (2002) (stating that § 2254(d) requires a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt" (internal citation and quotation marks omitted)) This court's review of Smith's claims under § 2254(d)(1) is limited to the record that was before the state courts that adjudicated those claims on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). The "contrary to" clause in § 2254(d)(1) applies when the state court reaches a conclusion "opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts*." Jones v. GDCP Warden*, 753 F.3d 1171, 1182 (11th Cir. 2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)). An unreasonable application of law under § 2254(d)(1) occurs when the state court "identifies the correct governing legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* (quoting *Williams,* 529 U.S. at 413). The Supreme Court has explained that an "unreasonable application of" of its prior holdings must be "objectively unreasonable," not merely wrong; even "clear error" will not suffice to allow for relief under this clause of § 2254(d)(1). *Lockyer v. Andrade,* 538 U.S. 63, 75–76 (2003). Rather, "[u]nder § 2254(d), a habeas court must determine what arguments or theories supported or could have supported[ ] … the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" a prior Supreme Court holding.

Harrington v. Richter, 562 U.S. 86, 102 (2011). This point, the Supreme Court has observed, is "the only question that matters under § 2254(d)(1)." *Lockyer,* 538 U.S. at 71. To the extent that Smith disputes a factual determination by the state courts, this court may only overturn a state court's factual findings if Smith "produces 'clear and convincing evidence' that those findings are erroneous." *Jones*, 753 F.3d at 1182 (quoting 28 U.S.C. § 2254(e)(1)).

The court's review of Smith's § 2254 petition is highly deferential to the state courts' resolution of his claims. *See Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008) (asserting that federal habeas review is "highly deferential" to state courts' decisions). If "fairminded jurists could disagree" on the correctness of the state court's decision that a claim lacks merit, federal habeas relief is precluded. *Harrington*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004)).

B. Standard of Review for Claims Unexhausted in State Court

A petitioner ordinarily must exhaust all claims presented in his or her § 2254 petition by fairly presenting the legal and factual basis for the claims in state court before a federal court may consider them. Indeed, Section 2254(b)(1) provides that a federal court may not grant habeas relief to an applicant in state custody "unless it appears that the applicant has exhausted the remedies available in the courts of the State; or there is an absence of available State corrective process; or circumstances exist that render such process ineffective to protect the rights of the applicant." 28 U.S.C. § 2254(b)(1). To exhaust a claim in state court, a state prisoner must "invoke[ ] one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999). To invoke a complete round of appellate review in Alabama state courts, an Alabama prisoner must file a petition for certiorari with the Alabama Supreme Court. *Smith v. Jones*, 256 F.3d 1135, 1140-41 (11th Cir. 2001). A federal

claim has been fairly presented to the state courts if "a reasonable reader would understand each claim's particular legal basis and specific factual foundation." *Kelley v. Sec'y Dep't of Corr.*, 377 F.3d 1317, 1344-45 (11th Cir. 2004). "The exhaustion doctrine requires a habeas applicant to do more than scatter some makeshift needles in the haystack of the state court record." *Id.* at 1345 (quoting *Martens v. Shannon*, 836 F.2d 715, 717 (1st Cir. 1988)). Among other requirements, the petitioner must inform the state courts that a claim is being asserted "under the United States Constitution" in order to fairly present a federal constitutional claim for state-court relief. *Duncan v. Henry*, 513 U.S. 364, 365-66 (1995). If a state petitioner's federal habeas claim is unexhausted, the district court has traditionally dismissed the habeas petition without prejudice or stayed the cause of action in order to allow the petitioner to first avail himself or herself of state law remedies. *E.g.*, *Ogle v. Johnson*, 488 F.3d 1364, 1370 (11th Cir. 2007). However, "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, this 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) (citing *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir. 1998)).

C. Standard of Review for Claims Denied by the State Courts on Adequate and Independent State Law Grounds

It is well established that, if a federal habeas petitioner fails to raise a claim in the state court at the time and in the manner dictated by the state's procedural rules, the state court can decide that the claim is not entitled to a review on the merits. Stated differently, "the petitioner will have procedurally defaulted on that claim." *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010). As the Supreme Court has explained:

> In habeas, the sanction for failing to exhaust properly (preclusion of review in federal court) is given the separate name of procedural default, although the habeas doctrines of exhaustion and procedural default are similar in purpose and

> design and implicate similar concerns[.] In habeas, state-court remedies are described as having been exhausted when they are no longer available, regardless of the reason for their unavailability. Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding.

Woodford v. Ngo, 548 U.S. 81, 92-93 (2006) (internal citations and quotation marks omitted).

Generally, if the last state court[3] to examine a claim finds clearly and explicitly that the claim is barred because the petitioner failed to follow state procedural rules, and that procedural bar provides an adequate and independent state ground for denying relief, then federal review of the claim also is precluded by federal procedural default principles. *See Cone v. Bell*, 556 U.S. 449, 465 (2009) ("[W]hen a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review").

> The federal courts' authority to review state court criminal convictions pursuant to writs of habeas corpus is severely restricted when a petitioner has failed to

[3] In this case, the Alabama Supreme Court denied Smith's petitions for writs of certiorari review of *Smith II* and *Smith III*. Alabama law provides the Alabama Supreme Court discretionary certiorari jurisdiction over decisions by the Alabama Court of Criminal Appeals. *See* Ala. Code § 12-2-2; Ala. R. App. P. 39(a). The permissible grounds for discretionary review by the Alabama Supreme Court are broader in capital appeals than in other appeals. Ala. R. Crim. P. 39(a)(2).

In *Wilson v. Warden, Georgia Diagnostic Prison*, 834 F.3d 1227, 1235 (11th Cir. 2016), the Eleventh Circuit sitting *en banc* held that a summary denial of an "application for a certificate of probable cause by the Georgia Supreme Court" is a "final state court adjudication on the merits" that is reviewed under § 2254(d). The *Wilson* opinion also held that such a summary adjudication on the merits is reviewed for any reasonable basis for the state court to deny relief, under the Supreme Court's opinion in *Harrington v. Richter*. *Id.* Accordingly, a federal court should not "look through" a summary denial on the merits to the last reasoned decision by a state court. *Id.* The *Wilson* opinion recognized, though, that the denial of a request for a discretionary appeal "similar to certiorari review" is not an adjudication on the merits by a state court. *Id.* at 1234. The Supreme Court recently granted a writ of certiorari to review the Eleventh Circuit's *Wilson* decision. *Wilson v. Sellers*, No. 16-6855 (U.S. Feb. 27, 2017). The Eleventh Circuit has not addressed, following *Wilson*, whether a denial of a petition for a writ of certiorari by the Alabama Supreme Court is a final summary decision on the merits subject to review under § 2254(d). "Because it does not matter to the result, and to avoid any further complications if the United States Supreme Court disagrees with [the Eleventh Circuit's] Wilson decision," the court has reviewed the final decisions by the Alabama Court of Criminal Appeals in analyzing this habeas petition. *See Butts v. GDCP Warden*, No. 15-15691, slip op. at 4 (11th Cir. Mar. 9, 2017) (applying a similar procedure when reviewing the denial of a state prisoner's habeas petition).

> follow applicable state procedural rules in raising a claim, that is, where the claim is procedurally defaulted. Federal review of a petitioner's claim is barred by the procedural default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar, and that bar provides and adequate and independent state ground for denying relief. The doctrine serves to ensure petitioners will first seek relief in accordance with state procedures, and to "lessen the injury to a State that results through reexamination of a state conviction on a ground that a State did not have the opportunity to address at a prior, appropriate time." *McCleskey v. Zant*, 499 U.S. 467, [493], 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991).

Johnson v. Singletary, 938 F.2d 1166, 1173 (11th Cir. 1991) (*en banc*) (internal citations omitted).

Absent some justifiable reason for not applying the doctrine, federal deference to a state court's clear finding of procedural default under its own rules is exceedingly strong.

> "[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. Through its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law. *Harris* [*v. Reed*], 489 U.S [255,] 264 n.10, 109 S. Ct. 1038 [(1989)] (emphasis in original). *See also Alderman v. Zant*, 22 F.3d 1541, 1549-51 (11th Cir. 1994) (where a Georgia habeas corpus court found that the petitioner's claims were procedurally barred as successive, but also noted that the claims lacked merit based on the evidence, "[t]his ruling in the alternative did not have the effect ... of blurring the clear determination by the [Georgia habeas corpus] court that the allegation was procedurally barred")[.]

Bailey, 172 F.3d at 1305.

Courts have recognized three circumstances in which a state court's denial of a federal law claim on an otherwise valid state-law ground will not bar a federal habeas court from considering that federal claim on habeas review: (i) where the petitioner demonstrates that he had good "cause" for not following the state procedural rule and that he was actually prejudiced by that alleged constitutional violation; (ii) where the state procedural rule was not "firmly established and regularly followed"; or (iii) where failure to consider the petitioner's claim will result in a "fundamental miscarriage of justice." *Edwards v. Carpenter*, 529 U.S. 446, 455 (2000)

(Breyer, J., concurring) (citations omitted); *see also, e.g.*, *Coleman v. Thompson*, 501 U.S. 722, 749–50 (1991) (holding that a state court 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") (internal citations and quotation marks omitted); *Murray v. Carrier*, 477 U.S. 478, 496 (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.").

III. Claims for Relief

Smith, through counsel, has asserted a number of claims in his § 2254 petition. The court addresses each one, in turn.

A. Whether the Alabama Court of Criminal Appeals Unreasonably Adjudicated Smith's Claims that the Prosecution Unconstitutionally Struck Jurors on the Bases of Gender, Race, and National Origin

Smith's first two claims assert that the trial prosecutor exercised his peremptory strikes at the trial to "purposely eliminate[ ] women from the jury," "eliminate African-American venire members," and eliminate the sole Hispanic veniremember. (Doc. # 1 at ¶¶ 47, 78). Because these two claims involve the same legal analysis, the court addresses them together. As part of his first ground for relief, Smith argues that the Alabama Court of Criminal Appeals unreasonably applied *Batson v. Kentucky*, 476 U.S. 79 (1986), and *J.E.B.* when reviewing his *Batson* claims. (*Id.* at ¶ 41). As an initial matter, because Smith raised these claims in the state courts on direct appeal, and the Court of Criminal Appeals denied them on the merits, these claims are exhausted for purposes of federal review. *See Smith II*, 838 So. 2d at 425-36, 464-66. Smith contends that the Alabama courts' determination that the trial prosecutor had genuine,

race-neutral and gender-neutral reasons for striking women from his jury was unreasonable in light of the facts and unreasonably applied *Batson* and *J.E.B.*[4] The court disagrees.

In reviewing whether a prosecutor intentionally used peremptory strikes to discriminate against a protected class of jurors, a federal habeas court necessarily relies heavily on the state trial court's "evaluation of the prosecutor's state of mind based on demeanor and credibility." *Hernandez v. New York*, 500 U.S. 352, 364–65 (1991). Credibility determinations regarding a prosecutor's motivations "lie peculiarly within a trial judge's province." *Davis v. Ayala*, 135 S. Ct. 2187, 2201 (2015) (quoting *Snyder v. Louisiana*, 552 U.S. 472, 477 (2008)). Thus, the Supreme Court requires that this court defer to the state court's evaluation of a petitioner's *Batson/J.E.B.* challenge unless "exceptional circumstances" exist for not deferring. *Id.* The court acknowledges that the deference owed to the state trial court is not insurmountable, but concludes in this case that Smith's allegations do not present the type of "exceptional circumstances" that merit federal habeas relief for the alleged *Batson* and *J.E.B.* violations. *Id*.

1. Standard of Review

A prosecutor's motive in striking a juror is a factual issue, and a state court's factual findings are presumed correct on federal habeas corpus review. 28 U.S.C. § 2254(d)(2), (e)(1); *Miller-El v. Dretke* ("*Miller-El II*"), 545 U.S. 231, 240 (2005). In seeking habeas relief, Smith bears the burden of rebutting that presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *Miller-El II*, 545 U.S. at 240; *Hernandez*, 500 U.S. at 364 ("*Batson*'s treatment of intent to discriminate as a pure issue of fact, subject to review under a deferential standard, accords with our treatment of that issue in other equal protection cases."). *See also Lee v. Comm'r, Alabama Dep't of Corr.*, 726 F.3d 1172, 1207 (11th Cir. 2013) (applying the "highly

[4] For the purposes of § 2254(d)(1), the court notes the holdings of *Batson* and *J.E.B*. were clearly established at the time of the Alabama Court of Criminal Appeals' opinion in *Smith III*.

deferential standard" from the Antiterrorism and Effective Death Penalty Act ("AEDPA") to the state appellate court's *Batson* decision). Smith must also show that the state court's finding of the absence of purposeful discrimination was incorrect by clear and convincing evidence and that its denial of the *Batson* claims was "objectively unreasonable" under § 2254(d)(2). *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) ("*Miller-El I*"); *see also Davis*, 135 S. Ct. at 2199 ("A federal habeas court must accept a state-court finding unless it was based on 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"); *Felkner v. Jackson*, 562 U.S. 594, 598 (2011) ("On federal habeas review, AEDPA 'imposes a highly deferential standard for evaluating state-court rulings' and 'demands that state-court decisions be given the benefit of the doubt.'") (quoting *Renico v. Lett,* 559 U.S 766, 773 (2010)).

2. Discussion of Smith's Gender-Based *Batson*/*J.E.B.* Claims

The Equal Protection Clause prohibits the use of peremptory strikes against potential jurors based on a juror's race or gender. *See generally J.E.B.*, 511 U.S. 127; *Batson*, 476 U.S. 79. The Supreme Court has set out a three-step inquiry to evaluate whether a prosecutor's use of peremptory strikes was discriminatory. *Batson*, 476 U.S. at 96-98. The Supreme Court summarized this inquiry in *Miller–El I.* First, the defendant must make a prima facie case that the prosecutor exercised a peremptory challenge on the basis of race or gender; second, if the trial court finds that a prima facie case has been established, the prosecutor must offer a permissible, non-discriminatory justification for its peremptory strike; and, third, the trial court must decide whether the defendant has shown purposeful discrimination despite the proffered reasons. *Miller-El I*, 537 U.S. at 328–29.

With regard to Smith's claim of purposeful discrimination against female veniremembers, *Batson*'s threshold inquiry and its first and second steps are established. Women

are a cognizable group for *Batson* purposes. *See generally J.E.B.*, 511 U.S. 127. On direct appeal, the Court of Criminal Appeals held that Smith had established a prima facie showing of gender discrimination. *Smith I*, 698 So. 2d at 1169. On remand to the trial court, the prosecution proffered non-discriminatory reasons for those strikes. *Smith II*, 838 So. 2d at 426-27. Therefore, the issue before this court centers on whether the Alabama courts' finding that Smith failed to carry his burden of showing purposeful discrimination under *Batson*'s third step was unreasonable in light of the state court record. *See Adkins v. Warden, Holman CF*, 710 F.3d 1241, 1250 (11th Cir. 2013).

a. Peremptory Strikes of Prospective Jurors Based on Church Activities

Smith alleges that the prosecutor's peremptory strikes of five female venirepersons -- Karen Marlar, Margaret Plyler, Dorothy Long, Glenda Freeman, and Leigh Cosby -- because of their church volunteer activities were discriminatory. (Doc. # 1 at ¶¶ 50-58). Smith argues that the prosecutor exercised those strikes because of the five panelists' gender based on the prosecutor's pattern of strikes against female jurors and the absence of any questioning related to "the jurors' religious attitudes and beliefs." (*Id.* at ¶ 50). Smith also contends that the record shows inconsistent treatment between the struck jurors and those who were not struck. (*Id.* at ¶ 55). The court first discusses the peremptory strikes employed against the four female venirepersons who were struck solely on the basis of church involvement (Cosby, Long, Marlar, and Plyer).

At the trial court's *Batson* hearing, the prosecutor summarized his reasons for the strikes as follows: (1) Cosby was struck because she worked at a church in the kindergarten class; (2) Long was struck because she was a church volunteer, a Sunday School teacher, and a volunteer with the Red Cross; (3) Marlar was struck because she was a Sunday School leader; and (4)

Plyler was struck because she did volunteer work at a church and was the church's counselor of ministry. *Smith II*, 838 So. 2d at 426-27. According to Smith, the prosecutor asked no questions at all of veniremembers Long, Marlar, or Plyler and only one question, unrelated to religious beliefs, of Cosby. (*See* Doc. # 1 at ¶ 51). During the remand hearing, the prosecutor explained that he struck these potential jurors on the basis of their church activities because he believed that they would be more receptive to the defense's arguments for mercy at sentencing in a capital case:

> I struck a lot of these [veniremembers] because they worked in the church; Sunday School teachers and Sunday School leaders, and things of that nature, and from people that I knew the defense counsel, if it came to the second phase of the sentencing hearing, would be asking the jurors to show mercy. And, it was my opinion that this argument would be receptive to someone who worked in the church and was well versed in the Bible more than someone who was not; be a female or male juror that was a strong worker in the church. No male jurors that was [sic] left seated on the jury worked in the church. …
>
> So, that is why I took into consideration when someone was a Sunday School leader, or Sunday School teacher, or someone that was well versed in the church, that that argument would be more receptive toward that juror as far as returning an advisory verdict of life without parole instead of death.

Smith II, 838 So. 2d at 427.

Smith's counsel challenged the reasons proffered at the remand hearing as pretexual and argued that the prosecutor did not question these potential jurors about their church activities during panel or individual voir dire. *Id.* at 428. The record shows that the information about veniremembers' religious activities was elicited during the defense's voir dire questions. (State Court Record, Vol. 3, at 297-304). The defense further noted that the prosecutor did not strike a female venireperson who also answered that she was a volunteer Sunday school teacher and on her church's board. *Smith II*, 838 So. 2d at 427-29; (State Court Record, Vol. 3, at 299-300).

The trial court credited the prosecutor's reasons for striking Cosby, Long, Marlar, and Plyler based on their church activities, finding that "the Court finds no juror was struck by the State for the reason that she was a female." (State Court Record, Vol. 13, Remand Hearing Transcript at 26). The trial court credited the prosecutor's testimony and observed that he was "certainly not a person prone to strike minorities denounced in the *Batson* case and its progeny." *Smith II*, 838 So. 2d at 436; (State Court Record, Vol. 34, Tab R-71 at 026). The trial court based that finding on "extensive in court experience with [the prosecutor] and close acquaintanceship with others that know him." (State Court Record, Vol. 34, Tab R-71 at 026).

On return to remand, the Alabama Court of Criminal Appeals acknowledged that the prosecutor had failed to ask potential jurors about their religious affiliations or duties and asked no follow-up questions to the defense's voir dire. *Smith II*, 838 So. 2d at 430. "Moreover," the Court of Criminal Appeals noted, "each of these jurors who was struck by the prosecutor based on her religious undertaking had previously affirmed that she would have no problem imposing the death penalty." *Id*. Nevertheless, the Court of Criminal Appeals affirmed the trial court's finding that the proffered reasons for the challenged strikes "were sufficiently facially gender neutral." *Id.* at 436.

Smith relies on the prosecutor's failure to strike three other veniremembers with religious affiliations as proof of the State's disparate treatment of female potential jurors, and, thus, evidence that the State's proffered ground for the strikes under discussion was a pretext for gender discrimination. (Doc. # 1 at ¶¶ 51, 54-55). In Smith's comparative juror analysis, he argues that the prosecutor left three panelists on the venire -- Mr. Johnson, Mary Parham, and John Hall -- who possessed the same characteristics as those female venirepersons who were struck for religious affiliations. (Doc. # 39 at 15-17). John Hall, who was the defense's twelfth

strike, was a football coach at a Young Men's Christian Association (YMCA) chapter. (State Court Record, Vol. 3, at 298). Mary Parham, who stated during voir dire that she was a youth director at a Sunday school, was a deputy with the Jefferson County Sheriff's Department, and was the last defense strike. (*See id.* at 152, 203, 304). Parham served as an alternate juror. (*Id.*; Vol. 9, at 1445).[5]

Although "side-by-side" comparisons of venirepersons who were struck and other panelists who were allowed to serve may be used to show disparate treatment, *see Miller-El II*, 545 U.S. at 241, the comparisons Smith relies upon here are tenuous. One of Smith's "comparators" was a female. The prosecutor's failure to strike an additional woman does not indicate gender discrimination, particularly as the empaneled juror, Mary Parham, could have been viewed as a favorable juror by the prosecutor because she was a sheriff's deputy. (*See* State Court Record, Vol. 3, at 152, 203, 304). Hall's coaching of a youth YMCA football team is simply not analogous to church volunteer activity, nor does it necessarily indicate his religious affiliation or his susceptibility to pleas for mercy grounded in the Christian faith. As stated earlier, the prosecutor testified that he struck Cosby, Long, Marlar, and Plyler because they might be more susceptible to a plea for Christian mercy. *Smith II*, 838 So. 2d at 427. Therefore, a comparison between the struck veniremembers and Hall provides little, if any, evidence indicating the prosecutor's discriminatory intent.

As for Plaintiff's claim that the prosecutor failed to strike "Mr. Johnson" due to his religious volunteer activity (*see* Doc. # 39 at 15-16), there was not anyone in the venire pool named Johnson (State Court Record, Vols. 2 at 134-54; 3 at 155-61), and the court cannot discern which veniremember indicated membership on a church board. (*Id.*, Vol. 3, at 300). To

[5] Earlene Kennedy, in addition to a volunteering at as a Sunday school teacher and serving on her church's board had also previously served on a criminal jury. (State Court Record, Vol. 3, at 188, 299-300). Kennedy is not mentioned as a comparator in Smith's briefing.

be sure, the transcript indicates that a juror named "Mr. Johnson" indicated membership on a church board (*id.*); however, the venire pool did not contain any member with the surname of Johnson. (*See id.*, Vols. 2 at 134-54; 3 at 155-61). Smith has not shown (much less asserted) which juror is the one the transcript referred to as "Mr. Johnson." (*See* Doc. # 39 at 13, 15-16). The court cannot determine whether it was a male juror who was not struck, and, if so, the other characteristics of that juror. Therefore, the court cannot rely upon a comparison between the struck female veniremembers and "Mr. Johnson" to conclude that the Court of Criminal Appeals made an unreasonable decision or an unreasonable determination of fact when it affirmed the trial court's denial of Smith's *Batson*/*J.E.B.* claim.

But, even putting aside that issue, the prosecutor's rationales do not suggest the type of post-strike rationalizations for pretextual discrimination condemned in *Miller-El II*. The Court of Criminal Appeals reasonably affirmed the trial court's factual finding that the prosecutor gave credible reasons for striking veniremembers. Simply stated, Smith's case is not comparable to others in this circuit in which courts have granted habeas relief to § 2254 petitioners for *Batson* claims. As another court in this circuit has observed, if the female potential jurors struck by the prosecutor had been the only women in the venire, or if all other women had been struck from the jury, a gender-neutral reason "otherwise unsupported by the record would provide strong evidence of intentional discrimination." *McNair v. Campbell*, 307 F. Supp. 2d 1277, 1298 (M.D. Ala. 2004), *rev'd in part on other grounds*, 416 F.3d 1291 (11th Cir. 2005). *See also United States v. Puentes*, 50 F.3d 1567, 1578 (11th Cir. 1995) (concluding that the presence of four African-American jurors on defendant's jury was "a significant factor tending to prove the paucity of the claim"). In this case, though, the record shows that five women served on Smith's

jury as deliberating jurors.[6] (State Court Record, Vol. 34, Tab R-71 at 018). While the prosecutor's use of fourteen of his fifteen strikes against women suggests some pattern of strikes, Smith's trial jury ultimately had five women and seven men, which significantly weakens the strength of his prima facie discrimination case. *Cf. Adkins*, 710 F.3d at 1255 (concluding that a prosecutor's use of peremptory strikes to exclude nine of eleven potential black jurors, resulting in only one black juror serving on the petit jury, was a disparity unlikely to have occurred by chance); *McGahee v. Alabama Dep't of Corr.*, 560 F.3d 1252, 1267 (11th Cir. 2009) (observing a strong prima facie case where, combining the prosecution's cause and peremptory strikes, the prosecution struck 24 African-American jurors, leaving an all-white jury in a county which was 55 percent African-American); *Bui v. Haley*, 321 F.3d 1304, 1309, 1314 (11th Cir. 2003) (finding a *Batson* violation where the prosecution failed to present race-neutral reasons from the prosecutor who actually used 9 of his 13 strikes to remove African-Americans from the jury and presented no reason for striking 1 black venireperson). Smith's counsel did not suggest that the State prosecutor's office had a history of discriminatory strikes against women. Nor did he suggest that the case presented a sensitive subject matter that would have incentivized the prosecutor to strike women. *See United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1045 n. 39 (11th Cir. 2005) ("In some *Batson* claims, the subject matter of the case may be relevant if it is racially or ethnically sensitive."). For these reasons, Smith did not provide a particularly strong prima facie case, such as the prima facie discrimination cases presented in *Adkins* or *McGahee*. Accordingly, the court cannot rely on Smith's prima facie gender-discrimination case alone as substantial evidence that the Court of Criminal Appeals unreasonably adjudicated this claim.

Moreover, Smith has not presented strong side-by-side comparisons between female veniremembers who were struck for their religious volunteer activities and male veniremembers

[6] Two female jurors served as alternates. (State Court Record, Vol. 34, Tab R-71 at 018).

who were not struck by the prosecutor. As discussed above, Hall's coaching activities do not suggest that he was as invested in his religious beliefs in the same manner as veniremembers who served as church volunteers, Sunday School teachers, or ministry counselors. *See Smith II*, 838 So. 2d at 426-27 (describing the volunteer activities conducted by veniremembers Cosby, Long, Marlar, and Plyler). The transcript suggests that another unidentified juror (*i.e.*, one who was identified by the wrong name) was a church board member, but the court cannot compare that unidentified juror to those struck by the State through its peremptory challenges. (*See* State Court Record, Vol. 3, at 300). Finally, Parham was a female juror, so the State's failure to strike her does not indicate the prosecutor's discriminatory intent against women.

The state court record here does not support a conclusion that Hall, "Johnson," and Parham were so similarly situated to the struck female venirepersons that the prosecutor's facially race-neutral reasons must have been pretextual. Although they shared some characteristics of the struck jurors, the state court record does not show that they were indistinguishable in other relevant characteristics. Smith's simplistic argument does not account for other counter-factors. In sum, a comparison between the struck jurors and the ones that the prosecutor did not strike was not so close that a court could only conclude that the proffered reasons were a pretext for purposeful discrimination against women. *Cf. Purkett v. Elem*, 514 U.S. 765, 768 (1995) (per curiam).

b. Peremptory Strike of Venireperson Freeman

Smith also contends that the prosecutor used a peremptory strike to remove Glenda Freeman because of her gender. (Doc. # 1 at ¶¶ 59-61). The prosecutor asserted that Freeman was stuck for being a church youth minister and for having had legal training. (State Court Record, Vol. 13, Remand Hearing Transcript at 24). But, Smith argues that these reasons were

pretextual because the prosecutor did not strike two male venirepersons with similar legal training. (Doc. # 1 at ¶ 61). According to Smith, Freeman did not reveal any church activities during her voir dire testimony. (State Court Record, Vol. 13, Remand Hearing Transcript at 34). However, the prosecutor insisted at the remand hearing that he had personal knowledge of her church involvement. (*Id.* at 48). Because she was one of the final jurors stricken from the venire pool, Freeman served as an alternate on Smith's jury and was dismissed before deliberations. (*Id.*, Vol. 9, at 1445).

At the *Batson* remand hearing, the prosecutor also emphasized Freeman's legal training as a reason that he struck her. (*Id.*, Vol. 13, Remand Hearing Transcript at 24-25). Freeman had taken criminal law and criminal procedure law school classes from both the prosecutor and Smith's defense lawyer, as well as classes from a prominent criminal defense lawyer in Birmingham. (*Id.*, Vol. 4 at 456-57; Vol. 13, Remand Hearing Transcript at 25-27). Freeman stated during voir dire that she believed she would be "influenced" by those classes. (*Id.*, Vol. 3 at 250-51), The prosecutor believed that this influence "would not be good for [the prosecution]." (*Id.*, Vol. 13, Remand Hearing Transcript at 26-27). The trial court and the Alabama Court of Criminal Appeals credited these reasons as plausible and non-discriminatory. *Smith II*, 838 So. 2d at 436; (State Court Record, Vol. 34, Tab R-71 at 025-026).

Smith argues that both of the prosecutor's proffered justifications for striking Freeman, while facially gender-neutral, do not withstand scrutiny. As an initial matter, Smith points out that Freeman said during voir dire that her connection to the trial attorneys through her law school classes would not interfere with her consideration of the evidence, thus affirming her fitness to be a juror. (Doc. # 39 at 17-18). Smith also contends that, while Freeman was struck due to her law school training, the prosecutor did not strike two male venirepersons, James

Buettner and Dale Morgan, who also identified themselves as either studying law or having taken criminal justice courses in the past. (*Id.* at 18-19). Morgan ultimately served as one of Smith's jurors. (*Id.* at 18).

In reviewing a comparative juror analysis under *Batson*, a relevant factor is whether the prosecutor has articulated a credible "connection between the [gender]-neutral characteristic identified and the desirability of a prospective juror." *Jamerson v. Runnels*, 713 F.3d 1218, 1229 (9th Cir. 2013) (citing *Rice v. Collins*, 546 U.S. 333, 341 (2006)); *see also Taylor v. Sec'y, Dep't of Corr.*, 507 F. App'x 887, 891 (11th Cir. 2013) (holding that the State's use of a peremptory challenge to strike an African-American juror because the juror's brother was a police officer "was not unreasonable as an individual's understanding of the criminal justice system could be a reason that a prosecutor would not want that individual on the jury.")

A state court's finding that a prosecutor acted in a race-neutral and gender-neutral fashion in striking potential jurors is difficult to overcome "on the basis of a cold record." *Rice,* 546 U.S. at 343 (Breyer, J., concurring). Smith's comparison between Freeman and the male jurors who were not struck falls far short of showing that the prosecutor struck Freeman due to any discriminatory intent. When the facts permit "two permissible views of the evidence," as is the case here, "the factfinder's choice between them cannot be clearly erroneous." *Hernandez*, 500 U.S. at 369 (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)). Simply put, a wide gulf exists between the isolated criminal justice course Morgan took and the extensive legal training Freeman had received, *which included classes from counsel involved in the case*. (*See* State Court Record, Vol. 3, at 277-78). Additionally, the record does not indicate how much legal training Buettner had received before the trial began. (*See id.* at 196 (indicating that Buettner affirmatively responded to the prosecutor's question of whether he had studied law)).

The Alabama Court of Criminal Appeals could have reasonably determined that Freeman's legal training was a non-pretextual reason for the prosecutor's strike. *See Sifuentes v. Brazelton*, 825 F.3d 506, 527 (9th Cir.), (concluding that, although the stricken veniremember had not practiced law, "the prosecutor may have reasonably been concerned that a person with legal training would exhibit the behaviors on a jury that the prosecutor feared"), *cert. denied*, 137 S. Ct. 486 (2016). This is especially true because neither Morgan nor Buettner stated that their legal training would influence their perception of the case, whereas Freeman confirmed that it would influence hers. (State Court Record, Vol. 3, at 250-51). Given the deferential standard afforded to the trial and state court's determination under the AEDPA, this court cannot conclude with a "definite and firm conviction that a mistake has been committed." *Hernandez*, 500 U.S. at 370 (quoting *United States v. U.S. Gypsum Co*., 333 U.S. 364, 395 (1948)). Indeed, just the opposite is true. Therefore, this claim is due to be denied.

c. Peremptory Strike of Prospective Juror Carolanne Roberts

Smith further contends that the prosecutor's strike of Carolanne Roberts was not gender neutral. (Doc. # 1 at ¶ 69). During voir dire, Roberts stated that she was a travel writer for Southern Living magazine. (State Court Record, Vol. 3, at 270). The prosecutor testified that he struck Roberts because, as a journalist, she might ask questions about the "who, what, where, when, and why" of the offense. (*Id.*, Vol. 13, Remand Hearing Transcript at 19-20). And, the prosecutor believed that the reasons why Smith committed the murder would not favor the sentence the State sought. (*Id.* at 20-21). The prosecutor further recounted his concern that a journalist might be more sympathetic to the defense's penalty phase argument for mercy based on Smith's deprived background. (*Id*. at 20). Smith contends that these proffered reasons were illegitimate because the prosecutor failed to question Roberts during voir dire about her

occupation or whether being a reporter might affect her ability to be a juror. (Doc. # 1 at ¶ 69). This failure to question Roberts, Smith argues, belies the prosecutor's explanation that Roberts' job was significant in his decision to peremptorily strike her. (*Id.*). *Batson*, however, requires only that the prosecutor offer a legitimate, non-discriminatory reason for a peremptory that does not violate the Equal Protection Clause. *Purkett*, 514 U.S. at 768–69. There may be a number of reasons why an attorney may not ask specific questions in an area which is already concerning to him (*e.g.*, not eliciting an unfavorable response in front of the venire, conservation of voir dire time, and the need to focus questions on other members of the panel). And, peremptory strikes based on a veniremember's occupation generally have been upheld as gender-neutral. *See United States v. Steele*, 178 F.3d 1230, 1235 (11th Cir. 1999); *J.E.B.*, 511 U.S. at 142 n. 14. The evidence in the state court record about the strike of Carolanne Roberts is insufficient for the court to find that the Alabama Court of Criminal Appeals adjudicated this claim unreasonably.

3. Discussion of Smith's *Batson* Claims Based on Race and National Origin Discrimination

As part of his second claim, Smith argues that the prosecutor engaged in purposeful discrimination when he struck Lourdes Ramos. (Doc. # 1 at ¶ 68). Smith contends that the prosecutor considered not only Lourdes's Hispanic origin but also her gender in striking her. (*Id.*). In addition, Smith claims that the prosecutor discriminated against African-Americans by using five peremptory strikes against African-American women. (*Id.* at ¶¶ 78, 80).

At trial, Smith's counsel raised three objections to the prosecutor's use of his peremptory strikes. He first asserted that the prosecutor had used 14 of his 15 strikes against women. (State Court Record, Vol. 4, at 453). Next, he claimed that the prosecutor struck the only Hispanic member of the venire pool, Ramos. (*Id.* at 453-54). He noted that the prosecutor had asked no questions of Ramos and had used his seventh strike to remove her from the jury. (*Id.* at 454).

Moreover, Smith's counsel highlighted the racial sensitivity of the case, which involved a black defendant and a white victim. (*Id.* at 460).

Finally, Smith's attorney contested the prosecutor's decision to strike five black jurors.[7] (*Id.* at 461). Counsel argued "that [Jefferson County's] prosecutor's office has been reversed on many, many, many occasion for systematically excluding blacks." (*Id.*). The trial court disagreed with counsel's characterization of the prosecutor's office, and counsel replied that he had previously "reversed them myself." (*Id.*). The court observed that one black juror "lean[ed] to the defendant, another black juror "ha[d] a problem with capital punishment," and a third black juror was "nervous" and did not "want to see the pictures." (*Id.* at 463). Ultimately, the trial court found that defense counsel had failed to present a prima facie case of race discrimination under *Batson*. (*Id.* at 464).

On direct appeal, the Alabama Court of Criminal Appeals determined that Smith had made a prima facie showing of discrimination and remanded his case for a *Batson* hearing in which the prosecutor would provide his reasons for striking fourteen of the fifteen women in the venire. *Smith I*, 698 So. 2d at 1169. The Court of Criminal Appeals specifically noted in its opinion that "juror no. 210 [Ramos] was struck without having been asked any questions." *Id*.

At the remand hearing, the prosecutor explained that he had struck Ramos because she had failed to answer any questions during the questioning, she was especially young, and she was single. (State Court Record, Vol. 34, Tab R-71 at 023-024). As the prosecutor elaborated:

> when you enter a voir dire, and you are looking at the child, and she is looking scared back there in the middle of a courtroom, you can look over her and say, Ms. Ramos, you haven't said nothing to us today. Why don't you tell us something about yourself? And, again, I have to do that with all the other jurors or I will be picking on her, and then sometimes that backfires.

[7] Before addressing the *Batson* objections, the trial court noted that 11 of the 42 members of the venire pool were African-American. (State Court Record, Vol. 4, at 449).

(*Id.*, Vol. 13, Remand Hearing Transcript at 13). The prosecutor added that Ramos was "just nonresponsive, and a kid of this nature, with her age, I just thought she was a bit young to take a chance on having her on the jury, and that's about it." (*Id.* at 13-14). The trial court credited the prosecutor's explanation for his strike of Ramos. (State Court Record, Vol. 34, Tab R-71 at 026). On return to remand, the Court of Criminal Appeals affirmed the trial court's finding that the prosecutor's explanations for the challenged strikes were facially gender-neutral and that the prosecutor did not violate *J.E.B*. *Smith II*, 838 So. 2d at 436.[8] This claim thus has been exhausted for federal review.

In addition to affirming the trial court's finding that the prosecutor had not discriminated against women in his peremptory strikes, the Court of Criminal Appeals also affirmed the trial court's finding that defense counsel had failed to present a prima facie case of discrimination for his other *Batson* claims. *Smith II*, 838 So. 2d at 464-66. With regard to the prosecutor's strikes of African-American veniremembers, the Court of Criminal Appeals determined that defense counsel had provided no evidence to support an inference of discrimination other "than the fact that five of black potential jurors were struck." *Id.* at 466. With regard to the prosecutor's strike of Ramos, the sole Hispanic veniremember, the Court of Criminal Appeals concluded that there was no "pattern of discrimination" because there had been only one Hispanic individual in the venire pool. *Id.* The Court of Criminal Appeals discovered "no indication [of discriminatory intent] from the questioning of the prosecutor." *Id.* "Furthermore, because the appellant's *Batson* motion concerning the striking of the one Hispanic potential juror was based solely on the fact that he was asked no question by the prosecutor, the appellant failed to establish a prima facie

[8] Smith raised the *J.E.B*. claim again in Rule 32 proceedings, which the circuit court found was precluded by Ala. R. Crim. P. 32(a)(2) and (a)(4) because the claim had been raised and addressed at trial and on appeal. *Smith II,* 838 So. 2d at 425-36 (as to female potential jurors) and 464-66 (as to the Latina and African-American potential jurors).

case, as this Court has held that such facts alone do not create a sufficient inference of discrimination." *Id.* Finally, the Court of Criminal Appeals observed that the prosecutor asked Ramos questions "along with the rest of the veniremembers, . . . although she failed to respond to any of these questions." *Id.*

Again, under AEDPA, this court must consider whether the Court of Criminal Appeals unreasonably determined that (1) defense counsel failed to present a prima facie showing of discrimination on the grounds of race and national origin, and (2) the prosecutor provided a sufficiently race-neutral and gender-neutral explanation for striking Ramos. The court addresses these questions below.

First, the Alabama Court of Criminal Appeals reasonably applied *Batson* and made no unreasonable determination of fact when it held that Smith had failed to establish a prima facie case of discrimination against African-Americans or Hispanics in the prosecutor's use of peremptory strikes. *Smith II*, 838 So. 2d at 464-66. With regard to Smith's *Batson* claim for strikes against African-American jurors, the record demonstrates that the prosecutor used 5 of his 15 strikes against African-American veniremembers and that 5 African-American jurors remained after jury selection. (State Court Record, Vol. 4, at 448-49, 452). Thus, this case presents an especially weak statistical prima facie case of discrimination based on race (African-American). *Cf. United States v. Hill*, 643 F.3d 807, 838-39 (11th Cir. 2011) (concluding that the defendant presented no prima facie case of discrimination where the prosecutor had used 64 percent of his strikes against black jurors, the prosecutor could have struck 5 more black veniremembers, 9 jurors were black, and no other circumstances supported an inference of discrimination). Smith's defense counsel explained why some of the struck jurors were indistinguishable from male potential jurors in the venire pool, but he used those comparisons to

support a gender-based *Batson* claim, not a race-based *Batson* claim. (*See* State Court Record, Vol. 4, at 453-58). The court has reviewed Smith's defense counsel's *Batson* arguments (*see id.* at 448-61), but concludes that the Alabama Court of Criminal Appeals' finding that there was no prima facie showing of discrimination against African-American jurors was reasonable, given the especially weak statistical evidence of the prosecutor's intent to strike black jurors.[9]

Second, the court concludes that the Court of Criminal Appeals reasonably affirmed the trial court's determination that defense counsel failed to establish a prima facie *Batson* claim regarding Hispanic jurors. The Court of Criminal Appeals correctly found no pattern of discrimination against Hispanic jurors, as there was only one Hispanic individual in the venire pool. *See Smith II*, 838 So. 2d at 466. Smith's defense counsel complained of a history of discrimination against black jurors, but did not suggest that the prosecutor's office had a history of discrimination against *Hispanic* jurors. (State Court Record, Vol. 4, at 461). Additionally, to the extent that the case implicated racial concerns because it involved an African-American defendant and a white victim, the Court of Criminal Appeals reasonably could have found that fact irrelevant to a prima facie showing of discrimination against Hispanic veniremembers because the crimes at issue did not involve a Hispanic individual.[10] (*See id.* at 460). For these

[9] Although Smith argues that the prosecutor struck African-American jurors for a discriminatory purpose (*see* Doc. # 1 at ¶¶ 78-81), he has not identified any specific juror who was struck due to his or her African-American race. Indeed, Smith's reply brief does not even discuss the *Batson* claims premised upon allegedly discriminatory strikes of African-American veniremembers. (*See* Doc. # 39 at 5-30 (discussing the gender-based *Batson* claims and the allegedly discriminatory strike of the sole Hispanic veniremember)). Nevertheless, in the interest of completeness, the court has addressed the denied race-based *Batson* claim presented to the Alabama Court of Criminal Appeals.

[10] Smith cites *Madison v. Commissioner, Alabama Department of Corrections*, 677 F.3d 1333 (11th Cir. 2012), in support of his gender-based *Batson* claim, but does not cite that case to support his race-based or national-origin-based *Batson* claims. (*See* Doc. # 39 at 8, 11-12). Nevertheless, the court has analyzed *Madison* in reviewing the race-based or national-origin-based *Batson* claims and concludes that *Madison* is distinguishable. In *Madison*, the Eleventh Circuit held that the Alabama Court of Criminal Appeals unreasonably applied *Batson* when concluding that the petitioner had failed to present a prima facie showing of race discrimination. *See* 677 F.3d at 1337-39. The *Madison* panel emphasized that the Court of Criminal Appeals erred by requiring the defendant to establish "purposeful racial discrimination" at the first step of *Batson*, instead of merely demonstrating an inference

reasons, Smith has established no basis for habeas relief on his *Batson* claims of race discrimination and national origin discrimination.

Third, and in any event, even if the Court of Criminal Appeals unreasonably applied the first prong of *Batson* when analyzing Smith's national-origin *Batson* claim (and, to be clear, the Court of Criminal Appeals reasonably applied that precedent), that court reasonably applied the third prong of the *Batson* test when finding that the prosecutor presented credible non-discriminatory reasons for striking Ramos. Smith maintains that the prosecutor's reasons for striking Ramos were merely a pretext for gender and national origin discrimination. (Doc. # 1 at ¶ 68). He points to the prosecutor's decision not to strike two male venirepersons who sat on the jury, Mark Roddam, and William T. Pesnell, even though they shared similar characteristics with Ramos. (*Id.* at ¶ 64). Like Ramos, Roddam and Pesnell were single. (State Court Record, Vol. 3, at 155-56). However, the similarities end there. That is, Smith's comparison does not take into account the additional reasons that the prosecutor provided for striking Ramos -- her youth and her lack of responsiveness -- which are relevant and gender-neutral reasons to strike a panelist and are also differences between Ramos and the two male jurors who Smith argues were similarly-situated. The prosecutor's explanations emphasized Ramos' age and the fact that he knew nothing about her as the primary factors as motivating his choice. And, the state trial and appellate courts credited those reasons as nondiscriminatory under *J.E.B*. and *Batson*. *Smith II*, 838 So. 2d at 436 ("In the present case, the prosecutor came forward with a facially neutral explanation for striking these potential jurors; his reasons based on religion were facially neutral

---

of racial discrimination. *Id.* at 1338. In contrast, the Court of Criminal Appeals in *Smith II* clearly enunciated the appropriate legal standard for determining whether a defendant had presented a prima facie case of discrimination. "Only when the defendant establishes facts and circumstances that raise an inference of discrimination must the State give its reasons for its peremptory strikes." *Smith II*, 838 So. 2d at 465 (quoting *McElmore v. State*, 798 So. 2d 693, 695-96 (Ala. Crim. App. 2000)). Therefore, this case is distinguishable from *Madison* because the Court of Criminal Appeals did not issue a decision contrary to *Batson*. *See Madison*, 677 F.3d at 1339 ("Because the state-court decision falls within the 'contrary to' clause of § 2254(d)(1), we must undertake a *de novo* review of the record.").

to a claim of discrimination based on gender."). The court perceives no ground for disturbing this finding.

Smith next argues that the prosecutor's explanation for striking Ramos is not compelling (at least, not compelling to his counsel). But, it need not be. As the Supreme Court has noted in *Rice*, 546 U.S. at 341-12, a state trial court's decision to credit a prosecutor's race-neutral explanation for a peremptory strike of a young African-American female for being young and rolling her eyes during voir dire was not an unreasonable factual determination. The Court in *Rice* reiterated that a prosecutor's explanation for striking a challenged juror need not be particularly "'persuasive, or even plausible'; so long as the reason is not inherently discriminatory, it suffices." *Id.* at 338 (quoting *Purkett*, 514 U.S. at 767-768). "Reasonable minds reviewing the record might disagree about the prosecutor's credibility, but on habeas review that does not suffice to supersede the trial court's credibility determination." *Id.* at 341-42. As in *Rice*, Smith's allegations are insufficient to "supersede the trial court's credibility determination" under § 2254(d)'s deferential standard of review. *Id*. The evidence in the state court record presents no evidence that raises an inference of a discriminatory motive.

To warrant habeas relief, a petitioner must show that the state court's decision was objectively unreasonable, not merely incorrect. The Alabama Court of Criminal Appeals was persuaded that the prosecutor's justification for striking Ramos was nondiscriminatory. *Smith II*, 838 So. 2d at 436. Because this court cannot conclude that the state court's decision was unreasonable in its application of the law or that its factual findings were incorrect by clear and convincing evidence, the writ cannot be granted on this claim. *See Lockyer,* 538 U.S at 75-76 ("[A] federal habeas court may not issue the writ simply because that court concludes in its

independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.").

B. Whether this Court is Barred from Reviewing Smith's Allegation that the State's Administration of the Antipsychotic Drug Haldol During the Trial and Penalty Phase Violated Smith's Rights under the Fifth and Sixth Amendments

Under the Due Process Clause of the Fourteenth Amendment, a defendant awaiting trial has "a significant liberty interest in avoiding the unwanted administration of antipsychotic drugs." *Washington v. Harper*, 494 U.S. 210, 221-22 (1990) (discussing how the liberty interest in avoiding unwanted medication applies to convicted prisoners); *Riggins v. Nevada*, 504 U.S. 127, 135 (1992) (providing that state pretrial detainees have a liberty interest under the Fourteenth Amendment in avoiding forced administration of antipsychotic medication). The Supreme Court has recognized that a significant liberty interest is implicated when a capital trial defendant is involuntarily medicated to the point that he or she is impaired in assisting counsel. *See Sell v. United States*, 539 U.S. 166, 179, 181 (2003). In light of that significant interest, if a state entity wishes to involuntarily administer antipsychotic drugs to a mentally ill defendant facing serious criminal charges, the government must show that "the treatment is medically appropriate, is substantially unlikely to have side effects that may undermine the fairness of the trial, and, taking account of less intrusive alternatives, is necessary significantly to further important governmental trial-related interests." *Id.* at 179. The rights involved in involuntary medication are critical. Once it has been established that a defendant was involuntarily medicated during a criminal trial without the proper due process considerations, because of the "substantial probability of trial prejudice," prejudice is presumed. *Riggins*, 504 U.S. at 137-38.

In his third argument for reversal, Smith alleges that his constitutional rights under *Harper* and *Riggins* were violated because he was inappropriately medicated with the anti-

psychotic drug Haldol (Haloperidol) during his capital murder trial.[11] (Doc. # 1-1 at ¶¶ 96-102). According to Smith's counsel, the medication caused him to appear at trial as emotionless and unremorseful for his crimes, a demeanor that the prosecution commented upon during the guilt phase closing argument. (Docs. # 1 at ¶¶ 90-91; 1-1 at ¶¶ 91-92). For these reasons, Smith argues that the administration of Haldol violated his due process rights. (Doc. # 1-1 at ¶¶ 100-07). Smith further alleges that the inappropriate administration of Haldol compromised his Sixth Amendment right to counsel during his penalty phase and sentencing proceedings. (*Id.* at ¶¶ 96-99).

The State counters that Smith's *Harper/Riggins* claim is precluded from federal habeas review because the Alabama state courts held that the claim was procedurally defaulted. (Doc. # 28 at 23-25). For the reasons explained below, the court concludes that this claim is due to be denied because the Alabama Court of Criminal Appeals denied it on an adequate and independent state ground.

Smith's medical records apparently were not retained by the jail where he was housed during trial. *Smith III*, 112 So. 3d at 1139. Therefore, there is no conclusive evidence of whether the State actually administered Haldol to Smith during his trial. (*See* State Court Record, Vol. 34, Tab R-74 at 10). More importantly, Smith has offered no evidence that he objected before or during his capital murder trial to any drug being administered to him involuntarily or otherwise given to him against his will. (*See id.*).

[11] To be clear, Smith himself has never testified (orally or by affidavit) that he was administered Haldol, but there is record evidence that the medication was administered to him at the jail facility in which he was housed before his trial. (State Court Record, Vol. 34, Tab R-74 at 10 ("Dr. Morton testified that Willie Smith was on Haldol when he came to prison from the county jail.")). Nevertheless, the trial court found it was more probable than not that Haldol was administered to Smith during the course of the trial. (*Id.* at 20 ("The Defendant did not testify that he was taking this medication, but this Court is of the opinion that the Petitioner has shown that it is more likely than not that Smith was taking Haldol at the time of his trial.")).

At the Rule 32 hearing, Dr. William Morton, Jr., an expert in the field of psychopharmacology, testified for Smith and opined that, based on his review of Smith's Holman State Prison records, Smith showed symptoms of side effects from a reaction to Haldol and there was a high likelihood that Smith had been administered the drug while in jail custody during trial. (*See* State Court Record, Vol. 30, at 184-86 (describing symptoms that could have resulted from Haldol administration)). *See also Smith III*, 112 So. 3d at 1139 ("In the 'Progress Notes' from Holman Correctional Facility, the following entry states: 'He [Smith] had apparently been given some Haldol in the County Jail, but there is no record of this in the file.'"). Dr. Morton's testimony was uncontroverted, and the Rule 32 court credited it. (State Court Record, Vol. 34, Tab R-74 at 10 (finding that the "evidence presented by the petitioner would appear to indicate that Willie Smith was [] taking Haldol at the time of trial"); 20 (stating that the "[c]ourt is of the opinion that the Petitioner has shown that it is more likely than not that Smith was taking Haldol at the time of his trial.").

1. Exhaustion and procedural bar

Smith's constitutional claims related to administration of Haldol (hereinafter "medication claims") are exhausted for purposes of federal habeas review because he previously presented them to the state courts, both in his Rule 32 proceedings and on collateral appeal. But, while Smith's claims may have been exhausted, the state trial court denied the claims as procedurally barred under Alabama Rule of Criminal Procedure 32.2(a)(3) and (a)(5) because Smith had not raised the claims at trial or on direct appeal. (State Court Record, Vol. 34, Tab R-74 at 10). The Alabama Court of Criminal Appeals affirmed that conclusion. *Smith III*, 112 So. 3d at 1136-38.

When a state prisoner defaults a claim in state court by violating an independent and adequate state procedural rule, "federal habeas review of the claims is barred unless the prisoner

can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman*, 501 U.S. at 750. This court must therefore consider whether Smith's claims are barred from federal habeas review because the Alabama courts "clearly and expressly" refused to review the medication claims' merits because of an independent and adequate state procedural rule. *Id*. at 735-36, 750; *Harris v. Reed*, 489 U.S. 255, 260–65 (1989).

The court first turns to whether an "independent" and "adequate" state rule precludes Smith's medication claims. To determine if a state procedural rule is independent, firmly established, and regularly followed, the Eleventh Circuit Court of Appeals has applied a three-part test. First, the last reasoned state court decision in the case must have "clearly and expressly" relied on a state procedural rule to resolve the federal claim. *Card v. Dugger,* 911 F.2d 1494, 1516 (11th Cir. 1990). Second, the state court decision must have rested solidly on a state law ground that is not "intertwined with an interpretation of federal law." *Id.* Finally, the state court's refusal to hear the claim must be based on a procedural rule that is "faithfully and regularly applied." *Id.* at 1516-17.

Although the state trial court heard and discussed the issue of medication allegedly administered during Smith's capital trial, it expressly concluded that the medication claims were barred by Rule 32(a)(3) and (a)(5), except for the ineffective assistance claim related to Haldol administration. (State Court Record, Vol. 34, Tab R-74 at 10 ("To the extent the argument does not relate to an ineffective assistance of counsel claim[,] then it is precluded because it could have been raised at trial or on appeal but was not."); 12 (recognizing that the due process claim was "procedurally barred")). The Court of Criminal Appeals affirmed the trial court's application of those state procedural bars. *Smith III*, 112 So. 3d at 1136-38. Accordingly, the court finds that

the state court clearly and expressly relied on Alabama's procedural rules in refusing to review these claims. Moreover, the procedural bars of Alabama Rule of Criminal Procedure 32.2(a)(3) and (a)(5) were not intertwined with a question of federal law, and, thus, were independent state rules for the purposes of habeas review.

A state procedural rule is adequate if it was "firmly established and regularly followed" at the time of the alleged procedural default. *Ford v. Georgia,* 498 U.S. 411, 424 (1991). In this case, the court does not write on a blank slate regarding the adequacy of Alabama's Rule 32 procedural bars to habeas review of constitutional claims. The Eleventh Circuit has recognized repeatedly that Rule 32.2(a)(3) and (a)(5) are "independent and adequate" state law rules that may bar claims from federal habeas review. *Brownlee v. Haley*, 306 F.3d 1043, 1066 (11th Cir. 2002) ("The district court correctly determined that the claims ... are procedurally defaulted under Rules 32.2(a)(3) and (5) because they were not raised either at trial or on appeal."); *Holladay v. Haley*, 209 F.3d 1243, 1254 & n. 9 (11th Cir. 2000) (recognizing that claims dismissed under Rule 32.2(a)(5) are procedurally barred in federal court), *see also James v. Culliver*, 2014 WL 4926178, at *10 (N.D. Ala. Sept. 30, 2014) (explaining that Rule 32(a) provides independent state procedural rules for deciding a claim). Therefore, binding precedent establishes that Rule 32.2(a)(3) and (a)(5) are independent and adequate state law grounds for adjudicating the Fifth and Sixth Amendment medication claims which bar federal habeas review.

2. Cause and prejudice for the default

Smith acknowledges that his Fifth and Sixth Amendment claims were not raised at trial or on direct appeal. (Doc. # 39 at 50). Nevertheless, he argues that there was sufficient "cause" for the default and that actual prejudice would result if this court does not review his claims. (*Id.* at 51, 54-55).

To demonstrate cause for a procedural default, a petitioner must show that "some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Murray v. Carrier*, 477 U.S. 478, 488 (1986). The Supreme Court has provided examples of objective impediments. A showing that "the factual or legal basis for a claim was not reasonably available to counsel … or that some interference by officials[ ] made compliance impracticable" can be cause for a procedural default. *Id.* (internal citations and quotation marks omitted). To demonstrate actual prejudice, a petitioner must show that the errors during his trial created more than a mere possibility of prejudice; he must show that the errors "worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Id*. at 494 (quoting *United States v. Frady*, 456 U.S. 152, 170 (1982)) .[12]

Smith presents two claimed objective impediments as cause for his failure to comply with the state's procedural rules. (Doc. # 39 at 51-53). First, he asserts that the factual basis for this claim was not reasonably available to his trial and appellate counsel because "of the State's inadequate record-keeping, or outright deception" about Mr. Smith's medical treatment during trial. (*Id.* at 52). Second, if evidence that Smith was administered Haldol existed, Smith contends that his counsel was constitutionally ineffective for failing to discover and present it. (*Id.* at 52-54). The court addresses these arguments, in turn.

The record does not support Smith's first contention that the evidence of his Haldol administration was not discovered because it was hidden or misplaced. Smith's trial counsel testified during the Rule 32 hearing that Smith did not inform her that he had received medication at the jail. (State Court Record, Vol. 29, Tab R-63 at 61-62). Smith relies on the trial

[12] Alternatively, though not at issue here, a habeas court may excuse a procedural default without a showing of cause in extraordinary cases where a "constitutional violation has probably resulted in the conviction of one who is actually innocent," *Murray*, 477 U.S. at 496, or where "review of a state prisoner's claim is necessary to correct a fundamental miscarriage of justice," *Coleman*, 501 U.S. at 748 (internal quotation marks omitted).

court's observation that defense counsel could not have discovered the Haldol administration as evidence that the State concealed or destroyed the jail records. (*See* Doc. # 39 at 52 (citing State Court Record, Vol. 34, Tab R-74 at 11). But, the trial court's findings do not support a cause for failing to raise the Haldol administration issue at trial. The trial court never stated why the jail's medical records were unavailable at the time of the Rule 32 hearing. (*See id.* at 10-12). Indeed, the trial court observed that it was "not clear that the Defendant actually took Haldol." (*Id.* at 11). Simply put, Smith has not demonstrated that the State inappropriately failed to preserve medical records or that it hid facts from his counsel.

Smith's second ground for cause was addressed by the Rule 32 court. The Rule 32 trial court found that Smith's attorneys were not ineffective for failing to investigate "non-obvious psychological problems that [were] not brought to their attention by their client." (*Id.* at 20-21). The Rule 32 court found that Smith exhibited no behavior at trial that would have prompted counsel to investigate whether he was given Haldol, given that Smith's lack of communication and expressions could have reasonably been attributed to his personality and mental capacity rather than to medication. (*Id.* at 11, 21). Based upon the testimony of the witnesses and Smith's counsel during the Rule 32 hearing, the trial court found that Smith's attorneys were unaware he was being given Haldol and that they could not have discovered that fact through reasonable diligence. (*Id.* at 11). For these reasons, along with the reasons discussed below in the analysis of Smith's ineffective-assistance claim concerning counsel's allegedly inadequate investigation, Smith has not shown cause for failing to present the medication claims to the trial court or the Court of Criminal Appeals during his direct criminal proceedings.

Smith points to several cases which have concluded that an involuntary administration of medication violated a defendant's rights where the medication was involuntarily supplied or

where the provision of the medication could not be medically justified. Neither situation applies here, however. Smith's jail medical records are unavailable, and, thus, the record contains no confirmation that (1) Smith was administered Haldol during his criminal trial or (2) he objected to it being administered to him. And, even assuming the administration of the drug to Smith, he has not presented any evidence showing that the drug was medically unnecessary. In sum, Smith cannot show cause to excuse his failure to satisfy Alabama's procedural rules. Accordingly, because the Alabama Court of Criminal Appeals expressly relied on Rule 32(a)(3) and (a)(5) to decide Smith's constitutional medication claims, this court is barred from considering the merits of those claims.

C. Whether Application of the Death Penalty to Smith Violates the Eighth Amendment to the United States Constitution and is Contrary to and an Unreasonable Application of Established United States Court Precedent

Smith argues that he is intellectually disabled[13] and, as such, application of the death penalty to him would violate his Eighth Amendment rights. (Doc. # 1-1 at 8-19). The Supreme Court has held that imposing the death penalty on intellectually disabled individuals is "excessive and that the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (citing *Ford v. Wainwright*, 477 U.S. 399, 405 (1986)).

The State makes no argument that Smith has failed to exhaust his *Atkins* claim. (*See* Doc. # 17 at ¶¶ 22-26). Nevertheless, for purposes of his petition, Smith's *Atkins* claim is deemed exhausted for purposes of federal habeas review, as he presented it in Rule 32 proceedings and on appeal to the Alabama Court of Criminal Appeals. In his petition, Smith argues that the state

[13] Following the guidance of the Eleventh Circuit, the court uses the terms "intellectually disabled" and "intellectual disability" in this opinion as both law and medicine have moved away from the terms "mentally retarded" and "mental retardation." *See Kilgore v. Sec'y, Florida Dep't of Corr.*, 805 F.3d 1301, 1303 n. 1 (11th Cir. 2015). However, the court uses the terms "mentally retarded" and "mental retardation" in this opinion as necessary to accurately reflect statements made by the parties, their experts, and prior opinions.

court failed to apply the proper legal test in determining that he did not prove that he was intellectually disabled. (Doc. # 1-1 at ¶ 112). He further argues that he exhibits subaverage intellectual functioning. (Doc. # 1-1 at ¶ 111). He specifically contends that he has a Full Scale Intelligence Quotient (IQ) of 64 as measured by the Stanford-Binet test. (*Id.* at ¶ 115). Smith's expert, Dr. Salekin, testified at the state post-conviction hearing that he had an IQ of 64 as measured by the Stanford-Binet test, and the State's expert, Dr. King, stated that he had no reason to question or doubt the numerical results of Dr. Salekin's IQ test. (10-11, 20-21). (*Id.* at ¶¶ 115-16 (*see* State Court Record, Vol. 29, Tab R-63 at 156; State Court Record, Vol. 30, Tab R-63 at 273-74)). According to Smith, neither the Circuit Court nor the State identified a specific error in Dr. Salekin's test results. (*Id.* at ¶ 116).

Smith contends that other neuropsychological testing confirms that he has deficits in his executive functioning. (*Id.* at ¶ 118). He submits that the executive system is involved in carrying out goal-oriented behavior and includes skills such as planning, sequencing, self-monitoring, and mental flexibility – skills which are required to successfully carry out everyday activities. (*Id.* (citing State Court Record, Vol. 30, Tab R-63 at 130-32)). He alleges that he has various deficits in this system that affect his aptitude with respect to these skills. For example, Smith contends that his "Expressive Language Domain" is in the severely impaired range, and tests of his memory show only a second percentile score on the "Logical Memory I test." (*Id.* at ¶ 119 (citing State Court Record, Vol. 30. Tab R-63 at 125, 127)). He also alleges that his score on the "Rey-O" test indicates that he had a moderate impairment in his ability to recognize visual information, which he contends would impact his ability to function in both school and work environments. (*Id.* at ¶ 120 (citing State Court Record, Vol. 30, Tab R-63 at 132-33). Smith further asserts that that his score on the "Trails B" test, which measures mental flexibility,

indicates that he has a "mild impairment" in mental flexibility as compared to the general population, and that this impairment would prevent him from seeing multiple approaches to solving problems. (*Id.* at ¶ 121 (citing State Court Record, Vol. 30, Tab R-63 at 128-29)). Smith argues that these tests provide further evidence that he meets the definition of being intellectually disabled established by *Atkins v. Virginia*. (*Id.* at ¶ 122).

Smith further argues that, while the IQ test performed by Dr. King rendered an IQ score over 70, IQ test results are typically reported in a "band" of plus or minus five points. (*Id.* at ¶ 117). Accordingly, while he received a full scale IQ score of 72 from Dr. King's test, he submits the range of likely scores based on that result extends as low as 67. (*Id.*). He also alleges that the "Flynn Effect" must be taken into account in assessing an individual's IQ score. The "Flynn Effect" is a theory that contends that IQ scores have been increasing over time and, as such, IQ scores must be recalibrated in order to reflect this increase. (*Id.* at ¶ 123). Smith provided evidence, through Dr. Salekin's testimony, that "although there is no national consensus regarding the application of the Flynn Effect to IQ scores, individuals in the mental retardation and forensics field agree that it should be used." (*Id.* at ¶ 124 (citing State Court Record, Vol. 29, Tab R-63 at 160, 170)). The Flynn Effect purports to recalibrate an individual IQ score by lowering the score by 0.3 points per year (measured by the year the test was last calibrated) in order to account for the general rise in IQ scores. (*Id.* ¶ 127). Accordingly, if the Flynn Effect were applied to Smith's IQ score of 72 that he received on the IQ test that Dr. King administered, then the normed test result would be a 69. (*Id.*).

Smith notes that application of the Flynn Effect has found some favor in the Eleventh Circuit. One district court, after a hearing on the merits of the issue of a defendant's mental retardation, concluded that the Flynn Effect was relevant in determining whether an IQ score was

less than 70. *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1281 (N.D. Ala. 2009). The Eleventh Circuit affirmed the court's decision, reasoning that "[t]he question is not whether the district court's application of the Flynn effect to lower [the petitioner's] IQ scores was mandatory, but whether the district court's application of it in this case was clearly erroneous. We cannot say it was." *Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010). Smith contends that, in light of the Flynn Effect, and when the IQ result "band" of plus or minus five points is taken into account, the IQ test administered by Dr. King results in a score below 70. (*Id.* at ¶ 128). Of course, it has also been observed that "the Flynn effect 'is not accepted in the general community' and is only seen in capital punishment litigation." *Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 627 (11th Cir. 2016) (noting district court findings). Smith argues that he satisfied his burden of proof to establish that he exhibits subaverage intellectual functioning. (*Id.*).

Smith next argues that he exhibits limitations in adaptive skill areas, and those limitations manifested before the age of 18. Dr. Salekin evaluated his adaptive behavior using the Scales of Independent Behavior – Revised (SIB-R) to measure what skills Smith reflected at age 17. (*Id.* at ¶ 130). Dr. Salekin conducted this test by interviewing Smith's brother. (*Id.* at ¶ 131). Smith notes that the test revealed that his "overall functional independence" at age 17 was on the level of an average individual at age 11 years, 3 months. (*Id.*). Further, the test results suggested that at age 17 his motor skills were equivalent to a child of age 8 years, 5 months; his social interaction and communications skills were on the level of age 11 years; his personal living skills were on the level of age 12 years, 8 months; and his community living skills were on the level of age 13 years, 3 months. (*Id.*). Smith contends that all of these results demonstrate that he lacks functioning in certain key skill areas. Smith then argues that even the State's expert, Dr. King,

found that he had "some difficulties with community use, health and safety, self-direction, social skills, and leisure skill." (*Id.* at ¶ 133 (citing State Court Record, Vol. 30, Tab R-63 at 277)). Smith contends that the Circuit Court found that "Smith showed deficits in adaptive functioning based upon test results," but nonetheless found that he and had not sufficiently demonstrated that he met the adaptive functioning prong of Alabama's *Atkins* test. (*Id.* at ¶ 134). On review, the Alabama Court of Criminal Appeals did not find any error in that finding. (*Id.*). Smith contends that this determination by both Alabama courts was unreasonable, and is due to be set aside on habeas review.

1. The Circuit Court's Rule 32 Order

Smith raised his *Atkins* claim in his August 1, 2003 Rule 32 petition. Indeed, by the trial court's estimation, "[a] majority of the testimony taken at the evidentiary hearing related to the issue." (State Court Record, Vol. 34, Tab R-74 Order at 2). The court noted that the testimony of the experts conflicted as it related to whether Smith has "significantly sub-average intellectual functioning." (*Id.* at 3). Dr. Salekin testified that Smith had an overall IQ of 64. Dr. Salekin also testified that the Flynn Effect could lower the Defendant's IQ test score by more than two points; however, the court did not find Dr. Salekin's evidence regarding the Flynn Effect convincing enough to warrant a reduction in the IQ tests before the court. (*Id.*). Instead, the court noted that even Dr. Salekin agreed that there is no national consensus regarding whether the Flynn Effect should be applied to IQ scores, and accordingly determined not to apply the Flynn Effect to the IQ scores before it. (*Id.*). *See Ledford*, 818 F. 3d at 627 (noting that "[t]he district court was 'not impressed' by Ledford's evidence concerning the Flynn effect. The district court found Dr. Zimmerman (Ledford's expert) and Dr. King (the State's expert) both agreed that the Flynn effect was not used in clinical practice to reduce IQ scores, and neither had

seen the Flynn effect applied to IQ scores outside the context of capital litigation."). By contrast, here, Dr. King testified that Defendant had a verbal IQ of 75 and a performance IQ level of 74, which resulted in a full scale IQ of 72. (*Id.*). The court found both Dr. Salekin and Dr. King to be credible with an appropriate background to testify regarding IQ tests. (*Id.* at 3-4). However, the court credited Dr. King's overall IQ calculation as "probably more accurate than that determined by Dr. Salekin." (*Id.* at p. 4). The court based this determination in part on the fact that Dr. King's test resulted in a verbal IQ calculation of 75, which is the exact score verbal IQ score that Smith had received on a prior IQ test.[14] (*Id.*).

Having concluded that Smith had failed to satisfy his burden of demonstrating that his IQ was 70 or below, the Circuit Court then assessed Smith's adaptive function. (*Id.*). The court concluded that, "[a]lthough the Petitioner showed deficits in adaptive functioning based upon test results, the Petitioner did not show many, if any, actual examples of how his low IQ affected his adaptive functioning in everyday life before or after the incident in question." (*Id.*). The court described Dr. Salekin's testimony on the adaptive functioning issue as follows:

> As it relates to the adaptive functioning issue, Dr. Salekin testified that she administered the SIB-R test which includes interviewing a third person about the abilities of the person in question. According to Dr. Salekin, the SIB-R is one of many scales of adaptive behavior that tries "to evaluate a person's ability to function on a day-to-day basis." Dr. Salekin testified that the results "show deficits in adaptive behavior for Willie Smith." According to Dr. Salekin, she used this test because a self-administered test such as ABAS, which was administered by Dr. King, is not usually recommended to determine mental retardation since individuals often "overestimate their abilities." Therefore, they use tests from individuals who know the person in question.
>
> One of the "draw backs" to the SIB-R test is the individual's ability to remember past events, and Dr. Salekin agreed that the tests administered to the Petitioner's brother involved questions about behavior approximately 30 years prior to the

[14] Alan D. Blotcky, Ph.D. testified in front of the jury at the sentencing phase of trial, but did not testify at the ensuing Rule 32 hearing. (*See* State Court Record, Vol. 34, Tab R-69 at 12-13). Dr. Blotcky testified that Defendant "tested to have a verbal I.Q. of 75" and "was borderline between mild retardation and low average intelligence." (*Id.*).

> test. Ideally one would want to administer the SIB-R test at the time in question rather than many years later because that is how the "test was normed." On the SIB-R, Smith's "personal living skills indicated an age equivalency of 12 years, 8 months.
>
> Dr. Salekin also administered the "Woodcock Johnson III test to determine current achievement levels, which relates directly to school function." The "norm" or average on this test is a score of 100. The Defendant scored an 89 in ability to speak to others which is less than one standard deviation from the "norm" of 100. He scored an 84 in "oral expression" which also includes communicating orally with others and is "slightly more than one standard deviation below the mean." Smith had a "pretty good" score of 93 in listening comprehension, an 88 in "broad reading", a 92 in "broad math", and a 97 in broad written language." The Defendant also scored a 101 in calculation, 101 in math fluency, and 107 in spelling. These three scores were above the "mean" or above the national average score. Therefore, in math fluency the Defendant's grade equivalent was 12.9 and in spelling his grade equivalency was 13.9. According to Dr. Salekin these grades were "inconsistent… with a diagnosis that Mr. Smith would be mildly mentally retarded." According to Dr. Salekin, the Defendant's 8.8 grade level in math, 8.5 grade level in broad written language, his 11th grade level in calculation, his 9.8 grade level in written skills, his 10.5 grade level in academic skills, his 12.9 grade level in math fluency, his 13.9 grade level in spelling, and his 8.4 grade level in oral comprehension are all inconsistent with a diagnosis of mental or mild mental retardation. Over an objection by counsel [of] the Petitioner, Dr. Salekin testified that she does not believe Smith has mental retardation. She reached this conclusion after doing "a full Atkins evaluation."

(*Id.* at 4-5) (internal citations omitted).

Smith also offered the testimony of Dr. Daniel Marson, a clinical neuropsychologist employed at the University of Alabama at Birmingham. In addition to giving IQ tests, Dr. Marson conducts "specific tests of discreet cognitive abilities." (*Id.* at 5). The Circuit Court assessed his testimony as follows:

> Dr. Marson believes that Smith came "into this world with a learning disability, both for verbal and visual information. What he does learn, he is able to, however, carry over and hold on to." Dr. Marson was hired more to do a neuropsychological evaluation rather than an intellectual functioning test. In the "attention" domain of this test the Defendant was "very mildly impaired" in the area of "special span" which means that he would have difficulty scanning his environment and may not notice new stimuli in his surroundings. The Defendant's exhibits #11 and #12 conflicted with regard to the percentile under WMS III working memory as to whether the Defendant was in the mildly

> impaired range or in the low average range. As it relates the "expressive language" domain, the Defendant's three test scores range from low average to high average; therefore, there was no deficit in that area. Although there was no deficiency as it relates to the Defendant's racial group, there was one deficiency as it relates to the overall population. In the "memory" domain, the Defendant tested as moderately impaired in two categories which referred primarily to the Defendant's ability or lack thereof in short term retention of verbal or visual information. The Defendant also tested as moderately or severely impaired on four visual tests relating to his ability to reproduce a complex drawing after short or long period of time. Dr. Marson appeared to summarize Smith's ability to remember items as having difficulties in immediately retaining information, but once he learned information he was generally good at retaining the information for long periods of time. In the remaining sixteen "memory" tests, it appears the Defendant was mildly impaired in one category and was in the low average or high average range for the remaining tests. Dr. Marson also conducted five tests in the category he listed as "executive function." In general, these tests relate to an individual's ability to plan, time matters, and organize life situations so as to properly function in society. As described to this Court, this general category appears to be of greater importance as it relates to the adaptive functioning aspect of Atkins. The Defendant was listed by Dr. Marson as moderately impaired in a category involving raw processing speed, mildly impaired or borderline range on a second test[], low average on a third test, and low average as it relates to the general population, but average as it relates to Smith's racial group on the final test.
>
> In general, this Court would summarize Dr. Marson's testimony as indicating that the Defendant's deficits would cause him some difficulty in following instructions and retaining information so as to cause some short comings as it relates to school or work activities. Yet, Dr. Marson did not indicate that the Defendant's short comings would cause him to be unable to succeed in school, work, o[r] society in general, but it might require additional effort or instruction for Smith to perform on par with his peers. Dr. Marson did not express an opinion as to whether the Defendant was mildly mentally retarded.

(*Id.* at 5-6) (internal citations omitted).

Having reviewed Smith's evidence regarding his adaptive functioning, the Circuit Court then assessed the State's evidence with regard to the issue. (*Id.* at 6). Dr. King performed a WRAT-4 test which "gives an indication of an individual's ability to read, write, and do arithmetic." (*Id.*). The average score for this test is 100. (*Id.*). Smith scored an 85 on reading, 93 on spelling, and an 84 on math computation. (*Id.*). These test scores equate to grade levels as

follows: reading equated to an 8.6 grade level, spelling to an 11.5 grade level, and math to a 6.3 grade level. (*Id.*). Dr. King performed other tests on Smith as well. On one test, the Minnesota Multiphasic Personality Inventory (MMPI-2) test, the test profile was invalid because it demonstrated that Smith either "purposefully attempted to look like he was having a mental illness on this particular instrument or he randomly sorted items." (*Id.*). Dr. King also testified that he interviewed Smith, and Smith did not have any difficulties in communication or understanding questions or administration of the tests. (*Id.*).

Dr. King also testified, over Smith's objection, that in his opinion Smith "is not mentally retarded and he likely functions somewhere in the high borderline to low average range of intellectual ability." (*Id.* at p. 7). The court recognized that one test that Dr. King performed, the Adaptive Behavior Assessment System, Second Edition (ABAS-2), resulted in a finding that Smith "has some difficulties with community use, health and safety, self-direction, social skills, and leisure skill areas." (*Id.*). The Rule 32 court did not credit this finding, however, because it "may not be fully applicable because it sometimes refers to activities that would be limited to someone not in prison."[15] (*Id.*). The court also found it instructive that:

> [a]ll tests require the respondent to have "constant contact with the particular target person on practically a daily basis", but that is not possible for the other instruments since the Defendant has been away from others while in prison for so many years. According to Dr. King, tests such as that run by Dr. Salekin cannot be used because "there aren't any norms for that" and because under the circumstances it would be a violation of the test's protocol.

(*Id.*) (internal citations omitted).

In addition to the testimony from the Rule 32 evidentiary hearing, the court found certain portions of the trial transcript relevant. (*Id.*). As the court noted:

[15] Dr. King's testimony indicated that he chose to use the ABAS-2 because it is the only test that allows the individual in question to answer the questions himself. (State Court Record, Vol. 34, Tab R-74 at 7).

> [i]n particular, the Petitioner's father did not help take care of him and his mother frequently worked; therefore, after age 8 or 9 Willie Smith and siblings "practically raised themselves." According to the Defendant's mother, it appears that Smith took care of the other children while she was gone. The Defendant dropped out of school in the 10th grade so that he could work and help provide for his family. According to Mrs. Smith, the Defendant provided well for her. He kept a job at Birmingham Stove and Range for 2 years then got another job at Coca-Cola Company, but he was "relieved" from his job at Coca-Cola when he "got on dope" and missed some work. As noted in Ferguson v. State, supra, the Defendant's ability to work and support his family, even at a young age, weighs against the Petitioner in his argument that he is mentally retarded. Furthermore, Dr. Blotcky testified that he found "no diminished capacity" when he met with the Defendant."

(*Id.*) (internal citations omitted). The court also determined that other evidence from Smith's trial relevant to the adaptive function inquiry as well. (*Id.*). Specifically, the Rule 32 court found one of Smith's pre-trial conversations illuminating:

> Mr. Smith stated as follows in a pre-trial conversation that he did not know was being recorded:
>
> > "I thought somebody saw me back there, I waited for a day. I said if nobody find that car today that mean ain't too much looking for her. So what I do, I'll go round there and burn that bitch up, get my fingerprints off it. So that's what I did. I burned that bitch slap off, I burned that bitch so bad….
>
> In the same statement the Defendant also acknowledged his understanding that he may be caught if he failed to kill the victim, in part because she was a police officer's sister, when he stated as follows: "She didn't know [he would kill her], she just said here you can take the car. I was acting like this here. I was thinking don't shoot, don't do it. Her brother a police. No if I let you go you going to fuck me up…. She said, No I'm not. I promise. (mimicking a female voice). I said you a liar, boom, [t]hen shot her in the head with that gun." In this Court's opinion, the Defendant's intentional killing of the victim, based in part upon his realization that the victim's relationship to a police officer would make his capture more likely, and his apparently well thought-out attempt to cover up the crime, weighs against the Petitioner in relation to the adaptive functioning requirement. This conclusion is supported by the opinion in Ferguson v. State, supra, indicating that extensive involvement in crime and post-crime planning are factors to consider.

(*Id.* at 8) (internal citations omitted).

Taking all of the testimony into account, the Rule 32 court summarized the evidence that it found relevant and drew its conclusions. It noted that Dr. Salekin's SIB-R test, when conducted by way of interview with Smith's brother, placed him at an overall skill level of 12 years and 8 months, but when conducted by way of interview with Smith's mother, placed him at a skill level of 15 years and 3 months. (*Id.*). Dr. Salekin testified that large difference between the two tests was significant, and the court found that such a difference "detracts from the significance placed on the test results." (*Id.*). The Rule 32 court further noted the high likelihood of inaccuracy in Smith's SIB-R test which was based on answers from his younger brother. (*Id.*). At best (for Smith), his "younger brother was in his middle teens when the events that he was questioned about occurred, and he was trying to remember Smith's skill level approximately 30 years later." (*Id.*). The court reasoned that this, too, diminished the credibility of the SIB-R score that Dr. Salekin presented. (*Id.*).

The Rule 32 court also noted that, while the Woodcock-Johnson Achievement Test that Dr. Salekin administered included below average scores, it also demonstrated that Smith did not have significantly substandard scores in the categories of speech, communication, listening comprehension, reading, math, and written skills. (*Id.* at p. 9). Further, Dr. Salekin testified that adaptive functioning tests would be affected by an individual's use of drugs or alcohol. (*Id.*). Because the record indicated that Smith used alcohol and drugs on a regular basis, the court reasoned that some deficits in his adaptive functioning, even at age 17, could be attributed to his drug use. (*Id.*). The court concluded that:

> [a]lthough evidence is clear that Defendant has below average intelligence which has, in some ways, probably affected his life style, the Petitioner has failed to meet the burden of proving that he is mentally retarded so as to preclude imposition of the death penalty.

(*Id.*). The Rule 32 court further reasoned that, while it was not bound to follow an expert's opinion as to whether or not an individual meets the *Atkins* standard, "the lack of any testimony that Willie Smith is mildly mentally retarded is a strong contributing factor in the Court's decision as it relates to this issue." (*Id.*).

The Rule 32 court concluded its analysis as follows:

> Based on the testimony presented at the Rule 32 hearing, relevant portions of the trial transcript, and other matters outlined herein, this Court finds that the Petitioner has failed to establish that he is mentally retarded so as to preclude him from receiving a death sentence in this case. Two experts stated that in their opinion Willie Smith was not mentally retarded, and the other experts who testified did not refute those opinions. The record indicates that Willie Smith properly functioned in society prior to his arrest for the offense in question. Although testimony was presented regarding possible deficiencies in the Defendant's adaptive functioning based upon test results, there was no testimony regarding deficiencies in the Defendant's actual ability in areas such as "communication, self care, home living, social interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety." Ferguson v. State, 2008 WL 902901, *14 (Ala. Crim. App. 2008). In numerous test[] categories the Defendant tested in the average range or above average, and those test scores were inconsistent with a finding that the Defendant was mentally retarded.

(*Id.*).

2. The Court of Criminal Appeals' Decision

Smith appealed the Circuit Court's denial of his Rule 32 motion. On May 25, 2012, the Court of Criminal Appeals of Alabama affirmed the circuit court's ruling. *Smith III*, 112 So. 3d 1108. The Court of Criminal Appeals, after examining each argument Smith raised on appeal, held that the Rule 32 court did not err in finding that Smith is not mentally retarded under the standards set forth in *Atkins*. *Id.* at 1134. The appellate court noted both Smith's standard of proof (*i.e.*, in order to prove that he was entitled to relief, he was required to demonstrate his intellectual disability by a preponderance of the evidence) as well as its own standard of review

(*i.e.*, the Court of Criminal Appeals reviewed the Circuit Court's findings for abuse of discretion). *Id.* at 1125.

After outlining Smith's arguments and the Alabama law related to *Atkins*, the Court of Criminal Appeals determined that "[a]s the circuit court found and as the evidence at the hearing established, Smith did not prove by a preponderance of the evidence that he was mentally retarded." *Id.* at 1130. "The greater weight of the evidence indicated that, although he suffered with some mental deficiencies, they did not rise to the level at which an impartial mind would conclude from the evidence that he was mentally retarded." *Id.* The court found that the Circuit Court did not err in its determination not to apply the Flynn Effect to lower Smith's IQ scores. *Id.* at 1131. The court then held that the Circuit Court did not err when it refrained from adopting a margin of error when examining Smith's IQ score. *Id.* at 1131. The appellate court reasoned that Alabama courts have specifically "refrained from adopting a margin of error as it would apply to IQ scores, because doing so would expand the definition of mentally retarded established by the Alabama Supreme Court in *Ex parte Perkins*." *Id.* (citing *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002)). The court also affirmed the Circuit Court's determination that Smith had not sufficiently demonstrated a lack of adaptive behavior as required by *Atkins*. *Id.* at 1132. The appellate court noted that, even where there are shortfalls in adaptive behavior, those "shortcomings are not evaluated in a vacuum" and "other relevant evidence may weigh against an overall finding of deficiency in this area. *Id.* at 1133. Finally, the court found that the Circuit Court did not err in relying upon the clinical opinions of Dr. Salekin and Dr. King that he was

not mentally retarded.[16] *Id.* The court reasoned that "testimony from a clinical psychologist is admissible in evaluating mental retardation in capital cases." *Id.* at 1334.

3. Analysis of Smith's *Atkins* Claim

As the Supreme Court has noted, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." *Atkins*, 536 U.S. at 317. This is the issue Smith asked the state courts to decide. He now asks this court to review the state courts' unfavorable determination. In *Atkins*, the Court expressly left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Id.* (quotation marks omitted and alterations adopted).

Alabama courts first applied *Atkins* in *Ex parte Perkins*. There, the Alabama Supreme referenced *Atkins*'s guidance and stated:

> [T]his court can determine, based on the facts presented at Perkins's trial, that Perkins, even under the broadest definition of mental retardation, is not mentally retarded. Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18).

Ex parte Perkins, 851 So. 2d at 456. In the absence of further guidance from the Alabama Legislature, Alabama appellate courts have adopted *Perkins*'s reasoning:

> [t]he Alabama Legislature has not yet established a method for determining whether a capital defendant is mentally retarded and, thus, ineligible for a sentence of death. "However, the Alabama Supreme Court, in *Ex parte Perkins,* 851 So.2d 453 (Ala.2002), adopted the most liberal definition of mental retardation as defined by those states that have legislation barring the execution of a mentally retarded individual." *Smith v. State,* [Ms. CR–97–1258, Jan. 16, 2009]

[16] In evaluating Petitioner's *Atkins* claim, the Court of Criminal Appeals also affirmed the Circuit Court on two grounds not before this court. *Smith III*, 112 So. 3d at 1134-36 (finding that the circuit court did not err by (1) considering Dr. King's testimony, or (2) selectively relying on certain evidence).

—— So.3d ——, —— (Ala.Crim.App.2009) (opinion on return to fourth remand); *see also Smith v. State,* [Ms. 1060427, May 25, 2007] —— So.3d ——, —— (Ala.2007) ("Until the legislature defines mental retardation for purposes of applying *Atkins,* this Court is obligated to continue to operate under the criteria set forth in *Ex parte Perkins.*"). Pursuant to *Ex parte Perkins,* "to be considered mentally retarded, [a capital defendant] must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior." *Ex parte Perkins,* 851 So.2d at 456; *see also Atkins,* 536 U.S. at 321 n. 5. Further, "these [two deficits] must have manifested themselves during the developmental period (i.e., before the defendant reached age 18)." *Ex parte Perkins,* 851 So.2d at 456…. "Therefore, in order for an offender to be considered mentally retarded in the *Atkins* context, the offender must currently exhibit subaverage intellectual functioning, currently exhibit deficits in adaptive behavior, and these problems must have manifested themselves before the age of 18." [….]

"In the context of an *Atkins* claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded." *Smith v. State,* [Ms. 1060427, May 25, 2007] —— So.3d at ——; *see Smith v. State,* [Ms. CR–97–1258, Jan. 16, 2009] —— So.3d at ——. "'The question of [whether a capital defendant is mentally retarded] is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony of that issue.'" *Smith v. State,* [Ms. CR–97–1258, Jan. 16, 2009] —— So.3d at —— (quoting *Atkins v. Commonwealth,* 266 Va. 73, 581 S.E.2d 514, 515 (2003)). As the Alabama Supreme Court has explained, questions regarding weight and credibility determinations are better left to the circuit courts, "which [have] the opportunity to personally observe the witnesses and assess their credibility." *Smith v. State,* [Ms. 1060427, May 25, 2007] —— So.3d at —— (quoting *Smith v. State,* [Ms. CR–97–1258, Sept. 29, 2006] ——So.3d ——, —— (Ala.Crim.App.2006) (Shaw, J., dissenting) (opinion on return to third remand)).

Byrd v. State, 78 So. 3d 445, 450–51 (Ala. Crim. App. 2009).

Accordingly, Smith was required to establish each of three prongs: (1) he currently exhibits subaverage intellectual functioning (demonstrated by an IQ of 70 or below), (2) he currently exhibits deficits in adaptive behavior, and (3) these problems manifested themselves before the age of 18. Importantly, in presenting his claims to the Rule 32 court, Smith bore the burden of proving that he is intellectually disabled by a preponderance of evidence. As mentioned above, federal courts reviewing habeas petitions pursuant to 28 U.S.C. § 2254 may grant relief only when the state court's adjudication "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 "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). Importantly, "a state court's factual determination is entitled to a presumption of correctness." *Debruce v. Comm'r, Alabama Dep't of Corr.*, 758 F.3d 1263, 1266 (11th Cir. 2014) (citing 28 U.S.C. § 2254(e)(1)). After careful review, the court concludes that the state courts' determination that Smith failed to satisfy the burden of proving that he is intellectually disabled was not unreasonable. Nor did the state court act unreasonably in its analysis of the three *Perkins* prongs, or unreasonably apply Alabama law in coming to its conclusion.

a. The Significantly Subaverage Intellectual Functioning Prong

Smith argues that he exhibits significant subaverage intellectual functioning because (1) his IQ (as reflected by Dr. Salekin's test) is 64, (2) his IQ score based on Dr. King's testing would be below 70 if the state courts had accounted for the Flynn Effect and a five point "band" reflecting the margin of error in the test, and (3) neuropsychological testing demonstrates that he shows a deficit in executive function. The court addresses each of these arguments, in turn.

i. Dr. Salekin's IQ score

The evidence before the court highlights a division in the experts' opinions. On the one hand, Smith's expert presented evidence that his IQ was below the line set in *Perkins* (an IQ of 70 or below). On the other, the State's expert presented evidence that his IQ was above Alabama's standard. Here, it is worth noting (again) that in the state court Smith had the burden of proving by a preponderance of the evidence that he is intellectually disabled. *Byrd*, 78 So. 3d at 450. Of course, this burden, coupled with "the mere existence of a division in expert opinion," does not necessarily preclude Smith from proving that he is intellectually disabled. *See Tharpe*

v. Warden, 834 F.3d 1323, 1346 (11th Cir. 2016) (determining that the district court's conclusion that Tharpe failed to prove he was intellectually disabled was not unreasonable). But it is an important factor in the analysis.

The court cannot say that the state court's resolution of the conflicting expert testimony was unreasonable. Indeed, this court can imagine a scenario where two equally credible and persuasive experts testify regarding a defendant's IQ in Alabama: one testifying that a defendant's IQ was above 70, and the other that it was below 70. In such a scenario, a state court could reasonably evaluate the conflicting proof and conclude that the defendant was not intellectually disabled, because he failed to show his intellectual disability by a preponderance of evidence. Of course, this is not the case here. While Smith correctly notes that the Circuit Court found both experts "to be credible with an appropriate background to testify regarding Intelligence Quotient tests," the court found a way to differentiate the two scores presented at the Rule 32 hearing. (*See* State Court Record, Vol. 34, Tab-74 at 4). As the state court noted, during the penalty phase of his trial, Smith's expert testified that he had a verbal IQ of 75. (*Id.*). Because this was the exact same verbal IQ score that Dr. King presented, the circuit court reasoned that "Dr. King's overall IQ calculation … was probably more accurate than that determined by Dr. Salekin." (*Id.*). This determination was reasonable in light of the legal and proof standards that were applicable in the state court. As such, the Court of Criminal Appeals' determination -- which it made after quoting the Circuit Court's reasoning -- that "the greater weight of the evidence" indicated that Smith's mental deficiencies "did not rise to the level at which an impartial mind would conclude from the evidence that he was mentally retarded" (*Smith III*, 112 So. 3d at 1130) was not unreasonable. *See Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 635 (11th Cir. 2016) (considering the fact that

one expert's opinion was corroborated by another expert's opinion with regard to a defendant's IQ when assessing the expert's credibility).

Contrary to Smith's suggestion, the reasoning of *Tarver v. Thomas*, 2012 WL 4461710 (S.D. Ala. Sept. 24, 2012), does not change this conclusion. In *Tarver*, the court held that the state Circuit Court's decision to disregard Tarver's IQ score of 61 in favor of other scores was unreasonable. *Id.* at *7. There, however, the state Circuit Court "refused to consider Tarver's score of 61" and "disregarded it without explanation." *Id.* Here, the Circuit Court clearly detailed why it credited Dr. King's overall calculation as "probably more accurate. (State Court Record, Vol. 34, Tab-74 at 4). That determination, and the Court of Criminal Appeals' affirmance, was clearly reasonable.

ii. The Flynn Effect and Margin of Error

As discussed above, Smith presented evidence related to the Flynn Effect and an alleged standard measurement error to the Circuit Court and the Court of Criminal Appeals as bases for lowering or "norming" Dr. King's IQ score. The state courts rejected Smith's argument to employ these concepts to lower the IQ score presented by Dr. King. After careful review, the court concludes that the state courts' determinations of this issue were not unreasonable.

Smith contends that "[t]he Eleventh Circuit has held that, to fairly assess IQ scores in capital cases, IQ scores must be adjusted to account for the Flynn Effect." (Doc. # 39 at 45 (citing *Thomas v. Allen*, 607 F.3d 749 (11th Cir. 2010)). That, however, is an absolute misstatement of the law. In *Thomas v. Allen*, all but one of the petitioner's claims under 28 U.S.C. § 2254 were dismissed; the sole claim that survived the motion for summary judgment was the petitioner's claim that he was mentally retarded. *See Thomas v. Allen,* 614 F. Supp. 2d 1257, 1259 (N.D. Ala. 2009), aff'd, 607 F.3d 749 (11th Cir. 2010). Upon joint motion of the

parties, that claim was litigated on the merits in the federal district court, rather than being remanded to the state court system. *Id.* In finding that the petitioner was mentally retarded, the district court accounted for the Flynn Effect in its analysis. *Id.* at 1276-81. On appeal, the Eleventh Circuit held that the district court's application of the Flynn Effect was not clearly erroneous. *Thomas*, 607 F.3d at 757. As the Eleventh Circuit reasoned:

> [b]ecause there is no uniform consensus regarding the application of the Flynn effect in determining a capital offender's intellectual functioning, and there is no Alabama precedent specifically discounting a court's application of the Flynn effect, we cannot say that the district court clearly erred in applying it.

Id.

However, *Thomas* does not stand for the premise that courts in the Eleventh Circuit *must* account for the Flynn Effect when performing their analysis. In fact, Alabama law is clear that Alabama courts are not *required* to consider the Flynn Effect when determining whether a criminal defendant is intellectually disabled. *Albarran v. State*, 96 So. 3d 131 at 199-200 (Ala. Crim. App. 2011) (stating that, even though an expert testified regarding the Flynn Effect, "the circuit court could have reasonably rejected the 'Flynn effect' and determined that Albarran's IQ was 71). Similarly, the Eleventh Circuit has held that "a district court is not required to apply a Flynn effect reduction to an individual's IQ score in a death penalty case." *Ledford*, 818 F.3d at 640.

While the state courts are certainly *permitted* to consider the Flynn Effect, the Circuit Court's decision not to do so (and the Court of Criminal Appeals' affirmance of that decision) was not unreasonable. The Circuit Court did not find the evidence of the Flynn Effect convincing enough to warrant a reduction of Smith's IQ test results, and found Dr. Salekin's testimony that there was no national consensus regarding the Flynn Effect instructive. (State Court Record, Vol. 34, Tab-74 at 3). In both *Thomas* and *Ledford* our Circuit has noted that

there is no uniform consensus regarding the application of the Flynn Effect. *See Thomas*, 607 F.3d at 757; *Ledford*, 818 F.3d at 636. Accordingly, and taking into account the authority permitting the court to reject the Flynn Effect, the Circuit Court's determination not to take it into account given the lack of consensus was not unreasonable. Similarly, the Court of Criminal Appeals' affirmance of the Circuit Court's determination was not unreasonable.

Finally, the state courts' determination not to account for so-called "standard measurement error" was not unreasonable. The Circuit Court noted that Dr. King introduced evidence of standard measurement error during the Rule 32 hearing. (*See* O. p. 7). However, the Court of Criminal Appeals found that the Circuit Court did not err by not applying the standard measurement error. The court noted that "this Court has refrained from adopting a margin of error as it would apply to IQ scores, because doing so would expand the definition of mentally retarded established by the Alabama Supreme Court in *Ex parte Perkins*." *Smith III*, 112 So. 3d at 1132. Indeed, at the time the state courts made their determinations, the following reasoning controlled in Alabama:

> Smith urges this Court to adopt a 'margin of error' when examining a defendant's IQ score and then to apply that margin of error to conclude that because Smith's IQ was 72 he is mentally retarded. The Alabama Supreme Court in *Perkins* did not adopt any 'margin of error' when examining a defendant's IQ score. If this Court were to adopt a 'margin of error' it would, in essence, be expanding the definition of mentally retarded adopted by the Alabama Supreme Court in *Perkins*. This Court is bound by the decisions of the Alabama Supreme Court. See § 12–3–16, Ala.Code 1975.

Smith v. State, 71 So. 3d 12, 20-21 (Ala. Crim. App. 2008) *overruled by Lane v. State*, 2016 WL 1728753 (Ala. Crim. App. Apr. 29, 2016). At the time the state courts made their respective rulings, Alabama state law did not allow consideration of "margin of error" when examining a defendant's IQ score. This principle did not run afoul of clearly established principles found in

Atkins, and the state courts' determination not to account for standard measurement error was not unreasonable.

The Supreme Court's decision in *Hall v. Florida* does not alter this analysis. 134 S. Ct. 1986 (2014). In *Hall*, a 2014 decision, the Court held that "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 2001. If Alabama's rule could be construed as a "strict IQ cutoff at 70," it may run afoul of *Hall*. *See id.* at 1996; *Lane v. State*, 2016 WL 1728753 (Ala. Crim. App. Apr. 29, 2016). However, this does not entitle Smith to 2254 relief. As the Eleventh Circuit has stated, "*Hall*'s holding was not clearly established by *Atkins*," and *Hall* "changed course by requiring the states to recognize a margin of error of five points above or below an IQ score of 70 in assessing intellectual disability." *Kilgore v. Sec'y, Florida Dep't of Corr.*, 805 F.3d 1301, 1311 (11th Cir. 2015). At the time *Hall* was decided (2014), the Alabama state courts had already rendered their decisions – in 2009 and 2012, respectively. Accordingly, at the time of their decisions, the Alabama courts were tasked with applying *Atkins*, not *Hall*, to Smith's case. *Id.* at 1312. "Nothing in *Atkins* suggested that a bright-line IQ cutoff of 70 ran afoul of the prohibition on executing the intellectually disabled," and as such, the state court did not unreasonably apply *Atkins* when it referenced a bright-line IQ cutoff of 70. *Id.* This holding is supported by our Circuit's determination that nothing "convinces us that *Hall* can be applied retroactively." *Id.* at 1315. Accordingly, the state courts' decision not to apply standard measurement error -- which was made well before *Hall* was decided -- was not unreasonable.

iii. Smith's Neuropsychological Testing

Smith argues that certain neuropsychological testing provides further support that he exhibits subaverage intellectual functioning. (Doc. # 39 at 50). He specifically directs the court to his scores on tests measuring (1) his "Expressive Language Domain," (2) logical memory, (3) ability to encode visual information, (4) and mental flexibility, and argues that they all demonstrate that he satisfies the first prong of the *Perkins* test. (*Id.* at pp. 50-52). After careful review, the court concludes the state court's holding on this matter was not contrary to federal law or unreasonable.

Both state courts addressed, and dismissed, this additional neuropsychological testing in the context of the "adaptive behavior" prong of the *Perkins* test, rather than the "subaverage intellectual functioning" prong. This was not error. In Alabama, a court need not look beyond an IQ score when assessing the subaverage intellectual functioning prong. *See Peraita v. State*, 897 So. 2d 1161, 1207 (Ala. Crim. App. 2003) (equating "subaverage intellectual functioning" with "an IQ score of 70 or below). And, before *Hall*, states were permitted to present IQ test score "cutoffs," which, if not met, prevented the defendant from presenting additional evidence of intellectual disability. *Kilgore*, 805 F.3d at 1308, 1311. Accordingly, the state court's determination that Smith failed to prove his subaverage intellectual functioning, which was based on the IQ scores presented to the Circuit Court, was not unreasonable.[17]

b. The Adaptive Behavior Prongs

Smith consolidates his analysis of the final two prongs of the *Perkins* analysis into a single claim for relief. (*See* Doc. # 39 at 52). The court will do likewise in its discussion. As mentioned above, Smith alleges that the state court unreasonably weighed the evidence and

[17] To the extent that Smith's neuropsychological testing can be considered in assessing the adaptive behavior prong of Perkins, it is addressed below.

determined that he had failed to meet his burden of proving that he satisfied the adaptive behavior prong of the *Perkins* test. (Doc. # 39 at 54). He specifically contends that the Court of Criminal Appeals disregarded certain test results that he presented and instead relied on collateral evidence from the record and the opinions of expert witnesses. (*Id.*). He also asserts that the tests he presented showed that he had significant adaptive functioning deficits before he reached 18. (*Id.* at 56).

In Alabama, "to be diagnosed as mentally retarded, an offender must have significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." *Ferguson v. State*, 13 So. 3d 418, 434–35 (Ala. Crim. App. 2008). Here, again, the state court did not unreasonably err in concluding that Smith failed to meet his burden of proving that he was intellectually disabled.

The Circuit Court assessed the SIB-R scores on which Defendant relies in his Petition, but found them less credible than other evidence before the court. (State Court Record, Vol. 34, Tab-74 at 8). Specifically, the court noted the difference between the SIB-R test results when the test was given to Smith's mother as opposed to his younger brother. (*Id.*). The court also noted that the SIB-R test required Smith's younger brother to recall events and assess Smith's skill level from approximately 30 years earlier, and the court found this technique problematic. (*Id.*). As such, the Circuit Court looked to record evidence that demonstrated that Smith was able to work and support his family as well as engage in a well thought-out attempt to cover up his crime. (*Id.* at 7-8). After weighing all of the evidence before it, including the experts' opinion testimony, the Circuit Court concluded that Smith failed to meet his burden of proving that he is intellectually disabled. (*Id.* at 9). The Court of Criminal Appeals affirmed that determination,

and found that "[a]lthough there was some evidence of deficiencies in Smith's adaptive behavior, these deficiencies were not significant in relation to all his testing concerning this prong of the *Atkins* test." The state courts' factual findings and conclusions were not unreasonable.

Smith also claims that the state courts disregarded his test results in favor of other considerations, but that argument is off the mark. Both the Circuit Court and the Court of Criminal Appeals considered the test results Smith presented. The Circuit Court found that even after considering the test results before the court, "[p]etitioner did not show many, if any, actual examples of how his low IQ affected his adaptive functioning in everyday life before or after the incident in question." (*Id.* at 4). The Court of Criminal Appeals correctly noted that "although it is true that as a threshold matter the psychological evaluator must determine that the defendant was deficient in at least two areas of adaptive behavior, these shortcomings are not evaluated in a vacuum." *Smith III*, 112 So. 3d at 1133. Indeed, Alabama courts routinely look to factors besides test scores to evaluate whether a defendant has met his burden of proving deficiencies in his adaptive behavior. *See Ex parte Perkins*, 851 So. 2d at 456 (finding it instructive that Perkins maintained interpersonal relationships and had a job for a short period when analyzing his "adaptive behavior"); *Lewis v. State*, 889 So. 2d 623, 698 (Ala. Crim. App. 2003) ("the nature and circumstances surrounding the crimes in this case – including Lewis's articulate and detailed statement to the police – suggest goal-directed behavior, thus indicating that Lewis does not suffer from deficits in adaptive behavior."). The state courts' consideration of the record was neither impermissible nor unreasonable. *Tharpe v. Warden* is instructive. 834 F.3d at 1346. In *Tharpe*, the Eleventh Circuit noted that the mental-health experts who examined the petitioner were divided with regard to the extent of the deficiencies in his adaptive behavior. *Id.* After examining the content and basis of the experts' opinions, the court held that "there is insufficient

evidence presented here to establish that [the state court's] conclusion… was unreasonable." *Id.* Here, the state courts did not err in viewing the entire record in making a determination regarding Smith's adaptive behavior. Smith has not shown that the deficiencies in his adaptive functioning were so significant "that no fairminded jurist could reasonably conclude" that he had failed to prove that his impaired behavior qualified him as intellectually disabled for purposes of Alabama's death penalty law. *Id.* 1347.

That the state courts considered the experts' opinions as to whether Smith was intellectually disabled does not change this conclusion. The Court of Criminal Appeals correctly noted that testimony from a clinical psychologist is admissible in evaluating mental retardation in capital cases. *Smith III*, 112 So. 3d at 1134. Indeed, the court properly noted that it is common for Alabama courts to consider expert opinion regarding whether a defendant is mentally retarded. *Id.* (citing *Ex parte Perkins*, 651 So.2d at 456; *Ray v. State*, 80 So. 3d 965, 981 (Ala. Crim. App. 2011); *Borden v. State*, 60 So. 3d 935, 938 (Ala. Crim. App. 2004)). Given the number of cases in which courts have considered an expert's opinion regarding whether a defendant is intellectually disabled, the court finds that the state courts' consideration of the experts' opinion was not unreasonable.

Having found that the state courts did not unreasonably find that Smith failed to prove the second *Perkins* prong, it follows that the state courts did not unreasonably find that Smith failed to meet the third *Perkins* prong as well. The second *Perkins* prong requires that Smith demonstrate that he currently exhibits deficits in adaptive behavior. The third prong requires he prove that those problems manifested themselves before the age of 18. The state court reasonably determined that Smith failed to prove deficits in adaptive behavior. In the absence of proof that Smith currently exhibits (or has exhibited in the past) deficits in adaptive behavior, the

state court did not unreasonably determine that Smith failed to establish that those deficits manifested before the age of 18.

c. Smith's Final Contention

As a separate argument, Smith contends that "the Court of Criminal Appeals' decision was contrary to, and an unreasonable application of the *Perkins* test adopted pursuant to *Atkins*." (Doc. # 39 at 54). In support of his argument, Smith alleges (again) that the Court of Criminal Appeals unreasonably (1) relied on subjective expert opinions as to whether he was intellectually disabled, (2) disregarded the IQ score that Dr. Salekin presented, (3) disregarded the Flynn Effect, and (4) failed to acknowledge test results showing that he had significant adaptive functioning deficits at the age of 17. This court has already determined, the state courts' determinations on these matters were not unreasonable. Accordingly, Smith's above-listed contentions do not support his argument that the Court of Criminal Appeals involved an unreasonable application of the *Perkins* test.

To the extent Smith's section 2254 petition seeks relief based on *Atkins*, it is due to be denied.

D. Whether Mr. Smith was Denied Effective Assistance of Counsel in Violation of Supreme Court Precedent in *Strickland v. Washington*

Smith alleges in his habeas petition that he was denied effective assistance of counsel in numerous respects. The court addresses the general constitutional standard that applies to Smith's ineffective assistance claims and then discusses each of Smith's allegations.[18]

[18] Because the Alabama Court of Criminal Appeals held that Smith failed to establish counsel's ineffective performance with respect to all of his ineffective assistance claims, the court limits its review of the claims under 28 U.S.C. § 2254 to the first prong of the *Strickland* test.

1. General Ineffective Assistance Standard

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-pronged standard for judging the Sixth Amendment effectiveness of attorneys who represent criminal defendants at trial or on direct appeal.[19]

> 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.

Id. at 687; *see also Williams v. Taylor*, 529 U.S. 362, 390 (2000). The two parts of the *Strickland* standard are conjunctive; accordingly, a petitioner bears the burden of proving *both* deficient performance *and* prejudice in order to prevail on an ineffective assistance claim. *Williams v. Allen*, 598 F.3d 778, 789 (11th Cir. 2010). Thus, a court is not required to address both aspects of the *Strickland* standard when a habeas petitioner makes an insufficient showing on one of the prongs. *See, e.g.*, *Holladay*, 209 F.3d at 1248 ("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.") (internal citation omitted). Here, the court need only address the performance prong of *Strickland*.

a. The Performance Prong

To establish that counsel's performance was deficient, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness," which is defined in terms of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 687-88;

[19] Smith has not argued in this § 2254 petition that he received ineffective assistance from the attorneys who represented him during his post-conviction proceedings.

see also Williams, 529 U.S. at 390-91; *Darden v. Wainwright*, 477 U.S. 168, 184 (1986). The *Strickland* Court instructed lower federal courts to be "highly deferential" when assessing counsel's performance:

> 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.

Strickland, 466 U.S. at 689 (citations and internal quotation marks omitted). *See also, e.g.*, *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (stating that, "[w]hen reviewing whether an attorney is ineffective, courts should always presume strongly that counsel's performance was reasonable and adequate") (internal quotation marks omitted). To overcome the presumption that counsel's conduct fell within the wide range of reasonable professional assistance, a petitioner "must establish that no competent counsel would have taken the action that [petitioner's] counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*).

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.*, *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001) (giving lawyers "the benefit of the doubt for 'heat of the battle' tactical decisions"); *Mills v. Singletary*, 161 F.3d 1273, 1285-86 (11th Cir.

1998) (noting that *Strickland* performance review is a "deferential review of all the circumstances from the perspective of counsel at the time of the alleged errors").

> Under this standard, there are no "absolute rules" dictating what reasonable performance is or what line of defense must be asserted. Indeed, as we have recognized, "[a]bsolute rules would interfere with counsel's independence-which is also constitutionally protected-and would restrict the wide latitude counsel have in making tactical decisions."

Michael v. Crosby, 430 F.3d 1310, 1320 (11th Cir. 2005) (quoting *Chandler* and *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001)). "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that no reasonable lawyer, in the circumstances, would have done so." *Rogers*, 13 F.3d at 386. In short, an attorney's performance will be deemed deficient only if it is objectively unreasonable (*i.e.*, falls below the wide range of competence demanded of attorneys in criminal cases), such that no competent attorney would have taken the action that petitioner's counsel did take.[20] *See, e.g.*, *Chandler*, 218 F.3d at 1315; *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990).

While decisions by counsel are "virtually unchallengeable" if made "after thorough investigation" of the applicable law and facts, "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments

---

[20] At times, Smith's § 2254 petition appears to suggest that the minimum standard of performance for trial counsel was established by the American Bar Association's Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases ("ABA Guidelines"). (*See, e.g.*, Doc. # 1-1 at ¶ 145 (citing ABA Guideline 11.8.6(B)(1)); ¶ 147 (citing ABA Guideline 11.8.6(D)); ¶ 154 (citing ABA Guidelines 11.4.1(D)(2)(c), 11.8.6(B)(1), and 11.8.6(D))). That is wrong. The Eleventh Circuit has held that the ABA Guidelines do not establish the minimum standard in all cases that counsel must meet to comply with prevailing professional norms. *Butts v. GDCP Warden*, No. 15-15691, slip op. at 9 (11th Cir. Mar. 9, 2016). As the *Butts* opinion explained:

> Counsel must perform reasonably under "prevailing professional norms." Strickland, 466 U.S. at 688, 104 S. Ct. at 2065. Those norms, Butts insists, are established by the recommendations of the ABA and the Southern Center for Human Rights. They aren't. Butts argues that the Supreme Court's decision in Wiggins v. Smith, 539 U.S. 510, 123 S. Ct. 2527 (2003), establishes that trial counsel performed deficiently by failing to follow those recommendations. It doesn't.

Id.

support the limitations on investigation." *Strickland*, 466 U.S. at 690-91. At the same time, defense counsel does not have an "absolute duty to investigate particular facts or a certain line of defense, although in some circumstances, a complete failure to investigate may constitute deficient performance of counsel." *DeYoung v. Schofield*, 609 F.3d 1260, 1284 (11th Cir. 2010) (internal quotation marks omitted). And, the court must accord substantial deference to counsel's decision to forego a particular investigation. *Strickland*, 466 U.S. at 691. To render effective assistance at the penalty phase of a capital trial, defense counsel must "reasonably investigate[] possible mitigating factors and [make] a reasonable effort to present mitigating evidence to the sentencing court." *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir. 2006). A part of effective defense advocacy is formulating "a strategy that [is] reasonable at the time and [balances] limited resources in accord with effective trial tactics and strategies." *Harrington*, 562 U.S. at 107. In short, counsel "is not required to pursue every path until it bears fruit or until all hope withers." *Williams v. Head*, 185 F.3d 1223, 1237 (11th Cir. 1999) (internal quotation marks omitted).

b. Deference to State Court's Adjudication of Ineffective Assistance Claims

The Supreme Court has established an especially high burden that § 2254 petitioners must meet to succeed on ineffective assistance claims decided in the respondent's favor by the state courts. This is so for two reasons. First, § 2254(d) requires a federal court to grant deference to a state court's adjudication of an ineffective assistance claim. Second, the *Strickland* standard requires all courts to defer to the assumption that counsel provided adequate assistance to a defendant. "The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly' so." *Harrington*, 562 U.S. at 105 (internal citations omitted). "When § 2254(d) applies, the question is not whether counsel's actions were

reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

In addition, under AEDPA, "a state court's factual findings are presumed correct, and the petitioner bears the burden of rebutting the presumption by clear and convincing evidence." *Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1309 (11th Cir. 2012) (citing 28 U.S.C. § 2254(e)(1)). "Therefore, where factual findings underlie the state court's legal ruling, our already deferential review under AEDPA becomes [again] doubly so." *Id.* (internal quotation marks, brackets, and citation omitted).

2. Analysis of Smith's Ineffective Assistance Claim Regarding Counsel's Failure to Raise an Issue Regarding Administration of Haldol at Trial

Smith first claims that his trial counsel provided ineffective assistance to him because they failed to investigate his mental state and discover that jail personnel administered Haldol to him before trial. (Doc. # 1-1 at ¶¶ 139-40). According to Smith, counsel's failure to discover that he had been administered Haldol prejudiced him because, owing to that failure, counsel could not rebut the prosecution's claim that he had shown a lack of remorse during the trial by informing the jury of his medication. (*Id.* at ¶ 141). The State responds that the Alabama Court of Criminal Appeals' adjudication of this ineffective assistance claim was not contrary to *Strickland* nor was it an unreasonable application of *Strickland*. (Doc. # 28 at 39).

Smith contends that the Court of Criminal Appeals improperly relied on his failure to inform trial counsel that he had received Haldol because counsel should have conducted a reasonable investigation into his use of medication. (Doc. # 39 at 61-62). According to Smith, there is a reasonable probability that the jury "would have given [him] a life sentence instead of the death penalty" if it had been informed of the Haldol administration. (*Id.* at 63-64).

Frankly, the court is uncertain whether Smith seeks to raise an ineffective assistance claim relating solely to trial counsel's inadequate investigation of his medication, or whether he also intends to present an ineffective assistance claim regarding trial counsel's failure to present information about his medication to the jury during rebuttal argument. In the interest of a comprehensive review, the court will discuss both claims.

On collateral review, the Alabama Court of Criminal Appeals affirmed the trial court's denial of these claims. *Smith III*, 112 So. 3d at 1138-40, 1144-46. The trial court made the following findings of fact and conclusions of law in its Rule 32 Order:

> The Petitioner [Smith] asserts that being under the influence of Haldol prevented him from showing any emotion during the trial or from assisting his counsel during the penalty phase. The Petitioner asserts that the State improperly took advantage of this situation by pointing out his lack of remorse and pointing out that he appeared to be an emotionless killer. Attorneys for the Petitioner called Dr. William Alexander Morton, Jr., an expert in the field of psychopharmacology. Dr. Morton testified about how Haldol reduces brain activity and makes an individual slow down and not respond to outside stimuli. Dr. Morton testified that Willie Smith was on Haldol when he came to prison from the county jail. Although Dr. Morton was unable to testify conclusively that the Defendant was on Haldol at the time of his trial, and Petitioner Smith did not testify regarding any medications he may have taken prior to trial, evidence presented by the Petitioner would appear to indicate that Willie Smith was [ ] taking Haldol at the time his case proceeded to trial. If the Defendant was taking Haldol at the time of his trial, the next question which must be addressed [is] whether his counsel was ineffective in representing the Defendant as it relates to his use of Haldol. The Petitioner claims that his trial counsel should have objected to the prosecutor's comments regarding Mr. Smith's lack of remorse, and argues that such an objection would have been even more necessary had defense counsel known the Defendant was taking Haldol. Yet, the record is clear that the Defendant did not tell his attorney that he was taking any medication, and neither of the two doctors who examined the Defendant prior to trial recognized any problems which could be directly attributed to such medication. Nor was anything else brought to counsel's attention which would have caused either attorney to realize that the Defendant may have been taking some medication which could affect his demeanor. Based upon these findings, this Court cannot find that either of the Petitioner's trial attorneys were deficient or that their performance was below the standard called for in the first prong of [*Strickland*].

> In a similar argument Smith goes on to argue that his trial counsel was ineffective in failing to investigate Smith's psychiatric condition. As the Court previously indicated, this argument as it relates to the Defendant's use of Haldol is not supported by the evidence because the Court finds defense counsel could not have reasonably known that the Defendant may have been taking medication that affected his demeanor. As the Petitioner's brief and case law cited therein indicates, an attorney (or even a mental health expert) could reasonably assume that an individual's lack of emotion and lack of communication could be based upon the personality of the individual and could be amplified due to a lower intelligence quotient of the individual. Therefore, Smith's trial counsel could not be expected to do additional investigation to determine whether the Defendant was taking some type of medication. This is especially true in light of the fact that neither of the mental health experts who saw the Defendant at the time of trial felt that this was an issue. Attorney Amy Peake also testified that she did not recall the Defendant telling her that he was given medication that affected him in any way; therefore, her actions, or lack thereof, were reasonable. . . .
>
> Contrary to the Petitioner's assertions, this Court is also of the opinion that the Respondent is correct in asserting that defense counsel cannot be regarded as ineffective for failing to reveal Smith's use of Haldol and how the drug may have affected him. As previously noted in this Order, the argument that the Defendant was given Haldol is disputed. The Defendant did not testify that he was taking this medication, but this Court is of the opinion that the Petitioner has shown that it is more likely than not that Smith was taking Haldol at the time of his trial. Even though he may have been taking Haldol, it appears clear that Smith [never] told his attorneys that he was being medicated or that the medication may have caused Smith to act emotionless. The Respondent correctly cites Funchess v. Wainwright, 772 F.2d 683, 689 (11th Cir. 1984) for the proposition that defense counsel should not be regarded as ineffective for failing to know about non-obvious psychological problems that are not brought to their attention by their client. Without addressing the prejudice prong of Strickland v. Washington, it is clear that Petitioner has not shown that his counsel was ineffective for failing to notify the court and the jury of the possible effect of medication which counsel was never informed the Defendant was taking. As previously noted, the fact that two doctors who interviewed the Defendant prior to trial also did not see this as a problem weighs heavily against the argument that trial counsel was ineffective for not bringing this to the attention of the jury or judge.

(State Court Record, Vol. 34, Tab R-74 at 10-11, 20-21).

The Alabama Court of Criminal Appeals affirmed the trial court's decisions on both of Smith's ineffective-assistance claims. It held that Smith's attorneys did not provide deficient assistance by failing to investigate "the State's administration of Haldol to him during trial"

because (a) Smith provided "no evidence to establish that his counsel knew or should have known that he was taking Haldol, if he was in fact administered the drug," (b) Smith's counsel testified that he never complained about being administered Haldol to her, and (c) "nothing in the record suggests that any Haldol was involuntarily or unknowingly administered to Smith." *Smith III*, 112 So. 3d at 1138-39. According to the Court of Criminal Appeals, "[w]hile there was testimony that Smith's demeanor was consistent with that of someone who had taken Haldol, there was also testimony that Smith's affect may have been caused by other reasons." *Id.* at 1140. Thus, it concluded that the trial court's finding of no deficient assistance was not clearly erroneous. *Id.*

With regard to Smith's claim that counsel should have informed the judge and jury of the Haldol administration during the penalty phase once the prosecution had commented on his lack of visible remorse, the Court of Criminal Appeals highlighted the lack of evidence that Smith had informed his attorneys of the drugs he was administered, the lack of "any indication that his counsel should have reasonably believed that to be the case," and prior precedent that permitted the prosecution to "comment on a capital defendant's lack of remorse." *Id.* at 1144-45. Accordingly, the Court of Criminal Appeals affirmed the trial court's conclusion that Smith failed to show counsel's ineffectiveness as to that claim. *Id.* at 1145.

Smith does not dispute the state court's factual findings but claims that the Court of Criminal Appeals unreasonably applied *Strickland*. (Doc. # 39 at 61). The court is not convinced. Smith never informed his trial counsel that he had been administered Haldol. (State Court Record, Vol. 34, Tab R-74 at 11). Two doctors who examined Smith before the penalty phase did not recognize any symptoms of Haldol use. (*Id.*). And, counsel reasonably could have

attributed his lack of emotion during the trial to other factors. (*Id.*). There is nothing in the record to suggest the state appellate court misapplied *Strickland*.

As the Eleventh Circuit has made clear, counsels' investigation into mitigating evidence can be found reasonable even where they fail to discover evidence of a defendant's psychiatric condition. For example, in *Holladay*, trial counsel failed to discover evidence that the defendant was treated in the psychiatric ward of a mental hospital. 209 F.3d at 1251. Nor did counsel in *Holladay* discover the defendant's friends who recalled "his unpredictable behavior." *Id.* Nevertheless, the Eleventh Circuit affirmed the denial of an ineffective assistance claim premised on trial counsel's investigation because "the report of the lunacy commission that [petitioner] was sane and competent combined with counsel's impression of [petitioner] as cooperative, articulate, and affable did not put [trial counsel] on notice that there were or might be psychiatric records that she needed to find." *Id.* at 1252. The *Holladay* court also noted that the petitioner in that case provided no proof that he had informed counsel of his prior psychiatric treatment. *Id.* Here, Smith's ineffective assistance claim concerning counsel's allegedly insufficient investigation into his medication is analogous to the claim decided against the petitioner in *Holladay*. These claims are analogous because Smith never informed counsel that he had been administered Haldol, and the medical experts who examined Smith discovered no signs that he had received anti-psychotic medication.[21]

[21] This court agrees with the state trial court that *Funchess* provides strong authority for denying Smith's claims that counsel was ineffective for failing to investigate the administration of Haldol and for failing to bring it to the attention of the jury and trial judge. In *Funchess*, a pre-AEDPA habeas action by a state prisoner, the petitioner claimed that trial counsel rendered ineffective assistance by failing to investigate and present evidence that the petitioner had suffered from "extreme mental and emotional disturbance." 772 F.2d at 689. The Eleventh Circuit held that the petitioner failed to demonstrate counsel's deficient performance in investigating that mitigating circumstance because the petitioner never informed his counsel about his past psychological problems, a psychological examination conducted before trial found that the petitioner was competent to stand trial and criminally responsible at the time of the murders, the examination noted no history of psychological problems, and counsel perceived that the petitioner competently assisted him in trial preparation. *Id.* at 689-90. As in *Funchess*, the examinations Smith received did not reveal symptoms of Haldol administration, and therefore there was an

Dr. Morton's testimony during the Rule 32 hearing does not alter this conclusion. According to Smith, Dr. Morton, a psychopharmacologist, testified that (a) "it would have only taken [him] between 10 and 15 minutes to perform an evaluation to determine that Mr. Smith was suffering from the effects of Haldol," and (b) "he could have spoken on the phone with trial counsel and taught them how to determine whether their client was on Haldol." (Doc. # 1-1 at ¶ 140). Dr. Morton's testimony does not provide significantly probative evidence that counsel rendered deficient performance because it relies on the benefits of hindsight. *Strickland* instructs courts not to be the Monday morning quarterbacks. That is, courts must *not* evaluate counsel's performance through a rear-view mirror and rely on the benefits of hindsight to determine which experts or witnesses competent counsel would have discovered. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (*en banc*) (citing *Strickland*, 466 U.S. at 689). In *Waters*, the court explained why testimony regarding what an expert *could have* provided to counsel *if* counsel had investigated the right issue is of questionable value in this context.

> It is common practice for petitioners attacking their death sentences to submit affidavits from witnesses who say they could have supplied additional mitigating circumstance evidence, had they been called, or, if they were called, had they been asked the right questions. This case is no exception. But the existence of such affidavits, artfully drafted though they may be, usually proves little of significance. This case is no exception in that respect, either. That other witnesses could have been called or other testimony elicited usually proves at most the wholly unremarkable fact that with the luxury of time and the opportunity to focus resources on specific parts of a made record, post-conviction counsel will inevitably identify shortcomings in the performance of prior counsel. As we have noted before, "[i]n retrospect, one may always identify shortcomings," *Cape v. Francis,* 741 F.2d 1287, 1302 (11th Cir.1984), *cert. denied,* 474 U.S. 911, 106 S.Ct. 281, 88 L.Ed.2d 245 (1985), but perfection is not the standard of effective assistance.

---

insufficient basis for investigating any possible medication use. (*See* State Court Record, Vol. 34, Tab R-74 at 11 ("[N]either of the mental health experts who saw the Defendant at the time of trial felt that [medication] was an issue."). Given that *Funchess* examined a petitioner's *Strickland* claim under a less deferential standard than that provided in § 2254(d), and the *Funchess* opinion strongly weighs against Smith's claim here, this court cannot say that the Alabama Court of Criminal Appeals ruled contrary to *Strickland* or unreasonably applied *Strickland*.

Waters, 46 F.3d at 1513-14. To accept Dr. Morton's testimony as proof that the Court of Criminal Appeals unreasonably applied *Strickland*, the court would have to engage in hindsight analysis of what Smith's counsel could have done better if the evaluations conducted before the penalty phase had been more fruitful. But such an argument provides no basis for determining that the Court of Criminal Appeals' application of *Strickland* was unreasonable or contrary to prior precedent. Thus, the court finds that the Alabama Court of Criminal Appeals' adjudication of the ineffective assistance claim regarding counsel's supposedly insufficient investigation into Smith's medication was neither contrary to the Supreme Court's opinion in *Strickland* nor an unreasonable application of *Strickland*.

Similarly, the court is unconvinced by Smith's argument that the state courts' denial of his ineffective assistance claim regarding counsel's failure to present rebuttal argument based on the administration of Haldol merits relief under § 2254(d). As explained above, the state trial court found that counsel could not be faulted for failing to bring this issue to the jury's or the trial court's attention because Smith never mentioned the medication to counsel and the doctors who examined Smith did not perceive a problem related to the use of Haldol. (State Court Record, Vol. 34, Tab R-74 at 21). The Court of Criminal Appeals' holding that Smith failed to show deficient assistance by trial counsel because they had no reasonable indication that he was suffering from effects of Haldol use is a reasonable application of *Strickland*. *Smith III*, 112 So. 3d at 1144-45. As the *Williams* court explained, trial counsel is not obligated to investigate every avenue "until all hope withers." *Williams*, 185 F.3d at 1237.

For these reasons, Smith's ineffective assistance claims related to trial counsel's investigation of his medication and failure to present information about his Haldol use to the court are due to be denied.

3. Analysis of Petitioner's Ineffective Assistance Claim Regarding Trial Counsel's Investigation of His Intelligence and His Psychiatric Condition

Smith's second ineffective assistance claim concerns counsel's investigation of his intelligence and psychiatric condition. (Doc. # 1-1 at ¶¶ 143-48). According to Smith, trial counsel failed to present evidence of his low intellectual capacity to the jury, which would have "provided strong evidence of mitigation." (*Id.* at ¶ 145). Smith contends that counsel failed to order a full intelligence test or a test to determine his adaptive skills. (*Id.* at ¶ 148). In addition, Smith argues that counsel "spent minimal time with the psychology experts in preparation for trial." (*Id.*). These shortcomings in counsel's performance caused prejudice to Smith because the jury did not hear "crucial evidence" regarding his low intellectual capacity, and that evidence "likely would have had an effect on his ultimate sentence." (*Id.*).

The State responds that the Alabama Court of Criminal Appeals referred to Smith's mental condition and low intelligence as "nonstatutory mitigating circumstances." (Doc. # 28 at 39 (citing *Smith III*, 112 So. 3d at 1141)). According to the State, the Alabama Court of Criminal Appeals also concluded that, based on fee declarations that showed counsel met with a psychologist and a psychiatric social worker before Smith's trial, counsel investigated Smith's mental condition. (*Id.* at 39-40).

Smith replies that his counsel's fee declarations "do not show that counsel's investigation was reasonable." (Doc. # 39 at 65). Smith contends that the attorney responsible for his penalty phase proceedings, Amy Peake, did not recall meeting with the two doctors who examined Smith before his trial. (*Id.*). Although he concedes that his other trial counsel, L. Dan Turberville, met the psychologist and social worker, he argues that Turberville presented no mitigating evidence

on his behalf because that attorney was occupied with personal problems.[22] (*Id.*). Finally, Smith contends that the Court of Criminal Appeals failed to consider whether the jury heard the mitigating evidence. (*See id.* at 65-66).

On collateral review, the Alabama Court of Criminal Appeals affirmed the trial court's denial of this ineffective assistance claim. *Smith III*, 112 So. 3d at 1141-42. It noted that the trial court made no findings on the issue of whether counsel failed to present evidence of Smith's low intelligence as mitigation evidence. *Id.* at 1141. But, it found that Smith's argument on appeal that the trial court failed to adequately address the issue was "not preserved for review" because he did not object to the trial court's order denying the state habeas petition on that ground. *Id.* at 1141 n. 19. The trial court's findings of fact and conclusions of law related to this issue state:

> The Petitioner then alleges that Defendant's trial counsel failed to properly interview, prepare and question Dr. Blotcky regarding reasonably available mitigation evidence. (p. 63, Rule 32 Petition). Although the Petitioner alleges that Dr. Blotcky was not sufficiently qualified, the record reflects that he had a "Ph.D. in Clinical Psychology from Vanderbilt University. Did an internship in Clinical Psychology at the University of Texas Health and Science Center, and [had] been in private practice for seven years." Although another expert may have provided more information in mitigation for the Defendant, this Court cannot say that defense counsel was ineffective in hiring Dr. Blotcky as opposed to hiring another expert. The Petition further asserts that another expert could have given mitigation testimony showing that Smith was "under the influence of extreme mental and emotional disturbance at the time of the crime," that his "ability to appreciate the criminality of his conduct was impaired, and that his "ability to conform his conduct to the law was substantially impaired." (p. 64, Rule 32 Petition). Yet, no such testimony was presented at the evidentiary hearing. Therefore, there is insufficient proof of the Defendant's mental condition at the time of the offense to establish that his trial counsel was ineffective in not hiring a different expert.
>
> Assuming that the Petitioner is correct in asserting that trial counsel waited until a week before trial to hire Blotcky, such a delay does not automatically result in a conclusion that counsel was ineffective in hiring him. The petitioner must also show how a delay in hiring the expert prejudiced Smith, but no such showing has been made.

[22] As explained in more detail below, Turberville participated in Smith's penalty phase proceedings by presenting a final argument on Smith's behalf and by conducting some investigatory work for mitigating evidence.

(State Court Record, Vol. 34, Tab R-74 at 18). The state trial court's order that imposed the death penalty discussed at length the evidence submitted by counsel during the penalty phase and sentencing phase regarding Smith's intelligence and psychiatric condition:

> Defendant Smith was examined by C.J. Rosencrans, [Ph.D.], Clinical Professor of Psychiatry and certified Forensic Examiner. Dr. Rosencrans' findings were orally communicated by the undersigned to counsel on May 1, 1992, written findings consisting of cover letter and four typed pages were given to counsel on May 4, 1992.
>
> Dr. Rosencrans stated in his findings that "the defendant is fully capable of assisting his attorney in his own defense and of cooperatively interacting with the court at this time[."] Also, Dr. Rosencrans stated, "It is my opinion that defendant was not mentally ill nor suffering from any other discernible psychiatric nor psychologic disturbance at the time of the offense[."] Dr. Rosencrans' findings were not disclosed to the jury nor did he testify.
>
> Alan D. Blotcky, [Ph.D.] was retained by the defense at State expense to evaluate the defendant. Dr. Blotcky testified in front of the jury at second stage, stating that defendant tested to have a verbal I.Q. of 75, was borderline between mild retardation and low average intelligence, that defendant's personality tests indicated the defendant was distressed and depressed, had a paranoid view of the world, was a good candidate for rehabilitation, knew right from wrong, was not suffering from any psychosis; further, that defendant reported previous cocaine abuse that would impair his judgment, reported a pill overdose in effort to commit suicide, had suffered at the hands of an abusive father who mistreated defendant and defendant's mother.

(*Id.*, Vol. 34, Tab R-69 at 12-13). At the sentencing phase, the trial court did not find that Smith had committed the murder "under the influence of extreme mental or emotional disturbance." (*Id.* at 16). But, the trial court did find that the effects of his father's abuse and his verbal I.Q. in "the borderline range between mild retardation and low average intelligence" were mitigating factors under Alabama Code § 13A-5-52. (*Id.* at 18-19).

The Alabama Court of Criminal Appeals held that Smith's counsel were not "ineffective during the penalty phase by only using Dr. Blotcky's findings as to this matter" because debatable trial tactics normally do not rise to the level of ineffective assistance. *Smith III*, 112 So.

3d at 1142. "Significantly, the existence of alternative or additional mitigation theories generally does not establish ineffective assistance of counsel." *Id.* (quoting *Daniel v. State*, 86 So. 3d 405, 407 (Ala. Crim. App. 2011)). The Court of Criminal Appeals acknowledged the sentencing court's finding that Smith's low intelligence and mild retardation were mitigating circumstances. *Id.* at 1141. Most significantly, that court determined that "Smith's counsel clearly investigated Smith's mental condition as evidenced by counsel's fee-declaration sheets, which were introduced by Smith at the evidentiary hearing. They indicate that counsel conferred with a psychologist on a number of occasions and also spoke with a psychiatric social worker." *Id.*

The Alabama Court of Criminal Appeals also denied Smith's claim that his counsel were ineffective due to their failure to direct the experts to "perform what Smith says are the correct tests." *Id.* at 1143-44. "Smith has failed to show that their testing was incorrect or misleading. Although these experts did not reach the results Smith may have desired, their testing has not been shown to have been faulty or inadequate. . . . Although newer tests become available periodically, as occurred concerning one of the tests in this case, there is no indication that any such testing would have yielded different results." *Id.*

Smith complains that the Alabama Court of Criminal Appeals' adjudication of this claim was "manifestly unreasonable." (Doc. # 39 at 64). The court disagrees. This claim does not come close to meeting the high threshold for granting Smith relief under § 2254(d). Smith's current argument mainly consists of second-guessing the tests that medical experts performed on him before the penalty phase and contending that he should have been given more tests. (*See* Doc. # 39 at 64). It must be acknowledged, though, that Dr. Blotcky conducted a verbal IQ test and personality tests before the penalty phase of the trial. (State Court Record, Vol. 34, Tab R-69 at 12 (discussing Dr. Blotcky's testimony at trial)). Moreover, Smith's counsel talked to a

psychologist on April 14, 1992, April 18, 1992, April 20, 1992, April 29, 1992, and May 3, 1992.[23] (*Id.*, Vol. 26, Tab R-62 at 1591). Smith's attorney also talked to a psychiatric social worker for an hour on April 24, 1992. (*Id.*). Dr. Blotcky testified before the jury during the penalty phase that Smith suffered from "mild retardation," "low average intelligence," depression, and paranoia. (*Id.*, Vol. 34, Tab R-69 at 12-13). Indeed, the state trial court recognized that Smith's low intelligence and his "troubled adolescence occasioned in large part by an abusive father" were mitigating factors weighing against the imposition of the death penalty. (*Id.* at 19). In short, Smith's § 2254 petition provides no ground for this court to disturb the Court of Criminal Appeals' holding that trial counsel conducted a competent investigation of Smith's intelligence and psychiatric condition.[24]

Smith contends in his reply brief that the Court of Criminal Appeals erred by relying on the trial court's findings alone without addressing that the jury had to consider the mitigating evidence. (Doc. # 39 at 66). Smith relies on *Lockett v. Ohio*, 438 U.S. 586 (1978), to support this assertion. But, Smith's argument is not supported by the record in that he ignores the sentencing court's finding that Dr. Blotcky presented evidence of Smith's low verbal IQ, depression, and paranoia to the jury during the penalty phase. (*See* State Court Record, Vol. 34, Tab R-69 at 12-

[23] To be sure, Turberville's fee declaration did not specify how long his conferences with the psychologist were before trial. (*See* State Court Record, Vol. 26, Tab R-62 at 1591). But, at the same time, the fee declarations do not support Smith's factual claim that "his attorneys spent minimal time with the psychology experts in preparation for trial." (Doc. # 1-1 at ¶ 148).

[24] In many respects, Smith's claim that counsel selected the wrong psychiatric and intelligence tests is analogous to a claim that counsel selected the wrong experts. In *Hinton v. Alabama*, 134 S. Ct. 1081 (2014), the Supreme Court rejected the proposition that a compelling ineffective-assistance claim can be premised on a mere failure to choose the right experts. In that opinion, the Supreme Court asserted that "[t]he selection of an expert witness is a paradigmatic example of the type of strategic choice that, when made after thorough investigation of the law and facts, is virtually unchallengeable." *Hinton*, 134 S. Ct. at 1089 (internal quotation marks and brackets omitted). The Supreme Court cautioned in *Hinton* that it did not intend to "launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired." *Id.* Similarly, the court concludes that *Strickland* does not obligate federal courts to examine the relative merits of the medical tests actually performed on a capital defendant at counsel's direction and the medical tests that might have been performed, absent evidence that all competent attorneys would have ordered a particular test as part of a particular mitigation investigation.

13 (describing the testimony presented during the penalty phase)). This is not a case where defense counsel presented no mitigating evidence concerning the petitioner's intellectual or mental condition during the penalty phase or sentencing phase. And, "[i]t is well-settled in this Circuit that a petitioner cannot establish an ineffective assistance claim simply by pointing to additional evidence that could have been presented." *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1324 (11th Cir. 2002). Even in a case with stakes as high as those in capital litigation, defense counsel is not required to present every piece of mitigation evidence to a sentencer, as stacking defenses often weakens the strength of an argument. *See Chandler*, 218 F.3d at 1319 ("Counsel is not required to present every nonfrivolous defense; nor is counsel required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy.").

For these reasons, Smith's ineffective assistance claim based on counsel's investigation into his intellectual and psychological condition is due to be denied.

4. Analysis of Petitioner's Ineffective Assistance Claim Regarding Reliance on Inexperienced Trial Counsel for Penalty Phase Argument

Smith's characterization of the record is that the senior member of his counsel team, Turberville, "effectively handed off the penalty phase to [Amy] Peake, who was involved in her very first case after becoming admitted to the State of Alabama Bar." (Doc. # 1-1 at ¶ 150). He claims that Turberville conducted no investigation of mitigating factors and did not question any of the witnesses who testified during the penalty phase. (*Id.*). Smith contends that Peake failed to direct experts to conduct sufficiently comprehensive tests that would have determined his level of mental intelligence. (*Id.* at ¶ 152). According to Smith, "Turberville's mere presence at the penalty phase was *not* sufficient in protecting Mr. Smith's rights because none of the appropriate investigation had been done by Ms. Peake." (*Id.* at ¶ 156) (emphasis in original). He complains

that the trial court incorrectly found that Tuberville presented the closing argument, as Turberville only presented a brief statement following Peake's closing argument. (*Id.*). Additionally, Smith argues that counsel failed to investigate "all aspects of his background" for mitigating evidence. (*Id.* at ¶ 154).

The State responds that the mitigating evidence Smith believes should have been presented would not have established a statutory mitigating circumstance. (Doc. # 28 at 42). Nor would the additional evidence have changed the aggravating circumstance found by the trial court. (*Id.*). The State argues that Smith has failed to show prejudice from counsel's allegedly deficient assistance because "there is no reasonable probability" that the additional mitigating evidence presented at the post-conviction hearing "would have altered the balance of aggravating and mitigating circumstances in this case and changed the outcome of the sentencing proceedings." (*Id.* at 43).

The Alabama Court of Criminal Appeals affirmed the trial court's denial of this ineffective assistance claim. *See Smith III*, 112 So. 3d at 1142-44. It held that Turberville, Smith's lead counsel, had the amount of prior experience required under Alabama law for capital defense and that only one attorney on Smith's defense team was required under Alabama law to have that level of experience. *Id.* at 1144. The trial court's findings of fact and conclusions of law on this issue state:

> It appears that Smith is correct in asserting that Attorney Amy Peake handled all of the questioning of witnesses during the penalty phase and that this was Peake's first time to appear in a criminal trial. Yet, the State of Alabama is likewise correct in noting that "the appellate courts of Alabama have held that only one attorney representing a capital defendant is required to meet the five-year prior experience requirement. See, e.g., Hodges v. State, 856 So.2d 875 (Ala.Crim.App. 2001). There is no dispute that Smith's lead defense attorney, L. Dan [Turberville], exceeded the statutory requirements for appointed representation." (p. 27, State's Post-Hearing Memorandum addressing Smith's Second Amended Rule 32 Petition). Contrary to the Petitioner's argument on pages 52 and 53 of his

> Petition, there is insufficient evidence to show that Mr. [Turberville] excluded himself from the proceedings so as to treat the matter as if [Turberville] was not present to assist Ms. Peake. In fact, Mr. [Turberville] gave the closing argument of the defense after evidence was presented in the penalty phase. Since Smith did have an attorney who met the minimal five year requirement, in order to prevail regarding a claim of ineffective assistance of counsel at the penalty phase the Petitioner is required to meet the elements outlined in Strickland v. Washington, supra.

(State Court Record, Vol. 34, Tab R-74 at 16).

According to the Alabama Court of Criminal Appeals, Peake took several steps to investigate Smith's background prior to trial:

> [Peake] testified that she attempted to obtain Smith's school records. She was following up on information from Smith that he had attended special-education classes; however his records were no longer available. She therefore contacted an assistant principal, who remembered Smith and who testified for him at the penalty phase. Cocounsel stated that her duties were to conduct investigation for sentencing. She also testified that she was instructed "to a limited extent" by the lead counsel as to with whom to speak and what to investigate. (R. 60.) She stated that she spoke with Smith's family members, as well as with members of the community in which he had lived. She testified that she was certain that she had spoken with Dr. Blotcky before the penalty phase, although she could not recall this. . . . She stated that lead counsel "was not very helpful." (R. 62.) She testified that she introduced testimony concerning Smith's upbringing and his severe drug abuse. Lead counsel, however, retained the services of Dr. Blotcky.

Smith III, 112 So. 3d at 1143. According to Peake's fee declaration, she visited Smith once for an hour before trial, interviewed witnesses for 9.25 hours before trial, and met with a psychologist for 1.5 hours before trial. (State Court Record, Vol. 26, Tab R-62 at 1589).

Smith's § 2254 ineffective assistance claim fails to demonstrate that the Court of Criminal Appeals unreasonably applied *Strickland*. As the Court of Criminal Appeals held, the question of whether Smith's defense team included an attorney with sufficient criminal-trial experience is a question of state law, not a question of constitutional law. *See Smith III*, 112 So. 3d at 1144 (citing Alabama case law that only requires one attorney on a defense team to have five years' experience in order to comply with Alabama Code § 13A-5-54). While counsel is

granted a stronger presumption of effective advocacy by courts as they become more experienced, *see Chandler*, 218 F.3d at 1316, *Strickland* simply does not require a minimum threshold of experience for an attorney to provide effective assistance to a defendant.

Further, Smith incorrectly suggests in his petition that Turberville did not work on the penalty phase of the trial. Turberville's fee declaration states that he met with a psychologist and a psychiatric social worker before trial and called a family court to obtain evidence. (State Court Record, Vol. 26, Tab R-62 at 1591). While Turberville did not examine the defense witnesses during the penalty phase, he was at counsel's table and nothing in the record suggests he failed to supervise the defense. He presented the defense's final argument during the penalty phase. (*See generally id.*, Vol. 9, Tab R-23 at 1537-44; Vol. 10, Tab R-23 at 1545-46). Contrary to Smith's characterization in the § 2254 petition, Turberville presented a substantial closing argument to the jury during the penalty phase, along with Peake's closing argument. (*Cf.* Doc. # 1-1 at ¶ 156). If Smith's claim is that the Alabama state courts incorrectly determined that Turberville acted as counsel during the penalty phase of his criminal trial, he has not demonstrated by clear and convincing evidence that the Alabama state courts made an incorrect determination of fact. *Cf.* 28 U.S.C. § 2254(e)(1). And, to the extent that this claim contests Peake's pretrial investigation into mitigating factors, Smith has failed to show that the Alabama Court of Criminal Appeals unreasonably applied *Strickland* or ruled contrary to *Strickland*. As explained above, Smith's counsel investigated his intellectual and psychological condition before trial and presented evidence from a psychologist during the penalty phase. (*See, e.g.*, State Court Record, Vol. 9, Tab R-21 at 1492-1507). Smith's counsel also interviewed family members and witnesses with knowledge of his school record. *See Smith III*, 112 So. 3d at 1143. During the penalty phase,

Smith's counsel presented testimony from Smith's mother, his godmother, and his fiancée, along with Dr. Blotcky's testimony. (*See* State Court Record, Vol. 9, Tab R-21 at 1464-91).

For these reasons, Smith's ineffective assistance claim premised on Peake's relative lack of experience and Turberville's alleged non-involvement in the penalty phase of the trial presents no ground for relief under § 2254(d) or § 2254(e).

5. Analysis of Smith's Ineffective Assistance Claim Based on Counsel's Presentation of *Batson* Motion

Finally, Smith claims that trial counsel and appellate counsel rendered ineffective assistance by "failing to properly support Mr. Smith's Batson claim" with "citations of historical discriminatory strikes in Jefferson County." (Doc. # 1-1 at ¶ 157 & n. 7). Smith contends that Turberville was familiar with cases where Alabama courts had concluded that the Jefferson County District Attorney's Office committed *Batson* violations because Turberville had acted as defense counsel in those cases. (*Id.* at ¶¶ 158-59). But, Smith asserts that appropriate citations were not presented to the Alabama Court of Criminal Appeals because that court commented on the lack of citations to support the argument that the prosecutor had a history of discriminatory peremptory strikes. (*Id.* at ¶ 160).

The State responds by arguing that Smith has not demonstrated a decision contrary to *Strickland* or an unreasonable application of *Strickland* with respect to this ineffective assistance claim. (Doc. # 28 at 43-45). In reply, Smith asserts that counsel's failure to provide specific examples of prior *Batson* violations by the district attorney's office "allowed the Alabama Court of Criminal Appeals to dismiss this allegation as 'vague' and led the trial court to conclude that Mr. Smith had not presented a prima facie case." (Doc. # 39 at 68). Smith reiterates that Turberville was familiar with a "pattern of local jury discrimination" but failed to provide

sufficient support of that pattern to the trial court and the Court of Criminal Appeals. (*Id.* at 69-70).

The trial court denied this ineffective assistance claim in the Rule 32 petition. With regard to trial counsel's performance, the trial court ruled as follows:

> This Court is of the opinion that this argument is without merit for several reasons. First, at the Rule 32 evidentiary hearing the Petitioner did not specify how Mr. Turberville's 'extensive knowledge' of prior discrimination by the Jefferson County District Attorney's Office would have, if sufficiently conveyed to the court, successfully resulted in his Batson Motion being granted. Furthermore, it appears that "fourteen of [the State's] fifteen strikes [were] to eliminate prospective jurors of the female gender." The State's decision to strike each of these fourteen prospective female jurors was sufficiently addressed on remand by the trial court. The Court of Criminal Appeals of Alabama held that "[a]ll of the reasons given by the prosecutor for his strikes of these potential jurors were sufficiently facially gender neutral." Smith v. State, 838 So.2d 413, 436 (Ala.Crim.App. 2002). Based upon the appellate court's standard of review in death penalty cases, if any of the reasons given for striking said jurors violated Batson, then the court would have been obligated to find plain error and address that issue. Yet, the appellate court did not find any error or any improper motive in the prosecutor's strikes. Since the appellate court held that fourteen of the fifteen strikes were proper, the only issue which would need to be addressed was the State's decision to strike the one remaining male juror. Based upon this court's summary of the State's strikes, although not entirely clear, it appears that the only remaining strike by the prosecution was a white male. (RT. 448-455). Therefore, any claim of a Batson violation would be without merit. Even if this conclusion regarding the fifteenth juror struck by the State being a white male is incorrect, the Petitioner has failed to sufficiently carry his burden at the evidentiary hearing as it relates to this issue.

(State Court Record, Vol. 34, Tab R-69 at 19-20). The trial court also denied Smith's ineffective assistance claim regarding appellate counsel's presentation of the *Batson* issues in Smith's direct appeal, based in part on its finding that appellate counsel had not provided ineffective assistance:

> Smith then asserts that his "appellate counsel improperly presented the issue of discriminatory strikes of jurors to the Alabama Supreme Court" and the Court of Criminal Appeals of Alabama. As it relates to the submission of this issue to the Court of Criminal Appeals, the record is clear that the issue was presented and a remand was required by the appellate courts. After a hearing on remand, the Alabama Court of Criminal Appeals affirmed Smith's conviction and held that "the reasons given by the prosecutor for his strikes of these potential jurors were

> sufficiently facially gender neutral." Smith v. State, 838 So.2d 413, 436 (Ala.Crim.App. 2002). As this Court noted in paragraph 20 of this Order, this issue is without merit as it relates to the gender of the potential jurors and the race of the potential jurors. . . . Furthermore, the Petitioner has failed to show that Smith's appellate attorney was deficient or that Smith was prejudiced in any way by appellate counsel's actions.

(*Id.* at 24).

The Alabama Court of Criminal Appeals affirmed the trial court's denial of this ineffective assistance claim in the Rule 32 petition. *Smith III*, 112 So. 3d at 1147-48. According to the Court of Criminal Appeals, "[t]he record affirms that trial counsel effectively argued this ground to the trial court, and this Court's remand indicates that appellate counsel effectively argued discrimination by the prosecutor. Therefore, Smith has failed to prove ineffectiveness on this ground." *Id.*

Smith's contention that his trial and appellate counsel failed to present appropriate authority in support of the *Batson* claims falls far short of showing that his trial or appellate counsel rendered deficient assistance, much less that the Court of Criminal Appeals unreasonably adjudicated these claims. Smith cites no authority whatsoever -- and the court has not found any -- to support the proposition that reasonable jurists would find counsel's assertion of the *Batson* claims ineffective because counsel failed to cite certain authority. An attorney might provide ineffective assistance under *Strickland* if he or she is ignorant "of a point of law that is fundamental to [the defendant's] case" and fails to "perform basic research on that point." *Hinton v. Alabama*, 134 S. Ct. 1081, 1089 (2014). The record demonstrates, though, that counsel understood and referenced the fundamental law concerning the constitutional prohibition of discriminatory peremptory strikes. Indeed, at the trial in 1992, Smith's trial counsel raised a challenge to the prosecution's use of strikes against females two years before the Supreme Court held that peremptory strikes on the basis of gender violate the Fourteenth Amendment's Equal

Protection Clause in *J.E.B. v. Alabama*. Notably, Smith does not argue that trial or appellate counsel performed an ineffective investigation of law supporting the *Batson* claims, nor has he provided evidence that counsel failed to investigate precedent supporting the claims. *See Eady v. Morgan*, 515 F.3d 587, 599 (6th Cir. 2008) (stating that a habeas petitioner bears the burden of proving that counsel conducted an ineffective investigation of law because courts presume that attorneys provided competent representation). Unlike a claim that trial or appellate counsel rendered ineffective assistance by failing to present an issue for judicial review, a claim that counsel rendered ineffective assistance by failing to provide certain citations to authority has no support in Supreme Court case law interpreting *Strickland*. Accordingly, the court concludes that the Alabama Court of Criminal Appeals reasonably applied *Strickland* in denying these ineffective assistance claims. As a practical matter, the state courts understood and applied the correct legal framework in addressing the challenged use of jury strikes. And, as a more academic matter, counsel are duty bound to be effective trial and appellate advocates, not law review editors.

E. Whether the Failure of a Juror to Reveal that He had Prior Knowledge of the Case Violated Smith's Constitutional Rights to Due Process, a Fair Trial, and a Reliable Sentencing Determination

Smith argues that one juror's failure to reveal his prior knowledge of the case violated Smith's constitutional rights to due process, a fair trial, and a reliable sentencing. (Doc. # 1-1 at ¶¶ 163-74). After Smith's trial, a juror wrote a letter to the trial court. (State Court Record, Vol. 2, at 241-43). In the letter, the juror wrote in part:

> One juror who lived in [Center Point], and was a vocal proponent of sentencing the defendant to death, even made a comparison of the jury selection process by mentioning the fact that he had previous knowledge of the case (which he supposedly told you about) and thus disclosed it to you. Therefore those who were sympathetic to life should have disclosed their problem with the death penalty.

(*Id.* at 242). Smith contends that this passage reveals that a juror failed to respond to voir dire questions about his prior knowledge of the case[25] and that Smith was consequently denied a trial by a panel of impartial, indifferent jurors, as required under *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). (Doc. # 39 at 71).

In denying relief on this claim on direct appeal, the Alabama Court of Criminal Appeals concluded that Smith "was not deprived of a fair trial because a juror might have had knowledge of the case." *Smith II*, 838 So. 2d at 439. The Court of Criminal Appeals highlighted the lack of evidence that any juror actually communicated his or her prior knowledge to the jury:

> Although the appellant argues that the fact that a juror was, according to another juror's letter, not forthcoming or honest in his answers during voir dire, there is no real evidence of that fact in the record. As previously stated, the letter was not an affidavit; the author of the letter did not testify concerning this possible hearsay statement, nor did the juror from [Center Point] testify.

Id. at 437-38. Smith maintains that the state court's finding contravened established Supreme Court precedent in *Irvin* and was an unreasonable determination of the facts. (*See* Doc. # 39 at 73).

The court concludes that the Alabama Court of Criminal Appeals reasonably applied established Supreme Court law on this issue and did not issue a decision contrary to clearly established law. As the State points out, *Irvin* involved a case of pervasive pretrial publicity in the community and not just a single juror. (*See* Doc. # 28 at 48-49). The Supreme Court's precedent makes clear that "[q]ualified jurors need not … be totally ignorant of the facts and issues involved." *Murphy v. Florida*, 421 U.S. 794, 799-800 (1975) (holding that juror exposure to information about a prior conviction or to news accounts of the crime did not presumptively

[25] Of course, the very language of the passage itself tends to undercut Smith's argument. The note indicates that the Center Point juror claimed he had disclosed the "previous knowledge" to the court. (*Id.*).

deprive a defendant of due process when there was no evidence of prejudgment or hostility towards the defendant in the community or courtroom).

In *Irvin* and its progeny, the Supreme Court has held that jurors' exposure to pretrial publicity or even knowledge about a defendant's prior convictions does not presumptively deprive a defendant of due process. Instead, only those instances of publicity or prior knowledge that can be shown to be pervasive and inflammatory warrant reversal of a defendant's conviction. *See e.g.*, *Irvin*, 366 U.S. at 727 (granting habeas relief where pervasive pretrial publicity about confession resulted in 90 percent of the venire members expressing an opinion about the defendant's guilt); *Rideau v. Louisiana*, 373 U.S. 723, 726 (1963) (holding that a denial of venue change violated due process after confession was broadcast to substantial percentage of community); *Estes v. Texas*, 381 U.S. 532, 550-52 (1965) (holding that pretrial television coverage and disruptive recording during trial violated defendant's due process rights); *Sheppard v. Maxwell*, 384 U.S. 333, 363 (1966) (inherent prejudicial publicity and disruptive influences in courtroom deprived defendant of due process). In contrast, Smith has only presented evidence that a single juror may have had prior knowledge of the case and referred to his prior knowledge during jury deliberations. (State Court Record, Vol. 2, at 242). Smith neither obtained nor presented evidence that the juror shared his outside knowledge with the jury. Indeed, if the submitted letter is taken at face value as a complete and accurate portrayal of the jury's penalty-phase deliberations (and this is the only "evidence" in the record on this issue), the juror claimed to have told the court of this knowledge and did not disclose his extrinsic knowledge to the jury. That is, he told the other jurors that he had disclosed his information to the trial court and was arguing that other jurors should have "disclosed their problem with the death penalty" to the trial court before the trial began. (*See id.*). And, again, in any event, we are

not informed of exactly what this previous knowledge was. Due to the stark differences between Smith's claim and the claim presented in *Irvin*, Smith's claim for habeas relief on this ground is due to be denied.

Smith further argues that the Court of Criminal Appeals' denial of this claim was unreasonable because the court unreasonably applied the legal principle that "a jury's verdict is not subject to impeachment by the testimony of jurors as to matters which transpired during the deliberations." *Smith II*, 838 So. 2d at 438 (citing *Fox v. State*, 269 So. 2d 917, 920 (Ala. Crim. App. 1972)). This application was incorrect, Smith argues, because federal courts have "held that statements indicating juror misconduct fall outside of the rule cited by the appellate court governing impeachment of verdicts." (Doc. # 39 at 73). But Smith's argument misses the point. The record contains no evidence that the juror from Center Point committed misconduct by disclosing extrinsic information to the jury, much less extrinsic evidence. For example, in *United States v. Martinez*, 14 F.3d 543, 550 (11th Cir. 1994) a juror informed the other jurors that the defendant faced 160 years of imprisonment if convicted, jurors watched television news accounts about the trial, jurors used a dictionary during deliberations, and a juror became aware of media accounts that she was participating in the trial. In contrast, the letter that Smith relies upon provided no specific extrinsic information shared by the juror from Center Point to the jury. (*See* State Court Record, Vol. 2, at 242). Whereas the *Martinez* court could presume prejudice against the defendant based on the introduction of extrinsic evidence during jury deliberations, *see* 14 F.3d at 550-51, the Alabama Court of Criminal Appeals was not obligated to presume prejudice against Smith based upon an unsworn statement that a juror had disclosed some type of knowledge of the case to the jury during penalty phase deliberations.

For these reasons, the Alabama Court of Criminal Appeals' denial of this claim was neither contrary to clearly established federal law or an unreasonable application of clearly established federal law. Nor did the Court of Criminal Appeals make an unreasonable finding of fact. Accordingly, this claim in Smith's habeas petition is due to be denied.

F. Whether Smith's Post-Arrest Statement to Police Informant Latonya Roshell was Obtained in Violation of his Sixth Amendment Right to Counsel

Smith next alleges that, while he was awaiting trial, a State's witness solicited an incriminating statement from him outside of the presence of counsel, in contravention of Supreme Court precedent in *Maine v. Moulton*, 474 U.S. 159 (1985) and *United States v. Henry*, 447 U.S. 264 (1980). (Doc. # 1-1 at ¶ 175). While Smith was detained at the Jefferson County Jail, he asked Latonya Roshell (a police informant and later one of the State's witnesses) to assist him in making a three-way telephone call to family members. (State Court Record, Vol. 7, at 1139-41). While Roshell was listening to the call, Smith said that he suspected that Roshell was a police informant. (*Id.* at 1142). Smith then allegedly told Roshell "that he knew he did [the crime] and I [Roshell] knew he did it[,] but he wasn't going to go to court and tell the judge that he did it." (*Id.*). Roshell testified that she did not respond to the statement. (*Id*.) Roshell later reported Smith's statements to police and testified about them at trial. (*Id*. at 1142-43).

On return to remand, the Alabama Court of Criminal Appeals held that the admission of Roshell's testimony about the phone call did not violate Smith's right to counsel. *Smith II*, 838 So. 2d at 463. It concluded that the Hoover Police Department did not solicit her assistance with regard to Johnson's murder. *Id.* Additionally, it determined that there was no "deception or custodial interrogation initiated by law-enforcement officers." *Id.*

Under *Massiah v. United States*, 377 U.S. 201, 206 (1964), the Sixth Amendment is violated when a government agent deliberately elicits incriminating statements from a defendant

who is represented by counsel. The Supreme Court has established three requirements for finding a Sixth Amendment violation based on deliberately eliciting an incriminating statement through an informant: (1) an informant was acting as a "government agent"; (2) the informant engaged in a "deliberate elicitation" of incriminating information from the defendant; and (3) the right to counsel had attached at the time of the conversation between the defendant and the informant. *Moulton*, 474 U.S. at 170-71; *Henry*, 447 U.S. at 269-70. The Court has in turn identified three important factors to consider in determining whether an informant deliberately elicited incriminating information from a defendant: (1) whether the informant "was acting under instructions as a paid informant"; (2) whether the defendant was unaware of the informant's role; and (3) whether the defendant "was in custody and under indictment at the time he was engaged in conversation." *See Henry*, 447 U.S. at 270. To establish a violation of the right to counsel, "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986); *Moulton*, 474 U.S. at 177 n. 13 (asserting that the Sixth Amendment right to counsel is violated when an informant engages the defendant "in active conversation … [that] was certain to elicit" incriminating statements).

Smith contends that for two reasons the Court of Criminal Appeals unreasonably applied *Moulton* and *Henry* to the facts of his case: first, he faults the state court for relying upon the fact that Smith "initiated the telephone call during which he . . . admitted that he had committed the murder," *Smith II*, 838 So. 2d at 461, and contends that the identity of the caller is irrelevant under *Moulton* and *Henry*; second, he claims the state court relied on its determination that Roshell was a passive listener because "she said nothing in response to [Smith's] . . . confession," *id.* at 462. (*See* Doc. # 39 at 76). This court reviews each of these contentions in

turn.

1. Government Agent

Smith's first challenge to this holding by the Alabama Court of Criminal Appeals fundamentally misconceives the basis of the Court of Criminal Appeals' holding. Smith correctly points out that "the identity of the party who instigated the meeting at which the Government obtained incriminating statements [is] not decisive or even important," *Moulton*, 474 U.S. at 175. But, Smith cites a portion of the Court of Criminal Appeals' opinion that discusses a Fourth Amendment claim by Smith, rather than the Sixth Amendment claim at issue in this habeas petition:

> Similarly, in the present case, the appellant suffered no violation of his right to privacy as he initiated the telephone call during which he threatened the person who had revealed his actions and again admitted that he had committed the murder.

Smith II, 838 So. 2d at 461. Although it is true that the Court of Criminal Appeals referenced Roshell's initiation of the call at issue, the Court of Criminal Appeals centered its Sixth Amendment analysis on *Henry*, finding that the police did not purposely recruit Roshell to obtain incriminating statements from Smith after he was represented by counsel. *Smith II*, 838 So. 2d at 463.

Smith argues that Roshell acted under instructions from police by recording incriminating statements in a conversation that occurred before his arrest. (Doc. # 39 at 75 (citing State Court Record, Vol. 7, at 1133-35)). However, Smith has not claimed that Roshell received instructions from police to elicit additional evidence from Smith once he had been arrested. Nor has Smith advanced any evidence in his petition to demonstrate that Roshell received such instructions from police. Thus, this court cannot find that the Court of Criminal Appeals' determination here was an objectively unreasonable application of *Moulton* or *Henry*. *Harrington*, 562 U.S. at 100.

2. Deliberate Elicitation

Smith further alleges that the length and the breadth of Roshell and Smith's phone conversation demonstrates deliberate elicitation under *Henry*. (Doc. # 39 at 76). He asserts that the Court of Criminal Appeals' finding that Roshell passively listened to the incriminating statement is unreasonable. The court disagrees.

Moulton and *Henry* are instructive on when an informant's actions will be considered deliberate elicitation. In *Moulton*, the Supreme Court held that a codefendant deliberately elicited information from a defendant by feigning memory loss and asking the defendant to remind him of details about crimes, while tape recording the conversation. *Moulton*, 474 U.S. at 166, 176-77. In *Henry*, a paid informant, who shared a cell with the defendant, offered to obtain information from Henry. *Henry*, 447 U.S. at 266. Although agents told the informant not to question Henry about a robbery, the fact that federal agents paid the informant on a contingency-fee basis for useful information and told the informant to "pay attention" to Henry's statements was sufficient forewarning that the informant might engage Henry in conversations that were likely to elicit incriminating information. *Id.* at 270-71.

In contrast, the state court record here shows that Roshell's actions did not come close to approaching deliberate elicitation. Roshell did not prompt Smith to say that "he did it," nor did she say anything in response to Smith's confession. (*See* State Court Record, Vol. 7, at 1142). The Court of Criminal Appeals determined that Roshell was a "passive listener" as Smith voluntarily made incriminating statements. The Supreme Court's precedent from *Kuhlmann* requires that an informant take some action beyond mere listening to establish a Sixth Amendment violation. *Kuhlmann*, 477 U.S. at 459. Here, as in *Kuhlmann,* there is no evidence that Roshell initiated a conversation with Smith that was designed to elicit incriminating

statements or that Roshell asked questions concerning the pending charges. *Id.* at 460. Thus, this court denies Smith's claim that the state court's decision was contrary to or an unreasonable application of established federal law.

G. Whether the State's Withholding of an Extrajudicial Statement that Smith Made to Police Informant Roshell Violated Smith's Constitutional Rights of Due Process, a Fair Trial, and a Reliable Sentencing Determination

In this claim, Smith alleges that the prosecution violated his "rights of due process, a fair trial and a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the U.S. Constitution" by admitting Roshell's recollection of the phone conversation. (Doc. # 1-2 at ¶ 178). Specifically, Smith contends that the prosecution failed to provide inculpatory statements from Roshell, a police informant, to defense counsel until the morning trial began. (Doc. # 1-1 at ¶¶ 176-77). According to Smith, the State failed to provide this information despite discovery requests that sought such statements as well as assurances by the prosecutor that the State would provide necessary discovery materials for its confidential informant. (Doc. # 1-2 at ¶ 182). In addition, Smith contends that the admission of the statement violated his right against self-incrimination because he sought to suppress the statement and he informed the court of the prejudice he had suffered from the State's failure to disclose it. (*Id.* at ¶ 184). Smith insists that the failure to disclose this inculpatory evidence violated his right to confront witnesses against him during the preliminary hearing because he could have cross-examined Roshell about the statement during that hearing. (*Id.* at ¶ 186). Finally, Smith contends that the failure to disclose this inculpatory evidence in the prosecution's possession placed him at a disadvantage during plea negotiations because he "may have been more inclined to accept the prosecutor's offer of life imprisonment without possibility of parole" if his counsel had been informed of Roshell's testimony by the prosecution. (*Id.* at ¶ 190). Notably, throughout the 15

paragraphs of this argument, Smith does not identify a single Supreme Court precedent which he contends the Alabama Court of Criminal Appeals unreasonably applied or an unreasonable finding of fact.

In Smith's direct appeal brief, his counsel argued that the prosecution failed to turn over evidence of his out-of-court statement to Roshell in a timely fashion, as required under Alabama Rule of Criminal Procedure 16.1.[26] (State Court Record, Vol. 14, Tab R-32 at 11-14). Smith indicated that the late disclosure violated his confrontation rights. (*Id.* at 16). Relying on state law, Smith argued that the late disclosure of this evidence required him to improvise at trial. (*Id.* at 17). Smith also argued in his appeal brief that the failure to disclose this evidence placed him at an extreme disadvantage during plea negotiations because he might have accepted the plea offer if the prosecution had provided the evidence to his counsel. (*Id.* at 18). In closing, Smith argued that he was "entitled to a second trial where his Constitutional rights [were] not undermined by the State's illegal actions." (*Id.*).

On return to remand, the Alabama Court of Criminal Appeals affirmed the trial court's admission of Roshell's testimony "because the appellant's telephone conversation with Roshell was not admitted in violation of the trial court's discovery order or in violation of constitutional or state law." *Smith II*, 838 So. 2d at 442. That court concluded that the prosecutor had not suppressed the statement because (1) the prosecutor had no knowledge of it before he informed defense counsel about it, and (2) Roshell had informed officers in another jurisdiction about the contents of the statement. *Id.* at 440-41.

[26] Smith's appellate brief also cited an Eleventh Circuit direct criminal opinion, *United States v. Noe*, 821 F.2d 604 (11th Cir. 1987). (State Court Record, Vol. 14, Tab R-32 at 15). In *Noe*, the Eleventh Circuit reversed a defendant's convictions because the government had violated Federal Rule of Criminal Procedure 16. 821 F.2d at 606-09. This decision did not rely on a rule of federal constitutional law, and the Federal Rules of Criminal Procedure do not apply in Alabama state court.

Again, Smith has not cited any Supreme Court precedent to show that the delayed disclosure clearly violated established federal law or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Further, even if this court liberally construed Smith's claim to present a federal constitutional violation, his claim would nevertheless be ineligible for federal habeas relief because he only presented one federal constitutional basis for this claim (which the court addresses below) to the state appellate court during his direct appeal. (*See* State Court Record, Vol. 14, Tab R-32 at 9-18). Rather, Smith based his direct appeal claim on Alabama Rule of Criminal Procedure 16.1. That rule addresses discovery. The Supreme Court cases that address constitutionally-mandated discovery, such as *Brady v. Maryland*, 373 U.S. 83 (1963), are of no help to Smith here. The evidence at issue was not exculpatory, as *Brady* requires, nor did Smith allege that there was a reasonable probability that the outcome of his case would have been different had the evidence been disclosed at the time he contends it should have. *United States v. Bagley*, 473 U.S. 667, 682 (1985).

As mentioned above, Smith raised a single federal constitutional claim related to this issue on direct appeal. He argued that the delayed discovery violated his Sixth Amendment right to confrontation at the preliminary hearing. But, he did not cite any Supreme Court precedent in support of that argument. (*See* State Court Record, Vol. 14, Tab R-32 at 16). Indeed, it is difficult to conceive of precedent to support the argument that Smith's confrontation rights were violated because he lacked this single piece of information. "Generally speaking, the Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20 (1985) (emphasis in original). Smith's habeas petition

does not indicate that he was deprived of an opportunity to cross-examine Roshell during the preliminary hearing.[27]

The Supreme Court has made plain that "[i]n conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (citing 28 U.S.C. § 2241); *see also Branan v. Booth*, 861 F.2d 1507, 1508 (11th Cir. 1988) ("[A] habeas petition grounded on issues of state law provides no basis for habeas relief."). Even though Smith's claim is "couched in terms of … due process" and other federal constitutional violations, it essentially raises issues of state law (violations of Alabama Rule of Criminal Procedure 16) that are not cognizable on federal habeas review. *Branan*, 861 F.2d at 1508. To the extent that Smith presents constitutional issues regarding the admission of his telephone conversation with Roshell -- other than the *Henry* claim and the confrontation claim discussed above -- the claims are due to be denied because Smith failed to fairly present them to the Alabama Court of Criminal Appeals during his direct appeal. (*See* State Court Record, Vol. 14, Tab R-32 at 9-18); *Baldwin v. Reese*, 541 U.S. 27, 32 (2004) ("We consequently hold that ordinarily a state prisoner does not 'fairly present' a claim to a state court if that court must read beyond a petition or a brief (or a similar document) that does

[27] Under Alabama law, "the purpose of a preliminary hearing is to determine if there is sufficient probable cause to hold the accused on the alleged offense." *Rowland v. State*, 460 So. 2d 282, 284 (Ala. Crim. App. 1984). Here, the record does not suggest that the trial judge would have had "a significantly different impression of [Roshell's] credibility" during the preliminary hearing if Smith's counsel had access to the statements from the telephone call, which buttressed the incriminating content of other statements Smith made to Roshell. *See Delaware v. Van Arsdall*, 475 U.S. 673, 680-81, 684 (1986) (holding that harmless-error analysis applies to Confrontation Clause claims premised upon an "improper denial of a defendant's opportunity to impeach a witness for bias"). Smith's habeas petition indicates that the admission of Roshell's testimony regarding the telephone call violated his Confrontation Clause rights because the State had not disclosed that information in a timely fashion and it was prejudicial to his defense. (Doc. # 1-2 at ¶¶ 183-84). As an initial matter, this argument incorrectly suggests that the court should conduct a prejudice analysis to determine whether the State's conduct violated Smith's Confrontation Clause rights. Even if the court conducted a prejudice analysis, though, Smith would not be entitled to relief. This is because even more effective cross examination of Roshell during the preliminary hearing would not likely have changed the trial court's determination that there was probable cause here. And, Smith received ample opportunity to cross-examine Roshell during the guilt phase of the trial after his defense counsel had been informed about Roshell's testimony regarding the telephone call. (*See* State Court Record, Vols. 7, at 1144-54; 8 at 1155-62).

not alert it to the presence of a federal claim in order to find material, such as a lower court opinion in the case, that does so."). For these reasons, this claim provides no basis for affording Smith relief under 28 U.S.C. § 2254(d).

H. Whether the District Attorney Employed Improper Arguments to the Jury in Both the Guilt-Innocence and Penalty Phases of Mr. Smith's Trial

Smith alleges that during closing argument, the prosecutor violated Smith's rights to due process, a fair trial, and a reliable sentencing determination by (1) impeding the jury's role in assessing the credibility of a State witness and bolstering that witness' credibility, and (2) indirectly commenting on Smith's choice not to testify as part of remarks regarding his lack of remorse. (Doc. # 1-2 at ¶ 191). The court discusses these allegations, in turn.

1. Comment on a State Witness' Credibility

Smith first argues that the prosecutor improperly told the jury that State witness Michael Wilson's denial of involvement in illegal drug activity during his testimony was immaterial and should not be considered by them in assessing the credibility of his testimony:

> And His Honor told you about lying to you about a material fact. Was it material whether or not [Michael Wilson] dealt drugs? Was it material about whether or not this Tech 9 was his? No, that's not material, it's a smokescreen to take your mind off of what is material. . .
>
> Ms. Sharma Ruth Johnson was not killed by an overdose of drugs. Ms. Sharma Ruth Johnson was not killed by a Tech 9. Ms. Sharma Ruth Johnson was killed by a shotgun. So, is that material whether or not that Tech 9 was his or he dealt drugs?

(State Court Record, Vol. 8, Tab R-13 at 1310). Smith argues that he was prejudiced by the prosecutor's argument suggesting that the jury disregard the discrepancies in Wilson's testimony. Smith further contends that the prosecutor later bolstered Wilson's testimony during closing argument. The State responds by asserting that Smith has not alleged the type of severe and

pervasive conduct to support a claim of constitutional error. (Doc. # 28 at 61, citing *Berger v. United States*, 294 U.S. 78 (1935)).

On direct appeal, the Alabama Court of Appeals reviewed and denied both allegations on the merits. *Smith II*, 838 So. 2d at 455-59. The claims were reviewed under a plain error standard as Smith had not made a timely objection to the allegedly improper prosecutorial remarks. *Id.* at 455. The appellate court found no plain error in the prosecutor's comments that these "discrepancies" in Michael Wilson's testimony were immaterial because the prosecutor's comments were supported by the evidence and, under Alabama law, "the credibility of a witness is a legitimate subject of comment during closing arguments." *Id.* at 456 (internal citation omitted). The appellate court similarly held that the prosecutor's bolstering of Wilson's testimony during closing argument did not amount to reversible error.

The challenged remarks to the jury were as follows:

> What was material is what the defendant told Michael Wilson sometime thereafter or early month of November, 'I did some madness and I have to get off this side of town.' That was what was material.

(State Court Record, Vol. 8, Tab R-13 at 1311). The appellate court held that these remarks were "proper inferences from the evidence in his [closing] statement concerning Michael Wilson's testimony." *Smith II*, 838 So. 2d at 457.

Smith cites *Berger v. United States*, 295 U.S. 78 (1935) and *Darden v. Wainwright*, 477 U.S. 168 (1986) as the "clearly established Federal law" providing the basis for relief for this claim. 28 U.S.C. § 2254(d)(1). Habeas relief is only available as to this claim "if the state court applies a rule that contradicts the governing law set forth" in *Berger* and *Darden* or "if the state court confront[ed] a set of facts that [were] materially indistinguishable from a decision of [the

Supreme] Court and nevertheless arrive[d] at a result different from [its] precedent." *Williams v. Taylor*, 529 U.S. 362, 405-06 (2000); *see also Brown v. Payton*, 544 U.S. 133, 141 (2005).

First, the facts of Smith's case are not "materially indistinguishable" from *Berger* and *Darden*. Here, Smith alleges the prosecutor bolstered a State witness' credibility. In *Darden*, the Court addressed a prosecutor's closing remarks directed at the defendant. *See Darden*, 477 U.S., at 180, n. 11 (prosecutor's closing argument referred to the defendant as an "'animal,'"; prosecutor also stated, "'I wish I could see [the defendant] with no face, blown away by a shotgun.'" *id.,* at 180, n. 12). And in *Berger*, the Court was confronted with prosecutorial attacks on witnesses while testifying. *Berger,* 295 U.S. at 84 (prosecutor persistently misstated the facts in his cross-examination, pretended that a witness had said something he had not said, assumed prejudicial facts not in evidence, and argued with witnesses.)

Claims such as this one face a substantial hurdle to overcome the deference afforded to a state court's determination that a prosecutor's closing argument was not constitutionally erroneous. This is particularly true given that "*Darden* itself held that a closing argument considerably more inflammatory than the one at issue here did not warrant habeas relief." *Parker v. Matthews*, 132 S. Ct. 2148, 2152-56 (2012) (state court's rejection of *Darden* prosecutorial misconduct claim -- based on prosecutor's remarks that defendant had a motive to exaggerate his emotional disturbance in his meetings with a mental health expert -- precluded federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision."); *Harrington*, 562 U.S. at 101 (internal citation omitted). The Supreme Court made clear in *Darden* that "[i]n order for a petitioner to be entitled to habeas relief on the basis of prosecutorial misconduct, the petitioner must demonstrate that the prosecutor's improper conduct 'so infected the trial with unfairness as to make the resulting conviction a denial of due

process.'" *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). When a habeas petitioner makes a claim of prosecutorial misconduct, "the touchstone of due process analysis ... is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982); *see also Yarborough v. Alvarado,* 541 U.S. 652, 664 (2004) (holding that state courts have "more leeway ... in reaching outcomes in case-by-case determinations" in prosecutorial misconduct claims). As one circuit court has put it, "[t]he Supreme Court has clearly indicated that the state courts have substantial breathing room when considering prosecutorial misconduct claims because 'constitutional line drawing [in prosecutorial misconduct cases] is necessarily imprecise.'" *Slagle v. Bagley*, 457 F.3d 501, 516 (6th Cir. 2006) (quoting *Donnelly*, 416 U.S. at 645).

Smith has not persuaded the court that the state court's decision is not entitled to the substantial deference that § 2254(d) affords a determination regarding prosecutorial misconduct. The Court of Criminal Appeals found that the prosecutor's comments were proper inferences from the evidence and unlikely to mislead the jury, particularly given the strength of the evidence against Smith. Because there is no basis to set the state court's conclusion as contrary to Supreme Court precedent or an unreasonable factual determination, habeas relief is unavailable for this claim. *Parker*, 132 S. Ct. at 2154–55; *Williams*, 529 U.S. at 407-08.

2. Comment on Lack of Remorse

Smith also asserts that the prosecutor's closing argument unconstitutionally commented on his Fifth Amendment right to remain silent as established in *Griffin v. California*, 380 U.S. 609 (1965). (Doc. # 1-2 at ¶ 199).

During his penalty phase closing arguments, the prosecutor addressed Mr. Smith's failure to show remorse during trial:

> I see no remorsefulness. I see no remorsefulness now, probably no remorsefulness then and probably never will be any remorsefulness.

(State Court Record, Vol. 9, Tab R. 22 at 1515). Smith also alleges that the following comments made by the prosecutor were improper:

> And he sits here and does not shed one tear, not even one tear for his mother sitting on this stand begging and crying for his life. All he can do is close his eyes and that's what he does to everything, is close his eyes. And that's what he will continue to do to the world is close his eyes.

(*Id.* at 1518).

The Alabama Court of Criminal Appeals denied relief on this claim. *See Smith II*, 838 So. 2d at 459 (holding that the prosecutor's comments were proper in that they were making "inferences and conclusions from the evidence."). After careful review, this court concludes that the state court's basis for concluding that the prosecutor's closing argument was not an unconstitutional comment on Smith's failure to testify at trial was reasonable.

The Fifth Amendment to the United States Constitution "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin*, 380 U.S. at 615 (defendant's right against self-incrimination violated when the prosecutor argued to the jury that the defendant knew the facts, but had "not seen fit to take the stand and deny or explain."). In the Eleventh Circuit, an indirect comment on silence, as alleged here, violates the Fifth Amendment only if "the statement was *manifestly intended* to be a comment on the defendant's failure to testify" or "the statement was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify." *Jones v. GDCP Warden*, 753 F.3d 1171, 1194 (11th Cir. 2014) (emphasis in original) (citing *United States v. Knowles,* 66 F.3d 1146, 1162–63 (11th Cir. 1995) (internal quotation

marks omitted)); s*ee also Isaacs v. Head,* 300 F.3d 1232, 1270 (11th Cir. 2002) ("The defendant bears the burden of establishing the existence of one of the two criteria. The comment must be examined in context, in order to evaluate the prosecutor's motive and to discern the impact of the statement... .").

In *Jones*, the Eleventh Circuit held that a comparable comment ("Have you seen any remorse in this case?") was not an unconstitutional comment on the defendant's failure to testify because it did not directly criticize the defendant's refusal to testify to his remorse. *Jones*, 753 F.3d at 1194. "At most," the Eleventh Circuit explained, "the prosecutor drew the jury's attention to the lack of remorse that Jones had expressed to his pen pals and confidants." *Id*. Similarly, Smith's prosecutor drew the jury's attention to Smith's lack of remorse, but in the context of the surrounding argument, it is plausible that the reference was to Smith's conduct during the offense, not his silence at trial. Immediately before the challenged comments, the prosecutor referred to Smith's lack of compassion during the death of the victim. (State Court Record, Vol. 9, Tab R-22 at 1514 ("I ask you to show him no compassion today as he showed Ms. Sharma Ruth Johnson no compassion on October the 27th, 1991.")). Because there was an equally plausible explanation for the prosecutor's comment, the remark was not a manifest comment on the defendant's silence. *United States v. Swindall,* 971 F.2d 1531, 1551–52 (11th Cir.1992) (internal quotation marks omitted) (there is no manifest intention to comment on a defendant's silence "if some other explanation for [the] remark is equally plausible"). The second set of comments about Smith's lack of emotion during his mother's testimony was even more attenuated from any comment on Smith's failure to testify. In context, the prosecutor's comments were based on the defendant's courtroom demeanor.

Smith has provided no basis for this court to conclude that the Alabama Court of Criminal Appeals unreasonably applied *Griffin*. Therefore, his claim that the prosecutor's argument violated his Fifth Amendment privilege against self-incrimination is due to be denied. *See Taylor v. Culliver*, 2012 WL 4479151, at *94 (N.D. Ala. Sept. 26, 2012), *aff'd,* 638 F. App'x 809 (11th Cir. 2015) (references to the appellant's lack of remorse were not comments on the appellant's constitutional right against self-incrimination but rather references to the appellant's behavior after he had murdered the victims).

I. Whether the Trial Court's Reference to Inadmissible Evidence to Which Mr. Smith's Jury had Already been Exposed Violated Mr. Smith's Rights of Due Process, a Fair Trial, and a Reliable Sentencing Determination under the United States Constitution

Smith contends that his constitutional rights were violated by the trial court's reference to a redacted portion of a tape that the court had ruled inadmissible. The trial court had ruled the portions of the tape and the transcription of the tape inadmissible because it contained irrelevant and prejudicial references to unrelated criminal conduct during a conversation between Smith and witness Latonya Roshell. (Doc. # 1-2 at 12-16; see Vol. 8 at 1165-96; 1196-1217). Smith contends that the trial court improperly told the jury about inadmissible portions of the transcript and gave the jury a transcript that contained the inadmissible evidence. (Doc. # 1-2 at ¶ 201). Smith cites Alabama law. But he does not point to any Supreme Court authority in support of his claim. (Doc. # 1-2 at ¶ 205).

The Alabama Court of Appeals rejected this claim on direct appeal, finding that "there is no likelihood that, given the court's instructions, the jury could have reached an adverse conclusion or guessed what the missing portion contained based on the gap in the tape." *Smith II*, 838 So. 2d at 443 (quotations omitted). The appellate court further explained that "the trial

court's instructions to the jury properly informed them that the omitted portions were not pertinent and dealt with matters unrelated to the present case." *Id*.

As an initial matter, the court notes that Smith is essentially seeking habeas relief based on a violation of state law. Such a claim is not cognizable on federal habeas review under 28 U.S.C. § 2254(a). *Estelle*, 502 U.S. at 67-68 ("[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."); *Phillips*, 455 U.S. at 221 ("A federally issued writ of habeas corpus, of course, reaches only convictions obtained in violation of some provision of the United States Constitution."). In federal habeas corpus proceedings, state courts are the "ultimate expositors of state law." *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975). Therefore, the only question that this court need resolve is "whether the state court's decision was contrary to clearly established federal law." *Fondren v. Comm'r, Alabama Dep't of Corr.*, 568 F. App'x 680, 685 (11th Cir. 2014); ("Questions of pure state law do not raise issues of constitutional dimension for federal habeas corpus purposes"); *Carrizales v. Wainwright*, 699 F.2d 1053, 1054-55 (11th Cir. 1983). After careful review, the court concludes the state court decision at issue was not "contrary to" a conclusion reached by the Supreme Court on a question of law, nor was it decided differently than a Supreme Court decision addressing a set of materially indistinguishable facts. *Williams*, 529 U.S. at 405-06. The Supreme Court has "repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus." *Bradshaw v. Richey*, 546 U.S. 74, 76 (2005). This court must therefore defer to the state court's interpretation of its evidentiary rules.

To the extent that Smith's claim alleges that the state court's purported reference to inadmissible evidence violated his Due Process rights, that argument lacks any merit. Under such a theory, federal habeas courts do not grant relief, as might a state appellate court, simply because an instruction or reference was incorrect under state law. *Estelle*, 502 U.S. at 72. The question, instead, is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process." *Cupp v. Naughten*, 414 U.S. 141, 147 (1973). "It is well established that the instruction 'may not be judged in artificial isolation,' but must be considered in the context of the instructions as a whole and the trial record." *Estelle*, 502 U.S. at 72 (internal citations omitted).

During the State's case in chief, the trial court admitted into evidence a recording of Smith's conversation with a police informant, Latonya Roshell. (State Court Record, Vol.8, at 1191). In conjunction with the tape, the State provided transcripts of the tape to the jurors, so that they could follow along with the testimony as the tape played. (*Id.* at 1190). After playing the tape for approximately sixteen minutes, the court *sua sponte* stopped the tape and informed the attorneys outside the presence of the jury that portions of the tape which had not yet been played contained potentially objectionable material. (*Id.* at 1197). Upon agreement of the parties, the trial court ruled that those statements which referenced collateral bad acts be redacted from the transcript, and that the portion of the tape that contained inadmissible statements be skipped when the tape was played to the jury. (*Id.* at 1198-1210). Before calling the lawyers to discuss the possible redaction outside the presence of the jury, the trial judge stated:

> I have an idea that might save us a little time, let's do that. I have got a proposal I would like to make to the lawyers, folks. If you don't mind[,] let us talk a little bit out of your presence. *If you will leave the paperwork in the chair* and retire to the jury room for a minute.

(*Id.* at 1197-98) (emphasis added). The court later described to the jury that one of the lawyers would fast-forward through irrelevant portions of the tape, and stated that "[s]ometimes there are materials that don't really pertain to the litigation… so we have taken a few minutes just to make sure everything that comes to your attention is pertinent." (*Id.* at 1230). No good deed ever goes unpunished. Smith now argues that the state court erred by making reference to the redacted portions of the transcript, as well as by giving the jurors copies of the full transcript (which they were instructed to leave behind as they retired to the jury room) prior to redacting those transcripts. (Doc. # 1-2 at ¶¶ 205-207).

Neither of Smith's allegations amounts to a Due Process violation. While Smith cites Alabama state law for the premise that "mere mention of the inadmissible evidence itself is error," the trial judge's statements did not violate Smith's Due Process rights. (*Id.* at ¶ 205). Here, the trial judge never mentioned the inadmissible evidence, and instead only stated that portions of the tape were being skipped because they weren't relevant. Moreover, even if the trial judge's statements could be construed as mentioning inadmissible evidence, they certainly do not rise to the level of a violation of Smith's Due Process rights. The judge's brief statements, which make no reference at all to the content of the redacted material, did not "so infect[] the entire trial that the resulting conviction violates due process." *Cupp*, 414 U.S. at 147. In light of the record, the evidence against Smith was overwhelming. The trial judge's explanation regarding the portions of the tape that were redacted does not change that, and did not compromise the trial as a whole.

Similarly, Smith's claim that each member of his jury received an unredacted transcript for approximately sixteen minutes does not support his claim for habeas relief. Smith points to no record evidence that a juror actually saw any evidence that the court later ruled to be

inadmissible. Moreover, the court ultimately redacted the tape and transcript on its own motion – Smith's counsel stated that he did not plan on objecting to the collateral acts mentioned in the tape until they were about to be played to the jury in open court. (State Court Record, Vol.8, at 1198-99). As such, the court on its own initiative actually reduced the risk of jurors seeing potentially prejudicial evidence in their transcripts. And, indeed, even if a juror had seen the inadmissible evidence (*i.e.*, evidence suggesting that Smith had sold drugs and previously been arrested), that alone would not rise to the level of a Due Process violation in this case. Again, the weight of the evidence against Smith was overwhelming, and the possibility that a juror *might* have seen certain collateral evidence is simply not enough to support Smith's claim that the state court acted unreasonably when it denied his Due Process claim based on the trial court's determinations related to the transcript. Accordingly, Smith is not entitled to habeas relief on this claim.

J. Whether the Trial Court Improperly Considered Mr. Smith's Court Ordered Pretrial Psychiatric Examination in Sentencing Mr. Smith to Death

Smith argues that the trial court improperly considered a court-ordered pretrial psychiatric examination in sentencing him to death. His argument has three components: first, Smith did not have an opportunity to confront the examiner, Dr. C.J. Rosecrans, because he never testified at trial (Doc. # 1-2 at 17-18); second, there was no evidence that Smith received *Miranda* warnings before a pretrial competency examination (*id.* at 18-19), and third, the trial court improperly used evidence from that competency evaluation against Smith at sentencing. (*Id.* at 20).

Smith further alleges that the trial court's use of findings from a pretrial competency evaluation violated the Sixth Amendment's confrontation clause because Dr. Rosecrans did not testify and therefore, Smith never got an opportunity to cross examine him. (*See* State Court

Record, Vol. 12 at 217-21, forensic report of Dr. C.J. Rosecrans.) The trial court first used findings by Dr. C.J. Rosecrans to support a statutory mitigating factor under Ala. Code § 13A-5-52. ("Mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.") (*See* State Court Record, Vol. 10, Tab R-27 at 1715-18; 1720; *Smith II*, 838 So. 2d at 444). At Smith's sentencing, the court discussed the Alabama capital scheme's requirement that the sentencer consider "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death" as mitigating evidence. Ala. Code § 13A-5-52.[28] Referring to this provision, the trial court stated from the bench:

> Of course, we go now to 13A-5-52, what's been called in the case law as the eighth mitigating circumstance. But, we know this includes the defendant's character, record, et cetera. We know from Mr. Mixson's comments in the personal social history part of the presentence report that the defendant grew up in what the defendant terms as a poor environment… .
>
> The defendant further relates to Dr. Mixson his adolescent problems, after talking to him about his childhood problems. No money for drug rehab, states he has a two hundred dollar – three hundred dollar a day drug habit. Tells Dr. Rosecrantz (sic), if I am not mistaken, that that he was enrolled in the TASK (sic) program at one time.

(State Court Record, Vol. 10, Tab R-27 at 1715-18). A short time later, the trial court added, "Defendant related to Dr. Rosecrantz (sic) his overdose of pills a year or so ago." (*Id.* 1720).

Because Smith did not object to the trial court's discussion of the evaluation, the state appellate court addressed this allegation for plain error. *Smith II*, 838 So. 2d at 444. The

[28] Ala. Code § 13A-5-52 (1975) provides: In addition to the mitigating circumstances specified in Section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

Alabama Court of Criminal Appeals found that "the trial court had orally communicated the findings to defense counsel prior to trial, and that the written findings from the psychiatrist were also given to defense counsel prior to trial." *Id.*. The court further noted that Smith "had an opportunity to review the findings before trial and to call the psychiatrist as a witness, or otherwise to rebut his findings. Furthermore, defense counsel had the appellant evaluated by his own expert, who was called to testify for the appellant at sentencing." *Id*. The Court of Criminal Appeals found that this reference to the competency evaluation worked to Smith's benefit and was not prejudicial to Smith. Having examined the record, this court agrees with the appellate court's conclusion.

Smith also alleges the trial court should not have considered information from the competency evaluation by Dr. Rosecrans because that there was no evidence that Smith was advised of his *Miranda* rights before the evaluation. (Doc. # 1-2 at ¶ 214). He argues that this violated his Fifth Amendment right against self-incrimination, established in decisions such as *Estelle v. Smith*, 451 U.S. 454 (1981) and *Miranda v. Arizona*, 384 U.S. 436 (1966). *Estelle* and *Miranda* protect the privilege against compulsory self-incrimination. In *Estelle*, the Supreme Court held that using a capital defendant's statement made during a court-ordered psychological examination to prove an aggravating factor violated the defendant's right against self-incrimination. However, several factors distinguish Smith's allegation from *Estelle*. First, the trial court did not use Smith's statements made during the competency examination against him, which was the core concern of *Miranda* and *Estelle*. Instead, the court used Smith's statements as evidence of a mitigating factor. (*See* State Court Record, Vol. 10, Tab R-27 at 1715-18). Beyond that, at most, the trial court considered the absence of a mental health diagnosis. Additionally, the trial court's use of Dr. Rosecrans's report is distinguishable from *Estelle*

because it did not apply the report to an element of the offense or to an aggravating factor at sentencing. Further, the court did not use the report to justify the capital sentence it imposed.

Even assuming for the sake of argument that Smith did not receive Miranda warnings before his competency hearing (the record is actually silent on the matter), the Supreme Court has ruled that statements obtained in violation of *Miranda* may nevertheless be admissible for other purposes at trial. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985) ("[T]he *Miranda* presumption, though irrebuttable for purposes of the prosecution's case in chief, does not require that the statements and their fruits be discarded as inherently tainted"); *Harris v. New York,* 401 U.S. 222, 224-26 (1971) (statements obtained without warning a defendant of his right to counsel under *Miranda* may be used to impeach the defendant's testimony at trial). The Supreme Court permits the use of unconstitutionally-obtained evidence at sentencing if it does not "impugn the integrity of the fact-finding process" or permit a sentencing decision to rest upon inherently unreliable evidence. *Stone v. Powell*, 428 U.S. 465, 479 (1976) (quoting *Kaufman v. United States*, 394 U.S. 217, 224 (1969)). *See e.g.*, *United States v. Graham-Wright*, 715 F.3d 598, 601 (6th Cir. 2013) (sentencing court may consider statements defendant made to a psychiatrist during a pretrial competency examination); *United States v. Nichols*, 438 F.3d 437, 441 (4th Cir. 2006) (permitting consideration at sentencing of defendant's statement obtained in violation of *Miranda*).

Finally, Smith challenges the trial court's reference to Dr. Rosecrans's evaluation in the written sentencing order. (Doc. # 1-2 at ¶ 216). On direct appeal, the Court of Criminal Appeals rejected this claim, and stated that the trial court's notation in its summary of the facts that Smith had a competency evaluation was inconsequential:

[A]lthough the appellant argues that the trial court improperly considered the

> psychiatrist's finding concerning his competence to stand trial, a review of the record clearly indicates that the information concerning this finding was simply a statement that the psychiatrist found appellant competent to stand trial which was included in the statement of facts portion of the sentencing order. There is no indication that this fact was considered by the trial court in sentencing, rather a review of the record indicates otherwise. Thus, there was no plain error on this ground.

Id. at 445. Smith also alleges that the court considered the evaluation as substantive evidence in its order. (Doc. # 1-2 at ¶ 216). In the written sentencing order, the trial court cited the evaluation as one example of the overall lack of evidence that Smith had an extreme emotional disturbance:

> Dr. Rosencrans (sic) stated in his findings that 'the defendant is fully capable of assisting his attorney in his own defense and of cooperatively interacting with the court at this time.' Also, Dr. Rosecrans stated, 'It is my opinion that defendant was not mentally ill nor suffering from any other discernible psychiatric nor psychologic disturbance at the time of the offense.'

(Vol. 1, C.R. 159, Order of the Court on Imposition of the Death Penalty at 12).

Because Dr. Rosecrans did not testify at trial, Smith alleges that using the competency evaluation in this instance to reject the statutory mitigating circumstance of "extreme mental or emotional disturbance" abridged his right to confront the evidence against him as established in *Davis v. Alaska*, 415 U.S. 308, 316 (1974). (See Vol. 1, C.R. 163, Order of the Court on Imposition of the Death Penalty at 16, discussing Ala. Code § 13A-5-52).[29]

This court first addresses Smith's argument that he was not confronted with this evidence until he viewed it in the trial court's sentencing order. (*See* Doc. # 1-2 at ¶¶ 211-12). And, to be

[29] Regarding the mitigating circumstance under Ala. Code § 13A-5-52, the trial court found the following:

"2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

Does not exist. No evidence adduced at trial nor at the second stage in front of the jury nor by way of evidence adduced at third stage, nor the reports of either psychologist, Dr. Rosecrans or Dr. Blotcky suggest that the defendant acted under the influence of a mental or emotional disturbance, much less extreme mental or emotional disturbance." (Vol. 1, C.R. 163, Order of the Court on Imposition of the Death Penalty at 16).

clear, the court interprets Smith's contention as an assertion that the defense was not told that the trial court would *use* Dr. Rosecrans's report, not that Smith did not receive a copy of the report. In fact, Smith was given Dr. Rosecrans's report, and his mental health expert reviewed it in preparation for trial.[30]

As to the substance of Smith's challenge, the Alabama Court of Criminal Appeals found, in a related claim presented in Smith's Rule 32 appeal, that no prejudice existed from the discussion of Dr. Rosecrans's report in the written sentencing order. *See Smith III*, 112 So. 3d at 1150. The appellate court found that no prejudice existed because Smith had not attempted at trial "to prove the mitigating circumstance that the 'capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.'" *Id.*; *see also* (State Court Collateral Appeal Record, Vol. 19 at 88).

This court agrees with the appellate court. The trial court did not rely on Smith's competency evaluation as substantive evidence to reject the § 13A-5-52 mitigating circumstance. The trial court listed the report while concluding that none of the evidence, including that presented by the defendant, pointed towards the existence of that mitigating circumstance. While the confrontation clause bars admission of testimonial evidence and reports that are testimonial in nature (unless the declarant is unavailable to testify and the accused has had a prior opportunity to cross-examine the declarant), the reference to Dr. Rosecrans's report was not the type of testimonial evidence that implicates the confrontation clause. And, as the Respondent points out in his brief (Doc. # 28 at 67-68), Smith has not explained how *Davis* applies here beyond its general holding that a defendant has the right under the confrontation

[30] The trial court wrote in the sentencing order, "Dr. Rosencrans' findings were orally communicated by the undersigned to counsel on May 1, 1992, written findings consisting of cover letter and four typed pages were given to counsel on May 4, 1992," the day Smith's trial began. (State Court Trial Transcript, Record Vol. 1, C.R. 159; 148).

clause to explore a witness's biases on cross-examination. *Davis v. Alaska*, 415 U.S. 308 (1974). *Compare Crawford v. Washington*, 541 U.S. 36 (2004) (finding that the confrontation clause is violated by the admission of an unavailable witness' out of court statement when defendant did not have a prior opportunity to cross-examine the witness); *Melendez–Diaz v. Massachusetts*, 557 U.S. 305 (2009) (extending *Crawford* to prohibit the prosecution's use of certificates of analysis as proof that substance was cocaine absent the testimony of the analysts who conducted the scientific testing).

Nor has Smith argued that there was any reasonable possibility that the mitigating circumstance would have been found to exist if Smith had been given an opportunity to cross-examine Dr. Rosecrans or if the trial court had not included Dr. Rosecrans's report in its fact-findings. Based on the state court record, Smith's claim does not support a finding that the state court decision was contrary to *Davis v. Alaska*, or that the state court's decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Smith is not entitled to relief on this claim under § 2254(d). *Everett v. Sec'y, Florida Dep't of Corr.*, 779 F.3d 1212, 1239 (11th Cir. 2015) (quoting *Loggins v. Thomas,* 654 F.3d 1204, 1220 (11th Cir. 2011) (As long as "some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief must be denied.")).

K. Whether the Trial Court's Instruction to the Jury at Both the Guilt-Innocence and Penalty Phase of Mr. Smith's Trial Denied Mr. Smith's Right to Due process, a Fair Trial, and Reliable Sentencing Determination

Smith contends that the trial court deprived him of his right to due process by failing to properly instruct the jury in three particular ways. (Doc. # 1-2 at 20-25). First, Smith alleges that the trial court failed to instruct the jury (a second time) that it could not convict Petitioner based

on uncorroborated statements of an accomplice. Second, Smith maintains that the trial court failed to give a supplemental instruction regarding witness Latonya Roshell's testimony in light of the fact that she was a paid informant for the State. Finally, Smith argues that a jury instruction which suggested that the jurors use their "collective minds," to determine guilt or innocence was flawed. For the reasons discussed below, these allegations are not cognizable in federal habeas corpus proceedings either because they involve only an issue of state law or because they present no unreasonable application of Supreme Court precedent.

1. Instruction on corroboration of accomplice testimony

Smith contends that the trial court's failure to give the jury a second set of instructions on corroboration of accomplice testimony deprived him of due process. Smith acknowledges that the jury was given one set of instructions regarding accomplice testimony, but complains because a second set of instructions on the corroboration of accomplice Angelica Willis's testimony was not given. Without those additional instructions, he argues, the jury may have impermissibly relied solely on Willis's statement in reaching its guilty verdict. (Doc. # 1-2 at ¶ 218).

Smith's claim centers on an Alabama statute which proscribes that a defendant in a felony case may not be convicted solely upon accomplice testimony.[31] In keeping with Alabama law that accomplice testimony be corroborated, the trial court gave an initial set of instructions

[31] Ala. Code § 12–21–222 (1975) ("A conviction of felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense, and such corroborative evidence, if it merely shows the commission of the offense or the circumstances thereof, is not sufficient.")

before guilt-phase closing arguments in Smith's trial. During this initial charge, the trial court instructed on corroboration as follows:

> As you know, Angelica Willis is a, I would guess a self-confessed accomplice in the murder component here that we are discussing today of Ms. Johnson, having testified in exchange for an offer of a twenty-five year sentence on a plea of guilty to murder.
>
> Now, the reason I mention this to you, we have a special statute relative to accomplice testimony and it would probably be good for me to go over this with you, maybe paraphrase it. It is entitled accomplice's testimony for a felony conviction. And it says in substance that a conviction of a felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. And such corroborative evidence, if it merely shows the commission of the offense or circumstances thereof, is not sufficient.

(State Court Record, Vol. 8, Tab R-12, at 1295-96). Smith contends that the trial court's failure to reinstruct the jury on corroboration after closing arguments of counsel, despite having indicated that it would do so (*see id.* at 1299), led the jury to underestimate the importance of corroborating Angela Willis' testimony. (Doc. # 1-2 at ¶ 219).

The Alabama Court of Criminal Appeals rejected this claim on the merits, holding:

> In the present case, the trial court sufficiently charged the jury as to the applicable law; no plain error resulted from his procedural decisions as to when to instruct the jury. Nor is there any indication in the record that this concept would have been given insufficient emphasis by not being repeated at the close of the argument. The decision whether to repeat certain instructions to the jury is a matter generally left to the trial court's discretion.

Smith II, 838 So. 2d at 452. On habeas review, Smith must establish that the state court decision is contrary to federal law, unreasonably applies clearly established law, or is based on an unreasonable determination of the facts in light of the evidence presented. Additionally, to obtain habeas relief for a jury instruction claim, he must show that the instruction was so unfair that it denied him the due process of law. *Estelle*, 502 U.S. at 72 ("The only question for us is "whether the ailing instruction by itself so infected the entire trial that the resulting conviction

violates due process.") (quoting *Cupp,* 414 U.S. at 147); *see also Henderson v. Kibbe*, 431 U.S. 145, 154 (1977) (a state habeas petitioner's burden is especially heavy to show prejudice based on an incomplete instruction because "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law"); *Donnelly v. DeChristoforo,* 416 U.S. 637, 643, (1974) ("'[I]t must be established not merely that the instruction is undesirable, erroneous, or even "universally condemned," but that it violated some [constitutional right]'").

As noted above, Smith's contention that the trial court erred by failing to recharge the jury on how to consider corroboration of accomplice testimony fails because it raises an issue of state law that is not cognizable on federal habeas review. *See* 28 U.S.C. § 2254(a); *Estelle,* 502 U.S. at 67-68. The Court of Criminal Appeals held that additional instructions on corroboration were unnecessary under Alabama law, and this court is bound by the court of appeal's interpretation of state law. *See Bradshaw,* 546 U.S. at 76 ("[A] state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.").

Moreover, Smith was not deprived of due process or a fair trial under existing Supreme Court precedent. In *United States v. Beard*, the Eleventh Circuit stated that "a defendant is entitled to a special cautionary instruction on the credibility of an accomplice or a government informer if he requests it and the testimony implicating the accused is elicited solely from the informer or accomplice." 761 F.2d 1477, 1481 (11th Cir. 1985), quoting *United States v. Garcia*, 528 F.2d 580, 587-88 (5th Cir. 1976). In *Beard*, our Circuit found no instructional error because the jury instruction on credibility and bias afforded adequate protection against any prejudice from the government's use of a confidential informant. *Beard* is not clearly established Supreme Court precedent, as required under § 2254(d) to warrant habeas relief. However, even if *Beard*

did apply, Angelica Willis's testimony was found to be corroborated, *see Smith II*, 838 So. 2d at 425 (noting that informant's testimony was corroborated by defendant's recorded statements, other witness testimony, and physical evidence), and Smith does not challenge that finding as unreasonable. Smith's claim is thus not cognizable under § 2254(d), and his claim is denied.

Finally, even if the trial court's failure to reinstruct the jury were constitutional error (and, to be clear, it is not), that error would not amount to a denial of due process unless it had a "substantial and injurious effect on the verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637–38 (1993). Given Smith's recorded statements, other witness statements, and the physical evidence, there is no basis to conclude that the jury would have reached a different verdict had it been reinstructed regarding uncorroborated accomplice testimony. The Court of Criminal Appeals concluded that its "review of the entire charge reveals that the jury was properly instructed as to the law concerning the corroboration of accomplice testimony and its importance was not diminished to the jury because the trial court failed to repeat these instructions at the close of the parties' arguments." *Smith II*, 838 So. 2d at 452-53. Accordingly, the state courts' rejection of Smith's instructional error claim was neither contrary to, nor an unreasonable application of, clearly established federal law as determined by the Supreme Court. Habeas relief, therefore, is not warranted on this claim.

a. Failure to give supplemental instruction on witness bias

Smith's next contention is similar to his claim about witness Angelica Willis. Smith asserts that the trial court should have specifically instructed the jury to evaluate witness Latonya Roshell's testimony in light of the fact that she was a paid informant for the State. (Doc. # 1-2 at ¶ 220). The trial court instructed the jury on witness bias. (*See* State Court Record, Vol. 9, Tab R-16, at 1417-18 ("[Y]ou can consider anything you observed about a

witness that tends if you think you observed something about a witness that might make he or she color their testimony; the motive of one testifying, any bias exhibited by a witness, just whatever, big area for common sense.")).

The Alabama Court of Criminal Appeals considered this claim on direct appeal and found no error because the "record clearly indicates that the trial court's charge completely addressed the subject of witness credibility and bias, therefore, there was no error in refusing to give the requested instructions." *Smith II*, 838 So. 2d at 453. In his argument to this court, Smith again cites the *Beard* court's holding that "a defendant is entitled to a special cautionary instruction on the credibility of an accomplice or a government informer if he requests it and the testimony implicating the accused is elicited solely from the informer or accomplice." 761 F.2d at 1481 (quoting *Garcia,* 528 F.2d at 587-88). As already noted above, *Beard* is not clearly established Supreme Court precedent. But even if *Beard* did apply, the record does not establish the two pre-conditions for a cautionary instruction: Smith did not request the jury instruction, nor was Willis's testimony uncorroborated. *See Smith II*, 838 So. 2d at 453 (finding that issue was not raised at trial), 425 (noting that informant's testimony was corroborated by defendant's recorded statements, other witness testimony, and physical evidence). Smith's claim is thus not cognizable under section 2254(d), and habeas relief is not warranted on this claim.

b. Reasonable doubt instruction

At Smith's trial, before closing argument from the parties, the trial court gave an initial jury charge. (State Court Record, Vol. 8, Tab R-12, at 1273-1300). In that charge, the court began by reminding the jury that Smith was presumed to be not guilty and that "[t]he burden of proof does not shift to Willie B. Smith here at any point in the litigation." (*Id.* at 1274). In his petition, Smith alleges that the trial court improperly shifted the burden of proof to him by

instructing the jury during its initial charge that the jury begin its consideration with "an abiding conviction that Mr. Willie B. Smith is guilty," thus creating a risk that Smith was convicted on a standard of proof below that required by the Due Process Clause of the United States Constitution. (Doc. # 1-2 at ¶ 223). Smith further alleges that the trial court's instruction that reasonable doubt had to be removed from the jury's "collective minds" before voting to acquit Smith, instead of individually, also lowered the prosecution's burden of proof. (Doc. 1-2 at 26). Smith objects to the portion of the jury instruction below:

> I will say this: If after a full and fair consideration of all of the evidence in the case, if there should remain in your collective minds an abiding conviction that Willie B. Smith here is guilty of the offense or offenses charged, then you would be convinced by that full measure of proof required in the law, you would be convinced beyond a reasonable doubt or to a moral certainty and you should convict.
>
> On the other hand if after that same and full and fair consideration of all of the evidence in the case, if there does not remain in your collective minds -- the verdict has to be unanimous, as I will say again in a little bit -- if there does not remain in your collective minds an abiding conviction that he is guilty, then that is another way of saying I'm not convinced by that full measure of proof that the judge is talking about and the man should be acquitted.

(State Court Record, Vol. 8, Tab R-12, at 1277-78).

The Alabama Court of Criminal Appeals denied Smith's claim on the merits, finding that the trial court's reasonable doubt jury instruction was constitutionally acceptable as a whole. *Smith*, 839 So. 2d at 454. The Court of Criminal Appeals relied upon an Alabama Supreme Court decision that upheld a similar jury instruction as proper. *Id.* (citing *Ex parte Brooks,* 695 So.2d 184, 192 (Ala.1997)) (holding that reasonable doubt charge that instructed the jury that it should acquit "if there does not remain in your collective minds here an abiding conviction that [the defendant] is guilty" did not diminish the reasonable standard of proof by shifting the burden of proof from the State).

As one court has explained, in federal habeas proceedings state court jury instructions are to be evaluated as a whole, rather than in isolation:

> In a criminal case, the government must prove each element of a charged offense beyond a reasonable doubt. *See, e.g.*, *In re Winship*, 397 U.S. 358, 361 (1970). … When reviewing the correctness of reasonable-doubt charges, the Supreme Court has phrased the proper constitutional inquiry as "'whether there is a reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the *Winship* standard.'" *Harvell v. Nagle*, 58 F.3d 1541, 1542-43 (11th Cir. 1995) (quoting *Victor*, 511 U.S. at 6, 114 S. Ct. at 1243). We consider the instruction as a whole to determine if the instruction misleads the jury as to the government's burden of proof. *See id.; see also Victor v. Nebraska*, 511 U.S. 1 at 5-6 (instructions must be "taken as a whole"); *Cage*, 498 U.S. at 41 (explaining that "[i]n construing the instruction, we consider how reasonable jurors could have understood the charge as a whole").

Davis v. Allen, 2016 WL 3014784, at *113 (N.D. Ala. May 26, 2016) (citing *Johnson*, 256 F.3d at 1190-91) (parallel citations omitted).

As previously noted, the part of the charge that Smith challenges was an initial charge which was given before the closing arguments. In the main part of the jury charge, which was given after closing argument, the trial court instructed that the jurors should exercise their independent judgment, but that their verdict had to be unanimous:

> I told you a moment ago that your verdict had to be unanimous, a verdict of all soon to be twelve. That is to say that in order to convict Willie B. Smith of either of the counts in the charge, your verdict has to be unanimous with respect to that count, all twelve must agree. *If one is not so satisfied by that full measure of proof required in the law, then the jury cannot convict*.
>
> Likewise in order to acquit him your verdict must be unanimous. *Your verdicts don't have to pigtrack*[32]*, any permutation of verdicts is possible*.

(State Court Record, Vol. 9, Tab R-16, at 1438-1439, emphasis added).

The trial court's instruction to Smith's jury, when considered in its entirety, could not possibly have led the jury to convict him on a lesser showing of proof than that required by *In re*

[32] While the record indicates that the trial judge informed the jury that their verdicts don't have to "pigtrack," the court believes that the phrase that was likely intended was "piggyback." In any event, neither phrase changes this court's analysis.

Winship, 397 U.S. 358, 361 (1970). As the Supreme Court held in *Victor v. Nebraska,* "so long as the court instructs the jury on the necessity that the defendant's guilt be proved beyond a reasonable doubt, the Constitution does not require that any particular form of words be used in advising the jury of the government's burden of proof. Rather, 'taken as a whole, the instructions [must] correctly conve[y] the concept of reasonable doubt to the jury." 511 U.S. 1, 5 (1994).

In light of the state court record, this court cannot conclude that the Alabama Court of Criminal Appeals' legal conclusion -- that the mention of "unanimously as a collective mind" in the jury charge did not unconstitutionally lower the prosecution's burden of proof -- was an unreasonable application of Supreme Court law. Therefore, habeas relief is not available on this claim.

L. Whether the Trial Court Improperly Restricted Mr. Smith's Ability to Confront the Witnesses Against Him

Smith alleges that the trial court improperly impeded his constitutional right to confront three of the State's witnesses. Specifically, Smith asserts that the trial court impeded his trial counsel's cross-examination of (1) witness Michael Wilson, about a prior juvenile adjudication (Doc. # 1-2 at ¶ 226), (2) Smith's codefendant, Angela Willis, about her plea agreement (Doc. # 1-2 at ¶ 230), and (3) police officer Steve Corvin, about his investigation of a potential alternate suspect. (Doc. # 1-2 at ¶ 232). Smith contends that the Alabama courts' rejection of his confrontation claim is contrary to *Davis v. Alaska,* 415 U.S. 308 (1974). The court addresses Smith's argument in relation to each of these witnesses.

1. State Witness Michael Wilson's Prior Adjudication

In the first subpart of his claim, Smith alleges that his right to confrontation was violated when the trial court refused to allow defense counsel to impeach a prosecution witness, Michael

Wilson, with a prior juvenile adjudication for a drug offense. In considering this claim on direct appeal, the Alabama Court of Criminal Appeals recounted the following exchange at trial:

[Defense counsel]:	You make your living selling dope, don't you?
[Wilson]:	Naw.
[Prosecutor]:	I object unless he has some basis for –
[Defense counsel]:	I do.
[The Court]:	He said 'No' did you not?
[Wilson]:	Yes. I said 'No, I work.'
[Defense counsel]:	You have been to Mt. Meigs for selling dope, haven't you?
[Prosecutor]:	Your Honor, I object to this, Your Honor.
[The Court]:	Sustained. Go ahead, next question.

Smith II, 838 So. 2d at 447-48.

Alabama law prohibits using juvenile records for general impeachment. *See* Alabama Rule of Evidence 609(d) ("[e]vidence of juvenile or youthful offender adjudications is not admissible under this rule") and Alabama Code § 12-15-72(a)(b) (providing that a juvenile adjudication is not a conviction and is not admissible against a juvenile in any court). The state appellate court noted that Smith made no proffer, as required under Alabama precedent, that the juvenile adjudication would be proof of bias. *Smith II*, 838 So. 2d at 448. Thus, the Court of Criminal Appeals distinguished Smith's line of questioning about a juvenile adjudication on general credibility from the factual basis of the U.S. Supreme Court's decision in *Davis v. Alaska* addressing "cross-examination directed toward revealing possible bias, prejudices, or ulterior motives of a witness." *Id*. at 448 (quoting *Davis*, 425 U.S. at 316). In *Davis*, defense counsel was prevented from cross-examining a trial witness about possible bias related to the witness's juvenile adjudication for burglary and his probation status at the time of the events. During cross-examination, Davis's counsel sought to explore whether the witness identified the petitioner out of fear or concern that the police might believe the witness had committed the burglary for which the defendant was on trial, thereby jeopardizing the witness's probation. Davis argued that the

witness's fear that he would be blamed may have compromised his identification of the defendant. *Davis,* 415 U.S. at 311, 317. The Supreme Court reversed Davis's conviction, holding that his counsel should have been permitted to ask the witness not only "whether he was biased," but also "why [he] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." *Id.* at 318.

The line of inquiry in Smith's case, however, is simply not analogous to the one in *Davis*. Smith's cross-examination sought to show that Michael Wilson's juvenile drug offense was relevant to bias because Wilson was under investigation by the police at the time of the offense for drug trafficking. (*See* Doc. # 1-2 at ¶ 228). But Smith did not proffer an explanation at the time of the trial court's ruling that, as Alabama precedent required, the cross-examination would show Wilson's bias, as opposed to general credibility. *Smith II*, 838 So. 2d at 448. Moreover, that evidence was already before the trier of fact. The Court of Criminal Appeals noted that the testimony about Wilson's criminal drug activities would have been cumulative to other testimony by a police informant stating that Michael Wilson was under investigation for "selling narcotics." *Smith II*, 838 So. 2d at 449; (State Court Record, Vol. 7, at 1111). In light of the other evidence, the Court of Criminal Appeals concluded that the trial court's ruling about Wilson's juvenile drug adjudication was, even if it were found to be error, harmless error. *Id*. Thus, it concluded, Smith was not precluded at trial from developing the probative value of the evidence of Wilson's potential biases because of his criminal activities.

The state court's finding that the impeachment evidence Smith sought at trial was marginally probative and cumulative was not contrary to *Davis v. Alaska* or any clearly established Supreme Court authority. Trial courts may impose evidentiary limits on cross-examination into the potential bias of a witness without violating the confrontation clause. *See*

Delaware v. Van Arsdall, 475 U.S. 673, 679 (1986) ("… trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally relevant."). The state court here disallowed impeachment with a juvenile conviction that was inadmissible under Alabama law. Therefore, Smith's claim does not support a finding that the state court decision was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Accordingly, under § 2254(d), Smith is not entitled to relief on this claim.

2. State Witness Angelica Willis's Plea Agreement

In the second subpart of his confrontation claim, Smith argues that the trial court unconstitutionally restricted his counsel's cross-examination of witness Angelica Willis about her plea agreement with the State. (State Court Record, Vol. 6, at 945). Willis was originally charged with capital murder in Smith's case and entered into an agreement to testify against Smith at trial. Willis testified that she agreed to plead guilty to murder and receive a 25-year sentence. *Smith II*, 838 So. 2d at 459. At Smith's trial, defense counsel cross-examined Willis about her attorney, "who negotiated an excellent deal for you." *Id.* The prosecution objected, and the court sustained the objection. *Id.*

After his conviction, Smith argued on direct appeal that the trial court's ruling curtailed his opportunity to explore Willis' plea agreement on cross-examination. The Alabama Court of Criminal Appeals held, to the contrary, that Smith had been permitted to explore Willis' plea agreement and her potential bias at trial. *Smith II*, 838 So. 2d at 459 ("[d]efense counsel was allowed to cross-examine the witness extensively about the agreement and made the jury fully

aware of the possible influences that the plea agreement could have had on [Willis's] testimony." (internal quotations omitted)).

The Confrontation Clause is violated when a defendant is "prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby to expose to the jury the facts from which jurors could appropriately draw inferences relating to the reliability of the witness." *Van Arsdall,* 475 U.S. at 680. However, the Supreme Court has noted, a defendant's right to cross-examine adverse witnesses is not unlimited. *Id*. at 679 ("The Confrontation Clause guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.") (quoting *Fensterer*, 474 U.S. at 20).

Smith's jury was repeatedly informed, during direct and cross-examination, that Willis was testifying in exchange for a plea offer from the prosecution. *Smith II*, 838 So. 2d at 459. In an exchange during the cross-examination of Willis, defense counsel emphasized Willis' plea deal:

> "Q. And you have pleaded not guilty all the way up to a couple of days ago when you decided that they are trying Willie Smith and I may be next and the government is offering you a deal, isn't that right?
>
> "A. I took the offer that was given to me because it was in my best interest.
>
> "Q. That's right, that's exactly right."

Id. The trial court also instructed the jury about Willis' plea deal as follows:

> As you know, Angelica Willis is a, I would guess a self-confessed accomplice in the murder component here that we are discussing today of Ms. Johnson having testified in exchange for an offer of a 20–25 year sentence on a plea of guilty of murder.

Smith II, 838 So. 2d at 450.

The Confrontation Clause guarantees a defendant a legitimate opportunity to apprise a jury of a witness' biases through cross-examination. Smith's counsel was given ample

opportunity to elicit testimony about Willis' motivations to testify. The jury was made aware of Willis' plea deal, through both examinations and the trial court's instructions. The Confrontation Clause requires no more under these facts. The Eleventh Circuit has consistently held that "[a]s long as sufficient information is elicited from the witness from which the jury can adequately assess possible motive or bias, the Sixth Amendment is satisfied." *De Lisi v. Crosby,* 402 F.3d 1274, 1301 (2005), *citing United States v. Lankford,* 955 F.2d 1545, 1549 at n. 10 (11th Cir. 1992) (internal citations and quotation marks omitted). The Court of Criminal Appeals' decision does not contravene clearly established Supreme Court precedent or reach an unreasonable determination based on the facts. 28 U.S.C. § 2254(d); *Williams,* 529 U.S. at 405–06. Accordingly, Smith is not entitled to habeas relief on this claim.

3. Cross-examination of Officer Steve Corvin

Smith's third contention alleges that the trial court limited his ability to cross-examine Officer Steve Corvin about other individuals who owned a jacket similar to the one that Mr. Smith reportedly wore on the night of the crime. (State Court Record, Vol. 6, at 861). The trial court sustained the prosecution's objection to this line of questioning on hearsay grounds. (*Id.*). The trial court's ruling was upheld on direct appeal. *Smith II*, 838 So. 2d at 463. The Court of Criminal Appeals concluded that the trial court committed no error in sustaining the hearsay objection as "[d]efense counsel clearly was attempting to introduce the third party's statement for the truth of the matter asserted; specifically, that her boyfriend owned the same jacket and that he looked like the appellant." *Smith II*, 838 So. 2d at 464.

As noted previously, the Confrontation Clause does not entitle defendants to "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Fensterer,* 474 U.S. at 20. In *Crawford v. Washington*, the Court explained that "it is wholly

consistent with the Framers' design to afford the States flexibility in their development of hearsay law." 541 U.S. at 68. The Court has also noted that "trial judges retain wide latitude [under the Confrontation Clause] ... to impose reasonable limits on such cross-examination." *Van Arsdall,* 475 U.S. at 679. Smith has not identified how the Court of Criminal Appeals' decision upholding the exclusion of hearsay evidence is contrary to or an unreasonable interpretation of established federal law. Upon careful review, this court concludes it did not. Habeas relief is precluded on this claim.

M. Whether the Trial Judge Improperly Referred to Smith's Choice not to Testify in Violation of Smith's Right Against Self-Incrimination as Protected Under the Fifth and Fourteenth Amendments to the United States Constitution

Smith alleges that the trial court improperly referred to his failure to testify at trial, thereby violating his Fifth Amendment right against self-incrimination. (Doc. # 1-2 at ¶ 233.) This claim was raised on direct appeal, and the Alabama Court of Criminal Appeals considered it on the merits but rejected it. *Smith II*, 838 So. 2d at 467. Habeas relief is only available if the state court decision was contrary to or an unreasonable application of clearly established law. Here, the state court's decision was neither an unreasonable application of nor contrary to *Griffin*, 380 U.S. at 615 (holding that the Fifth Amendment forbids either comment by the prosecution or jury instructions about an accused's silence as evidence of guilt at trial). *Griffin* prohibited certain comments on silence because the jury may infer guilt from comments on a defendant's failure to testify and thus relieve the prosecution of a portion of its burden of proof.

Smith challenges a portion of the trial court's sentencing order in which the trial court summarized the proceedings:

Second stage proceedings were conducted beginning May 7, 1992, no additional

> evidence adduced by state; defense witnesses consisted of mother, neighbor, friend and psychologist Allen D. Blotcky. Defendant did not testify nor had defendant testified at guilt stage.

(State Court Record, Vol. 1, Tab R-1, at 148). The Alabama Court of Criminal Appeals concluded that this reference was a factual recitation of what evidence was presented at trial, not an adverse comment on Smith's failure to testify. *Smith II*, 838 So. 2d at 459. The court agrees. Smith has presented no argument or evidence to the contradict this conclusion. Moreover, here, the sentencing order was *post-verdict* and did not influence the jury's consideration of the evidence at trial or sentencing. The trial court's statement that Smith did not testify was neither used nor viewed in any adverse manner; it was simply stated as matter of record. The Supreme Court has not prohibited all references to a defendant's silence at trial: it has prohibited only uninvited and adverse ones. *See, e.g.*, *United States v. Robinson*, 485 U.S. 25, 31-32 (1988) (declining to expand *Griffin* to preclude a prosecutor's reference to defendant's opportunity to testify in response to claim that the Government had not allowed defendant to explain his side of the story); *Lockett v. Ohio*, 438 U.S. 586, 595 (1978) (prosecutor's references in closing remarks to State's evidence as "unrefuted" and "uncontradicted" did not violate defendant's Fifth and Fourteenth Amendment rights when defendant first focused the jury's attention on her silence). No Supreme Court decision required the state appellate court to reach a different conclusion here. For these reasons, this claim does not warrant habeas relief.

N. Whether the Trial Court Erred in Refusing to Grant Smith's Request to Strike for Cause Venire Member Florence Noe

Smith alleges that the trial court erred in denying his request to challenge venire member Florence Noe for cause. (Doc. # 1-2 at ¶ 234). He contends that she was aware of some of the facts of the case, lived near the crime scene, knew that her daughter used an

automatic teller machine near the crime scene, and had a firm belief in the death penalty. (Doc. # 1-2 at ¶ 235). Smith raised this allegation on direct appeal, and the Alabama Court of Criminal Appeals reviewed it on the merits. *Smith II*, 838 So. 2d at 473-75. The Court of Criminal Appeals held that the venire member "indicated that she would base her verdict on the evidence presented and attempt to be a fair juror." *Smith II*, 838 So. 2d at 475. The court also stated that "there was no indication of bias toward [Smith] by this potential juror; therefore, no error resulted in the trial court's denial of the challenge for cause." *Id*.

The record reveals that Noe was questioned by the court and defense counsel regarding her feelings toward the death penalty. (State Court Record, Vol. 4, at 383). She testified that she was aware of the case because she lived four blocks away from where the victim was abducted. (*Id.*). She also stated that she had particular concerns with the case because one of her daughters used the same ATM where the kidnapping occurred. (*Id.* at 384). However, she stated that she had not formulated any opinion regarding the defendant's guilt or innocence. (*Id.*). She further testified that she could be fair to the man charged in the event, and that her verdict would be based on in-court evidence and would not be affected by her concern for her daughter's safety. (*Id* at 384-85).

When Noe was asked about her views on the death penalty, the following exchange occurred:

> Q. But you do believe very, strongly in the death very penalty? You believe very, very strongly in the death penalty?
>
> A. I believe in the death penalty. I wouldn't say strongly. In certain cases I do.

(*Id.* at 389).

Smith alleges that the trial court erred in refusing to grant his request to strike Ms. Noe for cause. As an initial matter, the court notes that his claim sounds solely in state law. (*See*

Doc. # 1-2 at ¶¶ 234-238). Indeed, he cites Alabama law for the premise that "[a] challenge for cause must be sustained upon a showing of 'probable prejudice.'" (*Id.* at ¶ 236, citing *Dixon v. Hardey*, 591 So. 2d 3 (Ala. 1992). After citing other Alabama state law, he contends that Ms. Noe exhibited "probable prejudice," and that the trial court "committed reversible error" in denying defense counsel's challenge for cause. (*Id.* at ¶ 238).

As mentioned above, the Supreme Court has made plain that "in conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *McGuire*, 423 at 67-68, citing 28 U.S.C. § 2241; *see also Brannan*, 861 F.2d at 1508 (11th Cir. 1988) ("[A] habeas petition grounded on issues of state law provides no basis for habeas relief."). Here, Smith has not alleged any violation of federal law. Whether a trial court "committed reversible error" in its "probable prejudice" finding is a question for state court on appellate review. There is no basis for federal habeas relief as to such a claim. Accordingly, habeas relief is not available for this claim.

Further, Smith cannot claim that Noe's inclusion on the jury violated his Due Process rights (and to be clear, he has not made that claim), because such a claim would be off the mark. A juror must be struck for cause when his views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. 412, 424 (1985). "The judgment as to 'whether a venireman is biased ... is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations [are] entitled to deference even on direct review; the respect paid such findings in a habeas proceeding certainly should be no less.'" *Uttecht v. Brown*, 551 U.S. 1, 7, (2007) (citing *Witt*, 469 U.S. at 428). There is nothing in the record to indicate that the state court erred at all, much less acted unreasonably in refusing to strike Ms. Noe for

cause. Ms. Noe testified that she had not pre-formed any opinion regarding Defendant's guilt or innocence, she would act fairly as a juror, and her verdict would be based on the evidence presented in the courtroom. (State Court Record, Vol. 4, at 383-85). She further stated that she believed that the death penalty was appropriate "in certain cases," but did not say that she "strongly" believed in the death penalty. (*Id.* at 389). There is absolutely nothing in the record that indicates Ms. Noe's views would have prevented (or substantially impaired) her ability to perform as a juror. For this reason, too, habeas relief is not available on this claim.

O. Whether the Atmosphere at Trial Violated Smith's Rights of Due Process, a Fair Trial, and a Reliable Sentencing Determination

Smith next alleges that the aggregated conduct of private spectators at his capital trial created a sufficiently prejudicial atmosphere at trial to deny his rights to due process, to a fair trial, and to a reliable sentencing determination. (Doc. # 1-2 at ¶ 239). Smith contends that: the victim's family and friends' presence in the courtroom, including the victim's brother, a Birmingham police officer in uniform, was unduly inflammatory and created prejudice; the victim's family, along with the jury, was given a transcript of police informant Latonya Roshell's testimony, which, according to Smith, gave the jury the impression that the victim's family's rights were superior to the defendant's rights; and the trial court interrupted the reading of the jury instructions at sentencing because a spectator was crying. (*Id.* at ¶ 241). This claim was considered and denied on the merits by the Alabama Court of Criminal Appeals on Smith's Rule 32 appeal. *Smith II*, 838 So. 2d at 469-72. This court is therefore bound by that determination unless Smith can show that the state court's decision was contrary to or an unreasonable application of clearly established federal law. He cannot.

Smith argues that he is entitled to relief because the state court failed to consider the totality of the evidence purportedly constituting a prejudicial atmosphere at trial and instead

examined each instance of prejudice in isolation. (Doc. # 39 at 93). As an initial matter, the record suggests that in its opinion the Alabama Court of Criminal Appeals did indeed consider the totality of the evidence supporting Smith's claim. The fact that the appellate court also discussed the allegations individually does not mean that the court did not consider the collective impact of spectator conduct on Smith's trial. However, even assuming, *arguendo,* that the Alabama court failed to consider the totality of the circumstances, this court concludes that it cannot review this claim under § 2254(d)(1) because there was no clearly established federal law to support his claim that was sufficiently related to the facts of Smith's case, even if the allegations were reviewed in their totality. In other words, the Alabama Court of Criminal Appeals' decision did not contravene clearly established federal law because no Supreme Court precedent has established that private spectator conduct has denied a defendant's fair-trial rights. *Carey v. Musladin*, 549 U.S. 70, 77 (2006) ("Given the lack of holdings from this Court regarding the potentially prejudicial effect of spectators' courtroom conduct of the kind involved here, it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'").

In *Carey v. Musladin*, members of a victim's family sat in the spectator gallery during the trial wearing buttons displaying the victim's picture. *Id.* at 72. Musladin objected to the display at trial and challenged the spectators' conduct in state court, relying on *Estelle v. Williams*, 425 U.S. 501 (1976) and *Holbrook v. Flynn,* 475 U.S. 560 (1986), as establishing Supreme Court precedent regarding inherent prejudice that the state court failed to apply to Musladin's case. *Id.* at 75. (Smith also relies on *Estelle* and *Flynn*). The Supreme Court in *Musladin* distinguished both *Williams* and *Flynn* because those cases addressed the constitutionality of government-sponsored practices – in *Williams,* compelling the defendant to stand trial in prison clothes, and

in *Flynn,* seating state troopers immediately behind the defendant. In those cases, the Court discussed whether some state actions were so inherently prejudicial that they had to be justified by an "essential state interest." *Flynn,* 475 U.S. at 568-569. In contrast, Smith's case (like Musladin's) involved no state action. The Court wrote in *Musladin* that it had "never addressed a claim that such private-actor courtroom conduct was so inherently prejudicial that it deprived a defendant of a fair trial;" thus, the state court's finding could not be challenged in federal habeas corpus for failing to apply clearly established precedent. *Musladin*, 549 U.S. at 76.

Finally, Smith argues that he suffered actual prejudice from the atmosphere at his trial, as evinced by a letter from a juror stating that the juror felt a prejudicial bias towards the death penalty during the trial. (Doc. # 39 at 95). But such a letter is not determinative, in any event, because the Supreme Court's test for inherent prejudice is "not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play.'" *Holbrook,* 475 U.S. at 570 (quoting *Estelle,* 425 U.S. at 505).

The case Smith primarily relies upon, *Woods v. Dugger*, 923 F.2d 1454, 1457 (11th Cir. 1991), is not Supreme Court precedent. Moreover, *Woods* discusses a display by state actors -- uniformed correctional officers whose presence showed solidarity with the victim, a correctional officer -- not private ones. And, *Musladin* considered whether private spectator conduct was inherently or "potentially prejudicial," rather than a question of actual prejudice. *See Musladin*, 549 U.S. at 77. This court finds a recent federal circuit court decision in which a habeas petitioner challenged private spectator conduct instructive. Like Smith, the petitioner in *Turner v. McEwen*, 819 F.3d 1171 (9th Cir. 2016), relied on a "more general principle that a jury may rely only on evidence presented at trial in reaching its verdict." 819 F.3d at 1177-78. The Ninth

Circuit held that "[i]f 'state-sponsored' actions within a courtroom such as those at issue in *Williams* and *Flynn* were too dissimilar to establish law applicable to conduct by private actors in the courtroom, as the Court held in *Musladin,* then cases regarding actions outside the courtroom, such as *Turner v. Louisiana,* cannot suffice to constitute clearly established law applicable to this situation, either." *Id*. at 1178. As the Eleventh Circuit has noted, "[s]tate courts are not obligated to widen or enlarge legal rules set forth by the U.S. Supreme Court to contexts in which it has never decided." *Walker v. Hadi*, 611 F.3d 720, 723 (11th Cir. 2010) (quoting *Hawkins v. Alabama,* 318 F.3d 1302, 1307 n. 3 (11th Cir. 2003)). Smith is not entitled to habeas relief on this claim because it is not cognizable in federal habeas corpus proceedings.

P. Whether Alabama's System of Judicial Sentencing in Capital Cases Violates the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution

Smith alleges that Alabama's sentencing scheme is unconstitutional under the Sixth and Fourteenth Amendment because the judge, rather than the jury, is tasked with deciding the facts that enhance a sentence from life without parole to death. (Doc. # 1-2 at ¶ 246). Smith argues that the Alabama courts' rejection of this claim was an unreasonable application of clearly established federal law as determined by the Supreme Court in *Apprendi v. New Jersey*, 530 U.S. 466 (2000) and *Ring v. Arizona*, 536 U.S. 584 (2002).

Apprendi proscribes that "[o]ther 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." 530 U.S. at 490. *Ring* extended the rule in *Apprendi*, and held that capital defendants were entitled to a jury determination of any fact, including aggravating factors, that made them eligible for the death penalty. 536 U.S. at 598. Smith

argues that the Alabama sentencing scheme violated *Ring* in three respects: first, Alabama's sentencing structure under Ala. Code § 13A-5-45(e)-(f) violates *Ring* because the statute permits a trial judge to find facts that expose a capital defendant to greater punishment; second, Alabama law unconstitutionally allows a trial judge to increase a capital defendant's sentence from life imprisonment to death based on facts that the jury does not find beyond a reasonable doubt; and third, Alabama sentencing juries do not specifically find aggravating factors but only make sentencing recommendations. (Doc. 1-2 at 37). Respondent counters that habeas relief cannot be granted because the state court's determination was neither an unreasonable determination of, nor contrary to, Supreme Court precedent.

Smith's claim was raised and adjudicated on the merits by the Alabama Court of Criminal Appeals on state post-conviction review and is therefore exhausted for federal review. *See Smith III*, 112 So. 3d at 1150-52. The Court of Criminal Appeals found that neither *Ring* nor *Apprendi* were violated because the jury convicted Smith of kidnapping and robbery at the guilt phase and based its penalty phase finding of aggravating circumstances -- that the capital offense was committed during the course of a kidnapping and a robbery -- on the guilt phase evidence. Thus, the Court of Criminal Appeals concluded that Smith's jury made the fact findings that rendered Smith eligible for the death penalty. *Id*. at 1152.

After Smith filed his petition, the United States Supreme Court decided *Hurst v. Florida*, 136 S. Ct. 616 (2016). In *Hurst*, the Court found that Florida's capital sentencing scheme violated the Sixth Amendment because Florida's sentencing scheme entrusted the "judge alone to find the existence of an aggravating circumstance." *Id.* at 624. Following the *Hurst* decision,

Smith filed a Notice of Supplemental Authority (Doc. # 40), which attached a copy of the decision and argued that *Hurst* supports his argument that Alabama's capital sentencing scheme violates the Sixth Amendment. Following this filing, the parties each filed briefs addressing the applicability of *Hurst* to Alabama's sentencing scheme. (Docs. # 43, 44).

The State contends that *Hurst* is a decision based on *Ring*, which has no retroactive application. *See Schriro v. Summerlin*, 542 U.S. 348 (2004). As such, it argues that because the Supreme Court did not make the *Hurst* rule retroactive, it has no effect on cases such as Smith's that had become final at the time it was announced. (Doc. # 43 at 5). However, this court may consider a Supreme Court decision postdating the state judgment under review if it "made no new law" and is "illustrative of the proper application of [previously established] standards." *Wiggins v. Smith*, 539 U.S. 510, 522 (2003). The court concludes that this description aptly describes the *Hurst* decision. In *Hurst*, the *C*ourt characterized its holding as one which "applied" *Ring* to Florida's sentencing scheme. *Hurst*, 136 S. Ct. at 621-22 ("In light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment."). *Hurst* did not articulate a new rule of law; rather, it applied *Ring*'s analysis to Florida's sentencing scheme. Because this is so, for purposes of this court's review, the court must consider whether the state court unreasonably applied *Ring* here.[33]

However, while Smith's argument must be considered, it is not a successful one. This is because it is foreclosed by Eleventh Circuit precedent. *See Lee v. Comm'r, Alabama Dep't of Corr.*, 726 F.3d 1172 (11th Cir. 2013). In *Lee*, the petitioner argued that Alabama's capital sentencing scheme violated *Ring*. *Id.* at 1197. The court disagreed, and found that:

[33] To be clear, *Ring* does not apply retroactively. *Schriro*, 542 U.S. at 354. However, *Ring* was decided on June 24, 2002, while Smith's case was still pending before the Alabama courts on direct review, meaning that it is applicable to his case. *Id.* at 351 (holding that *Ring* "applies to all criminal cases still pending on direct review.").

> The holding of *Ring* is narrow: the Sixth Amendment's guarantee of jury trials requires that the finding of an aggravating circumstance that is necessary to imposition of the death penalty must be found by a jury…. *Ring* goes no further, and Lee points to no Supreme Court precedent that has extended *Ring*'s holding to forbid the aggravating circumstance being implicit in the jury's verdict or to require that the jury weigh the aggravating and mitigating circumstances.

Id. at 1198. On March 24, 2014, the Supreme Court denied certiorari review of the Eleventh Circuit's decision. *Lee v. Thomas*, 134 S. Ct. 1542 (2014). This court is bound by our Circuit's precedent, which has established that a state court's application of Alabama's capital sentencing scheme "is not contrary to or an unreasonable application of *Ring*." *Lee*, 726 F.3d at 1198.

And, *Hurst* does nothing to dispel this conclusion. Before *Hurst* was decided, Florida law required that, while the trial judge was required to give the jury's recommendation "great weight," *Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975), the judge's sentencing order "must reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Blackwelder v. State*, 851 So. 2d 650, 653 (Fla. 2003) (*per curiam*). A jury in Florida did not make specific factual findings with regard to the existence of mitigating or aggravating circumstances. *Hurst*, 136 S. Ct. at 622. Therefore, under pre-*Hurst* law in Florida, the maximum punishment a defendant "could have received without any judge-made findings was life in prison without parole." *Id.* It follows inexorably that, under the Florida scheme, a judge's determination to impose a death sentence, based on her own findings of aggravating circumstances, would violate the Sixth Amendment. *Id.*

Alabama's capital sentencing scheme is different. Indeed, as explained below, it is different enough to be distinguishable from the Florida scheme struck down in *Hurst*. Thus, even if the court were to consider *Hurst* and distinguish it from this Circuit's pronouncement in *Lee* (and to be sure, it need not), the state court's rejection of Smith's Alabama sentencing scheme claim would still not be contrary to or an unreasonable application of federal law.

To be clear, *Hurst* did not hold that judicial sentencing in capital cases is unconstitutional. Instead, the Supreme Court held Florida's capital sentencing scheme unconstitutional because it "conditioned a capital defendant's eligibility for the death penalty on findings made by the trial court and not on findings made by the jury." *Ex parte State*, 2016 WL 3364689, at *5 (Ala. Crim. App. June 17, 2016). By contrast, under Alabama's capital sentencing scheme, "a capital defendant in Alabama is not eligible for the death penalty unless at least one of the aggravating circumstances of § 13A-5-49 exists." *Id.* at *7. If the jury determines that the State has failed to prove the existence of an aggravating circumstance beyond a reasonable doubt, it is required to return a verdict assessing the penalty of life imprisonment without parole, and that finding and verdict are binding on the trial court. *Id.* As such, Alabama's capital sentencing scheme "forecloses the trial court from imposing a death sentence unless *the jury* has unanimously found beyond a reasonable doubt the existence of at least one § 13A-5-49 aggravating circumstance." *Ex parte McGriff*, 908 So. 2d 1024, 1037 (Ala. 2004).

Ring held that a capital defendant is "entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment." *Ring*, 536 U.S. at 589. In Alabama, one such fact is the finding of an aggravating circumstance, which makes a defendant eligible for the death penalty. *Hurst* found fault with Florida's scheme specifically because Florida trial judges were tasked with independently finding the existence of aggravating circumstances. *Hurst*, 136 S. Ct. at 622. However, consistent with *Ring*, Alabama juries must find an aggravating circumstance beyond a reasonable doubt before a defendant is eligible to receive the death penalty. Alabama's capital sentencing scheme does not run afoul of *Ring*, and

the state court's decision was not contrary to or an unreasonable application of the Sixth Amendment or *Ring*.[34]

Smith also contends for the first time in his reply brief, that his sentence is constitutionally flawed because the trial judge relied in part on guilt-phase findings in imposing his sentence, and because his jurors believed that they were not responsible for his sentence. Neither of these theories demonstrates that the state court acted contrary to, or unreasonably applied, federal law. In finding no constitutional defect in Alabama's capital sentencing scheme, the Eleventh Circuit has previously permitted a trial court to consider the jury's verdict at the guilt-phase when making determinations in the sentencing phase. *Lee*, 726 F. 3d at 1198.

Further, while Smith claims that his sentence violated *Caldwell v. Mississippi*, he points to no record evidence or any argument that was made that would support his claim. 472 U.S. 320 (1985). In *Caldwell*, the Supreme Court held that the following argument, made by the State, was impermissible:

> I'm in complete disagreement with the approach the defense has taken. I don't think it's fair. I think it's unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know—they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it….
>
> They said 'Thou shalt not kill.' If that applies to him, it applies to you, insinuating that your decision is the final decision and that they're gonna take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think it's unfair and I don't mind telling them so.

Id. at 325–26. No such statement was made in Smith's case, however.

[34] That trial judges in Alabama are tasked with determining whether a death penalty is an appropriate sentence is of no moment. That component of Alabama's capital sentencing scheme does not violate the Sixth Amendment. Whether a defendant is *eligible* to receive the death penalty is a determination made by the jury. Only after that determination has been made, and a defendant qualifies as eligible for the death penalty, may the trial court determine whether or not a death sentence is *appropriate*. This comports with *Ring* and the requirements of the Sixth Amendment.

It is, of course, axiomatic that neither the court nor a party may lead the sentencer to believe that the responsibility of determining the appropriateness of the defendant's death rests elsewhere. But there is simply no indication that that happened here. Smith has directed the court to no argument or statement in the record that could have led the jury to come to an improper conclusion about its role. In fact, all he offers is a statement by a juror which states that the juror assumed the judge could accept or disregard the jury's sentencing recommendation. (Doc. # 39 at 98). This is a correct statement of Alabama law, and constitutionally permissible. The state court did not act unreasonably or contrary to federal law. Accordingly, Smith's claim for relief based on Alabama's capital sentencing scheme is denied.

Q. Whether Alabama's Method of Execution Violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Smith alleges that Alabama's method of execution by lethal injection violates the Eighth Amendment. Smith challenges both the constitutionality of lethal injection itself and Alabama's lethal injection protocol, alleging further that the State has no legal alternative method to implement Smith's sentence. (Doc. # 1-2 at ¶ 250). In Smith's petition, he alleges that "[o]ne issue with lethal injection is that doctors rarely participate in the procedure." (*Id.* at ¶ 249).[35] Respondent contends that Smith's claim is not cognizable in habeas and that Smith may only challenge Alabama's execution protocol through a lawsuit filed pursuant to 42 U.S.C. § 1983. (Doc. 27 at 40).

Respondent is correct that the part of Smith's claim attacking the means by which the State intends to execute him -- lethal injection -- rather than the validity of his conviction or

[35] In his supporting brief addressing this claim, Smith adds an argument that the sedative that Alabama uses in its three-drug lethal injection protocol "pose[s] a substantial risk of inflicting cruel and unusual punishment." (Doc. # 39 at 100). This argument was not raised in the habeas petition itself, and normally, the court would require that Smith re-plead his claim for the court to consider it. However, because this argument is foreclosed from habeas review under *Glossip v. Gross* and *McNabb v. Comm'r Ala. Dep't of Corr*., 727 F.3d 1334 (11th Cir. 2013), it would be futile for Smith to amend his petition to add this allegation.

sentence, do not sound in habeas. "[H]abeas corpus law exists," the Eleventh Circuit has noted, "to provide a prisoner an avenue to attack the fact or duration of physical imprisonment and to obtain immediate or speedier release." *Valle v. Sec'y, Fla. Dep't of Corr*., 654 F.3d 1266, 1267 (11th Cir. 2011). The Supreme Court and this circuit's precedent make clear that challenges directed to execution protocols must be brought in a lawsuit under 42 U.S.C. § 1983. *Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015) ("a method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence."); *Baze v. Rees*, 553 U.S. 35 (2008); *McNabb v. Comm'r Ala. Dep't of Corr*., 727 F.3d 1334, 1344 (11th Cir. 2013) ("[a] § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures" (quoting *Tompkins v. Sec'y, Dep't of Corr*., 557 F.3d 1257, 1261 (11th Cir. 2009)). That portion of Smith's Eighth Amendment claim challenging the procedures that Alabama may use to effect his execution is, therefore, not cognizable in habeas. Smith may raise those allegations in a § 1983 action. *McNabb*, 727 F.3d at 1344. The court will, therefore, dismiss those allegations and turn to Smith's remaining challenge.

Smith challenges the *per se* constitutionality of lethal injection. (Doc. # 1-2 at ¶ 248, 250). Smith raised this claim in state postconviction proceedings. The Alabama Court of Criminal Appeals rejected Smith's claim on appeal from the denial of his Rule 32 petition, explaining that "this issue has been determined adversely to Smith's argument and he has failed to distinguish his claim from established caselaw." *Smith III*, 112 So. 3d at 1149. In his habeas corpus petition, Smith alleges that Alabama has changed its procedures for implementing lethal injection since the last reasoned state court decision, and accordingly the state court decision no longer deserves deference under §2254(d). The court disagrees.

To allege an Eighth Amendment method-of-execution claim in habeas, Smith must allege

that a risk of future harm is "'*sure or very likely* to cause serious illness and needless suffering,' and give rise to 'sufficiently *imminent* dangers.'" *Baze*, 553 U.S. at 50 (emphasis in original) (citing *Helling v. McKinney*, 509 U.S. 25, 33, 34-35 (1993)). Further, a method of execution claim must present an "objectively intolerable risk of harm." *Id.* "Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of 'objectively intolerable risk of harm' that qualifies as cruel and unusual." *Id.* Indeed, the Supreme Court has never invalidated a state's method of execution as unconstitutional under the Eighth Amendment, and has specifically upheld lethal injection as a constitutional method of execution against Eighth Amendment challenges. *Baze*, 553 U.S. at 48; *Glossip*, 135 S. Ct. at 2732-33 (affirming denial of § 1983 action alleging that Oklahoma's three-drug lethal injection protocol created an unacceptable risk of severe pain in violation of Eighth Amendment). The state courts' denial of Smith's challenge to the constitutionality of lethal injection as a means of execution thus does not constitute an unreasonable application of Supreme Court precedent.

Baze appears to leaves open the opportunity for a petitioner to offer alternatives to the challenged method of execution:

> [T]he proffered alternatives must effectively address a "substantial risk of serious harm." *Farmer, supra*, at 842, 114 S.Ct. 1970. To qualify, the alternative procedure must be feasible, readily implemented, and in fact significantly reduce a substantial risk of severe pain. If a State refuses to adopt such an alternative in the face of these documented advantages, without a legitimate penological justification for adhering to its current method of execution, then a State's refusal to change its method can be viewed as "cruel and unusual" under the Eighth Amendment.

553 U.S. at 52. However, Smith has presented no evidence regarding the purported deficiencies in Alabama's current method of execution or argument regarding possible alternative methods of execution. His contention that "Alabama now uses an untested sedative in its lethal injection

protocol" (Doc. # 39 at 100) is unsupported by any record evidence and the record simply does not present any evidence of an "objectively intolerable risk of harm." *Baze*, 553 U.S. at 50.

In summary, that portion of Smith's method-of-execution claim that challenges the implementation of Alabama's execution protocol is dismissed as lacking habeas jurisdiction. Smith's allegation challenging the validity of lethal injection as a constitutional method to impose his sentence is denied because the state court's decision is not contrary to clearly established federal law. *See* 28 U.S.C. § 2254(d)(1).

IV. Conclusion

For all these reasons, and after careful review, the court concludes that Smith's petition (Doc. # 1) is due to be denied. A separate order will be entered.

DONE and **ORDERED** this March 28, 2017.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION

WILLIE B. SMITH, III,	}	
	}	
Petitioner,	}	
	}	
v.	}	**Case No.: 2:13-CV-00557-RDP**
	}	
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	}	
	}	
Respondent.	}	

MEMORANDUM OPINION

This matter is before the court on the court's March 29, 2017 order (Doc. # 47), which reopened this action for the sole purpose of considering the effect of *Moore v. Texas*, 137 S. Ct. 1039 (2017) on the *Atkins* issue presented in this case. (*See* Doc. # 46 at 1-2). The issues raised in the court's order are fully briefed. (Docs. # 55, 56).

I. Background

Petitioner filed this § 2254 action alleging that his conviction and sentence were secured in violation of his rights under the Constitution. (*See* Doc. # 1). Among other grounds for relief, Petitioner claimed that he is intellectually disabled, and as such, ineligible for the death penalty under the Eighth Amendment. (Doc. # 1-1 at ¶¶ 108-134). The court entered a Memorandum Opinion and Final Judgment on March 28, 2017, which denied his petition for writ of habeas corpus and dismissed the petition with prejudice. (*See* Docs. # 45, 46). The court granted Petitioner a certificate of appealability on the issue of whether the Alabama Court of Criminal Appeals unreasonably applied *Atkins v. Virginia*, 536 U.S. 304 (2002), in holding that Petitioner failed to prove that he was intellectually disabled, and, thus, ineligible for the death penalty. (Doc. # 46 at 1-2).

On March 29, 2017, the court reopened this action for the purpose of considering the effect of *Moore v. Texas*, 137 S. Ct. 1039, 197 L. Ed. 2d 416 (2017). (Doc. # 47). The court directed the parties to answer five questions in their briefing of the issue:

1. Whether *Moore*'s holding(s) constitute "clearly established Federal law" that must be applied by this court when reviewing whether the Alabama Court of Criminal Appeals issued a decision contrary to clearly established law or unreasonably applying clearly established law under 28 U.S.C. § 2254(d)(1). *Cf. Kilgore v. Sec'y, Florida Dep't of Corr.*, 805 F.3d 1301, 1310-12 (11th Cir. 2015) (concluding that *Hall v. Florida*, 134 S. Ct. 1986 (2014), established a new obligation on state courts in making intellectual disability determinations that was not clearly established by *Atkins v. Virginia*, 536 U.S. 304 (2002));

2. Whether *Moore* announced a new rule of constitutional law that must be applied retroactively to this case, pursuant to *Teague v. Lane*, 489 U.S. 288 (1989). *Cf. Kilgore*, 805 F.3d at 1312-15 (concluding that *Hall*'s holding did not fall under a *Teague* exception to non-retroactivity);

3. Whether the Alabama courts unreasonably applied clearly established federal law or issued a decision contrary to clearly established federal law by failing to apply an adjustment to Smith's credible IQ score to account for the test's standard error;

4. Whether the Alabama courts unreasonably applied clearly established federal law or issued a decision contrary to clearly established federal law by considering Smith's adaptive strengths when examining whether he had sufficient adaptive deficits to be deemed intellectually disabled; and

5. Whether the Alabama courts unreasonably applied clearly established federal law or issued a decision contrary to clearly established federal law by failing to identify a clinical medical standard that they used to determine intellectual disability, such as those located in the Diagnostic and Statistical Manual of Mental Disorders or the clinical manual issued by the American Association on Intellectual and Developmental Disabilities.

(*Id.* at 1-2).

II. The *Moore* Opinion

In *Moore*, the Supreme Court vacated the Texas Court of Criminal Appeals' judgment. *Moore,* 137 S. Ct. at 1044. Moore had challenged his death sentence on the ground that he was intellectually disabled and therefore exempt from execution. *Id.* While the state habeas court

determined that Moore qualified as intellectually disabled, the Texas appellate court declined to adopt the judgment recommended by the state habeas court.[1] *Id.* The appellate court reasoned that the evidentiary factors announced in *Ex parte Briseno*, 135 S.W.3d 1 (2004) "weigh[ed] heavily" against upsetting Moore's death sentence. *Id.* (citing *Ex parte Moore*, 470 S.W.3d 481, 526 (2015)). While the state habeas court consulted current medical diagnostic standards in making its recommendation, the appellate court reaffirmed *Briseno* as binding precedent on intellectual disability issues in Texas capital cases. *Id.* at 1046 (citing *Ex parte Briseno*, 135 S.W.3d at 7).

Employing *Briseno*, the Texas appellate court discounted the lower end of the standard-error range associated with Moore's IQ scores, and determined that he had failed to prove significantly subaverage intellectual functioning. *Id.*, at 1047 (citing *Ex parte Briseno*, 135 S.W.3d at 514-19). The appellate court then reasoned that even if Moore had proven that he suffers from significantly sub-average general intellectual functioning, he failed to prove "significant and related limitations in adaptive functioning." *Id.* (citing *Ex parte Briseno*, 135 S.W.3d at 520). The appellate court credited Moore's adaptive strengths as more illustrative of his intellectual functioning than his adaptive weaknesses, and noted that the *Briseno* factors "weigh[ed] heavily" against finding that Moore's adaptive deficits were related to his intellectual functioning deficits. *Id.* (citing *Ex parte Briseno*, 135 S.W.3d at 488-89, 522-27).

However, the Supreme Court granted certiorari and found that the state appellate court's adherence to superseded medical standards and its reliance on *Briseno* did not comply with either the Eighth Amendment or the Court's precedents. *Id.* at 1053. The Court held that the state appellate court's conclusion that Moore's IQ scores established that he was not intellectually

[1] Under Texas law, the CCA, not the court of first instance, is the "ultimate factfinder" in habeas proceedings. *Moore*, 137 S.Ct. at 1044 n.2.

disabled was irreconcilable with its decision in *Hall*. *Id.* at 1049 (citing *Hall v. Florida*, 134 S. Ct. 1986, 2000 (2014)). *Hall* instructs that courts must account for an IQ test's "standard error of measurement," which the appellate court did not do.[2] *Id.*

The Court then held that the "[appellate court's] consideration of Moore's adaptive functioning also deviated from prevailing clinical standards and from the older clinical standards the court claimed to apply." *Id.* at 1050. Specifically, the Court faulted the Texas appellate court for overemphasizing Moore's perceived adaptive strengths, when the medical community focuses the adaptive-functioning inquiry on adaptive deficits. *Id.* Moreover, the Court faulted the appellate court for departing from clinical practice by improperly weighing Moore's past traumatic experiences and requiring Moore to show that his adaptive deficits were not related to "a personality disorder." *Id.* at 1051 (citing *Ex parte Moore*, 470 S.W.3d at 488, 526).

In its analysis, the Supreme Court condemned the use of the *Briseno* factors. *Id.* The *Briseno* court defined its objective as identifying the "consensus of Texas citizens" on who "should be exempted from the death penalty," reasoning that individuals with "mild" intellectual disability might be treated differently under clinical standards than under Texas' capital system. *Id.* (citing *Ex parte Briseno*, 135 S.W.3d at 6). However, the Court noted that those with "[m]ild levels of intellectual disability, although they may fall outside Texas citizens' consensus, nevertheless remain intellectual disabilities."[3] *Id.* Moreover, the Supreme Court recognized that

[2] The court stated that "Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 70, as the State's retained expert acknowledged. Because the lower end of Moore's score range falls at or below 70, the appellate court was required to consider Moore's adaptive functioning. *Moore*, 137 S.Ct. at 1049 (internal citations omitted).

[3] The Court noted that *Briseno* questions such as, "Did those who knew the person best during the developmental stage… think he was mentally retarded at that time, and, if so, act in accordance with that determination?" demonstrate the [appellate court's] improper emphasis on lay perceptions of intellectual disability, as opposed to medical and clinical standards. *Moore*, 137 S.Ct. at 1051-52.

no other state legislature approved the use of the *Briseno* factors, and Texas itself does not follow *Briseno* in contexts other than the death penalty. *Id.* at 1052.

Accordingly, the Supreme Court held that:

> By rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseno*, including the wholly nonclinical *Briseno* factors, the CCA failed adequately to inform itself of the "medical community's diagnostic framework," *Hall*, 572 U.S., at —— – ——, 134 S.Ct., at 2000. Because *Briseno* pervasively infected the CCA's analysis, the decision of that court cannot stand.

Id. at 1053.

III. Analysis

After careful review, the court concludes that Petitioner is not entitled to relief.

A. *Moore* Does Not Constitute Clearly Established Federal Law Which Governed at the Time the State Court Rendered its Decision.

Under § 2254(d)(1), federal courts must uphold a state court decision unless it is "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1). "'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court *at the time* the state court renders its decision." *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003) (emphasis added). Moreover, "[t]he Supreme Court has repeatedly held that only the actual holdings of its decisions can 'clearly establish []' federal law for § 2254(d)(1) purposes," and an opinion that merely "interprets" or "refines" a prior opinion does not constitute clearly established law under § 2254(d)(1). *Kilgore*, 805 F.3d at 1310-11 (citing *Loggins v. Thomas*, 654 F.3d 1204, 122 (11th Cir. 2011)).

Petitioner concedes that *Moore* cannot be considered "clearly established Federal law" at the time the Alabama courts heard Smith's case.[4] (Doc. # 56 at 15). Indeed, *Moore*'s holding was not set forth on the date which the Alabama Court of Criminal Appeals issued its decision. *Smith v. State*, 112 So. 3d 1108, 1116 (Ala. Crim. App. 2012).

> *Atkins* held that the execution of intellectually disabled offenders is categorically prohibited by the Eighth Amendment. Notably, *Atkins* did not define intellectual disability, nor did it direct the states on how to define intellectual disability, nor, finally, did it provide the range of IQ scores that could be indicative of intellectual disability. Rather, *Atkin*s expressly left it to the states to develop "appropriate ways to enforce the constitutional restriction" on executing the intellectually disabled.

Kilgore, 805 F.3d at 1311 (citing *Atkins*, 536 U.S. at 317). By contrast, the Court's holding in *Moore* addressed Texas' standards for how to define intellectual disability. At most, *Moore*'s holding can be construed as an application of *Hall v. Florida*, 134 S.Ct. 1986 (2014). *See Moore*, 137 S.Ct. at 1044 ("As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.'"); *Id.* at 1049 ("The [appellate court's] conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with *Hall*."). However, this Circuit has held that *Hall* was not clearly established by *Atkins*. *Kilgore*, 805 F.3d at 1311. And *Hall* was not decided until after the Alabama Court of Criminal Appeals entered the relevant decision in this case. Accordingly, *Moore* does not constitute clearly established federal law which governed at the time the state court rendered its decision.

[4] To be clear, Petitioner's concession comes with two caveats. First, Petitioner "respectfully disagrees with the decision in *Kilgore*, but recognizes *Kilgore* is the controlling legal authority in the Eleventh Circuit." (Doc. # 56 at 14). Second, the Supreme Court recently granted *certiorari*, vacated judgment and remanded two cases back to the Fifth Circuit "for consideration in light of *Moore*." *Martinez v. Davis*, 581 U.S. ___ (2017) (No. 15-7974); *Henderson v. Davis*, 581 U.S. ___ (2017) (No. 16-6445). Petitioner contends that the court should consider *Moore* as clearly established law to the extent that the two remands (referenced above) might be construed as a finding that *Moore* constituted clearly established federal law as of May 25, 2012. (Doc. # 56 at15 n. 2).

B. *Moore* Did Not Announce a New Rule of Constitutional Law that Must Be Applied Retroactively

A petitioner is not entitled to federal habeas relief when he relies on a "new rule" of federal law, unless certain exceptions are met. *Kilgore*, 805 F.3d at 1312 (citing *Lambrix v. Singletary*, 520 U.S. 518, 527 (1997)). "[A] case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final." *Teague v. Lane*, 489 U.S. 288, 301 (1989). New *substantive* rules generally apply retroactively. *Schriro v. Summerlin*, 542 U.S. 348, 352 (2004). And "'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding" apply retroactively. *Id.* (citing *Saffle v. Parks*, 494 U.S. 484, 495 (1990)).

Here, Petitioner argues that *Moore* announced a new substantive rule which should apply retroactively. "Substantive rules include 'rules forbidding criminal punishment of certain primary conduct,' as well as 'rules prohibiting a certain category of punishment for a class of defendants because of their status or offense.'" *Montgomery v. Louisiana*, 136 S. Ct. 718, 728, 193 L. Ed. 2d 599 (2016) (citing *Penry v. Lynaugh*, 492 U.S. 302, 330 (1989); *Teague*, 489 U.S. at 307). Petitioner contends that *Moore* should apply retroactively because "the same person engaging in the same conduct is no longer subject to" the punishment at issue. *Welch v. United States*, 136 S.Ct. 1257, 1265 (2016). The court disagrees.

First, *Kilgore*'s analysis regarding the retroactivity of *Hall* is instructive here:

> Since *Hall*'s holding undeniably is "new," we turn to Kilgore's claim that it meets the first *Teague* exception—that it prohibits the imposition of a certain type of punishment for a class of defendants because of their status or offense. Applying this exception, the Supreme Court has said that a rule prohibiting "the execution of [intellectually disabled] persons ... would be applicable to defendants on collateral review" because "a new rule placing a certain class of individuals beyond the State's power to punish by death is analogous to a new rule placing certain conduct beyond the State's power to punish at all." *Penry v. Lynaugh*, 492 U.S. 302, 330, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). Thus, when *Atkins* later

> held that "an exclusion for the [intellectually disabled] is appropriate," 536 U.S. at 319, 122 S.Ct. 2242, we recognized that *Atkins* established a new rule of constitutional law. We concluded that "the new constitutional rule abstractly described in *Penry* and formally articulated in *Atkins* is retroactively applicable to cases on collateral review." *In re Holladay*, 331 F.3d at 1173.
>
> But the same result does not hold true for *Hall*, which merely provides new procedures for ensuring that states follow the rule enunciated in *Atkins*. As we held in *In re Henry*, *Hall* did not expand the class of individuals protected by *Atkins*'s prohibition. *In re Henry*, 757 F.3d at 1161. Rather, *Hall* created a procedural requirement that those with IQ test scores within the test's standard of error would have the opportunity to otherwise show intellectual disability. *Hall* guaranteed only a chance to present evidence, not ultimate relief. Therefore, as we recognized in *In re Henry*, *Penry* in no way dictated that the rule announced in *Hall* is retroactive to cases on collateral review. *See id.*

Kilgore, 805 F.3d at 1314. *Kilgore*'s analysis of *Hall* applies equally here. In *Moore*, the Supreme Court dealt with the "procedural requirement[s]" associated with the Texas appellate court's determination of a petitioner's disability – it did not expand the class of individuals protected by *Atkins*. As with *Hall*, *Moore* did not guarantee relief for a new class of individuals not previously protected by *Atkins*. To the contrary, *Moore* condemned the particular procedure and analysis used by the Texas appellate court, and held that courts must account for a test's "standard error of measurement" and make intellectual disability determinations which are informed by the medical community's diagnostic framework. *Moore*, 137 S.Ct. at 1048-53.

Second, to the extent that *Moore* is viewed as an application of *Hall*, it cannot apply retroactively. As addressed above, the Court, in *Moore*, cited *Hall* in support of its holdings.[5] *See id.* at 1044 ("As we instructed in *Hall*, adjudications of intellectual disability should be 'informed by the views of medical experts.'"); *Id.* at 1049 ("The [appellate court's] conclusion that Moore's IQ scores established that he is not intellectually disabled is irreconcilable with

[5] The findings that (1) *Moore*'s holding was not clearly established law at the time of the Alabama Court of Criminal Appeals' ruling, and (2) *Moore* can be viewed as an application of *Hall* are not contradictory. As addressed above, *Hall* was decided *after* the Alabama Court of Criminal Appeals rendered its operative decision.

Hall."). And, this Circuit has already held that *Hall* does not apply retroactively. *Kilgore*, 805 F.3d at 1316.

Finally, *Moore* did not announce a "watershed" rule which would fall under *Teague*'s second exception to non-retroactivity.[6] "To fall within this exception, a new rule must meet two requirements: Infringement of the rule must seriously diminish the likelihood of obtaining an accurate conviction, and the rule must alter our understanding of the bedrock procedural elements essential to the fairness of a proceeding." *Tyler v. Cain*, 533 U.S. 656,665 (2001) (quotation and emphasis omitted). This exception "is so tight that very few new rules will ever squeeze through it." *Howard v. United States*, 374 F.3d 1068, 1080 (11th Cir. 2004). As our Circuit has recognized, "[t]he presentation of evidence by a defendant seeking to establish intellectual disability does not meet this standard." *Kilgore*, 805 F.3d at 1314. Accordingly, *Moore* does not meet any of the *Teague* exceptions to non-retroactivity, and does not apply retroactively in this case.

C. The Alabama Courts Did Not Unreasonably Apply Clearly Established Federal Law or Issued a Decision Contrary to Clearly Established Federal Law

Because *Moore* was not clearly established federal law at the time the Alabama Court of Criminal Appeals entered its decision, and because *Moore* does not apply retroactively, the state courts did not unreasonably apply clearly established federal law in failing to consider "margin of error" when examining Petitioner's IQ score. As addressed in the court's March 28, 2017 opinion, *Atkins* does not prohibit such a determination, and only when *Hall* was decided did federal law "change[] course" by requiring states to recognize a margin of error when assessing IQ scores. (Doc. # 45 at 56 (citing *Kilgore*, 805 F.3d at 1311)). While *Moore* cited *Hall* for the

[6] Petitioner does not argue that *Moore* announced a "watershed" procedural rule. (*See generally* Doc. # 56). However, having found that any new rule announced by *Moore* is procedural rather than substantive, the court addresses the second *Teague* exception.

premise that the Texas appellate court erred by failing to account for the IQ test's standard error of measurement, *Moore*, 137 S.Ct. at 1049, federal law imposed no such obligation on the Alabama Court of Criminal Appeals at the time it rendered its decision. Accordingly, *Moore* provides no relief to Petitioner with respect to the state court's determination not to account for standard error of measurement.

Similarly, the state court did not unreasonably apply clearly established federal law by considering Petitioner's adaptive strengths when examining whether he had sufficient adaptive deficits. In *Moore*, the Court faulted the lower court for "overemphasiz[ing] Moore's perceived adaptive strengths." *Moore*, 137 S.Ct. at 1050. The Court noted that "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*," and referenced *Hall* for the proposition that the intellectual-disability determination must be "informed by the medical community's diagnostic framework. *Id.* at 1048, 1050. However, as addressed above, the Alabama courts were not bound by this holding at the time they heard Petitioner's case, and the holding is not retroactive.

Moreover, the Alabama Court of Criminal Appeals' holding is distinguishable from the situation presented in *Moore*. *Moore* did not condemn *any* reference to adaptive strengths included in the intellectual-disability analysis, and instead only noted the medical community's emphasis on deficits in adaptive functioning and cautioned against overemphasis of perceived adaptive strengths. Here, the parties presented the state courts with conflicting test scores regarding Petitioner's adaptive functioning. (State Court Record, Vol. 34, Tab-74 at 7-9). In light of this conflicting evidence, it was reasonable for the Alabama Court of Criminal Appeals to look to Petitioner's demonstrated adaptive abilities (or lack thereof) to reconcile the test scores and determine which ones were credible. Such a determination does not run afoul of *Moore*.

Finally, the state court did not unreasonably apply clearly established federal law by failing to identify the clinical medical standard used to determine intellectual disability. As addressed above, *Moore* was not clearly established federal law at the time of the Alabama courts' decisions, and does not apply retroactively in this case. Moreover, *Moore* imposes no specific requirement that courts identify the clinical medical standard that they apply – it simply requires that a court's determination must be "informed by the medical community's diagnostic framework." *Moore*, 137 S.Ct. at 1048 (quoting *Hall*, 134 S.Ct. at 2000). Indeed, the *Briseno* factors addressed in *Moore* were in many ways unique. The factors sought to identify the "consensus of Texas citizens" on who "should be exempted from the death penalty." *Id.* at 1051 (citing *Briseno*, 135 S.W.3d at 6). The Alabama courts did not operate under such a standard, and even if *Moore* applied to analysis of this case (and, to be sure, it does not) the court cannot say that state courts unreasonably applied clearly established federal law.

IV. Conclusion

Smith's petition, which the court reopened for limited consideration, is due to be denied. A separate order will be entered.

DONE and **ORDERED** this July 21, 2017.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

Inc., 919 So.2d 1186, 1192 (Ala.Civ.App. 2005) (citing *Estelle v. Gamble*, 429 U.S. 97, 105–06, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)). However, as the court in *King* also noted:

> " '[D]eliberate indifference to serious medical needs of prisoners constitutes the "unnecessary and wanton infliction of pain," ' and is a violation of the Eighth Amendment right to be free from cruel and unusual punishment. *Estelle v. Gamble*, 429 U.S. 97, 104, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976). Deliberate indifference can be manifested by prison personnel intentionally denying or delaying access to medical care, by prison personnel interfering with prescribed treatment, *or by prison doctors responding indifferently to a prisoner's medical needs*. *Estelle*, 429 U.S. at 104–05, 97 S.Ct. 285."

King, 919 So.2d at 1192 (emphasis added). *Cf. Bedsole v. Clark*, 33 So.3d 9, 15 (Ala. Civ.App.2009) (summary judgment was proper as to a physician against whom a claim of deliberate indifference had been alleged when inmate presented no evidence indicating that the physician had acted with deliberate indifference in rendering treatment to the inmate).

Being mindful of our duty to view the allegations in Murray's pleadings most strongly in his favor and that a Rule 12(b)(6) dismissal " ' "is proper only when it appears beyond doubt that the plaintiff can prove no set of facts in support of the claim that would entitle the plaintiff to relief," ' " we conclude that, in alleging that PHS denied or delayed medical treatment to him, Murray has set forth a valid claim of deliberate indifference. *Crosslin*, 5 So.3d at 1195 (emphasis omitted). In reaching this conclusion, we do not consider whether Murray will ultimately prevail on his claim, only whether he might possibly prevail. *Id.* However, because Murray set forth a valid claim of deliberate indifference against PHS, the trial court erred in dismissing that claim as well.

For the reasons set forth above, we affirm that portion of the judgment dismissing Murray's claim of medical malpractice. However, we reverse the judgment as to the claims seeking to compel medical treatment and asserting that PHS acted with deliberate indifference in denying or delaying needed medical treatment. The cause is remanded to the trial court for further proceedings consistent with this opinion.

AFFIRMED IN PART; REVERSED IN PART; AND REMANDED.

THOMPSON, P.J., and PITTMAN, THOMAS, and MOORE, JJ., concur.

BRYAN, J., concurs in the result, without writing.

Willie B. SMITH III

v.

STATE of Alabama.

CR–08–1583.

Court of Criminal Appeals of Alabama.

May 25, 2012.

Rehearing Denied Aug. 10, 2012.

Background: Following affirmance of capital-murder conviction and death sentence, 838 So.2d 413, petitioner sought postconviction relief. The Circuit Court, Jefferson County, No. CC–92–1289.60, J. William Cole, J., denied petition. Petitioner appealed.

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

(1) although petitioner suffered from some mental deficiencies, petitioner was not mentally retarded as would bar imposition of death penalty;

(2) petitioner failed to establish ineffective assistance based on the State's alleged administration of antipsychotic medication to him during trial;

(3) petitioner failed to establish ineffective assistance in presentation of mitigation evidence;

(4) petitioner was not deprived of adequately experienced counsel at trial;

(5) imposition of death penalty did not violate *Apprendi* and *Ring* following convictions for capital murder for committing intentional murder during the course of a robbery and a kidnapping; and

(6) requirement that jury be allowed to determine facts that might increase defendant's sentence did not apply to determination of mitigating circumstances that could decrease sentence.

Affirmed.

Certiorari denied, Ala., 112 So.3d 1152.

1. Criminal Law ⚿1156.11
Sentencing and Punishment ⚿1793

Although the standard of proof to have been met by postconviction petitioner in order to prove that he was entitled to relief from death penalty because he was mentally retarded was a preponderance of the evidence, the circuit court's findings are reviewed for whether the court abused its discretion by denying relief. U.S.C.A. Const.Amend. 8; Rules Crim.Proc., Rule 32.3.

2. Criminal Law ⚿1147

A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision.

3. Sentencing and Punishment ⚿1793

Capital-murder defendant was not mentally retarded, and thus imposition of death sentence did not violate Eighth Amendment prohibition on cruel and unusual punishment; although defendant scored 64 on one intelligence-quotient (IQ) test and suffered with some mental deficiencies, defendant scored 72 on another IQ test, two experts testified that defendant was not mentally retarded, defendant demonstrated extensive post-crime planning, there was no testimony regarding demonstrated deficiencies in defendant's adaptive functioning, and in numerous test categories defendant tested in the average range or above average. U.S.C.A. Const. Amend. 8.

4. Sentencing and Punishment ⚿1642

Trial court considering capital defendant's claim of mental retardation, as would bar imposition of death penalty, was not required to find that defendant's intelligence-quotient (IQ) scores should be lowered pursuant to the "Flynn Effect," which posited that IQ scores rose over time and that IQ tests that did not adjust for rising IQ levels would overstate a testee's IQ. U.S.C.A. Const.Amend. 8.

See publication Words and Phrases for other judicial constructions and definitions.

5. Sentencing and Punishment ⚿1642

Trial court considering capital defendant's claim of mental retardation, as would bar imposition of death penalty, was not required to apply a margin of error in determining defendant's intelligence quotient (IQ).

6. Sentencing and Punishment ⚿1642

Although it is true that as a threshold matter the psychological evaluator must determine that the defendant was deficient in at least two areas of adaptive behavior to be considered mentally retarded as would bar imposition of death penalty, these shortcomings are not evaluated in a vacuum; even where there are indications of shortfalls in adaptive behavior, other relevant evidence may weigh against an overall finding of deficiency in this area. U.S.C.A. Const.Amend. 8.

7. Sentencing and Punishment ⚿1793

Psychological experts' testimony in postconviction proceedings that capital defendant was not mentally retarded, and thus eligible for the death penalty, did not violate the rule prohibiting testimony as to the ultimate issue. U.S.C.A. Const. Amend. 8; Rules of Evid., Rule 702(a).

8. Sentencing and Punishment ⚿1793

Testimony from a clinical psychologist is admissible in evaluating mental retardation as would bar imposition of death penalty. U.S.C.A. Const.Amend. 8.

9. Criminal Law ⚿470(2), 474

An expert may testify as to mental deficiency or illness in Alabama as an exception to the ultimate-issue rule. Rules of Evid., Rule 702(a).

10. Criminal Law ⚿1128(2)

The record on appeal cannot be enlarged or supplemented by an appendix to the appellant's brief.

11. Criminal Law ⚿1112, 1128(2)

Argument in brief reciting matters not disclosed by the record cannot be considered on appeal, and the record cannot be impeached on appeal by statements in brief, by affidavits, or by other evidence not appearing in the record.

12. Criminal Law ⚿627.8(6)

Capital-murder defendant was not prejudiced as a result of delay in State's disclosure of psychological expert's test results on the issue of mental retardation as would bar imposition of death penalty, and thus was not entitled to exclusion of test results; prosecutor argued that the defense knew the results of the evaluation, and court had given defense counsel permission to have defendant evaluated again by an expert, but counsel decided against such action.

13. Criminal Law ⚿627.5(2)

Discovery matters are within the sound discretion of the trial judge.

14. Criminal Law ⚿1148

Trial court's judgment on discovery matters will not be reversed absent a clear abuse of discretion and proof of prejudice resulting from the abuse.

15. Criminal Law ⚿1159.2(1), 1159.4(2)

Questions regarding weight and credibility determinations are better left to the circuit courts, which have the opportunity to personally observe the witnesses and assess their credibility.

16. Criminal Law ⚿1158.1

Appellate court reviews the circuit court's findings of fact for an abuse of discretion.

17. Criminal Law ⚿1042.7(2)

Postconviction petitioner could not properly raise on appeal claim that antipsychotic medication involuntarily administered to him prior to trial prevented him from interacting with his counsel, where petitioner did not raise such claim in postconviction petition. Rules Crim.Proc., Rule 32.1 et seq.

18. Criminal Law ⚿1429(2)

Postconviction petitioner was precluded from raising claim that antipsychotic

medication involuntarily administered to him prior to trial violated his right to fair trial because it made him appear emotionless and remorseless and prevented him from contributing to his defense, where claim could have been raised at trial or on direct appeal. Rules Crim.Proc., Rule 32.2(a)(3, 5).

19. Criminal Law ⚿1429(2)

Postconviction petitioner was precluded from raising claim that antipsychotic medication involuntarily administered to him prior to trial violated his right to due process, where claim could have been raised at trial or on direct appeal. U.S.C.A. Const.Amend. 14; Rules Crim. Proc., Rule 32.2(a)(3, 5).

20. Criminal Law ⚿1959

Capital-murder defendant failed to establish that trial counsel rendered ineffective assistance by failing to investigate the State's administration of antipsychotic medication to him during trial or to object to its administration; there was no evidence that counsel knew or should have known that defendant had been administered the drug, there was no affirmation in the record that defendant had been given the drug, and prosecutor's comments on defendant's lack of remorse were not based only on his demeanor at trial, but also on his behavior at the time of offense. U.S.C.A. Const.Amend. 6.

21. Criminal Law ⚿1888

Judicial scrutiny of counsel's performance must be highly deferential. U.S.C.A. Const.Amend. 6.

22. Criminal Law ⚿1870

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. U.S.C.A. Const. Amend. 6.

23. Criminal Law ⚿1871

A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. U.S.C.A. Const.Amend. 6.

24. Criminal Law ⚿1870

A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. U.S.C.A. Const.Amend. 6.

25. Criminal Law ⚿1880

In determining the reasonableness of counsel's challenged conduct, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. U.S.C.A. Const.Amend. 6.

26. Criminal Law ⚿1882

A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment; the court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance. U.S.C.A. Const.Amend. 6.

27. Criminal Law ⚿1871

Counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. U.S.C.A. Const.Amend. 6.

28. Criminal Law ⚿1960

Counsel for capital-murder defendant is required to make only a reasonable in-

vestigation into mitigation evidence and is not required to investigate every possible defense. U.S.C.A. Const.Amend. 6.

29. Criminal Law ⚿1961

Capital-murder defendant failed to establish that trial counsel rendered ineffective assistance by failing to present evidence of his mental illness and retardation; trial court found defendant's low intelligence and his mild retardation to be nonstatutory mitigating circumstances as to his sentence, counsel investigated defendant's mental condition, conferring with a psychologist on a number of occasions and speaking with a psychiatric social worker, defense case involved attempting to impeach testimony of codefendant, and evidence of guilt was overwhelming. U.S.C.A. Const.Amend. 6.

30. Criminal Law ⚿1884

Debatable trial tactics generally do not constitute ineffective assistance of counsel. U.S.C.A. Const.Amend. 6.

31. Criminal Law ⚿1961

The existence of alternative or additional mitigation theories generally does not establish ineffective assistance of counsel in capital-sentencing proceedings. U.S.C.A. Const.Amend. 6.

32. Criminal Law ⚿1959

Capital-murder defendant was not deprived of adequately experienced counsel, even though defendant's trial was the first trial experience for cocounsel, who conducted the investigation for sentencing and presented certain evidence during sentencing phase; defendant's lead counsel had the requisite experience and was present for guilt phase and penalty phase of trial, and lead counsel gave the closing argument to the jury at the penalty phase. Code 1975, § 13A–5–54.

33. Sentencing and Punishment ⚿1780(2)

A prosecutor may properly comment on a capital-murder defendant's lack of remorse.

34. Criminal Law ⚿1433(2)

Postconviction petitioner was precluded from raising *Batson* claim, where claim was raised and addressed both at trial and on appeal. Rules Crim.Proc., Rule 32.2(a).

35. Criminal Law ⚿1901

Postconviction petitioner insufficiently pleaded and presented claim that counsel was ineffective in the handling of *Batson* claims in capital-murder prosecution; although requesting that procedurally barred *Batson* claims be reviewed as claims of ineffective assistance of counsel, petitioner failed to indicate how counsel performed ineffectively, and petitioner failed to cite any authority to support his claim of ineffectiveness. U.S.C.A. Const. Amend. 6; Rules App.Proc., Rule 28(a)(10).

36. Jury ⚿34(9)

Imposition of death penalty did not violate capital-murder defendant's right to jury; jury specifically found that murder was committed during the course of a robbery and during a kidnapping, thus establishing aggravating circumstance of committing a capital offense while engaged in the commission of a kidnapping and robbery. U.S.C.A. Const.Amend. 6; Code 1975, § 13A–5–49(4).

37. Jury ⚿34(6)

Other than the fact of a prior conviction, it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed, and such facts must be established by proof beyond a reasonable doubt. U.S.C.A. Const.Amend. 6.

38. Jury ⇨34(9)

Requirement that jury be allowed to determine facts that may increase defendant's sentence did not apply in capital prosecution to sentencing court's determination that the mitigating circumstance of impairment caused by emotional or mental disturbance, which could decrease sentence, did not exist. U.S.C.A. Const. Amend. 6.

Kathryn Roe Eldridge, Birmingham; Hugh A. Abrams, Chicago, Illinois; and Tung T. Nguyen, Dallas, Texas, for appellant.

Troy King and Luther Strange, attys. gen., and Jon Hayden, asst. atty. gen., for appellee.

BURKE, Judge.

Willie B. Smith III appeals the circuit court's denial of his Rule 32, Ala. R.Crim. P., petition for postconviction relief challenging his May 7, 1992, conviction of two counts of capital murder and the resulting sentence of death. Smith was convicted of the intentional murder of Sharma Ruth Johnson during a kidnapping, § 13A–5–40(a)(1), Ala.Code 1975, and the intentional murder of Sharma Ruth Johnson during a robbery, § 13A–5–40(a)(2), Ala.Code 1975. The facts of this case are set out in this Court's opinion on return to remand. *See Smith v. State,* 838 So.2d 413, 421–25 (Ala. Crim.App.2002). Briefly, Smith was convicted of abducting the female victim from the automatic teller "ATM" site of a bank, with the aid of an accomplice who approached the victim from her front passenger's window, and inquired as to the location of a Krystal's Hamburger restaurant. Smith then approached the vehicle at the front driver's window, armed with a gun, and forced the victim into the trunk. After driving away in the vehicle, he returned to the ATM. He forced the victim to provide her password and used the victim's debit card to withdraw funds. A surveillance camera recorded Smith using the victim's card. He drove around with her in the trunk, taunting her with sexual threats when she cried for help. After picking up another passenger, he drove her to a cemetery where he shot her execution-style. Smith abandoned the car, but later returned to the car and burned it. He admitted committing the offense to other witnesses, one of whom was an informant who was wired when Smith made the admission.

On appeal, this Court remanded this case, pursuant to *J.E.B. v. State,* 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994), for a hearing to be held and the prosecutor to come forward with his reasons for striking female veniremembers. The trial court was thereafter to determine whether the prosecutor had removed females from the jury in a discriminatory manner. *Smith v. State,* 698 So.2d 1166 (Ala.Crim. App.1997). On return to remand, this Court affirmed the trial court's judgment, *Smith v. State,* 838 So.2d 413 (Ala.Crim. App.2002), and the Alabama Supreme Court denied certiorari review on June 28, 2002. On December 16, 2002, Smith's petition for a writ of certiorari to the United States Supreme Court was denied.

Smith filed a Rule 32 petition on August 1, 2003, and, following a motion by the State arguing that certain of his claims were insufficiently pleaded, he was granted leave to amend his petition. The State also filed a motion to dismiss certain of Smith's claims that presented no material issue of law or fact and an answer responding to each of Smith's claims. Smith responded to the State's filing, and the State in turn responded to Smith's response.

Smith filed an amended Rule 32 petition on May 31, 2005. Smith's appellate counsel's motion to withdraw was granted and new appellate counsel was appointed. The State filed an answer to Smith's claims and a motion to dismiss certain claims that were procedurally barred, insufficiently pleaded, or failed to present any material issue of fact or law, pursuant to Rules 32.3, 32.6(b), and 32.7(d), Ala. R.Crim. P. The State also filed a motion to conduct a mental evaluation of Smith.

Smith filed his second amended Rule 32 petition on November 26, 2007. The State filed an answer to Smith's second amended petition, responding to each claim and concluding that relief should be denied on all claims except his claim that he is mentally retarded. The State acknowledged that an evidentiary hearing should be held as to that claim.[1] One of Smith's attorneys was then allowed to withdraw and Smith filed a response to the State's answer, arguing that he was entitled to a hearing; that the "Flynn Effect" indicated that he was retarded; that he was entitled to discovery concerning his retardation, his mental- and physical-health history, and his ineffective-assistance-of-counsel claims; that the effects of his allergic reaction to Haldol prejudiced him at trial during both the guilt phase and the penalty phase; and that his ineffective-assistance claims were not insufficiently pleaded because the State had not provided him with the necessary requested records.

On November 12, 2008, a hearing was held as to Smith's claims in his second amended Rule 32 petition. Smith's counsel stated that evidence would be presented concerning only those issues raising factual disputes. Smith asked that the court simply rule as to the remaining issues, which raised only questions of law and whether they were precluded or insufficiently pleaded. The court indicated that it would do so after the hearing. The two basic issues presented at the hearing concerned claims of ineffective assistance of trial counsel and whether Smith was mentally retarded.

As to his claims of ineffective assistance of counsel, Smith introduced a declaration from one of his five counsel representing him at the hearing, stating that she had made diligent efforts to obtain the testimony of Smith's lead trial counsel. She had contacted him by telephone in Florida, but he had indicated that he was unwilling to return to Alabama to testify concerning his representation of Smith. However, the attorney who had assisted in representing Smith, and who was notably responsible for representing him during the penalty phase, testified at the hearing. She stated that she had been admitted to the Alabama State Bar eight months before Smith's trial and that his trial had been her first trial as a practicing attorney. She had been hired by Smith's lead counsel, who had already been working on Smith's case. She stated that during the guilt phase, she "was observing and assisting [lead counsel] in any way necessary." (R. 39.) She did not present evidence or examine witnesses during that time.

She testified that her role during the penalty phase, however, was to interview witnesses beforehand and then to examine them at trial. She further stated that lead counsel had discussed the relevance of various mitigating factors with her and had presented half of the closing argument. She stated that she had interviewed people in the community and family members but did not interview any experts. She ac-

1. The United States Supreme Court's decision in *Atkins v. Virginia,* 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), was not released until after Smith's conviction and sentencing. *See Morrow v. State,* 928 So.2d 315 (Ala.Crim.App.2004).

knowledged that the court had ordered a competency test to be performed on Smith before trial by Dr. C.J. Rosecrans. Smith's lead counsel had retained a psychologist, Dr. Alan Blotcky, to evaluate Smith, and the witness stated that she believed that she also had met with Dr. Blotcky. Dr. Blotcky's report, following administering the test pursuant to the Wechsler Adult Intelligence Scale Revised (WAIS–R), indicated that Smith had a verbal IQ of 75, placing him in the borderline range of intelligence. Smith's attorney testified that she did not believe that any full IQ testing or any other psychological, intelligence, or drug testing had been performed on Smith.

On cross-examination, the witness recalled that a clinical psychologist, Dr. Allen Shealy, had been retained by the defense to aid in jury selection. She also testified that she had attempted to obtain Smith's school records because he had indicated that he had been in special-education classes. Because the school no longer had the records, the assistant principal had been called to testify at the penalty phase. She testified that the fee declarations indicated that the lead counsel had also spoken to a psychiatric social worker whom the witness believed to be Donna Click, who had worked at the jail. Smith never complained to the witness of having been "given stuff at the jail that made him not feel right." (R. 61.) She stated that the lead counsel had been with her during the guilt and penalty phases and that she had discussed the interviews that she had completed with him. However, she complained that the lead counsel had not been very helpful. The prosecutor noted that the witness had presented testimony that Smith had a severe drug problem from the age of 17 and that he had had a difficult childhood.

Dr. Karen Lee Salekin testified that she administered the Stanford–Binet Intelligence Skills, Fifth Edition (Stanford–Binet), test to Smith. She also administered the Scales of Independent Behavior–Revised (SIB–R) test to Smith's family members concerning what skills he reflected at age 17. She testified that the SIB–R test indicated that Smith had an overall score of 67, indicating that it would be very difficult for him to participate in age-appropriate activities. He also scored a 61 as to motor skills, which score raised the same implications of limited ability. He was also limited as to social interaction and communications skills, and limited to age-appropriate level (which category does not indicate that functioning in this area was as "difficult") as to community-living skills. (R. 80.)

Dr. Salekin testified that the "Flynn Effect" "is a gradual increase in measured IQ score over the course of time" and indicates "that each year there's an increase in IQ score by .3, leading to a three-point increase in measured IQ in a ten-year span." (R. 81.) On cross-examination, the prosecutor elicited testimony that the manual used by psychiatrists and psychologists to diagnose mental conditions does not recommend adjusting IQ scores to conform to the "Flynn Effect." Dr. Salekin further acknowledged that there was no national consensus about whether the "Flynn Effect" should be applied to IQ tests.

Moreover, the prosecutor also elicited testimony from Dr. Salekin that a drawback of the SIB–R was that it was reliant upon the memory of the test taker. In this case, Dr. Salekin had testified as to Smith's score pursuant to the testing of Smith's brother, who had been in prison since 1993 or 1994 and who had had no contact with Smith; therefore he was relying on 30-year-old memories of Smith. She further acknowledged that she had

gotten different results as to Smith when she administered the SIB–R test to Smith's mother.[2] She acknowledged that the test "was not normed for individuals to take ... thirty years later to reach into their memories and try to remember these things from so long ago." (R. 96.)

The prosecutor then introduced evidence that Dr. Salekin had also administered the Woodcock Johnson III test to Smith, which relates directly to school functioning in order to assess mental retardation. Smith had scored either one standard below the mean, in the mean, or slightly above average in each category. A number of these categories fell outside (above) the range for even mild mental retardation. Dr. Salekin further testified that drug and alcohol abuse, rather than mental retardation, could affect adaptive functioning. Finally, Dr. Salekin testified that she was retained to do a mitigation evaluation and an *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), evaluation. She concluded that Smith did not suffer from mental retardation.

Dr. Daniel Marson, a clinical neuropsychologist, conducted an evaluation of Smith to determine if there were any cognitive deficits or emotional and personality issues present and, if so, to relate them to possible neurological injuries Smith may have sustained. As to some of the categories for which Smith was tested, he scored in the low average to mildly deficient range, and Dr. Marson stated that "there's an indication that he has trouble learning new material." (R. 136.) As to the tests concerning his personality, mood, and emotions, he scored as severely impaired. On cross-examination, the prosecutor pointed out that there were tests on which Smith had performed in the average range or the borderline between the average and above-average range.

Dr. William Alexander Morton, Jr., a professor of pharmacy practice and a clinical social professor of psychiatry, testified that his specialty was psychopharmacology, which concerns prescribed drugs for psychiatric disorders and other medicines that might have psychiatric effects, as well as illicit substances that affect the brain. He testified that he reviewed Smith's medical records, school records, and his trial transcript. He also spoke on the phone with Smith's mother and sister, and interviewed Smith. Morton testified that Smith had reported to him that he was allergic to Haldol, which is an antipsychotic medication. He explained that Haldol "settles one down" and reduces the brain's activity. (R. 171–72.) One of Smith's counsel introduced some medical records from Holman Correctional Facility in which Smith had reported that his tongue was thick and that he was having difficulty breathing, and that he had previously taken medicine, including Haldol, at the prison. The records indicated that his tongue appeared thick but that no respiratory distress was noted. However, Dr. Morton testified that the records indicated that he was under distress due to "significant side effects" and had to be treated for about a week to reverse these side effects. (R. 179.) Dr. Morton testified that the effects of Haldol can include difficulty breathing and muscular difficulties, as well as making a person "be relatively unexpressive and uninvolved." (R. 184.) He testified that Haldol can make a person appear to lack emotion, speak in a flat monotone, and be less spontaneous. When referred to other evaluations of Smith, including the competency report, Dr. Morton testified that Haldol could have affected Smith's

2. The testing of Smith's brother placed Smith, who was 17, at a skill level of 12 years and 8 months, whereas Smith's mother's testing placed him at 15 years and 3 months.

aloof and detached responses. Smith's counsel then pointed to two portions of the prosecutor's closing argument from trial in which he had stated that he did not see any remorsefulness from Smith and that Smith had no compassion. Dr. Morton testified that, based on conversations with Smith's mother and sister, Smith appeared to be under the influence of Haldol at trial.

On cross-examination, Dr. Morton acknowledged that he did not have any medical record indicating that Smith had been prescribed Haldol by a doctor. Moreover, an Inpatient Progress Notes document contained a notation that the files had been reviewed to determine whether Smith had been given Haldol, and they [3] had found no indication of that. The prosecutor also verified through Dr. Morton that those records were posttrial and would not have been available to him at trial. The record in which Smith complained of a thick tongue and inability to breathe was dated months after trial, and Dr. Morton verified that those symptoms would have manifested within a few days of taking Haldol and may have recurred for a few weeks. Dr. Morton further acknowledged that it was possible that severe abuse of alcohol and cocaine, as admitted by Smith, might result in effects similar to those caused by Haldol.

Following Dr. Morton's testimony, Smith renewed a motion to have an evaluation of Smith by Dr. C. Van Rosen using the newest Wechsler Adult Intelligence Scale (WAIS) test and to have the test made part of the record following the hearing, or to reopen the hearing thereafter to allow the State to cross-examine the person who administered the test. The prosecutor responded by requesting a ruling by the court as to the issue of retardation and arguing that Dr. Salekin had testified that Smith was not retarded and that Dr. Morton's testimony did not address retardation. Moreover, the prosecutor contended that another test, the newest test, was not necessary.

Smith's counsel responded that they believed that they had met their burden of proof as to mental retardation and that they were further raising other issues of mental incapacity, such as the administration of Haldol. The court ruled that the testing by Dr. Van Rosen was allowed and the results should be submitted to the State as well as defense and that the State would be given time to evaluate the results. The results were then to be made a part of the record by affidavit.

Smith put in the record a copy of "The Alabama Lawyer," a publication of the Alabama State Bar, that indicated that Smith's lead trial attorney had been disbarred. Smith also requested to listen to a tape of a confidential informant's conversation with Smith that had been recorded outdoors and that was partially inaudible. A transcript of the tape had been admitted at trial. Smith argued that they were given the tape only eight days before the hearing. However, the prosecutor responded that the tape had not been in the district attorney's file but had to be acquired from the police department.

Finally, at the hearing, the State presented the testimony of Dr. Glen David King, a clinical and forensic psychologist, as well as an attorney, who testified that he was retained by the State to evaluate Smith.[4] He testified that the purpose of

3. Presumably by "they" the prosecutor was referring to the medical staff at the Holman Correctional Facility.

4. Smith objected to Dr. King's testimony as well as his reports and data because of the tardiness of the State's compliance with a discovery order. The prosecutor responded that the defense had known that the evalua-

his examination was as to determine the presence of any mental retardation, mental illness, or psychopathology. He testified that he had reviewed "numerous and voluminous documents" concerning Smith, including the evaluations by Dr. Rosecrans and Dr. Blotcky, and had interviewed and examined Smith. (R. 250.) To test Smith's intelligence, Dr. King administered the WAIS–III test and Smith received a verbal score of 75, a performance score of 74, and a full-scale score of 72. Dr. King further tested Smith using the Wide Range Achievement Test 4th edition (WRAT–4) concerning an individual's ability to read, write, and perform arithmetic.[5] The results indicated that Smith was reading at the 8.6 grade level; that he was spelling at the 11.5 grade level; and that he was doing math computation at the 6.3 grade level. As to an adaptive-behavior assessment, Dr. King performed the Adaptive Behavior Assessment System, 2d edition (ADAS–2) and the Minnesota Multiphasic Personality Inventory, 2d edition (MMPI–2). The ADAS–2 tests various functions, such as communication skills, leisure, self-direction, and community use, while the MMPI–2 tests for psychotic symptoms, anxiety symptoms, depressive symptoms, and other areas of functional psychopathology. Dr. King testified that the MMPI–2 is a self-administered, true-false test that includes indicators to reveal if the person being tested is attempting to alter his or her score so that he or she appears to have a mental illness when he or she does not, or appears not to have a mental illness when he or she does. Dr. King testified that Smith's test results were invalid and that his score indicated that he either attempted to feign a mental illness or that he randomly "sorted items." (R. 264.)

As to the ADAS–2, Dr. King stated, on cross-examination, that the test indicated that Smith had difficulties in the areas of community use, health and safety, self-direction, social skills, and leisure skills.

Dr. King testified that he noticed no difficulties in Smith's communicating with him or understanding questions. Dr. King further testified that, in his opinion, Smith was not mentally retarded and functioned in the high borderline to low average range of intellectual ability.

As to the Flynn Effect, Dr. King testified that he believed that even Dr. Flynn's article, that promoted the down-scoring of the IQ tests, only applied this factor to capital cases in order to avoid execution. (R. 270.) Dr. King opined that there were many problems with Dr. Flynn's methodology and further opined that the Flynn Effect was merely a theory rather than a fact.

On cross-examination, Dr. King testified that he did not believe that the WAIS–IV test was more accurate than the WAIS–III; rather, it was "just the most recent test." (R. 283.) The circuit court determined that Smith would be given 30 days following the hearing to meet with Dr. Van Rosen to be administered the WAIS–IV test and to file a brief.

tion had taken place approximately 10 months before the hearing; that he had agreed to exchange the information at a meeting with Smith's counsel on the Friday before to the hearing and had done so; and that he had not understood the discovery order to include the posttrial evaluation. The court determined that because the defense was being afforded additional time to have Dr. Van Rosen evaluate Smith, they could make any further response at that time.

5. Dr. King testified that this test examines the same abilities as the Woodcock Johnson Test that had been administered to Smith by Dr. Salekin.

On December 11, 2008, Smith withdrew his request for further testing by Dr. Van Rosen. Smith filed a brief supporting his claims presented in the hearing on March 6, 2009, and four days later, the State filed its brief in opposition. Following Smith's response to the State's memorandum brief, and after acknowledging the law as to this issue as well as the relevant and conflicting evidence, the circuit court issued an order regarding Smith's claim of mental retardation, to which the court noted the majority of the evidence at the hearing had related. The court found as follows:

"Mr. Smith stated as follows in a pretrial conversation that he did not know was being recorded:

"'I thought somebody saw me back there, I waited for a day. I said if nobody find that car today that mean ain't too much looking for her. So what I do, I'll go round there and bum that bitch up, get my fingerprints off of it. So that's what I did. I burned that bitch slap off, I burned that bitch so bad that the car seat, you know a little.... I/A [inaudible] heart.... I threw the keys away in the ... I threw the keys away in the ... I/A ... and I wiped the car off with some gas, you understand what I'm saying?'

"(RT. 220, 221.)

"In the same statement [Smith] also acknowledged his understanding that he may be caught if he failed to kill the victim, in part because she was a police officer's sister, when he stated as follows: 'She didn't know [he would kill her], she just said here you can take the car. I was acting like this here. I was thinking don't shoot, don't do it. Her brother a police. No if I let you go you going to fuck me up.... She said. No I'm not. I promise, (mimicking a female voice). I said you a liar, boom, Then shot her in the head with that gun.' (CT. 219.) In this Court's opinion, [Smith's] intentional killing of the victim, based in part upon his realization that the victim's relationship to a police officer would make his capture more likely, and his apparently well thought-out attempt to cover up the crime, weighs against [Smith] in relation to the adaptive functioning requirement. This conclusion is supported by the opinion in *Ferguson v. State*, [13 So.3d 418 (Ala. Crim.App.2008)], indicating that extensive involvement in crime and post-crime planning are factors to consider.

"After considering the expert testimony of all witnesses, this Court summarizes the testimony as follows and reaches the following conclusions: Dr. Salekin's test results indicate that [Smith's] lowest adaptive functioning scores were in the area of motor skills and his highest scores were associated with his community living skills. It appears that the SB–R test, as conducted with [Smith's] brother, placed [Smith] at an overall skill level of 12 years and 8 months. Yet, the test conducted with [Smith's] mother placed him at a skill level of 15 years 3 months. Even Dr. Salekin indicated that the large difference between the two tests scores was significant. In this Court's opinion, such a difference detracts from the significance placed on the test results. The Court also notes the high likelihood of inaccuracy in [Smith's] primary SB–R test which was based upon answers of [Smith's] 'younger brother.' At best, [Smith's] younger brother was in his middle teens when the events that he was questioned about occurred, and he was trying to remember [Smith's] skill level approximately 30 years earlier. When Dr. Salekin [did the] Woodcock–Johnson Achievement Te[st] levels included below average scores, but not significantly substandard scores in the

categories of speech, communication, listening comprehension, reading, math, and written skills. Dr. Salekin testified that [Smith's] math and spelling skills were at the level of a high school senior or college participant. In Dr. Salekin's opinion, Smith's high math, oral language, writing, spelling and oral comprehension scores were inconsistent with a finding that Smith is mildly mentally retarded. Dr. Salekin also testified that adaptive functioning tests would be affected by an individual's use of drugs or alcohol. The record from interviews done by Dr. Blotcky and Dr. Rosecrans prior to [Smith's] trial indicates that [Smith] used alcohol and drugs on a regular basis; therefore, some deficits in his adaptive functioning, even at age 17, could be attributed to his drug use.

"Although evidence is clear [Smith] has below average intelligence which has, in some ways, probably affected his life style, [Smith] has failed to meet the burden of proving that he is mentally retarded so as to preclude imposition of the death penalty. Although the undersigned is of the opinion that a court is not bound to follow an expert's opinion as to whether or not an individual meets the *Atkins* criteria, the lack of any testimony that Willie Smith is mildly mentally retarded is a strong contributing factor in the Court's decision as it relates to this issue. Furthermore, this Court is of the opinion that [Smith] is incorrect in asserting that Rule 704, Alabama Rules of Evidence, precludes testimony from the experts regarding their opinion as to whether or not [Smith] is mentally retarded. First, the commentary to Rule 704 notes that this rule 'has been little enforced.' Furthermore, the appellate courts of Alabama has held ' " ' "that expert testimony as to the ultimate issue should be allowed when it would aid or assist the trier of fact, and the fact that ' " 'a question propounded to an expert witness will illicit an opinion from him in practical affirmation or disaffirmation of a material issue in a case will not suffice to render the question improper' " ' (citations omitted); *see also* Rule 702, Ala. R. Evid. (stating that expert testimony should be allowed when it will aid or assist the trier of fact." ' " ' *Kennedy v. State,* 929 So.2d 515, 519 (Ala.Crim.App.2005) (citations omitted). Based upon the foregoing, this Court is of the opinion that it was proper for either side to illicit testimony as to a qualified expert's opinion about whether [Smith] was mentally retarded. Furthermore, that testimony was relevant to the ultimate issue of whether the test outlined in *Atkins v. Virginia*, *Ex parte Perkins,* [851 So.2d 453 (Ala.2002) and their progeny was met."

(C. 70–71.) Thus, the court determined that Smith failed to meet his burden of proving that his "limitations" were " 'significant' enough" to meet the requirements of proving mental retardation. (C. 72.)

As to Smith's claim that he was denied a fair trial and the effective assistance of counsel because he was under the influence of Haldol during trial, the court found that his claim that he had been denied his right to a fair trial was precluded. Specifically, the court determined that this issue could have been, but was not, raised at trial or on appeal. Rule 32.2(a)(3) and (5), Ala. R.Crim. P. Similarly, the court found, to the extent Smith contended that the State had violated his rights to due process by administering Haldol to him, that the claim was precluded. However, the court opined that his claim of ineffective assistance of counsel based on this claim was not precluded.

The court also addressed Smith's claim that his counsel was ineffective for failing

to object to the prosecutorial comments concerning his lack of remorse and that this failure was compounded because his counsel did not know that he had been taking Haldol. The court stated in its order that, because there was no indication that Smith informed either of his counsel that he was taking Haldol or any other medication, nor was there evidence that either doctor who had examined him before trial noted any difficulty attributable to the possible use of Haldol, his counsel had not performed ineffectively under the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).

As to Smith's claim that lethal injection violates the Eighth Amendment because it constitutes cruel and unusual punishment, the court determined this claim to be insufficiently pleaded and to lack merit, citing *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008). The court also found as insufficiently pleaded and proved Smith's claim that the State failed to disclose a letter concerning his suicide attempt and hallucinations, because the letter was not produced or discussed at the hearing and the date of its discovery was not pleaded.[6] Although Smith argued that the State improperly bolstered the testimony of a State's witness, the court stated that this issue was previously raised on appeal and this Court determined that the issue lacked merit. Therefore, the court held that the issue was precluded under Rule 32.2(a)(4), Ala.R.Crim.P.[7], and lacked merit. Similarly, Smith contends that the admission of certain evidence, a wristwatch and a ring, was improper due to a faulty chain of custody; however, the court found that this matter was previously raised on direct appeal. Rule 32.2(a)(4). This Court has found no plain error as to this matter; also, it was not raised at trial. Rule 32.2(a)(3), Ala.R.Crim.P. *Smith v. State*, 838 So.2d at 449.

Smith's claim, that his rights to be protected against double jeopardy were violated because he was convicted of two counts of capital murder and was sentenced to death, was previously addressed and determined to lack merit by this Court. *See Smith v. State*, 838 So.2d at 469. Therefore, the circuit court determined that, although jurisdictional, it was precluded as having previously been addressed and resolved. Rule 32.2(a)(3).[8] Moreover, "double counting" is permissible. *See, e.g., Whatley v. State*, [Ms. CR–08–0696, December 16, 2011] —— So.3d ——, —— (Ala.Crim.App.2011); *Brown v. State*, 74 So.3d 984, 1034–35 (Ala.Crim.App.2010); *Brooks v. State*, 973 So.2d 380, 415 (Ala.Crim.App.2007).

As to Smith's claim that he received an unfair trial as a result of the prejudicial atmosphere in the community, the circuit court stated in its order that this claim was precluded because it could have been raised at trial and it was raised on appeal. Rule 32.2(a)(3) and (4). *See Smith v. State*, 838 So.2d at 469–71. Moreover, the court found this issue to lack merit. Smith's claim concerning the improper admission of prejudicial photographs was also found to be precluded because he raised this issue both at trial and on appeal. Rule 32.2(a)(2) and (4).

6. The court noted that, if it was disclosed during trial, the issue is precluded because it could have been raised at that time.

7. The court also found that the issue could have been raised at trial. Rule 32.2(a)(3).

8. Smith was convicted of murder made capital because it was committed during a kidnapping and murder made capital because it was committed during a robbery, so that the offenses involved different elements.

Smith had argued in his petition that the trial court improperly considered during sentencing, evidence that was not presented to the jury. He specifically referred to the reports by Dr. Rosecrans and Dr. Blotcky that the trial court had noted in determining that a mitigating factor, specifically that the offense was committed while Smith was under the influence of extreme mental or emotional distress, did not exist. As to this contention, the circuit court stated that the argument was based on *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000), and, without ruling as to whether it was precluded, the court determined that the argument lacked merit. The court stated that the mention of these reports did not affect the trial court's finding that Smith had presented no evidence of this mitigating circumstance during the guilt or penalty phases. The circuit court also acknowledged that, on direct appeal, this Court held in a related issue that the trial court's mention of these reports was not prejudicial to Smith and did not constitute to plain error. *See Smith v. State*, 838 So.2d at 443–444.

As to Smith's claim that his right to counsel was violated when the State obtained his statement made post-arrest to a police informant, this issue was raised at trial and on appeal. Rule 32.2(a)(2) and (4). *See Smith v. State*, 838 So.2d at 462. Smith also contended that the State violated a discovery order as to this statement and improperly withheld it until the day of trial; however, the circuit court determined that this issue had also been raised at trial and on appeal. Rule 32.2(a)(2) and (4). *Smith v. State*, 838 So.2d at 439–42. Moreover, the court stated in its order that, as this issue relates to other exculpatory statements by Smith, those claims could have been, but were not, raised at trial or on appeal. Rule 32.2(a)(3) and (5).

As to Smith's claims of errors by the trial court during both phases of trial, the circuit court found these claims to be precluded. Specifically, Smith's claims that the trial court erred in failing to recuse and failing to conduct a competency hearing were neither raised at trial or on appeal. Rule 32.2(a)(3) and (5). Moreover, the circuit court found the following claims to be precluded because they could have been raised at trial and were raised on direct appeal: the giving of allegedly improper jury instructions during both phases, commenting on Smith's failure to testify, refusing to answer a juror's question, allowing the jury to be exposed to allegedly inadmissible evidence, and improperly considering a pretrial psychiatric examination. Rule 32.2(3) and (4). Finally, the circuit court determined that the following issues were raised both at trial and on appeal: improperly limiting the cross-examination of certain State's witnesses, refusing to allow Smith to use a juror questionnaire, refusing to strike a potential juror, and denying Smith's motion for change of venue. Rule 32.2(a)(2) and (4).

The circuit court further addressed each of the ineffective-assistance-of-counsel claims raised by Smith in his petition. The circuit court deemed a number of these claims to have been abandoned or to have been insufficiently pleaded in the petition and/or proved, because Smith did not provide any evidence or specific factual basis to support them in his petition or at the hearing. These claims included claims that his counsel was inadequate for failing to contact him in order to develop a strategy; that his counsel failed to call a witness who had had contact with Smith on the day of the offense; that his counsel failed to investigate whether someone else was the triggerman; that his counsel failed to adequately investigate his long-time sub-

stance abuse so as to negate the element of intent;[9] that his counsel failed to allow him to testify, although he wished to rebut the testimony of certain State's witnesses; that his counsel's failure to request the trial judge to recuse himself because the judge allegedly[10] made a pretrial statement that he would sentence Smith to death if he did not accept a plea offer; that his counsel failed to life-qualify the jury and to request the jury to state if it could consider, or reasons it could not consider, a life-imprisonment sentence;[11] that his counsel failed to object to allegedly improper prosecutorial conduct;[12] that his counsel failed to hire a qualified expert in Dr. Blotcky and did not sufficiently prepare or question him or hire him in a timely manner; that his counsel failed to call a number of character witnesses and defense witnesses[13] or to sufficiently investigate his background for mitigating evidence; that his counsel was ineffective as a result of inadequate compensation by the State for representation of indigent capital defendants; that his counsel failed to properly prepare defense witnesses to testify; that witnesses' testimony at the penalty phase presented by his counsel conflicted;[14] and that his counsel failed to move for a competency hearing.[15]

Smith also raised a number of claims that his trial counsel failed to properly examine various items of State's evidence. He contended and the circuit court found: that counsel should have known to object to a tape showing prior misconduct (however, the circuit court determined that the trial court had excluded evidence of the prior misconduct and this holding was upheld on appeal); that counsel could have seen an ATM tape indicating that an individual resembled Lorenzo Smith (however, the circuit court determined that Smith had failed to show how this tape could have been admitted or its relevance); and that his counsel should have objected to the chain of custody of some evidence (however, the circuit court found that this Court addressed the chain of custody as it related to two items of evidence and Smith failed to present any specific evidence as to this claim).

Smith also argued, concerning his representation during the penalty phase by his assisting counsel, that he received ineffectiveness of counsel because this counsel had only been licensed to practice for one year and yet handled the majority of his penalty phase. Moreover, his was her first criminal trial. However, the circuit

9. The court noted as to this issue that there was no evidence indicating that Smith was using drugs on the day of the offense and that defense counsel presented expert testimony concerning Smith's diminished capacity.

10. The circuit court noted that he searched the pretrial portion of the trial transcript and found no indication of bias.

11. The court noted that although counsel had failed to do so, Smith had not met his burden of proof as to prejudice.

12. Smith makes blanket allegations on this ground and cites only one reference in the record; that argument concerned the victim's role as a family member and was held on appeal not to constitute plain error.

13. Smith specifically named certain witnesses but did not proffer their testimony at the hearing.

14. The circuit court noted that there was no evidence or pleading indicating that either witness (Ms. Johnson and Ms. Willis) testified untruthfully and further noted that Smith had failed to show sufficient prejudice on this ground.

15. The circuit court noted that even the evidence at the evidentiary hearing failed to show that Smith was incompetent to stand trial or that he was unable to appreciate the wrongfulness of his acts.

court stated in its order that the lead counsel's experience had far exceeded the statutory requirement, and he had been present throughout the penalty phase and delivered the closing argument at sentencing. Because only one counsel representing a capital defendant is required to have over five years of experience, the court determined that Smith failed to satisfy the ineffectiveness prong of *Strickland v. Washington,* supra. *See Hodges v. State,* 856 So.2d 875 (Ala.Crim.App.2001).

Smith also contended in his petition that his trial counsel was ineffective for failing to present evidence concerning the history of the prosecutors from the Jefferson County District Attorney's Office for engaging in discriminatory strikes against potential jurors. However, the circuit court determined that this issue lacked merit. It noted that the record on appeal, as well as the findings by this Court when it remanded the case to determine if the prosecutor had improperly removed females from the jury, indicated that the prosecutor used 14 of his 15 strikes against females. As to the 14 strikes against females, this Court determined that they were based on nondiscriminatory grounds and, as to the 15th strike, it was waged against a white male. Therefore, the circuit court found that Smith failed to show prejudice or ineffectiveness concerning his counsel's failure to introduce any alleged evidence of a history of discriminatory striking of potential jurors by the prosecutor.

Further, the circuit court stated, as to Smith's claim that his trial counsel was ineffective for failing to introduce the fact or to argue that he was using Haldol and how its use had affected him at trial, the circuit court found that there was no clear evidence indicating that Smith had been given Haldol and there was no evidence indicating that he had informed his counsel that he had taken medicine or that he felt affected by medicine. Nor did either of the doctors who interviewed him notify counsel of such. The court stated "defense counsel should not be regarded as ineffective for failing to know about non-obvious psychological problems that are not brought to their attention by their client." (C. 83.)

Smith also claimed ineffective representation by his appellate counsel because, he argues, counsel should have argued differently to the Alabama Court of Criminal Appeals his claim of discriminatory strikes of potential jurors by the prosecutor. However, this Court remanded this case concerning the issue of discriminatory strikes against females and determined that the strikes were not discriminatory as to gender. This Court also determined that Smith failed to show discriminatory strikes by the prosecutor as to a Hispanic veniremember and as to the black potential jurors. The circuit court determined that this issue as to any discrimination during the striking of the jury lacked merit, and that neither trial nor appellate counsel were ineffective in raising this claim. Further, the circuit court found no prejudice to Smith on this ground. Additionally, the court found that, to the extent Smith argued as a substantive issue that the prosecutor improperly removed potential jurors from the venire in a discriminatory manner, this issue was precluded because it was raised at trial and on appeal. Rule 32.2(a)(2) and (4).

Moreover, the circuit court determined that appellate counsel was not ineffective for failing to present this issue differently to the Alabama Supreme Court because Smith did not have a right to counsel when pursuing a discretionary appeal to that Court. *State v. Carruth,* 21 So.3d 764 (Ala.Crim.App.2008). Thus, he could not claim ineffectiveness. Similarly, Smith's

claim that his appellate counsel failed to include several arguments in his petition for the writ of certiorari to the Alabama Supreme Court is rejected by the holding in *Carruth*. The circuit court further found that Smith had failed to meet his burden of showing prejudice under *Strickland v. Washington* on this issue.

On appeal, Smith argues: that the circuit court erred in failing to find that he is mentally retarded; that the circuit court erred in failing to find that the administration of Haldol to him at the time of trial violated his constitutional rights; that Smith's counsel was ineffective based on four grounds; that the prosecutor improperly removed potential jurors from the venire in a discriminatory manner and did not come forward with sufficient reasons for these strikes; that Alabama's method of execution—lethal injection—is unconstitutionally cruel and unusual punishment; and that Smith was denied due process because the jury did not determine the facts, in violation of *Ring v. Arizona*, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

I.

Smith argues that the circuit court erred in holding that he is not mentally retarded under the standards set fourth in *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002), and *Ex parte Perkins*, 851 So.2d 453 (Ala.2002). Specifically, he contends that the court erred in failing to find that Smith had satisfied the three-pronged test set fourth in *Atkins* to prove mental retardation and, by relying on expert-opinion evidence concerning clinical mental retardation, had improperly relied on evidence outside these factors.

[1, 2] Although the standard of proof to have been met by Smith in order to prove that he was entitled to relief because he is mentally retarded was a preponderance of the evidence, *see* Rule 32.3, the circuit court's findings are reviewed for whether the court abused its discretion for denying relief. *Morrow v. State*, 928 So.2d 315, 323 (Ala.Crim.App.2004). "'"'A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision.'"' *Hodges v. State*, 926 So.2d 1060, 1072 (Ala.Crim.App.2005) (quoting *State v. Jude*, 686 So.2d 528, 530 (Ala.Crim.App.1996) (quoting *Dowdy v. Gilbert Eng'g Co.*, 372 So.2d 11, 12 (Ala. 1979) (quoting *Premium Service Corp. v. Sperry & Hutchinson, Co.*, 511 F.2d 225 (9th Cir.1975)))." *Byrd v. State*, 78 So.3d 445, 450–51 (Ala.Crim.App.2009).

In *Morris v. State*, 60 So.3d 326, 339 (Ala.Crim.App.2010), this Court addressed the legal definition of mental retardation in Alabama, which is to be applied in determining whether a capital defendant should be executed, and stated:

> "The United States Supreme Court in *Atkins* provided guidelines for determining whether a person is mentally retarded to the extent that he or she should not be executed. However, the Court also held that ultimately the states should establish their own definitions. The Court stated:
>
> > "'To the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded. In this case, for instance, the Commonwealth of Virginia disputes that Atkins suffers from mental retardation. Not all people who claim to be mentally retarded will be so impaired as to fall within the range of mentally retarded offenders about whom there is a national con-

sensus. As was our approach in *Ford v. Wainwright,* 477 U.S. 399 (1986), with regard to insanity, "we leave to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." *Id.,* at 405, 416–417.'

"536 U.S. at 317, 122 S.Ct. at 2250. (Footnote omitted.)

"Alabama has yet to statutorily define mental retardation in the context of determining the sufficiency of an *Atkins* claim. However, Alabama has defined a mentally retarded person for the purposes of the 'Retarded Defendant Act,' § 15–24–1 et seq., Ala.Code 1975, as follows:

" 'Mentally retarded person. A person with significant subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period, as measured by appropriate standardized testing instruments.'

" § 15–24–2(3), Ala.Code 1975.

"The Alabama Supreme Court has directed that review of *Atkins* claims are to be conducted applying the ' "most common" or "broadest" definition of mental retardation, as represented by the clinical definitions considered in *Atkins* and the definitions set forth in the statutes of other states that prohibit the imposition of the death sentence when the defendant is mentally retarded. *See, e.g., Ex parte Perkins,* 851 So.2d 453, 455–56 (Ala.2002).' *Smith v. State,* [Ms. 1060427, May 25, 2007] —— So.3d ——, —— (Ala.2007). Moreover, in examining the definitions of mental retardation in other states with statutes prohibiting the execution of a mentally retarded person, the Alabama Supreme Court has written:

" 'Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18).'

"*Ex parte Perkins,* 851 So.2d 453, 456 (Ala.2002).[3]

"Similarly, in suggesting guidance for determining whether a defendant is mentally retarded so as to prohibit the defendant's execution, the *Atkins* Court discussed clinical definitions of mental retardation and concluded that these definitions 'require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18.' 536 U.S. at 318, 122 S.Ct. 2242. Further, '[i]mplicit in the definition is that the subaverage intellectual functioning and the deficits in adaptive behavior must be present at the time the crime was committed as well as having manifested themselves before age 18.' *Smith v. State,* —— So.3d at ——.

"Alabama appellate courts have determined that until the Alabama Legislature establishes a definition for mental retardation to be used in determining *Atkins* claims, Alabama courts will continue to review such claims 'on a case-by-case basis and to apply the guidelines that have been judicially developed thus far.' *Morrow v. State,* 928 So.2d 315, 324 (Ala.Crim.App.2004).

"The burden of proof for a claim that a capital defendant is mentally retarded and therefore may not constitutionally be executed is on the defendant, and he or she must prove this claim by a preponderance of the evidence. *Cf. Trawick v. State,* 698 So.2d 151 (Ala.Crim.App.1995) (overruling *Bass v. State,* 585 So.2d 225 (Ala.Crim.App.1991), to the extent it implied that the burden of proving an insanity defense was by a 'preponderance of the evidence' rather than by 'clear and convincing evidence').

"'"In the context of an *Atkins* claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded." *Smith v. State,* [Ms. 1060427, May 25, 2007] —— So.3d at ——; see *Smith v. State,* [Ms. CR–97–1258, Jan. 16, 2009] —— So.3d —— at —— (Ala.Crim.App.2007) (opinion on return to fourth remand). "'The question of [whether a capital defendant is mentally retarded] is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony of that issue.'" *Smith v. State,* [Ms. CR–97–1258, Jan. 16, 2009] —— So.3d at —— (quoting *Atkins v. Commonwealth,* [266 Va. 73,] 581 S.E.2d 514, 515 (2003)). As the Alabama Supreme Court has explained, questions regarding weight and credibility determinations are better left to the circuit courts, "which [have] the opportunity to personally observe the witnesses and assess their credibility." *Smith v. State,* [Ms. 1060427, May 25, 2007] —— So.3d at —— (quoting *Smith v. State,* [Ms. CR–97–1258, Sept. 29, 2006] —— So.3d ——, —— (Ala.Crim.App.2006) (Shaw, J., dissenting) (opinion on return to third remand)).'

"*Byrd v. State,* [78 So.3d at 450]. *See also Jenkins v. State,* 972 So.2d 165, 167 (Ala.Crim.App.2005) ('"Preponderance of the evidence" is defined as: "The greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other." *Black's Law Dictionary* 1220 (8th ed.2004).').

"[3] *See* 851 So.2d at 456 n. 3 for a list of statutes referenced. Moreover, *Morrow v. State,* 928 So.2d 315, 323–24 n. 8, 9, and 10 (Ala.Crim.App.2004), provides a list of states that have created procedures for determining mental retardation legislatively and judicially and sets out states' varying requisite burdens of proof."

Morris v. State, 60 So.3d 326, 339–41 (Ala. Crim.App.2010).

[3] In this case, Smith was afforded a hearing at which he could attempt to prove by a preponderance of the evidence that he was mentally retarded under *Atkins.* Expert testimony and evaluations were presented as to Smith's mental condition. Following this hearing, the parties were allowed to submit briefs, and the court thereafter made the following findings, in pertinent part, as to Smith's claim of mental retardation:

"[Smith's] failure to present an expert who believes [Smith] is mentally retarded does not preclude relief. Yet, . . . the lack of such expert testimony weighs against [Smith].

"There was conflicting testimony by experts as it relates to the first factor of whether [Smith] has 'significantly subaverage intellectual functioning'. Dr. Karen Salekin, who was called by [Smith], testified [Smith] had an overall

IQ of 64. Dr. Salekin testified that [Smith] had [']a full scale intelligence quota of 64 with a 95 confidence interval of 61 to 69.' (R. 69). Although Dr. Salekin also testified that the 'Flynn Effect could lower [Smith's] IQ test score by more than two points', this Court did not find evidence regarding the Flynn Effect to be convincing enough so as to warrant a reduction of Salekin's or Dr. King's Intelligence Quotient test results. Even Dr. Salekin agreed that there is 'no [national consensus]' on whether the Flynn Effect should be applied to IQ scores. (R. 87). Dr. Glenn King, who testified for the [State], stated that [Smith] had a verbal IQ of 75 and a performance IQ level 74, which resulted in full scale IQ of 72. The Court found both of these experts to be credible with an appropriate background to testify regarding the Intelligence Quotient tests. Based in part upon Dr. King's verbal IQ score calculation of 75 and this score's exact correlation with Dr. Blotcky's determination that Willie Smith also had a verbal IQ of 75, this Court was of the opinion that Dr. King's overall IQ calculation for Willie Smith was probably more accurate than that determined by Dr. Salekin.

"As it relates to [Smith's] adaptive functioning, areas to be considered include 'communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work.' *Atkins v. Virginia,* 536 U.S. 304, 309 122 S.Ct. 2242, 2245 (2002). Although [Smith] showed deficits in adaptive functioning based upon test results, [Smith] did not show many, if any, actual examples of how his low IQ affected his adaptive functioning in everyday life before or after the incident in question. . . .

"One of the 'drawbacks' to the SIB–R test is the individual's ability to remember past events, and Dr. Salekin agreed that the tests administered to [Smith's] brother involved questions about behavior approximately 30 years prior to the test. Ideally one would want to administer the SIB–R test at the time in question rather than many years later because that is how the 'test was normed.' (R. 90). On the SIB–R, Smith's 'personal living skills indicated an age equivalency of 12 years, 8 months.' (R. 89, 90).

"Dr. Salekin also administered the 'Woodcock Johnson III test to determine current achievement levels, which relates directly to school function.' . . . Over an objection by counsel [for] [Smith], Dr. Salekin testified that she does not believe Smith has mental retardation. She reached this conclusion after doing 'a full *Atkins* evaluation.' (R. 106, 107).

"[Smith] also called Dr. Daniel Marson, a clinical neuropsychologist employed in the Department of Neurology at the University of Alabama at Birmingham. . . .

"In general, this Court would summarize Dr. Marson's testimony as indicating that [Smith's] deficits would cause him some difficulty in following instructions and retaining information so as to cause some shortcomings as it relates to school or work activities. Yet, Dr. Marson did not indicate that [Smith's] shortcomings would cause him to be unable to succeed in school, work, of society in general, but it might require additional effort or instruction for Smith to perform on par with his peers. Dr. Marson did not express an opinion as to whether [Smith] was mildly mentally retarded.

"The State then called Dr. Glen David King, a clinical and forensic psychologist, to testify. According to Dr. King, on the Wechsler Adult Intelligence Scale, Third Edition, [Smith] generated

a verbal IQ of 75, a performance IQ level of 74, and a full scale IQ of 72. Dr. King also did the WRAT–4 test which 'gives an indication of an individual's ability to read, write, and do arithmetic.' With the average score being 100, the Defendant scored an 85 on reading, 93 on spelling, and 84 on math computation. These test scores equate to grade levels as follows: reading equated to 8.6 grade level, spelling to a 11.5 grade level, and math to a 6.3 grade. (R. 240–242). Dr. King then administered the Adaptive Behavior Assessment System, Second Edition (ABAS–2), test to measure the Defendant's adaptive functioning. He also administered the Minnesota Multiphasic Personality Inventory (MMPI–2) test to determine whether Smith showed psychotic symptoms, anxiety symptoms or depression. (R. 245, 246). On the MMPI test the profile was invalid because it showed that Smith either 'purposefully attempted to look like he was having a mental illness on this particular instrument or he randomly sorted items.' (R. 248). Dr. King also did an interview with Mr. Smith, and Smith did not have any difficulties in communication or understanding questions or administration of the tests. Over the Petitioner's objection. Dr. King testified that in his opinion 'Mr. Smith is not mentally retarded and that he likely functions somewhere in the high borderline to low average range of intellectual ability.' (R. 251)....

"In addition to the testimony from the Rule 32 evidentiary hearing, this Court found certain portions of the trial transcript to be relevant to this issue, in particular, [Smith's] father did not help take care of him and his mother frequently worked; therefore, after age 8 or 9 Willie Smith and siblings 'practically raised themselves.' According to [Smith's] mother, it appears that Smith took care of the other children while she was gone. (R. 1474.) [Smith] dropped out of school in the 10th grade so that he could work and help provide for his family. (R. 1479.) According to Mrs. Smith, [Smith] provided well for her. (R. 1480.) He kept a job at Birmingham Stove and Range for 2 years then got another job at Coca–Cola Company, but he was 'relieved' from his job at Coca–Cola when he 'got on dope' and missed some work. (R. 1659.) As noted in *Ferguson v. State*, [13 So.3d 418 (Ala. Crim.App.2008)], [Smith's] ability to work and support his family, even at a young age, weighs against [Smith] in his argument that he is mentally retarded. Furthermore, Dr. Blotcky testified that he found 'no diminished capacity' when he met with [Smith]. (R. 1504.)

"Other testimony or evidence from [Smith's] trial which is relevant to the question of whether Smith had insufficient adaptive functioning came from a conversation with [Smith] which was admitted to evidence during the trial. In particular, Mr. Smith stated as follows in a pretrial conversation that he did not know was being recorded: 'I thought somebody saw me back there, I waited for a day. I said if nobody find that car today that mean ain't too much looking for her. So what I do, I'll go round there and bum that bitch up, get my fingerprints off of it. So that's what I did. I burned that bitch slap off, I burned that bitch so bad that the car seat, you know a little.... I/A [inaudible] heart... I threw the keys away in the ... I threw the keys away in the ... I/A ... and I wiped the car off with some gas, you understand what I'm saying?' (RT. 220, 221.)

"In the same statement [Smith] also acknowledged his understanding that he may be caught if he failed to kill the

victim, in part because she was a police officer's sister, when he stated as follows: 'She didn't know [he would kill her], she just said here you can take the car. I was acting like this here. I was thinking don't shoot, don't do it. Her brother a police. No if I let you go you going to fuck me up.... She said. No I'm not. I promise, (mimicking a female voice). I said you a liar, boom, Then shot her in the head with that gun.' (CT. 219.) In this Court's opinion, [Smith's] intentional killing of the victim, based in part upon his realization that the victim's relationship to a police officer would make his capture more likely, and his apparently well thought-out attempt to cover up the crime, weighs against [Smith] in relation to the adaptive functioning requirement. This conclusion is supported by the opinion in *Ferguson v. State,* supra, indicating that extensive involvement in crime and post-crime planning are factors to consider. "....

"Although evidence is clear [Smith] has below average intelligence which has, in some ways, probably affected his life style, the Petitioner has failed to meet the burden of proving that he is mentally retarded so as to preclude imposition of the death penalty....

"Based upon the testimony presented at the Rule 32 hearing, relevant portions of the trial transcript, and other matters outlined herein, this Court finds that [Smith] has failed to establish that he is mentally retarded so as to preclude him from receiving a death sentence in this case. Two experts expressly stated that in their opinion Willie Smith was not mentally retarded, and the other experts who testified did not refute those opinions. The record indicates that Willie Smith properly functioned in society prior to his arrest for the offense in question. Although testimony was presented regarding possible deficiencies in [Smith's] adaptive functioning based upon tests results, there was no testimony regarding deficiencies in [Smith's] actual ability in areas such as 'communication, self care, home living, social interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety.' *Ferguson v. State,* [13 So.3d 418] (Ala. Crim.App.2008). In numerous test categories the Defendant tested in the average range or above average, and those test scores were inconsistent with a finding that [Smith] was mentally retarded.

"Based upon the foregoing, this Court finds that [Smith] has failed to meet the burden of proving that he is mentally retarded so as to preclude opposition of the death sentence that was imposed in this case. This Court finds that [Smith's] limitations are not 'significant' enough to meet the requirements previously outlined herein."

(C. 65–72.)

As the circuit court found and as the evidence at the hearing established, Smith did not prove by a preponderance of the evidence that he was mentally retarded. The greater weight of the evidence indicated that, although he suffered with some mental deficiencies, they did not rise to the level at which an impartial mind would conclude from the evidence that he was mentally retarded.

A.

Smith did not show that he suffered from subaverage intellectual functioning. Despite his argument that the testimony by Dr. Salekin concerning the Flynn Effect showed that his IQ was actually lower than the test results indicated, the circuit

court found that the evidence was unconvincing. On cross-examination of Dr. Salekin, she admitted that the Stanford–Binet test and the WAIS–III test did not refer to the Flynn Effect or the need to adjust the test scores. The *Diagnostic and Statistics Manual 4 TR,* which was likened to the *Physicians' Desk Reference* also did not recommend adjusting IQ scores for the Flynn Effect.

[4] Moreover, this Court has previously held on several occasions that a trial court need not accept the "Flynn Effect" as binding, and that it has not been accepted as scientifically valid by all courts. *See Albarran v. State,* 96 So.3d 131, 200 (Ala.Crim.App.2011) ("Although Dr. Weinstein also testified that, when adjusted for the 'Flynn effect,' Albarran's IQ was around 68, the circuit court could have reasonably rejected the 'Flynn effect' and determined that Albarran's IQ was 71. *Gray v. Epps,* 616 F.3d 436, 446 n. 9 (5th Cir.2010) (quoting *In re Mathis,* 483 F.3d 395, 398 n. 1 (5th Cir.2007) ('[T]he Flynn Effect "has not been accepted in this Circuit as scientifically valid." ')); *Bowling v. Commonwealth,* 163 S.W.3d 361, 375 (Ky.2005) (holding that '*Atkins* did not discuss margins of error or the "Flynn effect" and held that the definition [of mental retardation] in KRS 532.130(2) "generally conform[ed]" to the approved clinical definitions' so the court could not consider the Flynn effect); *Thomas v. Allen,* 607 F.3d 749, 758 (11th Cir.2010) ('[T]here is no uniform consensus regarding the application of the Flynn effect in determining a capital offender's intellectual functioning, and there is no Alabama precedent specifically discounting a court's application of the Flynn effect. . . .')."))(Footnote omitted.)

> "The United States Court of Appeals for the Eleventh Circuit has stated:
>
> " '[A]ll the experts acknowledged that the Flynn effect is a statistically-proven phenomenon, although no medical association recognizes its validity. Numerous courts recognize the Flynn effect. *See e.g., Walker v. True,* 399 F.3d 315, 322–23 (4th Cir. 2005) (stating that on remand, the district court should consider the Flynn effect evidence to determine if petitioner's IQ score is overstated); *United States v. Davis,* 611 F.Supp.2d 472, 486–88 (D.Md.2009) (district court considered Flynn effect in evaluation of defendant's intellectual functioning); *People v. Superior Court,* 28 Cal.Rptr.3d 529, 558–59 (Cal.Ct.App. 2005), overruled on other grounds by 40 Cal.4th 999, 56 Cal.Rptr.3d 851, 155 P.3d 259 (2007) (recognizing that Flynn effect must be considered); *State v. Burke,* No. 04AP–1234 . . . (Ohio Ct.App. Dec. 30, 2005) [(not reported in N.E.2d)] (stating that court must consider evidence on Flynn effect, but it is within court's discretion whether to include it as a factor in the IQ score). There are also courts that do not recognize the Flynn effect. See *In re Mathis,* 483 F.3d 395, 398 n. 1 (5th Cir.2007) (noting that circuit has not recognized Flynn effect as scientifically valid); *Berry v. Epps,* No. 1:04CV328–D–D . . . (N.D.Miss. Oct. 5, 2006) [(not reported in F.Supp.2d)] (refusing to consider Flynn effect); *Bowling v. Commonwealth,* 163 S.W.3d 361, 374–75 (Ky.2005) (noting that because Kentucky statute unambiguously sets IQ score of 70 as cutoff, courts cannot consider Flynn effect or SEM [standard error of measurement]).'
>
> "*Thomas v. Allen,* 607 F.3d 749, 757 (11th Cir.2010). *See also* Nava Feldman, *Application of Constitutional Rule of Atkins v. Virginia, 536 U.S. 304, 122*

S.Ct. 2242, 153 L.Ed.2d 335 (2002), that Execution of Mentally Retarded Persons Constitutes 'Cruel and Unusual Punishment' in Violation of Eighth Amendment, 122 A.L.R.5th 145 (2004)."

Daniel v. State, 86 So.3d 405, 433 (Ala. Crim.App.2011). Thus, the circuit court did not err in failing to find that Smith's IQ scores should be lowered pursuant to the Flynn Effect.

[5] Similarly, Smith contends that the court should have applied the standard measurement of error, referring to the testimony by Dr. King that IQ scores are typically reported in a range of plus or minus five points, to its findings concerning his scores. However, this Court has refrained from adopting a margin of error as it would apply to IQ scores, because doing so would expand the definition of mentally retarded established by the Alabama Supreme Court in *Ex parte Perkins*. In *Smith v. State*, 71 So.3d 12 (Ala.Crim. App.2008), this Court stated:

"Smith urges this Court to adopt a 'margin of error' when examining a defendant's IQ score and then to apply that margin of error to conclude that because Smith's IQ was 72 he is mentally retarded. The Alabama Supreme Court in *Perkins* did not adopt any 'margin of error' when examining a defendant's IQ score. If this Court were to adopt a 'margin of error' it would, in essence, be expanding the definition of mentally retarded adopted by the Alabama Supreme Court in *Perkins*. This Court is bound by the decisions of the Alabama Supreme Court. See § 12–3–16, Ala. Code 1975. As one court noted concerning the margin of error in IQ tests as it related to a federal regulation:

" 'We find the reasoning in *Bendt* [*v. Chater*, 940 F.Supp. 1427 (S.D.Iowa 1996)], and its reliance on *Cockerham v. Sullivan*, 895 F.2d 492, 495 (8th Cir.1990), to be most persuasive. *Ellison v. Sullivan*, 929 F.2d 534 (10th Cir.1990). In *Bendt*, the district court noted that "incorporating a 5 point measurement error into a claimant's IQ test results would effectively expand the requisite IQ under listing 12.05(C) from test scores of 60 to 70 to test scores of 60 to 75." *Bendt*, 940 F.Supp. at 1431. The Court concluded that this would alter the range of IQ's which satisfy the Listing of Impairments for Mental Retardation and Autism in contradiction of the federal regulations interpreting the Act.'

"*Colavito v. Apfel*, 75 F.Supp.2d 385, 403 (E.D.Pa.1999)."

71 So.3d at 20–21.

B.

Although there was some evidence of deficiencies in Smith's adaptive behavior, these deficiencies were not significant in relation to all his testing concerning this prong of the *Atkins* test. Moreover, other than statements by his family, there was no indication that Smith had been unable to function in society prior to the offense. Smith, however, argues that because at least two of the number of categories addressed by his adaptive-functioning tests indicated that he lacked the ability to function in the normal skills area, the trial court should have found that he met this prong. He argues that, in order to prove a lack of adaptive behavior under *Atkins*, a defendant need only be deficient in two areas. He argues that the determination as to deficiency in adaptive functioning does not involve a balancing test.

However, as noted by the State in its brief on appeal, the Alabama Supreme Court in *Ex parte Perkins* looked to evidence presented at trial of factors in Perkins's life in determining his adaptive be-

havior, aside from his test results. The Court stated:

> "Additionally, the evidence presented at trial indicates that Perkins did not exhibit 'significant' or 'substantial' deficits in adaptive behavior before or after age 18. Perkins was able to have interpersonal relationships. Indeed, he was married for 10 years. He maintained a job as an electrician for a short period."

851 So.2d at 456. *See also Stallworth v. State,* 868 So.2d 1128, 1182 (Ala.Crim.App. 2001) (although Stallworth's scores qualified him for special-education classes, as well as vocational-rehabilitation services, he was not found to be mentally retarded and, as to his adaptive behavior, this Court considered that he had "maintained a job for most of his adult life; he has worked as a cook, a brick mason, and a landscaper. Stallworth also has had a long-term relationship and is the father of a daughter who was four months old at the time of the murders. At the time of trial Stallworth was unemployed, but he had qualified for food stamps. There is absolutely no evidence indicating that Stallworth could not function in society. . . .").

[6] Thus, although it is true that as a threshold matter the psychological evaluator must determine that the defendant was deficient in at least two areas of adaptive behavior, these shortcomings are not evaluated in a vacuum. *See Holladay v. Allen,* 555 F.3d 1346, 1353 (11th Cir. 2009) ("According to literature in the field, significant or substantial deficits in adaptive behavior are defined as 'concurrent deficits or impairments in present adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety.' American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders,* 39 (4th ed.1994)."). Even where there are indications of shortfalls in adaptive behavior, other relevant evidence may weigh against an overall finding of deficiency in this area. *See Lewis v. State,* 889 So.2d 623, 698 (Ala.Crim.App.2003) ("Although the record indicates that Lewis had poor grades in school, was in 'special classes' for most of his education, and had behavioral problems beginning at age three, it appears that his childhood problems were not related to his intellectual functioning, but, rather, were precursors to his subsequent diagnosis of personality disorder with delusional features. In addition, there is nothing in the record indicating that Lewis had a history of mental retardation, and Lewis did not make his IQ an issue at trial or present any evidence during either the guilt phase or the sentencing phase of the trial indicating that he was mentally retarded. Furthermore, the nature and circumstances surrounding the crimes in this case—including Lewis's articulate and detailed statement to the police—suggest goal-directed behavior, thus indicating that Lewis does not suffer from deficits in adaptive behavior.").

C.

[7] Smith also contends that the circuit court improperly relied upon the clinical opinions of Dr. Salekin and Dr. King that he was not mentally retarded. He contends that *Perkins* does not require expert opinions and that, therefore, the circuit court's consideration of this testimony and the court's statement that the lack of expert testimony to the contrary weighed against him were misplaced. In conjunction with this argument, Smith alleges that the experts were improperly allowed to testify as to the ultimate issue in conflict with Rule 704, Ala. R. Evid.

[8] However, testimony from a clinical psychologist is admissible in evaluating mental retardation in capital cases. *See, e.g., Ex parte Perkins,* 851 So.2d 453, 456 (Ala.2002) ("The record establishes that Dr. John Goff, a licensed clinical neuropsychologist and clinical psychologist, testified on Perkins's behalf . . .; he did not conclude that Perkins was mentally retarded. We find Dr. Goff's diagnosis pivotal in light of the fact that, when the penalty phase of Perkins's trial was conducted, *Penry v. Lynaugh,* 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989), and its progeny were applicable, and evidence of mental retardation established a strong mitigating circumstance to be considered in determining the appropriate sentence." (footnote omitted)); *Ray v. State,* 80 So.3d 965, 981 (Ala.Crim.App.2011) ("Dr. Glen King, a clinical and forensic psychologist[,] . . . testified that . . . [i]t was his opinion that Ray is not mentally retarded and that Ray 'was not suffering from any serious mental illness or mental defect at the time of the offense' or now."). *See also Borden v. State,* 60 So.3d 935, 938 (Ala.Crim.App. 2004), reversed on other grounds, 60 So.3d 940 (Ala.2007)(in which Dr. King's opinion that Borden was moderately mentally retarded was considered in reversing Borden's sentence of death).

[9] Moreover, an expert may testify as to mental deficiency or illness in Alabama as an exception to the ultimate-issue rule. *See* §§ 127.02(1) and 128.04, C. Gamble, *McElroy's Alabama Evidence* (6th ed.2009). There is no violation of the prohibition against testimony concerning the ultimate issue where a physician testifies concerning his opinion as to a diagnosis, including a mental diagnosis. "If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." Rule 702(a), Ala. R. Evid. *See* J. Colquitt, *Alabama Law of Evidence* (1990) (noting that lay and expert opinion evidence is allowed on certain issues, including mental condition, regardless of whether such opinion evidence goes to an ultimate issue in a case). Thus, Dr. Salekin's and Dr. King's opinions that Smith was not mentally retarded did not violate the rule prohibiting testimony as to the ultimate issue.

D.

[10–12] Smith also argues that Dr. King's test results should have been excluded because, he says, the State violated the court's discovery order by not producing these test results in a timely manner. As noted by the State, although Smith has attached a copy of the discovery order to his brief, it is not contained in the record.[16] "The record on appeal cannot be enlarged or supplemented by an appendix to the appellant's brief. . . ." *Jenkins v. State,* 516 So.2d 944, 945 (Ala.Crim.App.1987), citing *Tyus v. State,* 347 So.2d 1377, 1380 (Ala.Crim.App.), cert. denied, *Ex parte Tyus,* 347 So.2d 1384 (Ala.1977).

> "As a corollary, we are not permitted to consider matters 'dehors the record.' *Cooper v. Adams,* 295 Ala. 58, 61, 322 So.2d 706, 708 (1975). This rule may be restated as follows: '(1) Argument in brief reciting matters not disclosed by the record cannot be considered on appeal. (2) The record cannot be impeached on appeal by statements in brief, by affidavits, or by other evidence not appearing in the record.' *Id.*"

Etherton v. City of Homewood, 700 So.2d 1374, 1378 (Ala.1997). The record reveals

16. An excerpt of the order, however, was read by Smith's counsel at the hearing.

that, when the State sought to question Dr. King at the evidentiary hearing concerning his testing and evaluation of Smith, defense counsel objected, stating that the order required the State to permit the defense to copy and to inspect any reports and results of testing done pursuant to mental examinations. Defense counsel argued that

> "only last Friday did the State provide to us a copy of what is believed to be a report as well as Dr. King's notes and raw data. And based on the Court's order for discovery that was not complied with by the State, we move to exclude Dr. King's report, his testimony relating to that report, as well as his notes and raw data."

(R. 245.) The prosecutor responded that the defense had known for months that Dr. King had evaluated Smith pursuant to the court's ruling. Further, he had believed that the discovery order addressed evaluations that had been made by the State and had been part of its file, rather than evaluations made pursuant to a subsequent court ruling and that the prosecutor considered to be a part of the trial file. The prosecutor contended that the defense had known for months that Dr. King had evaluated Smith according to the court's ruling and that a member of the defense team had agreed to exchanging information from Dr. King and certain defense experts on the day that the report was due to be turned over to Smith. Thus, the prosecutor argued that the defense knew the results of the evaluation and could not show any prejudice. The court then overruled the objection. It should be noted that the court had given defense counsel permission to have Smith evaluated again by an expert, but counsel decided against such action.

Here, the State did not fail to turn over the reports by Dr. King, although Smith challenges the timeliness of the discovery. However, Smith has failed to show that he was prejudiced as the result of any delay.

[13, 14] In *Travis v. State*, 776 So.2d 819 (Ala.Crim.App.1997), this Court stated:

> "The State did not fail to disclose any *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963) material, neither did it ultimately fail to turn over material discoverable under Rule 16, Ala.R.Crim.P., although it did not always do so as promptly as it should have.
>
> "In *Thomas v. State*, 508 So.2d 310 (Ala.Cr.App.1987), upon similar facts, this Court concluded that the appellant was actually challenging the timeliness of the State's compliance with the trial court's discovery order. The Court concluded:
>
> > " ' "The appellant provides no evidence that the untimeliness of the State's compliance prejudiced her case. Moreover, this court has found that even if the State failed to comply with an order for discovery, the items may still be admissible because the State offered the defense counsel an opportunity to inspect and examine them in accordance with Rule 18.5(a), Alabama Temporary Rules of Criminal Procedure. *Clemons v. State*, 491 So.2d 1060 (Ala.Cr.App.1986)."
>
> " '*Robinson v. State*, 528 So.2d 343 (Ala.Cr.App.1986).'
>
> "508 So.2d at 313."

776 So.2d at 867. *See also Parker v. State*, 777 So.2d 937, 939 (Ala.Crim.App.2000) (Parker's contention that the State violated the court's discovery order directing the State "to produce or to make available at the discovery conference the results of any scientific or expert test to be used at trial," as well as Rule 16.1, Ala.R.Crim.P.,

by revealing test results on the first day of trial lacked merit because the thorough cross-examination by defense counsel was not prejudiced). " 'Discovery matters are within the sound discretion of the trial judge. *Williams v. State,* 451 So.2d 411 (Ala.Cr.App.1984). The court's judgment on these matters will not be reversed absent a clear abuse of discretion and proof of prejudice resulting from the abuse. *Ex parte Harwell,* 639 So.2d 1335 (Ala.1993).' *Parker v. State,* 777 So.2d 937, 938 (Ala. Crim.App.2000)." *Belisle v. State,* 11 So.3d 256, 277 (Ala.Crim.App.2007).

E.

[15, 16] Although Smith argues that the circuit court selectively relied on evidence introduced at trial and exaggerated certain evidence, such as Smith's criminal activity, there is no indication of improper or incorrect findings made by the circuit court as to the evidence.

> "As the Alabama Supreme Court has explained, questions regarding weight and credibility determinations are better left to the circuit courts, ' "which [have] the opportunity to personally observe the witnesses and assess their credibility." ' *Smith v. State,* —— So.3d at —— (quoting *Smith v. State,* [Ms. CR–97–1258, Sept. 29, 2006] —— So.3d ——, —— (Ala.Crim.App.2006) (Shaw, J., dissenting) (opinion on return to third remand)).
>
> " 'This court reviews the circuit court's findings of fact for an abuse of discretion.' *Byrd,* 78 So.3d at 451 (citing *Snowden v. State,* 968 So.2d 1004, 1012 (Ala.Crim.App.2006)). ' " ' " ' 'A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision.' " ' " ' *Byrd,* 78 So.3d at 450–51 (quoting *Hodges v. State,* 926 So.2d 1060, 1072 (Ala. Crim.App.2005), quoting in turn *State v. Jude,* 686 So.2d 528, 530 (Ala.Crim.App. 1996), quoting in turn *Dowdy v. Gilbert Eng'g Co.,* 372 So.2d 11, 12 (Ala.1979), quoting in turn *Premium Serv. Corp. v. Sperry & Hutchinson, Co.,* 511 F.2d 225 (9th Cir.1975))."

Albarran v. State, 96 So.3d 131, 198 (Ala. Crim.App.2011).

Based on the evidence presented at the hearing, the circuit judge did not abuse his discretion in determining that Smith was not mentally retarded.

II.

Smith argues that the circuit court erred in ruling that his Sixth and Fifth Amendment rights were not violated by the State's administration of Haldol to him before and during trial. Smith contends that the Haldol made him appear emotionless at trial and that the prosecutor capitalized on this effect by arguing that he was a cold killer and that he lacked remorse. Thus, he argues, he was denied a fair trial. He also argues that he was denied due process because he was involuntarily treated with this antipsychotic drug. Further, he submits that he was denied the effective assistance of counsel because his counsel did not investigate the State's use of Haldol on Smith or object thereto.

The circuit court determined:

> "[Smith] then asserts that he was denied his right to a fair trial by being given an antipsychotic drug called Haldol prior to trial. To the extent that this argument relates to the ineffective assistance of Smith's trial court, it is not precluded by any of the procedural bars outlined in Rule 32, A.R.Cr.P. To the extent the argument does not relate to an ineffective assistance of counsel claim then it is precluded because it could

have been raised at trial or on appeal but was not. Rule 32.2(a)(3) and (5), Alabama Rules of Criminal Procedure.

"[Smith] asserts that being under the influence of Haldol prevented him from showing any emotion during the trial or from assisting his counsel during the penalty phase. [Smith] asserts that the State improperly took advantage of this situation by pointing out his lack of remorse and pointing out that he appeared to be an emotionless killer. Attorneys for [Smith] called Dr. William Alexander Morton, Jr., an expert in the field of psychopharmacology. Dr. Morton testified about how Haldol reduces brain activity and makes an individual slow down and not respond to outside stimuli. Dr. Morton testified that Willie Smith was on Haldol when he came to prison from the county jail. Although Dr. Morton was unable to testify conclusively that [Smith] was on Haldol at the time of his trial, and Petitioner Smith did not testify regarding any medications he may have taken prior to trial, evidence presented by [Smith] would appear to indicate that Willie Smith was taking Haldol at the time his case proceeded to trial. If [Smith] was taking Haldol at the time of his trial, the next question which must be addressed is whether his counsel was ineffective in representing [Smith] as it relates to his use of Haldol. [Smith] claims that his trial counsel should have objected to the prosecutor's comments regarding Mr. Smith's lack of remorse, and argues that such an objection would have been even more necessary had defense counsel known the Defendant was taking Haldol. Yet, the record is clear that [Smith] did not tell his attorney that he was taking any medication, and neither of the two doctors who examined [Smith] prior to trial recognized any problems which could be directly attributed to such medication. Nor was anything else brought to counsel's attention which would have caused either attorney to realize that [Smith] may have been taking some medication which could affect his demeanor. Based upon these findings, this Court cannot find that either of [Smith's] trial attorneys were deficient or that their performance was below the standard called for in the first prong of *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984)."

(C. 72–73.)

A.

Smith claims that he was denied his right to a fair trial under the Sixth Amendment as a result of being given Haldol because he appeared emotionless at trial, allowing the prosecutor to characterize him as remorseless. Moreover, he contends, he was unable to interact with his counsel because of the Haldol, which also denied him a fair trial.

[17] In his second amended petition, Smith raised his claims concerning the improper use of Haldol and, in the context of the Sixth Amendment, he argued that the drug resulted in his emotionless demeanor and allowed the prosecutorial comment concerning his lack of remorse and prevented him from assisting his counsel during the penalty phase. He did not contend that it prevented him from interacting with his counsel during the guilt phase of trial. Thus, this part of his claim is not properly raised on appeal. *Lee v. State*, 44 So.3d 1145, 1162 (Ala.Crim.App.2009) ("A review of Lee's amended Rule 32 petition shows that this issue was not presented in Lee's petition. Thus, it is not properly before this Court because it is raised for the first time on appeal. ' "[A]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition." ' *English v. State*,

10 So.3d 620, 621 (Ala.Crim.App.2007), quoting *Arrington v. State*, 716 So.2d 237, 239 (Ala.Crim.App.1997).”). Moreover, there is no indication in the trial transcript of such an inability.

[18] As to his claim that the Haldol made him appear emotionless and remorseless and prevented him from contributing to his defense during the penalty phase, as the circuit court determined, this issue could have been raised at trial or on appeal. Rule 32.2(a)(3) and (5). *Compare Riggins v. Nevada*, 504 U.S. 127, 112 S.Ct. 1810, 118 L.Ed.2d 479 (1992) (when defendant objected to the administration of antipsychotic drug during trial, the State should have been required to show the necessity for the drug and any reasonable alternatives). Because Smith did not raise this issue at trial or on appeal, he is precluded from raising it now.

B.

[19] Smith alleges that he was denied his due-process rights under the Fifth Amendment because, he says, he was forced to take Haldol during trial. He argues on appeal that due process allows a mentally ill defendant to be involuntarily treated only if he is a danger to himself or others, and, Smith argues, he was not. He also contends that, because the Haldol did not further any important governmental interest and had side effects that interfered with his right to a fair trial, the State violated his due-process rights by forcing him to take Haldol.

However, Smith failed to raise this claim at trial or on appeal and it is therefore precluded from review. Rule 32.2(a)(3) and (5). *Clayton v. State*, 867 So.2d 1150, 1151–52 (Ala.Crim.App.2003) (Clayton's claims in his Rule 32 petition that his due-process rights were violated were precluded because they could have been raised at trial).

C.

[20] Smith argues that his counsel were ineffective because they did not investigate the State's administration of Haldol to him during trial or object to its administration. The circuit court determined that Smith's counsel were not ineffective under *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), because Smith did not tell them that he was taking any type of medication and because the experts who examined Smith did not note any problems or side effects that would have been attributable to Haldol.

In *Lee v. State*, 44 So.3d 1145 (Ala.Crim. App.2009), “ ‘Lee ... allege[d] that his trial counsel were ineffective for not investigating the amounts of drugs and alcohol in his system at the time of the shootings and for failing to use the surveillance videotape “to ascertain whether [Lee] was under the influence of drugs or alcohol” at the time of the robbery and murders.’ ” 44 So.3d at 1157. The circuit court determined that Lee failed to proffer any specific evidence that would have been discoverable to substantiate his claims of mental illness or drug and alcohol abuse. This Court stated that “ ‘[C]laims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.’ *Thomas v. State*, 766 So.2d [860] at 892 [(Ala.Crim.App.1998)].” 44 So.3d at 1160. Lee failed to proffer specific discoverable evidence and, because “evidence of Lee's mental health and substance abuse were presented to the jury,” he failed to show prejudice. *Id.*

[21–27] In the present case, Smith has proffered no evidence to establish that his

counsel knew or should have known that he was taking Haldol, if he was in fact administered that drug. Smith suggests that he "has offered a large amount of evidence demonstrating that he was drugged, including the reports from Holman Correctional Facility, the reports of Dr. Blotcky and Dr. Rosecrans regarding Mr. Smith's affect during his meetings with them prior to trial, and the testimony of Dr. Morton." (Smith's brief, at 66.) However, none of the experts affirmed that Smith was taking Haldol or stated that Smith told them that he was being given Haldol in jail. The record indicates that Smith's medical records from jail were not available. The reports from Holman Correctional Facility indicated that Smith self-reported that when he came from county jail he was on Haldol. (C. 1778.) In the "Progress Notes" from Holman Correctional Facility, the following entry states: "He [Smith] had apparently been given some Haldol in the County Jail, but there is no record of this in the file." (C. 1785.) The notation appears to indicate that this information concerning the Haldol came from Smith. There is no other affirmation in the record that Smith had been given Haldol. One of Smith's trial counsel testified at his hearing and, when asked on cross-examination whether Smith had ever complained about having been given Haldol, she responded that he had not.[17] Moreover, nothing in the record suggests that any Haldol was involuntarily or unknowingly administered to Smith.

> "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. Cf. *Engle v. Isaac,* 456 U.S. 107, 133–134, 102 S.Ct. 1558, 1574–1575, 71 L.Ed.2d 783 (1982). 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.' See *Michel v. Louisiana,* supra, 350 U.S. [91], at 101, 76 S.Ct. [158], at 164 [(1955)]. 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 Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases,* 58 N.Y.U. L.Rev. 299, 343 (1983).
>
> ". . . .
>
> "Thus, a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside

17. She was not questioned as to this matter by Smith's counsel.

the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. At the same time, the court should recognize that counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.

". . . .

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."

Strickland v. Washington, 466 U.S. at 689–91.

Under these facts, there is no indication that Smith's counsel knew, or reasonably should have known, that Haldol might have been administered to Smith. *See People v. Williams*, 364 Ill.App.3d 1017, 1027, 302 Ill.Dec. 254, 848 N.E.2d 254, 262 (2006) (under the two-prong test established in *Strickland*, Williams failed to prove ineffectiveness because his "postconviction petition did not allege that he told his trial counsel about his mental problems or his lack of treatment. Instead, he alleged that counsel should have taken the initiative and asked him if he was 'mentally ill or under any psychiatric care.' The record belies defendant's allegation because defendant gave no indication that his judgment was impaired or he did not understand the proceedings."). While there was testimony that Smith's demeanor was consistent with that of someone who had taken Haldol, there was also testimony that Smith's affect may have been caused by other reasons. Thus, Smith has failed to prove ineffectiveness on this ground, and the circuit court's determination was not clearly erroneous.

III.

Smith argues that the circuit court erred in denying his claim of ineffectiveness of counsel based on his trial counsel's failure to fully investigate his level of intelligence and psychiatric condition, the inexperience of his lead penalty-phase counsel and her failure to investigate, his trial counsel's failure to bring to the court's and jury's attention the fact that he was being given Haldol in response to the prosecutor's comments concerning his lack of remorse, and his trial and appellate counsel's failure to present evidence to show a history of discriminatory jury strikes by the prosecutor to support his *Batson* [18] motion.

A.

Smith contends that his trial counsel was ineffective for failing to investigate his level of intelligence and his psychiatric condition in order to present all mitigating evidence and to assure that Smith could adequately participate in his defense.

[28] Initially, although Smith contends that counsel, in order to be effective, must investigate every possible defense, counsel is required to make only a reasonable investigation. As this Court stated in *Brooks v. State*, 929 So.2d 491 (Ala.Crim.App.2005):

" 'There is no doubt that counsel did not exhaustively investigate every single detail and aspect of this case. The law, however, does not require such and, in fact does not even require an investiga-

18. *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

tion into every possible theory of defense. Moreover, because the chosen theory of defense was reasonable, "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 [a reasonable-doubt defense] was not a deliberate choice between [it and some other course]." *Chandler v. United States*, 218 F.3d 1305, 1316, n. 16 (11th Cir.2000) (en banc). The "inquiry is limited to whether [the chosen defense] might have been a reasonable one." *Id.*, citing *Harich v. Dugger*, 844 F.2d 1464, 1470–71 (11th Cir.1988) (en banc); *Bonin v. Calderon*, 59 F.3d 815, 838 (9th Cir.1995).' "

929 So.2d at 503–04.

As the State notes in its brief on appeal, Smith did not raise the issue of counsel's failure to present evidence of his low intelligence as mitigation; therefore the circuit court did not make findings as to such an issue in its order. However, Smith did raise the issue of ineffectiveness concerning counsel's failure to present evidence of his mental illness and retardation as mitigation.[19] The circuit court determined that counsel was not ineffective for failing to present such evidence because Dr. Blotcky provided mitigating evidence in the form of such information for Smith. The court further stated that, although Smith contended that another expert might have provided better evidence, "no such testimony was presented at the evidentiary hearing. Therefore, there is insufficient proof of Smith's mental condition at the time of the offense to establish that his trial counsel was ineffective for not hiring a different expert." (C. 80.) Moreover, the circuit court found from the evidence presented at the evidentiary hearing that Smith was not mentally retarded.

Although Smith argues that his counsel was ineffective for failing to present mitigating evidence concerning his mental condition and retardation, the trial court found his low intelligence and his mild retardation to be nonstatutory mitigating circumstances as to his sentence. On direct appeal of his conviction and sentence, this Court stated:

"The trial court also properly considered nonstatutory mitigating circumstances; the trial court made lengthy findings of such evidence which he considered. Summarily, the trial court stated:

" 'I find that [Smith's] luckless childhood and troubled adolescence occasioned in large part by an abusive father, economic deprivations affecting [Smith's] family, [Smith's] verbal I.Q. of 75, classified as the borderline range between mild retardation and low-average intelligence, this position of co-defendant's cases for the lesser offense of murder are all relevant factors to be considered in mitigation of the sentence.' "

Smith v. State, 838 So.2d at 477.

[29] Smith's counsel clearly investigated Smith's mental condition as evidenced by counsel's fee-declaration sheets, which were introduced by Smith at the evidentiary hearing. They indicate that counsel conferred with a psychologist on a number of occasions and also spoke with a psychiatric social worker.

19. To the extent that Smith argues that the circuit court did not adequately address this issue in its findings, Smith did not object to the order denying his Rule 32 petition; therefore, this issue is not preserved for review. *Robinson v. State*, 869 So.2d 1191, 1193 (Ala. Crim.App.2003) ("Initially, we note that Robinson did not first raise his contention regarding the lack of specific findings of fact in the circuit court. Because he did not first present this claim to the circuit court, he has not preserved it for appellate review. *Whitehead v. State*, 593 So.2d 126 (Ala.Crim.App. 1991).").

At trial, Smith defended his case by attempting to impeach his codefendant through testimony concerning her plea agreement, through testimony that Smith and his mother had evicted her, and through testimony that the codefendant was not afraid of Smith. Smith's mother also denied that Smith ever admitted to the murder in a telephone conversation. However, the evidence presented by the State was overwhelming. *See Lee v. State,* 44 So.3d 1145, 1169 (Ala.Crim.App.2009) (finding that, in light of the overwhelming evidence against Lee, counsel's strategy of conceding guilt was not unreasonable and stating, " 'in a capital case, counsel must consider in conjunction both the guilt and penalty phases in determining how best to proceed. When counsel informs the defendant of the strategy counsel believes to be in the defendant's best interest and the defendant is unresponsive, counsel's strategic choice is not impeded by any blanket rule demanding the defendant's explicit consent. Instead, if counsel's strategy, given the evidence bearing on the defendant's guilt, satisfies the *Strickland* standard, that is the end of the matter; no tenable claim of ineffective assistance would remain.' "). As the trial court in this case summarized in its order:

> " 'Suffice it to say that the incriminating force of the whole evidence was overwhelming. The testimony of the witnesses summarized above as corroborated by [Smith's] own recorded statements to Ms. Roshell, by other witnesses such as Michael Wilson who testified about [Smith's] confessory statement, Maurice Leonard concerning jewelry owned by [Smith] as depicted in the bank photos and by the abundant physical evidence.' "

838 So.2d at 425.

[30, 31] Although defense counsel did not present evidence concerning Smith's mental condition or retardation during the guilt phase, they did not perform ineffectively. Nor were they ineffective during the penalty phase by only using Dr. Blotcky's findings as to this matter.

> " '[D]ebatable trial tactics generally do not constitute ineffective assistance of counsel. [*State v.*] *Clayton,* 62 Ohio St.2d [45,] 49, 402 N.E.2d 1189 [(1980)]. This court must indulge in a strong presumption that trial counsel's conduct falls within the wide range of reasonable professional assistance. [*State v.*] *Hartman,* 93 Ohio St.3d [274,] 300, 754 N.E.2d 1150 [(2001)]. Significantly, the existence of alternative or additional mitigation theories generally does not establish ineffective assistance of counsel. [*State v.*] *Combs,* 100 Ohio App.3d [90,] 105, 652 N.E.2d 205 [(1994)].' "

Daniel v. State, 86 So.3d 405, 437 (Ala. Crim.App.2011), quoting *Phillips v. Bradshaw,* 607 F.3d 199, 206–07 (6th Cir.2010).

B.

[32] Smith alleges that his lead trial counsel's "presence" at trial "did not make up for" his other trial counsel's inexperience and failure to investigate. (Smith's brief, at 71.) Specifically, Smith argues that his lead counsel did not cross-examine any witnesses during the penalty phase or conduct any investigation for the penalty phase, and essentially left his cocounsel, who was participating in her first trial, to conduct the penalty phase. He further complains that her performance was ineffective because she did not request that Dr. Blotcky or Dr. Rosecrans conduct more appropriate testing. He states that because these experts did not conduct the proper tests, his counsel failed to present adequate evidence of his low intelligence and use of Haldol.

Cocounsel for Smith at trial acknowledged that his trial was her first time to appear at a trial. She testified that she attempted to obtain Smith's school records. She was following up on information from Smith that he had attended special-education classes; however his records were no longer available. She therefore contacted an assistant principal, who remembered Smith and who testified for him at the penalty phase. Cocounsel stated that her duties were to conduct investigation for sentencing. She also testified that she was instructed "to a limited extent" by the lead counsel as to with whom to speak and what to investigate. (R. 60.) She stated that she spoke with Smith's family members, as well as with members of the community in which he had lived. She testified that she was certain that she had spoken with Dr. Blotcky before the penalty phase, although she could not recall this. Cocounsel testified that lead counsel had previously represented capital defendants and that "he was with [her] during the entire time during the trial, during the guilt phase and the penalty phase." (R. 62.) She confirmed that she discussed with him the interviews she had conducted and what she had investigated; however, they did not confer about what witnesses should be called or what facts should be elicited. She stated that lead counsel "was not very helpful." (R. 62.) She testified that she introduced testimony concerning Smith's upbringing and his severe drug abuse. Lead counsel, however, retained the services of Dr. Blotcky.

In its order following the evidentiary hearing, the circuit court stated as to this issue:

> "Smith then outlines several reasons why his trial counsel was ineffective in representing him at the penalty phase of his trial. It appears that Smith is correct in asserting that [cocounsel] handled all the questioning of witnesses during the penalty phase and that this was [cocounsel's] first time to appear in a criminal trial. Yet, the State of Alabama is likewise correct in noting that 'the appellate courts of Alabama have held that only one attorney representing a capital defendant is required to meet the five-year prior experience requirement. *See, e.g., Hodges v. State,* 856 So.2d 875 (Ala.Crim.App.2001). There is no dispute that Smith's lead defense attorney . . . exceeded the statutory requirements for appointed representation.' (p. 27, State's Post–Hearing Memorandum addressing Smith's Second Amended Rule 32 Petition). Contrary to [Smith's] argument on pages 52 and 53 of his Petition, there is insufficient evidence to show that [lead counsel] excluded himself from the proceedings so as to treat the matter as if [lead counsel] was not present to assist [cocounsel]. In fact, [lead counsel] gave the closing argument of the defense after evidence was presented in the penalty phase. Since Smith did have an attorney who met the minimal five year requirement, in order to prevail regarding a claim of ineffective assistance of counsel at the penalty phase [Smith] is required to meet the elements outlined in *Strickland v. Washington,* supra."

(C. 78.)

Moreover, the record on appeal indicates that lead counsel gave the closing argument to the jury at the penalty phase, as noted by the circuit court; further, during the sentencing phase before the trial court, he examined Smith's sister and delivered the closing argument.

As to cocounsel's failure to have Dr. Rosecrans and Dr. Blotcky perform what Smith says are the correct tests, Smith has failed to show that their testing was incorrect or misleading. Although these ex-

perts did not reach the results Smith may have desired, their testing has not been shown to have been faulty or inadequate. As this court stated in *Hinton v. State,* [Ms. CR–04–0940, August 26, 2011] —— So.3d —— (Ala.Crim.App.2008) (opinion on return to second remand):

> "As the Alabama Supreme Court noted in quoting then Judge Shaw's dissent to this Court's original opinion affirming the circuit court's denial of Hinton's Rule 32 petition:
>
> > "'"If Payne was in fact a qualified firearms and toolmarks expert, even if his qualifications did not necessarily match up with those possessed by the State's experts, then I would affirm the circuit court's judgment denying Rule 32 relief. Sorting out conflicting testimony from qualified experts presented at trial is solely within the province of the jury. Rule 32 is not a mechanism by which those convicted of criminal offenses may argue many years after trial that they now have found better expert witnesses that a newly selected jury should hear. . . ."'
>
> "*Ex parte Hinton,* [Ms. 1051390, October 17, 2008] —— So.3d [——,] at —— [(Ala.2008)] (quoting *Hinton v. State,* [Ms. CR–04–0940, April 28, 2006] —— So.3d ——, —— (Ala.Crim.App.2006) (Shaw, J., dissenting))."

—— So.3d at ——. Although newer tests become available periodically, as occurred concerning one of the tests in this case, there is no indication that any such testing would have yielded different results.

Finally, as found by the circuit court, because Smith's lead attorney had ample years of experience in criminal law and had previously tried cases involving the death penalty, Alabama law was not violated by cocounsel's lack of experience. Section 13A–5–54, Ala.Code 1975, requires that "[e]ach person indicted for an offense punishable under the provisions of this article who is not able to afford legal counsel must be provided with court appointed counsel having no less than five years' prior experience in the active practice of criminal law." This Court stated in *Revis v. State,* 101 So.3d 247 (Ala.Crim.App. 2011):

> "In *Sale v. State,* 8 So.3d 330 (Ala. Crim.App.2008), cert. denied, 8 So.3d 352 (Ala.2008), cert. denied, *Sale v. Alabama,* —— U.S. ——, 129 S.Ct. 2062, 173 L.Ed.2d 1141 (2009), this court stated:
>
> > "'"We have held that § 13A–5–54, Ala.Code 1975, requires only that one attorney meet the statutory requirements. 'In *Parker v. State,* 587 So.2d 1072 (Ala.Crim.App.1991), we held that when a person accused of a capital offense has one attorney whose experience meets that required in § 13A–5–54, the requirements of that section have been satisfied.' *Hodges v. State,* 856 So.2d 875, 899 (Ala.Crim. App.2001)." *Belisle v. State,* 11 So.3d 256, 279 (Ala.Crim.App.2007). Furthermore, a defendant in a capital case is entitled to only one attorney with five years' experience. *See Robitaille v. State,* 971 So.2d 43, 51–52 (Ala.Crim.App.2005); and *Whitehead v. State,* 777 So.2d 781, 851 (Ala.Crim. App.1999).'
>
> "*Sale v. State,* 8 So.3d at 341."

Revis v. State, 101 So.3d at 227. Therefore, because Smith's lead counsel had the requisite experience, his claim fails.

C.

Smith contends that his counsel was ineffective during the penalty phase of his trial for failing to bring to the attention of the judge and jury the fact that Haldol was being administered to him. Smith argues that this was particularly prejudicial due to the prosecutor's comments dur-

ing his closing argument concerning Smith's apparent lack of remorse.

[33] However, as discussed in Issue II of this opinion, there is no indication that Smith informed his counsel that he was being given Haldol nor is there any indication that his counsel should have reasonably believed that to be the case. Further, a prosecutor may properly comment on a capital defendant's lack of remorse and often does so. On direct appeal (opinion on return to remand), Smith alleged that the prosecutor's comments concerning his lack of remorse were indirect comments on his failure to testify. This Court stated:

> "The appellant argues that the prosecutor made indirect comments on his choice not to testify through the following two comments made by the prosecutor at his closing argument during the penalty phase of trial:
>
> " 'I see no remorsefulness. I see no remorsefulness now, probably no remorsefulness then, and probably never will be any remorsefulness.'
>
> " 'And he sits here and does not shed one tear, not even one tear for his mother sitting on this stand begging for his life. All he can do is close his eyes. . . .'
>
> "In *Ex parte Loggins,* 771 So.2d 1093, 1099 (Ala.2000), Loggins argued that the prosecutor had made improper comments during his closing argument in the penalty phase of the trial by stating: ' "And throughout every word you've heard from this witness stand in this courtroom this entire week has there been an iota of remorse? None. Absolutely none." ' Loggins argued that this argument by the prosecutor constituted a direct comment on his failure to testify. The Alabama Supreme Court found no merit to this argument stating:
>
> " 'Not every comment that refers or alludes to a nontestifying defendant is an impermissible comment on his failure to testify; the prosecutor has a right to comment on reasonable inferences from the evidence:
>
> " ' " 'During closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference. *Rutledge v. State,* 523 So.2d 1087 (Ala.Crim. App.1987), rev'd on other grounds, 523 So.2d 1118 (Ala.1988). Wide discretion is allowed the trial court in regulating the arguments of counsel. *Racine v. State,* 290 Ala. 225, 275 So.2d 655 (1973). In evaluating allegedly prejudicial remarks by the prosecutor in closing argument, no fixed standard can be applied, and each case must be judged on its own merits. *Hooks v. State,* 534 So.2d 329 (Ala.Crim.App.1987), aff'd, 534 So.2d 371 (Ala.1988).'
>
> " ' " . . . . "
>
> " '. . . Moreover, remorse is also a proper subject of closing arguments. *Dobyne v. State,* 672 So.2d 1319, 1348–49 (Ala.Cr.App.), on return to remand, 672 So.2d 1353 (Ala.Cr.App.1994), aff'd, 672 So.2d 1354 (Ala.1995), cert. denied, 517 U.S. 1169, 116 S.Ct. 1571, 134 L.Ed.2d 670 (1996).
>
> " ' " . . . . "
>
> " '. . . *Harris v. State,* 632 So.2d 503, 536 (Ala.Crim.App.1992), aff'd, 632 So.2d 543 (Ala.1993), aff'd, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) (wherein this Court held that a reference, during the sentencing stage of the trial, to the defendant's lack of remorse was not improper argument, where testimony introduced at trial had indicated that

the defendant's reaction to being informed of her husband's death was so unemotional that she was questioned concerning her reaction); *Dobyne,* supra, 672 So.2d at 1348–49 (wherein this Court held that a prosecutor's comment regarding the defendant's lack of remorse, made during the penalty phase of the trial, was a comment "on the [defendant's] demeanor when he made his statement to police").'

"*Ex parte Loggins,* 771 So.2d at 1101–02.

"Examining this comment made by the prosecutor in the context of his entire argument, it is clear that he was referring to [Smith's] demeanor and was drawing inferences and conclusions from the evidence. Testimony was presented that [Smith] bragged that he had shot the victim."

Smith v. State, 838 So.2d at 458–59.

As the comments by the prosecutor concerning Smith's lack of remorse indicate, they were based not only on his demeanor at trial but also on his behavior at the time of the offense, including the evidence that he bragged about the murder to others. There is no contention by Smith or indication in the record that Haldol had been administered to him at the time of the offense. Therefore, based on counsel's apparent lack of knowledge concerning the administration of Haldol to Smith, as well as the nature of the prosecutor's comments that referred to Smith's lack of remorse at the time of the offense and following, as evidenced by his statements to others, Smith has failed to show ineffectiveness as to this claim.

D.

Smith argues that his trial and appellate counsel were ineffective as to his *Batson* claim, because, he says, they failed to provide evidence to support his contention that the prosecutor had a history of discriminatory strikes. Despite this claim, Smith alternatively alleges that the circuit court erred by ignoring his trial counsel's argument as to this matter, as shown in this Court's opinion on direct appeal,[20] wherein the following occurred:

"[Defense counsel]: . . . We also bring to the Court's attention that this prosecutor's office has been reversed on many, many, many occasions for systematically excluding blacks.

"THE COURT: I don't agree with that, I really don't.

"[Defense counsel]: Judge, I have reversed them myself—

"THE COURT: Many, many, many, many occasions?

"[Defense counsel]: Many times.

"THE COURT: This is [prosecutor,] a very prominent black attorney—

"[Defense counsel]: Yes, sir, I understand that, Judge.

"THE COURT: That I have worked with and you have too.

"[Defense counsel]: Yes, sir. But also this same attorney came out in the paper, was quoted as saying that prosecutors do not use their strikes to eliminate blacks. And we feel like at least a prima facie case has been made out.

"THE COURT: Well, I respectfully call your attention to the record, Ms. G., the one that leans to the defendant; Ms. O., who has a problem with capital punishment. Ms. H., who is nervous and doesn't want to see the pictures, she's on whatever that stuff is—

". . . .

20. This Court remanded this case based on the prosecutor's striking of female jurors.

"THE COURT: And I have sat up here for 10 years and I know that—well, I don't want to say too much because you will say I am putting words in their mouths.

"[Defense counsel]: Yes, sir.

"THE COURT: So I don't want to say anything else but other than to decline to say that you have made a prima facie case, [defense counsel].

"[Defense counsel]: Even with the Hispanic, Judge and no—

"THE COURT: I am going to stand pat and say that you have not made out a prima facie case of discriminatory striking."

698 So.2d at 1168–69 (footnotes omitted). Although the circuit court found that Smith failed to make a prima facie case of discrimination in the prosecutor's strikes of potential jurors, defense counsel clearly made an argument concerning the prosecutor's history of discriminatory strikes. Appellate counsel also gave a persuasive argument concerning the prosecutor's strikes waged against female potential jurors, as evidenced by this Court's decision to remand this cause. *See J.E.B. v. State*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

Moreover, following the evidentiary hearing pursuant to Smith's Rule 32 petition, the circuit court stated in its order:

"This Court is of the opinion that this argument is without merit for several reasons. First, at the Rule 32 evidentiary hearing [Smith] did not specify how [defense counsel's] 'extensive knowledge' of prior discrimination by the Jefferson County District Attorney's Office would have, if sufficiently conveyed to the court, successfully resulted in his *Batson* motion being granted. Furthermore, it appears that 'fourteen of [the State's] fifteen strikes [were] to eliminate prospective jurors of the female gender.' The State's decision to strike each of these fourteen prospective female jurors was sufficiently addressed on remand by the trial court. The Court of Criminal Appeals of Alabama held that '[a]ll of the reasons given by the prosecutor for his strikes of these potential jurors were sufficiently facially gender neutral' *Smith v. State*, 838 So.2d 413, 436 (Ala. Crim.App.2002). Based upon the appellate court's standard of review in death penalty cases, if any of the reasons given for striking said jurors violated *Batson*, then the court would have been obligated to find plain error and address that issue. Yet, the appellate court did not find any error or any improper motive in the prosecutor's strikes. Since the appellate court held that fourteen of the fifteen strikes were proper, the only issue which would need to be addressed was the State's decision to strike the one remaining male juror. Based upon this court's summary of the State's strikes, although not entirely clear, it appears the only remaining strike by the prosecution was a white male. (RT. 448–455). Therefore, any claim of a *Batson* violation would be without merit. Even if this conclusion regarding the fifteenth juror struck by the State being a white male is incorrect, the Petitioner has failed to sufficiently carry his burden at the evidentiary hearing as it relates to this issue."

(C. 81–82.) On appeal of the denial of his Rule 32 petition, Smith challenged his counsel's (at trial and on appeal) effectiveness specifically only for failing to support his claim of a history of discrimination by the prosecutor. The record affirms that trial counsel effectively argued this ground to the trial court, and this Court's remand indicates that appellate counsel effectively argued discrimination by the prosecutor.

Therefore, Smith has failed to prove ineffectiveness on this ground.

IV.

[34] Smith argues that the circuit court erred by dismissing his claim that his constitutional rights were violated because of a *Batson* violation. The circuit court determined that this claim was precluded and stated:

> "[Smith] then claims that the State's use of peremptory challenges to remove African Americans, Latinos, and women violated *Batson v. Kentucky* and *J.E.B. v. Alabama*, [511 U.S. 127 (1994)] (p. 132–151). Although [Smith] cites a significant amount of caselaw in support of this argument, the State is correct in asserting that Smith is precluded from relief as it relates to these issues. These issues were raised at trial and on direct appeal; therefore, they are precluded by Rules 32.2(a)(2) and (4). To the extent that they were not raised at trial or on appeal, they are precluded by Rule 32.2(a)(3) and (5)."

(C. 86.)

[35] The circuit court properly determined that this issue is precluded because it has been raised and addressed both at trial and on appeal. *See Smith v. State,* 838 So.2d at 425–36 (as to female potential jurors) and 464–66 (as to the Hispanic and African-American potential jurors). Moreover, although Smith further requests that this Court also examine this issue as a claim of ineffectiveness of counsel, he makes this bare request without any supporting basis of ineffectiveness. In fact, he breaks down this claim as to discriminatory strikes entered against African-Americans, the Latino, and women and then solely faults the trial court for its decision without indicating that his counsel did not perform effectively. He then argued that the State failed to engage in any meaningful voir dire examination of the potential female jurors and that certain reasons given by the State for its strikes, specifically that it struck all people with church affiliations and with law-school experience, were pretextual. Smith also cited the prosecutor's striking of a potential juror as young, unresponsive, and apparently afraid, as having been a sham. However, in each instance, Smith has failed to allege any ineffectiveness of counsel as to these strikes. Therefore, Smith has failed to establish the requisite specificity as to these claims and, in his brief on appeal, he has failed to cite any authority to support this claim of ineffectiveness. Rule 28(a)(10), Ala.R.App.P. (providing that the brief of an appellant shall contain "an argument containing the contentions of the appellant with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on"). "Recitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed. *Gay v. State,* 562 So.2d 283, 289 (Ala.Crim.App.1990)." *Hamm v. State,* 913 So.2d 460, 486 (Ala.Crim.App. 2002). This rule has been applied to appellate briefs addressing Rule 32 petitions of convictions of capital murder resulting in death penalties. *See also McWhorter v. State,* [Ms. CR–09–1129, September 30, 2011] —— So.3d ——, —— (Ala.Crim.App. 2011); *Taylor v. State,* [Ms. CR–05–0066, October 1, 2010] —— So.3d ——, —— (Ala. Crim.App.2010).

Therefore, Smith's contention regarding the violation of his constitutional rights pursuant to *Batson* is precluded from review, and his allegation of ineffectiveness of counsel based on his *Batson* claim is insufficiently pleaded and presented.

V.

Smith argues that Alabama's method of execution violates the cruel and unusual punishment clause of the Eighth Amendment. In his brief, Smith contends that despite the United Supreme Court's decision in *Baze v. Rees,* 553 U.S. 35, 128 S.Ct. 1520, 170 L.Ed.2d 420 (2008), the use of lethal injection should be constitutionally impermissible.

The circuit court in its order dismissing Smith's Rule 32 petition, stated as to this issue:

> "[Smith] then asserts that lethal injection violates the Eighth Amendment to the United States Constitution because it subjects an individual to cruel and unusual punishment. This argument was made and filed in Smith's Petition before the United States Supreme Court rejected a constitutional challenge to a similar lethal injection procedure administered in Kentucky. *Baze v. Rees,* 128 S.Ct. 1520 (2008). Based upon the aforementioned holding, this argument by [Smith] is without merit. Furthermore, [Smith] has failed to meet his burden as it relates to any argument or facts that may differ from those presented to the Court in *Baze v. Rees,* supra."

(C. 74.) As found by the circuit court, this issue has been determined adversely to Smith's argument and he has failed to distinguish his claim from established caselaw.

> "This issue has been addressed by both the Alabama Supreme Court and the United States Supreme Court. In *Ex parte Belisle,* 11 So.3d 323 (Ala. 2008), the Alabama Supreme Court stated:
>
> "'"The Supreme Court upheld the constitutionality of Kentucky's method of execution, *Baze* [*v. Rees,* 553 U.S. 35, 62,] 128 S.Ct. [1520] 1538 [(2008)], and noted that '[a] State with a lethal injection protocol substantially similar to the protocol we uphold today would not create a risk that meets this standard.' *Baze,* [553 U.S. at 61], 128 S.Ct. at 1537. Justice Ginsburg and Justice Souter dissented from the main opinion, arguing that 'Kentucky's protocol lacks basic safeguards used by other States to confirm that an inmate is unconscious before injection of the second and third drugs.' *Baze,* [553 U.S. at 114], 128 S.Ct. at 1567 (Ginsburg, J., dissenting). The dissenting Justices recognized, however, that Alabama's procedures, along with procedures used in Missouri, California, and Indiana 'provide a degree of assurance—missing from Kentucky's protocol—that the first drug had been properly administered.' *Baze,* [553 U.S. at 121], 128 S.Ct. at 1571 (Ginsburg, J., dissenting).
>
> "'"The State argues, and we agree, that Belisle, like the inmates in *Baze,* cannot meet his burden of demonstrating that Alabama's lethal-injection protocol poses a substantial risk of harm by asserting the mere possibility that something may go wrong. 'Simply because an execution method may result in pain, either by accident or as an inescapable consequence of death, does not establish the sort of "objectively intolerable risk of harm" that qualifies as cruel and unusual.' *Baze,* [553 U.S. at 50], 128 S.Ct. at 1531. Thus, we conclude that Alabama's use of lethal injection as a method of execution does not violate the Eighth Amendment to the United States Constitution."

"'11 So.3d at 339. *See also Vanpelt v. State,* 74 So.3d 32, at 90 (Ala.Crim.

App.2009) (holding that lethal injection is not unconstitutional).

> " 'Because this issue has been raised and rejected by the Alabama Supreme Court, the United States Supreme Court, and this Court, it is without merit.' "

Wilson v. State, [Ms. CR–07–0684, March 23, 2012] —— So.3d ——, —— (Ala.Crim.App.2010)(opinion on return to remand), quoting *Albarran v. State,* 96 So.3d 131, 202 (Ala.Crim.App.2011). Therefore, the circuit judge properly denied this claim and his decision was not clearly erroneous.

VI.

[36] Smith alleges that he was denied his Fourteenth Amendment due-process rights to have the facts of his case determined by the jury, in violation of *Ring v. Arizona,* 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000).

As to this issue, the circuit court found:

> "Smith's final claim addresses an allegation that the trial court improperly considered facts not presented to the jury before making its recommendation that Smith be sentenced to death. In particular, [Smith] asserts that
>
> > " 'the trial court in this case made the factual determination that the mitigating circumstance that [Smith] acted under extreme mental or emotional disturbance at the time of the trial did not exist. (C.R. 163) The court based its finding on the reports of Dr. C.R. Rosecrans and Dr. Alan Blotcky. Dr. Rosecrans did not testify at any phase of the trial nor was his report in evidence before the jury. (C.R. 159). Dr. Blotcky testified before the jury at the penalty phase, but his report was not in evidence and he did not testify to the absence of this mitigator.' (p. 156, Rule 32 Petition).
>
> "The argument made by [Smith] is based upon *Ring v. Arizona,* 536 U.S. 584 (2002), and *Apprendi v. New Jersey,* 530 U.S. 466 (2000).
>
> "Without making a determination as to whether this issue is procedurally barred, this Court finds that [Smith] is not entitled to relief based upon this argument. Based upon this Court's review of the record, it does not appear that the defense presented evidence to prove the mitigating circumstance that the 'capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.' § 13A–5–51, Code of Alabama (1975). On direct appeal, the Court of Criminal Appeals of Alabama addressed a related issue and held that Judge Hard's reference to Dr. Rosecrans's and Dr. Blotcky's reports was not prejudicial to the defendant nor was it plain error. *Smith v. State,* 838 So.2d 413, 445 (Ala. Crim.App.2002). This Court is of the opinion that Judge Hard's reference to Dr. Rosecrans and/or Dr. Blotcky in no way implicates the holdings in *Ring v. Arizona,* 536 U.S. 584 (2002), or *Apprendi v. New Jersey,* 530 U.S. 466 (2000). If the offense of conviction had not included an aggravating circumstance outlined in § 13A–5–49, Code of Alabama (1975), then *Ring* would have been applicable. Yet, Judge Hard's Order was merely noting that there was no evidence presented by the defense of one of the statutory mitigating circumstances. If the court had used improper evidence to find that an aggravating circumstance existed, then a separate set of factors would have to be considered. Yet, the trial court's mention of Dr. Rosecrans and Dr. Blotcky's reports does not change the Court's conclusion that 'no

evidence adduced at trial, nor at the second stage in front of the jury, nor by way of evidence adduced at the third stage' proved any 'extreme mental or emotional disturbance.' Therefore, [Smith] is not entitled to relief under Rule 32, based upon his claim."

(C. 87–88.)

In the present case, Smith was convicted of capital murder for committing intentional murder during the course of a robbery and during a kidnapping. As this Court stated in *Wilson v. State,* [Ms. CR–07–0684, March 23, 2012] —— So.3d —— (Ala.Crim.App.2010) (opinion on return to remand):

"In *Ex parte Waldrop,* 859 So.2d 1181 (Ala.2002), the Alabama Supreme Court held:

" '[W]hen a defendant is found guilty of a capital offense, "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing." Ala.Code 1975, § 13A–5–45(e). . . .

" 'Because the jury convicted Waldrop of two counts of murder during a robbery in the first degree, a violation of Ala.Code 1975, § 13A–5–40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala.Code 1975, § 13A–5–49(4), was "proven beyond a reasonable doubt." Ala.Code 1975, § 13A–5–45(e); Ala.Code 1975, § 13A–5–50. Only one aggravating circumstance must exist in order to impose a sentence of death. Ala.Code 1975, § 13A–5–45(f). Thus, in Waldrop's case, the jury, and not the trial judge, determined the existence of the "aggravating circumstance necessary for imposition of the death penalty." *Ring* [*v. Arizona*], 536 U.S. [584,] 609, 122 S.Ct. [2428,] 2443 [(2002)]. Therefore, the findings reflected in the jury's verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty. This is all *Ring* and *Apprendi* [*v. New Jersey,* 530 U.S. 466, 120 S.Ct. 2348, 147 L.Ed.2d 435 (2000),] require.'

"859 So.2d at 1188 (footnote omitted). The Alabama Supreme Court reaffirmed its holding in *Ex parte Waldrop* in *Ex parte Martin,* 931 So.2d 759, 770 (Ala. 2004)."

—— So.3d at ——. Thus, because by finding Smith guilty of the offenses for which Smith was convicted, the jury made a finding regarding the aggravating circumstances, and neither *Ring* nor *Apprendi* were violated.

[37, 38] Moreover, although Smith contends that the circuit court improperly [21] considered the reports from Dr. Rosecrans and Dr. Blotcky in determining that the mitigating circumstance of impairment caused by emotional or mental disturbance did not exist, this is not a concern recognized under *Ring* or *Apprendi.* Both cases pertain to the jury being allowed to determine facts that may increase, rather than decrease, the defendant's sentence. *See Apprendi,* 530 U.S. at 490 ("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. With that exception, we endorse the statement of the

21. Smith argues that the court's consideration of these reports was improper because they were not in evidence and because the jury never considered them.

rule set forth in the concurring opinions in that case: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' [*Jones v. United States*] 526 U.S. [227], at 252–253, 119 S.Ct. 1215 (opinion of Stevens, J.); see also *id.*, at 253, 119 S.Ct. 1215 (opinion of Scalia, J.).").

As this Court has held, because the jury specifically found that the aggravating circumstances existed–i.e., that the capital offense was committed during the course of a kidnapping and a robbery—this finding made Smith eligible for the death penalty. *See Wilson v. State,* [Ms. CR–07–0684, March 23, 2012] —— So.3d —— (Ala.Crim. App.2012); *Thompson v. State,* [Ms. CR–05–0073, February 17, 2012] —— So.3d —— (Ala.Crim.App.2012); *Whatley v. State,* [Ms. CR–08–0696, December 16, 2011] —— So.3d —— (Ala.Crim.App.2011); *Revis v. State,* 101 So.3d 247 (Ala.Crim. App.2011); *Dotch v. State,* 67 So.3d 936, 1005 (Ala.Crim.App.2010); *Ex parte Martin,* 931 So.2d 759, 770 (Ala.2004). Alabama's sentencing scheme is not unconstitutional under *Ring* or *Apprendi.*

Based on the foregoing, the circuit court's denial of Smith's Rule 32 petition is affirmed.

AFFIRMED.

WINDOM, P.J., and WELCH, KELLUM, and JOINER, JJ., concur.

Ex parte Willie B. SMITH III.

(In re Willie B. Smith III

v.

State of Alabama).

1111480.

Supreme Court of Alabama.

Nov. 16, 2012.

(Jefferson Circuit Court, CC–92–1289.60; Court of Criminal Appeals, CR–08–1583; J. William Cole, J.)

Kathryn R. Eldridge of Maynard, Cooper & Gale, P.C., Birmingham; Hugh A. Abrams of Sidley Austin LLP, Chicago, Illinois; and Tung Nguyen of Sidley Austin LLP, Dallas, Texas, for petitioner.

Submitted on petitioner's brief only.

Prior report: Ala.Cr.App., 112 So.3d 1108.

STUART, Justice.

The petition for the writ of certiorari is denied.

In denying the petition for the writ of certiorari, this Court does not wish to be understood as approving all the language, reasons, or statements of law in the Court of Criminal Appeals' opinion. *Horsley v. Horsley,* 291 Ala. 782, 280 So.2d 155 (1973).

WRIT DENIED.

MALONE, C.J., and WOODALL, BOLIN, PARKER, and SHAW, JJ., concur.

rule set forth in the concurring opinions in that case: '[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt.' [*Jones v. United States*] 526 U.S. [227], at 252–253, 119 S.Ct. 1215 (opinion of Stevens, J.); see also *id.*, at 253, 119 S.Ct. 1215 (opinion of Scalia, J.).").

As this Court has held, because the jury specifically found that the aggravating circumstances existed–i.e., that the capital offense was committed during the course of a kidnapping and a robbery—this finding made Smith eligible for the death penalty. *See Wilson v. State,* [Ms. CR–07–0684, March 23, 2012] —— So.3d —— (Ala.Crim. App.2012); *Thompson v. State,* [Ms. CR–05–0073, February 17, 2012] —— So.3d —— (Ala.Crim.App.2012); *Whatley v. State,* [Ms. CR–08–0696, December 16, 2011] —— So.3d —— (Ala.Crim.App.2011); *Revis v. State,* 101 So.3d 247 (Ala.Crim. App.2011); *Dotch v. State,* 67 So.3d 936, 1005 (Ala.Crim.App.2010); *Ex parte Martin,* 931 So.2d 759, 770 (Ala.2004). Alabama's sentencing scheme is not unconstitutional under *Ring* or *Apprendi.*

Based on the foregoing, the circuit court's denial of Smith's Rule 32 petition is affirmed.

AFFIRMED.

WINDOM, P.J., and WELCH, KELLUM, and JOINER, JJ., concur.

Ex parte Willie B. SMITH III.

(In re Willie B. Smith III

v.

State of Alabama).

1111480.

Supreme Court of Alabama.

Nov. 16, 2012.

(Jefferson Circuit Court, CC–92–1289.60; Court of Criminal Appeals, CR–08–1583; J. William Cole, J.)

Kathryn R. Eldridge of Maynard, Cooper & Gale, P.C., Birmingham; Hugh A. Abrams of Sidley Austin LLP, Chicago, Illinois; and Tung Nguyen of Sidley Austin LLP, Dallas, Texas, for petitioner.

Submitted on petitioner's brief only.

Prior report: Ala.Cr.App., 112 So.3d 1108.

STUART, Justice.

The petition for the writ of certiorari is denied.

In denying the petition for the writ of certiorari, this Court does not wish to be understood as approving all the language, reasons, or statements of law in the Court of Criminal Appeals' opinion. *Horsley v. Horsley,* 291 Ala. 782, 280 So.2d 155 (1973).

WRIT DENIED.

MALONE, C.J., and WOODALL, BOLIN, PARKER, and SHAW, JJ., concur.

MURDOCK, J., dissents.

MAIN and WISE, JJ., recuse themselves.*

* Justice Main and Justice Wise were members of the Court of Criminal Appeals when that court considered this case.

State of Alabama Unified Judicial System 10th Circuit Jefferson County	CASE ACTION SUMMARY CONTINUATION	Case Number CC 1992 1289.60 ID YR Number

Style: **Willie B. Smith, III v. State of Alabama**

DATE	Actions, Judgments, Case notes
06/5/09	**Order** On March 26, 1992, Willie B. Smith, III was indicted by the Jefferson County Grand Jury for two counts of Capital Murder. Attorney Dan Turberville was appointed to represent the Defendant after his arrest. Attorney Amy Peake was subsequently appointed to assist Mr. Turberville in representing the Defendant. On May 7, 1992, Smith was convicted of two counts of capital murder for an intentional killing during a robbery in the first degree and during a kidnapping in the first degree. After being instructed on the law, the jury returned a ten-two recommendation that the Defendant be sentenced to death. On July 17, 1992, Judge James H. Hard accepted the jury's recommendation and sentenced Smith to death by electrocution. The Defendant subsequently appealed his conviction and sentence, and the case was remanded with instructions that "the prosecutor should come forward with reasons for his strikes of females." Smith v. State, 698 So.2d 1166 (Ala.Crim.App. 1997). After the hearing on remand, the trial court held that no jurors were improperly struck based on their gender. On February 1, 2002, the Alabama Court of Criminal Appeals affirmed Smith's conviction and sentence. On June 28, 2002, the Alabama Supreme Court denied Smith's Petition for Writ of Certiorari, and on December 16, 2002, Smith's Petition for Writ of Certiorari to the United States Supreme Court was denied. On August 1, 2003, Smith filed a timely Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. The Petitioner was granted leave to file amended petitions. On November 26, 2007, the "Second Amended Petition for Relief from Judgment Pursuant to Rule 32 of the Alabama Rules of Criminal Procedure" was filed by counsel for Willie Smith. On November 12, 2008, a hearing was held and evidence presented on behalf of the Petitioner and the Respondent addressing numerous issues which were raised in Smith's Second Amended Petition. At said hearing, parties were notified that any issues that strictly involved questions of law would be regarded as properly preserved for review so as to prevent counsel for the Petitioner from having to read into the record all issues outlined in the Petition. Counsel for both parties were notified that any issue relating to a question of fact would have to be supported by proper evidence or would be subject to an adverse ruling based upon a failure to present evidence in support of the argument. This Order addresses the issues raised by the Petitioner in Smith's Second Amended Petition (herein referred to as "Rule 32 Petition").

1. The first issue raised by Smith is that he is mentally retarded; therefore, the United States Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242 (2002) would preclude Smith from being punished through death by lethal injection or death by electrocution. (pp. 5-18). A majority of the testimony taken at the evidentiary hearing related to this issue. The Supreme Court of Alabama first addressed and interpreted the Atkins decision in Ex parte Perkins, 851 So.2d 453 (Ala. 2002). In Ex parte Perkins, 851 So.2d at 456 the court determined that Alabama, like other states which prohibit execution of mentally retarded individuals, will "require that a defendant, to be considered mentally retarded, must have significantly sub-average intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e. before the defendant reached age 18)." This test outlined in Ex parte Perkins is essentially the standard that the appellate courts of Alabama have adopted since the Atkins decision, and is the standard which will be considered by this Court. In assessing an offender's adaptive functioning, the state appellate courts have looked to a myriad of factors in determining whether one is mentally retarded and therefore exempt from the death penalty. Perkins, 851 So.2d at 456; Smith, [--- So.2d at ----]; Stallworth, 868 So.2d at 1182. Among these factors are: employment history, the ability to have interpersonal relationships, being extensively involved in criminal activity and post-crime craftiness on the part of the criminal." Ferguson v. State, 2008 WL 902901, *15 (Ala.Crim.App. 2008). Furthermore, "to be diagnosed as mentally retarded, an offender must have significant limitations in adaptive functions in at least two of the following skill areas: communication, self care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety" Ferguson v. State, 2008 WL 902901, *14 (Ala.Crim.App. 2008).

As the Respondent emphasizes, one of the primary issues that must be considered is the failure of the experts for the Petitioner to state that in their opinion the Defendant is mentally retarded. In relation to the Petitioner's failure to present expert testimony that he is mentally retarded, the Tennessee appellate courts have held that such testimony is not required in a case such as this case. The Tennessee Courts have held that:

> "[a]lthough experts may offer insightful opinions on the question of whether a particular person satisfies the psychological diagnostic criteria for mental retardation, the ultimate issue of whether a person is, in fact, mentally retarded for purposes of the constitutional ban on excessive punishment is one for the finder of

fact, based upon all of the evidence and determinations of credibility." Vann Tran v. State, 2006 WL 3327828, *24 (Tenn.Crim.App. 2006).

Although this Court acknowledges that the ultimate issue of whether Smith is mentally retarded and not subject to execution pursuant to Atkins v. Virginia, 536 U.S. 304, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) is to be decided by the court, the opinion of an expert is certainly one factor that should be considered by the trial court. Although it does not appear that the appellate courts of Alabama have precluded application of Atkins when no expert testified that he or she felt the individual in question was mentally retarded, the appellate courts in Mississippi have established such a requirement. In King v. State, 960 So.2d 413, 425 (Miss. 2007) (quoting Chase v. State, 837 So.2d 1013, 1029 (Miss. 2004)) the Supreme Court of Mississippi held that

> "no defendant may be adjudged mentally retarded for purposes of the Eighth Amendment, unless such defendant produces, at a minimum, an expert who expresses an opinion, to a reasonable degree of certainty, that: 1. The defendant is mentally retarded, as that term is defined by the American Association on Mental Retardation and/or the American Psychiatric Association..."

Having no mandate from the Alabama appellate courts that such an opinion is necessary in reaching a decision that an individual is mentally retarded and, therefore, ineligible to be executed, this Court will hold that the Petitioner's failure to present an expert who believes the Defendant is mentally retarded does not preclude relief. Yet, once again, the lack of such expert testimony weighs against the Petitioner.

There was conflicting testimony by experts as it relates to the first factor of whether the Defendant has "significantly sub-average intellectual functioning". Dr. Karen Salekin, who was called by the Petitioner, testified the Defendant had an overall IQ of 64. Dr. Salekin testified that the Defendant had a full scale intelligence quota of 64 with a 95 confidence interval of 61 to 69." (R. 69). Although Dr. Salekin also testified that the "Flynn Effect could lower the Defendant's IQ test score by more than two points", this Court did not find evidence regarding the Flynn Effect to be convincing enough so as to warrant a reduction of Salekin's or Dr. King's Intelligence Quotient test results. Even Dr. Salekin agreed that there is "no [national] conscientious" on whether the Flynn Affect should be applied to IQ scores. (R. 87). Dr. Glenn King, who testified for the Respondent, stated that the Defendant had a verbal IQ of 75 and a performance IQ level 74, which resulted in full scale IQ of 72. The Court found both of these experts to be credible with an appropriate

background to testify regarding the Intelligence Quotient tests. Based in part upon Dr. King's verbal IQ score calculation of 75 and this score's exact correlation with Dr. Blotcky's determination that Willie Smith also had a verbal IQ of 75, this Court was of the opinion that Dr. King's overall IQ calculation for Willie Smith was probably more accurate than that determined by Dr. Salekin.

As it relates to the Defendant's adaptive functioning, areas to be considered include "communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work." Atkins v. Virginia, 536 U.S. 304, 309 122 S.Ct. 2242, 2245 (2002). Although the Petitioner showed deficits in adaptive functioning based upon test results, the Petitioner did not show many, if any, actual examples of how his low IQ affected his adaptive functioning in everyday life before or after the incident in question. As it relates to the adaptive functioning issue, Dr. Salekin testified that she administered the SIB-R test which includes interviewing a third person about the abilities of the person in question. According to Dr. Salekin, the SIB-R is one of many scales of adaptive behavior that tries "to evaluate a person's ability to function on a day-to-day basis." (R. 72). Dr. Salekin testified that the test results "show deficits in adaptive behavior for Willie Smith." (R. 73). According to Dr. Salekin, she used this test because a self-administered test such as ABAS, which was administered by Dr. King, is not usually recommended to determine mental retardation since individuals often "overestimate their abilities." Therefore, they use tests from individuals who know the person in question. (R. 81-82).

One of the "draw backs" to the SIB-R test is the individual's ability to remember past events, and Dr. Salekin agreed that the tests administered to the Petitioner's brother involved questions about behavior approximately 30 years prior to the test. Ideally one would want to administer the SIB-R test at the time in question rather than many years later because that is how the "test was normed." (R. 90). On the SIB-R, Smith's "personal living skills indicated an age equivalency of 12 years, 8 months." (R. 89, 90).

Dr. Salekin also administered the "Woodcock Johnson III test to determine current achievement levels, which relates directly to school function." The "norm" or average on this test is a score of 100. The Defendant scored an 89 in ability to speak to others which is less than one standard deviation from the "norm" of 100. He scored an 84 in "oral expression" which also includes communicating orally with others and is "slightly more than one standard deviation below the mean." Smith had a "pretty good" score of 93 in listening comprehension, an 88 in "broad reading", a 92 in "broad math", and a 97 in

"broad written language". The Defendant also scored a 101 in calculation, 101 in math fluency, and 107 in spelling. These three scores were above the "mean" or above the national average score. Therefore, in math fluency the Defendant's grade equivalent was 12.9 and in spelling his grade equivalency was 13.9. (R. 93-96). According to Dr. Salekin, these grades were "inconsistent ... with a diagnosis that Mr. Smith would be mildly mentally retarded." (R. 96). According to Dr. Salekin, the Defendant's 8.8 grade level in math, 8.5 grade level in broad written language, his 11th grade level in calculation, his 9.8 grade level in written skills, his 10.5 grade level in academic skills, his 12.9 grade level in math fluency, his 13.9 grade level in spelling, and his 8.4 grade level in oral comprehension are all inconsistent with a diagnosis of mental or mild mental retardation. (R. 100). Over an objection by counsel by the Petitioner, Dr. Salekin testified that she does not believe Smith has mental retardation. She reached this conclusion after doing "a full Atkins evaluation." (R. 106, 107).

The Petitioner also called Dr. Daniel Marson, a clinical neuropsychologist employed in the Department of Neurology at the University of Alabama at Birmingham. Dr. Marson was accepted as an expert in the field of neuropsychology and brain behavior relationships. In addition to frequently giving IQ tests, Dr. Marson also does "specific tests of discreet cognitive abilities." He is trained to determine cognitive deficits that may result from different neurological diseases. Dr. Marson believes that Smith came "into this world with a learning disability, both for verbal and visual information. What he does learn, he is able to, however, carry over and hold on to." (R. 146). Dr. Marson was hired more to do a neuropsychological evaluation rather than an intellectual functioning test. In the "attention" domain of this test the Defendant was "very mildly impaired" in the area of "spacial span" which means that he would have difficulty scanning his environment and may not notice new stimuli in his surroundings. (R. 120, 121). The Defendant's exhibits #11 and #12 conflicted with regard to the percentile under WMS III working memory as to whether the Defendant was in the mildly impaired range or in the low average range. As it relates to the "expressive language" domain, the Defendant's three test scores range from low average to high average; therefore, there was no deficit in that area. (Defendant's Exhibit #12). Although there was no deficiency in these categories as it relates to the Defendant's racial group, there was one deficiency as it relates to the overall population. In the "memory" domain, the Defendant tested as moderately impaired in two categories which referred primarily to the Defendant's ability or lack thereof in short term retention of verbal or visual information. The Defendant also tested as moderately or severely impaired on four visual tests relating to his ability to reproduce a complex drawing after short or long periods of time. Dr. Marson appeared to summarize Smith's ability to remember items as having

difficulties in immediately retaining information, but once he learned information he was generally good at retaining the information for long periods of time. In the remaining sixteen "memory" tests, it appears the Defendant was mildly impaired in one category and was in the low average or high average range for the remaining tests. Dr. Marson also conducted five tests in the category he listed as "executive function." In general, these tests relate to an individual's ability to plan, time matters, and organize life situations so as to properly function in society. As described to this Court, this general category appears to be of greater importance as it relates to the adaptive functioning aspect of Atkins. The Defendant was listed by Dr. Marson as moderately impaired in a category involving raw processing speed, mildly impaired or borderline range on a second tests, low average on a third test, and low average as it relates to the general population, but average as it relates to Smith's racial group on the final test.

In general, this Court would summarize Dr. Marson's testimony as indicating that the Defendant's deficits would cause him some difficulty in following instructions and retaining information so as to cause some short comings as it relates to school or work activities. Yet, Dr. Marson did not indicate that the Defendant's short comings would cause him to be unable to succeed in school, work, of society in general, but it might require additional effort or instruction for Smith to perform on par with his peers. Dr. Marson did not express an opinion as to whether the Defendant was mildly mentally retarded.

The State then called Dr. Glenn David King, a clinical and forensic psychologist, to testify. According to Dr. King, on the Wechsler Adult Intelligence Scale, Third Edition, the Defendant generated a verbal IQ of 75, a performance IQ level of 74, and a full scale IQ of 72. Dr. King also did the WRAT-4 test which "gives an indication of an individual's ability to read, write, and do arithmetic." With the average score being 100, the Defendant scored an 85 on reading, 93 on spelling, and 84 on math computation. These test scores equate to grade levels as follows: reading equated to 8.6 grade level, spelling to a 11.5 grade level, and math to a 6.3 grade. (R. 240-242). Dr. King then administered the Adaptive Behavior Assessment System, Second Edition (ABAS-2), test to measure the Defendant's adaptive functioning. He also administered the Minnesota Multiphasic Personality Inventory (MMPI-2) test to determine whether Smith showed psychotic symptoms, anxiety symptoms or depression. (R. 245, 246). On the MMPI test the profile was invalid because it showed that Smith either "purposefully attempted to look like he was having a mental illness on this particular instrument or he randomly sorted items." (R. 248). Dr. King also did an interview with Mr. Smith, and Smith did not have any difficulties in communication or understanding questions or administration of the tests. Over the Petitioner's objection, Dr.

King testified that in his opinion "Mr. Smith is not mentally retarded and that he likely functions somewhere in the high borderline to low average range of intellectual ability." (R. 251). Although he determined the Defendant's overall IQ to be 72, the confidence level has a standard error of measurement of "somewhere between 5 points below and 5 points above." (R. 262). Dr. King agrees that a 72 IQ is "low intelligence." According to the ABAS-2 test administered by Dr. King, "Willie Smith has some difficulties with community use, health and safety, self-direction, social skills, and leisure skill areas." (R. 277). Yet, that test may not be fully applicable because it sometimes refers to activities that would be limited to someone not in prison. According to Dr. King, the AAMR has suggested that only the ABAS-2 and the Vineland tests are adequate to access adaptive functioning. Use of any adaptive functioning test may not be completely accurate when accessing an individual's adaptive behavior for a time 20 years earlier. Dr. King chose the ABAS because it is the only test that allows the individual in question to answer the questions himself. All tests require the respondent to have "constant contact with the particular target person on practically a daily basis", but that is not possible for the other instruments since the Defendant has been away from others while in prison for so many years. According to Dr. King, tests such as that run by Dr. Salekin cannot be used because "there aren't any norms for that" (R. 281, 282) and because under the circumstances it would be a violation of the test's protocol.

In addition to the testimony from the Rule 32 evidentiary hearing, this Court found certain portions of the trial transcript to be relevant to this issue. In particular, the Petitioner's father did not help take care of him and his mother frequently worked; therefore, after age 8 or 9 Willie Smith and siblings "practically raised themselves." According to the Defendant's mother, it appears that Smith took care of the other children while she was gone. (R. 1474). The Defendant dropped out of school in the 10th grade so that he could work and help provide for his family. (R. 1479). According to Mrs. Smith, the Defendant provided well for her. (R. 1480). He kept a job at Birmingham Stove and Range for 2 years then got another job at Coca-Cola Company, but he was "relieved" from his job at Coca-Cola when he "got on dope" and missed some work. (R. 1659). As noted in Ferguson v. State, supra, the Defendant's ability to work and support his family, even at a young age, weighs against the Petitioner in his argument that he is mentally retarded. Furthermore, Dr. Blotcky testified that he found "no diminished capacity" when he met with the Defendant. (R. 1504).

Other testimony or evidence from the Defendant's trial which is relevant to the question of whether Smith had insufficient adaptive functioning came from a conversation with the

Defendant which was admitted to evidence during the trial. In particular, Mr. Smith stated as follows in a pre-trial conversation that he did not know was being recorded:

> "I thought somebody saw me back there, I waited for a day. I said if nobody find that car today that mean ain't too much looking for her. So what I do, I'll go round there and burn that bitch up, get my fingerprints off of it. So that's what I did. I burned that bitch slap off, I burned that bitch so bad that the car seat, you know a little .... I/A heart. ...I threw the keys away in the ... I threw the keys away in the ... I/A ... and I wiped the car off with some gas, you understand what I'm saying?" (RT. 220, 221).

In the same statement the Defendant also acknowledged his understanding that he may be caught if he failed to kill the victim, in part because she was a police officer's sister, when he stated as follows: "She didn't know [he would kill her], she just said here you can take the car. I was acting like this here. I was thinking don't shoot, don't do it. Her brother a police. No if I let you go you going to fuck me up.... She said, No I'm not. I promise. (mimicking a female voice). I said you a liar, boom, Then shot her in the head with that gun." (CT. 219). In this Court's opinion, the Defendant's intentional killing of the victim, based in part upon his realization that the victim's relationship to a police officer would make his capture more likely, and his apparently well thought-out attempt to cover up the crime, weighs against the Petitioner in relation to the adaptive functioning requirement. This conclusion is supported by the opinion in Ferguson v. State, supra , indicating that extensive involvement in crime and post-crime planning are factors to consider.

After considering the expert testimony of all witnesses, this Court summaries the testimony as follows and reaches the following conclusions: Dr. Salekin's test results indicate that the Defendant's lowest adaptive functioning scores were in the area of motor skills and his highest scores were associated with his community living skills. It appears that the SIB-R test, as conducted with the Defendant's brother, placed the Defendant at an overall skill level of 12 years and 8 months. Yet, the test conducted with the Defendant's mother placed him at a skill level of 15 years 3 months. Even Dr. Salekin indicated that the large difference between the two tests scores was significant. In this Court's opinion, such a difference detracts from the significance placed on the test results. The Court also notes the high likelihood of inaccuracy in the Petitioner's primary SIB-R test which was based upon answers of the Defendant's "younger brother." At best, the Petitioner's younger brother was in his middle teens when the events that he was questioned about occurred, and he was trying to remember the Petitioner's skill level approximately 30 years earlier. When Dr.

Salekin did the Woodcock-Johnson Achievement Test, the levels included below average scores, but not significantly substandard scores in the categories of speech, communication, listening comprehension, reading, math, and written skills. Dr. Salekin testified that the Defendant's math and spelling skills were at the level of a high school senior or college participant. In Dr. Salekin's opinion, Smith's high math, oral language, writing, spelling and oral comprehension scores were inconsistent with a finding that Smith is mildly mentally retarded. Dr. Salekin also testified that adaptive functioning tests would be affected by an individual's use of drugs or alcohol. The record from interviews done by Dr. Blotcky and Dr. Rosecrans prior to the Defendant's trial indicates that the Defendant used alcohol and drugs on a regular basis; therefore, some deficits in his adaptive functioning, even at age 17, could be attributed to his drug use.

Although evidence is clear the Defendant has below average intelligence which has, in some ways, probably affected his life style, the Petitioner has failed to meet the burden of proving that he is mentally retarded so as to preclude imposition of the death penalty. Although the undersigned is of the opinion that a court is not bound to follow an expert's opinion as to whether or not an individual meets the Atkins criteria, the lack of any testimony that Willie Smith is mildly mentally retarded is a strong contributing factor in the Court's decision as it relates to this issue. Furthermore, this Court is of the opinion that the Petitioner is incorrect in asserting that Rule 704, Alabama Rules of Evidence, precludes testimony from the experts regarding their opinion as to whether or not the Defendant is mentally retarded. First, the commentary to Rule 704 notes that this rule "has been little enforced." Furthermore, the appellate courts of Alabama has held "that expert testimony as to the ultimate issue should be allowed when it would aid or assist the trier of fact, and the fact that ""'a question propounded to an expert witness will illicit an opinion from him in practical affirmation or disaffirmation of a material issue in a case will not suffice to render the question improper'"" (citations omitted); see also Rule 702, Ala.R.Evid. (stating that expert testimony should be allowed when it will aid or assist the trier of fact." Kennedy v. State, 929 So.2d 515, 519 (Ala.Crim.App. 2005)(citations omitted). Based upon the foregoing, this Court is of the opinion that it was proper for either side to illicit testimony as to a qualified expert's opinion about whether the Defendant was mentally retarded. Furthermore, that testimony was relevant to the ultimate issue of whether the test outlined in Atkins v. Virginia, Ex parte Perkins, and their prodigeny was met.

Based upon the testimony presented at the Rule 32 hearing, relevant portions of the trial transcript, and other matters outlined herein, this Court finds that the Petitioner has failed to establish that he is mentally retarded so as to preclude him from receiving a death sentence

in this case. Two experts expressly stated that in their opinion Willie Smith was not mentally retarded, and the other experts who testified did not refute those opinions. The record indicates that Willie Smith properly functioned in society prior to his arrest for the offense in question. Although testimony was presented regarding possible deficiencies in the Defendant's adaptive functioning based upon tests results, there was no testimony regarding deficiencies in the Defendant's actual ability in areas such as "communication, self care, home living, social interpersonal skills, use of community resources, self direction, functional academic skills, work, leisure, health, and safety." Ferguson v. State, 2008 WL 902901, *14 (Ala.Crim.App. 2008). In numerous tests categories the Defendant tested in the average range or above average, and those test scores were inconsistent with a finding that the Defendant was mentally retarded.

Based upon the foregoing, this Court finds that the Petitioner has failed to meet the burden of proving that he is mentally retarded so as to preclude imposition of the death sentence that was imposed in this case. This Court finds that the Petitioner's limitations are not "significant" enough to meet the requirements previously outlined herein.

2. The Petitioner then asserts that he was denied his right to a fair trial by being given an anti-psychotic drug called Haldol prior to trial To the extent that this argument relates to the ineffective assistance of Smith's trial court, it is not precluded by any of the procedural bars outlined in Rule 32, A.R.Cr.P.. To the extent the argument does not relate to an ineffective assistance of counsel claim then it is precluded because it could have been raised at trial or on appeal but was not. Rule 32.2(a)(3) and (5), Alabama Rules of Criminal Procedure.

The Petitioner asserts that being under the influence of Haldol prevented him from showing any emotion during the trial or from assisting his counsel during the penalty phase. The Petitioner asserts that the State improperly took advantage of this situation by pointing out his lack of remorse and pointing out that he appeared to be an emotionless killer. Attorneys for the Petitioner called Dr. William Alexander Morton, Jr., an expert in the field of psychopharmacology. Dr. Morton testified about how Haldol reduces brain activity and makes an individual slow down and not respond to outside stimuli. Dr. Morton testified that Willie Smith was on Haldol when he came to prison from the county jail. Although Dr. Morton was unable to testify conclusively that the Defendant was on Haldol at the time of his trial, and Petitioner Smith did not testify regarding any medications he may have taken prior to trial, evidence presented by the Petitioner would appear to indicate that Willie Smith was been taking Haldol at the time his case proceeded to trial. If the Defendant was taking Haldol at the time of his trial, the next question which must be

addressed is whether his counsel was ineffective in representing the Defendant as it relates to his use of Haldol. The Petitioner claims that his trial counsel should have objected to the prosecutor's comments regarding Mr. Smith's lack of remorse, and argues that such an objection would have been even more necessary had defense counsel known the Defendant was taking Haldol. Yet, the record is clear that the Defendant did not tell his attorney that he was taking any medication, and neither of the two doctors who examined the Defendant prior to trial recognized any problems which could be directly attributed to such medication. Nor was anything else brought to counsel's attention which would have caused either attorney to realize that the Defendant may have been taking some medication which could affect his demeanor. Based upon these findings, this Court cannot find that either of the Petitioner's trial attorneys were deficient or that their performance was below the standard called for in the first prong of Strickland v. Washington, 466 U.S. 668, 104 S.Ct 2052, 80 L.Ed.2d 674 (1984).

In a similar argument Smith goes on to argue that his trial counsel was ineffective in failing to investigate Smith's psychiatric condition. As the Court previously indicated, this argument as it relates to the Defendant's use of Haldol is not supported by the evidence because the Court finds defense counsel could not have reasonably known that the Defendant may have been taking medication that affected his demeanor. As the Petitioner's brief and case law cited therein indicates, an attorney (or even a mental health expert) could reasonably assume that an individual's lack of emotion and lack of communication could be based upon the personality of the individual and could be amplified due to a lower intelligence quotient of the individual. Therefore, Smith's trial counsel could not be expected to do additional investigation to determine whether the Defendant was taking some type of medication. This is especially true in light of the fact that neither of the mental health experts who saw the Defendant at the time of trial felt that this was an issue. Attorney Amy Peake also testified that she did not recall the Defendant telling her that he was given medication that affected him in any way; therefore, her actions, or lack thereof, were reasonable.

Smith then argues that the State violated his due process rights under the Fifth Amendment to the United States Constitution by administering Haldol to him during the trial. First, it is not clear that the Defendant actually took Haldol, and it is certainly not clear to what extent the medication may have affected him if it was given to him. As the State notes, the Appellate Courts have held that a similar claim was insufficient "absent proof that [the defendant] has at some time objected to medication." Magwood v. State, 689 So.2d 959, 985 (Ala.Crim.App. 1996). Since it appears undisputed that the defense attorneys were

never notified regarding any medication, this claim would be precluded. Furthermore, the claim is procedurally barred because it could have been raised at trial and on appeal, but was not. Rule 32.2(a)(3) and (5), Alabama Rules of Criminal Procedure.

3. The Petitioner then asserts that lethal injection violates the Eighth Amendment to the United States Constitution because it subjects an individual to cruel and unusual punishment. This argument was made and filed in Smith's Petition before the United States Supreme Court rejected a constitutional challenge to a similar lethal injection procedure administered in Kentucky. Baze v. Rees, 128 S.Ct. 1520 (2008). Based upon the aforementioned holding, this argument by the Petitioner is without merit. Furthermore, the Petitioner has failed to meet his burden as it relates to any argument or facts that may differ from those presented to the Court in Baze v. Rees, supra.

4. Smith then argues that he was denied effective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668 (1984), and its progeny. The Petitioner breaks this argument into several sub categories, the first of which relates to counsel's performance in the guilt phase of his trial. Smith asserts that his attorneys were "inadequate in failing to speak with Smith regarding the events in question in order to develop a defense strategy." (p. 30, Rule 32 Petition). It should be noted that "Rule 32.3 of the *Alabama Rules of Criminal Procedure* places the burden of proof squarely on [the petitioner] and [Strickland v. Washington, 466 U.S. 668 (1984)] mandates that ...claims be reviewed pursuant to a presumption that counsel rendered effective assistance. Therefore, where the record is unclear – either because an issue was not addressed or because counsel could not recall – the court will presume that counsel acted in a manner consistent with the requirements of the Sixth Amendment... [A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing." Brooks v. State, 929 So.2d 491, 497 (Ala.Crim.App. 2005). Since there was no evidence presented by the Petitioner showing what Smith may or may not have told his attorneys to prepare for trial, this claim is considered "abandoned" as outlined in Brooks, supra. Furthermore, the Petitioner had not me his burden of proof to show that his attorneys did not meet with him or that he was prejudiced by any failure to meet with him.

5. Smith then argues that his trial counsel was ineffective for failing to call a witness, Van Singleton, who had contact with Smith on the day in question. Since Singleton was not called at the Rule 32 hearing, this claim should either be considered "abandoned" or insufficiently proven.

6. Smith then argues that his trial counsel was inadequate due to their failure to fully investigate and determine if someone other than the Defendant was the "trigger man". (p. 33, Rule 32 Petition). The lack of any evidence or testimony to support this claim renders the argument abandoned or insufficiently proven. Likewise, the Petitioner's failure to present any witnesses to testify regarding Smith's "good character" precludes the Petitioner from receiving relief regarding the effect any character witnesses may have had on the trial.

7. The Petitioner then argues that his trial counsel's failure to sufficiently examine the State's evidence prior to trial prevented them from adequately representing the Defendant. In particular, they argued that a thorough review of the discovery would have allowed defense counsel to object to inadmissible prior misconduct present in a recorded tape, would have allowed defense counsel to see that an individual on an ATM video tape resembled an individual named Lorenzo Smith, and would have allowed defense counsel to adequately object to the admission of some evidence based upon an improper chain of custody. Since the Petitioner did not present testimony regarding particular evidence which should have been excluded or show the Court how the ATM video could have been properly presented, this issue is regarded as abandoned or improperly proven. Furthermore, the record reflects that the trial court properly excluded evidence of prior misconduct in a recorded conversation and this issue was affirmed on appeal. Next, the appellate courts addressed the issue of whether the State had failed to establish a proper chain of custody for two items, and the Defendant's conviction as it related to the admission of that evidence was also affirmed. Therefore, the Petitioner has failed to show any prejudice that resulted from the alleged deficiencies of his trial counsel as it relates to those arguments.

8. The Petitioner then asserts that his trial counsel failed to adequately investigate and present evidence regarding Smith's drug and alcohol abuse which would have negated the "intent" element needed to sustain a charge of intentional murder. (p. 36, Rule 32 Petition). As the State notes, the Petitioner has a high burden of proof as it relates to this argument because 'in order for intoxication to negate specific intent it must rise to the level of insanity'. Harbin v. State, 2008 WL 2554009 (Ala.Crim.App.). Although the defense presented expert testimony regarding the Defendant's diminished capacity and touched on aspects of how the Defendant's capacity could be affected by drugs and alcohol, there was no direct evidence at the evidentiary hearing that the Defendant used drugs or alcohol on the night in question. Since there was no evidence proving this allegation, it is regarded as abandoned or insufficiently proven. This finding of insufficient proof relates not only to insufficiency of the evidence regarding the day of the incident in question, but also as it relates to a claim that Smith's defense counsel should have shown Smith's extensive history of drug and

alcohol abuse to assist him in the guilt phase and the sentencing phase. In this portion of his Petition, Smith also reasserts and expands upon his argument that trial counsel failed to discover that he was sedated by anti-psychotic medication such as Haldol and failed to discover the effects of his long term drug use, but this issue has also already been addressed in this Order.

9. Smith's Petition then asserts that his trial counsel was ineffective for ignoring Smith's request to testify and failing to explain the implications of his possible testimony. Although the Petition asserts that Smith wanted to rebut the testimony of Michael Wilson, Angelicia Willis, Germaine Norman, and Latonya Rochelle at the Rule 32 evidentiary hearing, no such testimony was presented by the Defendant. Although the Petitioner is correct in asserting that he has an absolute and "fundamental right to testify on his own behalf", there was no evidence to show that the Defendant's decision not to testify was forced or involuntary. This issue has either been dropped by the Petitioner or it was inadequately proven.

10. The Petitioner then asserts that trial counsel's failure to request that Judge Hard recuse himself constituted ineffective assistance of counsel. In support of this argument, the Petitioner alleges that the trial judge made a pretrial assertion that he would sentence Smith to death by electrocution if he did not accept the State's plea agreement for a sentence of life imprisonment without parole. This Court has reviewed the pretrial portions of the transcript in an attempt to locate any statements made by the trial court which would indicate a predisposition, but the Court has been unable to find any such statements. No testimony was presented at the Rule 32 hearing in support of this claim. It appears that the Petitioner has either abandoned this claim or failed to sufficiently meet his burden of proof as it relates to this issue.

11. The Petitioner then asserts that his trial counsel was ineffective for failing to "life qualify" the jury and to request that the court do so. (p. 45, Petition). Although the State asserts that the Petitioner has abandoned this claim due to his failure to question Amy Peake regarding the attorney's failure to life qualify the jury, the record from the Defendant's trial is sufficient to establish that the jury was not life qualified. It appears that the appellate courts of Alabama and other states have addressed similar issues in the past. In particular, the Pennsylvania Supreme Court held in Com. v. Tedford, 598 Pa. 639, 960 A.2d 1 (Pa. 2008), that "counsel cannot be deemed ineffective for failing" to life qualify jurors. In a similar holding, the court in Keith v. Mitchell, 455 F.3d 662, 677 (6th Cir. 2006) held that the defendant had failed to show "'a reasonable probability that, but for counsel's

unprofessional errors, the result of the proceeding would have been different,' where a reasonable probability 'is a probability sufficient to undermine confidence in the outcome.' Strickland, 466 U.S. at 694, 104 S.Ct. 2052." The court in Keith v. Mitchell, supra, noted the "brutal and callous circumstances" of the murders in that case, and indicated that the attorney's decision not to life qualify, in and of itself, did not establish a reasonable possibility that the outcome of the trial would have been different. In denying a similar claim, the Alabama Court of Criminal Appeals in Hunt v. State, 940 So.2d 1041, 1063-1064 (Ala.Crim.App. 2005), citing Ex parte Brown, 686 So.2d 409 (Ala. 1996), held that "the failure to life qualify prospective jurors does not constitute plain error if no prospective juror expressed strong views in favor of the death penalty. Hunt presented no evidence as to any responses offered by the prospective jurors during voir dire. Hunt failed to meet his burden of proof." Although this Court acknowledges trial counsel's deficiency in failing to "life qualify" the jury, it must be presumed that each juror followed the trial court's instructions, properly weighed the aggravating and mitigating circumstances, and did not disregard life without parole as a sentencing option. Smith v. State, 2009 WL 113363, *18 (Ala.Crim.App.). Smith has failed to meet his burden of proof as it relates to this issue.

12. The Petitioner then asserts that his trial counsel failed to prevent several instances of prosecutorial misconduct. The Petitioner asserts that the prosecutor did several things such as "impeding the jury's role in assessing the credibility of witnesses, bolstering the credibility of the State's witnesses, making comments about the victim that were intended to inflame the jury, and indirectly commenting on Mr. Smith's choice not to testify" (p. 47, Rule 32 Petition). Yet, the Petitioner appears to only cite one specific example of improper argument. In particular, the Petitioner asserts that the prosecutor improperly pointed out to the jury that "there are people that love Sharma Ruth Johnson also because she was somebody's daughter, because she was somebody's sister, because she was somebody's friend..." (R. 1513). Although this Court is aware that such comments would tend to illicit an emotional reaction from the jury and that a jury's verdict should be based upon evidence rather than sympathy or emotions, it is impossible and impractical to preclude either side from making an emotionless argument. In ruling on the direct appeal of Smith's conviction, the Alabama Court of Criminal Appeals ruled on the admissibility of this same portion of the State's closing argument, and held that the "comments by the prosecutor did not focus on the affect on the family; rather, they referred to 'matters already obvious to any juror.'... 'Furthermore, victim impact argument is not prohibited at the penalty phase of the trial.'... The prosecutor could properly comments on the victim's lost roles as a family member and a friend during closing argument at the sentencing phase of the trial." Smith v. State, 838 So.2d 413, 458 (Ala.Crim.App. 2002) (citations omitted). Since the appellate courts have

already held that this portion of the prosecution's closing argument was not plain error, the Petitioner cannot realistically assert that his counsel was deficient in failing to object. Therefore, the claim is without merit and the Petitioner is not entitled to relief based upon this claim.

13. Smith then outlines several reasons why his trial counsel was ineffective in representing him at the penalty phase of his trial. It appears that Smith is correct in asserting that Attorney Amy Peake handled all the questioning of witnesses during the penalty phase and that this was Peake's first time to appear in a criminal trial. Yet, the State of Alabama is likewise correct in noting that "the appellate courts of Alabama have held that only one attorney representing a capital defendant is required to meet the five-year prior experience requirement. See, e.g., Hodges v. State, 856 So.2d 875 (Ala.Crim.App. 2001). There is no dispute that Smith's lead defense attorney, L. Dan Tuberville, exceeded the statutory requirements for appointed representation." (p. 27, State's Post-Hearing Memorandum addressing Smith's Second Amended Rule 32 Petition). Contrary to the Petitioner's argument on pages 52 and 53 of his Petition, there is insufficient evidence to show that Mr. Tuberville excluded himself from the proceedings so as to treat the matter as if Tuberville was not present to assist Ms. Peake. In fact, Mr. Tuberville gave the closing argument of the defense after evidence was presented in the penalty phase. Since Smith did have an attorney who met the minimal five year requirement, in order to prevail regarding a claim of ineffective assistance of counsel at the penalty phase the Petitioner is required to meet the elements outlined in Strickland v. Washington, supra.

Regarding specific allegations of ineffective acts by his attorneys, Smith first argues that his trial counsel failed to object to the prosecutor's improper comments regarding Smith's decision not to testify. In ruling on Smith's direct appeal, the Alabama Court of Criminal Appeals held that the complained about comments made by the prosecutor were "referring to the appellant's demeanor and was drawing inferences and conclusions from the evidence. Testimony was presented that the appellant bragged that he had shot the victim. This comment could not reasonably be interpreted to be an indirect comment on the appellant's failure to testify; therefore, there was no error on this ground." Smith v. State, 838 So.2d 413, 459 (Ala.Crim.App. 2002). Since the complained about comment was not improper, the Petitioner cannot argue ineffective assistance based upon his trial attorney's failure to object to said comments.

14. The Petitioner then asserts that his trial counsel failed to investigate and present significant mitigating factors at the penalty phase of his capital trial. (p.48, Rule 32 Petition). Counsel

for the Petitioner correctly notes that an attorney on a capital murder case should investigate and present to the jury evidence about the Defendant's history and life that may be considered as statutory mitigating factors or any mitigation pursuant to §13A-5-52, Code of Alabama (1975). (p.54, Rule Petition). First, counsel for the Petitioner argues that his trial counsel failed to adequately prepare the four witnesses that she called during the penalty phase. Smith's petition correctly notes an attorney's obligation to investigate the client's history to prepare for the penalty phase in a capital trial, but the Petitioner carries the burden of proving this obligation was not met. In particular, the Petitioner argues that his trial counsel failed to adequately prepare his mother, Mrs. Smith, to testify. As the Respondent's brief indicates, "Smith's trial counsel presented evidence [at trial] that Smith was abused, neglected, and poor as a child through his mother. (R. 1464-1481, 1650)." (p. 29, State's Post-Hearing Memorandum). Therefore, it appears the Defendant's mother was prepared to testify at trial. In addition to this allegation of improper preparation being refuted by the record, the Petitioner has failed to carry his burden as to how further preparation would have assisted the defense. The allegations outlined in paragraphs 160 through 162 on pages 57 and 58 of the Petition are not sufficiently supported by the evidence. The Petitioner's assertion that counsel should have "assist[ed]" the mother in testifying appears to incorrectly suggest that improper leading questions would have been more appropriate. There is also insufficient evidence of the proposed testimony that other individuals could have presented regarding Mrs. Smith's neglect of the Defendant and her other children. The Petitioner further asserts that his trial counsel "failed to call a multitude of witnesses that, if asked, would have come forward to testify to numerous mitigating factors." (p. 55, Rule 32 Petition). Yet, this argument regarding additional witnesses that should have been called is considered abandoned or insufficiently proven since additional witnesses were not called during the Rule 32 hearing.

15. As it relates to defense counsel's alleged failure to prepare penalty phase witness Christina Johnson to testify, the State is correct in asserting that "Smith did not call Ms. Johnson to testify at the evidentiary hearing; therefore, this court should find that he has abandoned this claim of ineffective assistance of counsel." (pp. 30, 31, State's Post Hearing Memorandum). Although the Court acknowledges the apparent conflict between the testimony of Ms. Johnson and Ms. Willis and that said testimony was not beneficial to the Defendant (RT. 1487), said testimony was not sufficiently prejudicial to the Defendant to warrant a new sentencing hearing nor was it sufficiently prejudicial to result in a finding by this Court that defense counsel was ineffective in calling both witnesses during the penalty phase. There is no proof that either witness intentionally testified untruthfully, and the conflicting testimony could have come out on cross-examination if it did not come out

during defense counsel's questions. Furthermore, there is no evidence to show the lack of preparation of Barbara Grooms or how further preparation would have assisted the defense's presentation during the penalty phase.

16. The Petitioner then alleges that Defendant's trial counsel failed to properly interview, prepare and question Dr. Blotcky regarding reasonably available mitigation evidence. (p. 63, Rule 32 Petition). Although the Petitioner alleges that Dr. Blotcky was not sufficiently qualified, the record reflects that he had a "Ph.D. in Clinical Psychology from Vanderbilt University. Did an internship in Clinical Psychology at the University of Texas Health and Science Center, and [had] been in private practice for seven years." Although another expert may have provided more information in mitigation for the Defendant, this Court cannot say that defense counsel was ineffective in hiring Dr. Blotcky as opposed to hiring another expert. The Petition further asserts that another expert could have given mitigation testimony showing that Smith was "under the influence of extreme mental and emotional disturbance at the time of the crime", that his "ability to appreciate the criminality of his conduct was impaired", and that his "ability to conform his conduct to the law was substantially impaired." (p. 64, Rule 32 Petition). Yet, no such testimony was presented at the evidentiary hearing. Therefore, there is insufficient proof of the Defendant's mental condition at the time of the offense to establish that his trial counsel was ineffective in not hiring a different expert.

Assuming that the Petitioner is correct in asserting that trial counsel waited until a week before trial to hire Blotcky, such a delay does not automatically result in a conclusion that counsel was ineffective in hiring him. The Petitioner must also show how a delay in hiring the expert prejudiced Smith, but no such showing has been made.

17. Regarding Petitioner's general allegation that "if trial counsel had investigated Mr. Smith's history and relationships, the trial court and jury would have heard and considered extensive mitigating evidence" (p. 66, Rule 32 Petition), and additional allegations outlined in this section of Smith's Rule 32 Petition, said allegations were not sufficiently proven by testimony at the evidentiary hearing; therefore, the Petitioner has failed to meet his burden of proof regarding this claim.

18. Likewise, the Petitioner's allegation that his trial counsel should have called "numerous character witnesses" is also considered abandoned or insufficiently proven. The Petitioner's further allegations regarding physical, mental, and emotional abuse suffered by Smith throughout his lifetime are also not supported by any evidence beyond that presented

by Smith's trial counsel during the penalty phase. The records mentioned in Paragraphs 203 and 204 of Smith's Petition, which allegedly could have been presented in mitigation, were also not presented to the Court at the evidentiary hearing; therefore, those allegations are not insufficiently proven. It also does not appear that the Defendant's trial attorney was questioned during the Rule 32 hearing regarding other medical, jail, police, educational, employment, or other records that could have been presented to the jury or the trial court. Although some jail or medical records were presented to the court as exhibits, the majority of those records were prison records after the Defendant was convicted. Without further evidence as to what records trial counsel could have presented so as to assist in the penalty phase, this Court will consider the Petitioner's argument regarding trial counsel's failure to produce such records as insufficiently proven.

19. As it relates to the argument that Smith's attorneys were ineffective because they were improperly compensated (p. 78, Rule 32 Petition), this Court is of the opinion that inadequate compensation has to be coupled with an actual showing of ineffective assistance of counsel. The Respondent correctly notes that the Alabama Court of Criminal Appeals has concluded on many occasions that "the State's cap on attorney's fees for capital cases [does] not unconstitutionally deprive defendants of their rights to effective assistance of counsel. See, e.g., Hyde v. State, 950 So.2d 344, 361 (Ala.Crim.App. 2006)." (p.36, State's Post-Hearing Memorandum). Although this Court agrees that the defense attorneys were probably insufficiently paid for their representation of Mr. Smith, lack of compensation does not mean that the attorney in question was incompetent or ineffective. For example, the present attorneys for the Petitioner, who clearly spent numerous hours in representing the Petitioner and did extensive preparation talking to potential witnesses and preparing for the evidentiary hearing, are apparently representing Smith without any compensation. In fact, the Defendant's present attorneys are representing Smith at a great expense of both time and money to assure that the Defendant is adequately represented in these post-conviction proceedings. Clearly a mere allegation of inadequate compensation is insufficient to prove ineffective assistance of counsel.

20. Smith then asserts that his trial counsel was ineffective in failing to support his Batson Motion with evidence that the Jefferson County District Attorney's Office had a pattern of discriminatory strikes against potential jurors. (p. 78, Rule 32 Petition). This Court is of the opinion that this argument is without merit for several reasons. First, at the Rule 32 evidentiary hearing the Petitioner did not specify how Mr. Turberville's 'extensive knowledge' of prior discrimination by the Jefferson County District Attorney's Office would have, if sufficiently conveyed to the court, successfully resulted in his Batson Motion

being granted. Furthermore, it appears that "fourteen of [the State's] fifteen strikes [were] to eliminate prospective jurors of the female gender." The State's decision to strike each of these fourteen prospective female jurors was sufficiently addressed on remand by the trial court. The Court of Criminal Appeals of Alabama held that "[a]ll of the reasons given by the prosecutor for his strikes of these potential jurors were sufficiently facially gender neutral." Smith v. State, 838 So.2d 413, 436 (Ala.Crim.App. 2002). Based upon the appellate court's standard of review in death penalty cases, if any of the reasons given for striking said jurors violated Batson, then the court would have been obligated to find plain error and address that issue. Yet, the appellate court did not find any error or any improper motive in the prosecutor's strikes. Since the appellate court held that fourteen of the fifteen strikes were proper, the only issue which would need to be addressed was the State's decision to strike the one remaining male juror. Based upon this court's summary of the State's strikes, although not entirely clear, it appears the only remaining strike by the prosecution was a white male. (RT. 448-455). Therefore, any claim of a Batson violation would be without merit. Even if this conclusion regarding the fifteenth juror struck by the State being a white male is incorrect, the Petitioner has failed to sufficiently carry his burden at the evidentiary hearing as it relates to this issue.

21. As it relates to the Petitioner's claim that his trial counsel was ineffective for failing to move for a competency hearing, the Respondent is correct in arguing that this argument does not warrant relief for the Petitioner. First, it appears that an expert hired by the court found that Smith was "'fully capable of assisting his attorneys on defense' and was competent to stand trial." (P. 38, State's Post-Hearing Memorandum). Although counsel for the Petitioner ably showed Smith's mental deficiencies, even testimony presented at the evidentiary hearing failed to show that Smith was incompetent to stand trial or unable to appreciate the wrongfulness of his acts. Therefore, Smith failed to meet the burden of proof as it relates to this argument. To the extent that this argument addresses the issue of Smith's possible mental retardation, that argument is addressed in a separate portion of this order.

22. Contrary to the Petitioner's assertions, this Court is also of the opinion that the Respondent is correct in asserting that defense counsel cannot be regarded as ineffective for failing to reveal Smith's use of Haldol and how the drug may have affected him. As previously noted in this Order, the argument that the Defendant was given Haldol is disputed. The Defendant did not testify that he was taking this medication, but this Court is of the opinion that the Petitioner has shown that it is more likely than not that Smith was taking Haldol at the time of his trial. Even though he may have been taking Haldol, it appears clear that

Smith never told his attorneys that he was being medicated or that the medication may have caused Smith to act emotionless. The Respondent correctly cites Funchess v. Wainwright, 772 F.2d 683, 689 (11th Cir. 1984) for the proposition that defense counsel should not be regarded as ineffective for failing to know about non-obvious psychological problems that are not brought to their attention by their client. Without addressing the prejudice prong of Strickland v. Washington, it is clear that the Petitioner has not shown that his counsel was ineffective for failing to notify the court and the jury of the possible effect of medication which counsel was never informed the Defendant was taking. As previously noted, the fact that two doctors who interviewed the Defendant prior to trial also did not see this as a problem weighs heavily against the argument that trial counsel was ineffective for not bringing this to the attention of the jury or judge.

23. The Petitioner then asserts that his appellate counsel was ineffective for failing to include several issues in Smith's Petition for Writ of Certiorari. (p. 80, Rule 32 Petition). Attorneys for the Petitioner assert that this failure could prevent Smith from raising said arguments in a future petition in state or federal court. The State alleges that this argument is without merit because the Defendant did not have a "right to counsel when seeking the Alabama Supreme Court's discretionary review on direct appeal." (p. 39, State's Post-Hearing Memorandum). The State cites Carruth v. State, 2008 WL 2223060 (Ala.Crim.App. May 30, 2008), which also involves the appeal of a death sentence, for the proposition that "there is no right to counsel when pursuing a second appeal before the Alabama Supreme Court; therefore, there is no right to the effective assistance of counsel." Carruth v. State, 2008 WL 2223060 at *6. Regardless of whether the undersigned judge agrees with the opinion released in Carruth v. State, supra, this Court is bound by the higher court's decision regarding that issue. Therefore, Smith can not successfully argue that he received ineffective assistance of counsel as it relates to his Petition for Writ of Certiorari since the higher courts have held that Smith was not entitled to effective counsel at that stage of his appeal. Even if Smith was entitled to effective assistance of counsel when filing a Petition for Writ of Certiorari, the undersigned finds that the Petitioner has failed to convince this Court that the Alabama Court of Criminal Appeals erred to the extent that Smith's Petition for Writ of Certiorari or any later petitions would have been granted if Smith's attorney had made the arguments his present attorneys say he should have made.

24. The Petitioner then asserts that the "State violated Mr. Smith's Sixth Amendment right to counsel under the U.S. Constitution in obtaining Mr. Smith's post-arrest statement to police informant Latonya Rochelle." (p. 83, Rule 32 Petition). The Petitioner asserts that said statements were inadmissible because Smith had the right to counsel at the time the

statements were made. As the Respondent correctly notes, the Petitioner is precluded by Rules 32.2(a)(2) and (4) because this issue was raised at trial and on appeal. The Alabama Court of Criminal Appeals addressed this issue and held that "because the appellant's telephone conversation with Rochelle was not admitted in violation of the trial court's discovery order or in violation of constitutional state law, there was not error on this ground." Smith v. State, 838 So.2d at 442. As it relates to the Petitioner's argument that the same statement was improperly withheld from defense counsel until the time of trial, this issue is also precluded by Rules 32.2(a)(2) and (4) because it was raised at trial and on direct appeal. As it relates to the Petitioner's claims involving Smith's exculpatory statements or other related issues outlined in pages 85 through 92 of the Petition, those claims are also barred because they could have been raised at trial and were not and because they could have been raised on appeal but were not. Rules 32.2(a)(2), (3), and (5), Alabama Rules of Criminal Procedure.

25. The Petitioner also asserts that the State violated Brady v. Maryland, 373 U.S. 83 (1963) by failing to produce to defense counsel a letter written by Smith "threatening suicide and detailing various hallucinations." (p. 92, Rule 32 Petition). Without having the letter admitted into evidence during the evidentiary hearing, the Court finds that Smith failed to meet his burden of proving how such evidence would have assisted defense counsel. The Court also cannot tell when the letter in question was discovered by defense counsel. If it was discovered during trial then this claim is precluded because it could have been raised at trial but was not. (Rule 32.2(a)). If it was found after trial and sentencing then the State correctly notes that the Petitioner would have to establish the factors outlined in Rule 32.1(e) regarding newly discovered evidence, but the Petitioner has failed to meet those elements. The State's position that this claim is not sufficiently proven is also supported by the holding in Payne v. State, 791 So.2d 383, 397 (Ala.Crim.App. 1999).

26. The Petitioner then asserts that the State improperly mislead the jury regarding the credibility of Michael Wilson's testimony and that the State improperly bolstered Wilson's testimony. (p. 93, Rule 32 Petition). The Respondent correctly asserts in response to this argument that Smith is procedurally barred because this issue could have been raised at trial but was not (Rule 32.2(a)(3)) and because it has already been raised on appeal. (Rule 32.2(a)(4)). In addressing this issue on appeal, the Court of Criminal Appeals of Alabama held that "the prosecutor was ... making proper inferences from the evidence in his statement concerning Michael Wilson's testimony." Smith v. State, 838 So.2d at 457. After reviewing said statements, the Court concurs with the Court of Criminal Appeals' opinion holding that the statements were not improper nor did they improperly bolster

Wilson's testimony.

27. The Petitioner then asserts that the State failed to establish a proper chain of custody before admitting a wrist watch into evidence. The Respondent correctly argues that this issue is procedurally barred because it could have been raised at trial but was not. (Rule 32.2(a)(3)). As the Respondent also notes, this issue was addressed on direct appeal and decided adversely to the Petitioner. In particular, the Court of Criminal Appeals of Alabama held that there "was no plain error in the admission into evidence of the wrist watch, because it was properly identified and authenticated in the record." The Petition also mentions "a number of critical items" which were improperly admitted. To the extent that this includes testimony regarding a ring, the appellate court also held that said ring was properly admitted. Since this issue has already been addressed on direct appeal, it is precluded by Rule 32.2(a)(4). Even if it was not precluded, the Court of Criminal Appeals' opinion shows that the issue is without merit.

28. The Petitioner then asserts numerous errors made by the trial court during the guilt phase or penalty phase of the Defendant's trial. (p. 98-124, Rule 32 Petition). The Court finds that each of the arguments outlined in this portion of the Defendant's Petition are precluded by Rule 32.2, Alabama Rules of Criminal Procedure. The first two claims regarding the trial court's refusal to recuse itself and the trial court's failure to hold a hearing on Smith's competency to stand trial and to be executed are precluded by Rule 32.2(a)(3) and (5) because they could have been raised at trial and on direct appeal but were not. It should also be noted that the Defendant went to trial well before the Atkins decision was released; therefore, the present procedure for addressing an individual's competency to be executed had not been established. The Petitioner then claims as follows: that the trial court allowed the jury to be exposed to inadmissible evidence (p.103, Rule 32 Petition), that the trial court improperly considered a pretrial psychiatric examination (p. 107-111, Rule 32 Petition), that the trial court gave improper instructions during the guilt and penalty phase (p. 113-117, Rule 32 Petition), the trial court improperly referred to Smith's decision not to testify (p. 120, Rule 32 Petition), and that the trial court erred in refusing to answer a juror's question (p. 121, Rule 32 Petition). Each of these arguments are precluded by Rule 32.2(a)(3) and (4) because they could have been raised at trial but were not and because they have already been raised and addressed on direct appeal. Regarding the remaining claims by the Petitioner such as the court's improper restriction of cross-examination of Michael Wilson, Angelica Willis, and Officer Steve Corbin (p. 111, 118, and 119, Rule 32 Petition), the trial court's error in not allowing Smith to use a juror questionnaire, the court's error in refusing to strike venire member Florence Noe, and the trial court's error in denying Smith's motion

for change of venue, each of these claims are precluded by Rule 32.2(a)(2) and (4) because they could have been raised at trial but were not and because they have already been raised and addressed on direct appeal.

29. Smith then asserts that his "appellate counsel improperly presented the issue of discriminatory strikes of jurors to the Alabama Supreme Court" and the Court of Criminal Appeals of Alabama. As it relates to the submission of this issue to the Court of Criminal Appeals, the record is clear that the issue was presented and a remand was required by the appellate courts. After a hearing on remand, the Alabama Court of Criminal Appeals affirmed Smith's conviction and held that "the reasons given by the prosecutor for his strikes of these potential jurors were sufficiently facially gender neutral." Smith v. State, 838 So.2d 413, 436 (Ala.Crim.App. 2002). As this Court noted in paragraph 20 of this Order, this issue is without merit as it relates to the gender of the potential jurors and the race of the potential jurors. Since this Court has held that the trial court and Smith's trial counsel did not err in presenting this issue, by necessity Smith was not prejudiced by any short comings by appellate counsel as it relates to this issue. Furthermore, the Petitioner has failed to show that Smith's appellate attorney was deficient or that Smith was prejudiced in any way by appellate counsel's actions. As it relates to any claim that Smith's appellate counsel should have presented this issue to the Alabama Supreme Court in a different manner, this Court is once again bound by the decision in Carruth v. State, 2008 WL 2223060, *6, which held that "there is no right to counsel when pursuing a second appeal before the Alabama Supreme Court; therefore, there is no right to the effective assistance of counsel." Since the appellate courts have held that an individual is not entitled to counsel when filing a petition for writ of certiorari, it is not necessary for this Court to proceed to a second stage to determine if counsel's actions in preparing the Petition for Writ of Certiorari were appropriate under the circumstances.

30. The Petitioner then claims that the State's use of preemptory challenges to remove African Americans, Latinos, and women, violated Batson v. Kentucky and J.E.B. v. Alabama. (p. 132-151). Although the Petitioner cites a significant amount of case law in support of this argument, the State is correct in asserting that Smith is precluded from relief as it relates to these issues. These issues were raised at trial and on direct appeal; therefore, they are precluded by Rules 32.2(a)(2) and (4). To the extent that they were not raised at trial or on appeal, they are precluded by Rule 32.2(a)(3) and (5).

31. The Petitioner then asserts that he was convicted of two counts of capital murder and sentenced to death in violation of his right against double jeopardy. (p. 149). Willie Smith

was convicted of committing a murder during the course of a robbery in violation of §13A-5-40(a)(2) and committing a murder during the course of a kidnapping with intent to commit a robbery in violation of §13A-5-40(a)(1). Although "double-jeopardy claims such as the one presented here implicates jurisdictional issues" Davis v. State, 989 So.2d 624, 626 (Ala.Crim.App. 2007), the Respondent is correct in asserting that the Petitioner is not entitled to relief based upon this claim since the issue has already been raised and addressed on direct appeal. (Rule 32.2(a)(3)). In particular, the appellate court held that the Fifth Amendment's prohibition against being placed in jeopardy twice for the same offense was not violated in the case at bar. The court held that "the first count required proof of an actual robbery, while the second count did not. Thus, the elements of the offense charged in the first count were not included within the offense charged in the second count of the indictment." Smith v. State, 838 So.2d at 468. Since the offenses involved separate elements, the double jeopardy clause of the United States Constitution was not violated, and the Petitioner's claim relating to this issue is without merit.

32. Smith's next claim that "double counting of robbery as an element of the capital offense and as an aggravating circumstance violated Mr. Smith's right to an individualized sentence" is also without merit. This claim is procedurally barred by Rule 32.2(a)(3) because it was not raised at trial but could have been. Furthermore, the claim has already been raised on direct appeal without relief being granted. Rule 32.2(a)(4). As the Court of Criminal Appeals' opinion in Smith's case noted, the appellate courts of Alabama have held on numerous occasions that such "double counting" is permissible and does not violate the Petitioner's Sixth, Eighth, or Fourteenth Amendment rights. Therefore, the Petitioner is not entitled to relief based upon this claim.

33. As it relates to Smith's claim that a prejudicial atmosphere surrounding his trial violated his constitutional right to a fair trial, this claim is procedurally barred because it could have been raised at trial but was not and because it has already been raised on direct appeal. Rules 32.2(a)(3) and (4). Furthermore, there was insufficient evidence to substantiate this claim.

34. Smith's next argument regarding the inadmissibility of prejudicial photographs which were admitted during his trial is also procedurally barred. In accordance with Rules 32.2(a)(3) and (4), the merits of this issue should not be addressed by the Court because it was raised at trial and it was raised and addressed on direct appeal.

35. Smith's final claim addresses an allegation that the trial court improperly considered facts

not presented to the jury before making its recommendation that Smith be sentenced to death. In particular, the Petitioner asserts that

> "the trial court in this case made the factual determination that the mitigating circumstance that the defendant acted under extreme mental or emotional disturbance at the time of the trial did not exist. (C.R. 163) The court based its finding on the reports of Dr. C. R. Rosecrans and Dr. Alan Blotcky. Dr. Rosecrans did not testify at any phase of the trial nor was his report in evidence before the jury. (C. R. 159). Dr. Blotcky testified before the jury at the penalty phase, but his report was not in evidence and he did not testify to the absence of this mitigator." (p. 156, Rule 32 Petition).

The argument made by the Petitioner is based upon Ring v. Arizona, 536 U.S. 584 (2002) and Apprendi v. New Jersey, 530 U.S. 466 (2000).

Without making a determination as to whether this issue is procedurally barred, this Court finds that the Petitioner is not entitled to relief based upon this argument. Based upon this Court's review of the record, it does not appear that the defense presented evidence to prove the mitigating circumstance that the "capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." §13A-5-51, Code of Alabama (1975). On direct appeal, the Court of Criminal Appeals of Alabama addressed a related issue and held that Judge Hard's reference to Dr. Rosecrans' and Dr. Blotcky's reports was not prejudicial to the defendant nor was it plain error. Smith v. State, 838 So.2d 413, 445 (Ala.Crim.App. 2002). This Court is of the opinion that Judge Hard's reference to Dr. Rosecrans and/or Dr. Blotcky in no way implicates the holdings in Ring v. Arizona, 536 U.S. 584 (2002) or Apprendi v. New Jersey, 530 U.S. 466 (2000). If the offense of conviction had not included an aggravating circumstance outlined in §13A-5-49, Code of Alabama (1975), then Ring would have been applicable. Yet, Judge Hard's Order was merely noting that there was no evidence presented by the defense of one of the statutory mitigating circumstances. If the court had used improper evidence to find that an aggravating circumstance existed, then a separate set of factors would have to be considered. Yet, the trial court's mention of Dr. Rosecrans and Dr. Blotcky's reports does not change the Court's conclusion that "no evidence adduced at trial, nor at the second stage in front of the jury, nor by way of evidence adduced at the third stage" proved any "extreme mental or emotional disturbance." Therefore, the Petitioner is not entitled to relief under Rule 32, based upon his claim.

Having considered all the arguments presented by the Petitioner in his Second Amended Rule 32 Petition, this Court finds that the arguments therein are either procedurally barred, are insufficiently proven, are without merit, or they are denied for the reasons stated herein. This Court acknowledges the extensive amount of work performed on behalf of the Petitioner's by the attorneys of Sidley Austin, and of Maynard, Cooper, & Gale. Likewise the Attorney General's Office has ably represented the State of Alabama in this matter. The Court appreciates the remorse shown by the Petitioner at the evidentiary hearing, but the Court's ruling can only be based upon the evidence presented and the law as it relates to the issues raised in Willie Smith's Rule 32 Petition.

Based on the foregoing, Smith's Rule 32 Petition is denied. The Clerk's Office shall serve a copy of this Order on counsel for the Petitioner and Respondent.

DONE AND ORDERED this the 5th day of June, 2009.

J. William Cole
Circuit Court Judge

R – refers to Reporter's transcript of Rule 32 hearing.
RT – refers to Reporter's transcript from trial.
CT – refers to Clerk's transcript from trial.

application of a sentencing statute—which may result in the punishment of offenders based upon the date of final judgment—is reasonably related to these legitimate State interests and does not violate an offender's right to equal protection.

The judgment of the Court of Criminal Appeals is affirmed.

AFFIRMED.

MOORE, C.J., and HOUSTON, SEE, LYONS, JOHNSTONE, HARWOOD, WOODALL, and STUART, JJ., concur.

Willie B. SMITH III

v.

STATE.

CR–91–1975.

Court of Criminal Appeals of Alabama.

Feb. 1, 2002.

Rehearing Denied March 15, 2002.

Certiorari Denied June 28, 2002
Alabama Supreme Court 1011228.

Defendant was convicted in the Jefferson Circuit Court, No. CC-92-1289, James H. Hard IV, J., of robbery-murder and murder committed during a kidnapping. Defendant appealed. The Court of Criminal Appeals, 698 So.2d 1166, remanded. On remand the circuit court found that the prosecutor came forward with nondiscriminatory reasons for striking female jurors. On return from remand the Court of Criminal Appeals held that: (1) prosecutor's reason for striking female veniremembers was gender neutral; (2) prosecutor did not violate discovery order as knowledge of defendant's confession to informant could not be imputed to prosecutor; (3) admission of statement that defendant made to informant indicating he committed the murder did not violate defendant's constitutional rights; (4) defendant's double jeopardy rights were not violated, as robbery-murder was not a lesser included offense in murder committed during the course of a kidnapping; (5) defendant was not entitled to a change in venue; and (6) sentence of death was not disproportionate or excessive.

Affirmed.

Shaw, J., concurred in the result.

Cobb, J., concurred in part, dissented in part, and filed opinion.

1. Jury ⚿33(5.15)

Trial court's decision that prosecutor's explanation for striking female veniremembers in capital murder prosecution, that veniremembers maintained strong religious convictions or were engaged in religious work, was gender neutral, was not clearly erroneous, even though such veniremembers indicated they did not have any problems imposing a death sentence, defense counsel's questioning rather than prosecutor's brought out their religious affiliations or duties, and prosecutor asked no follow up questions, as explanation based on religion was facially neutral to a claim of discrimination based on gender, and trial court's prior courtroom experience was that prosecutor was not one to strike minorities.

2. Criminal Law ⚿957(1)

Public policy forbids that a juror disclose deliberations in the jury room and demands that they be kept secret; permitting such impeachment would open the

door for tampering with the jury after the return of their verdict.

3. Criminal Law ⚿957(1)

A jury's verdict is not subject to impeachment by the testimony of jurors as to matters which transpired during the deliberations.

4. Criminal Law ⚿957(1)

A juror may not, either in impeachment or in support of his verdict, testify as to his mental operation in reaching the verdict.

5. Criminal Law ⚿957(1)

For the affidavits of jurors to be admissible, they must be with respect to facts and occurrences open to the observation of other jurors so that they may be subject to contradiction; a jury's verdict may not be impeached by the testimony or affidavits of jurors as to what transpired among them during deliberations, or their own mental operations.

6. Criminal Law ⚿1166.16
Jury ⚿131(18)

Defendant convicted of capital murder was not prejudiced by juror's failure to disclose on voir dire that he had prior knowledge of the case, where evidence that such juror had prior knowledge was contained in letter another juror sent to court rather than in affidavit, and there was no indication in the letter that such juror actually imparted outside knowledge to other jury members during trial or deliberations.

7. Jury ⚿131(18)

Courts must balance two strong and competing interests when determining whether a juror's failure to disclose material information during voir dire prejudiced a defendant: fairness, which in the criminal context means the right to impartial jurors, the right to the intelligent use of peremptory strikes, and the right to be free from juror misconduct; and finality.

8. Criminal Law ⚿627.5(5)

Generally, the prosecution cannot be held to have failed to comply with a discovery request when the requested information was not in the prosecution's possession; however, if law-enforcement agents in the prosecutor's district have possession of this information, the prosecutor may be held to have knowledge of the information or evidence imputed to him.

9. Criminal Law ⚿627.5(5)

Knowledge of telephone call murder defendant made to police informant from jail, in which defendant attempted to learn who told on him and which was not disclosed to defense counsel until just before voir dire, could not be imputed to prosecutor, for purposes of determining whether prosecutor failed to comply with discovery request, where informant, though she worked for police in another jurisdiction, had not worked for police in prosecuting jurisdiction, informant did not approach the police of prosecuting jurisdiction with the intention of seeking compensation for her work as an informant, phone call from jail was initiated by defendant, and informant was not wired at the time of the phone call.

10. Constitutional Law ⚿266.1(3)
Criminal Law ⚿412.1(2)

Admission of statements murder defendant made in telephone call to informant from jail did not violate defendant's rights against self-incrimination, to due process, or to a fair trial; informant did not work for police in prosecuting jurisdiction, did not approach police with intention of seeking compensation when investigation began, defendant initiated phone call, statements were not made during a custodial interrogation within the meaning of *Miranda*, informant was not instructed to

elicit incriminating statements, call was not a psychological ploy by police, and defendant was not coerced due to moral and psychological pressures inherent in his relationship with informant. U.S.C.A. Const.Amends. 5, 6, 14.

11. Criminal Law ⚿777

Trial court's statement to jury, that certain parts of tape and transcript of conversation between informant and defendant would be skipped and redacted did not improperly reference and draw jury's attention to skipped and redacted portions; skipped portions and redactions would not have suggested to jury the prior bad acts of defendant, and trial court instructed jury that omitted portions were not pertinent and dealt with matters unrelated to trial.

12. Sentencing and Punishment ⚿311

Defendant convicted of capital murder and sentenced to death was not prejudiced by trial court's consideration of pretrial court ordered psychiatric evaluation in sentencing order without having psychiatrist subjected to cross-examination, where trial court orally communicated findings of evaluation and provided evaluation's written findings to defense counsel prior to trial, defendant had an opportunity to call psychiatrist as a witness, and defendant was evaluated by his own expert who was called to testify at sentencing.

13. Sentencing and Punishment ⚿311

Pretrial psychiatric evaluation of defendant convicted of capital murder was not improperly considered by trial judge in imposing death sentence, though defendant was not *Mirandized* before the evaluation; evaluation was never presented to the jury, trial court cited defendant's expert's testimony as well as evaluation to support finding that defendant did not act under influence of extreme mental or emotional disturbance when he committed murder, trial judge did find that evaluation evidenced nonstatutory mitigating circumstances, and defendant failed to show evaluation was materially false.

14. Sentencing and Punishment ⚿87, 310

A trial court can properly consider the impact of the crime on the victim's family members; however, it would be improper for a trial court to consider victim-impact evidence concerning the recommendation of an appropriate punishment.

15. Sentencing and Punishment ⚿1789(9)

Trial court did not commit reversible error, during sentencing phase of capital murder trial, in allowing murder victim's relative to testify that defendant should be electrocuted, where there was no evidence indicating that trial court considered relative's recommendation in arriving at defendant's sentence.

16. Criminal Law ⚿1036.2

Defendant convicted of capital murder failed to preserve for appellate review issue whether trial court improperly impeded his cross-examination of witness by refusing to allow defendant to reveal witness's juvenile drug offense, where defendant did not make an offer of proof concerning any juvenile adjudication or that it would be evidence of any particular bias.

17. Criminal Law ⚿1036.2

An offer of proof is essential to preserve issue for an appellate court of whether a trial court erred in refusing to allow a witness to be impeached by a juvenile adjudication, as juvenile records may not be used for impeachment of general credibility.

18. Witnesses ⚿359

When a witness denies a prior conviction, the impeaching party must prove the conviction and cannot do so by oral testimony; the prior conviction can be proved only by introduction of the original court record of the conviction, a certified or sworn copy of it, or certified copies of the case action summary sheets, docket sheets, or other records of the court.

19. Criminal Law ⚿1170.5(1)

Even if trial court erred in refusing to allow defendant to impeach witness for state with witness's prior juvenile adjudication, such error was harmless, where police informant had already testified that witness had been selling drugs, and witness's testimony, that defendant admitted to committing murder, was cumulative of evidence already presented to the jury. Rules App.Proc., Rule 45.

20. Criminal Law ⚿404.75

Wristwatch was properly authenticated as having been in defendant's possession, though defendant's brother was wearing watch when police obtained it, where defendant's mother testified that both defendant and his brother had been wearing watch.

21. Criminal Law ⚿404.36

Chain of custody of ring was sufficiently established, were officer testified she found ring in trunk of victim's car, that she turned it over to property room of police department, that it was in substantially the same condition as when she took possession of it, and that although seal had been broken on envelope, her initials remained on the envelope in which ring was kept and were the only initials on the envelope.

22. Criminal Law ⚿1038.1(6)

Trial court's exercise of its discretion in capital murder prosecution by varying statutory guidelines and instructing jury before rather than after arguments of counsel did not amount to plain error. Code 1975, § 13A-5-46(d).

23. Criminal Law ⚿806(1)

The decision whether to repeat certain instructions to the jury is a matter generally left to the trial court's discretion.

24. Criminal Law ⚿806(1)

Trial court did not abuse its discretion by failing to repeat after the close of counsel's arguments instructions concerning accomplice testimony, though some of the other instructions were readdressed, where the jury was properly instructed prior to final arguments as to the law concerning the corroboration of accomplice testimony.

25. Criminal Law ⚿1038.1(5)

Trial court did not plainly err in capital murder prosecution by refusing to provide a special cautionary instruction concerning paid informant's testimony, where trial court did provide general instruction to jury concerning how to evaluate certain witnesses' testimonies in light of bias they may have.

26. Criminal Law ⚿789(9)

Trial court's instructions in capital murder trial regarding reasonable doubt, referring to jury's "collective minds" and stating that a lack of an abiding conviction of the defendant's guilt required a finding of not guilty, did not shift the burden of proof from the state and diminish the standard for reasonable doubt.

27. Criminal Law ⚿720(5)

The credibility of witnesses is a proper subject for arguments to the jury.

28. Criminal Law ⚿720(9)

Prosecutor's argument in capital-murder trial, that certain evidence introduced

by defendant was an immaterial smoke screen, was not an improper attempt to mislead the jury concerning its role in assessing witness credibility, as prosecutors were allowed to make any inferences and deductions from the evidence.

29. Criminal Law ⚿720(5)

Argument by prosecutor that material part of witness's testimony was truthful was not an improper attempt to bolster witness's testimony, as prosecutor was making proper inferences from the evidence.

30. Criminal Law ⚿1171.3

Prosecutor's error during argument in citing Crimestoppers as source of numerous tips in murder investigation was harmless, where officer in charge of investigation did testify that police had received over 20 tips and reports concerning murder.

31. Sentencing and Punishment ⚿1780(2)

Victim impact argument is not prohibited at the penalty phase of a capital murder trial.

32. Sentencing and Punishment ⚿1780(2)

Prosecutor could comment at penalty phase of capital murder trial on victim's lost roles as a family member and a friend during closing arguments.

33. Sentencing and Punishment ⚿1780(2)

Prosecutor's comments at penalty phase of capital-murder trial, that he saw no remorsefulness on the part of defendant and that defendant had not shed one tear during the trial, was not an indirect comment on defendant's failure to testify; testimony was presented that defendant had bragged that he had shot the victim, and prosecutor was referring to defendant's demeanor and drawing inferences and conclusions from the evidence.

34. Witnesses ⚿367(1), 369

A defendant has a right to cross-examine an accomplice as to the nature of any agreement he has with the government or any expectation or hope that he may have that he will be treated leniently in exchange for his cooperation.

35. Criminal Law ⚿338(6)

If the accomplice has entered into a plea bargain agreement with the State, the full terms of this agreement must be allowed to be placed before the jury.

36. Witnesses ⚿367(1)

When the accomplice is a key witness, the trial court has little, if any, discretion to curtail an accused's attempts to show bias or motive on the part of the witness.

37. Witnesses ⚿372(2)

Defendant was not improperly restricted in his ability to cross-examine codefendant on plea agreement when trial court sustained objection to question concerning whether codefendant's attorney had negotiated an excellent deal for her, where the terms of the plea agreement were before the jury, and defense counsel was allowed to cross-examine codefendant extensively about agreement and make jury aware of the possible influences agreement could have had on her testimony.

38. Criminal Law ⚿412(4)

Admission of defendant's statement that he committed the murder, made to informant during telephone call from jail, did not violate defendant's right to privacy, where defendant initiated the telephone call and stated he suspected informant may have been the person who had revealed his actions. U.S.C.A. Const. Amend. 4.

39. Criminal Law ⚿412.1(2)

Defendant's statement in telephone call from jail that he initiated to informant, indicating that he had committed the murder, was not involuntary, though he was unaware that the person he called had worked as an informant with one police department and that she would inform police in prosecuting jurisdiction about his statement, as there was no deception or custodial interrogation initiated by law enforcement officers. U.S.C.A. Const. Amend. 5.

40. Criminal Law ⚿412.2(4)

Admission of defendant's statement in capital murder trial, made in telephone call defendant initiated from jail to informant, that he had committed the murder, did not violate defendant's Sixth Amendment rights to counsel, where informant did not deliberately elicit the statement, and was a passive listener. U.S.C.A. Const.Amend. 6.

41. Criminal Law ⚿417(1)

Defendant attempted to submit statement made to officer by third party, that third party's boyfriend had a jacket similar to that allegedly worn by defendant on night of murder, for the truth of the matter asserted, and, thus, such statement was inadmissible hearsay; defendant was trying to establish third party's boyfriend looked like defendant, defendant did not indicate that he was seeking to elicit how statement affected investigation, and defendant did not request a limiting instruction on that basis.

42. Jury ⚿33(5.15)

Defendant failed to establish a prima facie showing of discrimination by the prosecutor as to his strikes against black veniremembers, and, thus, prosecutor was not required to come forward with reasons for striking such veniremembers, where defendant only came forward with numbers alone and presented no evidence that would support an inference of discrimination.

43. Jury ⚿33(5.15)

Defendant failed to establish a prima facie showing of discrimination by prosecutor as to his strike of Hispanic veniremember, where there was only one Hispanic member of the venire, defendant's *Batson* motion was based solely on the fact that such member was asked no questions by the prosecutor, and trial judge's prior experience with prosecutor indicated prosecutor was not intending to discriminate.

44. Criminal Law ⚿1152(2)
Jury ⚿33(5.15)

It is within the discretion of the trial court to determine if the State's peremptory challenges were motivated by intentional racial discrimination, and the trial court will be reversed only if its determination is clearly erroneous.

45. Jury ⚿131(13)

Trial court did not abuse its discretion in capital murder trial by refusing to allow defendant to use jury questionnaires during selection process, where there was extensive questioning by the court and both counsels of prospective jurors, in panels and individually.

46. Witnesses ⚿309

Trial court's statement in sentencing order, that defendant convicted of capital murder chose not to testify at either guilt or sentencing stage of trial, did not violate defendant's right against self-incrimination, where there was no indication that court considered this fact any further. U.S.C.A. Const.Amend. 5.

47. Double Jeopardy ⚿162
Indictment and Information ⚿191(4)

Offense of committing murder during the course of a robbery was not a lesser

included offense of committing a murder during the course of a kidnapping, and, thus, double jeopardy rights of defendant convicted of both charges was not violated, where intended purpose of the abduction, robbery, did not have to be completed in order for defendant to be convicted of the second charge, while the robbery had to be completed in order for defendant to be convicted of the first charge. U.S.C.A. Const.Amend. 5; Code 1975, §§ 13A-1-8(b)(1), 13A-1-9(a), 13A-5-40(a)(1), (2).

48. Sentencing and Punishment ⚿1660

Treating robbery as an element of the offense of committing murder during the course of a robbery and as an aggravating circumstance in his sentencing for capital murder was not "double counting" in violation of defendant's right to an individualized sentence guaranteed by the Sixth, Eighth, and Fourteenth Amendment; action by trial court did not result in double punishment. U.S.C.A. Const.Amends. 6, 8, 14.

49. Criminal Law ⚿635

Trial court did not abuse its discretion in allowing murder victim's family and friends to remain in courtroom during trial; Crime Victims' Court Attendance Act guarantees a victim or victim's representative the right to be present in the courtroom, such person cannot be excluded without a valid reason, and defendant did not make a motion to close the courtroom or exclude victim's family and friends. Code 1975, §§ 15-14-50 to 15-14-57.

50. Constitutional Law ⚿268(2.1)

Criminal Law ⚿659

Allowing murder victim's brother to attend trial wearing his police uniform did not violate defendant's rights to due process or a fair trial. U.S.C.A. Const. Amends. 6, 14.

51. Constitutional Law ⚿268(2.1)

Criminal Law ⚿633(1)

Providing murder victim's family with copies of transcript of conversation between defendant and informant at same time transcript was provided to jury did not violate defendant's rights to due process or a fair trial, absent evidence that defendant suffered any prejudice as a result. U.S.C.A. Const.Amends. 6, 14.

52. Constitutional Law ⚿270(1)

Criminal Law ⚿659

Weeping of woman in courtroom which interrupted trial court's instructions to jury did violate defendant's rights to due process or a fair trial at sentencing phase of jury trial, where there was no evidence that defendant suffered any prejudice as a result, and trial court in subsequent instruction told jury to avoid any influences of passion, prejudice, or other arbitrary factors. U.S.C.A. Const. Amends. 6, 14.

53. Sentencing and Punishment ⚿1780(3)

Trial court's statement to jury at sentencing phase of murder trial when court completed instructions, in response to question from jury member concerning what would happen if jury became deadlocked, that the jury would just have to communicate with the court if that happened, did not encourage jury to return a death sentence, as court was merely refraining from addressing problems that did not exist until appropriate time, and court had instructed jury that it should base its verdict solely on the evidence.

54. Criminal Law ⚿438(7)

Probative value of autopsy photographs of murder victim outweighed their prejudicial effect, where photographs served to corroborate and elucidate pathologist's testimony as to victim's wound, the

cause of her death, and proximity of shotgun to victim's head when she was killed.

55. Jury ⚿131(2, 4)

How far counsel may go in asking questions of the jury on voir dire, and the nature, variety, and extent of those questions, are left to the discretion of the trial court.

56. Jury ⚿97(1)

For purposes of determining that a juror should not be disqualified, it is sufficient if the juror can lay aside his or her impression or opinion and render a verdict based on the evidence presented in court.

57. Jury ⚿103(6), 108

Trial court in murder prosecution did not abuse its discretion in refusing to strike for cause juror who lived near scene of crime, had some feelings for the case, and indicated she believed in the death penalty, where juror indicated she would listen to the evidence and base her verdict as to punishment on the law and the evidence.

58. Criminal Law ⚿134(1)

The burden is on a defendant seeking a change of venue to show, to the reasonable satisfaction of the court, that he or she cannot receive a fair and impartial trial in the county of original venue.

59. Criminal Law ⚿121, 1150

Motions for a change of venue are addressed to the sound discretion of the trial court and its decision on such a motion will not be disturbed on appeal except for an abuse of that discretion.

60. Criminal Law ⚿126(1)

There are two situations that would require a change of venue: one dealing with pretrial saturation of the community, the other requiring actual jury prejudice or a connection between the publicity generated by the news articles, radio and television broadcasts and the existence of actual jury prejudice.

61. Criminal Law ⚿126(1)

A criminal defendant is not constitutionally entitled to trial by jurors ignorant about relevant issues and events; the relevant question in determining whether venue should be changed is not whether the community remembered the case, but whether the jurors had such fixed opinions that they could not judge impartially the guilt of the defendant.

62. Criminal Law ⚿126(1)

In determining the existence of presumptive prejudice of a jury when ruling on a motion to change venue, a court must consider the totality of the circumstances, including the type of pretrial publicity, the time lapse between peak publicity and the trial, and the credibility of prospective jurors who indicate during voir dire that they could be impartial despite having been exposed to pretrial publicity about the case.

63. Criminal Law ⚿126(1)

The presumptive prejudice standard for purposes of determining whether there should be a change in venue is only rarely applicable, and is reserved for an extreme situation.

64. Criminal Law ⚿134(1)

The burden placed upon a petitioner seeking to change venue to show that pretrial publicity deprived him of his right to a fair trial before an impartial jury is an extremely heavy one.

65. Criminal Law ⚿1158(2)

The trial court's findings of impartiality of a jury, when ruling on a motion for a change of venue, should be overturned only for manifest error.

66. Criminal Law ⚿1150

Absent a showing of abuse of discretion, a trial court's ruling on a motion for change of venue will not be overturned.

67. Criminal Law ⚿126(2)

Defendant in murder trial was not entitled to a change in venue, though 28 venirepersons admitted they had some knowledge of the case, and several had extensive knowledge including the fact that the victim was a police officer's sister, where none of the actual jury members who sat on the case had stated on voir dire that they had any prior knowledge of the facts of the case.

68. Sentencing and Punishment ⚿1681, 1700

Aggravating circumstances outweighed mitigating circumstances, and sentence of death for defendant convicted of two counts of capital murder was appropriate; aggravating circumstances were that murder was committed while defendant was engaged in commission of a robbery and while defendant was in the commission of a kidnapping, mitigating circumstances were that defendant did not have a significant history of crime and was 22 years old at time of offense, and nonstatutory mitigating circumstances were that defendant had a luckless childhood, an abusive father, economic deprivations, and a verbal IQ of 75. Code 1975, § 13A-5-53(b)(2).

69. Sentencing and Punishment ⚿1681

Sentence of death for defendant convicted of robbery-murder and murder during kidnapping in the first degree was neither disproportionate nor excessive, as death sentences had been imposed on convictions in other cases for both crimes. Code 1975, § 13A-5-53(b)(3).

Ellen L. Wiesner, Brookfield, Wisconsin, for appellant.

Bill Pryor, atty. gen., and Cecil G. Brendle, Jr., asst. atty. gen., for appellee.

On Return to Remand

PER CURIAM.

The appellant, Willie B. Smith III, was convicted of capital murder for the intentional killing of Sharma Ruth Johnson during the course of a robbery and the intentional killing of Sharma Ruth Johnson during the course of a kidnapping. Following a sentencing hearing, the jury returned an advisory verdict of death, by a vote of 10 for death and 2 for life imprisonment without parole. A subsequent sentencing hearing was held before the trial court, and the appellant was sentenced to death by electrocution.

The trial court properly made the following findings of fact concerning the offense, which were contained in his sentencing order:

> "The Defendant is a black male, age 22 at the time of trial, charged in an execution style shotgun slaying of Sharma Ruth Johnson, a 22–year–old white female abducted at gunpoint from an automatic teller site at a local bank.
>
> ". . . .
>
> "Angelica Willis, also indicted for the capital murder of Ms. Johnson, testified in exchange for a plea to the lesser offense of murder and a twenty-five year sentence. Ms. Willis, age 17 at the time of the offense, stated that she was living with defendant Smith in October, 1991, that she and defendant left their apartment on foot at about midnight of October 26 to look for defendant's brother Lorenzo, were enroute to Pizza Hut [restaurant] and observed Ms. Johnson seated in her car at a First Alabama

Right Place automatic teller machine on Parkway East. Ms. Willis states that defendant Smith told her to approach the car and 'ask the lady where Krystals [hamburger fast food restaurant] is', that she complied by going to the passenger side of the car, made the inquiry, that Ms. Johnson said she did not know the location of Krystals, that the defendant approached the car, pulled out a sawed-off shotgun, inserting the gun partly in the window and repeatedly demanded that the victim get out of the car; that Ms. Johnson got out of the car and was placed in the car trunk, that defendant drives the car some distance to Huffman, returns to the point of the abduction at the bank and locates Ms. Johnson's bank card on the ground.

"The victim is made to call out her secret code number from the trunk of the car and the approximate amount of money she had in her account, enabling Willis at defendant's instruction to receive some $80.00 from the automatic teller machine.

"Unknown to defendant Smith the bank video camera is taking his photograph while he is seated in the car directing Willis' activities. The time of day depicted in the photo frame is Sunday, October 27, 1991, 1:25 a.m.

"The film runs for about four minutes depicting defendant's face and special wearing apparel, Los Angeles Raiders cap, epaulets on shoulders of coat.

"The witness describes how defendant Smith embarked again driving victim's car with victim in the trunk and Willis in the front seat, the purchase of some gas at a Texaco station and locating Lorenzo at a shopping center in Huffman.

"The witness describes Lorenzo getting into the car and upon learning that the owner of the car is a female locked in the trunk taunts the victim with sexual overtures, i.e., 'do you want to suck my _____.'

"The defendant and Willis manage to get Lorenzo to quiet down, a phone call is made to a Michael Wilson who is not in, witness then describes the trip to Zion Memorial Cemetery.

"Willis states that Smith said 'I'm going to have to kill her——she'll call the police,' Willis states that she (Willis) protested but that Smith persisted that he would have to kill Ms. Johnson; that Smith directed Lorenzo and Willis to get away from the trunk in case the woman might jump out at them, that he proceeded to open the trunk, remarking to the victim 'I'm going to have to kill you', that the victim promised that she would not tell the authorities, that Smith raises up the gun and she hears the report of the shotgun.

"Witness describes Lorenzo as stating 'Willie had shot her in the head.'

"Next the threesome drive to north Roebuck and abandon the vehicle with Ms. Johnson's remains in the trunk. The next day Willis states that defendant Smith confided in her that he had gone back and burned the car to remove his fingerprints.

"Germane Norman testified that in early November she heard the defendant on the phone describing how he had 'killed a white woman at the cemetery, had ridden around in her car and later burned the car.'

"The witness further describes defendant as saying that he was going to leave town.

"Latonya Roshell described how she met the defendant in November when defendant and Michael Wilson moved into her place; that Wilson stated to her that Willie needed a place to stay; that Smith stated that he had 'got a white woman and shot her——blowed her

brains out——and got some money from her.'

"Roshell is a Hoover Police Department informant and upon confirming through news reports that Smith was telling the truth she called her contact at Hoover Police Department. The Hoover Police Department gets Birmingham Police Department involved and Ms. Roshell agrees to be 'wired' with a body mike.

"Ms. Roshell, wearing a body mike and monitored by the police, engages in a dialogue with defendant Smith and though there is static and interference on the tape from airplanes, passing cars, radios, etc., defendant Smith is clearly heard to make a number of inculpatory statements.

"Redacted or 'sanitized' tapes were played to the jury and the jury was provided a redacted transcript of the dialogue. Some of the actual dialogue between Roshell and Smith at tape # 1 side B beginning at page 4 of the transcript follows:

" 'Smith: Now, now that's the only way he can help me, but as far as giving me some money, but it ain't never came down to it, really, really, really boil down to it, where I just have to go on and get out of town.

" 'Roshell: Even, Jermaine was trying to get money from folks. She said me and Willie had our differences but I don't want to see him get fucked up over no bullshit like this, but ah what I'm saying, they followed y'all to the apartment.

" 'Smith: Yeah.

" 'Roshell: What I'm saying is this thing fucked up.

" 'Smith: Yeah, it is fucked up boy, you know like I said earlier, it don't really matter to me.

" 'Roshell: What I like to know, I mean, do you, I mean you can't trust everybody.

" 'Smith: I can't trust everybody, only my, only person knows my brother, my brother he lives my brother worried about him, you understand?

" 'Roshell: What he was with you?

" 'Smith: Yeah, he was with me, my brother I ain't worried about him.

" 'Roshell: Oh.

" 'Smith: I ain't worried about him. And, and my cousin.

" 'Roshell: Your cousin was with you?

" 'Smith: Nah, not my cousin, but, he's my cousin, the one that went the next day when we burnt up the car, but I ain't worried about him. Because he helped me burn up that bitch, so my kin only know.

" 'Roshell: That's why you, you didn't want your fingerprints on it.

" 'Smith: Yeah, yeah.

" 'Roshell: But you ain't been to jail for no damn murder have you? What makes you, make you, ... I/A ... if you ain't been to jail for murder. Like you running scared?

" 'Smith: Right now, I ain't, I'm not on the run. I ain't on the run right now. What I was trying to do, I was trying to get my things away from Roebuck, period. You see what I'm saying, just in case, these white folks don't hardly like no black folks running there anyway. I walked through there with my gun, I had my hand on my gun like this and just in case they say, boom, and there he go, that is the one, you see what I'm saying? They going put a check on him. You see I don't want, I don't want to be around all that, see cause that's why I said I'd get away from the house for a couple of weeks, couple of months something

like that there, then my face wouldn't be seen from all these cars out in the clear. So you don't like that idea?

" 'Smith: . . . I/A . . . (road traffic) (interference inside store, Pac Man [video-game] machine.) Unknown males talking in store.

" 'Roshell: . . . I/A . . . I was thinking about this all last night I was like, I was just thinking. I don't know. I just thought like my nephew, he got shot at the Gallant Men, right 'sic,' the dude that he, they was shooting each other for a fifth of . . . I/A . . . but he killed the dude, but that still bother Greg. Even though it was self-defense. Like you see, I can imagine how you feel. You know . . . I/A. one hundred dollars?

" 'Smith: One hundred dollars . . . I/A . . . her brother was the police.

" 'Roshell: So what's the thing, how did you find out her brother was the police?

" 'Smith: 'Cause when I got in her car, I looked at the pictures, she had her brother sitting right there. It said Johnson, his name was Officer Johnson and her name was Sharma Johnson, she got pictures right there.

" 'Roshell: You remember her name and shit?

" 'Smith: Yeah, I remember her whole name.

" 'Roshell: How'd you kill her? Did you beat her to death or what?

" 'Smith: All I did, all I did was, uh, I took her to the cemetery.

" 'Roshell: And then you killed her in the cemetery?

" 'Smith: I killed her in the cemetery right in Zion City. It's probably about 12 blocks, nawh, about 14 blocks from my house.

" 'Roshell: From your house?

" 'Smith: Yeah, about 14, about 15, 16 blocks from my house . . . I/A . . . (road noise).

" 'Roshell: I don't know where you stay, so.

" 'Smith: Yeah, anyway it's a good ways from my house, . . . I/A . . . (road noise).

" 'Roshell: What you say, did she know you were going to kill her?

" 'Smith: She didn't know. She just said here you can take the car. I was acting like this here. I was thinking don't shoot, don't do it. Her brother a police, no, if I let you go you going to fuck me up.

" 'Roshell: Then what she say.

" 'Smith: She said, no I'm not, I promise (mimicking a female voice). I said you a liar, boom, then shot her in the head with that gun.

" 'Roshell: You shot her in the head with that gun in my house. That gun don't look like it would shoot no god-damn body. You shot her with that, Willie, damn! I was looking at that rusty motherfucker a few minutes ago.

" 'Smith: I just fired it, I just . . . I/A . . .

" 'Roshell: Was her brains blowed all the way?

" 'Smith: Like this here, her eye, everything just hung out. Ah, Ah her whole eye was just, just fell out.

" 'Roshell: When she saw it, what'd you did?

" 'Smith: She said, she said, no I ain't, like that, she said that. I touched her head, I said you're a motherfucking liar, Boom! And all this and then he slapped her, then we stopped, looked around, put the sawed off in my pocket, and I had my coat like this in case I saw some cars. I could just throw

that bitch, like that there. Hey, where are we going?

" 'Roshell: Don't ask me, I'm just following your ass.

" 'Smith: Like that there, and then I thought somebody saw me back there, I waited for a day. I said if nobody find that car today, that mean ain't too much looking for her. So, what I do, I'll go round there and burn that bitch up, get my fingerprints off of it. So, that's what I did. I burned that bitch slap off, I burned that bitch so bad that the car seat, you know that little . . . I/A . . . part.

" 'Roshell: Uh huh.

" 'Smith: That the iron part showing and all the steel in the wheel.

" 'Roshell: Was she burnt up in it too?

" 'Smith: Nawh, the trunk didn't burn up. Just the whole inside.

" 'Roshell: Oh, just the inside of the car.

" 'Smith: I threw the keys away in the . . . I/A . . . and I wiped the car off with some gas, you understand what I'm saying? . . . I/A . . .

" 'Roshell: Damn. So what you think, your brother going to L.A. with you?

" 'Smith: My brother ain't got to go to L.A.

" 'Roshell: Oh, he was with you, but he—

" 'Smith: He, my brother ain't got shot on here.

" 'Roshell: Oh, alright.

" 'Smith: He ain't got nothing, no, no . . . I/A . . . (road noise)

" 'Roshell: What I was saying we gonna have to get some money for both of y'all then.

" 'Smith: No, naw, he, he, he's safe. It's me you understand . . . I/A . . . (airplane).'

"There was no evidence of a statement by defendant after defendant was arrested.

"Suffice it to say that the incriminating force of the whole evidence was overwhelming. The testimony of the witnesses summarized above as corroborated by the defendant's own recorded statements to Ms. Roshell, by other witnesses such as Michael Wilson who testified about defendant's confessory statement, Maurice Leonard concerning jewelry owned by the defendant as depicted in the bank photos and by the abundant physical evidence.

"The defendant's case at the guilt stage consisted of trying to impeach Angelica Willis with defendant's mother Clara Smith, who testified that she and her son had tried to evict Willis, that Willis had never expressed fear of defendant Smith, moreover, Mrs. Smith denied hearing her son talk about the killing on the phone."

I.

We remanded this cause for the trial court to hold a hearing in which the prosecutor would be ordered to come forward with reasons for his strikes of female potential jurors. *Smith v. State,* 698 So.2d 1166 (Ala.Crim.App.1997). The trial court was instructed to then examine these reasons and determine whether the prosecutor had used any of his strikes in a manner that discriminated against females. The record had indicated that the prosecutor had used 14 of his 15 strikes to remove females and that he did not strike a male potential juror until his fourteenth strike. The other factors the appellant argued indicated a discriminatory intent in striking these female potential jurors are contained in the original opinion. 698 So.2d 1166. On remand, the trial court held a hearing following which the trial court

found that the prosecutor came forward with sufficient nondiscriminatory reasons to justify his strikes. At the hearing, the prosecutor came forward with the following reasons for his strikes of the 14 potential female jurors:

1. Juror no. 81 was struck because her uncle had been prosecuted and she had expressed her belief that he had been innocent and, therefore, she would probably "lean toward" the defendant. She had also indicated that she wished to be struck because she did not want to serve as a juror in a case involving violence.

2. Juror no. 13 had indicated that she had strong feelings in opposition to the death penalty.

3. Juror no. 184 was struck because she did not believe in capital punishment and because she had previously sat on a jury which returned a not guilty verdict.

4. Juror no. 189 was struck because she did not wish to sit on the jury and had stated, in chambers, that she had "bad nerves" and had been taking antidepressant drugs. She had further stated in chambers that she would not look at the pictures that were to be introduced into evidence.

5. Juror no. 210 was struck because she was very young and had answered no questions posed either by the prosecutor or by defense counsel. The prosecutor indicated that "[t]here was just a lack of response or participation."

6. Juror no. 192 was struck because she had seemed disinterested and had not been paying attention to the questions. The prosecutor also acknowledged that he had drawn the court's and defense counsel's attention to her inattentiveness. The trial court affirmed that fact, referring to his notes.

7. Juror no. 216 was struck because she was a journalist for Southern Living magazine and the prosecutor stated that he had never allowed a journalist to remain on the jury in a case he was trying. The prosecutor stated that he believed that journalists might require the State to prove motive.

8. Juror no. 102 was struck because she had previously served on a jury that had returned a verdict of not guilty in a rape case.

9. Juror no. 94 was struck because she had stated that she tended not to believe police, because she had been raped by a police officer.

10. Juror no. 74 was struck because she was a law student and knew both the attorneys. She was also struck because she may have been a Sunday School teacher.

The four remaining strikes against female potential jurors were all based on the fact that they were religious or were connected to church membership, so that the prosecutor presumed that those potential jurors might tend to be more sympathetic to the defendant and to be more likely to reject the death penalty.[1] Specifically, juror no. 45 was struck because she worked at a church in the kindergarten class; juror no. 200 did volunteer work at the church and was the counselor of ministry; juror no. 150 was a church volunteer, a

1. During the prosecutor's discussion concerning his reasons for the strikes, he referred to one potential juror, stating that he believed that she may have been an individual who seemed eccentric. The prosecutor, however, affirmed that he struck her because of her role as a church volunteer, a Sunday school teacher, and a volunteer for the Red Cross; he stated, "and, I don't want everybody to be normal, I just want a good cross-section of the jury." The trial court then asked, "She falls into the church category?" And the prosecutor responded, "Yes, sir, basically."

Sunday School teacher, and a volunteer with the Red Cross (see note 1); and juror no. 155 was struck because she was a Sunday School leader. It was during the discussion of the prosecutor's reason for having struck juror no. 155 that the prosecutor explained this reason as follows:

"[T]his question of whether or not someone did volunteer work or worked in the Sunday School was asked by defense counsel under voir dire after the State had sat down and finished his voir dire. And, [juror no. 155] was one of the jurors that stated that she was a Sunday School leader. And this was a capital case, and there was a possibility that the State—there was a good possibility that the State would be asking the jury to return an advisory verdict or opinion for death.

"The State also took into consideration from previous capital cases that it has tried, and usually, defense counsel, in their argument, would be asking the jurors to show mercy, and it was done in this case. I'm just trying to lay the predicate down why I struck a lot of these because they worked in the church; Sunday School teachers and Sunday School leaders, and things of that nature, and from people that I knew the defense counsel, if it came to the second phase of the sentencing hearing, would be asking the jurors to show mercy. And, it was my opinion that this argument would be receptive to someone who worked in the church and was well versed in the Bible more than someone who was not; be a female or male juror that was a strong worker in the church. No male jurors that was [sic] left seated on the jury worked in the church.

"As I stated before, as the Court will recall, this argument was made by [defense counsel] that one day they will be in front of their maker, and the judge would look back at that person's book-of-life, and he said you will not show—you will not show Willie B. Smith any mercy, and now you are asking me to show you mercy. So, that is why I took into consideration when someone was a Sunday School leader, or Sunday School teacher, or someone that was well versed in the church, that that argument would be more receptive toward that juror as far as returning an advisory verdict of life without parole instead of death."

Thereafter, in explaining the striking of the other three jurors on the basis of their church affiliation, the prosecutor referred to this argument. On rebuttal, defense counsel sought to show that this reason given by the prosecutor for his striking of these four potential jurors was a pretext or a sham, by making the following argument before the Court:

"Next, I would like to address generally [the prosecutor's] explanation for striking people that they were involved in Sunday School and would be well versed in the Bible as a reason for striking. I believe he gave that reason for [juror no. 155, juror no. 200, juror no. 150, juror no. 45, and juror no. 74.] [2]

"First of all, [juror no. 74] did not answer on voir dire that she had been a church youth leader that I found in the record. But, even if she had, involving the church group again, is not a valid, gender-neutral, or race-neutral reason for striking these women. Under *Pow-*

2. The prosecutor gave as reasons for his striking of juror no. 74 that she was a law student and that she knew both defense counsel and the prosecutor. Although he also gave as a reason that this potential juror was a Sunday School director, the record indicates that this potential juror never stated that she was a director of Sunday School, while another potential juror made this claim in response to a question by defense counsel.

ell v. State [548 So.2d 590 (Ala.Crim. App.1988)], and many other Alabama cases, and other cases across the country, the striking of a person because of their membership or enroll[ment] in a particular group or particular profession, without more explanation than that, is not a valid reason—a valid or race-neutral reason for striking them from the jury.

"He has talked about these people were well versed in the Bible and others were not. Well, first of all, that was not a subject of voir dire. They were not asked—none of the jurors were asked what their knowledge of the Bible was, what their religious beliefs were, how their religious affiliation applied to how they would apply that to decide this case. There is no indication that any of these jurors that were struck, allegedly through their church involvement, would have been biased against the prosecution because of their involvement in church. The prosecution was not interested in finding out whether they had religious beliefs, other than whether they would or would not go for the death penalty. The question of whether they would vote for the death penalty was asked. None of these people responded in the affirmative that they would be unable to impose the death penalty. The State did strike two women because they expressed [opposition] to imposing the death penalty.

"None of these women expressed any resistance to the death penalty, and the State's reason given was that they were more likely to be sympathetic to the defendant is not plausible under the circumstances. It has no relationship in this particular case. There is no allegation that someone who is a church official was killed. There is no connection whatsoever with any kind of religious overtones in the facts of this case.

"Secondly, in regard to religion, I just addressed the fact that the prosecutor assumed bias without more sufficient reason. The second thing that ties into that group bias is that there was a lot of voir dire I think I have already addressed, but—state and many other occasions, and the cite for *Powell* is 548 So.2d 590 (Ala.Crim.App.1988). In addition, in *Walker v. State,* 611 So.2d 1133 (Ala.Crim.App.1992), and other cases in Alabama indicate that failure to engage in meaningful voir dire on a subject then claimed as a basis for striking of a juror, is strongly—suggests an inference of discrimination based on race or gender as it was in this case."

Defense counsel then referred to the striking of juror no. 74 based on her being a law student at the time of trial and noted that a seated juror, who was a male, also indicated that he was studying law at the time of trial and that his wife was a legal secretary. Defense counsel also stated that juror no. 74 had ended up serving as an alternate on the jury. Defense counsel further indicated that juror no. 174 had stated in the record that he had taken a course in criminal justice at the University of Alabama in Birmingham, but that he served on the jury. Defense counsel continued, stating:

"I want to return for a moment to the reason that was given which was church involvement for striking these jurors, and point out to the court that [another alternate juror], who was—the defense strike no. 16, so she was not struck by the State, is an alternate on the jury, who was a woman juror, no. 188, who was a youth director at a Sunday School at the time of trial, and so answered on voir dire at page 304 of the record.

"The district attorney's statement that he struck everyone who had involvement in Sunday School or who was a Sunday

School teacher is simply false. He had used his strikes by the time this person was struck and failed to strike her, and there were other people struck by the State that did not have that characteristic of being involved in the church. [If] that was important for the State[,] [t]hey could have struck [juror no. 188], as well."

In response, the prosecutor stated that his notes reflected that juror no. 74—not juror no. 188—was a Sunday School youth director. The Court responded that juror no. 74 was the potential juror who knew the lawyers from law school. The prosecutor responded that he additionally had noted her to be a Sunday School director, but did not so note juror no. 188 to be a Sunday School director. The Court affirmed that its trial notes indicated that juror no. 188 had been noteworthy due to pretrial publicity issues and her employment in the sheriff's office. The prosecutor then stated, in pertinent part, as follows:

"I'm disputing that I did not strike [juror no. 188] if she was a Sunday School director or I would have struck her. My record reflects that I have [juror no. 74] as a Sunday School director, and I saw that in the record. I read the record, too, you know, and, as an officer of the Court, I know [juror no. 74], and she is a Sunday School youth director .... and [juror no. 188] is not, and that is a fact. I'm stating that as an officer of the Court. I'm saying the record is incorrect...."

Defense counsel responded, "Well, Your Honor, the record speaks for itself." Defense counsel then stated:

"To the extent [the prosecutor] is relying on the information he has either acquired or confirmed after the trial, [that] cannot be used to support his strikes. Additionally, Your Honor, I neglected to mention in the beginning to the extent that he relies at all on evidence that—not evidence but after the jury was struck to support his reasons for striking people, those are not valid support for his reasons for striking, because they had not occurred. He is not clairvoyant; they had not yet occurred. The record speaks for itself. The record is presumed to be correct. It was certified by the court reporter, and it has been used on appeal, and it has been used in all other respects in Alabama at page 304 as being accurate and believed to be accurate by both the State and the defense up until this time, and that is all I want to say."

The prosecutor stated that he did look at the record and that he knew juror no. 74 because he had taught her at law school and that his records reflected that she was a Sunday school youth director. Upon questioning by the trial court, the prosecutor stated that he knew juror no. 74 before trial, but that he did not know juror no. 188 before trial, although he had seen her several times in the sheriff's office at the jail. A review of the record containing a transcript of the voir dire of the potential jurors establishes that, upon questioning by defense counsel, juror no. 188 answered that she was a Sunday school teacher and youth director and then responded that she was not paid for this position.

At the close of the prosecutor's statements concerning his reasons for these strikes, the prosecutor stated that, even if the record was correct concerning which potential juror was the youth director, the record would affirm that juror no. 74 had studied specifically criminal law or procedure in law school and that he believed that something to do with her studies in this area might influence her.

Further, in closing his statement concerning his reasons for the strikes, the prosecutor made the following comments:

> "I, possibly, could have—after [defense counsel] brought out the questions that these people worked in Sunday schools or were church leaders—maybe I could have revisited voir dire to them to see what their feelings were toward the death penalty, being they were church members, or what their feelings were toward the death penalty, or how versed they were in Bible verses, but voir dire has to stop. It has to have some finality at some time. There is a possibility that [defense counsel] had other questions, so the State has an opportunity to voir dire."

Thus, it is apparent from the record that the statements made by the potential jurors indicating their religious affiliations or duties were brought out during defense counsel's questioning of the venire and that the prosecutor asked no follow-up questions. Moreover, each of these jurors who was struck by the prosecutor based on her religious undertaking had previously affirmed that she would have no problem imposing the death penalty.

In *Walker v. State,* 611 So.2d 1133 (Ala. Crim.App.1992), the case was remanded to the trial court for the prosecutor to come forward with race-neutral reasons for peremptory strikes of black veniremembers because the defendant had established a prima facie case of discrimination. On remand, the trial court found that the reasons given by the prosecutor were sufficiently race neutral; however, this Court reversed its judgment. Two of the strikes made by the prosecutor against black potential jurors were entered because one of the potential jurors was a minister's wife and another had commented that he was "very religious." Concerning these two strikes, this Court stated:

> "These veniremembers did not respond when asked whether they had a fixed opinion against the death penalty or whether they not being absolutely opposed to it, 'just [did not] like it,' or when asked whether any veniremember had 'a personal, religious, or moral conviction against passing judgment on [his] fellow man.' '[A]n explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically' is evidence that the reason was a sham or pretext. [*Ex parte*] *Branch,* 526 So.2d [609] at 624 [(Ala. 1987).] . . . Here, there is even stronger basis of concern, because in this case voir dire examination revealed that the two veniremembers in question did not possess the group trait assumed by the prosecutor. The prosecutor could have easily dispelled any doubt, had there been any, by asking a follow-up question specifically of each veniremember. He cannot, however, presume that, in the absence of a response to specific voir dire questioning as to whether the veniremember is in fact opposed to the death penalty, the veniremember would not vote in favor of the death penalty simply because the veniremember is very religious, is a minister or a minister's wife, or even is a member of a particular denomination. . . . The record offers nothing to give validity to the prosecutor's assumption about these two veniremembers. *Compare Coral v. State,* [628 So.2d 954] (Ala.Cr.App.1992) (in a capital case, the striking of a minister's wife was upheld where a white minister's wife was also struck); *Hart v. State,* 612 So.2d 520 (Ala.Cr.App.1992) (upholding the strike of a minister's wife, but acknowledging that this reason may be suspect); *Yelder v. State,* [630 So.2d 92] (Ala.Cr.App.1991) (in a non-

capital case, the striking of a minister was considered race-neutral where the veniremember was involved in prison ministry and where a white veniremember was struck because her husband was a retired minister); *Fisher v. State,* 587 So.2d [1027] at 1036–37 [(Ala.Cr.App.1991)] (strike of a minister upheld where a victim's family had informed the prosecutor that it knew the veniremember, that he would not vote to convict the defendant in any event, and that it did not like him and where the prosecution had sought to challenge this veniremember for cause because of his feelings about capital punishment); *Warner v. State,* 594 So.2d 664, 666 (Ala. Cr.App.[1990]), rev'd, 594 So.2d 676 (Ala. 1991) (reason for strike of minister considered race-neutral in a capital case, where minister proclaimed that he did not believe in the death penalty and he knew one of the defendants); *Bass v. State,* 585 So.2d 225, 237 (Ala.Cr.App. 1991) (in a noncapital case, strike of 'preacher' wearing a large cross was race-neutral where a minister was going to be a defense witness); *Currin v. State,* 535 So.2d 221 (Ala.Cr.App.), cert. denied, 535 So.2d 225 (Ala.1988) (in a noncapital case, the strike of a minister was upheld; no voir dire response was discussed)."

Walker v. State, 611 So.2d at 1141–42. (Emphasis omitted.) Thus, this Court determined that a prosecutor could not properly give as a reason for striking a potential juror the fact that the juror was very religious where there was no basis in the record for any assumptions to be drawn from this characteristic of the veniremember, nor was there any follow-up questioning by the prosecutor to lead him or her to such a conclusion.

In *Giles v. State,* 815 So.2d 585 (Ala. Crim.App.2000), the appellant alleged that the prosecutor's given reasons for his peremptory strikes in response to a *Batson*[3] objection were not race neutral. Specifically, the appellant referred to the following reason given by the prosecutor for his striking of a potential juror:

" '[Prosecutor 1]: The reason I gave—I don't know about these gentlemen, but the reason I have for [the strike] is I know her and I know her husband very well. They are very, very religious people, and in my opinion even though she did not answer when asked about having a problem, whether they would have a problem sitting in judgment, I didn't feel she could. I struck her in another case, too. But that was my reason.

" '[Prosecutor 2]: I think that is a sufficiently race-neutral reason. I had asked a question in one of the cases about people who may have problems because of religion. She did not respond, and yet [prosecutor 1] knows she is a highly religious person. And that is why she was struck.' "

In reversing the judgment in this case, this Court cited *Walker v. State,* supra, and stated:

"As was the case in *Walker,* the prosecutor in this case asked a specific question related to the veniremembers' religious beliefs, and [this potential juror] did not respond. Also, there was no follow-up questioning of [this potential juror] by the State. The prosecutor knew that [this potential juror] was 'very, very religious,' and simply presumed that, as a result, she would not be able to sit in judgment of another person. This is precisely the type of action we found in *Walker* to be prohibited, and to constitute reversible error."

3. *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986).

Giles v. State, supra at 587–88. A dissent to the majority opinion in *Giles v. State,* supra, acknowledged that a group trait that is not shown to apply to a specifically challenged juror is evidence of pretext and that a prosecutor cannot presume that a veniremember is opposed to the death penalty merely because he or she is very religious or is related to a minister or even is a member of a particular denomination; however, the dissent attempted to distinguish *Giles* based on the prosecutor's personal knowledge about the veniremember. The dissent argued that the reason for the prosecutor's strike in *Giles* was based on his personal knowledge rather than on a presumption, and that his statement indicated that he believed that the potential juror's failure to respond to the question in voir dire indicated that she was not being candid. Thus, the dissent stated that the prosecutor's reliance on his personal knowledge dispelled "the assumption that he made the strike based on the presumption that anyone involved in religious work or who maintained strong religious convictions would be biased." *Giles,* 815 So.2d at 590. The majority opinion addressed the dissent, arguing that the prosecutor's statements indicated that he personally knew the juror to be religious, yet assumed that she could not sit in judgment of another person despite her responses to voir dire questioning indicating otherwise. Moreover, the majority opinion noted that the prosecutor did not strike a veniremember who was a white minister.

In *Lucy v. State,* 785 So.2d 1174 (Ala. Crim.App.2000), a white defendant challenged the prosecutor's reasons for his peremptory challenges, arguing that they were insufficiently race neutral. The prosecutor, in *Lucy v. State,* supra, indicated that he struck a potential juror because "her 'husband is a pastor' and because he 'did not feel like she would be a strong law enforcement State's witness, that she would perhaps tend to be forgiving and forget.' " *Id.* at 1176. However, this Court noted that the record indicated that during the voir dire questioning, the veniremembers had been asked whether they could give the State and defendant a fair and impartial trial; this potential juror did not respond to the question. This potential juror also did not respond to a question whether any veniremember would have a problem returning a guilty verdict for any religious reason. Moreover, when individually questioned, this veniremember indicated that she "could follow the trial court's instructions and return a verdict based solely on the evidence presented." *Lucy v. State,* supra at 1176. Thus, this Court reversed the trial court's determination that the reasons given by the prosecutor were sufficiently race-neutral, stating:

> "Furthermore, unlike the prosecutor in *Giles v. State,* 815 So.2d 585 (Ala.Crim. App.2000), the prosecutor in this case did not state that his presumptions about [this potential juror] were based on his personal knowledge about [this potential juror]. Rather, it appears that the prosecutor presumed that, because her husband was a pastor, [this potential juror] would not be a strong law enforcement juror and might tend to forgive and forget. Based on the rationale set forth in *Walker,* we conclude that the prosecutor's reasons for striking [this potential juror] were not race-neutral and that the trial court's denial of the appellant's *Batson* motion was clearly erroneous. '[O]ne unconstitutional peremptory strike requires reversal and a new trial.' *Ex parte Bird,* 594 So.2d 676, 683 (Ala.1991)."

Lucy v. State, supra at 1178 (footnote omitted).

In the present case, the prosecutor asserted only that he had personal knowledge concerning one of the potential jurors

whom he struck for religious reasons. He further gave another reason for striking this juror—that she knew both of the attorneys and that she had studied criminal law. The prosecutor claimed no personal knowledge of any of the other potential jurors he struck for religious reasons. The affirmations made by these potential jurors indicating that they maintained strong religious convictions or that they were engaged in religious work came out during defense counsel's questioning of the veniremembers; the prosecutor asked no follow-up questions to determine whether their work or beliefs might have any negative impact on their ability to serve as a juror in this case. Moreover, during earlier questioning by the trial court, none of these potential jurors responded that they would have any problem imposing a death sentence. The trial court specifically asked the venire, "Are there any of you people that because of, oh, religious scruples or moral, philosophical scruples, whatever, are unalterably opposed to capital punishment such that you can say to me now going into the proceedings, without having heard a word of testimony, without having been instructed by the court by the important law concerning death penalty litigation . . . that you would not under any circumstances, irrespective of what might emerge in the course of the proceeding, irrespective of the law, you know that you would not vote for the death penalty?" Several jurors responded affirmatively to this question, but the potential jurors in question were not among them. These potential jurors also indicated that they could follow the law and evidence in arriving at their decision.

The law in Alabama concerning the standard and guidelines to be used for evaluating the reasons given by the prosecutor is unclear. Specifically, whether the courts in Alabama should follow the guidelines enunciated in *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), which established a more relaxed evaluation of reasons given for strikes or strictly adhere to the more stringent inquiry espoused under Alabama law, see *Ex parte Bird*, 594 So.2d 676 (Ala.1991), and *Ex parte Branch*, 526 So.2d 609 (Ala.1987), is in question. In *Ex parte Bruner*, 681 So.2d 173 (Ala.1996), the Alabama Supreme Court, in quashing the writ of certiorari, stated that "this Court disapproves the reliance of the Court of Civil Appeals on *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995). Those federal cases do not control Alabama's peremptory challenge procedure, which is based on adequate and independent state law." The author of a lengthy special concurrence to that decision stated that the following language by the United States Supreme Court in *Hernandez v. New York*, 500 U.S. 352, at 359–60, 111 S.Ct. 1859, 114 L.Ed.2d 395, was held inappropriate as a retreat from the standard declared in *Batson v. Kentucky*, supra:

> " 'In evaluating the race-neutrality of an attorney's explanation, a court must determine whether, *assuming the proffered reasons* for the peremptory challenges *are true*, the challenges violate the Equal Protection Clause as a matter of law. . . .
>
> " 'A neutral explanation in the context of our analysis here means an explanation based on something other than the race of the juror. At this step of the inquiry, the issue is the facial validity of the prosecutor's explanation. Unless a discriminatory intent is *inherent in the prosecutor's explanation*, the reason offered will be deemed race-neutral.' "

Ex parte Bruner, 681 So.2d at 180 (Cook, J., concurring specially)(emphasis in original). The concurring opinion continued,

stating that the "difference between the Alabama and federal standards was even more clearly evidenced in *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995)," *id.,* by criticizing the United States Supreme Court's language in reference to the second step of peremptory challenge, specifically, the burden of rebutting a prima facie case of discrimination, where the United States Supreme Court stated that the evaluation " 'does not demand an explanation that is persuasive, *or even plausible.*' 514 U.S. at 768, 115 S.Ct. at 1771 (emphasis in original)." *Ex parte Bruner,* 681 So.2d at 181. The special concurrence in *Ex parte Bruner* expressed further disapproval of the *Purkett* decision:

> "The Court cited with peculiar disapproval *Batson's* footnote 20 containing the terms 'clear' and 'specific' stating: 'The Court of Appeals *appears to have seized on* our admonition in *Batson* that to rebut a prima facie case, the proponent of a strike "must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the challenges . . . ." ' 514 U.S. at 768, 115 S.Ct. at 1771 (emphasis added). The Court concluded that '[t]he prosecutor's proffered explanation in [that] case—that he struck [the veniremember] because he had long, unkempt hair, a mustache, and a beard—[was] race-neutral and satisfie[d] the prosecution's step 2 burden of articulating a nondiscriminatory reason for the strike.' *Id.*"

Id. at 181. The special concurrence distinguished Alabama's procedure of analyzing the reasons, stating that in Alabama these reasons "even if facially neutral—are not viewed by the judiciary with credulous *naivete.* In Alabama, '[t]he trial court cannot merely accept the specific reasons given by the prosecutor at face value. . . . Rather, the court must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination.' " *Id.* at 179.

Following *Ex parte Bruner,* supra, the Alabama Supreme Court denied the petition for certiorari review in *Fletcher v. State,* 703 So.2d 432 (Ala.Crim.App.1997), wherein the Alabama Court of Criminal Appeals again affirmed the United States Supreme Court's evaluation of a prosecutor's explanations for strikes stated in *Purkett v. Elem,* supra, and *Hernandez v. New York,* supra. This Court stated:

> " ' "[The] United States Supreme Court recently stated in *Purkett v. Elem,* 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), that the second step does not demand an explanation that is persuasive or even plausible. It stated that a legitimate explanation is not necessarily one that must make sense, but one that does not deny equal protection. At this step of the inquiry, the issue is facial validity of the prosecutor's explanation, and unless a discriminatory intent is inherent in the explanation, the reason offered will be deemed neutral. *Id.,* at 768, 115 S.Ct. at 1771. When the defendant challenges as pretextual the prosecutor's explanations as to a particular venireperson, the inquiry becomes factual in nature and moves to step three. At this step the trial court must resolve the factual dispute, and whether the prosecutor intended to discriminate is a question of fact. *Hernandez v. New York,* 500 U.S. 352, 364–65, 111 S.Ct. 1859, 1868–69, 114 L.Ed.2d 395 (1991). In the third step, the trial court must determine whether the defendant has met his burden of proving purposeful discrimination. At this stage, the trial court must consider the persuasiveness of the explana-

tions, and it is also at this stage that 'implausible or fantastic justifications may (and probably will) be found to be pretext for purposeful discrimination.' *Purkett*, 514 U.S. at 768, 115 S.Ct. at 1771."

" '*Bush v. State*, 695 So.2d 70, 96 (Ala. Cr.App.1995).' "

Fletcher v. State, supra, at 435–36.

Thereafter, the Alabama Supreme Court again addressed what is required in Alabama by the proponent of a strike in order to prove the strike to be nondiscriminatory:

" 'The state then has the burden of articulating a clear, specific, and legitimate reason for the challenge which relates to *the particular case to be tried*, and which is nondiscriminatory.' [*Ex parte Branch*, 526 So.2d 609, 623 (Ala.1987)] (emphasis in original).

" 'In evaluating the evidence and explanations presented, the trial judge must determine whether the explanations are sufficient to overcome the presumption of bias.... The trial judge cannot merely accept the specific reasons given by the prosecutor at face value ...; the judge must consider whether the facially neutral explanations are contrived to avoid admitting acts of group discrimination.'

"*Id.* at 624 (citations omitted).* After race-neutral reasons are articulated, the moving party can offer evidence showing that the reasons or explanations given constitute merely a sham or pretext. *Id.* at 624.

'' *We note that the United States Supreme Court originally interpreted the 14th Amendment to the United States Constitution to require a similar standard of scrutiny of reasons offered for an allegedly discriminatory peremptory strike. The *Batson* decision stated that the proponent of a strike must give a 'clear and reasonably specific' explanation of his 'legitimate reasons' for exercising the strike and demanded that the reasons be 'related to the particular case to be tried.' 476 U.S. at 98 n. 20, 106 S.Ct. at 1724 n. 20. However, we recognize that the subsequent decisions of the United States Supreme Court in *Hernandez v. New York*, 500 U.S. 352, 111 S.Ct. 1859, 114 L.Ed.2d 395 (1991), and *Purkett v. Elem*, 514 U.S. 765, 115 S.Ct. 1769, 131 L.Ed.2d 834 (1995), can be interpreted to ease the federal standard. See *Bruner v. Cawthon*, 681 So.2d 161, 170–72 (Ala.Civ. App.1995). However, *Hernandez* and *Purkett* do not govern Alabama's peremptory challenge procedure, which rests upon adequate and independent state law. *Ex parte Bruner*, 681 So.2d 173 (Ala.1996). Thus, regarding the scrutiny that a trial court is to apply to reasons offered by a proponent of a peremptory strike, we adhere to the Alabama standard declared in *Ex parte Branch*, supra.''

Looney v. Davis, 721 So.2d 152, 164 (Ala. 1998).

Thereafter, in *Hagood v. State*, 777 So.2d 162 (Ala.Crim.App.1998), aff'd as to conviction, rev'd and remanded with instructions as to sentence, *Ex parte Hagood*, 777 So.2d 214 (Ala.1999), the standard in *Purkett* and *Hernandez* were again used in analyzing the prosecutor's reasons.

Finally, in *Ex parte Drinkard*, 777 So.2d 295 (Ala.2000), the Alabama Supreme Court addressed a reason given by the prosecution for striking a potential juror, specifically his involvement with law enforcement and his employment as a talk show host, which they held was unsubstantiated by the record. Despite acknowledging the standards for evaluating such reasons set forth in *Ex parte Bird*, 594 So.2d at 683, that "the failure of the State to engage in any meaningful voir dire on a subject of alleged concern is evidence that the explanation is a sham and a pretext for discrimination," and that of *Ex parte Branch*, 526 So.2d at 624, that the "trial judge cannot merely accept the specific reasons given by the prosecutor at face value," and acknowledging that "a simple

question directed to the veniremember could have dispelled any doubt," *Ex parte Bird,* 594 So.2d at 683, the Alabama Supreme Court nonetheless found that the trial court's decision was not "clearly erroneous." See *Ex parte Drinkard,* supra, at 306.

[1] In the present case, the prosecutor came forward with a facially neutral explanation for striking these potential jurors; his reasons based on religion were facially neutral to a claim of discrimination based on gender.[4] In light of the Alabama Supreme Court decision in *Ex parte Drinkard,* we cannot hold that the trial court's determination that the reasons were gender-neutral was "clearly erroneous." Although the appellant came forward with arguments indicating that the reason given by the prosecutor was pretextual, the trial judge stated in his order that he had presided for many years over many trials prosecuted by the particular attorney who was prosecuting for the State. The trial judge acknowledged that the prosecutor is "certainly not a person prone to strike minorities denounced in the *Batson* case and its progeny." The trial judge further stated in his order that "[i]n this writer's judgment, formed on the basis of extensive in-court experience with [the prosecutor] and close acquaintanceship with others that know him, there is no person more equitable and just in the performance of his duty as deputy prosecutor than [the prosecutor]." See *Bui v. State,* 627 So.2d 855, 861 (Ala.1992).

> " 'A circuit court's ruling on a *Batson* objection is entitled to great deference, and we will reverse such a ruling only if it is clearly erroneous. *Ex parte Branch,* 526 So.2d 609 (Ala. 1987); *Ex parte Thomas,* 659 So.2d 3 (Ala.1994); *Lynn v. State,* 543 So.2d 709 (Ala.1988), cert. denied, 493 U.S. 945, 110 S.Ct. 351, 107 L.Ed.2d 338 (1989).'
>
> "*Talley v. State,* 687 So.2d 1261, 1267 (Ala.Crim.App.1996).
>
> > " ' "[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with a definite and firm conviction that a mistake has been committed." '
>
> "*Davis v. State,* 555 So.2d 309, 312 (Ala. Crim.App.1989), quoting *Powell v. State,* 548 So.2d 590 (Ala.Cr.App.1988)."
>
> *Fletcher v. State,* 703 So.2d 432, 436 (Ala. Crim.App.1997).

All of the reasons given by the prosecutor for his strikes of these potential jurors were sufficiently facially gender neutral.

II.

The appellant argues that the failure of a member of the jury to reveal that he had prior knowledge of the case violated the appellant's rights to due process, a fair trial, and a reliable sentencing determination. The record indicates that none of the jury members had indicated during voir dire that they had any prior knowledge of the present offense. In his brief on appeal, the appellant asserts that, because he believed that pretrial publicity and prior knowledge were very important to this case, he used 7 of his 15 peremptory challenges to exclude veniremembers who had been exposed to information about the case. However, after the appellant was convicted and the jury returned its advisory verdict of death, but before the sentencing hearing in front of the trial court, the trial court received a letter written by one

4. To the extent that *Walker v. State,* supra, held that such religious based reasons were not facially race neutral, it is overruled.

of the jurors who had served on this case. Within the lengthy letter, the juror stated as follows:

> "One juror who lived in Centerpoint, and was a vocal proponent of sentencing the defendant to death, even made a comparison of the jury selection process by mentioning the fact that he had previous knowledge of the case (which he supposedly told you about) and thus disclosed it to you. Therefore, those who were sympathetic to life should have disclosed their problem with the death penalty."

Taken in context, the juror was arguing that he felt that the other jurors had perhaps been pressed into recommending death. Earlier in the letter, the juror also wrote that "[d]uring the verdict deliberations I had no reasonable doubt and I still have no reasonable doubt that the defendant was guilty. It is the sentencing phase of the trial that concerns me." Within the body of the letter, the juror reevaluated the jury's recommendation and noted that, perhaps it was unfair to return the death recommendation, especially in light of the fact that the juror had been privy to a far more comfortable life than that of the defendant.

[2–5] During the sentencing hearing before the trial court, defense counsel included the juror's letter in his argument to the judge. He stated, "the jury has found him guilty, I am not here to argue about what the jury did. You have [the juror's] letter in regard their misunderstanding and their feeling about sentencing him to the electric chair." However, defense counsel gave the letter very little emphasis in the body of his argument for mercy. After considering the arguments of counsel, and other pertinent evidence, the trial court returned a sentence of death. Thereafter, during the hearing on the appellant's motion for a mistrial, the following transpired:

> "[Defense counsel]: . . . You have—I believe you have already entered into the record a letter that you got from one of the jurors.
>
> "The Court: That's right.
>
> "[Defense counsel]: I believe [the juror]. Without arguing the letter, I would just want to confirm—in fact, I'll ask Your Honor to consider the fact that he said that—
>
> "[Prosecutor]: I'm going to object at this time for purposes of the motion for the new trial to anything—any affidavit or any testimony—
>
> "The Court: It wasn't an affidavit, just a letter.
>
> "[Prosecutor]: Any letter or any testimony relating to what jurors' deliberations were in effect to negate a verdict. The jury deliberations are secret and the only way that a jury's deliberations can be brought out in open court, [is] if the defense counsel has some evidence that there was some extraneous outside forces operating to effect that—
>
> "The Court: I've read the letter. You have read it. [Defense counsel] has read it.
>
> "[Defense counsel]: Yes, sir.
>
> "The Court: And it's in the record.
>
> "[Defense counsel]: That's all I would have to say.
>
> "The Court: Anything else?
>
> "[Defense counsel]: If you will consider that letter and consider my entire motion for a new trial, Your Honor, and grant us a new trial.
>
> "The Court: I'll rule in writing."

Thereafter, the trial court denied the motion for a new trial.

There is no indication that the juror imparted any outside knowledge to the

jury concerning this case or that he prejudiced the appellant in any way by using outside information he had learned before trial. Although the appellant argues that the fact that a juror was, according to another juror's letter, not forthcoming or honest in his answers during voir dire, there is no real evidence of that fact in the record. As previously stated, the letter was not an affidavit; the author of the letter did not testify concerning this possible hearsay statement, nor did the juror from Centerpoint testify.

> "After a case has been submitted to the jury, their deliberations in the jury room are not subject to review. Gamble, *McElroy's Alabama Evidence,* 3rd Ed., § 94.06, p. 207. Public policy forbids that a juror disclose deliberations in the jury room and demands that they be kept secret. *Taylor v. State,* 18 Ala. App. 466, 93 So. 78 (1922); *Harris v. State,* 241 Ala. 240, 2 So.2d 431 (1941). Permitting such impeachment would open the door for tampering with the jury after the return of their verdict. *Hawkins v. United States,* 244 F.2d 854, 856 (C.A.Va.1957).
>
> "Consequently a jury's verdict is not subject to impeachment by the testimony of jurors as to matters which transpired during the deliberations. *Fox v. State,* Ala.Cr.App., 269 So.2d 917 (1972). A juror may not, either in impeachment or in support of his verdict, testify as to his mental operation in reaching the verdict.
>
> " 'But in order to sustain a verdict of the jury, for the affidavits of the jurors to be admissible they must be with respect to facts and occurrences open to the observation of other jurors so that they may be subject to contradiction, for the rule does not permit evidence by the jurors "of their own mental operations by disclosing the grounds of, or the reasons for, their verdict, the discussions which took place in the jury room, or the motives or influences which affected their deliberations and decision by denying that they were affected by matters which might, if their effect was prejudicial to the moving party, furnish grounds for a new trial, or by asserting that they disregarded improper instructions by the court or incompetent material evidence which was before them and was not seasonably withdrawn or excluded." ' *Birmingham Electric Co. v. Yoast,* 256 Ala. 673, 678, 57 So.2d 103, 107 (1951)."

Atwell v. State, 354 So.2d 30, 37–38 (Ala. Crim.App.1977), cert. denied, 354 So.2d 39 (Ala.1978). See also *Berard v. State,* 486 So.2d 458 (Ala.Crim.App.1984) (wherein this Court held that a juror may not testify concerning the way that certain testimony was considered in the jury room or that certain evidence was or was not influential in order to impeach the verdict). See *Vinzant v. State,* 462 So.2d 1037 (Ala.Crim. App.1984) (a jury's verdict may not be impeached by the testimony or affidavits of jurors as to what transpired among them during deliberations).

> " 'A juror may not testify, either in impeachment or in support of his verdict, as to what effect a matter had upon his mind as causing or not causing him to agree to the verdict, as to why he agreed to the verdict or concerning the mental processes by which he came to agree to the verdict.' C. Gamble, *McElroy's Alabama Evidence,* § 94.06(2) (3rd ed.1977). '[T]he rule does not permit evidence by the jurors of their own mental operations.' *Birmingham Electric Company v. Yoast,* 256 Ala. 673, 678, 57 So.2d 103 (1951)."

Walker v. State, 519 So.2d 598, 599 (Ala. Crim.App.1987). See also *Neal v. State*, 731 So.2d 609, 618–19 (Ala.Crim.App.1997) (wherein the appellant filed a motion for new trial submitting a newspaper article indicating that a juror had spoken of his knowledge of the "history of the trial," and therefore he alleges considered extraneous facts, in an attempt to impeach the verdict.)

[6, 7] In the present case, the appellant has failed to show prejudice because of the alleged juror misconduct. See *Brown v. State*, 545 So.2d 106 (Ala.Crim.App.1999) (wherein this Court concluded that the Alabama Supreme Court's decision in *Dawson v. State*, 710 So.2d 472 (Ala.1997), indicated that the standard to be applied in this situation was "whether prejudice was shown, see *Reed v. State*, 547 So.2d 596 (Ala.1989), on remand, 547 So.2d 599 (Ala. Cr.App.1989)").

> "[T]he problem of jurors failing to disclose material information during voir dire is neither a recent development nor an unusual occurrence. In 1965 Dale Broeder published his seminal study on juror dishonesty during voir dire. The article included many case studies detailing why jurors fail to respond honestly during voir dire. For some jurors, the questions seemed too trivial to merit an honest response. Other jurors were simply too nervous to volunteer information during voir dire. For still others, the desire to serve outweighed the desire to tell the truth. One particular juror viewed selection as an honor and intended to use his jury experiences as a subject of barroom conversation. More recent research indicates that approximately twenty-five percent of jurors fail to reveal material information during voir dire.
>
> "Given the high frequency with which jurors fail to disclose material information, it should come as no surprise that a showing of juror dishonesty, made after the trial, does not necessarily lead to the granting of a new trial. As Professor David Crump has noted, courts must balance two strong and competing interests: fairness and finality. In the criminal context, fairness means the right to impartial jurors, the right to the intelligent use of peremptory strikes, and the right to be free from juror misconduct. Courts will consider some combination of these rights in deciding whether to grant a new trial."

When Jurors Lie: Differing Standards for New Trials, 22 Am.J.Crim.L. 733, 734–35 (1995) (footnotes omitted).

In the present case, the appellant was not deprived of a fair trial because a juror might have had knowledge of the case despite his failure to reveal this knowledge.

III.

The appellant alleges that the State's withholding of an extrajudicial statement that he gave to the police informant, Latonya Roshell, violated his rights to due process, a fair trial, and a reliable sentencing determination under the Fifth, Sixth, Eighth, and Fourteenth Amendments as well as under Alabama law. Specifically, the appellant alleges that the statement was withheld in violation of both state and federal law that mandates the disclosure of a defendant's extrajudicial statements, and that he was unduly prejudiced by its admission because he was unable to prepare for his defense and because he was unable to consider the ramifications of the statement in deciding whether to accept a plea offer from the State. The record indicates that just before the voir dire examination of the jury venire, the prosecutor informed defense counsel of a statement made by the appellant during a telephone call to

Latonya Roshell from jail. The prosecutor stated that he had learned of this conversation on the Friday afternoon preceding the Monday procedures and stated that he attempted to call defense counsel at that time. Defense counsel confirmed the prosecutor's attempts to contact him, but made a motion to suppress the statement. During the hearing on this motion to suppress, defense counsel acknowledged that the prosecutor had not deliberately withheld the statement by arguing that "granted [prosecutor] I don't think he knew about it or he said he didn't and I certainly believe him," but defense counsel argued that to allow the evidence would amount to a "trial by ambush" because, he said, Latonya Roshell had made no mention of this conversation during the preliminary hearing and they had had no opportunity to cross-examine her concerning this alleged telephone conversation. The prosecutor acknowledged that the conversation was made on Thanksgiving Day when the appellant telephoned Roshell and stated that he was attempting to discover who had "told on him" and stated, " 'Well, I know it was either you, Michael or Jermaine. And I didn't think you would tell on me. You know I did it, and I know I did it, but I ain't telling the Court I did it.' " (As paraphrased by the prosecutor.) The Court clarified defense counsel's motion and stated that defense counsel was seeking an opportunity to speak to Roshell before her testimony and defense counsel responded that he would certainly want to do that but that the late timing of the discovery of the evidence gave the State an unfair advantage. Defense counsel then argued that Roshell was recruited by the police, wired by the police, and was acting as a police agent. The prosecutor responded that she had previously worked for the police, but not for the Birmingham police. The prosecutor stated that Roshell did not seek the police with the intent of working for them or receiving money as a confidential informant. He stated that she was not paid for the information and that the conversation was initiated by the appellant upon his telephone call to her. The prosecutor further acknowledged that she was not wired at the time of the conversation and that she did not have any communication with the police concerning this incident, so that the conversation was just discovered immediately before trial. The trial court then denied the appellant's motion.

[8] In the present case, as defense counsel conceded, the prosecutor had no knowledge of the existence of this statement by the appellant before he informed defense counsel of its existence. Generally, the prosecution cannot be held to have failed to comply with a discovery request when "the requested information was not in the prosecution's possession. *See,* H. Maddox, *Alabama Rules of Criminal Procedure,* § 16.1 at 489 (1990)." *Averett v. State,* 640 So.2d 1, 2 (Ala.Crim.App.1993). However, even though a prosecutor is unaware of the existence of certain information, if law-enforcement agents in the prosecutor's district have possession of this information, the prosecutor may be held to have knowledge of the information or evidence imputed to him. See *Ex parte Hunter,* 777 So.2d 60, 61 (Ala.2000) (wherein the Alabama Supreme Court held that certain testimony by an investigating officer concerning an undisclosed statement made by the defendant required a mistrial for failure to disclose). In *Ex parte Hunter,* supra, the Alabama Supreme Court stated that, although the prosecutor informed the trial court that he had no knowledge that the officer would make such a statement, "Alabama law imputes to a prosecutor knowledge of information supplied by any investigating officer's testimony." *Id.,* at 61. The Court

cited *McMillian v. State,* 616 So.2d 933 (Ala.Crim.App.1993), wherein this Court held that a prosecutor could not be held to have suppressed a statement because it was in the possession of officers of a different jurisdiction, so that the prosecutor failed to have any knowledge of the statement. See *Robinson v. State,* 577 So.2d 928, 931 (Ala.Crim.App.1990) (Bowen, Judge, concurring in result only, stating that the patrolman's knowledge "must be imputed to the district attorney as was done in *Patton v. State,* 530 So.2d 886, 889 (Ala.Cr.App.1988)."). But see *Robinson v. State,* supra (holding that the prosecution could not have produced an incriminating statement made by the appellant to an investigating officer, because he was not aware of the statement). *Stewart v. State,* 601 So.2d 491, 499 (Ala.Crim.App.1992) (in a capital-murder case, where the prosecutor telephoned the officer on the scene of the offense who had testified at trial that day and learned that the appellant had made another incriminating remark to the officer at the scene, there was no discovery violation because the prosecutor made defense counsel aware of the statement as soon as he became aware of it himself). *Brown v. State,* 545 So.2d 106, 114–15 (Ala. Crim.App.1988) (wherein this Court found no error in a prosecutor notifying defense counsel of a change in testimony concerning the appellant's statement to an investigating officer where the prosecutor informed defense counsel the morning after he learned of the changes in the officer's testimony). See also *R.D. v. State,* 706 So.2d 770, 784–85 (Ala.Crim.App.1997) (wherein the appellant's argument that the State had constructive possession of the undisclosed tapes because the special prosecutor had represented the ex-wife in a civil case and, the appellant alleged, must have known of the existence of the tape, was without merit).

[9] In the present case, the prosecutor would not be held accountable for the knowledge of the information of the telephone conversation made by the appellant to Roshell, however, because Roshell was not an agent of the State and the statement was initiated by the appellant.

[10] The evidence indicates that the telephone call by the appellant was unsolicited by Roshell and thus spontaneous. See *Robinson v. State,* supra, at 930 (because a statement was voluntary and initiated by the defendant in a setting that did not involve interrogation, it was properly admitted, even though it was made to a police officer). In *Cure v. State,* 600 So.2d 415 (Ala.Crim.App.1992), cert. denied, 600 So.2d 421 (Ala.1992), an officer listened in on a telephone conversation between the defendant, who was an inmate at the time, and a third party, who had requested the officer to monitor the conversation. This Court held that the defendant-inmate was not in custody within the meaning of *Miranda v. Arizona,* 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), stating:

> " 'In recognizing "that a prison inmate is not automatically always in 'custody' within the meaning of *Miranda,*" *United States v. Conley,* 779 F.2d 970, 973 (4th Cir.1985), *cert. denied,* 479 U.S. 830, 107 S.Ct. 114, 93 L.Ed.2d 61 (1986), we hold that "custody" or "restriction" in the context of prison "necessarily implies a change in the surroundings of the prisoner which results in an added imposition on his freedom of movement," *id.* (quoting *Cervantes v. Walker,* 589 F.2d [424, 428 (9th Cir.1978))]. "Thus, whether an inmate is 'in custody' under *Miranda* depends on the circumstances of the case." *United States v. Cooper,* 800 F.2d 412, 414 (4th Cir.1986).' *Arthur v. State,* 575 So.2d 1165, 1188 (Ala.Crim. App.1990), *cert. denied,* 575 So.2d 1191 (Ala.1991)."

Cure v. State, 600 So.2d at 419. Thus, this Court determined that this statement was properly admissible due to the noncustodial circumstances in which it was made, "[w]ithout deciding whether the [defendant's] friend was an agent acting on behalf of law enforcement officers or was a private citizen." *Id.*

Moreover, Roshell was not acting as an agent of the police, as it is clear that she was not instructed to engage in this conversation in order to elicit incriminating statements from the appellant. In *Gilchrist v. State,* 585 So.2d 165, 174–78, this Court looked to the United States Supreme Court's decision in *Arizona v. Mauro,* 481 U.S. 520, 107 S.Ct. 1931, 95 L.Ed.2d 458 (1987) (wherein an imprisoned accused's wife was allowed to meet with him in the presence of an officer who tape-recorded their conversation), in determining that a third-party girlfriend who met with the defendant in jail was not acting as an agent of the police because she was not instructed by the police to question the defendant or get information from him; nor was her meeting a "psychological ploy" that would equate to an interrogation; nor was the defendant coerced by her due to moral and psychological pressures inherent in their relationship. In the present case, Roshell was also not an agent for the above-stated three reasons. *Gilchrist v. State,* 585 So.2d at 175, citing *State v. Bruneau,* 131 N.H. 104, 552 A.2d 585, 588 (1988) (Souter, J.) (holding that a finding that a third party was acting as an agent of the police "require[s] proof of some affirmative action by a police officer or other governmental official that preceded the interrogation and can reasonably be seen to have induced the third party to conduct the interrogation that took place"). See also *United States v. Taylor,* 800 F.2d 1012, 1016 (10th Cir.1986), cert. denied, 484 U.S. 838, 108 S.Ct. 123, 98 L.Ed.2d 81 (1987) ("No agreement was made between [the informant] and the Government and no benefits accrued to [the informant] for his cooperation."). Similarly, the evidence established that Roshell did not receive any compensation for her information concerning the appellant's telephone conversation.

Therefore, because the appellant's telephone conversation with Roshell was not admitted in violation of the trial court's discovery order or in violation of constitutional or state law, there was no error on this ground.

IV.

The appellant argues that his rights to due process, a fair trial, and a reliable sentencing determination were violated by the trial court's reference to inadmissible evidence to which his jury had also already been exposed. The record indicates that the State introduced into evidence an audiotaped conversation between the appellant and Latonya Roshell. There were apparently several reels of this tape. The jurors each received a transcript of the conversation contained on the tape. Approximately 16 minutes into the tape, the trial court had the tape stopped and requested to speak to the attorneys outside the presence of the jury. The trial court then spoke to defense counsel, acknowledging that although defense counsel's trial tactics were a matter for his own consideration, the trial court pointed out that certain parts of the conversation alluded to collateral bad acts by the appellant; specifically, the fact that he had sold drugs, the fact that he had apparently previously been arrested, and some conversation indicating that the appellant could be given money and run away. Defense counsel stated that he planned to object to the statements concerning the selling of drugs and prior arrests when that portion of the tape approached; that portion of the con-

versation was apparently on the next reel, and defense counsel stated that he planned to object when the reels were being changed. The trial court then began to direct that the statements be removed from the transcripts by having them covered with blank paper. Defense counsel acquiesced in this plan, and thanked the judge. The prosecutor was to stop and start the tape appropriately, so that the objectionable portions would be omitted from the jury's hearing, and defense counsel would stand with the prosecutor during this process. There was no objection by defense counsel as to this arrangement. Defense counsel also asked that the conversation concerning the possibility of money being given to the appellant so that he could escape remain in the transcript and tape, arguing that this conversation indicated that the State's witnesses would commit a robbery to help the appellant. Defense counsel acknowledged that this would be his argument to the jury. Thereafter, when the jury was again present and the tape was played for them, the trial court informed them, during the playing of the tape, there would be times during which the prosecutor would retire with the tape recorder and fast forward it past certain material. The trial court explained, "sometimes there are materials that don't really pertain to the litigation, of necessity, that gets involved in a printed document, so we have take a few minutes just to make sure everything that comes to your attention is pertinent."

[11] The appellant argues that the trial court's reference to pertinent parts of the transcript being omitted, improperly referenced and drew the jury's attention to the redacted portion of the transcript concerning the collateral bad acts. Because the appellant did not object to these instructions by the trial court, the plain-error rule applies to this claim. Rule 45A Ala. R.App. P.

In *Taylor v. State,* 808 So.2d 1148 (Ala. Crim.App.2000), the appellant had argued that the trial court had improperly allowed the jury to hear a portion of his audiotaped statement that referred to uncharged misconduct and that had been redacted at the defense's request, because he argued that the gap, as well as the trial court's instructions concerning the gap, prompted the jury to draw adverse inferences. Using the plain-error standard, this Court determined that, in light of the trial court's statement to the jury that the skipped portions were irrelevant and should be disregarded,

> "there is no likelihood that, given the court's instructions, the jury could have reached an adverse conclusion or guessed what the missing portion contained based on the gap in the tape. 'Because the trial court's statements, when viewed under the facts of this case, were not such as to influence the result of the case, they did not constitute plain error.' "

Taylor v. State, 808 So.2d at 1181 , quoting *Maples v. State,* 758 So.2d 1 (Ala.Crim. App.1999).

Similarly, in the present case, the omitted portions would not have suggested to the jury the prior bad acts of the appellant, based on a review of the entire conversation. Moreover, the trial court's instructions to the jury properly informed them that the omitted portions were not pertinent and dealt with matters unrelated to the present case. There was no plain-error pursuant to this ground.

V.

The appellant argues that the trial court improperly considered the appellant's court-ordered pretrial psychiatric examination in sentencing him to death. The ap-

pellant raises three claims of error as to this ground: that the psychiatrist's findings were considered by the trial court although the psychiatrist never testified at trial, so that he was never available for cross-examination; that the appellant was never *Mirandized* before the court-ordered evaluations; and that the trial court improperly considered the findings as to his competence to stand trial, a matter that he argues has no pertinence to sentencing. During the trial and sentencing, the appellant failed to object to this matter; therefore, this claim must be analyzed pursuant to Rule 45A, Ala. R.App. P.

[12] Although the appellant argues that he was never confronted with the evidence by the psychiatrist and that this evidence was never admitted at trial, the record indicates the trial court had orally communicated the findings to defense counsel prior to trial, and that the written findings from the psychiatrist were also given to defense counsel prior to trial. Thus, the appellant had an opportunity to review the findings before trial and to call the psychiatrist as a witness, or otherwise to rebut his findings. Furthermore, defense counsel had the appellant evaluated by his own expert, who was called to testify for the appellant at sentencing. Thus, the appellant was not prejudiced on this ground, and there was no plain error. Cf. *Jackson v. State,* 791 So.2d 979 (Ala.Crim.App.2000) (wherein this Court held that, although the trial court improperly considered extrajudicial factors from the trial of the codefendants during the sentencing phase of the appellant's capital trial, the error was harmless as the trial court's sentencing order was not so egregious to require a new sentencing order based on the evidence contained in the record, quoting *Sockwell v. State,* 675 So.2d 4 (Ala.Crim.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); *Fortenberry v. State,* 545 So.2d 129, 144 (Ala.Crim.App. 1988), aff'd, 545 So.2d 145 (Ala.1989)).

[13] The appellant's argument that the findings were improperly considered because he was not *Mirandized* before the psychiatric evaluation was conducted is also without merit. The record indicates that the psychiatric evaluation to which the appellant refers, that conducted by Dr. Rosencrans, was never in evidence because he never testified before the jury nor were any of his findings ever presented to the jury. However, a defense-paid psychologist, Dr. Blotcky, did testify on the appellant's behalf during the sentencing hearing before the jury. In his sentencing order, other than a portion where the trial court recites that the psychiatrist did make a psychiatric evaluation and find the appellant competent, the trial court referenced Dr. Rosencrans's findings in considering the mitigating factor whether the appellant was under extreme mental or psychological distress and in considering whether nonstatutory mitigating circumstances existed. The order finds that the statutory mitigating circumstance concerning extreme emotional or psychological distress did not exist and refers to the reports of both Dr. Rosencrans and Dr. Blotcky as support for this conclusion. The trial court also found the existence of several nonstatutory mitigating circumstances based on Dr. Rosencrans's report, including factual biographical information imparted by the appellant. Thus, the factual information derived from the appellant and contained in the psychiatrist's report benefited the appellant by constituting nonstatutory mitigating circumstances to be considered in sentencing the appellant. The trial court's statement concerning his findings as to the nonexistence of the statutory mitigating circumstance that the appellant

was under the influence of extreme emotional disturbance was as follows:

> "No evidence adduced at trial, nor at the second stage in front of the jury, nor by way of evidence adduced at third stage, nor the reports of either psychologist, Dr. Rosencrans or Dr. Blotcky, suggest that the defendant acted under the influence of a mental or emotional disturbance, much less extreme mental or emotional disturbance."

Despite the appellant's reliance on *Estelle v. Smith*, 451 U.S. 454, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981), there was no error on this ground because this situation is distinguishable from that in *Estelle*. *Ex parte Hart*, 612 So.2d 536, 540–41 (Ala. 1992). As in *Ex parte Hart*, it is important that the psychological report was never seen by the jury and yet the jury recommended a sentence of death. *Id.* at 540. Additionally, the appellant has failed to show that the information in the psychologist's report was "materially false," *id.* at 541, in that the psychologist retained by the defense also came to the conclusion that the appellant was not under the influence of extreme mental or emotional distress.

Furthermore, although the appellant argues that the trial court improperly considered the psychiatrist's finding concerning his competence to stand trial, a review of the record clearly indicates that the information concerning this finding was simply a statement that the psychiatrist found appellant competent to stand trial which was included in the statement of facts portion of the sentencing order. There is no indication that this fact was considered by the trial court in sentencing, rather a review of the record indicates otherwise. Thus, there was no plain error on this ground.

VI.

The appellant argues that the testimony of the victim's brother at the sentencing hearing, in which he encouraged the trial court to sentence the appellant to death, violated *Booth v. Maryland*, 482 U.S. 496, 107 S.Ct. 2529, 96 L.Ed.2d 440 (1987), and *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991). The record indicates that during the sentencing phase of this capital trial before the trial court, the State announced its intention to present to the Court the testimony of the victim's brother as to how the victim's death "has affected the family in general." Defense counsel objected, stating:

> "I know there is [sic] cases that would indicate that they could do it, but [I] don't feel like that is appropriate at this time. And we can understand and appreciate the fact it has been a terrible thing for the family, for any family."

The trial court responded that the witness would be allowed to testify. During his testimony, the following transpired:

> "[The victim's brother]: Just like on the night that my sister was killed, she begged for mercy and didn't get any mercy. Today, I am begging you to sentence Willie B. Smith to the fullest extent of law, which is electrocution by death.
>
> "[Defense counsel]: Your Honor, I object to that, I think that's inappropriate, how it affects his family, giving his opinion what the sentence should be. We understand—I think that's inappropriate and ask you to not consider.
>
> "[The Court]: All right, sir. Go ahead and make your statement, please, sir, if you have anything else to say.
>
> "[The witness]: That's basically all I have left to say.
>
> "[The Court]: Thank you very much."

Thereafter, defense counsel cross-examined the witness as to how he believed, as a Christian, that electrocuting the appellant would be merciful or would remove the offense from the family's minds.

In the sentencing order filed by the trial court, the initial section sets out the statement of the case, makes a brief factual recitation of the three stages of this murder trial, and states, concerning the third stage—the sentencing stage before the trial court—as follows:

> "Third stage sentencing was conducted July 17, 1992, the pre-sentence report and [a juror]'s letter wherein [juror] states his misgivings in having voted for death were made a part of the record.
>
> "Brother to the deceased testified for State; sister and mother of the defendant testified as did Ms. Lucia Penland, Executive Director of the Alabama Prison Project. Defendant did not testify or choose to speak before pronouncement of sentence."

Thereafter, after the lengthy sentencing order, the trial court thoroughly explained his considerations in arriving at a sentence of death.

[14] The trial court could have properly considered the impact of the crime on the victim's family members; however, it would have been improper for him to consider the portion of the victim-impact evidence concerning the recommendation of an appropriate punishment. Despite such testimony in the present case, there was no reversible error because the trial court acknowledged that any consideration by it of this objectionable testimony would have been inappropriate, as evidenced by the trial court's sustaining of defense counsel's objection by stating, "All right," in response to that objection. There was no inclusion in the sentencing order of any consideration of this testimony; all that was included was a mere factual assertion that the victim's brother testified during the third phase of the trial.

In *Taylor v. State,* 808 So.2d 1148 (Ala. Crim.App.2000), Taylor argued that the trial court had improperly considered sentencing recommendations made by family members and friends of the victims offered during sentencing and as part of the presentencing report. Specifically, Taylor argued that the trial court should not have considered the victim-impact testimony of two family members given during the sentencing phase before the trial court, wherein they both asked the trial judge to impose the death penalty. A packet of letters from other family members was also introduced into evidence by the prosecutor, most of which recommended that the judge impose the death penalty. This Court found no plain error by the trial court as to this matter, and stated:

> "Statements regarding the impact of the crime on the victim's family members are properly before a trial court at sentencing. *Payne v. Tennessee,* 501 U.S. 808[, 111 S.Ct. 2597, 115 L.Ed.2d 720] (1991). Therefore, the trial judge properly considered the victim-impact evidence before him at sentencing regarding the impact Taylor's acts had on the family members of the victims. However, the trial court could not consider that part of the victim-impact evidence regarding the characterization of the crime, the defendant, or the recommendations of an appropriate punishment. *Ex parte Rieber,* 663 So.2d 999 (Ala.1995), cert. denied, 516 U.S. 995[, 116 S.Ct. 531, 133 L.Ed.2d 437] (1995).
>
> "The trial court, after accepting the letters from family members and ascertaining that there were no objections to the documents, stated, 'Now, this is not evidence. Make it clear it is simply a bench hearing exhibit offered by the State.' (R. 1618.) Then, before retiring

to deliberate on the sentence, the trial judge commented, 'I know that everybody wants this hearing to come to a conclusion. At the same time, I am going to follow the law to the letter and in the spirit.' (R. 1632.) Just before pronouncing sentence, the trial judge stated, 'The court has considered all materials appropriate for consideration . . . .' (R. 1634.) Trial judges are presumed to know the law and to follow it in making their decisions. *Ex parte Harrell,* 470 So.2d 1309, 1318 (Ala.1985); *Sockwell v. State,* 675 So.2d 4, 36 (Ala.Cr.App.1993), aff'd, 675 So.2d 38 (Ala.), cert. denied, 519 U.S. 838[, 117 S.Ct. 115, 136 L.Ed.2d 67] (1996). Our review of the record and the trial court's sentencing order leads us to conclude that there was no plain error. We find absolutely no evidence that the family members' sentence recommendations were considered by the trial court at sentencing. *Burgess v. State,* 723 So.2d 742, 765 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360[, 143 L.Ed.2d 521] (1999)."

Taylor v. State, supra, at 1167–68. Cf. *Stallworth v. State,* [Ms. CR–98–0366, Sept. 28, 2001] —— So.2d —— (Ala.Crim.App.2001) (the cause was remanded to the trial court to indicate whether it had considered victim-impact evidence in the form of statements by one of the victim's daughters and another victim's husband stating that defendant deserved no mercy and that he should pay for his crime with his life, during the sentencing phase before the trial court, because the cause was due to be remanded on another ground and there was no evidence as to whether the trial court had considered the victim impact statements in determining sentence).

[15] Because there was evidence in the record that the trial court did not consider the sentencing recommendation by the victim's brother in arriving at the appellant's sentence, and no evidence indicating otherwise, there was no reversible error in allowing this testimony by the family member.

VII.

The appellant argues that the trial court improperly impeded his right to cross-examine a State's witness concerning his involvement in criminal activity; specifically, the appellant argues that he should have been allowed to expose the illegal drug activity of a State's witness, Michael Wilson, who had testified that the appellant had confessed to him. The appellant argues that he should have been allowed to reveal the witness's juvenile drug offense to show bias in order to impeach his testimony.

The record indicates that this State's witness, during direct examination, gave cumulative evidence indicating that the appellant had told Latonya Roshell and him of committing this offense. Roshell had already given testimony concerning this admission by the appellant. Moreover, the appellant's girlfriend, the codefendant, had also testified to the appellant's actions in committing this offense. During the cross-examination of Wilson, the following transpired:

"[Defense counsel]: You make your living selling dope, don't you?

"[Wilson]: Naw.

"[Prosecutor]: I object unless he has some basis for—

"[Defense counsel]: I do.

"[The Court]: He said 'No' did you not?

"[The witness]: Yes. I said 'No, I work.'

"[Defense counsel]: You have been to Mt. Meigs for selling dope, haven't you?

"[Prosecutor]: Your Honor, I object to this, Your Honor.

"[The Court]: Sustained.

"[Prosecutor]: It is inappropriate and he knows it is inappropriate.

"[The Court]: Sustained. Go ahead, next question."

The appellant made no offer of proof concerning any juvenile adjudication or that it would be evidence of any particular bias.

[16, 17] In *Smith v. State*, 795 So.2d 788, 815–16 (Ala.Crim.App.2000), Smith, a capital defendant, argued that the trial court improperly restricted his right to cross-examine a State's witness in order to elicit that she had been adjudicated a juvenile offender and that at the time of trial she was in the custody of a juvenile correctional authority because her probation had been revoked. In finding no error by the trial court for restricting this cross-examination, this Court stated:

"Smith made no attempt to argue that [the State's witness] had made any deal with the State that would result in her being biased. Smith made no offer of proof that the juvenile probation revocation would be proof of bias. We have held that an offer of proof is necessary before we can review a trial court's ruling on the limitation of cross-examination. See *M.T. v. State*, 677 So.2d 1223 (Ala.Cr.App.1995); *Myers v. State*, 601 So.2d 1150 (Ala.Cr.App.1992).

"Other jurisdictions have held that because of the restrictive holding of *Davis* [*v. State*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)], and the fact that juvenile records may not be used for impeachment of general credibility, an offer of proof is essential to preserve this issue for an appellate court. In *Smith v. United States*, 392 A.2d 990 (D.C.Ct.App.1978), the issue before the court was whether the lower court erred in not allowing a State's witness, who had identified the accused as the robber and had picked him out of a lineup, to be cross-examined about the fact that the witness, at the time of trial, was incarcerated in a juvenile facility. The *Smith* court stated:

"'In the case at bar, counsel for appellant did not proffer, nor does the record indicate any reason why Mr. Thames' juvenile record or place of residence would make his testimony partial or biased. Hence, the proffered cross-examination here was intended simply as a general impeachment of the witness' credibility.

"'There is an inherent difference between cross-examination intended as a general attack on the credibility of a witness and cross-examination directed toward revealing possible bias, prejudices, or ulterior motives of a witness. See *Davis v. Alaska*, [415 U.S. 308, 316, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974)]; *Springer v. United States*, [388 A.2d 846] at 855 [(D.C.1978)]; *Gillespie v. United States*, D.C.App., 368 A.2d 1136, 1137 (1977).'"

[18] Moreover, it is clear that when a witness denies a prior conviction, the impeaching party must prove the conviction and cannot do so by oral testimony. C. Gamble, *McElroy's Alabama Evidence*, § 145.01(16) (5th ed.1996). The prior conviction can be proved only by introduction of the original court record of the conviction, a certified or sworn copy of it, or certified copies of the case action summary sheets, docket sheets, or other records of the court. *Id.*

[19] Moreover, even if this limitation of cross-examination by the trial court could have been construed as error, the ruling was harmless. The record indicates that before the testimony of Michael Wilson, during the direct examination of Latonya Roshell, when she was asked how she was

working as an informer for the Hoover Police Department, she responded that she was working by following Michael Wilson concerning narcotics because "Michael Wilson was selling narcotics." The prosecutor then asked Roshell if Michael Wilson was "supposed to be selling narcotics," and she responded, "He was selling drugs." Therefore, this evidence was already before the jury. Moreover, the evidence presented by Wilson was cumulative of evidence already presented to the jury. Rule 45, Ala. R.App. P.

VIII.

The appellant argues that the State failed to establish the proper chain of custody when admitting into evidence certain items—specifically, a wristwatch and a ring. The appellant argues that the wristwatch was improperly authenticated because, he says, it was never identified as having belonged to the victim and because the watch was taken from the appellant's brother rather than from the appellant. Moreover, the appellant argues that the investigating officer who was testifying during the admission of the wristwatch could not identify the evidence, and therefore it should not have been presented into evidence. As to the ring, the appellant argues that the chain of custody was broken as to this item of evidence because the seal on the envelope in which the ring was contained had been broken, and an officer admitted that she did not know how the ring was maintained once it was stored in the property room.

[20] As to the appellant's arguments concerning the wristwatch, the appellant's mother had previously testified at trial that she could identify the wristwatch as the one the appellant's brother had had when they were instructed to turn the wristwatch over to the police. When asked who had been wearing the watch, she testified that both the appellant and his brother had worn the watch. Moreover, the officer who was testifying when the watch was admitted into evidence initially stated that he did not recall the watch; however, he subsequently indicated that he was present when the watch was accepted from the appellant's brother and was received by the Birmingham Police Department. The appellant made no objection to the admission into evidence of the wristwatch; therefore, the analysis of this claimed error is made pursuant to Rule 45A, Ala. Rules. App. P. There was no plain error in the admission into evidence of the wristwatch, because it was properly identified and authenticated in the record.

[21] As to the ring, an officer testified that she had found the gold ring in the trunk of the victim's car. She stated that it remained in her possession until she turned it over to the property room of the Birmingham Police Department and that it had been maintained in the property room until it was brought to court. She further testified that it was in substantially the same condition as when she took possession of the ring. Although defense counsel elicited testimony from this witness on cross-examination that she did not remain in the property room to guard over the evidence, so that she could not testify that it was not tampered with in the property room, she testified that, although the seal had been broken on the envelope, her initials remained on the envelope in which the ring was kept and were the only initials on the envelope; moreover, she testified that the ring was in the same condition as when she had taken possession of it. The court stated for the record that the seals on this evidence were broken by the Court and by the attorneys at the beginning of trial. Defense counsel ac-

knowledged that the evidence was initially presented still in a sealed condition.

> "This Court has established that the State 'need only prove to a reasonable probability that the object is in the same condition as, and not substantially different from, its condition at the commencement of the chain.' *Sommer v. State,* 489 So.2d 643, 645 (Ala.Cr.App.1986). Moreover, the 'evidence need not negate the most remote possibility of substitution, alteration, or tampering of the evidence.' *Slaughter v. State,* 411 So.2d 819, 822 (Ala.Cr.App.1981). We conclude that the State established a proper chain of custody."

Turner v. State, 610 So.2d 1198, 1200 (Ala. Crim.App.1992). See also *Evans v. State,* 794 So.2d 415 (Ala.Crim.App.2000).

The chain of custody concerning the ring found in the victim's trunk of her vehicle was sufficient to establish the identity, authenticity, and reliability of this evidence.

IX.

The appellant argues that the trial court's instructions to the jury during the guilt and sentencing phases of his trial denied him of his rights to due process, a fair trial, and a reliable sentencing determination. Specifically, the appellant argues that the trial court failed to give adequate instructions on the necessity that accomplice testimony be corroborated, and failed to give any instruction to the jury on how to consider the testimony of the paid informant. The appellant further argues that the trial court's instructions as to reasonable doubt established a standard that is constitutionally below that required by the due-process clause. The appellant also adds the argument in his brief, by way of a footnote, that the trial court improperly refused to instruct the jury on the lesser-included offense of manslaughter.

A.

The appellant argues that the trial court's instructions on the corroboration of accomplice testimony were inadequate and improper. The appellant argues that, before closing arguments by counsel, the trial court sufficiently instructed the jury concerning the corroboration of accomplice testimony as follows:

> "As you know, Angelica Willis is a, I would guess a self-confessed accomplice in the murder component here that we are discussing today of Ms. Johnson having testified in exchange for an offer of a 20–25 year sentence on a plea of guilty of murder.
>
> "Now, the reason I mention this to you, we have a special statute relative to accomplice testimony and it would probably be good for me to go over this with you, maybe paraphrase it. It is entitled Accomplice Testimony for Felony Conviction. And it says in substance that a conviction of a felony cannot be had on the testimony of an accomplice unless corroborated by other evidence tending to connect the defendant with the commission of the offense. And such corroborating evidence, if it merely shows the commission of the offense or circumstances thereof, is not sufficient. . . ."

The appellant argues that the trial court erred by stating at the close of these initial instructions to the jury that he would again speak to them following the closing arguments in order to "sum-up" and answer any questions about the important principles; however, following the closing arguments, the trial court did not refer to accomplice corroboration again. The appellant argues that because the trial court did readdress a number of instructions, he drew emphasis away from his instruction concerning the corroboration of accomplice testimony. Moreover, the appellant argues that the trial court's action in in-

structing the jury before counsels' arguments was improper in itself pursuant to § 13A–5–46(d), Ala.Code 1975, and *Duren v. State,* 507 So.2d 111, 114–15 (Ala.Crim.App.1986). ("[a]fter hearing the evidence and the arguments of both parties . . ., the jury shall be instructed on its function and on the relevant law by the trial judge"). Thus, the appellant argues that the instructions should have been given following the arguments of counsel. It should be noted that the appellant failed to object on these grounds at trial; therefore, any claim of error must be analyzed pursuant to Rule 45A, Ala. R.App. P.

The record indicates that the instruction given by the trial court before the closing arguments of counsel was more extensive than that quoted by the appellant. The trial court continued in its instructions as follows:

> "Now, you people decided as jurors and triers of the facts, as I have told you, if sufficient corroborative evidence has been presented to you that makes more certain or confirms or strengthens the incriminating force of the lady's testimony. Corroborative evidence need not be strong nor sufficient in itself to support a conviction. The requirement is that it legitimately tend to connect Willie B. Smith with the offense.
>
> "Sufficient corroboration of the testimony of an accomplice may be furnished by tacit admission of the accused, by his suspicious conduct, by his associating with the accused . . . [,] by the defendant's proximity and opportunity to commit the crime. And, of course, by the non-accomplice witness-type testimony that tends to connect a defendant with the offense."

These instructions by the trial court were clearly sufficient to apprise the jury of the law concerning accomplice corroboration; moreover, despite the appellant's argument based on § 13A–5–46(d), Ala.Code 1975, to the contrary, the trial court's actions in instructing the jury before counsel's argument did not constitute plain error. In *Grayson v. State,* 824 So.2d 804 (Ala.Crim.App.1999), Grayson argued that plain error existed because the trial court, during the sentencing phase, instructed the jury before counsel's arguments and taking of testimony, without reinstructing the jury following the closing arguments. As in the present case, Grayson failed to object to the order of the proceedings. In finding that no error existed as to the argument, this Court stated:

> "[T]here are guidelines for the order of proceedings of a trial in Alabama; however, with the agreement of the parties, the Court may direct otherwise. Moreover, it has long been held in this State that ' "[t]he trial court is vested with discretion in the conduct of a trial and appellate courts will not interfere therewith unless it appears that there has been an abuse of discretion." *Townsell v. State,* 255 Ala. 495, 498, 52 So.2d 186, 189 (1951).' *Houston v. State,* 565 So.2d 277, 279 (Ala.Cr.App.1990). See also *Tombrello v. State,* 421 So.2d 1319, 1322 (Ala.Cr.App.1982); *Carson v. State,* 49 Ala.App. 413, 272 So.2d 619, 622 (1973).
>
> " 'It has often been stated by this court that:
>
> > " ' "The trial judge, as a natural consequence of his position and the many duties devolving upon him, is necessarily vested with much discretion in the conduct of the trial of causes, and, unless it clearly appears that there has been an abuse of this discretion, appellate courts will not interfere to control such discretion, but will presume that one occupying so important a position as that of circuit judge will accord to all litigants in his court a fair and impartial trial provid-

ed for in the Constitution of this state. . . .' *Dennison v. State,* 17 Ala. App. 674, 88 So. 211.'

"*Lockett v. State,* 50 Ala.App. 58, 62, 276 So.2d 643, 646 (1973).

"Thus, in other states where the trial procedure is established by statute, courts have held that any deviation from the statutory order of proceedings is a matter within the sound discretion of the trial judge ' "and any claim that a judge erred in following the statutorily mandated order of proceedings must sustain a heavy burden to demonstrate the unfairness and prejudice. . . ." ' *State v. Evilsizor,* [No. 94 CA 11, September 28, 1994](Ohio Cr.App.1994) (unpublished) (wherein the Court held that the defendant had not demonstrated any unfairness or prejudice resulting from the trial judge's decision to forego opening and closing statements, especially where neither party requested to make such a statement.) See *State v. Lorenzo,* [No. 52640, January 7, 1988](Ohio Cr.App. 1988) (unpublished); *Ohio v. Johnson,* [C–840346, C–840379, February 27, 1985] (Ohio Cr.App.1985) (unpublished).

" 'Courtroom procedures for the most part are dictated by statute and court rules, as well as by Constitutional requirements; but, in addition, the trial court has inherent authority, unless other-wise specifically precluded, to control the conduct of the proceedings before it, in order to insure that the proper decorum and appropriate atmosphere are established, that all parties are treated fairly, and that justice is done. See *Guaranty Dev. Co. v. Liberstein,* 83 A.2d 669, 671 (D.C.1951) ("[i]t is a well-settled rule that the mode of conducting trials . . . [is a] matter [ ] belonging very largely to the practice of the court"); 75 AM. JUR. 2D *Trial* § 180 (1991). Indeed, innovative trial procedures are acceptable as long as they "are administered carefully and meet the requirements of due process." *United States v. Lewis,* 230 U.S.App. D.C. 212, 219, 716 F.2d 16, 23, cert. denied, 464 U.S. 996, 104 S.Ct. 492, 78 L.Ed.2d 686 (1983) (sustaining trial of several criminal cases simultaneously before two juries absent evidence indicating dual jury causes specific prejudice to a defendant).'

"*Hicks–Bey v. United States,* 649 A.2d 569, 575 (D.C.App.1994)."

Grayson v. State, 824 So.2d at 840–41.

[22] In the present case, the trial court sufficiently charged the jury as to the applicable law; no plain error resulted from his procedural decisions as to when to instruct the jury.

[23, 24] Nor is there any indication in the record that this concept would have been given insufficient emphasis by not being repeated at the close of the argument. The decision whether to repeat certain instructions to the jury is a matter generally left to the trial court's discretion. See *Parsons v. State,* 251 Ala. 467, 480, 38 So.2d 209 (1948) (this Court found that "[i]t was in the discretion of the court to give more emphasis to the question of [the defendant's] consent," by repeating certain charges in response to a question by the jury and refusing submitted charges by the defendant). See also *Flowers v. State,* 402 So.2d 1118, 1119 (Ala.Crim.App.1981) (the trial court repeated certain instructions to the jury and refused to recharge the jury as to certain instructions that defense counsel requested be reread to the jury). See also *Thomas v. State,* 455 So.2d 278, 281 (Ala.Crim.App.1984) (the practice of repeating instructions to the jury pursuant to questions from the jury does not place added weight or undue emphasis on that portion of the charge). A review of

the entire charge reveals that the jury was properly instructed as to the law concerning the corroboration of accomplice testimony and its importance was not diminished to the jury because the trial court failed to repeat these instructions at the close of the parties' arguments.

B.

The appellant argues that the trial court's failure to instruct the jury concerning how to consider the testimony of Latonya Roshell as a paid informant constituted reversible error. The appellant acknowledges that the trial court gave a general instruction concerning how to evaluate certain witnesses' testimonies in light of biases they may have; however, he argues that because there was not a special cautionary instruction as to Roshell's testimony as an informant paid by the government for her involvement in the case, the trial court committed reversible error. The record indicates that the appellant failed to raise this issue at the trial court level; therefore, it must be analyzed pursuant to the plain-error rule. Rule 45A, Ala. R.App. P.

[25] The record clearly indicates that the trial court's charge completely addressed the subject of witness credibility and bias; therefore, there was no error in refusing to give the requested instructions. *Walters v. State,* 585 So.2d 206 (Ala.Crim. App.1991) (requested charge as to testimony from a witness under the promise of immunity or hope of reward in a drug prosecution was properly refused as it had been substantially covered by instructions as to the credibility of witnesses and conflicting testimony). See also *Felder v. State,* 697 So.2d 490 (Ala.Crim.App.1996) (trial court was not required to give instructions requested by defendant concerning the credibility of an informant where trial court's instructions as to witness credibility were adequate). In the present case, there is no indication that the jury was not aware of its ability to weigh the evidence and to believe or disbelieve the witnesses' testimony.

C.

[26] The appellant argues that the trial court's instructions as to reasonable doubt were improper and misleading and that they were burden-shifting and required a lesser standard by referring to the jury's "collective minds" rather than stating that each and every juror must be convinced beyond a reasonable doubt. The record indicates that, after the trial court had given its entire charge both before and after arguments of counsel at the guilt phase of trial, defense counsel objected to the trial court's charge as to reasonable doubt; specifically, defense counsel referred to the court's instruction that "if after listening to the evidence either you have an abiding conviction that he is guilty, then in fact he is guilty" as diminishing the standard for reasonable doubt. On appeal, the appellant pulls out of context two phrases the trial court used in his charge to the jury. The record indicates that the trial court charged the jury as to reasonable doubt as follows:

> "On the criminal side, though, the burden of proof is higher. The State has a more onerous burden or as expressed by that phrase that you had heard Monday so many times, the State has to prove guilt by strong and cogent evidence that convinced you people beyond a reasonable doubt or to a moral certainty of Mr. Smith's guilt here before the presumption of innocence is overcome and thus before you would be authorized to convict. So, again, the State must prove guilt by strong and cogent evidence that convinces you people beyond a reasonable doubt of guilt.

"The State does not have to prove guilt to a mathematical certainty.

"I will say this: If after a full and fair consideration of all of the evidence in the case, if there should remain in your collective minds a conviction that Willie B. Smith here is guilty of the offense or offenses charged, then you would be convinced by that full measure of proof required in the law, you would be convinced beyond a reasonable doubt or to a moral certainty and you should convict.

"On the other hand if after that same full and fair consideration of all of the evidence in the case, if there does not remain in your collective minds—the verdict has to be unanimous, as I will say again in a little bit—if there does not remain in your collective minds an abiding conviction that he is guilty, then that is another way of saying I'm not convinced by that full measure of proof that the judge is talking about and the man should be acquitted.

"A reasonable doubt may spring from the evidence that was adduced in court. A reasonable doubt may spring from a lack of sufficient and satisfying evidence. And indeed a reasonable doubt may spring from any part of the evidence.

". . . .

"The State has the burden of proof. The burden of proof does not shift to the defendant at any point in the litigation.

"We talked at great length about the quantum of proof on the criminal side, the State having to prove guilt beyond a reasonable doubt or to a moral certainty.

". . . .

"Stated a bit differently, if after considering all of the evidence in the case as measured against the applicable legal principles that we have been discussing, if your minds are left in a state of doubt or confusion of whether or not Willie Smith is guilty or if the evidence reasonably permits either of two conclusions, one of innocence and one of guilt, then, of course, you would adopt the theory of innocence and the man will be acquitted.

"Do remember that a reasonable doubt is a doubt which would entitle defendant Smith to an acquittal is not a mere fanciful doubt, vague or conjectural, but a reasonable doubt arising from the evidence and remaining after a consideration of the testimony and the litigation."

These instructions by the trial court as to reasonable doubt were not improper as diminishing the reasonable standard of proof by shifting the burden of proof from the State. The exact terminology complained of by the appellant in the above-stated charge, "collective minds" of the jury and the instruction referring to a lack of an abiding conviction of the defendant's guilt requiring a finding of not guilty, have previously been held proper in a jury instruction by the Alabama Supreme Court. *Ex parte Brooks*, 695 So.2d 184, 192 (Ala. 1997). In *Brooks*, Brooks claimed that the trial court had committed reversible error in its charge concerning reasonable doubt by giving the charge that reduced the State's burden of proof and could have caused a reasonable juror to believe that the degree of proof to convict was lower than that required by the Constitution. The complained of charge in *Brooks* was as follows:

" 'On the other hand, if after the same full and fair consideration of all of the evidence in this case, if there does not remain in your collective minds here an abiding conviction that he is guilty, then you would not be convinced by that full measure of proof required in the law and he should be acquitted.' "

Id. The Alabama Supreme Court noted that this language did not violate *Cage v.*

Louisiana, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990), and that "in *Victor v. Nebraska*, 511 U.S. 1, 114 S.Ct. 1239, 127 L.Ed.2d 583 (1994), the United States Supreme Court held that an instruction cast in terms of an abiding conviction as to guilt correctly states the prosecutor's burden of proof." 695 So.2d at 192, citing *Alexander v. State*, 601 So.2d 1130 (Ala.Crim.App. 1992).

Similarly, there is no error in the present case as to the trial court's charge on reasonable doubt.

X.

The appellant argues that the prosecutor made improper arguments to the jury during the guilt and sentencing phases of his trial. He alleges that these arguments addressed: "Impeding the jury's role in assessing the credibility of witnesses, bolstering the credibility of the state witnesses, commenting on facts that were not in evidence, making comments about the victim that were intended to inflame the jury and indirectly commenting on Mr. Smith's choice not to testify."

A.

Improper Arguments During the Guilt Phase of the Appellant's Trial

The appellant cites to three arguments by the prosecutor during his closing argument at the guilt phase that he argues were reversible error.

1.

The appellant argues that the prosecutor misled the jury concerning its role in assessing the credibility of witnesses by making the following argument:

> "And His Honor told you about lying to you about a material fact. Was it material whether or not he dealt drugs? Was it material about whether or not this Tech 9 was his? No, that's not material, it's a smoke screen to take your mind off what is material.
>
> "Ms. Sharma Ruth Johnson was not killed by an overdose of drugs. Ms. Sharma Ruth Johnson was not killed by a Tech 9. Ms. Sharma Ruth Johnson was killed by a shotgun. So, is that material whether or not that Tech 9 was his or he dealt drugs?"

The appellant did not object to this argument by the prosecutor at trial; therefore, it must be analyzed pursuant to the plain-error rule. Rule 45A, Ala. R.App. P.

[27] There was no plain error as to this argument by the prosecutor. "The credibility of witnesses is a proper subject for arguments to the jury. *Price v. State*, 725 So.2d 1003, 1029 (Ala.Crim.App.1997), aff'd, 725 So.2d 1063 (Ala.1998)." *Smith v. State*, [Ms. CR–97–1258, Dec. 22, 2000] —— So.2d ——, —— (Ala.Crim.App.2000).

> "In *Price v. State*, 725 So.2d 1003 (Ala. Cr.App.1997), aff'd, 725 So.2d 1063 (Ala. 1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999), we held as follows:
>
> > " 'There was no impropriety by the prosecutor in making these comments because they were grounded in the evidence and were proper inferences from the evidence; moreover, the credibility of witnesses is proper subject matter for arguments to the jury. In *Cross v. State*, 536 So.2d 155 (Ala. Cr.App.1988), the district attorney, in closing argument to the jury, stated that the defendant's son had lied and that a deputy sheriff had told the truth, further commenting that the deputy sheriff had no reason to lie. This Court noted that the testimonies of defense witnesses and the deputy sheriff, who was the State's witness, were in conflict and were properly

opened to comment during closing argument. This Court stated:

"'"[T]he testimony was in evidence and the prosecutor could comment on this, since her comments were supported by the evidence. Moreover, the credibility of a witness is a legitimate subject of comment during closing arguments. In *Milton v. State,* 417 So.2d 620 (Ala.Cr.App.1982), the prosecution called the appellant's witness a 'blatant liar'; we held that the prosecutor's argument or comment was within the scope and limit of argument, because the argument went to the credibility of the witness. 417 So.2d at 623. In *Clark v. State,* 462 So.2d 743, 747 (Ala.Cr.App.1984), we held that when a party places a witness on the stand, he vouches for his credibility, but does not personally vouch for the witness. In the case at bar, the prosecutor was arguing to the jury as to the effect of the witness's testimony, but was not personally vouching for [the witness's] credibility.

"'"Therefore, the trial court did not err in allowing the prosecution to attack the credibility of the appellant's witness, nor did the prosecutor personally vouch for the credibility of the State's witness."

"'536 So.2d at 159–60. See also *Ex parte Rieber,* 663 So.2d 999 (Ala.1995), cert. denied, 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995).'"

Wilson v. State, 777 So.2d 856, 902 (Ala. Crim.App.2000), aff'd, 777 So.2d 935 (Ala. 2000), cert. denied, 531 U.S. 1097, 121 S.Ct. 826, 148 L.Ed.2d 709 (2001).

[28] Thus, there was no error in allowing the prosecutor to argue that certain evidence introduced by the appellant was an immaterial smoke screen, as the prosecutors are allowed to make any inferences and deductions from the evidence, nor was it improper as an attempt to mislead the jury concerning its role in assessing the credibility of witnesses.

The appellant further argues that the prosecutor attempted to improperly bolster witness testimony by allegedly giving latent assurances that he had been truthful in other parts of his testimony; specifically, when the prosecutor argued as follows:

"What was material is what the defendant told Michael Wilson sometime thereafter or early month of November, 'I did some madness and I have to get off this side of town.' That was what was material. . . ."

The appellant argues, concerning this remark, that it left "little way for the jury to discern whether Mr. Wilson's entire testimony should be disregarded." The appellant argues that this comment led the jury to believe that while the witness may have been untruthful during parts of his testimony, "the jury could be assured that Mr. Wilson testified truthfully about Mr. Smith's involvement in the crime."

[29] This comment by the prosecutor was not improper. In *Wilson v. State,* 777 So.2d 856, 902 (Ala.Crim.App.1999), Wilson argued that the prosecutor had improperly vouched for the credibility of his witnesses during his closing argument. This Court found no error in counsel's arguments, noting that the comments were grounded in the evidence and were proper inferences to be drawn from the evidence; moreover, the prosecutor was not making a personal guarantee as to the credibility of the State's witness. See also *Harris v. State,* 632 So.2d 503 (Ala.Crim.App.1992) (this Court found no plain error in the comment by the prosecutor during his closing argument at the guilt phase that a State's witness had no reason to lie and that another State's witness had nothing to gain, as these comments were proper inferences from the evidence). In the present case,

the prosecutor was also making proper inferences from the evidence in his statement concerning Michael Wilson's testimony.

2.

The appellant also argues that the prosecutor commented on facts which were not in evidence by making the following statement during his closing argument at the guilt phase:

> "Steve Corvin testified that he was the officer in charge of the case. Testified, got numerous reports associated with people who thought they could identify the person, numerous reports from Crimestoppers."

The appellant argues that this comment was improper because the officer never testified that he had received reports from Crimestoppers. The appellant argues that the only mention of Crimestoppers in the trial related to Roshell's receipt of $500 from Crimestoppers in exchange for her assistance in apprehending the appellant. The record indicates that the appellant failed to object on this ground at trial; therefore, this alleged error must be analyzed pursuant to the plain-error rule. Rule 45A, Ala. R.App. P.

[30] The record indicates that after he had finished testifying, Officer Steve Corvin was recalled as a witness by the State so that the chain of custody could be finalized as to a certain item of evidence in order to properly admit it. The witness was then cross-examined concerning this item of evidence, the jacket, as to where the officer had gotten his information and whether other people had informed him that they had a jacket similar to the one to be admitted. During this cross-examination, defense counsel asked for a "ballpark figure" as to "how many tips you all received." When Officer Corvin responded that he did not have a ballpark figure, defense counsel questioned him as to whether they had received more than 20 tips. The witness responded, "Yes, sir, probably so." Defense counsel then stated, "And probably way on up over that?" The witness responded, "Yes, sir." Thus, the prosecutor had properly argued that State's witness Steve Corvin had testified that the police had received a number of reports and tips concerning this offense. Although he did not testify that the tips came specifically from Crimestoppers, any error in citing that source would clearly be harmless. Rule 45, Ala. R.App. P.

B.

Improper Comments at the Sentencing Phase of the Trial

The appellant cites to two arguments by the prosecutor made during the sentencing phase of the trial, which he alleges were highly improper and inflammatory; specifically, the appellant argues that the prosecutor made improper arguments concerning the impact of the crime on the victim's family and indirectly commented on the appellant's choice not to testify.

1.

The appellant argues that the prosecutor improperly presented evidence concerning the impact of the victim's murder on the victim's family. Thereafter, during closing argument at the sentencing phase, the prosecutor argued as follows:

> "Ladies and Gentlemen of the jury, there are people that love Sharma Ruth Johnson also because she was somebody's daughter, because she was somebody's sister, because she was somebody's friend. . . ."

The appellant argues that these comments created a prejudicial atmosphere that rendered the jury's death sentence unreliable. However, the appellant failed to object to this matter at trial; therefore, any alleged

error must be analyzed pursuant to the plain-error rule. Rule 45A, Ala. R.App. P.

[31, 32] These comments by the prosecutor did not focus on the effect on the family; rather, they refer to "'matters already obvious to any juror.'" *Kuenzel v. State*, 577 So.2d 474, 507 (Ala.Crim.App. 1990). "Furthermore, victim impact argument is not prohibited at the penalty phase of the trial. *Hutcherson v. State*, 727 So.2d 846 (Ala.Cr.App.1997), aff'd, 727 So.2d 861 (Ala.1998); *Ex parte Slaton*, 680 So.2d 909 (Ala.1996), cert. denied, 519 U.S. [1079], 117 S.Ct. 742, 136 L.Ed.2d 680 (1997)." *Frazier v. State*, 758 So.2d 577, 604 (Ala.Crim.App.1999). The prosecutor could properly comment on the victim's lost roles as a family member and a friend during closing arguments at the sentencing phase of the trial.

2.

The appellant argues that the prosecutor made indirect comments on his choice not to testify through the following two comments made by the prosecutor at his closing argument during the penalty phase of trial:

> "I see no remorsefulness. I see no remorsefulness now, probably no remorsefulness then, and probably never will be any remorsefulness."
>
> "And he sits here and does not shed one tear, not even one tear for his mother sitting on this stand begging for his life. All he can do is close his eyes...."

In *Ex parte Loggins*, 771 So.2d 1093, 1099 (Ala.2000), Loggins argued that the prosecutor had made improper comments during his closing argument in the penalty phase of the trial by stating: "'And throughout every word you've heard from this witness stand in this courtroom this entire week has there been an iota of remorse? None. Absolutely none.'" Loggins argued that this argument by the prosecutor constituted a direct comment on his failure to testify. The Alabama Supreme Court found no merit to this argument stating:

> "Not every comment that refers or alludes to a nontestifying defendant is an impermissible comment on his failure to testify; the prosecutor has a right to comment on reasonable inferences from the evidence:
>
> "'"During closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference. *Rutledge v. State*, 523 So.2d 1087 (Ala. Crim.App.1987), rev'd on other grounds, 523 So.2d 1118 (Ala.1988). Wide discretion is allowed the trial court in regulating the arguments of counsel. *Racine v. State*, 290 Ala. 225, 275 So.2d 655 (1973). In evaluating allegedly prejudicial remarks by the prosecutor in closing argument, no fixed standard can be applied, and each case must be judged on its own merits. *Hooks v. State*, 534 So.2d 329 (Ala.Crim.App.1987), aff'd, 534 So.2d 371 (Ala.1988)."
>
> "'....
>
> "... Moreover, remorse is also a proper subject of closing arguments. *Dobyne v. State*, 672 So.2d 1319, 1348–49 (Ala.Cr.App.), on return to remand, 672 So.2d 1353 (Ala.Cr.App.1994), aff'd, 672 So.2d 1354 (Ala.1995), cert. denied, 517 U.S. 1169, 116 S.Ct. 1571, 134 L.Ed.2d 670 (1996).
>
> "'....
>
> "... *Harris v. State*, 632 So.2d 503, 536 (Ala.Crim.App.1992), aff'd, 632 So.2d 543 (Ala.1993), aff'd, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) (wherein this Court held that a reference, during the sentencing stage

of the trial, to the defendant's lack of remorse was not improper argument, where testimony introduced at trial had indicated that the defendant's reaction to being informed of her husband's death was so unemotional that she was questioned concerning her reaction); *Dobyne,* supra, 672 So.2d at 1348–49 (wherein this Court held that a prosecutor's comment regarding the defendant's lack of remorse, made during the penalty phase of the trial, was a comment 'on the [defendant's] demeanor when he made his statement to police')."

Ex parte Loggins, 771 So.2d at 1101–02.

[33] Examining this comment made by the prosecutor in the context of his entire argument, it is clear that he was referring to the appellant's demeanor and was drawing inferences and conclusions from the evidence. Testimony was presented that the appellant bragged that he had shot the victim. This comment could not reasonably be interpreted to be an indirect comment on the appellant's failure to testify; therefore, there was no error on this ground.

XI.

The appellant argues that the trial court improperly restricted his ability to cross-examine the codefendant, Angelica Willis, about her plea agreement. The record indicates that the following occurred during the cross-examination of Angelica Willis:

"Q. And you have talked to your defense lawyer, didn't you?

"A. Yes, I have.

"Q. Who negotiated an excellent deal for you—

"[Prosecutor]: I am going to object—

"Q. —and doing a good job, isn't that right?

"The Court: Sustained."

A review of the record indicates that at the commencement of Angelica Willis's direct examination, testimony was elicited by the prosecutor that she was originally charged with capital murder and entered into an agreement with the State to testify against the appellant, and in return she agreed to plead guilty to murder and receive a 25–year sentence. The record further reveals that, following defense counsel's attempted questioning of this witness concerning her plea agreement, defense counsel again elicited testimony concerning the witness's plea agreement as follows:

"Q. So you are pleading guilty to murder when in fact you were forced to participate in it, is that right?

"A. It was in my best interest.

"Q. It was in your best interest. Oh, so you deny any guilt, then?

"A. I feel guilty about what happened.

"Q. But you deny—are you going to tell the judge I'm guilty when he has to take your plea?

"A. I feel guilty about what happened.

"Q. I understand that, ma'am. But, are you going to tell the judge I'm guilty when he takes your plea?

"A. I pleaded not guilty.

"Q. You pleaded not guilty?

"A. That's correct.

"Q. And you have pleaded not guilty all the way up to a couple of days ago when you decided that they are trying Willie Smith and I may be next and the government is offering you a deal, isn't that right?

"A. I took the offer that was given to me because it was in my best interest.

"Q. That's right, that's exactly right."

Defense counsel then repeatedly stated that the witness acted in her best interest by entering the plea and by "tell[ing] a

pack of lies on the person who brought me in and fed me and took care of my baby."

[34–36] Thus, a review of the entire record as to the questioning of Angelica Willis demonstrates that she was thoroughly examined concerning her plea agreement and her resulting bias.

> "[I]t is well settled that 'a defendant has a right to cross-examine *an accomplice* as to the nature of any agreement he has with the government or any expectation or hope that he may have that he will be treated leniently in exchange for his cooperation. *Davis v. Alaska,* 415 U.S. 308, 315–16, 94 S.Ct. 1105, 1109–10, 39 L.Ed.2d 347 (1974).' *United States v. Barrett,* 766 F.2d 609, 614 (1st Cir.) (emphasis added [in *Starks*]), cert. denied, 474 U.S. 923, 106 S.Ct. 258, 88 L.Ed.2d 264 (1985). If the accomplice has entered into a plea bargain agreement with the State, 'the *full terms of this agreement* must be allowed to be placed before the jury.' *Dawkins v. State,* 494 So.2d 940, 943 (Ala.Cr.App. 1986) (emphasis added [in *Starks*]). The accomplice's agreement with the State has bearing on his credibility and bias. *Id.* Additionally, the terms of the agreement provide the jury with an 'understand[ing] of the possible motivations of the accomplice as he sits on the stand.' *State v. Donelson,* 302 N.W.2d 125, 131 (Iowa 1981), quoted with approval in *Dawkins v. State,* 494 So.2d at 943. Moreover, where, as in this case, the accomplice is a key witness, the trial court has little, if any, discretion to curtail an accused's attempts to show bias or motive on the part of the witness. See *Jones v. State,* 531 So.2d 1251, 1254 (Ala.Cr.App.1988); *Proctor v. State,* 331 So.2d 828, 830 (Ala.Cr.App.1976)."

Starks v. State, 594 So.2d 187, 197 (Ala.Cr. App.1991).

[37] However, in the present case, the terms of Willis's plea agreement were before the jury. Defense counsel was allowed to cross-examine the witness extensively about the agreement and made the jury "fully aware of the possible influences that the plea agreement could have had on [Willis's] testimony. The jury was free to reject [Willis's] testimony. It chose not to do so." *Wilson v. State,* 690 So.2d 449, 462 (Ala.Crim.App.1995). See also *Allen v. State,* 611 So.2d 1152 (Ala.Crim.App.1992).

XII.

The appellant argues that his post-arrest statement to police informant, Latonya Roshell, was obtained in violation of his Sixth Amendment right to counsel and Alabama law. Specifically, the appellant refers to the telephone conversation he had from jail with Latonya Roshell, who was a paid informant, in which he made certain incriminating statements that Roshell reported to the police. The appellant argues that because his right to counsel had attached, the statements were obtained and admitted into evidence in violation of his constitutional rights.

However, the record indicates that evidence concerning this telephone call revealed that the appellant telephoned Roshell from the jail on Thanksgiving Day. Roshell testified that it was a three-way call so that his mother was also on the telephone, as well as his sister and his cousin. She testified that the appellant talked about many things and stated that "it was only three people that could have fucked him up" and he indicated that it was either Roshell, Jermaine Norman, or Michael Wilson. He then stated he had "a feeling" that Roshell had done it. Roshell testified that he then stated that "he knew he did it and I knew he did it but he wasn't going to go to court and tell the judge that he did it." Roshell testified that she then

telephoned the police to report the telephone call and subsequently, after the preliminary hearing in this case, she received $500 from Crimestoppers. She testified that when she called the police she did not know that there was a reward. She testified on cross-examination that she had been working with the Hoover Police Department giving them information for a few months at the time of the telephone call. She further testified that she had not heard anything about this case. She was subsequently recalled as a witness and on direct examination testified that, after she received the telephone call, she telephoned Steve Corvin with the Birmingham Police Department and reported the conversation on the Monday following Thanksgiving.

[38] In *Bates v. State,* 549 So.2d 601, 604–08 (Ala.Crim.App.1989), Bates argued that a statement he made to the victim's wife should have been suppressed because he alleged that she had been acting as an agent of the police and, although the appellant was in jail, he was given no *Miranda* warnings, and that his statement was involuntary. The victim's wife had received several telephone calls from the appellant while he was in jail. She informed the sheriff's department of the telephone calls and an investigator responded by asking if she would continue talking to the appellant so that he would, hopefully, admit to the shooting. The victim's wife was then "tapped" by police officials and the appellant began writing to her. When the victim's wife asked the investigator what she should do concerning the letters, he stated that " 'it would be nice if he [the appellant] would write admitting that he had done the shooting.' " After Bates was released on bond he began visiting her house and, eventually, during one visit told her that he had shot the victim and that he had enjoyed doing it. The victim's wife then reported this conversation to the district attorney's office. In *Bates,* the Court found that the victim's spouse was acting as an agent of the police; however, the statement was not inadmissible as a violation of the appellant's due process rights. The Court found no violation of the appellant's right to privacy under the Fourth Amendment, noting that " '[n]either this Court nor any member of it has ever expressed the view that the Fourth Amendment protects a wrongdoer's misplaced belief that a person to whom he voluntarily confides his wrongdoing will not reveal it.' " 549 So.2d at 605, quoting *Hoffa v. United States,* 385 U.S. 293, 302, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966). Similarly, in the present case, the appellant suffered no violation of his right to privacy as he initiated the telephone call during which he threatened the person who had revealed his actions and again admitted that he had committed the murder.

[39] Furthermore, in *Bates,* the Court found no violation of *Miranda* or the Fifth Amendment as to the voluntariness of the statement.

> "This type of 'false friend' situation, 'that in which by deception the defendant is made unaware that the person with whom he is conversing is a police officer or police agent, clearly does not make the defendant's statement involuntary even though he acted in the mistaken impression that this person could be trusted not to reveal it.' LaFave and Israel, *Criminal Procedure,* Vol. 1 (1984), § 6.2(c). There was no coercive police activity which would have overborne the appellant's will and made his confession not the product of rational intellect and a free will. *Townsend v. Sain,* 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963)."

Bates, 549 So.2d at 606. Similarly, in the present case, the appellant's statement

was not involuntary simply because he was unaware that Roshell had worked as an informant with the Hoover Police Department and that she would inform the Birmingham Police Department about his confession.

[40] Moreover, in *Bates,* this Court found that Bates's statement was not introduced into evidence in violation of his Sixth Amendment right to counsel, because the victim's wife did not " 'deliberately elicit' " his incriminating statements. This Court in *Bates* distinguished those facts from those in *United States v. Henry,* 447 U.S. 264, 271, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). In *Henry,* the United States Supreme Court held the appellant's statements inadmissible, noting that the Court in *Henry* "found noteworthy the fact that the agent 'was not a passive listener; rather, he had "some conversations with [the defendant]" while he was in jail and [the appellant's] incriminatory statements were "the product of this conversation." ' " *Bates v. State,* supra, at 607. In *Bates,* as in the present case, the agent (or possible agent) was a passive listener; Roshell even responded that she said nothing in response to the appellant's threat or confession. This Court, in *Bates,* also looked to the United States Supreme Court's decision in *Kuhlmann v. Wilson,* 477 U.S. 436, 106 S.Ct. 2616, 91 L.Ed.2d 364 (1986):

> " 'As our recent examination of this Sixth Amendment issue in [*Maine v.] Moulton[,* 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985)] makes clear, the primary concern of the *Massiah* [*v. U.S.,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964)] line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation. Since "the Sixth Amendment is not violated whenever—by luck or happenstance—the State obtains incriminating statements from the accused after the right to counsel has attached," 474 U.S., at 176, [106 S.Ct. at 487] citing *United States v. Henry, supra,* [447 U.S.] at 276[, 100 S.Ct. at 2189] (Powell, J., concurring), a defendant does not make out a violation of that right simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statement to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks.'
>
> "477 U.S. at 459, 106 S.Ct. at 2630. In determining that the police agent did not 'deliberately elicit' the incriminating statements, the Court noted that the agent never asked the appellant any questions concerning the pending charges, but merely listened to the appellant's spontaneous and unsolicited statements. In the present case, the record indicates that the appellant's admission was not made in response to any questions by [the victim's ex-wife], but was rather a spontaneous and unsolicited statement of guilt. Therefore, we find that the appellant's right to counsel was not violated."

Bates v. State, supra, at 607.

Finally, Roshell's testimony concerning the appellant's statement was not introduced into evidence in violation of the appellant's due process rights. In *Bates v. State,* supra, at 607–08, this Court found that Bates's rights to due process were not violated by the admission of his inculpatory statement made to the victim's ex-wife, and quoted *Hoffa v. United States,* 385 U.S. at 311, 87 S.Ct. 408, in which the United States Supreme Court held that "the use of a government informer under similar circumstances was not 'a shabby

thing in any case'." *Bates v. State,* supra, at 607. The United States Supreme Court further noted that the use of secret informers "is not *per se* unconstitutional," and that the safeguards of our "legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa v. United States,* 385 U.S. at 311, 87 S.Ct. 408.

In the present case, although Roshell had been working for two weeks as a government informer with the Hoover Police Department, the police had not solicited her help with the present case, nor did she elicit the incriminating statement from the appellant. Nor was there any deception or custodial interrogation initiated by law-enforcement officers that would have denied him of his Fifth Amendment rights. He was not deprived of his right to privacy, due process, or right to counsel by the admission into the evidence of his telephone confession to Roshell. See also *Gilchrist v. State,* 585 So.2d 165, 174–78 (Ala. Crim.App.1991); *Hagood v. State,* 588 So.2d 526, 534–36 (Ala.Crim.App.1991).

XIII.

[41] The appellant argues that the trial court improperly prohibited him from cross-examining Officer Corvin about his police investigation, specifically information that Officer Corvin received tips concerning other individuals who owned a jacket similar to that which the appellant allegedly wore on the night of the offense. The appellant asserts that when the district attorney objected on hearsay grounds to this testimony, the trial court sustained; however, the appellant alleges that this testimony would have indicated how the investigation was affected by the conversations rather than constituting hearsay. However, a review of the record indicates that the appellant was attempting to elicit testimony concerning what this third party had actually said rather than what actions Officer Corvin took as a result of any conversations that he had had with this third party. The following transpired during the cross-examination of Officer Steve Corvin:

"Q. Sir, you all interviewed quite a few people in regards to this crime, did you not?

"A. Yes, sir, we did.

"Q. You had suspects, and so forth?

"A. Yes, sir.

"Q. Do you remember interviewing an Angelica Thomas?

"A. Yes, I do.

"Q. And isn't it a fact that she said—

"[Prosecutor]: I object to what she said, Your Honor.

"The Court: Sustained.

"Q. Did you get information in your investigation that other people may have had a jacket similar to this?

"[Prosecutor]: Same question, Your Honor. It is hearsay.

"The Court: Sustained.

"[Prosecutor]: He had an opportunity—

"[Defense counsel]: Can I approach the bench, if I may?

"The Court: Sure."

Thereafter, a hearing was held in the judge's chambers, wherein the following occurred:

"[Defense counsel]: Judge, we have a situation where this girl called and said that she was positive it was her boyfriend's—he had a jacket just like it, looked like him. We asked the district attorney's office for her address and never got it.

"[Prosecutor]: Wait a minute, it's on her tape.

"[Defense counsel]: But her current address.

"[Prosecutor]: I don't know her current address. I mean, I gave you everything I had, [defense counsel]. I gave you her tape, I gave you her statement, I gave you everything I had.

"The Court: There must be a number of jackets, what do you call them—

"[Defense counsel]: Yes, sir, there is. This girl said she had one just like it.

"[Second defense attorney]: This woman said over and over again she was positive that it was her boyfriend's—

"The Court: Did they make an arrest?

"[Defense counsel]: No.

"The Court: Did they talk to the boyfriend?

"[Defense counsel]: I think they did.

"The Court: Can't let it in, [defense counsel].

"[Defense counsel]: We can get an instanter for her, then, I guess for our case.

"The Court: If you can find her, give me a decent address and I'll try to help you.

"[Defense counsel]: All right."

Defense counsel clearly was attempting to introduce the third party's statement for the truth of the matter asserted; specifically, that her boyfriend owned the same jacket and that he looked like the appellant. No reasonable interpretation of defense counsel's discussion concerning this statement would indicate that he sought to elicit how the statement affected the investigation, nor did he make any request for such a limiting instruction by the trial court. Thus, the trial court properly sustained the State's objection as to hearsay. C. Gamble, *McElroy's Alabama Evidence* (4th ed.1991), § 242.01(1).

XIV.

The appellant argues that the prosecutor's use of peremptory strikes to exclude African–American and Hispanic veniremembers violated *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and Alabama law. Specifically, the appellant argues in brief that "it is unclear whether the district attorney used his peremptory strikes in a racially discriminatory manner because the trial court improperly speculated about what the reasons were." A review of the record concerning the appellant's challenges made pursuant to *Batson v. Kentucky,* supra, indicates that he based these challenges on gender, see *Smith v. State,* 698 So.2d 1166 (Ala. Crim.App.1997), and race. However, the appellant argued almost exclusively concerning the gender discrimination. As to racial discrimination, the appellant alleged only that the prosecutor struck five black veniremembers. Defense counsel stated that the prosecutor had a history of reversals based on racial discrimination in the jury selection process; however, the trial court refuted that claim and stated, "I don't agree with that, I really don't." The trial court then stated, "This is [prosecutor], a very prominent black attorney . . . [t]hat I have worked with and you have too." The trial judge then acknowledged that he had sat on the bench for 10 years and that he did not believe that a prima facie case of racial discrimination based on peremptory challenges had been shown in this case. He pointed out certain answers or characteristics of some of the veniremembers who were struck and then stated, "[W]ell, I don't want to say too much because you will say I am putting words in their mouths."

As to the single Hispanic veniremember, the record indicates that she was struck by the prosecutor, and that he struck her as his no. 7 strike, although he had asked her no questions.

[42] The appellant failed to establish a prima facie showing of discrimination by the prosecutor as to his strikes against black veniremembers.

" 'In *Batson*, the United States Supreme Court held:

" ' "Although a prosecutor is ordinarily entitled to exercise permitted peremptory challenges 'for any reason at all, as long as that reason is related to his view concerning the outcome' of the case to be tried, ... the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."

" '476 U.S. at 89, 106 S.Ct. 1712 (citations omitted.)

" 'The Court went on to outline the components of a defendant's prima facie case of racial discrimination:

" ' "To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the [veniremembers] from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."

" '*Batson*, 476 U.S. at 96, 106 S.Ct. 1712 (citations omitted).

" '... In *Strauder v. West Virginia*, 100 U.S. (10 Otto) 303, 25 L.Ed. 664 (1880), the Court held that racial discrimination in jury selection offends the Equal Protection Clause; however, it recognized that a defendant has no right to a jury composed in whole or in part of persons of his own race.

" 'A defendant making a *Batson* challenge bears the burden of proving a prima facie case of purposeful or intentional discrimination and, in the absence of such proof, the prosecution is not required to state its reasons for its peremptory challenges. *Ex parte Branch*, 526 So.2d 609 (Ala.1987). Only when the defendant establishes facts and circumstances that raise an inference of discrimination must the State give its reasons for its peremptory strikes. *Stokes v. State*, 648 So.2d 1179, 1180 (Ala.Crim.App.1994).

" '....

"Procedurally, the party alleging racial discrimination in the use of peremptory challenges bears the burden of establishing a prima facie case of discrimination. *Ex parte Branch*, 526 So.2d 609, 622 (Ala.1987). ' "[I]t is important that the defendant come forward with *facts*, not just numbers alone, when asking the [trial] court to find a prima facie case" ' of racial discrimination. *Mitchell v. State*, 579 So.2d 45, 48 (Ala.Cr.App.1991), cert. denied, 596 So.2d 954 (Ala.1992), quoting *United States v. Moore*, 895 F.2d 484, 485 (8th Cir.1990)."

McElemore v. State, 798 So.2d 693, 695–96 (Ala.Crim.App.2000), cert. denied, 798 So.2d 702 (Ala.2001).

In the present case, the prosecutor was not required to come forward with reasons, because the trial court found that there was no prima facie case of discrimination as to the striking of the black prospective jurors. Therefore, any error by the trial court in supposing reasons for certain of the strikes was harmless. Rule 45, Ala. R.App. P. Moreover, the trial court properly found that there was no prima facie case of discrimination in that the appellant presented none of the cited types of evidence that would support an inference of discrimination, rather than the fact that five black potential jurors were struck. Numbers alone are insufficient to raise an inference of discrimination. *Hood v. State,* 598 So.2d 1022, 1023 (Ala.Crim. App.1991).

[43] As to the prosecutor's striking of the only Hispanic member of the venire, the appellant also failed to make a prima facie showing of discrimination. Because there was only one Hispanic member of the venire, no pattern of discrimination existed that would imply discriminatory intent on the part of the prosecutor; moreover, the prosecutor did not strike this veniremember until his seventh strike. There is further no indication from the questioning of the prosecutor of the veniremembers, contained in the record, which would indicate that the prosecutor intended to discriminate. Moreover, the trial court, in his response to these *Batson* motions by defense counsel, clearly indicated that, based on his presence in the courtroom for the present case, as well as his prior experience, he did not believe that the prosecutor was intending to discriminate.

[44] Furthermore, because the appellant's *Batson* motion concerning the striking of the one Hispanic potential juror was based solely on the fact that he was asked no question by the prosecutor, the appellant failed to establish a prima facie case, as this Court has held that such facts alone do not create a sufficient inference of discrimination. *Edwards v. State,* 628 So.2d 1021, 1024 (Ala.Crim.App.1993).

> "It is within the discretion of the trial court to determine if the State's peremptory challenges were motivated by intentional racial discrimination, and the trial court will be reversed only if its determination is clearly erroneous. *Ex parte Lynn,* 543 So.2d 709 (Ala.1988)."

Bone v. State, 706 So.2d 1291, 1299 (Ala. Crim.App.1997).

The record indicates that, along with the rest of the veniremembers, the Hispanic potential juror was asked questions, although she failed to respond to any of these questions. The trial court's decision that the prosecutor did not act in violation of *Batson v. Kentucky,* supra, as to these strikes was not clearly erroneous.

XV.

The appellant argues that the trial court erred in refusing to allow him to use jury questionnaires during the jury selection process.

[45] In *Harris v. State,* 632 So.2d 503, 518 (Ala.Crim.App.1992), aff'd, 632 So.2d 543 (Ala.1993), this Court addressed the same issue, where the appellant claimed error by the trial court in denying her request to have the venire complete a questionnaire. This court stated that:

> " '[T]he trial court has discretion regarding how the voir dire examination of [the] jury [venire] will be conducted, and . . . reversal can be predicated only upon an abuse of that discretion.' *Bui v. State,* 551 So.2d 1094, 1110 (Ala.Cr.App. 1988), affirmed, 551 So.2d 1125 (Ala. 1989), vacated on other grounds, 499 U.S. 971, 111 S.Ct. 1613, 113 L.Ed.2d 712 (1991). There was no abuse of dis-

cretion by the trial court as to this matter."

Id. In the present case, the record clearly demonstrates an extensive questioning by the trial court and both counsel of prospective jurors, in panels and individually. There was no abuse of discretion by the trial court as to the voir dire procedures.

XVI.

The appellant argues that the trial judge improperly referred to his choice not to testify in violation of his right against self-incrimination under the Fifth and Fourteenth Amendments of the United States Constitution and under Alabama law. Specifically, the appellant refers to the trial court's sentencing order in which the trial court makes a reference to the fact that the appellant chose not to testify at either stage of his trial. The record indicates that the appellant failed to object to this inclusion before the trial court; therefore, any error must rise to the level of plain error. Rule 45A, Ala. R.App. P. However, a review of the sentencing order clearly indicates that the trial court was giving a factual recitation of the evidence and procedures at trial.

[46] This statement made by the trial court is included in his statement of facts and was merely intended as such; there is no indication that he considered this fact further. As was the case in *Ferguson v. State,* 814 So.2d 925 (Ala.Crim.App.2000), in which the appellant had argued that the trial court had improperly considered non-statutory aggravating circumstances citing to the sentencing order by the trial court, this Court, quoting *Burgess v. State,* 827 So.2d 134 (Ala.Crim.App.1998), quoting in turn *Rutledge v. State,* 523 So.2d 1087, 1103 (Ala.Crim.App.1987), for the proposition that a "logical reading of the sentencing order" indicated that the trial court first made findings as to aggravating and mitigating circumstances and then considered the facts of the case and weighed the circumstances. Quoting *Burgess* and *Rutledge* again, this Court stated that " 'the facts of this case support the court's statements, which we believe are merely the court's editorial comments on the evidence presented.' " *Ferguson,* 814 So.2d 925 at 958. As this Court found in *Ferguson v. State,* supra, the appellant's interpretation of the trial court's sentencing order in this case is " 'strained and unrealistic.' " 814 So.2d at 958, quoting *Burgess,* 827 So.2d 183. We find no error by the trial court in recounting the fact that the appellant did not testify at trial or at sentencing in the trial court's findings of fact in his sentencing order.

XVII.

The appellant argues that because he was charged with two counts of capital murder, one of which he alleges was a lesser-included offense of the other, his rights against being placed in double jeopardy were violated. Specifically, he argues that the first count of the indictment, which charged him with committing murder during the course of a robbery, was a lesser-included offense of the second count of his indictment under which he was convicted of committing murder made capital because it was committed during the course of a kidnapping with the intent to commit a robbery.

Pursuant to § 13A–1–8(b)(1), Ala.Code 1975:

"When the same conduct of a defendant may establish the commission of more than one offense, the defendant may be prosecuted for each such offense. He may not, however, be convicted of more than one offense if:

"(1) One offense is included in the other, as defined in Section 13A–1–9...."

A lesser-included offense is defined by § 13A–1–9, as follows:

> "(a) A defendant may be convicted of an offense included in an offense charged. An offense is an included one if:
>
> "(1) It is established by proof of the same or fewer than all the facts required to establish the commission of the offense charged; or
>
> "(2) It consists of an attempt or solicitation to commit the offense charged or to commit a lesser included offense; or
>
> "(3) It is specifically designated by statute as a lesser degree of the offense charged; or
>
> "(4) It differs from the offense charged only in the respect that a less serious injury or risk of injury to the same person, property or public interests, or a lesser kind of culpability suffices to establish its commission."

In the present case, the appellant was not convicted of an attempt or solicitation to commit an offense, as condemned in § 13A–1–9(a)(2); moreover, § 13A–5–40(a)(2), the capital offense of robbery-murder, is not defined by statute as a lesser-included offense to § 13A–5–40(a)(1), the capital offense of murder committed during a kidnapping, as condemned in § 13A–1–9(a)(3); these two forms of capital murder do not differ in that a less serious injury or risk of injury or a lesser culpability is required to establish its commission. § 13A–1–9(a)(4). Moreover, the capital offense of robbery-murder is not established by the same or fewer than all the facts required to establish the commission of the capital offense of murder-kidnapping. According to the commentary to § 13A–1–9(a)(1), this Code section "provides that a lesser offense is necessarily included in a charge of the greater offense if the proof necessary to establish the greater offense will of necessity establish every element of the lesser offense."

The first count of the indictment charged that the appellant:

> "Did intentionally cause the death of Sharma Ruth Johnson, by shooting her with a shotgun, and Willie B. Smith caused the death at the time that [he] was in the course of committing a theft of Eighty Dollars of the lawful currency of the United States of America ... by the use of force of the person of Sharma Ruth Johnson, with intent to overcome her physical resistance or physical power of resistance while Willie B. Smith was armed with a deadly weapon ... in violation of § 13A–5–40(a)(2) of the Alabama Criminal Code."

The second count of the indictment charged that the appellant:

> "Did intentionally cause the death of Sharma Ruth Johnson, by shooting her with a shotgun, and ... caused said death by the abduction or attempt to abduct, Sharma Ruth Johnson, with the intent to accomplish or aid the commission of robbery, a felony, or flight therefrom in violation of § 13A–5–40(a)(1) of the Alabama Code."

Thus, the appellant was charged with committing a robbery as an element of the first count; whereas the kidnapping element of the second count merely included the intention to commit a robbery as the intended felony when the victim was abducted. Therefore, the first count required proof of an actual robbery, while the second count did not. Thus, the elements of the offense charged in the first count were not included within the offense charged in the second count of the indictment.

[47] Pursuant to § 13A–6–43(a), kidnapping in the first degree requires the abduction of another person coupled with

one of six different goals of criminal intent: to hold the victim for ransom; to use him as a shield or a hostage; to accomplish or aid in the commission of a felony or flight therefrom; to inflict injury or to abuse sexually the victim; to terrorize the victim or a third person; and to interfere with any governmental or political function. In the present case, the goal of the appellant's criminal intent in committing the abduction was to accomplish or aid in the commission of a felony, specifically, robbery. The commentary to this kidnapping statute states as follows:

> "Note that none of the purposes listed in § 13A–6–43(a)(1)-(6) must be actually accomplished in order for the crime of kidnapping to be committed; the crime is complete when there is an 'abduction,' *i.e.,* intentional or knowing restraint, coupled with an intent to secrete or to hold the victim where he is not likely to be found, or use, or threaten to use deadly physical force. Section 13A–6–40(1) and (2). Proof of any one of the additional purposes increases the gravity of the offense. All of these criminal purposes pose substantial danger to the life of the victim or afford a strong incentive to kill him in order to avoid identification or apprehension."

Thus, because the intended purpose of the abduction need not be completed, while the felony of robbery was required to be completed in the first count, Count one was not a lesser-included offense of Count two, and the appellant's rights against double jeopardy were not violated.

XVIII.

[48] The appellant argues that the double counting of robbery as an element of the capital offense and as an aggravating circumstance violated his right to an individualized sentence guaranteed by the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. Specifically, the appellant argues that the trial court acted improperly by "double counting" the robbery as an element of the capital offense as well as an aggravating circumstance in his conviction and sentencing. However, this issue has previously been decided adversely to the appellant's argument. *Tarver v. State,* 500 So.2d 1232 (Ala.Crim.App.), aff'd, 500 So.2d 1256 (Ala. 1986), cert. denied, 482 U.S. 920, 107 S.Ct. 3197, 96 L.Ed.2d 685 (1987). Moreover, this action by the trial court did not result in double punishment for the same offense. *Fortenberry v. State,* 545 So.2d 129 (Ala. Crim.App.1988), aff'd, 545 So.2d 145 (Ala. 1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990). See also *Lowenfield v. Phelps,* 484 U.S. 231, 241–46, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988).

XIX.

The appellant argues that the highly prejudicial atmosphere at his trial violated his rights to due process, a fair trial, and a reliable sentencing determination. Specifically, the appellant cites the fact that the victim's family and friends "crowded the courtroom" and that the victim's brother, a Birmingham police officer, wore his uniform during the appellant's trial. He also cites to the fact that, when the jurors were given copies of the transcript of the tape recording of the appellant's conversation with Latonya Roshell, the victim's family members were also given a copy of this transcript. As to the sentencing phase, the appellant cites the fact that the trial court had to interrupt its instructions to the jury because a woman in the courtroom began crying. He also argues that the district attorney's closing argument highlighted the suffering of the victim and her family. This last claim has previously been addressed and determined to be meritless in this opinion. See Issue X.

There was no error in allowing the victim's family and friends to be present in the courtroom.

> " 'To the contrary, the Alabama Crime Victims' Court Attendance Act, §§ 15–14–50 to 15–14–57, Ala.Code 1975, guarantees a victim or the victim's representative the right to be present in the courtroom and to be seated at the prosecution table. This right applies in capital cases. See *Weaver v. State,* 678 So.2d 260, 272 (Ala.Cr.App.1995), rev'd on other grounds, 678 So.2d 284 (Ala.1996). Moreover, this court has held on numerous occasions that a victim's family should not be excluded from the trial without a valid reason. See, e.g., *Few v. State,* 518 So.2d 835, 836 (Ala. Cr.App.1987), and cases cited therein.'
>
> "*Burgess v. State,* 723 So.2d 742, 756–57 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999).
>
> "The decision whether to exclude persons from the courtroom during trial is a matter left entirely to the trial court's discretion. See *Henderson v. State,* 583 So.2d 276 (Ala.Cr.App.1990), aff'd, 583 So.2d 305 (Ala.1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992)."

Taylor v. State, 808 So.2d 1148, 1200 (Ala. Crim.App.2000).

[49] Moreover, there is no indication in the record that the appellant made any motion to close the courtroom or objected on this ground. Rule 45A, Ala. R.App. P. There was no abuse of discretion in the trial court's decision to allow friends and family of the victim to remain in the courtroom, and there was no plain error on this ground.

[50] There was also no impropriety in the victim's brother wearing his uniform to trial. In *Willis v. Kemp,* 838 F.2d 1510 (11th Cir.1988), a murder victim's young son appeared at trial, and sat in the courtroom dressed in a copy of a police uniform.

> "The victim's young son had been present in the courtroom throughout the day, dressed in a copy of a Ray City police uniform. Defense counsel asked the court to order the child removed from the courtroom. The court denied his request, noting that the trial was open to the public, including the victim's children, that the children had been present throughout the guilt and sentencing phases of the trial, and that they had behaved themselves properly. . . .
>
> "We see no error, much less a constitutional deprivation, in the trial court's ruling. Petitioner cites no authority for the proposition that due process requires that in a capital sentencing proceeding, the defendant has a constitutional right to have removed from the courtroom spectators whose presence may remind the jury of the victim. A criminal proceeding is a public hearing; all citizens, including the victim's family, have a right to attend."

Willis v. Kemp, 838 F.2d at 1523. See also *State v. Munoz,* 340 N.J.Super. 204, 774 A.2d 515 (2001) (a robbery victim, who as an active member of the United States Marines was required to wear his dress uniform when appearing in public, was properly allowed to wear his dress uniform while he testified). See also *Hansen v. State,* 592 So.2d 114 (Miss.1991) (the trial court properly held that the appellant was not entitled to an order prohibiting highway patrol officers from wearing their uniforms while sitting as spectators in the capital murder trial of a highway patrol officer). In the present case the victim's brother could properly attend the trial of his murdered sister in his police uniform.

[51] Although the appellant alleges that the trial atmosphere was saturated with preferential treatment for the victim's family as demonstrated by the fact that the family members were provided with copies of the transcript of the conversation between the appellant and Roshell at the same time the jury members were provided with such transcripts, there is no evidence indicating that the appellant suffered any prejudice as a result of the Court's treatment of the victim's family. In *McDonald v. Delo,* 897 F.Supp. 1224, 1240–43 (E.D.Mo.1995), the appellant argued that the trial court's conduct and its rulings evidenced its negative regard for the habeas petitioner, who had been convicted of capital murder and sentenced to death. Specifically, the petitioner in *McDonald v. Delo,* supra, argued that the trial court improperly admonished defense counsel to refrain from blocking the Court's view of the petitioner, revealing his prejudice against the petitioner; that it had improperly permitted various relatives of the victim to introduce themselves to the jury; that it had improperly permitted the victim's wife to testify to irrelevant matters; and that it had failed to prevent the victim's wife from displaying her grief to the jury. The federal court found no due process violations on the alleged grounds and noted that there had been no showing that these acts "prejudiced the jury in any manner, and there is certainly nothing to show that the trial was 'fatally infected.' " *Id.* at 1242. Similarly, in the present case, there is no indication in the record that the appellant was prejudiced by the fact that the family members received a copy of the transcript. Moreover, defense counsel, in his closing argument at the guilt phase, used this fact as well as the fact that the victim's brother appeared at court in his uniform in order to argue to the jury specifics to fuel his claim that the appellant was being treated unfairly at trial as opposed to the preferential treatment being shown to the victim's family.

The appellant did not object at trial to any of the above claims concerning the biased atmosphere of his trial, and he has failed to show plain error on these grounds. Rule 45A, Ala. R.App. P.

[52] Finally, the appellant argues that the biased atmosphere of his trial was further demonstrated in the sentencing phase when the trial court had to interrupt its instructions to the jury because a woman in the courtroom began weeping. The appellant admits in his brief to this Court the record is unclear whether the woman was a member of the victim's family. Again, the appellant failed to object on this ground and there is no evidence in the record that the jurors were distracted, disturbed, or in any way influenced by the woman's showing of emotion. Furthermore, the trial court instructed the jury to avoid any influences of passion, prejudice, or any other arbitrary factors during his subsequent instructions. "Generally, any misconduct or demonstration by a spectator during a criminal trial is not sufficient reason to grant a new trial, unless it appears that the rights of the accused were prejudiced. *McNair v. State,* 653 So.2d 320 (Ala.Cr.App.1992)." *Smith v. State,* 727 So.2d 147, 173 (Ala.Crim.App.1998), aff'd, 727 So.2d 173 (Ala.1999). See also *Henderson v. State,* 583 So.2d 276, 287 (Ala.Crim.App.1990) (this Court held that any prejudice caused by the outburst of crying by victim's family members at trial was eradicated by the trial court's prompt curative instructions to the jury).

In *Crymes v. State,* 630 So.2d 120, 123 (Ala.Crim.App.1993), defense counsel objected at trial to the fact that the murder victim's wife had been crying and that she eventually left the courtroom and was crying loudly in the next room. This Court

found no error in the trial court's denial of a motion for a new trial based on the alleged prejudicial conduct by the victim's wife. See also *Crowe v. State*, 485 So.2d 351, 362–63 (Ala.Crim.App.1984), rev'd on other grounds, 485 So.2d 373 (Ala.1985), cert. denied, 477 U.S. 909, 106 S.Ct. 3284, 91 L.Ed.2d 573 (1986) (the murder victim's widow, who sat at the counsel table, cried during the pathologist's testimony, but the trial judge refused to remove her from the counsel table).

In the present case, as the appellant acknowledged in brief, the record does not indicate the identity of the woman who cried. There is no indication in the record that the woman disturbed the jury or distracted the jury in any manner. There was no plain error on this ground. Rule 45A, Ala. R.App. P.

XX.

The appellant argues that the trial court's refusal to answer a juror's question about what would happen if the jury became deadlocked improperly encouraged the jury to return a death sentence against him. The record indicates that, following the trial court's charge to the jury during the punishment phase of the appellant's trial, the trial court asked counsel if they had any objection to the charge, and the counsels all responded negatively. The trial court then asked the jury members if they had any questions and reminded them that he would be glad to address any such questions. A juror then asked the following: "What if we don't have a vote of seven on a life sentence?" The trial court responded as follows:

> "You just have to communicate with me through the jury room door like you have been doing in the past. Let's just take things as they come."

No objection was made by the appellant to these instructions by the trial court; therefore, any claim must now be analyzed pursuant to the plain-error rule. Rule 45A, Ala. R.App. P.

[53] Despite the appellant's argument to the contrary, there is no reasonable interpretation that can be made from these instructions by the trial court that would suggest that the judge was in any way encouraging the jury to return a sentence of death. The trial court was merely refraining from addressing problems that did not exist until the appropriate time. Clearly, in this way, the trial court sought to avoid any possible juror confusion. Moreover, the trial court properly instructed the jury that it should base its verdict solely on the evidence in the case. Because the juror asked a question that was not ripe—the jury was not deadlocked as it had not yet retired to begin deliberations—to view the trial court's response to the question as prompting a sentence of death would be a " 'strained and unrealistic' " interpretation of the trial court's statement. See *Ferguson v. State*, supra at 958. Moreover, immediately after responding to the juror's question, the trial court addressed the jury panel and asked whether the jurors would like to begin deliberations for a short time and then, because of the hour, break for dinner, or have dinner and then begin deliberations, stating, "You don't have to reach a verdict at any particular time." There was no plain error on this ground. Rule 45A, Ala. R.App. P.

XXI.

The appellant argues that the photographs of the victim's body were gruesome and that they served no purpose other than to prejudice the appellant. Specifically, the appellant refers to five photographs of the victim's body as it appeared during the autopsy examination introduced by the State. The appellant argues that

the photographs were irrelevant and cumulative and were accompanied by the "particularly gruesome descriptions of 'the coroner's testimony.' "

[54] However, as the appellant acknowledged in his brief, the photographs served to corroborate and elucidate the testimony of the pathologist as to the victim's wound, the cause of her death, and the proximity of the shotgun to the victim's head when she was shot. Thus, they were properly admitted. See, e.g., *Whitley v. State,* 607 So.2d 354 (Ala.Crim.App. 1992); *Hawkins v. State,* 594 So.2d 181 (Ala.Crim.App.1991); *Hamilton v. State,* 492 So.2d 331 (Ala.Crim.App.1986). In the present case, there was no reversible error due to the admission of these photographs.

XXII.

The appellant argues that the trial court erred in refusing to grant his request to strike for cause a certain veniremember. Specifically, the appellant argues that a veniremember's indication that she knew the facts of the case and that she was concerned about the case because she lived close to the crime scene and had two daughters who frequented the automatic teller machine where the crime occurred, demonstrated that she could not sit as a fair and impartial juror at trial. The appellant also argues that the same veniremember expressed a firm belief in the death penalty. The appellant argues that he attempted to question the veniremember further about her apparent biases and to explain to her the meaning of aggravating circumstances and mitigating circumstances, but the trial court did not allow him to do so.

The record indicates that during the voir dire examination of the entire venire, the trial court questioned the members as to pretrial publicity and informed them that, although he and the parties would speak privately to each potential juror who had been previously exposed to some form of prior knowledge of the facts or circumstances of the case, the Court wanted any jurors exposed to pretrial publicity to raise their hands. A large number of jurors so indicated. The trial court then instructed the jurors that they must be able to base their verdict on the evidence presented at trial and the law as explained to them; it further stated that if any of these potential jurors who had acknowledged that they had some information concerning the case would be unable to consider solely the law and evidence, they needed to raise their hand. He further stated that if anyone had formed some judgment concerning the ultimate question of guilt or innocence prior to the beginning of the trial, they should also so indicate by raising their hand. No one did so.

Thereafter, when the potential jurors were individually questioned pursuant to their response to the introductory voir dire, the veniremember cited by the appellant was brought into chambers for questioning. She was asked whether she could recall any details concerning the case, and she responded that she lived about four blocks from the site of the offense. She further stated that she had "some feelings" about the offense because she had two daughters, one of whom used the ATM machine that was the scene of the abduction. She was then asked if she had formulated any opinion as to the appellant's guilt or innocence and she responded, "Oh, no." She testified that she had simply taken an interest in the case because of its location and the safety implications for her family. She was then asked if she could be fair to the appellant and responded, "Yes." She further stated that her verdict would be based on the evidence presented at trial and would not be affected in any way by her own concern for her daughter's

safety. Defense counsel then questioned the potential juror as to her feelings concerning the death penalty; she indicated that she did "believe" in the death penalty. Defense counsel then asked if the present case was one on which she would feel compelled to return a death-penalty sentence, and she responded, "It would depend on how strong the evidence is, I think." The trial court then stopped defense counsel's questioning and indicated that if defense counsel wanted to pursue such questions, the potential juror should be informed concerning the meaning of aggravating circumstances and mitigating circumstances and how they apply to the weighing process of the sentencing phase. Therefore, the trial court instructed her briefly as to these matters and asked her if she would listen to the evidence and base her verdict as to punishment on the law and evidence, and she responded, "Oh, definitely." The trial court then stated that he believed that defense counsel was concerned that the location of the offense and the safety of her daughter might impede her ability to sit as a fair juror to which she responded, "Oh, no, I don't—." Defense counsel then interrupted with the question but "[y]ou do believe very, very strongly in the death penalty? You believe, very strongly, in the death penalty?" The potential juror responded, "I believe in the death penalty. I wouldn't say strongly. In certain cases I do." Defense counsel then again attempted to ask her whether she would vote for the death penalty in the present case. The prosecutor objected, stating that the potential juror could not respond to the question as she had not yet been presented with the evidence of the case. The trial court agreed that the juror would be unable to respond to that question until she was aware of the evidence and that defense counsel had already asked the question to which she had responded as best she could. Defense counsel then moved that the juror be told what the aggravating circumstances and the mitigating circumstances would be in the present case. The trial court responded, "Well, I am not going to open that up, [defense counsel], to [potential juror.]" The trial court then stated that he had instructed the juror as best he could to the relevant law. The veniremember was then asked whether she had something she wished to say to which she responded negatively. Defense counsel moved that this veniremember be struck for cause, stating, "I don't think there's any question this is a woman that would sentence him to the electric chair at the drop of a hat." The trial court responded, "I don't see how you can say that . . . in good conscious, I really don't."

A review of the questioning concerning this veniremember and her responses clearly indicates that, although she had some personal interest in the case based on its location and the implication of that location to her family's safety, the potential juror indicated that she would base her verdict on the evidence presented and attempt to be a fair juror.

[55, 56] "How far counsel may go in asking questions of the jury on voir dire, and the nature, variety, and extent of those questions are left to the discretion of the trial court. *Dawkins v. State,* 455 So.2d 220 (Ala.Crim.App.1984)." *Ingram v. State,* 779 So.2d 1225, 1262 (Ala.Crim. App.1999), aff'd, 779 So.2d 1283 (Ala.2000).

> " 'It is sufficient if the juror can lay aside his [or her] impression or opinion and render a verdict based on the evidence presented in court." ' *Smith v. State,* 581 So.2d 497, 503 (Ala.Crim.App. 1990), rev'd on other grounds, 581 So.2d 531 (Ala.1991), quoting *Irvin v. Dowd,* 366 U.S. 717, 723, 81 S.Ct. 1639, 1643, 6 L.Ed.2d 751 (1961). See also *Johnston v. State,* 497 So.2d 844, 849 (Ala.Cr.App.

1986) (a juror 'is not disqualified if he states that he can find a true verdict on the evidence alone'); and *Stringfellow v. State*, 485 So.2d 1238, 1241 (Ala.Cr.App. 1986) (a juror who stated that she would 'try real hard' to put her personal bias aside was not due to be dismissed for cause)."

Whitehead v. State, 777 So.2d 781, 810–11 (Ala.Crim.App.1999) aff'd, 777 So.2d 854 (Ala.2000).

[57] In the present case, there was no indication of bias toward the appellant by this potential juror; therefore, no error resulted in the trial court's denial of the challenge for cause. *Minor v. State*, 780 So.2d 707 (Ala.Crim.App.1999), rev'd on other grounds, 780 So.2d 796 (Ala.2000); *Hyde v. State*, supra; *Willie Burgess v. State*, supra; *Kinder v. State*, 515 So.2d 55 (Ala.Crim.App.1986).

XXIII.

[58, 59] The appellant argues that the trial court erred by denying his motion for a change of venue because, he says, he demonstrated actual prejudice to him during voir dire. Specifically, the appellant submits that 28 venirepersons admitted they had some knowledge of the case, and several had extensive knowledge of the facts including the fact that the victim was a police officer's sister. However, although a number of venirepersons admitted that they had some knowledge of the case, none of the actual jurors who sat on the case had stated on voir dire that they had any prior knowledge of the facts of this case. Therefore, the appellant has demonstrated no actual prejudice.

> "The burden is on a defendant seeking a change of venue to show, to the reasonable satisfaction of the court, that he or she cannot receive a fair and impartial trial in the county of original venue. Motions for a change of venue are addressed to the sound discretion of the trial court and its decision on such a motion will not be disturbed on appeal except for an abuse of that discretion."

Acklin v. State, 790 So.2d 975, 997 (Ala. Crim.App.2000), writ denied, 790 So.2d 1012 (Ala.2001).

[60–66] There are two situations that would require a change of venue: one dealing with pretrial saturation of the community; the other requiring actual jury prejudice or "'"'"a connection between the publicity generated by the news articles, radio and television broadcasts and the existence of actual jury prejudice." *McWilliams v. United States*, [394 F.2d 41 (8th Cir.1968)].'"'" *Hyde v. State*, 778 So.2d 199, 232 (Ala.Crim.App.1998). The appellant's claims address the situation requiring a showing of actual prejudice.

> "'"A criminal defendant is not constitutionally entitled to trial by jurors ignorant about relevant issues and events.... 'The relevant question is not whether the community remembered the case, but whether the jurors ... had such fixed opinions that they could not judge impartially the guilt of the defendant.' ... In determining the existence of presumptive prejudice, a court must consider the totality of the circumstances, including the type of pretrial publicity, the time lapse between peak publicity and the trial, and the credibility of prospective jurors who indicate during voir dire that they could be impartial despite having been exposed to pretrial publicity about the case.... We note that 'the presumptive prejudice standard ... is only "rarely" applicable ... and is reserved for an "extreme situation."' ... 'In short, the burden placed upon the petitioner to show that pretrial publicity deprived him of his right to a fair trial before an im-

partial jury is an extremely heavy one.' "

"'*United States v. Lehder–Rivas,* 955 F.2d 1510, 1524 (11th Cir.), cert. denied, 506 U.S. 924, 113 S.Ct. 347, 121 L.Ed.2d 262 (1992).

"'Our review convinces this Court that the trial judge did not abuse his discretion in denying the motion for a change of venue.

"'"'The trial court's findings of impartiality should be overturned only for "manifest error." *Irvin v. Dowd,* 366 U.S. 717, 724, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961).' *Fortenberry v. State,* [545 So.2d 129 (Ala.Cr.App.1988), affirmed, 545 So.2d 145 (Ala.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1937, 109 L.Ed.2d 300 (1990)]. 'Absent a showing of abuse of discretion, a trial court's ruling on a motion for change of venue will not be overturned. *Ex parte Magwood,* 426 So.2d 929, 931 (Ala.), cert. denied, 462 U.S. 1124, 103 S.Ct. 3097, 77 L.Ed.2d 1355 (1983).' *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)]. We find no abuse of discretion by the trial court or manifest error in his finding of impartiality."

"'*Oryang v. State,* 642 So.2d 979 (Ala.Cr.App.1993) (every member of venire indicated that they had been exposed to pretrial publicity). See also *Thomas v. State,* 539 So.2d 375, 394 (Ala.Cr.App.) ("[a]t the beginning of voir dire, every member of the venire stated he or she had read or heard about this case"), affirmed, 539 So.2d 399 (Ala. 1988), cert. denied, 491 U.S. 910, 109 S.Ct. 3201, 105 L.Ed.2d 709 (1989). Here, as in *Thomas,* 539 So.2d at 395, the appellant has "failed to show a connection between the pre-trial publicity and the existence of actual jury prejudice." '

"*Smith v. State,* 646 So.2d 704, 706–07 (Ala.Crim.App.) (where every veniremember acknowledged having heard of the capital offense), cert. denied, 646 So.2d 704 (Ala.1994). See also *Holladay v. State,* 549 So.2d 122, 126 (Ala.Crim. App.1988) ('The fact that virtually every prospective juror had some knowledge of the appellant's case does not mean the appellant could not receive a fair and impartial trial.'), aff'd, 549 So.2d 135 (Ala.), cert. denied, 493 U.S. 1012, 110 S.Ct. 575, 107 L.Ed.2d 569 (1989)."

Hardy v. State, 804 So.2d 247, 292–93 (Ala. Crim.App.1999).

[67] In the present case, the appellant failed to meet his burden of proof as to actual prejudice. He failed to show that he could not receive a fair trial and, in fact, none of his actual jurors indicated they had any previous knowledge of this case.

XXIV.

As is required by § 13A–5–53, Ala.Code 1975, this Court must review the propriety of the appellant's conviction and his sentence of death by electrocution. The appellant was convicted of capital murder pursuant to § 13A–5–40(a)(2) and § 13A–5–40(a)(1), Ala.Code 1975. A review of the record reflects that the appellant's sentence to death was not the result of any influence of passion, prejudice, or any other arbitrary factor. See § 13A–5–53(b)(1), Ala.Code 1975.

The trial court properly found the existence of the following aggravating circumstances: that the murder was committed while the appellant was engaged in or was an accomplice in the commission of a robbery, and that the murder occurred while the appellant was engaged in or was an accomplice in the commission of a kidnap-

ping. The trial court properly found the existence of two mitigating circumstances: that the appellant had no significant history of criminal activity, and the age of the defendant at the time of the crime; specifically, that he was 22 years and 25 days old at the time of the offense. The trial court also properly considered nonstatutory mitigating circumstances; the trial court made lengthy findings of such evidence which he considered. Summarily, the trial court stated:

> "I find that the defendant's luckless childhood and troubled adolescence occasioned in large part by an abusive father, economic deprivations affecting the defendant's family, the defendant's verbal I.Q. of 75, classified as the borderline range between mild retardation and low-average intelligence, this position of co-defendant's cases for the lesser offense of murder are all relevant factors to be considered in mitigation of the sentence."

[68] According to § 13A–5–53(b)(2), Ala.Code 1975, this Court must independently weigh the aggravating and mitigating circumstances. We have weighed all of the evidence presented in support of the aggravating and mitigating circumstances and are convinced that the appellant's sentence to death is appropriate and that the aggravating circumstances outweigh the mitigating circumstances.

[69] As required by § 13A–5–53(b)(3), Ala.Code 1975, this Court must also determine whether the appellant's sentence is disproportionate to the penalties imposed in similar cases. The appellant's sentence is neither disproportionate nor excessive. For death sentences imposed on convictions of robbery-murder, see, e.g., *Kuenzel v. State,* supra; *Henderson v. State,* supra; *Davis v. State,* 718 So.2d 1148 (Ala.Crim. App.1997). For cases involving the imposition of the death penalty on conviction of murder during kidnapping in the first degree, see, e.g., *Perkins v. State,* 808 So.2d 1041 (Ala.Crim.App.1999), aff'd, 808 So.2d 1143 (Ala.2001); *Duncan v. State,* 827 So.2d 838 (Ala.Crim.App.1999), aff'd, 827 So.2d 861 (Ala.2001); *Baker v. State,* [Ms. CR–95–0292, Jan. 12, 2001] —— So.2d —— (Ala.Crim.App.2001).

We have searched the entire record for any error that might have adversely affected the appellant's substantial rights and have found none. Rule 45A, Ala. R.App. P.

The judgment of the circuit court is due to be, and it is hereby, affirmed.

AFFIRMED.

McMILLAN, P.J., and BASCHAB and WISE, JJ., concur.

SHAW, J., concurs in the result.

COBB, J., concurs in part and dissents in part, with opinion.

COBB, Judge, concurring in part and dissenting in part.

I concur with the majority's disposition of all issues except the issue discussed in Part I of its opinion. As to that issue, I must dissent.

Philosophically, I am in agreement with the majority. I continue to question the propriety of the United States Supreme Court's decisions in *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), and its progeny, and the decisions of the Alabama Supreme Court applying those cases. Nevertheless, this Court is obliged to follow existing precedent, and the law now provides that an explanation based on group bias, when the group trait has not been shown to apply to the specific juror who was struck, is evidence that the reason given for striking a juror was a pretext for discrimination. *E.g., Walker v.*

State, 611 So.2d 1133, 1141 (Ala.Crim.App. 1992); *Giles v. State,* 815 So.2d 585, 587 (Ala.Crim.App.2000).

In *Walker,* this Court addressed the issue now before us. We stated:

> "We further find that the reasons for two other strikes were not race neutral under the circumstances before us: veniremember no. 68 because she was a minister's wife and veniremember no. 123 because he was 'very religious.' These veniremembers did not respond when asked whether they had a fixed opinion against the death penalty or whether they not being absolutely opposed to it, 'just [did not] like it,' or when asked whether any veniremember had 'a personal, religious or moral conviction against passing judgment on [his] fellow man.' '[A]n explanation based on a group bias where the group trait is not shown to apply to the challenged juror specifically' is evidence that the reason was a sham or pretext. [*Ex parte*] *Branch,* 526 So.2d [609, 624 (Ala.1987)](quoting *Slappy v. State,* 503 So.2d [350, 355 (Fla. Ct.App.1987)]; noting as an example 'an assumption that teachers as a class are too liberal, without any specific questions having been directed to ... the individual juror showing the potentially liberal nature of the challenged juror'). *See also Williams v. State,* 548 So.2d 501, 507–08 (Ala.Cr.App.1988), cert. denied, 489 U.S. 1028, 109 S.Ct. 1159, 103 L.Ed.2d 218 (1989) (wherein the court noted that strikes based on age-based bias, residence-based bias, and employment-based bias, without any voir dire examination in reference to these biases, raise a strong inference of discrimination). ' "Group-based" strikes without "examination of [the] juror apparent in the record to determine any further information about the juror and the juror's competency to serve" caused our Supreme Court "great concern." ' *Parker v. State,* 568 So.2d [335, 337 (Ala.Cr.App. 1990)] (quoting *Branch,* 526 So.2d at 626 n. 13).... The prosecutor could have easily dispelled any doubt, had there been any, by asking a follow-up question specifically of each veniremember. He cannot, however, presume that, *in the absence of a response to specific voir dire questioning as to whether the veniremember is in fact opposed to the death penalty,* the veniremember would not vote in favor of the death penalty simply because the veniremember is very religious, is a minister or minister's wife, or even is a member of a particular denomination."

611 So.2d at 1140–41.

The record in this case discloses that the prosecutor struck several women because they indicated that they had close affiliations with various churches. The trial court noted in its order on return to remand that the prosecutor "feared that these prospective jurors would be more susceptible to the troubled youth/adolescent argument." (S.R.22.) The trial court further stated that the prosecutor explained that he struck jurors who had strong church affiliations because he was afraid that "church oriented people" would be more receptive to a mercy argument than would other veniremembers. (S.R.19.) However, the prosecutor asked no follow-up questions. There is no indication in the record that the church affiliations of any of the jurors would have impacted the ability to sit as a juror in this case. There is certainly nothing in the record to support the prosecutor's presumption that the church affiliations would make the jurors more receptive to a mercy argument. It might be equally presumed that a religious person would be more susceptible to the arguments in favor of capital punishment, as indicated by a juror

in *Price v. State*, 725 So.2d 1003, 1025 (Ala.Crim.App.1997):

> " '[DEFENSE COUNSEL]: When you say an eye for an eye and a tooth for a tooth, you feel like you take a life, your life should be taken?
>
> " 'PROSPECTIVE JUROR: That's what the Bible says.
>
> " '[DEFENSE COUNSEL]: That's a strong religious conviction that you hold?
>
> " 'PROSPECTIVE JUROR: That's what I've always been taught.' "

725 So.2d at 1023.

As we observed in *Giles*, "This is precisely the type of action we found in *Walker* to be prohibited, and to constitute reversible error." 815 So.2d at 588.

The extensive order filed by the trial court on remand demonstrates that the court went to great lengths to uphold the prosecution's peremptory strikes. The trial court's assertion that the prosecutor "is certainly not a person prone to strike *minorities*" is not helpful to our resolution of this issue, however, because women are not a minority in the United States. The order might be sufficient to persuade some that the denial of the *Batson* motion was not clearly erroneous.

The prosecution's use of 14 of its 15 peremptory challenges to remove women from the venire is strong evidence that the State intended to exclude qualified women from serving on the jury. Due to the lack of voir dire questioning on the effect of the veniremembers's religious beliefs and church affiliations on their "susceptibility to mercy arguments" or on their ability to decide the case on the law and the facts, we are left only with the indication that the prosecutor struck on the basis of group bias unsubstantiated by anything in the record before us. I must conclude that the trial court's denial of Smith's *Batson* motion was clearly erroneous. Based on the existing law that this Court is bound to follow, Smith's conviction should be reversed, and the cause remanded for a new trial.

Therefore, I dissent.

IN THE SUPREME COURT OF ALABAMA

June 28, 2002

1011228

Ex parte Willie B. Smith, III. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Willie B. Smith, III v. State of Alabama) (Jefferson Circuit Court: CC-92-1289; Criminal Appeals : CR-91-1975).

CERTIFICATE OF JUDGMENT

Writ Denied

The above cause having been duly submitted, IT IS CONSIDERED AND ORDERED that the petition for writ of certiorari is denied.

Writ Denied - No Opinion

HOUSTON, J. - Moore, C.J., and See, Lyons, Brown, Johnstone, Harwood, Woodall, and Stuart, JJ., concur.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this *28th* **day of** *June,* *2002*

Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

/rb

THE STATE OF ALABAMA— JUDICIAL DEPARTMENT
THE COURT OF CRIMINAL APPEALS

CERTIFICATE OF JUDGMENT

Criminal Appeals Case **CR-91-1975**

Willie B. Smith, III v. State of Alabama (Appeal from Jefferson Circuit Court: CC92-1289).

Whereas, the appeal in the above cause having been duly submitted and considered, it is now hereby certified that on the 1st day of February, 2002, the judgment of the court below was affirmed.

Witness, Lane W. Mann, Clerk,
Court of Criminal Appeals, this
28th day of June, 2002

Clerk
Court of Criminal Appeals
State of Alabama

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
vs.	)	**CASE NO: CC 92-01289**
	)	**CR 91-01975**
WILLIE B. SMITH, III	)	
	)	

ORDER ON REMAND

This cause was remanded by the Court of Criminal Appeals directing the undersigned to require the state prosecutor to state his reasons for striking females from the venire.

It is noted that from the court's minute entries made May 4, 1992 that the petit jury of fourteen consisted of seven women, five of whom actually deliberated upon excusal of the two female alternates.

Oral hearing on the remand proceedings was conducted August 21, 1997.

Defendant Smith was present with his counsel Kathryn Stanley and Ellen L. Wiesner.

Deputy D. A. Doug Davis was present with notes made contemporaneous with the jury selection proceedings.

Each female juror struck by the state is discussed below.

NO. 81 KAYLA GILCHRIST B/F:

Ms. Gilchrist was questioned in chambers at Tr. pg. 360-365 wherein Ms. Gilchrist expressed a definite bias for the defendant due to residual feelings that her uncle had been unjustly convicted of an assault type crime, serving in excess of a twenty year sentence.

Mr. Davis stated that Ms. Gilchrist was struck because of her stated bias for the Defendant Smith, moreover, that Ms. Gilchrist stated she did not want to sit on any case involving violence.

NO. 13 MELISSA BEATTY, W/F:

Ms. Beatty's in chambers voir dire is depicted at Tr. pg. 318 thru 324 wherein Ms. Beatty stated at Tr. pg. 320, 'I have to be honest, I do not think that even if I did think he was guilty, I don't think I could go for the death penalty. I have strong feelings about the death penalty.'

Additionally, Ms. Beatty stated that 'God is the only person that can do that' (impose the death penalty).

Mr. Davis stated with reference to Ms. Beatty that "she had strong feelings against the death penalty -- it wasn't to the point where she would be struck for cause ..."

NO. 155 KAREN MARLER, W/F:

During voir dire defense counsel was identifying those jurors who perform volunteer work and specifically those who taught Sunday School.

At Tr. pg. 301, Ms. Marler responded that she was a Sunday School Teacher and girl scout leader.

Mr. Davis stated that he struck Ms. Marler and other jurors who had strong church affiliations because of his fear that church oriented people (men and women) would be more receptive to a 'mercy' argument that other prospective jurors.

Mr. Davis projection that defense counsel would ask for mercy and cite Biblical passages was well founded as observed at Tr. pg. 1519 --

Ms. Peake: (Assistant to chief defense counsel Turberville) at Tr. pg. 1532.

> And I believe in God and I believe in the Bible and my religion, the Methodist Church, and many other religions, come out against the death penalty because the Christian philosophy is not revenge. The Christian philosophy is mercy and forgiveness.
>
> Jesus said, "Love your enemies. If somebody strikes you, turn the other cheek."

Mr. Turberville at Tr. pg. 1542 --

> Now, all of these people out here, they go to bed at night and they ask God to forgive them of their sins. And I guess we assume they are forgiven, if they are truthfully sorry. Don't know if they are going to heaven or not, I don't know if I am going to heaven, you don't know if you are going to heaven.
>
> But, ladies and gentlemen, there is going to be a judgment day for all of us. I can assure you of that, there is going to be a judgment day for all of us.

> And how are we going to ask God for mercy for all the bad things we have done, all the times we have sinned, all the times we have been greedy, all the times we have neglected the poor, the hungry and the sick, how are we going to ask God for mercy if we didn't give mercy?
>
> Mercy is so much higher a level than justice, so much higher level.
>
> You are going to have to ask for it some day. The Center Point crowd out here is going to have to ask for it some day. They're going to have to ask for mercy. And believe me, what we do with Willie Smith and the Willie Smiths of the world will be on that tally sheet. It will be there, ladies and gentlemen of the jury.
>
> You may die tonight, you may die tomorrow, you may die in a hundred years but you are going to die. You are going to be before God. There is going to be a judgment day. There is going to be a judgment day.

All parties knew going into voir dire that the litigation involved the senseless execution style killing of an innocent woman and that the evidence against Defendant Smith was iron tight and insurmountable.

See Order of the Court on Imposition of the Death Penalty for a summary of the evidences against defendant.

In other words the focus of the litigation concerned punishment.

The State was seeking the death penalty (the defendant having refused a life without parole offer) and it was reasonable to anticipate a mercy argument based on Biblical scripture from Mr. Turberville.

Additionally, what the undersigned termed defendant's 'luckless childhood and troubled adolescence occasioned in large part by an abusive father, economic deprivations... (Tr. pg. 19 of Sentencing Order) was forecasted by Mr. Davis to be developed through defense testimony at second stage.

Mr. Davis stated with reference to closely affiliated church members and with reference to journalist Roberts discussed below that he feared that these prospective jurors would be more susceptible to the troubled youth/adolescent argument.

Again, Mr. Davis' projections were proven to be on the mark.

See Ms. Peake's summation at Tr. pg. 1521 - 1525.

NO. 184 BETTY OGLETREE, B/F:

Ms. Ogletree's in camera commentary is observed at Tr. pg. 434-442 where Ms. Ogletree stated 'I don't believe in capital punishment.'

Mr. Davis recited that he struck Ms. Ogletree because of her opposition to capital punishment and noted as well that she had previously acquitted a defendant in a criminal trial (Tr. pg. 193).

NO. 189 BURNICE PATTERSON, B/F:

Individual voir dire of Ms. Patterson is recorded at Tr. pg. 398-410.

Ms. Patterson related that she had a nerve problem, was under a doctor's care, took prescribed anti depressants, had come a long way, did not want to risk a set back by having to endure a criminal trial entailing graphic/gruesome photos, felt she could not handle the stress and so on.

The court's effort to eliminate Ms. Patterson from the jury pool by agreement failed.

The Mr. Sheely denoted in the record is the psychologist furnished to the defense to aid the defense in jury selection.

Mr. Davis correctly recited Ms. Patterson's importunities not to be impaneled in the Smith case.

NO. 200 MARGARET PLYLER, W/F:

Ms. Plyler stated that she was Counselor of Ministry at a Methodist Church among her other volunteer activities (Tr. pg. 303).

Mr. Davis viewed Ms. Plyler as being susceptible to the mercy argument underpinned by Biblical references as stated above for Ms. Marler.

NO. 210 LOURDES RAMOS, HISPANIC:

Ms. Ramos stated that she was a student at UAB and single.

Mr. Davis cited Ms. Ramos' youth and inexperience, single status and the paucity of information gleaned from Ms. Ramos relative to other more experienced and articulate jurors as reasons for striking Ms. Ramos.

Mr. Davis correctly cites that the voir dire process was thorough and sifting and that only one other venire person, No. 192 Deborah Perry discussed below, failed to respond to any question posed by the court, the state or the defense.

NO. 216 CAROLANNE ROBERTS, W/F:

Mr. Davis noted that Ms. Roberts was a journalist with Southern Living Magazine and that he does not view male or female journalists as attractive jurors for the State, having experienced poor encounters with journalists in his capacity as a prosecutor.

Mr. Davis was concerned that the journalist credo of 'who, what, where and when' would work against him in the punishment phase of the litigation, that a journalist might be more sympathetic than another type juror to evocations for sympathy for the defendant.

NO. 192 DEBORAH PERRY, B/F:

Mr. Davis observed, as did the court during voir dire that Ms. Perry was perhaps sleeping and in any event was inattentive.

Mr. Davis reminded the undersigned that during the voir dire process he called the court's attention as well as defense counsel's attention to Ms. Perry's apparent disinterestedness in the proceedings.

NO. 102 JOANN HARKINS, W/F:

Mr. Davis stated that Ms. Harkins was struck because she had previously acquitted a defendant in a criminal case.

NO. 94 MS. H. E. GUTHRIE, W/F:

Ms. Guthrie related in chambers that she had been raped by a police officer (Tr. pg. 436-430).

Mr. Davis stated that the deceased in the case at bar was the sister of a police officer and that police officers were expected to testify -- that he was concerned about negative residual feelings the juror might hold against police officers.

NO. 150 DOROTHY LONG, W/F:

Ms. Long stated (Tr. pg. 149) among other things that she worked at church and was a good politician.

Mr. Davis' reasons for striking jurors with close church affiliations are referenced above.

NO. 45 LEIGH COSBY, W/F:

Ms. Cosby worked for a church kindergarten and was struck as were other closely affiliated church people for reasons stated above.

NO. 74 GLENDA FREEMAN, B/F:

Ms. Freeman stated that she knew the defense attorney and Mr. Davis (Tr. pg. 106). Further, that she was a student in Mr. Davis' class at law school (Tr. pg. 163) and also knew defense counsel from law school (Mr. Davis and defense counsel taught courses at Miles Law School at the time of trial).

Defense counsel at the time of trial defense counsel was projected to be Ms. Freeman's teacher in the upcoming academic year (Tr. pg. 248-252).

Mr. Davis stated that he was uncomfortable with Ms. Freeman because of her role as a third year law student, that the law courses that Ms. Freeman had taken are geared to the rights of the defendant.

In summary, based on the Court's observations of the voir dire proceedings, observation of the venire persons in the courtroom and in chambers and upon the proceedings conducted on remand the Court finds no juror was struck by the State for the reason that she was a female.

Finally, in light of some of the commentary by defense counsel during the Batson motion at trial and during the remand proceedings it is noted that the undersigned has known Mr. Doug Davis for many years, has presided over many trials wherein Mr. Davis prosecuted for the State.

Mr. Davis is certainly not a person prone to strike minorities denounced in the Batson case and its progeny.

In this writer's judgment, formed on the basis of extensive in court experience with Mr. Davis and close acquaintanceship with others that know him there is no person more equitable and just in the performance of his duties as deputy prosecutor than Mr. Davis.

DONE and ORDERED this 9th day of October, 1997.

James H. Hard
CIRCUIT JUDGE

JHH:hw

State of Alabama
vs.
Willie B. Smith, III

Case No: CC 92-01289

cc: Honorable Lane Mann
Clerk, Court of Criminal Appeals
300 Dexter Avenue
Montgomery, Alabama 36104

Ellen L. Wiesner
Equal Justice Initiative of Alabama
114 North Hull Street
Montgomery, Alabama 36104

Ms. Kathryn V. Stanley
P. O. Box 110192
Atlanta, Georgia 30311

Mr. Doug Davis, Esq.
Deputy District Attorney
L-01 Criminal Justice Center
801 North 21st Street
Birmingham, Alabama 35203

COOK, Justice.

WRIT DENIED.

ALMON, SHORES, and KENNEDY, JJ., concur.

SEE, J., concurs specially.

HOOPER, C.J., and MADDOX, J., dissent.

HOUSTON, J., recused.

SEE, Justice (concurring specially).

The State's petition for certiorari review fails to make a sufficient showing that the defendant Victor Keith Robinson waived his previously asserted right to counsel before making a statement to the police. *Michigan v. Jackson*, 475 U.S. 625, 106 S.Ct. 1404, 89 L.Ed.2d 631 (1986).

MADDOX, Justice (dissenting).

The Court of Criminal Appeals found that the defendant Victor Keith Robinson's confession to a robbery was given after he had indicated that he wanted an attorney and that the State failed to prove that the defendant initiated the contact that led to his confession.

I have examined the State's brief and the facts before this Court. I believe that the State is probably right in stating that all the evidence presented by the State relating to who made the initial contact after the defendant had said he wanted an attorney was hearsay but was not objected to, and that some of the evidence on that question was elicited by the defendant's counsel during his cross-examination of the police officer. The extracts from the record quoted in the State's brief suggest to me that the State is probably right in arguing that not only did defendant's counsel not object to the admission of the hearsay, but that defense counsel actually asked questions of the police officers that further elicited evidence indicating that the defendant made the initial contact. Although I realize that the defendant testified that he did not make the initial contact, it appears to me that testimony only presents a credibility issue—the question being whether the trial judge believed the testimony of the police officers, although it was hearsay that was not objected to, or whether he believed the defendant, who the officer said was read his rights again before he made his confession.

I would issue the writ in this case and examine the record and the legal issues. Consequently, I must dissent.

HOOPER, C.J., concurs.

Willie B. SMITH III

v.

STATE.

CR-91-1975.

Court of Criminal Appeals of Alabama.

Jan. 17, 1997.

Rehearing Denied March 21, 1997.

Certiorari Denied July 3, 1997
Alabama Supreme Court 1961068.

Defendant was convicted in the Jefferson Circuit Court, No. CC-92-1289, James H. Hard IV, J., of two counts of capital murder. Defendant appealed. The Court of Criminal Appeals, McMillan, J., held that defense counsel presented sufficient evidence to make prima facie showing of gender discrimination based on prosecutor's peremptory strikes against potential female jurors.

Reversed and remanded.

Taylor, P.J., filed a dissenting opinion.

Jury ⇐33(5.15)

Defense counsel presented sufficient evidence to make prima facie showing of gender discrimination based on prosecutor's peremptory strikes against potential female jurors; defense counsel noted number of strikes by prosecutor against females in relation to prosecutor's total strikes, prosecutor's pat-

tern in that he struck only females until his fourteenth strike, fact that strikes did not appear to be clearly based on thorough voir dire in that one juror was struck without having been asked any questions, and that prosecutor struck at least one female for reason that did not cause him to strike a male with same characteristic.

Michael W. Sanderson, Birmingham (appointed Feb. 25, 1993); and Kathryn V. Stanley, Montgomery (appearance entered May 10, 1993), for appellant.

Bill Pryor, atty. gen., and Cecil Brendle, Jr., asst. atty. gen., for appellee.

McMILLAN, Judge.

The appellant, Willie B. Smith III, was found guilty of two counts of capital murder, for committing an intentional murder during the course of a robbery and for committing an intentional murder in the course of a kidnapping, see § 13A–5–40(a)(2) and § 13A5–40(a)(1), *Code of Alabama* 1975, respectively. The jury thereafter returned an advisory verdict recommending that the appellant be sentenced to death, by a vote of 10 to 2. Following a sentencing hearing before the trial court, the appellant was sentenced to death by electrocution.

Because the appellant raises an issue that requires us to remand this cause to the trial court for a hearing, the remaining issues are pretermitted until a return is filed by the trial court with this court.

The appellant argues that the trial court erred in determining that he failed to make a prima facie showing of gender discrimination in the exercise of the prosecutor's preemptory challenges against potential jurors, as prohibited by *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994). The appellant argues that he made a prima facie showing of such discrimination and that the trial court should have required that the prosecutor come forward with gender-neutral reasons for his strikes.

The record reflects that, following the striking of the jury, defense counsel stated that he would request a hearing pursuant to *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The following then transpired outside the presence of the jury:

"THE COURT: [Defense counsel,] do you want to be heard, sir?

"[Defense Counsel]: Yes, if I may, Judge, on actually three matters. Number one, he used 14 of his 15 strikes to eliminate prospective jurors of the female gender. He did not strike anything but females until his fourteenth strike.

"I don't see any—you know, there's no recognizable difference between some of the women he struck and some of the men,—there's no basis for it other than the fact that he was trying to eliminate women from the jury. Also I want to talk about specifically number 210, which is a Hispanic, which would also be covered under Batson. This is the only Hispanic in the jury venire. Mr. Davis asked her absolutely no questions whatsoever. And struck her as his number seven strike. We feel like that is a clear *Batson* violation and she should be replaced on the jury. I don't know what he could have learned, as I say, he asked her no questions, none.

"192—the one that you indicated that he asked us to observe, I did observe. At the time I observed her she was not—did not appear to be inattentive. But, I also point out, in the event that in fact she did appear to be inattentive, Mr. T. G., Number 93, was almost asleep during all of the questions, unless he was asked a question. He was sitting right on the first row of the back row of benches, which is clear for someone to see. And he rubbed his eyes and his eyes were closed much of the time, his hands were on his face.

"THE COURT: You struck him, didn't you—

"[Defense Counsel]: I struck him way down the line, Judge.

"THE COURT: Okay.

"[Defense Counsel]: Number 93—

"THE COURT: Yes, tenth strike.

"[Defense Counsel]: He was my tenth strike, so there were nine strikes that the Honorable prosecutor had prior to getting

to him. You know, he appeared to be less alert than the black female. I think striking her was merely a ruse, her inattentiveness was a ruse to get rid of her.

"Also on the black female seated, Number 74. Your Honor, [the prosecutor] and I, it is a unique situation where he and I both basically have the same access to her, he has taught her in one or two courses out at Miles [School of Law]. I believe he has taught her in two courses.

[Prosecutor]: Two courses.

"[Defense Counsel]: Yes, sir. I am going to be teaching her. She indicated clearly it wouldn't influence her in any other way. There was no other reason to strike this young lady. She is articulate, she is alert, she didn't seem hostile to either side. I feel like she should also be replaced.

"If I could go back, Your Honor, the constitution of the State of Alabama, the equal protection clauses prohibit striking prospective jurors because of gender.

"THE COURT: Does that apply to you too or just the State? What is your argument on that? You struck 11 males, right?

[Defense Counsel]: Yes, sir. He struck, 14 out of 15 of his strikes were females. I believe our constitution is very clear, you cannot use race—I mean sex as a basis for eliminating jurors. And I believe that he has done that and I would ask that these women be put back on the jury, if he does not have gender-neutral reasons for striking each and every one of them. And I would ask you to query him on that.

"THE COURT: Well, I am going to respectfully decline to say that you have made a prima facie case of discriminatory striking, sir.

"[Prosecutor]: Thank you.

"THE COURT: Let's go.

"[Defense Counsel]: Let me finish. For the record, I thought you set the prima facie when you start asking—we have the white [sic] defendant—

"THE COURT: I was just giving the background, Dan.

"[Defense Counsel]: Yes, sir. Oh, I'm sorry—

"THE COURT: I'm sorry, I didn't mean to say that—

"[Defense Counsel]: No, no—

"THE COURT:—there was a prima facie case—

"[Defense Counsel]: We have a black defendant, we have a situation where the victim is white.

"THE COURT: That's right.

"[Defense Counsel]: We have a situation where a number of one, two, three, four, five blacks were struck, we had one Hispanic struck, which had no questions asked her by the prosecutor.

"We also bring to the Court's attention that this prosecutor's office has been reversed on many, many, many occasions for systematically excluding blacks.

"THE COURT: I don't agree with that, I really don't.

"[Defense Counsel]: Judge, I have reversed them myself—

"THE COURT: Many, many, many, many occasions?

"[Defense Counsel]: Many times.

"THE COURT: This is [prosecutor,] a very prominent black attorney—

"[Defense Counsel]: Yes, sir, I understand that, Judge.

"THE COURT: That I have worked with and you have too."

Thereafter, defense counsel made an objection based on alleged racial discrimination by the prosecutor in his peremptory strikes.[1]

"[Defense Counsel]: Yes, sir. But also this same attorney came out in the paper, was quoted as saying that prosecutors do not use their strikes to eliminate blacks. And we feel like at least a prima facie case has been made out.

"THE COURT: Well, I respectfully call your attention to the record, Ms. G., the

1. It should be noted that in attempting to establish a prima facie case of racial discrimination by the prosecutor in the preemptory challenges, defense counsel simply pointed out the number of strikes made by the prosecutor against blacks, and a vague claim of a history of prejudicial striking without citing any specific instances.

one that leans to the defendant; Ms. O., who has a problem with capital punishment. Ms. H., who is nervous and doesn't want to see the pictures, she's on whatever that stuff is—

". . . .

"THE COURT: And I have sat up here for 10 years and I know that—well, I don't want to say too much because you will say I am putting words in their mouths.

"[Defense Counsel]: Yes, sir.

"THE COURT: So I don't want to say anything else but other than to decline to say that you have made a prima facie case, [defense counsel].

"[Defense Counsel]: Even with the Hispanic, Judge and no—

"THE COURT: I am going to stand pat and say that you have not made out a prima facie case of discriminatory striking.

"[Defense Counsel]: We respectfully except.

"THE COURT: Yes, sir. Very good."

Thus, in making his objection that the prosecutor engaged in gender-based discrimination, defense counsel brought to the trial court's attention the number of strikes by the prosecutor against females in relation to the prosecutor's total strikes; the prosecutor's pattern in that he struck only females until his fourteenth strike; the fact that the strikes did not appear to be clearly based on a thorough voir dire in that juror no. 210 was struck without having been asked any questions; that the prosecutor struck at least one female for a reason that did not cause him to strike a male with the same characteristic, specifically inattentiveness; and that he struck a female who indicated that she knew the prosecutor, but also indicated that she knew defense counsel, further stating that her acquaintance with both the prosecutor and the defense counsel would not interfere with her consideration of the evidence in the case.[2] This evidence was sufficient to present a prima facie showing of gender-based discrimination based on the striking of females from the venire. *J.E.B. v. Alabama*, 511 U.S. 127, 114 S.Ct. 1419, 128 L.Ed.2d 89 (1994).

This case is therefore remanded to the trial court with orders that a hearing be held and that the prosecutor should come forward with reasons for his strikes of females. The trial court should examine the reasons given by the prosecutor to determine whether the prosecutor exercised any of his strikes in a discriminatory manner against females. The trial court is directed to file a return to this Court within 90 days of the date of this opinion.

REMANDED WITH INSTRUCTIONS.

All judges concur except TAYLOR, P.J., who dissents with opinion.

TAYLOR, Presiding Judge, dissenting.

I dissent from the majority's remand of this case. The majority holds that the judge erred in finding that no prima facie case of gender-based discrimination was established. See *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). The majority, reversing the trial judge's ruling, concludes that a prima facie case of discrimination was established. I dissent because I believe that the majority fails to give the proper deference to the trial judge's ruling.

As this court stated in *Mitchell v. State*, 579 So.2d 45, 50 (Ala.Cr.App.1991):

" 'Since the trial judge's findings . . . largely will turn on evaluation of credibility, a reviewing court ordinarily should give those findings great deference.' *Batson*, 476 U.S. at 98 n. 21, 106 S.Ct. at 1724 n. 21. *The trial judge 'plays a "pivotal role" in determining whether a prima facie case has been made under* Batson *because he or she observes the voir dire procedure firsthand and is in a far better position than we to assess the prosecutor's decisions.'* [*U.S. v.*] *Young–Bey*, 893 F.2d [178] at 180–81 [(8th Cir.1990)]. An appellate court may reverse the trial court's determination that the prosecutor's peremptory challenges were not motivated by intentional discrimination only if that determi-

2. These latter two reasons are not included as a finding that the reasons for these strikes fail to be gender-neutral, but rather as part of an examination of the total circumstances surrounding the establishment of a prima facie case.

nation is 'clearly erroneous'. *Ex parte Branch*, 526 So.2d [609] at 625 [(Ala. 1987)]. Here, this Court cannot find any *clear* abuse of discretion."

(First emphasis added; second emphasis original.)

I believe that the trial judge's ruling that no prima facie case of discrimination was established was not "clearly erroneous." For that reason, I respectfully dissent. I believe this case should be affirmed.

Ardis TEMMIS

v.

STATE.

CR–95–1281.

Court of Criminal Appeals of Alabama.

Jan. 17, 1997.

Following conviction for murder, defendant appealed, and the Court of Criminal Appeals, 665 So.2d 951, remanded with directions. After conviction was affirmed, 665 So.2d 953, defendant petitioned for postconviction relief. The Circuit Court, Houston County, No. CC–92–41.60, Charles L. Little, J., denied relief following evidentiary hearing. Defendant appealed. The Court of Criminal Appeals, Taylor, P.J., held that postconviction court failed to make specific findings of fact relating to each issue of material fact presented at evidentiary hearing.

Remanded with directions.

Criminal Law ⇐998(18), 1181.5(2)

Postconviction court failed to make specific findings of fact relating to each issue of material fact presented at evidentiary hearing, thus requiring remand. Rules Crim. Proc., Rule 32.9(d).

William Terry Bullard, Jr., Dothan, for appellant.

Bill Pryor, atty. gen., and Jean Therkelsen, asst. atty. gen., for appellee.

TAYLOR, Presiding Judge.

The appellant, Ardis Temmis, appeals the denial of his petition for post-conviction relief filed pursuant to Rule 32, Ala.Cr.Crim.P. The petition attacks the appellant's 1994 conviction for murder on the ground that he received ineffective assistance from both his trial and appellate counsel. The circuit court denied the appellant's Rule 32 petition following an evidentiary hearing; the court found that the appellant's contentions regarding the issue of ineffective assistance counsel were not supported by the record. However, the trial court issued no written findings of fact.

The State, in its brief to this court, cites Rule 32.9(d), Ala.R.Crim.P., and requests that we remand this cause to the circuit court so that the trial judge can make formal, written findings as to each material issue of fact presented at the evidentiary hearing. Rule 32.9(a) states that if the trial judge does not dismiss the petition, the petitioner shall be entitled to an evidentiary hearing to determine the disputed issue of material fact regarding the contentions set out in the Rule 32 petition. Following the evidentiary hearing, the trial judge must "make specific findings of fact relating to each issue of material fact presented." Rule 32.9(d). See *Jones v. State*, [Ms. CR–95–45, July 3, 1996] — So.2d —— (Ala.Cr.App.1996), and *Johnson v. State*, 677 So.2d 1280 (Ala.Cr.App.1996).

Because the trial judge, in this case, failed to make such findings following the evidentiary hearing, we are required by Rule 32.9(d) to remand this cause to the Circuit Court for Houston County for proceedings not inconsistent with this opinion. Due return should be filed in this court no later than 42 days from the date of this opinion.

IN THE CIRCUIT COURT OF THE
TENTH JUDICIAL CIRCUIT IN AND
FOR JEFFERSON COUNTY, ALABAMA
CRIMINAL DIVISION

STATE OF ALABAMA,	)	
PLAINTIFF,	)	
vs.	)	CASE NUMBER:
WILLIE B.	)	CC 92-1289
SMITH, III,	)	
DEFENDANT.	)	

'93 JAN 12 PM 1 53

C A P T I O N

ARRAIGNMENT PROCEEDINGS

THE ABOVE-ENTITLED CAUSE came on to be heard before the Honorable James H. Hard, IV, at the Jefferson County Courthouse, Birmingham, Alabama, commencing on the 26th day of March, 1992, beginning at or about 3:00 p.m. when the following proceedings were had and done:

REPORTED BY WALTER ENOCH

A P P E A R A N C E S

Mr. Doug Davis, Deputy District Attorney, Jefferson County Courthouse, Birmingham, Alabama, appearing for the State of Alabama.

Mr. Dan Turberville and Ms. Amy Peak, Suite 210 Garvin Building, 3900 Montclair Road, Birmingham, Alabama, appearing for the Defendant.

P R O C E E D I N G S

THE COURT: Mr. Court Reporter this is going to be the State versus Lorenzo Smith and Willie B. Smith, III and Angelica Willis, these three defendants charged with capital murder relative to the deceased Sharma Ruth Johnson.

These three defendants are in open court, they are all in custody, the three court appointed lawyers are present and we will proceed now with the formal arraignment. Who do you have first, Mr. Davis?

MR. DAVIS: Willie B.

I N D E X

have seated on the jury that retires, apparently you have got one, two, three, four -- if everybody stays healthy all week as is, you'll have five people on the twelve. One, two, three, four, five, six, six from eleven is five, five deliberating jurors on the question of guilt. That's our background, is that right, gentlemen?

MR. DAVIS: Yes, sir.

MR. TURBERVILLE: Yes, sir.

THE COURT: Mr. Turberville, do you want to be heard, sir.

MR. TURBERVILLE: Yes, if I may, Judge, on

actually three matters. Number one, he used fourteen of his fifteen strikes to eliminate prospective jurors of the female gender. He did not strike anything but females until his fourteenth strike.

I don't see any -- you know, there's no recognizable difference between some of the women he struck and some of the men, there's no basis for it other than the fact that he was trying to eliminate women from the jury. Also I want to talk about specifically number 210, which is a

hispanic, which would also be covered under the Batson. This is the only hispanic in the jury venire, Mr. Davis asked her absolutely no questions whatsoever. And struck her as his number seven strike. We feel like that is a clear Batson violation and she should be replaced on the jury. I don't know what he could have learned, as I say, he asked her no questions, none.

192, the one that you indicated that he asked us to observe, I did observe. At the time I observed her she

was not -- did not appear to be inattentive. But, I also point out, in the event that in fact she did appear to be inattentive, Mr. Thomas Gunter, Number 93, was almost asleep during all of the questions, unless he was asked a question. He was sitting right on the first row of the back row of benches, which is clear for someone to see. And he rubbed his eyes and his eyes were closed much of the time, his hands were on his face.

THE COURT: You struck him, didn't you --

MR. TURBERVILLE: I struck him way down the line, Judge.

THE COURT: Okay.

MR. TURBERVILLE: Number 93 --

THE COURT: Yes, tenth strike.

MR. TURBERVILLE: He was my tenth strike, so there were nine strikes that the Honorable prosecutor had prior to getting to him. You know, he appeared to be less alert than the black female. I think striking her was merely a ruse, her inattentiveness was a ruse to get rid of her.

Also on the black female seated, Number

74. Your Honor, Doug and I, it is a unique situation where he and I both basically have the same access to her, he has taught her in one or two courses out at Miles. I believe he has taught her in two courses.

MR. DAVIS: Two courses.

MR. TURBERVILLE: Yes, sir. I am going to be teaching her. She indicated clearly it wouldn't influence her in any other way. There was no other reason to strike this young lady. She is articulate, she is alert, she didn't seem hostile to either side.

I feel like she should also be replaced.

If I could go back, Your Honor, the constitution of the State of Alabama, the equal protection clauses prohibit striking prospective jurors because of gender.

THE COURT: Does that apply to you too or just the State? What is your argument on that? You struck eleven males, right?

MR. TURBERVILLE: Yes, sir. He struck fourteen out of fifteen of his strikes were females. I believe our constitution is very

clear, you cannot use race -- I mean sex as a basis for eliminating jurors. And I believe that he has done that and I would ask that these women be put back on the jury, if he does not have gender neutral reasons for striking each and every one of them. And I would ask you to query him on that.

THE COURT: Well, I am going to respectfully decline to say that you have made a prima facia case of discriminatory striking, sir.

MR. DAVIS: Thank you.

THE COURT: Let's go.

MR. TURBERVILLE: Let me

finish. For the record, I thought you set the prima facia when you start asking -- we have the white (sic) defendant --

THE COURT: I was just giving the background, Dan.

MR. TURBERVILLE: Yes, sir. Oh, I'm sorry --

THE COURT: I'm sorry, I didn't mean to say that --

MR. TURBERVILLE: No, no --

THE COURT: -- there was a prima facia case --

MR. TURBERVILLE: We have a black defendant, we have a situation where the victim is white.

THE COURT: That's right.

MR. TURBERVILLE: We have a situation where a number of one, two, three, four, five blacks were struck, we had one hispanic struck, which had no questions asked her by the prosecutor.

We also bring to the Court's attention that this prosecutor's office has been reversed on many, many, many occasions for systematically excluding blacks.

THE COURT: I don't agree with that, I really don't.

MR. TURBERVILLE: Judge, I have reversed them myself --

THE COURT: Many, many, many, many, many occasions?

MR. TURBERVILLE: Many times.

THE COURT: This is Doug Davis, a very prominent black attorney --

MR. TURBERVILLE: Yes, sir, I understand that, Judge.

THE COURT: That I have worked with and you have too.

MR. TURBERVILLE: Yes, sir. But also this same attorney came out in the paper was quoted as saying that prosecutors do not use their strikes to eliminate blacks. And we feel like at least a prima facia case has

been made out.

THE COURT: Well, I respectfully call your attention to the record, Ms. Gilchrist, the one that leans to the defendant; Ms. Ogletree who has a problem with capital punishment. Ms. Henderson who is nervous and doesn't want to see the pictures, she's on whatever that stuff is --

DR. SHEALY: Sloft.

THE COURT: And I have sat up here for ten years and I know that -- well, I don't want to say too much because you will say I am

putting words in their mouths.

MR. TURBERVILLE: Yes, sir.

THE COURT: So I don't want to say anything else but other than to decline to say that you have made a prima facia case, Dan.

MR. TURBERVILLE: Even with the hispanic, Judge and no --

THE COURT: I am going to stand pat and say that you have not made out a prima facia case of discriminatory striking.

MR. TURBERVILLE: We respectfully except.

THE COURT: Yes, sir. Very good.

IN THE CIRCUIT COURT OF JEFFERSON COUNTY, ALABAMA
TENTH JUDICIAL CIRCUIT
CRIMINAL DIVISION

STATE OF ALABAMA	*	
VS.	*	CASE NO. CC92-1289
WILLIE B. SMITH	*	

ORDER OF THE COURT ON IMPOSITION OF THE DEATH PENALTY

Defendant Smith was charged in a two count indictment with the capital murder of Sharma Ruth Johnson, count I alleging murder during a robbery in the first degree per §13A-5-40(2), count II alleging murder during a kidnapping in the first degree per §13A-5-40(1).

Defendant refused a life without parole offer tendered under auspices of §13A-5-42; on May 4, 1992 a petit jury was duly impaneled and sworn as required by law, after hearing the evidence and the court's charge as to the applicable law on May 7, 1992 the jury found the defendant guilty of both counts of capital murder.

Second stage proceedings were conducted beginning May 7, 1992, no additional evidence adduced by state; defense witnesses consisted of mother, neighbor, friend and psychologist Allen D. Blotcky. Defendant did not testify nor had defendant testified at guilt stage.

The jury was charged on §13A-5-49(4) re aggravation and §13A-5-51(1) (2) (4) (5) (6) (7) and §13A-5-52 re mitigation.

The jury deliberated concerning punishment for an hour or so before retiring to the hotel for the evening. Jury deliberations resumed 9:00 a.m. on May 8, 1992, the jury reaching a ten for death two for life without parole advisory verdict at about 12:30 p.m.

State's counsel did not attempt to emotionally influence the jury with passion, prejudice or other artifices in arriving at their advisory verdict.

The trial record abundantly supports the court's finding that the jury's advisory verdict was not imposed under the influence of passion, prejudice or any arbitrary factor.

Third stage sentencing was conducted July 17, 1992, the presentence report and juror Barnett's letter wherein Mr. Barnett states his misgivings in having voted for death were made a part of the record.

Brother to the deceased testified for state; sister and mother of defendant testified as did Ms. Lucia Penland, Executive Director of the Alabama Prison Project. Defendant did not testify or choose to speak before pronouncement of sentence.

FINDINGS OF FACT FROM THE TRIAL JURY

Defendant is a black male, age 22 at the time of trial, charged in an execution style shotgun slaying of Sharma Ruth Johnson, a 22 year old white female abducted at gun point from a automatic teller site at a local bank.

State's prosecutor, Doug Davis, is a black man currently specializing in the prosecution of homicide cases, the defendant was represented by court appointed counsel, Dan Turberville who has had extensive experience in defending capital cases. Co-counsel was appointed to assist Mr. Turberville.

Eleven of the forty two 'net' venire were black, the State utilizing four of fourteen peremptory strikes to remove blacks. The State's designated alternate denoted by their fifteenth strike was black.

The defense designated a black female as an alternate but otherwise struck all whites.

Neither alternate was called upon to deliberate thus the deliberating jury of twelve was comprised of seven whites and five blacks, five of the deliberating twelve were female.

A Batson motion was made in chambers, court ruling no prima facie showing of discriminatory striking was made by defendant; the reasons for the strikes of black venire persons being apparent from the dialogue with the respective jurors and the court's observation of the voir dire process. Additionally the State was not required to explain allegedly gender based strikes.

EVIDENCE

Twenty-five witnesses testified for the State.

Angelica Willis, also indicted for the capital murder of Ms. Johnson, testified in exchange for a plea to

the lesser offense of murder and a twenty-five year sentence. Ms. Willis, age 17 at the time of the offense, stated that she was living with defendant Smith in October, 1991, that she and defendant left their apartment on foot at about midnight of October 26th to look for defendant's brother Lorenzo, were enroute to Pizza Hut and observed Ms. Johnson seated in her car at a First Alabama Right Place automatic teller machine on Parkway East. Ms. Willis states that defendant Smith told her to approach the car and 'ask the lady where Krystals is', that she complied by going to the passenger side of the car, made the inquiry, that Ms. Johnson said she did not know the location of Krystals, that the defendant approached the car, pulled out a sawed off shotgun, inserting the gun partly in the window and repeatedly demanded that the victim get out of the car; that Ms. Johnson got out of the car and was placed in the car trunk, that defendant drives the car some distance to Huffman, returns to the point of abduction at the bank and locates Ms. Johnson's bank card on the ground.

The victim is made to call out her secret code number from the trunk of the car and the approximate amount of money she had in her account, enabling Willis at defendant's instruction to receive some $80.00 from the automatic teller machine.

Unknown to defendant Smith the bank video camera is taking his photograph while he is seated in the car directing Willis' activities. The time of day depicted in

the photo frame is Sunday, October 27, 1991, 1:25 a.m.

The film runs for about four minutes depicting defendant's face and special wearing apparel, Los Angeles Raiders cap, epaulets on shoulders of coat.

The witness describes how defendant Smith embarked again driving victim's car with victim in the trunk and Willis in the front seat, the purchase of some gas at a Texaco station and locating Lorenzo at a shopping center in Huffman.

The witness describes Lorenzo getting into the car and upon learning that the owner of the car is a female locked in the trunk taunts the victim with sexual overtures, i.e. "do you want to suck my _____".

The defendant and Willis manage to get Lorenzo to quiet down, a phone call is made to a Michael Wilson who is not in, witness then describes the trip to Zion Memorial Cemetery.

Willis states that Smith said "I'm going to have to kill her - - - she'll call the police," Willis states that she (Willis) protested but that Smith persisted that he would have to kill Ms. Johnson; that Smith directed Lorenzo and Willis to get away from the trunk in case the woman might jump out at them, that he proceeded to open the trunk, remarking to the victim "I'm going to have to kill you", that the victim promised that she would not tell the authorities, that Smith raises up the gun and she hears the report of the shotgun.

Witness describes Lorenzo as stating "Willie had shot her in the head."

Next the threesome drive to north Roebuck and abandon the vehicle with Ms. Johnson's remains in the trunk. The next day Willis states that defendant Smith confided in her that he had gone back and burned the car to remove his fingerprints.

Germane Norman testified that in early November she heard the defendant on the phone describing how he had 'killed a white woman at the cemetery, had ridden around in her car and later burned the car.'

The witness further describes defendant as saying that he was going to leave town.

Latonya Roshell described how she met the defendant in November when defendant and Michael Wilson moved into her place; that Wilson stated to her that Willie needed a place to stay; that Smith stated that he had 'got a white woman and shot her - - - blowed her brains out - - - and got some money from her.'

Roshell is a Hoover Police Department informant and upon confirming through News reports that Smith was telling the truth she called her contact at Hoover Police Department. The Hoover Police Department gets Birmingham Police Department involved and Ms. Roshell agrees to be 'wired' with a body mike.

Ms. Roshell, wearing a body mike and monitored by the police, engages in a dialogue with defendant Smith and

though there is static and interference on the tape from airplanes, passing cars, radios, etc., defendant Smith is clearly heard to make a number of inculpatory statements.

Redacted or 'sanitized' tapes were played to the jury and the jury was provided a redacted transcript of the dialogue. Some of the actual dialogue between Roshell and Smith at tape #1 side B beginning at page 4 of the transcript follows:

Smith: "Now, now that's the only way he can help me, but as far as giving me some money, but it ain't never came down to it, really, really, really boil down to it, where I just have to go on and get out of town.

Roshell: Even Jermaine was trying to get money from folks. She said me and Willie had our differences but I don't want to see him get fucked up over no bullshit like this, but ah what I'm saying, they followed ya'll to the apartment.

Smith: Yeah.

Roshell: What I'm saying is this thing fucked up.

Smith: Yeah, it is fucked up boy, you know like I said earlier, it don't really matter to me.

Roshell: What I like to know, I mean, do you, I mean you you can't trust everybody.

Smith: I can't trust everbody, only my, only person knows my brother, my brother he lives my brother worried about him, you understand?

Roshell: What he was with you?

Smith: Yeah, he was with me, my brother I ain't worried about him.

Roshell: Oh.

Smith: I ain't worried about him. And, and my cousin.

Roshell: Your cousin was with you?

Smith: Nah, not my cousin, but, he's my cousin, the one

that went the next day when we burnt up the car, but I ain't worried about him. Because he helped me burn up that bitch, so my kin only know.

Roshell: That's why you, you didn't want your fingerprints on it.

Smith: Yeah, yeah.

Roshell: But you ain't been to jail for no damn murder have you? What makes you, make you, . . .I/A. . .if you ain't been to jail for murder. Like you running scared?

Smith: Right now, I ain't, I'm not on the run. I ain't on the run right now. What I was trying to do, I was trying to get my things away from Roebuck, period. You see what I'm saying, just in case, these white folks don't hardly like no black folks running there anyway. I walked through there with my gun, I had my hand on my gun like this and just in case they say, boom, and there he go, that is the one, you see what I'm saying? They going put a check on him. You see I don't want, I don't want to around all that, see cause that's why I said I'd get away from the house for a couple of weeks, couple of months something like that there, then my face wouldn't be seen from all these cars out in the clear. So you don't like that idea?

Smith: ...I/A...(road traffic)

(interference inside store, Pac Man machine.) Unknown males talking in store.

Roshell: ...I/A...I was thinking about this all last night I was like, I was just thinking. I don't know. I just thought like my nephew, he got shot at the Gallant Men, Rigth "sic", the dude that he, they was shooting each other for a fifth of...I/A... but he killed the dude, but that still bother Greg. Even though it was self defense. Like you see, I can imagine how you feel. You know...I/A.. one hundred dollars?

Smith: One hundred dollars . . .I/A . . . her brother was the police.

Roshell: So what's the thing, how did you find out her brother was the police?

Smith: Cause when I got in her car, I looked at the pictures, she had her brother sitting right there. It said Johnson, his name was Officer Johnson and

her name was Sharma Johnson, she got pictures right there.

Roshell: You remember her name and shit?

Smith: Yeah, I remember her whole name.

Roshell: How'd you kill her? Did you beat her to death or what?

Smith: All I did, all I did was, uh, I took her to the cemetery.

Roshell: And then you killed her in the cemetery?

Smith: I killed her in the cemetery right in Zion City. It's probably about 12 blocks, nawh, about 14 blocks from my house.

Roshell: From your house?

Smith: Yeah, about 14, about 15, 16 blocks from my house . . .I/A . . .(road noise).

Roshell: I don't know where you stay, so.

Smith: Yeah, anyway it's a good ways from my house, . . .I/A . . . (road noise).

Roshell: What you say, did she know you were going to kill her?

Smith: She didn't know. She just said here you can take the car. I was acting like this here. I was thinking don't shoot, don't do it. Her brother a police, no, if I let you go you going to fuck me up.

Roshell: Then what she say.

Smith: She said, no I'm not, I promise (mimicking a female voice). I said you a liar, boom, then shot her in the head with that gun.

Roshell: You shot her in the head with that gun in my house. That gun don't look like it would shoot no goddamn body. You shot her with that Willie, damn! I was looking at that rusty motherfucker a few minutes ago.

Smith: I just fired it, I just . . .I/A . . .

Roshell: Was her brains blowed all the way?

Smith: Like this here, her eye, everything just hung out. Ah, Ah her whole eye was just, just fell out.

Roshell: When she saw it, what'd you did?

Smith: She said, she said, no I ain't, like that, she said that. I touched her head, I said you're a motherfucking liar, Boom! And all this and then he slapped her, then we stopped, looked around, put the sawed off in my pocket, and I had my coat like this in case I saw some cars. I could just throw that bitch, like that there. Hey, where are we going?

Roshell: Don't ask me, I'm just following your ass.

Smith: Like that there, and then I thought somebody saw me back there, I waited for a day. I said if nobody find that car today, that mean ain't too much looking for her. So, what I do, I'll go round there and burn that bitch up, get my fingerprints off of it. So, that's what I did. I burned that bitch slap off, I burned that bitch so bad that the car seat, you know that little . . .I/A. . .part.

Roshell: Uh huh

Smith: That the iron part showing and all the steel in the wheel.

Roshell: Was she burnt up in it too?

Smith: Nawh, the trunk didn't burn up. Just the whole inside.

Roshell: Oh, just the inside of the car.

Smith: I threw the keys away in the . . .I/A. . .and I wiped the car off with some gas, you understand what I'm saying? . . .I/A. . .

Roshell: Damn. So what you think, your brother going to L.A. with you?

Smith: My brother ain't got to go L.A.

Roshell: Oh, he was with you, but he

Smith: He, my brother ain't got shit on here

Roshell: Oh, alright

Smith: He ain't got nothing, no, no ...I/A...(road noise)

Roshell: What I was saying we gonna have to some money for both of ya'll then.

Smith: No, naw, he, he, he's safe. It's me you
Smith: understand ...I/A...(airplane)"

There was no evidence of a statement by defendant after defendant was arrested.

Suffice it to say that the criminating force of the whole evidence was overwhelming. The testimony of the witnesses summarized above as corroborated by the defendant's own recorded statements to Ms. Roshell, by other witnesses such as Michael Wilson who testified about defendant's confessory statements, Maurice Leonard concerning jewelry worn by the defendant as depicted in the bank photos and by the abundant physical evidence.

The defendant's case at the guilt stage consisted of trying to impeach Angelica Willis with defendant's mother Clara Smith, who testified that she and her son had tried to evict Willis, that Willis had never expressed fear of defendant Smith, moreover, Mrs. Smith denied hearing her son talk about the killing on the phone.

Defense also recalled detective Corvin for a few brief questions.

No other witnesses were called by the defense, no rebuttal witnesses were called by the State.

After arguments and the court's charge the defense excepted to court's charge on reasonable doubt and failure to charge on lessor offenses.

It is noted that there was no evidence whatsoever re intoxication.

The jury deliberated about two hours before announcing that unanimous verdicts had been reached. Verdict was returned at approximately 3:37 p.m.

SECOND STAGE

Defendant Smith was examined by C.J. Rosencrans, Phd, Clinical Professor of Psychiatry and certified Forensic Examiner. Dr. Rosencrans' findings were orally communicated by the undersigned to counsel on May 1, 1992, written findings consisting of cover letter and four typed pages were given to counsel on May 4, 1992.

Dr. Rosencrans stated in his findings that "the defendant is fully capable of assisting his attorney in his own defense and of cooperatively interacting with the court at this time". Also, Dr. Rosencrans stated, "It is my opinion that defendant was not mentally ill nor suffering from any other discernible psychiatric nor psychologic disturbance at the time of the offense". Dr. Rosencrans' findings were not disclosed to the jury nor did he testify.

Alan D. Blotcky, Phd. was retained by the defense at State expense to evaluate the defendant. Dr. Blotcky testified in front of the jury at second stage, stating that defendant tested to have a verbal I.Q. of 75, was borderline between mild retardation and low average intelligence, that defendant's personality tests indicated the defendant was distressed and depressed, had a paranoid view of the world,

was a good candidate for rehabilitation, knew right from wrong, was not suffering from any psychosis; further, that defendant reported previous cocaine abuse that would impair his judgment, reported a pill overdose in effort to commit suicide, had suffered at the hands of an abusive father who mistreated defendant and defendant's mother.

Defendant's mother, Clara Smith testified at second stage highlighting the abuse and neglect visited upon the family by the father; defendant's godmother, Barbara Grooms, echoed the sentiments expressed re the abusive father; defendant's fiancee, Christine Johnson, testified about defendant's drug overdose approximately one year preceding her testimony.

No additional evidence was adduced at second stage by the State other than adopting by reference the pertinent evidence presented during the guilt stage per §13A-5-45(c).

The jury was charged at defendant's request on §13A-5-51(1)(2)(4)(5)(6)(7) and §13A-5-52 re mitigation and §13A-5-49(4) re aggravation.

The jury deliberated a total of about four and one-half hours over the course of two days before reaching the ten to two vote for death.

THIRD STAGE

At third stage, as stated previously the presentence report and the juror's letter referenced above were received into evidence.

State's witness at third stage was defendant's

brother, Scott Johnson, who requested that the death penalty be imposed.

On behalf of the defendant the court recalled Ms. Grooms testimony from second stage and all the other evidence adduced at second stage.

Ms. Latrenda Smith, defendant's sister, testified about the scarcity of food and clothing in the home during defendant's childhood and adolescence, that the defendant was the 'man of the house' at an early age, that he looked after the family as best he could in light of an abusive and absent father.

Defendant's mother testified concerning her husband's abuse towards her and the children, that she called the police out to the house many times, that the defendant wanted to please her to make up to her for the abuse she had suffered at the hands of her husband.

Lucia Penland, Executive Director of the Alabama Prison Project testified that the death penalty is no deterrent to crime, that the race of the victim skews proportionality in the imposition of the death penalty, that if the victim is black there is less likelihood of a sentence of death.

Pursuant to §13A-5-47(d) the court makes the following findings concerning aggravating and mitigating circumstances.

13A-5-49. Aggravating Circumstances

1) The capital offense was committed by a person under sentence of imprisonment.

Does not exist.

2) The defendant was previously convicted of another capital offense or a felony involving the use or threat of violence to the person.

Does not exist.

3) The defendant knowingly created a great risk of death to many persons;

Does not exist.

4) The capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, rape, robbery, burglary or kidnapping;

Does exist as evidenced by the jury's finding that the deceased was murdered during a first degree robbery (theft component supplied by unlawful taking of car and money) and during a first degree kidnapping (abduction supplied by secreting victim into trunk of car). Jury's unanimous findings with reference to the existence of these aggravating factors is uncontradicted by the evidence; defendant's own admissions, testimony of co-defendant Willis and other compelling evidences lead to inescapable conclusion that defendant robbed and kidnapped victim prior to the execution style killing.

5) The capital offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody;

Does not exist.

6) The capital offense was committed for pecuniary gain;

Does not exist.

7) The capital offense was committed to disrupt or hinder the lawful exercise of any governmental

function or the enforcement of laws; or

Does not exist.

8) The capital offense was especially heinous, atrocious or cruel compared to other capital offenses.

Does not exist.

13A-5-51. Mitigating Circumstances - Generally

1) The defendant has no significant history of prior criminal activity;

Does exist. Minimal prior contact with law enforcement agencies is gleaned from a records check, a drug possession case dismissed; defendant admits to a misdemeanor trespass case for which he paid a fine.

2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance;

Does not exist. No evidence adduced at trial nor at the second stage in front of the jury nor by way of evidence adduced at third stage, nor the reports of either psychologist, Dr. Rosecrans or Dr. Blotcky suggest that the defendant acted under the influence of a mental or emotional disturbance, much less extreme mental or emotional disturbance.

3) The victim was a participant in the defendant's conduct or consented to it;

Does not apply.

4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor;

Does not apply.

It is noted that co-defendant Angelica Willis, who

testified for the State, plead guilty to murder as embraced in count I of the indictment on May 21, 1992 and was sentenced to 25 years, that co-defendant Lorenzo Smith did not testify, plead guilty to murder as embraced in count II of the indictment on May 21, 1992 and was sentenced to 23 years. No evidence adduced at trial nor at any collateral proceedings relative to the disposition of the two co-defendant's cases supports the existence of this mitigating circumstance.

5) The defendant acted under extreme duress or under the substantial domination of another person;

Does not apply.

6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired;

Does not apply.

Again, no evidence presented at any stage of the proceedings suggests that the defendant's capacity to appreciate the criminality of his actions or to conform his conduct to the requirements of the law was substantially impaired. Of course, in connection with this statutory circumstance one should recall Dr. Blotcky's testimony at second stage that defendant tested at verbal I.Q. of 75, borderline between mild retardation and low average intelligence; that defendant's reported substance abuse problems (cocaine and alcohol) would, and did, in the doctor's opinion impair the defendant's judgment.

7) The age of the defendant at the time of the crime.

Does apply. Defendant was born October 2, 1969, thus was 22 years and some 25 days old at the time of the offense.

13A-5-52. Same - Inclusion of defendant's character, record, etc.

In addition to the mitigating circumstances specified in section 13A-5-51, mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without parole instead of death, and any other relevant mitigating circumstance which the defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

Does exist.

We know from Mr. Mixon's comments in the Personal/ Social History of the presentence report that the defendant grew up in what the defendant termed a 'poor environment', not enough food to eat or clothes to wear, fighting with father at an early age, the father's observed beating of the mother, the police called to the home numerous times, parents divorced when defendant was 17 or 18; defendant further related to Mr. Mixon his adolescent problems, no money for drug rehabilitation, states he had a $200 to $300 a day habit; tells Dr. Rosecrans he was enrolled in the TASC program, kicked out of Carver High School in the 11th grade for fighting, kicked out of Job Corps for fighting, fired from Coca Cola for drug abuse in 1986.

Defendant's mother, Clara Smith, defendant's godmother, Barbara Grooms, defendant's fiancee, Christine Johnson and defendant's sister, Latrenda Smith all confirm that the defendant was raised in unfortunate circumstances,

childhood and adolescence marked by an abusive father, abusive to defendant and siblings and to the defendant's mother.

Defendant demonstrated in his interviews with Dr. Blotcky his desire to protect his mother, to please his mother; mother confirms this today.

Defendant has related to Dr. Rosecrans his overdose of pills a year or so ago, Ms. Johnson, defendant's fiancee also relates this episode, mother also references us to the event.

In summary, I find that the defendant's luckless childhood and troubled adolescence occasioned in large part by an abusive father, economic deprivations affecting the defendant's family, the defendant's verbal I.Q. of 75, classified as the borderline range between mild retardation and low average intelligence, disposition of co-defendant's cases for the lesser offense of murder are all relevant factors to be considered in mitigation of the sentence.

As stated at §13A-5-48 the process of weighing the aggravating and mitigating circumstances is not a mere tallying of respective circumstances for numerical purposes. Quoting from the statute, "Instead, it shall be defined to mean a process by which circumstances relevant to sentence are marshalled and considered in an organized fashion for the purpose of determining whether the proper sentence in view of all the relevant circumstances in an individual case is life imprisonment without parole or death."

In conclusion, it is the judgment of the

undersigned that the aggravating circumstance previously discussed outweighs the mitigating circumstances in the case, thus, the defendant Willie B. Smith is hereby sentenced to death by electrocution, the time and place to be set by the Alabama Supreme Court.

DONE AND ORDERED this 17th day of July, 1992.

James H. Hard

James H. Hard, Circuit Judge
Tenth Judicial Circuit

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 17-15043-P

WILLIE B. SMITH, III,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

Appeal from the United States District Court
for the Northern District of Alabama

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, MARTIN, and JORDAN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

UNITED STATES CIRCUIT JUDGE

ORD-42

IN THE CIRCUIT COURT FOR THE COUNTY OF JEFFERSON - TENTH JUDICIAL CIRCUIT

CRIMINAL

WILLIE B. SMITH, III)

PETITIONER) CASE NO.

V.) CC-92-1289

THE STATE OF ALABAMA)

RESPONDENT.)

H E A R I N G

The above-entitled case came on to be heard before the Honorable James Hard, Judge, on the 21st day of August, 1997, at or about 11:55 a.m.

APPEARANCES

FOR THE PETITIONER:

Ms. Kathryn V. Stanley, Esq.,

Ms. Ellen L. Wiesner, Esq.,

Petitioner's Attorneys.

FOR THE RESPONDENT:

Mr. Doug Davis, Esq.,

District Attorney

Randall E. Murphree,

Official Court Reporter

PROCEEDINGS

(11:55 a.m.)

(Attorneys present.)

(Open Court.)

THE COURT: This is Alabama versus Willie B. Smith, III. We are here on orders of remand from the Court of Criminal Appeals; hearing to held; the Prosecutor should come forward with reasons for his strikes of females. The order was offered by Justice McMillan, I believe. And, it went on up to the Supreme Court. State's application for rehearing was accepted on 02/05, but ultimately, cert was denied. And, we are here now pursuant to the Court of Appeals' order.

Now, Mr. Davis is with us, the Prosecutor who actually prosecuted the Smith case, and we have three attorneys here appearing on behalf of Mr. Smith--

MR. DAVIS: Two attorneys.

THE COURT: Two attorneys and a law student; excuse me.

THE COURT: Would you mind, from left to right, giving me the names again, please?

MS. VOLANAK: My name is Marina Volanak.

THE COURT: Thank you very much.

MS. WIESNER: Ellen Wiesner.

THE COURT: And, you wrote--and I made part of the file--the letter where you're attorney of record now.

MS. WIESNER: Okay, thank you.

THE COURT: And you are?

MS. STANLEY: Kathryn Stanley.

THE COURT: You and I talked by phone.

MS. STANLEY: We sure did.

THE COURT: Well, Mr. Davis, you have the floor, sir.

MR. DAVIS: Thank you.

I will start with the order that I struck this jury, and give my reasons at that time why I did strike fourteen female jurors; starting off with Number 81, Kayla Gilchrist. Juror Number 81, I think this was brought out in chambers--I mean, the Judge's chambers--her uncle was prosecuted, and she thought he was innocent, and she made a statement that she probably would lean towards the Defendant. I think she even made the indication that she wanted to be struck, and didn't want to sit on the case involving violence; and, that is why I struck Juror Number 81.

THE COURT: All right, thank you.

MR. DAVIS: Juror Number 13, she had strong feelings against the

death penalty. I think this was elicited also in chambers because it wasn't to the point where she would be struck for cause; but, she did mention she had strong feelings against the death penalty.

MS. STANLEY: Would you give us the name?

MR. DAVIS: I'm sorry; Melissa Beatty, B-e-a-t-t-y.

THE COURT: All right.

MR. DAVIS: Juror Number--

MR. DAVIS: Do you want to know if the jurors were black or white females?

MS. WIESNER: I think we have that.

MR. DAVIS: --Juror Number 155, Karen Marlar, M-a-r-l-a-r; and, the reason I struck this juror is this question--and the question that was asked by Defense Counsel--the Court of Criminal Appeals and Supreme Court

made mention that there was--there did not appear to be clearly based on theory of voir dire. And, this question of whether or not someone did volunteer work or worked in the Sunday School was asked by Defense Counsel under voir dire after the State had sat down and finished his voir dire. And, Karen Marlar was one of the jurors that stated that she was a Sunday School leader. And, this was a capital case, and there was a possibility that the State--there was a good possibility that the State would be asking the jury to return an advisory verdict or opinion for death.

The State also took into consideration from previous capital cases that it has tried, and usually, Defense Counsel, in their argument, would be asking the jurors to show mercy, and it was done in this case. I'm just trying to lay the predicate

down why I struck a lot of these because they worked in the church; Sunday School teachers and Sunday School leaders, and things of that nature, and from people that I knew the Defense Counsel, if it came to the second phase of the Sentencing Hearing, would be asking the jurors to show mercy. And, it was my opinion that this argument would be receptive to someone who worked in the church and was well versed in the Bible more than someone who was not; be it a female or male juror that was a strong worker in the church. No male jurors that was left seated on the jury worked in the church.

As I stated before, as the Court will recall, this argument was made by Mr. Turberville that one day they will be in front of their maker, and the judge would look back at that person's book of life, and he said you

will not show--you did not show Willie B. Smith any mercy, and now you are asking me to show you mercy. So, that is why I took into consideration when someone was a Sunday School leader, or Sunday School teacher, or someone that was well versed in the church, that that argument would be more receptive toward that juror as far as returning an advisory verdict of life without parole instead of death. So, that is why I struck Jury Number 155, Karen Marlar.

THE COURT: I believe 184 is next; Ms. Ogletree.

MR. DAVIS: Ms. Ogletree--

THE COURT: I think it is; Capital punishment problem and something about Hitler.

MR. DAVIS: Capital punishment problem; didn't believe in capital punishment. I have a not guilty verdict. That is why I struck

her.

MR. DAVIS: I have a not guilty verdict. Juror Number--

THE COURT: I believe the record will also show that she had a problem with capital punishment, as you said. I think--you know how hypothetical questions typically goes in the office of, Well, what if Hitler were on trial and so forth; and, I believe we will find that she gave a dialogue with Mr. Turberville about that.

MR. DAVIS: That is correct.

THE COURT: Ms. Henderson, I think, is next Doug; maybe I'm wrong--

MR. DAVIS: I have 189 next.

THE COURT: Who is that?

MR. DAVIS: Let me make sure that is correct. I have Burnice Patterson as 189 next.

THE COURT: All right; excuse me.

MR. DAVIS: She didn't want to sit. And, I think most of this came out in chambers also. She was on antidepressant; she had bad nerves. She told the Court, the Defense Counsel, and the Prosecution that she had bad nerves, and said she would not look at the pictures that was introduced into evidence. So, in effect, she was telling us that she would have failed to take into consideration some part of the State's evidence because some part of the State's evidence were going to be the pictures, and the pictures were not introduced to elicit some type of negative reaction from her, but they were just introduced because they were going to be part of the evidence. And, she said she would refuse to look at the pictures. But, the thing of it was that she said she had bad nerves and she was on antidepressant, and I

believe she said she did not want to sit.

THE COURT: I don't think she wanted to be sequestered.

MR. DAVIS: Sequestered; I'm sorry about that.

THE COURT: No problem; we are both right; that is Ms. Patterson. All right, who is next?

MR. DAVIS: Margaret Plyler, Juror Number 200. She did volunteer work at the church, and going back to the same argument, she was the Counselor of Ministry, and I refer back to my same argument about church workers I made earlier.

THE COURT: Okay.

MR. DAVIS: Juror Number 210; and, I ask the Court to remember this, Judge, she was a young--I think Hispanic--female, and she was very very young. She answered no questions from the State. She answered no

questions from the Defense. There was just a lack of response or participation.

THE COURT: All right, sir.

MR. DAVIS: And, taking into consideration that, that she was--the only thing I knew about her was, she was a student, she was single, and that is about it. I thought we had a thorough and sifty voir dire, but she just totally answered nothing. The only other person that answered nothing, I will bring to the Court's attention later on. I just knew nothing about her, and there was no one on the jury as young as her, and something as important as a life and death case, I want to know a little something about her.

Now, like the jury (sic) said--I mean, the Criminal Court of Appeals said, Well, you should have asked her something specific; but,

when you enter a voir dire, and you are looking at the child, and she is looking scared back there in the middle of a courtroom, you can look over her and say, Ms. Ramos, you haven't said nothing to us today. Why don't you tell us something about yourself? And, again, I have to do that with all the other jurors or I will be picking on her, and then sometimes that backfires. The rest of the jurors will look at you and say, Why is he picking on that child?

So, I have to weigh whether or not I'm going to specifically say something to her to try to elicit something from her so I can know something about her. And, you have to weigh that with whether or not you want to alienate all the other jurors sitting in there watching you pick on this child. Mr. Turberville elicited nothing from her either. She was just

nonresponsive, and a kid of this nature, with her age, I just thought she was a bit young to take a chance on having her on the jury, and that's about it.

THE COURT: All right.

MR. DAVIS: The only other one that didn't have any response from was Number 192; Juror Number 192; and I think that was Ms. Perry. And, she had no response at all just like Juror Number 210. I brought to the Court's attention at the end of my voir dire that she just seemed disinterested. She wasn't paying attention to the questions. I brought that to the Court's attention; I brought it to the Defense Counsel's attention; and, that she appeared to be disinterested in the whole part.

THE COURT: Let me look at something here. I have in my notes, sleeping, inattentive; Deborah Perry;

right?

MR. DAVIS: That's correct.

THE COURT: Sleeping; question mark; inattentive; those are my observations. Go ahead.

MR. DAVIS: Mr. Turberville and the Court of Appeals brought out something to the effect, Well, Mr. Turberville also brought out a juror that was inattentive, and the State did not strike him, and I will get to that later. I'm trying to see which one it was that Mr. Turberville brought out that was not attentive. But, I had looked at that juror. He brought it out after the fact; after we had struck and things like that; but, that juror that Mr. Turberville said was inattentive, he struck. The best of my recollection he was the one that struck that juror, and I wish I had that juror's number right now. Maybe I can find it in my notes or

something like that, but I looked at that juror's--and it should be in the record--I looked at that juror's answer, and he answered three questions from the State and three questions from the Defense on voir dire. So, how can you equate that with something that--with somebody that answers six questions on voir dire with somebody that answered none, as being inattentive?

Like I said, I didn't notice him being inattentive and I don't want Ms. Wiesner to think anything. All I can state for the record, if they can find that number of that juror--that said that she was inattentive also--if you will look at that you will see she answered six questions. I'm trying to see if they put that and gave a juror number.

THE COURT: Okay.

MR. DAVIS: I also point out

the fact that she appeared to be inattentive. Mr. Thomas Gunter was almost asleep during all the questions unless he was asked a question. He was sitting right on the first row. And, when I looked back at Number 93, he answered questions and knew the police. I think his brother was an attorney or New York City Attorney. He asked Mr. Turberville questions about supervising people. He supervised four people now. And, he might have said something about church. I have church down here underlined. But, the Defense Counsel struck him. I don't know what number they struck him, but they struck him. So, I don't known how you can equate that and hold me responsible for something he struck. I think that is a moot issue.

THE COURT: All right.

Let's don't forget 216. Did

you skip Number 216?

MR. DAVIS: No. I think that 216 is next.

THE COURT: I think we skipped to 192, skipping over 216; did we not?

MR. DAVIS: I'm sorry.

THE COURT: We talked about the sleeping juror; the woman that may have been inattentive. Did we not skip 216?

MR. DAVIS: No, that is next. I have Ms. Perry and then I have Ms. Plyler next. I said about Ms. Plyler; 200--

THE COURT: Did I mention Ms. Plyler?

MR. DAVIS: Yes, sir.

Next is 210 with Ms. Ramos, and now is 216, Ms. Roberts. Ms. Roberts was a journalist. She worked for "Southern Living"; editor for "Southern Living," and I particularly

don't like journalists. I would not leave a male journalist on my jury. I don't know if it is just because maybe from a bad experience I had with a certain journalist from around here, but I have never left a journalist on my jury.

Maybe it's because they tend to express that they believe in who, what, where, when, and why, and in a lot of cases--a lot of times you can prove who, what, where, and when, but you can't prove why. And motive, it is not up to the State to prove, and because of their tendency, and their background, and training, they might hold the State to--expect the State to show why.

The second reason is that who, what, where, when, and why, the why was because of this young man's background, this young man's upbringing, and things like that. I

thought she may be somewhat more sympathetic with someone as a journalist, more sympathetic to the why, and why this young man may have committed this crime--or did commit this crime, and that was elicited from the testimony of his mother on--during the second phase of the Sentencing Hearing. It was brought out how he was raised, had an abusive father, and things of that nature. I think a why in that situation would favor someone that is looking for a why; would favor the Defense more than it would the State. And basically, it was because she was a journalist, and it is just the nature of journalism that I just can't leave them on my jury.

And then also, you don't know whether or not, you know, what--and I'm not saying this would have been in her case or in another situation--but in listening to the

evidence in the light of returning a verdict or to write a story, you know, I don't know. You see a lot of things and I just don't know where their minds are going to be, because there are a lot of journalists and print media, and this was a high publicity case, and I just didn't know how her mind is set or any journalist's mind would be in listening to a case of this nature. And, like I said, who, what, when, where, and why. The why's were not in the State's favor; why it happened and why he did it.

THE COURT: Okay.

MR. DAVIS: Number 102 is next?

THE COURT: Uh-huh; Ms. Harkins.

MR. DAVIS: JoAnn Harkins; she had a jury verdict of not guilty in a rape case.

THE COURT: Uh-huh.

MR. DAVIS: Juror Number 94, Ms. H. E. Guthrie; she brought this out in the Judge's chambers, that she had some concern about--she said she didn't believe the police. She was raped by a police officer. A number of the State's witnesses were going to be police officers, and the victim in this case was a sister of a Birmingham police officer. So, I didn't know what ill feelings she would hold against police officers in her deliberations, and she did let us know she was raped by a police officer.

Juror Number 150; she was a church volunteer, a Sunday School teacher, and volunteered with the Red Cross.

THE COURT: I think she came in the office, as well.

MR. DAVIS: Yeah. She came in the office, as well.

THE COURT: On pre-trial

publicity, as did many of these people.

MR. DAVIS: I don't have any notes as to what she was -- Somewhat eccentric person as I recollect. I don't know if the Judge recollects. A lot of these things, as well as Ms. Ramos and this lady, other than her being a church worker and Sunday School teacher, just observation and intuition, and things of that nature, things like that with her. You know, I've had eccentric males that I've struck that just seemed somewhat -- And, I don't want everybody to be normal; I just want a good crossection of the jury.

THE COURT: She falls into the church category?

MR. DAVIS: Yes, sir, basically.

THE COURT: You remember that part?

MR. DAVIS: Yes, sir.

THE COURT: Sunday school teacher; all right.

That was Ms. Long; is that right?

MR. DAVIS: Yes, sir, Dorothy Long.

THE COURT: Now 45 is next?

MR. DAVIS: Yes, Ms. Cosby; she worked at the church in kindergarten; same thing; falls into the same category.

THE COURT: All right, sir.

MR. DAVIS: Number 151 was a white male. Juror Number 74, Glenda Freeman. She was a law student, and the Court of Criminal Appeals makes mention of this also, that myself and Mr. Turberville know her. My notes have that she was a Sunday School teacher, or let me see--

THE COURT: She knows both the attorneys; you and Mr. Turberville

had her at Miles.

MR. DAVIS: Right. The big thing is, she was a Sunday School director. She knew me and Mr. Turberville both. But, if your notes reflect as my notes reflected, Mr. Turberville asked her if she had had Criminal Law or Criminal Procedure, and she said yes. And, Mr. Turberville asked her was there something by Criminal Law or Criminal Procedure that might influence her, and she said yes. Now, nothing else was asked by Mr. Turberville except was there something about Criminal Law and Criminal Procedure that might influence her, and she said yes.

THE COURT: I don't recall, Doug. The record will bear you out.

MR. DAVIS: I think it is definitely in the record; I'm almost certain; but, nothing else is asked, you know. What is it about Criminal

Law and Criminal Procedure that might influence her? I know I taught at the same law school as Mr. Turberville taught, and like I said, maybe I should have brought this out on further voir dire, but how long is voir dire suppose to go? I had an opportunity. Mr. Turberville never went into it any further.

Now, I don't have to be totally ignorant. I know who taught Criminal Law and Criminal Procedure at Miles Law School, and I know this was in my mind. He knows it in his mind, and just for the record, it was Mr. Jaffe at that time, who is a well known Defense Lawyer in the Birmingham area. Now, maybe I should have got up and re-voir dired her about additional things, but it was the fact that something about Criminal Law and Criminal Procedure might influence her. That is not good for me, you

know, taking into consideration law school training and things of that nature, and I'm not saying that training in law school is toward the Defendant, but when you think as Miranda, Escobedo, and Terry, and things like that, most of the criminal law liens toward Defendants' right, the Fourth Amendment Right, and things of that nature, and Fourteenth implied towards the State, but it is good training, and I took Criminal Law and Procedure at Miles myself. I knew who taught it, and she said something about Criminal Law and Criminal Procedure might influence her. Taking into consideration that, and the fact that she was a Sunday School Youth Director, I thought it was a necessity to strike her, and not because she was a female--female gender.

THE COURT: Thank you, Mr. Davis.

MS. WIESNER: Your Honor, if we could have ten minutes to assimilate all this information and then come back with a rebuttal?

THE COURT: If you wish.

(12:22 p.m.)

(Recess.)

(12:45 p.m.)

(Attorneys present.)

THE COURT: Ma'am, on behalf of Mr. Smith?

MS. STANLEY: Your Honor, as the Court knows, the persons on The Criminal Court of Appeals found that the State used fourteen out of the fifteen peremptory strikes, or ninety-two percent, removed women from the jury. Based on this overwhelming number, The Court of Criminal Appeals determined that there was prima facie evidence that women had been discriminated against in the jury selection process. I'm giving the

strength of the prima facie case.

It's incumbent on the State to provide reasons for the striking of women. Those reasons of the State didn't have a prima facie case, and it appeared to be quite strong, and we are at this time going to rebut the reasons that the State has given because they did not muster under Alabama State Law or Federal Law.

MS. WIESNER: First of all, Your Honor, I would like to address the District Attorney's reason for striking Ms. Ramos, who was Juror Number 210, and was the State's seventh strike. Mr. Davis offered the reason that she--that he didn't know anything about her, that she was young, and offered her demeanor. That is not on the record for the reason of striking her. He said that she did not participate in voir dire.

As the Court knows, Ms.

Ramos was the only Latino member of the jury panel. And, although she did not answer any questions on voir dire, there were several seated jurors who answered only one question on voir dire; that being, whether they had ever been a victim of a crime. Mr. Pesnell?

MR. DAVIS: Would you give me the number, please? Do you know the number? I appreciate it.

MS. WIESNER: Okay; Mr. Pesnell, who is a seated juror, and was Juror Number 194, answered only the preliminary questions which was to describe whether he was single and his occupation, and then answered he had tires stolen from his car. That, certainly, gave the District Attorney no information than this information available to him from the voir dire of Ms. Ramos.

Additionally, Mr. Beard, who

was Juror Number 11, and was the State's, he was a seated juror, answered again, only the preliminary questioning about his employment status and marital status, and that he had previously been on a criminal jury. Certainly, that does not give any more information than Ms. Ramos who answered completely the question about her marital background, her employment status, and whether she had any children.

Mr. Roddam, in addition who was a seated juror, Juror Number 219, answered again that he was single, where he lived, and what his profession was, and answered just briefly when the Court was inquiring as to a show of hands whether he had heard anything about the case, raised his hand and was called back into chambers and said he didn't remember any of the details of the case beyond

what was said on voir dire.

Certainly, as the District Attorney recognized, had he wanted more information about Ms. Ramos, he could have asked more questions and directed towards her. In fact, the Defense attorneys did directly address people on a couple of occasions. Ms. Freeman was directly questioned and singled out by--I can't remember if it was Defense Counsel or the District Attorney--I think Defense Counsel asked about her law school background. There was ample opportunity for the District Attorney to bring people into chambers and question them. Numerous jurors were questioned in chambers; most of them for questions about the extent of their observation of pretrial publicity.

Finally, Ms. Kennan, who was a seated juror, was Juror Number 138, gave very little information on voir

dire. She did respond to questions that applied to her, apparently. One of them, whether she knew any law enforcement officers; another, whether she had ever served on a jury. The District Attorney assumed that Ms. Ramos was inattentive and uninterested, when in fact, quite probably, none of the questions applied to her, and she simply didn't have an affirmative response for any of them. She did answer the questions she was asked directly.

Furthermore, the District Attorney described her demeanor as one of the reasons for striking her, saying she was looking scared in the back. Demeanor is a highly suspect reason for a strike of a juror, especially in the face of a prima facie case of where fourteen out of sixteen State's strikes were used to exclude female jurors. We contend

that there was simply no good reason other than Ms. Ramos' gender, which is not a good reason that she was struck from the jury.

Next, I would like to address generally Mr. Davis' explanation for striking people that they were involved in Sunday School and would be well versed in the Bible as a reason for striking. I believe he gave that reason for Ms. Marlar, Ms. Plyler, Ms. Long, Ms. Cosby, and Ms. Freeman.

First of all, Ms. Freeman did not answer on voir dire that she had been a church youth leader that I found in the record. But, even if she had, involving the church group again, is not a valid, gender neutral, or race neutral reason for striking these women. Under Powell versus State, and many other Alabama cases, and other cases across the country, the striking

of a person because of their membership or enrolled in a particular group or particular profession, without more explanation than that, is not a valid reason; a valid or race neutral reason for striking them from the jury.

He has talked about these people were well versed in the Bible and others were not. Well, first of all, that was not a subject of voir dire. They were not asked--none of the jurors were asked what their knowledge of the Bible was, what their religious beliefs were, how their religious affiliation applied to how they would apply that to decide this case. There is no indication that any of these jurors that were struck, allegedly through their church involvement, would have been bias against the Prosecution because of their involvement in church. The

Prosecution was not interested in finding out whether they had religious beliefs, other than whether they would or would not vote for the death penalty. The question of whether they would vote for the death penalty was asked. None of these people responded in the affirmative that they would be unable to impose the death penalty. The State did strike two women because they expressed -- to imposing the death penalty.

None of these women expressed any resistance to the death penalty, and the State's reason given was that they were more likely to be sympathetic to the Defendant is not plausible under the circumstances. It has no relationship in this particular case. There is no allegation that someone who is a church official was killed. There is no connection whatsoever with any kind of religious

overtones in the facts of this case.

Secondly, with regard to religion, I just addressed the fact that the Prosecutor assumed bias without more sufficient reason. The second thing that ties into that group bias is that there was a lot of voir dire I think I have already addressed, but -- state and many other occasions, and the cite for Powell is 548 So.2d 590, Alabama Court of Criminal Appeals, 1988. In addition, in Walker v. State, which is 611 So.2d, 1133, which is Alabama Court of Criminal Appeals, 1992, and other cases in Alabama indicate that failure to engage in meaningful voir dire on a subject then claimed as a basis for striking of a juror, is strongly--suggests an inference of discrimination based on race of gender as it was in this case.

Next, Your Honor, I would

like to address Mr. Davis' reason for striking Ms. Carol Anne Roberts who was Juror Number 216, and who was the State's eighth strike; Mr. Davis gave as a reason for striking Ms. Roberts that she was a journalist, and he doesn't like journalists, and he would not want a male juror on the jury, and expressed the belief or the stereotype that all journalists would be looking for the why, and the why in this case would not be favorable to the State.

Once again, that is a strike that was based on a group bias, based on employment, which is insufficient reasons for striking someone. It calls into question the State's reason and suggests it was a pretext for discrimination against Ms. Roberts because she is a woman.

Additionally, another fact about Ms. Roberts is that she was a journalist. However, she worked for

"Southern Living," and she was in the travel section of "Southern Living," which is certainly not investigative reporting for criminal related area of journalism or that "Southern Living" is devoted to that sort of journalism.

Next, I would like to add that Mr. Davis stated reason for striking Ms. Freeman from the jury. She was the State's fifteenth strike, so she sat as an alternate on the jury. She was Juror Number 74. Ms. Freeman, for the record, is a black female who stated she was in law school at the time of the trial.

First of all, the District Attorney stated that because she had Criminal Law that she was likely to be sympathetic to the Defendant. One of the seated jurors, Mr. Buettner, who was Juror Number--I'm sorry; just a moment--Juror Number 29, answered on voir dire on the record at Page 196,

that he was studying law at the time of the trial; additionally, that his wife was a legal secretary. There were no questions asked of Mr. Buettner as to what kind of law he had studied; no questions asked of Mr. Buettner as to whether he had studied Criminal Law. The fact that no questions were asked of him or that voir dire was engaged with Ms. Freeman about what she had studied, and what her Criminal Law background was, suggests that once again the fact that she was a woman was the reason for this strike.

In addition, seated Juror Number 174, Mr. Dale Morgan, answered on voir dire on the record at Page 277 and 278 that he was--that he had taken a course in Criminal Justice at UAB. He was seated on the jury subsequent by the State or by the Defense. No further questions were asked of him,

and that further suggests that Ms. Freeman was a victim of discrimination based on her gender.

I want to return for a moment to the reason that was given which was church involvement for striking these jurors, and pointed out to the Court that Ms. Parham, who was--the Defense strike number 16, so she was not struck by the State--is an alternate on the jury, who was a woman juror, Number 188, who was a Youth Director at a Sunday School at the time of the trial, and so answered on voir dire at Page 304 for the record.

The District Attorney's statement that he struck everyone who had involvement in Sunday School or who was a Sunday School teacher is simply false. He had used his strikes by the time this person was struck, and failed to strike her, and there were other people struck by the State

that did not have that characteristic of being involved with the church. That was important to the State. They could have struck Ms. Parham, as well.

Finally I would like to address in more detail the allegations that Ms. Perry was struck because of her demeanor. The District Attorney has said that she did not participate in voir dire, appeared to be uninterested, and however, there is--the only mention in the record of disinterest on her part was an inference to an off the record discussion that took place between the Court and counsel for both sides in which Defense Counsel was asked to watch Ms. Perry, apparently.

Now, this is what I'm reading from the record because the conversation was not on the record, and Mr. Davis was there, so he might be actually able to say what happened

in that conversation. But, in any event, Defense Counsel was made aware that there was some concern on the part of either His Honor or the State that Ms. Perry was not paying attention. She was struck, and in the course of a Batson Motion, after she was struck, after the jury was struck, the Defense pointed out that there was another juror, Mr. Gunter, who also appeared to the Defense to be inattentive, and who was struck by the Defense--Defense struck number ten--which was after more than half the strikes had been exercised.

Additionally, as I have stated before, demeanor--general demeanor without any other support on the record is not an acceptable gender reason for striking a juror. Under Madison versus State, which is 545 So.2d, 1994, which is a Court of Criminal Appeal, 1987, the Court there

rejected explanation based upon inattention, disinterest, which is falling asleep during voir dire as being highly suspective reasons because they were not supported by any objective facts on the record.

In summary, Your Honor, I would like to reiterate that the State in this case used fourteen out of it's fifteen strikes to exclude women. That, in itself, sets out an overwhelming prima facie case of gender discrimination in this case.

Even though J.E.B. was not cited at the time of this trial, it does apply now. J.E.B. prohibits discrimination against women in jury service. This kind of a prima facie case is much stronger than many cases that have been reversed on Batson which is the foundation of J.E.B.

Additional numbers that support the prima facie case are that

sixty-four point eight percent of the venire were women. The jury ended up to be five women, which was only forty-one percent; disproportionately struck from the jury. Additionally, the pattern of strikes indicate that the State discriminated against woman. Thirteen out of it's first fourteen strikes were against women. The fact that the struck women share nothing in common, or no significant characteristics in common, other than their gender, further support that there is a very strong prima facie case of gender discrimination on the part of the State in this case.

Because of the prima facie case is so strong, reasons given by the State must be particularly strong to rebut the discrimination. Suspect reasons such as gender involvement in a particular group without further voir dire are made even weaker by the

fact that this is a strong prima facie case. In addition, one suspect reason is given that all other jurors must be looked at in light of that suspect reason, and that is clear under law.

For these reasons, because of the State's reason for striking these women are insufficient because it is clear these women were struck because they are women and not for any other reason. Mr. Smith is entitled to a new trial at which he is allowed to exercise his Constitutional Rights in which any members of the jury are allowed to serve on the jury based on their qualifications rather than based on their gender or their race.

THE COURT: Thank you so much, ma'am.

Did you want to say anything else, sir?

MR. DAVIS: Yes, sir. I think something was mistaken. I'm not

sure it's a mistake on the record or what. I have Ms. Freeman as a Sunday School Youth Director and not Ms. Parham. I don't know what the Court record reflect.

THE COURT: Ms. Freeman is the one that knew the lawyers.

MR. DAVIS: That is correct; I also have her as a Sunday School Director. I do not have Ms. Parham as a Sunday School Director. I have Ms. Freeman as that. Now, the record may say something else but I'm just asking the Court to look at it's notes. Does it have anything on Ms. Parham as working at anything in Sunday School because I don't know that?

THE COURT: I have pre-trial publicity and S/O which sometimes means -- I don't know; the record will reflect what she says.

MS. WIESNER: Well, Your Honor, on 304 of the record, I have--

MR. DAVIS: I'm not disputing that it says it in the record. I'm disputing that I did not strike Ms. Parham if she was a Sunday School Director or I would have struck her. My record reflects that I have Ms. Freeman as a Sunday School Director, and I saw that in the record. I read the record too, you know, and, as an officer of the Court, I know Ms. Freeman, and she is a Sunday School Youth Director. And, as an officer of the Court I may put on testimony in front of the Court to that effect, and Ms. Parham is not, and that is a fact. I'm stating that as an officer of the Court. I'm saying the record is incorrect, and I will give you Ms. Parham's and Ms. Freeman's number if you would like to call them and address that. I have it both right here, and you are welcome to call, because one works with the

Deputy Sheriff in the jail, and one is a law student. I have both their numbers.

THE COURT: That is what this S/O means; the sheriff's office.

MR. DAVIS: She works at the sheriff's office, and I was confused about the record myself, and I'm saying this as an officer of the Court; that Ms. Freeman is a Sunday School Youth Director. I have both of their numbers and you are welcome to call them.

MS. WIESNER: Well, Your Honor, the record speaks for itself.

THE COURT: Well, the records can be wrong, you know; people are people.

MR. DAVIS: They can say Ms. Freeman and put it under somebody else's name. I talked to both those ladies. I probably should have put them on the witness stand. If I knew

this was coming up, I would have put them on as witnesses.

MS. WIESNER: Your Honor, first of all, to the extent that the District Attorney is relying on afterall information for his strikes--

MR. DAVIS: Well, I'm just--

MS. WIESNER: May I finish, Your Honor?

MR. DAVIS: I'm sorry; go ahead.

MS. WIESNER: To the extent Mr. Davis is relying on the information he is either acquired or confirmed after the trial, those cannot be used to support his strikes. Additionally, Your Honor, I neglected to mention in the beginning to the extent that he relies at all on evidence that--not evidence but after the jury was struck to support his reasons for striking people, those are not valid support for his reasons for

striking, because they had not occurred. He is not clairvoyant; they have not yet occurred. The record speaks for itself. The record is presumed to be correct. It was certified by the Court Reporter, and it has been used on appeal, and it has been used in all other respects in Alabama at Page 304 as being accurate and believed to be accurate by both the State and the Defense up until this time, and that is all I want to say.

MR. DAVIS: I just want to bring that out for the record that I did look at the record.

THE COURT: Is that after acquired information or did you know these women? Did you say you knew the women?

MR. DAVIS: I knew Ms. Freeman because I taught her. I have on my paper that she was a Sunday

School Youth Director, and I just ask the Court to look at his paper and see if you--

THE COURT: Well, if you know her personally, that is important. You knew her before you struck the jury?

MR. DAVIS: Yeah. She said she knew both of us as teacher/student relationship. And, that is how I knew her. She was still in class.

THE COURT: Did you know the sheriff's lady, Ms. Parham?

MR. DAVIS: No. I did not know her. I have seen her a number of times in the sheriff's office in the jail.

THE COURT: You knew her casually?

MR. DAVIS: Casually, yes.

THE COURT: All right; anything else you want to say?

MR. DAVIS: Yes; a few other

things.

As far as Juror Number 194, they talked about didn't answer any questions. Number 194; asked a couple of questions. He had his tires stolen from his car, and that he was a supervisor, which I thought was important. Juror Number 11 found someone guilty, which I thought was important. Juror Number 219, Mr. Roddam, in chambers, stated he knew about this crime because it happened one half--one block away from his brother's car dealership. That is how he had knowledge of some information which I thought was important.

And, as Defense Counsel and the Court has said that there was not a thorough and sifting on voir dire -- most of these questions or most of these reasons that were listed as why I struck were asked by the Defense Counsel. I don't know how long voir

dire is suppose to go on. You know, we are in trial and we have seventy something people here in the jury room. I, possibly, could have--after Mr. Turberville brought out the questions that these people worked in Sunday Schools or were church leaders--maybe I could have revisited voir dire to them to see what their feelings were toward the death penalty, being they were church members, or what their feelings were toward the death penalty, or how versed they were in the Bible verses, but voir dire has to stop. It has to have some finality at some time. There is a possibility that Mr. Turberville had other questions, so the State has an opportunity to voir dire.

It has been the policy and general practice at this time in this jurisdiction that the State has the

opportunity to voir dire and the Defense has the opportunity to voir dire. Most of these indications were glean through the Defense Counsel's voir dire.

And lastly--oh, again with Ms. Freeman, even if the record is correct, and we will say that the record is correct--I will state that I won't even bring that up; I'm sorry I did--it is also in the record that--and supposedly it is in my notes--that she had something in Criminal Law and in Criminal Procedure that might influence her. Now, what that was I don't know.

All I'm saying is, all the other people said they took Business Law, or whatever law it was, whether Criminal Law at UAB, but she took Criminal Law and she was in law school. The other people may have been to law school, but she did answer

the question as something in Criminal Law or Criminal Procedure might influence her. No other questions were asked.

Mr. Turberville asked other questions. I asked her a lot of questions but I had to sit down. I didn't have any opportunity to voir dire. The voir dire process has to stop at some time. I think we had a thorough and sifting voir dire from both parties, and I state for the record that I did not strike any of these jurors because of their gender. Thank you.

THE COURT: Thank you, sir.

And, thank you very much. Anything else?

MS. WIESNER: Thank you, Your Honor.

MS. STANLEY: Thank you, sir.

THE COURT: Thank you,

ladies, and Mr. Davis; thank you, Andy.

I won't rule until I study what has been said and done here. I will write my findings, of course, and mail them to Ms. Wiesner; is that okay?

MS. WIESNER: That is fine, sir.

THE COURT: Would you give Randall an address again, if you wish?

MS. STANLEY: I will do that.

THE COURT: Thank you; have a safe trip back.

(End of proceedings.)

STATE OF ALABAMA	)	CASE NO. CC92-1289
PLAINTIFF,	)	DATE OF JUDGMENT
V.	)	_____
WILLIE B. SMITH, III	)	NOTICE OF APPEAL
DEFENDANT.	)	_____

TO: THE CLERK OF THE COURT
OF CRIMINAL APPEALS OF ALABAMA

FROM: Randall E. Murphree,
Court Reporter,
Tenth Judicial Circuit

REPORTER'S CERTIFICATE

"REPORTER'S TRANSCRIPT" COMPLETED

I, the undersigned Court Reporter of the Tenth Judicial Circuit of Alabama (comprised of Jefferson County), hereby certify that I have this date completed and filed with the Clerk of the Circuit Court of Jefferson County, the Original and three copies of a true and correct TRANSCRIPT OF THE EVIDENCE (and matters designated, if any) in the above criminal action; said evidence

being taken down stenographically by me and being transcribed by me or under my supervision and control.

All the pages of the transcript are numbered serially, at the right-hand corner of each page, followed by the transcript of the proceeding, and ending with Page No. 59.

I further certify that a copy of this certificate has this day been served by me on:

A) Clerk of Court of Criminal Appeals of Alabama

B) Attorney General of Alabama

C) District Attorney, Tenth Judicial Circuit

D) Counsel for Appellant.

DATED this 26th day of August, 1997.

Randall E. Murphree

COURT REPORTER

REPORT OF ADAPTIVE BEHAVIOR TESTING

NAME: Smith, Willie
DATE OF TESTING: 08/06/2007
DATE OF BIRTH: 08/06/1990
AGE: 17 years 0 months

RESPONDENT: Lorenzo Smith brother
EXAMINER: Karen Salekin, Ph.D.

TEST ADMINISTERED

Willie's adaptive behavior was evaluated using the Scales of Independent Behavior--Revised (SIB-R).

ADAPTIVE BEHAVIOR

Broad Independence is a measure of overall adaptive behavior based on an average of four different areas of adaptive functioning: motor skills, social interaction and communication skills, personal living skills, and community living skills. Willie's functional independence is limited; his performance is comparable to that of the average individual at age 11 years 3 months (11-3). This is within the very low range of scores obtained by others at his age level, as shown by his percentile rank (1) and standard score (67).

Motor Skills includes gross- and fine-motor proficiency tasks involving mobility, fitness, coordination, eye-hand coordination, and precise movements. Willie's motor skills are limited; his performance is comparable to that of the average individual at age 8-5. Motor tasks below the age 6-3 level will be quite easy for Willie; those above the age 11-4 level will be quite difficult for him.

When presented with age-level tasks, Willie's gross-motor skills are limited. Age-level tasks involving balance, coordination, strength, and endurance will be very difficult for him.

When presented with age-level tasks, Willie's fine-motor skills are limited to very limited. Age-level tasks requiring eye-hand coordination using the small muscles of the fingers, hands, and arms will be very difficult to extremely difficult for him.

Social Interaction and Communication Skills measures Willie's interactions with others in various social settings and his understanding and communication of information through signs, oral expression, or written symbols. Willie's social interaction and communication skills are limited; his performance is comparable to that of the average individual at age 11-0. Similar tasks below the age 8-0 level will be quite easy for Willie; those above the age 14-2 level will be quite difficult for him.

When presented with age-level tasks, Willie's social interaction skills are limited. Age-level tasks involving social interaction with other people will be very difficult for him.

When presented with age-level tasks, Willie's language comprehension skills are limited. Age-level tasks involving understanding signals, signs, or speech and in deriving information from spoken and written language will be very difficult for him.

When presented with age-level tasks, Willie's language expression skills are age-appropriate. Age-level tasks involving talking and other forms of expression will be manageable for him.

Personal Living Skills includes adaptive behaviors related to eating and preparing meals, taking care of personal hygiene and appearance, and maintaining an orderly home environment. Willie's personal living skills are limited; his performance is comparable to that of the average individual at age 12-8. Similar tasks below the age 10-0 level will be quite easy for Willie; those above the age 15-6 level will be quite difficult for him.

DEFENDANT'S EXHIBIT

9

When presented with age-level tasks, Willie's eating and meal preparation skills are limited. Age-level tasks involving eating and meal preparation will be very difficult for him.

When presented with age-level tasks, Willie's toileting skills are age-appropriate. Age-level tasks involving using the toilet and bathroom will be manageable for him.

When presented with age-level tasks, Willie's dressing skills are limited. Age-level tasks involving performance in dressing will be very difficult for him.

When presented with age-level tasks, Willie's personal self-care skills are limited to age-appropriate. Age-level tasks involving basic grooming and health-maintenance tasks will be difficult for him.

When presented with age-level tasks, Willie's domestic skills are limited to age-appropriate. Age-level tasks involving home maintenance will be difficult for him.

Community Living Skills measures the skills Willie needs to successfully use community resources, perform in an employment setting, and assume other social and economic requirements encountered in community settings (including tasks involving time and punctuality, money and value, work skills, and home and community orientation). Willie's community living skills are limited to age-appropriate; his performance is comparable to that of the average individual at age 11-3. Similar tasks below the age 10-4 level will be quite easy for Willie; those above the age 16-1 level will be quite difficult for him.

When presented with age-level tasks, Willie's time and punctuality skills are limited to age-appropriate. Age-level tasks involving time and time concepts will be difficult for him.

When presented with age-level tasks, Willie's money and value skills are limited. Age-level tasks related to determining the value of items and using money will be very difficult for him.

When presented with age-level tasks, Willie's work skills are limited. Age-level work habits and prevocational skills will be very difficult for him.

When presented with age-level tasks, Willie's home and community orientation skills are age-appropriate. Age-level tasks related to getting around the home, neighborhood, or traveling in the community will be manageable for him.

ADAPTIVE BEHAVIOR STRENGTHS AND WEAKNESSES

Comparisons among Willie's adaptive behavior domain scores help to determine if any strengths and weaknesses exist. Inspection of these scores shows variability in performance. Willie's greatest strengths include his community living skills. His lowest scores include his motor skills.

SUMMARY

Willie's Broad Independence, an overall measure of adaptive behavior, is comparable to that of the average individual at age 11 years 3 months. His functional independence is limited.

When presented with age-level tasks, Willie's community living skills are limited to age-appropriate. His motor skills, social interaction and communication skills, and personal living skills are limited.

Willie has limitations in eight adaptive skill areas: gross-motor skills, fine-motor skills, social interaction, language comprehension, eating and meal preparation, dressing, money and value, and work skills.

REPORT OF ADAPTIVE BEHAVIOR TESTING
[redacted]ith, Willie
[redacted]gust 6, 2007

Willie's greatest strengths include his community living skills. His lowest scores include his motor skills.

Karen Salekin, Ph.D.
Examiner