APPENDIX

TABLE OF APPENDICES

Appendix A

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13906-P

JAMES MCWILLIAMS,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,
ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

Before: WILSON, JORDAN and TJOFLAT, Circuit Judges.

BY THE COURT:

Appellees' Motion to Recall the Mandate and Stay the Mandate Pending a Petition for Certiorari is DENIED.

Appendix B

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 13-13906

District Court Docket No.
7:04-cv-02923-RDP-RRA

JAMES MCWILLIAMS,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,
ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents - Appellees.

Appeal from the United States District Court for the
Northern District of Alabama

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

Entered: October 15, 2019
For the Court: DAVID J. SMITH, Clerk of Court
By: David L. Thomas

Appendix C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13906-P

JAMES MCWILLIAMS,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,
ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents - Appellees.

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, JORDAN, and TJOFLAT, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ENTERED FOR THE COURT:

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

ORD-42

Appendix D

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13906

D.C. Docket No. 7:04-cv-02923-RDP-RRA

JAMES MCWILLIAMS,

Petitioner – Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,
ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents – Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(October 15, 2019)

ON REMAND FROM THE
SUPREME COURT OF THE UNITED STATES

Before TJOFLAT, WILSON, and JORDAN, Circuit Judges.

TJOFLAT, Circuit Judge:

Petitioner, James McWilliams, is an Alabama prison inmate awaiting execution for murder. A jury found McWilliams guilty as charged and recommended that he be sentenced to death. At McWilliams's sentencing hearing, his attorney requested, under *Ake v. Oklahoma*,[1] that the court appoint a psychiatrist to assist him in countering the State's argument that McWilliams's mental health status was insufficient to constitute a mitigating circumstance that warranted imposing a sentence of life imprisonment rather than death. The trial judge denied that request. The U.S. Supreme Court, reviewing our denial of

[1] 470 U.S. 68, 83, 105 S. Ct. 1087, 1096 (1985). McWilliams was indigent during all phases of the murder case. *Ake* holds that

> when [an indigent] defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Id.

> This elementary principle, grounded in significant part on the Fourteenth Amendment's due process guarantee of fundamental fairness, derives from the belief that justice cannot be equal where, simply as a result of his poverty, a defendant is denied the opportunity to participate meaningfully in a judicial proceeding in which his liberty is at stake.

Id. at 76.

McWilliams's application for a writ of habeas corpus under 28 U.S.C. § 2254,[2] concluded that the trial judge's refusal to provide the requested psychiatric assistance, which the Alabama appellate courts had upheld,[3] constituted a decision that was "contrary to, or involved an unreasonable application of, clearly established Federal law"—i.e., its holding in *Ake v. Oklahoma*—and reversed. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (quoting 28 U.S.C. § 2254(d)(1)). The Court remanded the case with the instruction that we consider, under *Brecht v. Abrahamson*,[4] whether McWilliams is entitled to the habeas writ and a new sentencing hearing. We conclude that he is.

I.

We draw from the Supreme Court's opinion in *McWilliams v. Dunn* in describing McWilliams's murder prosecution, the circumstances that gave rise to

[2] *McWilliams v. Comm'r, Ala. Dep't of Corr.*, 634 F. App'x 698, 700 (11th Cir. 2015).

[3] The Alabama Court of Criminal Appeals, in affirming McWilliams's conviction and death sentence, found no error in the trial judge's denial of his *Ake* request. *McWilliams v. State*, 640 So. 2d 982, 991 (Ala. Crim. App. 1991). The Alabama Supreme Court, on certiorari review, affirmed the Court of Criminal Appeals decision (without expressly addressing McWilliams's *Ake* claim). *Ex parte McWilliams*, 640 So. 2d 1015, 1016 (Ala. 1993). Although the Supreme Court did not expressly address McWilliams's *Ake* claim, we treat the Court, in affirming the Court of Criminal Appeals' decision, as having rejected the *Ake* claim on the merits for the reasons stated by the Court of Criminal Appeals.

[4] 507 U.S. 619, 623, 113 S. Ct. 1710, 1714 (1993). As explained *infra*, *Brecht v. Abrahamson* establishes what a § 2254 petitioner must show in order to obtain relief from a constitutional error committed during trial in a criminal prosecution in state court, which is reviewable on direct appeal.

his attorney's request for psychiatric assistance, and why the refusal of that request ran afoul of *Ake*.

> [T]he State of Alabama charged McWilliams with rape and murder. The trial court found McWilliams indigent and provided him with counsel. It also granted counsel's pretrial motion for a psychiatric evaluation of McWilliams'[s] sanity, including aspects of his mental condition relevant to "mitigating circumstances to be considered in a capital case in the sentencing stage." . . . .
>
> Subsequently a three-member Lunacy Commission examined McWilliams . . . . The three members, all psychiatrists, concluded that McWilliams was competent to stand trial and that he had not been suffering from mental illness at the time of the alleged offense. . . .
>
> McWilliams'[s] trial took place in late August 1986. On August 26 the jury convicted him of capital murder. The prosecution sought the death penalty, which under then-applicable Alabama law required both a jury recommendation (with at least 10 affirmative votes) and a later determination by the judge. The jury-related portion of the sentencing proceeding took place the next day. The prosecution reintroduced evidence from the guilt phase and called a police officer to testify that McWilliams had a prior conviction. The defense called McWilliams and his mother. Both testified that McWilliams, when a child, had suffered multiple serious head injuries. McWilliams also described his history of psychiatric and psychological evaluations, reading from the prearrest report of one psychologist, who concluded that McWilliams had a "blatantly psychotic thought disorder" and needed inpatient treatment.
>
> . . . .
>
> Although McWilliams'[s] counsel had subpoenaed further mental health records from Holman State Prison, where McWilliams was being held, the jury did not have the opportunity to consider them, for, though subpoenaed on August 13, the records had not arrived by August 27, the day of the jury hearing.
>
> After the hearing, the jury recommended the death penalty by a vote of 10 to 2, the minimum required by Alabama law. The court scheduled its judicial sentencing hearing for October 9, about six weeks later.

Five weeks before that hearing, the trial court ordered the Alabama Department of Corrections to respond to McWilliams's subpoena for mental health records. The court also granted McWilliams'[s] motion for neurological and neuropsychological exams. . . .

. . . Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health, examined McWilliams. On October 7, two days before the judicial sentencing hearing, Dr. Goff filed his report. The report concluded that McWilliams presented "some diagnostic dilemmas." On the one hand, he was "obviously attempting to appear emotionally disturbed" and "exaggerating his neuropsychological problems." But on the other hand, it was "quite apparent that he ha[d] some genuine neuropsychological problems." . . . .

The day before the sentencing hearing defense counsel also received updated records from Taylor Hardin hospital, and on the morning of the hearing he received the records (subpoenaed in mid-August) from Holman Prison. The prison records indicated that McWilliams was taking an assortment of psychotropic medications . . . .

The judicial sentencing hearing began on the morning of October 9. Defense counsel told the trial court that the eleventh-hour arrival of the Goff report and the mental health records left him "unable to present any evidence today." He said he needed more time to go over the new information. Furthermore, since he was "not a psychologist or a psychiatrist," he needed "to have someone else review these findings" and offer "a second opinion as to the severity of the organic problems discovered."

. . . [D]efense counsel moved for a continuance in order "to allow us to go through the material that has been provided to us in the last 2 days."[5] The judge offered to give defense counsel until 2 p.m. that afternoon. He also stated that "[a]t that time, The Court will entertain any motion that you may have with some other person to review" the new material. Defense counsel protested that "there is no way that I can go through this material," but the judge immediately added, "Well, I

[5] Two attorneys represented McWilliams throughout his trial and the sentencing hearing before the trial judge. Only one of the attorneys was involved in the exchanges with the judge regarding the need for psychiatric assistance.

will give you the opportunity. . . . If you do not want to try, then you may not." The court then adjourned until 2 p.m.

During the recess, defense counsel moved to withdraw. . . . The trial court denied the motion . . . .

When the proceedings resumed, defense counsel renewed his motion for a continuance, explaining,

> "It is the position of the Defense that we have received these records at such a late date, such a late time that it has put us in a position as laymen, with regard to psychological matters, that we cannot adequately make a determination as what to present to The Court with regards to the particular deficiencies that the Defendant has. We believe that he has the type of diagnosed illness that we pointed out earlier for The Court and have mentioned for The Court. But we cannot determine ourselves from the records that we have received and the lack of receiving the test and the lack of our own expertise, whether or not such a condition exists; whether the reports and tests that have been run by Taylor Hardin, and the Lunacy Commission, and at Holman are tests that should be challenged in some type of way or the results should be challenged, we really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance."

The trial court denied the motion.

The prosecutor then offered his closing statement, in which he argued that there were "no mitigating circumstances." Defense counsel replied that he "would be pleased to respond to [the prosecutor's] remarks that there are no mitigating circumstances in this case if I were able to have time to produce . . . any mitigating circumstances." But, he said, since neither he nor his co-counsel were "doctors," neither was "really capable of going through those records on our own." . . .

The trial judge then said that he had reviewed the records himself and found evidence that McWilliams was faking and manipulative. . . . . . .

The court then sentenced McWilliams to death.

McWilliams, 137 S. Ct. at 1794–97 (alterations within quotation marks in original) (citations omitted).

McWilliams appealed, arguing that the trial court had erred in denying him the right to meaningful expert assistance guaranteed by *Ake*. The Alabama Court of Criminal Appeals disagreed. It wrote that *Ake*'s requirements "are met when the State provides the [defendant] with a competent psychiatrist." *McWilliams*, 640 So. 2d at 991. And the State, by "allowing Dr. Goff to examine" McWilliams, had satisfied those requirements. *Id.*

"This was plainly incorrect," in the Supreme Court's view. *McWilliams*, 137 S. Ct. at 1800. The trial judge's conduct at the sentencing hearing "did not meet even *Ake*'s most basic requirements." *Id.* *Ake* "requires the State to provide the defense with 'access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense." *Id.* (quoting *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096) (alterations and emphasis in original).

The Supreme Court assumed that the State

> met the *examination* portion of [the *Ake*] requirement by providing for Dr. Goff's examination of McWilliams. But what about the other three parts? Neither Dr. Goff nor any other expert helped the defense evaluate Goff's report or McWilliams'[s] extensive medical records and translate these data into a legal strategy. Neither Dr. Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that McWilliams'[s] purported malingering was not necessarily inconsistent with mental illness . . . . Neither Dr.

> Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself.

Id. at 1800–01.

Having concluded that the Alabama courts unreasonably applied its holding in *Ake,* the Supreme Court remanded the case to us to decide if "access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered." *Id.* at 1801. We deem the phrase "would have mattered" to mean whether the denial of such assistance "would have prejudiced" McWilliams in defending against the imposition of a death sentence.[6]

II.

The trial judge's *Ake* error in refusing to grant defense counsel's request for psychiatric assistance came shortly after the sentencing hearing convened in the morning of October 9, 1986. *Brecht v. Abrahamson* dictates how we review trial judges' constitutional errors, such as this one, that occur during trial.

Brecht places the errors into two categories. The first involves trial errors that are subject to harmless-error review. The second involves structural errors

[6] In explaining that the assistance of an expert might have "mattered," the Court took issue with our conclusion below that, even if there was an *Ake* error, it did not have a "substantial and injurious effect or influence" on the sentencing—the standard under *Brecht* for determining whether to grant habeas relief under § 2254 for a trial court error. *McWilliams*, 137 S. Ct. at 1801 (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015)). Thus, to determine whether it "would have mattered," we must evaluate the error under *Brecht*.

that are not. An error in the first category is "amenable to harmless error analysis because it 'may . . . be quantitatively assessed in the context of other evidence presented [during the trial] in order to determine [the effect it had on the trial].'" *Brecht*, 507 U.S. at 629, 113 S. Ct. at 1717. These errors involve, for the most part, the admission of evidence proffered by the State and the exclusion of evidence proffered by the accused.[7] The federal habeas court, reviewing the record of the trial, assesses the impact the error may have had on the jury's verdict. The petitioner prevails if the court finds that the error was prejudicial, i.e., that it had a "substantial and injurious effect or influence in determining the jury's verdict." *Id.* at 637, 113 S. Ct at 1722.

Errors in the second category are not subject to harmless-error analysis because they are structural. An example is the denial of the right to counsel. *See Strickland v. Washington*, 466 U.S. 668, 692, 104 S. Ct. 2052, 2067 (1984). Because the absence of counsel affects "[t]he entire conduct of the trial from beginning to end," *Arizona v. Fulminante*, 499 U.S. 279, 309–10, 111 S. Ct. 1246, 1265 (1991), it "def[ies] analysis by 'harmless-error' standards," *Brecht*, 507 U.S.

[7] Other errors in the first category include, for example, constitutional challenges to jury instructions, *see, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 752–54, 110 S. Ct. 1441, 1450–51 (1990); *Pope v. Illinois*, 481 U.S. 497, 501–04, 107 S. Ct. 1918, 1921–23 (1987); *Rose v. Clark*, 478 U.S. 570, 579–80, 106 S. Ct. 3101, 3107–08 (1986); comments on the defendant's silence, *United States v. Hasting*, 461 U.S. 499, 508–09, 103 S. Ct. 1974, 1980 (1983); and admission of the defendant's confession, *Milton v. Wainwright*, 407 U.S. 371, 372, 92 S. Ct. 2174, 2175 (1972).

at 629, 113 S. Ct. at 1717 (quoting *Fulminante*, 499 U.S. at 309, 111 S. Ct. at 1265). Prejudice is presumed, requiring "automatic reversal of the conviction." *Id.* at 629–30, 113 S. Ct. at 1717. The error defies analysis under the harmless-error standard used to assess the prejudice caused by a trial error because the assistance that counsel would have provided to the accused at trial is unknown. It is impossible to know how an attorney would have investigated the charges, developed a defense, selected jurors, presented and examined witnesses, and argued the case to the jury in summation, or even whether an attorney would have advised proceeding to trial at all. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 150, 126 S. Ct. 2557, 2564–65 (2006). As such, the effect of the denial cannot be "quantitatively assessed" in the context of the evidence presented to the jury at the trial.

The constitutional error in this case is structural. Like the denial of counsel, the *Ake* error infected the entire sentencing hearing from beginning to end, as McWilliams was prevented from offering any meaningful evidence of mitigation based on his mental health, or from impeaching the State's evidence of his mental health. The assistance a psychiatrist *would have* provided McWilliams's counsel in "evaluating, preparing, and presenting the defense that *Ake* requires" is unknown and, as such, cannot be quantitatively assessed in the context of the evidence presented to the sentencing judge. To determine whether it "would have

mattered"—i.e., would have helped McWilliams defend against the State's case for a death sentence and present mitigating evidence—would require us to speculate as to *how* a psychiatrist would have assisted the defense, *what* mitigating evidence the defense would have presented based on the psychiatrist's analysis, or what evidence the defense would have offered to impeach the State's evidence, and *how* the State would have responded in rebuttal. Such a hypothetical exercise, as with the denial of counsel, is all but impossible. Because *this Ake* error defies analysis by harmless-error review, prejudice to McWilliams must be presumed.[8]

III.

Our decision in *Hicks v. Head*, 333 F.3d 1280 (11th Cir. 2003), that "an *Ake* error is a trial error . . . subject to harmless error analysis," *id.* at 1286, does not compel a different result. In reaching that conclusion, this Court in *Hicks assumed*

[8] The cases from our sister circuits holding that an *Ake* error is subject to harmless error review are inapposite. *See* Concurring Op. at 16 n.1 (citing *White v. Johnson*, 153 F.3d 197, 203 (5th Cir. 1998); *Tuggle v. Netherland*, 79 F.3d 1386, 1388 (4th Cir. 1996); *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995); *Starr v. Lockhart*, 23 F.3d 1280, 1291 (8th Cir. 1994), *superseded by statute on other grounds*, Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214). Except for *Starr*, in each of those cases the *Ake* request was made in anticipation that the State would introduce psychiatric testimony regarding the defendant's future dangerousness. *See White*, 153 F.3d at 203; *Tuggle*, 79 F.3d at 1391; *Brewer*, 51 F.3d at 1529–30. If the State never introduced that testimony, the right to assistance under *Ake* would never arise. Thus, any *Ake* error could not be structural. *White*, 153 F.3d at 203; *Tuggle*, 79 F.3d at 1391–92; *Brewer*, 51 F.3d at 1530; c*f. Starr*, 23 F.3d at 1291 ("We do not believe that a right to which a defendant is not entitled absent some threshold showing can fairly be defined as basic to the structure of a constitutional trial."). The case is much different when the defendant seeks to affirmatively offer evidence of his mental state, as McWilliams did here. In this context, the right to the assistance of a psychiatrist is not so conditional.

that there was in fact an *Ake* error—that the Georgia Supreme Court on direct appeal, in the context of passing on Hicks's argument that the trial court abused its discretion in denying his motion for a continuance, unreasonably rejected Hicks's *Ake* claim on the merits. But the Georgia Supreme Court never reviewed an *Ake* claim. On appeal, Hicks argued that the trial court abused its discretion in denying his motion for a continuance and motion for funds for a neurological examination so he could seek additional testing to support his *Ake*-appointed psychiatrist's opinion on his insanity defense. The Georgia Supreme Court decided, as a matter of state law, that the trial court "did not abuse its discretion" by denying Hicks's motions. *Hicks v. State*, 352 S.E.2d 762, 775 (Ga. 1987) (citing *Ealy v. State*, 306 S.E.2d 275, 279 (Ga. 1983)).[9]

The *Ake* claim this Court considered in *Hicks* did not arise until Hicks petitioned the Superior Court of Butts County, Georgia for a writ of habeas corpus. In his petition, Hicks argued that the trial court's denial of his motion for a continuance rendered his counsel ineffective under *Strickland*, insofar as he was unable to obtain a neurological examination, which he contended was part of the psychiatric assistance he was entitled to under *Ake*. The state habeas court held an

[9] This Court *assumed* that the Georgia Supreme Court, in finding no abuse of discretion in the trial court's denial of Hicks's motion for a continuance, rendered a decision that "was contrary to, or involved an unreasonable application of," 28 U.S.C. § 2254(d)(1), the U.S. Supreme Court's holding in *Ake*.

evidentiary hearing on Hicks's ineffective assistance claim, at which Hicks introduced the additional expert opinions regarding his mental condition that he would have obtained had the trial court not denied his motions. The habeas court denied Hicks's ineffective assistance claim and, in the process, his claim that the trial court violated his rights under *Ake*.[10]

The District Court was thus faced with an *Ake* claim litigated in a collateral proceeding. Reviewing the evidence Hicks presented at the evidentiary hearing in the state habeas court, the District Court held that while the denial of the continuance violated *Ake*, the error was harmless. *Hicks v. Turpin*, No. 3:97-CV-51-JTC (N.D. Ga. Sept. 2, 2000). On appeal, we *assumed* the denial of the continuance constituted an *Ake* error[11] so we could decide the sole question whether *Ake* violations are amenable to harmless error analysis. *Hicks*, 333 F.3d at 1284. We held that they are and, reviewing the same evidence the state habeas

[10] Hicks's *Ake* claim was cognizable on direct appeal. Therefore, under Georgia's procedural default rules, the habeas court lacked authority to entertain it. *See Whatley v. Warden, Ga. Diagnostic & Classification Ctr.*, 927 F.3d 1150, 1184 n.56 (11th Cir. 2019) (citing *Black v. Hardin*, 336 S.E.2d 754, 755 (Ga. 1985)). Nonetheless, the State, in defending the District Court's denial of Hicks's *Ake* claim in this Court, effectively waived the argument that the habeas court disregarded Georgia's procedural default rule.

[11] We indulged the assumption notwithstanding the absence of any U.S. Supreme Court precedent decided prior to Hicks's trial holding that the denial of a continuance, requested to enable an *Ake*-appointed psychiatrist to bolster her opinion, constitutes a violation of the Due Process Clause of the Fourteenth Amendment.

court and the District Court considered, affirmed the District Court's finding of harmless error. *Id.* at 1286–87.

Therefore, our decision in *Hicks* stands only for the narrow proposition that when an *Ake* claim is entertained on collateral attack in state court—in a hearing at which the petitioner can introduce the evidence that would have been obtained and presented at trial but for the *Ake* violation—we may review for harmless error under *Brecht*. But *Hicks* does not control the analysis of an *Ake* claim like the one presented here, which is based on a denial of psychiatric assistance and was litigated and rejected on direct appeal. Prejudice in these cases must be presumed, because the error is structural.

Our colleague argues that "the procedural history of *Hicks* . . . cannot limit its unambiguous holding that *Ake* error is subject to harmless-error review." Concurring Op. at 17. But the procedural context in which the *Ake* claim in *Hicks* arose was critical for determining whether the error could be harmless. In reviewing for harmless error under *Brecht*, we look to the record of the state *trial* court as a whole and consider whether the violation had a "substantial and injurious effect" in the context of the entire trial. *Brecht*, 507 U.S. at 638, 113 S. Ct. at 1722; *see also id.* at 641, 113 S. Ct. at 1724 (Stevens, J., concurring) (explaining that a reviewing court must "evaluate the error in the context of the entire *trial* record" (emphasis added)). In *Hicks*, because the *Ake* claim was raised

for the first time on collateral attack, that record encompassed the record of Hicks's trial *and* the record of the state habeas proceedings, which included the evidentiary hearing the habeas court conducted to determine, in the context of Hicks's ineffective assistance of counsel claim, whether the denial of the continuance prejudiced counsel's performance. At that evidentiary hearing, Hicks was able to offer the expert opinions that he would have obtained before trial but for the denial of the continuance—the purported *Ake* error. This was the body of evidence this Court (and the District Court) had before it in assessing whether the *Ake* error was amenable to harmless error review. *See Hicks*, 333 F.3d at 1286 (relying on the evidence presented at the state habeas proceeding to find the *Ake* error harmless); *Hicks*, No. 3:97-CV-51-JTC, at 22–24 (same).

By contrast, here we have no such record from which we could assess prejudice, because there has been no evidentiary hearing convened for the express purpose of deciding whether the trial judge's error was harmless. All we have is the record before the trial judge at the sentencing hearing. Unlike in *Hicks*, McWilliams never had an opportunity to demonstrate what the provision of a psychiatrist would have meant to his defense. Therefore, we cannot "quantitatively assess[ ] in the context of [the] other evidence presented [at the sentencing hearing]" the effect the denial of psychiatric assistance had on the trial judge's

sentencing decision. *Brecht*, 507 U.S. at 629, 113 S. Ct at 1717. Prejudice must be presumed.

IV.

For the foregoing reasons, we hold that this *Ake* error was structural. We remand the case to the District Court with instructions to issue a writ of habeas corpus vacating McWilliams's sentence and entitling him to a new sentencing hearing, following the provision of a psychiatrist to provide assistance in accordance with *Ake*.

SO ORDERED.

JORDAN, Circuit Judge, concurring in the judgment.

I concur in the judgment granting federal habeas corpus relief to Mr. McWilliams, but for a different reason. The majority may be right that an error under *Ake v. Oklahoma*, 470 U.S. 68 (1985), should be classified as structural, but that conclusion contradicts our prior decision in *Hicks v. Head*, 333 F.3d 1280, 1286 (11th Cir. 2003), which holds that an *Ake* error is a trial error. Because we are bound by *Hicks*, I would conduct a harmless-error analysis under *Brecht v. Abrahamson*, 507 U.S. 619, 623 (1993), and *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995). That review convinces me that Mr. McWilliams was harmed by the *Ake* error, so I would remand to the district court with instructions to issue a writ of habeas corpus vacating Mr. McWilliams' death sentence and ordering Alabama to provide him with a new sentencing hearing consistent with *Ake*.

I

More than 15 years ago, we considered in *Hicks* an issue of "first impression for our circuit: whether violations of *Ake* . . . are subject to harmless error analysis[.]" 333 F.3d at 1282. We answered that question affirmatively, holding that an *Ake* error is not structural, but rather "trial error" amenable to harmless-error review. *Id.* at 1286.[1]

[1] Every other circuit to decide the issue has also held that an *Ake* error is subject to harmless-error review. *See White v. Johnson*, 153 F.3d 197, 203 (5th Cir. 1998); *Tuggle v.*

We then ruled that *Brecht* supplied the appropriate harmless-error standard for *Ake* violations in federal habeas cases. *See id.* at 1286. Applying *Brecht*, we concluded that the alleged *Ake* error in that case—the trial court's "denial of psychiatric assistance until a few days before trial"—was harmless because the additional expert testimony offered by the defendant in post-conviction proceedings did not "contradict[ ] the evidence presented at trial that [the defendant] understood the difference between right and wrong" at the time of the murder, and "relate[d] to the same impulse control disorder testified to [by the defendant's expert] at trial." *Id.* at 1287.

The majority believes that *Hicks* can be distinguished—and therefore avoided—because the *Ake* claim in that case was litigated in state post-conviction proceedings whereas the *Ake* claim here was litigated at trial and on direct appeal. But the procedural history of *Hicks*—while possibly relevant to the ultimate outcome—cannot limit its unambiguous holding that *Ake* error is subject to harmless-error review. *See Hightower v. Schofield*, 365 F.3d 1008, 1027 n.28 (11th Cir. 2005) ("We recently decided in *Hicks* . . . that *Ake* errors are subject to harmless

Netherland, 79 F.3d 1386, 1388 (4th Cir. 1996); *Brewer v. Reynolds*, 51 F.3d 1519, 1529 (10th Cir. 1995); *Starr v. Lockhart*, 23 F.3d 1280, 1291 (8th Cir. 1994).

error analysis."), *vacated and remanded*, 545 U.S. 1124 (2005), *opinion reinstated*, *Hightower v. Terry*, 459 F.3d 1067, 1071 (11th Cir. 2006).[2]

Figuring out whether a constitutional violation is structural can be difficult, as illustrated by the many opinions in *United States v. Roy*, 855 F.3d 1133 (11th Cir. 2017) (en banc). Nevertheless, the answer to that question depends on the nature of the violation, and not on when or how the error was raised or litigated. *See, e.g.*, *United States v. Neder*, 527 U.S. 1, 14 (1999) ("Under our cases, a constitutional error is either structural or it is not."). Given our holding in *Hicks*, we are not at liberty to hold that an *Ake* error is structural. If that is going to be the new rule in this circuit, it can only be announced by the en banc court. *See United States v. Steele*, 147 F.3d 1316, 1318 (11th Cir. 1998) (en banc) (explaining that "a panel cannot overrule a prior one's holding even though convinced it is wrong").

Nor can *Hicks* be meaningfully distinguished based on its facts. In *Hicks*, as here, the trial court granted the request for psychiatric assistance, but denied a request for a continuance, failing to allow sufficient time for the court-appointed

[2] The majority asserts that this procedural distinction is critical because the record in *Hicks* encompassed the trial *and* the state habeas proceedings, which included the evidentiary hearing the habeas court conducted to determine, in the context of Mr. Hicks' ineffective assistance of counsel claim, whether the denial of the continuance prejudiced counsel's performance. Here too the record contains both the record of Mr. McWilliams' trial *and* the record of the state post-conviction proceedings, which included an evidentiary hearing on Mr. McWilliams' ineffective assistance of counsel claim. As discussed below, Mr. McWilliams presented testimony regarding his mental health at that hearing to support his ineffective assistance of counsel claim. As in *Hicks*, that testimony helps inform our analysis of the type of evidence Mr. McWilliams could have been presented at sentencing had the trial court provided him expert assistance in accordance with *Ake*.

expert to effectively assist the defense. Neither case involves an outright refusal to provide an expert under *Ake*.[3]

Specifically, in *Hicks* the trial court granted Mr. Hicks' request for psychiatric assistance, but the psychiatrist was appointed just days before the trial. *See* 333 F.3d at 1284–85 n.2. The alleged *Ake* error was the trial court's denial of Mr. Hicks' motion for a continuance and request for additional funds for neurological testing. *See id*. Here, similarly, the trial court appointed Dr. John Goff to perform neuropsychological testing requested by Mr. McWilliams' counsel, in accordance with *Ake*. But because of the trial court's denial of a continuance, Mr. McWilliams was unable to meet with Dr. Goff or another expert to help him evaluate Dr. Goff's report and the extensive medical records and translate the data into a legal strategy. Thus, the nature of the *Ake* error here is essentially the same as that in *Hicks*: the short time frame provided did not allow for meaningful expert assistance.

Because of these factual similarities, the line drawn by the majority between the "trial error" in *Hicks* and the "structural error" here will prove difficult for district courts to apply. It will be nearly impossible to determine whether *Ake* violations

[3] It is possible that *Hicks* would not control, and structural error would exist, had the trial court outright refused to appoint a psychiatric expert under *Ake*. Such a refusal would have been more akin to the complete denial of the right to counsel, which has been held to be structural error. *See Gideon v. Wainwright*, 372 U.S. 335, 342–45 (1963) (establishing the right to counsel for indigent criminal defendants); *Johnson v. United States*, 520 U.S. 461, 468–69 (noting the total deprivation of the right to counsel in violation of *Gideon* is structural error); *Brecht*, 507 U.S. at 629–30 (same). But, as discussed above, that is not what happened here.

raised in future habeas petitions are subject to harmless-error analysis or not. For these reasons, I would apply *Hicks*, find that the *Ake* violation constitutes trial error, and proceed to the *Brecht* harmless-error analysis.

II

On remand from the Supreme Court, we must determine whether Alabama's *Ake* violation prejudiced Mr. McWilliams. In particular, we must "specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered," i.e., whether it resulted in a "substantial and injurious effect or influence." *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (quoting *Davis v. Ayala*, 135 S. Ct. 2187, 2198 (2015), and *Brecht*, 507 U.S. at 623)). I would conclude, based on the standards set forth in *Brecht* and *O'Neal*, that it would have.

A

Our divided opinion in *McWilliams v. Commissioner, Alabama Department of Corrections*, 634 F. App'x 698 (11th Cir. 2015), rejected Mr. McWilliams' argument that the Alabama state courts unreasonably applied *Ake*. We explained that our sister circuits were divided on whether *Ake* requires a state to provide a mental health expert solely for the defense, or whether a neutral expert (available to both sides) is sufficient. *See id*. at 705–06. Given that split and the lack of a Supreme Court resolution, we held that Alabama's "provision of a neutral psychologist [in

Mr. McWilliams' case] would not be 'contrary to, or involve[ ] an unreasonable application of, clearly established Federal law.'" *Id*. at 706 (quoting 28 U.S.C. § 2254(d)(1)).

We also provided an alternative holding. "[A]ssuming an *Ake* error occurred," we denied relief because Mr. McWilliams did not show that the error had "a substantial and injurious effect on [his] sentence." *Id*. at 706–07. We reached this conclusion because the trial court "reviewed Dr. Goff's report and took into account the possibility of organic brain damage but also noted that, throughout [Mr.] McWilliams'[ ] medical records, different psychologists and psychiatrists describe him as a malingerer . . . . Based on a review of this and other evidence, the trial [court] found that [Mr.] McWilliams'[ ] 'aggravating circumstances overwhelmingly outweighed the mitigating circumstances.'" *Id*. Moreover, "[a] few additional days to review Dr. Goff's findings would not have somehow allowed the defense to overcome the mountain of evidence undercutting his claims that he suffered mental illness during the time of the crime." *Id*. at 707.

I wrote a separate concurrence agreeing that Mr. McWilliams had not shown prejudice. I reached that conclusion "in part because Mr. McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing" and it was therefore difficult "to conclude that Mr. McWilliams has met his burden on

prejudice, as we do not know how additional time with Dr. Goff (and his report) would have benefitted the defense." *Id*. at 712 (Jordan, J., concurring).

Judge Wilson dissented, concluding both that the Alabama courts unreasonably applied *Ake* and that Mr. McWilliams demonstrated that this error had a substantial and injurious effect on his sentence. *See id*. at 713–17 (Wilson, J., dissenting). Regarding prejudice, Judge Wilson determined that the *Ake* error "precluded [Mr.] McWilliams from offering evidence that directly contradicted the psychiatric evidence put forward by the state." *Id*. at 716–17. Moreover, testimony from the Rule 32 post-conviction hearing established that "with appropriate assistance, he would have been in position to confront the State's evidence that he was merely feigning mental health issues." *Id*. at 717. In particular, Dr. George Woods explained that Mr. McWilliams would have presented "different," significantly "more viable" mental health evidence had he been "afforded an expert who actually reviewed his full psychiatric history and had more than a few hours to assist the defense." *Id*.

Mr. McWilliams appealed the denial of his *Ake* claim. The Supreme Court granted certiorari, *see McWilliams v. Dunn*, 137 S. Ct. 808 (2017) (mem.), and then reversed. *See McWilliams*, 137 S. Ct. at 1801. The Supreme Court determined that it did not need to answer whether "*Ake* clearly established that a State must provide an indigent defendant with a qualified mental health expert retained specifically for

the defense team" because it found that "Alabama here did not meet even *Ake*'s most basic requirements." *Id*. at 1799–1800. The Court explained that *Ake* "requires the State to provide the defense with 'access to a competent psychiatrist who will conduct an appropriate [1] *examination* and assist in [2] *evaluation*, [3] *preparation*, and [4] *presentation* of the defense.'" *Id*. at 1800 (quoting *Ake*, 470 U.S. at 83, with emphasis in *McWilliams*).

Although it assumed that Dr. Goff met the examination requirement, the Supreme Court found *Ake* error because no expert assisted in the evaluation, preparation, or presentation of the defense. *See id*. at 1800–01. It then remanded the case to us to "specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered." *Id*. at 1801. Both the majority opinion and the dissent in the Supreme Court provided divergent accounts of what, in their respective views, the record showed regarding prejudice. *Compare id*. (majority opinion) ("There is reason to think that [the *Ake* error] could have [mattered]. For example, the trial judge relied heavily on his belief that McWilliams was malingering. If McWilliams had the assistance of an expert to explain that 'malingering is not inconsistent with serious mental illness,' . . . he might have been able to alter the judge's perception of the case."), *with id*. at 1809–11 (Alito, J., dissenting) (recounting the aggravating

circumstances and the psychological evidence presented to conclude that Mr. McWilliams failed to show prejudice).[4]

B

We are required to grant habeas relief to Mr. McWilliams if the *Ake* error had a "substantial and injurious effect or influence" on his sentence. *See Brecht*, 507 U.S. at 623. "To show prejudice under *Brecht*, there must be more than a reasonable possibility that the error contributed to the conviction or sentence." *Mason v. Allen*, 605 F.3d 1114, 1123 (11th Cir. 2010) (per curiam) (internal quotation marks omitted and alterations adopted). Although the *Brecht* standard "is more favorable to and less onerous on the state, and thus less favorable to the defendant, than the *Chapman* harmless beyond a reasonable doubt standard," *Brecht* is not a burden of proof. *Trepal v. Sec'y, Fla. Dep't of Corr.*, 684 F.3d 1088, 1111–12 & n.26 (11th Cir. 2012) (citation and internal quotation marks omitted). *See also O'Neal*, 513 U.S. at 994–95 ("[W]e deliberately phrase the issue in this case in terms of a judge's grave doubt, instead of in terms of 'burden of proof.'") (alteration added).[5]

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[4] The prejudice discussion in the majority and dissenting opinions in *McWilliams* seems to confirm that the Supreme Court did not view the *Ake* violation as structural. If the error had been deemed to be structural, prejudice would have been presumed and Mr. McWilliams would have been given a new sentencing hearing without the need for us to conduct harmless-error analysis.

[5] There is some language in *Brecht* suggesting the Supreme Court shifted to the petitioner the burden to show prejudice. *See Brecht*, 507 U.S. at 637 (stating habeas petitioners "are not entitled to habeas relief based on trial error unless *they* can establish that it resulted in 'actual prejudice'") (emphasis added). The Supreme Court, however, subsequently clarified in *O'Neal*

When considering whether a defendant was prejudiced by a constitutional error that affected his presentation of mitigating evidence, we have to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweigh[ ] it against the evidence in aggravation." *Williams v. Taylor*, 529 U.S. 362, 397–98 (2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 751–52 (1990)). *See also Hicks*, 333 F.3d at 1286–87. So, in order to answer the specific question remanded to us by the Supreme Court, we must first understand what sort of assistance in evaluation, preparation, and presentation of the defense Dr. Goff provided (or could have provided). We must then reweigh the mental health evidence obtained through such assistance against the evidence presented by the prosecution. If review of the record leaves us in "grave doubt about the likely effect of an error on the jury's verdict," we must "treat the error, not as if it were harmless, but as if it affected the verdict (*i.e.*, as if it had a 'substantial and injurious effect or influence in determining the jury's verdict')." *O'Neal*, 513 U.S. at 435. If we cannot say with fair assurance that

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that this language "is not determinative." *O'Neal*, 513 U.S. at 438–39 (explaining that *Brecht* adopted the harmlessness standard of *Kotteakos v. United States*, 328 U.S. 750 (1946), which placed "the risk of doubt on the State," and that this statement in *Brecht* "did not speak for a Court majority"). *See also Fry v. Pliler*, 551 U.S. 112, 122 (2007) (Stevens, J., concurring in part and dissenting in part) ("[T]he *Brecht* standard . . . imposes a significant burden of persuasion on the State."); *Trepal*, 684 F.3d at 1111 n.26 ("We do not phrase the *Brecht* requirement as a burden of proof, for it is not.") (citing *O'Neal*, 513 U.S. at 435); *Bonner v. Holt*, 26 F.3d 1081, 1083 (11th Cir. 1994) (stating that *Brecht* "did not alter the burden of proving error harmless, which remains with the government").

the verdict—here the sentence of death—was not substantially swayed by the error, we must grant relief. *See Trepal*, 684 F.3d at 1114.

We have not yet conducted a prejudice analysis for the specific *Ake* violation articulated by the Supreme Court, as in our initial opinion we considered the alleged *Ake* error to be the failure to appoint a defense expert for Mr. McWilliams. *See McWilliams*, 137 S. Ct. at 1801 (noting that the Eleventh Circuit "did not specifically consider whether access to the type of meaningful assistance in evaluating, preparing, and presenting the defense that *Ake* requires would have mattered"). As the Supreme Court has now explained, *Ake* requires more than an examination. *See id*. at 1800–01. Our prejudice analysis on remand therefore requires more as well.

Based on my review, there is sufficient evidence in the record to conclude the *Ake* error identified by the Supreme Court had a "substantial and injurious effect or influence in determining" the trial court's sentence. *Brecht*, 507 U.S. at 623. Dr. Goff's report, which the parties received just two days before the judicial sentencing hearing, stated that the "neuropsychological assessment" administered to Mr. McWilliams reflected "organic brain dysfunction." Dr. Goff found "evidence of cortical dysfunction attributable to right cerebral hemisphere dysfunction," shown by "left hand weakness, poor motor coordination on the left hand, sensory deficits including suppressions of the left hand and very poor visual search skills." These deficiencies were "suggestive of a right hemisphere lesion" and "compatible with

the injuries" Mr. McWilliams said he sustained as a child. The report also stated that Mr. McWilliams' "obvious neuropsychological deficit" could be related to his "low frustration tolerance and impulsivity."

Dr. Goff concluded that although Mr. McWilliams exaggerated certain symptoms, "it is quite apparent that he has some neuropsychological problems." He explained that psychological tests are classified by their "transparency," meaning some tests are easy for the subject to influence to falsely "look bad on," whereas others are not. Mr. McWilliams "performed poorly" on those tasks he would not have been able to manipulate.

The prison records received the morning of the sentencing hearing further supported Dr. Goff's opinion that Mr. McWilliams had neuropsychological problems. Those records indicated that Mr. McWilliams was taking an assortment of psychotropic medications, including Desyrel, Librium, and an antipsychotic Mellaril.

Had Mr. McWilliams and his counsel been given sufficient time to review Dr. Goff's report and the medical records with Dr. Goff himself or with another expert, that data could have been translated into a legal strategy. *See McWilliams*, 137 S. Ct. at 1800. But because the trial court refused to allow a continuance for defense counsel to obtain such assistance, Mr. McWilliams was unable to respond to the prosecutor's argument that there were no mitigating mental health circumstances.

Indeed, Mr. McWilliams' counsel stated at the sentencing hearing that he "would be pleased to respond to [the prosecutor's] remarks that there are no mitigating circumstances," but because neither he nor his co-counsel were doctors, neither was really capable of going through those records on their own.

When it sentenced Mr. McWilliams to death, the trial court found no mitigating circumstances, relying heavily on evidence that Mr. McWilliams was "feigning, faking, and manipulative." As the Supreme Court noted, had Mr. McWilliams received the assistance of an expert to explain Dr. Goff's findings and conclusions—which support a claim that Mr. McWilliams' malingering is not inconsistent with serious mental illness—"he might have been able to alter the judge's perception of the case." *McWilliams*, 137 S. Ct. at 1802.

Testimony from the Rule 32 hearing likewise shows that, had Mr. McWilliams' been able to obtain meaningful assistance from a psychiatric expert, he would have been able to confront the prosecution's evidence of malingering. The Rule 32 court conducted a four-day evidentiary hearing on Mr. McWilliams' petition, which alleged in part that his counsel rendered ineffective assistance by failing to investigate and present mitigating evidence at his penalty phase and sentencing hearing. Dr. Woods, a neuropsychiatrist, testified at the hearing that Mr. McWilliams' testing indicated a "cry-for-help." He also explained the difference between a "fake-bad" and a "cry-for-help" diagnosis: the former is "someone

attempting to make themselves look worse," and though the latter seems similar, it actually reflects "significant psychiatric and psychological problems."

Dr. Woods further explained that the results of the MMPI, which Mr. McWilliams had been given *prior* to his arrest in this case (when he had no incentive to fake his results), were "very, very consistent" with the results of the MMPIs administered post-arrest by the state's doctors. The "internal consistency" of the tests undermined the trial court's impression that evidence of malingering eliminated the possibility that Mr. McWilliams had genuine mental health issues.

Finally, Dr. Woods testified that Mr. McWilliams was suffering from bipolar disorder on the night of the crime. Dr. Woods relied on prison records showing that Mr. McWilliams was medicated with antipsychotics and antidepressants throughout his entire incarceration. Due to the *Ake* error, which precluded meaningful review of these records in advance of the sentencing hearing, Mr. McWilliams was unable to present this or similar evidence to the trial court.

Together, Dr. Goff's report and Dr. Woods' testimony indicate that, had Mr. McWilliams received the assistance he was entitled to under *Ake*, he would have been able to present evidence and arguments to explain that his purported malingering was not necessarily inconsistent with mental illness. *See McWilliams*, 137 S. Ct. at 1800. This could have persuaded the trial court that his organic brain

dysfunction caused sufficient impairment to rise to the level of a mitigating circumstance. *See id*.

Admittedly, the record contains testimony from psychiatrists which supports the prosecution's theory of malingering. *See McWilliams*, 137 S. Ct. at 1810 (Alito, J., dissenting) (summarizing psychiatric evidence that supports the prosecution's theory that Mr. McWilliams was feigning mental illness). But at the very least the record creates "grave doubt" as to whether the *Ake* error had a "substantial and injurious effect or influence" in determining the trial judge's sentence. *O'Neal*, 513 U.S. at 436. As a result, the error is not harmless, and Mr. McWilliams is entitled to habeas relief. *See id*. *See also Booker v. Singletary*, 90 F.3d 440, 444 (11th Cir. 1996) (finding prejudice under *Brecht* because "we were unable to speculate as to the effect of the disregarded 'substantial [mitigating] evidence would have had on the sentencing body'") (quoting *Booker v. Dugger*, 922 F.2d 633, 636 (11th Cir. 1991)); *Smith v. Singletary*, 61 F.3d 815, 818–19 (11th Cir. 1995) (finding prejudice under *Brecht* where the sentencing court precluded the presentation of certain mitigating evidence).

III

Under our prior decision in *Hicks*, the *Ake* violation in Mr. McWilliams' case constitutes trial error. Under *Brecht* and *O'Neal*, however, the error was not harmless. I would therefore remand to the district court with instructions to issue a

writ of habeas corpus vacating the death sentence and requiring Alabama to provide Mr. McWilliams with a new sentencing hearing in accordance with *Ake*.

Appendix E

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 13-13906

D.C. Docket No. 7:04-cv-02923-RDP

JAMES E. MCWILLIAMS,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, et al.,

Respondents - Appellees.

Appeal from the United States District Court
for the Northern District of Alabama

(December 16, 2015)

Before TJOFLAT, WILSON, and JORDAN, Circuit Judges.

PER CURIAM:

James Edmund McWilliams, Jr., an inmate on Alabama's death row, appeals the district court's denial of his 28 U.S.C. § 2254 habeas petition challenging his death sentence.

We granted McWilliams a Certificate of Appealability (COA) on four issues: (1) whether the district court erred in holding the state court was not objectively unreasonable in determining McWilliams failed to show a violation of *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087 (1985); (2) whether McWilliams is procedurally barred from arguing the trial court violated his Sixth Amendment rights by denying him a continuance for his sentencing hearing; (3) whether the district court erred in finding the state court was not objectively unreasonable in ruling McWilliams received effective assistance of counsel during the penalty phase of his trial and sentencing; and (4) whether the district court erred in determining the state court was not objectively unreasonable in holding McWilliams's rights under *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229 (1965) were not violated.

We hold that the state court did not commit reversible error under 28 U.S.C. § 2254(d) in denying McWilliams's *Ake* claim, his claim of ineffective assistance of counsel during the penalty phase of trial and sentencing, and his *Griffin* claim. We also hold that McWilliams is procedurally barred from arguing the trial court

violated his Sixth Amendment rights in denying his motion for continuance. Accordingly, we affirm.

I. BACKGROUND

On December 30, 1984, McWilliams entered a convenience store in Tuscaloosa, Alabama, where Patricia Reynolds was working the nightshift by herself. McWilliams locked the doors behind him and proceeded to rob and brutally rape Ms. Reynolds. When he was finished, he shot her with a .38 caliber handgun. Ms. Reynolds died in surgery that night.

McWilliams was arrested driving a stolen car in Ohio with the murder weapon in his possession soon afterwards. He was identified by eyewitnesses who placed him at the scene. While in jail in Ohio, McWilliams bragged to other inmates that he robbed, raped, and killed a woman in Alabama.

In the months leading up to the murder, McWilliams was voluntarily attending mental health counseling in the form of couple's therapy with his pregnant wife at the office of Dr. Sherril Rhodes.[1] After meeting with McWilliams, Dr. Rhodes documented in a report that "there are deeper psychological problems that [McWilliams] is avoiding and hopefully the testing will reveal this." She also suspected the presence of "psychosis, or possibly manic-depressive disorder." Dr. Rhodes then set up an appointment for

[1] Dr. Rhodes's reports and notes were introduced into evidence during the Rule 32 hearing.

McWilliams to undergo psychological testing with Dr. Marci K. Davis,[2] a clinical psychologist, on October 15, 1984.

Dr. Davis administered the Minnesota Multiphasic Personality Inventory (MMPI) to McWilliams and concluded that McWilliams's MMPI test scores "on the surface indicate that the results are invalid due to faking bad." However, on closer examination, she then determined that "[McWilliams] did tell the truth and took the test in good faith . . . [c]onsequently, we may assume that he is extremely disturbed, has much internal anxiety, and we would expect to find serious pathology." Dr. Davis also recommended McWilliams be admitted to an inpatient treatment facility, evaluated by a psychiatrist for medication, and carefully monitored by counselors. Dr. Davis ended the report by warning other counselors not to meet with McWilliams alone after dark. Nonetheless, McWilliams did not return to counseling before murdering Ms. Reynolds two and a half months later.

A. The Lunacy Commission

McWilliams's mental health has been frequently contested and repeatedly examined throughout the long history of his case, but the central cause for most of the speculation stems from McWilliams's tendency to malinger, or fake symptoms of his alleged mental illness.

[2] Dr. Davis's reports were entered into evidence during the penalty phase.

McWilliams's counsel began investigating McWilliams's mental health less than a month after he was arrested for murdering Ms. Reynolds. On January 21, 1986, counsel petitioned the Circuit Court of Tuscaloosa County to provide a psychiatric assessment of McWilliams, including an evaluation of his sanity, his competency, and any mitigating circumstances.[3] The court granted the petition and ordered the State of Alabama (State) to create a "Lunacy Commission" to evaluate McWilliams's mental health at the Taylor Hardin Secure Medical Facility (Taylor Hardin). The Lunacy Commission reported directly to the court.

On June 4, 1986, the Lunacy Commission presented the court with a three-and-a-half-page report summarizing the conclusions of three doctors serving on the Commission.[4] All three doctors concluded McWilliams was competent to stand trial, free of mental illness at the time of the crime, and faking psychotic symptoms.

B. Trial and Penalty Phase

On August 27, 1986, the jury found McWilliams guilty of murder during robbery in the first degree and murder during rape in the first degree. The penalty phase took place the following day. Counsel's strategy during the penalty phase was to present McWilliams as a man who grew up with significant psychological

[3] The petition is known as a "Petition for Inquisition Upon Alleged Insane Prisoner."

[4] Four doctors appear in the report, including Dr. Norman G. Poythress, the Director of Clinical Services at Taylor Hardin. Dr. Poythress did not summarize his own medical conclusions but did ultimately sign the report on May 27, 1986.

problems that affected his behavior. Although counsel subpoenaed Dr. Rhodes to testify during the penalty phase, Dr. Rhodes did not respond to the subpoena. Ultimately, only McWilliams and his mother testified for the defense. McWilliams and his mother testified that McWilliams had head injuries as a child and a history of blacking out, hallucinating, chronic headaches, doctor visits, and memory problems. Prior to this testimony, counsel was unaware of these injuries and conditions.

McWilliams was permitted to read Dr. Davis's report and her MMPI test results into the record and explain his mental health issues to the jury. The court also admitted Dr. Davis's report into evidence. However, McWilliams was unable to explain any technical aspects of the report, and when cross-examined, he told the prosecutor that he was not a psychologist. The State then presented two mental health experts from the Lunacy Commission, who each testified that McWilliams was faking psychotic symptoms and was not mentally ill. The jury voted 10 to 2 in favor of the death sentence.

C. Sentencing Hearing

On September 3, 1986, counsel filed a motion requesting that McWilliams undergo neuropsychological testing for possible organic brain damage, based on the information revealed during the penalty phase about his head injuries. The court granted the request, ordering the Alabama Department of Corrections (DOC)

to perform complete neurological and neuropsychological testing on McWilliams. The court further instructed the DOC to send all results and evaluations to the court no later than September 25, 1986.

On September 22, 1986, Dr. Paul Bivens, a psychologist employed by the DOC, wrote the court, explaining that he completed some of the neuropsychological testing, which indicated "possible organic impairment," but was unable to complete all the neuropsychological tests. Instead, Dr. Bivens recommended more testing and advised the court to find a clinical neuropsychological specialist who could perform the tests independent of the DOC to "avoid unnecessary conflict."

On September 30, 1986, the trial court appointed Dr. John R. Goff, a specialist in clinical neuropsychology and the Chief of Psychology at Bryce Hospital. Dr. Goff met with McWilliams on October 3, 1986, and performed the neuropsychological testing requested by counsel. Dr. Goff's completed neuropsychological assessment was delivered to all the parties approximately 48 hours before the sentencing hearing.

Dr. Goff's report was approximately five pages long. He determined that McWilliams was suffering from organic brain dysfunction and that "organic personality disorder should be considered." His report also indicated evidence of malingering but noted it was potentially consistent with a "cry for help posture" or

possibly a "fake bad." The report further explained there were some "genuine neuropsychological problems," and Dr. Goff diagnosed McWilliams with "organic personality syndrome."

Counsel subpoenaed McWilliams's medical and psychiatric records multiple times before the penalty phase and well in advance of the sentencing hearing. But, the DOC and Taylor Hardin failed to fully comply with the subpoena until the day of the sentencing hearing. The last of the medical and psychiatric records subpoenaed by counsel arrived at the court on October 8 and October 9, 1986—the morning of the 10 a.m. sentencing hearing.

At the sentencing hearing, counsel moved for a continuance to review the newly arrived records with the assistance of an expert. The court denied the request but invited counsel to review the records at the clerk's office during a brief recess. When the hearing resumed at 2 p.m., the court admitted Dr. Goff's report and all the new records into evidence. Counsel again asked for a continuance. The court again denied the request.

The court found three aggravating circumstances in support of McWilliams's death sentence: (1) McWilliams was previously convicted of a felony involving the use of violence to the person, specifically a robbery and rape he was convicted of on June 26, 1985; (2) the murder was committed during the course of a robbery and rape; and (3) the murder was especially heinous, atrocious,

or cruel compared to other capital offenses in light of the brutality of the rape, the execution-type slaying, and McWilliams's behavior after the crime. The court found no mitigating circumstances.

The court determined that "the [d]efendant is not psychotic, either from organic brain dysfunction or any other reason." The court did find that "the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that does not rise to the level of a mitigating circumstance" and by "a preponderance of the evidence . . . the defendant [is] feigning, faking, and manipulative." The court then sentenced McWilliams to death by electrocution.

D. Rule 32 Evidentiary Hearing

On April 2, 1997, McWilliams challenged his conviction in a petition under Rule 32 of the Alabama Rules of Criminal Procedure, claiming that his counsel was ineffective for failing to investigate and present mitigating evidence at his penalty phase and sentencing. On June 12, 2000, the Alabama circuit court conducted a four-day evidentiary hearing. In September 2001, the Alabama circuit court denied the petition. In 2004, the Alabama Court of Criminal Appeals reviewed and affirmed the decision.

The Rule 32 evidentiary hearing on McWilliams's post-conviction claims included the testimony of defense expert Dr. George Woods and the State's

rebuttal expert, Dr. Karl Kirkland. Dr. Woods reviewed the MMPI performed by Dr. Davis that McWilliams read to the jury during the penalty phase. Dr. Woods explained the test could be confused with exaggerated scores but actually indicated McWilliams had significant psychiatric and psychological problems, including paranoia and mania, as well as "abundant evidence of psychopathology." Dr. Woods agreed with Dr. Davis that McWilliams took the MMPI in good faith. Dr. Woods also examined the 1986 MMPI testing performed at Taylor Hardin, which the State used during the penalty phase. He explained that the results indicated a cry for help with severe psychopathology and did not necessarily mean McWilliams faked his symptoms.

Dr. Woods also reviewed Dr. Goff's report and testified that the results revealed symptoms of a psychiatric disorder, but because neuropsychological impairments change over time, McWilliams's neuropsychological function was somewhat restored as of 2000. Dr. Woods further testified that he reviewed the DOC records, and the records revealed McWilliams was medicated with antipsychotics and antidepressants throughout his entire incarceration. Dr. Woods stated that, in examining the DOC records, the administration of medication was consistent with the presentation of symptoms that required psychiatric treatment.

` Dr. Woods ultimately diagnosed McWilliams with bipolar disorder, with symptoms of mania, hypomania, and depression. Dr. Woods also concluded that

McWilliams was suffering from bipolar disorder on the night of the crime. Dr. Karl Kirkland, a forensic psychologist, testified that he disagreed with Dr. Woods's diagnosis. Dr. Kirkland agreed with the evaluation of the Taylor Hardin doctors that McWilliams was feigning psychiatric symptoms and that his behavior was more appropriately categorized as a character disorder.

II. PROCEDURAL HISTORY

McWilliams's conviction and death sentence were affirmed on direct appeal by the Alabama Court of Criminal Appeals and the Alabama Supreme Court. *See McWilliams v. State*, 640 So. 2d 982 (Ala. Crim. App. 1991), *aff'd in part, remanded in part sub nom.*, *Ex parte McWilliams*, 640 So. 2d 1015 (Ala. 1993), *on remand to sub nom.*, *McWilliams v. State*, 640 So. 2d 1025 (Ala. Crim. App. 1994), *opinion after remand*, 666 So. 2d 89 (Ala. Crim. App. 1994), *aff'd sub nom.*, *Ex part McWilliams*, 666 So. 2d 90 (Ala. 1995), *cert. denied sub nom.*, *McWilliams v. Alabama*, 516 U.S. 1053, 116 S. Ct. 723 (1996).

The Alabama circuit court entered its final order denying McWilliams's Rule 32 petition in September 2001, and the Alabama Court of Criminal Appeals affirmed the denial. *See McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004). On September 24, 2004, the Alabama Supreme Court denied McWilliams's petition for a writ of certiorari on his Rule 32 petition.

McWilliams then turned to the federal courts. On October 6, 2004, he filed a petition for a writ of habeas corpus in the United States District Court for the Northern District of Alabama. The district court assigned a magistrate judge to review McWilliams's petition and submit a recommendation. On February 1, 2008, the magistrate judge issued a report and recommendation denying all of McWilliams's claims. On August 25, 2010, the district court entered a memorandum opinion adopting the magistrate judge's conclusions. The district court further addressed specific objections McWilliams raised to the magistrate judge's report and recommendation and then entered an order dismissing McWilliams's habeas petition with prejudice and denying his application for a COA.

This court granted a COA on whether the district court improperly overruled all of McWilliams's objections to the magistrate judge's report and recommendation without specifically acknowledging certain objections. On September 10, 2012, we vacated the district court's decision and remanded McWilliams's case to the district court with instructions to resolve all the claims in his habeas petition. The district court then entered a memorandum opinion on April 17, 2013 overruling all of McWilliams's objections to the magistrate judge's report, adopting the report in full, and denying McWilliams's habeas petition. On October 7, 2013, the district court again denied McWilliams's request for a COA.

McWilliams then filed an application for a COA in this court. On December 16, 2013, we granted McWilliams a COA.

III. STANDARD OF REVIEW

"When examining a district court's denial of a . . . habeas petition, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error." *Connor v. Sec'y, Fla. Dep't of Corr.*, 713 F.3d 609, 620 (11th Cir. 2013) (internal quotation marks omitted).

"Because [McWilliams] filed his federal petition after April 24, 1996, this case is governed by 28 U.S.C. § 2254, as amended by the Anti-Terrorism and Effective Death [Penalty] Act of 1996 (AEDPA)." *See Guzman v. Sec'y, Dep't of Corr.*, 663 F.3d 1336, 1345 (11th Cir. 2011). When a state court has denied a claim on the merits, "the standard a petitioner must meet to obtain federal habeas relief was intended to be, and is, a difficult one." *See Johnson v. Sec'y, DOC*, 643 F.3d 907, 910 (11th Cir. 2011) (citing *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 786 (2011)).

The "purpose of AEDPA's" amendments to § 2254 "is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." *Greene v. Fisher*, 565 U.S. __, __, 132 S. Ct. 38, 43–44 (2011) (internal quotation marks omitted). Therefore, federal review of final state court decisions under § 2254 is

"greatly circumscribed" and "highly deferential." *See Hill v. Humphrey*, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) (internal quotation marks omitted). AEDPA only allows federal courts to grant relief for habeas claims decided by a state court on the merits if the state court's resolution of the claims:

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

28 U.S.C. § 2254(d).

Under AEDPA, "the state court's application of governing [F]ederal law . . . must be shown to be not only erroneous, but objectively unreasonable." *Waddington v. Sarausad*, 555 U.S. 179, 190, 129 S. Ct. 823, 831 (2009) (internal quotation marks omitted); *see also Williams v. Taylor*, 529 U.S. 362, 410–11, 120 S. Ct. 1495, 1522 (2000) ("[A]n *unreasonable* application of [F]ederal law is different from an *incorrect* application of [F]ederal law."). This is a "substantially higher threshold" than when only a showing of erroneousness is required. *Schriro v. Landrigan*, 550 U.S. 465, 473, 127 S. Ct. 1933, 1939 (2007). When assessing the state court's decision, we must consider the record the court had before it. *Cullen v. Pinholster*, 563 U.S. 170, __, 131 S. Ct. 1388, 1400 (2011). It is the petitioner's burden to demonstrate that the state court applied the relevant clearly

established law to that record "in an objectively unreasonable manner." *See Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S. Ct. 357, 360 (2002) (per curiam). Given this determination is objective, 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. *See Williams*, 529 U.S. at 409–11, 120 S. Ct. at 1522.

Our review of a petitioner's claim is further limited under § 2254(e)(1) by "a presumption of correctness [that] applies to the factual findings made by state trial and appellate courts." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011) (internal quotation marks omitted). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations." *Id.* (internal quotation mark omitted). "Instead, it must conclude that the state court's findings lacked even fair support in the record." *Id.* (internal quotation mark omitted). The petitioner has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

IV. DISCUSSION

A. Alabama's Application of *Ake*

McWilliams contends the State deprived him of due process under *Ake* because the State did not provide him the meaningful assistance of an independent psychiatric expert at his sentencing hearing.

Under *Ake*, "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the [s]tate must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. This right "extends to the sentencing phase of a criminal case." *Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1223 (11th Cir. 2012) (internal quotation marks omitted). However, *Ake* cautions that a defendant does not have "a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. Rather, *Ake* entitles the defendant access to a "competent psychiatrist." *Id.* "[T]he decision on how to implement this right" is left "to the [s]tate." *Id.*

McWilliams first argues that he was denied the assistance contemplated by *Ake* because he was not provided an "expert of his own." Specifically, McWilliams asserts that he was denied such an expert because Dr. Goff's assistance was "equally disseminated to all parties." The State contends there is no clearly established Federal law that requires it to provide a partisan mental health expert to the defense and, therefore, McWilliams is not entitled to federal habeas relief on this basis.

In some jurisdictions, a court-appointed neutral mental health expert made available to all parties may satisfy *Ake*. *See Miller v. Colson*, 694 F.3d 691, 697–99 (6th Cir. 2012) (discussing the split amongst Sixth Circuit decisions that address whether a neutral mental health expert satisfies *Ake*), *cert. denied*; *Granviel v. Lynaugh*, 881 F.2d 185, 191–92 (5th Cir. 1989) (holding that *Ake* is met when the government provides a defendant with neutral psychiatric assistance), *cert. denied*. Other circuits have held that the state must provide a non-neutral mental health expert to satisfy *Ake*. *See United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) (holding that a defendant is entitled to independent, non-neutral psychiatric assistance); *Smith v. McCormick*, 914 F.2d 1153, 1158 (9th Cir. 1990) ("[U]nder *Ake*, evaluation by a 'neutral' court psychiatrist does not satisfy due process."). However, the United States Supreme Court has thus far declined to resolve this disagreement among the circuits. *See Miller*, 694 F.3d at 697 n. 6; *Granviel v. Texas*, 493 U.S. 963, 110 S. Ct. 2577 (1990) (denying certiorari). As a result, the State's provision of a neutral psychologist would not be "contrary to, or involve[] an unreasonable application of, clearly established Federal law." *See* 28 U.S.C. § 2254(d)(1). Therefore, McWilliams's argument fails.

McWilliams next contends that Dr. Goff's late arrival to the proceedings denied him due process under *Ake*. The State asserts a defendant is only entitled to

assistance from a psychiatrist under *Ake* and the trial court's appointment of Dr. Goff satisfied this requirement.

McWilliams was entitled access to a "competent psychiatrist" to assist him in the development of his defense. *See Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. The State appointed Dr. Goff to examine McWilliams and produce a report. Nothing in the record suggests that Dr. Goff lacked the requisite expertise to examine McWilliams and generate a report. While Dr. Goff provided the report to McWilliams only a few days before the sentencing hearing, McWilliams could have called Dr. Goff as a witness or contacted him prior to the completion of the report to ask for additional assistance. McWilliams's failure to do so does not render Dr. Goff's assistance deficient. Moreover, the report was admitted into evidence and considered by the court at sentencing, demonstrating the defense utilized Dr. Goff's assistance. Thus, the State provided McWilliams access to a competent psychiatrist, and McWilliams relied on the psychiatrist's assistance.

Given the deference owed to the state court, its determination that *Ake* was satisfied under these circumstances was not objectively unreasonable. Therefore, we hold that the State's adjudication of McWilliams's *Ake* claim was not contrary to or an unreasonable application of clearly established Federal law.

Even assuming an *Ake* error occurred, relief may only be granted if the error had a "substantial and injurious effect or influence" on the outcome of

McWilliams's case. *See Hicks v. Head*, 333 F.3d 1280, 1286–87 (11th Cir. 2003) (internal quotation marks omitted). The jury at McWilliams's penalty phase voted 10 to 2 in favor of the death penalty. The trial judge reviewed Dr. Goff's report and took into account the possibility of organic brain damage but also noted that, throughout McWilliams's medical records, different psychologists and psychiatrists describe him as a malingerer. For example, the mental health professionals on the Lunacy Commission determined McWilliams was a malingerer and a faker; Dr. Goff's report indicated that McWilliams was malingering on some level; Dr. Kirkland determined McWilliams was faking symptoms; and even Dr. Woods, McWilliams's post-conviction expert admitted McWilliams has a history of malingering and can be deceitful and manipulative. Moreover, Dr. Woods was the only doctor who diagnosed McWilliams as bipolar—a diagnosis contested by Dr. Kirkland. Based on a review of this and other evidence, the trial judge found that McWilliams's "aggravating circumstances overwhelmingly outweighed the mitigating circumstances."

A few additional days to review Dr. Goff's findings would not have somehow allowed the defense to overcome the mountain of evidence undercutting his claims that he suffered from mental illness during the time of the crime. Accordingly, even assuming the state court committed an *Ake* error, the error did not have a substantial and injurious effect on McWilliams's sentence.

B. Procedural Default

McWilliams argued to the district court that he was denied his Sixth Amendment right to effective assistance of counsel when the trial court refused his motion for continuance of the sentencing hearing. However, the magistrate judge determined McWilliams did not properly raise this claim before the Alabama Supreme Court and, in turn, McWilliams failed to exhaust his state remedies. Therefore, the district court determined this claim is procedurally barred.

When a habeas claim arises in state court, the petitioner must exhaust his state remedies. 28 U.S.C. § 2254(b)(1)(A). In order to satisfy the exhaustion requirement, a petitioner must "fairly presen[t] federal claims to the state courts in order to give the [s]tate the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365, 115 S. Ct. 887, 888 (1995) (per curiam) (internal quotation marks omitted). The petitioner must apprise the state court of "the federal constitutional issue," not just the underlying facts of the claim or a "somewhat similar state-law claim." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) (internal quotation marks omitted). The Supreme Court has observed that "Congress surely meant that exhaustion be serious and meaningful." *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 10, 112 S. Ct. 1715, 1720 (1992). The Court further explained:

> [c]omity concerns dictate that the requirement of exhaustion is not satisfied by the mere statement of a federal claim in state court. Just

> as the [s]tate must afford the petitioner a full and fair hearing on his federal claim, so must the petitioner afford the [s]tate a full and fair opportunity to address and resolve the claim on the merits.

Id.; *see also Henderson v. Campbell*, 353 F.3d 880, 898 n. 25 (11th Cir. 2003).

McWilliams first raised his ineffective assistance of counsel claim based on the motion for continuance in his direct appeal to the Alabama Court of Criminal Appeals. The court denied this claim because McWilliams "demonstrated no prejudice." *McWilliams v. State*, 640 So. 2d 982, 993 (Ala. Crim. App. 1991). McWilliams then petitioned the Alabama Supreme Court for a writ of certiorari. In his petition, McWilliams asserted: (1) his rights were violated "under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution" and (2) the Alabama Court of Criminal Appeals erred by holding he had not demonstrated prejudice. The Alabama Supreme Court declined to review the petition.

McWilliams only mentioned his motion for continuance in Sections VIII and IX of his brief to the Alabama Supreme Court. But, he failed to argue in either of those Sections that the denial of the motion violated his right to effective assistance of counsel. Although Section VIII asserted the trial court abused its discretion in denying McWilliams's motion for continuance, McWilliams did not allege the denial violated his right to effective assistance of counsel, and he did not mention the phrase "effective assistance of counsel" or cite *Strickland v. Washington*, 466

U.S. 668, 104 S. Ct. 2052 (1984). McWilliams also did not mention *Strickland* or use the phrase "effective assistance of counsel" in Section IX of the brief.

Accordingly, McWilliams did not apprise the state court of his constitutional claim regarding his motion for continuance of the sentencing hearing. The district court did not err in concluding McWilliams's ineffective assistance of counsel claim is procedurally barred.

C. Ineffective Assistance of Counsel During the Penalty Phase of Trial and Sentencing

McWilliams also claims counsel was ineffective for failing to investigate or present mitigating evidence during the penalty phase of his trial and sentencing.

The district court's denial of McWilliams's habeas corpus petition on this issue is reviewed de novo. *See Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010).

As with McWilliams's *Ake* claim, we may only grant habeas relief on this issue if the State's resolution of the Rule 32 proceedings and subsequent appeals resulted in a decision that was either (1) "contrary to or involved an unreasonable application of, clearly established Federal law," or (2) "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). Therefore, in contrast to our review of a *Strickland* claim on direct appeal from a federal district court, we must defer to the state court unless its application of *Strickland* was unreasonable. *See Richter*, 562

U.S. at 101, 131 S. Ct. at 785. "A state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Id.* at 786 (internal quotation marks omitted). Furthermore, as discussed above, we must presume the state court's factual findings to be correct unless the petitioner rebuts this presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

"The object of an ineffectiveness claim is not to grade counsel's performance." *See Strickland*, 466 U.S. at 697, 104 S. Ct. at 2069; *White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). The issue is "not what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 794, 107 S. Ct. 3114, 3126 (1987) (internal quotation marks omitted).

To establish that his counsel provided constitutionally ineffective assistance, McWilliams must show both that "counsel's performance was deficient" and that the deficiency "prejudiced [his] defense." *See Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064. Deficient performance is representation that falls "below an objective standard of reasonableness" measured by "prevailing professional norms." *See id.* at 687–88, 104 S. Ct. at 2064–65. "[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of

reasonable professional judgment." *Id.* at 690, 104 S. Ct. at 2066. Thus, "to show that counsel's performance was unreasonable, the petitioner must establish that *no competent counsel would have taken the action that his counsel did take*." *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001).

Given the strong presumption of reasonableness under *Strickland* and the requirements of AEDPA, our review of counsel's performance is "doubly deferential." *See Knowles v. Mirzayance*, 556 U.S. 111, 123, 129 S. Ct. 1411, 1420 (2009). McWilliams's claim cannot succeed unless he provides affirmative evidence of ineffectiveness—an "absence of evidence cannot overcome the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance." *Burt v. Titlow*, 571 U.S. __, 134 S. Ct. 10, 17 (2013) (internal quotation marks omitted).

McWilliams asserts counsel was ineffective because counsel failed to investigate and present evidence of McWilliams's family history and mental health. According to McWilliams, the mitigation evidence presented at his post-conviction hearings shows the evidence counsel offered during trial and sentencing was deficient. But, the Alabama Court of Criminal Appeals determined that counsel diligently investigated and presented evidence about McWilliams's family history and mental health, and this conclusion does not unreasonably contravene clearly established Federal law.

First, counsel spoke to McWilliams's mother, father, and wife about McWilliams's family history. Counsel also telephoned McWilliams's friends. Counsel testified at the Rule 32 evidentiary hearing that he would have investigated any other potentially useful sources of information or individuals mentioned to him as possible mitigation witnesses. Moreover, McWilliams's mother and McWilliams testified extensively about his childhood during the penalty phase.

Second, counsel: (1) requested that McWilliams be evaluated by the Lunacy Commission; (2) retrieved McWilliams's medical records, despite the DOC and Taylor Hardin ignoring his subpoenas; (3) obtained the assistance of a volunteer psychologist, (4) arranged for McWilliams to be evaluated by Dr. Goff, and (5) subpoenaed McWilliams's previous psychologist to testify during the penalty phase. Although the subpoenaed psychologist did not respond to the subpoena, counsel testified at the Rule 32 hearing that he made a strategic decision not to enforce the subpoena because forcing a doctor into court could backfire. Furthermore, although counsel did not learn of the head injuries McWilliams sustained as a child until the penalty phase of trial, the Lunacy Commission reported no evidence of a brain injury. Therefore, it was reasonable for counsel to conclude that McWilliams had no such injuries. Nevertheless, once counsel learned of the head injuries, he immediately moved for and obtained a

neuropsychological report prior to the sentencing hearing. At the hearing, the report was admitted into evidence.

In undertaking such efforts, counsel's investigation of McWilliams's family history and mental health was reasonable. *See Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1241–43 (11th Cir. 2010) (finding that counsel performed an adequate mitigation investigation where he gathered medical records and assisted with the development of an expert evaluation report). In addition, given McWilliams's questionable mental health history and the limited value of his family background information, it cannot be found that "no competent counsel" would have adopted the same approach as counsel. *See Grayson*, 257 F.3d at 1216. While counsel may have been able to present more mitigation evidence, this alone does not render his decision not to do so unreasonable. *See Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995) (en banc) ("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.").

On this record, McWilliams has not met his AEDPA burden. He has not shown that counsel's performance was so deficient as to overcome the "doubly deferential" standard required for relief. *See Knowles*, 556 U.S. at 123, 129 S. Ct.

at 1420. We therefore reject McWilliams's claim of ineffective assistance of counsel.

D. Prosecutorial Misconduct

Finally, McWilliams alleges the prosecutor's comments during closing argument on his failure to testify at trial violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments. McWilliams contends these statements denied him a fair trial because they constituted improper burden-shifting arguments.

McWilliams's claim of prosecutorial misconduct involves mixed questions of law and fact and, therefore, is reviewed de novo. *See United States v. Noriega*, 117 F.3d 1206, 1218 (11th Cir. 1997).

The Fifth and Fourteenth Amendments "forbid[] 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, 85 S. Ct. at 1233. However, "a prosecutor's indirect reference to a defendant's failure to testify is not reversible error per se." *United States v. Delgado*, 56 F.3d 1357, 1368 (11th Cir. 1995). This court has "strictly enforced the requirement that a defendant show that the allegedly offensive comment was either manifestly intended to be a comment on the defendant's silence or that the comment naturally and necessarily related to the defendant's silence." *Isaacs v. Head*, 300 F.3d 1232, 1270 (11th Cir. 2002). "A

comment on the failure of the *defense*, as opposed to that of the *defendant*, to counter or explain the testimony presented or evidence introduced is not [improper burden-shifting]." *Duncan v. Stynchcombe*, 704 F.2d 1213, 1215–16 (11th Cir. 1983) (per curiam).

Prosecutorial misconduct during closing argument, including an inappropriate burden-shifting argument, only warrants a new trial if the remarks were "improper" and "prejudicially affect[ed]" the defendant's "substantial rights." *See United States v. Wilson*, 149 F.3d 1298, 1301 (11th Cir. 1998) (internal quotation marks omitted), *aff'd*, 37 F. App'x 978 (11th Cir. 2002). "A defendant's substantial rights are prejudicially affected when a reasonable probability arises that, but for the remarks, the outcome of the trial would be different." *Id.* (alterations in original) (internal quotation marks omitted).

McWilliams challenges the following comment made by the prosecution:

> You know, one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the armrest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk about the bullets down in the floorboard of the car—the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you have not heard an explanation; the evidence doesn't show any other explanation for it.

Ex parte McWilliams, 640 So. 2d 1015, 1018–19 (Ala. 1993).

The Alabama Court of Criminal Appeals found that the prosecutor's comment was not "intended to be a reference to [McWilliams's] silence." *McWilliams*, 640 So. 2d at 1010. Furthermore, the Alabama Supreme Court determined that "[t]his is clearly a comment on the failure of *defense counsel* to explain testimony or evidence." *Ex parte McWilliams*, 640 So. 2d at 1019–20. The prosecutor began his comment by telling the jury he was referring to what the *defense attorneys* did not talk about "in the *evidence*." While the statement, "[t]here is no good reason, explanation that indicates anything other than guilt in this case," by itself could be taken to mean the defendant did not provide an explanation himself, the prosecutor followed the comment by stating that "the evidence doesn't show any other explanation for it." In light of the entire statement, it is clear that the prosecutor intended the statement to be directed at counsel, and the comment naturally and necessarily related to counsel's arguments regarding the evidence introduced at trial, not McWilliams's constitutionally protected silence.

Accordingly, McWilliams has failed to show the state court's "was contrary to or involved an unreasonable application of, clearly established Federal law" or "was based on an unreasonable determination of the facts in light of the evidence presented in the [s]tate court proceeding." *See* 28 U.S.C. § 2254(d).

V. CONCLUSION

For the foregoing reasons, we find as follows. First, the state court did not commit reversible error under 28 U.S.C. § 2254(d) in denying McWilliams's (1) *Ake* claim, (2) his claim of ineffective assistance of counsel during the penalty phase of trial and sentencing, and (3) his claim that the prosecutor improperly commented on his failure to testify. Second, McWilliams's ineffective assistance of counsel claim based on the trial court's denial of his motion for continuance of the sentencing hearing is procedurally defaulted. Therefore, we affirm the district court's denial of McWilliams's petition for a writ of habeas corpus.

AFFIRMED.

JORDAN, Circuit Judge, concurring.

I concur in the judgment denying federal habeas corpus relief to Mr. McWilliams. My reasons are as follows.

• The ineffective assistance of counsel claim based on the denial of the continuance of the sentencing hearing was not exhausted under 28 U.S.C. § 2254(b)(1) because Mr. McWilliams did not present it in his petition for discretionary review to the Alabama Supreme Court. *See O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999).

• The ineffective assistance of counsel claim related to the investigation and presentation of mitigating evidence at the penalty phase fails because counsel conducted a competent mental health investigation; had Mr. McWilliams evaluated not once, but twice; and presented mitigating evidence (including Dr. Goff's report) at the sentencing hearing. *See Bobby v. Van Hook*, 558 U.S. 4, 9-12 (2009).

• The claim based on a violation of *Griffin v. California*, 380 U.S. 609 (1965), is a close one, as shown by the fact that two judges on the Alabama Court of Criminal Appeals sided with Mr. McWilliams. See *McWilliams v. State*, 640 So.2d 982, 1014 (Ala. Cr. App. 1991) (Bowen, J., dissenting in part). But given AEDPA deference, the finding by the Court of Criminal Appeals that the prosecutor's argument was not a comment on Mr. McWilliams' right to remain silent was a reasonable application of *Griffin*.

• The claim based on *Ake v. Oklahoma*, 470 U.S. 68 (1985), is also close, for the reasons outlined in Judge Wilson's dissent. At the end of the day, however, I think the claim fails. First, the Supreme Court has not addressed whether *Ake* is satisfied by the court appointment of a neutral mental health expert. As a result, I cannot say that the Court of Criminal Appeals unreasonably applied, or ruled in a way that was contrary to, *Ake*. *See Woods v. Donald*, 135 S. Ct. 1372, 1377 (2015). Second, I do not think Mr. McWilliams has shown a "substantial and injurious effect" from any *Ake* violation. *See Fry v. Pliler*, 551 U.S. 112, 119-20 (2007). I reach this conclusion in part because Mr. McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing. Given this void in the record, it is difficult for me to conclude that Mr. McWilliams has met his burden on prejudice, as we do not know how additional time with Dr. Goff (and his report) would have benefited the defense. My point is not that a capital defendant must always present the testimony of his medical expert at a post-conviction hearing to prove prejudice under *Ake*. It is, instead, that in this case Dr. Goff's absence is one of the reasons that Mr. McWilliams cannot show a "substantial and injurious effect."

WILSON, Circuit Judge, dissenting:

Defendants facing the death penalty—the "gravest sentence our society may impose"—must have "a fair opportunity to show that the Constitution prohibits their execution." *Hall v. Florida*, 572 U.S. __, __, 134 S. Ct. 1986, 2001 (2014). This means that they must receive "meaningful access to justice" during their capital proceedings. *See Ake v. Oklahoma*, 470 U.S. 68, 76–77, 105 S. Ct. 1087, 1092–1093 (1985). In *Ake*, the Supreme Court held that this guarantee requires states to provide defendants meaningful "access to a psychiatrist[]" when their mental health "is likely to be a significant factor" at trial or sentencing. *See id.* at 74–77, 105 S. Ct. at 1091–1093. James Edmund McWilliams, Jr. was denied this basic right.

McWilliams's mitigation case depended on the judge and jury's conclusions about his mental health. Nonetheless, McWilliams did not receive any expert assistance during his sentencing before the jury. And, at his judicial sentencing hearing, he again was denied assistance, absent an expert report provided hours beforehand from a mental health expert who did not have the opportunity to review his full psychiatric history. This was not meaningful assistance. For these reasons, Alabama's resolution of McWilliams's *Ake* claim was "an unreasonable application of clearly established Federal law." 28 U.S.C. § 2254(d)(1). Therefore, I would reverse the district court's denial of McWilliams's habeas

petition with directions to remand the case to state court for a new sentencing hearing.

I.

The penalty phase of McWilliams's trial began on August 28, 1986. On that date, a sentencing hearing was held before the jury. Although McWilliams received psychological services in the months leading up to the murder of Patricia Reynolds and his mental health history formed the basis of his mitigation case, the trial court did not provide him access to a psychiatrist during this phase. Moreover, defense counsel subpoenaed Dr. Sherril Rhodes to testify at the hearing, but Dr. Rhodes did not appear. Ultimately, McWilliams and his mother were the only witnesses for the defense during the penalty phase. Meanwhile, the State proffered multiple expert psychiatric witnesses.

McWilliams's judicial sentencing hearing was scheduled for October 9, 1986. On September 30, 1986, the trial court appointed a clinical neuropsychologist, Dr. John R. Goff—a state employee—to examine McWilliams and generate a report. Dr. Goff provided his report to both the prosecution and defense on October 7, 1986. The report stated that McWilliams's "neuropsychological assessment [wa]s reflective of organic brain dysfunction which is localized to the right cerebral hemisphere." It also found there was evidence of "cortical dysfunction attributable to the right cerebral hemisphere

dysfunction." The report concluded that "in light of [McWilliams's] obvious neuropsychological deficit, organic personality syndrome should be considered." The next day, on October 8, the court advised defense counsel that it had just received McWilliams's medical and psychiatric Department of Corrections (DOC) records, which counsel had subpoenaed multiple times. However, various records remained missing. The DOC produced more records on October 9—the day of the sentencing hearing.

Faced with less than 48 hours to review this new information and consider its usefulness, defense counsel sought more time to secure the services of an expert to assist him in evaluating the records. Counsel stated to the court:

> [G]iven the nature of this case . . . it is necessary on my part to have someone else review these findings. . . . [W]e are unable to present anything because of the shortness of time between which this material was supplied to us and the date of the hearing. . . . It is the position of the Defense that we received these records at such a late date, such a late time that it has put us in a position as layman, with regard to psychological matters, that we cannot adequately make a determination as to what to present to The [sic] Court with regards to the particular deficiencies that the Defendant has. . . . [W]e really need an opportunity to have the right type of experts in this field, take a look at all of those records and tell us what is happening with him. And that is why we renew the Motion for a Continuance.

Nevertheless, the court denied the Motion for Continuance.

This sequence of events does not constitute the meaningful access to a mental health expert contemplated by *Ake*.

II.

A. An Unreasonable Application of Ake

Ake is unequivocal: due process requires states to provide a defendant the access to a psychiatrist necessary to assure him "a fair opportunity to present his defense" and the ability "to participate meaningfully in [his] judicial proceeding[s]." *See Ake*, 470 U.S. at 76–77, 83–84, 105 S. Ct. at 1092–93, 1096–97; *Medina v. California*, 505 U.S. 437, 444–45, 112 S. Ct. 2572, 2577 (1992) ("The holding in *Ake* can be understood as an expansion of earlier due process cases holding that an indigent criminal defendant is entitled to the minimum assistance necessary to assure him a fair opportunity to present his defense and to participate meaningfully in the judicial proceeding." (internal quotation marks omitted)). Accordingly, "[t]he [s]tate must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination *and assist in evaluation, preparation, and presentation of the defense*." *Ake*, 470 U.S. at 83, 105 S. Ct. at 1096 (emphasis added). This requirement applies to any trial or sentencing proceedings in which the defendant's mental health will be a

significant factor.[1] *See id.* at 83–84, 105 S. Ct. at 1096–97; *Blanco v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1211, 1223 (11th Cir. 2012).

Providing further insight into the type of assistance compelled by *Ake*, the *Ake* Court explained the role of the psychiatrist in this context as: (1) gathering facts—through an examination, interviews, and elsewhere—to share with the judge and jury; (2) analyzing the information gathered and rendering conclusions about the defendant's mental condition; (3) assisting the defendant with identifying the probative questions to ask of the prosecution's psychiatrists; (4) assisting the defendant with understanding the opinions proffered by the other party's psychiatrists; and (5) helping lay jurors make a sensible and educated determination about the defendant's mental condition. *See Ake*, 470 U.S. at 80–81, 105 S. Ct. at 1095.

Thus, *Ake* does not simply entitle a criminal defendant to expert assistance; the assistance must be meaningful. McWilliams was denied this right during both the penalty phase and judicial sentencing hearing.

[1] Here, it was clear that McWilliams's mental health was a significant factor in his sentencing proceedings, including both the penalty phase and judicial sentencing hearing. There is no dispute among the parties that McWilliams's rights under *Ake* were triggered for the judicial sentencing hearing. Moreover, at the penalty phase, the trial court was aware of the substantial role that McWilliams's mental health was to play in his case for mitigation—the defense informed the court that it subpoenaed a mental health expert to testify at the penalty phase hearing, and at the hearing, the State offered expert psychiatric testimony, and McWilliams's mother testified about McWilliams's childhood head trauma.

1. As with the Defendant in *Ake*, McWilliams Was Not Provided Any Psychiatric Assistance When He Appeared Before the Jury for Sentencing.

The facts surrounding McWilliams's penalty phase hearing mirror those that resulted in a denial of due process in *Ake*. After the defendant in *Ake* was found guilty, he appeared before the jury for sentencing. During this proceeding, the prosecution relied on testimony from state psychiatrists who examined the defendant, but the defendant had "no expert witness to rebut this testimony or to introduce on his behalf evidence in mitigation of his punishment." *Id.* at 73, 105 S. Ct. at 1091. The Court held that the defendant was denied due process as a result of the state's failure to provide him access to a psychiatrist at the proceeding. *Id.* at 86–87, 105 S. Ct. at 1098. Likewise, McWilliams appeared before the jury for sentencing—his "penalty phase" hearing—after his verdict was rendered, and the trial court did not provide him any access to a psychiatrist, leaving him with no means to rebut the State's expert testimony. Therefore, as in *Ake*, McWilliams was denied due process when he appeared before the jury for sentencing.

2. The Trial Court Failed to Provide McWilliams Meaningful Assistance at the Judicial Sentencing Hearing.

The trial court's failure during the penalty phase could have been remedied through the provision of meaningful expert assistance for the judicial sentencing hearing. But, the trial court did not provide McWilliams such assistance, thereby denying him due process.

First, Dr. Goff's late arrival to the proceedings rendered any assistance he could provide a nullity, not the meaningful assistance contemplated by *Ake*. This court has previously explained that a psychiatric examination must be done "at such a time to allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Blake v. Kemp*, 758 F.2d 523, 533 (11th Cir. 1985). Dr. Goff was unable to provide assistance to the defense until less than 48 hours before the judicial sentencing hearing—when his report and findings were finally completed. This was an inadequate amount of time for Dr. Goff to educate defense counsel on the report, assist counsel in developing a strategy and testimony for the hearing, and/or help counsel understand and respond to the testimony put forth by the State's expert witnesses at the penalty phase. *See Ake*, 470 U.S. at 80–81, 105 S. Ct. at 1095. In light of the technical nature of the report and McWilliams's complex mental health history, the defense did not even have enough time to achieve the basic level of understanding of the report needed to use it at the hearing. Moreover, in the hours leading up to the hearing, defense counsel had to determine how the newly provided DOC records related to the report's findings. Thus, any assistance received from Dr. Goff's report was superficial and far from meaningful.

Second, Dr. Goff could not provide competent assistance because he did not have the benefit of reviewing critical mental health records. Despite defense

counsel's multiple requests to the DOC, the DOC did not produce McWilliams's mental health records until hours before the sentencing hearing—after Dr. Goff's report was completed. These records showed, *inter alia*, that McWilliams was medicated with antipsychotics and antidepressants while incarcerated. Without access to these highly relevant records, Dr. Goff could not have provided a meaningful analysis.[2] *See Blake*, 758 F.2d at 532–33 (finding the defendant was denied due process because the state did not produce records relevant to his expert psychiatrist's testimony until the day before trial); *Starr v. Lockhart*, 23 F.3d 1280, 1288–89 (8th Cir. 1994) (holding that the defendant was denied due process under *Ake* where the psychiatrist was merely "[un]able to interpret or explain" relevant information, including the results of past mental health examinations).

Third, in order to obtain meaningful assistance from a psychiatrist, the defense must be able to speak freely with the psychiatrist about its case, without the prosecution's access to the discussion. As McWilliams points out in his brief, *Ake* is not satisfied by an expert "who would provide . . . assistance to the defendant, only to cross the aisle and disclose to the State the future cross-

[2] Additionally, under these circumstances—where the factfinder is deprived of expert testimony on parts of the defendant's psychiatric history—the factfinder "loses the substantial benefit of potentially probative information," resulting in "a much greater likelihood of an erroneous decision." *See Ford v. Wainwright*, 477 U.S. 399, 414, 106 S. Ct. 2595, 2604 (1986) (plurality opinion) (discussing the application of *Ake*).

examination of defense counsel." However, as a neutral expert, Dr. Goff was free to make such a disclosure.

Relatedly, *Ake* requires that a defendant receive an opportunity—through an independent psychiatrist—to "develop[] his *own* psychiatric evidence to rebut the [State's] evidence and to enhance his defense in mitigation." *Tuggle v. Netherland*, 516 U.S. 10, 13, 116 S. Ct. 283, 285 (1995) (per curiam) (emphasis added). In addition to being a state employee with the ability to speak to the prosecution about his report and the defense's case, Dr. Goff provided his report to the defense and prosecution at the same time. Clearly, the report did not serve as McWilliams's "own psychiatric evidence."[3]

In sum, far from simply being denied the chance to choose his own psychiatrist or receive funds to hire his own psychiatrist, McWilliams was deprived of basic access to a psychiatrist. Although his life was at stake and his case for mitigation was based on his mental health history, McWilliams received

[3] Indeed, we previously stated that "[t]he right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense deems appropriate." *Cowley v. Stricklin*, 929 F.2d 640, 644 (11th Cir. 1991) (internal quotation marks omitted). Furthermore, the Majority opinion puts us at odds with our sister circuits on this issue. *See Starr*, 23 F.3d at 1287–88, 1290–91, 1294 (examining the relationship between *Ake* and *United States ex rel. Smith v. Baldi*, 344 U.S. 561, 73 S. Ct. 391 (1953) and reversing where the defendant was provided a "neutral" state examiner); *Smith v. McCormick*, 914 F.2d 1153, 1157–58 (9th Cir. 1990) (holding that *Ake* requires the provision of a non-neutral psychiatrist); *United States v. Sloan*, 776 F.2d 926, 929 (10th Cir. 1985) ("The essential benefit of having an expert in the first place is denied the defendant when the services of the doctor must be shared with the prosecution.").

an inchoate psychiatric report at the twelfth hour and was denied the opportunity to utilize the assistance of a psychiatrist to develop his own evidence. As a result, McWilliams was precluded from meaningfully participating in the judicial sentencing hearing and did not receive a fair opportunity to rebut the State's psychiatric experts. Put simply, he was denied due process. *See Simmons v. South Carolina*, 512 U.S. 154, 164–65, 114 S. Ct. 2187, 2194 (1994) (plurality opinion) (citing *Ake*, 470 U.S. at 83–87, 105 S. Ct. 1096–98) (holding that defendant was denied due process where he was "prevented from rebutting information that the sentencing authority considered"). Given these circumstances, the state court's application of *Ake* was unreasonable.[4]

B. A Substantial and Injurious Effect

We are required to grant habeas relief for an "*Ake* error" if the error had a "substantial and injurious effect" on the trial or sentencing. *See Hicks v. Head*, 333

[4] The concurring opinion states that the Supreme Court has not addressed whether *Ake* is satisfied by the appointment of a neutral psychiatrist and, therefore, the state court did not unreasonably apply *Ake*. This focus on the "neutral expert" issue misses the point. Assuming for the sake of argument that a state's failure to provide a defendant access to his own psychiatrist is not contrary to *Ake*, the state court's decision is still an unreasonable application of *Ake*. As noted above, *Ake* plainly holds that when a defendant's mental health is a significant factor at trial or sentencing, due process requires that the defendant receive access to a psychiatrist who can competently "assist in [the] evaluation, preparation, and presentation of [his] defense." *See Ake*, 470 U.S. at 83, 105 S. Ct. at 1096. Regardless of the "neutral expert" issue, Dr. Goff was unable to assist defense counsel with the preparation and presentation of the defense because he did not finish his report until hours before the sentencing hearing and did not have access to pivotal mental health records. Solely considering these deficiencies, it is clear that McWilliams was denied "the assistance of a psychiatrist for the *development* of his defense." *See Simmons*, 512 U.S. at 165, 114 S. Ct. at 2194 (emphasis added) (summarizing the holding in *Ake*). Said another way, the concurring opinion's focus on the "neutral expert" issue misses the broader controlling issue: whether McWilliams received access to meaningful expert assistance.

F.3d 1280, 1286 (11th Cir. 2003) (quoting *Brecht v. Abrahamson*, 507 U.S. 619, 623, 113 S. Ct. 1710, 1714 (1993)) (internal quotation marks omitted). Alabama's *Ake* error had this effect on McWilliams's death sentence, as it precluded McWilliams from offering evidence that directly contradicted the psychiatric evidence put forward by the State.

At the penalty phase of his trial, McWilliams had no opportunity to respond to testimony provided by the State's expert psychiatrists opining that McWilliams was a malingerer who "faked" mental illness. He was reduced to reading to the judge and jury a technical psychiatric report that indicated he was potentially psychopathic, but the information was virtually useless in the absence of an expert who could explain the report and answer the State's questions. At the judicial sentencing hearing, McWilliams was again denied the assistance he required to respond to the State's expert testimony. Hence, as a result of the trial court's error, a convicted murderer had to testify about his own mental health, was called a liar by State experts, and then was prevented from showing otherwise.

Testimony from McWilliams's state post-conviction hearing shows that, with appropriate assistance, he would have been in position to confront the State's evidence that he was merely feigning mental health issues. At the post-conviction hearing, Dr. George Woods—an expert in psychiatry and neurology—stated that McWilliams's psychiatric testing indicated a "cry-for-help." He then explained the

difference between a "fake-bad" and a "cry-for-help" diagnosis; the former is "someone attempting to make themselves look worse," and the latter, while seemingly "very similar" to the former, actually reflects "significant psychiatric and psychological problems." Dr. Woods further contradicted the State's experts by concluding McWilliams was suffering from bipolar disorder the night of the crime. Dr. Woods's findings relied on, *inter alia*, records from the DOC showing McWilliams was medicated with antipsychotics and antidepressants throughout his entire incarceration. Due to the trial court's failures, McWilliams was wholly unable to present this or similar evidence during sentencing.

Despite this powerful evidence, the concurring opinion finds that McWilliams has not shown a substantial and injurious effect "in part because . . . [he] did not present Dr. Goff as a witness at the state post-conviction hearing[,]" and therefore, "we do not know how additional time with Dr. Goff (and his report) would have benefited the defense." *See* Concurring Op. at 32. But, this argument is belied by Dr. Woods's testimony, which shows that McWilliams would have presented "different," significantly "more viable" mental health evidence during sentencing if he was afforded an expert who actually reviewed his full psychiatric history and had more than a few hours to assist the defense. *See Hicks*, 333 F.3d at 1287.

Furthermore, when considering whether a defendant was prejudiced by a constitutional error that affected his presentation of mitigation evidence, we are required to "evaluate the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweigh[] it against the evidence in aggravation." *See Williams v. Taylor*, 529 U.S. 362, 397–98, 120 S. Ct. 1495, 1515 (2000) (citing *Clemons v. Mississippi*, 494 U.S. 738, 751–52, 110 S. Ct. 1441, 1449–50 (1990)); *Hicks*, 333 F.3d at 1286–87 (weighing the mitigation evidence presented during trial and habeas proceedings in considering whether an *Ake* error had a substantial and injurious effect). In other words, we must consider the evidence *before us*. Nonetheless, my concurring colleague is dissuaded, in part, because "McWilliams did not present Dr. Goff as a witness at the state post-conviction hearing." Concurring Op. at 32. In light of the relevant precedent, I am inclined, however, to weigh the evidence in the record, rather than opine about the value of hypothetical evidence not in the record. *See Williams*, 529 U.S. at 397–98, 120 S. Ct. at 1515.

After weighing the available evidence, we are required to ask ourselves: "does a grave doubt exist as to whether" the *Ake* error "substantially influence[d]" McWilliams's sentence? *See Duest v. Singletary*, 997 F.2d 1336, 1339 (11th Cir. 1993) (per curiam). To me, the answer to this question is clear. McWilliams has shown that but-for the trial court's *Ake* error, the court would have been faced with

a starkly different record. McWilliams has put forth evidence contesting the Lunacy Commission, showing he was not malingering, and demonstrating that he suffered from a major mental illness at the time of the crime. Therefore, I cannot find that the *Ake* error did not substantially influence McWilliams's sentence.

III.

Because the state court's resolution of McWilliams's *Ake* claim was an unreasonable application of *Ake* itself and this error had a substantial and injurious effect, I dissent. To remedy the error, I would reverse the district court's denial of the petition for a writ of habeas corpus so that the matter can be remanded to the state court for a new sentencing hearing.

Appendix F

FILED
2013 Apr-17 PM 02:13
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

JAMES E. McWILLIAMS,	}	
	}	
Petitioner,	}	
	}	
v.	}	**Case No.: 7:04-CV-2923-RDP-RRA**
	}	
DONAL CAMPBELL, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS, et al.,	}	
	}	
Respondents.	}	

MEMORANDUM OPINION

This case is before the court on limited remand from the United States Court of Appeals for the Eleventh Circuit which found that while this court specifically addressed some of Petitioner James E. McWilliams' ("McWilliams" or "Petitioner") claims, it failed under *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992), to address Petitioner's other claims. (Doc. 83). After remand, McWilliams has filed a Motion to Permit Supplemental Pleadings (Doc. 84) pursuant to Federal Rule of Civil Procedure 15(d) and that motion has been briefed by the parties. (Docs. 89 & 92). Based on an examination of the remand order and the arguments raised in McWilliams' motion, the court finds that both require: (1) a judgment as to the remaining claims identified as the subject of *Clisby* error in the Eleventh Circuit's remand order; and (2) a determination as to whether this court has jurisdiction to consider McWilliams' Motion to Permit Supplemental Pleadings, and if so, analysis of (and a decision regarding) whether to grant or deny that motion. The court addresses these two issues in turn after providing some background information.

I. BACKGROUND

Before addressing the issues raised by the parties, the court reviews the procedural history of this case *prior* to remand. This case involves a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254 on behalf of Petitioner, who has been convicted of the brutal capital murder of Patricia Vallery Reynolds and sentenced to death.[1] The Magistrate Judge filed a Report and Recommendation on February 1, 2008 recommending that all of Petitioner's claims (Claims I-XXX) and his requests for an evidentiary hearing be denied. (*See* Doc. 55). In doing so, the Magistrate Judge instructed, "[i]n order to save everyone concerned time and effort, if the substance of an objection is that which has been set out in pleadings or argument, the party objecting may simply **refer** to his previous argument, instead of repeating his argument in the full form of objections." (*Id.* at 181) (emphasis in original).

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[1] On August 27, 1986, the Petitioner, James Edmond McWilliams, was convicted of two counts of capital murder because he committed the murder during the course of a robbery, *see* Ala. Code § 13A-5-40(a)(2), and one count of capital murder because he committed the murder during the course of a rape, *see* Ala. Code § 13A-5-40(a)(3). On August 28, 1986, a jury voted 10-2 to recommend that he be sentenced to death. The Alabama Court of Criminal Appeals affirmed his conviction on direct appeal, *see McWilliams v. State*, 640 So.2d 982, 1014 (Ala. Crim. App. 1991); the Alabama Supreme Court affirmed his convictions, *see Ex parte McWilliams*, 666 So. 2d 90, 91 (Ala. 1995); and the Supreme Court of the United States denied his petition for certiorari review, *see McWilliams v. Alabama*, 516 U.S. 1053, 1053(1996).

On April 2, 1997, the Petitioner filed a Rule 32 petition, challenging his convictions. After several attorneys were appointed and allowed to withdraw, the Petitioner filed an amended Rule 32 petition on September 29, 1999. He filed a second amended petition on June 8, 2000, and a revised second amended petition on June 12, 2000. The circuit court conducted an evidentiary hearing on June 12-15, 2000. On August 8, 2000, the Petitioner moved to amend his Rule 32 petition, to examine additional witnesses, and to have a one-day evidentiary hearing so he could call those witnesses. After the State objected, the circuit court denied the Petitioner's motion. In March 2001, the Petitioner again moved to amend the Rule 32 petition and to conduct additional discovery. The circuit court denied that motion. In September 2001, the circuit court issued a 43-page order denying the Petitioner's petition. The Rule 32 court's denial of post-conviction relief was affirmed. *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004) (NO. CR-01-0235), *rehearing denied,* 897 So. 2d at 437 n.1 (Ala. Crim. App. Jun. 11, 2004), *cert. denied,* 897 So. 2d at 437 n.1 (Ala. Sep. 24, 2004).

McWilliams filed objections (Doc. 57), supplemental objections, and notices to the Report and Recommendation. To the extent he requested permission to file the supplemental objections and notices, those requests (Docs. 59, 61, 63, 67 and 68) were granted by this court in its August 25, 2010 Order and Memorandum Opinion (Doc. 75 at 3-4). That Memorandum Opinion expressly addressed and denied Claims I, II, III, IV, XX, XXIII, XXV(a), XXV(b) and XXVIII of the habeas petition. (*Id*. at 4-24). In the conclusion of the Memorandum Opinion,[2] the undersigned overruled McWilliams' objections and accepted the Magistrate Judge's Findings of Fact and Conclusions of Law. (*Id.* at 24).

Following Petitioner's first appeal, the Eleventh Circuit entered a Remand Order which vacated this court's judgment and remanded this case in order to allow this court to address all of McWilliams' objections to the Magistrate Judge's Report and Recommendation, and thereafter enter a final judgment regarding the claims in McWilliams' habeas petition that were not specifically addressed in the August 25, 2010 Memorandum Opinion. The Remand Order reads as follows:

> Petitioner James McWilliams filed a motion asking this Court to vacate and remand the district judge's order because he failed to address each of the claims in McWilliams' habeas petition as required by *Clisby v. Jones*, 960 F.2d 925 (11th Cir. 1992) (en banc). In *Clisby*, we determined that the district court must "resolve all claims for relief raised in a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 . . . , regardless [of] whether habeas relief is granted or denied." *Id.* at 936. If a case is referred to the magistrate judge, the district court must rule on the "preserved issues," *i.e.*, those claims Petitioner objected to from the magistrate judge's Report and Recommendation. *See Callahan v. Campbell*, 396 F.3d 1287, 1288-89 (11th Cir. 2005). That does not require the district court, however, to provide a detailed explanation as to why it is overruling each of petitioner's objections. *See e.g., Hillary v. Sec'y for Dept. Of Corr.*, 294 F. App'x 569, 572 (11th Cir. 2008) (per curium).

[2] The August 25, 2010 Memorandum Opinion is adopted and incorporated into this Final Judgment as if fully set out herein.

Here, however, we do not encounter a situation where the district judge categorically overruled all objections because his order demonstrates that he was not aware of all objections. The magistrate judge's Report and Recommendation states: "In order to save everyone concerned time and effort, if the substance of an objection is that which has been set out already in pleadings or argument, the party objecting may simply refer to his previous argument, instead of repeating his argument in the full form of objections." In response, McWilliams' objections to the Report and Recommendation ("Objections Filing") begin by stating: "The Magistrate on February 5, 2008, held that petitioner could object by simply referencing his earlier argument. Hence, [McWilliams] objects to the Magistrate's Report and Recommendation and refers to his [earlier] argument including but not limited to: 1. [McWilliams'] federal habeas petition" and numerous other filings he made. Furthermore, the Objections Filing offered "additional objections" to some of the magistrate judge's conclusions. Therefore, based on the Objections Filing, which complied with the magistrate judge's directions, McWilliams objected to the resolution of each of the claims in the Report and Recommendation because each ran counter to the contentions in his habeas petition.

The district judge, however, did not acknowledge that McWilliams objected to the magistrate judge's resolution of each claim. Instead, the district judge stated that McWilliams "objected to the Magistrate Judge's recommendations as to Claims I, II, III, IV, XX, XXIII, and XXV(a)." Those claims were the select few given extensive treatment in the "additional objections" sections of the Objections Filing.[3] It is clear, therefore, the district judge viewed the "additional objections" as the *only* objections since he enumerated them in an exhaustive list. The inclusion of "additional" in the Objections Filing makes clear, however, that is not the case. Therefore, since the district judge's opinion demonstrates he was not aware of the existence of objections to the claim, he necessarily could not resolve them in accordance with *Clisby*. *See* 960 F.2d at 936.

We acknowledge that this is an unusual circumstance that could have been avoided at two junctions. First, the magistrate judge's decision to allow McWilliams to object to a claim's resolution by simply referring to previous arguments made on the claim created an opportunity for McWilliams to object without explicitly drawing the district judge's attention to the objection. Second, had the district judge not explicitly listed each of the objections he believed McWilliams made, his language

[3] At this juncture, the circuit court placed footnote two, wherein it found that "[t]he district court also explicitly recognized another claim that he included in a later filing. The district judge addressed that claim in his order as well." The court's previous Memorandum Opinion addresses two additional claims: Claim XXV(b), alleging ineffective assistance of trial counsel at the guilt and penalty phases of trial; and XXVIII (incorrectly designated XXVII), alleging ineffective assistance of post-conviction counsel.

rejecting "all" objections would have captured the claims we now deem unresolved.

> Therefore, out of an abundance of caution, we vacate and remand the district judge's order so that he may resolve the remaining claims alleging a constitutional violation. We note that the district judge already possesses the magistrate judge's thorough Report and Recommendation and McWilliams' habeas petition which contains his arguments on each remaining claim. After the district court resolves the remaining claims, McWilliams, should he choose, is permitted to file a request for a new certificate of appealability from the district court and this court.
>
> **VACATED AND REMANDED.**

(Doc. 83 at 1-5) (emphasis in original) (additional footnotes omitted).

After remand, and pursuant to Federal Rule of Civil Procedure 15(d), McWilliams moved to permit supplemental pleadings. (Doc. 84). Specifically, McWilliams sought leave to brief and argue the applicability of *Maples v. Thomas*, 132 S. Ct. 912 (2012), and *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), to this court's earlier determination that McWilliams' multiple and extensive claims asserting *Brady* and *Giglio* violations were procedurally defaulted because they were not presented, in the first instance, to the Rule 32 circuit court.

After full briefing on the issues raised by McWilliams' motion, the court heard oral argument. After careful review, and with the benefit of argument, the court finds the motion to supplement the pleadings is due to be denied for the following reasons.

II. DISCUSSION

A. Judgment as to the Remaining Claims in Compliance with *Clisby v. Jones*

In accordance with the Eleventh Circuit's remand order, this court has carefully reviewed and considered *de novo* all the materials in the court file pertaining to all remaining claims, and all objections to those remaining claims as that term specifically is defined by the Magistrate Judge in his Report and Recommendation. The court finds that Petitioner has not raised any meritorious

claims. Indeed, during the hearing on January 16, 2013, even the Petitioner's attorney, while discussing procedural implications possibly imposed by *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), and *Maples v. Thomas*, 132 S. Ct. 912 (2012), conceded that he is not entitled to relief on his *Clisby* claims, which were the subject of the limited review:

> COURT: All right. From your pleadings and your argument today, I get this much. The heart of your argument in this court is going to revolve around Maples and Martinez, right?
>
> ATTORNEY: At least as to their defaulted Brady claims, yes, Your Honor.
>
> COURT: Sure. All right. Let's step back for a second. Let's get on the other track for just one second. Let's say Martinez and Maples had never been decided and that my order had not addressed all of the objections, whether nominally stated or substantively stated, from the R&R. What other claims out there besides Martinez and Maples are you pressing today, if any?
>
> ATTORNEY: What I'm pressing is the applicability of Martinez and Maples to the procedural default.
>
> COURT: Got that.
>
> ATTORNEY: That's it.
>
> COURT: Okay.
>
> ATTORNEY: And I think if –
>
> COURT: So in other words, if Martinez and Maples had not been decided, and the 11th Circuit picked up on this confusion that could have been avoided at two junctions and had remanded the case back, we'd all be sitting around the courtroom looking at each other going well, there isn't any real substantive arguments to deal with; all I need to do is write a paragraph? Is that where we are at least on that part?

ATTORNEY: Basically, Your Honor, yes.

(Doc. 95 at 20-21). After thorough examination of the record, this court determines that all of McWilliams' objections to all remaining claims are due to be overruled, and the Magistrate Judge's Report is due to be adopted and the Recommendation accepted. Accordingly, McWilliams' Petition for Writ of Habeas Corpus and request for evidentiary hearing are due to be denied in their entirely.

B. Motion to Permit Supplemental Pleadings Pursuant to Federal Rule of Civil Procedure 15(d)

1. Background and the Issues Raised in the Motion to Supplement

McWilliams requests permission to supplement his pleadings under Rule 15(d)[4] in order to "brief and argue the applicability of *Maples v. Thomas*, 132 S. Ct. 912 ([Jan. 18,] 2012), and *Martinez v. Ryan*, 132 S. Ct. 1309 ([Mar. 20,] 2012), to this court's earlier determination that McWilliams' multiple and extensive claims asserting *Brady* and *Giglio* violations [Claim XXV(a)] were procedurally defaulted because they were not presented, in the first instance, to the Rule 32 Court." (Doc. 84, at 1-2). McWilliams does not attack the correctness of this court's earlier determination based upon any legal case or rule in existence at the time the decision was rendered on August 25, 2010, but asserts that these recent Supreme Court decisions now permit him to argue that his post-conviction counsels' abandonment and ineffectiveness during the Rule 32 proceedings excuse the procedural default of the substantive *Brady/Giglio* claims. (*Id.* at 4-12). *See Maples v. Allen*, 132 S. Ct. at 922-23 (holding that abandonment by post-conviction counsel can be cause to

[4] Rule 15(d) reads:

> **Supplemental Pleadings.** On motion and reasonable notice, the court may, on just terms, permit a party to serve a supplemental pleading setting out any transaction, occurrence, or event that happed after the date of the pleading to be supplemented. The court may permit supplementations even though the original pleading is defective in stating a claim or defense. The court may order that the opposing party plead to the supplemental pleading within a specified time.

overcome a procedural default); *Martinez v. Ryan*, 132 S. Ct. at 1315 (holding that post-conviction counsel's failure to raise an ineffective assistance of trial counsel claim during initial-review collateral proceedings can be cause to overcome a procedural default).

2. Whether this Court has Jurisdiction to Consider McWilliams' Motion to Permit Supplemental Pleadings

After careful consideration, this court finds that McWilliams' Motion to Permit Supplemental Pleadings (Doc. 84) is moot. The Court of Appeals instructed this court to resolve the habeas claims that were not specifically addressed.[5] McWilliams' *Brady/Giglio* assertions (Claim XXV(a)) are addressed in the August 25, 2010, Memorandum Opinion. In short, McWilliams has already received a complete and final decision on that claim, a ruling which has been acknowledged by the Court of Appeals. Thus, these matters related to Claim XXV(a) are "distinct from the question presented on limited remand. The law is settled that a district court should not assert jurisdiction over matters that are without the scope of a mandate." *Thomas v. Dugger*, 846 F.2d 669, 673 (11th Cir. 1988), citing *Litman v. Massachussetts Mutual Life Insurance Co.*, 825 F.2d 1506 (11th Cir. 1987) (en banc), *cert. denied*., 108 S. Ct. 700 (1988).

3. Alternatively, and Out of an Abundance of Caution, the Court will Address the Motion

Alternatively, the court concludes that McWilliams' motion to supplement the pleadings pertaining to Claim XXV(a) under Federal Rule of Civil Procedure 15(d) is due to be denied. As previously stated, a final ruling already has been entered on that claim, and this court declines McWilliams' invitation to reconsider it. Moreover, neither of the Supreme Court cases upon which

[5] The Eleventh Circuit referred to those as the "remaining claims." (Doc. 83 at 5).

McWilliams relies lend support to his request for relief from the procedurally defaulted *Brady/Giglio* claims in Claim XXV(a) of his petition.

a. *Maples v. Thomas*, 132 S. Ct. 912 (2012)

The court begins this discussion with an examination of an excerpt from *Maples v. Thomas* that explains the particular federal procedural default principle which that decision addressed. In *Maples*, the Supreme Court noted that:

> As a rule, a state prisoner's habeas claims may not be entertained by a federal court "when (1) 'a state court [has] declined to address [those] claims because the prisoner had failed to meet a state procedural requirement,' and (2) 'the state judgment rests on independent and adequate state procedural grounds.'" *Walker v. Martin*, 562 U.S. ----, ---- 131 S. Ct. 1120, 1127 (2011), quoting *Coleman*, 501 U.S., at 729-30, 111 S. Ct. 2546). The bar to federal review may be lifted, however, if "the prisoner can demonstrate cause for the [procedural] default [in state court] and actual prejudice as a result of the alleged violation of federal law." *Id.*, at 750, 111 S. Ct. 2546; *see Wainwright v. Sykes*, 433 U.S. 72, 84-85, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977).
>
> Given the single issue on which we granted review, we will assume, for purposes of this decision, that the Alabama Court of Criminal Appeals' refusal to consider Maples' ineffective-assistance claims rested on an independent and adequate state procedural ground: namely, Maples' failure to satisfy Alabama's Rule requiring a notice of appeal to be filed within 42 days from the trial court's final order. Accordingly, we confine our consideration to the question whether Maples has shown cause to excuse the missed notice of appeal deadline.
>
> Cause for a procedural default exists where "something *external* to the petitioner, something that cannot fairly be attributed to him[,] ... 'impeded [his] efforts to comply with the State's procedural rule.' " *Coleman*, 501 U.S., at 753, 111 S. Ct. 2546 (quoting *Murray v. Carrier*, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986); emphasis in original). Negligence on the part of a prisoner's post-conviction attorney does not qualify as "cause." *Coleman*, 501 U.S., at 753, 111 S. Ct. 2546. That is so, we reasoned in *Coleman*, because the attorney is the prisoner's agent, and under "well-settled principles of agency law," the principal bears the risk of negligent conduct on the part of his agent. *Id.*, at 753-54, 111 S. Ct. 2546. *See also Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 92, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990) ("Under our system of representative litigation, 'each party is deemed bound by the acts of his lawyer-agent.'" (quoting *Link v. Wabash R. Co.*, 370

> U.S. 626, 634, 82 S. Ct. 1386, 8 L. Ed. 2d 734 (1962))). Thus, when a petitioner's post-conviction attorney misses a filing deadline, the petitioner is bound by the oversight and cannot rely on it to establish cause. *Coleman*, 501 U.S. at 753-54, 111 S. Ct. 2546. We do not disturb that general rule.
>
> A markedly different situation is presented, however, when an attorney abandons his client without notice, and thereby occasions the default. Having severed the principal-agent relationship, an attorney no longer acts, or fails to act, as the client's representative. See 1 Restatement (Third) of Law Governing Lawyers § 31, Comment *f* (1998) ("Withdrawal, whether proper or improper, terminates the lawyer's authority to act for the client."). His acts or omissions therefore "cannot fairly be attributed to [the client]." *Coleman*, 501 U.S. at 753, 111 S. Ct. 2546. *See*, *e.g.*, *Jamison v. Lockhart*, 975 F.2d 1377, 1380 (C.A. 8 1992) (attorney conduct may provide cause to excuse a state procedural default where, as a result of a conflict of interest, the attorney "ceased to be [petitioner's] agent"); *Porter v. State*, 339 Ark. 15, 16-19, 2 S. W. 3d 73, 74-76 (1999) (finding "good cause" for petitioner's failure to file a timely habeas petition where the petitioner's attorney terminated his representation without notifying petitioner and without taking "any formal steps to withdraw as the attorney of record").

Maples v. Thomas, 132 S. Ct. at 922-23.

The Court then examined the circumstances that caused Maples' failure to timely file his collateral appeal with the state court. It determined that (1) unbeknownst to Maples, *none* of the attorneys listed as his counsel of record were acting as such during the 42-day time period in which he was required to file a collateral appeal *and* (2) Maples had no reason to act because he had no reason to believe that he had no counsel. As the Supreme Court concluded:

> In the *unusual circumstances* of this case, *principles of agency law and fundamental fairness* point to the same conclusion: There was indeed cause to excuse Maples' procedural default. Through no fault of his own, Maples lacked the assistance of any authorized attorney during the 42 days Alabama allows for noticing an appeal from a trial court's denial of post-conviction relief. As just observed, he had no reason to suspect that, in reality, he had been reduced to pro se status. Maples was disarmed by extraordinary circumstances quite beyond his control. He has shown ample cause, we hold, to excuse the procedural default into which he was trapped when counsel of record abandoned him without a word of warning.

Maples v. Thomas, 132 S. Ct. 912, 927 (2012) (emphasis supplied).[6]

McWilliams declares that he was similarly abandoned by the three New York lawyers[7] who acted as his post-conviction counsel throughout much of the Rule 32 proceedings. McWilliams asserts that this abandonment manifested itself in the following ways: his New York lawyers were not admitted pro hac vice to practice law in Alabama; they questioned his competence; they lied, were deceptive, and ignored his instructions by failing to plead, prove, adequately argue and brief, and disclose and preserve the record of missing/exculpatory evidence to support his *Brady/Giglio* claims before the Rule 32 court. (Doc. 84 at 2-3, 5-6).[8] He contends that such actions severed the agency relationship that existed between himself and counsel, thus establishing the type of causation necessary under *Maples v. Thomas* to overcome the procedural default of his *Brady/Giglio* claims. However, *Maples* is not applicable to McWilliams' case because it does not embrace the type of

[6] The *Maples* Court made no holding regarding prejudice and remanded for resolution of that issue by the lower courts.

[7] The court refers to post-conviction counsel as the "New York lawyers" because McWilliams had several lawyers during the post-conviction proceedings and these are the only post-conviction lawyers about which he registers any complaints.

[8] McWilliams describes his New York lawyers' abandonment and ineffectiveness in his federal habeas petition, which reads:

> Rule 32 counsel "failed to plead and prove these [*Brady*] violations and failed to disclose to [McWilliams] these documents existed" (Doc. 1 at 152), that post-conviction counsel "failed to adequately argue and preserve the record concerning the missing evidence" (Doc. 1 at 161), that "Rule 32 counsel constantly impaired and destroyed his causes of action . . . failed to amend [McWilliams' petition with the issues that [McWilliams] wanted to address, failed to communicate with [McWilliams], lied to [McWilliams], failed to disclose to [McWilliams] the exculpatory evidence that he discovered after he fired them, . . . and failed to brief the issues that [McWilliams] wanted briefed after the Rule 32 hearing." (Doc. 1 at 220).

(*Id.* at 3), quoting Habeas Petition (first alteration supplied, remainder by Petitioner).

broad-spectrum complaints McWilliams makes against his New York lawyers as cause to overcome a procedural default.

Even if this court were to entertain McWilliams' principal-agent severance theory as being cognizable under *Maples*, his factual circumstances simply do not establish cause to overcome the default. The complaints McWilliams now makes about his New York lawyers are the same complaints he made against them prior to, during, and after the evidentiary hearing before the Rule 32 court. The complaints were addressed at each instance by the Rule 32 court and then on collateral appeal when McWilliams argued that he was unfairly denied permission to file additional amendments to his Rule 32 petition immediately before (and months after) his evidentiary hearing. The Alabama Court of Criminal Appeals affirmed the Rule 32 court's determination that McWilliams' counsel were admitted to practice law in the State of Alabama,[9] had committed no

[9] On collateral appeal, the Alabama Court of Criminal Appeals addressed this issue as follows:

> The appellant also argues, as part of this issue, that his New York attorneys were never admitted to practice law in Alabama. The record shows that attorney Panora was admitted pro hac vice to the Alabama State Bar in late 1998. However, it appears that there was some problem with Jarmul's application. The record shows that Jarmul submitted a pro hac vice application pursuant to Rule VII, Rules Governing Admission to the Alabama State Bar, on December 21, 1998, and that application was returned to her. This new application is stamped resubmitted to the circuit court on January 11, 1999. This application appears to fully comply with Rule VII. Attorney Julia Tarver is not referenced in any pleading until May 2000, when her name appears at the bottom of a pleading with a notation that she had applied for pro hac vice admission to the Alabama State Bar. The record also shows that only one attorney - attorney Panora - signed all of the pleadings in this case. In fact, her name is the only name that appears on the majority of the pleadings. Panora's application for pro hac vice admission was approved in the early stages of the proceedings before any pleadings were filed. With regard to this contention, the circuit court stated:
>
> > "1. Based on the correct representations of said counsel that their applications to proceed pro hac vice had been submitted to the Bar prior to the hearing date, this Court ordered that Julia Tarver and Holly Jarmul be admitted.
> >
> > "2. This order was entered prior to the beginning of the Rule 32 evidentiary hearing in this case and, therefore, Julia Tarver and Holly Jarmul were both admitted pro hac vice so that their participation in the evidentiary hearing was proper.
> >
> > "3. This Court knows of no evidence of misconduct on the part of McWilliams'

misconduct, had demonstrated a clear understanding of Alabama law, and had competently represented McWilliams to the best of their ability. *McWilliams v. State*, 897 So. 2d 437, 447-49 (Ala. Crim. App. 2004). Moreover, it was determined that McWilliams himself had engaged in repeated manipulative actions and caused delays in the state court. *Id.* These factual findings made by the State court judge are entitled to deference. 28 U.S.C. § 2254(e)(1). As set out further herein, this court's examination of the allegations and record citations in McWilliams' current motion and reply, along with thorough review of the post-conviction record, do not in any way suggest that the State court's factual findings were unreasonable.

The allegations McWilliams offers in support of his position took place before, during and after the evidentiary hearing.

(1) Allegations of Purported Client Abandonment Before the June 2000 Evidentiary Hearing

McWilliams claims that his New York lawyers abandoned him during the pre-evidentiary stage for two reasons: (1) they did not raise *Brady* and *Giglio* claims as he instructed, and (2) when he complained they attempted to have the court declare him incompetent. These incidents culminated at a May 25, 2000, motions hearing set by the trial judge.

> attorneys and takes notice of their more than competent representation during the Rule 32 proceedings. Both attorneys exhibited a more than adequate knowledge of Alabama law and represented McWilliams to the best of their abilities."
>
> (C.R. 983-84.) The circuit court correctly resolved this issue.

McWilliams v. State, 897 So. 2d 437, 448 (Ala. Crim. App. 2004). It is within the jurisdiction and authority of the State court, not this court, to determine who may be admitted to practice before the court of the State of Alabama.

As for his contention that counsel failed to include his *Brady* and *Giglio* claims in his Rule 32 petition, McWilliams alleges that when he discovered New York counsel had not done so, he "attempted to have them discharged through the filing of a pro-se motion" that he signed on April 24, 2000. (Doc. 84 at 5) (citing Vol. 19 at 608-09)). McWilliams asserts that at the May 25, 2000, hearing counsel "appeased him by promising to include the claims, but they never did." (*Id.* at 6).

The bulk of the post-conviction record leading up these events begins with a scheduling hearing held by the Rule 32 court on March 18, 1999. (Vol. 32, Tab. 55). This hearing was the first in-court appearance by two of McWilliams' New York lawyers, Lauren Panora and Holly Jarmul. (*Id.* at 16-18). On April 28, 1999, the circuit court memorialized a scheduling order discussed at the hearing. (Vol. 16 at 193-94). Discovery was to be completed and any disputes regarding discovery were to be resolved at a July 1999 status conference. (*Id.* at 194). The Amended Petition was to be filed on August 16, 1999. (*Id.*).

On May 26, 1999, the State agreed to full disclosure of the District Attorney's file. (Vol. 17 at 203).[10] The Rule 32 court conducted August 4 and September 9, 1999, status conferences[11] to resolve various discovery disputes, and the court extended the time for filing the Amended Rule 32 petition until September 27, 1999.[12] The Amended Petition was filed September 28, 1999, and

[10] Any information from the District Attorney's file that was not turned over to McWilliams' counsel was inspected by the Rule 32 judge *in camera*, and on May 23, 2000, the court entered an order declaring that its examination of the material revealed no exculpatory evidence. (Vol. 19 at 659).

[11] (Vol. 32, Tab. 56 at 26-54). On September 17, 1999, nine audiotapes and 2 videotapes from the Tuscaloosa Homicide Unit (THU) were disclosed and on September 27, 1999, seven additional audiotapes from THU were disclosed. (Vol. 18 at 464-65).

[12] (Vol. 17 at 216-17). The Rule 32 record shows that even after the amended petition was filed on September 27, 1999, McWilliams' counsel continued to pursue and ask for additional discovery from various city and state agencies. For instance, the record shows that on October 5, 1999, the judge entered orders granting McWilliams discovery material from the Department of Youth Services, the Department of Mental Health and Mental Retardation, Bryce and Taylor Hardin Facilities, the Department of Forensic Sciences and the Department of Corrections. (Vol. 18 at 533-36). On

identified 12 separate *Brady* offenses. (Vol. 18 at 470-75). Thereafter, the State filed an answer and motion to dismiss.[13] A request for extension of time to exchange witness lists and exhibits was filed. (*Id.* at 543-92).

On January 11, 2000, McWilliams' counsel filed a motion for an order "directing the Department of Corrections to Allow Petitioner's Expert to Visit and Interview Petitioner." (*Id.* at 592). The motion requested permission for a neuropsychologist to visit, interview, and examine McWilliams for the purpose of establishing an ineffective assistance of trial counsel claim, with the underlying basis being counsel's failure to present mitigating evidence.[14] (*Id.* at 593).

On April 18, 2000, the trial judge set the evidentiary hearing date for June 12, 2000. (Vol. 19 at 603). On the same date, the court also granted the motion requesting the neuropsychologist's visit, permitted the expert to interview and test McWilliams from May 1-3, 2000, and also allowed for two days of followup visits. (Vol. 18 at 597).

March 23, 2000, an order granting discovery of Mobile Police Department records was entered. (*Id.* at 595). On May 15, 2000, another order granted McWilliams discovery of records held by the State Board of Pardon and Parole. (Vol. 19 at 611). On June 6, 2000, records from the Department of Mental Health/Mental Retardation, Searcy Hospital were ordered disclosed. (*Id.* at 674). Immediately prior to start of the June 12, 2000, evidentiary hearing, McWilliams' counsel represented to the court that discovery was complete, with the exception of the Mobile Police Records as those records had purportedly been turned over to the District Attorney's office in Mobile but that office could not locate them. (Vol. 32, Tab. 59 at 126-29). At the hearing, New York counsel also pointed to a blank file on the desk of opposing counsel that was titled Dr. John Gross, and asked for the content of the file. (*Id.*). The State's Attorney informed the court the file was empty, that the information in it had been notes that were submitted to the court for *in camera* review, and that he was not aware of any further information. (*Id.*).

[13] In its answer, the State moved to dismiss McWilliams' *Brady* claims for failure to satisfy the specificity requirements of Alabama Rule of Criminal Procedure 32.6(b), or in the alternative, deny the claims. (Vol. 18 at 544-49 (Answer)). McWilliams responded that the petition was sufficiently specific, and requested permission to file an amended complaint in the event the court decided otherwise. (*Id.* at 573-80 (Response)). The separate motion to dismiss was directed at other claims and was based on Rule 32.2, Ala. R. Crim. P. (*Id.* at 537-42 (Motion)); (*id.* at 573-80 (Petitioner's Response)). The trial judge granted the Rule 32.2 motion. (Vol. 19 at 604-07 (Order)).

[14] Present habeas counsel characterizes this motion as "informing [the] Rule 32 court of [New York counsels'] intent to allege that McWilliams was incompetent." (Doc. 92 at 4) (additions supplied). This court simply rejects that characterization.

Six days later, on April 24, 2000, McWilliams signed the motion he now points to in this court as evidence that he informed the circuit court that he had just discovered that his lawyers had not raised the *Brady* claims he desired, and demanded their removal. (Vol. 19 at 608). The motion shows McWilliams complained generally that he had recently discovered that his New York lawyers had failed to raise all the claims he instructed them to, but he never identified any claim, much less a *Brady/Giglio* claim that he desired to present. (*Id.*). He did request a hearing. (*Id.*).

The Rule 32 court set the matter for hearing on May 25, 2000. (*Id.* at 651). New York lawyers Panora and Jarmul were present in court along with Ms. Julia Tarver, the third lawyer to represent McWilliams from the New York firm. (Vol. 32, Tab. 58). The judge addressed McWilliams and he (McWilliams) informed the court that he and his counsel had resolved their problems and he desired to withdraw the motion. (*Id.* at 106). However, McWilliams now contends that, at the time, he was unaware that on May 23, 2000, his New York lawyers had filed a motion "alleging that McWilliams was no longer competent to assist in his defense or to waive counsel because he had exhibited bizarre behavior, including disordered and illogical thinking, a marked paranoia about his attorneys, and severe mood swings." (Doc. 84 at 5-6) (internal quotations and citations omitted).

McWilliams' counsel did make these allegations in a May 23, 2000, motion to the court, and did so in the context of requesting a continuance of the June 12, 2000, evidentiary hearing. (Vol. 19 at 661). Counsel declared that their relations with McWilliams had become strained four to six weeks earlier and that, during that time period, McWilliams had impeded their ability to meet witnesses and family members and cancelled scheduled trips with experts and counsel. (*Id.*).

Although McWilliams denies that he was aware that counsel expressed concerns about his competence, he does not deny that he was aware counsel had requested a continuance of the evidentiary hearing in part because, as the trial judge stated to McWilliams, "of their relationship with you." (Vol. 32, Tab. 59 at 105). Moreover, counsel for the State expressly asserted that New York counsel's motion to continue mentioned that McWilliams might be incompetent. (*Id.* at 108). While McWilliams' counsel did not use the word incompetent in front of McWilliams at the hearing, she clearly did state every other reason she needed a continuance – and *all* were because McWilliams had thwarted their ability to prepare for the case. (*Id.* at 109). McWilliams did not deny counsel's allegations at the hearing.

McWilliams also did not at any point in the remainder of the hearing address the trial court and register any complaints about New York counsel raising questions as to his competence, much less decry it. (*Id.* at 108-23). In fact, much of the remainder of the hearing involved a logistical discussion, with some input from McWilliams himself, as to scheduling mental health testing and examination by experts for both sides before the evidentiary hearing. Even now, McWilliams does not deny that his relationship with counsel had become strained four to six weeks earlier and, during that time, he had impeded their ability to meet witnesses and family members and cancelled scheduled trips with experts and counsel.

(2) Allegations of Purported Abandonment by the New York Lawyers[15] During the Evidentiary Hearing

McWilliams points to two instances during the June 12-14, 2000, evidentiary hearing where he expressed dissatisfaction with post-conviction counsel. In the first, he contends that when he discovered during the hearing that his attorneys were continuing to lie about (and refusing to present) his *Brady* and *Giglio* claims, he felt "compelled to try to advance" those claims himself. (Doc. 84 at 6-7). As support for this contention, he quotes excerpts from the hearing transcript where his trial counsel, Mr. Joel Sogol, was being questioned. (*Id.*, quoting Vol. 33 at 283-85). The pertinent portions of this transcript read:

> DEFENDANT McWILLIAMS: Your Honor, as you know, I petitioned the Court earlier to have my counsel dismissed because they had not included all the issues I wanted addressed in my Rule 32. Since that time we've met and they have given me several promises that they were going to cover areas that I wanted them to. Since that time, once I just, you know, removed that motion before you I have only met with them momentarily. And we've had some troubles today as well, certain things I would like for Mr. Sogol to address that were not included as far as the investigative files that were given to us from the District Attorney's Office.[16]

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[15] On June 9, 2000, counsel for McWilliams attempted to file a Second Amended Petition and on June 12, 2000, a Second-Revised Amended Petition. The trial judge refused to allow the Second Amended Petition immediately before the evidentiary hearing (Vol. 32, Tab. 59 at 132) and indicated that he might strike the Second-Revised petition because it was filed in an untimely fashion, but that a final decision would be reserved until after the hearing. (*Id.* at 142). Ultimately, it was stricken on the basis of undue delay in the Order denying post-conviction relief. (Vol. 41, Tab. 80 at 1). For purposes of McWilliams' *Brady* claims, the refusal to allow either document makes no difference because the *Brady* allegations in both were identical to the *Brady* claims in the Amended Petition (the operative Rule 32 petition), with the exception of one additional claim based on destruction of evidence. In its final order, the trial court made rulings on the *Brady* claims in McWilliams' amended petition. The court also addressed the destruction of evidence claim, finding that McWilliams had failed to raise it in his amended petition, and further made an alternative ruling denying it on the merits. (*Id.* at 2, 52-53).

[16] Joel Sogol and John Bivens were McWilliams' appointed trial counsel in 1985 and 1986. (Vol. 32, Tab. 59 at 164). Sogol was primarily responsible for the guilt phase of trial. (Vol. 33 at 217, 240). Sogol testified that he did not "have a distinct recollection of the discovery given to [him] by the Prosecution." (Vol. 32, Tab. 59 at 164). Sogol explained that Jeff Dean preceded him as McWilliams' counsel, that he received Dean's file when he became counsel for McWilliams, and that Dean's file contained material that had been disclosed by the District Attorney (DA). (*Id.* at 175). The trial record shows that Dean was allowed to withdraw in December 1985 based on McWilliams' complaints that Dean was not presenting points McWilliams wanted raised, and that McWilliams was going to sue Dean for legal malpractice in connection with Dean's representation of him on a rape and robbery charge in Mobile, Alabama. (Vol.

. . . .

. . . I understand that if I don't get this information in these proceedings that I would be barred from using them in future proceedings. They are relevant, and I ask your indulgence. I know that I was not prepared to do this and I that this is quite unusual, but it is necessary.

THE COURT: What are you asking for?

DEFENDANT McWILLIAMS: I'm asking to address several pieces of information that was [*sic*] given to us through discovery that were not part of the investigative files or the files given to us during pretrial or during trial that are relevant to my Brady claim.

THE COURT: Are you talking about you want to ask the witness questions?

DEFENDANT McWILLIAMS: Well, I would prefer that my attorneys ask the questions, but I'm getting, you know, deaf ears, turned to me. They are much more articulate in doing so. But the information I have before me they have not seen, and —

THE COURT: All right.

DEFENDANT McWILLIAMS: – evidently they don't want to do it.

(Vol. 33 at 283-85) (footnote alteration supplied).

10, Tabs. 29 and 30). In a May 1986 hearing held several months before the capital trial, McWilliams also complained that Sogol and Bivens were not performing to his satisfaction. (*Id*. at Tab. 31).

In any event, Sogol also filed discovery motions himself and testified that he was allowed to (and actually did) go to the DA's office to discuss discovery matters. (Vol. 32, Tab. 59 at 164-66). Sogol admitted that had he been given a lot of information from the DA. (*Id.* at 164-70). He acknowledged five letters from the DA that were directed to him that listed extensive discovery materials that were being disclosed. (*Id.* at 169-76). Penalty phase counsel John Bivens gave similar responses. (Vol. 33 at 302-08). Moreover, Sogol could not remember the last time he had seen his file, adding that he had given the bulk of it to Al Vreeland, McWilliams' lawyer on direct appeal. (*Id.* at 239).

After some discussion,[17] the trial judge allowed Mr. McWilliams to ask his own questions of Mr. Sogol. (*Id.* at 289). These questions involved whether Sogol was aware of a notation on the back side of an investigator's report that read that an individual who had been tracked from Austin's convenience store by a police K-9 unit "had wet, muddy pant legs," to which Sogol responded that he did not remember. (*Id.* at 296). McWilliams further asked if this information would have been useful to Sogol to call and question the investigator at trial since Ronald Thomas, an eyewitness, testified that the perpetrator had "a stain on his pants," and Sogol responded that it "would have been worthwhile." (*Id.* at 297-98).[18]

Of course, what McWilliams does not mention is that this *Brady* claim was considered in full by the Rule 32 court, the last state court to address the claim on the merits. (Vol. 41 at 1784-85). The final order initially dismissed the claim for failure to comply with the specificity requirements of Alabama Rule of Criminal Procedure 32.6(b). (*Id.*). Alternatively, however, the Rule 32 court found:

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[17] The court asked McWilliams if he wanted to terminate his counsel or ask questions of the witness himself. (Vol. 33 at 285). McWilliams answered no, but added that

> it would be more expeditious for me to ask questions. I don't want to. . . . I made the mistake before of doing this, and I will . . . if the Court wishes me to or if it's going to make things go faster. It would be easier, because I have the material and am more familiar with it, they haven't see it, and it would take time for them to familiarize themselves with it. But I can attempt to do so, and you will have to bear with me a little bit, if you don't mind.

(*Id.* at 285-86).

[18] McWilliams' active participation in his post-conviction proceedings was not his first foray into that area. During the trial proceedings, he specifically requested permission to be allowed to act as co-counsel. (Vol. 8, Tab. 25 at 1514-15). He also questioned a witness during pre-trial hearings. (Vol. 10, Tab. 32 at 300-07). At the trial itself, he was allowed to cross-examine eyewitness Ronald Thomas (Vol. 3 at 417-25), made a closing statement (Vol. 7 at 1232), and took the stand (*id.* at 1320-25) during the mitigation phase of trial to read into the record the report of a mental health expert. Bivens testified that McWilliams was "very intelligent" but also found him to be non-cooperative in insisting on acting as co-counsel. (Vol. 34 at 396-99).

> that this claim is without merit. As demonstrated at the Rule 32 hearing, Sogol's contention that he had no knowledge of the K-9 unit was clearly mistaken. (EH at 148-50). Not only had trial counsel been aware of this information, Sogol referenced in his opening statement to the jury. (*Id.*; R. 260) In his trial brief, Petitioner adds the assertion that, while defense counsel may have known about the dog tracking another suspect from the scene, defense counsel was not aware that this other suspect "was actually wearing the same muddy pants witnesses had testified that the perpetrator was wearing." (Brief at 13-14) Petitioner offers no support for this statement and, in fact, there does not appear from the record that there is any support for such a contention.[19] Petitioner has, therefore, failed to establish the first requisite prong of the *Brady* analysis, that this information was suppressed by the prosecution. This claim is without merit and is, therefore, denied.

(*Id.*) (alteration supplied). For purposes of a federal habeas filing, either ruling is on the merits,[20] and the Rule 32 court's merits rulings are decisions that satisfy 28 U.S.C. § 2254(d). This court has conducted a thorough review of the record in an effort to determine whether there are any facts or circumstances to justify McWilliams' pursuit of a *Maples*' argument that his post-conviction counsel were deceptive, disloyal or attempted to sabotage his attempt to present this *Brady* claim. The post-conviction record of counsels' representation, the evidentiary hearing transcript and the weakness of the particular facts upon which this *Brady* claim was based belie McWilliams' allegations.

At another point in the hearing, McWilliams raised an objection to his mother's mitigation testimony on the basis of her qualifications. (Vol. 35 at 702). He then stated to the court, "I'm not being heard and I'm not being . . . represented by counsel by my counsel." (Doc. 92 at 4, quoting Vol. 35 at 703). McWilliams declared:

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[19] This court notes that during the evidentiary hearing, McWilliams himself affirmatively represented to the Rule 32 court that Ronald Thomas had testified at trial that the individual he saw at the scene of the crime had muddy pants. (Vol. 33 at 296-97). As correctly found by the Rule 32 court, Ronald Thomas did not testify that the perpetrator he witnessed had wet, muddy pants. Instead, Thomas testified that he saw McWilliams in the store, that McWilliams was wearing khaki pants, and that the pants had "a stain on the right leg, I believe: just a dark colored stain." (Vol. 2 at 283).

[20] Dismissal of a claim pursuant to Alabama Rule of Criminal Procedure 32.6(b) is a ruling on the merits for purposes of federal habeas review. *Powell v. Allen*, 602 F.3d 1263 (11th Cir. 2010).

> these attorneys keep telling me this, and they keep putting me off. Since the last time that I talked to you last Monday, I have not seen them. And I think one of their tactics is to put me off and try to go on with this as they want to and disregard everything I'm talking about.

(Vol. 35 at 702). He also asserted that the attorneys "are going on with this mitigation evidence and stuff" and that they had not met with him. (*Id.*). At that juncture, the trial judge informed McWilliams that he could discharge his lawyers. (*Id.*). The court stated, "I have evaluated your intelligence, and I think you're a very smart individual. I've heard you ask questions, and I've heard you make objections." (*Id.* at 704). McWilliams was told that he could continue with his local counsel, Paula Watkins, and when McWilliams asked for half day to meet with local counsel, the court agreed that it would allow it. (*Id.* at 705-07).

McWilliams' New York counsel stated that if he wanted them removed that they would like an opportunity to be heard on the same matters before the court as the May 25, 2000, hearing (meaning McWilliams' competence), including the opportunity to testify and to present mental health experts. (*Id.* at 708). The court then asked McWilliams if he wanted to terminate New York counsel and he replied, "No, no, not yet. I'm going to wait until I meet with them. *But that tactic they're using as far as mental health is concerned, I have no concern with that. I have no problem whatsoever with that*." (*Id.*) (emphasis supplied).

The court expressed that it did not know that counsel would be in any position to offer witnesses with regard to McWilliams' competence in the event he decided to terminate them, but reserved that matter until McWilliams made such a decision. (*Id.* at 710). Ultimately, it was agreed that McWilliams would meet with his New York lawyers before making a decision, and the court

allowed McWilliams to consider the matter overnight with the understanding that counsel would meet with McWilliams at the jail that evening. (*Id.* at 710-11).

The next morning, the New York lawyers expressed the following to the court:

> We have had an opportunity to confer with our client, and he is willing and happy to proceed with us as his counsel. He has one request that he has asked us to make to Your Honor, which is that we be able to subpoena as witnesses Robbie Parker, Mike Turner, and Doug Turner. Mr. Parker drafted a composite sketch of the perpetrator of the crime, and . . . both Mr. Mike Turner and Mr. Doug Turner were involved in the investigation of Mr. McWilliams' crime. And he would like to recall those witnesses and have us question them regarding some Brady material and some - - a potential possibility for supporting perjury.

(*Id.* at 714). Counsel for the State objected to the request, in part, because the witnesses were not listed on the witness exchange lists. (*Id.* at 715). New York counsel admitted that they had known about the witnesses but did not reveal them when the parties exchanged witness lists. (*Id.* at 715-16). Counsel then said the witnesses might only need to be called in rebuttal to another witness, Mr. Freeman (one of the prosecuting attorneys at the 1986 trial), and the court responded that it would take the matter up when it arose. (*Id.* at 717).

The court informed McWilliams that it had not made a decision as to whether it would allow the witnesses to be called, and that if McWilliams agreed to allow his lawyers to continue he was doing so knowing that the court may not allow those witnesses. (*Id.* at 718). McWilliams stated that although his lawyers had been directed to do so; they had not included him in preparation of the witness exchange list, and had they done so the problem at hand would not have occurred, particularly because no one knew the details of his case better than him. (*Id.* at 718-19).

The court then asked McWilliams if he wanted to terminate counsel, repeated to McWilliams that he had not made a decision as to whether he would allow the witnesses to be called, and that if

McWilliams agreed to allow his lawyers to continue he was doing so knowing that the court may not allow those witnesses. (*Id.* at 720). The court added: "And I'll say for the record: You are - - I have talked to you, this is not the first time I've talked to you. I've seen you before. You are an intelligent individual. There is not a doubt in my mind that you have an understanding of what's going on." (*Id.* at 721). McWilliams complained that he did not have the skills himself to proceed against opposing counsel and would have to keep the New York lawyers. (*Id.* at 721-22). McWilliams also stated that counsel had not mentioned the final stipulation to his keeping them as counsel, and that was the possibility of his taking the stand and testifying at the evidentiary hearing. (*Id.* at 722). The court expressed to McWilliams that he had an absolute choice and right to terminate counsel and that he must choose. (*Id.* at 723-24). Having been fully informed of his right to do so, McWilliams declined to terminate his New York counsel. (*Id*. at 724).

Toward the end of the evidentiary hearing, further discussion of the prospect of calling the witnesses McWilliams had requested took place. (Vol. 37 at 1170). New York counsel informed the court that the State no longer intended to call two witnesses on its list, Mr. Freeman and Mr Steverson (the latter was also a prosecutor at the original trial), and they wanted to discuss with their client their attempts to contact the witnesses he desired. (*Id.*). After speaking with McWilliams, New York counsel stated that they still were trying to locate Mike Turner and Doug Turner, and asked to submit their testimony via deposition or affidavit, whereupon the State objected. (*Id.* at 1171-72). Counsel reiterated that the witnesses would be testifying about documents that McWilliams believed contained *Brady* material. (*Id.* at 1172). The court responded:

> All right. I don't intend to open the evidence to go on beyond this point. That's the purpose of having this trial. I set aside all the way through today and also cancelled tomorrow when we talked earlier that we might have needed it. . .

. . . .

> And we went late last night, obviously to make sure that we had all the time in the world available.
>
> I think we've made it abundantly clear that I have told y'all about the witness list, that you had to disclose your witnesses to each other. And, I mean, if you wish to get affidavits following the conclusion of evidence and make some kind of motion to supplement the evidence with the affidavits attached and whatever exhibits attached, I will rule on that type of motion at that time, okay?

(*Id.* at 1173).[21]

At another point later in the hearing, when the court asked what witnesses McWilliams wanted called, McWilliams stated Bobby Parker, Mike Turner, Doug Turner, Mr. Freeman and Mr. Steverson. (*Id.* at 1189). The court explained that it believed Freeman and Steverson could be found. After a recess, Mr. Steverson was presented. (*Id.* at 1190). At that time, McWilliams and his counsel decided not to call Steverson as a witness. (*Id.*). Moreover, McWilliams wanted to take the stand and testify concerning missing pages of the trial transcript,[22] the substance of which purportedly involved an in chambers conference. (*Id.* at 1191-92). Counsel objected to allowing McWilliams to testify on the ground that McWilliams was incompetent, but the court found him to be competent based on its observations of Petitioner and the testimony of several mental health experts who testified at the evidentiary hearing. (*Id.* at 1192-98). Against his counsel's advice McWilliams presented his testimony, and during cross-examination.[23] (*Id.* at 1209-45).

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[21] No affidavits from Mike Turner or Doug Turner were ever filed.

[22] To be sure, none of this pertains to *Brady* material.

[23] Petitioner's counsel advised him to assert his Fifth Amendment rights and not testify. McWilliams' testimony was incriminatory. According to Joel Sogol, McWilliams also refused to follow his advice before the original capital case was tried. The defense strategy at trial was that McWilliams had not committed the crime because his client had told him that he did not do it. (Vol. 33 at 242). Sogol wanted to present an alibi defense through Sonya McWilliams and the fact that law enforcement initially focused on another individual, Jerry Porter, as the perpetrator. (*Id.*). Yet,

At the very end of the hearing, McWilliams informed the court that he did not believe that counsel had attempted to find Doug Turner, and asked the court to retrieve Turner as a witness. (*Id.* at 1246-47). The court refused and reiterated that Doug Turner had not been placed on the witness list. (*Id.* at 1248-49). The court allowed McWilliams to make a proffer concerning Turner, and McWilliams asserted that, based on material disclosed during the post-conviction proceedings, he could show that Doug Turner had lied under oath. (*Id.* at 1249-50). The court then asked McWilliams if he had anything else, and McWilliams responded, *"No, Your Honor*." (*Id.* at 1250) (emphasis added). The hearing concluded shortly thereafter.

(3) Post-Evidentiary Hearing Allegations of Purported Abandonment by New York Lawyers

Two months after the evidentiary hearing, on August 8, 2000, McWilliams' New York lawyers filed a "Motion to Amend . . . And to Have the Opportunity to Examine Six Additional Witnesses." (Vol. 20 at 893-95). Only two of these witnesses, Charles Freeman and Doug Turner, had even been mentioned by McWilliams at the Rule 32 hearing. The State responded to the motion (*id.* at 896-99) and on August 15, 2000, the Rule 32 court denied it (*id.* at 900).

McWilliams insisted on giving a statement to Shirley Fields, a Tuscaloosa Homicide investigator, over Sogol's objection. (*Id.*). In this statement, which Sogol testified was the same version of events that McWilliams had consistently told Sogol, McWilliams said that he had gone into Austin's Convenience Store, found the victim in the back and helped her up. (*Id.* at 245). Sogol testified that he did not want to use the statement at trial and the State did not attempt to use it. (*Id.* at 243).

Ironically (or perhaps prophetically), the State's Attorney also tried to cross-examine McWilliams about Field's statement when he insisted on testifying during post-conviction proceedings. This line of questioning elicited numerous objections from Petitioner's New York counsel, and when Petitioner refused to follow their instructions not to answer, counsel in turn argued that he was not competent. (Vol. 37 at 1234-44). Although McWilliams answered the questions with denials and assertions that he lacked recollection, he also admitted during the hearing that he had told a lie about another matter and agreed with an expert's testimony that he could be deceitful and misleading. (*Id.* at 1223, 1225). Only when McWilliams insisted on proceeding even further with narrative testimony, and consequently opened the door to questioning about other crimes he had been accused of committing, did he finally heed New York counsel's advice and assert his Fifth Amendment privileges. (*Id.* at 1245-46).

On August 22, 2000, McWilliams filed a "Pro Se Response to State's Objection to Petitioner's Motion to Amend and Examine Six Additional Witnesses." (*Id.* at 905-07). In it, he expressly stated that with the exception of the initial paragraph of his New York lawyer's motion (which did not relate to either the six specific witnesses or the motion to amend[24]), *he and counsel* had composed the motion. (*Id.* at 905). He also informed the court that his New York counsel had informed him "of their objections to this pleading, and the basis of their objections is that . . . I [am] incompetent and so mentally impaired that [my] conclusions and factual determinations are so unwarranted that they refuse to investigate and/or present these claims to this Court." (*Id.*). He complained of his counsel's deception and requested permission to file another amended petition and to present the testimony of the six witnesses. (*Id.* at 907).

On August 28, 2000, the Rule 32 court denied this pro se motion. (*Id.* at 909). The court expressed that it knew of no misconduct on the part of counsel, that counsel ably represented McWilliams at the hearing, that McWilliams had "repeatedly represented" to the court that he had resolved his differences with counsel and wanted their assistance, and was further given the opportunity to proceed during the hearing with the assistance of local counsel if he wanted to terminate the New York lawyers, but he had declined to do so. (*Id.* at 909-10).

On both September 11 and 17, 2000, McWilliams signed Pro Se Motions to Reconsider his Pro Se Motions to Amend the Complaint. (*Id.* at 916-31; 947-982).[25] These are the motions present

[24] The initial paragraph referred to counsels' May 23, 2000, motion to continue and the reasons for that motion.

[25] The court notes that in the September 11, 2000 motion for reconsideration, McWilliams continued to repeat his complaints that counsel did not perform as he instructed, listed the six witnesses set out in the August 8, 2000 motion, added seven more witnesses and expands the purported suppressed or exculpatory materials that he wanted presented at the evidentiary hearing. (*Id.* at 916-31). He indicated that due to lack of paper he would be following up in another document. (*Id.* at 928). This document, which is the September 17 (filed September 25), 2000 motion of the same title as the September 11 motion, lists the thirteen previous witnesses, adds one new witness, and further expands the scope

habeas counsel now points to in support of the argument that New York counsel ignored and deceived McWilliams. However, it is apparent that the trial court conducted a thorough review of these allegations, flatly rejected McWilliams' accusations against counsel, and denied his pro se motion to amend the complaint.

In between filing these motions, McWilliams filed[26] another motion on September 13, 2000, in which he requested that the evidentiary hearing proceedings be nullified on the grounds that his New York lawyers were not admitted to practice law pro hac vice. (*Id.* at 911-13). In response to various other complaints about his New York lawyers (and his reference to those lawyers as being "former" counsel), the trial judge directed the lawyers to determine if McWilliams had indeed terminated them and present an affidavit containing the response. (*Id.* at 914-15). Counsel responded that McWilliams had refused to give a definitive answer, and they believed they were not authorized to actively represent him until a response was received. (*Id.* at 943-44). On October 5, 2000, New York counsel filed a motion to withdraw for the same reason, but the court denied the motion after determining that all three New York lawyers were properly admitted pro hac vice, and afforded counsel additional time to file a post-hearing brief in November 2000. (*Id*. at 983-84; 989-Vol. 24 at 1656-58).

In his reply brief, present habeas counsel has stated that:

> [a]fter discovering that his attorneys, despite repeated promises and assurances to the contrary, once more failed to argue the *Brady* claims in their post-hearing briefs, McWilliams immediately sought and received permission from the Rule 32 court to file pro se pleadings addressing those issues. The court, however, never ruled on those pro se pleadings.

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of materials that post-conviction counsel did not present. (*Id.* at 947-82).

[26] The motion was signed September 8, 2000.

(Doc. 92 at 5). Noticeably, habeas counsel fails to cite any portion of the post-conviction record in support of this contention. Moreover, the court's independent review of the record finds no support for it. The only document that might have even some arguable connection to the issue is a November 17, 2000, letter by Paula Watkins (McWilliams' local counsel) to the court in which she wrote:

> McWilliams is requesting that you allow him seven (7) days from the November 20th filing deadline to amend, alter or supplement the brief being submitted on his behalf by his new York attorneys. He has advised me that he is concerned that the brief will contain mitigation information. He plans to ask that any information concerning mitigation be struck from your consideration. Also, he is in need of this seven (7) day extension because he has not been provided with copies of the briefs to be submitted on his behalf.

(Vol. 20 at 946). Handwritten on the letter is the following: "Nov. 20 7 day for [defendant] to file granted[,] Paula notified of such." (*Id.*). Based on this document, McWilliams sought and was granted permission to alter post-conviction counsels' brief only if it contained mitigation information. He neither moved to file nor was he granted permission to file additional pro se pleadings.

On November 22, 2000, counsel filed their post-hearing brief. (Vol. 20 at 1000; Vol. 21 at 1001-81). On November 30, 2000, McWilliams signed a "Motion to Strike Surplasage from Petitioner's Rule 32 Proceeding." (Vol. 22 at 1222-24). In it, he asked the court to strike the testimony of witnesses who were called for mitigation purposes. (*Id.*). He also signed the "Pro Se Supplement to Foreign Counsel['s] Proposed Finding of Fact and Conclusion of Law," the third document that he points to in support of the present motion to supplement the pleadings. (*Id.* at 1225-1360). In that pro se supplement, he repeated his complaints against counsel, made arguments concerning subject matter the court already had refused to consider in its previous post-evidentiary

hearing orders, and embedded another motion to amend the complaint to add entirely new subject matter. But as already discussed, the court did not give him permission to file the latter document. Thus, habeas counsel's declaration has no foundation.

(4) Alleged Deception Discovered After Retention of New Post-Conviction Counsel

On January 1, 2001, Richard Jaffe and Steven Strickland filed notices of appearance on McWilliams' behalf as his new counsel (Vol. 22 at 1366-67) and an order allowing the withdrawal (Vol. 23 at 1566) of the New York lawyers was entered. On or about March 14, 2001, Strickland filed a motion titled, "Petitioner's Motion For Leave to Amend his Rule 32 Petitions and Memorandum Brief in Support of Said Motion and Brief in Support of 'Motion for Reconsideration of Petitioner's Pro Se Motion to Amend Petition for Relief and Examination of Additional Witnesses' filed by the Defendant James McWilliams." (*Id.* at 1571-1600; Vol. 24 at 1601-1615). This motion repeated many of McWilliams' previous complaints and made additional arguments that included supporting affidavits and exhibits. (*Id.*).

Several other motions were filed by Attorney Strickland, in which he requested limited discovery and production of documents, the opportunity to file an amended petition, an evidentiary hearing with post-briefing opportunity, a status conference, permission to withdraw the pro se motion to strike surplasage, and leave to supplement proposed findings of fact and conclusions of law submitted by the New York lawyers. (*Id.* at 1616-25).[27] Other than the withdrawal of the motion to strike surplasage, the content (and alleged reasons proffered in support) of these motions merely repeated the previous motions rejected by the court. On April 24, 2001, the Rule 32 court

[27] Counsel also filed numerous responses to the State's responses to the New York lawyers' post-evidentiary efforts. (*Id.* at 1626-42).

again denied the motions. (*Id.* at 1674-78). The denials were followed by still more motions to reconsider filed May 2, 2001. (*Id.* at 1679-89). Those motions were denied on May 8, 2000. (*Id.* at 1692).

In June 2001, McWilliams filed a motion to be allowed to view videotapes, a motion to reconsider the request for status conference, and a clarification of his previous motion to amend the complaint and supplement the evidence. (*Id.* at 1694-1742). In that supplement, McWilliams declared that he had just discovered that his New York lawyers had possession of exculpatory material, but did not reveal it to him during their representation or present a claim based on it. (*Id.* at 1698-1701, 1713-42). On September 13, 2001, the trial court denied the request to view the videotapes, holding that there was no requirement that a defendant be allowed to view it before counsel "can determine a legal question." (Vol. 25 at 1830). The court also denied the motion seeking a status conference, clarification, and to supplement the evidence for the many of the same reasons it had repeatedly denied McWilliams' previous motions. (Vol. 25 at 1831-33) (noting the grounds for the motion were not credible, there was no evidence the state agencies had refused to turn over any post-conviction discovery or destroyed any evidence, the relief requested was a violation of the scheduling order, there was no misconduct on the part of McWilliams' New York lawyers, and the issues were not the result of newly discovered evidence pursuant to Alabama Rule of Criminal Procedure 32.1(e)). The court entered a final judgment that denied the amended Rule 32 petition on September 13, 2001, as well. (Vol. 24 at 1775-1800; Vol. 25 at 1801-28; *see also* Vol. 41, Tab. 80). That denial of post judgment relief was affirmed by the Alabama Court of Criminal Appeals. *McWilliams v. State*, 897 So.2d 437 (Ala. Crim. App. 2004).

After careful examination of the representation given to McWilliams by his New York lawyers, this court finds that McWilliams cannot establish cause to overcome the procedural default of his *Brady/Giglio* claims because the attorney/client (*i.e.*, agency) relationship between McWilliams and his New York post-conviction lawyers was not severed by disloyalty or deceit. There is ample evidence to support the Alabama Court of Criminal Appeals' reasonable determination that:

> [u]nder the facts presented in this case, the circuit court did not abuse its discretion in denying the appellant's motion to amend his petition. It is evident that the appellant caused the majority of the delays in this case. If we were to hold that the circuit court abused its discretion in denying the motions to amend, we would reward the appellant for his repeated and intentional efforts to delay and disrupt the circuit court proceedings.

McWilliams v. State, 897 So.2d at 448. Elsewhere, the appellate court quoted the trial judge's determination that "that McWilliams has repeatedly attempted to manipulate [and engaged in ploys to manipulate] the proceedings." *Id.* at 443 (internal citation omitted).

The facts relied upon by McWilliams simply bear no resemblance to the unusual circumstances found to excuse the procedural default in *Maples*. McWilliams' New York lawyers may not have perfectly tried the post-conviction case, but there is no evidence that any alleged action or inaction by any of these individuals (even in questioning their client's competence) was done because they were disloyal to him, became antagonistic toward him in response to his complaints, intentionally undermined his case through deception, and refused to present his *Brady/Giglio* claims. Instead, as found by the state court, New York counsel zealously represented their client and competently performed throughout the proceedings. Also as found by the state court, there is more

than ample evidence McWilliams intentionally manipulated the proceedings on a consistent basis in an effort to effectuate delay.

For all of the foregoing reasons, this court finds the attorney-client relationship between McWilliams and his New York lawyers was not severed and the post-conviction proceedings McWilliams was afforded were not fundamentally unfair. Even if this court had jurisdiction to address the issue, it would conclude Petitioner cannot establish cause to overcome the procedural default of his *Brady* claims by way of *Maples v. Thomas*.

b. *Martinez v. Ryan,* 132 S. Ct. 1309 (2012)

In his initial Motion to Supplement his Pleadings, McWilliams also urges that *Martinez v. Ryan*, 132 S. Ct. 1309, 1317 (2012), offers him relief because post-conviction counsel's "ineffectiveness does constitute an excuse to the procedural default" that precluded the bulk of his *Brady/Giglio* claims during the Rule 32 initial review proceedings. (Doc. 84 at 9). McWilliams categorically asserts that "the first instance McWilliams could raise the *Brady* and *Giglio* claims were at the Rule 32 proceedings, after uncovering the evidence underlying the claims that had previously been suppressed by the State." (*Id.* at 8-9). In a footnote attached to this statement, McWilliams comments, "Moreover, the Rule 32 proceedings provided the first opportunity to consider and raise issue with trial attorney Sogol's failure to investigate and develop the materiality of critical exculpatory evidence, an issue post-conviction counsel failed to identify and litigate." (*Id.* at n. 2, citing ¶12 n.3 and ¶13 of the same motion, in which he identifies four items of "suppressed evidence" by the State and two items of "exculpatory evidence" that should have independently investigated and discovered). McWilliams concludes his motion by asking this court "to excuse the

defaults previously relied upon . . . to dismiss McWilliams' *Brady* and *Giglio* claims as detailed in his federal habeas petition." (*Id.* at 11).

In response, the State asserts that "McWilliams' argument on this front is not entirely clear," but assumes out of an abundance of caution that McWilliams is attempting to argue that under *Martinez*, post-conviction counsels' ineffectiveness could excuse the procedural default of the *Brady/Giglio* claims *and* the procedural default of an ineffective assistance of trial counsel claim on the basis that trial counsel were ineffective for failing to raise *Brady* claims at trial. (Doc. 89 at 8).

McWilliams replies that his argument has two components:

> First, to the extent that the *Brady* material was only uncovered at the time of the state post-conviction proceedings, post-conviction counsel were ineffective for failing to present those claims in McWilliams' Rule 32 petition. Second, if *Brady* material could have, and should have, been discovered by trial counsel, then post-conviction counsel were ineffective in the collateral proceedings for failing to allege and challenge trial counsel's failure to discover and present that evidence.

(Doc. 92 at 6).

In conclusion, McWilliams again argues that cause exists under *Martinez* to excuse the default of his meritorious *Brady*[28] claims. (*Id.* at 11).

As McWilliams has addressed this argument in a twofold manner, the court shall follow that lead. However, the court begins with a basic discussion of *Martinez*. Before the *Martinez* decision, the Supreme Court had long held that "the errors of post-conviction counsel on collateral review . . . [are] neither a proper constitutional claim nor proper to offer as cause and prejudice to overcome a procedural default." *Coleman v. Thompson,* 501 U.S. 722, 754 (1991) (redaction and alteration supplied). Pursuant to the reasoning in *Coleman*, since "[t]here is no right to counsel in state post-

[28] McWilliams does not mention his purported *Giglio* claims in his reply brief.

conviction proceedings," a petitioner cannot allege the constitutional ineffectiveness of his post-conviction counsel as cause to overcome a claim that was procedurally defaulted during collateral proceedings. *Id.* at 752, citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989).

In *Martinez*, the Supreme Court narrowly modified *Coleman's* long-standing principle after studying "[t]he precise question [of] whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding." 132 S. Ct. at 1315. The Court held that:

> [t]o protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a post-conviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

Id. (alteration supplied). The Court explained that the phrase "initial-review collateral proceedings" is meant to exclusively refer to post-conviction proceedings at the trial court level:

> [w]hen an attorney err [or makes it] likely that no state court at any level will hear the prisoner's claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. See, *e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S. Ct. 183, 80 L .Ed. 158 (1935); *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875); cf. *Coleman*, *supra*, at 730-731, 111 S. Ct. 2546. And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.
>
> The same is not true when counsel errs in other kinds of post-conviction proceedings. While counsel's errors in these proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding. *See*, *e.g.*, *Coleman*, *supra*, at 756, 111 S. Ct. 2546.

Martinez v. Ryan, 132 S. Ct. at 1317 (alterations supplied).

The holding in *Martinez* is not "a constitutional ruling," but rather an "equitable ruling." *Id.* at 1320. Thus, a petitioner still has no independent constitutional right to post-conviction counsel, and any equitable cause and prejudice allegations concerning the inadequacies of post-conviction counsel can be asserted only in an attempt to overcome the procedural default of an ineffective assistance of trial counsel claim when the default occurred at the Rule 32 level. Even in that limited instance, the alleged post-conviction counsel error must be of such a degree as to offend the *Strickland* standard. *Martinez*, 132 S. Ct. at 1318, citing *Strickland v. Washington*, 466 U.S. 668 (1984).

Martinez does not apply to errors made by post-conviction counsel in any other collateral proceedings or with regard to any issue other than failure to raise an ineffective assistance of trial counsel claim. Thus, if post-conviction counsel properly raised an ineffective assistance of trial counsel claim before the trial (Rule 32) court, but then failed to properly raise the same claim on collateral appeal, neither *Coleman* nor *Martinez* allow the petitioner to argue ineffective assistance of collateral appeal counsel as cause and prejudice for the default. The *Martinez* Court instructed:

> The rule of *Coleman* governs in all but the limited circumstances recognized here. The holding in this case does not concern attorney errors in other kinds of proceedings, including appeals from initial-review collateral proceedings, second or successive collateral proceedings, and petitions for discretionary review in a State's appellate courts. *See* 501 U.S., at 754, 111 S. Ct. 2546; *Carrier*, 477 U.S., at 488, 106 S. Ct. 2639. It does not extend to attorney errors in any proceeding beyond the first occasion the State allows a prisoner to raise a claim of ineffective assistance at trial, even though that initial-review collateral proceeding may be deficient for other reasons.

Id. at 1320.

In any event, once cause is proven, a habeas petitioner also must show prejudice. Such a showing must go beyond proof "that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *see also McCoy v. Newsome*, 953 F.2d 1252, 1261 (11th Cir. 1992) (per curiam). In the event that the cause appears in the form of a *Martinez* exception, "[t]o overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 132 S. Ct. at 1319, citing for comparison *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue).

McWilliams suggests that this court should expand *Martinez* beyond its parameters and determine that its equitable remedy applies to post-conviction counsel's failure to raise claims other than ineffective assistance of trial counsel. (Doc. 92 at 6-8). In doing so, he points to a portion of Justice Scalia's dissent in *Martinez*, which reads:

> no one really believes that the newly announced "equitable" rule will remain limited to ineffective-assistance-of-trial-counsel cases. There is not a dime's worth of difference in principle between those cases and many other cases in which initial state habeas will be the first opportunity for a particular claim to be raised: claims of "newly discovered" prosecutorial misconduct, for example, see *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), claims based on "newly discovered" exculpatory evidence or "newly discovered" impeachment of prosecutorial witnesses, and claims asserting ineffective assistance of appellate counsel.

Martinez v. Ryan, 132 S. Ct. at 1321.

Notwithstanding Justice Scalia's figurative peek into the crystal ball, this court is bound to follow the express *holding* of the Supreme Court. For the foregoing reasons, it is clear that *Martinez*

does not apply to errors made by post-conviction counsel in any other collateral proceedings other than the initial review proceeding (the Rule 32 circuit court) itself or to *any claim other than ineffective assistance of trial counsel.*[29]

Having thoroughly reviewed *Martinez's* narrow equitable procedural default exception, the court now turns to McWilliams' twofold argument.

(1) Post-Conviction Counsels' Failure to Raise and Present *Brady/Giglio* Evidence and Independently Investigate to Ensure No Further *Brady/Giglio* Evidence Existed

McWilliams' next bid to overcome the procedural default in this instance boils down to an argument that post-conviction counsel failed to present the *Brady* evidence that he alleges was discovered for the first time during Rule 32 proceedings *and* that their failure to exercise reasonable diligence in conducting independent interviews of witnesses of which they were aware resulted in a failure to present exculpatory evidence. However, the previous examination of *Martinez v. Ryan* shows that he cannot avail himself of that precedent in order to overcome his procedurally defaulted *Brady/Giglio* claims.

(2) The *Martinez* Procedural Default Principles Are Not Applicable to McWilliams' Footnote Assertion That Post-Conviction Counsel Failed to Identify and Litigate "Trial Counsel's Failure to Investigate and Develop the Materiality of Critical Exculpatory Evidence" During Rule 32 Proceedings

The second portion of McWilliams' argument initially resided in a footnote in his motion to supplement the pleadings. (Doc. 84 at 9 n.2). In that footnote, McWilliams commented, "Moreover, the Rule 32 proceedings provided the first opportunity to consider and raise issue with trial attorney

[29] For purposes of resolving this motion, this court assumes without deciding that the first instance in which McWilliams could have raised an ineffective assistance of trial counsel claim with the underlying basis of that claim being failure to investigate and discover *Brady* evidence would have been in the initial Rule 32 proceeding.

Sogol's failure to investigate and develop the materiality of critical exculpatory evidence, an issue post-conviction counsel failed to identify and litigate." (*Id.*). To supply the grounds for a purported ineffective assistance of trial counsel claim regarding the *Brady* material, McWilliams refers to same four specific items of "suppressed evidence" (*Brady/Giglio*) and two investigative interviews post-conviction counsel should have conducted that purportedly would have led to exculpatory evidence. (*Id.*, citing ¶12 n.3 and ¶13 of the motion).[30]

After Respondent called into question the clarity of this footnote, McWilliams summed up the argument in his reply brief with this sentence: "[t]o the extent the *Brady* evidence at issue in this case could have been discovered by trial counsel, they were ineffective for failing to do so. Post-conviction counsel should have advanced that claim of ineffectiveness at the earliest possible stage -

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[30] The four items of "suppressed evidence" are:

[1] The suppressed evidence in McWilliams' case included proof that an alleged eyewitness [Ronald Thomas] who testified against McWilliams had unequivocally identified another person [Jerry Lee Porter] as the perpetrator at a police-arranged line-up. (Vol. 22, p. 1301) (handwritten note of police officer indicator "Jerry Lee Porter photograph was picked from 5 photographs.").)

[2] The evidence also included proof that clothes the prosecution alleged McWilliams had destroyed to avoid detection were actually in possession of the police the entire time. (Vol. 22, pp. 1283-89 (police inventory list), p. 1290 (handwritten notes of Captain Fields concerning phone call with Investigator Helms stating "Helms advised that he had a large amount of clothing that was in the vehicle McWilliams was arrested in his custody. Stated there were khaki pants and long sleeve white shirts in the clothing").)

[3] Also uncovered were handwritten notes by law enforcement officers that indicated that McWilliams' wife responded to police inquires [(sic)] and did not, as the prosecution claim at trial, ignore requests for information. (Vol. 22, p. 1296 (handwritten police notes indicating call from McWilliams' wife).)

[4] Additional evidence revealed that another eyewitness [Howard Marsh] who testified against McWilliams was shown a composite sketch prior to picking McWilliams in another line-up despite the witness' claims at trial to the contrary. (Vol. 22, p. 1320 (handwritten notes of prosecutor stating: "Before either line-up W[itness] was shown a composite.

(Doc. 84 at 9-10 n. 3) (all but final alteration supplied). The two items of alleged exculpatory evidence involve McWilliams' declaration that post-conviction counsel were ineffective for failing to investigate and independently interview inmate snitches Ronnie Hands and Anthony Finn for considerations and favorable treatment they received in exchange for their trial testimony. (*Id.* at 9-10).

at the Rule 32 proceedings." (Doc. 92 at 11). He concludes that this argument establishes the cause to excuse his procedurally defaulted *Brady* claims. (*Id.*).

Significantly, McWilliams does *not* conclude that the same argument establishes cause to excuse a procedurally defaulted *ineffective assistance of trial counsel claim*. Nor does he express a desire to pursue a claim of ineffective assistance of trial counsel and ask for habeas relief on the merits of that claim. In all instances in his motion and reply, McWilliams' only request is to present his substantive *Brady* claims. As best this court can surmise, McWilliams appears to argue that once he overcomes the procedural default of his ineffective trial counsel claim related to the *Brady* evidence, then his ineffective trial counsel claim in turn may be argued as cause to overcome the procedural default of the *Brady* claims.

Even if this court were to afford McWilliams the benefit of the doubt and assume that he wishes to resurrect a procedurally defaulted ineffective assistance of counsel claim, an ineffective assistance of trial counsel claim cannot be utilized as cause to overcome the default of another claim unless that claim itself has merit. As the Eleventh Circuit has explained:

> [i]n order to constitute cause sufficient to overcome procedural default, a counsel's performance must be constitutionally ineffective under the standards of *Strickland v. Washington*, 466 U.S. 668 (1984). *See Devier v. Zant*, 3 F.3d 1445, 1455 (11th Cir.1993) (petitioner could not use ineffective assistance of counsel as cause for procedural default because he failed to satisfy two-prong *Strickland* test); *Smelcher v. Attorney General of Alabama*, 947 F.2d 1472, 1475 (11th Cir.1991) ("While it is true that ineffective assistance of counsel may be the cause for a default, ... it must first satisfy [the] two-part [*Strickland*] test"). In *Strickland*, the Supreme Court set forth the test for determining whether counsel's performance "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* 466 U.S. at 686.

Jackson v. Herring, 42 F.3d 1350, 1358 (11th Cir. 1995) (parallel citations omitted).

After thorough examination of the post-remand briefs and the Habeas Petition itself, this court finds that *Martinez* affords McWilliams no relief because the purported ineffective trial counsel allegations in the post-remand motion (concerning *Brady* material and a failure to independently discover exculpatory evidence) were *never* raised in the Habeas Petition before this court.[31] Further, to the extent he did raise other ineffective trial counsel claims in the Habeas Petition, this court, in its August 25, 2010, Memorandum Opinion, has already determined that those claims were procedurally defaulted *and* without merit.[32]

---

[31] Although McWilliams did raise an ineffective assistance of trial counsel claim in the habeas petition, that claim contends that counsel failed to:

1. Independently interview Teresa Harris, who initially identified Jerry Porter as the assailant.
2. Interview Teresa Summerville, the victim of Jerry Porter's first robbery at Austin's Food.
3. Secure the testimony of C. Jackson who would have impeached several state witnesses who claim Jerry Porter was in his establishment at the time of the crime.
4. Secure the test results of the analysis done on the blood trace evidence removed from the victim's fingernails.
5. Interview Donnie Otis Brown, an inmate at the time Porter was confined, who observed Porter changing his appearance to look different from when he was arrested.
6. Interview two witnesses that identified James as being in Tuscaloosa two day prior to his arrival, and to locate the person whom they saw.

(Doc. 1 at 190-91).

[32] In adopting the Magistrate Judge's Report and Recommendation (Doc. 55 at 171-75), this court found that the claims were precluded from federal review because McWilliams attempted to raise them for the first time in the pro-se post-hearing brief filed approximately six months after the evidentiary hearing. (*Id.* at 172). This court also found that:

> Even assuming that the guilt phase claims were not defaulted, McWilliams would still not be entitled to relief on these claims. McWilliams has never offered as much as a shred of evidence in support of these allegations of ineffective assistance of counsel. The allegations are extremely general and vague, and he has not even speculated as to how many of the evidence in question could have assisted in his defense. Further, the court notes that although McWilliams claims that he entitled to conduct discovery and have an evidentiary hearing on these claims, he has made no showing that he has ever attempted to obtain any of this information without formal discovery. These vague, general and conclusory allegations are insufficient to warrant habeas relief. Moreover, absent any evidence tending to support these claims, the court is not obligated to conduct an evidentiary hearing.

As such, there is not now, nor has there ever as been, a procedurally defaulted ineffective trial counsel claim related to any of the *Brady* and/or exculpatory material McWilliams discusses in the post-remand motion. The court will not consider a *Martinez* procedural default exception to a claim that simply does not existent in the Habeas Petition.

For all of the foregoing reasons, McWilliams' Motion to Supplement the Pleadings is due to be denied. The court will direct the Clerk to term the Motion to Permit Supplemental Pleadings pursuant to Rule 15(d) (Doc. 84), further direct that final judgment be entered against McWilliams, and that this civil case be closed.

DONE and **ORDERED** this 17th day of April, 2013.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

(*Id.* at 174-75).

Appendix G

FILED
2010 Aug-25 PM 12:45
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

JAMES E. McWILLIAMS,	}	
	}	
Petitioner,	}	
	}	
v.	}	**Case No.: 7:04-CV-2923-RDP-RRA**
	}	
DONAL CAMPBELL, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS, et al.,	}	
	}	
Respondents.	}	

MEMORANDUM OPINION

This case involves a petition for a writ of habeas corpus on behalf of James McWilliams ("McWilliams" or "Petitioner") who has been convicted of capital murder and sentenced to death. The state trial court made specific findings concerning the circumstances of McWilliams' participation in the brutal murder, and those findings were adopted by the Alabama Court of Criminal Appeals:

> The defendant, James Edmund McWilliams, Jr., raped, robbed, and murdered Patricia Vallery Reynolds. The crime occurred on December 30, 1984 at Austin's Food Store, Hargrove Road, Tuscaloosa, Alabama.
>
> Patricia Vallery Reynolds was a clerk at Austin's, a convenience store. The defendant went into the store, locked the front doors, robbed Mrs. Reynolds by taking money from her possession, took her to the back room and brutally raped her, then shot her with a .38 caliber pistol. There were 16 gunshot wounds (8 entrance, 8 exit). She was initially shot while standing, and also shot while lying on the floor. She was shot

> 6 times, with 2 of the bullets first penetrating her hand or arm before entering and exiting her body. The bullets penetrated both lungs, both hemidiaphragms, the liver, pancreas, stomach, spleen, upper forearms, and hand.
>
> Mrs. Reynolds died in surgery at 12:40 a.m. The cause of death was exsanguination.
>
> The defendant was identified by eyewitnesses who placed him at the scene.
>
> The defendant was apprehended in Findlay, Ohio, driving a stolen car. The murder weapon (also stolen) was in his possession. He was jailed in Ohio, charged with auto theft, possession of stolen property, carrying a concealed weapon, and no operator's license. In the Ohio jail, he bragged to other inmates that he had robbed, raped, and killed a woman in Alabama.

McWilliams v. State, 640 So. 2d 982, 986-87 (Ala. Crim App. 1991), *aff'd in part and remanded in part*, 640 So. 2d 1015 (Ala. 1993), *on remand*, 640 So. 2d 1025 (Ala. Crim. App. 1994), *opinion after remand*, 666 So. 2d 89 (Ala. Crim. App. 1994), *aff'd*, 666 So. 2d 90 (Ala. 1995), *cert. denied*, 516 U.S. 1053 (1996).

On February 1, 2008, the Magistrate Judge entered a Report and Recommendation recommending that the petition for a writ of habeas corpus and Petitioner's requests for an evidentiary hearing be denied. (Doc. 55). Petitioner timely filed objections to the Report and Recommendation on February 25, 2008. (Doc. 57). In the document, Petitioner objected to the Magistrate Judge's recommendations as to Claims I, II, III, IV, XX, XXIII, and XXV(a).

On April 14, 2008, Petitioner requested and was granted permission to file additional objections to the Magistrate Judge's recommendation pertaining to Claim XXIII. (Doc. 59). On November 14, 2008, Petitioner again requested and was granted permission to file supplemental objections to the Report and Recommendation. (Docs. 61 and 63). In these documents, McWilliams made objections pertaining to Claims XXV(a) and XXV(b).[1]

Upon fervent request of Petitioner's counsel, on June 23, 2009, this court once again allowed Petitioner to file as exhibits two self-styled "Notice[s] of Supplemental Law," that previously had been stricken by the court. (*See* Exhibits A and B to Doc. 67). The content of these "Notices" pertains to Claim XXV(a) (*Brady/Giglio*) and XXV(b) (ineffective assistance of counsel) as well as Claim XXVIII (ineffective assistance of post-conviction counsel). (*Id.*). On the same day, Petitioner filed yet another Motion for Leave to file a Notice of Supplemental Law, which the court granted. (Doc. 68). In this "Notice," McWilliams makes further arguments concerning the substantive aspects of Claim III (*Batson*) and Claim XXV(a) (*Brady*/*Giglio*).

[1] Petitioner is clearly objecting to the Magistrate Judge's recommendation that he "is barred from raising his timely filed *Brady* issues." (Doc. 63, pp. 1-6). He then adds, without explanation, that the *Brady* issues (Claim XXV) "also deal with Issues VIII, XXIII, XXV.I." *Id.* at 4.

In addition to each of the foregoing objections, supplements and notices for which he requested permission and was (generously) granted leave to file, Petitioner has filed numerous other out-of-time objections and notices without requesting leave of court to do so. (Docs. 58, 69, 72, 74).

As a matter of organization, inasmuch as Petitioner's first objections (filed on February 25, 2008) to the Magistrate Judge's Report and Recommendation are the most comprehensive (at least in terms of the number of claims addressed), the Memorandum Opinion will follow the same general organization as those objections. (*See* Doc. 57). Where pertinent, the additional allowed objections and notices (Docs. 59, 61, 63, 67, and 68) will be referenced and considered.

Claim I. The State's Adverse Comment on James McWilliams' Choice Not to Testify Denied Him His Rights Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Doc. 57, pp. 2-3 ("Objections")).

McWilliams challenges the following comment:

> You know, one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the armrest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk about the bullets down in the floorboard of the car-the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case.

> There is no other explanation for it, and you have not heard an explanation; the evidence doesn't show any other explanation for it.

Ex parte McWilliams, 640 So. 2d 1015, 1018 (Ala. 1993). The Alabama Supreme Court held that these statements were "clearly a comment on the failure of defense counsel to explain testimony or evidence." *Id*. at 1020.

The Magistrate Judge concluded that the prosecutor's argument was not an improper comment on McWilliams' right to remain silent under *Isaacs v. Head*, 300 F.3d 1231 (11th Cir. 2002), and that the defendant had not shown that the state court's decision was contrary to or involved an unreasonable interpretation of the law or that it was based on an unreasonable determination of the facts in light of the evidence presented in state court.

In his objections, McWilliams reiterates his assertion that only he could have explained why he had bullets in his pocket if he did not know the gun was in his car. Therefore, he contends, the comments at issue could have been referring only to the fact that he did not testify. This objection lacks merit. The comment was clearly directed to the failure of the defense attorneys, not the defendant, to address the evidence of the loaded gun beside McWilliams in the car, the bullets in McWilliams' pocket, the bullets on the floorboard, and the bullets McWilliams was biting. When McWilliams was stopped in Ohio, he said he had been chewing on the bullets but

claimed that his uncle had been in the vehicle earlier and had had the gun with him. The prosecutor's comment pointed out the failure of defense counsel to offer any explanation for the inconsistencies within the statements made by the defendant. There is no evidence that the prosecutor's comment was manifestly intended to comment on McWilliams' right to silence, and McWilliams cannot show that the jury would naturally and necessarily have interpreted the comment as such.

Claim II. The Presumption of Innocence and the Reliability of the Sentencing Trial Were Undermined When a Guard Provoked an Argument with James McWilliams in Front of Several Jurors, While James Was Wearing Handcuffs. (Doc. 57, pp. 3-10).

The Alabama Court of Criminal Appeals described the incident to which McWilliams refers as follows:

> The record indicates that, after the proceedings had ended on one day of the trial and the jury had been escorted out of the courtroom, a confrontation arose between the defendant and a guard who was to escort the defendant back to his cell. The confrontation apparently began in the courtroom and continued into the hall of the courthouse. The appellant was handcuffed by the guard while in they were in [sic] the courtroom and he was then led out into the hall, where words were apparently exchanged-possibly concerning the appellant's guilt or innocence. On the following morning, the jurors were individually questioned as to what they heard or saw concerning the incident, and whether anything they might have seen or heard would prejudice them against the appellant or the State in any way. Each juror who indicated any sort of awareness of the matter testified that he or she would not be prejudiced against the appellant or the State.

McWilliams v. State of Ala., 640 So. 2d 982, 995 (Ala. Crim. App. 1991). The Alabama Court of Criminal Appeals found that McWilliams suffered no prejudice as a result of this incident. The Magistrate Judge's Report concludes that, in light of the record, it was not unreasonable for the criminal appeals court to conclude that the incident did not undermine McWilliams' presumption of innocence or the reliability of the sentencing. McWilliams has not offered clear and convincing evidence to rebut the presumption of correctness this court is required to accord the state court's findings, and he has not demonstrated that the state appellate court's decision on this issue was contrary to, or an unreasonable application of, clearly established federal law, or an unreasonable interpretation of the facts in light of the evidence before that court.

In his objections, McWilliams argues again that he is automatically entitled to a new trial pursuant to *Deck v. Missouri*, 544 U.S. 622 (2005). In *Deck*, the Court held "that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest' — such as the interest in courtroom security — specific to the defendant on trial." *Id*. at 624. However, the defendant in *Deck* was "shackled with leg irons, handcuffs, and a belly chain," in full view of the jury, during the entire penalty phase of his trial, over the objection of his counsel. *Id.*

McWilliams claims that *Deck* shows there were numerous problems with the state court's holding on this issue. First, he claims that the shackling of a defendant in a criminal trial is "inherently prejudicial" and a violation of due process, unless it is necessary to achieve an essential state interest policy or maintaining security in the courtroom. *Holbrook v. Flynn*, 475 U.S. 560, 568 (1986). He claims that the prosecution did not make such a showing in his case. However, there is no indication that McWilliams was ever handcuffed during the trial. Further, this incident happened when McWilliams was being removed from the courtroom and there is no evidence that any juror actually saw McWilliams in handcuffs. There simply is no merit to this objection.

Claim III. James McWilliams' Rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution Were Violated by the State's Racially Discriminatory Exercise of Peremptory Strikes. (Doc. 57, pp. 10-13) and (Doc. 68, pp. 1-5).

McWilliams claims that his rights were violated when the state used nine of its seventeen peremptory strikes to exclude qualified black members of the jury venire. The Alabama Supreme Court found that McWilliams had not established a *prima facie* case of a *Batson* violation. *McWilliams*, 640 So. 2d at 1018. The Magistrate Judge found that the state court properly applied *Batson* to McWilliams' claim and that the denial of the claim was not contrary to, nor did it involve an unreasonable

application of clearly established law, and that McWilliams had not established that the decision was based on an unreasonable interpretation of the facts in light of the evidence presented. The Magistrate Judge further found, in any event, that allegations in support of his *Batson* claim that were not raised in the state court were procedurally barred.

McWilliams argues in his objections and supplement[2] that he did in fact present these allegations in the Alabama Supreme Court. However, to the extent they were presented in state court, that court found that they were conclusory and did not consider them. When a party attempts to present a claim to a federal court, but that claim was presented in such a conclusory form that the state court could not address its merits, the federal court may not address that claim. *See Duncan v. Henry*, 513 U.S. 364, 365 (1996); *Johnson v. Singletary*, 938 F.2d 1166, 1173 (11th Cir. 1991). Therefore, as explained below, these conclusory claims have been procedurally defaulted.

McWilliams conceded in his habeas petition that, other than the pattern and number of black venire members peremptorily struck by the prosecution in his case, almost all other allegations pertaining to the first prong of the *Batson* test were

[2] In his supplement (Doc. 68, pp. 1-5), McWilliams cites *McGahee v. Alabama Department of Corrections*, 560 F.3d 1252 (11th Cir. 2009). However, the factual issues underlying *McGahee* (and, for the most part, the particular *Batson* issues examined therein) bear virtually no resemblance to anything in McWilliams' case.

conclusory. (Doc. 1, pp. 58-59). Thus, the Magistrate Judge's and the state court's conclusions regarding this aspect of McWilliams' claim are correct. *See Trawick v. Allen*, 520 F.3d 1264, 1269 (11th Cir. 2008) (finding that the Alabama Supreme Court did not err when it found that Petitioner's "reliance on the number and pattern of strikes against women was, without more, insufficient to establish a *prima facie* case of gender discrimination in this case.").[3]

In any event, the only other allegation McWilliams excepts from this admission (*i.e.*, that the bulk of this claim was conclusory) was his assertion that the Tuscaloosa County District Attorney's office had a history of discriminating against black venire persons, and this included a capital case that had been tried just six months after his conviction. (Doc. 1, p. 59). He further alleges that the historical discrimination argument was made in a reply brief before the Alabama Supreme Court, when appellate counsel wrote:

> In addition, the Tuscaloosa County District Attorney's Office has a history of racial discrimination in jury selection. See, *Ex parte Branch*, supra at 623. *Hemphill v. State*, ___ So.2d ___ [No. 6 Div. 261] (Ala.Cr.App. 7/24/1992) (in case tried less than six months after Mr. McWilliams' trial, Tuscaloosa County District Attorney's office violated *Batson*). See also, *Jackson v. Thigpen*, __ F.Supp.__ [No. 87-C-2046-W] [NDAla 11/30/90 (prior to 1982, Tuscaloosa County District

[3] Moreover, many of his allegations are procedurally defaulted because he did not raise them until he filed his application for rehearing before the Alabama Supreme Court (which was denied).

> Attorneys' office found in violation of *Swain v. Alabama*, which required a higher of proof than *Batson*).

Id. at 59-60[4] (no citation to record by Petitioner).

It was this allegation that the Magistrate Judge initially found to be procedurally defaulted on the ground that McWilliams had not raised it at all before the Alabama Supreme Court. (*See* Doc. 55, pp. 34-36). As noted above, however, in fact, the record shows that appellate counsel first raised *Batson* allegations in a *reply brief* before the Alabama Supreme Court, and even then the allegations were buried within other allegations that Petitioner already has conceded were conclusory. (*See* R. Vol. 42, Tab. 83, pp. 3-4). It is a well "settled rule that [the Alabama Supreme] Court does not address issues raised for the first time in a reply brief." *Byrd v. Lamar* 846 So. 2d 334, 341 (Ala. 2002) (citing *Perkins v. Dean*, 570 So. 2d

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[4] Although McWilliams cites to *Hemphill v. State*, 610 So. 2d 413 (Ala. Crim. App. 1992) (on remand) that case is easily distinguishable. In *Hemphill*, the Alabama Court of Criminal Appeals remanded for a *Batson* hearing because trial counsel objected to the prosecutor's striking of 7 out of 11 blacks, the State (at trial and on appeal) chose to defend its strikes, and the court was unable to determine if the reasons articulated by the State were sufficient to overcome the defendant's *Batson* challenge. *Hemphill v. State*, 571 So. 2d 365, 367 (Ala. Crim. App. 1990). Thus, the question that initiated the remand in *Hemphill*, unlike McWilliams' case, was not whether the petitioner had indeed established a *prima facie* case of discrimination.

Petitioner also cites to *Jackson v. Thigpen*, 42 F.3d 1350, 1356, 1358 (11th Cir. 1985), but that case is of no help to McWilliams either. In *Jackson*, the evidence showed that the Tuscaloosa County District Attorney's office engaged in systematic discrimination of blacks in the early 1980's by striking all or as many blacks as they could in criminal jury trials involving violent crimes. However, this practice ended in 1985, which was *before* McWilliams' case was tried. Moreover, the *Batson* issue in *Jackson* was procedurally defaulted, and relief was granted to the petitioner on the basis of ineffective assistance of counsel for failure to raise a *Batson* claim.

One final point is worth noting. McWilliams' case decisions were rendered on direct appeal by the Alabama Court of Criminal Appeals in 1991 and by the Alabama Supreme Court in 1993. Prior to those decisions, the Alabama courts had already remanded in cases like *Hemphill* when it was determined a *Batson* claim was not properly addressed in the trial court. This point actually strengthens the Alabama Supreme Court's determination that, in McWilliams' case, the Alabama courts properly viewed his allegations as conclusory and that he failed to establish a *prima facie* case of a *Batson* violation.

1217, 1220 (Ala. 1990); *Kennesaw Life & Accident Ins. Co. v. Old Nat'l Ins. Co.*, 291 Ala. 752, 287 So. 2d 869, 871 (1973)) (brackets added). McWilliams' failure to make any assertion about juror panelist discrimination in the Tuscaloosa County District Attorney's office until filing his reply brief operates as a waiver of the allegations pursuant to adequate and independent state procedural rules. Such a default precludes federal review of the allegations, and as such, to the extent McWilliams failed to properly raise Tuscaloosa County's historical discrimination in support of his *prima facie Batson* claim before the Alabama Supreme Court, it is procedurally defaulted in this court. Furthermore, and in any event, even if his *Batson* allegations were not procedurally defaulted, McWilliams did not fairly present the allegation in his reply brief. Such a failure also precludes federal review of the claim.

Claim IV. The Prosecutor Used Inadmissible Hearsay Testimony about Harry Porter's Alibi to Disprove the Defense Theory That James McWilliams Was Mistakenly Identified as the Killer. (Doc. 57, pp. 32-35).

Although McWilliams raised this claim on direct appeal in the Alabama Court of Criminal Appeals, he did not include it in his petition for a writ of *certiorari*. Therefore, the Magistrate Judge recommended that it be dismissed as procedurally barred under *O'Sullivan v. Boerckel*, 526 U.S. 838, 843-47 (1999).

In his objections, McWilliams argues that, because the Alabama Supreme Court made the following statement in its opinion, it must be assumed that the court reviewed this claim and found it to be without merit:

> In his petition to this Court, McWilliams presents 26 issues for review. He presented all but six of these issues to the Court of Criminal Appeals. That court issued a detailed and lengthy opinion, which provided a thorough treatment of each of the issues raised by McWilliams. We have thoroughly reviewed the record before us for error regarding the issues raised, as well as for plain error not raised. FN.1.
>
> > FN. 1. Our review of a death penalty case allows us to address any plain error or defect found in the proceeding under review. This is so even if the error was not brought to the attention of the trial court. Rule 45, A. R. App. P.

McWilliams, 640 So. 2d at 1016. McWilliams claims that the Alabama Supreme Court identified the constitutional claim and decided the claim on the merits. That assertion is incorrect. The Alabama Supreme Court never mentioned this claim at all.

McWilliams cites *Julius v. Johnson*, 840 F.2d 1533, 1546 (11th Cir. 1988) in support of his argument that because the Alabama Supreme Court reviewed the record for "plain error not raised," the court implicitly found that this claim was without merit. However, as the Eleventh Circuit stated in *Julius*, "[a]doption of this position would preclude a finding of procedural default in virtually every Alabama capital case." *Id.* The court went on to find as follows:

> Since Magwood was silent about the non-effect of Alabama's plain error rule on procedural default issues, we will be explicit: the mere existence of a "plain error" rule does not preclude a finding of procedural default; moreover, the assertion by an Alabama court that it did not find any errors upon its independent review of the record does not constitute a ruling on the merits of claims not raised in that court or in any court below. FN10. Unless there is some indication that the state court was aware of this issue, we cannot say that the court rejected the merits of Petitioner's constitutional claim. A contrary rule would encourage the "sandbagging" of state courts criticized in *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 594 (1977). *See Murray v. Carrier*, 477 U.S. 478, 106 S. Ct. 2639, 2647, 91 L. Ed. 2d 397 (1986) (possibility of "sandbagging" exists on appeal "since appellate counsel might well conclude that the best strategy is to select a few promising claims for airing on appeal, while reserving others for federal habeas review should the appeal be unsuccessful."). Accordingly, we reject [this] argument.
>
> > FN10. This rule is limited to the facts of this case. We express no opinion as to the effect of such a statement when the allegedly barred issue was raised by the defendant but not discussed in the state court's opinion. Nor need we decide whether such language permits federal review where the defendant raised the claim at trial, thus making it more likely that the state appellate court came across the claim during its review of the record.

840 F.2d at 1546. Thus, the Eleventh Circuit in *Julius* clearly stated that the rule it set out applied only to the peculiar facts of that case. And certainly no rule was established for a case like this one where McWilliams raised the claim in the Court of Appeals but failed to raise it in the Supreme Court. The point is as tautological as it is true: if the Alabama Supreme Court had intended to address the merits of this

claim, it certainly would have done so. This court cannot assume that the Alabama Supreme Court decided the merits of the claim against McWilliams, as such an assumption would virtually render the procedural default law meaningless in capital cases.

Finally, the Magistrate Judge found that even if the claim had not been defaulted, the claim is due to be denied because McWilliams failed to show the Alabama Court of Criminal Appeals' decision on the merits of the claim was contrary to, or involved an unreasonable application of clearly established law, or was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. McWilliams has not objected to this portion of the recommendation.

Claim XX. Due Process Required a Jury Instruction about the Lesser Included Offense of Felony Murder Because a Rational Jury Could Have Found That the Robbery Was Committed by Two Men and James McWilliams Was Not the Triggerman or an Accomplice to the Murder. (Doc. 57, p. 35).

McWilliams claims that he was denied due process of law when the trial court refused to instruct the jury to consider the lesser included offense of felony murder. The Alabama Court of Criminal Appeals denied this claim on the merits, finding that there was "no reasonable theory from the evidence which would have supported such a charge." *McWilliams*, 640 So. 2d at 1003. The Magistrate Judge recommended that

the claim be denied because McWilliams failed to show the state court's decision was contrary to, or involved an unreasonable application of clearly established law, or was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

McWilliams' objection to the Recommendation regarding this claim centers on his assertion that "[a]s with Issue VIII, the *Brady* and *Giglio* claims, raised as a separate claim, in Claim XXV(a) support this claim." But as Petitioner's objections to the Recommendation on Claim XXV(a) are without merit, they are of no help to McWilliams on this claim.

Claim XXIII. The Identification of James McWilliams by Howard Marsh, Ronnie Thomas and Steven McDaniel Should Have Been Suppressed Because James Was Denied His Right to Have Retained Counsel Present When These Witnesses Identified Him in a Lineup. (Doc. 57, pp. 35-36) and (Doc. 59).

McWilliams next claims that his rights were violated by his identification in a pre-indictment line-up in which he was not allowed to have retained counsel present, even though at that time he was represented by appointed counsel. The Magistrate Judge recommended that this claim be dismissed because, as the Alabama Court of Criminal Appeals correctly noted, pursuant to *Kirby v. Illinois*, 406 U.S. 682 (1972), there is no constitutional right to have counsel present at a pre-indictment lineup. The Magistrate Judge found that the Alabama Court of Criminal Appeals'

decision was not contrary to clearly established law, did not involve an unreasonable application of clearly established law, and was not based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

McWilliams objects to that finding, citing *Floyd v. State*, 412 So. 2d 826, 828 (Ala. Crim. App. 1981) and *Sparks v. State*, 376 So. 2d 834, 841 (Ala. Crim. App. 1970), for the proposition that:

> An accused is not entitled to have counsel provided for him at a pre-indictment lineup. *Hatchet v. State*, Ala.Cr.App., 335 So.2d 415 (1976). However, he does have the right to have his own employed counsel present upon request. *Sparks v. State*, Ala.Cr.App., 376 So.2d 834 (1979).

Floyd, 412 So. 2d at 828. However, in its opinion, the Alabama Court of Criminal Appeals cited several more recent Alabama cases[5] which held that defendants do not have a right to counsel during a pre-indictment lineup.

This claim clearly involves nothing more – and nothing less – than a state court's determination of its own law. Generally, a state court's "construction of state law is binding on federal courts entertaining petitions for habeas relief." *Beverly v.*

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[5] *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); *Franklin v. State*, 424 So. 2d 1353 (Ala. Crim. App. 1982), *cert. denied*, 424 So. 2d 1353 (Ala. 1983); *Tankersley v. State*, 448 So. 2d 486 (Ala. Crim. App. 1984); *Fisher v. State*, 439 So. 2d 176 (Ala. Crim. App.), *cert. denied*, 439 So. 2d 176 (Ala. 1983); *Johnson v. State*, 526 So. 2d 34, 38 (Ala. Crim. App. 1987); and *Hollingquest v. State*, 552 So. 2d 1078 (Ala. Crim. App. 1989). *McWilliams*, 640 So. 2d at 1012-13.

Jones, 854 F.2d 412, 416 (11th Cir. 1988) (*quoting Tyree v. White*, 796 F.2d 390, 392-93 (11th Cir. 1986)). "A federal habeas corpus court may not interfere with a state court's interpretation of state law absent a constitutional violation." *McCoy v. Newsome*, 953 F.3d 1252, 1264 (11th Cir. 1992).

> Questions of state law rarely raise issues of federal constitutional significance, because "[a] state's interpretation of its own laws provides no basis for federal habeas corpus relief, since no question of a constitutional nature is involved." *Carrizales v. Wainwright*, 699 F.2d 1053, 1053-54 (11th Cir. 1983)(citations omitted). We review questions of state law in federal habeas proceedings only to determine whether the alleged errors were so critical or important to the outcome to render "the entire trial fundamentally unfair." *Id*. at 1054 (defective jury charge raises issue of constitutional dimension "only if it renders the entire trial fundamentally unfair"); *see also Futch v. Dugger*, 874 F.2d at 1487 (improperly admitted evidence "must be inflammatory or gruesome, and so critical that its introduction denied petitioner a fundamentally fair trial"). "[T]he established standard of fundamental unfairness [when reviewing state evidentiary rulings] is that habeas relief will be granted only if the state trial error was 'material in the sense of a crucial, critical, highly significant factor.'" *Shaw v. Boney*, 695 F.2d 528, 530 (11th Cir. 1983)(*quoting Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir. 1976).

Tejada v. Dugger, 941 F.2d 1551, 1560 (11th Cir. 1991). Thus, this court is bound by the Alabama Court of Criminal Appeals' determination that McWilliams did not have a right to have counsel present at the line-up. McWilliams has not cited any authority from the United States Supreme Court or the Eleventh Circuit Court of

Appeals indicating that his constitutional rights have been violated. This objection has no merit.[6]

Claim XXV(a). The State Blatantly Violated *Brady* and *Giglio* and Often Used These Violations to Mislead the Jury. (Doc. 57, pp. 36-63), (Docs. 61, 63, 67, 68 pp. 5-7).

McWilliams made numerous allegations of *Brady* and *Giglio* violations in this claim. The only parts of this claim that were successfully raised appeared in his amended Rule 32 petition filed September 29, 1999. The Rule 32 court, the last state court to address the merits of the claim, found that there was no *Brady* violation. The Magistrate Judge recommended that the claim be denied because McWilliams did not show that the decision was contrary to, or an unreasonable application of law, or that the decision was based on an unreasonable determination of the facts in light of the evidence before the court. McWilliams does not appear to object to this portion of the Recommendation. Regardless, a review of the Rule 32 court's order shows no basis upon which to grant McWilliams habeas relief.

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[6] In his "Motion to Leave to File the Following Objections to the Magistrate's Report and Recommendation," filed April 24, 2008, Petitioner objects to footnote 24 of the Report and Recommendation, in which the magistrate judge noted the following: "[h]owever, the court notes that according to McWilliams, '[a] lawyer named Boller appeared at the lineup and said the he was representing' him. Petition at 141." (Doc. 59, p. 1). Petitioner characterizes this statement as an alternative holding. However, a reading of the recommendation reveals that it was nothing more than a statement referencing a comment by Petitioner. The magistrate judge clearly stated that he was recommending that the claim be denied because the Alabama Court of Criminal Appeals had correctly noted that pursuant to *Kirby v. Illinois*, 406 U.S. 682 (1972), there is no constitutional right to have counsel present at a pre-indictment lineup, and that this decision was neither contrary to, nor involved an unreasonable application of clearly established law, nor was it based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceedings.

McWilliams also raised numerous other *Brady* and *Giglio* claims that the Alabama Court of Criminal Appeals held were procedurally barred because they had not been raised before the trial court:

> [McWilliams] argues that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). However, he raised only one of the claims he presents in his brief - i.e., that there was evidence that two inmates who testified against him had a motive to lie, that their testimony was contradicted by evidence at the scene, and that the witnesses lied about receiving favorable treatment-before the circuit court. FN.
>
> > FN. Because he did not first present the remaining *Brady* claims to the circuit court, they are not properly before this court. *See Morrison v. State*, 551 So.2d 435 (Ala. Crim. App. 1989).

McWilliams, 897 So. 2d at 451. The Magistrate Judge recommended that the additional claims be denied because they were procedurally defaulted in state court.

McWilliams asserts in his objections, notices, and supplements that he should have been allowed to amend his Rule 32 petition after the evidentiary hearing was held in order to add these new claims (regardless of the fact that the court had issued an agreed upon pre-trial order in which he agreed not to amend his pleadings or put on new evidence). That argument is off the mark. The Alabama Court of Criminal Appeals reasonably found that the trial court had not abused its discretion when it refused McWilliams' repeated attempts to amend his petition long after the scheduled

time period for doing so had expired, and long after an evidentiary hearing had been held. *See McWilliams v. State*, 897 So. 2d 437, 448-449 (Ala. Crim. App. 2004).

McWilliams also argues that the Alabama Supreme Court subsequently overruled the procedural holding that barred McWilliams from amending his Rule 32 petition in *Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005), and its progeny. That is not the case. In *Jenkins*, the Alabama Supreme Court overruled *McWilliams*, 897 So. 2d 437 (Ala. Crim. App. 2004), to the extent that the court "applied the relation-back doctrine to proceedings governed by Rule 32, Ala. R. Crim. P." *Jenkins*, 972 So. 2d at 165. However, the *Jenkins* decision does not help McWilliams in this instance. The Alabama Court of Criminal Appeals held that these claims were defaulted because McWilliams "did not first present the remaining *Brady* claims to the circuit court." *McWilliams*, 897 So. 2d at 451. Thus, there simply was no finding that the claims were defaulted because they did not relate back to the original petition.

McWilliams also asserts that these claims are not defaulted pursuant to the holding in *Ex parte Clemons*, No. 1041915, 2007 WL 1300722 (Ala. May 4, 2007), and its progeny. He states that in *Clemons* the "Alabama Supreme Court subsequently overruled the procedural holdings that the claims in his *second* amended

petition were barred by the statute of limitations."[7] (Doc. 57, p. 62) (emphasis added). However, McWilliams ignores the fact that the appellate court found no abuse of discretion in the trial court's denial of his untimely motions to amend the petition (including the second amended petition), which in turn supported its conclusion that the claims were defaulted because McWilliams "did not first present the remaining *Brady* claims to the circuit court." *McWilliams*, 897 So. 2d at 451. There was no finding that the claims in the second amended petition were defaulted because they were barred by the statute of limitations. Therefore, the holding in *Clemons* has no effect here.

Claim XXV(b). James McWilliams' Attorneys Provided Ineffective Assistance of Counsel During His Trial. (Docs. 61, 63, 67).

As a part of this claim, Petitioner alleged that the Alabama appellate courts applied the wrong standard of review in denying his ineffective assistance of counsel claims. The Magistrate Judge found that:

> even assuming he is correct, this claim standing alone, does not warrant habeas relief. Only if McWilliams shows that the wrong standard of review was used in conjunction with one of his substantive ineffective assistance of counsel claims can he obtain any relief. As discussed below, McWilliams' sentencing phase claims were properly decided by

[7] In *Clemons*, the court did not specifically overrule *McWilliams* as Petitioner would have this court believe. Further, to the extent it could be argued that the appellate court applied the Clemons' ruling to McWilliams' *Brady* claim as set out in the first amended petition, this court already has determined that the Rule 32 court's decisions regarding the *Brady* claims in the first amended petition control this court's review.

> the state appellate court, and the guilt phase claims are procedurally defaulted. Therefore, this claim is due to be denied.

(Doc. 55, p. 156 n. 28).

Petitioner now contends that the majority and minority holdings in *Danforth v. Minnesota*, 128 S. Ct. 1029, 1054 (2008), support his argument that the Alabama appellate courts are using the wrong standard of review to interpret federal law for ineffective assistance of counsel claims. However, as the Magistrate Judge stated in the Report and Recommendation, even assuming that the wrong standard was used by Alabama courts, this claim alone does not warrant habeas relief. (Doc. 55, p. 156 n. 28). Thus, this objection has no merit.

Claim XXVII. James McWilliams' Post-Conviction Attorneys were Ineffective. (Exhibit A to Doc. 67).

The Magistrate Judge properly found that Petitioner had failed to state a claim for which habeas relief could be granted because "Title 28 U.S.C. § 2254(I) provides that '[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.'" (Doc. 55, p. 180).

This court allowed McWilliams to file Exhibit A because Petitioner's counsel asserted that he understood the document had been filed in August 2007, but had discovered that it in fact had not been filed. In that filing, Petitioner concedes that the

Eleventh Circuit confirmed in *Barbour v. Haley*, 471 F.3d 1222, 1227 (11th Cir. 2006), that "there is no constitutional right to appointed counsel" post-conviction. (Doc. 67, p. 6). He nevertheless argues that *Barbour* did not address the type of facts that are particular to his case, and that unlike the defendant in *Barbour*, he can establish prejudice. (*Id.*)

McWilliams' assertion is without merit. As there is no constitutional or statutory right to post-conviction counsel, the facts underlying his particular allegations make little difference in the final equation. He cannot state a claim upon which relief can be granted.

CONCLUSION

The court overrules all of Petitioner's objections and hereby adopts and approves the findings and conclusions of the Magistrate Judge as the findings and conclusions of the court. Accordingly, this habeas petition is due to be dismissed. An appropriate order will be entered.

DONE and **ORDERED** this 25th day of August, 2010.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

Appendix H

FILED
2008 Feb-01 PM 03:37
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

JAMES E. McWILLIAMS,	]	
	]	
Petitioner,	]	
	]	
v.	]	CV-04-RDP-RRA-2923-W
	]	
DONAL CAMPBELL, COMMISSIONER OF THE ALABAMA DEPARTMENT OF CORRECTIONS, et al.,	]	
	]	
Respondents.	]	

MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

This action seeks habeas corpus relief with respect to petitioner James E. McWilliams' state court conviction and death sentence on a charge of capital murder. (*See* 28 U.S.C. § 2254).

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PROCEDURAL HISTORY

On August 27, 1986, McWilliams was found guilty of two counts of capital murder during the course of a robbery, and one count of capital murder during the course of a rape, as charged in Counts I through III of the indictment. A penalty hearing immediately followed, and on August 28, 1986, the jury recommended by a vote of 10 to 2, that McWilliams be sentenced to death.

A formal sentencing hearing as required by Alabama Code § 13A-5-47 (1975) followed, and, in accordance with the jury's recommendation, the trial judge sentenced McWilliams to death on October 9, 1986.

McWilliams appealed his conviction and sentence to the Alabama Court of Criminal Appeals, raising twenty claims. On August 23, 1991, that court entered a published opinion affirming McWilliams' conviction and death sentence. *McWilliams v. State*, 640 So.2d 982 (Ala. Crim. App. 1991).

McWilliams presented twenty-six claims to the Alabama Supreme Court in a petition for a writ of certiorari.[1] On January 29, 1993, the Alabama Supreme Court affirmed

[1] All but six of these claims were presented on direct appeal.

McWilliams' conviction, but remanded with instructions as to sentencing.[2] *Ex Parte McWilliams*, 640 So.2d 1015 (Ala. 1993).

On return to remand, the trial court filed written findings stating that it did not consider any part of the victim impact statements in sentencing McWilliams to death. The Alabama Court of Criminal Appeals then affirmed, finding that there was no error in the trial court's imposition of the death sentence. *McWilliams v. State*, 666 So.2d 89 (Ala. Crim. App. 1994).

The Alabama Supreme Court again accepted McWilliams' petition for certiorari review, and on May 12, 1995, affirmed the judgment of the Court of Criminal Appeals. *Ex Parte McWilliams*, 666 So.2d 90 (Ala. 1995).

The United States Supreme Court denied McWilliams' petition for writ of certiorari on January 8, 1996. *McWilliams v. Alabama*, 516 U.S. 1053 (1996).

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[2] The court concluded that:

> McWilliams's Eighth Amendment rights were violated if the trial judge in this case considered the portions of the victim impact statements wherein the victim's family members offered their characterizations or opinions of the defendant, the crime, or the appropriate punishment. Because the record does not reveal whether the trial judge considered these statements in imposing the death sentence on McWilliams, this case must be remanded for further proceedings.
>
> On remand, the trial judge is directed to determine and make a written finding stating whether, in imposing the sentence upon James McWilliams, he considered the portions of the presentence report wherein [the victim's] family members stated their characterizations of McWilliams, the murder of [the victim], or the appropriate sentence for McWilliams. If, and only if, the trial judge finds that he did consider those portions of the presentence report, then he is hereby directed to vacate McWilliams's death sentence and to hold another sentencing hearing consistent with this opinion.

Ex Parte McWilliams, 640 So.2d 1015, 1017 (Ala. 1993).

McWilliams filed a petition for relief from judgment pursuant to Rule 32 of the Alabama Rules of Criminal Procedure on April 2, 1997. After several attorneys were appointed and allowed to withdraw, McWilliams filed an amended Rule 32 petition on September 29, 1999. He filed a second amended petition on June 8, 2000, then a revised second amended petition on June 12, 2000. The trial court held an evidentiary hearing on June 12 - 15, 2000. On August 8, 2000, McWilliams filed a motion to amend his petition, to examine additional witnesses, and to have a one-day evidentiary hearing so he could call those witnesses. The trial court denied that motion. In March, 2001, McWilliams again moved to amend his petition and to conduct additional discovery. The trial court denied that motion, too. In September, 2001, the trial court issued a 43-page order denying the Rule 32 petition.

The Alabama Court of Criminal Appeals affirmed the trial court's denial of the Rule 32 petition on April 30, 2004, and denied McWilliams' application for rehearing on June 11, 2004. *McWilliams v. State*, 897 So. 2d 437 (Ala. Crim. App. 2004).

The Alabama Supreme Court denied his petition for a writ of certiorari on September 24, 2004. *Id*. Shortly thereafter, on October 6, 2004, McWilliams filed the present habeas petition in this court.

FACTUAL BACKGROUND

The Alabama Court of Criminal Appeals, in its decision on direct appeal, adopted the trial court's specific findings concerning the circumstances of the crime and McWilliams' participation in the crime. *McWilliams v. State*, 640 So.2d 982 (Ala. Crim. App. 1991).

> The defendant, James Edmund McWilliams, Jr., raped, robbed, and murdered Patricia Vallery Reynolds. The crime occurred on December 30, 1984 at Austin's Food Store, Hargrove Road, Tuscaloosa, Alabama.
>
> Patricia Vallery Reynolds was a clerk at Austin's, a convenience store. The defendant went into the store, locked the front doors, robbed Mrs. Reynolds by taking money from her possession, took her to the back room and brutally raped her, then shot her with a .38 caliber pistol. There were 16 gunshot wounds (8 entrance, 8 exit). She was initially shot while standing, and also shot while lying on the floor. She was shot 6 times, with 2 of the bullets first penetrating her hand or arm before entering and exiting her body. The bullets penetrated both lungs, both hemidiaphragms, the liver, pancreas, stomach, spleen, upper forearms, and hand.
>
> Mrs. Reynolds died in surgery at 12:40 a.m. The cause of death was exsanguination.
>
> The defendant was identified by eyewitnesses who placed him at the scene.
>
> The defendant was apprehended in Findlay, Ohio, driving a stolen car. The murder weapon (also stolen) was in his possession. He was jailed in Ohio, charged with auto theft, possession of stolen property, carrying a concealed weapon, and no operator's license. In the Ohio jail, he bragged to other inmates that he had robbed, raped, and killed a woman in Alabama.
>
> The jury deliberated less than one hour before returning a verdict of guilty. The following day, the jury recommended the death penalty.

640 So. 2d at 986-987.

THE SCOPE OF FEDERAL HABEAS REVIEW

Pursuant to 28 U.S.C. § 2254(a), a federal district court is prohibited from entertaining a petition for writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a State court" unless the petitioner alleges "he is in custody in violation of the Constitution or laws or treaties of the United States." In other words, this court's review of habeas claims is limited to federal constitutional questions. Claims pertaining solely to questions of state law fall outside the parameters of this court's authority to provide relief under § 2254. Thus, unless otherwise expressly stated, use of the word 'claim' in this opinion presupposes a federal claim of constitutional proportion.

I. Exhaustion and Procedural Default

Prior to seeking relief in federal court from a state court conviction and sentence, a habeas petitioner is first required to present his federal claims to the state court by exhausting all of the state's available procedures. The purpose of this requirement is to ensure that state courts are afforded the first opportunity to correct federal questions affecting the validity of state court convictions. As explained by the Eleventh Circuit:

> In general, a federal court may not grant habeas corpus relief to a state prisoner who has not exhausted his available state remedies. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . ."). "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction. . . . The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Smith v. Newsome*, 876 F.2d 1461, 1463 (11th Cir. 1989) (*quoting Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)).

> Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971) (internal quotation marks omitted). The Supreme Court has written these words:
>
> > [T]hat the federal claim must be fairly presented to the state courts . . . . it is not sufficient merely that the federal habeas applicant has been through the state courts. . . . Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies.
>
> *Picard*, 404 U.S. at 275, 92 S. Ct. at 512. *See also Duncan*, 513 U.S. at 365, 115 S. Ct. at 888 ("Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment.").
>
> Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues. "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 5-6, 103 S. Ct. 276, 277, 74 L. Ed. 2d 3 (1982) (citations omitted).

Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998).

Moreover, if a petitioner fails to raise his federal claim to the state court at the time and in the manner dictated by the state's procedural rules, the state court can decide the claim is not entitled to a review on the merits, because the claim is procedurally defaulted. Usually, if the last state court to examine a claim explicitly finds that the claim is defaulted because the petitioner failed to follow state procedural rules, then federal review of the claim is also precluded pursuant to federal procedural default principles. As explained by the Eleventh Circuit:

> 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 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, *Harris v. Reed*, 489 U.S. 255, 263, 109 S. Ct. 1038, 1043, 103 L. Ed. 2d 308 (1989), and that bar provides an adequate and independent state ground for denying relief. *See id.* at 262, 109 S. Ct. at 1042-43; *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S. Ct. 1981, 1987, 100 L. Ed. 2d 575 (1988). The doctrine serves to ensure petitioners will first seek relief in accordance with state procedures, *see Presnell v. Kemp*, 835 F.2d 1567, 1578-79 (11th Cir. 1988), *cert. denied*, 488 U.S. 1050, 109 S. Ct. 882, 102 L. Ed. 2d 1004 (1989), 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, 111 S. Ct. 1454, 1470, 113 L. Ed. 2d 517 (1991).

Johnson v. Singletary, 938 F.2d 1166, 1173 (11th Cir. 1991). Federal deference to a state court's clear finding of procedural default under its own rules is so strong that:

> 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*, 489 U.S. at 264 n. 10, 109 S. Ct. 1038 (emphasis in original). *See also Alderman v. Zant*, 22 F.3d 1541, 1549-51 (11th Cir.) (where a Georgia habeas corpus court found that the petitioner's claims were procedurally barred as successive, but also noted that the claims lack merit based on the evidence, "this ruling in the alternative did not have an effect . . . of blurring the clear determination by the [Georgia habeas corpus] court that the allegation was procedurally barred"), *cert. denied*, 513 U.S. 1061, 115 S. Ct. 673, 130 L. Ed. 2d 606 (1994).

Bailey v. Nagle, 172 F.3d 1299, 1305 (11th Cir. 1999).

The Supreme Court defines an "adequate and independent" state court decision as one that "rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." *Lee v. Kemna*, 534 U.S. 362, 375 (2002) *(quoting Coleman v.*

Thompson, 501 U.S. 722, 729 (1991). Whether or not a state procedural rule is "adequate and independent" so as to have a preclusive effect on federal review of a claim "is itself a federal question." *Id.* (*quoting Douglas v. Alabama*, 380 U.S. 415, 422 (1965).

A state procedural rule is "independent of the federal question" when it "rests solidly on state law grounds [that are] not intertwined with an interpretation of federal law." *Judd v. Haley,* 250 F.3d 1308, 1313 (11th Cir. 2001) (*quoting Card v. Dugger*, 911 F.2d 1494, 1516 (11th Cir. 1990)). To be considered "adequate," by a federal court, the state procedural rule must be both "firmly established and regularly followed." *Lee v. Kemna,* 534 U.S. at 375 (*quoting James v. Kentucky*, 466 U.S. 341, 348 (1984). In other words, the rule must be "clear [and] closely hewn to" by the state for a federal court to find it to be adequate. *James v. Kentucky*, 466 U.S. at 345. This does not mean that the procedural rule must be applied rigidly in every instance, or that occasional failure to do so eliminates its "adequacy." Rather, the "adequacy" requirement means only that the procedural rule "must not be applied in an arbitrary or unprecedented fashion." *Judd v. Haley,* 250 F.3d at 1313. If it is adequate, then the federal court normally cannot review the issue. However, if the rule is not firmly established, or if it is applied in an arbitrary, unprecedented and manifestly unfair fashion, it is not adequate to preclude federal review. *Card v. Dugger*, 911 F.2d at 1517.

There are also instances where the doctrines of procedural default and exhaustion intertwine. For instance, if a petitioner's federal claim is unexhausted, the district court will traditionally dismiss it without prejudice or stay the cause of action in order to allow the petitioner first to avail himself of his state remedies. 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 Picard v. Connor*, 404 U.S. 270, 276 (1971) and *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir. 1998)).

There are only three circumstances in which an otherwise valid state-law ground will not bar a federal habeas court from considering a constitutional claim that was procedurally defaulted in state court: (1) where the petitioner had good "cause" for not following the state procedural rule and was actually "prejudiced" by not having done so; (2) where the state procedural rule was not "firmly established and regularly followed"; and (3) where failure to consider the petitioner's claims will result in a "fundamental miscarriage of justice." *See Edwards v. Carpenter*, 529 U.S. 446, 455 (2000) (Breyer, J., concurring); *see also*, *e.g.*, *Coleman v. Thompson*, 501 U.S. at 749-50 (holding that a state 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"); *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."); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (same); *Davis v. Terry*, 465 F.3d 1249, 1252 n.4 (11th Cir. 2006) ("It would be considered a fundamental miscarriage of justice if 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'") (*quoting Schlup v. Delo*, 513 U.S. 298, 327 (1995) (*in turn quoting Murray v. Carrier*, 477 U.S. at 496)).

A. The "Cause and Prejudice" Standard

As the "cause and prejudice" standard clearly is framed in the conjunctive, a petitioner must prove both parts. To show cause, a petitioner must prove that "some objective factor external to the defense impeded counsel's efforts" to raise the claim previously. *Murray v. Carrier*, 477 U.S. 478, 488 (1986).

> Objective factors that constitute cause include "interference by officials" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." *Ibid.* In addition, constitutionally "[i]neffective assistance of counsel . . . is cause." *Ibid.* Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default. *Id.* at 486-488, 106 S. Ct. at 2644-45.

McCleskey v. Zant, 499 U.S. 467, 493-94 (1991). *See also Murray v. Carrier*, 477 U.S. at 488-89 ("Ineffective assistance of counsel . . . is cause for a procedural default."); *Reed v. Ross*, 468 U.S. 1, 16 (1984) ("[W]here a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures.").

Once cause is proved, a habeas petitioner also must prove prejudice. Such a showing must go beyond proof "that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).

B. The "Fundamental Miscarriage of Justice" Standard

In a "rare," "extraordinary,"[3] and "narrow class of cases,"[4] a federal court may consider a procedurally defaulted claim in the absence of a showing of "cause" for the procedural default, if: (1) a "fundamental miscarriage of justice" has "probably resulted in the conviction of one who is actually innocent," *Smith v. Murray*, 477 U.S. 527, 537-38 (1986) (*quoting, respectively, Engle v. Isaac*, 456 U.S. 107, 135 (1982), and *Murray v. Carrier*, 477 U.S. at 496);[5] or (2) the petitioner shows "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." *Schlup v. Delo*, 513 U.S. 298, 323-27 & n.44 (1995) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)); *see also, e.g., Smith v. Murray*, 477 U.S. at 537-38.

Even when exhaustion and procedural default are not at issue, federal review of a claim that has been decided on the merits by a state court is fairly restrictive.

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[3] *Schlup v. Delo*, 513 U.S. 298, 321 (1995) ("To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence.").

[4] *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) ("Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.") (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986)).

[5] Specifically, the *Murray v. Carrier* Court observed that, "in an extraordinary case, where 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." 477 U.S. at 496.

II. Rules Governing Habeas Corpus Cases Under § 2254

A. 28 U.S.C. § 2254(d) and (e)

When it enacted the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Congress significantly limited the circumstances under which a habeas petitioner may obtain relief. Indeed, under the AEDPA, a petitioner is entitled to relief on a federal claim only if he shows that the state court's adjudication of his claim "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court," or that the court's rulings "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1) and (2). *See also Williams v. Taylor*, 529 U.S. 362, 404 (2000); *Brown v. Payton*, 544 U.S. 133 (2005); *Miller-El v. Dretke*, 545 U.S. 231 (2005); *Putman v. Head*, 268 F.3d 1223, 1241 (11th Cir. 2001). "Moreover, a state court's factual determinations are presumed correct unless rebutted by clear and convincing evidence." *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005) (*citing* 28 U.S.C. § 2254(e)(1)).

A state court's adjudication of a claim will be sustained under § 2254(d)(1) unless it is "contrary to" clearly established, controlling Supreme Court precedent, or it is an "unreasonable application" of that law. These are two different inquiries, not to be confused, nor conflated, as the Supreme Court explained in *Williams v. Taylor*, 529 U.S. 362 (2000), saying:

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of

> habeas corpus if the relevant state-court decision was either (1) "*contrary to* . . . clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "*involved an unreasonable application of* . . . clearly established Federal law, as determined by the Supreme Court of the United States."

Williams, 529 U.S. at 404-405 (emphases in original). The statute limits the source from which "clearly established Federal law" can be drawn to "holdings, as opposed to the dicta, of the [Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412; *see Jones v. Jamrog*, 414 F.3d 585 (6th Cir. 2005); *Sevencan v. Herbert*, 342 F.3d 69 (2nd Cir. 2003); *Warren v. Kyler*, 422 F.3d 132, 138 (3rd Cir. 2005) ("[W]e do not consider those holdings as they exist today, but rather as they existed as of the time of the relevant state-court decision.") (internal quotation marks and citation omitted).

A state-court determination can be "contrary to" clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Williams v. Taylor, 529 U.S. 362, 405 (2000).

Likewise, a state-court determination can be an "unreasonable application" of clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should

> not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 407; *see also Putman v. Head*, 268 F.3d 1223 (11th Cir. 2001). Whether a particular application of Supreme Court precedent is "reasonable" turns not on subjective factors, but on whether the application of Supreme Court precedent at issue was "objectively unreasonable." The question is not whether the state court "correctly" decided the issue, but whether its determination was "reasonable," *even if incorrect*. *See Bell v. Cone*, 535 U.S. 685, 694 (2002).

Having explained the scope of this court's authority to review state court decisions, it is now appropriate to examine the federal procedural rules applicable to the controversy presently before the court.

B. Procedural Rules Governing Habeas Corpus Cases Under § 2254

Since "habeas corpus review exists only to review errors of constitutional dimension," a habeas corpus petition must meet the "heightened pleading requirements [of] 28 U.S.C. § 2254 Rule 2c." *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (other citations omitted). A petitioner must specify all grounds for relief available to him, state the facts supporting each ground, and state the relief requested. 28 U.S.C. § 2254, Rule 2(c)(1)(2)(3) of the *Rules Governing Section 2254 Cases*. A "general reference to the transcripts, case records and briefs on appeal patently fails to comply with Rule 2(c)." *Phillips v. Dormire*, 2006 WL 744387, *1, No. 4:04CV1483 (E.D. Mo. March 20, 2006) (*citing Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990).

The burden of proof is on the habeas petitioner to establish a factual basis for the relief he seeks. *Hill v. Linahan*, 697 F.2d 1032, 1034 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549, *reh'g denied*, 714 F.2d 159 (11th Cir. 1983). Consequently, a petitioner must provide substantial evidence to meet his burden of proof to show why federal post-conviction relief should be awarded. *Douglas v. Wainwright*, 714 F.2d 1532, *reh'g denied*, 719 F.2d 406 (11th Cir. 1983), *vacated on other grounds*, 468 U.S. 1206 (1984) and 468 U.S. 1212 (1984), *on remand* 739 F.2d 531 (11th Cir. 1984). That burden is to demonstrate at least *prima facie* evidence establishing the alleged constitutional violation. The mere assertion of a ground for relief, without more factual detail, does not satisfy petitioner's burden of proof or the requirements of 28 U.S.C. § 2254(e)(2) and Rule 2(c), *Rules Governing § 2254 Cases in the United States District Courts*.

With these principles in mind, the court now turns to McWilliams' claims.

THE CLAIMS

McWilliams has raised thirty-two claims in this case. The court will address each of them in turn.

Claim I. The State's Adverse Comment on James McWilliams' Choice Not to Testify Denied Him His Rights Guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

McWilliams first claims that during closing argument, the prosecution commented on his decision not to testify at trial. *Petition* at 41. McWilliams claims that:

> "[T]he Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids . . . comment by the prosecution on the accused's silence." *Griffin v. California*, 380 U.S. 609, 615 (1965). "[R]emarks about the defendant's failure to testify constitute reversible error. Such statements infringe on the defendant's presumption of innocence and violate his Fifthe [sic] Amendment right against self-incrimination by converting silence to evidence of guilt." *United States v. White*, 444 F.2d 1274, 1277 (5th Cir. 1971).
>
> Hence, it is clearly error for the prosecutor to tell the jury that certain evidence is uncontradicted or unexplained when only the defendant could have explained it or contradicted it. "[F]or the government to say, in summation to the jury, that certain of its evidence was 'uncontradicted,' when contradiction would have required the defendant to take the stand, [draws] attention to his failure to do so, and hence [is] unconstitutional comment." *United States v. Flannery*, 451 F.2d 880, 881 (1st Cir. 1971). It is possible to argue, "ingenuously, that to say that the government witnesses' testimony was uncontradicted is simply a statement of historical fact. There are many 'facts' which are benign in themselves. The difficulty is that such reference, when only the defendant could have contradicted, clearly calls to the jury's mind the fact that he failed to testify." *Id.* at 881-882.

McWilliams raised this claim before the Alabama Supreme Court on direct appeal.

The Alabama Supreme Court addressed the claim as follows:

> McWilliams next argues that in its closing argument the State made adverse comments upon McWilliams's choice not to testify. Specifically, McWilliams complains of the following portion of the district attorney's closing argument:
>
> > You know, one thing I do note that neither of the defense attorneys have talked about in the evidence or really dwelt on: they did not talk about that gun in that car right beside the man underneath the armrest, loaded, up in Ohio. And they did not talk about the bullets in his pocket; and they did not talk about the bullets down in the floorboard of the car-the ones he said he was biting on. He said he knew those were there, but he didn't know about the gun being there. Why did he have bullets in his pocket if he didn't know anything about any of this? There is no good reason, explanation, that indicates anything other than guilt in this case. There is no other explanation for it, and you

> have not heard an explanation; the evidence doesn't show any other explanation for it.

It is the law in Alabama that in all criminal prosecutions, the accused shall not be compelled to give evidence against himself. Ala. Const. 1901, Art. I, § 6. That privilege is also protected under § 12-21-220, which provides:

> On the trial of all indictments, complaints or other criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him nor be the subject of comment by counsel. If the district attorney makes any comment concerning the defendant's failure to testify, a new trial must be granted on motion filed within 30 days from entry of the judgment.

The Fifth and Fourteenth Amendments of the United States Constitution are also violated when the prosecutor comments on the accused's silence. *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). "Alabama law clearly holds that '[w]here there is the possibility that a prosecutor's comment could be understood by the jury as reference to failure of the defendant to testify, Art. I, § 6 [Const. of Ala. of 1901] is violated.'" *Ex parte Wilson*, 571 So. 2d 1251, 1262 (Ala. 1990) (*quoting Ex parte Tucker*, 454 So. 2d 552, 553 (Ala. 1984)).

McWilliams asserts, and Judge Bowen agreed in his dissent, 640 So. 2d at 1014, that the comment made by the prosecutor in this case is virtually indistinguishable from that made in *Windsor v. State*, 593 So. 2d 87 (Ala. Crim. App. 1991), wherein the Court of Criminal Appeals reversed a capital murder conviction because of the argument of the prosecutor. The court in Windsor focused on the following portion of the prosecutor's argument:

> And the strongest piece of circumstantial evidence that you have in this case, and [defense counsel] just glossed over this-State's Exhibit No. 31 [the victim's gun], it has been identified a number of ways in this case, but they can't explain this-they can't explain why this weapon was in the defendant's pocket when he was arrested. Can you offer me another reasonable hypothesis as to how that weapon got there?

593 So. 2d at 90.

We note that while in Windsor the defendant made a proper objection to the prosecutor's argument and promptly moved for a mistrial, 593 So. 2d at 90, the record in this case reveals that McWilliams did not object to the comment he now questions. In its opinion in this case, the Court of Criminal Appeals cited *Kuenzel v. State*, 577 So. 2d 474, 489 (Ala. Crim. App. 1990), *aff'd, Ex parte Kuenzel*, 577 So. 2d 531 (Ala. 1991), *cert. denied, Kuenzel v. Alabama*, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991), where that court stated:

> "While this failure to object does not preclude review in a capital case, it does weigh against any claim of prejudice." *Ex parte Kennedy*, 472 So.2d [1106,] at 1111 [(Ala. 1985)] (emphasis in [*Kennedy*]). "This court has concluded that the failure to object to improper prosecutorial arguments . . . should be weighed as part of our evaluation of the claim on the merits because of its suggestion that the defense did not consider the comments in question to be particularly harmful." *Johnson v. Wainwright*, 778 F.2d 623, 629 n. 6 (11th Cir. 1985), *cert. denied*, 484 U.S. 872, 108 S. Ct. 201, 98 L. Ed. 2d 152 (1987). "Plain error is error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings." *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir.), *cert. denied*, 479 U.S. 933, 107 S. Ct. 407, 93 L. Ed. 2d 359 (1986). *See also Biddie v. State*, 516 So. 2d 837, 843 (Ala. Cr. App. 1986), *reversed on other grounds*, 516 So. 2d 846 (Ala. 1987).

The United States Court of Appeals for the Eleventh Circuit has held that a prosecutor's comments "on the failure of the defense, as opposed to that of the defendant to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth Amendment privilege." *Duncan v. Stynchcombe*, 704 F.2d 1213, 1215-16 (11th Cir. 1983) (emphasis added). In the present case, the prosecutor commented that "neither of the defense attorneys have talked about" various pieces of physical evidence found in McWilliams's possession. This is clearly a comment on the failure of defense counsel to explain testimony or evidence.

McWilliams was arrested at a highway rest area in Ohio. The arresting officer testified that he recovered a handgun and some bullets from the car that McWilliams was driving. The officer further testified that when he asked about the bullets, McWilliams said that he had been chewing on them while driving. McWilliams first denied any knowledge of the handgun, but the officer testified

that McWilliams later claimed that his uncle had been in the vehicle earlier and had had the handgun on his person at that time. The prosecutor's comment, therefore, was pointing out the failure of defense counsel to offer an explanation for the inconsistencies within the statements made by the defendant. *Duncan, supra*.

A prosecutor "may state or comment on proper inferences from the evidence and may draw conclusions from the evidence based upon his own reasoning." *Harris v. State*, 539 So.2d 1117, 1123 (Ala. Crim. App. 1988) (*quoting Sasser v. State*, 494 So. 2d 857, 859-60 (Ala. Crim. App. 1986)). Moreover, "the prosecutor does have a right to point out to the jury that the State's evidence does stand uncontradicted." *Ex parte Wilson*, 571 So. 2d at 1262. In *United States v. Blackwood*, 768 F.2d 131, 139 (7th Cir.), *cert. denied*, 474 U.S. 1020, 106 S. Ct. 569, 88 L. Ed. 2d 554 (1985), the United States Court of Appeals for the Seventh Circuit held that the prosecutor's reference to previous statements made by the defendant did not violate the defendant's rights under the Fifth Amendment. The Court of Criminal Appeals has held:

> "In evaluating a claim that the prosecutor's statement amounted to a comment on the defendant's failure to testify, 'the facts and circumstances of each case must be carefully analyzed to determine whether the language used was manifestly intended or was of such character that the jury would naturally and necessarily take it to be a comment on the failure of the accused to testify.'" *Brinks v. State*, 500 So. 2d 1311, 1314 (Ala. Crim. App. 1986) (*quoting McKissick v. United States*, 379 F.2d 754, 757 (5th Cir. 1967).

Owen v. State, 586 So. 2d 958, 960 (Ala. Crim. App. 1990), *rev'd on other grounds*, *Ex parte Owen*, 586 So. 2d 963 (Ala. 1991).

In *Ex parte Williams*, 461 So. 2d 852, 854 (Ala. 1984), the prosecutor directly commented on an absence of testimony with regard to a specific circumstance regarding which only the defendant could have testified. In that case the Court of Criminal Appeals held:

> In a case in which there has been a direct reference to a defendant's failure to testify and the trial court has not acted promptly to cure the comment, the conviction must be reversed. *Whitt* [*v. State*, 370 So. 2d 736, 739 (Ala. 1979)]. In a case in which there has been only an indirect reference to a defendant's failure to testify, in order for the comment to constitute

> reversible error there must be a virtual identification of the defendant as the person who did not become a witness. *Ex parte Yarber*, 375 So. 2d 1231, 1234 (Ala. 1979).

461 So. 2d at 854. The court in *Windsor* relied on the rationale of *Ex parte Williams* and reversed the judgment of the trial court because of the prosecutor's comment that "[the defense] can't explain why this weapon was in the defendant's pocket when he was arrested." 593 So. 2d at 90. There was no evidence in that case that any other person could possibly offer an explanation.

> The present case, however, presents a different set of circumstances. McWilliams stated that the handgun had been on his uncle's person earlier and that the vehicle he was driving belonged to his uncle. McWilliams's uncle could have testified regarding the presence of the handgun in his automobile, but he was not called to testify at all. Sonya McWilliams testified that she had traveled with McWilliams from Mobile to Tuscaloosa; however, she did not offer an explanation for the presence of the handgun in the vehicle.
>
> We find that the prosecutor's comments did not constitute a direct comment on McWilliams's failure to testify and that the comments did not identify McWilliams as the only possible person who could explain the matters in question. We conclude, therefore, that the content of the prosecutor's closing argument did not constitute "error which, when examined in the context of the entire case, is so obvious that failure to notice it would seriously affect the fairness, integrity, and public reputation of the judicial proceedings." *United States v. Butler*, 792 F.2d 1528, 1535 (11th Cir. 1986), quoted in the excerpt from *Kuenzel, supra*.

McWilliams, 640 So. 2d at 1018 - 1021.

Contrary to McWilliams' contention, the prosecutor's argument was not an improper comment on his right to remain silent. In *Isaacs v. Head*, 300 F.3d 1232 (11th Cir. 2002), the Eleventh Circuit described the proper manner in which to evaluate a *Griffin* claim:

> The Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. A prosecutor's statement violates the defendant's right to remain silent if either (1) the statement was manifestly intended to be a comment on the defendant's failure to testify; or (2) 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. The question is not whether the jury possibly or even probably would view the remark in this manner, but whether the jury necessarily would have done so. 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. . . .
>
> *United States v. Knowles*, 66 F.3d 1146 (11th Cir.1995) (citations, quotations, and footnotes omitted). See also *United States v. LeQuire*, 943 F.2d 1554, 1565 (11th Cir.1991) (same); *Solomon v. Kemp*, 735 F.2d 395, 401 (11th Cir.1984).
>
> In applying *Griffin*, we have strictly enforced the requirement that a defendant show that the allegedly offensive comment was either manifestly intended to be a comment on the defendant's silence or that the comment naturally and necessarily related to the defendant's silence.

Id. at 1270.

After careful review of the *Griffin* standard, as interpreted by this Circuit, it is apparent that McWilliams has failed to show the state court's decision "was contrary to or involved an unreasonable application of clearly established law" or "was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). The prosecutor's comments were clearly directed at the failure of defense counsel to explain testimony or evidence.[6] The Eleventh Circuit has held that a prosecutor's comments "on the failure of the defense, as opposed to that of the defendant to counter or explain the testimony presented or evidence introduced is not an infringement of the defendant's Fifth Amendment privilege." *Duncan v. Stynchcombe*, 704 F.2d 1213,

[6] Various witnesses could have been called by the defense to explain how the gun got in the car, why McWilliams had bullets in his pocket, and why there were bullets in the floorboard of the car, to explain the inconsistencies in the statements made by McWilliams.

1215-16 (11th Cir. 1983). As there is no evidence whatsoever that the prosecutor's comments in this case were manifestly intended to comment on McWilliams' right to silence, and McWilliams cannot show that the jury would naturally and necessarily have interpreted the comments as such, this claim is due to be denied.

Claim II. The Presumption of Innocence and the Reliability of the Sentencing Trial Were Undermined When a Guard Provoked an Argument with James McWilliams in Front of Several Jurors, While James Was Wearing Handcuffs.

In support of this claim, McWilliams argues that:

> The presumption of innocence was undermined when a guard provoked a loud argument with James McWilliams in front of several jurors, while James was wearing shackles. *Allen v. Montgomery*, 728 F.2d 1409,1413 (11th Cir. 1984). The reliability of the sentencing determination was also destroyed by this incident because it gave the jurors the impression that James was a dangerous and uncontrollable prisoner.

The Alabama Court of Criminal Appeals denied this claim on the merits, after reviewing the issues and making findings of fact.

> The appellant argues that his rights to the presumption of innocence and the reliability of the sentencing trial were undermined when a guard provoked an argument with him in front of several jurors, while he was wearing handcuffs. The record indicates that, after the proceedings had ended on one day of the trial and the jury had been escorted out of the courtroom, a confrontation arose between the defendant and a guard who was to escort the defendant back to his cell. The confrontation apparently began in the courtroom and continued into the hall of the courthouse. The appellant was handcuffed by the guard while in they were in the courtroom and he was then led out into the hall, where words were apparently exchanged-possibly concerning the appellant's guilt or innocence. On the following morning, the jurors were individually questioned as to what they heard or saw concerning the incident, and whether anything they might have seen or heard would prejudice them against the appellant or the State in any way. Each juror who indicated any sort of awareness of the matter testified that he or she would not be prejudiced

against the appellant or the State. Thus, the appellant suffered no actual prejudice.

The appellant cites cases which warn against the prejudicial effect of allowing the jury to view a defendant in shackles or handcuffs during his trial. However, in light of the fact that few jurors polled stated that they saw the appellant in handcuffs, and that those that did stated that it would not prejudice them against the appellant, there was no error.

> All of the authorities we have studied are agreed that to bring a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with our notion of a fair trial, for it creates in the minds of the jury a prejudice which will likely deter them from deciding the prisoner's fate impartially. . . .
>
> Not to be overlooked, is the distinction made in *Clark* [*v. State*, 280 Ala. 493, 195 So.2d 786 (1967)], between handcuffing a prisoner in taking him to and from the court and in keeping him in handcuffs while he is being tried, unless there is reasonable ground for belief that such restraint is necessary to prevent his escape or his rescue.
>
> Furthermore, it is not ground for a mistrial that an accused felon appear in the presence of the jury in handcuffs when such appearance is only a part of going to and from the courtroom. This is not the same as keeping an accused in shackles and handcuffs while being tried. *Rhodes v. State*, 34 Ala. App. 481, 41 So.2d 623 [(1949)]. *Evans v. State*, Ala. Crim. App., 338 So.2d 1033 [1976], *cert. denied*, 348 So.2d 784 (1977).

Taylor v. State, 372 So.2d 387, 389 (Ala. Crim. App. 1979). *See also Cushing v. State*, 455 So.2d 119, 121 (Ala. Crim. App. 1984) ("[i]t is not ground for a mistrial that the accused appeared before the jury in handcuffs when this appearance was only a part of going to and from the courtroom"). *Campbell v. State*, 484 So.2d 1168, 1170 (Ala. Crim. App. 1985) (wherein the court held that the trial court did not abuse its discretion by allowing the jury to see the defendant restrained in shackles where "[t]here is little doubt that the appellant here had substantial reason to attempt to escape, since he faced a sentence of life without parole . . ."). Under the circumstances of this case, and in light of the showing of no actual prejudice, we find no abuse of discretion by the trial

> court in allowing the appellant to be handcuffed for purposes of going to and from the courtroom.

McWilliams, 640 So. 2d at 995-996.

The findings made by the state appellate court are supported by the record and McWilliams has offered nothing to rebut the presumption that the factual findings are correct. The record reveals that out of the fourteen jurors, five of them heard nothing and saw nothing; seven of them heard a commotion, but saw nothing; six of them either thought it was McWilliams they heard, or were told by another juror that they thought McWilliams was involved; and two of them heard the commotion and saw McWilliams, but did not indicate that they saw that he was handcuffed. Tab #R-6, Vol. 3, pp. 483-505. Each juror who heard or saw anything testified that he or she would not be prejudiced by what they saw or heard. *Id*.

In *Gates v. Zant*, 863 F.2d 1492 (11th Cir. 1989), the Eleventh Circuit addressed the brief appearance of a defendant in handcuffs:

> The principal difficulty arising from shackling or handcuffing a defendant at trial is that it tends to negate the presumption of innocence by portraying the defendant as a bad or dangerous person. The Supreme Court has referred to shackling during trial as an "inherently prejudicial practice" which may only be justified by an "essential state interest specific to each trial." *Holbrook v. Flynn*, 475 U.S. 560, 569, 106 S. Ct. 1340, 1346, 89 L. Ed. 2d 525 (1986). *See also Illinois v. Allen*, 397 U.S. 337, 344, 90 S. Ct. 1057, 1061, 25 L. Ed. 2d 353 (1970). This court recently has extended the general prohibition against shackling at trial to the sentencing phase of a death penalty case. *Elledge v. Dugger*, 823 F.2d 1439, 1450-52 (11th Cir.1987), *modified*, 833 F.2d 250 (1987), *cert. denied*, 485 U.S. 1014, 108 S. Ct. 1487, 99 L. Ed. 2d 715 (1988).
>
> On the other hand, a defendant is not necessarily prejudiced by a brief or incidental viewing by the jury of the defendant in handcuffs. *Allen v. Montgomery*, 728 F.2d 1409, 1414 (11th Cir.1984); *United States v. Diecidue*,

> 603 F.2d 535, 549-50 (5th Cir. 1979), *cert. denied sub nom. Antone v. United States*, 445 U.S. 946, 100 S. Ct. 1345, 63 L. Ed. 2d 781, 446 U.S. 912, 100 S. Ct. 1842, 64 L. Ed. 2d 266 (1980); *Wright v. Texas*, 533 F.2d 185, 187-88 (5th Cir. 1976); *Jones v. Gaither*, 640 F. Supp. 741, 747 (N.D. Ga. 1986), *aff'd without opinion*, 813 F.2d 410 (11th Cir. 1987). The new fifth circuit is among those circuits which adhere to this rule. *King v. Lynaugh*, 828 F.2d 257, 264-65 (5th Cir. 1987), *vacated on other grounds*, 850 F.2d 1055 (5th Cir. 1988); *see also United States v. Williams*, 809 F.2d 75, 83-86 (1st Cir. 1986), *cert. denied*, 481 U.S. 1030, 107 S. Ct. 1959, 2469, 2484, 95 L. Ed. 2d 531 (1987); *United States v. Robinson*, 645 F.2d 616, 617-18 (8th Cir. 1981), *cert. denied*, 454 U.S. 875, 102 S. Ct. 351, 70 L. Ed. 2d 182 (1981). In these latter cases, the courts generally have held that the defendant must make some showing of actual prejudice before a retrial is required.
>
> Thus, the case law in this area presents two ends of a spectrum. This case falls closer to the "brief viewing" end of the spectrum and requires a showing of actual prejudice before a retrial is required. The prosecution showed the fifteen-minute tape twice during several days of trial. The handcuffs were only visible during short portions of the tape.
>
> Gates has made no attempt to show that he suffered actual prejudice because the jury saw him in handcuffs. Our independent examination of the record also persuades us that he did not suffer any prejudice. Although defense counsel strenuously objected to the admission of the videotape, he did not object to the handcuffing in particular. He did not ask for a cautionary instruction or a poll of the jury. Furthermore, the videotape at issue here was taken at the scene of the crime, not at the police station. Thus, jurors likely would infer that handcuffing was simply standard procedure when a defendant is taken outside the jail. The viewing of the defendant in handcuffs on television rather than in person further reduces the potential for prejudice. In light of the foregoing facts, and the fact that Gates sat before the jury without handcuffs for several days during his trial, we conclude that the relatively brief appearance of the defendant in handcuffs on the videotape did not tend to negate the presumption of innocence or portray the defendant as a dangerous or bad person. We therefore conclude on the particular facts of this case that the handcuffing of Gates during the videotaped confession does not require a new trial.

Gates v. Zant, 863 F.2d 1492, 1501-1503 (11th Cir. 1989).

The record reflects that the incident occurred after court proceedings ended one day and the jury had been removed from the courtroom. There is no indication that any of the

jurors actually saw McWilliams in handcuffs. Therefore, as in *Gates*, McWilliams must show actual prejudice in order to prevail on this claim, and McWilliams has shown nothing to indicate that any juror was prejudiced as a result of the incident.

In light of the record, it was not in any way unreasonable for the Alabama Court of Criminal Appeals to conclude that the incident did not undermine McWilliams' presumption of innocence or the reliability of sentencing. McWilliams has not offered clear and convincing evidence to rebut the presumption of correctness this court is required to accord the state court's findings. Further, he has not demonstrated that the state appellate court's decision on this issue was contrary to, or an unreasonable application of, clearly established federal law, nor an unreasonable interpretation of the facts in light of the evidence before that court.[7] This claim is due to be denied.

[7] McWilliams argues in *Petitioner's Notice of Supplemental Law and Facts*, Court Document 47, at 1-3, that he is "automatically entitled to a new trial" pursuant to the holding in *Deck v. Missouri*, 544 U.S. 622 (2005). *Deck* held "that the Constitution forbids the use of visible shackles during the penalty phase, as it forbids their use during the guilt phase, unless that use is 'justified by an essential state interest' - such as the interest in courtroom security-specific to the defendant on trial." *Id.* at 624. However, the defendant in *Deck* was "shackled with leg irons, handcuffs, and a belly chain," in full view of the jury, during the entire penalty phase of his trial, over the objection of his counsel. *Id.* The facts in *Deck* could not be more different from incident that occurred during McWilliams' trial. *Deck* clearly has absolutely no relevance to the facts of McWilliams' case.

Moreover, even if *Deck* could be used in McWilliams' favor, the court notes that the holding in *Deck* does not render the Alabama Court of Criminal Appeals' decision on this issue contrary to or an unreasonable application of clearly established federal law, because "clearly established law as determined by this Court" refers to the holdings, as opposed to the dicta, of the Supreme Court's decisions **as of the time of the relevant state court decision**. *Hunter v. Secretary, Dept. of Corrections*, 395 F.3d 1196, 1202 (11th Cir. 2005). The relevant state court decision in McWilliams' case was rendered in 1991, long before the Supreme Court's decision in *Deck*.

Claim III. James McWilliams' Rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution Were Violated by the State's Racially Discriminatory Exercise of Peremptory Strikes.

In support of this claim, McWilliams asserts that:

> During jury selection the State used nine of its seventeen peremptory strikes to exclude qualified black venire members from James McWilliams' petit jury. Mr. McWilliams is a black male. On appeal, James asserted that the prosecution used its peremptory challenges to strike black veniremembers in a racially discriminatory manner, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). Specifically, James asserted that State's use of nine of seventeen peremptory strikes to exclude qualified black venire members constituted a prima facie case under *Batson v. Kentucky*, 476 U.S. 79 (1986).

Petition at 56.

In denying the claim on its merits under the plain error standard of review,[8] the Alabama Supreme Court found as follows:

> McWilliams asserts that the prosecution used its peremptory challenges to strike black veniremembers in a racially discriminatory manner, in violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L. Ed. 2d 69 (1986). The venire from which McWilliams's jury was selected consisted of 68 members, of whom 17 were black. With 9 of its 16 peremptory strikes, the prosecution removed blacks from the venire. Ultimately, four blacks were selected to serve on the jury, and one black served as an alternate. The record shows that McWilliams did not object to the State's use of its peremptory strikes. Accordingly, no hearing was held pursuant to the procedure set out in *Ex parte Branch*, 526 So.2d 609 (Ala. 1987).
>
> McWilliams argues that this case should be remanded for the trial court to afford the prosecution an opportunity to present race-neutral reasons for its strikes. We find, however, that McWilliams has not made a prima facie showing that the State used its peremptory strikes in violation of *Batson*.

[8] McWilliams did not object to the state's use of peremptory strikes; therefore, the claim was reviewed only for plain error.

McWilliams cites several of the factors set out in *Ex parte Branch* that are relevant in determining whether a prima facie showing of discrimination has been made. Significantly, he argues that the State's use of its peremptory challenges evinces a pattern of strikes against black jurors on the venire. *Ex parte Branch*, 526 So.2d at 623. In support of this contention, McWilliams cites *Bui v. State*, 627 So.2d 849 (Ala. Crim. App. 1992), *rev'd*, *Ex parte Bui*, 627 So.2d 855 (Ala. 1992). After Bui's conviction and sentence had been affirmed by the Court of Criminal Appeals and by this Court, the United States Supreme Court remanded the case for our further consideration in light of *Powers v. Ohio*, 499 U.S. 400, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). Bui challenged the State's use of 6 of its 13 peremptory strikes to remove blacks from the venire. FN2. The venire in that case consisted of either 13 or 15 qualified blacks. FN3. *Bui v. State*, 627 So.2d 849 (Ala. Crim. App. 1992).

> FN2. The opinion of the Court of Criminal Appeals in that case indicates that the State actually used 9 of its 13 strikes to remove blacks from the venire. However, Bui only challenged the removal of six blacks.
>
> FN3. According to the opinion of the Court of Criminal Appeals in that case, the record fails to show what happened to two blacks who were originally on the venire.

The Court of Criminal Appeals remanded the case to the trial court for a hearing with regard to the State's use of its peremptory challenges. *Bui v. State*, 627 So.2d 849. On remand, the trial court held that the State had not violated *Batson* in the use of its peremptory strikes. On return to remand, the Court of Criminal Appeals held that the record did establish a discriminatory use of peremptory challenges by the State. *Bui v. State*, 627 So.2d 849. Holding that the trial court's conclusion was not clearly erroneous, we reversed the judgment of the Court of Criminal Appeals and remanded the case for the reinstatement of Bui's conviction and sentence. *Ex parte Bui*, 627 So.2d 855.

McWilliams emphasizes that in the present case the State used its peremptory strikes to remove 53% of the qualified blacks from the venire, while in *Bui* the Court of Criminal Appeals remanded the case for a hearing although the State had struck only 46% percent of the qualified blacks from the venire. In *Bui*, 34% of the venire were blacks, and the jury consisted of only one black, or 8% of the empaneled jury. In the present case, however, 25% of the venire consisted of blacks, and 33% of the empaneled jury were blacks. In *Harrell v. State*, 571 So.2d 1270, 1271-72 (Ala. 1990), we stated:

> [A] defendant cannot prove a prima facie case of purposeful discrimination solely from the fact that the prosecutor struck one or more blacks from his jury. A defendant must offer some evidence in addition to the striking of blacks that would raise an inference of discrimination. When the evidence shows only that blacks were struck and that a greater percentage of blacks sat on the jury than sat on the lawfully established venire, an inference of discrimination has not been created. Logically, if statistical evidence may be used to establish a prima facie case of discrimination, by showing discriminatory impact [citation omitted], then it should also be available to show the absence of a discriminatory purpose.
>
> Other than by conclusory statements in his brief, McWilliams has made no attempt to show that the State exercised its peremptory strikes in violation of *Batson*, and our review of the record discloses no such violation. Accordingly, we find no error in the State's use of its peremptory challenges.

McWilliams, 640 So. 2d 1017-1018.

McWilliams argues that "[t[here were voluminous problems with the Alabama Supreme Court's holding." First, he claims that "James' appellant [sic] counsel argued in his brief that there was several other factors that showed James McWilliams had presented a prima facie case." He then goes on to concede that the other arguments presented were conclusory. In the Alabama Supreme Court, McWilliams based this claim solely on the number of blacks struck from the jury by the state. Although he also presented various other conclusory arguments,[9] he presented absolutely no evidence that would establish a prima facie

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[9] The conclusory allegations appellant [sic] counsel made were:

> Other Branch factors are present here as well. The voir dire conducted by the State was not searching or sifting. *See Ex parte Branch* at 622-3. See also, *Guthrie v. State*, __So.2d__, No. 89-1078, slip op. at 16 (Ala. Crim. App. 11/27/91) (lack of thorough voir dire supports inference of discrimination); *Richmond v. State*, 590 So.2d 384 (Ala. Crim. App. 1991); *Williams v. State*, 548 So.2d 501 (Ala. Crim. App. 1988) (lack of voir dire to be weighed against State). Similarly, the record does not reflect that these black prospective jurors gave any significantly different responses on voir dire than white prospective

Batson violation. The state court properly applied *Batson* to McWilliams' claim, and the denial of the claim was not contrary to nor did it involve an unreasonable application of clearly established law. Furthermore, McWilliams has not established that the Alabama Supreme Court's decision was based upon an unreasonable determination of the facts in light of the evidence presented. This claim is due to be denied.

McWilliams has also raised allegations in support of his *Batson* claim that were not raised in the Supreme Court of Alabama. *Petition* at 59-66. However, because he has not presented these allegations in state court, McWilliams is procedurally barred from presenting them in this court. McWilliams has not established cause to excuse the default of these claims, nor has he demonstrated actual prejudice.

McWilliams has, however, alleged that he is actually innocent.[10] In a "rare," "extraordinary,"[11] and "narrow class of cases,"[12] a federal court may consider a procedurally

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> jurors who were not peremptorily struck by the State. *See, Sumlin Construction v. Moore*, __So.2d__, No. 1900040 (Ala. 6/21/91) (disparate treatment of similarly situated black and white prospective jurors supports inference of discrimination by State); *Moss v. City of Montgomery*, 588 So.2d 520 (Ala. Crim. App. 1991) (same); *Carrick v. State*, 580 So.2d 31 (Ala. Crim. App. 1991) (same); *Madison v. State*, 545 So.2d 94 (Ala. Crim. App. 1988) (same). Nor is there any evidence that these black prospective jurors shared any significant characteristics other than their race. *See, Ex parte Branch*, supra at 623.

Petition at 58-59.

[10] McWilliams raised his actual innocence as a free-standing claim in Claim XXVII. *Petition* at 195-212.

[11] *Schlup v. Delo*, 513 U.S. 298, 321 (1995) ("To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the 'extraordinary case,' while at the same time ensuring that the exception would extend relief to those who were truly deserving, this Court explicitly tied the miscarriage of justice exception to the petitioner's innocence.").

[12] *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) ("Federal courts retain the authority to issue the writ of habeas corpus in a further, narrow class of cases despite a petitioner's failure to show cause for a procedural default. These are extraordinary instances when a constitutional violation probably has caused the conviction

defaulted claim in the absence of a showing of "cause" for the procedural default, if: (1) a "fundamental miscarriage of justice" has "probably resulted in the conviction of one who is actually innocent," *Smith v. Murray*, 477 U.S. 527, 537-38 (1986) (*quoting, respectively, Engle v. Isaac*, 456 U.S. 107, 135 (1982), and *Murray v. Carrier*, 477 U.S. at 496);[13] or (2) the petitioner shows "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." *Schlup v. Delo*, 513 U.S. 298, 323-27 & n.44 (1995) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)); *see also, e.g., Smith v. Murray*, 477 U.S. at 537-38.

In *Schlup v. Delo*, 513 U.S. 298 (1995), the Supreme Court elaborated on the fundamental miscarriage of justice exception and the necessity of showing innocence. To meet this exception, the petitioner "must show that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt." *Schlup*, 513 U.S. at 327. The standard focuses on the *actual* innocence of the petitioner. As the Supreme Court explained:

> Instead, the emphasis on "actual innocence" allows the reviewing tribunal also to consider the probative force of relevant evidence that was either excluded or unavailable at trial. Indeed, with respect to this aspect of the *Carrier* standard, we believe that Judge Friendly's description of the inquiry is appropriate: the habeas court must make its determination concerning the petitioner's innocence "in light of all the evidence, including that alleged to have been illegally admitted (but with due regard to any unreliability of it) and

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of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice.") (citing *Murray v. Carrier*, 477 U.S. 478, 485 (1986)).

[13] Specifically, the *Murray v. Carrier* Court observed that, "in an extraordinary case, where 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." 477 U.S. at 496.

> evidence tenably claimed to have been wrongfully excluded or to have become available only after trial."

Id. at 327. (*Quoting* Friendly, *Is Innocence Irrelevant? Collateral Attack on Judgment*, 38 U.Chi.L.Rev. 142, 160 (1970)). To be credible, a claim of actual innocence must be based on reliable evidence not presented at trial. *Fortenberry v. Haley*, 297 F.3d 1213, 1222 (11th Cir. 2002).

In support of his argument that he is actually innocent, McWilliams simply reiterates all his theories as to why he is entitled to habeas corpus relief and offers conjecture as to what might have been done differently. He has offered nothing in the way of evidence to support a finding that it is more likely than not that no reasonable juror would have found petitioner guilty beyond a reasonable doubt. Thus, he has not established actual innocence to excuse the default of these claims. Therefore, the elements of his *Batson* claim that were not presented in state court are due to be denied because they are procedurally defaulted.

Claim IV. The Prosecutor Used Inadmissible Hearsay Testimony about Harry Porter's Alibi to Disprove the Defense Theory That James McWilliams Was Mistakenly Identified as the Killer.

McWilliams next claims that "[t]he prosecutor 'put before the jury illegal evidence that undermined the very essence of the defense,' *White v. State*, 448 So.2d 970, 972 (Ala. Cr. App. 1984), when he used inadmissible hearsay testimony to establish an alibi for Jerry Porter." *Petition* at 67. Although he raised this claim on direct appeal before the Alabama Court of Criminal Appeals, he did not include the claim in his certiorari petition. Therefore,

McWilliams is procedurally barred from raising his claims in this court pursuant to *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1732-33 (1999).

"Section 2254(c) provides that a habeas petitioner 'shall not be deemed to have exhausted the remedies available in the courts of the State . . . if he has the right under the law of the State to raise, by any available procedure, the question presented.'" *Boerckel*, 119 S. Ct. at 1732. To exhaust state court remedies, federal habeas corpus petitioners need only provide the "state courts a fair opportunity to act on their claims." *Id.* The *Boerckel* Court held that in order to satisfy the exhaustion requirement for bringing a habeas corpus petition, the petitioner was required to present his claims to the state supreme court for discretionary review when that review is part of the ordinary review procedure in the State. *Id.* at 1733.

The Eleventh Circuit Court of Appeals has indicated that "there is no doubt that Alabama's discretionary review procedures bring Alabama prisoner habeas petitions within the scope of the *Boerckel* rule." *Smith v. Jones*, 256 F.3d 1135, 1140 (11th Cir. 2001).

> The Alabama Supreme Court's certiorari review rule gives that court broad discretion over the issues it will review. Among other grounds, certiorari review can be granted to decide issues of first impression; to decide whether an Alabama Supreme Court decision relied upon by the Court of Criminal Appeals ought to be overruled; and to determine whether the Court of Criminal Appeals' decision conflicted with prior decisions of the United States Supreme Court, the Alabama Supreme Court, or the Court of Criminal Appeals itself. FN5.
>
> > FN5. Alabama Rule of Appellate Procedure 39(c), as in effect at the time of Smith's direct appeal, provided that:
> >
> > In all other cases [except death penalty cases], civil or criminal, petitions for writs of certiorari will be considered only:
> >
> > . . . .

> (3) From decisions when a material question requiring decision is one of first impression in Alabama;
>
> (4) From decisions in conflict with prior decisions of the United States Supreme Court, the Alabama Supreme Court, or the Alabama courts of appeals; . . . and,
>
> (5) Where petitioner seeks to have controlling [Alabama] supreme court cases overruled which were followed in the decision of the court of appeals.
>
> Ala.R.App.P.39(c)(1990)(amended 2000). The rule has not been changed in any respect relevant to the Boerckel rule since Smith's direct appeal.
>
> Any federal law question would fit within one or more of those grounds for certiorari review, and that is particularly true in light of the limitation on federal habeas review now contained in 28 U.S.C. § 2254(d). Because the scope of the Alabama Supreme Court's discretionary review on direct appeal is broader than that of the Illinois Supreme Court, which was the court whose review procedures were involved in the *Boerckel* case itself, see 526 U.S. at 845-48, 119 S. Ct. at 1732-34, Alabama convictions and prisoners clearly come within the scope of the *Boerckel* rule.

Id. at 1140-41. Additionally, the Eleventh Circuit Court of Appeals has held that the *Boerckel* rule applies to a petitioner's state collateral review process. *Pruitt v. Jones*, 348 F.3d 1355, 1359 (11th Cir. 2003).

McWilliams has not satisfied the exhaustion requirements of § 2254(c) as to his claims. However, because it is now too late for him to return to state court to attempt to exhaust the claims, this court considers the claim to be procedurally defaulted. *Collier*, 910 F.2d at 773. McWilliams has offered nothing to excuse the procedural default of this claim. Moreover, as previously discussed, McWilliams has failed to establish that he is actually innocent. Therefore, he is procedurally barred from raising this claim in federal court.

Even assuming that the claim had been exhausted, McWilliams would be entitled to no relief on this claim. In denying the claim on the merits, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that the prosecutor used inadmissible hearsay testimony concerning Jerry Porter's alibi to disprove the defense theory that the appellant was mistakenly identified as the killer. The record indicates that, shortly following the offense, the police received information incriminating Jerry Porter in the instant offense. Thereafter two of the witnesses to the offense "tentatively identified" Jerry Porter as the man they had seen at the scene of the offense. During the trial, on cross-examination of State's witness Officer Robert McFerrin, the defense counsel asked about any information which had been received regarding Jerry Porter. McFerrin testified that he had received information from an informant that Jerry Porter was seen in the vicinity of Austin's Food Store at approximately 10:00 p.m. on the night of the offense. The informant described Porter as wearing khaki pants, a brown coat, and a white shirt; this description apparently matched the description of the killer which had been run in the local newspaper following the murder. The informant further stated that Porter was carrying a sack of coins and paper money on that night.
>
> On redirect examination, the prosecutor asked Officer McFerrin why no charges had ever been brought against Jerry Porter, and the witness testified that the police discovered that the informant was Porter's ex-girlfriend, who later admitted that she had lied about the identification in order "to get even" with Porter. Officer McFerrin testified that, after investigating Porter, they discovered that he had been in Sylacauga on the night of the murder.
>
> Although the appellant argues that Officer McFerrin's testimony on redirect examination concerning the recanting of the informant's identification of Porter, violated his right of confrontation and was inadmissible hearsay, we note that the appellant "opened the door" for the introduction of this testimony by eliciting testimony from Officer McFerrin as to what the informant had told him concerning Jerry Porter. *See Ringer v. State*, 489 So.2d 646, 652 (Ala. Crim. App. 1986); *Loyd v. State*, 580 So.2d 1370 (Ala. Crim. App. 1990), *reversed on other grounds*, 580 So.2d 1374 (Ala. 1991); *Hollingsworth v. State*, 549 So.2d 110 (Ala. Crim. App. 1988); *Campbell v. State*, 508 So.2d 1186 (Ala. Crim. App. 1986). *See also Garrett v. State*, 580 So.2d 58 (Ala. Crim. App. 1991) ("[t]he record reveals that the appellant opened these matters up during cross-examination; therefore, they were properly within the scope of the State's re-direct examination").

> Moreover, the appellant failed to object to this testimony at trial and, even if the testimony was hearsay, its admission does not rise to the level of plain error as defined by Rule 45A, A. R. App. P. *See Ex parte Womack*, 435 So.2d 766, 769 (Ala. 1983), *cert. denied*, 464 U.S. 986, 104 S. Ct. 436, 78 L. Ed. 2d 367 (1983); *Ex parte Harrell*, 470 So.2d 1309, 1313 (Ala. 1985), *cert. denied*, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 276 (1985); *Ex parte Watkins*, 509 So.2d 1074 (Ala. 1987), *cert. denied*, 484 U.S. 918, 108 S. Ct. 269, 98 L. Ed. 2d 226 (1987).

McWilliams, 640 So. 2d at 1003-1004.

The Alabama Court of Criminal Appeals correctly found that the defense had opened the door to the testimony elicited from the witness in question. McWilliams has failed to show the state court's decision "was contrary to or involved an unreasonable application of clearly established law" or "was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). Therefore, even if he had not defaulted this claim, it would be due to be denied.

Claim V. The Prosecutor Denied James McWilliams a Fair Trial When He Impeached James' Wife with an Extremely Incriminating Prior Inconsistent Statement, Without Producing the Witness to Whom the Statement Was Allegedly Made.

In support of this claim, McWilliams claims that:

> The prosecutor converted Cynthia Love into an unsworn witness against James McWilliams when he questioned James' wife, Sonya Smith, about an extremely inculpatory statement that she allegedly made to Love, without producing Love and exposing her to cross-examination. This prosecutorial misconduct denied James a fair trial.

Petition at 71.

Although McWilliams raised this claim on certiorari to the Alabama Supreme Court on direct appeal, he raised the claim strictly as a state law claim.[14] The claim was not "fairly presented" to the state court as a federal constitutional claim. *See McNair v. Campbell*, 315 F. Supp. 2d 1179, 1184-1186 (M.D. Ala. 2004). Therefore, it is not exhausted and is now procedurally barred from review in this court. McWilliams has not shown cause or prejudice to excuse the default of this claim. Moreover, as previously stated, he has not shown that he is actually innocent. Therefore, the claim is procedurally barred and is due to be denied.

Even if the claim were found to be exhausted, McWilliams would not be entitled to relief on this claim. In denying the claim on the merits, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that he was denied a fair trial by the prosecutor's impeachment of the appellant's wife, Sonya Smith McWilliams, through an incriminating prior inconsistent statement, without producing the witness to whom the statement was allegedly made. The record indicates that the appellant, his pregnant wife, and their child were staying in the apartment of Cynthia Love at the time of the offense. Cynthia Love had been a good friend of the appellant's wife. On cross-examination of the appellant's wife, the following occurred:
>
> > [PROSECUTOR]: Now, there at the time when you returned the key, I will ask you at that time and place, if you would have made this statement to [Cynthia Love]: that you were on the telephone across from the apartment, and that James [the appellant] went across the street to Austin's Convenience Store. Did you make that statement to Cynthia Love there at that time and place?
> >
> > [APPELLANT'S WIFE]: No, I did not.

[14] Although McWilliams mentioned the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution in the headings in his brief, his argument focused solely on state law and never mentioned federal law.

The appellant did not object to this remark, but later made a motion for mistrial based on the prosecutor's question. The prosecutor submitted that Cynthia Love had been subpoenaed as a State's witness and that she had been reliable in the past. The prosecutor testified that Cynthia Love never appeared to testify and therefore was never called to impeach the appellant's wife. The trial court subsequently instructed the jury as follows:

> Before we begin the arguments of counsel, ladies and gentlemen, I want to give you this instruction: the State has attempted to impeach Sonya Smith McWilliams [the appellant's wife] by showing prior inconsistent statements made to Cynthia Love. Cynthia Love has not testified to those statements, and thus Sonya McWilliams has not been successfully impeached. I instruct you ladies and gentlemen that you cannot consider statements allegedly made to Cynthia Love and denied by Sonya Smith McWilliams in weighing the credibility of Sonya McWilliams.

> It is generally agreed that, when a witness is called to testify to a material issue in the case, the party against whom the witness is called may impeach his credibility by proving that he has previously made statements that are inconsistent with his present testimony. These prior statements of self-contradiction can be introduced either through the cross-examination of the witness or, under limiting rules ... by introducing other witnesses who will testify to the inconsistent statement.

C. Gamble, *McElroy's Alabama Evidence*, § 155.02(1) (4th ed. 1991).

> When a witness, on cross-examination, denies that he made a statement out of court which is inconsistent with his testimony on direct examination, the only available move for the impeaching party is to bring on an impeaching witness who can testify as to the prior inconsistent statement of the witness being impeached.

C. Gamble, *McElroy's Alabama Evidence*, § 157.01(1) (4th ed. 1991). Although the prosecution laid a proper predicate for the impeachment of the appellant's wife through her prior inconsistent statements made to another witness, because the other witness (Cynthia Love) never testified, the appellant's wife was never impeached.

Moreover, the prosecutor's testimony at trial establishes that he intended to produce the testimony of Cynthia Love. The following transpired following the defense counsel's motion for mistrial:

> [PROSECUTOR]: The witness obviously is not available, Judge, but I was assured last night-I talked to two people, both of whom claimed to be the mother of Cynthia Love. I think I determined which one was the correct one, and that one told me that she felt very certain that she would be able to have Cynthia here this morning at 9:00. I assured her that we would try to pay her expenses or whatever. There is no way I could know whether she was going to appear here or not. Now, she obviously did not appear. I don't know where she is; she was under subpoena.
>
> [ASSISTANT PROSECUTOR]: And our impeaching of her was just not done arbitrarily, Your Honor. We had had a statement taken by Ms. Cynthia Love; we have been in contact with Ms. Love, and Ms. Love has been here, was under subpoena, and told that we may need her in rebuttal on these particular facts that were brought out in court. And we did have statements and the things that were offered in impeachment of Mrs. Sonya Smith McWilliams [were] done in good faith. And our witness just didn't pan out, just didn't show up.

It is becoming increasingly clear that one does not have an unbridled and absolute right to ask about a prior inconsistent statement. Rather, the cross-examiner must have some reasonable grounds and good faith upon which to believe that such a statement was in fact made." C. Gamble, *McElroy's Alabama Evidence*, § 156.01(7) (4th ed. 1991), *citing Wysinger v. State*, 448 So.2d 435 (Ala. Crim. App. 1983).

Because of Cynthia Love's unavailability, the appellant's wife was not impeached. Also, because she denied having made the statement, any possible prejudice to the appellant was lessened. Moreover, because the prosecutor provided evidence that he undertook the impeachment in good faith and that he had reasonable grounds to believe that Cynthia Love would be present to testify as to the prior inconsistent statement, and also, in light of the trial court's instructions to the jury, we find no prejudice to the appellant as a result of the prosecutor's statements.

McWilliams, 640 So. 2d at 1004-1005.

Although McWilliams claims that this finding was "contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court," he has not identified the federal law to which it was contrary or of which it was an unreasonable application. There being no evidence to support his contentions, this claim is due to be denied.

Claim VI. The Trial Court Interfered with James McWilliams' Right to Confront His Accusers When it Refused to Allow Defense Counsel to Impeach the Jail House Informant by Questioning Him about a Material Circumstance Surrounding His Decision to Cooperate with the Authorities in this Case.

In support of this claim, McWilliams claims that the trial court violated his "fundamental right to cross-examine a prosecution witness about a material issue when it refused to allow defense counsel to question jail house informant, Anthony Finn, about his conversations with a second jail house informant, Ronnie Hands." *Petition* at 74-75. He adds that "[t]his line of cross-examination was highly material because it could have shown that Finn's testimony about James' confession was a fabrication based on what Hands told him." *Id.* at 75.

In denying this claim on the merits, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that the trial court interfered with his right to confront his accusers because he was not allowed to impeach an inmate informant by questioning him about his decision to cooperate with the authorities in this case. Two inmates who had been incarcerated with the appellant following his apprehension in Ohio testified for the State, concerning statements which the appellant had allegedly made to them while he was in prison. One of the witnesses, Ronnie Hands, testified on cross-examination as follows:

When you talked to Investigator Helm and told him you didn't know anything, and you went back and talked to Anthony Finn [the other inmate] did you tell Anthony Finn what they wanted?

A. I just told him they was asking questions about him.

Q. About [the appellant]?

A. Yeah.

Q. You told Anthony Finn that?

A. Yeah.

Q. What else did you tell him?

A. That's it.

Q. Did Anthony say he was going to talk to somebody?

A. He didn't say.

Q. You and Anthony didn't talk?

A. Probably. Not really, no.

Q. And you knew that [the appellant] had come from Alabama? Right?

A. Well, I didn't know until he told me.

Q. Well, he told you he had come from Alabama? Right?

A. Yeah.

Q. And you got all this information from [the appellant]? Right: that you have testified to?

A. Yeah.

Q. And you didn't get any of it from Anthony Finn?

A. No.

Q. And you and Anthony Finn never talked about what was said by [the appellant]?

A. No.

Q. You never compared notes about what you knew?

A. No.

Thereafter, on cross-examination of the other inmate, Anthony Finn, who actually shared a cell with the appellant, the following transpired:

Q. Did you have occasion to talk with Ronnie Hands about the prosecution wanting some information about [the appellant]?

A. Yes.

Q. And when you talked to him, what did he tell you?

[PROSECUTOR]: We object to hearsay, Your Honor.

THE COURT: Sustained.

[DEFENSE COUNSEL]: Your Honor, Mr. Hands testified he never had a conversation.

[PROSECUTOR]: No, he didn't. He said he did talk to him, Your Honor, and we would object to the nature of any content of any conversation as hearsay.

[DEFENSE COUNSEL]: Judge, how am I supposed to impeach Mr. Hands, if I don't know what they said?

THE COURT: I will sustain.

[DEFENSE COUNSEL]: We except, Your Honor.

The appellant argues that there was evidence that both inmates received lighter sentences because of their cooperation in this case and that, through this questioning, the appellant sought to produce evidence that the two inmates had fabricated their stories so as to receive this beneficial treatment. The appellant argues that the trial court's sustaining of the prosecutor's hearsay objection limited his ability to impeach the inmates. The appellant also argues that the

> alleged conversation was not hearsay because it was offered for the purpose of impeachment. However, the record indicates that immediately following the trial court's sustaining of the prosecutor's objection and the defense counsel's exception to the trial court's ruling, defense counsel was allowed to ask the following:
>
> > Q. Did you ever talk to Ronnie Hands about the things that [the appellant] said to you or to him?
> >
> > A. No.
> >
> > Q. You never talked to him about that.
> >
> > A. No.
>
> Thus, the defense counsel was allowed to rephrase his question so that it was not as broad, and he received an answer to his question. Therefore, even if the hearsay testimony should have been allowed for the limited purpose of impeachment, any error was harmless, because the defense counsel was allowed to elicit an answer concerning this question. *See Walker v. State*, 581 So.2d 570 (Ala. Crim. App. 1991) (wherein defense counsel's question, which was preliminary step to impeachment, should have been admitted; however, the error was harmless). Moreover, based on the defense counsel's formulation of the initial question we do not find that the trial court abused its discretion in sustaining the prosecutor's objection. *See* C. Gamble, *McElroy's Alabama Evidence* § 21.01(1)(3), (4th ed. 1991).

McWilliams, 640 So. 2d at 1005-1006.

McWilliams neglected to mention in this claim, that after initially being prevented from asking Anthony Finn what Ronnie Hands told him, he was then able to ask Finn if he ever spoke to Hands about things McWilliams told him, to which Finn replied that he had never talked to Hands about that. Thus, McWilliams clearly got the answer to his question: if Finn never spoke to Hands about what McWilliams said to him, then Hands never told Finn anything. McWilliams has failed to show that the state court's determination of this claim "was contrary to or involved an unreasonable application of clearly established law" or

"was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d). There being no merit to this claim, it is due to be denied.

Claim VII. The Trial Court Denied James McWilliams Effective Assistance of Counsel When it Summarily Overruled an Objection to the Testimony of a Jail House Informant about His Confession, Without Determining Whether the Informant Was an Agent of the State.

In support of this claim, McWilliams claims that:

> When the authorities used a jail house informant as their agent to obtain an incriminating statement from a suspect in custody after his right to counsel attached, and the suspect "did not even know that he was under interrogation by a government agent," the confession was obtained in violation of the Sixth Amendment and it must be suppressed. *Massiah v. United States*, 377 U.S. 201, 206 (1964); *accord United States v. Henry*, 447 U.S. 264 (1980).

Petition at 78. He adds that the trial court interfered with his defense by summarily overruling "his objection to the testimony of jail house informant, Anthony Finn, about the confession that appellant allegedly made to him" when counsel "was trying to show that the confession was obtained in violation of [McWilliams'] constitutional rights, but the court prevented him from making a record about the issue." *Id.*

In denying this claim on the merits, the Alabama Court of Criminal Appeals found the following:

> The appellant argues that the trial court denied the appellant the effective assistance of counsel by overruling an objection to the testimony of prison inmates concerning the appellant's confession, without determining whether the inmates were agents of the State. There is no indication in the record that either inmate was working as an agent of the police. There was further evidence that none of the Alabama officials had promised the inmates anything in return for their testimony. However, there was an indication that

certain charges were lessened or dropped against these inmates by the Ohio officials in return for their testimony. The record indicates that these arrangements were made after the appellant had been transferred and after he had made the confessions to the inmates.

During the testimony of one of the inmates, defense counsel objected, citing *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964). Although the trial court overruled the objection, the prosecutor subsequently asked the inmate whether he had coerced or threatened the appellant or had promised anything in return for making this confession. The inmate stated that he had not.

> [W]hen an accused volunteers a confession to a person who is not a law enforcement official or agent and has no connection whatever with law enforcement authorities, who has no interest whatever in the prosecution of the accused, is not in a position to promise or give the accused anything to compensate for his confession or to harm him for not making a confession, and there was no occasion whatever on the part of the person to whom the confession was made to have threatened the defendant if he did not confess or to make him any promise if he did confess, the confession under such circumstances is voluntary and admissible in evidence. *Ellis v. State*, Ala. Crim. App., 338 So.2d 428, 432 (1976); *Kircheis v. State*, 56 Ala. App. 526, 323 So.2d 412 (1975), *cert. denied*, 295 Ala. 409, 323 So.2d 421." *Primm v. State*, 473 So.2d 547, 553 (Ala. Crim. App. 1984). *See also Warrick v. State*, 460 So.2d 320, 323 (Ala. Crim. App. 1984); *Hinshaw v. State*, 398 So.2d 762, 764 (Ala. Crim. App.), *cert. denied*, 398 So.2d 766 (Ala. 1981).

Jackson v. State, 502 So.2d 858, 862 (Ala. Crim. App. 1986).

Because the statement was voluntarily made to persons who were not law enforcement officers or agents, the appellant was not entitled to counsel or constitutional warnings prior to making his statement. *McCall v. State*, 501 So.2d 496, 500 (Ala. Crim. App. 1986); *Jackson v. State*, supra, and cases cited therein.

McWilliams, 640 So. 2d at 1006-1007.

The premise of McWilliams' argument is that the jailhouse informant to whom McWilliams confessed was acting as an agent of the State of Alabama. However, the Alabama

Court of Criminal Appeals specifically found that McWilliams' cellmate was not a law enforcement officer or agent of the state, and that McWilliams' statement was voluntarily made to him. The findings made by the state appellate court are supported by the record and McWilliams has offered nothing to rebut the presumption that the factual findings are correct. In light of the record, it was not in any way unreasonable for the Alabama Court of Criminal Appeals to conclude that neither *Escobedo* nor *Massiah* was violated by the cellmate's testimony. McWilliams has not offered clear and convincing evidence to rebut the presumption of correctness this court is required to accord the state court's findings. Further, he has not demonstrated that the state appellate court's decision on this issue was contrary to, or an unreasonable application of, clearly established federal law, nor an unreasonable interpretation of the facts in light of the evidence before that court. This claim is due to be denied.

Claim VIII. The Prosecutor's Improper Closing Argument in the Guilt Phase Denied James McWilliams a Fundamentally Fair Trial.

McWilliams claims that the prosecution's summation was "riddled with improper comments that misstated the evidence and inflamed the jury," and that "[v]iewed in its entirety, [the] closing argument denied [McWilliams] a fundamentally fair trial." *Petition* at 79. McWilliams points to the following comments that he believes were improper:

> Here, the prosecutor commenced his summation by reminding the jury that his "best witness," the victim, was not "here today. . . I wish she were here today with her family, and could testify about what happened" (1257). This gratuitous comment was an improper appeal for sympathy for the victim and her family. *See South Carolina v. Gathers*, 109 S. Ct. 2207 (1989).

The prosecutor next contended, "not a single" eyewitness "identified Jerry Porter" (1258). Defense counsel objected that this was a misstatement of the evidence because two witnesses "tentatively" identified Porter (1259). The court overruled the objection. The prosecutor's comment was a serious misstatement of the evidence for exactly the reason that counsel gave. If the jury accepted it, James McWilliams' defense of mistaken identification was dealt a fatal blow.

The prosecutor struck another foul blow at the heart of the defense when he argued that the jury should accept the fact that Jerry Porter had an alibi because the "Tuscaloosa County Homicide Unit investigated the case thoroughly and they concluded conclusively that the man had nothing to do with it" (1262). Counsel objected that there was "no evidence" to support this argument, but the court overruled his objection (1262). In fact, there was "no evidence" to support this argument, but the court overruled his objection (1262). In fact, there was no evidence that the Tuscaloosa police conducted a thorough investigation that conclusively exonerated Porter. Moreover, the opinion of the police about Porter's guilt or innocence was not competent evidence that the jury cold consider to resolve this issue.

The prosecutor also invented a piece of incriminating evidence when he argued that the Ohio police let appellant keep the brown coat that Steven McDaniel allegedly saw him wearing on the night of the murder (1264). Counsel objected to this argument because there was no evidence that James was wearing a brown coat when he was arrested in Ohio or allowed to keep it. The court overruled the objection with the comment that "the Court doesn't make rulings on the evidence. That is up to the jurors" (1264).

The court's comment seriously compounded the prejudicial impact of the prosecutor's improper arguments. When the prosecutor misstates the evidence, as the prosecutor repeatedly did here, the court has a duty to sustain objections and give appropriate curative instructions. *Darden v. Wainwright*, 106 S. Ct. at 2672. The jury cannot determine for itself whether a prosecutor's misstatement of the evidence was improper as a matter of law.

The prosecutor next stated that he personally suspected that James got rid of the khaki pants that he as allegedly wearing on the night of the murder because they had blood on them (1265). The argument was improper for two reasons. The prosecutor's personal opinion was not evidence and there was no evidence that appellant had blood on his pants and got rid of them.

The prosecutor improperly suggested that Jerry Porter's fingerprints were not found at the scene of the crime (1265). The court sustained counsel's

objection to this comment because there was no evidence that Porter's fingerprints were compared to the prints found at the scene of the crime (1266).

. . .

At James' trial, the prosecutor also argued, "I think it was obvious that Sonya (Smith) intended to be misleading and untruthful" (1266). The prosecutor's personal opinion about her credibility was not a proper subject for the jury to consider.

The prosecutor also misstated the law when he argued that a reasonable doubt requires "a good reason" to doubt the defendant's guilt and then reminded the jury, "that burden is overcome very day. Obviously people commit crimes, and people get convicted of them. It's like the Scales of Justice. I know all of you have seen that: we have to balance those scales. It's not overcoming the burden of proof for the State" (1268). These comments shifted and diminished the prosecution's burden of proof beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1969).

The prosecutor concluded his summation with a patently improper emotional appeal:

> And the people's rights, now, need to be enforced; people have a right to live free from crime and criminals. . .We have talked about all of the witnesses except one. Unfortunately, she is not a witness in body. But imagine, if you will, how Patricia Vallery Reynolds felt. You know, we are here in a rather sterile sometimes cold atmosphere of the courtroom. But it is abstract: we can set back and look and see what happens, and think about it, talk about it, and so forth. But the crime happens within the hot light of violence. And I wonder how she felt that night. The fear. . . (1269).

The court sustained counsel's objection to this inflammatory tirade, but the prosecutor continued to appeal to the jury's fears and emotions:

> It is a very degrading crime – degrading – what was done to her. Having been shot some 5 or 6 time, but beforehand, having been raped, robbed. I submit to you that this is a malicious crime, it is a cold-blooded crime, very heartless: the one who committed this crime is obviously devoid of feeling for humans (1270).

> This appeal for sympathy for the victim was irrelevant to the issue that the jury had to decide: whether the prosecution proved that James was the person who committed the crime.

Id. at 80-82, 86-87.

In denying this claim on appeal, the Alabama Court of Criminal Appeals found the following:

> The appellant argues that he was denied a fair trial because of improper comments made by the prosecutor during his closing argument at the guilt phase. The appellant refers to the following arguments made by the prosecutor:
>
> > I can assure you, I believe all of us in this room believe that this is real, and the gun in this case, which you have seen, that is real; the slacks which you have seen, that's real, showing the evidence of the semen-that's real; the only thing that is not real here today is Patricia Vallery Reynolds. She is, unfortunately, not here today, our best witness. The only evidence we have of her is her clothing, her key chain, and that picture (indicating). I wish she were here today with her family, and could testify about what happened. But she is not, and that is why we are here."
> >
> > Both of them talk about, they keep saying that our witnesses picked out Jerry Porter, and that they identified Jerry Porter. That's not correct, now, and you heard the evidence. They said it looked like him, but none of them said it was him: not a single one of them. They all said yes, that looked very much like him. And when you-
> >
> > [DEFENSE COUNSEL]: I am going to object to that as a misstatement of the evidence. The evidence was that they-the testimony was that they tentatively identified him as the one who was in the store. That was exactly what the officer testified to concerning Mr. McDaniel.
> >
> > THE COURT: The jury is aware of the evidence. I will note your objection.
> >
> > [PROSECUTOR]: Now, [Defense Counsel] attacked our witnesses: Marsh, Thomas. He talked about the Porter case, and

the friends supposedly alibiing. The Tuscaloosa County Homicide Unit investigated that case thoroughly, and they concluded conclusively that that man had nothing to do with it.

[DEFENSE COUNSEL]: I am going to object. There's no evidence of any conclusive determination by any homicide investigation.

THE COURT: I will note your objection.

[DEFENSE COUNSEL]: Could I have a ruling?

THE COURT: Overruled.

[PROSECUTOR]: He was going north. Why? Because he was fleeing from the crime; it looked like things were focusing in on him; he was not supposed to have been a suspect until Investigator Rester's card turns up on his door. And he is afraid that now he is a suspect. And the brown coat, he said, '[w]here is it?' Well, of course, we know that Trooper Elder didn't take the clothing he was wearing. It was cold up in Ohio in January, so he got his clothes back. He had to have gotten those.

[DEFENSE COUNSEL]: I am going to object to that as not being a correct statement of the evidence, Your Honor.

THE COURT: Again, the Court doesn't make rulings on the evidence. That is up to the jurors.

[PROSECUTOR]: And as to what happened to the khaki pants, I don't know. But I suspect they had blood on them. I suspect that he got rid of them.

All right, sir. And of course as far as printing the gun, this Defendant wasn't even a suspect for several weeks. They didn't know to print the gun. I think it was obvious that Sonya intended to be misleading and untruthful. And that's why I cross-examined her about what she could see from that phone to the apartment. She was trying to tell you that she was there on the phone and could see the door the whole time, and that she could have seen him come and go. But when I showed her obvious physical evidence, she admitted that she was not correct. And as for what Sonya told Chief Miller as to when this

> Defendant had the gun in Mobile, they were talking about in context of this crime, and-
>
> [DEFENSE COUNSEL]: Your Honor, I am going to object again. There is no evidence as to when that reference was to. I specifically asked Investigator Miller; he said there was no way he knew. I object; that is a misstatement of the evidence.
>
> [PROSECUTOR]: It is a fair inference.
>
> THE COURT: The jury is aware of the evidence.

The above-quoted prosecutorial comments were proper inferences or conclusions drawn from the evidence. The prosecutor could properly conclude the victim was dead, that Jerry Porter was never positively identified, that the information pertaining to Jerry Porter had been investigated and that the police had determined that Porter was in Sylacauga on the night of the murder, that the appellant might have gotten rid of the khaki pants and brown coat which he was seen wearing on the night of the offense, and that the appellant's wife was untruthful in testifying that she was able to see the apartment from the telephone booth.

> [PROSECUTOR]: He talked about the fingerprints. You know I didn't hear any mention of Jerry Porter's fingerprints in that story either. You heard the officers say that they rarely ever are able to get prints in a robbery. Certainly they are going to have a lot of prints because people work there day in and day out.
> [DEFENSE COUNSEL]: Your Honor, I object to that as misleading the jury. There is no evidence Jerry Porter's fingerprints were ever sent for comparison.
>
> THE COURT: Sustained.

As to the prosecutor's comment concerning the lack of evidence of any of Jerry Porter's fingerprints being found in Austin's food store, there was no evidence introduced that any of Jerry Porter's fingerprints were found or even sought out for purposes of comparison. The trial court sustained defense counsel's objection and, although it gave no curative instructions, we do not find that the prosecutor's argument was so unreasonable as to amount to plain error. *Dixon v. State*, 476 So.2d 1236 (Ala. Crim. App. 1985) (prosecutor's argument attempting to inject criminal record of defense witness into evidence was cured by trial court's sustaining of objections and giving instructions to the jury that there was no evidence of prior criminal conduct of the witness). *See*

also Holladay v. State, supra, at 131, *quoting Bui v. State*, supra (wherein it was held that improper prejudicial statements are generally considered eradicated when the trial court sustains the defendant's objection or gives curative instructions or both).

> [PROSECUTOR]: Now, I submit to you that we have proven beyond a reasonable doubt, the evidence on each of the counts of the indictment that you will have before you. When I talk about reasonable, defense attorneys sometimes would have you believe that that is with certainty. That is not what the law says, and I would ask you to listen when the Court explains the applicable law to you. Reasonable doubt is simply a doubt for which you can give a good reason: not conjecture, speculation. Sure, you could speculate about all kinds of things, but you should make your decision based only on the evidence that you have heard. The burden of proof in this case is the same in any case when the State has prosecuted. And that burden is overcome every day. Obviously people commit crimes, and people get convicted of them. It is like the Scales of Justice. I know all of you have seen that. We have to balance those scales. It is not overcoming the burden of proof for the State; it is not some impossibility.
>
> And the people's rights, now, need to be enforced; people have a right to live free from crime and criminals. It is time for you to fulfill your obligation.
>
> [DEFENSE COUNSEL]: Judge, we are going to object to this line of argument as being illegal [based] on the cases cited by the Eleventh Circuit.
>
> THE COURT: I will sustain.
>
> [PROSECUTOR]: All right, sir. I would like to ask you to think about this for a minute. We have talked about all of the witnesses except one. Unfortunately she is not a witness in body. But imagine, if you will, how Patricia Vallery Reynolds felt. You know, we are here in a rather sterile, sometimes it may seem cold atmosphere of the courtroom. But it is abstract: we can sit back and look and see what happens, and think about it, talk about it, and so forth. But the crime happens within the hot lights of violence. And I wonder how she felt that night? The fear-

> [DEFENSE COUNSEL]: Your Honor, I am going to object. This is pleading sympathy from the jury; it is not proper, and we do object.
>
> THE COURT: Sustained.
>
> The prosecutor's comments concerning the jury's obligation and "justice" were proper comments as an appeal by the prosecutor for law enforcement. *See e.g. Ex parte Waldrop*, 459 So.2d 959, 961-62 (Ala. 1984), *cert. denied*, 471 U.S. 1030, 105 S. Ct. 2050, 85 L. Ed. 2d 323 (1985); *Allen v. State*, 462 So.2d 1031, 1035 (Ala. Crim. App. 1984). The appellant argues that this summation by the prosecutor was a "patently improper emotional appeal"; however, this court has upheld similar comments during a prosecutor's closing. *See e.g. Rutledge v. State*, 523 So.2d 1087 (Ala. Crim. App. 1987), *reversed on other grounds*, 523 So.2d 1118 (Ala. 1988); *Lewis v. State*, 456 So.2d 413 (Ala. Crim. App. 1984).

McWilliams, 640 So. 2d at 1007-1009.

McWilliams has failed to show that this decision was contrary to clearly established federal law, or that it involved an unreasonable application of federal law. Neither has he shown that the state court's denial of the claim resulted in a decision was based on an unreasonable determination of the facts in light of the evidence presented in state court. Therefore, this claim is due to be denied.[15]

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[15] McWilliams also argues that his *Brady* and *Giglio* claims, raised as a separate claim in Claim XXV(a), support the current claim:

> First, James McWilliams' appellant counsel correctly showed that the prosecution misstated the evidence. Therefore, the Court of Criminal Appeals erred in its holding. More importantly, after James' trial and direct appeal, the State produced evidence showing it had repeatedly withheld exculpatory and impeaching evidence from him during his trial. (R. 6-16,466-531,689-830,892-95,905-31,943-82,991-999,1222-1360,1571-1615,1624-25,1674-1742,1754-55,1831-33,1841-71). Much of the withheld *Brady* evidence and *Giglio* evidence could have been used to rebut the above-cited argument by the State; moreover, this evidence could have been used to show that someone else, such as Jerry Porter or Wesley Homer, committed the crimes that James McWilliams has been charged with.
>
> First, **the State withheld an audio taped confession by Wesley Homer (Hallman) to the murder!** (R. 464-65,1698-99,1713-17,1843-44,1856-68).

Second, on January 3, 1985, Investigator Turner met with Ronald Thomas and a photo-spread lineup was conducted. (R. 894,926-27,955-56,1244-48,**1301**). Thomas picked out **Jerry Porter** from the five photos that were shown. (Id). The State disclosed a typed accounting of Thomas' identification. (Id). This disclosed report suggested that Thomas made a less than positive identification of Porter; moreover, Officer McFerrin testified no one ever positively identified Porter, but it was Turner that conducted the interview. (Id). At trial, Thomas was questioned about the January 3rd photograph lineup and testified, "Yes, I didn't pick no certain one, I just told them that it looked like him." (Id). The prosecutor later argued to the jury that eyewitnesses only "tentatively identified" Jerry Porter as the man they had seen at the time of the offense. (R. 1845). However, the new documents show that Porter was positively identified; therefore, there was no tentativeness to Thomas' identification, and it was improper for the State to argue something that is not true. (R. 894,926-27,1845,1854-55).

Third, the State misled the jury, counsel, and the courts when it presented testimony and argued "why no charges had ever been brought against Jerry Porter, and the witness testified that the police discovered that the informant was Porter's ex-girlfriend, who later admitted that she had lied about the identification in order 'to get even' with Porter." *McWilliams v. State*, 640 So.2d 982, 1003 (Ala. Crim. App. 1991).

However, the State had in its possession evidence that a city informant, Cecil Ward, also told the police that Jerry Porter was the person that killed Patricia Reynolds, so Porter's girlfriend, Teresa Harris, is not the only other person to identify Porter as the perpetrator. (R. 1688-89,1574-75,1613-15). Cecil Ward told Lt. Gene Pilkington on January 3, 1985, that: "Ward stated to me that Jerry Porter B/M was the man who robbed Austin's Food Store on Sunday, December 30, 1984, during which a white female was killed. Ward stated that Jerry Porter was the one that pulled the trigger on her. Ward also stated that Teresa Harris B/F knew of Jerry Porters actions.

> Cecil Ward had also on Wednesday 26, December 1984 given me information that Jerry Porter had been booked in the County Jail in Tuscaloosa using phony name. Jail records reflected that a James Coleman and Teresa Harris had been booked on 16, December 1984. Cecil Ward came by the Tuscaloosa County Jail on that date and talked to myself, Lt. Cecil Simpson and Inv. Hubert Hallman stating that Jerry Porter and Teresa Harris were living at Cribb Creek Apartments. Cecil Ward was trying to sell us information and stated that he had sold information to the City Police Department on previous occasions."

(R. 1574-75, 1613-15,1688-89).

Fourth, the State knew James had only one alibi witness, his wife Mrs. McWilliams. (R. 924,927,953-54, 1240-44,1295-96). Mrs. McWilliams' credibility was vital to James' defense. (I*d*). The State embarked to completely discredit her testimony about having called the Tuscaloosa police in response to a calling card left at the apartment the McWilliams were living in at the time of the crime. (*Id*).

At trial, Investigator Tommy Rester testified that no one in the Homicide Unit received a telephone call or message from Mrs. McWilliams in response to that card. (Id). However, Mrs. McWilliams testified that she called and left a message stating, "We had seen nothing,"

leaving her name and address. (Id).

The Tuscaloosa Homicide files have phone logs, which detail calls and the accompanying comments left by potential witnesses. (*Id*). The log has Mrs. McWilliams' name, the apartment number, name of the apartment complex and the exact message Mrs. McWilliams testified as to having left that day. (*Id*). The State had this in their possession and control, but they failed to disclose it to James' trial attorney. (*Id*).

Fifth, the State argued in its closing that James got rid of his Khaki pants because they had blood on them. This Court held that this argument was a proper inference or conclusion drawn from the evidence. *McWilliams v. State*, 640 So.2d at 1008. However, new evidence shows the State had control and possessions of two pair of Khaki pants and mislead the courts and jury by claiming James had destroyed the pants. (R. 918-21,950-52,973-74,978,1844-45,1235,1237-39,1242,1282-89, 1298,**1290**). If James' trial attorney would have had this withheld evidence, he could have shown that James did not destroy this evidence and the State would have been prevented from misleading the jury and the courts again. (*Id*).

Sixth, Howard Marsh testified at James' trial that he "did not have a clear mental image of what he saw" the night of the crime. (R. 1264-67,1320). However, the State failed to disclose that Marsh had pointed at some one else at a line-up in Tuscaloosa in which Jerry Porter had participated and the State did not disclose that Marsh was given a composite before the line-up he attended in Mobile, the one in which James was identified. (*Id*). Hence, the State prevented defense counsel from effectively examining Marsh. (*Id*).

Additionally, Marsh testified he was not testifying in the hope of receiving any type of reward. (*Id*). However, new evidence shows a letter from Marsh the day James was sentenced to death inquiring about a $10,000 reward. (*Id*).

Seventh, the State withheld the existence of a second distinctively different composite drawing, composed by a key state eyewitness Steven McDaniels. (R. 1267,**1324**). The non-disclosure of this exculpatory second composite prevented defense counsel from effectively cross-examining McDaniels and from using the composite to contrast the description McDaniels gave and the actual appearance of James. (*Id*).

The Alabama Court of Criminal Appeals also held:

> As to the prosecutor's comment concerning the lack of evidence of any of Jerry Porter's fingerprints being found in Austin's food store, there was no evidence introduced that any of Jerry Porter's fingerprints were found or even sought out for purposes of comparison. The trial court sustained defense counsel's objection and, although it gave no curative instructions, we do not find that the prosecutor's argument was so unreasonable as to amount to plain error.

McWilliams v. State, 640 So.2d 982, 1008 (Ala. Crim. App. 1991). However, before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt. *Ex parte Baker*, 2004 W.L. 1179271 at 7-11 (Ala. 2004), citing *Chapman v. California*, 87 S. Ct. 824 (1967). The Alabama courts did not use this standard.

Claim IX. The Trial Court Denied James McWilliams an Individualized Determination of the Appropriate Punishment for His Capital Offense When it Refused to Consider His Organic Brain Damage as a Mitigating Circumstance.

McWilliams argues the following in support of this claim:

> In the present case, the defense proffered reports from experts, medical records and lay testimony to prove that appellant suffered from organic brain damage. Additional testimony about his mental condition was elicited from experts who testified for the prosecution.
>
> Dr. Goff was the only expert who administered all of the neuropsychological tests that were required to determine whether James suffered from organic brain damage. Dr. Goff's report stated that "meaningful date was obtained" from these tests and "valid interpretations" were made from it, in spite of appellant's attempt to exaggerate his mental impairment (1633). He concluded that James had "genuine neuropsychological problems" because he suffered from "organic brain dysfunction," an "Organic Personality Syndrome" and a "mixed personality disorder with anti-social features." These mental defects caused him to behave in an "impulsive" manner (1634-36).
>
> Dr. Nagi testified for the prosecution that appellant suffered from an antisocial and paranoid personality disorder, but he did not perform any tests to determine whether appellant has organic brain damage. He agreed that James was incapable of learning from experience.
>
> The court found that this evidence of James' mental condition did not establish either of the two statutory mitigating circumstances that deal with mental impairment. *See* Ala. Code §13-11-7(2)(6). Consideration of the psychiatric mitigating evidence for this limited purpose was not sufficient to satisfy the Eighth Amendment. *Hitchcock v. Dugger*, 107 S. Ct. at 1823 and n. 3 (Eighth Amendment violated, although trial judge considered these

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> In addition, James' trial counsel diligently sought to have the State disclose all the physical evidence including latent prints, and the State claimed it had complied. (R. 894,959,961-63,978,985-86,1620,1689,1249-51,1313-15). However, recent documents show that some latent prints were found and sent for testing and the results are unknown. (*Id*). Once again, the prosecution lied about the existence of this evidence to defense counsel, the jury, and the courts.

Petition at 82-86.

However, as discussed in Claim XXV(a), McWilliams' *Brady/Giglio* claims are due to be denied because they are either procedurally barred or without merit. Therefore, they do nothing to advance the current claim.

identical statutory mitigating factors in Florida case). Alabama's statutory mental impairment mitigating circumstances deal with "the degree of the accused's mental disability." *Berard v. State*, 402 So.2d 1044, 1051 (Ala. Crim. App. 1980) (emphasis in original). The defendant must demonstrate substantial or extreme mental impairment to establish these mitigating factors. The Eighth Amendment required consideration of appellant's mental impairment as a mitigating factor, even if "it did not measure up" to this high statutory standard. *Clisby v. State*, 456 So.2d at 102.

When the court searched the record for nonstatutory mitigating circumstances, it found that "the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but this does not rise to the level of a mitigating circumstance" (1652) (emphasis added).

There is at lest a "legitimate basis for finding ambiguity concerning the [mitigating] factors actually considered by the trial court." *Eddings v. Oklahoma*, 455 U.S. at 119 (O'Connor, J. concurring). The court implicitly ruled as a matter of law that appellant's organic brain damage was not a mitigating circumstance because it was not severe. *See, e.g., Messer v. State of Florida*, 834 F.2d at 894 (court refused to consider "mile cerebral dysfunction" as mitigating factor). The Eighth Amendment required consideration of this "mental deficiency" as a nonstatutory mitigating factor, regardless of the degree of impairment. *Clisby v. State*, 456 So.2d at 102.

The evidence of some mitigating mental impairment was undisputed. The Court correctly noted that James McWilliams was malingering during the neuropsychological tests, but this was not inconsistent with Dr. Goff's finding of organic brain damage because he factored it into his report. FN.

> FN. Furthermore, Dr. Goff's diagnosis of organic brain damage was confirmed by the Bender Visual Motor Gestalt test that was administered by the Department of Corrections. This test indicated that Mr. McWilliams had "possible organic impairment" (1612).

Organic brain damage is a classic and highly significant mitigating circumstance. *See, e.g., Penry v. Lynaugh*, 109 S. Ct. at 2941; *Wilson v. Butler*, 813 F.2d 664, 672-73 (5th Cir. 1987); *In Re Saunders*, 472 P.2d 921 (Cal. 1970). The prosecution's experts did not test appellant for organic brain damage, but they agreed that he was "unable to learn from his mistakes" because of his antisocial personality disorder. FN. *Penry v . Lynaugh*, 109 S. Ct. at 2942, 2949; *see also Magwood v. Smith*, 791 F.2d at 1450 (where none

of the experts testified that defendant "was free from mental illness," court was required to consider his mental condition as mitigating factor).

> FN. An antisocial personality disorder is also a mitigating circumstance. *Eddings v. Oklahoma*, 455 U.S. at 107; *Hargrave v. Dugger*, 832 F.2d 1528, 1535 (11th Cir. 1987); *Clisby v. State*, 456 So.2d at 99-102.

The defense also presented evidence that appellant "spent time in the mental health facility" which indicated that he was "in need of psychiatric treatment," *Evans v. Lewis*, 865 F.2d 631, 636 (9th Cir. 1988), evidence that his mental problems were exacerbated by drug abuse (1348), *Messer v. State of Florida*, 834 F.2d at 894, and lay testimony about his head injuries. *Wilson v. Butler*, 813 F.2d at 673.

The court did not avoid an Eighth Amendment violation when it stated that the aggravating circumstances would have outweighed the mitigating circumstances, even if appellant's organic brain damage did rise to the level of a mitigating factor. In a "due process hearing of the highest magnitude," where the defendant's life is at stake, such ambiguous, hypothetical finds are unacceptable. *See generally Richardson v. State*, 376 So.2d 205, 224 (Ala. Crim. App. 1978). Since the court did not understand why appellant's organic brain damage was necessarily a mitigating circumstance, it could not reliably determine how much weight it would have deserved if it had actually considered whether appellant was "'less culpable than defendants who have no such excuse'" for their capital crimes. FN. *See Penry v. Lynaugh*, 109 S. Ct. at 2947 (citation omitted).

> FN. An antisocial personality disorder is also a mitigating factor. *Eddings v. Oklahoma*, 455 U.S. at 107; *Hargrave v. Dugger*, 832 F.2d 1528, 1535 (11th Cir. 1987); *Clisby v. State*, 456 So.2d at 99-102.

We dare not risk the imposition of the death penalty under these circumstances. *See Mills v. Maryland*, 108 S. Ct. 1860, 1870 (1988).

Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion in their factual holdings and failure to properly consider all of the facts in this case. A new sentencing proceeding must therefore be ordered.

Petition at 89-93.

The Alabama Court of Criminal Appeals denied this claim.[16] It stated:

> The appellant argues that the trial court denied him an individualized determination of the appropriate punishment by refusing to consider his organic brain damage as a mitigating circumstance. The record indicates that, during the penalty stage of his trial before the jury, the appellant presented evidence that he had suffered two head injuries and that he had visited medical professionals as a result of those head injuries. During his sentencing hearing before the trial judge, the appellant presented evidence indicating that he might suffer from some organic brain dysfunction, although, as that court noted, the report suggesting such dysfunction also indicated that the appellant was exaggerating his problems.
>
> The record further reveals that the trial court did consider this mitigating circumstance, but found that it was not supported by the evidence. In his sentencing findings, the trial court first considered the statutory mitigating circumstances, stating in pertinent part:
>
> > This Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance.
> >
> > Evidence was presented as to this circumstance during Phase II of this trial, being the punishment phase; however, after consideration of this evidence, this Court finds that the preponderance of the evidence does not show that the defendant was under the influence of extreme mental or emotional disturbance."
>
> Thereafter, in considering the nonstatutory mitigating circumstances presented by the appellant, the trial court stated:
>
> > In addition to the above enumerated mitigating circumstances, the defendant was given the opportunity during the 2nd phase of the trial before the jury returned its advisory verdict to present any other evidence of mitigating circumstances and to make any statement of mitigating circumstances. The

[16] This claim was presented to the Alabama Supreme Court, but that court did not address it, thus making the Court of Criminal Appeals the last state court to do so.

defendant testified that he received two blows to the head at various times and places, and this resulted in some organic brain damage.

Following the verdict of the jury recommending the death penalty, the defendant requested that this Court order neurological and neuropsychological testing, and this request was granted.

This Court interprets Section 13A-5-47 of the Code of Alabama 1975 as limiting . . . what additional evidence may be presented in the 3rd phase, the exception being evidence in response to any part of the pre-sentence investigation report which is the subject of factual dispute.

Nevertheless, the Court reviewed additional evidence presented by the defense as to the result of the neurological and neuropsychological testing of the defendant and other medical records of the defendant made a part of the record from Holman Prison and from Taylor-Hardin Secure Medical Facility, and after a careful review and consideration of these records and reports, the Court finds that the defendant was not and is not psychotic, either from organic brain dysfunction or any other reason. The Court does find that the defendant possibly has some degree of organic brain dysfunction resulting in some physical impairment, but that this does not rise to the level of a mitigating circumstance. The Court finds that the preponderance of the evidence from these tests and reports show the defendant to be feigning, faking, and manipulative.

The Court further finds that even if this did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance.

"It is not required that evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the trial judge." *Mikenas v. State*, 407 So.2d 892, 893 (Fla.1981).

"Although consideration of all mitigating circumstances is required by the United States Constitution, *Lockett v. Ohio*, 438 U.S. 586, 98 S. Ct. 2954, 57 L. Ed. 2d 973 (1978), the decision of whether a particular mitigating circumstance and

> sentencing is proven and the weight to be given it rests with the judge and jury. *Lucas v. State*, 376 So.2d 1149 (Fla. 1979)." *Smith v. State*, 407 So.2d 894, 901 (Fla. 1981).

Harrell v. State, 470 So.2d 1303, 1308 (Ala. Crim. App. 1984), *affirmed*, 470 So.2d 1309 (Ala. 1985), *cert. denied*, 474 U.S. 935, 106 S. Ct. 269, 88 L. Ed. 2d 276 (1985).

> It is not required that the evidence submitted by the accused as a non-statutory mitigating circumstance be weighed as a mitigating circumstance by the sentencer, in this case, the trial court; although consideration of all mitigating circumstances is required, the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer. *Cochran v. State*, 500 So.2d 1161 (Ala. Cr. App. 1984), *affirmed in pertinent part, remanded on other part*, 500 So.2d 1179 (Ala. 1985), *affirmed on return to remand*, 500 So.2d 1188 (Ala. Cr. App.), *affirmed*, 500 So.2d 1064 (Ala. 1986), *cert. denied*, 481 U.S. 1033, 107 S. Ct. 1965, 95 L. Ed. 2d 537 (1987).

Haney v. State, 603 So.2d 368 (Ala. Cr. App. 1991). *See also Bankhead v. State*, 585 So.2d 97 (Ala. Cr. App. 1989), remanded on other grounds, 585 So.2d 112 (Ala. 1991) ("[while Locket and its progeny require consideration of all evidence submitted as mitigating, whether the evidence is actually found to be mitigating is in the discretion of the sentencing authority").

> The trial court clearly found that the evidence presented by the appellant did not rise to the level of a mitigating circumstance. We find no abuse of the trial court's discretion in this regard.

McWilliams, 640 So. 2d at 987-88 (emphases added).

The state appellate court correctly sets out the federal law requiring that all evidence submitted and argued by the defendant as constituting mitigating evidence be considered by the court, as well as the law that "the decision of whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer." In this case, the trial court

did consider the alleged mitigating evidence and, based upon all of the relevant evidence, factually found it unpersuasive.

Wherefore, it is determined that the appellant has not demonstrated that the denial of this claim by the state court 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 Sates.[17] This claim is due to be denied.

Claim X. James McWilliams' Due Process Right to the Assistance of a Partisan Psychiatrist Was Violated During Both Penalty Phases of the Trial.

The Alabama Supreme Court made the following statements concerning this claim:

> The appellant argues that his rights to due process were violated during the penalty phase of his trial, because he was denied the right to the assistance of a psychiatrist. The record indicates that prior to trial the appellant filed a motion requesting a competency examination to determine whether he was sane and whether he was subject to any mental conditions which would bring certain mitigating circumstances into evidence. The trial court granted the motion and ordered a lunacy commission to evaluate the appellant's sanity at the time of the crime, at the time of the evaluation, and as it might relate to any statutory mitigating circumstances. The appellant was evaluated at Taylor-Hardin Secure Medical Facility. Thereafter, during the penalty stage before the jury, the appellant and his mother testified that he had suffered two head injuries that had caused him to seek medical attention. They further testified that his behavior became more destructive and violent following the head injuries. The appellant was also allowed to read into evidence a medical report, which was made by a Dr. Davis prior to the offense, and which indicated that he suffered from an atypical paranoid disorder with schizoid features. The appellant also testified that he had consulted a neurosurgeon about his head injuries, but that the neurosurgeon had told him that the headaches were "not a neurological disorder, that it was probably something

[17] McWilliams argues in *Petitioner's Notice of Supplemental Law*, Court Document 47, at 3, that he is "automatically entitled to a new sentencing hearing" pursuant to the holding in *Smith v. Texas*, 125 S. Ct. 400, 405-407. However, the holding in *Smith* concerned instructions to the jury, whereas this claim asserted that the trial judge refused to consider organic brain damage as a mitigating circumstance, which he clearly did consider.

that a psychiatrist had to take care of." On rebuttal, the State presented the testimony of Dr. Nagi, one of the lunacy commission psychiatrists who evaluated the appellant at Taylor-Hardin Secure Medical Facility, and Dr. Poythress, a clinical psychologist who was a member of the treatment team that evaluated the appellant. Dr. Nagi testified that the appellant exhibited no symptoms suggestive of head injury when he was at Taylor-Hardin.

After the jury returned an advisory verdict of death, the appellant requested that he be evaluated for possible organic brain damage. The trial court granted the motion, and the appellant was examined by a neuropsychologist, Dr. John Goff. After receiving the neuropsychological report, and prior to his sentence hearing before the trial court, the appellant requested a continuance because he had only two days to review the report. The motion was renewed prior to the trial court's sentencing, defense counsel stating as grounds the late receipt of the report and the inability of defense counsel, as a layman concerning psychological matters, to determine what material from the report, if any, to present with regards to the case. The defense counsel stated that he could not determine whether "the type of diagnosed illness," i.e., organic brain dysfunction, exists. The trial court denied the motion for continuance and told defense counsel to return that afternoon for closing argument and sentencing. After the recess, the trial court stated that it had reviewed the records and the defense counsel again moved for a continuance. The trial court denied the motion, stating: "Well this Court has reviewed the records and this Court finds apparent throughout all the records the following quotes: 'No evidence of psychosis; no psychosis; not psychotic; faking; feigning, seen as manipulative; et cetera.' " The trial court then reiterated that it would give defense counsel the opportunity to make a motion to evaluate the reports when court reconvened in the afternoon. The defense counsel replied that he had no time to do that. The report from Dr. Goff was admitted and was considered as mitigating evidence.

The appellant claimed that the psychiatric assistance provided to him was inadequate under *Ake v. Oklahoma*, 470 U.S. 68, 105 S. Ct. 1087, 84 L. Ed. 2d 53 (1985), because the psychiatrists' reports were given to and were used by the State against him and because he was entitled to additional assistance to interpret certain of their reports prior to sentencing. The appellant claims that the State used the testimony of one of the psychiatrists and one of the psychologists who had examined him, after the State had received a report from the lunacy commission, in order to obtain a recommendation of death by the jury. The appellant argues that the use of this testimony violates *Smith v. McCormick*, 914 F.2d 1153 (9th Cir.1990), which held that *Ake v. Oklahoma*, supra, precludes a confidential report from an adversarial, i.e. not neutral, psychiatrist from being used against the defendant, unless the appellant calls an

expert to testify. The State argues that when the appellant read into evidence the psychiatric report of Dr. Davis, which had been made just prior to the offense, he put his mental status at issue by relying on expert testimony, and thus enabled the State to offer the results of the court-ordered psychological evaluation requested by the appellant. The defense argues, in response, that this expert testimony offered by the State was actually in rebuttal to the lay testimony of the appellant and his mother.

In *Buchanan v. Kentucky*, 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987), the petitioner attempted to establish at trial the defense of "extreme emotional disturbance," by having a social worker read excerpts from several psychological evaluations of the petitioner that had been made following a previous arrest. On cross-examination, the prosecutor attempted to rebut this defense by having the social worker read excerpts from another evaluation, which had been prepared by a psychiatrist on the joint motion of the petitioner and the prosecution following his arrest in the case at issue. The Supreme Court of Kentucky held that the petitioner had opened the door for the admission of the report by introducing earlier reports that were favorable to him and that the introduction of the latter report did not violate the petitioner's rights under *Estelle v. Smith*, 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981). FN1.

> FN1. In *Estelle v. Smith*, supra, the prosecutor called a psychiatrist as the only witness in a capital sentencing hearing. The psychiatrist had examined the petitioner at the request of the trial judge, who had not notified defense counsel about the scope of the examination or apparently even the existence of the examination. Moreover, the petitioner had not placed at issue his competency to stand trial, nor had he offered an insanity defense. The United States Supreme Court held that the petitioner's Fifth Amendment rights were violated by the presentation of this testimony.

The United States Supreme Court distinguished *Estelle v. Smith*, supra, noting that the trial court had ordered, sua sponte, the psychiatric examination in that case and that the petitioner had neither asserted an insanity defense nor offered any psychiatric evidence at trial. The Court further stated:

> We thus acknowledge that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense.

> 'When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant may be required to submit to a sanity examination conducted by the prosecutor's psychiatrist.' [*Estelle v. Smith*], at 465 [101 S. Ct. at 1874].
>
> We further noted: 'A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding.' Id., at 468 [101 S. Ct. at 1875]. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution."

Buchanan v. Kentucky, supra, 483 U.S. at 422, 107 S. Ct. at 2917. The Court held that, under the facts of *Buchanan v. Kentucky*, supra, the introduction of the psychiatrist's report by the prosecution for the limited rebuttal purpose did not violate the Fifth Amendment. The Court further held that the introduction of the report did not violate the petitioner's Sixth Amendment right to the assistance of counsel, because defense counsel was on notice that he intended to put on a "mental status" defense for the petitioner and would therefore "have to anticipate the use of psychological evidence by the prosecution in rebuttal." *Buchanan v. Kentucky*, supra, 483 U.S. at 425, 107 S. Ct. at 2919. In so holding, the United States Supreme Court also stated, in a footnote, that the petitioner's deterrence argument was without merit. The appellant in the present case makes the same argument. The United States Supreme Court replied to this argument, stating:

> Petitioner contends that, if the use of a pretrial psychological evaluation is allowed, as in this case, defense counsel will be reluctant to request competency evaluations, even if they believe that their clients are in need of one, or they may 'sandbag' the trial by raising the competency issue in a post-trial motion. . . . Moreover, petitioner argues that the rule requiring competency examinations when the trial judge has doubts about

> the defendant's mental condition, . . ., will be undermined by a decision in favor of the Commonwealth.
>
> While we cannot foresee the tactics of defense counsel, we find somewhat curious petitioner's prediction and proposed solution. Where a competency examination is required . . . and where the defendant does not place his mental state at issue, the Fifth and Sixth Amendments would mandate that he be allowed to consult with counsel and be informed of his right to remain silent. We observed in Smith that if, after receiving such advice and warnings, a defendant expresses his desire to refuse to answer any questions, the examination can still proceed 'under the condition that the results would be applied solely for that purpose.' [*Estelle v. Smith*,] 451 U.S., at 468 [101 S. Ct. at 1875]. Thus, where a defendant does not make an issue of his mental condition, we fail to see how the decision today will undermine *Pate* [*v. Robinson*, 383 U.S. 375, 86 S. Ct. 836, 15 L. Ed. 2d 815 (1966)]. Where, however, a defendant places his mental status at issue and thus relies upon reports of psychological examinations, he should expect that the results of such reports may be used by the prosecutor in rebuttal.

Buchanan v. Kentucky, supra, at 426, fn. 21, 107 S. Ct. at 2919, fn. 21.

The holding in *Ake v. Oklahoma*, supra, requires that, if a defendant makes a threshold showing that his sanity is likely to be a significant factor at trial, the State must provide access to a psychiatrist's assistance, if the defendant cannot otherwise afford one. In the present case, the appellant was provided with psychiatric assistance; thus the principle of Ake was not violated. Moreover, because the appellant placed his mental status at issue by reading into evidence the earlier psychiatrist's report, the State could properly rebut this evidence by introducing evidence from the court-ordered psychiatric evaluation. *Buchanan v. Kentucky*, supra.

Although the appellant argues that he was entitled to additional psychiatric assistance to aid him in evaluating Dr. Goff's report, which was received prior to the trial court's sentencing, the requirements of *Ake v. Oklahoma*, supra, are met when the State provides the appellant with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine the appellant. There is no indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings. Moreover, the trial court indicated that it would have considered a motion to present an expert to

evaluate this report. "Although additional psychiatric testimony might have been desirable . . . it was not required under the constitution." *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir.1986).

McWilliams, 640 So. 2d at 988-991.

McWilliams makes the following argument in support of this claim:

When counsel requested the appointment of a psychiatrist to assist the defense, the court appointed a neutral expert and made his work product available to the prosecution, as well as the defense, in blatant violation of *Ake v. Oklahoma*, 470 U.S. 78 (1985). The prosecution used the fruits of the psychiatric examination that counsel initiated to obtain a jury recommendation of death.

Defense counsel demonstrated a need for additional assistance from a psychiatrist to prepare for the sentencing hearing. The court ordered a further psychiatric evaluation, but it refused to provide counsel with access to an expert to "assist in evaluation, preparation and presentation" of his case. *Ake v. Oklahoma*, 470 U.S. at 83. The accuracy of the sentencing hearing was seriously damaged by this violation of due process. The second evaluation produced significant mitigating evidence of organic brain damage, but counsel did not understand the expert's report. Because he was unable to explain it to the court, the court mistakenly found that it did not establish a mitigating circumstance.

Ake Violations During Jury Recommendation of Sentencing

In the landmark case of Ake v. Oklahoma, the Supreme Court held that due process sometimes requires the appointment of a psychiatrist to assist an indigent defendant and his lawyer in a capital sentencing trial. 470 U.S. at 83. A defendant is entitled to this assistance when he makes "a preliminary showing" that his mental condition "is likely to be a significant factor at trial." 470 U.S. at 74.

In the present case, defense counsel made a sufficient showing of need to trigger James McWilliams' due process right to the assistance of a psychiatrist in the penalty phase of the trial when he advised the court that appellant was receiving psychotropic medication and behaving erratically. *See, e.g., Ake v. Oklahoma*, 470 U.S. at 71. In an effort to comply with *Ake v. Oklahoma*, the court ordered a psychiatric examination of appellant at Taylor Hardin Secure Medical Facility, but the results of the examination were disclosed to the prosecution, as well as the defense. The defense elected not to

use any part of the Taylor Hardin evaluation during the jury trial on the issue of punishment, but the prosecution still used the testimony of the experts who evaluated James at Taylor Hardin.

While James McWilliams did not have a "constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own" expert, he was entitled to the assistance of a partisan psychiatrist selected for him by the court. *Ake v. Oklahoma*, 470 U.S. at 83. Due process can be satisfied by providing the defendant with the assistance of a partisan psychiatrist at a state hospital, such as Taylor Hardin. *See, e.g., Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir. 1986); *Garrison v. State*, 520 So.2d 219, 221 (Ala. 1987). The examination of the defendant by "neutral psychiatrists" at a state hospital was not sufficient. *Ake v. Oklahoma*, 470 U.S. at 85.

The defense psychiatrist's evaluation of James McWilliams should have been covered by the attorney-client privilege, unless the defense called the expert as a witness or presented his report in evidence. *Miller v. District Court, City & County of Denver*, 737 P.2d 834, 836-37 (Colo. 1987) (and cases cited therein); *Ballew v. State*, 640 S.W.2d 237 (Tex. Crim. App. 1980). Disclosure of the Taylor Hardin evaluation to the prosecution was as unacceptable as compelling defense counsel to turn over his notes of his interview with the defendant. *Id.*

Defense counsel did not waive the confidentiality of the Taylor Hardin evaluation by presenting lay testimony about appellant's mental condition. *Miller v. District Court*, 737 P.2d at 838 (and cases cited therein). A waiver based solely on the presentation of lay testimony to prove a mental status defense "would chill the defendant's dialogue" with the defense psychiatrist and frustrate the policy underlying the attorney-client privilege. Id. at 839 (*citing Ake v. Oklahoma*).

The jury's recommendation of death must be reversed, although defense counsel did not object to the disclosure of the Taylor Hardin evaluation to the prosecution or the testimony of the Taylor Hardin experts. In a capital case, "the 'plain error' doctrine, as enunciated in rule 45A," requires a decision on the merits of any error that adversely affected a substantial right of the defendant. *Ex Parte Johnson*, 507 So.2d 1351, 1356 (Ala. 1986). James' due process right to the assistance of partisan dense psychiatrist was completely eviscerated when the prosecution used the psychiatrist's privileged work product to obtain a recommendation of death from the jury.

Ake Violation During Sentencing by the Court

A further violation of *Ake v. Oklahoma* occurred during the sentencing hearing that the court conducted. After the jury recommended the death penalty, defense counsel requested the assistance of an expert to determine whether appellant had organic brain damage. Counsel made the necessary "threshold showing to the trial court," *Ake v. Oklahoma*, 470 U.S. at 83, by alleging that James sustained two head injuries and received psychiatric treatment in prison. The court ordered a complete neuropsychological examination of appellant, but it did not provide all of the assistance that was required to give him "[m]eaningful access to justice." *Ake v. Oklahoma*, 470 U.S. at 77.

When an indigent defendant demonstrates to the trial court that his mental condition is likely to be a significant factor in his capital sentencing trial, as James McWilliams did, "the State must, at minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." *Ake v. Oklahoma*, 470 U.S. at 83 (emphasis added). The court ordered an appropriate examination, but it refused to give counsel access to an expert to assist him in preparing and presenting his case.

Dr. John Goff was hired by the state to perform the neuropsychological examination that the court ordered to assist the defense. The neuropsychological tests were so difficult to interpret that they presented a "diagnostic dilemma" to Dr. Goff. Defense counsel received Dr. Goff's written report less than two days before the sentencing hearing. He did not understand it, but he sensed that it was sufficiently favorable to merit further investigation. Counsel advised the court that he lacked the expertise to interpret the highly technical report. He explained that Dr. Goff's findings appeared to conflict with the findings of the Taylor Hardin experts. Counsel literally begged the court for an opportunity to consult with an expert who could explain the report to him. The court refused to allow this.

Dr. Goff's report was placed in evidence without explanation, because James had "no expert witness" to "introduce on his behalf evidence in mitigation of his punishment." *Ake v. Oklahoma*, 470 U.S. at 73. The report was useless without the testimony of a defense expert to explain it. Compare *Magwood v. Smith*, 791 F.2d at 1443 (no Ake violation because "three experts gave testimony highly favorable" to defense about their findings). Defense counsel could not be expected to interpret the report without the assistance of an expert, any more than he could be expected to perform the battery of

sophisticated neuropsychological tests that Dr. Goff administered. *Ake v. Oklahoma*, 470 U.S. at 83.

The "potential accuracy" of the sentencing verdict would have been "dramatically enhanced" if counsel had the assistance of an expert to help him "translate a medical diagnosis into language" that the court would have understood *Ake v. Oklahoma*, 470 U.S. at 81, 83. When a person sustains a serious head injury, as appellant did on two occasions, and his brain is damaged in the manner that Dr. Goff described in his report, he is likely to undergo "a marked change in personality." Kaplan and Sadock, *Comprehensive Textbook of Psychiatry*, 548, 489, 877 (4th Ed. 1985). Through no fault of his own, he will begin to engage in violent conduct. *Id*. at 964; *accord* R. Slovenko, *Psychiatry and Law*, 400 (1973). If the defense had been able to prove with expert testimony that appellant was "less able than a normal adult to control his impulses" because his brain was injured, this could have dramatically altered the sentencing calculus. *Penry v. Lynaugh*, 109 S. Ct. 2934, 2949 (1989).

Expert testimony about Dr. Goff's report would also have nullified the testimony of the experts from Taylor Hardin, who concluded that appellant merely suffered from an antisocial personality disorder. *See, e.g.*, *Deutscher v. Whitley*, 884 F.2d 1152, 1161 (9th Cir. 1989). The symptoms of organic brain damage mimic the symptoms of the antisocial personality disorder. Kaplan and Sadock, supra, 1866-68; R. Slovenko, supra, at 400. The Taylor Hardin experts based their diagnosis of antisocial personality disorder on a notoriously unreliable mental status examination. While "psychiatrists widely and frequently disagree on what constitutes mental illness," *Ake v. Oklahoma*, 470 U.S. at 81, virtually all competent experts agree that mental status examination is inadequate to determine whether antisocial conduct is caused by organic brain damage or an antisocial personality disorder. Kaplan and Sadock, supra, at 835.

The defense would surely have prevailed in a battle of the experts, if counsel had been given an opportunity to present the "opposing views" of an expert, who understood why Dr. Goff's report was obviously superior to the Taylor Hardin evaluation. *See Ake v. Oklahoma*, 470 U.S. at 84. Dr. Goff administered a battery of neuropsychological tests, including the Halstead test. These tests are widely considered to be the most valid and reliable tool for detecting organic brain damage. Filskov and Goldstein, *Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery*, 42 J. of Consulting and Clinical Psych. 382 (1974); Schreiber, Goldman, Goldfader and Snow, *The Relationship Between Independent Neuropsychological and Neurological*

> *Detection and Localization of Cerebral Impairment*, 162 J. of Nervous and Mental Disease 360 (1976).
>
> The defense was absolutely "devastated by the absence of…psychiatric… testimony" about these complex issues. *Ake v. Oklahoma*, 470 U .S. at 83. James McWilliams' death sentence must be vacated because he was entitled to the assistance of an expert who could have explained to the court why Dr. Goff's diagnosis of organic brain damage called for a less severe penalty.
>
> Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion in their factual holdings and failure to properly consider all of the facts in this case. A new sentencing proceeding must therefore be ordered.

Petition at 93-99.

The Use of Testimony from the Lunacy Commission

The respondent contends that the claim that has not been exhausted because it was not fairly presented to the Supreme Court of Alabama during the direct appeal. *Respondents' Brief on the Grounds for Relief Presented in McWilliams' Petition for Writ of Habeas Corpus*, Court Document 11, at 31. The Alabama Supreme Court recited some of the facts upon which this claim is based, but the court did not deal with the issue the petitioner now presents to this court.

In his reply brief, however, the petitioner states:

> The State claimed the *Ake* violation at the penalty stage has not been exhausted because it was never presented to the Alabama Supreme Court. However, the Alabama Supreme Court had plain error review, held it reviewed James' record for not raised plain error, and reviewed the issues he raised before the Court of Appeals, and James raised the issue before the Court of Appeals, making it more likely the state appellate court came across the claim during its review of the record. *Julius v. Johnson* 840 F.2d at 1546, fn. 10. Hence James exhausted the issue.

Petitioner's Reply Brief, Court Document 16, at 22.

The Supreme Court has held that:

> [b]efore seeking a federal writ of habeas corpus, a state prisoner must exhaust available state remedies, 28 U.S.C. § 2254(b)(1), thereby giving the State the " ' "opportunity to pass upon and correct" alleged violations of its prisoners' federal rights.' " *Duncan v. Henry,* 513 U.S. 364, 365, 115 S. Ct. 887, 130 L. Ed. 2d 865 (1995) *(per curiam)* (quoting *Picard v. Connor,* 404 U.S. 270, 275, 92 S. Ct. 509, 30 L. Ed. 2d 438 (1971). To provide the State with the necessary "opportunity," the prisoner must "fairly present" his claim in each appropriate state court (including a state supreme court with powers of discretionary review), thereby alerting that court to the federal nature of the claim. *Duncan, supra,* at 365-366, 115 S. Ct. 887; *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999). This case focuses upon the requirement of "fair presentation."

Baldwin v. Reese, 541 U.S. 27, 29, 124 S. Ct. 1347, 1349 (2004).

In the instant case, McWilliams argues that because he raised this issue to the Court of Appeals, and because the Alabama Supreme Court reviewed the record for not raised plain error, and reviewed the issues the petitioner raised before the Court of Appeals, the claim was "fairly presented."[18] This argument is akin to that made by the petitioner in *Baldwin*. The *Baldwin* court summarized the facts of that case as follows:

> Michael Reese, the respondent, appealed his state-court kidnaping and attempted sodomy convictions and sentences through Oregon's state court system. He then brought collateral relief proceedings in the state courts (where he was represented by appointed counsel). After the lower courts denied him collateral relief, Reese filed a petition for discretionary review in the Oregon Supreme Court.
>
> The petition made several different legal claims. In relevant part, the petition asserted that Reese had received "ineffective assistance of both trial court and appellate court counsel." App. 47. The petition added that "his

[18] The Petitioner does not use the term "fairly presented" or even argue that standard. However, since that standard is the one which applies, the court will apply it.

> imprisonment is in violation of [Oregon state law]." *Id.,* at 48. It said that his *trial* counsel's conduct violated several provisions of the *Federal* Constitution. *Ibid.* But it did not say that his separate *appellate* "ineffective assistance" claim violated *federal* law. The Oregon Supreme Court denied review.
>
> Reese ultimately sought a federal writ of habeas corpus, raising, among other claims, a federal constitutional claim that his *appellate* counsel did not effectively represent him during one of his direct state-court appeals. The Federal District Court held that Reese had not "fairly presented" his federal "ineffective assistance of appellate counsel" claim to the higher state courts because his brief in the state appeals court had not indicated that he was complaining about a violation of *federal* law.
>
> A divided panel of the Ninth Circuit reversed the District Court. 282 F.3d 1184 (2002). Although the majority apparently believed that Reese's petition itself did not alert the Oregon Supreme Court to the federal nature of the appellate "ineffective assistance" claim, it did not find that fact determinative. *Id.,* at 1193-1194. Rather, it found that Reese had satisfied the "fair presentation" requirement because the justices of the Oregon Supreme Court had had "the *opportunity* to read ... the lower [Oregon] court decision claimed to be in error before deciding whether to grant discretionary review." *Id.,* at 1194 (emphasis added). *Had they read the opinion of the lower state trial court,* the majority added, the justices would have, or should have, realized that Reese's claim rested upon federal law. *Ibid.*
>
> We granted certiorari to determine whether the Ninth Circuit has correctly interpreted the "fair presentation" requirement.

Baldwin, 541 U.S. at 29-30, 124 S. Ct. At 1349 - 1350 (emphasis in original).

> The *Baldwin* court held:
>
> [T]o say that a petitioner "fairly presents" a federal claim when an appellate judge can discover that claim only by reading lower court opinions in the case is to say that those judges *must* read the lower court opinions-for otherwise they would forfeit the State's opportunity to decide that federal claim in the first instance. In our view, federal habeas corpus law does not impose such a requirement.

Id. at 31. Further, the Court wrote:

> [O]rdinarily 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 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.

Id. at 32.

McWilliams' reliance on *Julius v. Johnson*, 840 F.2d 1533 (11th Cir. 1988), an Eleventh Circuit case decided sixteen years before the Supreme Court's decision in *Baldwin*, is misplaced. In *Julius*, the Eleventh Circuit clearly stated that:

> the mere existence of a "plain error" rule does not preclude a finding of procedural default; moreover, the assertion by an Alabama court that it did not find any errors upon its independent review of the record does not constitute a ruling on the merits of claims not raised in that court or in any court below.

Julius v. Johnson, 840 F.2d 1533, 1546 (11th Cir. 1988). Further, the footnote cited by the petitioner clearly states that the Court of Appeals never decided the issue in the instant case. *Julius*, 840 F.2d at 1546 n. 10 ("Nor need we decide whether such language permits federal review where the defendant raised the claim at trial, thus making it more likely that the state appellate court came across the claim during its review of the record.").

McWilliams makes no claim that the issues contained in this part of his habeas petition were raised to the Supreme Court of Alabama in a petition or a brief or a similar document. Thus, as to this claim, McWilliams did not exhaust available state remedies as required by *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1732-33 (1999).

However, a petitioner may still have his claim decided on the merits even if he failed to exhaust available state remedies, if he can show cause and prejudice or actual innocence. The petitioner has offered nothing in the way of cause to excuse his failure to present this claim to the Alabama Supreme Court. Further, as previously discussed, McWilliams has not

made a showing that he is actually innocent. Thus, McWilliams is procedurally barred from raising this claim in federal court.

Whether *Ake* Was Violated by not Providing Petitioner with Expert Assistance at the Judicial Phase of the Sentencing

McWilliams again cites *Ake v. Oklahoma*, 470 U.S. 68, 74 (1985), where the Supreme Court held:

> We hold that when a defendant has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the Constitution requires that a State provide access to a psychiatrist's assistance on this issue if the defendant cannot otherwise afford one.

Ake v. Oklahoma, 470 U.S. 68, 74 (1985). Further, the *Ake* Court held:

> We therefore hold that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.

Ake, 470 U.S. at 83. Further, with respect to rebuttal purposes at the sentencing phase, the Court held:

> Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequence of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

Id. at 84.

McWilliams contends that the trial court erred because, even though it ordered an examination of the defendant to determine if he had organic brain damage, at the sentencing

proceeding "it refused to give counsel access to an expert to assist him in preparing and presenting his case." *Petition* at 96.

The psychological testing requested by McWilliams was ordered by the trial court, and, therefore, he received the assistance required by *Ake*. Dr. Goff completed the testing and a report was given to both the petitioner and the respondent. McWilliams complains that counsel "lacked the expertise to interpret the highly technical report," that "the report was useless without the testimony of a defense expert to explain it," and "defense counsel could not be expected to interpret the report without the assistance of an expert, any more than he could be expected to perform the battery of sophisticated neuropsychological tests that Dr. Goff administered." *Petition* at 97.

There is no evidence that Dr. Goff was unavailable to the petitioner for consultation or to call as a witness. Indeed, the record indicates that McWilliams never requested Dr. Goff's assistance. Instead, McWilliams' counsel insisted that a different expert review Dr. Goff's findings.

In discussing the right to psychiatrist's assistance the *Ake* court was clear:

> [t]his is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his personal liking or to receive funds to hire his own. Our concern is that the indigent defendant have access to a competent psychiatrist for the purpose we have discussed, and as in the case of the provision of counsel we leave to the State the decision on how to implement this right.

470 U.S. at 83. Further, the *Ake* court limited psychological assistance to one expert. *Id.* at 78-79 ("This is especially so when the obligation of the State is limited to provision of one competent psychiatrist, as it is in many States, and as we limit the right we recognize today.")

Dr. Goff was the expert appointed for McWilliams. The onus was McWilliams' counsel to consult Dr. Goff if he had questions or did not understand the report. Not only could Dr. Goff have explained the report to counsel, but also to the jury.[19]

As the Supreme Court said:

> Although the appellant argues that he was entitled to additional psychiatric assistance to aid him in evaluating Dr. Goff's report, which was received prior to the trial court's sentencing, the requirements of *Ake v. Oklahoma*, supra, are met when the State provides the appellant with a competent psychiatrist. The State met this requirement in allowing Dr. Goff to examine the appellant. There is no indication in the record that the appellant could not have called Dr. Goff as a witness to explain his findings or that he even tried to contact the psychiatrist to discuss his findings. Moreover, the trial court indicated that it would have considered a motion to present an expert to evaluate this report. "Although additional psychiatric testimony might have been desirable . . . it was not required under the constitution." *Magwood v. Smith*, 791 F.2d 1438, 1443 (11th Cir.1986).

McWilliams, 640 So. 2d at 988-991.

Thus, the Court of Criminal Appeals' ruling on this issue was not contrary to clearly established Federal law as determined by the United States Supreme Court and did not involve an unreasonable application of clearly established Federal law as determined by the United States Supreme Court. This claim is due to be denied.

Claim XI. The Trial Court Denied James McWilliams' Effective Assistance of Counsel When it Refused to Give His Attorney Any Time to Prepare to Use the Mitigating Evidence of Organic Brain Damage That the State Disclosed to Him at the Last Moment.

The Alabama Court of Criminal Appeals addressed this issue as follows:

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[19] Notably, the *specific* testing requested by counsel for the Petitioner was ordered in this case. This minimizes somewhat the claim that he could not understand these tests or their results.

The appellant argues that he was denied the effective assistance of counsel when the trial court refused to give his attorney any time to evaluate the use of the mitigating evidence of organic brain damage, which was disclosed to him "at the last moment."

Despite the appellant's argument to the contrary, there is no indication in the record that the State interfered with the appellant's right to the effective assistance of counsel, by failing to produce all of his medical records from Holman Prison and all of his medical records from Taylor-Hardin Secure Medical Facility sufficiently in advance of his trial or sentencing hearing. The appellant argues that the medical records were not received until after the penalty stage of his trial before the jury and that this delay prejudiced his case. However, as the State argues, the record indicates that the appellant first requested a psychiatric examination by motion filed on January 21, 1985, which motion was granted on January 29, 1986. The psychiatric examination was conducted at Taylor-Hardin Secure Medical Facility over a period from April 2, 1986, to May 29, 1986. The resulting report was filed with the trial court on June 4, 1986, and copies were provided to defense counsel and the State. Defense counsel argues that the appellant filed a subpoena duces tecum, ordering representatives of Taylor-Hardin to produce medical records on June 18, 1986. On July 18, 1986, the appellant filed a motion to have Taylor-Hardin held in contempt for failing to comply. On July 21, 1986, the trial court ordered Taylor-Hardin to produce all its records relevant to the appellant, and this order was complied with on July 25, 1986. Thereafter, the appellant filed a petition to hold Taylor-Hardin in contempt for failing to produce the actual raw test data, and the trial court ordered these documents produced on July 31, 1986. The order was complied with on August 1, 1986. The appellant's trial began on August 20, 1986, and the jury returned with its verdict on August 27, 1986. Either prior to the trial or prior to the sentencing stage before the jury, which occurred on August 28, 1986, the appellant did not request a continuance to obtain further records. Following the penalty stage before the jury, on September 3, 1986, the appellant filed a motion to show cause, alleging that on August 13, 1986, he had served a subpoena duces tecum on Holman Prison requesting that his psychiatric records be produced and that Holman Prison had failed to comply. This subpoena does not appear in the record. On September 3, 1986, the trial court ordered Holman Prison to produce the psychiatric records before October 1, 1986, and also ordered the appellant's neuropsychological examination, which he had requested, and which was completed on October 3, 1986, with a report being filed on October 7, 1986. The appellant was subsequently sentenced on October 9, 1986.

We find no prejudice to the appellant on the basis of any alleged interference by the State, although there is some indication of delays in

providing reports. It is clear from the appellant's own testimony during the penalty phase before the jury, that he had long been aware of his head injuries and that he had sought medical evaluation as to the possibility of any organic brain damage based thereon. As he testified, he had been told that he had none. Moreover, the lunacy commission found no indications of any organic brain damage.

Nor did the trial court err in denying the appellant's motion for a continuance in order for the appellant to have additional time to review the neuropsychologist's report and to consult with an expert about the report.

> Applying the principles of the capital case of *Ex parte Hays,* 518 So.2d 768 (Ala. 1986), we find it extremely improbable that the additional time for preparation requested by the defendant would have changed the result of the trial and that the defendant has not met his burden of showing actual prejudice in the defense of the charge for which he was convicted. In *Hays,* our Supreme Court wrote:
>
> " 'Hays contends that the trial court's denial of his motion for continuance, under the facts of this case, denied him his constitutional right to effective assistance of counsel under the Sixth Amendment of the United States Constitution. The Court of Criminal Appeals rejected this argument because Hays failed to show any actual prejudice in the defense of his case as a result of the trial court's denial of his motion. We agree.
>
> " 'The United States Supreme Court in *Morris v. Slappy,* 461 U.S. 1, 11-12, 75 L. Ed. 2d 610, 619, 103 S. Ct. 1610, 1616 (1983), recognized that:
>
> > " 'Not every restriction on counsel's time or opportunity to investigate or to consult with his client or otherwise to prepare for trial violates a defendant's Sixth Amendment right to counsel. *See Chambers v. Maroney,* 399 U.S. 42, 53-54, 90 S. Ct. 1975, 1982-1983, 26 L. Ed. 2d 419 (1970). Trial judges necessarily require a great deal of latitude in scheduling trials. Not the least of their problems is that of assembling the witnesses, lawyers, and jurors at the same place at the same time, and this burden counsels against continuances except for compelling reasons.

> Consequently, broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary 'insistence upon expeditiousness in the face of a justifiable request for delay' violates the right to assistance of counsel. *Ungar v. Sarafite,* 376 U.S. 575, 589, 84 S. Ct. 841, 849, 11 L. Ed. 2d 921 (1964).

" ' *See also, Avery v. Alabama,* 308 U.S. 444, 60 S. Ct. 321, 84 L. Ed. 377 (1940); *Connor v. State,* 447 So.2d 860 (Ala. Cr. App. 1984). Furthermore, it is evident from recent Supreme Court precedent that, although certain criteria such as the time provided for the investigation and preparation of the case, counsel's experience, the gravity of the charge and complexity of defenses, and counsel's accessibility to witnesses are relevant factors to consider when evaluating effectiveness of counsel, the controlling analysis is whether the action prejudiced the accused in the defense of his or her case. *See United States v. Cronic,* 466 U.S. 648, 104 S. Ct. 2039, 80 L. Ed. 2d 657 (1984). The accused has the burden of proving prejudice by making a showing that he or she did not receive "a fair trial, a trial whose result is reliable." *Strickland v. Washington,* 466 U.S. 668 [687], 104 S. Ct. 2052, 2064, 80 L. Ed. 2d 674, 693 (1984). As opined in *United States v. Cronic, supra:*

> " ' "The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted-even if defense counsel may have made demonstrable errors-the kind of testing envisioned by the Sixth Amendment has occurred."

'466 U.S. at 656, 104 S.C. at 2045, 80 LED.2d at 666.' *Hays,* supra, 518 So.2d at 771-72.

Fortenberry v. State, 545 So.2d 129, 139-40 (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).

> In the present case, the appellant has demonstrated no prejudice by the trial court's denial of his motion for continuance. The trial court stated that it had reviewed the report and had found that, while the report indicates that there may have been some indication of organic brain dysfunction, the report also made continual references to the fact that the appellant appeared to be feigning or faking his problems during the examination.

McWilliams, 640 So.2d at 991 -993.

The petitioner presents his argument:

> [T]he trial court denied James McWilliams effective assistance of counsel when it refused to give his lawyer any time to prepare to use mitigating psychiatric evidence that was disclosed to him during the trial. *Blake v. Kemp*, 758 F.2d 523 (11th Cir. 1985).
>
> A defendant in a capital trial "is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). When there is "direct governmental interference" with counsel's efforts to play that role, the Sixth Amendment is offended. *Perry v. Leeke*, 102 L. Ed. 2d 624, 633 (1989) (and cases cited therein).
>
> In the punishment phase of a capital trial, the right to counsel encompasses the investigation and presentation "of mental impairment as a mitigating factor." *Wilson v. Butler*, 813 F.2d 664, 671 (5th Cir. 1987); *accord Deutscher v. Whitley*, 884 F.2d 1152, 1160-61 (9th Cir. 1989); *Evans v. Lewis*, 855 F.2d 631, 636-37 (9th Cir. 1988); *Blake v. Kemp*, 758 F.2d at 534; *In Re Saunders*, 472 P.2d 921 (Cal. 1970) (counsel failed to effectively investigate mitigating evidence of "head injuries that resulted in organic brain damage"). When "actions on the part of the state made it impossible" for counsel to present evidence of the defendant's mental impairment, the outcome of the trial is "presumptively unreliable." *Blake v. Kemp*, 758 F.2d at 532.
>
> In the present case, defense counsel made an extraordinary effort to investigate psychiatric mitigating evidence. Months before the trial, he obtained assistance form the court to have his indigent client examined by psychiatrists at the state's expense. When he discovered that appellant was treated with psychotropic drugs in a prison hospital, he suspected that the state had custody and control of mitigating psychiatric evidence. He requested the necessary medical records to investigate this possibility long before the sentencing trial.

When the day of the jury sentencing trial arrived, defense counsel still did not have the basic tools that he needed to present psychiatric mitigating evidence because state officials interfered with his concerted effort to obtain them. He had a conclusory report from Taylor Hardin Secure Medical Facility, but Taylor Hardin successfully resisted his efforts to obtain the unedited medical records and clinical data that were compiled there. Holman Hospital also refused to disclose the records that counsel subpoenaed.

The State "materially interfered with the defendant's ability 'to require the prosecution's case to survive the crucible of meaningful adversarial testing.'" *Blake v. Kemp*, 758 F.2d at 533 (*quoting Cronic v. United States*, 104 S.C. 2039, 2047 (1984). The medical records and clinical data from Taylor Hardin would have shown that the experts at that facility did not perform a neuropsychological examination to determine whether appellant suffered from organic brain damage. The Holman Hospital records would have shown that appellant exhibited psychotic symptoms. *See Evans v. Lewis*, 855 F.2d 631, 636-37 (9th Cir. 1988) (counsel ineffective because he did not investigate "possible mental impairment" as mitigating circumstance after he learned that defendant was incarcerated in prison mental hospital and he declined offer of continuance to obtain "records"). If the state had disclosed these records to counsel before the jury recommended the death penalty, he undoubtedly would have asked for the neuropsychological examination, which subsequently revealed that James had organic brain damage. By the time that he realized that such an examination was necessary, it was too late to present the results to the jury.

The court also "materially interfered" with counsel's ability to present psychiatric mitigating evidence during the hearing that it conducted on the issue of punishment. *See Blake v. Kemp*, 758 F.2d at 532-33. The court authorized a compete [sic] neuropsychological examination of appellant at the state's expense and ordered production of the Taylor Hardin and Holman Hospital records that counsel had been trying to obtain for months, but this "highly significant evidence" was not "made available to defense counsel until the day before" the hearing. *Blake v. Kemp*, 758 F.2d at 532.

Counsel advised the court that he did not understand the report that he received about the neuropsychological examination or the medical records. He pleaded for time to study this new evidence and consult with an expert about its meaning. The court refused to grant even a short continuance.

Defense counsel proffered Dr. Goff's report and the other medical records at the sentencing hearing, but this "was hardly an adequate substitute for a psychiatric opinion developed in such a manner and at such a time as to

> allow counsel a reasonable opportunity to use the psychiatrist's analysis in the preparation and conduct of the defense." *Blake v. Kemp*, 758 F.2d at 533. Courts have "long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." *United States v. Edwards*, 488 F.2d 1154, 1163 (5th Cir. 1974). A "lawyer inexpert in the science of psychiatry" could not be expected to interpret and explain the results of a psychiatric examination that he received at the last possible moment. *See United States v. Taylor*, 437 F.2d 371, 377, n. 9 (4th Cir. 1971).
>
> In short, James McWilliams was denied effective assistance of counsel when the state interfered with his lawyer's diligent efforts to investigate and present psychiatric mitigating evidence. Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion in their factual holdings and failure to properly consider all of the facts in this case. A new sentencing proceeding must therefore be ordered.

Petition at 100-103.

The respondent contends that this claim has not been exhausted because "it was not fairly presented to the Supreme Court of Alabama during the direct appeal." *Respondents' Brief on the Grounds for Relief Presented in McWilliams' Petition for Writ of Habeas Corpus*, Court Document 11 at 34. Further, the respondent states:

> This claim for relief, contained on pages 99-103 of McWilliams' petition for writ of habeas corpus, has not been exhausted, as it was not fairly presented to the Supreme Court of Alabama during the direct appeal. While McWilliams raised a very similar claim on direct appeal before the Supreme Court of Alabama, he did not raise this claim under the guise of IAC and *Strickland v. Washington*. (McWilliams' Brief to the Supreme Court of Alabama on Direct Appeal at pp. 43-46) (Vol. 13, Tab # R-38, at pp. 43-46) Not once did McWilliams refer to *Strickland v. Washington*, 466 U.S. 668 (1984), mention "assistance of counsel," or state the standard for establishing ineffective assistance of counsel. Instead, McWilliams presented this claim in the guise of an *Ake* claim. As such, the state courts were not fairly presented with this claim (federal IAC claim) meaning McWilliams failed to exhaust his state court remedies. *Cf.*, *Baldwin v. Reese*, 124 S.C. 1347 (March 2, 2004).

> While McWilliams did raise this claim in the guise of an ineffective assistance of counsel claim in his brief and argument to the Alabama Court of Criminal Appeals—which treated it as such—this is not sufficient to exhaust this claim for purposes of preserving it for federal review. *Baldwin*, 541 U.S. at 1350-1351 ("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 not alert it to the presence of a [particular] federal claim in order to find material, such as a lower court opinion in the case, that does so."). Accordingly, this claim is not appropriate for federal habeas corpus review.

Respondents' Brief on the Grounds for Relief Presented in McWilliams' Petition for Writ of Habeas Corpus, Court Document 11, at 35-36.

In his reply brief, however, the petitioner states:

> James never claimed in this issue that his attorney provided ineffective assistance of counsel. Instead, James showed the trial court denied James the right to effective assistance of counsel. In the alternative, the Alabama Supreme Court had plain error review, reviewed James' record for plain error, and reviewed the issues he raised before the Court of Criminal Appeals, and James raised this issue before the Court of Appeals, making it more likely the state appellate court came across the claim during its review of the record. Julius v. Johnson, 840 F.2d at 1546, fn. 10. In the alternative, to the extent James raised the "very similar claim" to both courts this issue has been exhausted.

Petitioner's Reply Brief, Court Document 16 at 22-23.

Notably, McWilliams does not refer the court to any section of his brief to the Alabama Supreme Court where he contends that this issue has been exhausted. The court has examined and compared McWilliams' submission to the Alabama Supreme Court with his current claim.[20] Only sections VIII and IX of McWilliams' brief to the Alabama Supreme Court mention a continuance of the sentencing hearing. In section VIII of his brief to the

[20] The section of the petitioner's brief to the Alabama Supreme Court cited by the respondent is not the correct section.

Alabama Supreme Court, McWilliams argues that the trial court abused its discretion and denied him his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution when it denied his motion for a continuance. These arguments reference the "various mental health reports" and quote from the Court of Appeals' decision which references the Taylor-Hardin records and the Holman records, as well as the delays in receiving them.

At first blush, this might deceptively appear to be the same argument raised in the instant petition In the current petition; however, McWilliams claims that the state's delay in providing the medical records and the trial court's refusal of a continuance denied him *effective assistance of counsel*. In the Alabama Supreme Court, McWilliams focused on the Court of Appeals' decision that he had not been *prejudiced* by the delays and/or the denial of a continuance. McWilliams argued to the state Supreme Court that there had indeed been prejudice. There is no mention of the cases now cited by McWilliams or of ineffective, or denial of effective assistance of, counsel.

The only other section of McWilliams' brief to the Alabama Supreme Court which references a continuance is section IX. In that section, McWilliams argued that the trial court erred when it denied McWilliams a continuance to consult an expert regarding recently received mental health reports; he asserted that violations of his rights under the Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and under Alabama law. Nowhere in this section does McWilliams mention the cases he cites now of ineffective, or denial of effective assistance of, counsel. Instead, McWilliams argued to the Alabama Supreme Court an *Ake* violation in section IX of his brief.

Wherefore, this claim is procedurally defaulted, and McWilliams has not shown cause for and prejudice from the default in order to escape the consequences of his default. Neither has he shown actual innocence. This claim is due to be denied.

Claim XII. James McWilliams' Right Against Self Incrimination Was Violated When the Prosecution Presented Testimony from Two Experts Who Examined Him Without Warning Him That the Results of the Examination Could Be Used Against Him.

In denying this claim on the merits, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that his right against self-incrimination was violated by the prosecution's presentation of the testimony of the psychiatrist and psychologist who examined him. The appellant cites *Estelle v. Smith,* 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), in support of his argument. However, this argument has been held to be without merit under similar circumstances in *Buchanan v. Kentucky,* 483 U.S. 402, 107 S. Ct. 2906, 97 L. Ed. 2d 336 (1987). See discussion at part II.

McWilliams, 640 So.2d at 993. The Alabama Court of Criminal Appeals also held, "[m]oreover, because the appellant placed his mental status at issue by reading into evidence the earlier psychiatrist's report, the State could properly rebut this evidence by introducing evidence from the court-ordered psychiatric evaluation. *Buchanan v. Kentucky*, *supra*." *Id.* at 991.

Although it did not address this issue specifically, the Alabama Supreme Court held:

> In his petition to this Court, McWilliams presents 26 issues for review. He presented all but six of these issues to the Court of Criminal Appeals. That court issued a detailed and lengthy opinion, which provided a thorough treatment of each of the issues raised by McWilliams. We have thoroughly reviewed the record before us for error regarding the issues raised, as well as

for plain error not raised. Except as set out in Part I below, we find no error by the Court of Criminal Appeals in affirming the conviction and sentence.

McWilliams, 640 So.2d at 1016 (footnote omitted).[21]

McWilliams makes the following argument in his petition:

James McWilliams was made the "'deluded instrument' of his own execution" when the prosecution used the testimony of the psychiatrists who examined him at Taylor Hardin to obtain a jury recommendation of death. *Estelle v. Smith*, 451, U.S. 454, 462 (1981).

A defendant's "unwarned statements" to a psychiatrist cannot be used against him in the sentencing phase of a capital trial. *Estelle v. Smith*, 451 at 463. The record is devoid of any indication that appellant was warned by the Taylor Hardin psychiatrists "that any statement he made could be used against him at a sentencing proceeding." *Estelle v. Smith*, 451 U.S. at 461.

James "did not waive his right to *Miranda* warnings merely because he initiated the request" for a psychiatric examination. *Hargrave v. Wainwright*, 804 F.2d 1182, 1191 (11th Cir. 1986), *reversed on other grounds*, 832 F.2d 1528 (11th Cir. 1987); *accord Battie v. Estelle*, 655 F.2d 692, 695-96 (5th Cir. 1981). He requested the examination because he wanted to be able to "offer a well-informed expert's . . . view" to *support* his case. *Ake v. Oklahoma*, 470 U.S. 78, 84 (1985). He did not expect the experts who examined him to be converted into "agent[s] of the State." *Battie v. Estelle*, 655 F.2d at 699. When he decided not to use the fruits of the examination that was ordered to help him, he should not have been "suddenly faced with the use of self incriminating testimony on an issue he had never raised." *Hargrave v. Wainwright*, 804 F.2d at 1192.

In addition, James did not waive his Fifth Amendment rights when he and his mother testified about his head injuries and his efforts to seek psychiatric treatment. When a defendant presents expert testimony about his mental condition, his unwarned statements to a psychiatrist can be used against him because "'his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he has interjected into the case.'" *Powell v. Texas*, 109 S. Ct. at 3149 (citations omitted); *accord Hargrave v. Wainwright*, 804 F.2d at 1191-92. "The waiver doctrine is inapplicable…when the defendant does not introduce the testimony of a

[21] The relevant part of Part I is set out below.

mental health expert on the issue of a mental state relevant to the offense or a defense raised by the evidence in the case." *Battie v. Estelle*, 655 F.2d at 692 (emphasis added).

James McWilliams did not introduce "psychiatric testimony to establish a mental status defense." *Powell v. Texas*, 109 S. Ct. at 3149. He relied on his own testimony and the "inexpert observation of an immediate relative." *Wilson v. Butler*, 813 F.2d 664, 673 (5th Cir. 1987). Because the prosecution could have impeached or rebutted the testimony of appellant and his mother, without using expert testimony about the un-*Mirandized* psychiatric examination at Taylor Hardin, the rationale for the waiver rule does not apply here.

James did not waive his Fifth Amendment rights when he read an evaluation that he received from a psychologist to answer one of the prosecutor's questions. The defense conscientiously avoided the presentation of any evidence in its direct case that might give the prosecution a legal excuse to introduce testimony from the Taylor Hardin experts. A "'different situation arises where a defendant intends to introduce psychiatric evidence at the penalty phase.'" *Hargrave v. Wainwright*, 804 F.2d at 1191 (citation omitted). Here, the prosecutor opened the door. He asked James on cross-examination whether a psychiatrist gave him a diagnosis that would prove one of the statutory mitigating circumstances, and James did not forfeit his Fifth Amendment rights when he answered this question by reading the psychologist's report because he did not intentionally raise the issue himself. FN.

> FN. The prosecutor objected to appellant's answer when he opened the door, but the defense took no position on the issue.

James was entitled to a decision on the merits of his *Estelle v. Smith* claim under Rule 45A, although defense counsel did not raise it below, because the Fifth Amendment violation was plain error and it probably affected a substantial right. *See Ex Parte Johnson*, 507 So.2d 1351, 1353 (Ala. 1986). Because his statements to the Taylor Hardin experts were "unwittingly made without an awareness that he was assisting the State's efforts to obtain the death penalty," *Estelle v. Smith*, 451 U.S. at 466, the jury's recommendation of death must be vacated and a new sentencing trial must be ordered.

Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion

in their factual holdings and failure to properly consider all of the facts in this case.

Petition at 103-106.

In *Buchanan v. Kentucky,* 483 U.S. 402 (1987), the Supreme Court dealt with this very issue. The Court wrote:

> This Court's precedent also controls petitioner's claim as to the prosecutor's use of Doctor Lange's report. In *Estelle v. Smith,* 451 U.S. 454, 101 S. Ct. 1866, 68 L. Ed. 2d 359 (1981), we were faced with a situation where a Texas prosecutor had called as his only witness at a capital-sentencing hearing a psychiatrist, who described defendant Smith's severe sociopathic condition and who expressed his opinion that it could not be remedied by treatment. *Id.,* at 459-460, 101 S. Ct., at 1871. The psychiatrist was able to give this testimony because he had examined Smith at the request of the trial judge, who had not notified defense counsel about the scope of the examination or, it seemed, even about the existence of the examination. *Id.,* at 470-471, and n. 15, 101 S. Ct., at 1876-1877, and n. 15. Moreover, Smith's counsel neither had placed at issue Smith's competency to stand trial nor had offered an insanity defense. See *id.,* at 457, and n. 1, 458, 101 S. Ct., at 1870, and n. 1. Under the then-existing Texas capital-sentencing procedure, if the jury answered three questions in the affirmative, the judge was to impose the death sentence. See *id.,* at 457-458, 101 S. Ct., at 1870. One of these questions concerned the defendant's future dangerousness, an issue that the psychiatrist in effect addressed.
>
> We concluded that there was a Fifth Amendment violation in the prosecutor's presentation of such testimony at the sentencing proceeding. After noting that the Fifth Amendment was applicable at a capital-sentencing hearing, we observed that the psychiatrist's prognosis of Smith's future dangerousness was not based simply on his observations of the defendant, but on detailed descriptions of Smith's *statements* about the underlying crime. *Id.,* at 464, and n. 9, 101 S. Ct., at 1873, and n. 9. Accordingly, in our view, Smith's communications to the psychiatrist during the examination had become testimonial in nature. Given the character of the psychiatrist's testimony, moreover, we were unable to consider his evaluation to be "a routine competency examination restricted to ensuring that respondent understood the charges against him and was capable of assisting in his defense." *Id.,* at 465, 101 S. Ct., at 1874. We concluded: "When [at trial the psychiatrist] went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent's

future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Id.,* at 467, 101 S. Ct., at 1875. In such a situation, we found a Fifth Amendment violation because of the failure to administer to Smith, before the examination, the warning required by *Miranda v. Arizona,* 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966).

We recognized, however, the "distinct circumstances" of that case, 451 U.S., at 466, 101 S. Ct., at 1874 - the trial judge had ordered, *sua sponte,* the psychiatric examination and Smith neither had asserted an insanity defense nor had offered psychiatric evidence at trial. We thus acknowledged that, in other situations, the State might have an interest in introducing psychiatric evidence to rebut petitioner's defense:

> When a defendant asserts the insanity defense and introduces supporting psychiatric testimony, his silence may deprive the State of the only effective means it has of controverting his proof on an issue that he interjected into the case. Accordingly, several Courts of Appeals have held that, under such circumstances, a defendant can be required to submit to a sanity examination conducted by the prosecution's psychiatrist. *Id.,* at 465, 101 S. Ct., at 1874.

We further noted: "A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding." *Id.,* at 468, 101 S. Ct., at 1875. This statement logically leads to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution. See *United States v. Byers,* 239 U.S. App. D.C. 1, 8-10, 740 F.2d 1104, 1111-1113 (1984) (plurality opinion); *Pope v. United States,* 372 F.2d 710, 720 (CA8 1967) (en banc), vacated and remanded on other grounds, 392 U.S. 651, 88 S. Ct. 2145, 20 L. Ed. 2d 1317 (1968).

This case presents one of the situations that we distinguished from the facts in *Smith.* Here petitioner's counsel joined in a motion for Doctor Lange's examination pursuant to the Kentucky procedure for involuntary hospitalization. Moreover, petitioner's entire defense strategy was to establish the "mental status" defense of extreme emotional disturbance. Indeed, the *sole* witness for petitioner was Elam, who was asked by defense counsel to do little

> more than read to the jury the psychological reports and letter in the custody of Kentucky's Department of Human Services. In such circumstances, with petitioner not taking the stand, the Commonwealth could not respond to this defense unless it presented other psychological evidence. Accordingly, the Commonwealth asked Elam to read excerpts of Doctor Lange's report, in which the psychiatrist had set forth his general observations about the mental state of petitioner but had not described *any* statements by petitioner dealing with the crimes for which he was charged. The introduction of such a report for this limited rebuttal purpose does not constitute a Fifth Amendment violation.

Buchanan v. Kentucky, 483 U.S. at 421-424 (footnotes omitted).

In this case, McWilliams admits that it was he who requested the Taylor Hardin evaluation, *Petition* at 104, but he states that his "psychiatric evidence" was his and his mother's testimony. McWilliams argues that because this evidence could have been rebutted without using expert testimony, the reports of the examination should have been excluded. However, *Buchanan* allows the introduction of the report to rebut "psychiatric evidence," without requiring that the rebuttal be in response to expert evidence. Moreover, even if expert evidence were required by *Buchanan*, in this case, in response to a question asked by the prosecution on cross-examination, McWilliams read into evidence a psychologist's evaluation of his mental status. McWilliams admits that he presented this evidence in response to a question about "whether a psychiatrist gave him a diagnosis that would prove one of the statutory mitigating circumstances." *Petition* at 105. McWilliams argues that because the prosecution "opened the door" to this evidence, he should not be deemed to have raised it in his defense. McWilliams cites no authority for that proposition, and the court is unpersuaded by Petitioner's argument. Whether on cross examination or direct examination,

the psychologist's report was submitted by McWilliams, without objection by his counsel. *Petition* at 106.

The state court's rulings were not contrary to clearly established Federal law as determined by the Supreme Court and did not involve an unreasonable application of clearly established Federal law as determined by the United States Supreme Court. McWilliams' right against self-incrimination was not violated under the facts of this case. This claim is due to be denied.

Claim XIII. James McWilliams' Death Sentence Was Arbitrarily Based on a Large Quantity of Constitutionally Inadmissible Victim Impact Evidence.

In support of this claim, McWilliams contends that "in sentencing him to death, the trial court considered portions of victim impact statements wherein the victim's family expressed their characterizations and opinions about the crime, the defendant, and the appropriate sentence, and that the court erred in doing so." *Petition* at 107. In denying the merits of this claim on direct appeal, the Alabama Supreme Court explained the history of the claim and found as follows:

> James Edmund McWilliams, Jr., was convicted of capital murder in 1986 for the 1984 murder of Patricia Reynolds and was sentenced to death. The Court of Criminal Appeals affirmed McWilliams's conviction and sentence. *See McWilliams v. State*, 640 So.2d 982 (Ala. Crim. App. 1991). This Court granted McWilliams's petition for the writ of certiorari. Rule 39(c), Ala.R.App.P. We affirmed the Court of Criminal Appeals as to its holding on McWilliams's conviction; however, we remanded with instructions as to his sentence. *See Ex parte McWilliams*, 640 So.2d 1015 (Ala. 1993).
>
> Specifically, we concluded in our 1993 opinion that McWilliams's Eighth Amendment rights had been violated if the trial court, in considering a presentence report, had relied upon certain victim impact statements wherein

Reynolds's family members had submitted "their characterizations or opinions of [McWilliams], the crime, or the appropriate punishment." *Ex parte McWilliams*, supra, at 1017. Noting that the record did not indicate whether the court had considered those statements, we remanded, with the following instructions:

> On remand, the trial judge is directed to determine and make a written finding stating whether, in imposing the sentence upon James McWilliams, he considered the portions of the presentence report wherein Patricia Reynolds's family members stated their characterizations of McWilliams, the murder of Reynolds, or the appropriate sentence for McWilliams. If, and only if, the trial judge finds that he did consider those portions of the presentence report, then he is hereby directed to vacate McWilliams's death sentence and to hold another sentencing hearing consistent with this opinion.

640 So.2d at 1017.

On return to the remand, the trial court filed the following written findings with the Court of Criminal Appeals:

> (5) This Court reviewed these victim impact statements, but in no way considered any part of these victim impact statements in deciding what sentence to impose on McWilliams. This Court in no way considered any part of these victim impact statements in sentencing McWilliams to death.
>
> (6) This Court has reviewed *Payne* [v.] *Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991), and [has determined that] in sentencing McWilliams to death, this Court in no way violated the restrictions stated in Payne and contained in *Ex parte McWilliams*.

McWilliams v. State, 666 So.2d 89 (Ala. Crim. App. 1994). The Court of Criminal Appeals affirmed the sentence. *McWilliams v. State*, supra. This Court again granted McWilliams's petition for certiorari review. Rule 39(c), Ala. R. App. P.

The trial court complied with our instructions to make written findings as to whether it considered those portions of the statements by Reynolds's family members concerning McWilliams, the crime, and the sentence. In its written findings, the trial court expressly found that it did not consider those

> portions of the presentence report. Therefore, it was not required to hold another sentencing hearing for McWilliams. *Ex parte McWilliams*, supra. Because the trial court did not consider the statements in imposing McWilliams's sentence, we conclude that McWilliams's Eighth Amendment rights were not violated. Therefore, we affirm the judgment of the Court of Criminal Appeals.

McWilliams, 666 So. 2d at 90.

McWilliams again seeks to raise the claim that the trial court improperly based his death sentence on the victim impact evidence, regardless of the trial judge's written findings stating that he did not consider these statements at arriving at the sentence.

> Upon remand, the trial court claimed it did not rely upon the impact statements. *Ex parte McWilliams*, 666 So.2d 90 (Ala. 1995). However, the record in the present case strongly indicates that the seven victim impact statements contributed to the court's decision to impose the death penalty. First, the court overruled a pointed objection to the "letters and recommendations from the family" (1418). If the court did not intend to consider this evidence at all, it would have sustained the objection, as it did when defense counsel objected to the probation officer's recommendation about the appropriate punishment (1417; PSR at 10). Then, the court stated in its sentencing order that it "considered . . . the presentence report and evidence submitted in connection with it" (1646) (emphasis added.). The court must have considered the victim impact statements because these statements were the only "evidence submitted in connection with" the presentence report.
>
> Furthermore, the court adopted that language from one of the victim impact statements in its decision. The court found that the murder was especially heinous, atrocious and cruel because of the defendant's "obvious lack of regard for the life . . . of the victim" (1649). The victim's mother recommended the death penalty for exactly the same reason: because the defendant "showed no regard for human life."

The Alabama Supreme Court specifically found that the trial court did not consider the victim impact statement in arriving at McWilliams' death sentence. The findings made by the state appellate court are clearly supported by the record. The petitioner's attempt to prove that the trial judge did in fact base his sentence on the statements borders on the

ridiculous. In light of the record, it was not in any way unreasonable for the Alabama Court of Criminal Appeals to conclude that *Payne* was not violated in sentencing McWilliams. McWilliams has not offered clear and convincing evidence to rebut the presumption of correctness this court is required to accord the state court's findings. Further, he has not demonstrated that the state appellate court's decision on this issue was contrary to, or an unreasonable application of, clearly established federal law, nor an unreasonable interpretation of the facts in light of the evidence before that court. This claim is due to be denied.

Claim XIV. James McWilliams Was Denied His Constitutional Right to Confront the Authors of the Victim Impact Statements.

In support of this claim, McWilliams offers the following:

> The Sixth Amendment guarantees a defendant's right to cross-examine the witnesses against him. In a capital sentencing trial, the defendant has a corollary due process right to deny or explain any statement that is used against him. *Gardner v. Florida*, 430 U.S. 349, 362 (1977). Both of these constitutional requirements are violated when the defendant in a capital sentencing trial has no opportunity to cross-examine the author of presentence report. *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *modified*, 706 F.2d 311 (11th Cir. 1983). If written victim impact statements are admissible, the defendant would therefore also "have the right to cross-examine the declarants.
>
> Here, the prosecution was allowed to "have its cake and eat it too." Seven hearsay victim impact statements were admitted over objection, without giving the defense an opportunity to cross-examine the relatives of the victim who made them. If the victim impact statements did not violate *Booth v. Maryland*, they certainly violated *Proffitt v. Florida*.
>
> The *Proffitt v. Florida* violation was extraordinarily prejudicial. FN.

> FN. The *Proffitt* violation was not objected to, but it must be reviewed on the merits under Rule 45A because it was plain error and it adversely affected appellant's substantial rights. *Ex Parte Johnson*, 507 So.2d 1351, 1353 (Ala. 1986).

> One of the victim's relatives rendered an expert opinion as an economist about the costs and benefits of a death sentence. He concluded that James McWilliams should be executed because society could not afford to maintain him in prison for life. Cross-examination would have allowed the defense to confront this expert with the cost-benefit analysis studies that have conclusively demonstrate that it is much more costly to execute a defendant than incarcerate him for life. *See, e.g. Garey, The Cost of Taking a Life: Dollar and Cents of the Death Penalty*, 18 U.C. Davis L. Rev. 1221 (1985); Nakell, *The Cost of the Death Penalty*, 14 Crim. L. Bulletin 68 (1978).
>
> In short, the victim impact statements violated James' right of confrontation and his right to deny or explain any evidence that was used against him in the sentencing hearing. His death sentence must be vacated and the court must resentence him. Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion in their factual holdings and failure to properly consider all of the facts in this case.

Petition at 110-112.

In denying this claim on the merits, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that he was denied his constitutional right to confront the authors of the victim impact statements, which were attached to the presentence report, in violation of *Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 440 (1987). The appellant argues that, even if the victim impact statements did not violate *Booth v. Maryland*, *supra*, they violated *Proffitt v. Wainwright*, 685 F.2d 1227 (11th Cir. 1982), *cert. denied*, 464 U.S. 1002, 104 S. Ct. 508, 78 L. Ed. 2d 697 (1985), in that the appellant was not allowed the opportunity to cross-examine the authors of the victim impact statements.
>
> The appellant's argument that the victim impact statements attached to the presentence investigative report, as well as the testimony of the victim's

husband and photographs of the victim, were introduced in violation of *Booth v. Maryland*, *supra*, is without merit because the United States Supreme Court has recently overruled the applicable holding in *Booth v. Maryland*, *supra*, and *South Carolina v. Gathers*, 490 U.S. 805, 109 S. Ct. 2207, 104 L. Ed. 2d 876 (1989). *See Payne v. Tennessee*, 501 U.S. 808, 111 S. Ct. 2597, 115 L. Ed. 2d 720 (1991). In *Payne v. Tennessee*, the victim impact statements included testimony by a family member of the victims and comments made by the prosecutor during his arguments to the jury. However, the United States Supreme Court noted that in *Booth v. Maryland*, a statute that required the presentence report in all felony cases to include a "victim impact statement" describing the effect of the crime on the victim and the victim's family was at issue. The court indicated that the source of these statements was not a distinguishing feature, stating:

> Congress and most of the States have, in recent years, enacted similar legislation to enable the sentencing authority to consider information about the harm caused by the crime committed by the defendant. Evidence involved in the present case was not admitted pursuant to any such enactment, but its purpose and effect was much the same as if it had been. While the admission of this particular kind of evidence-designed to portray for the sentencing authority the actual harm caused by a particular crime-is of recent origin, this fact hardly renders it unconstitutional.

In overruling *Booth v. Maryland*, *supra*, the United States Supreme Court stated:

> [W]hile virtually no limits are placed on the relevant mitigating evidence a Defendant may introduce concerning his own circumstances, the State is barred from either offering 'a glimpse of the life' which a defendant 'chose to extinguish,' *Mills* [*v. Maryland*], 486 U.S. [367], at 397 [108 S. Ct. 1860 at 1876, 100 L. Ed. 2d 384 (1988)] (Rehnquist, C.J., dissenting), or demonstrating the loss of the victim's family and to society which have resulted from the defendant's homicide. Booth reasoned that victim impact evidence must be excluded because it would be difficult, if not impossible, for the defendant to rebut such evidence without shifting the focus of the sentencing hearing away from the defendant, thus creating a ' "mini-trial" on the victim's character.' *Booth, supra*, [482 U.S.] at 506-507 [107 S. Ct. at 2534-2535]. In many cases the evidence relating to the victim is already before the jury at least in part because of

> its relevance at the guilt phase of the trial. But even as to additional evidence admitted at the sentencing phase, the mere fact that for tactical reasons it might not be prudent for the defense to rebut victim impact evidence makes the case no different than others in which a party is faced with this sort of dilemma. As we explained in rejecting the contention that expert testimony on future dangerousness should be excluded from capital trials, 'the rules of evidence generally extant at the federal and state levels anticipate that relevant, unprivileged evidence should be admitted and its weight left to the factfinder, who would have the benefit of cross-examination and contrary evidence by the opposing party.' *Barefoot v. Estelle*, 463 U.S. 880-898 [103 S. Ct. 3383-3397, 77 L. Ed. 2d 1090] (1983).
>
> . . . .
>
> 'Within the constitutional limitations defined by our cases, the States enjoy their traditional latitude to prescribe the method by which those who commit murder should be punished.' *Blystone v. Pennsylvania*, 494 U.S. 299, 309 [110 S. Ct. 1078, 1084, 108 L. Ed. 2d 255] (1990). The States remain free, in capital cases, as well as others, to devise new procedures and new remedies to meet felt needs. Victim impact evidence is simply another form or method of informing the sentencing authority about the specific harm caused by the crime in question, evidence of a general type long considered by sentencing authorities. We think the *Booth* Court was wrong in stating that this kind of evidence leads to the arbitrary imposition of the death penalty. In the majority of cases, and in this case, victim impact evidence serves entirely legitimate purposes. In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of Fourteenth Amendment provides a mechanism for relief. *See Darden v. Wainwright*, 477 U.S. 168, 179-183 [106 S. Ct. 2464, 2470-2472, 91 L. Ed. 2d 144] (1986)."

Payne v. Tennessee, *supra*, 501 U.S. at 822-825, 111 S. Ct. at 2607-2608.

Moreover, the victim impact statements attached to the pre-sentence investigative report were not inadmissible as hearsay which denied the appellant his right to confrontation.

> It is clear to this Court that the use of the pre-sentencing report is consistent with Ala. Code 1975, § 13A-5-45(d), Alabama's capital murder statute, which states:
>
> > Any evidence which has probative value and is relevant to sentence shall be received at the sentence hearing regardless of its admissibility under the exclusionary rules of evidence, provided that the defendant is accorded a fair opportunity to rebut any hearsay statements. This subsection shall not be construed to authorize the introduction of any evidence secured in violation of the Constitution of the United States or the State of Alabama.
>
> The entire report itself is an out-of-court statement and is entirely hearsay; however, it is admissible under Ala. Code 1975, § 13A-5-47. *Thompson v. State*, [503 So.2d 871 (Ala. Crim. App. 1986), *affirmed*, 503 So.2d 887 (Ala. 1987), *cert. denied*, 484 U.S. 872, 108 S. Ct. 204, 98 L. Ed. 2d 155 (1987)]. The trial court is not obligated to do more than provide a fair opportunity for rebuttal; where the record indicates that the defendant was given sufficient opportunity to rebut any hearsay statements made at the sentencing hearing, there is no error. *Johnson v. State*, 399 So.2d 859 (Ala. Crim. App. 1979), *aff'd in part and rev'd on other grounds*, 399 So.2d 873 (Ala. 1979)."

Ex parte Davis, 569 So.2d 738, 741 (Ala. 1990), *cert. denied*, 498 U.S. 1127, 111 S. Ct. 1091, 112 L. Ed. 2d 1196 (1991). "No right to cross-examine was denied, as is contended. Appellant would have been entitled to call, as a witness, any person who could give information about the report, including its author, but apparently chose not to do so." *Haney v. State*, 603 So.2d 368 (Ala. Crim. App. 1991).

The evidence contained in the victim impact statements was relevant to this case, especially in light of *Payne v. Tennessee, supra*, and the defendant was given an opportunity to rebut the evidence. Therefore, there was no error. *See Thompson v. State,* supra*; Kuenzel v. State*, 577 So.2d 474 (Ala. Crim. App. 1990), *affirmed*, 577 So.2d 531 (Ala. 1991).

McWilliams, 640 So. 2d 993-995.

The victim impact statements were admissible pursuant to *Payne v. Tennessee*. Although McWilliams claims that he was not given the opportunity to cross-examine the victims' relatives who made victim impact statements, the state appellate court specifically found that he was given the opportunity to rebut this evidence. The findings made by the state appellate court are supported by the record and McWilliams has offered nothing to rebut the presumption that the factual findings are correct. In light of the record, it was not in any way unreasonable for the Alabama Court of Criminal Appeals to conclude that the incident did not undermine McWilliams' presumption of innocence or the reliability of sentencing. McWilliams has not offered clear and convincing evidence to rebut the presumption of correctness this court is required to accord the state court's findings. Further, he has not demonstrated that the state appellate court's decision on this issue was contrary to, or an unreasonable application of, clearly established federal law, nor an unreasonable interpretation of the facts in light of the evidence before that court. This claim is due to be denied.

Claim XV. The Jury Instructions about the Especially Heinous, Atrocious or Cruel Statutory Aggravating Circumstance Did Not Genuinely Narrow the Class of Persons Eligible for the Death Penalty.

McWilliams alleges that "the jury instructions about the especially heinous, atrocious and cruel statutory aggravating circumstance violated the Eighth Amendment because they were too vague to adequately guide the jury. *Maynard v. Cartwright*, 108 S. Ct. 1853 (1988)." *Petition* at 112. He further claims that "the Court of Criminal Appeals erred in its finding that the evidence presented in James' case was sufficient to show the existence of this

aggravating factor" and that it erred in its finding that the evidence presented in the case was sufficient to show the existence of the especially heinous, atrocious and cruel aggravating factor. *Id*. at 116.

In denying this claim on the merits on direct appeal, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that the jury instructions concerning the especially heinous, atrocious, or cruel statutory aggravating circumstance violated the Eighth Amendment in that they were too vague to adequately guide the jury. He further argues that this aggravating circumstance was not supported by the facts.
>
> The record indicates that, in defining the aggravating circumstances which the jury could consider in arriving at its advisory verdict, the trial court charged:
>
> > The capital offense was especially heinous, atrocious, or cruel, compared to other capital offenses.
> >
> > The term "heinous" means especially wicked or shockingly evil. The term "atrocious" means outrageously wicked and violent. The term "cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others. For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially cruel, it must be a consciousless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness, atrociousness or cruelty exceeds that which will always exist when a criminal capital case is committed.
>
> These instructions were sufficient to overcome the vagueness condemned in *Maynard v. Cartwright*, 486 U.S. 356, 108 S. Ct. 1853, 100 L. Ed. 2d 372 (1988) (wherein the United States Supreme Court held that the words "especially heinous, atrocious, or cruel," without more, are unconstitutionally vague, as they fail to sufficiently inform juries of what they

must find in order to impose the death penalty). *See also Lawhorn v. State*, 574 So.2d 970 (Ala. Crim. App. 1990), *affirmed*, 581 So.2d 1179 (Ala. 1991) (wherein the trial court gave the following instruction to the jury concerning this aggravating circumstance: "[a]nother one that you could consider but is not proven by your verdict is that the capital offense was especially heinous, atrocious, or cruel, compared with other capital offenses as set out in Subdivision 8 defining aggravating circumstances").

However, where sufficient guidance is given to the jury by the trial court's adequately defining the terms used so that the jury is made aware of what it must find in order to impose the death penalty, such an instruction is constitutionally acceptable. *See Proffitt v. Florida*, 428 U.S. 242, 255-56, 96 S. Ct. 2960, 2968-69, 49 L. Ed. 2d 913 (1976). In *Haney v. State*, 603 So.2d 368 (Ala. Crim. App. 1991), the appellant challenged a jury instruction concerning this aggravating circumstance, which was similar to the one given in the present case, as unconstitutionally vague. That trial court instructed the jury as follows:

> The word "heinous" means extremely wicked or shockingly evil. The term "atrocious" means outrageously wicked and vile. The term "cruel" means designed to inflict a high degree of pain with utter indifference to, or even enjoyment of the suffering of others.
>
> What is intended to be included in this aggravating circumstance is those cases where the actual commission of a capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses.
>
> For a capital offense to be especially heinous or atrocious, any brutality which is involved in it must exceed that which is normally present in any capital offense. For a capital offense to be especially cruel, it must be [a] consciousless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious, and cruel to some extent. What is intended to be covered by this aggravating circumstance is only those cases in which the degree of heinousness or atrociousness or cruelty exceeds that which [normally] exists when a capital offense is committed.

Id. at 385-86. This court held that these instructions met the constitutional standard and sufficiently overcame the vagueness prohibition of *Maynard v. Cartwright*, supra. This court held:

> These instructions were proper and furnished adequate guidance to the jury. The court's instructions that this aggravating circumstance should apply to the consciousless or pitiless crime which is unnecessarily tortuous to the victim and one in which the brutality exceeds that which is normally present in any capital offense met the requirements of law. *See Proffitt v. Florida*, 428 U.S. 242 [96 S. Ct. 2960, 49 L. Ed. 2d 913] (1976); *Ex parte Kyzer*, 399 So.2d 330 (Ala. 1981); *Hallford v. State*, 548 So.2d 526 (Ala. Crim. App. 1988), *aff'd*, 548 So.2d 547 (Ala. 1989), *cert. denied* [493 U.S. 945], 110 S. Ct. 354 [107 L. Ed. 2d 342] (1989)."

Haney, supra, at 386.

Moreover, the trial court properly instructed the jury on this aggravating circumstance because the evidence presented in this case was sufficient to show its existence. The trial court stated:

> This finding is based upon the evidence of the execution type slaying of the victim, coupled with the number of times the victim was shot, after having been brutally raped and robbed, and done to eliminate an eyewitness to the rape and robbery.

The record indicates that the victim bled to death, after having been shot a number of times while she was standing and then lying on the floor, and after having been raped. Her death did not come for two hours after she had been shot. Witnesses testified that, as she clung to a mop in the back of the Austin's Convenience Store, she stated, "It just hurts so bad," and indicated that she "was burning," was "losing it," and that she was having great difficulty breathing. At the hospital, she begged to see her husband and child because she knew she was going to die. The execution-type slaying in this case, the number of shots fired into the victim, and the nature of the victim's suffering all indicate that an instruction on this aggravating circumstance was appropriate. *See, e.g., Lawhorn,* supra ("[w]hen a defendant deliberately shoots a victim in the head in a calculated fashion, after the victim has already been rendered helpless by gunshots to the chest, such 'extremely wicked or shockingly evil' action may be characterized as especially heinous, atrocious, or cruel"). *White v. State*, supra ("[e]vidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was heinous, atrocious, and cruel").

McWilliams, 640 So. 2d at 996-997.

McWilliams claims that the trial court's instruction was too vague to adequately instruct the jury and that the instruction "did not limit the jury's discretion to impose the death penalty at all because the jury was then explicitly told that these terms describe all capital offenses to some degree that was not defined." *Petition* at 113. In addition, McWilliams challenges the jury instruction requiring that McWilliams' crime be compared to other capital offenses. He claims that:

> In effect, the instructions told the jury to determine whether "the murder is more than just 'heinous', whatever that means." *Id*. This is precisely what the Eighth Amendment does not permit.
>
> The instructions did not tell the jurors what they had to find, in addition to the elements of capital murder, to impose the death penalty. Instead, the jury was instructed to determine the punishment by performing a bizarre kind of proportionality analysis. *See generally Pulley v. Harris*, 465 U.S. 37 (1984). The jurors were invited to compare the murder in this case to "other capital offenses," but they were not given any guidance about how they should determine the degree of heinousness, atrociousness and cruelty that "always exist when a criminal capital case is committed" (1389-90). They had to rely on their own personal knowledge of capital murders when they interpreted and applied this part of the instruction.
>
> It was the height of arbitrariness to permit a randomly selected group of twelve laymen to compare this case to any other capital murder cases they may have learned about from such sources as the Geraldo Rivera television show or the National Enquirer. "While juries indeed may be capable of understanding the issues posed in capital sentencing proceedings, they must first be properly instructed" about them. *Mills v. Maryland*, 108 S. Ct. 1860, 1867, n. 10 (1988).

Petition at 113-114. Finally, McWilliams claims that the Alabama Court of Criminal Appeals erred in its finding that the evidence presented in the case was sufficient to show the existence of the especially heinous, atrocious and cruel aggravating factor. *Petition* at 116.

The Eleventh Circuit uses a three-part test in reviewing the constitutionality of instructions on the especially heinous, atrocious or cruel aggravating factor:

> We read *Godfrey* and *Cartwright* to require that, in order to survive an eighth-amendment vagueness challenge, a sentencing court's consideration of the "especially heinous, atrocious or cruel" aggravating factor must satisfy a three-part test. First, the appellate courts of the state must have narrowed the meaning of the words "heinous, atrocious or cruel" by consistently limiting their application to a relatively narrow class of cases, so that their use "inform[s] [the sentencer of] what [it] must find to impose the death penalty." *Cartwright*, 108 S. Ct. at 1858. Second, the sentencing court must have made either an explicit finding that the crime was "especially heinous, atrocious or cruel" or an explicit finding that the crime exhibited the narrowing characteristics set forth in the state-court decisions interpreting those words. FN5. Third, the sentencer's conclusion - that the facts of the case under consideration place the crime within the class of cases defined by the state court's narrowing construction of the term "heinous, atrocious or cruel" - must not have subverted the narrowing function of those words by obscuring the boundaries of the class of cases to which they apply.
>
> > FN5. Where the jury is the sentencer, a recitation that the murder was "especially heinous, atrocious or cruel" would not satisfy the second prong of this test unless the jury had been properly instructed regarding the narrow meaning of those words as interpreted by the state courts. Unlike a state-court judge, who is presumed to know and apply the appropriate, narrow construction of the term, an uninstructed lay jury could reasonably conclude that any intentional taking of human life was "especially heinous, atrocious or cruel." *Godfrey*, 446 U.S. at 428-29, 100 S. Ct. at 1764-65; *Cartwright*, 108 S. Ct. at 1859.

Lindsey v. Thigpen, 875 F.2d 1509, 1514.

As for the first factor, *Lindsey* held that:

> A survey of Alabama cases reveals that the first prong of the analysis is satisfied. Since the 1981 case of *Kyzer v. Alabama*, 399 So.2d 330 (Ala. 1981), the Alabama appellate courts have confined the application of the "heinous, atrocious or cruel" aggravating factor to "those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." *Kyzer*, 399 So.2d at 334 (*citing State v. Dixon*, 283 So.2d 1 (Fla. 1973)). The class of cases that

> are "unnecessarily torturous to the victim" is not too indefinite to serve the narrowing function mandated by the eighth amendment. *See Proffitt v. Florida*, 428 U.S. 242, 255-56, 96 S. Ct. 2960, 2986, 49 L. Ed. 2d 913 (opinion of Stewart, Powell, Stevens, JJ.), *reh'g denied*, 429 U.S. 875, 97 S. Ct. 198, 50 L. Ed. 2d 158 (1976). Thus, when Lindsey was sentenced in 1982, the courts of Alabama had already developed and consistently applied a narrowing construction of the term "heinous, atrocious or cruel as compared to other capital offenses."

Lindsey, 875 F.2d at 1513-14. Based on *Lindsay*, it is impossible for McWilliams to refute that the trial court's definitions of "heinous," "atrocious" and "cruel" satisfied the proper channeling requirements mandated by *Cartwright* and the Eleventh Circuit. McWilliams cites no Supreme Court case in which it has been held that an especially heinous, atrocious or cruel instruction identical to Alabama's is constitutionally vague as applied. McWilliams also fails to mention that in *Bradley v. Nagle*, 212 F.3d 559, 570 (11th Cir. 2000), the Eleventh Circuit found Alabama's channeling instruction and the comparative aspect of it to be constitutionally adequate for equal protection purposes.[22] Finally, McWilliams can point to no Supreme Court, Eleventh Circuit or Alabama cases in which it has been held that in order to deliver a constitutionally satisfactory instruction, the trial must instruct the jury by engaging in a factually comparative study of capital murders for which the death penalty was imposed to

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[22] In *Bradley*,

> the jury was instructed that the term "heinous" means extremely wicked or shockingly evil, the term "atrocious" means outrageously wicked or violent, and the term "cruel" means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. They were also informed that the degree to which this crime is heinous, atrocious, or cruel must exceed that which exists in all capital offenses, and that in order to find the aggravating circumstance, they must find that the crime was "unnecessarily torturous to the victim."

Bradley v. Nagle 212 F.3d 559, 570 (11th Cir. 2000).

those capital murders for which life without parole was imposed. Therefore, the state court clearly met the first prong of the test.

The second prong of the test requires that "the sentencing court must have made either an explicit finding that the crime was "especially heinous, atrocious or cruel" or an explicit finding that the crime exhibited the narrowing characteristics set forth in the state-court decisions interpreting those words." *Lindsey*, 875 F.2d at 1514. The trial court specifically found that the murder was heinous, atrocious or cruel:

> This finding is based upon the evidence of the execution type slaying of the victim, coupled with the number of times the victim was shot, after having been brutally raped and robbed, and done to eliminate an eyewitness to the rape and robbery.

McWilliams, 640 So. 2d at 997. In reviewing the evidence, the Alabama Court of Criminal Appeals found the following:

> The record indicates that the victim bled to death, after having been shot a number of times while she was standing and then lying on the floor, and after having been raped. Her death did not come for two hours after she had been shot. Witnesses testified that, as she clung to a mop in the back of the Austin's Convenience Store, she stated, "It just hurts so bad," and indicated that she "was burning," was "losing it," and that she was having great difficulty breathing. At the hospital, she begged to see her husband and child because she knew she was going to die. The execution-type slaying in this case, the number of shots fired into the victim, and the nature of the victim's suffering all indicate that an instruction on this aggravating circumstance was appropriate. *See, e.g., Lawhorn,* supra ("[w]hen a defendant deliberately shoots a victim in the head in a calculated fashion, after the victim has already been rendered helpless by gunshots to the chest, such 'extremely wicked or shockingly evil' action may be characterized as especially heinous, atrocious, or cruel"). *White v. State*, supra ("[e]vidence as to the fear experienced by the victim before death is a significant factor in determining the existence of the aggravating circumstance that the murder was heinous, atrocious, and cruel").

Id. Therefore, the state court clearly met the second prong of the test.

The third and final prong of the test requires that:

> the sentencer's conclusion - that the facts of the case under consideration place the crime within the class of cases defined by the state court's narrowing construction of the term "heinous, atrocious or cruel" - must not have subverted the narrowing function of those words by obscuring the boundaries of the class of cases to which they apply.

Lindsey, 875 F.2d at 1514. In order to prevail on this step, McWilliams must prove that the trial court's determination was clearly erroneous. *Marquard v. Secretary for the Department of Corrections*, 429 F.3d 1278, 1317. Given the evidence in this case of an execution-type slaying, the number of shots fired into the victim, and the nature of the victim's suffering this court cannot conclude that the state court's determination was clearly erroneous. Therefore, the state court clearly met the third prong of the test.

Because the state court met each of the three prongs of this test, McWilliams cannot show that the Alabama Court of Criminal Appeals' findings on this claim were contrary to or an unreasonable application of federal law. The claim is due to be denied.

Claim XVI. The Jury's General Verdict Recommending the Death Penalty, Without Specifying Whether Any of the Statutory Aggravating Circumstances Were Found, Violated the Eighth Amendment Because it Is Not Rationally Reviewable.

In support of this claim, McWilliams offers the following:

> The jury's general verdict recommending the death penalty violated the Eighth Amendment prohibition against the arbitrary infliction of capital punishment because it is impossible to determine whether the jury found one or more of the statutory aggravating circumstances that were a prerequisite to the imposition of a death sentence.
>
> Because death is different from all other punishments, the Eighth Amendment requires capital sentencing procedures that "minimize the risk of

wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189 (1976). Statutory aggravating circumstances that genuinely narrow the class of persons eligible for death are the most important safeguard against the arbitrary infliction of capital punishment. *Maynard v. Cartwright*, 108 S. Ct. (1988); *Zant v. Stephens*, 462 U.S. 862 (1983).

The jury's compliance with the statutory aggravating circumstances must be "rationally reviewable." *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980). An appellate court must be able to determine from "the verdict form and the judge's instructions" that the requirements of the Eighth Amendment were satisfied. *Mills v. Maryland*, 108 S. Ct. 1860, 1869 (1988); *see also Presnell v. Georgia*, 439 U.S. 14 (1978).

The jury's general verdict recommending the death penalty in the present case is not rationally reviewable. The jury was instructed to consider three statutory aggravating circumstances, but the foreman did not say whether any statutory aggravating circumstances were found when he announced the verdict. The verdict sheet also failed to indicate whether the jury found one or more of the statutory aggravating circumstances. The jury could therefore have recommended the death penalty without finding that appellant was a member of a limited class of persons who are eligible for that punishment. *Godfrey v. Georgia*, 446. U.S. at 426-27.

Because this is a capital case, an appellate court cannot presume that the jury followed the court's instructions when it rendered a general verdict. The Eighth Amendment does not require written findings about statutory aggravating circumstances, but the jury must indicate in some fashion what criteria it relied upon when it found that the defendant was eligible for death. Because this essential safeguard against the arbitrary and capricious imposition of the death penalty was not followed here, James' death sentence must be vacated and a new sentencing trial must be ordered. Defense counsel preserved this issue in a written motion (1466-69).

It is respectfully submitted that, based on *Ring v. Arizona*, 122 S. Ct. 2428 (2002), James McWilliams is correct in raising this argument. Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion in their factual holdings and failure to properly consider all of the facts in this case. A new sentencing proceeding must therefore be ordered.

Petition at 117-119.

In denying the claim on the merits, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that the jury's general verdict recommending the death penalty, without specifying whether any of the statutory aggravating circumstances were found, violated the Eighth Amendment, because it was not "rationally reviewable." However, jury specification of aggravating and mitigating circumstances is not constitutionally required. *See Bush v. State*, 431 So.2d 555, 559 (Ala. Crim. App. 1982), *affirmed*, 431 So.2d 563 (Ala. 1983), *cert. denied*, 464 U.S. 865, 104 S. Ct. 200, 78 L. Ed. 2d 175 (1983); *Morrison v. State*, 500 So.2d 36, 42 (Ala. Crim. App. 1985), *affirmed*, 500 So.2d 57 (Ala. 1986), *cert. denied*, 481 U.S. 1007, 107 S. Ct. 1634, 95 L. Ed. 2d 207 (1987); *Rutledge v. State*, 482 So.2d 1250, 1259 (Ala. Crim. App. 1983), *affirmed in pertinent part and reversed on other grounds*, 482 So.2d 1262 (Ala. 1984); *Whisenhant v. State*, 482 So.2d 1225, 1239 (Ala. Crim. App. 1982), *affirmed in pertinent part and reversed on other grounds*, 482 So.2d 1241 (Ala. 1983), *affirmed on remand*, 482 So.2d 1246 (Ala. Crim. App. 1983), *reversed on other grounds*, 482 So.2d 1247 (Ala. 1984).

McWilliams, 640 So. 2d at 997.

Although McWilliams claims that the appellate court's decision was contrary to clearly established federal law and/or involved an unreasonable application of clearly established law, he has failed to cite any federal law that requires a jury to indicate, either through the foreman or the verdict sheet, whether any statutory aggravating circumstances were found. Clearly, McWilliams has failed to show the state court's decision was contrary to or involved an unreasonable application of clearly established law or was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings. This claim is due to be denied.

Claim XVII. James McWilliams Was Denied an Individualized Determination of the Appropriate Penalty for His Capital Offense Because the Jury Was Required to Recommend the Death Penalty If the Aggravating Circumstances Outweighed the Mitigating Circumstances, Even If All Twelve Jurors Believed That Life Was the Appropriate Sentence.

In support of this ground for relief, McWilliams claims that the "jury instructions did not permit an individualized determination of the appropriate penalty because death was mandated under certain conditions that precluded consideration of rational reasons for a less severe penalty." *Petition* at 121. He claims that:

> In the present case, the jury was instructed:
>
> > [If] you are convinced beyond a reasonable doubt and to a moral certainty that at least one aggravating circumstance does exist, and you are convinced that the aggravating circumstance outweighs the mitigating circumstances, your verdict in this case would read . . . that the Defendant . . . be punished by death (1395) (emphasis added).
>
> The jury was then instructed that recommendation of life without parole was permitted under two conditions: if there were no aggravating circumstances or if "the mitigating circumstances outweigh any aggravating circumstances" (1396). The instructions did not tell the jury what verdict they could or should return if the aggravating and mitigating circumstances were evenly balanced. The jury was also told that evidence of a mitigating factor could not even be placed on the scale if the prosecution disproved the existence of the mitigating circumstance by a mere preponderance of the evidence (1393).
>
> In this case, the unconstitutional mandatory weighing formula was especially likely to compel a death sentence, even if the jury believed that life was the appropriate penalty. The two jurors who voted for a life sentence apparently concluded that James' history of mental problems outweighed the aggravating circumstances. If any of the remaining ten jurors had a reasonable doubt about appellant's mental condition, but they were convinced that the prosecutor proved by a mere preponderance of the evidence that appellant was not mentally impaired, the instructions did not permit them to place the mitigating evidence that created the reasonable doubt about his mental condition on the scale. *See Stebbing v. Maryland*, 469 U.S. 900, 906-07 (1984)

> (Marshall, J., dissenting from denial of cert.). If one additional juror had voted for life because he had a reasonable doubt about the existence of this nonstatutory mitigating factor, the jury would not have been able to recommend death. *See Mills v. Maryland*, __ U.S. __, 108 S. Ct. 1860 (1988).

Id. at 120-121 (footnote omitted).

McWilliams is procedurally barred from raising this claim in federal court, because he did not present the claim to the Alabama Supreme Court as required by *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1732-33 (1999). Although he claims that "defense counsel preserved this issue in a written motion" at trial, this is clearly insufficient for exhaustion and procedural default purposes. McWilliams offers nothing to excuse the procedural default of this claim. Moreover, as previously discussed, McWilliams' has failed to establish that he is actually innocent. Therefore, he is procedurally barred from raising this claim in federal court. This claim is due to be denied.

Claim XVIII. The Court Erroneously Denied a Challenge for Cause Against Juror Grammar, Without Allowing Defense Counsel to Effectively Voir Dire Grammar about His Ability to Consider Mitigating Circumstances and Recommend a Life Sentence in this Case.

McWilliams argues that "[t]he trial court erroneously denied a challenge for cause to juror Grammar, without giving defense counsel a full and fair opportunity to determine whether he was biased in favor of the death penalty." *Petition* at 122. McWilliams claims that he was then "forced to use a peremptory strike to remove Grammar from the jury."

In denying this claim on the merits, the Alabama Court of Criminal Appeals found the following:

The appellant argues that the trial court erred by denying his challenge for cause against a potential juror, W.G.G., without allowing him to effectively voir dire the juror about his ability to consider mitigating circumstances and to recommend a life sentence in this case. The record indicates that during the voir dire of the jury venire in this case, the defense counsel asked the following:

> [DEFENSE COUNSEL]: . . . And if you find that the State has convinced you beyond a reasonable doubt and to a moral certainty that the Defendant, James McWilliams, is guilty of the things charged in this indictment, and no lesser offense-that is, he is guilty of a capital crime-if you have found him guilty of that crime, then, there would be a second hearing at which that same jury would hear evidence of aggravating and mitigating circumstances. Now, what I am asking is: If you were to serve on this jury, and if you and the 11 people who were on that jury with you were convinced beyond a reasonable doubt that James McWilliams was guilty of a capital offense, is there any person who feels that automatically a death sentence should be imposed? That is, if he was guilty of a capital offense, then, the death penalty would be imposed? Is there anyone who feels that way? If there is, would you please stand?
>
> PROSPECTIVE JURORS: W.G.G.; T.W.
>
> THE COURT: [Defense counsel], since you have gone into that, perhaps you should also tell the jury the other punishment that is available.
>
> [DEFENSE COUNSEL]: I will get to that. Thank you, Judge.
>
> OTHER JURORS ALSO RESPONDING: R.B.; A.H.; M.S.; D.F.; J.S.; T.O.; C.S.; W.D.W.; M.F.; R.R.; M.B.; D.B.; W.F.; T.K.
>
> NO FURTHER RESPONSES.
>
> [DEFENSE COUNSEL]: Now, the law provides for only two punishments if the Defendant is found guilty. And that is a sentence of death or a sentence of life in prison without parole. Those would be the only two sentences available, if that Defendant is convicted of the capital crime as charged in the indictment. Those of you who stood up and said that you believed that if he was guilty of this crime, he should receive a

> death sentence-those of you who said that-would the fact that you had an alternative of a sentence of life without parole, affect your decision? That is, could you give him life without parole if you were convinced, along with 11 others on the jury, that he was guilty of a capital offense? If you could, those of you who stood up would you stand up again?
>
> PROSPECTIVE JURORS: W.G.G.
>
> [DEFENSE COUNSEL]: Mr. G:, would you consider that an alternative punishment?
>
> JUROR GRAMMAR: Yes, sir.

Thereafter, several potential jurors were individually voir dired, among them W.G.G. During that questioning, the following occurred when W.G.G. was being examined by the prosecutor:

> [PROSECUTOR]: Mr. G., earlier you were asked the question that if you were serving on the jury and you reached a decision, along with the other members of the jury, that the Defendant was guilty of capital murder, and you indicated that you would impose the death penalty. Let me ask you this: Although in a given case, in this case you might ultimately arrive at your final decision: that being the death penalty, would you consider the evidence, and consider both life without parole and the death penalty before reaching your final decision?
>
> [W.G.G.]: Yes, sir.
>
> Q: All right. I believe that's all.
>
> RE-EXAMINATION BY [DEFENSE COUNSEL]:
>
> Q: Mr. G., if you and the 11 other jurors found the Defendant guilty of a capital offense: that is, you found in this case, James McWilliams had done what you were talking about that he had been through, shot the girl during the robbery and whatever else the proof might be, 'being so bold,' as you would still be able to consider mitigating circumstances and recommend a sentence of life without parole?
>
> [PROSECUTOR]: We object, Your Honor.

THE COURT: Sustained.

Q: Would you be able to recommend a life sentence without parole, as opposed to the death sentence, if you had already found him guilty beyond a reasonable doubt of the things that are alleged in this case?

[PROSECUTOR]: It is not whether he would recommend that, but whether he would consider the two alternatives?

THE COURT: Sustained.

Q: I will accept Your Honor's ruling, and stay on my question. I will stand with the question.

THE COURT: I don't think so. You are asking him to decide it now.

[DEFENSE COUNSEL]: I am asking a hypothetical question, if he found the defendant guilty, if he were convinced beyond a reasonable doubt that he had done the things alleged in this indictment that you have heard about, and that we have talked about, are you saying that you could consider mitigating circumstances and recommend a sentence of life without parole? Or do you feel that you would have to recommend the death sentence?

[PROSECUTOR]: We object on the same grounds. The question is not answerable.

THE COURT: Sustained.

[DEFENSE COUNSEL]: We'll except to Your Honor's ruling that we are asking the jury to pre-judge the evidence. I am asking him to pre-judge on a finding of guilt here, Mr. G. There would be 2 punishments available. Can you consider both of them?

THE WITNESS: Yes, I could.

Q: I have no further questions.

Thereafter, the defense counsel challenged W.G.G. for cause, stating that he should be able to ask the witness a hypothetical question. The trial court denied the challenge.

This potential juror clearly indicated that he could consider a sentence of life without parole, as well as a death sentence, and that his views on the death penalty would not prevent or substantially impair his duties as a juror. Therefore, the trial court did not abuse his discretion in denying the challenge for cause.

> The proper standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's 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, 105 S. Ct. 844, 852, 83 L. Ed. 2d 841 (1985); *Gray v. Mississippi*, 481 U.S. 648, 107 S. Ct. 2045, 2051, 95 L. Ed. 2d 622 (1987). 'The crucial inquiry is whether the venireman could follow the court's instructions and obey his oath notwithstanding his views on capital punishment.' *Dutton v. Brown*, 812 F.2d 593, 595 (10th Cir.), *cert. denied, Dutton v. Maynard*, 484 U.S. 836, 108 S. Ct. 116, 98 L. Ed. 2d 74 (1987). A juror's bias need not be proved with 'unmistakable clarity' because 'juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism.' *Id.*
>
> A trial judge's finding on whether or not a particular juror is biased 'is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province.' *Witt*, 469 U.S. at 429, 105 S. Ct. at 855. That finding must be accorded proper deference on appeal. *Id.* 'A trial court's rulings on challenges for cause based on bias [are] entitled to great weight and will not be disturbed on appeal unless clearly shown to be an abuse of discretion.' *Nobis v. State*, 401 So.2d 191, 198 (Ala. Crim. App.), *cert. denied, Ex parte Nobis*, 401 So.2d 204 (Ala. 1981)."

Martin v. State, 548 So.2d 488, 490-91 (Ala. Crim. App. 1988), *affirmed*, 548 So.2d 496 (Ala. 1989), *cert. denied*, 493 U.S. 970, 110 S. Ct. 419, 107 L. Ed. 2d 383 (1989).

Moreover, the trial court did not err in "limiting" the defense counsel's ability to question the potential juror on voir dire.

> "'In the process of selecting the jury from the venire afforded, each party has the right to have questions formulated by it propounded to the jury, either by the court or by the party as the court may determine, if such questions reasonably relate under the circumstances to the question of the qualification or interest or bias on the part of prospective jurors.' *Griffin v. State*, 383 So.2d 873, 876 (Ala. Crim. App.), *cert. denied*, 383 So.2d 880 (Ala. 1980), *quoted with approval in Alabama Power Co. v. Bonner*, 459 So.2d 827, 833 (Ala. 1984)." *Heath v. State*, 480 So.2d 26, 28 (Ala. Crim. App. 1985). It is well settled that the trial court has discretion regarding how the voir dire examination of the jury venire will be conducted, and that reversal can be predicated only upon an abuse of that discretion. *Ervin v. State*, 399 So.2d 894 (Ala. Crim. App.), *cert. denied*, 399 So.2d 899 (Ala. 1981); *Peoples v. State*, 375 So.2d 561 (Ala. Crim. App. 1979)."
>
> *Bui v. State*, 551 So.2d 1094, 1110 (Ala. Crim. 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).
>
> In the present case, the trial court sustained the prosecutor's objection on the ground that the formulation of defense counsel's questions required the potential juror to decide which sentencing alternative he would choose if he found this appellant guilty. The defense counsel was allowed to elicit from the potential juror whether he would consider a sentence of life imprisonment without parole. Therefore, we find no abuse of discretion by the trial court.

McWilliams, 640 So. 2d at 997-1000.

As the Alabama Court of Criminal Appeals correctly noted, the standard for determining whether a prospective juror may be excluded for cause because of his or her views on capital punishment is "whether the juror's 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 (1985). The trial court concluded from the prospective juror's answers that his view would not "prevent or substantially impair" his ability to serve as a juror in accordance with the court's instructions and the juror's oath.

Therefore, McWilliams is unable to show that the Alabama Court of Criminal Appeals decision was "contrary to or involved an unreasonable application of clearly established law" or "was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." This claim is due to be denied.

McWilliams also claims that:

> The court also erred when it refused to allow counsel to question Grammar about whether he would be biased by his knowledge of the facts of the crime, as it was portrayed in the news media. If Grammar formed a fixed opinion about the appropriate punishment for the crime described in the news reports that he was exposed to, he was obviously not qualified to serve.

Petition at 126-127. McWilliams is procedurally barred from raising this portion of his claim in federal court, because he did not present the claim to the Alabama Supreme Court as required by *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1732-33 (1999). McWilliams offers nothing to excuse the procedural default of this claim. Moreover, as previously discussed, McWilliams has failed to establish that he is actually innocent. Therefore, he is procedurally barred from raising this claim in federal court. This claim is due to be denied.

Claim XIX. The Prosecutor's Closing Argument in the Penalty Phase Undermined the Reliability of the Jury's Recommendation of Death.

McWilliams claims that "[t]he prosecutor's closing argument, taken as a whole, infected the sentencing trial with fundamental unfairness." *Petition* at 130. In support of this claim, McWilliams offers the following:

> [T]he prosecutor's summation was riddled with improper comments that misstated the evidence and inflamed the jury. Viewed in its entirety, his closing argument denied appellant a fundamentally fair trial. *Darden v. Wainwright*, 106 S. Ct. 2464 (1986).

> The prosecutor began his summation in the punishment phase by urging the jury to consider as a statutory aggravating circumstance that the murder was committed when the defendant was under a sentence of imprisonment. He contended that appellant's convictions for crimes after he committed the murder in this case proved this aggravating factor. The court sustained an objection to this argument because it encouraged the jury to impose the death penalty for a reason that was not authorized by Alabama law (1379-80).
>
> The prosecutor then violated appellant's Eighth Amendment rights when he argued that the jury should reject the statutory mitigating circumstance of extreme emotional disturbance because appellant had "a mental problem in this sense: that he has a mind which is just criminal. He is just bad. What else can you say? He is a dangerous man" (1380). The jury was required to consider mental disturbance as a mitigating factor, even if the defendant's mental illness made him more dangerous than a person who had no such excuse for this capital crime. *Penry v. Lynaugh*, 109 S. Ct. 2934, 2949 (1989). The prosecutor compounded this Eighth Amendment error when he suggested that the statutory mitigating circumstances contained an exclusive list of the mitigating factors that could be considered (1380-81). *Messer v. State of Florida*, 834 F.2d 890, 893 (11th Cir. 1987).
>
> The prosecutor also improperly urged the jury to consider nonstatutory aggravating circumstances. He contended that the "reason for" a death sentence included the defendant's inability "to change" his behavior and become "a good citizen", general deterrence, and society's "right to protect itself" from a person "who will always constitute a danger" (1382-83). Alabama law prohibited consideration of all of these aggravating forces because they were irrelevant to the statutory aggravating circumstances. *See Berard v. State*, 402 So.2d 1044 (Ala. Cr. App. 1981).
>
> The prosecutor inflamed the jury when he referred to James McWilliams' "animal lust" (1384), and characterized him as "cancer" that had to be "cut out" of society (1386). This appeal to emotion was highly improper.
>
> The prosecutor's closing argument, taken as a whole, infected the sentencing trial with fundamental unfairness. James' death sentence must be vacated because these improper arguments might have influenced the jury's verdict in this relatively close case, where two jurors recommend a life sentence.

Id. at 129-130.

In denying this claim on the merits, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that the prosecutor undermined the reliability of the jury's advisory verdict because of comments made during his closing argument in the penalty phase before the jury. The appellant cites seven different instances of alleged improper prosecutorial comment.
>
> The first comment by the prosecutor concerned the aggravating circumstances which he claimed to be applicable to the case. He stated that among these circumstances he expected that the trial court would charge "that the capital offense was committed by a person under sentence of imprisonment." He further stated that evidence had been presented that the appellant had been previously convicted on two occasions. The defense counsel objected, noting that "[t]he courts have interpreted that as being a person who was in prison at the time the crime was committed." The trial court sustained defense counsel's objection. The prosecutor then acknowledged, "I am incorrect: the first one [above-quoted aggravating circumstance] is not the applicable one." The appellant did not request a curative instruction and none was given. Thereafter, during its oral charge to the jury, the trial court instructed the jury on the aggravating circumstances which could properly be considered. "The general rule is that prejudicial statements, even though improper, are considered capable of being eradicated by the trial court in sustaining objections thereto or by appropriate instructions to the jury or both. *Meredith v. State*, 370 So.2d 1075 (Ala. Crim. App.), *cert. denied*, 370 So.2d 1079 (Ala. 1979). *Bui v. State*, 551 So.2d 1094 (Ala. Crim. App. 1988)." *Holladay v. State*, 549 So.2d 122, 131 (Ala. Crim. App. 1988), *affirmed*, 549 So.2d 135 (Ala.), *cert. denied*, 493 U.S. 1012, 110 S. Ct. 575, 107 L. Ed. 2d 569 (1989).
>
> The appellant also cites a comment made by the prosecutor as he was addressing the applicability of each statutory mitigating circumstance to this case. The prosecutor stated:
>
> > Two, the capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance. He has a mental problem in this sense: that he has a mind which is just criminal. He is just bad. What else can you say? He is a dangerous man, and he has proven it.
>
> The appellant argues that, by this comment, the prosecutor argued that the jury could not consider his alleged psychiatric problems. However, it is

clear that the prosecutor was arguing that the statutory mitigating circumstance that "[t]he capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance," did not apply to the facts and evidence presented in this case.

The appellant argues that the prosecutor's argument suggested that only statutory mitigating circumstances could be considered by the jury. The appellant bases his argument on the fact that the prosecutor listed the statutory mitigating circumstances and commented on each one. However, in *Bankhead v. State*, 585 So.2d 97 (Ala. Crim. App. 1989), the prosecutor raised the same argument. This court found no impropriety in the fact that "[i]n closing argument, the State went down the list of statutory mitigating circumstances, contending that none of these applied." *Bankhead*, supra, at 107.

The record further indicates that following the prosecutor's listing of the statutory mitigating circumstances the defense counsel objected on the basis that the list of statutory circumstances was not inclusive and that other circumstances may be considered. The trial court responded, "Counsel has the right to argue the law, but the Court will be the final authority on the law." The trial court then sustained the appellant's objection. The action of the trial court eradicated any error. *See Holladay*, supra, at 131, and cases cited therein. Moreover, during his oral charge to the jury, the trial court clearly instructed the jury that nonstatutory mitigating circumstances were to be considered by the jury, as well as the statutory mitigating circumstances. The trial court listed and described the pertinent nonstatutory mitigating circumstances.

The appellant also cites as error the following prosecutorial argument:

> Let me comment on the reasons for penalties, as I see it, or as I think all of you would agree. One reason is to rehabilitate somebody, to change their behavior and make them a good citizen. Is rehabilitation applicable in this case? I submit to you no, it is not. Another one is retribution, just punishment. And I think that society has a need to feel that when a man does the horrible crime that this man has committed, that people out there need to feel and know that the system works, and that the man has been punished to the degree that he can be punished in our society, which, in this case, is the maximum sentence. Another one is deterrent: that is, to deter-in other words, the punishment that might be applied to one defendant hopefully will deter others from thinking about committing the same kind of crime. Isn't that applicable in this case?"

Deterrence, retribution, and society's right to self-defense have all been held to be proper subjects of prosecutorial argument. *See, e.g., Rutledge v. State*, 523 So.2d 1087, 1100 (Ala. Crim. App. 1987), *reversed on other grounds*, 523 So.2d 1118 (Ala. 1988) ("[i]t is proper to argue deterrence in a sentencing phase closing argument"). *Holladay v. State*, 549 So.2d 122, 131 (Ala. Crim. App. 1988), *affirmed*, 549 So.2d 135 (Ala.), *cert. denied*, 493 U.S. 1012, 110 S. Ct. 575, 107 L. Ed. 2d 569 (1989) (retribution argument was held proper). *Kuenzel v. State*, supra (argument concerning society's right of self-defense was held proper).

The appellant cites as error the following statements made by the prosecutor:

> Then when he had satisfied that animal lust of his and reached an ejaculation, that is how that happened to be on her slacks. . . . I am suggesting to you that it is your duty, your obligation under the facts of the evidence in this case, to do that: to carry out your job as it should be done because we have to cut out a cancer sometimes.

As to the prosecutor's reference to the appellant's "animal lust":

> The prosecutor's statements are not evidence. *Henry v. State*, 468 So.2d 896, 899 (Ala. Crim. App. 1984), *cert. denied*, 468 So.2d 902 (Ala. 1985). Further, prosecutors are to be allowed a wide latitude in their exhortations to the jury. *Varner v. State*, 418 So.2d 961 (Ala. Crim. App. 1982). "Statements of counsel and argument must be viewed as in the heat of debate and must be valued at their true worth rather than as factors in the formation of the verdict." *Orr v. State*, 462 So.2d 1013, 1016 (Ala. Crim. App. 1984).

Armstrong v. State, 516 So.2d 806, 809 (Ala. Crim. App. 1986). Furthermore, '[t]he trial judge can best determine when discussion by counsel is legitimate and when it degenerates into abuse. *Garrett v. State*, 268 Ala. 299, 105 So.2d 541 (1958); *Hurst v. State*, 397 So.2d 203 (Ala. Crim. App.), *cert. denied*, 397 So.2d 208 (Ala. 1981).' *Henderson v. State*, 460 So.2d 331, 333 (Ala. Crim. App. 1984).

> . . . '[A] prosecutor as well as defense counsel has a right to present his impressions from the evidence,' and '[h]e may argue every legitimate inference from the evidence and may examine, collate, sift, and treat the evidence in his own way.'

> *Watson v. State*, 398 So.2d 320, 328 (Ala. Crim. App. 1980), writ. denied, 398 So.2d 332 (Ala. 1981), *cert. denied*, 452 U.S. 941, 101 S. Ct. 3085, 69 L. Ed. 2d 955 (1981).

Henderson v. State, 584 So.2d 841, 856 (Ala. Crim. App. 1989), *remanded*, 584 So.2d 862 (Ala.), *affirmed*, 587 So.2d 1071 (Ala. Crim. App. 1991).

As to the prosecutor's reference to the appellant as a "cancer that needed to be 'cut out'" of society, "the law is clear that '[i]n a proper case, the prosecuting attorney may characterize the accused or his conduct in language which, although it consists of invective or opprobrious terms, accords with the evidence of the case.'" *Pierce v. State*, 576 So.2d 236 (Ala. Crim. App. 1990), *cert. denied*, 576 So.2d 258 (Ala. 1991), *quoting Nicks v. State*, 521 So.2d 1018, 1023 (Ala. Crim. App. 1987), *affirmed*, 521 So.2d 1035 (Ala.), *cert. denied*, 487 U.S. 1241, 108 S. Ct. 2916, 101 L. Ed. 2d 948 (1988).

The appellant contends that the prosecutor erred in arguing that the victim was raped from behind, because, he argues, this fact was not supported by facts introduced into evidence. However, there was evidence that there was semen found on certain places on her slacks, which were still around her lower legs when she was found. Thus, this argument was proper as a reasonable inference to be drawn from the evidence. *See Henderson v. State*, supra.

The appellant cites three instances in which he claims that the prosecutor injected his personal opinion into the closing argument. The appellant appears to be referring to the prosecutor's comments that society needed protection and that the evidence presented concerning the appellant's mental state indicated not that he was mentally ill, but rather that he was simply mean. This argument was based on the report from the lunacy commission stating that the appellant did not have a mental defect, but rather had a character defect and repercussions from that defect. "'While it is never proper for the prosecutor to express his personal opinion as to the guilt of the accused during closing argument, reversible error does not occur when the argument complained of constituted mere expression of opinion concerning inferences, deductions and conclusions drawn from the evidence.' *Sams v. State*, 506 So.2d 1027, 1029 (Ala. Crim. App. 1986)." *Henderson v. State*, supra.

In reviewing claims of improper prosecutorial argument, comments made by the prosecutor must be examined in the context of the entire trial. *Duren v. State*, 590 So.2d 360 (Ala. Crim. App. 1990). "In judging a prosecutor's closing argument, the standard is whether the argument 'so infected the trial with unfairness as to make the resulting conviction a denial

> of due process.' *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S. Ct. 2464, [2471] 91 L. Ed. 2d 144 (1986), *quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1975)." *Bankhead v. State*, 585 So.2d 97 (Ala. Crim. App. 1989). We find no denial of due process resulting from the prosecutor's comments during his closing statement, nor do we find any error in those comments.

McWilliams, 640 So. 2d at 1000-1002.

After careful examination of McWilliams' challenged portions of the prosecutor's closing argument during the penalty phase, and the Alabama Court of Criminal Appeals' opinion, it is apparent that McWilliams cannot show the state court's adjudication of this claim is contrary to or an unreasonable application of clearly established Supreme Court precedent, nor can he show that the state court's decision was based upon an unreasonable determination of the facts in light of the evidence before it.

With regard to the prosecutor's comment that McWilliams' convictions for crimes committed after he committed the murder in this case constituted an aggravating factor, the state appellate court correctly noted that after sustaining McWilliams' objection to this comment, the prosecutor acknowledged that the comment had been incorrect. Additionally, in its oral charge to the jury, the court instructed the jury on the aggravating circumstances that could be properly considered.

> Improper arguments [only] render the capital sentencing hearing fundamentally unfair and require reversal when there is a reasonable probability that they changed the outcome of the case. *See id.* at 1402. "'A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* at 1401 *(quoting Strickland v. Washington*, 466 U.S. 668, 669, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)).

Spivey v. Head, 207 F.3d 1263, 1275-76 (11th Cir. 2000). Here, the prosecutor admitted his mistake to the jury and the trial judge properly instructed the jury as to which aggravating

circumstances could be considered. Therefore, "[t]he comment[s] [did not] 'so infect[] the trial with unfairness as to make the resulting [sentence] a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (*quoting Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)).

With regard to the prosecutor's comment that the "jury should reject the statutory mitigating circumstance of extreme emotional disturbance because appellant had "a mental problem in this sense: that he has a mind which is just criminal, that he "is just bad," "[w]hat else can you say," "[h]e is a dangerous man," McWilliams implies that this led the jury to believe that it could not consider mental disturbance as a mitigating factor. However, as the state appellate court found, "it is clear that the prosecutor was arguing that the statutory mitigating circumstance that '[t]he capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance,' did not apply to the facts and evidence presented in this case." *McWilliams*, 640 So. 2d at 1000. Moreover, even if the comment had been improper, McWilliams has not shown that there is a reasonable probability that the comment changed the outcome of his case.

With regard to McWilliams' claim that the prosecutor "suggested that the statutory mitigating circumstances contained an exclusive list of the mitigating factors that could be considered," the appellate court correctly noted that the trial court sustained McWilliams' objection to this comment, stating that "Counsel has the right to argue the law, but the Court will be the final authority on the law," and that the trial court instructed the jury that non-statutory mitigating circumstances must be considered as well as the statutory mitigating circumstances, and then listed and described the pertinent non-statutory mitigating

circumstances. *McWilliams*, 640 So. 2d at 1001. To the extent that the comment might have been improper, McWilliams has not shown that there is a reasonable probability that the comment changed the outcome of his case.

McWilliams' also claims that the prosecutor improperly "urged the jury to consider nonstatutory aggravating circumstances," when he "contended that the 'reason for' a death sentence included the defendant's inability 'to change' his behavior and become 'a good citizen,' general deterrence, and society's 'right to protect itself' from a person 'who will always constitute a danger.'" However, deterrence, retribution, and society's right to self-defense have been held to be proper subjects of prosecutorial arguments. *See, e.g. Simmons v. South Carolina,* 512 U.S. 154, 114 S. Ct. 2187, 129 L. Ed. 2d 133 (1994)*; Duren v. Hopper*, 161 F.3d 655 (11th Cir. 1998); *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993);

Davis v. Kemp, 829 F.2d 1522, 1527-1528 (11th Cir. 1987); *Brooks v. Kemp*, 762 F.2d 1383, (11th Cir. 1985), *vacated on other grounds by Kemp v. Brooks*, 478 U.S. 1016 (1986), *reinstated by Brooks v. Kemp*, 809 F.2d 700 (11th Cir. 1987).

McWilliams' final claim regarding the prosecutorial comments is that the prosecutor inflamed the jury when he referred to his "animal lust," and characterized McWilliams as a "cancer" that had to be "cut out" of society. He claims that this was an improper "appeal to emotion." McWilliams has cited no federal law finding that comments similar to these made by the prosecution were improper. In fact, the Eleventh Circuit has held that comments that a petitioner was motivated by lust and was a "cancer on the body of society" were not improper. *Davis*, 829 F.2d at 1527; *Brooks*, 762 F.2d at 1413. The comments in

McWilliams' case clearly went to the prosecutor's concern that McWilliams would continue to be a threat to society, based on the evidence before the court.

Because McWilliams has failed to establish that the state court's adjudication of these claims was contrary to or an unreasonable application of clearly established Supreme Court precedent, or that the state court's decision was based upon an unreasonable determination of the facts in light of the evidence before it, the claims are due to be denied.

Moreover, each comment objected to by McWilliams was either proper or cannot be said to have rendered the trial fundamentally unfair. Therefore, it stands to reason that McWilliams cannot show that the state court's opinion regarding the cumulative effect of the comments was contrary to or an unreasonable application of clearly established Supreme Court precedent, or an unreasonable determination of the facts in light of the evidence before it. Accordingly, this claim is also due to be denied.

Claim XX. Due Process Required a Jury Instruction about the Lesser Included Offense of Felony Murder Because a Rational Jury Could Have Found That the Robbery Was Committed by Two Men and James McWilliams Was Not the Triggerman or an Accomplice to the Murder.

McWilliams claims that he "was denied due process of law when the court refused to instruct the jury to consider the lesser-included offense of felony murder." *Petition* at 131. McWilliams offers the following in support of this claim:

> In a capital case, the defendant is entitled to a jury instruction about any lesser-included offense that is not punishable by death. *Beck v. Alabama*, 447 U.S. 625 (1980) and *Connolly v. State*, 500 So.2d 57 (Ala. Cr. App. 1985). The failure to give such an instruction is a violation of due process, unless the evidence would not permit a rational jury to acquit the defendant of the capital

crime and convict him of the lesser offense. *Hopper v. Evans*, 456 U.S. 605, 612 (1982).

In Alabama, common law felony murder is a lesser-included offense of capital murder. Capital murder requires an intentional killing during the course of certain enumerated felonies, including robbery. *Ex Parte Kyzer*, 399 So.2d 330 (Ala. 1981). A non-triggerman who participated in a robbery is not guilty of a capital offense in Alabama, unless he was an accomplice as a matter of law to an intentional murder that was committed during the course of the robbery. *Lindsey v. State*, 456 So.2d 383 (Ala. Cr. App. 1983). Thus, if a rational jury could find that a capital murder defendant participated in a robbery with the triggerman, without finding that the defendant was an accomplice to the killing, he is entitled to a jury instruction about the lesser-included offense of felony murder.

In the present case, defense counsel made a timely request to have the jury instructed to consider felony murder as a lesser-included offense on the theory that two men were involved in the robbery and appellant was not the triggerman (1177-88). The court refused to give the instruction because it believed that no rational jury could have found that two men were involved in the crime (1198).

James McWilliams was entitled to the lesser-included offense instruction that defense counsel requested. A rational jury co[u]ld have acquitted him of capital murder and convicted him of felony murder because there was evidence that Jerry Porter raped and shot the victim, while James aided him in robbing the convenience store, without sharing his intent to kill.

The victim was the only eyewitness to the rape and the shooting. She described the triggerman and rapist as "a big black man with long, curly hair" (1109) (emphasis added). A rational jury could have found that this description fit Jerry Porter than James McWilliams. Porter's hair was long and curly in the lineup photograph (1095). James' hair was not particularly long or noticeably curly in the arrest photographs and he was only 5'7" tall and 137 pounds (PSR at 1).

A rational jury could have found that the victim did not mention a second robber in her dying declaration because she never saw him. Porter could have raped and shot the victim into the back of the convenience store, while James was in another part of the store, acting as a lookout. James could also have left the scene of the crime before Porter shot the victim.

Ronnie Thomas' testimony provided a plausible evidentiary basis for this theory. Thomas said that when he entered the convenience store, a clean-shaven black man, wearing tan khaki pants and a white dress shirt, was behind the counter (380). The cash drawer was already open and empty (372). When Thomas asked the man where the counter girl was, he told Thomas that she was in the back of the store (371).

Thomas initially identified Jerry Porter in a photo array and a lineup as the man he saw behind the counter (392-400, 950-51). He claimed that he only made a tentative identification and he subsequently changed his mind and identified James, but his identification of Porter was strong enough for the police to arrest Porter for the murder, rape and robbery (954, 961). Since the police believed Thomas when he identified Porter, the jury was entitled to believe him as well.

Steve McDaniel also identified Porter as the robber in a photo array before he changed his story and identified James (599, 959). As McDaniel passed the convenience store, he saw a clean-shaven black man in a white sweater and brown corduroy sports jacket, standing inside the store.

A third eyewitness, Howard Marsh, identified James. Marsh said that the robber had a beard (563). The jury could have found that Marsh saw appellant with a beard in the store and McDaniel and Thomas saw the clean-shaven Porter. When McDaniel was shown the arrest photograph of appellant with a goatee beard, he said that the picture did not look like the person he saw in the convenience store (600). When Thomas saw the same photograph of James with a goatee beard, he said that he was sure that he would have remembered seeing such facial hair on the killer (410). The defense contended that James' beard was about as prominent on the night of the robbery as it was in the arrest photograph that was shown to McDaniel and Thomas. If the jury accepted that view of the evidence, there was a clear basis to find that the three eyewitnesses saw two different robbers.

The jurors had to accept three incredible coincidences to find that Thomas and McDaniel did not see Jerry Porter robbing the convenience store. First, they had to believe that both eyewitnesses mistakenly identified the same man. Then, they had to believe that Porter was coincidentally seen within a few miles of the convenience store on the night of the murder, wearing the clothes that McDaniel and Thomas described: khaki pants, a white shirt and a brown coat. Finally, they had to believe that Porter was not involved in the robbery of $305 from the convenience store, even though he was carrying a paper sack of twenty-dollar bills and coins on the night that the store was robbed (955-58).

The jurors could have found that on the night of the murder, James was not wearing the kind of clothes that McDaniel and Thomas described because four witnesses testified that he was wearing blue jeans and a plaid short that night (708-09, 224, 735, 1129). If the jurors accepted the defense theory that James was wearing blue jeans and a plaid shirt when the murder was committed and Porter was dressed like the robber that Thomas and McDaniel saw, they could have found that Thomas and McDaniel saw Porter inside the convenience store. FN.

> FN. A police officer claimed that Porter's unidentified friends gave him an alibi (958), but a rational jury could have found that these witnesses lied to protect a friend, as the defense contended. Furthermore, the testimony about Porter's alibi must be disregarded on appeal because it was inadmissible hearsay. *Hardee v. Hardee*, 93 So.2d 127, 133 (Ala. 1956). The jury could also have rejected the testimony of the two jailhouse informants, who claimed that appellant confessed to them. Both of these witnesses were heavily impeached because they received leniency in exchange for their testimony.

If the jurors found that Thomas and McDaniel saw Porter in the convenience store, they could still have convicted James McWilliams of felony murder. To find that James was a completely innocent man, the jury had to believe the defense theory that Porter coincidentally deposited the murder weapon and some ammunition in James' car as he fled from the scene. This coincidence was about as hard to believe as the coincidences that the prosecution asked the jury to believe about Porter. The theory that both men were involved in the crime was arguably the most plausible explanation for the evidence. A conviction for felony murder was possible under this theory because there was no direct evidence that James was an accomplice to the murder, as well as the robbery. FN.

> FN. The jury could have found that appellant did not share Porter's intent to kill or aid him in the killing, even though the murder weapon and ammunition were found in appellant's possession. He could have lent the murder weapon to Porter to use during the robbery, without intending for Porter to shoot the victim. He could have taken Porter's gun from the scene of the crime to hide the evidence of a killing that he did not anticipate. If appellant left the store before the shooting, Porter could have tossed the gun into appellant's unlocked car as he fled from the scene because he wanted to return it to its owner. Porter could also have planted the evidence of the murder in appellant's car

> because he wanted shift the blame to his accomplice in the robbery.
>
> An analogous *Beck* violation was condemned in *Cordova v. Lynaugh*, 838 F.2d 764 (5th Cir. 1988), *overruling on other grounds recognized by, Vanderbilt v. Collins*, 994 F.2d 189, 195 (5th Cir. 1993). Cordova and three other men were involved in the murder, robbery and rape of a woman. To prove that Cordova was guilty of capital murder, the prosecution had to prove that he committed the murder during the robbery. The evidence of Cordova's participation in the killing and the rape was direct and overwhelming, but the evidence of his participation in the robbery was weak and circumstantial. The Fifth Circuit held that an instruction on the lesser-included offense of murder was required because a rational jury could have found that Cordova was the killer, without finding that he was a party to the robbery that elevated the murder to a capital offense. 838 F.2d at 769-70.
>
> Here, as in *Cordova v. Lynaugh*, the jury could have found that the defendant was not guilty of capital murder, but guilty of a lesser-included offense, because the evidence "simply does not establish conclusively that he had the same intent" as the other party who participated in the crime. 838 F.2d at 769. The evidence of capital murder may have been stronger here because there was a factual dispute about whether more than one person was involved in the crime, but the harmless error rule does not apply to a failure to instruct the jury to consider a lesser included offense in a capital case. *Id.* at 770, n 8.
>
> In short, the court denied James due process of law when it refused to instruct the jury to consider the lesser included offense of felony murder. His conviction must be reversed and a new trial must be ordered. Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion in their factual holdings and failure to properly consider all of the facts in this case.

Petition at 131-137.

In denying this claim on the merits, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that he was denied his rights to due process by the trial court's refusal to instruct the jury on a lesser included offense of felony

murder, because he argues that a rational jury could have found that the robbery was committed by two men and that the appellant was not the triggerman or an accomplice to the murder. However, the evidence presented at trial clearly indicates that the appellant was not entitled to such a charge. There was no reasonable theory which could have been drawn from the evidence to support the appellant's contention that the jury might have concluded that there were two men involved. The appellant bases his argument on the fact that certain of the identifications given by witnesses varied and did not perfectly match the appellant. However, each of these witnesses positively identified the appellant as the man they saw at the time of the offense. The appellant was identified as the man present during the offense; he was found with the murder weapon in his possession; and the victim's dying declarations clearly indicated that there was only one man involved. FN.

> FN. There was testimony that, after the victim was found, she stated repeatedly that she did everything that the "son of a bitch" wanted, but that he still shot her. Her statements made at the hospital similarly only indicated one perpetrator.

> In *Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980), the United States Supreme Court held that the sentence of death could not be imposed after a jury verdict of guilt of a capital offense when the jury was precluded from considering a verdict of guilt of a lesser included non-capital offense, provided that the evidence would have supported such a verdict. Subsequently, in *Hopper v. Evans*, 456 U.S. 605, 102 S. Ct. 2049, 72 L. Ed. 2d 367 (1981), the Supreme Court clarified its decision in *Beck*, supra, to require that only when the evidence warrants such an instruction must a lesser included offense instruction be given. In so holding, the Court upheld the constitutionality of the following Alabama standard as applied in capital cases: "a lesser included offense instruction should be given if 'there is any reasonable theory from the evidence which would support the position.'" *Hopper*, 456 U.S. at 611, 102 S. Ct. at 2053 (*quoting Fulghum v. State*, 291 Ala. 71, 75, 277 So.2d 886, 890 (1973)).

Ex parte Julius, 455 So.2d 984, 986 (Ala. 1984), *cert. denied*, 469 U.S. 1132, 105 S. Ct. 817, 83 L. Ed. 2d 809 (1985). The appellant was not entitled to a charge on felony murder because there was no reasonable theory from the evidence which would have supported such a charge.

McWilliams, 640 So. 2d at 1002-1003.

McWilliams claims that "[a] rational jury co[u]ld have acquitted him of capital murder and convicted him of felony murder because there was evidence that Jerry Porter raped and shot the victim, while James aided him in robbing the convenience store, without sharing his intent to kill." *Petition* at 132. However, McWilliams has pointed to no evidence that established that Jerry Porter raped and shot the victim, or that McWilliams assisted Porter in robbing the store, without having any intention to kill the store clerk. As the Alabama Court of Criminal Appeals found, each of the witnesses mentioned by McWilliams positively identified him as the man they saw at the time of the offense; McWilliams was found with the murder weapon in his possession; and the victim's dying declarations clearly indicated that there was only one man involved. Additionally, McWilliams' defense at trial was that he was not involved in the offense at all. Therefore, after careful review of the *Beck* and *Hopper* standards, it is apparent that McWilliams has failed to show the state court's decision "was contrary to or involved an unreasonable application of clearly established law" or "was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." This claim is due to be denied.

Claim XXI. The Physical Evidence Seized from James McWilliams by the Ohio Police and His Custodial Statement must Be Suppressed Because this Evidence Was the Fruit of an Illegal Arrest.

McWilliams next claims that "all of the physical evidence seized from appellant by the Ohio police must be suppressed because it was obtained during a search pursuant to an illegal arrest." *Petition* at 137. In denying this claim on the merits, the Alabama Court of Criminal Appeals found as follows:

The appellant argues that all of the physical evidence which was seized from him by the Ohio police, as well as the statement taken when he was in custody, should have been suppressed because, he argues, this evidence was the fruit of an illegal arrest. The record indicates that an Ohio State Trooper testified at trial that, in the early morning of January 3, 1985, he drove into a rest area, where he observed a parked vehicle, which he noticed because the trunk lock had been punched out. The trooper checked the vehicle's tag number and determined that the vehicle had been reported as stolen, according to a NCIC report. The trooper intended to wait for other officers to arrive; however, the vehicle's back-up lights came on and the car began to back out of the parking slot. The trooper testified that he then immediately approached the vehicle with his weapon pointed at the appellant, and instructed the appellant to put his hands up. The trooper told the appellant why he was being stopped, and the appellant hesitantly followed the trooper's instructions. The trooper testified that the appellant stated that the vehicle he was in belonged to his uncle and that his uncle had been accompanying him in another vehicle, which had been parked next to him. He told the trooper that his name was Rufus Williams and that he was born on July 7, 1958. When asked how old he was the appellant stated that he was 23 years old; the trooper stated that the dates did not add up properly. The trooper asked for further identification. The appellant stated that he had none and the trooper asked if he carried a wallet. The appellant presented his wallet, and the trooper found a social security card belonging to Anthony G. Crawford, whom the appellant and his wife had visited in Tuscaloosa. The appellant then stated, "I lied to you; that's me. I am not Rufus Williams." The trooper testified that thereafter he performed an administrative inventory search of the vehicle, pursuant to the standard procedure of the Ohio Highway Patrol and, that upon entering the vehicle, he immediately observed a .38 caliber Smith & Wesson handgun underneath the arm-rest. He further found a box of .38 special cartridges and he also found bullets on the appellant's person. The appellant stated that the gun belonged to his uncle.

The basis for the appellant's objection to the arrest is the trooper's report wherein it states that, he "got an NCIC hit on the car, also says he then arrested the defendant. And he then verified that the car was stolen."

The appellant's arrest was proper as the trooper had sufficient probable cause to conduct a warrantless arrest. Although the State seems to argue that the appellant was merely being detained and questioned under *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968), it is clear that, when the trooper approached with a drawn gun, which he pointed at the appellant, telling him to raise his hands, the appellant was under arrest. *See e.g. Jordan*

> *v. State*, 549 So.2d 161 (Ala. Crim. App. 1989). The trooper had sufficient probable cause based on his observation that the "trunk lock was punched," that is, that the trunk lock had been removed, that the vehicle had an Alabama license plate and was present at approximately 2:00 a.m. at a rest area in Ohio and that the file check of the vehicle showed that it was entered into NCIC as stolen. *See e.g. Bryant v. City of Gadsden*, 574 So.2d 919, 920-21 (Ala. Crim. App. 1990) (an officer may rely upon a police radio broadcast to stop and arrest a suspect where the officer also had " 'a particularized and objective basis for suspecting the [defendant] of criminal activity.' " *Id., quoting Ex parte Betterton*, 527 So.2d 747, 749 (Ala. 1988)). Therefore, because the appellant's arrest was proper, the evidence seized from the vehicle was taken incident to a lawful arrest, *Manning v. State*, 568 So.2d 327 (Ala. Crim. App. 1990), and subsequent inventory search, and his confession was not to be excluded, because it was not the fruit of an illegal arrest. *Williams v. State*, 565 So.2d 1233 (Ala. Crim. App. 1990).

McWilliams, 640 So. 2d at 1010-1011.

> The United States Supreme Court has held:
>
> [W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial.

Stone v. Powell, 428 U.S. 465, 482 (1976); *see Devier v. Zant*, 3 F.3d 1445 (11th Cir. 1993) (Fourth Amendment claims that there was no probable cause to support arrest warrant were given a full and fair hearing in state court and district court did not err in holding that it lacked authority to review the claims). McWilliams concedes that he received a full and fair opportunity to litigate his Fourth Amendment claim in state court. The Alabama Court of Criminal Appeals made an explicit finding that the physical evidence obtained in the search by the Ohio police was properly admitted. Because the state provided McWilliams with a full and fair opportunity to litigate this claim, it is due to be denied.

Claim XXII. The Identification of James McWilliams by John Stephens Should Have Been Suppressed Because it Was Induced by a Suggestive Photo Lineup.

McWilliams claims that the "identification of James McWilliams by John Stephens should have been suppressed because it was induced by a suggestive photo lineup." *Petition* at 139. In support of this claim, McWilliams offers the following:

> John Stephens identified James at a photo lineup that was assembled by Officer McFerrin. The defense moved to suppress Stephens' identification testimony. At the suppression hearing, McFerrin revealed that James' photograph was distinguished from the other photographs in two ways. It was the only picture of a suspect displayed against a red background and James was the only suspect holding a plaque under his chin that said "Jefferson County Jail" (281-82, 301). The court denied the motion to suppress Stephens' identification of James.
>
> This photo lineup plainly violated the requirements of due process. The red background was literally a red flag that called Stephens' attention to James' photograph. The sign under his chin announced that he alone was in custody in an Alabama jail. There is a substantial likelihood that Stephens assumed that the police were trying to tell him in a not so subtle manner that, "This is the man!" Accordingly, James' conviction must be reversed.

Id. at 140.

In denying this claim on the merits, the Alabama Supreme Court found as follows:

> The appellant argues that John Stephens's identification of him should have been suppressed because it was induced by a suggestive lineup. The appellant bases his argument on the fact that John Stephens, a State's witness, picked the appellant out of a photographic array, wherein the appellant states that he was the only suspect who was displayed against a red background and the only suspect who held a plaque under his chin that said "Jefferson County Jail." The record indicates that the appellant's picture was framed during the array, so that only part of the wording, if any, was visible when Stephens viewed it. The record indicates further that the background of the photograph was red, because the photograph was taken at the Jefferson County jail. Furthermore, the record indicates that all of the pictures were distinct in some way, in that some of them had numbers on them, and some of them had height marks behind the individual. The State presented evidence that no suggestions were made by the police to Stephens as to making his identification.

> It is, first of all, apparent that the primary evil to be avoided is 'a very substantial likelihood of irreparable misidentification.' *Simmons v. United States*, 390 U.S. [377], at 384, 88 S. Ct. 967 [at 971], 19 L. Ed. 2d 1247 [1968]. While the phrase was coined as a standard for determining whether an in-court identification would be admissible in the wake of a suggestive out-of-court identification, with the deletion of 'irreparable' it serves equally well as a standard for the admissibility of testimony concerning the out-of-court identification itself. It is the likelihood of misidentification which violates a defendant's right to due process. . . . Suggestive confrontations are disapproved because they increase the likelihood of misidentification, and unnecessarily suggestive ones are condemned for the further reason that the increased chance of misidentification is gratuitous.

Neil v. Biggers, 409 U.S. 188, 198, 93 S. Ct. 375, 381, 34 L. Ed. 2d 401 (1972).

Even if the photographic array could have been said to be unduly suggestive, the in-court identification by Stephens was clearly independently reliable. "'[W]hether eyewitness identification evidence which ensues from a pre-trial identification procedure is constitutionally infirm requires a two-step inquiry. First, it must be determined whether the pre-trial identification procedures were unduly suggestive. . . . If so, then the suggestiveness of the identification procedures must be balanced against factors indicating that the in-court identification was independently reliable.' *Dickerson v. Fogg*, 692 F.2d 238, 244 (2d Cir.1982)." *Hull v. State*, 581 So.2d 1202 (Ala. Crim. App. 1990). "In *Neil v. Biggers*, 409 U.S. 188, 199, 93 S. Ct. 375, 382, 34 L. Ed. 2d 401 (1972) the United States Supreme Court set out certain factors to be considered in evaluating the reliability of an identification. These factors, as reaffirmed in *Manson v. Brathwaite*, 432 U.S. 98, 114, 97 S. Ct. 2243, 2253, 53 L. Ed. 2d 140 (1977), include 'the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of his prior description of the criminal, the level of certainty demonstrated at the confrontation, and the time between the crime and the confrontation.'" *Hull v. State*, supra. Each case is to be decided pursuant to a totality of the circumstances review. *Manson v. Brathwaite*, 432 U.S. at 110, 97 S. Ct. at 2251.

In the present case, the record indicates that the witness, John Stephens, lived in the same apartment complex as Cynthia Love and that he spoke to the

> appellant on two occasions while he was staying at the apartment. He first saw the appellant as he was carrying belongings into the apartment of Cynthia Love. The witness testified that he asked the appellant if he knew Cynthia Love, and that the appellant responded that he did and commended the witness for looking out for her. The witness again spoke to the appellant for a more extended period of time, after the police began investigating the crime. The witness testified that he observed the appellant with another man in a vehicle. He called the appellant over to his apartment and the appellant responded. He informed the appellant that the police had been looking for both the appellant and his wife in connection with the investigation of the offense. The appellant responded that he was concerned for his wife's welfare, with such a criminal on the loose. The witness then attempted to get some beer from the appellant; however, the appellant indicated that he had none. The witness also testified that he observed the appellant, prior to the latter conversation, fumbling with keys and apparently attempting to enter or lock Cynthia Love's apartment. The witness testified that this occurred possibly on the night of the offense. The witness was very specific and accurate in his descriptions of the appellant. It is further evident that the witness identified the appellant with a high level of certainty.
>
> Based on the above, we find that the witness's identification of the appellant was reliable.

McWilliams, 640 So. 2d at 1011-1012.

This court cannot find that the determination of the Court of Criminal Appeals 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). Even assuming that the lineup was unduly suggestive, it is quite clear that the in-court identification of McWilliams was independently reliable. The Alabama Court of Criminal Appeals made the following factual findings:

> In the present case, the record indicates that the witness, John Stephens, lived in the same apartment complex as Cynthia Love and that he spoke to the appellant on two occasions while he was staying at the apartment. He first saw the appellant as he was carrying belongings into the apartment of Cynthia

> Love. The witness testified that he asked the appellant if he knew Cynthia Love, and that the appellant responded that he did and commended the witness for looking out for her. The witness again spoke to the appellant for a more extended period of time, after the police began investigating the crime. The witness testified that he observed the appellant with another man in a vehicle. He called the appellant over to his apartment and the appellant responded. He informed the appellant that the police had been looking for both the appellant and his wife in connection with the investigation of the offense. The appellant responded that he was concerned for his wife's welfare, with such a criminal on the loose. The witness then attempted to get some beer from the appellant; however, the appellant indicated that he had none. The witness also testified that he observed the appellant, prior to the latter conversation, fumbling with keys and apparently attempting to enter or lock Cynthia Love's apartment. The witness testified that this occurred possibly on the night of the offense. The witness was very specific and accurate in his descriptions of the appellant. It is further evident that the witness identified the appellant with a high level of certainty.

McWilliams, 640 So. 2d at 1012. McWilliams has offered nothing to dispute the accuracy of these factual findings. Clearly, Mr. Stephens in-court identification of McWilliams was more than sufficient to meet the requirements of *Neil* and *Manson*. This claim is due to be denied.

Claim XXIII. The Identification of James McWilliams by Howard Marsh, Ronnie Thomas and Steven McDaniel Should Have Been Suppressed Because James Was Denied His Right to Have Retained Counsel Present When These Witnesses Identified Him in a Lineup.

McWilliams claims that "the identification of James McWilliams by Howard Marsh, Ronnie Thomas and Steven McDaniel in a lineup violated his right to counsel." *Petition* at 141. In support of this claim, McWilliams claims that:

> In the present case, the court denied a motion to suppress the identification of James in a lineup by three eyewitnesses – Howard Marsh, Steven McDaniel and Ronnie Thomas (334). A lawyer named Boller appeared at the lineup and said the he was representing appellant (327-28, 350). James

was charged and in custody for other unrelated offenses (364; PSR at 7). Jeff Deen was his retained counsel (364). James advised the police that he wanted Deen to represent him at the lineup, but they did not contact him (360). The police told appellant that the court appointed Boller to represent him (350, 361). James told Boller that he did not want his services (369). Boller nevertheless represented him at the lineup (350).

James had a right under the Sixth Amendment to retain his own lawyer if he could afford one. Since the police denied him access to his counsel of choice at the lineup, it was as if he had no lawyer at all.

The court should have suppressed the in-court identifications by Marsh, Thomas and McDaniel, as well as the lineup, because the prosecution failed to prove with clear and convincing evidence that the in-court identifications were based on an independent source. Thomas and McDaniel both identified Jerry Porter a few days after the crime, when the image of the perpetrator was fresh in their minds (285, 288, 292). Marsh saw the criminal fleetingly through the glass doors of the convenience store. These in-court identifications plainly lacked indicia of reliability and they should have been suppressed. James' conviction must be reversed.

Howard Marsh testified at James' trial that he "did not have a clear mental image of what he saw" the night of the crime. (1264-67,1320). However, the State failed to disclose that Marsh had pointed at some one else at a line-up in Tuscaloosa in which Jerry Porter had participated and the State did not disclose that Marsh was given a composite before the line-up he attended in Mobile, the one in which James was identified. (See Issue XXV[23]). Hence, the State prevented defense counsel from effectively examining Marsh. (See Issue XXV[a]).

Additionally, Marsh testified he was not testifying in the hope of receiving any type of reward. (See Issue XXV[a]). However, new evidence shows a letter from Marsh the day James was sentenced to death inquiring about a $10,000 reward. (See Issue XXV[a]).

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[23] Because McWilliams' petition contains two claims numbered XXV, the court refers to McWilliams' first claim XXV as Claim XXV(a) and the second claim XXV as Claim XXV(b). McWilliams' references to Claim XXV in this claim pertain to Claim XXV(a). As discussed later in this document, Claim XXV(a) is due to be denied because part of it is without merit and the remainder is procedurally barred. Thus, to the extent that McWilliams relies on Claim XXV(a) in support of this claim, those arguments will not be considered in support of the current claim.

> In addition, the State withheld the existence of a second distinctively different composite drawing, composed by a key state eyewitness Steven McDaniels. (See Issue XXV[a]). The non-disclosure of this exculpatory second composite prevented defense counsel from effectively cross-examining McDaniels and from using the composite to contrast the description McDaniels gave and the actual appearance of James. (See Issue XXV[a]).

Id. at 141-143.

In denying this claim on the merits, the Alabama Court of Criminal Appeals found the following:

> The appellant argues that the identification of him made by witnesses Howard Marsh, Ronnie Thomas, and Steven McDaniel should have been suppressed because he was denied his right to have retained counsel present when these witnesses identified him in a lineup. The record indicates that these three witnesses all saw the perpetrator of the offense in Austin's food store on the night in question. Thereafter, on February 21, 1985, FN., a preindictment lineup, which included the appellant, took place wherein all three witnesses positively identified him as the man that they had seen in Austin's on the night of the murder.
>
> FN. The appellant was not indicted until May 3, 1985.
>
> The record indicates that the appellant's court-appointed attorney was present at the lineup. However, at the suppression hearing, the appellant argued that he had retained another attorney to work on his case in addition to his appointed attorney and that he had requested the presence of this attorney at the lineup, but that his request was refused.
>
> However, "[a] defendant does not have a constitutional right to have counsel present at a pre-indictment lineup. *Kirby v. Illinois*, 406 U.S. 682, 92 S. Ct. 1877, 32 L. Ed. 2d 411 (1972); *Franklin v. State*, 424 So.2d 1353 (Ala. Crim. App. 1982), *cert. denied*, 424 So.2d 1353 (Ala. 1983); *Tankersley v. State*, 448 So.2d 486 (Ala. Crim. App. 1984); Fisher v. State, 439 So.2d 176 (Ala. Crim. App.), *cert. denied*, 439 So.2d 176 (Ala. 1983)." *Johnson v. State*, 526 So.2d 34, 38 (Ala. Crim. App. 1987). *See also Hollingquest v. State*, 552 So.2d 1078 (Ala. Crim. App. 1989). Moreover, the appellant in fact had counsel present. All three witnesses, furthermore, stated that they were absolutely certain that the appellant was the man that they had seen. The appellant argues that, because two of the witnesses had previously tentatively identified Jerry Porter as the man whom they had seen, their identifications

> were unreliable. However, the record is clear that these two witnesses' identifications of Porter were in fact tentative, and that they stated that Porter simply looked like the man whom they had seen. Therefore, the trial court properly overruled the appellant's motion to suppress the identification of him made by these three witnesses.

McWilliams, 640 So. 2d at 1012-1013.

The Alabama Court of Criminal Appeals correctly noted that pursuant to *Kirby v. Illinois*, 406 U.S. 682 (1972), there is no constitutional right to have counsel present at a pre-indictment lineup.[24] Therefore, it cannot be said that the Alabama Court of Criminal Appeals' decision was contrary to or involved an unreasonable application of clearly established law or was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings.[25] This claim is due to be denied.

Claim XXIV. James McWilliams Stands Three Times Convicted for One Crime and Sentenced to Death for Three Crimes in Violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

In support of this ground for relief, McWilliams claims that:

> James McWilliams was convicted of three counts of capital murder for killing one person. The indictment's Count I charges James McWilliams with murder during a robbery in violation of Ala. Code § 13A-5-40(a)(2). Count II also charges James with murder during a robbery in violation of Ala. Code § 13A-5-40(a)(2). Count I and Count II differ only in that Count I charges that

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[24] However, the court notes that according to McWilliams, "[a] lawyer named Boller appeared at the lineup and said the he was representing" him. *Petition* at 141.

[25] McWilliams' citation to *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557 (2006) in *Petitioner's Notice of Supplemental Law and Facts*, Court Document 41, at 1, is of no help to him. *Gonzales-Lopez* held that "[w]here the right to be assisted by counsel of one's choice is wrongly denied . . . it is unnecessary to conduct an [ineffective assistance of counsel] inquiry or a prejudice inquiry to establish a Sixth Amendment violation." *Id.* at 2563. However, *Gonzalez-Lopez* did not have any impact on the fact that McWilliams had no constitutional right to have counsel present at a pre-indictment lineup.

> the killing occurred "while the said defendant was armed with a deadly weapon or a dangerous instrument, to-wit: a gun [,]" while Count II charges that the killing occurred "and at the time caused serious physical power of resistance, and at the time caused serious physical injury to the victim." (R. 1435.) The indictment's Count III charges James with murder during a rape in the first degree in violation of § 13A-5-40(a)(3). James McWilliams was convicted under each of these counts. This triple conviction violated James McWilliams' right against double jeopardy.

Petition at 143 (footnote omitted).

In denying this claim on the merits, the Alabama Supreme Court found as follows:

> McWilliams claims that his Fifth and Fourteenth Amendment rights against double jeopardy were violated in that, he says, he was convicted three times for the same crime.
>
> McWilliams was initially charged under a four-count indictment. Count I of the indictment charged McWilliams with the murder of Patricia Reynolds made capital because it was committed during a robbery in the first degree while McWilliams was armed with a deadly weapon. § 13A-5-40(a)(2); and *see* § 13A-8-41(a)(1). Count II charged McWilliams with the murder of Patricia Reynolds made capital because it was committed during a robbery in the first degree in which McWilliams caused serious physical injury to Patricia Reynolds. § 13A-5-40(a)(2); and *see* § 13A-8-41(a)(2). Count III of the indictment charged McWilliams with the murder of Patricia Reynolds made capital because it was committed during a rape in the first degree. § 13A-5-40(a)(3). Count IV of the indictment charged McWilliams with the murder of Patricia Reynolds made capital because it was committed during sodomy in the first degree. § 13A-5-40(a)(3). Count IV of the indictment was dismissed on the State's motion at the conclusion of its case-in-chief. The jury found McWilliams guilty of the three remaining charges in the indictment, and the court sentenced him to death.
>
> In *King v. State*, 574 So.2d 921 (Ala. Crim. App. 1990), the defendant was prosecuted for the rape of his four-year-old daughter. The four-count indictment charged King with two counts of rape (sexual intercourse with a girl under the age of 16 and sexual intercourse with a female by forcible compulsion), and two counts of sexual abuse (sexual contact with a girl under the age of 16 and sexual contact with a female by forcible compulsion). King was convicted on all four counts. He received two life terms for the rape counts and two 20-year terms for the sexual abuse counts. All of the sentences were to run concurrently. *King*, 574 So.2d at 922. Concluding that King's

four convictions and multiple sentences for the same act violated his right against double jeopardy, the Court of Criminal Appeals remanded the case to the trial court with instructions to vacate three of the convictions and sentences.

King, however, is not apposite in the present case. In *Grady v. Corbin*, 495 U.S. 508, 110 S. Ct. 2084, 109 L. Ed. 2d 548 (1990), the United States Supreme Court addressed the scope of the coverage of the Double Jeopardy Clause, as follows:

> The Double Jeopardy Clause embodies three protections: "It protects against a second prosecution for the same offense after acquittal. It protects against a second prosecution for the same offense after conviction. And it protects against multiple punishments for the same offense." *North Carolina v. Pearce*, 395 U.S. 711, 717, 89 S. Ct. 2072, 2076, 23 L. Ed. 2d 656 (1969) (footnotes omitted). The *Blockburger* [*v. United States*, 284 U.S. 299, 304, 52 S. Ct. 180, 182, 76 L. Ed. 306 (1932),] test was developed "in the context of multiple punishments imposed in a single prosecution." *Garrett v. United States*, 471 U.S. 773, 778, 105 S. Ct. 2407, 2411, 85 L. Ed. 2d 764 (1985).

Grady, 495 U.S. at 516-17, 110 S. Ct. at 2090-91, 109 L. Ed. 2d at 561. This Court has also held that the Double Jeopardy Clause of the Alabama Constitution, Art. I, § 9, applies only in the three areas enumerated above. *Ex parte Wright*, 477 So.2d 492 (Ala. 1985).

In this case, McWilliams was not prosecuted for the same offense after an acquittal; nor was he prosecuted for the same offense after a conviction. That is, he was not prosecuted twice for the same offense. Moreover, while in *King* the defendant received four separate prison sentences for the same offense, McWilliams has only been sentenced to die once and, indeed, can only be put to death once.

In the context of prescribing multiple punishments for the same offense, the United States Supreme Court has stated that "the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366, 103 S. Ct. 673, 678, 74 L. Ed. 2d 535 (1983).

In the present case, it is clear that the jury knew that it was convicting McWilliams of murdering Patricia Reynolds only once. It is also clear that the jury knew that McWilliams's crime was made capital because his victim was

> murdered in the course of one robbery and one rape. We conclude, therefore, that the sentencing court has not prescribed a greater punishment than the legislature intended. Even if McWilliams's rights against double jeopardy had been violated by the two convictions of robbery-murder, the convictions for one count of robbery-murder and one count of rape-murder would remain; FN4, and either of these would be sufficient to support a death sentence.
>
> > FN4. Because each of those crimes contains an element not contained in the other, there could be no possible violation of the prohibition against double jeopardy. *Blockburger*, supra; *Ex parte Haney*, 603 So.2d 412 (Ala. 1992); *Ex parte Henderson*, 583 So.2d 305 (Ala. 1991); *Jackson v. State*, 516 So.2d 726 (Ala. Crim. App. 1985).

McWilliams, 640 So. 2d at 1021-1022.

The Double Jeopardy Clause of the Fifth Amendment provides that no person shall be "twice put in jeopardy of life or limb" for the same offense. The Double Jeopardy Clause has been applied in three broad categories of cases: (1) successive prosecution for the same offense after acquittal; (2) successive prosecution for the same offense after conviction; and (3) multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717 (1969).

In Counts I through III, McWilliams was charged as follows:

> COUNT I
>
> The Grand Jury of said County charge that before the finding of this Indictment, JAMES EDMUND MCWILLIAMS, JR., alias JAMES EDMOND MCWILLIAMS, alias JAMES EDWARD MCWILLIAMS, alias JAMES MCWILLIAMS, alias JAMUS MCWILLIAMS, alias WILLIAM RUFUS, alias ANTHONY G. CRAWFORD, alias ANTHONY CRAWFORD, whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of Patricia Vallery Reynolds, by shooting her with a gun, and the said defendant caused said death during the time that the said defendant was in the course of committing or attempting to commit, a theft of the following property, to-wit: money, to-wit: Three Hundred Five and 13/100 ($305.13) Dollars, lawful cash, currency or coin of the United States of America, the property of, or in

the lawful possession of Patricia Vallery Reynolds, with intent to overcome her physical resistance or physical power of resistance, while the said defendant was armed with a deadly weapon or a dangerous instrument, to-wit: a gun, in violation of Section 13A-5-40(a)(2) of the Code of Alabama.

COUNT II

The Grand Jury of said County charge that before the finding of this Indictment, JAMES EDMUND MCWILLIAMS, JR., alias JAMES EDMOND MCWILLIAMS, alias JAMES EDWARD MCWILLIAMS, alias JAMES MCWILLIAMS, alias JAMUS MCWILLIAMS, alias WILLIAM RUFUS, alias ANTHONY G. CRAWFORD, alias ANTHONY CRAWFORD, whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of Patricia Vallery Reynolds, by shooting her with a gun, and the said defendant caused said death during the time that the said defendant was in the course of committing or attempting to commit, a theft of the following property, to-wit: money, to-wit: Three Hundred Five and 13/100 ($305.13) Dollars, lawful cash, currency or coin of the United States of America, a better description of which is otherwise unknown to the Grand Jury, the property of, or in the lawful possession of Patricia Vallery Reynolds, with intent to overcome her physical resistance or physical power of resistance, and at the time caused serious physical injury to the said Patricia Vallery Reynolds, in violation of Section 13A-5-40(a)(2) of the Code of Alabama.

COUNT III

The Grand Jury of said County charge that before the finding of this Indictment, JAMES EDMUND MCWILLIAMS, JR., alias JAMES EDMOND MCWILLIAMS, alias JAMES EDWARD MCWILLIAMS, alias JAMES MCWILLIAMS, alias JAMUS MCWILLIAMS, alias WILLIAM RUFUS, alias ANTHONY G. CRAWFORD, alias ANTHONY CRAWFORD, whose name is otherwise unknown to the Grand Jury, did intentionally cause the death of Patricia Vallery Reynolds, by shooting her with a gun, and the said defendant caused said death during the time that the said defendant, a male, was engaging, or attempting to engage, in deviate sexual intercourse with Patricia Vallery Reynolds, a female, by forcible compulsion, in violation of Section 13A-5-40(a)(3) of the Code of Alabama.

Trial Transcript, Volume 8 at 1434-1436. McWilliams was convicted on all three counts and sentenced to death.

McWilliams claims that his convictions on all three counts constitute multiple punishments for the same offense. He reasons that although the three counts might not technically be the same under the *Blockburger* test,[26] he was still convicted in violation of his Double Jeopardy rights because Counts I, II, and III "were merely alternative methods of proving the same crime, and therefore, did not constitute separate offenses." *Petition* at 145, *quoting King v. State*, 574 So. 2d 921 (Ala. Crim. App. 1990).

However, the Supreme Court has held that "[w]ith respect to cumulative sentences imposed in a single trial, the Double Jeopardy Clause does no more than prevent the sentencing court from prescribing greater punishment than the legislature intended." *Missouri v. Hunter*, 459 U.S. 359, 366 (1983). Therefore, regardless of whether Counts I, II, and III constitute the same offense, the issue in McWilliams' case is whether he received greater punishment than the legislature intended. McWilliams received the death penalty as punishment for his convictions. Clearly, the legislature intended that the death penalty be a sentencing option in McWilliams' case. Because McWilliams cannot be executed more than once for his crimes, no matter how many death sentences he received, his sentence does not

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[26] In *Blockburger v. United States*, 284 U.S. 299 (1932), the Supreme Court established the test for determining whether two offenses are sufficiently distinguishable to allow the imposition of cumulative punishments:

> The applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not.

284 U.S. at 304. The *Blockburger* test emphasizes that each of the crimes must have at least one element to itself. *Brown v. Ohio*, 432 U.S. 161, 166 (1977). "If each offense requires proof of a fact that the other does not, the *Blockburger* test is satisfied despite any overlap in the proof necessary to establish the crimes. *Moore*, 43 F.2d at 571 (*citing Iannelli v. United States*, 420 U.S. 770, 785 n.17 (1975). In order to establish a violation of double jeopardy rights, a petitioner must show that the crimes for which he was convicted are "in law and fact the same offense." *United States v. Fiallo-Jacome*, 784 F.2d 1064, 1066 (11th Cir. 1986)(*quoting United States v. Marable*, 578 F.2d 151, 153 (5th Cir. 1978)).

exceed the punishment the legislature intended to prescribe. Therefore, he was not sentenced in violation of the Double Jeopardy Clause.

McWilliams has failed to show the state court's decision "was contrary to or involved an unreasonable application of clearly established law" or "was based upon an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." Therefore this claim is due to be denied.

Claim XXV(a). The State Blatantly Violated *Brady* and *Giglio* and Often Used These Violations to Mislead the Jury.

In support of this claim, McWilliams offers the following:

> After the Rule 32 evidentiary hearing, James and his current counsel discovered, pled, and showed that the State had repeatedly withheld exculpatory and impeaching evidence from him during his trial. (R. 6-16,466-531,689-830,892-95,905-31,943-82,991-999,1222-1360,1571-1615,1624-25,1674-1742,1754-55,1831-33,1841-71). Much of the withheld *Brady* evidence and *Giglio* evidence could have been used the rebut the above hi-lighted testimony and argument by the State; moreover, this evidence could have been used to show that someone else, such as Jerry Porter or Wesley Homer, committed the crimes that James McWilliams has been charged with. Unfortunately, James' New York counsel failed to plead and prove these violations and failed to disclose to James these documents existed. (*Id*). However, the trial court denied James' requests to amend his Rule 32 petitions, to amend the discovery agreements . . . . (R. 900,909-10,914-15,1674-78,1692,1754-55,1831-33,1586-87).

Petition at 152.

McWilliams successfully presented only one portion of this claim in his Rule 32 petition. In his Rule 32 petition, McWilliams claimed that the prosecution suppressed evidence showing that Ronnie Hands received benefits in return for his testimony against McWilliams. In denying the claim on the merits, the trial court found the following:

In subpart A on pages 9 through 12, Petitioner contends that the prosecution suppressed evidence of benefits afforded Ronnie Hands in return for his testimony. This Court finds this issue to be without merit.

To begin, Petitioner relies upon exhibits 7 and 8 (letters from Hands to Tipson) in support of his contention that there were inducements made that were not disclosed. Petitioner offered no evidence that this information was kept from him and his counsel. The opposite is in fact demonstrated by his attorney's cross-examination of Hands.

This Court finds that there was no *Brady* violation. In exchange for his testimony against Petitioner, the District Attorney's Office in Ohio agreed to amend a robbery charge against Hands and allowed him to plead guilty to Grand Theft by threat. (Petitioner's Exhibit 5) Hands subsequently pled guilty and was sentenced to one and one half years in prison. (Id.) On April 17, 1985, Ronnie Hands testified under oath at a preliminary hearing as a witness for the State of Alabama. (Petitioner's Exhibit 41 at 300-347) On April 21, 1985, Hands requested that the Tuscaloosa District Attorney's Office provide the Ohio Adult Parole Board with confirmation that he had, in fact, testified in accordance with the deal he had made with the Ohio DA's Office. (Petitioner's Exhibit 8) On May 20, Assistant District Attorney Richie Tipton wrote a letter confirming that Hands had testified. (Petitioner's Exhibit 8)

On August 22, 1986, Hands testified at Petitioner's trial in keeping with what he had stated in the earlier preliminary hearing. (R. 854-875; Petitioner's Exhibit 41 at 300-347) Moreover, Hands correctly testified that he had made a deal with Ohio law enforcement and that the District Attorney's Office in Alabama had not promised him anything. (R. 860-861) He also stated that he had received no new promises. (R. 862)

Petitioner has offered nothing to suggest that any other promises existed and can only point out that, in response to Hand's purported request, the DA's office allegedly verified the deal that defense counsel knew existed. At trial, the jury was well aware that this deal had been made and Sogol thoroughly cross-examined Hands in an attempt to undermine his credibility. (R. 860-862, 864-875) Moreover, Hands's testimony was consistent throughout the proceedings and did not change from what he had stated at the preliminary hearing. (R. 854-875; Petitioner's Exhibit 41 at 300-347)

As previously stated, to properly establish a *Brady* violation, the defendant must make a showing that (1) the prosecution suppressed evidence, (2) the evidence suppressed was favorable to the defendant or was exculpatory, and (3) the evidence suppressed was material to the issues at trial. *Ex parte*

> *Kennedy*, 472 So. 2d 1106 (Ala. 1985). To begin, there is no evidence of other promises, only a request and a factual response that Hands gave testimony. There was no effort on the part of the DA's office to persuade the parole board to be lenient or to portray Hands as someone deserving of parole. Thus, there was no suppression of evidence.
>
> Moreover, this Court does not find that the fact that the Tuscaloosa DA's letter informing the parole board that Hands had testified was material to the issue of his credibility, particularly in light of the fact that the jury was aware that the Ohio DA's office had given Hands a considerable inducement to cooperate with the Alabama DA's office. *See Coral v. State*, 628 So. 2d 954, 979 (Ala. Crim. App. 1992)("'Materiality' requires a finding that, had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different."); *Coral v. State*, 628 So. 2d at 797 ("A 'reasonable probability' is one sufficient to undermine confidence in the results."). There is certainly no reasonable probability that, had the jury known that the Alabama DA's office had written a letter of confirmation to the Ohio parole board that this would have caused the jury to disbelieve Hands's testimony and, consequently, have found Petitioner not guilty of capital murder. This Court finds this issue to be without merit.

Order Denying McWilliams' Rule 32 Petition, Volume 24 to Respondent' Exhibits, at 1785-1788.[27]

The trial court specifically found that with respect to an inducement to Ronnie Hands' testimony, there was no suppression of evidence. McWilliams has offered nothing to establish that this factual finding is inaccurate. Because McWilliams is unable to show that this decision was contrary to or an unreasonable application of clearly established federal law, or that the decision was based upon an unreasonable determination of the facts in light of the evidence before it, this claim is due to be denied.

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[27] Although McWilliams did present this claim on appeal to the Alabama Court of Criminal Appeals, that court did not address the merits of the claim. Therefore, the trial court was the last state court to address the merits of this claim.

In addition to the claim regarding Ronnie Hands' testimony, McWilliams has raised numerous additional *Brady* and *Giglio* claims in his petition. *Petition* at 148-172. When McWilliams attempted to raise these claims on appeal from the denial of his Rule 32 petition, the Alabama Court of Criminal Appeals found that the claims were procedurally barred:

> [McWilliams] argues that the State violated *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). However, he raised only one of the claims he presents in his brief - i.e., that there was evidence that two inmates who testified against him had a motive to lie, that their testimony was contradicted by evidence at the scene, and that the witnesses lied about receiving favorable treatment-before the circuit court. FN.
>
> > FN. Because he did not first present the remaining *Brady* claims to the circuit court, they are not properly before this court. *See Morrison v. State*, 551 So.2d 435 (Ala. Crim. App. 1989).

McWilliams, 897 So. 2d at 451.

McWilliams argues that he is entitled to have these claims heard in this court due to the holding in *Ex Parte Jenkins*, No. 1031313, 2005 WL 796809 (Ala. April 8, 2005). In *Jenkins*, the Alabama Supreme Court overruled *McWilliams*, 897 So. 2d 437 (Ala. Crim. App. 2004), to the extent that the court "applied the relation-back doctrine to proceedings governed by Rule 32, Ala. R. Crim. P." *Jenkins*, 2005 WL 796809, at *6. However, Alabama Court of Criminal Appeals made it clear that these claims would not be considered because they were never presented in the trial court. *McWilliams*, 897 So. 2d at 451. The claims were **never** presented at the trial court level; therefore, the relation-back doctrine was never applied to them. Therefore, *Jenkins* does not help McWilliams in this instance.

The Alabama Court of Criminal Appeals clearly held that McWilliams was procedurally barred from raising these claims on appeal, since he failed to present them to

the trial court. Therefore, McWilliams is procedurally barred from raising these claims in this court. McWilliams has offered nothing to excuse the default of these claims. Moreover, as previously discussed, McWilliams has not shown that he is actually innocent. This claim is due to be denied.

Claim XXV(b). James McWilliams' Attorneys Provided Ineffective Assistance of Counsel During His Trial.

In support of his claim that he received ineffective assistance of counsel, McWilliams claims that he received ineffective assistance of counsel during the penalty phase of his trial because counsel failed to conduct adequate mitigation investigation, and that he received ineffective assistance of counsel at the guilty phase of his trial because counsel failed to interview several witnesses, failed to secure the testimony of a witness who would have impeached several of the state's witnesses, and failed to secure test results of the analysis done on blood trace evidence.[28]

1. Sentencing Phase Claims

McWilliams alleges that his trial counsel failed to conduct adequate mitigation investigation into his family history and mental illness. In support of this claim, McWilliams offers the following:

[28] McWilliams also raises as a separate claim, that the Alabama Appellate Courts applied the wrong standard of review in denying his ineffective assistance of counsel claims. *Petition* at 172-180. However, even assuming he is correct, this claim standing alone, does not warrant habeas relief. Only if McWilliams shows that the wrong standard of review was used in conjunction with one of his substantive ineffective assistance of counsel claims can he obtain any relief. As discussed below, McWilliams' sentencing phase claims were properly decided by the state appellate court, and the guilt phase claims are procedurally defaulted. Therefore, this claim is due to be denied.

In James' case, his counsel failed to conduct adequate mitigation investigation. Such testimony would have elicited a family history of physical, emotional, and sexual abuse, along with repeated instances of alcoholism, substance abuse, and sever[e] mental illness. The jury never learned many of the numerous mitigating factors listed in the Statement of Facts.

Moreover, counsel should have had an expert, such as Dr. Woods, testify about James' severe mental illness, bipolar disorder. Such an expert also would have explained how James was genetically vulnerable to mental illness, as well as to crimes of violence and sexual inappropriateness. He could have explained the link between James' relatives – who had been found not guilty of crimes of violence by reason of their insanity – and James' own psychiatric illness.

A mental health expert would also be able to explain how the stress and dysfunction in James' home contributed to his later behavior, and even how the traumas other family members suffered, particularly James' mother, would have an impact on his life and development. Such an expert also could have explained how the pattern of so-called "faking bad" on James' previous MMPI tests could be a mere "cry for help."

Moreover, the expert could have interpreted the highly probative – pre-crime –psychological testing that was done on James, at his request, in a clinical setting. The expert would also be able to talk about why that testing had "much less potential for biases" than is often "assumed" in testing done at facilities such as Taylor Hardin, which are forensic settings. Finally, in rebuttal to State witnesses who testified that James suffered from no psychological problems, an expert would have testified that the "very powerful medications" that the prison and other State institutions gave to James would not have been given if there were not some sort of psychological or psychiatric problems.

All of this information would have allowed the defense to present James to the jury in a completely different light. Rather than being seen as someone who is just faking a mental illness, James' true and serious psychiatric problems could have been highlighted, and in conjunction with a description of his full background and upbringing, could have been used by the jury as a reason to vote for life, rather than death. Instead, James' counsel completely abdicated their duty to show the jury why they should not impose the death penalty. In fact, counsel even said to the jury, "It is hard to really come up with something to say."

Neither the State nor the trial court denies that James' post conviction counsel found mitigating evidence that the original trial counsel failed to

discover. Instead, the court wrote that James' trial counsel should not be second guessed for failing to do everything they could have done because James was represented in his post conviction proceedings by three attorneys from the New York based law firm of Paul, Weiss, Wharton & Garrison, that the firm was very large, having more than 100 partners and offices all over the world. (R. 1796). Therefore, "with all of these resources and time they have devoted to the case," it is no surprise that they have shown that trial counsel could have done better. (R. 1797, 1796).

However, there are several problems with this holding. First, none of these partners or any attorneys of any significant legal skills and experience worked on James' case. Instead, the New York firm sent attorneys that [sic] had less than three years experience when they started working on James' case. In fact, on August 23, 2000, Lauren Panora filed a motion for extension of time to file Petitioner's post-hearing brief due to Holly Jarmul resigning from the firm and Julia Tarver being involved in a complicated arbitration trial. (R. 903-03). Ms. Panora indicated that she was having trouble finding any other associates to help her "until September 18, 2000, upon the arrival of the firm's first-year associates (or as the State would call them, a death row inmate's 'dream team' of overwhelming resources)." (R. 903).

Ala. Code § 13A-5-54 (1975) provides that each person 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." Thus, the Alabama Legislature has recognized that particular skills are required of attorneys for competent representation in a capital case. As the Florida Supreme Court has observed, death penalty cases involve "extraordinary circumstances and unusual representation." White v. Board of Commissioners, 537 So.2d 1376, 1380 (Fla. 1989). In fact, some of the local counsel, after reviewing James' case, filed motions to withdraw due to the fact that they did not have enough experience to work on his case. (R. 69,102,105). The post-conviction counsel that represented James had the same amount of experience of the attorneys that were appointed by the trial court to represent James McWilliams. If these attorneys recognized that they did not have the experience to work on James case, it reinforces that the attorneys from New York did not have the experience as well. Therefore, the lack of legal experience by James' post-conviction counsel is an additional factor to consider on James' argument that his post-conviction attorneys were ineffective, and it shows the fallacy in the trial court's holding that James had overwhelming resources through his initial post conviction counsel. If anything, a reverse argument can be made that, since a bunch of rookies were able to show that trial counsel could have done better, it reinforces that James' trial counsel were ineffective.

Second, the court's order recognizes that James' counsel could have done better; hence, they were ineffective. Third, the State conceded, and the trial court agreed, that if James had greater resources and time that they could have done better. Hence, James' argument that his attorneys were handicapped due to inadequate funding is now validated.

The trial court, the Alabama Court of Criminal Appeals, and the State did not deny that James McWilliams was able to present additional mitigating evidence that his trial attorneys did not present. *McWilliams v. State*, 2004 W.L. 918432, at 13 (Ala. Crim. App. 2004). In addition, the Alabama Court of Criminal Appeals correctly recognized that the deciding factor is whether the additional evidence would have made any difference in the mitigation phase of the trial. *McWilliams v. State*, 2004 W.L. at 14.

The court then incorrectly held: "'There has never been a case where additional witnesses could not have been called' . . . Accordingly, the appellant has not satisfied his burden under Strickland to this claim." *Id*.

The Eleventh Circuit reversed the Alabama courts in *Brownlee v. Haley*, 306 F.3d 1043, 1068 (11th Cir. 2002) because the Alabama courts are inaccurately applying *Strickland v. Washington* to the sentencing stage. The focus is not whether additional witnesses could have been called. Instead, [t]he appropriate analysis of the prejudice prong of Strickland requires an evaluation of 'the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceedings--in reweighing it against the evidence in aggravation.'" *Id*. If, after conducting this analysis, it is determined that the capital sentencing was "fundamentally unfair" and that the death sentence was therefore "unreliable," confidence has been undermined and the petitioner is entitled to relief. *Id.* at 1070.

In *Williams v. Taylor*, 120 S. Ct. 1495 (2000), defense counsel presented two mitigating witnesses at sentencing, and they failed to produce other evidence documenting Williams' abusive childhood, borderline mental retardation, history of head injuries and other mental impairments. While the Supreme Court recognized that not all of the additional evidence was favorable to the petitioner, the Court found that, considering all of the available mitigating evidence as a whole, Williams was prejudiced by his counsel's failure to offer the evidence. *Id* at 1514. In making its decision, the Court indicated that a capital defendant can have a "constitutionally protected right . . . to provide the jury with mitigating evidence that his trial counsel either failed to discover or failed to offer. *Id* at 1513. Hence, this undermines confidence in James' death sentence, and he is entitled to a new sentencing hearing.

The Court of Criminal Appeals also held that when ineffective assistance of counsel claims involve the penalty phase of a capital murder trial, the focus is on whether the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *McWilliams v. State*, 2004 WL at 13. However, the Supreme Court has held that a habeas petitioner does not need to show ineffectiveness rising to a level that actually negates an aggravating capital sentencing factor in order to have demonstrated a reasonable probability that the outcome would have been different. *Williams v. Taylor*, 120 S. Ct. 1495, 1516 (2000) and *McNair v. Campbell*, 307 F. Supp. 2d 1277, 1317 (M.D. Ala. 2004).

In addition, the New York attorneys were criticized for only using James' mother and the mitigation expert concerning the mitigation evidence that James' trial attorneys could have discovered from James' friends and family. It would have been desirable for the New York attorneys to use more witnesses; however, it is perfectly acceptable for a mitigation expert to use this technique. *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). In addition, the New York attorneys should have used Dr. Herlihy, but his report is still admissible. Mitigation related evidence, even if it is hearsay, is admissible. See 13A-5-45(d) and *Wiggins*.

The Alabama Court of Criminal Appeals also used the same wrong prejudice standard concerning trial counsel's failure to present evidence about James McWilliams' mental disorder. *McWilliams v. State*, 2004 WL at 15-16. However, the test is whether the capital sentencing was "fundamentally unfair" and that the death sentence was therefore "unreliable."

Therefore, the Alabama Courts' decisions were contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their discretion in their factual holdings and failure to properly consider all of the facts in this case, and James McWilliams is entitled a new sentencing hearing.

Petition at 184-190.

The Supreme Court established a two-pronged standard for judging, under the Sixth Amendment, the effectiveness of attorneys who represent criminal defendants at trial or on direct appeal in *Strickland v. Washington*, 466 U.S. 668 (1984).[29]

> 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 (emphasis supplied); *see also Williams v. Taylor*, 529 U.S. 362, 390 (2000) (same). The two parts of the *Strickland* standard are conjunctive, and a petitioner accordingly bears the burden of proving *both* "deficient performance" *and* "prejudice" by "a preponderance of competent evidence." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*). 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 v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) ("Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.").

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[29] Ineffective assistance of counsel claims are specifically limited to the performance of attorneys who represented a defendant at trial or on direct appeal from the conviction. *See* 28 U.S.C. § 2254(I) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."); *see also Coleman v. Thompson*, 501 U.S. 722, 752 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.")

The Performance Prong

To establish that counsel's performance was deficient, a defendant "must show that counsel's representation fell below an objective standard of reasonableness": a rule that is defined in terms of "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688; *see also Williams*, 529 U.S. at 390-91 (same); *Darden v. Wainwright*, 477 U.S. 168, 184 (1986) (same). The *Strickland* Court instructed lower federal courts to be "highly deferential" when engaging in such assessments, and to "indulge a strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance:"

> 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 (emphasis supplied) (citations and internal quotation marks omitted); *see also*, *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (holding that, "[w]hen reviewing whether an attorney is ineffective, courts should always presume strongly that counsel's performance was reasonable and adequate").

To overcome the presumption that counsel's conduct fell within the wide range of reasonable professional assistance, the habeas petitioner "must establish that no competent

counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (*en banc*) (footnote and citation omitted).

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 of 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. [*Chandler*, 218 F.3d] at 1317. 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." *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001).

Michael v. Crosby, 430 F.3d 1310, 1320 (11th Cir. 2005). "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 v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

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), and it is shown that no competent attorney would have taken the action that petitioner's counsel did take. *See*, *e.g.*, *Chandler*, 218 F.3d at 1315; *Cross v. United States*, 893 F.2d 1287, 1290 (11th Cir. 1990).

The Prejudice Prong

In addition to showing deficient performance, a petitioner must show prejudice. To satisfy the prejudice prong, a habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Williams*, 529 U.S. at 391 (same). Stated somewhat differently, "[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect." *Johnson v. Alabama*, 256 F.3d 1156, 1177 (11th Cir. 2001) (*quoting Eddmonds v. Peters*, 93 F.3d 1307, 1313 (7th Cir. 1996) (*in turn quoting Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986)) (internal quotation marks omitted); *see also*, *e.g.*, *Lockhart v. Fretwell*, 506 U.S. 364, 372 (1993) (holding that, to show prejudice, "a defendant must show that counsel's errors were so serious that they rendered the defendant's trial unfair or unreliable, not merely that the outcome would have been different").

A habeas petitioner "must affirmatively prove prejudice, because '[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.'" *Gilreath v. Head*, 234 F.3d 547, 551 (11th Cir. 2000) (quoting *Strickland*, 466 U.S. at 693). The fact that counsel's error may have "had some conceivable effect on the outcome of the proceeding" is not sufficient to show prejudice. *Strickland*, 466 U.S. at 693; *see also Gilreath*, 234 F.3d at 551 (same); *Tompkins v. Moore*, 193 F.3d 1327, 1336 (11th Cir. 1999) (same). Instead, a petitioner must present competent evidence proving

"that trial counsel's deficient performance deprived him of 'a trial whose result is reliable.'" *Brown v. Jones*, 255 F.3d 1272, 1278 (11th Cir. 2001) (*quoting Strickland*, 466 U.S. at 687).

In summary, "[t]he benchmark for judging any claims of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial [or subsequent direct appeal] cannot be relied upon as having produced a just result." *Strickland*, 466 U.S. at 686.

Deference Accorded State Court Findings of Historical Fact

"Ineffectiveness of counsel is a mixed question of fact and law." *Thompson v. Haley*, 255 F.3d 1292, 1297 (11th Cir. 2001) (*citing Meeks v. Moore*, 216 F.3d 951, 959 (11th Cir. 2000)). "State court findings of historical facts made in the course of evaluating an ineffectiveness claim are subject to a presumption of correctness under 28 U.S.C. § 2254(d)." *Thompson*, 255 F.3d at 1297.

In denying this claim on the merits, the Alabama Court of Criminal Appeals found the following:

> Finally, the appellant argues that his trial and appellate attorneys rendered ineffective assistance. In *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000), the United States Court of Appeals for the Eleventh Circuit stated:
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> > The purpose of ineffectiveness review is not to grade counsel's performance. *See Strickland*, 104 S. Ct. at 2065; *see also White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 104 S. Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of

> what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 107 S. Ct. 3114, 3126, 97 L. Ed. 2d 638 (1987).
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> . . . .
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> . . . Because the reasonableness of counsel's acts (including what investigations are reasonable) depends "critically" upon "information supplied by the [petitioner]" or "the [petitioner]'s own statements or actions," evidence of a petitioner's statements and acts in dealing with counsel is highly relevant to ineffective assistance claims. *Strickland*, 104 S. Ct. at 2066. "[An] inquiry into counsel's conversations with the [petitioner] may be critical to a proper assessment of counsel's investigation decisions, just as it may be critical to a proper assessment of counsel's other litigation decisions." *Id*. ("[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable.").

Chandler, 218 F.3d at 1313-19 (footnotes omitted). Also, when ineffective-assistance-of-counsel claims involve the penalty phase of a capital murder trial, the focus is on "whether 'the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Stevens v. Zant*, 968 F.2d 1076, 1081 (11th Cir. 1992), *cert. denied*, 507 U.S. 929, 113 S. Ct. 1306, 122 L. Ed. 2d 695 (1993), *quoted in Daniels [v. State*], 650 So.2d [544,] 568 [(Ala. Crim. App. 1994)]. *Jones v. State*, 753 So.2d 1174, 1197 (Ala. Crim. App. 1999). *See also Williams v. State*, 783 So.2d 108 (Ala. Crim. App. 2000).

The appellant argues that neither the State nor the circuit court denied the fact that Rule 32 counsel was able to find additional mitigating evidence that his trial attorneys did not present. In his original brief, he does not state what additional mitigating evidence his attorneys did not present. In a supplemental brief, he presents a laundry list of evidence that he asserts his attorneys should have presented to the jury. The evidence related to his troubled childhood and his alleged bipolar disorder.

The only issue in the appellant's Rule 32 petition that is related to the presentation of evidence about his childhood is the claim that counsel did not investigate his background, conduct in-depth interviews with his family members, or otherwise develop this type of evidence. With regard to this claim, the circuit court made the following findings:

> Petitioner contends that trial counsel failed to investigate his background, conduct in depth interviews with family members, or otherwise develop evidence relevant to an appropriate punishment. As previously noted, trial counsel prepared this case in a reasonable and diligent manner and, based on the information gathered in their investigation, trial counsel reasonably determined to portray Petitioner as a man who had suffered from emotional problems most of his life that had gone untreated. . . . Petitioner now bases his contentions to the contrary upon the testimony of Jan Vogolsang, a social worker, and upon the allegation that trial counsel should have called Dr. Charles Herlihy to testify.
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> As to Dr. Herlihy. . . . Petitioner has offered no additional argument in support of this claim and cites this Court to exhibit 35, an exhibit this Court admitted for a limited purpose. (Brief at 17-18; See Order On The Admission Of Exhibits Presented At The Rule 32 Evidentiary Hearing) This exhibit was admitted for the sole purpose of showing that the document was in [defense counsel's] file. Petitioner offered no evidence that anything in the exhibit is true. Petitioner was free to call Dr. Herlihy as a witness in support of his petition. Moreover, defense counsel specifically stated that it did not remember why Herlihy was not called. (EH at 251) When trial counsel has no memory of the reasoning behind a decision, it will be presumed that it acted properly. *See Williams v. Head*, 185 F.3d at 1236. Petitioner has offered nothing to rebut this presumption and has not even attempted to demonstrate that but for counsel's failure to call Herlihy as a witness, the outcome of the trial would have been different. In fact, Petitioner's counsel has, in this claim, argued that trial counsel was ineffective for failing to call a witness that they themselves failed to call. This claim is without merit.
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> As to Jan Vogolsang, Petitioner's present counsel has failed to do exactly what it now contends trial counsel was ineffective for failing to do. Petitioner's counsel failed to call

> any of the 'friends, relatives, neighbors, and even treating physicians' it alleges should have testified and, instead, offered the testimony of Jan Vogolsang, a social worker from South Carolina, as a "mitigation expert." (Brief at 17) In short, rather than calling witnesses to testify where they can be subjected to cross-examination, Petitioner's counsel called a paid witness to tell what these witnesses allegedly would have said, had they been called, without attempting to offer proof that Vogolsang had even conducted these interviews, much less what these people actually said. In support of this one paragraph allegation of attorney misconduct, Petitioner provides only assertions and string cites.

(C.R. 1801-03.)

The record from the direct appeal shows that the appellant's mother testified during the penalty phase of the trial about the appellant's troubled childhood. (A.R. 1303-18.) The appellant also testified and echoed his mother's testimony about an accident that occurred when he was about 13 years of age in which his skull was fractured, the problems he experienced as a result of that accident, and the medication he took to control his headaches after the accident. In addition, he was allowed to read into evidence a psychological report that concluded that he had mental problems. Therefore, the record shows that the appellant's attorneys developed and presented evidence about his childhood during his trial. "Prejudicial ineffective assistance of counsel under *Strickland* cannot be established on the general claim that additional witnesses should have been called in mitigation. *See Briley v. Bass*, 750 F.2d 1238, 1248 (4th Cir. 1984); *see also Bassette v. Thompson*, 915 F.2d 932, 941 (4th Cir. 1990). Rather, the deciding factor is whether additional witnesses would have made any difference in the mitigation phase of the trial." *Smith v. Anderson*, 104 F. Supp. 2d 773, 809 (S.D. Ohio 2000), *aff'd*, 348 F.3d 177 (6th Cir. 2003). "There has never been a case where additional witnesses could not have been called." *State v. Tarver*, 629 So.2d 14, 21 (Ala. Crim. App. 1993). Accordingly, the appellant has not satisfied his burden under *Strickland* as to this claim.

With regard to the appellant's claim that counsel rendered ineffective assistance by not presenting evidence about his mental disorder, the circuit court made the following findings:

> In support of his claim that trial counsel were ineffective in failing to call a mental health expert during the penalty phase, McWilliams presented the testimony of Dr. George Woods, a

psychiatrist from California. (EH. 789) Dr. Woods diagnosed Mr. McWilliams as suffering from 'bipolar disorder with symptoms of both mania, hypomania, and depression.' (EH. 872) Dr. Karl Kirkland, a forensic psychologist, testified as a rebuttal witness for the State. (EH. 927) He disagreed with Dr. Woods's diagnosis of bipolar disorder based in part on the fact that 'that diagnosis has never appeared in all the records that are present, plus that [McWilliams] was never treated with a primary drug for bipolar disorder such as Depakote or Lithium.' (EH. 974) Dr. Kirkland testified that 'a character disorder . . . is what explains more of his behavior than any other diagnostic category' and noted that this conclusion and diagnosis was consistent with the Taylor Hardin records. (EH. 964-65) For the following reasons, McWilliams's claim regarding counsel's failure to call a mental health expert is denied.

. . . .

. . . McWilliams's claims based upon the testimony of Dr. Woods are without merit. . . .

. . . .

The trial transcript reveals that on January 21, 1986, trial counsel filed a 'Petition For Inquisition Upon Alleged Insane Prisoner.' (R. 1526) The request was granted by the trial court and McWilliams was sent to Taylor Hardin [Secure Medical Facility] to undergo a comprehensive mental evaluation. (R. 1528) During the evidentiary hearing, trial counsel testified that he requested the mental evaluation to address the issue of insanity, but also for the purpose of seeking mitigation in preparation for a possible penalty phase. (EH. 156-57) The trial record supports this testimony. The request for the evaluation itself is based upon the relevance of mental heath issues to the sentencing stage of a capital trial and the trial court's order specifically directed McWilliams to be evaluated "as to existence of mitigating circumstances." (R. 1526, 1528) McWilliams remained at Taylor Hardin for an extended period of time. During his stay, he was continuously observed and was specifically evaluated by three psychiatrists. (R. 1544) The consensus opinion of the Lunacy Commission was that McWilliams did not suffer from a mental illness and two of the

> three psychiatrists specifically stated that they found no evidence of mitigation. (R. 1544-47)
>
> Trial counsel testified that, in addition to the request for a formal evaluation, he also obtained the help of a 'local psychologist' to assist him in evaluating any mental health issues. (EH. 136-37) Specifically, trial counsel stated that Dr. Marianne Rosenzweig was recruited to help 'with interpretation and understanding of existing records' and in evaluating possible mitigation. (EH. 137) For example, counsel and Dr. Rosenzweig reviewed and discussed the Taylor Hardin records and determined that "there was nothing that we felt was going to be useful in mitigation." (EH. 137) Counsel additionally made repeated attempts to make contact with a psychologist in Mobile (Dr. [Rhodes]) who had previously evaluated McWilliams. (EH. 133) They even subpoenaed Dr. Rhodes in an effort to obtain her presence during penalty phase, but she did not comply. (R. 1319) This Court finds that counsel made a reasonable decision not to enforce the subpoena that was not "outside the wide range of professionally competent assistance." The record additionally establishes that counsel was successful in obtaining a neuropsychological assessment. (R. 1632) Specifically, the evaluation was conducted following the penalty phase, but prior to the final sentencing hearing. Dr. John Goff conducted the evaluation and his resulting report was admitted into evidence.
>
> Plainly, trial counsel considered, investigated and presented evidence relating to McWilliams's mental health. Both McWilliams and his mother testified at the penalty phase regarding the issue. (R. 1303, 1321) McWilliams was even allowed to read into evidence-and subsequently admit into evidence-a report prepared by Dr. Maurice K. Davis, a psychologist who had previously tested McWilliams. The fact that counsel's efforts did not result in a sentence less than death does not make their performance deficient.

(C.R. 1809-13.) The record supports the circuit court's findings, and we adopt them as part of this opinion.

The appellant also objects to the following comments from the introductory portion of the circuit court's order denying his petition:

> As a final introductory observation, this Court notes that, at the time of their representation of Petitioner, both [defense attorneys] were attorneys in private practice who were appointed to the case due to their status and responsibility as members of the Tuscaloosa County Bar. In these proceedings, Petitioner has been represented by members of the New York based law firm, Paul, Weiss, Rifkind, Wharton & Garrison. The firm is very large, having more than 100 partners alone and offices in Washington, D.C., Paris, France, Tokyo, Japan, Beijing, China, and Hong Kong. Moreover, Petitioner was represented at the Rule 32 hearing by three lawyers and had stand by local counsel . . . . Two other support personnel were additionally present on behalf of Petitioner.
>
> (C.R. 1796.) We do not conclude that these comments, which were part of the introduction to the order and not the findings of the court, were objectionable.

McWilliams, 897 So. 2d at 451-455.

The Alabama Court of Criminal Appeals applied the correct legal standard in deciding that McWilliams' attorneys were not consititutionally ineffective for failing to present further evidence of McWilliams' childhood or a mental disorder; that is, the standard set out in *Strickland*. The state court's conclusion that trial counsel was not constitutionally ineffective is neither contrary to nor an unreasonable application of federal law, nor an unreasonable determination of the facts in light of the evidence presented to it. Moreover, upon reviewing the entire record, the court has come to the independent conclusion that McWilliams' attorneys were not constitutionally deficient. The sentencing phase claims are, therefore, due to be denied.

2. Guilt Phase Claims

Finally, McWilliams claims that he was denied effective assistance of counsel at the guilt/innocence phase of his trial because his attorneys failed to:

1. Independently interview Teresa Harris, who initially identified Jerry Porter as the assailant.
2. Interview Teresa Summerville, the victim of Jerry Porter's first robbery at Austin's Food.
3. Secure the testimony of C. Jackson who would have impeached several state witnesses who claim Jerry Porter was in his establishment at the time of the crime.
4. Secure the test results of the analysis done on the blood trace evidence removed from the victim's fingernails.
5. Interview Donnie Otis Brown, an inmate at the time Porter was confined, who observed Porter changing his appearance to look different from when he was arrested.
6. Interview two witnesses that identified James as being in Tuscaloosa two days prior to his arrival, and to locate the person whom they saw.

Petition at 190-191. McWilliams concedes that "the Alabama courts held that he was procedurally barred from arguing" these claims. *Petition* at 190. He adds that he was "not allowed to raise [the claims] at the trial court." *Id*. at 191. McWilliams raised these claims in "Petitioner[s] Pro Se Supplement to Foreign Counsel[s] Proposed Finding of Fact and Conclusion of Law," filed November 30, 2000, in connection with his Rule 32 proceedings, more than five months after the June, 2000 evidentiary hearing on his Rule 32 petition. *Record of Rule 32 Proceedings*, Volume 22 at 1273-1274. In its September 13, 2001 "Order on Petitioner's Rule 32 Hearing," the trial court declined to consider any claims that were not included in McWilliams' post-hearing brief. *Order on Petitioner's Rule 32 Hearing*, Volume 41 at 1775-1828.

The respondents argue that the claims are procedurally barred because the trial court properly refused to consider them:

> The Rule 32 circuit court properly declined to review those six claims. In *Jenkins*,[30] 2005 WL 796809, at *5, the Supreme Court of Alabama affirmed that "a petitioner does not have the unfettered right to file endless amendments to a Rule 32 petition." The court further states:
>
> > The right to amend is limited by the trial court's discretion to refuse to allow an amendment if the trial court finds that the petitioner has unduly delayed filing the amendment or that an amendment unduly prejudices the State. Such an exercise of the trial court's discretion would certainly be appropriate, for example, if, on the eve of an evidentiary hearing, a Rule 32 petitioner filed an amendment that included new claims of which the State had no prior notice and as to which it was not prepared to defend.
>
> *Id.* (emphasis added). Thus, the court, in *Jenkins*, recognized that a Rule 32 circuit court has the discretion to refuse an amendment to a Rule 32 petition, especially when the amendment is filed on the eve or day of the petitioner's Rule 32 evidentiary hearing. *Id.* In the present case, McWilliams's attempt to add these six new claims was even more egregious because he raised those claims more than five months after his Rule 32 evidentiary hearing. Thus, the circuit court clearly had the discretion and authority, under *Jenkins*, to refuse to consider his six new guilt phase ineffective assistance of counsel claims.
>
> Petitioner McWilliams's failure to properly raise those six claims in the Rule 32 circuit court constitutes a procedural default under state law, which bars federal habeas review. . . . Because those claims became procedurally defaulted under the State of Alabama's procedural rules when McWilliams failed to properly raise them in the Rule 32 circuit court, they are procedurally defaulted from this Court's review.

Respondents' Reply to Petitioner McWilliams's "Supplement to Petitioner's Reply Brief," Court Document 26 at 7-8.

Because McWilliams failed to present these claims either at the evidentiary hearing or in the post-hearing brief, he waived the right to raise them in the state court. Thus, the claims are also procedurally barred from review in this court unless he can show cause for and

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[30] *Ex Parte Jenkins*, No. 1031313, 2005 WL 796809 (Ala. April 8, 2005)

prejudice from failing to properly present the claims in state court. McWilliams argues that "Issue XXV[(a)] shows why James is not procedurally barred from raising these issues." *Petitioner's Reply Brief* at 52. This court has already found that Claim XXV(a), that the state blatantly violated *Brady* and *Giglio* and often used these violations to mislead the jury, is due to be denied. Therefore, McWilliams is unable to use that claim as a basis to excuse the procedural default of another claim.

McWilliams also argues that he is entitled to have these claims heard in this court due to the holding in *Jenkins*. In *Jenkins*, the Alabama Supreme Court overruled *McWilliams*, 897 So. 2d 437 (Ala. Crim. App. 2004), to the extent that the court "applied the relation-back doctrine to proceedings governed by Rule 32, Ala. R. Crim. P." *Jenkins*, 2005 WL 796809, at *6. However, the court did not address these ineffective assistance of counsel claims in *McWilliams* and the relation-back doctrine was never applied to them. Instead, the trial court did not consider the claims because they were not raised until months after the evidentiary hearing in a pro se pleading filed by the petitioner on his own. Therefore, *Jenkins* does not help McWilliams in this instance.

Finally, as previously explained, McWilliams is unable to establish that he is actually innocent. The guilt phase claims are procedurally defaulted and are due to be denied.

Even assuming that the guilt phase claims were not defaulted, McWilliams would still not be entitled to relief on these claims. McWilliams has never offered as much as a shred of evidence in support of these six allegations of ineffective assistance of counsel. The allegations are extremely general and vague, and he has not even speculated as to how any of the evidence in question could have assisted in his defense. Further, the court notes that

although McWilliams claims that he is entitled to conduct discovery and have an evidentiary hearing on these claims, he has made no showing that he has ever attempted to obtain any of this information without formal discovery. These vague, general and conclusory allegations are insufficient to warrant habeas relief. Moreover, absent any evidence tending to support these claims, the court is not obligated to conduct an evidentiary hearing.

Claim XXVI. James McWilliams' Right to Testify in His Own Defense Was Violated.

McWilliams claims that "the trial court disregarded the personal nature of [his] right to decide whether to testify." *Petition* at 192. In finding the claim to be without merit, the Alabama Supreme Court found as follows:

> McWilliams asserts that his right to testify in his own defense was violated. The record shows that the following colloquy took place out of the hearing of the jury:
>
> > MR. FREEMAN [the district attorney]: Judge, I still want to point out that perhaps it might be good if the Defendant was asked if he personally agreed with the decision not to testify. I am just thinking down the road.
> >
> > THE COURT: Well, Mr. McWilliams is present. Mr. McWilliams, do you understand you have the right to testify?
> >
> > MR. McWILLIAMS, THE DEFENDANT: Yes, sir.
> >
> > THE COURT: And do you understand that you have the right not to testify?
> >
> > MR. McWILLIAMS, THE DEFENDANT: Yes, sir.
> >
> > THE COURT: And it is your choice not to testify?
> >
> > MR. McWILLIAMS, THE DEFENDANT: NO ANSWER

> MR. SOGOL [defense attorney]: Judge, again, I think that would come between Mr. McWilliams and myself, and I had just as soon not discuss it.
>
> THE COURT: I agree. It was just out of an abundance of caution I asked that.
>
> MR. SOGOL: Yes, sir.

The right of a criminal defendant to testify at his own trial is fundamental and personal to the defendant. *Nichols v. Butler*, 953 F.2d 1550, 1552 (11th Cir. 1992); *Rock v. Arkansas*, 483 U.S. 44, 107 S. Ct. 2704, 97 L. Ed. 2d 37 (1987). "It is basic that every person has the right in all criminal prosecutions to be heard by himself and counsel, or either . . . to testify in his own behalf, if he elects to so do." *Carter v. State*, 424 So.2d 1336, 1340 (Ala. Crim. App. 1982) (citations omitted). A criminal defendant's decision not to testify in his own behalf must be made knowingly and voluntarily. *Streeter v. State*, 406 So.2d 1024 (Ala. Crim. App.), *cert. denied, Ex parte Streeter*, 406 So.2d 1029 (Ala. 1981), *cert. denied, Streeter v. Alabama*, 456 U.S. 932, 102 S. Ct. 1984, 72 L. Ed. 2d 450 (1982).

The record shows that McWilliams was fully aware that he had the right to testify in his own behalf and that he had the right not to testify. The trial court inquired whether McWilliams understood his rights in this regard; and McWilliams had ample opportunity to state his preference whether to testify or not. We find no evidence in the record that either the trial court or McWilliams's counsel interfered with his right to testify in his own behalf. Accordingly, we reject this claim.

McWilliams, 640 So. 2d at 1021.

McWilliams' entire argument is that:

> the record shows that the trial court disregarded the personal nature of James McWilliams' right to decide whether to testify. No inquiry was made to ascertain whether James McWilliams had knowingly, intelligently, and voluntarily waived his right to testify during the guilt stage.

Therefore, the Alabama Supreme Court's decision was contrary to clearly established Federal law as determined by the Supreme Court and/or involved an unreasonable application of clearly established Federal law as determined by the Supreme Court. Moreover, the Alabama courts abused their

> discretion in their factual holdings and failure to properly consider all of the facts in this case, and James McWilliams is entitled a new trial.

Petition at 192-193.

A criminal defendant's constitutional right to testify at trial was recognized by the Supreme Court in *Rock v. Arkansas*, 483 U.S. 44, 49 (1987). McWilliams' argument implies that he believes his right to testify was violated because the trial judge made no inquiry to ascertain whether McWilliams had knowingly, intelligently, and voluntarily waived his right to testify during the guilt stage of his trial. However, the Eleventh Circuit and other federal circuits have consistently held that there is no per se requirement that the trial court advise the defendant of his right to testify and conduct an on-the-record inquiry into whether a non-testifying defendant knowingly, voluntarily, and intelligently waived the right to testify. *United States v. Van De Walker*, 141 F.3d 1451, 1452 (11th Cir. 1998)(citing cases). Moreover, it is perfectly clear from the record that McWilliams was fully aware of his right to testify in his own defense and that he had a right not to testify, and there is nothing in the record to indicate that McWilliams desired to testify, but was not allowed to do so. Therefore, it is apparent that McWilliams has failed to establish that the Alabama Supreme Court's decision was contrary to clearly established federal law or that it was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceedings. As there is no evidence that McWilliams' right to testify was violated, this claim is due to be dismissed.

Claim XXVII(a). A Juror Testified Falsely During Voir Dire, Thereby Preventing Mr. McWilliams' Full Use of His Peremptory Strikes and Denying His Right to a Fairly Constituted Jury.

In support of this claim, McWilliams states that:

> During voir dire, at least one juror failed to disclose critical and material evidence, despite direct and unambiguous questions from defense counsel. The failure of this juror to answer truthfully denied James McWilliams his right to use of peremptory strikes and to a fairly selected jury.
>
> When asked during voir dire whether either he or a member of his immediate family had ever been charged with a serious crime of violence, potential juror Mr. Frank David Burns remained silent, thereby leaving the false impression that no one in his immediate family had been charged with such a crime. TR. 30-31, 49-50.
>
> In fact, Mr. Burns' son, also named Frank David Burns, was indicted on a charge of murder in the second degree on July 11, 1979, and convicted of manslaughter in the first degree on September 24, 1980 – years before Mr. McWilliams' trial.
>
> When asked during voir dire whether he knew or was acquainted with David Reynolds, Mr. and Mrs. Chuck Reynolds, or their family, Mr. Burns again remained silent. TR. 47-48. Upon information and belief, contrary to his silence, Mr. Burns and his family were acquainted with members of the Reynolds family.
>
> Mr. Burns was ultimately selected as a juror and indeed served as the jury foreman – a position of considerable influence. In addition, Mr. Burns was a swing vote on the jury's 10-2 decision to recommend the death penalty because, under Alabama law, if less than 10 jurors recommend the death penalty, the jury must return a life verdict.
>
> Because Mr. Burns did not answer truthfully on voir dire, James McWilliams was denied the full use of his peremptory strikes. The absence of this opportunity irreparably harmed James McWilliams in his subsequent trial.

Petition at 193-194.

McWilliams attempted to raise this claim in the second amendment to his Rule 32 petition, but the trial court refused to entertain the claim. *McWilliams*, 897 So. 2d at 446.

On appeal from the denial of his Rule 32 petition, the Alabama Court of Criminal Appeals found that:

> The appellant filed both his second amended petition and his revised second amended petition in violation of the circuit court's express scheduling order; he filed both too near the scheduled evidentiary hearing; and both raised issues that were time-barred. Accordingly, the circuit court did not abuse its discretion in refusing to entertain the appellant's second amended petition and his revised second amended petition.

Id. However, McWilliams did not include the claim in his petition for a writ of certiorari to the Alabama Supreme Court. Therefore, McWilliams is procedurally barred from raising this claim in federal court pursuant to *O'Sullivan v. Boerckel*, 119 S. Ct. 1728, 1732-33 (1999).

The petitioner argues that "Issue XXV shows why [he] is not procedurally barred." *Petitioner's Reply Brief*, Court Document 16, at 52. However, he does not specify which "Issue XXV" he believes constitutes cause and/or prejudice to excuse his procedural default of this claim. In fact, neither Claim XXV(a), the *Brady*/*Giglio* claims, nor Claim XXV(b), the ineffective assistance of counsel claims, could serve as cause to excuse the default of this claim. First, both Claims XXV(a) and XXV(b) have been found to lack merit and are due to be denied. Moreover, to excuse this default, McWilliams must show why he did not raise this claim on certiorari to the Alabama Supreme Court. Neither the *Brady*/*Giglio* claims, nor the ineffective assistance of counsel at the trial and sentencing can provide such cause, even if they did merit relief on their own. Furthermore, as previously discussed, McWilliams has failed to show that he is actually innocent. This claim is due to be denied.

Claim XXVII(b). James McWilliams Is Actually Innocent.

McWilliams raises as a separate claim that there is newly discovered evidence that he is actually innocent. "[A] claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." *Herrera v. Collins*, 506 U.S. 390, 404 (1993). Therefore, McWilliams cannot obtain habeas relief on an actual innocence claim standing alone, and the claim is due to be dismissed.

Claim XXVIII. James McWilliams Received Ineffective Assistance of Counsel from His Post Conviction Counsel.

McWilliams argues at length that although he had no legal right to counsel in his collateral proceedings, he is entitled to relief from his conviction or sentence because he had ineffective post-conviction counsel. Title 28 U.S.C. § 2254(i) provides that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254." Clearly, this claims fails to state a claim for which § 2254 relief may be granted and the claim is due to be denied.

Claim XXIX. Alabama's Death Penalty is Unconstitutional.

McWilliams argues that Alabama's death penalty scheme is unconstitutional under *Ring v. Arizona*, 122 S. Ct. 2428 (2002). However, "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." *Schriro v.*

Summerlin, 542 U.S. 348, 358 (2004). McWilliams' convictions were final in 1996, prior to the decision in *Ring*. Therefore, it is inapplicable to his case. This claim is due to be denied.

Claim XXX. Due to the Unconstitutionality of Alabama's Death Sentencing Statute, James McWilliams' Sentence Is Void.

McWilliams' final claim is that "[i]f Alabama's death penalty scheme is unconstitutional, James' sentence is void and he must be sentenced to life without parole." This claim is based on Claim XXIX, which is without merit. Because Alabama's death sentencing statute is not unconstitutional under *Ring*, this claim is also due to be denied.

RECOMMENDATION AND NOTICE OF RIGHT TO OBJECT

In accord with the foregoing, the magistrate judge recommends that McWilliams' petition for a writ of habeas corpus and his requests for an evidentiary hearing be DENIED.

The parties have until February 15, 2008 to file objections. In order to save everyone concerned time and effort, if the substance of an objection is that which has been set out already in pleadings or argument, the party objecting may simply ***refer*** to his previous argument, instead of repeating his argument in full in the form of objections.

Done this 1st day of February, 2008.

Robert R. Armstrong, Jr.
United States Magistrate Judge