[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11779

D.C. Docket No. 1:17-cv-00061-KD-MU

MATTHEW REEVES,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA
DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

(November 10, 2020)

Before WILSON, MARTIN, and JORDAN, Circuit Judges.

PER CURIAM:

Matthew Reeves, an Alabama prisoner on death row, appeals the district court's denial of his habeas corpus petition. *See* 28 U.S.C. § 2254. He argues that habeas relief should have been granted on two grounds. First, he asserts that he is intellectually disabled and therefore ineligible for the death penalty. Second, he

contends that his trial counsel rendered ineffective assistance by failing to hire an expert to evaluate him for intellectual disability—despite petitioning for and obtaining funds to do so.

For the reasons which follow, we affirm in part and reverse in part. We affirm the denial of habeas relief on the intellectual disability claim, but we reverse the denial of habeas relief on the ineffective assistance of counsel claim.

I

In January of 1998, an Alabama jury found Mr. Reeves guilty of capital murder. By a 10-2 vote, the jury recommended that Mr. Reeves be sentenced to death, and the trial court followed that recommendation. We recount the events that led to Mr. Reeves' conviction and sentence, as well as evidence adduced at the state post-conviction proceedings.

A

The facts underlying Mr. Reeves' conviction were described by the Alabama Court of Criminal Appeals on direct appeal. *See Reeves v. State*, 807 So. 2d 18 (Ala. Crim. App. 2000). We summarize them as follows.

On November 27, 1996, Mr. Reeves, who was 18 years old at the time, his brother Julius, and several other individuals set out to commit a robbery. *See id.* at 24. Their car, however, broke down. A passing driver, Willie Johnson, stopped in his pickup truck and offered to tow the car. *See id.*

After Mr. Johnson towed the car, Julius offered to give him a ring as payment if he would drive the group to his girlfriend's house to get it. *See id.* Mr. Johnson agreed, not knowing that Julius had told the others that Mr. Johnson was going to be their robbery victim. *See id.* After taking the group to pick up the ring, Mr. Johnson drove them back to the Reeves' house. *See id.* at 24–25. As the truck came to a stop, Mr. Reeves shot and killed Mr. Johnson and instructed the others to go through his pockets to "get his money." *See id.* at 25.

B

Two attorneys, Blanchard McLeod and Marvin Wiggins, were initially appointed to represent Mr. Reeves. Before trial, Mr. McLeod and Mr. Wiggins petitioned the trial court for funds to hire a clinical neuropsychologist, Dr. John R. Goff, to evaluate Mr. Reeves for intellectual disability. After the trial court denied the motion, Mr. McLeod and Mr. Wiggins sought rehearing. In their rehearing request, they said they "possesse[d] hundreds of pages of psychological, psychometric and behavioral analysis material relating to" Mr. Reeves. *See* D.E. 23-1 at 74. They also asserted "[t]hat a clinical neuropsychologist or a person of like standing and expertise *is the only avenue* open to the defense to compile this information, correlate this information, interview the client and present this

information in an orderly and informative fashion to the jury during the mitigation phase[.]" *Id*. at 74–75 (emphasis added).[1]

During a subsequent hearing before the trial court, Mr. McLeod further explained why retaining a neuropsychologist was critical:

> This is a mitigation expert who we would expect because of the tremendous amount of discovery material provided to us from the Department of Youth Services, from the schools, . . . and all of the psychologicals and all that we do have available that we are going to need someone to assist us in the mitigation phase of this case. . . . This is not for competency. This is for the mitigation phase of the case, and it's going to be a little late once we finish the guilt phase of the case to worry about retaining someone to assist with the preparation of the mitigation phase.

D.E. 23-3 at 92–93. Mr. McLeod continued: "We have received two to three hundred pages of discovery material in the nature of a psychological and a psychiatric information that is going to be exceptionally pertinent at the penalty phase of this proceeding." *Id.* at 96.

On October 16, 1997, the trial court granted the defense's request for funding to hire Dr. Goff. Shortly thereafter, Mr. McLeod withdrew as counsel and was replaced by Thomas Goggans. Mr. Wiggins, however, continued to represent Mr. Reeves.

[1] We later describe the medical and behavioral records that Mr. Reeves' counsel had in their possession prior to trial.

Mr. Goggans and Mr. Wiggins moved for and were granted access to Mr. Reeves' mental health records from the Taylor Hardin Secure Medical Facility, including records related to an evaluation performed by a clinical psychologist, Dr. Kathy Ronan, a few months earlier. But despite securing funding and obtaining the Taylor Hardin records, they never contacted Dr. Goff or hired any other neuropsychologist to evaluate Mr. Reeves for intellectual disability.

Instead, on the day of the sentencing phase of Mr. Reeves' trial, Mr. Goggans and Mr. Wiggins spoke to Dr. Ronan about Mr. Reeves for the first time and then called her to testify. Dr. Ronan had been appointed by the court to evaluate Mr. Reeves solely to assess his competency to stand trial and his mental state at the time of the offense. She had not conducted a sentencing-phase evaluation, which she later explained "would contain different components than those for the trial phase evaluations, and would be more extensive in terms of testing and background investigation." D.E. 23-15 at 11. She also had not evaluated Mr. Reeves for intellectual disability. Specifically, Dr. Ronan had not administered a full IQ test (she had administered only the verbal portion of the test), and she had not assessed Mr. Reeves' adaptive skills, both of which are necessary to properly evaluate intellectual disability. *See id.* at 10–12; D.E. 23-8 at 145.

Dr. Ronan nevertheless testified at the sentencing phase, based on her limited evaluation of Mr. Reeves, that he was in the "borderline range of intelligence." When

the state asked Dr. Ronan on cross-examination whether Mr. Reeves was intellectually disabled, she responded that "[h]e was not in a level that they would call . . . mental retardation." Mr. Reeves' trial counsel did not object, nor did they elicit testimony from Dr. Ronan on redirect about her inability to offer that opinion without having conducted the necessary intellectual disability evaluation.

Mr. Reeves' trial counsel presented two other witnesses during the sentencing phase. They called Detective Pat Grindle of the Selma Police Department, who described the poor condition of Mr. Reeves' childhood home. And they called Mr. Reeves' mother, Marzetta Reeves, who testified about various struggles in Mr. Reeves' childhood. For example, she testified that that his father was absent, that he repeated first grade and "either third or fourth grade," that he "had a hyperization problem" and "some learning disabilities," that he "got whipped a lot from [his grandmother] and his aunties," and that his brother Julius had significant influence over him.

During closing argument, the state emphasized that Mr. Reeves "chose his path"—that he was not a "victim of our society," but instead had "every resource . . . available," yet he "pushed it all away." The defense referenced Mr. Reeves' mental capacity only in passing: "You heard the psychiatrist or the psychologist as she talked about Matthew's upbringing. You heard her talk about the resources that were there and the resources that were not there. You heard Ms. Reeves talk about

first grade, his failing that. He went on through the system, and the third grade, he failed that. And in the eighth grade . . . because of his violent behavior, because of his condition, because he just wouldn't listen, wouldn't pay attention, didn't want to be in that environment he was kicked out of school . . ."

The jury recommended that Mr. Reeves be sentenced to death by a 10-2 vote, and the trial court subsequently imposed a death sentence. On direct appeal, the Alabama Court of Criminal Appeals affirmed, and Mr. Reeves' petitions for writ of certiorari to the Alabama Supreme Court and the U.S. Supreme Court were denied. *See Reeves v. State*, 807 So. 2d 18 (Ala. Crim. App. 2000), *cert. denied*, *Ex parte Reeves*, No. 1000234 (Ala. 2001), & *Reeves v. Alabama*, 534 U.S. 1026 (2001).

C

Mr. Reeves timely petitioned for post-conviction relief pursuant to Rule 32 of Alabama's Rules of Criminal Procedure. Mr. Reeves asserted, among other claims, that his trial counsel were ineffective for failing to obtain an expert to evaluate him for intellectual disability—despite having sought and obtained funds to hire a neuropsychologist for that very purpose. He also argued that his counsel were ineffective for failing to retain a mitigation expert, and that his death sentence violated the Eighth Amendment because he is intellectually disabled.

The Rule 32 court held a two-day evidentiary hearing on Mr. Reeves' petition. Both sides presented witnesses at the hearing.

Mr. Reeves called Dr. Goff, whom post-conviction counsel had retained to evaluate him prior to the hearing. Dr. Goff testified—based on his review of Mr. Reeves' mental health and school records and the results of a battery of tests designed to assess Mr. Reeves' IQ, cognitive abilities, and adaptive functioning—that Mr. Reeves was intellectually disabled. Dr. Goff concluded, based on Mr. Reeves' IQ scores of 71 and 73, that he has significantly subaverage intellectual functioning. Dr. Goff also concluded that Mr. Reeves has significant deficits in multiple areas of adaptive functioning, including functional academics, self-direction, work, and health and safety. In addition, Dr. Goff testified that, had Mr. Reeves' trial counsel asked him to evaluate Mr. Reeves years earlier for the purpose of testifying at trial, he would have performed similar evaluations and reached the same conclusions.

Mr. Reeves also presented a mitigation expert, Dr. Karen Salekin, who testified about the neglect, domestic violence, drug abuse, and extreme poverty that he experienced as a child. Mr. Reeves did not call Mr. McLeod, Mr. Wiggins, or Mr. Goggans to testify.[2]

The state called Dr. Glen King, a clinical and forensic psychologist who also evaluated Mr. Reeves for the Rule 32 proceedings. Dr. King concluded that Mr. Reeves was "in the borderline range of intellectual ability." D.E. 23-25 at 234. Dr.

[2] At the time of the Rule 32 proceedings, Mr. Wiggins was an Alabama state judge.

King testified that Mr. Reeves had an IQ of 68, but that his "achievement scores [on other tests] indicate a level of functioning higher than the IQ scores actually indicated." *Id.* at 223–24. Although Dr. King found that Mr. Reeves achieved low test scores in three areas of adaptive functioning (domestic activity, work, and self-direction), he explained that other evidence indicated that he did not have substantial deficiencies in these areas.

The Rule 32 court denied Mr. Reeves' petition in 2009, but the order was not served on Mr. Reeves, his counsel, or the state until 2013. Because of this error, Mr. Reeves was granted leave to file an out-of-time appeal.

In 2016, the Court of Criminal Appeals affirmed the denial of Mr. Reeves' Rule 32 petition. *See Reeves v. State*, 226 So. 3d 711 (Ala. Crim. App. 2016). As relevant here, it concluded that the Rule 32 court did not abuse its discretion in denying Mr. Reeves' intellectual disability claim. *See id.* at 725–44. It also held that Mr. Reeves could not meet his burden of proving ineffective assistance of counsel because he did not call his trial counsel to testify at the Rule 32 hearing. *See id.* at 747–48. It explained that Mr. Reeves' "failure to call his attorneys to testify [was] *fatal* to his claims of ineffective assistance of counsel," because without such testimony "the record is silent as to the reasons trial counsel . . . chose not to hire Dr. Goff[.]" *Id.* at 749–51 (emphasis added).

The Alabama Supreme Court denied Mr. Reeves' petition for a writ of certiorari. *See Ex parte Reeves*, No. 1160053 (Ala. 2017). The U.S. Supreme Court also denied certiorari. *See Reeves v. Alabama*, 138 S. Ct. 22 (2017) (Mem.). Justice Sotomayor—joined by Justices Ginsburg and Kagan—dissented, explaining that the Court of Criminal Appeals' "imposition of a categorical rule that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective-assistance-of-counsel claim contravenes [Supreme Court] decisions requiring an objective inquiry into the adequacy and reasonableness of counsel's performance based on the full record before the court." *Id.* at 23.

Mr. Reeves then filed a federal habeas corpus petition. The district court denied relief, but granted Mr. Reeves a certificate of appealability on his claim that trial counsel were ineffective for failing to hire an expert to investigate his intellectual disability. We granted Mr. Reeves a certificate of appealability on his claims that he is intellectually disabled and that the Court of Criminal Appeals incorrectly required trial counsel's testimony to establish ineffectiveness.[3]

[3] We also granted a certificate of appealability on Mr. Reeves' claim that trial counsel were ineffective for failing to conduct a sufficient mitigation investigation or hire a defense mitigation expert. Given our ruling on trial counsel's ineffectiveness for failing to retain an expert to evaluate Mr. Reeves for intellectual disability, we do not reach whether trial counsel were also ineffective for failing to secure additional mitigation evidence.

II

The district court's denial of a § 2254 habeas corpus petition is subject to *de novo* review. *See Ward v. Hall,* 592 F.3d 1144, 1155 (11th Cir. 2010). Because Mr. Reeves filed his petition after April 24, 1996, however, this appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996. AEDPA "establishes a highly deferential standard for reviewing state court judgments." *Parker v. Sec'y, Dep't. of Corr.*, 331 F.3d 764, 768 (11th Cir. 2003). Under AEDPA, a federal court may only grant a writ of habeas corpus if the state court's determination of a federal claim was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The phrase "clearly established Federal law" encompasses only the holdings of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

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

principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id*. Reasonableness is an objective standard, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. *See id*. at 410. *See also Woods v. Donald*, 575 U.S. 312, 316 (2015) ("[A]n unreasonable application . . . must be objectively unreasonable, not merely wrong; even clear error will not suffice.") (citation and internal quotation marks omitted).

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

III

We first address Mr. Reeves' intellectual disability claim.

A

Mr. Reeves argues that he is ineligible for the death penalty under *Atkins v. Virginia*, 536 U.S. 304, 321 (2002), which held that executing intellectually disabled individuals violates the Eighth Amendment. Generally, a determination of whether

a person is intellectually disabled is a finding of fact. *See Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014).

Though *Atkins* left defining intellectual disability to the states, the Supreme Court noted that the medical community defines intellectual disability (then referred to as "mental retardation") as follows:

> *Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure and work. Mental retardation manifests before 18.

Atkins, 536 U.S. at 308 n.3. The Alabama Supreme Court has similarly held that, for a defendant to prove that he is intellectually disabled under *Atkins*, he must show (1) that he has "significantly subaverage intellectual functioning (an IQ of 70 or below);" (2) that he has "significant or substantial deficits in adaptive behavior;" and (3) that these problems "manifested themselves during the development period (i.e., before the defendant reached age 18)." *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002). *See also Smith v. State*, 213 So. 3d 239, 248 (Ala. 2007) (same).

In *Hall v. Florida*, 572 U.S. 701, 721 (2014), the Supreme Court held that a determination of intellectual disability must be "informed by the medical community's diagnostic framework." The Court in *Hall* invalidated a Florida statute that defined intellectual disability based on a strict IQ test score cutoff of 70,

concluding that it contravened the established medical practice of taking into account the standard error of measurement. The standard error of measurement reflects "that an individual's score is best understood as a range of scores on either side of the recorded score." *Id.* at 713. The Court explained that "an individual with an IQ test score between 70 and 75 or lower may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." *Id.* at 722 (citation and internal quotation marks omitted).

B

Mr. Reeves argues that the Court of Criminal Appeals' analysis of the first two prongs of the intellectual disability standard is both contrary to and an unreasonable application of *Hall*, as well as an unreasonable determination of the facts. *See* Appellant's Initial Br. at 25–38. We disagree.[4]

In analyzing the first prong, the Court of Criminal Appeals interpreted *Hall* to mean that "an IQ score, alone, is not determinative of intellectual disability or even of the intellectual-functioning prong of intellectual disability." *Reeves*, 226 So. 3d at 740. Thus, although Mr. Reeves had full-scale IQ scores of 68, 71, and 73, the Court of Criminal Appeals concluded that the Rule 32 court did not abuse its discretion by finding—based on all the evidence presented and after observing Mr. Reeves when

[4] The Court of Criminal Appeals did not reach the third prong, regarding whether the intellectual disability manifested before the age of 18. *See Reeves*, 226 So. 3d at 743 n.15.

he testified at a pretrial hearing—that his intellectual functioning was not significantly subaverage. *See id.* at 741.

Turning to the second prong, the Court of Criminal Appeals similarly stated that a court "is not *required* to find that a person suffers from significant deficits in adaptive functioning merely because that person's scores on a standardized test indicate such deficits." *Id.* at 741–42. It reasoned that, although testing performed by both experts reflected that Mr. Reeves had adaptive deficits in certain areas, "other evidence was presented that either called into question the validity of those scores and/or indicated that [Mr. Reeves'] deficits in those areas were not, in fact, *significant*." *Id.* at 742.

Mr. Reeves contends that the Court of Criminal Appeals deviated from the medical community's diagnostic framework in evaluating his intellectual functioning because it did not place enough weight on his IQ scores. *See* Appellant's Initial Br. at 27–33. He also asserts that the Court of Criminal Appeals' analysis of his adaptive functioning contravened established medical standards because it treated his adaptive strengths as negating his adaptive deficits. *See id.* at 36–38. For this latter point, he relies on *Moore v. Texas*, 137 S. Ct. 1039, 1050 (2017), which clarified that "the medical community focuses the adaptive-functioning inquiry on adaptive *deficits*." As we have stated, "[a]fter *Moore*, states cannot 'weigh' an

individual's adaptive strengths against his adaptive deficits." *Smith v. Ala. Dep't of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019).

Assuming without deciding that the Court of Criminal Appeals unreasonably applied *Hall* with respect to the first prong of the intellectual disability standard, Mr. Reeves cannot prevail on his *Atkins* claim. The Court of Criminal Appeals did not unreasonably apply *Hall* in analyzing the second prong.[5]

1

Under *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny, cases establishing new constitutional rules of criminal procedure generally cannot be applied retroactively on collateral review. *See Welch v. United States*, 136 S. Ct. 1257, 1264 (2016). We therefore address whether *Hall* and *Moore* apply to Mr. Reeves' claim, as both opinions were issued after Mr. Reeves' conviction and sentence became final in 2001, and *Moore* was issued after the Court of Criminal Appeals denied post-conviction relief. *See Caspari v. Bohlen*, 510 U.S. 383, 389

[5] To the extent that Mr. Reeves claims that the Court of Criminal Appeals' opinion is an unreasonable application of *Atkins*, we reject that argument. "*Atkins* did not define intellectual disability, nor did it direct the states on how to define intellectual disability . . . Rather, *Atkins* expressly left it to the states to develop 'appropriate ways to enforce the constitutional restriction' on executing the intellectually disabled." *Kilgore v. Secretary, Fla. Dep't of Corr.*, 805 F.3d 1301, 1311 (11th Cir. 2015) (quoting *Atkins*, 536 U.S. at 317). The Court of Criminal Appeals therefore did not unreasonably apply *Atkins* in evaluating whether Mr. Reeves was intellectually disabled.

(1994) ("A threshold question in every habeas case . . . is whether the court is obligated to apply the *Teague* rule to the defendant's claim.").[6]

We do not apply *Moore* to Mr. Reeves' *Atkins* claim for two reasons. First, *Moore* was decided after the Court of Criminal Appeals issued the relevant state-court decision in 2016, and therefore it was not "clearly established" law under § 2254(d)(1). *See Shoop v. Hill*, 139 S. Ct. 504, 507–08 (2019) (summarily vacating the Sixth Circuit's grant of habeas relief because it was improperly based on *Moore*, a case "which was not handed down until long after the state-court decisions" that were relevant for purposes of the § 2254(d) analysis). Second, we have held that *Moore* "announced a new rule" that does not apply retroactively under *Teague*. *See Smith*, 924 F.3d at 1338–39.

Unlike *Moore, Hall* had been decided at the time the Court of Criminal Appeals issued its opinion in the Rule 32 appeal. In reviewing Mr. Reeves' claim, the Court of Criminal Appeals applied *Hall*, rejecting the state's argument that *Hall* does not apply retroactively to cases on collateral review. *See Reeves*, 226 So. 3d at 727 n.7. Although the Court of Criminal Appeals was free to apply *Hall* as a matter of state law, s*ee Danforth v. Minnesota*, 552 U.S. 264, 282 (2008), its retroactivity

[6] *Atkins* was decided in 2002, also after Mr. Reeves' conviction and sentence became final, but we have held that *Atkins*—which announced a substantive rule of constitutional law—applies retroactively. *See In re Holladay*, 331 F.3d 1169, 1173 (11th Cir. 2003) ("[T]here is no question that the new constitutional rule . . . articulated in *Atkins* is retroactively applicable to cases on collateral review.").

determination does not govern whether *Hall* applies retroactively in federal court. *See Knight v. Fla. Dep't of Corr.*, 936 F.3d 1322, 1333 (11th Cir. 2019) ("[A] state-law retroactivity determination has no significance in federal court . . . if the government raises the issue, a *Teague* analysis is mandatory.").

We have held that *Hall* sets forth a new rule of criminal procedure that does not apply retroactively under *Teague*. *See In re Henry*, 757 F.3d 1151, 1158–59 (11th Cir. 2014); *In re Hill*, 777 F.3d 1214, 1223 (11th Cir. 2015); *Kilgore v. Secretary, Fla. Dep't of Corr.*, 805 F.3d 1301, 1313–16 (11th Cir. 2015). Although we would normally follow this precedent, a state can waive a *Teague* nonretroactivity argument. *See Caspari*, 114 S. Ct. at 953 ("[A] federal court may, but need not, decline to apply *Teague* if the State does not argue it."). Here, despite the existence of cases like *Henry*, *Hill*, and *Kilgore*, the state has failed to argue on appeal that *Hall* is not retroactive. In fact, it has chosen to address *Hall* on the merits. *See* State's Answer Br. at 24, 30. We therefore consider whether the Court of Criminal Appeals unreasonably applied *Hall*.[7]

[7] Although Mr. Reeves also says that the opinion of the Court of Criminal Appeals is "contrary to" *Hall*, he does not argue that it failed to identify the correct legal standard or refused to apply Supreme Court precedent that involved materially indistinguishable facts. *See Williams*, 529 U.S. at 413. His contention is better characterized as an "unreasonable application" argument, as he acknowledges that the Court of Criminal Appeals identified the correct legal principles but contends that it unreasonably applied those standards to his case. *See id.*

2

Hall does not provide guidance as to how a court is to analyze the adaptive deficits prong of the intellectual disability standard, other than saying that the analysis is informed by the medical community's diagnostic framework. *See Hall*, 572 U.S. at 721. *See also Mays v. Stephens*, 757 F.3d 211, 218 (5th Cir. 2014) (explaining that *Hall* does not dictate what kinds of evidence a court might consider when determining adaptive functioning, and "[i]nstead, . . . exclusively addresses the constitutionality of mandatory, strict IQ cutoffs"); *Arbelaez v. Fla. Dep't of Corr.*, 662 F. App'x 713, 723 (11th Cir. 2016) ("Nothing in the holdings of *Atkins* or *Hall* speaks directly to the methodology for discerning an individual's deficits in adaptive functioning.").

Mr. Reeves argues that prevailing medical standards make clear that the focus should be on adaptive *deficits*, not adaptive *strengths*. *See* Appellant's Initial Br. at 37. To the extent that the Court of Criminal Appeals may have improperly balanced Mr. Reeves' adaptive strengths against his adaptive deficits, the Supreme Court did not hold that this was improper until *Moore*. "[W]hile that approach today would be contrary to clearly established federal law—that is, contrary to *Moore* . . .—it was neither contrary to nor an unreasonable application of clearly established Supreme Court law when" the Court of Criminal Appeals affirmed the denial of Mr. Reeves' Rule 32 petition. *See Clemons v. Comm'r, Ala. Dep't of Corr.*, 967 F.3d 1231, 1250

(11th Cir. 2020). *See also Smith*, 924 F.3d at 1343 (explaining that, although the Alabama courts had improperly reasoned that the petitioner's adaptive strengths outweighed his deficits, this approach was acceptable until *Moore*).

In any event, the Court of Criminal Appeals did not treat Mr. Reeves' adaptive strengths as overriding his adaptive deficits; instead, it weighed conflicting evidence and concluded—based on Dr. King's testimony and other record evidence—that Mr. Reeves' adaptive deficits were not significant, despite his low test scores in certain areas. *See Reeves*, 226 So. 3d at 742.

Although Dr. King testified that Mr. Reeves achieved low test scores in domestic activity, work, and self-direction, he also explained that other evidence indicated that Mr. Reeves did not have substantial deficits in these areas. For example, the Court of Criminal Appeals relied on Dr. King's testimony that Mr. Reeves scored low in domestic activity "because [he] had never been required to do any type of domestic activity growing up and had been incarcerated since he was 18 years old." *Id.* It also cited testimony by Dr. King that he would have scored Mr. Reeves higher in "self-direction" had he known at the time of the evaluation that Mr. Reeves had been "involved in a lot of drug activity and was actually directing the behaviors and activities of others[.]" *Id.*

The Court of Criminal Appeals further relied on Dr. King's conclusion that Mr. Reeves scored low in the work domain because he "did not get to the age where

he might be able to master use of complex job tools or equipment" before he was incarcerated. *See id.* And it recounted other evidence confirming that Mr. Reeves has at least some vocational skills. He had certificates in brick masonry, welding, and automobile mechanics, and held a construction job while his brother was incarcerated. *See id.* at 742–43.

In addition, the Court of Criminal Appeals noted that although Mr. Reeves scored low in the health and safety, self-care, and leisure domains on the test administered by Dr. Goff, he achieved high scores in these areas in tests administered by Dr. King. *See id.* at 743. It viewed certain evidence—that Mr. Reeves "sold drugs to make money" and "used that money to buy personal belongings for himself, including a car, and to help pay the household bills"—as demonstrating that he could care for himself. *See id.* Finally, the Court of Criminal Appeals credited Dr. King's testimony that Mr. Reeves could read at a fifth-grade level, and Dr. Goff acknowledged that reading at that level "would not qualify as a *significant* deficit in functional academics." *Id.*

In sum, the Court of Criminal Appeals did not unreasonably apply *Hall* by relying on this evidence to find that Mr. Reeves did not have substantial deficits in at least two areas. We reiterate that a determination of whether a person is intellectually disabled is a finding of fact, *see Fults*, 764 F.3d at 1319, and under AEDPA such a finding is presumed to be correct. Even if we may have viewed the

evidence differently, "we are not sitting as the initial triers of fact determining whether [Mr. Reeves] is in fact [intellectually disabled]. We are not even assessing factual findings made by a district court for clear error. We are reviewing the factual findings of the state habeas court through the prism of AEDPA, which calls for a presumption of correctness that can only be overcome by clear and convincing evidence." *Id.* at 1321. Accordingly, we affirm the district court's denial of relief on Mr. Reeves' *Atkins* claim.

IV

We now turn to Mr. Reeves' claim that he received ineffective assistance of counsel in violation of the Sixth Amendment. Mr. Reeves must establish two elements to prevail on this claim: (1) deficient performance of counsel; and (2) resulting prejudice. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984).

To prove deficiency, Mr. Reeves must show that his trial "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. In considering counsel's performance, courts "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance[.]" *Id.* at 689. "To overcome that presumption, [Mr. Reeves] must show that counsel failed to act reasonably considering all the circumstances." *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (citation and internal quotation marks omitted).

To prove prejudice, Mr. Reeves "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A "reasonable probability" does not mean that counsel's performance "more likely than not altered the outcome." *Nix v. Whiteside*, 475 U.S. 157, 175 (1986). Instead, a "reasonable probability" is a "probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

Under AEDPA, Mr. Reeves is "entitled to relief only if the state court's rejection of his claim of ineffective assistance of counsel was 'contrary to, or involved an unreasonable application of,' *Strickland*, or rested on 'an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Porter v. McCollum*, 558 U.S. 30, 39 (2009) (quoting § 2254(d)). If the Court of Criminal Appeals unreasonably applied *Strickland*, then we review Mr. Reeves' ineffectiveness claim without AEDPA deference. *See McGahee v. Ala. Dep't of Corr.*, 560 F.3d 1252, 1266 (11th Cir. 2009) ("Where we have determined that a state court decision is an unreasonable application of federal law under 28 U.S.C. § 2254(d), we are unconstrained by § 2254's deference and must undertake a *de novo* review of the record.").

A

In rejecting Mr. Reeves' ineffective assistance of counsel claims, the Court of Criminal Appeals held that, "to overcome the strong presumption of effectiveness, *a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning*." *Reeves*, 226 So. 3d at 748. It concluded, based on this categorical rule, that Mr. Reeves' "failure to call his attorneys to testify [was] *fatal* to his claims," *id.* at 749 (emphasis added), without considering the extensive evidence before it about counsel's performance or explaining why this other evidence did not establish ineffectiveness. By treating Mr. Reeves' failure to call his counsel to testify as a *per se* bar to relief—despite ample evidence in the record to overcome the presumption of adequate representation—the Court of Criminal Appeals unreasonably applied *Strickland*.

Strickland established a "presumption" of reasonable performance, but it also made clear that the presumption may be "overcome." 466 U.S. at 689. *See also Kimmelman v. Morrison*, 477 U.S. 365, 384 (1986) (recognizing that, although under *Strickland* counsel's competence is presumed, the defendant may "rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms"). "The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' not

whether it deviated from best practices or most common custom." *Harrington v. Richter*, 562 U.S. 86, 105 (2011).

Rather than creating (or even permitting) a *per se* rule that the petitioner must present counsel's testimony to rebut the presumption, *Strickland* emphasized that counsel's performance must be judged "on the facts of the particular case, viewed as of the time of counsel's conduct." 466 U.S. at 690. *See also id.* at 688 ("[T]he performance inquiry must be whether counsel's assistance was reasonable considering *all the circumstances*.") (emphasis added). "Most important, in adjudging a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules." *Id.* at 696. *See also Rompilla v. Beard*, 545 U.S. 374, 381 (2005) ("A standard of reasonableness applied as if one stood in counsel's shoes spawns few hard-edged rules[.]"); *id.* at 393–94 (2005) (O'Connor, J., concurring) ("[T]oday's decision simply applies our longstanding *case-by-case approach* to determining whether an attorney's performance was unconstitutionally deficient under *Strickland*[.]") (emphasis added).

The Supreme Court has ruled that state courts unreasonably applied *Strickland* by requiring a petitioner to additionally show on the prejudice prong that the result of the proceeding was fundamentally unfair, *see Williams*, 529 U.S. at 393–95; by "deferring to counsel's decision not to pursue a mitigation case despite their

unreasonable investigation," *Wiggins v. Smith*, 539 U.S. 510, 534 (2003); and by concluding that, rather than examine their client's prior conviction file, counsel could ask the client and family relatives whether they recalled anything helpful or damaging in the prior victim's testimony, *see Rompilla*, 545 U.S. at 388–89. Here, we agree with Justice Sotomayor that the Court of Criminal Appeals unreasonably applied *Strickland* by creating a categorical rule requiring the testimony of counsel:

> *Strickland* and its progeny establish that when a court is presented with an ineffective-assistance-of-counsel claim, it should look to the full record presented by the defendant to determine whether the defendant satisfied his burden to prove deficient performance. The absence of counsel's testimony may make it more difficult for a defendant to meet his burden, but that fact alone does not absolve a court of its duty to look at the whole record and evaluate the reasonableness of counsel's professional assistance in light of that evidence.

Reeves, 138 S. Ct. at 26 (Sotomayor, J., dissenting from the denial of certiorari). If the Court of Criminal Appeals were correct, then an ineffectiveness claim would be barred as a matter of law if counsel had passed away or did not recall the reasons for his conduct. Its *per se* rule is objectively unreasonable.[8]

[8] We recognize that only Supreme Court cases constitute clearly established law under § 2254(d). We note, however, that we have considered the totality of the evidence in evaluating ineffectiveness claims where trial counsel has not been able to provide meaningful testimony at a post-conviction hearing, either because he had passed away or could not recall the pertinent events. *See Williams v. Head*, 185 F.3d 1223, 1227–28 & 1234–35 (11th Cir. 1999) (considering the totality of the evidence regarding mitigation investigation where trial counsel's recollection of events was hampered due to the loss of the case file); *Callahan v. Campbell*, 427 F.3d 897, 933–36 (11th Cir. 2005) (examining the reasonableness of trial counsel's performance in light of the evidence in the record even though trial counsel did not testify at the Rule 32 hearing because he had passed away).

That *Strickland* does not demand counsel's testimony is also clear from cases in which the Supreme Court found ineffectiveness due to failure to investigate despite such testimony. In those cases, the Court based its review on the full record. *See id.*

For example, in *Williams*, 529 U.S. at 392, the Supreme Court held that the Virginia Supreme Court's decision rejecting the petitioner's ineffectiveness claim was both contrary to, and an unreasonable application of *Strickland*. Though trial counsel testified about his strategic decision before the state habeas court, *see id.* at 373, the Court nonetheless concluded that "the failure to introduce the comparatively voluminous amount of" mitigating evidence "was not justified by a tactical decision[.]" *Id.* at 396. Instead, the Court determined—based on the totality of the evidence in the record—that counsel did not "fulfill their obligation to conduct a thorough investigation of the defendant's background." *Id.* Specifically, the Court explained that "[t]he record establishes that counsel did not begin to prepare for [the sentencing] phase of the proceeding until a week before the trial," that counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing [the petitioner's] nightmarish childhood," and that "[c]ounsel failed to introduce available evidence that [the petitioner] was 'borderline mentally retarded'" or "even to return he phone call of a certified public accountant who had

offered to testify that he had visited [the petitioner] frequently" in prison and he seemed to thrive in a more structured environment. *See id.* at 395–96.

Similarly, in *Wiggins*, the Supreme Court held that the Maryland Court of Appeals unreasonably applied *Strickland* in rejecting the petitioner's claim that his trial attorneys rendered ineffective assistance by failing to investigate and present mitigating evidence. Though trial counsel testified that they made a strategic decision to focus on "retry[ing] the factual case" and dispute the petitioner's responsibility for the murder, *see* 539 U.S. at 517, the Supreme Court proceeded to "conduct an objective review of their performance." *Id.* at 523.

In doing so, the Court considered other evidence in the record, noting that trial counsel had available to them a written PSI, which included a one-page account of the petitioner's personal history, and records from the city department of social services. *See id.* The Court concluded that "[c]ounsel's decision not to expand their investigation beyond the PSI and the DSS records fell short of" professional standards, and that the "scope of their investigation was also unreasonable in light of what counsel actually discovered in the . . . records." *Id.* at 524–25. Namely, the records revealed that the petitioner was "shuttled from foster home to foster home," that his mother was an alcoholic, that he had frequent, lengthy absences from school, and that on at least one occasion, he was left alone for days without food. *See id.* at 525. The Court also noted that "[d]espite the fact that the Public Defender's office

made funds available for the retention of a forensic social worker, counsel chose not to commission [a social history] report." *Id.* at 524. The record thus established the unreasonableness of counsel's conduct, despite their testimony about having made a strategic decision.

And in *Porter*, 558 U.S. at 39–40, the Supreme Court again concluded that trial counsel's decision not to investigate mitigating evidence "did not reflect reasonable professional judgment," despite trial counsel's testimony at the postconviction hearing. Reviewing counsel's performance *de novo*, the Supreme Court explained that the record reflected that "like the counsel in *Wiggins*, [trial counsel] ignored pertinent avenues for investigation of which he should have been aware." *Id.* at 40. For instance, the court-ordered competency evaluations indicated that the petitioner spent very few years in regular school, served in the military and sustained wounds in combat, and noted his father's "over discipline." *Id.* Yet counsel did not further investigate, and "thus failed to uncover and present any evidence of [the petitioner's] mental health or mental impairment, his family background, or his military service." *Id.*

These Supreme Court cases demonstrate that, even when trial counsel does testify that a decision not to investigate was made for a strategic reason, that testimony may not establish adequate performance if it is rebutted by other evidence in the record. As Justice Sotomayor stated: "It cannot be, then, that such testimony

is necessary in every case. Where counsel does not testify but the defendant offers other record evidence, a court can simply presume that counsel would have justified his actions as tactical decisions and then consider whether the record rebuts the reasonableness of the justification." *Reeves*, 138 S. Ct. at 27 (Sotomayor, J., dissenting from the denial of certiorari).

Finally, the Supreme Court's opinion in *Massaro v. United States*, 538 U.S. 500 (2003), further indicates that trial counsel's testimony is not required for an ineffective assistance of counsel claim. There, the Supreme Court held that failing to raise an ineffective assistance of counsel claim on direct appeal does not bar the claim from being brought in a later post-conviction proceeding under § 2255. *See id.* at 509. But it declined to hold that ineffective-assistance claims *must* be reserved for collateral review, recognizing that "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal. There may be instances, too, when obvious deficiencies in representation will be addressed by an appellate court *sua sponte*." *Id.* at 508. The Court thus acknowledged that, in at least some cases, ineffectiveness may be established based on the trial record and without testimony from trial counsel or any other evidence presented on post-conviction review.

In view of these cases, "[t]here can be no dispute that the imposition of a categorical rule that counsel must testify in order for a petitioner to succeed on a

federal constitutional ineffective-assistance-of-counsel claim contravenes [the Supreme Court's] decisions requiring an objective inquiry into the adequacy and reasonableness of counsel's performance based on the full record before the court." *Reeves*, 138 S. Ct. at 23 (Sotomayor, J., dissenting from the denial of certiorari). The Court of Criminal Appeals' decision contravenes the command of *Strickland* that courts are to consider "all the circumstances" rather than applying "mechanical rules." *Strickland*, 466 U.S. at 688, 696. The Court of Criminal Appeals thus unreasonably applied *Strickland* by applying a *per se* rule that trial counsel's failure to testify was fatal to Mr. Reeves' ineffective assistance of counsel claims, and by refusing to consider or discuss the evidence in the record, discussed below, establishing counsel's deficient performance.

B

Because the Court of Criminal Appeals unreasonably applied *Strickland*, "we are unconstrained by § 2254's deference and must undertake a *de novo* review of the record" to determine whether trial counsel's performance was deficient. *See McGahee*, 560 F.3d at 1266. The Court of Criminal Appeals never reached whether trial counsel's failure to retain a neuropsychologist was deficient, as its decision rested solely on the lack of testimony from trial counsel at the Rule 32 hearing.

As the Supreme Court explained in *Strickland*, "counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular

investigations unnecessary." 466 U.S. at 691. The Supreme Court has further instructed that "[i]n assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527–28 (holding that "counsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible" in light of what the records that they reviewed "actually revealed"). *See also Porter*, 558 U.S. at 40 (holding that counsel performed deficiently because he "ignored pertinent avenues for investigation of which he should have been aware").

Here, under *Williams*, *Wiggins*, and *Porter*, the totality of the evidence establishes that trial counsel ceased their investigation at an "unreasonable juncture." *Wiggins*, 539 U.S. at 527. The record includes trial counsel's own statements that retaining a neuropsychologist to evaluate Mr. Reeves was "the only avenue open to the defense to compile" the "hundreds of pages of psychological, psychometric, and behavioral analysis material relating to" Mr. Reeves. *See* D.E. 23-1 at 74–75. Trial counsel also acknowledged that they had "hundreds" of pages of documents, including records from the Department of Youth Services, school records, and other mental health records that they believed would be "exceptionally pertinent at the penalty phase." D.E. 23-3 at 96. They further represented that a neuropsychologist

was necessary "to assist [counsel] in the mitigation phase of the case," even stating that waiting until after the guilt phase to retain someone would be "a little late." D.E. 23-3 at 92–93.

Indeed, trial counsel twice requested that the court appoint such an expert—only to then neglect to hire Dr. Goff or any other neuropsychologist once the court granted the request for funds. They never even contacted Dr. Goff, despite having over three months to do so—as the funds to hire him were granted on October 16, 1997, and the trial began on January 26, 1998.

This conduct is particularly unreasonable and deficient in light of what trial counsel actually knew about the need for an intellectual disability evaluation. *See Wiggins*, 539 U.S. at 505. Among other things, the documents that trial counsel had in their possession before trial included:

- Mental health records from the Cahaba Center for Mental Health reflecting that Mr. Reeves was treated at the center for behavioral problems and ADHD beginning when he was eight years old, that he was re-admitted for treatment when he was 10 years old, and noting that "his intelligence is somewhat below average" and his "[j]udgment and insights are poor." *See* D.E. 23-19 at 1064–65; D.E. 23–20 at 12.

- Records reflecting that Mr. Reeves was administered an IQ test when he was 14 years old and obtained a verbal IQ score of 75, a performance IQ score of 74, and a full-scale IQ score of 73. These records state that he is in the "borderline range of intellectual functioning" and that he has "severe deficiencies in non-verbal social intelligence skills and his ability to see consequences." D.E. 23-20 at 13, 57.

- Mental health and school records demonstrating that Mr. Reeves failed the first, fourth, and fifth grades, that he was placed in special education services

for "emotional conflict," that he was "socially promoted to the seventh grade," and that he was expelled in eighth grade. *See* D.E. 23-20 at 12, 43, 88–90, 156.

- An outpatient forensic evaluation report from the Alabama Department of Mental Health and Mental Retardation describing Mr. Reeves as having "below normal intellectual functioning" in June of 1997. *See* D.E. 23-19 at 981–88.

The record further reflects that—in contravention of their own statement that waiting until after the guilt phase would be too late—trial counsel did not speak to Dr. Ronan about testifying on Mr. Reeves' behalf until the day of the penalty phase. And, despite specifically requesting the appointment of a *neuropsychologist* to do an intellectual disability evaluation for mitigation, trial counsel relied on Dr. Ronan—a *clinical psychologist* who had evaluated Mr. Reeves only for competency to stand trial and his mental state at the time of the offense, and who had not conducted an intellectual disability evaluation for mitigation.

At the Rule 32 proceedings, Mr. Reeves submitted an affidavit from Dr. Ronan, in which she explained that she "was not requested to complete a sentencing phase evaluation," and she "had not conducted an extensive clinical evaluation regarding mental retardation as that was not within the scope of [her] evaluation." D.E. 23-15 at 10. Specifically, Dr. Ronan testified that an "evaluation for [c]apital sentencing would contain different components than those for the trial phase evaluations, and would be more extensive in terms of testing and background investigation." *Id.* at 11. For example, Dr. Ronan only administered the verbal

portion of an IQ test. Had she been conducting an intellectual disability evaluation, the entire IQ test "would be required to be given," and further investigation into adaptive functioning would have been necessary. *See id.* The state's own expert, Dr. King, acknowledged that a "full scale IQ test" should be given to evaluate intellectual disability. *See* D.E. 23-25 at 52.

Dr. Ronan further stated in her affidavit that "[a]ttorneys were routinely informed as to the limitations" of her testimony for the capital penalty phase, "in that the original evaluation was not performed for that purpose." D.E. 23-15 at 10. Despite this, Mr. Reeves' trial counsel called Dr. Ronan as a witness. Under the circumstances and our cases, it was not reasonable for trial counsel to rely on Dr. Ronan, as she had only performed a competency evaluation and they did not speak to her until the day of the penalty phase. *See Debruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1273–74 (11th Cir. 2014) (holding that no lawyer could reasonably forego the pursuit of mitigation evidence on the defendant's mental health "based on the results of [a] pre-trial report governing competency to stand trial" because competency cannot be equated with guilt-phase mental health defenses). *See also Hardwick v. Crosby*, 320 F.3d 1127, 1163 (11th Cir. 2003) ("Regarding mental health evidence, our court has distinguished between its use during the guilt phase to establish competency to stand trial and presenting mental health mitigating evidence at the penalty phase."); *Blanco v. Singletary*, 943 F.2d

1477, 1503 (11th Cir. 1991) ("One can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider.").

In denying relief on Mr. Reeves' ineffective assistance of counsel claim, the district court noted that the records obtained by trial counsel indicated that Mr. Reeves was in the borderline range of intellectual functioning. As a result, the district court concluded that they "cannot reasonably be faulted for failing to pursue further expert inquiry into [his] intellectual functioning[.]" D.E. 29 at 49.[9]

But as the Supreme Court stated in *Strickland*, "strategic choices made after *less than complete investigation* are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." 466 U.S. at 690–91 (emphasis added). Given that trial counsel had already obtained the funds to retain Dr. Goff—and was well aware that Mr. Reeves' intellectual ability was an important issue—counsel should have at least had his mental capacity *evaluated* so that they could "mak[e] an informed choice among possible defenses."

[9] The Rule 32 court similarly concluded that when Dr. Ronan's testimony is considered together with the records collected by trial counsel, "there was no indication of a diagnosis of mental retardation." D.E. 23-16 at 155. But because the Court of Criminal Appeals applied its *per se* rule requiring trial counsel's testimony, it did not analyze counsel's conduct and did not pass on the Rule 32 court's analysis. We therefore review only the decision of the Court of Criminal Appeals. *See Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018) ("when the last state court to decide a prisoner's federal claim explains its decision on the merits in a reasoned opinion," a "federal habeas court simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable").

Wiggins, 539 U.S. at 525. *See also Williams*, 529 U.S. at 396 (holding that counsel's failure to investigate and present mitigating evidence was deficient even though "not all of the additional evidence was favorable to Williams"); *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1306–07 & 1312 n.6 (11th Cir. 2016) (holding that counsel's performance was deficient because he did not have the defendant evaluated by a mental health expert despite evidence that neuropsychological testing was needed, even though there were also other unfavorable psychological evaluations in the defendant's records, including notations that he was not suffering from any mental illness). *Cf. Sealey v. Warden*, 954 F.3d 1338, 1356 (11th Cir. 2020) (noting that trial counsel's decision not to further investigate the petitioner's mental health, despite having requested and received funding from the trial court for a complete psychological evaluation, was "deeply troubling").

We recognize, of course, that because a habeas petitioner bears the burden of proving that his counsel's performance was deficient, "the 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. 12, 17 (2013) (citation and internal quotation marks omitted); *Chandler v. United States*, 218 F.3d 1305, 1314 n.5 (11th Cir. 2000) (same). Presenting counsel's testimony at a post-conviction hearing may, therefore, be necessary to prove deficiency where the record is otherwise silent. For example, in *Jenkins v. Alabama Department of Corrections*,

963 F.3d 1248, 1265–66 (11th Cir. 2020), we held under AEDPA deference that a petitioner claiming his counsel was ineffective for failing to investigate and present mitigating evidence could not meet his burden of overcoming the presumption of competence, in part because the attorney who was responsible for the penalty phase did not testify at the Rule 32 hearing. The "record [was] silent as to [counsel's] thoughts and intentions as he prepared for the penalty phase," and the "limited record" that the petitioner did develop undermined his assertion that counsel prepared inadequately. *See id.*

Where the record is not silent, however, counsel's testimony is not necessarily required. For instance, in *Buck v. Davis*, 137 S. Ct. 759, 775 (2017), the Supreme Court recently found deficient performance in a case where the state and lower federal courts had concluded that the ineffective assistance of counsel claim was procedurally defaulted. *See id.* (finding deficient performance where, during the penalty phase, trial counsel introduced testimony from an expert that the defendant had a greater propensity for violence because of his race, as "[n]o competent defense attorney would introduce such evidence about his own client"). It reached this conclusion even though it appears that counsel did not testify at any post-conviction hearing. *See id.* at 769–770. Neither the Supreme Court, Fifth Circuit, nor district court opinions referenced any testimony from trial counsel. *See id*. at 775–76. *See also Buck v. Stephens*, 623 F. App'x 668 (5th Cir. 2015); *Buck v. Stephens*, No. H-

04-3965, 2014 WL 11310152 (S.D. Tex. Aug. 29, 2014); *Buck v. Thaler*, 452 F. App'x 423 (5th Cir. 2011); *Buck v. Thaler*, 345 F. App'x 923 (5th Cir. 2009).

Here, as in *Buck*, the record is not silent. The record establishes that trial counsel ended their investigation of Mr. Reeves' intellectual ability at an unreasonable time. They had numerous records pointing to Mr. Reeves' low intelligence and educational failures. And yet they failed to even contact Dr. Goff after proclaiming their need for him and obtaining the funds to retain him. In view of their awareness of the need for an intellectual disability evaluation, there can be no valid strategic reason for this decision. Trial counsel's performance was thus deficient, given what Mr. Reeves' records revealed.

C

As explained in cases like *Brownlee v. Haley*, 306 F.3d 1043, 1049–50 (11th Cir. 2002), at the time of Mr. Reeves' trial and sentencing hearing in 1998, an Alabama jury performed an advisory role in a capital sentencing proceeding. The jury, after hearing the evidence presented by the parties at the second phase of a bifurcated proceeding, issued an advisory verdict recommending a sentence to the trial court based on its evaluation of aggravating and mitigating factors. If the jury found no statutory aggravating circumstances, or found that the statutory aggravating circumstances did not outweigh the mitigating circumstances, it had to return an advisory verdict recommending a sentence of life imprisonment without

parole. *See* Ala. Code § 13A-5-46(e)(1)–(2) (2001). If, on the other hand, the jury found that one or more statutory aggravating circumstances outweighed the mitigating circumstances, it had to return an advisory verdict recommending a sentence of death. *See* Ala. Code § 13A-5-46(e)(3) (2001). The decision to recommend a sentence of death had to be based on a vote of at least 10 jurors. *See* Ala. Code § 13A-5-46(f) (2001). The trial court, based upon its independent determination and weighing of the aggravating circumstances, made the final decision as to the appropriate sentence. *See* Ala. Code § 13A-5-47(d)–(e) (2001).[10]

The Court of Criminal Appeals did not reach the prejudice prong here, so we review this element of the *Strickland* claim *de novo*. *See Rompilla*, 545 U.S. at 390. "Given that the jury here recommended a sentence of death by the narrowest possible vote, 10 to 2, [Mr. Reeves] need establish only 'a reasonable probability that at least one juror would have struck a different balance' between life and death." *Jenkins*, 963 F.3d at 1270 (quoting *Wiggins*, 539 U.S. at 537). He "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 693. In assessing the reasonable probability of a different result, we "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh

[10] In 2017 Alabama amended its capital sentencing scheme. *See* 2017 Ala. Laws Act 2017-131 (S.B. 16) (amending, e.g., Ala. Code. §§ 13A-5-46, 13A-5-47). The new provisions are not before us in this appeal.

it against the evidence in aggravation." *Porter*, 558 U.S. at 41 (internal citation, quotation marks, and alteration omitted).

In sentencing Mr. Reeves, the trial court found only one aggravating circumstance: that the offense was committed during the course of a robbery. On the other hand, the trial court found two statutory mitigating circumstances, his lack of significant prior criminal activity and his age at the time of the offense, and two non-statutory mitigating circumstances: he grew up in a poor home environment without appropriate developmental resources and responds positively when placed in a structured environment.

Although Mr. Reeves is not ineligible for the death penalty under *Atkins*, the jury or trial court might have found other statutory or non-statutory mitigating factors had evidence of his intellectual disability been presented, and thus weighed the aggravating and mitigating circumstances differently. As Mr. Reeves asserts, *see* Appellant's Initial Br. at 64, his mental capacity is relevant to the statutory mitigating circumstance of "[t]he capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law," Ala. Code § 13A-5-51(6) (2001), and two non-statutory mitigating factors under Ala. Code § 13A-5-52 (2001) ("mitigating circumstance shall include . . . any other relevant mitigating circumstance which the defendant offers"). *See also Brownlee*, 306 F.3d at 1071–73 (explaining that the jury could have found a non-statutory

mitigating circumstance based on the petitioner's "borderline intellectual functioning and psychiatric disorders"). *Cf. Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (recognizing that evidence of impaired intellectual functioning is "inherently mitigating" even if the petitioner does not "establish a nexus between [his] mental capacity and [his] crime"); *Atkins*, 536 U.S. at 305 ("Mentally retarded persons . . . have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. Their deficiencies do not warrant an exemption from criminal sanctions, but diminish their personal culpability.").

The mitigating evidence that counsel failed to obtain and present was powerful. At the Rule 32 hearing, Dr. Goff testified that Mr. Reeves was "mentally retarded." He also testified that Mr. Reeves read at a third-grade level, his other academic skills were at a fourth-grade level, and he spelled at a fifth-grade level, and that Mr. Reeves has had significant deficits in self-direction, functional academics, work activities, and health and safety throughout his life.

The district court concluded that Mr. Reeves failed to show prejudice because the jury was informed of his "lower intellectual functioning multiple times during the penalty phase[.]" D.E. 29 at 50–51. During the penalty phase, however, trial counsel only presented evidence that he was in the "borderline" range of intellectual

ability, not that he was intellectually disabled. Indeed, the only evidence they put on about his mental capacity undermined that finding, as the sole witness to testify as to his intellectual ability during the penalty phase—Dr. Ronan—stated on cross examination "[h]e was not in a level that they would call . . . mental retardation." Trial counsel did not object or clarify on re-direct examination that Dr. Ronan had not conducted the necessary evaluation to make that determination. The jury thus never heard from a qualified expert who had fully evaluated Mr. Reeves that he was "mentally retarded." In fact, they were told the opposite.

The jury or the trial court may have found Dr. Goff's testimony particularly relevant in light of Dr. Ronan's and Dr. Salekin's testimony that Mr. Reeves was negatively influenced by his brother Julius—who was present for the offense and conceived of the idea to rob Mr. Johnson—and that his low intellectual functioning made him particularly susceptible to the influence of others. Had Dr. Goff's testimony been considered, there is a "reasonable probability that the advisory jury—and the sentencing judge—'would have struck a different balance.'" *Porter*, 558 U.S. at 42 (quoting *Wiggins*, 539 U.S. at 537). The neglected evidence here is, in other words, "sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. *See also Williams*, 529 U.S. at 398 (explaining that evidence of the petitioner's childhood abuse and "the reality that he was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability");

Glenn v. Tate, 71 F.3d 1204, 1209–11 (6th Cir. 1995) (holding that the petitioner was prejudiced by trial counsel's failure to present evidence of his low intellectual capacity, particularly because the jury was presented with a report stating that his offense was not the result of "mental retardation").

Although the state's expert, Dr. King, testified that Mr. Reeves was in the borderline range and was not intellectually disabled, this "does not justify discounting [Mr. Reeves'] mitigating evidence." *Debruce*, 758 F.3d at 1277. *See also Porter*, 558 U.S. at 43 (holding that it was not reasonable for the Florida Supreme Court to discount the effect that the petitioner's expert might have had on the jury or the sentencing judge based on the fact that the state's expert provided contradictory testimony). Significantly, some of Dr. King's testimony was consistent with Dr. Goff's, including that Mr. Reeves' full-scale IQ score of 68 indicated significantly subaverage intellectual functioning and that Mr. Reeves had low test scores in certain areas of adaptive functioning.

The state, moreover, "does not point to any additional aggravating evidence that would have been introduced had counsel presented testimony" about Mr. Reeves' intellectual disability. *See id.* And we repeat that the trial court found only one aggravating circumstance and four mitigating circumstances, none of which dealt with Mr. Reeves' intellectual ability. Accordingly, we conclude that "the available mitigating evidence, taken as a whole, might well have influenced the

jury's [or the trial judge's] appraisal" of Mr. Reeves' moral culpability. *See Wiggins*, 539 U.S. at 538 (citation and internal quotation marks omitted).

V

For the foregoing reasons, we affirm the ruling of the district court as to Mr. Reeves' claim that he is intellectually disabled and thus ineligible for the death penalty. We reverse the ruling of the district court as to Mr. Reeves' claim of ineffective assistance of counsel at the penalty phase and remand to the district court for issuance of the writ in the form of a new capital sentencing hearing for Mr. Reeves.

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED.

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

MATTHEW REEVES, **Plaintiff,**	:	
vs.	:	**CIVIL ACTION NO. 17-0061-KD-MU**
JEFFERSON D. DUNN, **Respondent.**	:	

ORDER

Petitioner, Matthew Reeves, a state prisoner currently in the custody of the Alabama Department of Corrections, has petitioned this Court for federal habeas corpus relief pursuant to 28 U.S.C. § 2254. Reeves challenges the validity of his 1998 conviction for capital murder in the Circuit Court of Dallas County, Alabama. (Doc. 24). This matter is now before the Court on Reeves's petition, Respondent's answer, and the briefs, responses, and exhibits filed by the parties, as well as the 32-volume record of state-court proceedings. Following a thorough review of the petition and record, the undersigned finds that an evidentiary hearing is not warranted on the issues.[1] For the reasons set forth below, the Court finds that Petitioner Reeves's petition for writ of habeas corpus is due to be **DENIED**, and that if Reeves seeks the issuance of a certificate of appealability, his request be denied, along with any request to appeal *in forma pauperis*.

I. Background and Facts.

[1] Because Reeves filed his federal habeas petition after April 24, 1996, this case is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). "AEDPA expressly limits the extent to which hearings are permissible, not merely the extent to which they are required." *Kelley v. Sec'y for the Dep't of Corr.*, 377 F.3d 1317, 1337 (11th Cir. 2004). Reeves has failed to establish that an evidentiary hearing is warranted in this case. *Birt v. Montgomery*, 725 F.2d 587, 591 (11th Cir. 1984) (en banc) ("The burden is on the petitioner . . . to establish the need for an evidentiary hearing.").

The Alabama Court of Criminal Appeals found the facts of this case to be as follows:[2]

> "On November 27, 1996, the appellant (who was 18 years old at the time) and his younger brother, Julius, visited Brenda Suttles and Suttles's 15—year—old cousin, Emanuel, at Suttles's house on Lavender Street in Selma. There, according to Suttles, everyone agreed to go out 'looking for some robberies.' (R. 684.) Shortly after noon that day, the foursome left Suttles's house on foot and walked to a nearby McDonald's restaurant, where they saw Jason Powell driving by in his car. The appellant's brother, Julius, flagged Powell down, and Powell agreed to give the group a ride."
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> "Brenda Suttles and Emanuel Suttles testified that after the foursome got into Powell's car, Julius Reeves suggested that they go to White Hall, a town in neighboring Lowndes County, to rob a drug dealer. According to Brenda Suttles, everyone in the car agreed to the plan. (Powell, who also testified at trial, denied hearing the discussion about a robbery.) Before leaving Selma, the group stopped at an apartment on Broad Street. Julius Reeves went inside the apartment and returned to the car a short time later carrying a shotgun, which he handed to the appellant. With Powell driving, the group then headed for White Hall."
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> "Before they reached White Hall, however, Powell's car broke down on a dirt road off Highway 80. Shortly thereafter, a passing motorist, Duane Smith, stopped and told the group that he was in a hurry to meet some friends to go hunting, but that he would return around sunset and would take them to get help then. For the next couple of hours, the group sat in Powell's car and listened to music, until another passing motorist, Willie Johnson, stopped in his pickup truck and offered to tow Powell's car to Selma. Using some chains that he kept in his pickup truck, Johnson hooked Powell's car to the back of his truck. With Julius Reeves riding in the truck with him and the others in Powell's car, Johnson towed the car to the Selma residence where the appellant and Julius lived with their mother."
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> "When they arrived at the Reeveses' house, Julius Reeves got out of Johnson's truck and told the others that Johnson wanted $25 for towing them. However, no one had any money to pay Johnson. Julius Reeves then offered to give Johnson a ring as payment if Johnson would drive him to his

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[2] AEDPA directs that a presumption of correctness be afforded factual findings of state courts, "which may be rebutted only by clear and convincing evidence." *Bui v. Haley*, 321 F. 3d 1304, 1312 (11th Cir. 2003) (citing 28 U.S.C. § 2254(e)(1)). "This presumption of correctness applies equally to factual determinations made by state trial and appellate courts." *Id*. (citing *Sumner v. Mata*, 449 U.S. 539, 547, 101 S. Ct. 764, 66 L. Ed. 2d 722 (1981)). These facts are recited in the memorandum opinion of the Alabama Court of Criminal Appeals on Reeves's direct appeal of his trial and conviction. *See Reeves v. State*, (CR-13,1504), 226 So. 3d 711, 718-22 (Ala. Crim. App. 2016) (Doc. 23-31 at 3-9).

girlfriend's house to get the ring. Johnson agreed and he unhooked Powell's car from his truck. According to Jason Powell and Emanuel Suttles, Julius Reeves at this point told the others that Johnson was going to be their robbery victim. While Jason Powell and Emanuel Suttles stayed behind with Powell's car in front of the Reeveses' house, Julius Reeves got back in the cab of the truck with Johnson, and Brenda Suttles climbed into the rear bed of the truck. Testimony indicated that when Johnson started the truck, the appellant jumped into the rear bed of the truck with the shotgun, hiding the weapon behind his leg as he did so."

"When they arrived at Julius's girlfriend's house in Johnson's truck, Julius went inside and retrieved the ring he had promised to give Johnson as payment. According to Brenda Suttles, when Julius came out of the house, he walked to the rear of Johnson's truck and told her and the appellant that he was not going to let Johnson keep the ring. After Julius got back in the cab of the truck, Johnson drove everyone back to the Reeveses' house.
"Jason Powell and Emanuel Suttles, who had remained at the house with Powell's car, testified that sometime around 7:00 p.m., they saw Johnson's truck drive by the house and turn into an alley -- known as Crockett's Alley -- behind the house. According to Brenda Suttles, who was in the rear bed of the truck with the appellant, just as the truck came to a stop in the alley, she heard a loud 'pow' sound. (R. 704.) Suttles testified that when she looked up, the appellant was withdrawing the barrel of the shotgun from the open rear window of the truck's cab. Johnson had been shot in the neck and was slumped over in the driver's seat. Suttles testified that Julius Reeves jumped out of the truck's cab and asked the appellant what he had done, and that the appellant then told Julius and Suttles to go through Johnson's pockets to 'get his money.' (R. 704.) Suttles stated that Julius then pulled Johnson out of the truck and went through his pockets, giving the money he found in the pockets to the appellant. After Julius had gone through Johnson's pockets, Suttles helped him put Johnson back in the truck's cab. According to Suttles, Johnson was bleeding heavily and making 'gagging' noises. (R. 721.)"

"Jason Powell and Emanuel Suttles testified that they heard the gunshot after Johnson's truck pulled into Crockett's Alley and that a short time later they saw the appellant, Julius Reeves, and Brenda Suttles run out of the alley and into the Reeveses' house. The appellant was carrying a shotgun, they said. They followed the appellant, Julius Reeves, and Brenda Suttles into the Reeveses' house and saw the appellant place the shotgun under a bed in his bedroom. The appellant told Julius and Brenda Suttles to change out of their bloodstained clothes and shoes, and he took the clothes and shoes and stuffed them under a dresser in his bedroom. According to Emanuel Suttles, as the appellant, Julius, and Brenda changed their clothes, they were 'jumping and hollering' and celebrating about 'all the stuff [they] got' from Johnson. (R. 842.) Jason Powell testified that he heard the appellant say, 'I made the money.' (R. 786.)"

"After changing their clothes, the appellant, Julius Reeves, and Brenda Suttles ran to Suttles's house. On the way, the appellant stopped to talk to his girlfriend, telling her that if she should be questioned by the police, to tell them that he had been with her all day. At Suttles's house, the appellant divided the money taken from Johnson -- approximately $360 -- among himself, Julius Reeves, and Brenda Suttles. Testimony indicated that throughout the evening, the appellant continued to brag about having shot Johnson. Several witnesses who were present at Suttles's house that evening testified that they saw the appellant dancing, 'throwing up' gang signs, and pretending to pump a shotgun. Brenda Suttles testified that as the appellant danced, he would jerk his body around in a manner 'mock[ing] the way that Willie Johnson had died.' (R. 713.) The appellant was also heard to say that the shooting would earn him a 'teardrop,' a gang tattoo acquired for killing someone. (R. 720.)"

"Yolanda Blevins, who was present during the post-shooting 'celebration' at Suttles's house, testified that the appellant called her into the kitchen and told her that he had shot a man in a truck after catching a ride with him. Blevins noticed that there was what appeared to be dried blood on the appellant's hands. LaTosha Rodgers, who was also present at Suttles's house, testified that the appellant told her that he had 'just shot somebody' in the alley. (R. 924.)"

"At around 2:00 a.m. on November 28, 1996 (approximately seven hours after the shooting), Selma police received a report of a suspicious vehicle parked in Crockett's Alley. When police officers investigated, they found Johnson's body slumped across the seat of his pickup truck. There was a pool of blood on the ground on the driver's side of the truck. Several coins and a diamond ring were on the ground near the truck. On the floorboard of the truck, police found wadding from a shotgun shell. The pockets of Johnson's pants had been turned inside out and were empty. Testimony at trial indicated that Johnson was a longtime employee of the Selma Housing Authority and that on the afternoon of November 27, 1996, he had cashed his paycheck, which had been in the amount of $500."

"At the shooting scene on the morning of November 28, police also discovered a trail of blood leading from Johnson's truck to the Reeveses' house. Randy Tucker, a canine-patrol officer with the Selma Police Department, testified that his dog tracked the blood trail from the pool of blood next to Johnson's truck, down Crockett's Alley, through the yard at 2126 Selma Avenue (the residence next to the alley), and ultimately to the front steps of the Reeveses' house at 2128 Selma Avenue."

"Pat Grindle, the detective in charge of investigating Johnson's murder, went to the Reeveses' house after learning that the blood trail led there. Det. Grindle testified that he obtained the consent of the appellant's mother, Marzetta Reeves, to search the house. In a bedroom shared by the appellant and Julius, Det. Grindle found bloodstained clothes and

> bloodstained shoes; under a bed in this bedroom, Det. Grindle found a shotgun. In searching the kitchen, Det. Grindle found a pair of bloodstained pants. After making these discoveries, Det. Grindle questioned Marzetta Reeves and several other persons who were in the house at that time. Det. Grindle stated that he learned that the bloodstained clothes and shoes belonged to Julius Reeves, Brenda Suttles, and the appellant. Det. Grindle then went to Suttles's house in an attempt to locate the three. At Suttles's house, Det. Grindle found the appellant lying on a couch in a front room. The appellant was placed under arrest, and the officers seized a balled-up bloodstained jacket he was using as a headrest on the couch. Det. Grindle later returned to the Reeveses' residence, where he seized a 12 gauge shotgun shell from a garbage can in the bathroom.
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> "An autopsy revealed that Johnson had died from a shotgun wound to his neck that severed the carotid artery, causing him to bleed to death over a period of several minutes. Bloodstain patterns in Johnson's truck indicated that he was sitting upright in the driver's seat, facing forward, when he was shot from behind, through the open rear window. The bloodstain patterns also indicated that the driver's side door had been opened and closed shortly after Johnson was shot."
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> "Testimony indicated that the appellant's fingerprints were found on the shotgun that Det. Grindle had seized from under the bed in the appellant's bedroom. Brenda Suttles's and Julius Reeves's fingerprints were found on a fender of Johnson's truck. Joseph Saloom, a firearms expert with the Alabama Department of Forensic Sciences, testified that the shotgun shell seized from the bathroom at the Reeveses' residence was of the type commonly fired from the shotgun seized from the appellant's bedroom. Saloom stated that shotgun-shell wadding found on the floorboard of Johnson's truck was of the type commonly found in the kind of shotgun shell seized from the bathroom at the Reeveses' residence."

Reeves v. State, (CR-13,1504), 226 So. 3d 711, 718-22 (Ala. Crim. App. 2016) (quoting *Reeves v. State*, 807 So. 2d 18, 24-26 (Ala. Crim. App. 2000) (Doc. 23-31 at 3-9).

In January, 1997, Petitioner Reeves was indicted by the Dallas County, Alabama Grand Jury of capital murder in violation of ALA. CODE § 31A-5-40(a)(2) ("Murder by the defendant during a robbery in the first degree or an attempt thereof committed by the defendant.". (Doc. 23-1 at 10-11; Vol. 1, JR-1, pp. 10-11). Reeves entered a plea of not guilty to the charges (Doc. 23-1 at 27-28; Vol. 1, JR-1, pp. 27-28), and, following a jury trial in the Circuit Court of Dallas County, Alabama, Petitioner was convicted of the

indicted charge. (Doc. 23-8 at 85-86; Vol. 8, JR-19). The trial judge accepted the jury's recommendation and, on August 20, 1998, sentenced Reeves to death. (Doc. 23-8 at 212; Vol. 8; JR-31; Doc. 23-2 at 20-26; Vol. 2; JR-3 at 233-39).

Through representation of counsel, Reeves filed a motion for new trial which was denied on December 8, 1998. On August 22, 2000, the Court of Criminal Appeals upheld Reeves's conviction and death sentence. Reeves filed an application for rehearing that was overruled on October 27, 2000. *See Reeves v. State*, 807 So. 2d 18 (Ala. Crim. App. 2000) (Doc. 23-10 at 43-104; Vol. 10, JR-35). Reeves was denied certiorari review by the Alabama Supreme Court on June 8, 2001, and by the United States Supreme Court on November 13, 2001. (Doc. 23-10 at 106-98; Vol. 10, JR-36; Doc. 23-11 at 136; Vol. 11, JR-41); *see also, Reeves v. Alabama*, 534 U.S. 1026 (2001).

On October 30, 2002, Reeves executed a post-conviction Rule 32 petition. (Doc. 23-12 at 1758; Vol. 12, JR-42). He filed an amended petition on February 26, 2003 (Doc. 23-12 at 124-86; Vol. 12, JR-47) and a second amended and superseding petition on August 31, 2006. (Doc. 23-14 at 149-201; Doc. 23-15 at 1-17; Vol. 14, JR-60; Vol. 15, JR. 60). The State answered the petition on October 28, 2006, and the Circuit Court conducted an evidentiary hearing on the petition on November 28-29, 2006. (Docs. 23-24, 23-25, 23-26 at 1-10; Vols. 24-26, JR-85). On May 7, 2008, the State filed a proposed order denying Reeves's Rule 32 petition (Doc. 23-15 at 174-201, Doc. 23-16 at 1-57; Vols. 15-16, JR-63) and on September 9, 2008, Reeves filed a written objection to the State's proposed order and a brief in support of his Rule 32 petition. (Doc. 23-16 at 58-134; Vol. 16, JR 64). The Circuit Court denied Reeves's Rule 32 Petition on October 26, 2009; however, the Circuit Court Clerk did not serve the denial order on the parties, and the denial order was not

entered into the case docket, until January 7, 2013.[3] (Doc. 23-16 at 135-67; Vol. 16, JR-65).

Reeves was granted an out-of-time appeal on May 30, 2014 (Doc. 23-19 at 95; Vol. 193, JR-82), and on December 10, 2014, appealed the denial of his Rule 32 petition, asserting the following claims:

1. The Circuit Court erroneously adopted verbatim the portion of the State's proposed order addressing his claim of intellectual disability,

2. The Circuit Court erred in denying his claim of intellectual disability under *Atkins*,

3. The Circuit Court erred in denying his claims of ineffective assistance of trial and appellate counsel for:

   (1) not hiring Dr. Goff, or another neuropsychologist, to evaluate Reeves for intellectual disability despite having court-approved funds to do so,

   (2) relying on the testimony of Dr. Ronan, the court-appointed psychologist who examined Reeves to determine his competency to stand trial, to present mitigation evidence during the penalty phase,

   (3) failing to object during the penalty phase to Dr. Ronan's testimony that Reeves was not intellectually disabled,

   (4) failing to conduct an adequate mitigation investigation and presenting the evidence during the penalty phase of the trial,

   (5) failing to preserve claims for direct appeal, including not objecting during the trial to prosecutor's urging to the jury to consider non-statutory aggravating circumstances to impose a death sentence, prosecutor's argument and reference that Reeves was involved in a gang, prosecutor's reference during the penalty phase that the jury's verdict was a recommendation, and the trial court's instruction to the jury during the penalty phase that its verdict was a recommendation,

   (6) failing to raise the aforementioned claims regarding trial counsels' ineffectiveness on appeal.

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[3] "The record indicates that the parties were not notified of the circuit court's ruling until January 2013. Reeves then filed another Rule 32 petition pursuant to Rule 32.1(f), Ala. R. Crim. P., requesting an out-of-time appeal from the circuit court's October 26, 2009, order denying his first petition." *Reeves v. State*, 226 So 3d 711, 721 (Ala. Crim. App. 2016).

4. The Circuit Court erred in summarily dismissing his claims of juror misconduct,

5. The Circuit Court erred in denying on procedural grounds that claim that lethal injection constitutes cruel and unusual punishment in violation of the Eighth Amendment.

(Doc. 23-29 at 2-115; Vol. 29, JR-90). The Criminal Appeals Court affirmed the Circuit Court's judgment and denied the application for rehearing. (Doc. 23-31 at 2-105; Vol. 31, JR-94; *Reeves v. Sta*te, 226 So 3d 711 (Ala. Crim. App. 2016), *rehearing denied by*, (CR-13-1504), 2016 Ala. Crim. App. LEXIS 1011 (Ala. Crim. App., Oct. 14, 2016)). And, Reeves's petition for writ of certiorari in the Supreme Court of Alabama was denied (Docs. 23-31 at 106-299, 23-32 at 1-48; Vols. 31, 32, JR-95; Vol. 32, JR-96), as well as his petition for writ of certiorari in the United States Supreme Court, *Reeves v. Alabama*, __ U.S. __, 138 S. Ct. 22, 199 L. Ed. 2d 341 (2017) (Sotomayor, J., dissenting); (Doc. 23-32 at 288-301; Vol. 32, JR-100).

Reeves timely filed the instant petition for federal habeas relief on February 1, 2017, challenging his 1998 conviction for capital murder. (Docs. 1, 24).

II. Grounds for Relief.

In his petition for habeas relief, Reeves raises the following grounds for relief:

1. Capital sentence violates the constitutional prohibition on the execution of intellectually disabled persons.

2. Constitutional right to Due Process was denied when the Circuit Court adopted word-for-word language from the State's proposed order denying Reeves's Atkins claim that contained serious factual omissions and relied on inappropriate considerations.

3. Ineffective Assistance of Counsel:

    a. Court of Criminal Appeals unreasonably concluded that counsel's testimony is required to overcome *Strickland's* presumption of sound trial strategy.

b. Counsel failed to investigate his alleged intellectual disability.

c. Counsel failed to retain mitigating expert and failed to present crucial mitigating evidence.

d. Counsel failed to preserve certain arguments for and present on appeal.

4. Denied a fair trial due to juror misconduct.

5. Alabama's method of execution is unconstitutional.

6. Death sentence violates the Eighth Amendment.

7. Death sentence violates the Sixth Amendment.

(Doc. 24). The habeas petition has been fully briefed and is ripe for consideration. The Court will consider each of Reeves' claims in turn.

III. Standard of Review.

This Court's review of Reeves's petition is governed by the Antiterrorism and Effective Death Penalty Act (AEDPA). Under AEDPA, "the role of the federal court . . . is strictly limited." *Jones v. Walker*, 496 F.3d 1216, 1226 (11th Cir. 2007). Specifically, § 2254(d) provides:

> (d) 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 with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim - -
>
> (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 facts in light of the evidence presented in the State court proceeding.
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> (e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

28 U.S.C. § 2254(d).

According to subsection (1), "[a] federal habeas court may issue the writ under the 'contrary to' clause if the state court applies a rule different from the governing law set forth in [Supreme Court] cases, or if it decides a case differently than [the Supreme Court has] done on a set of materially indistinguishable facts." *Bell v. Cone*, 535 U.S. 685, 694, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002). "A state court's decision is not 'contrary to ... clearly established Federal law' simply because the court did not cite our opinions." *Mitchell v. Esparza*, 540 U.S. 12, 16, 124 S. Ct. 7, 157 L. Ed. 2d 263 (2003). Indeed, "a state court need not even be aware of our precedents, so long as neither the reasoning nor the result of the state-court decision contradicts them." *Id.* (internal quotes omitted).

The "clearly established Federal law" contemplated by subsection (1) "refers to the holdings, as opposed to the dicta, of [U.S. Supreme] Court's decisions as of the time of the relevant state-court decision." *Lockyer v. Andrade*, 538 U.S. 63, 71, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003) (internal quotes omitted); *accord Greene v. Fisher*, 565 U.S. 34, 37-38, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011). Moreover, review under Section 2254(d)(1) is "limited to the record that was before the state court that adjudicated the claim on the merits." *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 179 L. Ed. 2d 557 (2011).

Importantly, "[f]or purposes of § 2254(d)(1), an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (internal quotes omitted, emphasis in original). Thus, "[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.* (internal quotes omitted). That is, "an unreasonable application of those holdings must be objectively unreasonable, not merely wrong; even clear error will

not suffice." *White v. Woodall*, 572 U.S. 415, 419, 134 S. Ct. 1697, 1702, 188 L. Ed. 2d 698 (2014) (internal quotes omitted); *Williams v. Taylor*, 529 U.S. 362, 411, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law *erroneously* or *incorrectly*. Rather, that the application must also be *unreasonable*."). "To satisfy this high bar, a habeas petitioner is required to show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Woods v. Donald*, 135 S. Ct. 1372, 1376, 191 L. Ed. 2d 464 (2015) (internal quotes omitted). And "[t]he more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Harrington*, 562 U.S. at 101 (internal quotes omitted). However, "even a general standard may be applied in an unreasonable manner." *Panetti v. Quarterman*, 551 U.S. 930, 953, 127 S. Ct. 2842, 168 L. Ed. 2d 662 (2007). The petitioner bears the burden of showing that the state court's ruling was contrary to, or involved an unreasonable application of, controlling Supreme Court precedent. *Harrington*, 562 U.S. at 98; *Woodford v. Visciotti*, 537 U.S. 19, 25, 123 S. Ct. 357, 154 L. Ed. 2d 279 (2002).

Likewise, with respect to §2254(d)(2), "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Burt v. Titlow*, 571 U.S. 12, 134 S. Ct. 10, 15, 187 L. Ed. 2d 348 (2013) (internal quotes omitted). In other words, "if some fair-minded jurists could agree with the state court's decision, although others might disagree, federal habeas relief must be denied. . .[T]he deference due is heavy and purposely presents a daunting hurdle for a habeas petitioner to clear." *Loggins v. Thomas*, 654 F.3d 1204, 1220 (11th Cir. 2011);

see also Greene v. Fisher, 565 U.S. 34, 132 S. Ct. 38, 181 L. Ed. 2d 336 (2011) (AEDPA standard is purposely onerous because "federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice system, and not as a means of error correction") (citations and internal quotation marks omitted); *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 1398, 179 L. Ed. 2d 557 (2011) (AEDPA standard "is a difficult to meet ... and highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt")(citations and internal quotation marks omitted); *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012) ("if some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief must be denied") (citation omitted).

Accordingly, in evaluating Reeves's § 2254 petition, the Court takes great care to abide by the stricture that "[a] federal court may not grant habeas relief on a claim a state court has rejected on the merits simply because the state court held a view different from its own." *Hill v. Humphrey*, 662 F.3d 1335, 1355 (11th Cir. 2011); *see also Reese v. Sec'y, Fla. Dep't of Corr.*, 675 F.3d 1277, 1286, 2012 U.S. App. LEXIS 6501 (11th Cir. 2012) ("This inquiry is different from determining whether we would decide *de novo* that the petitioner's claim had merit."). "If this standard is difficult to meet, that is because it was meant to be." *Holsey*, 694 F.3d at 1257 (citation omitted). "Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102-03 (citation and internal quotation marks omitted).

Additionally, when a state court refuses to decide a federal claim on state procedural grounds, the federal habeas court is generally precluded from reviewing the claim at all. *See*, *e.g., Williams v. Alabama*, 791 F.3d 1267, 1273 (11th Cir. 2015) ("[I]t is

well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that is independent of the federal question and adequate to support the judgment.") (citation omitted); *Conner v. Hall*, 645 F.3d 1277, 1287 (11th Cir. 2011) ("a federal habeas court will not review a claim rejected by a state court if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment"). If, however, the state court's procedural ruling is not adequate to bar federal review, then the federal habeas court must review the claim *de novo*, and is not confined to the state-court record. *See Williams*, 791 F.3d at 1273.

Section 2254 also generally requires petitioners to exhaust all available state-law remedies. In that regard, "[a] petitioner must alert state law courts to any federal claims to allow the state courts an opportunity to review and correct the claimed violations of his federal rights." *Lamarca v. Secretary, Dep't of Corrections*, 568 F.3d 929, 936 (11th Cir. 2009). "[T]o exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." *Lucas v. Secretary, Dep't of Corrections*, 682 F.3d 1342, 1352 (11th Cir. 2012); *see also Williams v. Allen*, 542 F.3d 1326, 1345 (11th Cir. 2008) (exhaustion requirement not satisfied unless "petitioner presented his claims to the state court such that a reasonable reader would understand each claim's ... specific factual foundation") (citation omitted). It is not sufficient "that a somewhat similar state-law claim was made." *Kelley v. Sec'y for the Dep't of Corr.*, 377 F.3d 1317, 1344-45 (11th Cir. 2004). Nor is it sufficient for a petitioner to present federal claims to the state trial court; rather, "the petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Powell v. Allen*, 602 F.3d 1263, 1269 (11th Cir. 2010) (citation and internal marks

omitted); *see also Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) ("Exhaustion requires that state prisoners must give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process.") (citations and internal quotation marks omitted). That said, "habeas petitioners are permitted to clarify the arguments presented to the state courts on federal collateral review provided that those arguments remain unchanged in substance." *Kelley*, 377 F.3d at 1344.

Having established the proper standard of review, the Court turns to the claims asserted in Reeves's petition.

IV. Analysis of Claims.

In addressing Petitioner Reeves's claims, the Court numbers them as does the Petitioner.

1. Whether Reeves's Capital Sentence Violates the Constitutional Prohibition of the Execution of Intellectually Disabled Individuals

Petitioner Reeves asserts that he is intellectually disabled[4] and his capital sentence, thus, violates the Eighth Amendment pursuant to the holding of *Atkins*. In *Atkins*, the Court held that that execution of intellectually disabled persons contravenes the Eighth Amendment's prohibition on cruel and unusual punishment. *Atkins v. Virginia*, 536 U.S. 304, 122 S. Ct. 2242, 153 L. Ed. 2d 335 (2002); *see also Ford v. Wainwright*, 477 U.S.

[4] In this opinion, the court will use the terms "intellectually disabled" and "intellectual disability" as the legal and medical fields have moved away from the terms "mentally retarded" and "mental retardation." *See*, e.g., Robert L. Schalock et al., *The Renaming of Mental Retardation: Understanding the Change to the Term Intellectual Disability*, 45 Intell. & Dev. Disabilities 116, 116-17 (2007); *Hall v. Florida*, __ U.S.__, 134 S. Ct. 1986, *1990, 188 L. Ed. 2d 1007 (2014); *Kilgore v. Sec'y, Floida Dep't of Corr.*, 805 F.3d 1301, 1301 n.1 (11th Cir. 2015). This change in terminology is a change in name only and for the purposes of this opinion, the terms are synonymous, referring to the same condition.

399, 405, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986) ("[T]he execution of mentally retarded criminals will [not] measurably advance the deterrent or the retributive purpose of the death penalty. . . [W]e therefore conclude that such punishment is excessive and that the constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender.")(citation omitted). In reaching its holding, the Court reasoned that intellectually disabled defendants "frequently know the difference in right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others." *Id*. at 318. The *Atkins* noted that "clinical definitions of mental retardation require not only subaverage intellectual functioning, but also significant limitations in adaptive skills such as communication, self-care, and self-direction that became manifest before age 18"[5] and identified "an IQ between

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[5] *Atkins* cited to the following clinical standards:

> The American Association on Mental Retardation [now known as the "American Association on Intellectual and Developmental Disabilities" (AAIDD)] defines mental retardation as follows: "*Mental retardation* refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes

70 and 75 or lower" as the typical "cutoff IQ score for the intellectual function prong of the mental retardation definition. However, the Court did not dictate a national standard for determining whether a criminal defendant is intellectually disabled and expressly left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." *Atkins*, 536 U.S. at 309, n.5, 317-18 (internal quotation marks and citation omitted).

In regard to establishing intellectual functioning, the first prong of the *Atkins* analysis, the Supreme Court has instructed that sentencing courts must consider the standard error of measurement ("SEM") when assessing intellectual disability. *See Hall v. Florida*, __ U.S. __, 134 S. Ct. 1986, 188 L. Ed. 2d 1007 (2014). The Supreme Court observed that:

> The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should be read not as a single fixed number but as a range. See D. Wechsler, The Measurement of Adult Intelligence 133 (3d ed. 1944) (reporting the range of error on an early IQ test). Each IQ test has a "standard error of measurement," *ibid.*, often referred to by the abbreviation "SEM." A test's SEM is a statistical fact, a reflection of the inherent imprecision of the test itself. See R. Furr & V. Bacharach, Psychometrics 118 (2d ed. 2014) (identifying the SEM as "one of the most important concepts in measurement theory").

Hall, 134 S. Ct. at 1995-96. Accordingly, the Court determined that "a State must afford these test scores the same studied skepticism that those who design and use the tests do,

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> that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. *Id.*, at 42-43.

Atkins, 536 U.S. at 309 n.3; *see also* AAIDD at https://aaidd.org/about-aaidd (last visited October 29, 2018) confirming name change of the American Association on Mental Retardation to the AAIDD.

and understand that an IQ test score represents a range rather than a fixed number. . . . [otherwise, the State] risks executing a person who suffers from intellectual disability." *Id*. at 2000-01. Thus, "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits", as well as "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances."[6] *Id*. at 1994, 2001. Notably, *Hall* was decided in 2014, after the Circuit Court's denial of Reeves's Rule 32 petition.

In light of the reasoning and guidance of *Atkins*, the Alabama Supreme Court set forth its three-prong test for intellectual disability in *Ex parte Perkins*:

> [T]he Alabama Supreme Court has defined the test for mental retardation that rises to the level of prohibiting execution as having three components: (1) significant subaverage intellectual functioning (an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the

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[6] In listing the types of evidence which shed light on an individual's adaptive functioning, the Court cited to a brief filed by the American Psychiatric Association and noted that the medical community accepts the following as "substantial and weighty evidence of intellectual disability, including individuals who have an IQ test score above 70": "medical histories, behavioral records, school tests and reports, and testimony regarding past behavior and family circumstances." *Hall*, 134 S. Ct. at 1994.

In regard to establishing the second prong of *Atkins*, adaptive functioning, the Supreme Court has reiterated that courts must be guided by current medical standards and may not rely on "lay perceptions of intellectual disability"; specifically, the Court discussed that adaptive deficits '[are] not outweighed by the potential strengths in some adaptive skills.' *Moore v. Texas*, __. U.S. __, 137 S. Ct. 1039, 1051, 197 L. Ed. 2d 416 (2017) (quoting AAIDD-11 at 47).

Moore, however, was not decided until after the state courts rendered their decisions in this case and *Moore* did not announce a new rule of law that must be applied retroactively. Accordingly, *Moore* is not considered clearly established federal law under AEDPA for purposes of Reeves's petition. *See Kilgore v. Sec'y, Fla. Dep't of Corr*., 805 F.3d 1301, 1310 (11th Cir. 2015) ("'[C]learly established Federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.") (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72, 123 S. Ct. 1166, 155 L. Ed. 2d 144 (2003); *Smith v. Dunn*, 2017 U.S. Dist. LEXIS 113682 (Ala. N.D., July 21, 2017).

> manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age 18).

Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002).[7]

Reeves previously presented this claim in his Rule 32 post-conviction proceedings. The Alabama Court of Criminal Appeals, in a memorandum opinion, affirmed the circuit court's denial of Reeves's claim of intellectual disability. Reeves now bears the burden of proving by clear and convincing evidence that the state court's determination that he is not intellectually disabled is objectively unreasonable based on the record. *Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014) (the determination as to whether a person is intellectually disabled is a finding of fact). In accordance with the State's definition for intellectual disability, the Court will review each prong of Alabama's test.

a. **Significantly Subaverage Intellectual Functioning.**

Reeves argues that the trial court unreasonably determined that he did not have significantly subaverage intellectual functioning because: (1) it misapplied factual evidence, when it ignored his full-scale IQ score of 68, (2) it failed to adjust his scores of 71 and 73 downward for the Flynn Effect and SEM, and (3) it looked beyond the numerical IQ scores to determine his intellectual functioning. Reeves presented the same argument to the Alabama Court of Criminal Appeals during his Rule 32 proceedings, and, in its memorandum opinion affirming the trial court's denial of relief, the court stated:

> In this case, Reeves had full-scale IQ scores of 68, 71, and 73. Considering the SEM [Standard Error of Measurement], these scores indicate that Reeves's IQ could be as low as 63 or as high as 78. Reeves's expert, Dr. Goff, concluded, based on Reeves's IQ scores as well as all other information before him, that Reeves suffered from significantly subaverage

[7] Likewise, Alabama's criminal procedure law defines an intellectually disabled person as "[a] person with significant subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period, as measured by appropriate standardize testing instruments." ALA. CODE § 15-24-2(3) (1975).

> intellectual functioning. On the other hand, the State's expert, Dr. King, concluded, based on Reeves's IQ scores and all other information before him, that Reeves falls within the borderline range of intellectual functioning. The circuit court, after considering all the evidence presented at the hearing, and after observing Reeves when Reeves testified at a pretrial hearing, resolved the conflicting expert testimony as to Reeves's intellectual functioning adversely to Reeves, finding that, *although Reeves's intellectual functioning was subaverage, it was not significantly subaverage* as required to meet the first prong of intellectual disability. "Conflicting evidence is always a question for the finder of fact to determine, and a verdict rendered thereon will not be disturbed on appeal." *Padgett v. State*, 668 So. 2d 78, 86 (Ala. Crim. App. 1995). There is ample evidence in the record to support the circuit court's finding and we will not disturb the circuit court's resolution of the conflicting expert testimony. Therefore, we find no abuse of discretion on the part of the circuit court in concluding that Reeves failed to prove by a preponderance of the evidence that he suffered from significantly subaverage intellectual functioning.

Reeves v. State, 226 So. 3d 711, 741 (Ala. Crim. App. 2016); Doc. 23-31 at 61-62; Vol. 31, JR-94, pp. 60-61). (emphasis added)

Having reviewed the record in this matter, the Circuit Court did not make an unreasonable factual determination that Reeves did not suffer from significant subaverage intellectual functioning. Nor is the state court decision "contrary to . . . clearly established Federal law." 28 U.S.C. § 2254(d)(1).

The record evidence, including school, medical, mental health, juvenile-court, and Department of Youth Services records, supports that Reeves functioned in the range of borderline intellectual functioning. The records indicate that Reeves was habitually truant and exhibited emotional and behavioral problems in school. Evidence shows that Reeves began mental health treatment when he was 8 years old, beginning with a diagnosis of attention deficit disorder with hyperactivity, and at that time his intelligence level was "estimated to be low average." (Doc. 23-19 at 1037, Vol. 19-3, JR-84, p. 1515). Although therapy services were terminated after approximately a year and a half due noncompliance (doc. 23-19 at 1061; vol. 19-3, JR-84, p. 1539), Reeves was readmitted approximately 8

months later and "it [wa]s estimated that his intelligence [wa]s somewhat below average, but not within the [intellectual disability] range." (Doc. 23-19 at 1065; Vol. 19-3, JR-84, p. 1543). Reeves was later diagnosed with conduct disorder. (Doc. 23-19 at 1109; Vol. 19-3, JR-84, p. 1587).

The record reveals that Reeves failed and repeated the first, third, and fourth grades and that he was "socially" promoted to the seventh grade when he was 14 years old based only on his "level of maturity." (Doc. 23-20 at 89; Vol. 20, JR-84, p. 1688). According to Reeves's mother, Reeves was tested for placement into the Special Education Program at 11 years old, but he "did not qualify" (Doc. 23-19 at 1065; Vol. 19-3, JR-84, p. 1543.) and was later placed in special-education classes for emotional conflict. (Doc. 23-20 at 55; Vol. 20, JR-84, p. 1654).

Reeves was administered the Wechsler Intelligence Scale for Children, Revised ("WISC-R") when he was 14 and half years old, and he attained a verbal IQ score of 75, a performance IQ score of 74, and a full-scale IQ score of 73, and was classified as being in the borderline range of intellectual functioning. (Doc. 23-20 at 57-58; Vol. 20, JR-84, pp. 1656-58). Reeves was subsequently expelled from school for behavioral reasons in the eighth grade, after a failed attempt at homebound services.[8] When Reeves was 17 years old, the Department of Youth Services reported in its Service Plan Evaluation that "Matthew's background, interview, and test data indicate that he has a conduct disorder

[8] A letter from the homebound teacher, Mrs. Betty Johnson indicates that on one visit to the Reeves' home, she arrived prior to Reeves and his brother Julius. Reeves's mother explained to Mrs. Johnson that Julius had been injured by a gunshot wound to his leg from a drive-by-shooting. According to Mrs. Reeves, when Reeves and his brother, Julius, entered the home, Reeves appeared "very angry" and "refused to cooperate with [her] or his mother." (Doc. 23-20 at 191; Vol. 20, JR-84, p.1790). Reeves walked through the house using profanity and repeatedly asking for his gun. Homebound services were ended shortly thereafter. (Doc. 23-20 at 200; Vol. 20; JR-84, p.1799).

with borderline intelligence who is in need of intensive academic/vocational guidance and training in anger management. There was no evidence of a major psychiatric disturbance and he did not display symptoms of ADHD." (Doc. 23-20 at 13; Vol. 20, JR-84, p. 1612).

At the Rule 32 hearing, Dr. King opined that Reeves's exhibited borderline intellectual functioning, despite Reeves's full-scale score of 68 on the administered Wechsler Adult Intelligence Scale, Third ("WAIS-III").[9] In his clinical judgement, Dr. King discredited the validity of the IQ score when compared against the achieved scores of the Wide Range Achievement Test, on which Reeves scored a 75, 74, and 70 for reading (5th grade level), spelling (5th grade level) and arithmetic (4th grade level), respectively.[10] (Doc. 23-25 at 24). According to Dr. King, Reeves's achievement scores "indicate[d] a level of functioning higher than the IQ scores actually indicated" which created a

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[9] Reeves argues in his petition that his score of 68 "indisputably satisfies the significantly subaverage intellectual functioning requirement" but was ignored by the trial court, making the court's decision unreasonable based on the facts. (Doc. 24 at 31-32). Indeed, the trial court failed to discuss the score of 68 in its reasoning. *Tarver v. Thomas*, 2012 U.S. Dist. LEXIS 137139, 2012 WL 441710 (S.D. Ala. 2012) (state court's decision to disregard Tarver's IQ scores of 61 and consider only the scores of 72, 76, and 74 was unreasonable determination in light of the facts and because the court disregarded it without explanation); *but cf., Smith v. Dunn*, 2:13-CV-00557-RDP, 2017 U.S. Dist. LEXIS 45274 (N.D. Ala., S.D., March 28, 2017) (disregarded IQ score was clearly reasonable where court detailed why it credited one expert's calculation over another).

Review of the trial court's order shows that the court articulated Reeves's IQ score of 68 and further provided a summary of Dr. King's evaluation in the court's Rule 32 Findings of Fact, including Dr. King's inability to "reach a definitive conclusion regarding Reeves's intellectual ability" based on the score of 68, alone, and Dr. King's ultimate conclusion that Reeves functioned in the borderline range of intellectual ability. (Doc. 23-16 at 144-45; Vol. 16, JR-65, pp. 10-11). Consequently, it cannot be said that that the court failed to consider the score in its determination. Rather, the court appears to have credited Dr. King's opinion that Reeves functioned in the borderline intelligence range and primarily relied on Reeves's failure to satisfy the adaptive functioning prong of the analysis in reaching its conclusion.

[10] Dr. King testified that the Wide Range Achievement Test is scored with a base score of 100 as average, like the scoring of an IQ test. Therefore, the scoring can be categorized as a grade level or numerical score. (Doc. 23-25 at 24).

discrepancy making Dr. King unable to reach a conclusion about Reeves's intellectual ability based on those tests alone. (Doc. 23-25 at 25-26). After completing adaptive functioning tests, neurological functioning tests, personally observing Reeves, analyzing Reeves's other IQ scores (of 71, 73, and a partial score of 74 on the verbal portion) and reviewing Reeves's childhood and adolescent academic records, Dr. King concluded that Reeves was functioning in the borderline intellectual range and did not exhibit significant subaverage intellectual functioning.

Dr. Goff, on the other hand, testified that Reeves exhibited subaverage intellectual functioning, with an achieved IQ score of 71 on the administered WAIS-III, on which Reeves attained a verbal IQ score of 71, a performance IQ score of 76, and a full-scale IQ score of 71. (Doc. 23-24 at 43). Dr. Goff opined that Reeves's full-scale score of 71 should be adjusted downward to account for the SEM and the "Flynn Effect",[11] thereby, reflecting an adjusted full-scale IQ score of 66 (subtracting three points for the "Flynn Effect" and an additional two points for the SEM).[12] (Doc. 23-24 at 43). Nonetheless,

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[11] Research has shown that IQ scores tend to increase over time, at a rate of approximately 0.3 points a year after a test is normed - this phenomenon is known as the "Flynn Effect". (Doc. 23-24 at 29-31). According to Dr. Goff, the downward adjustment for the Flynn Effect should be applied to all Reeves's previous IQ scores, including the WISC-R that was administered in 1992 and the WAIS-R, verbal portion, that was administered in 1997 by Dr. Ronan. Dr. Goff testified that the full-scale IQ score of 73 should be adjusted 0.3 points for every year after the test was normed, thus to 67.6. Similarly, the verbal score of 71 should be adjusted to 69.2, making the 1997 score "statically identical" to the 1992 score. (Doc. 23-24 at 45-48).

However, Dr. Goff admitted on cross examination that the "scoring manual" for the WAIS-III does not require the use of the "Flynn Effect" to get an accurate IQ score, and that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") does not mention the "Flynn Effect". (Doc. 23-24 at 84-85).

[12] The court's decision not to apply the downward score departure for the Flynn Effect was not contrary to federal or state law. The Supreme Court, to date, has not ruled on such issue, and the law in Alabama is clear - courts may, but are not required to, apply the Flynn Effect in capital cases. *Albarran v. State*, 96 So. 3d 131, 199-200 (Ala. Crim. App. 2011) (stating that, even though an expert testified regarding the Flynn Effect, "the circuit court

Dr. Goff testified that for purposes of diagnosing Reeves as intellectually disabled "[i]t doesn't matter" whether his full-scale IQ score was adjusted "because the criteria is that the IQ score has to be around 70 [and] he qualifies because 71 is around 70." (Doc. 23-24 at 44-45).

> To be entitled to federal habeas relief under § 2254, a petitioner must show that the state court's ruling was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. , , 131 S. Ct. 770, 786-87, 178 L. Ed. 2d 624 (2011). "A state court's application of clearly established federal law or its determination of the facts is unreasonable only if no 'fairminded jurist' could agree with the state court's determination or conclusion." *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012) (quoting Harrington, 562 U.S. at , 131 S. Ct. at 780).

Lee v. Comm'r, Ala. Dep't of Corr. 726 F.3d 1172, 1192 (11th Cir. 2013).

Although Alabama requires all three prongs of the *Perkins* test to be established, when considering the first prong, "a court should not look at a raw IQ score as a precise measurement of intellectual functioning."[13] *Thomas v. Allen*, 614 F. Supp. 2d 1257, 1281

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could have reasonably rejected the 'Flynn Effect' and determined that Albarran's IQ was 71); *see also Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F.3d 600, 640 (11th Cir. 2016) ("[A] district court is not required to apply a Flynn effect reduction to an individual's IQ score in a death penalty case."). Notably, there is no uniform consensus in the Eleventh Circuit regarding the application of the Flynn Effect. *See Thomas v. Allen*, 607 F.3d 749, 757 (11th Cir. 2010); *Ledford*, 818 F.3d at 636. Accordingly, the Circuit Court's determination not to apply the Flynn Effect was not unreasonable or contrary to federal law.

[13] "Intellectual functioning is primarily evaluated using standardized test that measures a person's "Intelligence Quotient," or "IQ." *United States v. Wilson*, 922 F. Supp. 2d 334, 343 (E.D. N.Y. 2013) (quoting AAIDD 2010 Manual at 31). "At the same time, the AAIDD makes clear that IQ scores themselves do not tell the whole story about someone's intelligence; rather, 'one needs to use clinical judgement' to interpret those scores and other relevant information. *Id*. (quoting AAIDD 2010 Manual at 31). The term "clinical judgment" referenced by the AAIDD is defined as "a special type of judgment rooted in a high level of clinical expertise and experience and judgment that emerges directly from extensive training, experience with the person, and extensive data." *Id*. at 344, n.9 (quoting AAIDD 2010 Manual at 29).

(N.D. Ala., S.D. 2009). The state appellate court correctly noted[14] that Reeves's IQ could be anywhere in the range of 63 to 78[15] and correctly identified the trial court's struggle with conflicting expert testimony as to Reeves's intellectual functioning. In assessing the credibility of the experts, the trial court credited the consistency of Reeves's full-scale IQ scores of 73 (from when he was 14 years old) and 71 (achieved on the test administered by Dr. Goff). *See Ledford v. Warden, Georgia Diagnostic & Classification Prison*, 818 F. 3d 600, 635 (11th Cir. 2016) (When assessing credibility, the court considered the fact that one expert's opinion was corroborated with another expert's opinion.). This reasoning is substantiated by Reeves's school records which indicate, although Reeves performed poorly in school, he was habitually truant and that his struggles stemmed mostly from behavioral and emotional issues, rather than lack of intellectual ability. Likewise, Reeves did not qualify for Special Education classes in school. Additionally, evidence showed that Reeves was capable of attaining and holding a job, of showing up on time, and completing skilled construction tasks. *See Smith v. Dunn*, 2017 U.S. Dist. LEXIS 113862, *15 (N.D. Ala. S.D., July 21, 2017) ("In light of the conflicting evidence, it was reasonable for the Alabama Court of Criminal Appeals to look to Petitioner's demonstrated adaptive

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[14] The Alabama Court of Criminal Appeals, quoting *Ledford*, correctly explained, that application of the SEM as required by all "is a bi-directional concept that does not carry with it a presumption that an individual's IQ falls to the bottom of his IQ range. *Ledford*, 818 F.3d 600, 641.

[15] Reeves argues that the trial court did not apply the SEM in violation of *Hall*. Notably, the trial court was not bound to apply the SEM at the time of its decision in 2009. *Kilgore v. Sec'y, Florida Dep't of Corr.*, 805 F.3d 1301, 1311 (11th Cir. 2015) ("*Hall*'s holding was not clearly established by *Atkins*," and *Hall* "changed course by requiring the states to recognize a margin of error of five points above or below an IQ score of 70 in assessing intellectual disability."). Review of the court's decision reveals that the court did, however, meet the requirements of *Hall* by allowing Reeves to present evidence of his adaptive functioning. In fact, it is on the determination that Reeves did not exhibit substantial adaptive deficits that the court primarily based its decision.

abilities (or lack thereof) to reconcile the test scores and determine which ones were credible."). In light of the record evidence, the state court's reliance on Dr. King's expert opinion, which was corroborated by the record, cannot be said to be an unreasonable determination based on the facts.[16] *See Smith v. State*, 213 So. 3d 264, 270-71 (Ala. Crim. App. 2009), *remanded on other grounds*, *Ex parte Smith*, 213 So. 3d 313 (Ala. 2010) (court looked beyond test scores to the record evidence in resolving conflicting expert opinions). Thus, the Court cannot say that "no fair minded jurist" could conclude that Reeves failed to establish he suffered from significant sub-average intellectual functioning based on the entirety of the record, and neither was the decision contrary to, or an unreasonable application of, clearly established Supreme Court precedent. Accordingly, under AEDPA this Court is barred from granting habeas relief.

b. Significant or Substantial Deficits in Adaptive Behavior.

Turning to the second prong of establishing intellectual disability, Reeves must show that he has significant limitations in adaptive functioning in at least two skill areas.

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[16] In a factually similar case, *Smith v. State*, 213 So. 3d 264, 270-71 (Ala. Crim. App. 2009), the court resolved conflicting IQ scores and expert testimony by evaluating outside evidentiary support.

Smith had full-scale IQ scores of 67, 68, and 72. The court credited the state's expert's testimony, who opined Smith was of borderline intelligence, over Dr. Goff's, Smith's expert, who opined that Smith was mildly mentally retarded. The experts' opinions primarily differed in the area of adaptive functioning. Dr. Goff interviewed and administered tests to people close to Smith to determine which tasks Smith was capable of performing to evaluate Smith's adaptive functioning. The state's expert's evaluation, on the other hand, included testing Smith, interviewing other individuals with knowledge of Smith's current and past abilities and behavior (including a correctional officer who had close contact with Smith), a review of Smith's work history (which included construction work, general labor and the selling of drugs), and his personal observations of and conversations with Smith. The court concluded that Dr. Goff's assessment focused more of smith's past mental -health functioning rather than his present functioning, in contrast to the state's expert. Additionally, the court observed Smith when he testified and concluded Smith was articulate and found no indication that Smith was mentally retarded. The Court of Criminal Appeals affirmed the court's findings.

Due to Reeves's scores being within the margin of error, *Atkins* and *Hall* require that Reeves be allowed to present evidence of his adaptive functioning – which clearly he was allowed to do evidenced by the two-day evidentiary hearing, briefing opportunities, and the introduction of hundreds of pages of school, medical, mental health, and detention records. In affirming the Circuit Court's dismissal of Reeves's intellectual disability claim, the Alabama Court of Criminal Appeals stated:

> As for the adaptive-functioning prong of intellectual disability, Reeves contends that he "presented evidence of significant deficits in at least six areas of adaptive functioning and therefore [he] meets" the requirements for the second prong of intellectual disability -- significant deficits in at least two areas of adaptive functioning -- and that the circuit court erred in not so finding. (Reeves's brief, p. 45.) Specifically, Reeves asserts that the circuit court "erroneously discounted Dr. Goff's findings by pointing to anecdotal tasks that Mr. Reeves can perform, such as his purported planning of the crime, his earning of Job Corps certificates in welding, brick masonry, and auto mechanics, his extremely brief construction employment, and his purported drug selling activities," none of which, Reeves claims, undermines or refutes Dr. Goff's opinion that Reeves suffers from significant deficits in multiple areas of adaptive functioning. (Reeves's brief, pp. 50-51.) At oral argument, Reeves further argued that even discounting Dr. Goff's testimony, Dr. King testified that on the ABS-RC-II test, Reeves scored in the 25th percentile in the prevocational/vocational, self-direction, and domestic-activity domains, thus conclusively establishing that Reeves suffered significant deficits in those three areas of adaptive functioning. Therefore, Reeves concludes, the circuit court was required to find that he suffered from significant deficits in at least two areas of adaptive functioning.
>
> Reeves's arguments in this regard appear to be based solely on his scores on the ABAS test administered by Dr. Goff and the ABS-RC-II test administered by Dr. King. However, contrary to Reeves's apparent belief, a circuit court is not required to find that a person suffers from significant deficits in adaptive functioning merely because that person's scores on a standardized test indicate such deficits. Just as an IQ test is necessarily imprecise and, therefore, not determinative of the intellectual-functioning prong of intellectual disability, standardized tests for adaptive functioning are also necessarily imprecise and, therefore, are not determinative of the adaptive-functioning prong of intellectual disability. *Cf.*, *United States v. Davis*, 611 F. Supp. 2d 472, 493 (D. Maryland, 2009) (noting that "nearly all methods of assessing an individual's adaptive functioning -- particularly in a retroactive analysis -- are imperfect" and that, therefore, "the typical

approach used in forensic assessments of adaptive functioning is to collect information from a multitude of sources and look for convergence of findings in order to confirm one's conclusions"); and *Singleton v. Astrue*, [No. 2:11CV512-CSC, February 29, 2012) 2012 U.S. Dist. LEXIS 26069 (M.D. Ala. 2012) (not reported) (noting that scores on the ABAS-II test are not determinative as to adaptive functioning for purposes of qualification for social security disability). Although standardized tests for adaptive functioning are certainly useful in assessing a person's adaptive functioning, a court should assess such test scores in light of the circumstances of each case and in light of all other relevant evidence regarding adaptive functioning, including the person's actions at the time of the crime.

In this case, the evidence regarding Reeves's adaptive functioning was conflicting. Although Reeves scored low in the domains of domestic activity, self-direction, and work on the ABS-RC-II test administered by Dr. King and in the areas of self-direction, work, leisure activities, health and safety, self-care, and functional academics on the ABAS test administered by Dr. Goff, thus indicating significant deficits in those areas of adaptive functioning, other evidence was presented that either called into question the validity of those scores and/or indicated that Reeves's deficits in those areas were not, in fact, significant.

For example, Dr. King testified that Reeves scored in the 25th percentile in the domain of domestic activity because Reeves had never been required to do any type of domestic activity growing up and had been incarcerated since he was 18 years old. Dr. Goff testified that it is not unusual for someone who is incarcerated to have low adaptive functioning. Dr. King also testified that he would have scored Reeves higher in the self-direction domain if he had known at the time that he evaluated Reeves that, from an early age, Reeves had been "involved in a lot of drug activity and was actually directing the behaviors and activities of others in this drug related activity." (R. 231-32.) Additionally, Reeves was described in his juvenile mental-health records as "extremely goal-directed," even at a young age. (C. 1556.)

Dr. King further testified that he believed that Reeves's low score in the work domain was because Reeves "did not get to the age where he might be able to master use of complex job tools or equipment" before he went to prison, and because school records indicated that Reeves often missed school and had "pretty poor school habits." (R. 230-31.) Dr. Goff concurred, stating that Reeves's deficit in the work area "may be because he had a lack of opportunity." (R. 62.) Dr. Goff further testified that the validity of Reeves's low score in this area was questionable in light of the fact that Beverly Seroy, the person to whom he administered the ABAS test, had simply guessed on the majority of questions in this area. Additionally, as the circuit court noted in its order, Reeves had obtained certificates in brick masonry, welding, and automobile mechanics, all of which require some level of technical skill, and the record indicates that Reeves held a construction job while his brother was incarcerated and that he was a good

employee. Furthermore, the evidence indicated that Reeves's "poor school habits" were more a product of his defiant behavior in school than of any deficits in adaptive functioning.

Additionally, although Reeves scored low in the health and safety, self-care, and leisure-activity areas on the ABAS test administered by Dr. Goff, on the ABS-RC-II test administered by Dr. King, Reeves achieved the highest score possible in the domain of independent functioning, which included such things as self-care and health and safety, and Reeves also scored high in the domains of responsibility and socialization. Moreover, the evidence indicated that Reeves sold drugs to make money and that he used that money to buy personal belongings for himself, including a car, and to help pay the household bills.

Finally, Reeves scored in the 5th percentile in the area of functional academics on the ABAS test administered by Dr. Goff, and Dr. Goff testified that Reeves was functionally illiterate and could read only at a third-grade level and, therefore, that Reeves suffered from a significant deficit in this area. However, Dr. Goff indicated that the ability to read at about a fifth- or sixth-grade level would not qualify as a significant deficit in functional academics. Dr. King testified that Reeves was able to read at a fifth-grade level, thus indicating that Reeves did not have a significant deficient in functional academics.

Simply put, the circuit court in this case was faced with conflicting evidence regarding Reeves's adaptive functioning, including conflicting expert testimony. Reeves's expert, Dr. Goff, testified that Reeves suffered from significant deficits in six areas of adaptive functioning. On the other hand, the State's expert, Dr. King, indicated that, although Reeves scored low on the ABS-RC-II test in three areas of adaptive functioning, those scores were questionable for various reasons. It was for the circuit court to resolve the conflicting evidence and the conflicting expert testimony, and it obviously resolved the conflicts adversely to Reeves. In doing so, the court appropriately looked at evidence regarding Reeves's adaptive functioning other than the expert testimony -- such as Reeves's technical abilities in brick masonry, welding, and automobile mechanics; Reeves's ability to work construction and do so reliably when he was not around his brother, Julius; Reeves's participation in a drug-sale enterprise in which he was able to make thousands of dollars a week that he then used to purchase personal items and a car; and particularly Reeves's cold and calculated actions surrounding the murder, including planning the robbery with his codefendants, hiding incriminating evidence after he had shot the victim, splitting the proceeds of the robbery with his codefendants, and bragging about the murder, claiming that he would earn a "teardrop" — a gang tattoo indicating that a gang member had killed someone — for the murder *See*, e.g., *Ex parte Smith*, [Ms. 1080973, October 22, 2010] 213 So. 3d 313, 2010 Ala. LEXIS 210 (Ala. 2010) ("We find especially persuasive Smith's behavior during the commission of these murders.") There is ample

> evidence in the record to support the circuit court's finding that Reeves did not suffer from significant deficits in at least two areas of adaptive functioning, and we will not disturb the circuit court's resolution of the conflicting evidence. Therefore, we find no abuse of discretion on the part of the circuit court in finding that Reeves failed to prove by a preponderance of the evidence that he suffered from significant deficits in at least two areas of adaptive functioning.

Reeves v. State, 226 So. 3d 711, 741-43 (Ala. Crim. App. 2016).

Having reviewed the record in this matter, the Circuit Court did not make an unreasonable factual determination that Reeves failed to establish significant subaverage intellectual functioning. "Alabama courts routinely look to factors besides test scores to evaluate whether a defendant has met his burden of proving deficiencies in his adaptive behavior." *Smith v. Dunn,* 2:13-CV-00557-RDP, 2017 U.S. Dist. LEXIS 45274, *93-95 (N.D. Ala., S.D., March 28, 2017) (referencing *Ex parte Perkins*, 851 So. 2d at 456 (finding it instructive that Perkins maintained interpersonal relationships and had a job for a short period when analyzing his "adaptive behavior"); *Lewis v. State*, 889 So. 2d 623, 698 (Ala. Crim. App. 2003) ("the nature and circumstances surrounding the crimes in this case — including Lewis's articulate and detailed statement to the police — suggest goal-directed behavior, thus indicating that Lewis does not suffer from deficits in adaptive behavior.")). This practice was supported by Reeves's expert, Dr. Goff, as well. Dr. Goff explained that the concern regarding adaptive functioning "is whether it's an impediment to functioning in the community or to functioning on a day-today basis." (Doc. 23-24 at 54-55, Vol. 24, JR-85, pp. 53-54). Dr. Goff further explained:

> If one has an IQ of 64 but is working at the Coca-cola plant, reads well enough to read the newspaper, drives and car, does all of these other things and doesn't demonstrate any of these adaptive skills deficits, then you don't make the diagnosis. He has to have some deficits in some areas in order for the diagnosis to hold.

(Doc. 23-24 at 55; Vol. 24, JR-85, p. 54). Accordingly, the state courts' consideration of the record was neither impermissible nor unreasonable. *See Tharpe v. Warden,* 834 F.3d 1323 (11th Cir. 2016) (overruled on other grounds) (Where expert opinions were conflicting as to defendant's adaptive deficiencies, state courts did not err in viewing the entire record in making a determination regarding adaptive behavior.). Reeves has not shown that the deficiencies in his adaptive functioning were so significant "that no fair minded jurist could reasonably conclude" that he had failed to prove that his impaired behavior qualified him as intellectually disabled for purposes of Alabama's death penalty law.[17] Accordingly, the state court's decision was not unreasonable determination of the facts in light of the evidence presented at the Rule 32 hearing and was not contrary to or an unreasonable application of clearly established Supreme Court precedent.

c. Function deficits manifested before age 18.

Reeves argues that his intellectual disability manifested before the age of 18, and Respondent argues that Reeves has failed to prove the same. While the record again

[17] Reeves asserts in his petition that his impairments in functional academics and work are comparable to those of Glenn Holladay, whom the Eleventh Circuit determined was intellectually disabled and ineligible for the death penalty. *Holladay v. Allen*, 555 F.3d 1346 (11th Cir. 2009). The Court finds *Holladay* easily distinguishable. Holladay's "school records present a picture of a child with severe learning difficulties", whereas Reeves's school records are replete with borderline diagnoses, A's and B's earned in repeated grades, and emotional and behavioral placements versus learning disability placements. Similarly, Holladay's work history consisted of "menial jobs" where testimony confirmed that Reeves completed construction work, like "making a roof", was responsible on the job (Doc. 23-25 at 6; Doc. 23-24 at 14; Vol. 16, JR-65, pp. 151, 196) obtained certifications in welding, brick masonry, and auto mechanics through Job Corps (Doc. 23-16 at 152; Vol. 16, JR-65, p.951), and earned enough money selling drugs to purchase a car and provide assistance for his family. (Doc. 23-25 at 7). Indeed, Dr. Goff admitted that selling drugs could be considered work experience "depend[ing] on the level of sophistication of the individual task that is being performed." Drawing the distinction between "retarded people who are standing on the corner passing out things and taking money" and the "fellow who is doing the books." (Doc. 23-24 at 90; Vol. 24, JR-85, p. 89).

reflects conflicting expert testimony on this issue,[18] the state courts failed to address the merits of this prong. Given that Alabama requires a positive finding of all three prongs of the *Perkins* test in order to establish intellectual disability, and the State determined that Reeves has failed to establish two of the prongs (significant subaverage intellectual and adaptive functioning), it is unnecessary for the Court to discuss the merits of the third prong.

2. Whether the Constitutional Right to Due Process was Denied by the Circuit Court's Verbatim Adoption of Language from the State's Proposed Order Denying Reeves' *Atkins* Claim.

Petitioner Reeves contends that the Circuit Court adopted, word-for-word, the State's proposed order denying Reeves's intellectual disability claim in its denial of his Rule 32 petition in violation of his right to due process. Reeves presented this claim to the Alabama Court of Criminal Appeals, and, in finding no error in the verbatim adoption, it stated:

> "Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous." *McGahee v. State*, 885 So. 2d 191, 229-30 (Ala. Crim. App. 2003). "While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Bell v. State*, 593 So. 2d 123, 126 (Ala. Crim. App. 1991). "[T]he general rule is that, where a trial court does in fact adopt the proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court." *Ex parte Ingram*, 51 So. 3d 1119, 1122 (Ala. 2010). Only "when the record before this Court clearly establishes that the order signed by the trial court denying postconviction relief is not the product of the trial court's independent judgment" will the circuit court's adoption of the State's

[18] Dr. King opined that Reeves functioned in the borderline range prior to the age of 18 (Doc. 23-25 at 46, 58; Vol. 25, JR-85, pp. 245, 257), while Dr. Goff testified that Reeves was intellectually disabled before the age of 18. (Doc. 23-24 at 65-67; Vol. 24, JR-85, pp. 64-66).

> proposed order be held erroneous. *Ex parte Jenkins*, 105 So. 3d 1250, 1260 (Ala. 2012).

Reeves v. State, 226 So. 3d. 711, 723-24 (Ala. Crim. App. 2016).

"[T]he practice of adopting verbatim findings of fact prepared by the prevailing party in the context of a death penalty case is especially troublesome, given that factfinding procedures in capital proceedings are to "aspire to a heightened standard of reliability," *Jefferson v. Sellers*, 250 F. Supp. 3d 1340, 1351-1352 (N.D. Ga. 2017) (*citing Ford v. Wignwright*, 477 U.S. 399, 411, 106 S. Ct. 2595, 91 L. Ed. 2d 335 (1986). While the practice is condemned, reasoning it leads to "an appearance of impartiality", *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997), Reeves offers no authority for the proposition that the practice, in-and-of-itself, by a state postconviction court warrants habeas relief. *Clemons v. Thomas*, 2:10-CV-02218-LSC, 2016 U.S. Dist. LEXIS 40104, *27-28, 2016 WL 1180113 (N.D. Ala., S.D., March 28, 2016). "[W]hen the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. Bessemer City*, 470 U.S. 564, 572, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985) (citation omitted).

A review of the trial court's order reflects that the section titled, "Claim that Reeves is Mentally Retarded" is identical to the state's proposed order. (Doc. 23-26 at 93-95, 105-114; Vol. 26, JR-87, pp. 1-3, 13-21). Reeves therefore contends that the trial court's order was not the independent judgment of the trial court and clearly erroneous, evidenced most strongly by the omission of the mentioning of the IQ score of 68 and contrary to established law because the adopted order was unsolicited and drafted before the Court reached a conclusion on the issue of Reeves's intellectual disability. Reeves relies on the reasoning

of *Anderson* to support that the Alabama Criminal Court of Appeals unreasonably applied federal law in upholding the Circuit Court's verbatim adoption.

In *Anderson*, after a two-day trial, the trial court issued a memorandum explaining the rationale for its findings; the trial court then "requested that petitioner's counsel submit proposed findings of fact and conclusions of law expanding upon those set forth in the memorandum." *Anderson*, 470 U.S. at 568. The trial court then requested and received a response from respondent objecting to the proposed findings. *Id*. The Supreme Court found the trial court's adoption of petitioner's proposed findings of fact and conclusions of law, was not "uncritically accepted findings prepared without judicial guidance by the prevailing party" because

> [t]he court itself provided the framework for the proposed findings when it issued its preliminary memorandum, which set forth its essential findings and directed petitioner's counsel to submit a more detailed set of findings consistent with them. Further, respondent was provided and availed itself of the opportunity to respond at length to the proposed findings. Nor did the District Court simply adopt petitioner's proposed findings: the findings it ultimately issued -- and particularly the crucial findings . . . vary considerably in organization and content from those submitted by petitioner's counsel. Under these circumstances, we see no reason to doubt that the findings issued by the District Court represent the judge's own considered conclusions. There is no reason to subject those findings to a more stringent appellate review than is called for by the applicable rules.

Id. at 572-73.

As previously mentioned, the trial court's order is identical to the State's proposed order in the section titled "Claim that Reeves is Mentally Retarded". However, there is sufficient reason to conclude that the trial court's order represents an independent decision based on the additional facts that the trial court articulated in its order denying Reeves's Rule 32 petition. For instance, the trial court expounded on the finding of facts, adding that Brenda Suttles testimony illustrated a premeditated plan on the part of Reeves rather than an impulsive act. (Doc. 23-16 at 136; Vol. 16, JR-65, p. 2). The trial court then

articulated the testimony supporting its reasoning. The trial court's order also contains findings of facts from the penalty phase which are absent from the State's proposed order, and notably summaries of the testimony of Detective Grindle, Marzetta Reeves, and Dr. Kathaleen Ronan. (Doc. 23-16 at 137-141; Vol. 16, JR-65, pp. 3-7). Additionally, the findings of facts from the Rule 32 hearing are completely different in organization and wording and identify Reeves's IQ score of 68. (Doc. 23-16 at 141-145, Vol. 16, JR-65, pp. 7-11). As such, the trial court's inclusion of such necessary facts (explaining the reasoning contained in the adopted portion of the order) indicates that the trial court independently decided the claim and provided the necessary factual evidence of record to support the decision.

Furthermore, in keeping with *Anderson*, the record reveals that both parties (although unsolicited) submitted post-hearing briefs and proposed orders to the circuit court following the Rule 32 evidentiary hearing. Indeed, the State filed its proposed order on May 7, 2008, and by letter waved any objection to Reeves having adequate time to respond. (Doc. 23-15 at 173-201; Doc. 23-16 at 1-57; Vol. 15, JR-62, JR-63). On September 9, 2008, Reeves filed a motion objecting to the State's proposed order (Doc. 23-15 at 168), as well as a brief in support of his Second Amended Rule 32 Petition. (Doc. 23-16 at 58-134; Vol. 16, JR-64). The record reflects that the Circuit Court did not deny the petition until October 2009, over a year from the parties' filings. (Doc. 23-16 at 135-966; Vol. 16, JR-65).

The petitioner has failed to show that the state court decision was contrary to clearly established law or was an unreasonable determination of the facts in light of the evidence presented. Thus, Reeves's claim for habeas relief on this basis is denied.

3. Whether Reeves Received Ineffective Assistance of Counsel.

In his petition, Reeves contends that he received and was prejudiced by ineffective assistance of counsel from the outset of his trial through post-conviction proceedings. (Doc. 24 at 51-52). Reeves claims that but for counsels' deficient performance the jury would have been presented with evidence of Reeves's intellectual disability and mitigating factors, leading to a reasonable probability that the jury would have sentenced him to life in prison rather than to death. Furthermore, Reeves's appellate counsel failed to raise meritorious claims on appeal, prejudicing Reeves by denying him the opportunity to have the claims heard.

The Sixth Amendment of the Constitution guarantees every accused "the right . . . to have Assistance of counsel for his defense." U.S. Const. amend. VI. To establish an ineffective assistance claim under the Sixth Amendment, a petitioner must make both showings of the two-prong standard, discussed in *Strickland v. Washington*, that has been adopted by the Supreme Court for evaluating claims of ineffective assistance of counsel. *Strickland*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). That is, "[a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (citing *Strickland*, 466 U.S. at 687). Because the failure to demonstrate either deficient performance or prejudice is dispositive of the claim, courts applying the *Strickland* test "are free to dispose of ineffectiveness claims on either of [*Strickland's*] two grounds." *Oats v. Singletary*, 141 F.3d 1018, 1023 (11th Cir. 1998).

In order to satisfy the "performance" prong of the *Strickland* test, a petitioner is required to show that his attorney's representation "fell below an objective standard of reasonableness," which is measured by "reasonableness under prevailing professional

norms." *Strickland*, 466 U.S. at 688. That is, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. In considering such a claim, the court "must indulge a strong presumption that counsel's conduct fell within the wide range of reasonably professional assistance." *Smith v. Singletary*, 170 F. 3d 1051, 1053 (11th Cir. 1999) (citations omitted). Thus, the petitioner has a difficult burden as to be considered unreasonable, "the performance must be such that 'no competent counsel would have taken the action that [the petitioner's] counsel did take.'" *Ball v. United States*, 271 F. App'x 880 (11th Cir. 2008) (citations omitted).

The petitioner must also satisfy the "prejudice" prong of the *Strickland* test. To that end, the petitioner must show that a reasonable probability exists that "but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. The 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.'" *Butcher v. United States*, 368 F.3d 1290, 1293, 95 F. App'x 1290 (11th Cir. 2004) (citations omitted). Further, it is not enough to satisfy the prejudice prong to merely show that the alleged errors affected the case in some imaginable way. *See id*. at 1293-1294. ("[T]hat the errors had some conceivable effect on the outcome of the proceeding is insufficient to show prejudice") (quoting *Strickland*, 466 U.S. at 693) (internal quotation marks omitted). Thus, "under the exacting rules and presumptions set forth in *Strickland*, 'the cases in which habeas petitioners can properly prevail on the ground of ineffective assistance of counsel are few and far between.'" *Windom v. Sec'y, Dep't of Corr.*, 578 F.3d 1227, 1248 (citations omitted).

Having set forth the appropriate standard for determining an ineffective counsel claim, the Court turns to Petitioner Reeves's asserted challenges.

a. Claim that Alabama Court of Appeals unreasonably concluded that counsel's testimony is required to overcome *Strickland's* presumption of sound strategy.

Reeves argues that the state courts misapplied the *Strickland* standard in denying his claims of ineffective assistance of counsel by ignoring the ample evidence of ineffective assistance presented and determining his failure to call trial and appellate counsel to testify at the Rule 32 hearing was "fatal" to his claims of ineffective assistance of counsel. (Doc. 24 at 54-56). The Alabama Court of Criminal Appeals, in its memorandum opinion affirming the trial court's denial of relief, stated:

> The record from Reeves's direct appeal indicates that attorneys Blanchard McLeod and Marvin Wiggins were initially appointed to represent Reeves. McLeod withdrew approximately three months before trial, and Thomas Goggans was appointed as a replacement. Reeves was represented at trial by Goggans and Wiggins. Goggans continued to represent Reeves on appeal. At the Rule 32 evidentiary hearing, Reeves did not call McLeod, Goggans, or Wiggins to testify. In its order, the circuit court found that Reeves had failed to prove his claims of ineffective assistance of trial and appellate counsel, in part, because he had failed to call Goggans and Wiggins to testify at the evidentiary hearing. On appeal, Reeves argues that the circuit court erred in finding that his failure to call his attorneys to testify resulted in his failing to prove his ineffective-assistance-of-counsel claims because, he says, "there is no requirement that trial counsel testify." (Reeves's brief, p. 62.) Specifically, Reeves argues that because the *Strickland* test is an objective one, testimony from counsel is not necessary to prove any claim of ineffective assistance of counsel.
>
> However, Reeves's argument fails to take into account the requirement that courts indulge a strong presumption that counsel acted reasonably, a presumption that must be overcome by evidence to the contrary. In *Broadnax v. State*, 130 So. 3d 1232 (Ala. Crim. App. 2013), this Court stated:
>
> > "It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that

> occurred outside the record. Indeed, 'trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.' *Rylander v. State*, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). This is so because it is presumed that counsel acted reasonably:
>
> > "'The presumption impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced. "Counsel's competence ... is presumed, and the [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison*, 477 U.S. 365, 106 S. Ct. 2574, 2588, 91 L.Ed.2d 305 (1986) (emphasis added) (citations omitted). An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." *Williams* [*v. Head*,] 185 F.3d [1223,] 1228 [(11th Cir. 1999)]; *see also Waters* [v. *Thomas*,] 46 F.3d [1506,] 1516 [(11th Cir. 1995)] (en banc) (noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial indicate that counsel exercised sound professional judgment).'
>
> "*Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000). "'If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."' *Dunaway v. State*, 198 So. 3d 530, 547, 2009 Ala. Crim. App. LEXIS 174 (Ala. Crim. App. 2009) (quoting *Howard v. State*, 239 S.W.3d 359, 367 (Tex. App. 2007))."

130 So. 3d at 1255-56.

Subsequently, in *Stallworth v. State*, 171 So. 3d 53 (Ala. Crim. App. 2013) (opinion on return to remand), this Court explained:

> "Further, the presumption that counsel performed effectively "'is like the 'presumption of innocence' in a criminal trial,"' and the petitioner bears the burden of disproving that presumption. *Hunt v. State*, 940 So. 2d 1041, 1059 (Ala.

Crim. App. 2005) (quoting *Chandler v. United States*, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (en banc)). 'Never does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner.' *Id*. ""'An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, [a court] will presume that he did what he should have done, and that he exercised reasonable professional judgment."'"" *Hunt*, 940 So. 2d at 1070-71 (quoting *Grayson v. Thompson*, 257 F.3d 1194, 1218 (11th Cir. 2001), quoting in turn *Chandler*, 218 F.3d at 1314 n.15, quoting in turn *Williams v. Head*, 185 F.3d 1223, 1228 (11th Cir. 1999)). Thus, to overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning. *See, e.g., Broadnax v. State*, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013) (recognizing that '[i]t is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record[, and holding that] circuit court correctly found that Broadnax, by failing to question his attorneys about this specific claim, failed to overcome the presumption that counsel acted reasonably'); *Whitson v. State*, 109 So. 3d 665, 676 (Ala. Crim. App. 2012) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question appellate counsel regarding their reasoning); *Brooks v. State*, 929 So. 2d 491, 497 (Ala. Crim. App. 2005) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question trial counsel regarding their reasoning); *McGahee v. State*, 885 So. 2d 191, 221-22 (Ala. Crim. App. 2003) ('[C]ounsel at the Rule 32 hearing did not ask trial counsel any questions about his reasons for not calling the additional witnesses to testify. Because he has failed to present any evidence about counsel's decisions, we view trial counsel's actions as strategic decisions, which are virtually unassailable.'); *Williams v. Head*, 185 F.3d at 1228; *Adams v. Wainwright*, 709 F.2d 1443, 1445-46 (11th Cir. 1983) ('[The petitioner] did not call trial counsel to testify ... [; therefore,] there is no basis in this record for finding that counsel did not sufficiently investigate [the petitioner's] background.'); *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005) ('Because [trial counsel] passed away before

> the Rule 32 hearing, we have no evidence of what he did to prepare for the penalty phase of [the petitioner's] trial. In a situation like this, we will presume the attorney "did what he should have done, and that he exercised reasonable professional judgment."')."

171 So. 3d at 92-93 (emphasis added). *See also Clark v. State*, [Ms. CR-12-1965, March 13, 2015] 196 So. 3d 285, 2015 Ala. Crim. App. LEXIS 19 (Ala. Crim. App. 2015) (holding that Rule 32 petitioner had failed to prove that his appellate counsel was ineffective for not raising issues on appeal where the petitioner did not call his appellate counsel to testify at the Rule 32 evidentiary hearing regarding counsel's reasons for not raising those issues).

In this case, Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel.

. . .

The decisions by counsel that Reeves challenges in claims . . . -- what experts to hire, what witnesses to call to testify, what mitigation evidence to present, what objections to make and what issues to raise at trial, and what issues to raise on appeal -- are typically considered strategic decisions, and do not constitute per se deficient performance. *See, e.g., Walker v. State*, [Ms. CR-11-0241, February 6, 2015] 194 So. 3d 253, 2015 Ala. Crim. App. LEXIS 8 (Ala. Crim. App. 2015) ("'An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy.' *People v. Payne*, 285 Mich. App. 181, 190, 774 N.W.2d 714, 722 (2009). '[I]n general, the "decision not to hire experts falls within the realm of trial strategy."' *State v. Denz*, 232 Ariz. 441, 445, 306 P.3d 98, 102 (2013), quoting *Yohey v. Collins*, 985 F.2d 222, 228 (5th Cir. 1993)."); *Johnson v. State*, [Ms. CR-05-1805, September 28, 2007] So. 3d , , 2007 Ala. Crim. App. LEXIS 178 (Ala. Crim. App. 2007) ("'[I]n the context of an ineffective assistance claim, "a decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess."' *Curtis v. State*, 905 N.E.2d 410, 415 (Ind. Ct. App. 2009). '[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney.' *Boyle v. McKune*, 544 F.3d 1132, 1139 (10th Cir. 2008)."); *Dunaway v. State*, 198 So. 3d 530, 547, 2009 Ala. Crim. App. LEXIS 174 (Ala. Crim. App. 2009) ("'The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy.' *Hill v. Mitchell*, 400 F.3d 308, 331 (6th Cir. 2005)."), rev'd on other grounds, [Ms. 1090697, April 18, 2014] 198 So. 3d 567, 2014 Ala. LEXIS 59 (Ala. 2014); *Lane v. State*, 708 So. 2d 206, 209 (Ala. Crim. App. 1997) ("This court has held that '[o]bjections are a matter of trial strategy, and an appellant must overcome the presumption that "conduct falls within the wide range of reasonable professional assistance," that is, the presumption that the challenged action "might be considered sound trial strategy."' *Moore v. State*, 659 So. 2d 205, 209 (Ala. Cr. App. 1994)."); and *Thomas v.*

> *State*, 766 So. 2d 860, 876 (Ala. Crim. App. 1998) ("[A]ppellate counsel has no constitutional obligation to raise every nonfrivolous issue. ... Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal."), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds, *Ex parte Taylor*, 10 So. 3d 1075 (Ala. 2005).
>
> The burden was on Reeves to prove by a preponderance of the evidence that his counsel's challenged decisions were not the result of reasonable strategy, i.e., the burden was on Reeves to present evidence overcoming the strong presumption that counsel acted reasonably. However, because Reeves failed to call his counsel to testify, the record is silent as to the reasons trial counsel (1) chose not to hire Dr. Goff or another neuropsychologist to evaluate Reeves for intellectual disability and chose not to present testimony from such an expert during the penalty phase of the trial that Reeves was intellectually disabled in order to establish a mitigating circumstance; (2) chose to rely during the penalty phase of the trial on the testimony of Dr. Ronan to present mitigation evidence; (3) chose not to object to Dr. Ronan's testimony on cross-examination during the penalty phase of the trial that Reeves was not intellectually disabled; and (4) chose not to object at trial to the prosecutor's allegedly urging the jury during closing arguments at the penalty phase of the trial to consider nonstatutory aggravating circumstances to impose a death sentence, to the prosecutor's introducing evidence and making argument during both the guilt and penalty phases of the trial that Reeves was involved in a gang, to the prosecutor's allegedly referring to the jury's penalty-phase verdict as a recommendation, and to the trial court's instructing the jury that its penalty-phase verdict was a recommendation. The record is also silent as to the reasons appellate counsel chose not to raise on appeal the claims that the prosecutor improperly urged the jury during closing arguments at the penalty phase of the trial to consider non-statutory aggravating circumstances to impose a death sentence, that the prosecutor improperly introduced evidence and argued during both the guilt and penalty phases of the trial that Reeves was involved in a gang, that the prosecutor improperly referred to the jury's penalty-phase verdict as a recommendation, and that the trial court improperly instructed the jury that its penalty-phase verdict was a recommendation. Where """the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."""" *Broadnax*, 130 So. 3d at 1256 (citations omitted).

Reeves, 226 So. 3d 711, 746-52.

Reeves has failed to overcome the AEDPA burden of establishing that the state court decision was contrary to or based on an unreasonable application of *Strickland*. *See Cullen v. Pinholster*, 563 U.S. 170, 190, 196 ("The Court of Appeals was required not

simply to 'give [the] attorneys the benefit of the doubt,' but to affirmatively entertain the range of possible 'reasons Pinholster's counsel may have had for proceeding as they did.'") (alteration in original) (internal citation omitted).

Pursuant to *Strickland,* "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.'" 466 U.S. at 689 (citation omitted). "In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Id*. "Surmounting *Strickland's* high bar is never an easy task", *Padilla v. Kentucky*, 559 U.S. 356, 371, 130 S. Ct. 1473, 176 L. Ed. 2d 284 (2010), but it is even more daunting in the habeas context where state courts have adjudicated the ineffective assistance claim on the merits in post-conviction proceedings, as is the case here, making § 2254(d) applicable. **The question now is not whether counsel's actions were reasonable, but "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard."** *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011)(emphasis added). Put another way, Reeves must not only satisfy the two *Strickland* prongs, but he must also "show that the State court applied *Strickland* to the facts of his case in an objectively unreasonable manner." *Williams v. Allen*, 598 F.3d 778, 789 (11th Cir. 2010) (citations and internal quotation marks omitted). "Although courts may not indulge '*post hoc* rationalization' for counsel's decision making that contradicts the available evidence of counsel's actions, *Wiggins*[*v. Smith*, 539 U.S. 510], 526-527, 123 S. Ct. 2527, 156 L. Ed. 2d 471[(2003)], neither may they insist counsel confirm every aspect of the strategic basis for his or her actions." *Harrington v. Richter*, 562 U.S. 86, 109, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011).

Accordingly, the state court appropriately reviewed Reeves's ineffective assistance claims - giving deference to counsel's decisions, as it must. *Strickland*, *supra* at 689 ("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."). Without the testimony of counsel explaining their strategy, Reeves was left to show that counsel's decisions were unreasonable and prejudiced the outcome of his case, *Harvey v. Warden, Union Corr. Inst*., 629 F.3d 1228, 1245 (11th Cir. 2011) ("To give trial counsel proper deference, this circuit presumes that trial counsel provided effective assistance. . . . and it is the petitioner's burden to persuade us otherwise."), and Reeves failed to carry his burden.

In support of his proposition that counsel's testimony is not required to rebut the presumption of correctness, Reeves relies on *Ex parte Whited* – this reliance, however, is misplaced. Most notably, Whited's trial counsel did testify regarding the decision to wave closing argument. *Ex parte Whited*, 180 So. 3d 69 (Ala. 2015). In that case, trial counsel indicated that he "did not recall" the specifics of that decision, yet he was able to recall other aspects of the case, like the strategy to continue the case until victim was of age, the strategy to present an alibi, and the strategy to impeach the victim's testimony. Based on counsel's testimony, the court was unable to reconcile the challenged decision against the total evidence of the case. Consequently, the court found counsel's testimony failed to support that the decision to waive closing argument was in fact "strategic". *Id*. at 82. In the case at hand, Reeves certainly put forth briefs and argument regarding what trial decisions counsel made; however, this evidence sheds no light on the reasoning behind

counsel's action and, standing alone, this evidence is insufficient to prove counsel was ineffective.[19]

Review of the trial court's decision reveals that the court considered the total evidence of record for each claim and concluded it fell short of objectively establishing deficient performance.[20] (*See*, *infra*, section IV, 3, b through e discussing the state court's denial of Reeves's claims of ineffective assistance of counsel). With the record void of evidence (including the testimony of counsel) that the complained of actions were not the result of reasonable strategy, the court interpreted the evidence, as required, with deference to counsel's decisions and competency. Considering the evidence in such a light demonstrates that counsel's actions "might be considered sound trial strategy." *Strickland*, *supra* at 689. Thus, it cannot be said that the Alabama Court of Criminal Appeals unreasonably applied the *Strickland* standard to the facts of Reeves's ineffective assistance claims. *See Wiggins*, 539 U.S. at 520-21 ("The state court's application [of Supreme Court precedent] must have been 'objectively unreasonable'" to obtain habeas relief on a claim

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[19] In dissenting to the Unites States Supreme Court's denial for writ of certiorari, Justice Sotomayor concluded that the Alabama Court of Criminal Appeals unreasonably applied *Strickland* by requiring counsel's testimony to establish that his counsel's performance was deficient. *Reeves v. Alabama*, __ U.S. __, 138 S. Ct. 22, 199 L. Ed. 2d 341 (2017)(Sotomayor, J., dissenting). The dissent explained that "Reeves presented ample evidence in support of his claim that his counsel's performance was deficient, but the court never considered or explained why, in light of that evidence, his counsel's strategic decisions were reasonable. It rested its decision solely on the fact that Reeves had not called his counsel to testify at the postconviction hearing." 138 S. Ct. at 28.

[20] In denying Reeves's ineffective assistance of counsel claim, the Circuit Court stated:

> The Court notes at this point that the Petitioner during his Evidentiary Hearing, failed to call either Goggans or Wiggins in support of their claim of ineffective assistance of counsel. Therefore, this Court will review this claim in light of this failure and consider only that which is in the Record.

(Doc. 23-16 at 154-55, Vol. 16, JR-__, pp. 20-21).

that was previously decided on the merits by the state courts.) (internal citation omitted). Consequently, Reeves's claim for habeas relief on this basis is denied.

b. Claim that counsel failed to investigate Reeves's alleged intellectual disability.

In his petition, Reeves asserts that trial counsel had a duty to investigate his mental capacity and background where record materials indicated the possibility of mitigating evidence of intellectual disability. (Doc. 24 at 58). Respondent contends the merits of this claim were addressed and denied by the state courts in post-conviction proceedings. In denying the claim in Reeves's Rule 32 petition, the trial court state:

> This Court by Order dated October 20, 1997, approved funds for the purpose of hiring a neuropsychologist. Soon after the funds were approved, Defense Counsel McLeod withdrew, and the Court appointed Goggans and Wiggins.
>
> The Court notes at this point that the Petitioner during his Evidentiary Hearing, failed to call either Goggans or Wiggins in support of their claim of ineffective assistance of counsel. Therefore, this Court will review this claim in light of this failure and consider only which is in the Record.
>
> Trial Counsel made a decision to rely on the testimony of Dr. Kathy Ronan rather than retain Dr. John Goff.
>
> When Dr. Ronan's testimony is considered in its entirety together with the records collected by Trial Counsel, there was no indication of a diagnosis of mental retardation. As a matter of fact, Dr. Ronan on cross-examination by Assistant District Attorney Wilson was asked,
>
> "Q. So he wasn't actually mentally retarded?
>
> A. He was not in a level that they would call him mental retardation, no."
>
> Furthermore, the Reeves Trial took place four years before the United States Supreme Court issued its Opinion in *Atkins v. Virginia*, 536 U.S. 304 (2002). Therefore, the Court nor the Jury would have been required to consider mental retardation as a mitigating circumstance. The Court finds that the Petitioner failed to prove by a preponderance of the evidence ineffective

> assistance of counsel as alleged in Sec. II(a), Failure to prove necessary expert assistance.

(Doc. 23-16 at 154-55, Vol. 16, JR-65, pp. 20-21). The Alabama Court of Criminal Appeals, in its memorandum opinion affirming the trial court's denial of Reeves's claim, stated:

> The burden was on Reeves to prove by a preponderance of the evidence that his counsel's challenged decisions were not the result of reasonable strategy, i.e., the burden was on Reeves to present evidence overcoming the strong presumption that counsel acted reasonably. However, because Reeves failed to call his counsel to testify, the record is silent as to the reasons trial counsel (1) chose not to hire Dr. Goff or another neuropsychologist to evaluate Reeves for intellectual disability and chose not to present testimony from such an expert during the penalty phase of the trial that Reeves was intellectually disabled in order to establish a mitigating circumstance . . .

Reeves v. State, 226 So. 2d at 750-51.

"It is unquestioned that under the prevailing professional norms at the time of [Reeves's] trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 558 U.S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 396, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). Where counsel has reason to know of potential mitigating evidence they are required to investigate. *See Wiggins v. Smith*, 539 U.S. 510, 524-25, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (held that counsel "fell short of . . . professional standards" for not expanding their investigation beyond the presentence investigation report and one set of records they obtained, given the facts discovered in the two documents); *Daniel v. Comm'r.,* 822 F.3d 1248 (11th Cir. 2016) (counsel's performance was deficient where mitigation investigation ended after "acquir[ing] only rudimentary knowledge of [petitioner's] history from a narrow set of sources."). "In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgment." *Strickland*,

466 U.S. at 691. At some point during trial preparation, counsel "will reasonably decide that another strategy is in order, thus 'mak[ing] particular investigations unnecessary.'" *Pinholster*, 131 S. Ct. at 1407 (quoting *Strickland*, 466 U.S. at 691). The "strategic choices [of counsel] made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," while those "made after a less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation." *Strickland*, 466 U.S. at 690-91.

Unlike the cases cited by Reeves in his petition, the record confirms trial counsel engaged in investigating Reeves's mental capacity – thus, this claim more appropriately characterized as a question of the scope of counsel's investigation and trial strategy. It is undisputed from the trial record that counsel obtained substantial evidence of Reeves's educational history, medical history, juvenile correctional experience, family and social history, and work experience. See doc. 23-1 at 2-9, Vol. 1, JR-1 docketing counsel's requests for production of records. In addition, Reeves makes no claim that counsel were unaware of any of the information concerning his background or mental health history contained in these voluminous records. Indeed, these records raised red flags regarding substantial issues, including Reeves's mental capacity, prompting attorneys McLeod and Wiggins to petition the court, on September 16, 1997, for funds to hire an expert, Dr. Goff, to evaluate Reeves and assist in preparation of mitigation evidence for the penalty phase. (*See* Doc. 23-1 at 70-73; Vol. 1, JR-2, pp. 64-67). The trial court initially denied the Motion for Appointment of Clinical Neuropsychologist for Interview, Testing, Evaluation, and Trial Testimony Regarding Defendant and for Funds to Pay Such Expert, and counsel argued in their Application for Rehearing that they "possesse[d] hundreds of pages of psychological, psychometric and behavioral analysis material" and "[t]hat a clinical

neuropsychologist or a person of like standing and expertise [was] the only avenue open to the defense to compile [and] correlate this information, interview [Reeves,] and present this information in an orderly and informative fashion to the jury during the mitigation phase of the trial." (Doc. 23-1 at 74; Vol. 1, JR-2 p. 68). Counsel was granted a hearing on the motion to appoint and presented to the court:

> We have, however, filed a motion by recommendation of the Capital Mitigation Resources Program which has been assisting us with this matter because of the tremendous conflicting information we have received through probably I would anticipate more than 150 to 200 pages of material with reference to psychological and psychiatric evaluations, et certera, for the mitigation phase of this proceeding, we would need the services of a neuropsychiatrist and neuropsychologist that has previously been ordered in other capital cases as Mr. Greene so adequately reminded me. And we are asking for the same because in this instance the State has put us on notice that they are going for the death penalty. And the amount of material that we have received through discovery from the school and the Department of Youth Services is beyond our ability to deal with and feel that Dr. Goff would be competent to deal with that matter.

(Doc. 23-3 at 91; Vol. 1, JR-5, p. 7).[21] On October 16, 1997, the court granted counsel's motion and approved the funding for and appointment of John R. Goff, Ph.D. (Doc. 23-1 at 81; Vol. 1, JR-2, p. 75). Subsequently, Attorney McLeod withdrew as counsel[22] and was replaced by attorney Thomas Goggans. (Doc. 23-1 at 3, 78-80, Vol. 1, JR-1, p. 2; Vol.

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[21] At the hearing on the motion to appoint, the prosecution argued against the appointment of Dr. Goff reasoning that Dr. Goff was essentially "an expensive helper" and that the defense attorney could read the discovered reports himself. (Doc. 23-3 at 95, Vol. 1, JR-2, p. 11). Specifically, the prosecution opined that "ask[ing] Dr. Goff to review school records about [Reeves's] maladjustment" was unproductive and inappropriate spending for "an incidental witness". (*Id.*).

[22] Review of Attorney McLeod's motion to withdraw as counsel indicates an inability "to establish a meaningful attorney-client working relationship" as the reason for his withdrawal. (Doc. 23-1 at 78; Vol. 1, JR-2, p. 72). According to McLeod, "defendant ha[d] been combative, argumentative and ha[d] totally refused to assist [McLeod] in any manner with the trial of his cause." (*Id.*).

1, JR-2, pp. 72-75). Attorneys Wiggins and Goggans, thereafter, on December 3, 1997, petitioned the court for and were granted access to the complete mental health records of the Taylor Harden Secure Medical Facility in connection with its evaluation and treatment of Reeves, including the records related to Dr. Kathy Ronan's June 3, 1997, evaluation of Reeves. (Doc. 23-1 at 88, 150; Vol. 1, JR- 2, pp. 82, 144). The record, however, remains silent as to why Wiggins and Goggans never contacted Dr. Goff or hired any other expert to evaluate Reeves for intellectual disability.[23]

As reasoned by the state court and previously discussed, *supra*, the record is void of information related to trial counsel's ultimate decision not to hire Dr. Goff or further investigate Reeves's intellectual disability; the decision is, therefore, presumed reasonable unless rebutted by the total record evidence. In this case, the record reveals that counsel not only obtained extensive documentation from Reeves's childhood and adolescent years but counsel presented the information contained in the documents at the trial and penalty phase. The voluminous records indicate that Reeves was within the borderline range of intellectual functioning (represented by the full-scale score achieved when he was 14 years old and the verbal score achieved from the testing of Dr. Ronan), and these records further evidence that Reeves was denied special education services for intellectual disability and was instead recommended for emotional conflict and behavioral services. As such, Reeves's trial counsel cannot reasonably be faulted for failing to pursue further expert inquiry into Reeves's intellectual functioning where the evidence objectively indicated

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[23] Dr. Goff testified at the Rule 32 evidentiary hearing that Lucia Penland, from the Rison Project, notified him in 1997 that he his appointment had been approved by the court to interview and evaluate Reeves; however, he was never contacted by counsel. (Doc. 23-24 at 67-68; Vol. 24, JR-85, pp. 66-67). Dr. Goff exclaimed that he assumed the case "had pled out", but years later, during a conversation with Ms. Penland, he inquired about the case and Ms. Penland "said that they just never called [her]. (Doc. 23-24 at 68; Vol. 24, JR-85, p. 67).

Reeves was not intellectually disabled. In light of the total circumstances, trial counsel's decision not to expand its investigation further into Reeves's intellectual disability cannot be viewed as unreasonable, as the question is not "what the best lawyers" or "even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *Grayson v. Thompson*, 257 F.3d 1194, 1216 (11th Cir. 2001) (internal citation omitted). Consequently, Reeves has failed to satisfy the deficient performance prong of establishing ineffective assistance of counsel, and the state court's decision was not contrary to, or involved an unreasonable application of, clearly established federal law, nor was the decision based on an unreasonable determination of the facts in light of the evidence presented.

Additionally, Reeves has failed to show that he was prejudiced by the failure of counsel to hire Dr. Goff or to further investigate his intellectual disability.[24] While "the demonstrated availability of undiscovered mitigating evidence clearly me[ets] the prejudice requirement", *Armstrong v. Dugger*, 833 F.2d 1430, 1434 (11th Cir. 1987), the trial record evidences that Reeves's intellectual functioning was in the borderline range, and the jury was informed of Reeves's lower intellectual functioning multiple times during

[24] Where counsel ignores "red flags" "alerting them to the need for more investigation", counsel performs deficiently. *Rompilla*, 545 U.S. at 392; *see also Jefferson v. Sellers*, 250 F. Supp. 3d 1340 (N.D. Ga. 2017) (counsel was ineffective for failing to obtain neuropsychological testing following mental health expert's recommendation and knowledge of head trauma (petitioner was struck by a car when he was 2 years old)); *Blanco v. Singletary*, 943 F.2d 1477, 1503 (11th Cir. 1991) (counsel rendered ineffective assistance where he failed to put forth any mitigating evidence despite that an investigation would have uncovered an impoverished childhood, epileptic seizures, and organic brain damage); *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011) (counsel's failure to conduct a mitigation investigation beyond petitioner's character was ineffective where "obvious evidence of serious mental illness" was undiscovered). However, Reeves's case is distinguishable from such cases, as Reeves's counsel initiated investigation and discovery of voluminous background information regarding Reeve and presented evidence of the same at trial.

the penalty phase, including in defense counsel's opening statement, through the testimony of Marzetta Reeves and Dr. Kathy Ronan, and during counsel's closing statement. *Daniel v. Comm'r*, 822 F.3d 1248 (11th Cir. 2016) (The Court explained that "borderline intellectual disability that does not rise to the level of intellectual disability under *Atkins* is still powerful mitigation.") (citing *Williams*, 529 U.S. at 398, 120 S. Ct. at 1515 ("[T]he reality that [Mr. Williams] was 'borderline mentally retarded,' might well have influenced the jury's appraisal of his moral culpability."); *Wiggins* 539 U.S. at 535, 123 S. Ct. at 2542 (noting that "diminished mental capacities" is among "the kind of troubled history . . . relevant to assessing a defendant's moral culpability.")). Because post-conviction investigation further confirmed this borderline level of functioning and the jury was informed of the same, Reeves has failed to carry his burden of establishing that he was prejudiced by counsel's failure to further pursue investigating his intellectually functioning. For these reasons, the claim for habeas relief on this basis is denied.

c. Claim that trial counsel failed to retain a mitigation expert and failed to present crucial mitigating evidence.

In his petition, Reeves asserts that trial counsel unreasonably relied on a court-appointed competency expert, Dr. Ronan, to provide mitigation evidence during the penalty phase, rather than retaining an experienced and qualified mitigation expert. (Doc. 24 at 58-59). In support of his claim, Reeves argues that Dr. Ronan never interviewed any family members, friends, or professionals in his life, and never spoke with counsel until the day prior to trial. This claim was previously presented to the Alabama Court of Criminal, which stated, in its memorandum opinion affirming the circuit court's denial of Reeves's Rule 32 petition:

> As for Reeves's claim that his trial counsel were ineffective for not conducting an adequate mitigation investigation and for not presenting what

he claimed was substantial mitigation evidence during the penalty phase of the trial, . . . we point out that Reeves's claim in this regard is not that counsel failed to conduct any mitigation investigation or that counsel failed to present any mitigation evidence during the penalty phase of the trial. Rather, Reeves's claim is that counsel did not conduct an adequate investigation and either did not present during the penalty phase of the trial all mitigating evidence that may have been available or did not present the mitigating evidence in the manner he believes would have been most appropriate.

"[T]rial counsel's failure to investigate the possibility of mitigating evidence [at all] is, per se, deficient performance." *Ex parte Land*, 775 So. 2d 847, 853 (Ala. 2000), overruled on other grounds, *State v. Martin*, 69 So. 3d 94 (Ala. 2011). However, "counsel is not necessarily ineffective simply because he does not present all possible mitigating evidence." *Pierce v. State*, 851 So. 2d 558, 578 (Ala. Crim. App. 1999), rev'd on other grounds, 851 So. 2d 606 (Ala. 2000). When the record reflects that counsel presented mitigating evidence during the penalty phase of the trial, as here, the question becomes whether counsel's mitigation investigation and counsel's decisions regarding the presentation of mitigating evidence were reasonable.

> "'[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place....' *Lewis v. Horn*, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact.' *Chandler v. United States*, 218 F.3d 1305, 1320 (11th Cir. 2000)."

Broadnax, 130 So. 3d at 1248 (emphasis added).

At the evidentiary hearing, Reeves presented testimony from Karen Salekin, a forensic clinical psychologist who performed a mitigation investigation, regarding the mitigation evidence he believes his counsel should have presented and the manner in which he believes that evidence should have been presented. However, Reeves presented no evidence at the evidentiary hearing regarding what mitigation investigation his trial counsel conducted, because Reeves failed to call trial counsel to testify. Although Reeves argues that counsel's investigation was not adequate, because the record is silent as to the extent of counsel's actual investigation, we must presume that counsel exercised reasonable professional judgment in conducting the investigation and that counsel's decisions resulting from their investigation were also reasonable. The silent record before this Court regarding counsel's investigation and their resulting decisions as to what evidence to present during the penalty phase of the trial and how to present that evidence is not sufficient to overcome the strong presumption of effective assistance. *See, e.g., Woods v. State*, 13 So. 3d 1, 37 (Ala. Crim. App. 2007) (holding, on

> appeal from four capital-murder convictions and a sentence of death, that the appellant had failed to establish that his counsel's mitigation investigation constituted deficient performance where the record contained "no evidence about the scope of counsel's mitigation investigation" but contained indications that counsel had at least conducted some mitigation investigation).
>
> For the reasons set forth above, Reeves failed to satisfy his burden of proof as to his claims of ineffective assistance of counsel. Therefore, the circuit court properly denied those claims.

Reeves, 226 So 3d. at 751-52; (Doc. 23-31 at 89-92; Vol. 31, JR-94, pp. 88-91). After a review of the record, it is clear that Reeves' counsel did present mitigating evidence at the penalty phase. While more mitigation evidence may have been available, Reeves has failed to present evidence sufficient to rebut the presumption that counsel exercised reasonable professional judgment in constructing their mitigation strategy.

> We emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*. 466 U.S., at 689, 80 L Ed 2d 674, 104 S Ct 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.,* at 690-691, 80 L Ed 2d 674, 104 S Ct 2052. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.,* at 691, 80 L Ed 2d 674, 104 S Ct 2052.

Wiggins v. Smith, 539 U.S. 510, 533, 123 S. Ct. 2527, 2541, 156 L. Ed. 2d 471 (2003) (counsel's failure to investigate defendant's background was unreasonable "in light of the evidence counsel uncovered in the social services records--evidence that would have led a reasonably competent attorney to investigate further"); *see also Rompilla v. Beard*, 545 U.S. 374, 125 S. Ct. 2456, 162 L. Ed. 2d 360 (2005) (counsel's failure to review previous conviction files for aggravating details and mitigation leads which might have influenced

the jury's appraisal of petitioner's culpability was unreasonable given that counsel had notice that the prosecution sought to prove petitioner had a violent criminal history).

Review of the record reveals that counsel conducted a mitigation investigation by seeking information related to Reeves's background, evidenced by the various motions filed for Release of Records. (Doc. 23-1 at 5; Vol. 1, JR-1). Counsel further received the records, evidenced by the production of records from Carraway Methodist Medical Center, Selma Public Schools (including disciplinary reports, letters from teachers, standardized tests, special education assessments, and administration records and letters), Cahaba Mental Health Center (including counseling reports), Mobile Group Home. (Doc. 23-2 at 61-221; Doc. 23-3 at 1-85). Counsel comprehended the gravity of establishing a mitigation defense in a capital case, evidenced by counsel's obtained assistance of the Alabama Prison Project's Mitigation and Investigation Program[25] (doc. 23-1 at 17, Vol. 1, JR- 1; Doc. 23-3 at 91; Vol. 1, JR-5, p. 7) and counsel's petition to the court for the hiring of a mitigation expert. (Doc. 23-1a t 70-77). Counsel also presented this information to the jury and judge through the testimony of three witnesses and through its opening and closing statements at the penalty phase. The documents were also admitted into evidence and presented to the Jury as mitigation evidence. (Doc. 23-16 at 159). Thus, without evidence to the contrary, Reeves that the state court decision resulted in a decision contrary to, or involved an unreasonable application of, *Strickland*. Neither has Reeves shown that decision was based on an unreasonable determination of the facts in light of the evidence presented in the State Court proceedings.

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[25] On February 10, 1997, attorney McLeod petitioned the court for the approval of funds to obtain assistance from the Alabama Prison Project's Mitigation and Investigation Program. (Doc. 23-1 at 16-18). Counsel asserted that the assistance would be used to evaluate the reports and information received in the case. (*Id*. at 17).

Also, Reeves has failed to establish that he was prejudiced by counsel's failure to retain a mitigation expert. "When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. In Alabama, the sentencing judge makes the determination as to the existence and weight of aggravating and mitigating circumstances and the punishment, but he must give the jury verdict of life or death "consideration". Ala. Code § 13A-5-46 (1975)(a); *see also Harris v. Alabama*, 513 U.S. 504, 115 S. Ct. 1031, 130 L. Ed. 2d 1004 (1995) (discussing the "weight" that must be afforded to a jury's advisory sentencing verdict). Accordingly, to establish his claim, Reeves must show that but for his counsel's deficiency there is a reasonable probability he would have received a different sentence. In assessing that probability, courts consider "the totality of the available mitigation evidence--both that adduced at trial, and the evidence adduced in the habeas proceeding" --and "reweig[h] it against the evidence in aggravation." *Porter*, 558 U.S. at 40-41 (quoting *Williams*, *supra*, at 397-398, 120 S. Ct. 1495, 146 L. Ed. 2d 389).

During the penalty phase, trial counsel presented in its opening statement to the jury that evidence would be presented regarding Reeves upbringing, intellectual functioning, and environment that would help explain what would cause Reeves to commit the murder for which he was convicted. (Doc. 23-8 at 92-96). Trial counsel stated:

> You'll hear evidence that Matthew Reeves is what psychologists or psychiatrists call borderline intellectual functioning. . . It means he is right on the borderline of being classified as retarded, not insane or anything like that. But he's on the borderline.
>
> You will hear that that has a lot to [sic] with how people act in different environmental situations. You'll hear about the environment that

> Matthew Reeves grew up in. You will hear about lack of resources from all kinds of different places. You'll hear about lack of parental resources, lack of parental involvement. You'll hear of lack of school resources. The school just ran out of resourced for Matthew Reeves. You'll hear about lack of social services resources. You'll essentially hear about the lack of resources that are needed to raise somebody, to raise somebody up in the way that they will behave the way people should behave. And you put these things together with somebody who is borderline functioning, and you are going to have problems.
>
> Everybody is going to gravitate toward something. Everybody makes choices. The question is how capable is this person of making a choice in any situation. The evidence here will be Matthew Reeves has borderline intellectual functioning. It's probably not going to be great in any sense. But the choices that are made will be influenced by the environment factors, how people are raised, et cetera.
>
> You will hear evidence that people of his mental functioning are going to gravitate towards something. Everybody gravitates towards something, and some people are going to gravitate towards sports or Boy Scouts or church or whatever is out there that the appropriate resources provide for the child growing up. And Matthew Reeves' situation - - all of these things that we might normally think of as every day activities, every day resources you or I might have or we provide for our children weren't there. The thing out there for Matthew Reeves, the only structure of any sort if you can call it that was a structure of violence, gangs, thug life. The other resources just weren't there for him for somebody with borderline intellectual functioning.

(Doc. 23-8 at 94-96; Vol. 8, JR-22, JR23, pp. 1114-1116). Trial counsel then called Detective Grindle, Marzetta Reeves, and Dr. Kathy Ronan to present mitigation testimony.

Detective Grindle testified as to the dilapidated condition of Reeves's family home, which included graffiti on the front door, the lack of interior doors, open sections in the ceiling, and 16 photographs of the house were entered into evidence. (Doc. 23-8 at 98-102).

Marzetta Reeves, Reeves's mother, testified as to Reeves's background. She explained that Reeves has never known his father, indicating that Reeves first met his father around age 14 and once again at 16 years of age. She described that she relied solely on government assistance for income and identified at least ten (10) people who occupied the family's three-bedroom home (as the fourth bedroom was unusable due to a hole in the

roof which leaked water when it rained). According to Ms. Reeves, Matthew Reeves failed several grades, including first and third or fourth, and was socially promoted to seventh grade. She stated that Matthew Reeves began receiving mental health services in second or third grade, namely medication for hyperactivity and some counseling, but that in his early grades teachers would comment that Reeves was "doing really good" and "he was making good grades." (Doc. 23-8 at 108). Ms. Reeves further testified that Reeves was kicked out of school in the eighth grade, although she maintained she was unaware of why. She indicated that Reeves thereafter attended some GED classes, but when he was placed into a group home, he went entered the Job Corps and earned certificates in welding and auto mechanics. Upon his return home, Reeves went to work for Mr. Ellis's construction company, performing roofing and carpentry work. She further detailed that Reeves did well at the job and would wake up at 5:30/6:00 a.m. and be ready when his ride arrived to take him to work. Ms. Reeves further confirmed that approximately three months prior to the committed crime, Reeves was shot in the head on her front porch.

On cross examination, Ms. Reeves admitted Reeves had been in legal trouble multiple times prior to the incident in question for "lots of things", including stealing cars, breaking into homes, assault and drug offenses. The prosecution presented evidence that Reeves had been using marijuana since he was twelve and that he had numerous disciplinary actions at school (including cussing at teachers, threatening teachers, refusing to obey teachers, and hitting students) which caused him to be expelled. Ms. Reeves further opined that Reeves's behavior and conduct was better when Reeves was separated from his brother Julius, i.e., in group homes or when Julius was away in juvenile detention.

Dr. Kathy Ronan, clinical psychologist and forensic expert, then testified as to her examination, diagnosis, and opinion of Reeves.[26] In evaluating Reeves's mental state at the time of the crime and his competency to stand trial, Dr. Ronan stated that she relied on as much information as the parties had available, including investigative reports, police reports, witnesses' statements, coroner's statements, psychiatric history, juvenile history, scholastic history, as well as interviewing the defendant personally. In Reeves's case, she claimed that both the prosecution and defense provided her with these records and she also requested medical records from Carraway Medical Center and Selma Medical Center regarding treatment of Reeves's gunshot wound and psychiatric hospitalization, respectively.[27]

Review of the received records revealed and Dr. Ronan testified that Reeves "came from a very turbulent upbringing", which lacked "structure in the home or guidance or supervision." (Doc. 23-8 at 140; Vol. 8, JR-24, p. 1160). The jury further heard from Dr. Ronan that Reeves "presented with a number of behavioral difficulties in school. There [were] constant attempts on the part of the school to communicate with his mother - - the father was not present in the home - - in order to try and get him into appropriate programs and to control his behaviors." (*Id.*). The school records reviewed indicated "extreme truancy" and it was discovered that Reeves, and his brother, were roaming the streets. (*Id.* at 141). Documentation evidenced Reeves's mother suffered from a drinking problem and

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[26] Dr. Ronan confirmed she has completed approximately 700 forensic examinations in her eleven (11) years of practice. (Doc. 23-8 at 133).

[27] According to Dr. Ronan, the medical records related to psychiatric treatment at Selma Medical Center were never received, but no information was discovered to indicate that Reeves ever suffered from any type of major psychiatric disorder (doc. 23-8 at 157-58; Vol. 8, JR-24, pp. 1177-78), nor did medical records support that the gunshot wound to Reeves caused any neurological damage (doc. 23-8 at 157; Vol. 8, JR-24, p. 1177).

failed to "follow up" with: school recommendations to come in and discuss problems, mental health counseling appointments, and mental health treatment, including medication for attention deficient disorder. Dr. Ronan described that Reeves was twice placed in a group home by the Department of Youth Services subsequent to being adjudicated as a serious juvenile offender (for assault offenses), and while in the structured environment, Reeves "responded positively". (Doc. 23-8 at 146; Vol. 8, JR-24, p. 1166). Dr. Ronan further described how Reeves often followed the lead of his younger brother, Julius Reeves, and was involved in gang activity – which she explained was "not uncommon . . . to see individuals who may have a lot of loose structure at home become heavily involved in gang activities." (Doc. 23-8 at 147; Vol. 8, JR-24, p. 1167). Dr. Ronan expounded that gangs for such individuals become a "subculture", "[a]nd because this is who they are relating with, you know, going out shooting someone becomes nothing to them. It doesn't have the same meaning as it does for you and me." (Doc. 23-8 at 147-48; Vol. 8., JR-24, pp. 1167-68).

Dr. Ronan further testified that she conducted intellectual testing during her evaluation; specifically, she administered the verbal portion of the adult version of the Wexler Intelligence Scale. (Doc. 23-8 at 144-45; Vol. 8, JR-24, p. 1164-65). Dr. Ronan explained that she gave the verbal portion because it dealt with one's ability to understand and reason more so than the eye, hand coordination portion of the test, on which Reeves scored a 74 and fell within the borderline range of intellectual functioning. (Doc. 23-8 at 145, Vol. 8, JR-24, p. 1165). She opined that this verbal IQ score was comparable to the verbal score of 75 Reeves received when he was administered the child's version of the test at 14 years of age. (*Id.*). When questioned about the affect Reeves's lower intelligence, lack of parenting, and lack of discipline had on Reeves's decision to participate in gang

activity, Dr. Ronan affirmed that such factors "most certainly" made Reeves "more susceptible to [the] influence of gangs." (Doc. 23-8 at 148; Vol. 8. JR-24, p. 1168). She also opined that Reeves developed a personality disorder, which included adaptive paranoia due to his exposure to and need to survive in a dangerous environment, and that this disorder may not have occurred had Reeves been raised in what would be termed a "normal environment". (Doc. 23-8 at 149-50; Vol. 8; JR-24, pp. 1169-70). Dr. Ronan diagnosed Reeves as having a personality disorder mixed with anti-social paranoia (characterized as one who would repeatedly violate legal and social boundaries coupled with a mistrust of things around them) and borderline features (characterized as one who misreads social cues or has difficulty establishing close bonds with people). (*Id*). Dr. Ronan affirmed that the combination of Reeves' environmental and intelligence factors must be considered together when assessing "how [Reeves] got to where he is." (Doc. 23-8 at 151; Vol. 8, JR-24, p. 1171).[28]

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[28] As supporting evidence to Reeves's Rule 32 petition, Reeves submitted the affidavit of Dr. Kathy Ronan, in which she affirms that although she testified at Reeves's penalty phase hearing, a more thorough evaluation is necessary for mitigation in a capital case. Specifically, Dr. Ronan stated:

> The evaluation for Capital sentencing would contain different components than those for the trial phase evaluations, and would be more extensive in terms of testing and background investigation. These components were not completed in the case of Mr. Reeves in that I responded to the Court order and completed only evaluation of those areas I was requested to respond to, namely Competence to Stand Trial and Mental State at the Time of Offense.

(Doc. 23-15 at 11; Vol. 15, JR-60, p. 4). Dr. Ronan opined that due to Reeves's borderline intelligence range, an extensive neuropsychological evaluation and thorough background investigation would be clinically appropriate when considering a diagnosis of Mental Retardation and mitigation evidence for Capital sentencing. (Doc. 23-15 at 10-12; Vol. 15, JR-60, pp. 3-5).
The trial court considered Dr. Ronan's affidavit "in it's entirety" and concluded:

> Dr. Ronan's testimony during the sentencing phase of the Trial when considered with all exhibits and documents available to her at the time

Turning to the post-conviction Rule 32 hearing, Reeves presented the testimony of Dr. Karen Salekin, a forensic psychologist, in support of his claim that counsel unreasonably failed to retain a mitigation expert and put forth crucial mitigation evidence. Dr. Salekin opined that the mitigation evidence presented at the penalty phase was "a hodgepodge of information put out without context." (Doc. 23-24 at 132). She noted that testimony was provided as "single items" but "the whole story" was not present, i.e., "how the risk factors come together, how they play out in terms of protective factors and resilience"; according to Dr. Salekin, Dr. Ronan and Marzetta Reeves did not testify as to how the risk factors affected Reeves's development over time. (Doc. 23-24 at 132). In conducting her mitigation investigation, Dr. Salekin reviewed the records of Reeves's childhood and adolescent years, mental health records of Reeves's mother, Marzetta Reeves, criminal court records of Reeves's brother, Julius Reeves, interviewed Reeves's mother, his aunt, his previous employer, Jerry Ellis, and friends of the family, Beverley Seroy and Charles Morgan, and reviewed the trial transcript in her evaluation for mitigation evidence. Dr. Salekin illuminated the importance of early intervention in assisting individuals with numerous risk factors to help them develop coping strategies. (Doc. 23-24 at 134-136). Dr. Salekin identified and expounded on ten developmental risk factors related to Reeves: (1) multi-generational dysfunction, (2) maternal mental illness, (3) home environment, (4) father absence, (5) child neglect, (6) neuropsychological deficits, (7)

> including the Report prepared by her, establishes that it was reasonable for Defense Counsel to rely on her testimony and work as the sole source of mitigation evidence during the sentencing phase of his Trial. "The fact that Petitioner can find a professional witness years after his Trial that is willing to testify favorably at a post-conviction hearing in no way establishes that Trial Counsel's performance was deficient." *Horsley vs. Alabama*, 45 Fed.3rd 1486, 1495 (11th Cir. 1995).

(Doc. 23-16 at 157; Vol. 16, JR-65, p. 956).

deficient academic performance, (8) childhood psychological disorder, (9) institutionalization during adolescence, and (10) socioeconomic status.

Dr. Salekin testified that Reeves's mother was raised in a dangerous environment of abuse and neglect, with parents involved in illicit activities, and this negative pattern influenced Marzetta Reeves, causing her to develop a mental illness, specifically depression, and the dysfunction perpetuated downward to the next generation. Dr. Salekin testified as to the negative influence Reeves's brother Julius had on him and noted when Reeves was by himself, in group homes, "he had the capacity to be a kind, considerate person, follow[ed] order . . . yet when he got out of that environment and faced with Julius again, the same pattern of behavior came through. And again people attributed that to Julius." (Doc. 23-24 at 141). Salekin's investigation revealed that Reeves was brought up in an overcrowded, physically dilapidated structure that was filthy, rodent infested and falling apart (in part due to a fire that was set by Julius Reeves which rendered a room unusable because of an unfixed hole in the ceiling that went straight to the outdoors) and located in an extremely dangerous part of town referred to as Crack City". (Doc. 23-24 at 143). Ten to fourteen people would occupy the home simultaneously - creating a chaotic, argumentative, confrontational and violent environment, which negatively modeled to Reeves how to be involved in crime and deal with people. (Doc. 23-24 at 145). Weapons, alcohol and illicit substance abuse were mainstays of the house, and it was reported that children in the home often had easy access to guns and alcohol. Dr. Salekin testified that Reeves was often left at home with his grandmother, who did not want Marzetta to have Reeves at the age of 17 and encouraged her to abort him. And, the mental health, counseling records noted that Reeves had no positive reinforcement or emotional support at home or consistent discipline from his mother.

Records further revealed that Marzetta Reeves's depression was often untreated due to her noncompliance with medication, which can render one unable to parent appropriately and hinder the ability of a parent to attach to children. According to Dr. Salekin, Marzetta Reeves admitted, and Marzetta's sister confirmed, that she would often put her needs before her children and was unaware of her children's whereabouts, including their gang activity.

According to Dr. Salekin, Reeves's father, who was absent from Reeves's life until Reeves first had contact with him at age 15 (and once thereafter) was involved in criminal activity including the usage and selling of drugs. Dr. Salekin opined that Reeves likely idolized his father and speculated that Reeves may have modeled his father's criminal behavior. Additionally, Dr. Salekin opined that the three boyfriends of Marzetta Reeves also had a negative impact on Reeves. (Doc. 23-24 at 169-172).

In Dr. Salekin's opinion, these combined factors set Reeves on a path for conduct disorder which impacted his ability to function in school and in society. She explained that the combination of learning difficulties and conduct problems, like Reeves's, require early intervention or "there is a high likelihood that the behavior is going to worsen." (Doc. 23-24 at 178). Dr. Salekin confirmed this is exactly what happened to Reeves; his lower intellectual functioning was looked over and his dysfunctional behavior became the primary focus. Reeves, who was noncompliant with his attention deficit disorder and receiving low grades, began to act out to get attention. (Doc. 23-24 at 184-87). She affirmed that "the end result for someone with so many risk factors is often in the criminal justice system because there is nothing there to support the individual." (Doc. 23-24 at 164).

A comparison of the testimony presented at the penalty phase to that of the Rule 32 hearing demonstrates that the evidence produced in post-conviction proceedings by mitigation expert Dr. Salekin was more detailed but did not reveal completely unknown facts from those presented during the trial.[29] *See Walker v. State*, 194 So. 3d 253, 288 (Ala. Crim. App. 2015) ("[A] claim of ineffective assistance of counsel for failing to investigate and present mitigation evidence will not be sustained where the jury was aware of most aspects of the mitigation evidence that the defendant argues should have been presented.") (quoting *Frances v. State*, 143 So. 3d 340, 356 (Fla. 2014). Instead the Rule 32 evidence was merely cumulative to that presented at the penalty phase. *But cf*., *Williams v. Alabama*, 791 F.3d 1267 (11th Cir. 2015) ("because the sentencing judge and jury never heard evidence that Mr. Williams was a victim of sexual abuse, such evidence is not 'cumulative'. . . [and] can be powerful mitigating evidence, and is precisely the type of evidence that is 'relevant to assessing a defendant's moral culpability.'") (internal citation omitted).

Additionally, review of the sentencing order in light of the total evidence presented reveals that Reeves has failed to establish prejudice due to the failure of counsel to retain a mitigation expert. A single aggravating factor is articulated in the sentencing order (that being that the capital offense was committed while the defendant was engaged in the commission of a robbery), along with two mitigating factors: (1) that Reeves has no significant history of prior criminal activity, because juvenile adjudications may not be used to rebut the mitigating circumstance, and (2) Reeves' age at the time of the crime. The sentencing judge noted that the evidence was overwhelming that Reeves was the leader

[29] Notably, Dr. Salekin identified information related to Marzetta Reeves's life history and expounded on her neglectful parenting; additionally, Reeves's early exposure to guns, alcohol, and drug abuse due to its presence in the home was discussed.

of the crime and that despite Reeves's "low intellectual level, there was no evidence to show that he did not appreciate the criminality of his conduct, and there was no credible evidence presented to show that he could not conform his conduct to the requirements of law." (Doc. 23-2 at 24-25; Vol. 2, JR-3, p. 5-6). While acknowledging that Reeves "grew up in a poor home environment and that he lacked appropriate developmental resources in growing up", the sentencing judge maintained that evidence established "when placed in a structured environment, he responds positively", supporting that Reeves "had the ability to conduct himself properly and not engage in criminal conduct. He, however, voluntarily chose that course of conduct." (Doc. 23-2 at 25; Vol. 2, JR-3, p. 6). This assessment of aggravating and mitigating factors articulated in the sentencing order indicates "the new evidence" in Reeves's case "'would barely have altered the sentencing profile presented to the sentencing judge'", distinguishing this case from those where the "judge and jury at [the] original sentencing heard almost nothing that would humanize [the defendant] or allow them to accurately gauge his moral culpability." *Porter*, 558 U.S. at 41 (quoting *Strickland*, *supra*, at 700); *see also Evans v. Secretary, Dep't of Corr.*, 703 F.3d 1316, 1327 (11th Cir. 2013) (en banc) (To satisfy the prejudice prong, the likelihood of a different result must be substantial, not just conceivable.). After reviewing the omitted mitigation evidence and that which was presented, it cannot be said that counsel was unreasonable in their decision not to retain a mitigation expert nor was Reeves prejudiced by the decision. Therefore, the state court's decision was not contrary to or an unreasonable application of federal law. Consequently, the claim for habeas relief on this basis is denied.

d. Claim that counsel failed to preserve error for appellate review and appellate counsel failed to raise claims on direct appeal.

Reeves challenges in his petition that trial counsel failed to preserve the following errors for appellate review and appellate counsel failed to raise the same arguments on direct appeal: (1) instructional errors by the Circuit Court (that the jury's verdict was advisory); (2) prosecution's misconduct and improper arguments during trial;[30] and (3) unconstitutionality of Alabama's sentencing scheme. (Doc. 24 at 60). Respondent asserts that this claim was addressed and denied by the Alabama Court of Criminal Appeals on post-conviction appeal and, additionally, that the claim lacks merit. (Doc. 25 at 85-89).

The Alabama Court of Criminal Appeals, in its memorandum opinion affirming the circuit court's denial of Reeves's Rule 32 petition, reasoned:

> "The decisions by counsel that Reeves challenges . . what objections to make and what issues to raise at trial, and what issues to raise on appeal - - are typically considered strategic decisions, and do not constitute per se deficient performance. *See, e.g., . . .Lane v. State*, 708 So. 2d 206, 209 (Ala. Crim. App. 1997) ("This court has held that '[o]bjections are a matter of trial strategy, and an appellant must overcome the presumption that "conduct falls within the wide range of reasonable professional assistance," that is, the presumption that the challenged action "might be considered sound trial strategy."' *Moore v. State*, 659 So. 2d 205, 209 (Ala. Cr. App. 1994)."); and *Thomas v. State*, 766 So. 2d 860, 876 (Ala. Crim. App. 1998) ("[A]ppellate counsel has no constitutional obligation to raise every nonfrivolous issue. . . . Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal."), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds, *Ex parte Taylor*, 10 So. 3d 1075 (Ala. 2005))."

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[30] In his habeas petition and response to the State's answer, Reeves fails to specify the "prosecution's misconduct and improper arguments" being challenged (Doc. 24 at 60-61; Doc. 28 at 29-32). Review of Reeves's Rule 32 Petition, where he first presented this claim, raises challenges to the prosecution's reference to Reeves as a gang member during the trial and penalty phase (doc. 23-14 at 189-192; Vol. 14, JR-60, pp. 41-45), to the prosecution's repeated comments and the court's instruction to the jury that its verdict was a recommendation (doc. 23-14 at 193-194; Vol. 14, JR-60, pp. 45-46), and to the prosecution's argument to the jury to consider non-statutory aggravating circumstances (doc. 23-14 at 194-197; Vol. 14, JR-60, pp. 47-49). Given that Reeves's habeas filings provide argument and citation support related only to the questions regarding the comments to the jury diminishing its sentencing role by referring to its verdict as "advisory" and challenges to Alabama's sentencing scheme, the Court, thus, interprets Reeves's ineffective assistance claim to be related to the same.

Reeves, 226 So. 3d at 750; Doc. 23-31 at 85; Vol. 31, JR-94, p. 84. The Court of Criminal Appeals further stated:

> "[T]he record is silent as to the reasons trial counsel. . . chose not to object at trial to the prosecutor's allegedly urging the jury during closing arguments at the penalty phase of the trial to consider nonstatutory aggravating circumstances to impose a death sentence, to the prosecutor's introducing evidence and making argument during both the guilt and penalty phases of the trial that Reeves was involved in a gang, to the prosecutor's allegedly referring to the jury's penalty-phase verdict as a recommendation, and to the trial court's instructing the jury that its penalty-phase verdict was a recommendation. The record is also silent as to the reasons appellate counsel chose not to raise on appeal the claims that the prosecutor improperly urged the jury during closing arguments at the penalty phase of the trial to consider non-statutory aggravating circumstances to impose a death sentence, that the prosecutor improperly introduced evidence and argued during both the guilt and penalty phases of the trial that Reeves was involved in a gang, that the prosecutor improperly referred to the jury's penalty-phase verdict as a recommendation, and that the trial court improperly instructed the jury that its penalty-phase verdict was a recommendation. Where """the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim.""" *Broadnax*, 130 So. 3d at 1256 (citations omitted)."

Id. at 751.

> Counsel's competence … is presumed, and the [petitioner] must rebut this presumption by *proving* that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." *Kimmelman v. Morrison,* 477 U.S. 365, 106 S. Ct. 2574, 2588, 91 L. Ed. 2d 305 (1986) (emphasis added) (citations omitted). An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." *Williams,* 185 F.3d at 1228; *see also Waters,* 46 F.3d at 1516 (en banc)(noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial indicate that counsel exercised sound professional judgment).

Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (emphasis in original). The state court's decision was not contrary to, or involved an unreasonable application of *Strickland*.

Furthermore, Reeves has failed to establish prejudice under *Strickland*. As discussed, *infra*, at section IV., 6., the trial court's instructions to the jury and the prosecution's comments to the jury that its sentencing verdict was "advisory" or a "recommendation" were in fact accurate based on state law. *Doster v. State*, 72 So. 3d 50 (Ala. Crim. App. 2010) (trial court did not diminish jury's role in sentencing by referring to its verdict as a recommendation), *cert. denied by*, 132 S. Ct. 760, 181 L. Ed. 2d 490 (2011). Moreover, telling the jury that their decision is advisory is not contrary to *Caldwell v. Mississippi*, 472 U.S. 320 (1985). In *Caldwell* the court held it is "constitutionally impermissible to rest a death sentence on a determination made by a **sentencer** who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. *Caldwell* at 328–29 (emphasis added). In Alabama, the "sentencer" is not the jury, it is the judge. Because the court's instructions to the jury were proper, counsel is not ineffective for failing to object to the instructions at trial or raise such a claim on appeal. *Chandler v. Moore*, 240 F.3d 907, 917 (11th Cir. 2001) (counsel is not ineffective for failing to raise a non-meritorious objection or claim).

Likewise, as discussed, *infra*, in section IV., 7., an objection to Alabama's "sentencing scheme" would have been without merit. Consequently, Reeves cannot establish that but for counsel's deficient performance, the result of his trial or appeal would have been different. Thus, the state court did not err in its application of *Strickland*.

4. Whether the Constitutional Right to a Fair Trial was Denied Due to Juror Misconduct.

Reeves asserts in his petition that he was denied a fair trial, in violation of the Sixth and Fourteenth Amendments, because the jury which convicted him considered extraneous evidence and engaged in extraneous conversations. Thus Reeves concludes that the Criminal Court of Appeals' decision that ruled otherwise, was based on an unreasonable determination of the facts and involved an unreasonable application of Supreme Court precedent. He asserts in his petition that "he is now entitled to relief in this Court and an evidentiary hearing." (Doc. 24 at 69). Specifically, Reeves alleges that during the trial, Juror Jane Doe observed media reports regarding the trial and spoke with her husband about the trial; furthermore, during the penalty phase deliberations, Juror Jane Doe made statements to the jury that it did not matter how the jury voted because the sentencing decision lay with the judge, made statements to the members of the jury that Reeves's family "would "come after" the jurors after the trial[31] and spoke with another juror outside of jury deliberations to persuade her to change her vote. Reeves supports this challenge with the affidavit of Ms. Blackmon, one of the jurors, who avers these same facts. (Doc. 23-15 at 15).

The record reveals that Reeves presented this claim in his post-conviction Rule 32 petition. The Circuit Court, in summarily dismissing the claim and denying Reeves an evidentiary hearing, held that the juror misconduct claim was procedurally barred pursuant to Rules 32.2(a)(3) and (a)(5) of the *Alabama Rules of Criminal Procedure*, because the claim could have been but was not raised at trial or on appeal.[32] (Doc. 23-16 at 20). In

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[31] As noted by the Court of Criminal Appeals, Reeves does not allege that "Juror Jane Doe's statement to the jury that Reeves's family would "come after" the jurors after trial was based on extraneous information she had received." *Reeves*, 226 So. 3d at 754, n. 19.

[32] Juror misconduct claims are cognizable under Rule 32.1(a), Ala. R. Crim. P., as an alleged constitutional violation. *See also, Ex parte Pierce*, 851 So. 2d 606, 613 (Ala. 2000). Such claims are subject to the preclusions of Rule 32.2, including the denial of relief for

affirming the Circuit Court's decision, the Alabama Court of Criminal Appeals found that the court erred in holding that the claims were procedurally barred pursuant to 32.2(a)(3) and (a)(5)[33] but determined the error did not require a remand, because Reeves's juror misconduct "claims were not sufficiently pleaded to warrant an evidentiary hearing and, therefore, that the circuit court properly refused to allow Reeves to present evidence on this

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claims which could have been but were not raised at trial or on appeal. Ala. R. Crim. P. 32.2(a)(3) and (a)(5).

[33] Citing to *Ex parte Hodge*, 147 So. 3d 973 (Ala. 2011); *Ex parte Harrison*, 61 So. 3d 986 (Ala. 2010); and *Ex parte Burgess*, 21 So. 3d 746 (Ala. 2008), the Court of Criminal Appeals determined that the preclusions of Rule 32.2(a)(3) and (a)(5) were not applicable. Alabama law dictates that these preclusions are only applicable when there is evidence in the record indicating the petitioner should have been aware before filing his motion for a new trial or direct appeal of juror misconduct. *Ex parte Harrison*, 61 So. 3d 986, 990 (Ala. 2010) ("Placing a requirement on a defendant to uncover any and all possible juror misconduct without reason to know what type of misconduct the defendant might be looking for or, in fact, whether any misconduct occurred, would require criminal defendants to embark on a broad-ranging fishing expedition at the conclusion of every criminal trial or waive the right to complain of any juror misconduct the defendant might ultimately discover.") (citing *Ex parte Burges*s, 21 So. 3d 746 (Ala. 2008); *see also Waldrop v. Thomas*, 3:08-CV-515-WKW [WO], 2014 U.S. Dist. LEXIS 43168, *302-313 (M.D. Ala., E.D., March 31, 2014) (juror misconduct claim was not procedurally defaulted as "petitioner's counsel was not obligated to undertake a "fishing expedition" in the form of interviews with the jurors in time to raise his claim in a motion for new trial or on direct appeal.").

A review of the record reveals that in his Rule 32 petition, Reeves plead that "trial counsel could not have objected to jury misconduct during Mr. Reeves' trial and could not have raised it on direct appeal because counsel did not and could not have known about the misconduct" (doc. 23-14 at 187) and further contends in his response to the State's Answer that "counsel became aware of the juror misconduct only during counsel's post-conviction investigation. (Doc. 23-16 at 131). The record further shows that the State nor the Circuit Court articulated what further action should have been taken by Reeves to discover his claim sooner, and the record is void of facts to support that counsel was put on notice of juror misconduct during the trial or prior to bringing the claim. Therefore, there is no evidence in the record indicating that Reeves knew of a potential juror misconduct claim prior to post-conviction proceedings. *See Ex parte Burgess*, 21 So. 3d 746 (Ala. 2008) (there is no evidence in the record indicating that Burgess should have been aware that some jurors provided untruthful or inaccurate answers during voir dire examination); *Gillis v. Frazier*, 214 So. 3d 1127, 1139-40 (Ala. 2014) (no evidence in record indicating that Gillis had reason to know of juror misconduct earlier than pleaded). Accordingly, based on state law, it appears that Reeves's juror misconduct claim was not procedurally defaulted pursuant to 32.2(a)(3) and (a)(5).

claim at the Rule 32 hearing."[34] *Reeves*, 226 So. 3d 711, 753. The Court of Criminal Appeals stated in its memorandum opinion:

> Rule 32.3, Ala. R. Crim. P., states that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Rule 32.6(b), Ala. R. Crim. P., states that "[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." To sufficiently plead a claim of juror-misconduct, a Rule 32 petitioner must, at a minimum, identify the juror who the petitioner believes committed the misconduct, must allege specific facts indicating what actions that juror took that the petitioner believes constituted misconduct, and must allege specific facts indicating how that juror's actions denied the petitioner a fair trial. *See, e.g., Moody v. State*, 95 So. 3d 827, 859 (Ala. Crim. App. 2011) (holding that Rule 32 petitioner had failed to satisfy his burden of pleading his claim of juror misconduct when the petitioner "failed to identify a single juror who he believed did not answer questions truthfully during voir dire," failed to "identify which questions he believe[d] the jurors did not answer truthfully," and "failed to plead what 'extraneous' information he believes was considered during the jury's deliberations or how that information prejudiced him.").
>
> In this case, Reeves failed to identify in his petition the juror he believed committed the misconduct; he referred to the juror only as "Juror Jane Doe." (C. 584-85.) He also failed to identify the juror who allegedly changed her vote during the penalty-phase deliberations after allegedly speaking with Juror Jane Doe privately. G.B.'s affidavit also failed to identify Juror Jane Doe or the juror who allegedly changed her vote during the penalty-phase deliberations. In a footnote in his petition, Reeves admitted that he knew the identity of both jurors; he alleged that "[s]ignificant efforts have been undertaken to identify Juror Jane Doe" and that "by speaking with certain jurors who served on Mr. Reeves's trial and have been willing to speak with Mr. Reeves's current counsel, the identities of these jurors are believed to be known." (C. 585.) Nonetheless, Reeves failed to identify either juror in his petition. In addition, although Reeves alleged that Juror Jane Doe had spoken to her husband about the case and had watched and read media reports about the case, Reeves failed to identify exactly what information Juror Jane Doe received from her husband or from the media reports or how this unidentified information prejudiced him.

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[34] "[T]here exists a long-standing and well-reasoned principle that [Criminal Court of Appeals] may affirm the denial of a Rule 32 petition if the denial is correct for any reason." *McNabb v. State*, 991 So. 2d 313, 333 (Ala. Crim. App. 2007).

Because Reeves failed to identify in his petition Juror Jane Doe, the juror he believed was improperly influenced during the penalty phase of the trial, or the specific "extraneous" information he believed Juror Jane Doe improperly considered, all of Reeves's juror-misconduct claims were insufficient to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b). Moreover, Reeves's claim that Juror Jane Doe repeatedly told the other members of the jury that Reeves's family "would 'come after' the jurors after the trial" and stressed to the other jurors that "the decision to impose the death penalty truly belonged to the judge rather than the jury" also fails to state a material issue of fact or law upon which relief could be granted. (C. 585.) Reeves's claim in this regard is based on the debates and discussions of the jury, not on extraneous facts considered by it. As this Court explained in *Bryant v. State*, 181 So. 3d 1087 (Ala. Crim. App. 2011):

> "It is well settled that 'matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision.' *Sharrief v. Gerlach*, 798 So. 2d 646, 653 (Ala. 2001). 'Rule 606(b), Ala. R. Evid., recognizes the important "distinction, under Alabama law, between 'extraneous facts,' the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the 'debates and discussions of the jury,' which are protected from inquiry."' *Jackson v. State*, 133 So. 3d 420, 431 (Ala. Crim. App. 2009) (quoting *Sharrief*, *supra* at 652). '[T]he debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts.' *Sharrief*, 798 So. 2d at 653. Thus, 'affidavit[s or testimony] showing that extraneous facts influenced the jury's deliberations [are] admissible; however, affidavits concerning "the debates and discussions of the case by the jury while deliberating thereon" do not fall within this exception.' *CSX Transp., Inc. v. Dansby*, 659 So. 2d 35, 41 (Ala. 1995) (quoting *Alabama Power Co. v. Turner*, 575 So. 2d 551, 557 (Ala. 1991))."

181 So. 3d at 1126-27. To allow "consideration of this claim of juror misconduct – which is based entirely on the debate and deliberations of the jury – 'would destroy the integrity of the jury system, encourage the introduction of the unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny.'" *Bryant*[*v. State*], 181 So. 3d [1087,] 1128 [(Ala. Crim. App. 2011) (quoting *Jones v. State*, 753 So. 2d 1174, 1204 (Ala. Crim. App. 1999)).

For these reasons, the circuit court properly dismissed Reeves's claim of juror misconduct without affording Reeves an opportunity to present evidence.

Reeves, 226 So. 3d at 753-755.

The Alabama Court or Criminal Appeals based its dismissal of Reeves's juror misconduct claim pursuant to 32.6(b), which is considered an adjudication on the merits. *Borden v. Allen*, 646 F.3d 785, 816 (11th Cir. 2011) (a ruling "under Rule 32.6(b) is . . . a ruling on the merits"); *Daniel v. Comm'r Ala. Dep't of Corr*., 822 F.3d 1248, 1261 (11th Cir. 2016) (dismissal pursuant to 32.6(b) is evaluated under AEDPA's "contrary to, or involved an unreasonable application of clearly established Federal law' standard); *Frazier v. Bouchard*, 661 F.3d 519, 525 (11th Cir. 2011) ("[B]ecause a dismissal ... for failure to sufficiently plead a claim under Rule 32.6(b) requires an evaluation of the merits of the underlying federal claim, the Court of Criminal Appeals's determination was insufficiently 'independent' to foreclose federal habeas review. Accordingly, the district court was not barred from considering the merits of the relevant claim." (footnote omitted)); *Lee v. Comm'r, Ala. Dep't of Corr*., 726 F.3d 1172, 1208 (11th Cir. 2013) ("We have held repeatedly that a state court's rejection of a claim under the state's heightened-fact pleading rule in Alabama Rule of Criminal Procedure 32.6(b) is a ruling on the merits."); *Alvarez v. Stewart*, 2016 U.S. Dist. LEXIS 124074, *27 (Ala. N.D., Aug. 1, 2016) ("The Eleventh Circuit has concluded that state-court dismissals for failure to plead facts with specificity amounts to a merits determination, not a procedural default."). Under AEDPA, the Court must therefore ask whether "fairminded jurists could disagree on the correctness of the state court's decision", that is that Reeves failed to plead facts sufficient to demonstrate a possibility of constitutional error. *Harrington v. Richter*, 562 U.S. 86, 101, 131 S. Ct. 770, 178 L. Ed, 2d 624 (2011); *see also Daniel*, 822 F.3d at 1261 (Under AEDPA review, the court must "answer two questions to resolve th[e] habeas appeal. First whether [the] . . Rule 32 petition and its attached exhibits pleaded enough specific facts that, if proven,

amount to a valid . . . claim. Second, if we answer the first question in the affirmative, we must determine whether the Alabama Court of Criminal Appeal's decision to the contrary was unreasonable under § 2254(d)).

The Sixth Amendment to the United States Constitution guarantees the right to trial by an impartial jury. U.S. CONST. amend. VI. "[E]mbraced in the constitutional concept of trial by jury" is the requirement that a jury's verdict "must be based upon the evidence developed at the trial." *Turner v. Louisiana*, 379 U.S. 466, 472, 85 S. Ct. 546, 549, 13 L. Ed. 2d 424, 428 (1965) (internal quotation omitted) (a jury must base its verdict on evidence coming "from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel."). "[T]here is[, however,] no constitutional right to a perfect trial," *United States v. Alvarez,* 755 F.2d 830, 859 (11th Cir. 1985) (quoting *United States v. Ragsdale,* 438 F.2d 21 (5th Cir. 1971)), as "it is virtually impossible to shield jurors from every contact or influence that might theoretically affect their vote. *Smith v. Phillips,* 455 U.S. 209, 217, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982). When a petitioner challenges the impartiality of a jury resulting from juror exposure to extraneous information, he bears the burden of making a colorable showing that the exposure actually occurred. *United States v. Ayarza-Garcia,* 819 F.2d 1043, 1051 (11th Cir. 1987).

> To be sure, where "a colorable showing of extrinsic influence is made, a trial court ... must make sufficient inquiries or conduct a hearing to determine whether the influence was prejudicial." *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir.1984) (citation omitted). But "there is no *per se* rule requiring an inquiry in every instance. The duty to investigate arises only when the party alleging misconduct makes **an adequate showing** of extrinsic influence to overcome the presumption of jury impartiality." *Id.* (citations omitted). Where allegations are "speculative or unsubstantiated," the "burden to investigate" does not arise. *See United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir.1985). "In other words, there must be something more than mere speculation." *Barshov*, 733 F.2d at 851.

United States v. Alexander, 782 F.3d 1251, 1258 (11th Cir. 2015) (emphasis added). Importantly, the burden of pleading is distinguishable from the burden of proof necessary to establish a meritorious claim. *See, e.g., Ex parte Hodges*, 147 So. 3d 973, 976-977 (Ala. 2011) (The burden of pleading requites "a clear and specific statement of the grounds upon which relief is sought"). 'Once a petitioner has met his burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d) Ala. R. Crim. P., he is then entitled an opportunity to present evidence in order to satisfy his burden of proof.' *Id*. (quoting *Ford v. State*, 931 So. 2d 641, 644 (Ala. Crim. App. 2001); *see Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief; *United States v. Cuthel*, 903 F.2d 1381, 1383 (11th Cir. 1990) (The party requesting a hearing must first make an initial showing "[t]o justify a post-trial hearing involving the trial's jurors. . . .").

In support of this claim, Reeves presents the affidavit of Juror Ms. Blackmon. The affidavit states in relevant part:

> There was one member of the jury that was very controlling during our deliberations. I do not remember this juror's name, but this juror was female with dark hair. The juror repeatedly stated to the other jurors that she was afraid that Mr. Reeves' family would "come after" the jurors after the trial. This juror also repeatedly stated that she had discussed the case with her husband and had read newspaper articles and watched television news coverage of the case during the trial. This juror stated that she did not care what the judge said regarding not talking about the case with others and not learning about the case from media coverage.
>
> After our initial deliberations, the jury vote 9-3 in favor of the death penalty. There was a young woman on the jury who was very emotional and crying after the vote. This young woman stated that she did not think that the co-defendants' testimony added up and that there were too many inconsistencies in their testimony.
>
> At this point, the controlling juror began to try to persuade the young juror to change her vote to death. She repeatedly stated to the entire jury that the

> decision regarding a death sentence was really for the judge and not for the jury, so it did not matter how they voted. The controlling juror then suggested that she and the younger juror leave the jury room. She took the young juror into the hallway outside the jury room. I believe they were alone in the hallway because there was no guard and the courthouse was mostly empty because it was a Saturday.
>
> Immediately upon their return to the jury room, the controlling juror suggested that the jury vote again. The result was 10-2 in favor of death, and the young jury had changed her vote from life in prison without the possibility of parole to the death penalty.
>
> As soon as the vote was over, the controlling juror slammed her hands on the table and exclaimed, "Ring the bell, let's go home." She also repeated her statement that the decision regarding the death penalty was up to the judge, not the jury.

(Doc. 23-15 at 15-16).

"[A]llegations of juror misconduct concerning outside influences must be fully investigated to determine the scope of the misconduct and to ensure no prejudice results." *United States v. Bradley*, 644 F.3d 1213, 1276 (11th Cir. 2011). A petitioner, however, is not entitled to an evidentiary hearing when his claims are merely "conclusory allegations unsupported by specifics." *Blackledge v. Allison*, 431 U.S. 63, 74, 97 S. Ct. 1621, 52 L. Ed. 2d 136 (1977). To make an 'adequate showing,' a defendant "must show clear, strong, substantial and incontrovertible evidence . . . that a specific, nonspeculative impropriety has occurred." *Cuthel*, 903 F.2d at 1383 (internal quotations omitted) (quoting *United States v. Ianniello*, 866 F.2d 540, 543 (2d Cir. 1989)). The duty to investigate juror misconduct has been described by the Eleventh Circuit as existing on a spectrum. *United States v. Caldwell*, 776 F.2d 989, 998 (11th Cir. 1985). The duty to investigate is at its nadir when the allegations are speculative or unsubstantiated. *Id*. ("The more speculative or unsubstantiated the allegation of misconduct, the less the burden to investigate."). Conversely, the duty to investigate reaches its zenith the more certain the allegations. *Id*. ("At one end of the spectrum the cases focus on the certainty that some impropriety has

occurred."). In sum, as the certainty of potential jury contamination increases so too does the duty to investigate. The evidence for Reeves's claim surely rests on the lower end of this spectrum.

Alabama requires that "[e]ach claim in the [Rule 32] petition must contain a clear and specific statement of the grounds upon which relief is sought, **including full disclosure of the factual basis** of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." Ala. R. Crim. P. Rule 32.6(b) (emphasis added). "An evidentiary hearing on a [Rule 32] petition is required only if the petition is 'meritorious on its face.'" *Boyd v. State*, 913 So.2d 1113, 1125 (Ala. Crim. App. 2003) (quoting *Ex parte Boatwright*, 471 So. 2d 1257 (Ala. Crim. App. 1985) (alteration in original). Stated another way, the petitioner must allege facts in the pleading, which if true, entitle a petitioner to relief. *Id*. "'Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously without merit or is precluded, the circuit court [may] summarily dismiss that petition.'" *Id*. at 1126 (quoting *Tatum v. State*, 607 So. 2d 383, 384 (Ala. Crim. App. 1992)).

Taking the allegations of Reeves's Rule 32 petition as true, Reeves's pleading lacks sufficient facts to warrant a hearing. Reeves's failure to plead the name of the juror alleged to have engaged in the misconduct[35], coupled with the failure to disclose the subject of the extraneous information that Juror Jane Doe acquired from the media coverage[36] or from

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[35] Although Reeves contends he has sufficiently identified characteristics of this juror, the Court finds the facts that the juror was "a female with dark hair" to be demonstrably indistinct and, therefore, insufficient to identify the juror. (Doc. 23-15 at 15).

[36] Where a juror or jury has been exposed to media coverage, there is no presumed prejudice until "it is shown [that] such information was disclosed in the jury room." *United States v. Gaffney*, 676 F. Supp. 1544, 1551 (11th Cir. 1987). Even then, it may be demonstrated that the extrinsic evidence was not prejudicial. *See United States v. Bolinger*,

conversations with her husband (or even if such information was shared with the other jurors), supports a finding of an insufficient pleading pursuant to 32.6(b). *Accord*., *Hyde v. State*, 950 So. 2d 344, 356 (ala. Crim. App. 2006) ("The full factual basis for the claim must be included in the petition itself."). The absence of details plead regarding the extrinsic influence creates an unfillable void for the court in determining the nature of what reached the jury or may have influenced the verdict vote. Reeves's blanket assertions are impossible for the State to defend against. *See Brown v. State*, 807 So. 2d 1, 5-7 (Ala. Crim. App. 1999) (Pleading is insufficient pursuant to 32.6(b) where petitioner makes a "blanket assertions that jurors failed to answer questions" and does "not identify specific questions or jurors"); *see also Bryant v. State*, 181 So. 3d 1087 (Ala. Crim. App. 2011) (bare allegations that extraneous information coerced reluctant jurors to vote for death was insufficient to satisfy pleading requirements of 32.3 and 32.6(b)); *Stallworth v. State*, 171 So. 3d 53 (Ala. Crim. App. 2013) (insufficiently pleaded due to failure to identify juror); *Mashburn v. State*, 148 So. 3d 1094 (Ala. Crim. App. 2013) (summary dismissal for bare assertion that "a majority" of the venire had heard about the case but failed to identify a single juror that had read or heard about the case); *Williams v. Alabama*, 2010 U.S. Dist. LEXIS 51850 (N.D. Ala. April 12, 2012) (summary dismissal upheld for failure to state facts to support claim, like which juror was untruthful, . . .); *Woods v. State*, 221 So. 3d 1125 (Ala. Crim. App. 2016) (finding failure to plead adequately where Woods vaguely

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837 F.2d 436 (11th Cir., *cert. denied*, 486 U.S. 1009, 108 S. Ct. 1737, 100 L. Ed.2d 200 (1988) (juror's reading of a newspaper article containing information that had been suppressed as evidence was not prejudicial to the verdict considering the weight of evidence produced at trial against the defendant); *United States v. Guida*, 792 F.2d 1087, 1094 (11th Cir. 1986); (no prejudice in where extraneous information was merely duplicative of trial evidence); *but cf*., *United States v. Williams*, 568 F.2d 464 (5th Cir. 1978) (several jurors' hearing television report that defendant had previously been convicted of same offenses was prejudicial).

alleged "all of the jurors" were exposed to pretrial publicity); *United States v. Gaffney*, 676 F. Supp. 1544, 1551 (11th Cir. 1987) ("As a threshold matter, defendants must establish that extraneous material did in fact make its way into the jury room.).

Additionally, Reeves's remaining claims, that Juror Jane Doe improperly communicated with the jury, influencing the verdict, fall under the general exclusionary provision of Ala. R. Evid. 606(b), as the claims do not involve extrinsic or outside information reaching the jury. *Accord*., *Avarza-Garcia*, 819 F.2d at 1051 ("[p]ost-verdict inquiries into the existence of impermissible extraneous influences on a jury's deliberations are allowed under appropriate circumstances, but inquiries that seek to probe the mental processes of jurors are impermissible."). "A general rule has evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations." *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 861, (2017) (examining the history of the "no-impeachment rule"). This "near-universal and firmly established common-law rule in the United States flatly prohibit[s] the admission of juror testimony to impeach a jury verdict." *Tanner v. United States,* 483 U.S. 107,]117, 107 S. Ct. 2739, 97 L. Ed. 2d 90 (1987).

> Courts recognize few exceptions to this common-law rule and allow juror testimony on the jury's activities *only* in situations in which an *extraneous influence* been shown. *Id.* "In situations that did not fall into this exception for external influence, however, the [Supreme] Court [has] adhered to the common-law rule against admitting juror testimony to impeach a verdict." *Id.* On more than one occasion, the Supreme Court has considered and affirmed the wisdom of this approach and in so doing has discussed the numerous and substantial policy considerations supporting this approach. *See, e.g., Tanner,* 483 U.S. at 117-21 (collecting cases). Indeed, the Eleventh Circuit and the Supreme Court have repeatedly found that district courts did not abuse their discretion in denying motions for new trial or in rejecting defendants' demands for the examination of jurors predicated on

> arguments of a variety of types of juror misconduct *not encompassing* external influence on the jury.

United States v. Siegelman, 467 F. Supp. 2d 1253, 1270 (M.D. Ala. 2006). This common-law rule is supported by Alabama statutory law:

> Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes. Nothing herein precludes a juror from testifying in support of a verdict or indictment.

Ala. R. Evid. Rule 606(b), and federal statutory law:

> **(b) Inquiry into validity of verdict or indictment.**
>
> (1) *Prohibited Testimony or Other Evidence*. During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.
>
> (2) *Exceptions*. A juror may testify about whether:
>
> (A) extraneous prejudicial information was improperly brought to the jury's attention;
> (B) an outside influence was improperly brought to bear upon any juror; or
> (C) a mistake was made in entering the verdict on the verdict form.

Fed. R. Evid. 606(b).[37]

[37] Rule 606(b) applies to § 2254 proceedings pursuant to Fed. R. Evid. 1101(e).

In his petition, Reeves claims that Juror Jane Doe stated to the jury that Reeves's family "would come after the jurors after the trial" and that "the decision to impose the death penalty truly belonged to the judge rather than the jury". (Doc. 24 at 68. Reeves contends that these comments injected unfounded speculation into the jury's deliberations. However, he fails to plead or allege that the comments were made based on outside influence or extrinsic information. Therefore, Reeves's allegations are inadmissible pursuant to Rule 606(b). Likewise, Reeves essentially pleads that Juror Jane Doe coerced a "younger juror" into changing her vote, resulting in the verdict vote change to 10-2, in favor of the death penalty, but he fails to allege that any extraneous information was used to sway the vote. Therefore, Reeves has failed to establish that his claims meet an exception to the firm rule that "a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the juror to assent to or dissent from the verdict", and he has failed to sufficiently plead a claim for relief. Ala. R. Evid. Rule 606(b). *See also, Sharrief v. Gerlach*, 798 So.2d 646, 652 (Ala. 2001) (affidavits containing accounts of jurors' discussions did not fall under the extraneous information exception); *United States v. Campbell*, 221 App. D.C. 367, 684 F.2d 141, 151 (D.C. Cir. 1982) (jury's verdict will not be upset on basis of juror's post-trial report of jury deliberations unless extraneous influence is shown; evidence of discussion among jurors, intimidation of one juror by another, and other intra-jury influences on the verdict are not competent to impeach the verdict.); *United States v. Norton*, 867 F.2d 1354, 1366 (11th Cir. 1989) (noting that "alleged harassment or intimidation of one juror by another would not be competent evidence to impeach the guilty verdict"); *United States v. Barber*, 668 F.2d 778, 786 (4th Cir. 1982) (no basis to impeach

verdict where juror claimed that foreman "scared [her] to death"); *United States v. Bassler*, 651 F.2d 600, 602 (8th Cir. 1981) ("Intrinsic influences include discussions and even intimidation or harassment among jurors", and intrinsic influences are not competent to impeach verdict). Consequently, Reeves's juror misconduct claims related to Juror Jane Doe's comments to the jury are excluded from review pursuant to Rule 606(b) as they do not involve extrinsic communications or information affecting the jury's verdict. Accordingly, the Alabama Court of Criminal Appeals' decision was not contrary to, or an unreasonable application of, clearly established federal law, and the claim is denied.

To the extent Reeves seeks an evidentiary hearing in this Court, such relief is denied pursuant to 28 U.S.C. § 2254(e). According to §2254, the factual determinations made by a State court shall be presumed to be correct, and the failure to develop the factual basis of a claim in State court proceedings will not entitle petitioner to an evidentiary hearing, unless the claim relies on "a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" or "a factual predicate that could not have been previously discovered through the exercise of due diligence." §2254(e)(A)(i) and (ii). Reeves has failed to overcome this threshold and is, thus, barred from a hearing in this Court.

5. Whether the State of Alabama's Method of Execution is Unconstitutional.

In his petition, Reeves argues that the State of Alabama's undisclosed procedures for administering lethal injection, including the risk of improper sedation, pose a substantial risk of inflicting unnecessary pain in violation of the Eighth Amendment. Respondent asserts that this claim: (1) is outside the Court's habeas jurisdiction and is properly raised pursuant to 42 U.S.C. § 1983; (2) lacks merit, and (3) was previously reviewed and denied by the Alabama Court of Criminal Appeals.

> "Federal law opens two main avenues to relief on complaints related to imprisonment: a petition for habeas corpus, 28 U.S.C. § 2254, and a complaint under the Civil Rights Act of 1871, Rev. Stat. § 1979, as amended, 42 U.S.C. § 1983. Challenges to the validity of any confinement or to particulars affecting its duration are the province of habeas corpus." *Muhammad* v. *Close,* 540 U.S. 749, 750, 124 S. Ct. 1303, 158 L. Ed. 2d 32 (2004) *(per curiam)* (citing *Preiser*, 411 U.S. at 500, 93 S. Ct. 1827, 36 L. Ed. 2d 439). An inmate's challenge to the circumstances of his confinement, however, may be brought under § 1983. 540 U.S., at 750, 124 S. Ct. 1303, 158 L. Ed. 2d 32.

Hill v. McDonough, 547 U.S. 573, 579, 126 S. Ct. 2096, 2101, 165 L. Ed. 2d 44, 51 (2006).

The Eleventh Circuit has explained that "[t]he line of demarcation between a § 1983 civil rights action and a § 2254 habeas claim is based on the effect of the claim on the inmate's conviction and/or sentence." *Hutcherson v. Riley*, 468 F.3d 750, 754 (11th Cir. 2006). "When an inmate challenges the 'circumstances of his confinement' but not the validity of his conviction and/or sentence, then the claim is properly raised ... under § 1983." *Id.; see also Nelson v. Campbell*, 541 U.S. 637, 124 S. Ct. 2217, 158 L. Ed. 2d 924 (2004) (method-of-execution challenge was properly brought pursuant to § 1983 as success of the claim would not prevent the State from executing inmate); *Hill v. McDonough*, 547 U.S. 573, 126 S. Ct. 2096, 165 L. Ed. 2d 44 (2006) (challenge to method-of-execution was appropriately brought pursuant to § 1983 because success of the claim would not prevent the State from executing inmate). By contrast, "[f]ederal habeas corpus law exists to provide a prisoner an avenue to attack the fact or duration of physical imprisonment and to obtain immediate or speedier release." *Valle v. Secretary, Florida Dep't of Corrections*, 654 F.3d 1266, 1267 (11th Cir. 2011); *see also Heck v. Humphrey*, 512 U.S. 477, 144 S. Ct. 2364, 129 S. Ct. 2364, 129 L. Ed. 2d 383 (1994) (if success of claim would invalidate one's sentence, then the claim is only actionable through a writ of habeas corpus).

Reeves's method-of-execution claim is not attacking the validity of his conviction or death sentence. He is not challenging the fact or duration of his physical imprisonment

by the State of Alabama and is not requesting immediate or speedier release. Rather, Reeves is challenging the manner in which the State of Alabama intends to carry out that sentence, which is plainly a circumstance of his confinement. For this reason, Claim 5 is denied because it is not properly raised in a § 2254 petition.[38]

6. Whether Reeves' Death Sentence Violates the Eighth Amendment

Reeves claims in his petition that the trial court's instructions to the jury were constitutionally deficient because they misled the jury about the importance of its sentencing phase deliberation. (Doc. 24 at 73). Specifically, Reeves argues that the trial court's instructions to the jury regarding the "advisory" nature of its verdict were in violation of the Eighth Amendment and Supreme Court precedent because it diminished the jury's sense of responsibility. (*Id.*).

Respondent answered the petition asserting that this claim is procedurally barred from review because Reeves failed to raise the substantive claim at trial, on direct appeal,

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[38] In *Hill v. McDonough*, 547 U.S. 573, (2006), the Court concluded inmate's challenge to the adequacy of the first-drug in the lethal injection protocol was properly brought pursuant to 42 U.S.C. § 1983. The Court distinguished claims seeking to permanently enjoin the use of lethal injection, which may challenge the sentence itself, from a question regarding the procedure used in carrying out a lethal injection. *Hill*, 547 U.S. at 579. Following the same reasoning, the Eleventh Circuit has deemed such execution challenges as properly brought pursuant to 42 U.S.C. § 1983 rather than § 2254. *See Boyd v. Warden, Holman Corr. Facility*, 856 F.3d 853, 856 (11th Cir. 2017) (citing *e.g., Jones v. Comm'r, Ga. Dep't of Corr.*, 811 F.3d 1288, 1295 (11th Cir.), cert. denied sub nom. *Jones v. Bryson*, 136 S. Ct. 998, 194 L. Ed. 2d 16 (2016); *Brooks v. Warden*, 810 F.3d 812, 819 (11th Cir.), cert. denied sub nom. *Brooks v. Dunn*, 136 S. Ct. 979, 193 L. Ed. 2d 813 (2016); *Arthur v. Comm'r, Ala. Dep't of Corr.*, 840 F.3d 1268 (11th Cir. 2016), cert denied sub nom. *Arthur v. Dunn*, 137 S. Ct. 725, 197 L. Ed. 2d 225 (2017)); *see also, McNabb v. Comm'r Ala. Dep't of Corr.*, 722 F.3d 1334, 1344 (11th Cir. 2013)("A § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures.") (internal citation omitted).

in his amended Rule 32 petition, or on appeal from the denial of his Rule 32 petition. (Doc. 25 at 100). Reeves contends, however, that he "asserted – nearly verbatim – his stand-alone Eighth Amendment claim in his Rule 32 petition." (Doc. 28 at 38-39).

A review of the record reveals that Reeves asserted the following related claims in his Rule 32 petition:

> (1) that the trial court denied Reeves a fair trial and appropriate sentencing determination when it repeatedly commented and instructed the jury that its sentence decision was only "a recommendation regarding the sentence that Mr. Reeves would receive." (Doc. 23-26 at 60-61),
>
> (2) that the prosecution unconstitutionally diminished the jury's sense of responsibility for its sentencing verdict by referring to the jury's verdict as a "recommendation" in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the constitution,
>
> (3) that trial counsel's failure to object to trial court's instructions and prosecution's comments to jury regarding the jury's sentencing verdict as being merely "advisory" was constitutionally ineffective,
>
> (4) that appellate counsel was ineffective because he failed to challenge "the trial court's charges that diminished the jury's responsibility for its verdict" in violation of the Fifth. Sixth, Eighth, and Fourteenth Amendment of the constitution, and
>
> (5) that Alabama's statutory sentencing scheme violates the Fifth, Sixth, Eighth, and Fourteenth Amendments to the constitution.

(Doc. 23-26 at 66-67; Vol. 26, JR-86, pp. 39, 45-46, 49-54).

As to the claims (1), (2), and (5), regarding Alabama's capital sentencing scheme, instructional errors of the trial court to the jury, and the prosecutor's comments to the jury regarding the advisory nature of its sentencing decision, the trial court stated that each claim was "procedurally barred from post-conviction review because it could have been but was not raised at Trial, and because it could have been but was not raised on direct appeal." (Doc. 23-16 at 162-63, 167; Vol. 16, JR-65, pp. 28-29).

As to claims (3) and (4), regarding trial counsel's failure to preserve alleged errors for appellate review and appellate counsel's failure to raise the same on appeal, the trial court determined that such decision by counsel was "often a matter of trial strategy and is presumed to be reasonable" and "[found] that [Reeves] failed to call trial counsel at the Evidentiary Hearing, and further finds that [Reeves] has abandoned these claims for ineffective assistance of counsel." (Doc. 23-16 at 163).

The trial court also determined Reeves's claim regarding appellate counsel was without merit because "it was a correct statement of the law" to inform the jury that its verdict was a recommendation. (Doc. 23-16 at 166). The trial court further maintained that the substantive allegation was without merit as the law in Alabama is well established "that informing jurors their penalty phase verdict is a recommendation, is not improper. There is no impropriety in the trial court's reference to the Jury that its sentencing verdict is a recommendation." (Doc. 23-16 at 165).

On appeal, Reeves claimed that his trial counsel was ineffective for failing to preserve certain arguments for appeal, including:

(1) the instructional errors of the trial court to the jury,

(2) prosecution's misconduct and improper arguments during the trial, and

(3) the unconstitutionality of Alabama's sentencing scheme.

(Doc. 23-29 at 98-99). Similarly, Reeves argued that appellate counsel rendered ineffective assistance by failing raise these same claims on appeal. (*Id*. at 100-102).

Identifying that Reeves challenged the constitutionality of Alabama's sentencing scheme before the trial court and asserted that appellate counsel was ineffective for failing to raise this claim on direct appeal, the Alabama Court of Criminal Appeals noted that "[a] substantive challenge to the constitutionality of a statute is not the same as a claim of

ineffective assistance of counsel." *Reeves*, 226 So. 3d at 749, n.16; (Doc. 23-31 at 85 n.16; Vol. 31, JR-94, p. 84, n. 16).

The Court notes that Reeves presented the constitutionality of Alabama's sentencing claim in his Rule 32 petition, where the trial court denied the claim as procedurally barred because it could have been but was not brought at trial or on direct appeal. However, on appeal of his Rule 32, Reeves failed to raise the substantive claim, arguing only that trial and appellate counsel were deficient in failing to preserve the claim and appeal the claim, respectively. Consequently, issues of both procedural default and exhaustion are implicated.

Pursuant to Rule 32.2(a), Ala. R. Crim. P., a Rule 32 petitioner "will not be given relief under this rule based upon any ground . . . [w]hich could have been but was not raised at trial," or "[w]hich could have been but was not raised on appeal," subject to an exception that has no application here. Rule 32.2(a)(3) & (5), Ala.R.Crim.P. Alabama courts routinely follow the procedural default doctrine of Rule 32.2. *See Siebert v. Allen*, 455 F.3d 1269, 1271 (11th Cir. 2006) ("[T]he Alabama statute of limitation in Rule 32.2 is firmly established and regularly followed for purposes of applying the procedural default doctrine.") (citing *Hurth v. Mitchem*, 400 F.3d 857, 862-63 (11th Cir. 2005) (holding consistently with the earliest prior panel opinion that "Alabama's Rule 32.2(c) statute of limitations is firmly established and regularly followed in the courts of that state")). "[I]t is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that is independent of the federal question and adequate to support the judgment." *Williams v. Alabama*, 791 F.3d 1267, 1272-73 (11th Cir. 2015)(citation omitted); *Conner v. Hall*, 645 F.3d 1277, 1287 (11th Cir. 2011) ("a federal habeas court will not review a claim rejected

by a state court if the decision of [the state] court rests on a state law ground that is independent of the federal question and adequate to support the judgment"). If, however, the state court's procedural ruling is not adequate to bar federal review, then the federal habeas court must review the claim *de novo*, and is not confined to the state-court record. *See Williams*, 791 F.3d at 1273. For a state procedural rule to bar federal review, the rule must be "firmly established and regularly followed" by the state courts. *Lee v. Karmna*, 534 U.S. 362, 375, 122 S. Ct. 877, 151 L. Ed. 2d 820 (2002) (quoting *James v. Kentucky*, 466 U.S. 341, 348, 104 S. Ct. 1830, 80 L. Ed. 2d 346 (1984).

> There are basically 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: *i.e.*, (*i*) where the petitioner demonstrates that he had good "cause" for not following the state procedural rule, *and*, that he was actually "prejudiced" by the alleged constitutional violation; *or* (*ii*) where the state procedural rule was not "firmly established and regularly followed"; *or* (*iii*) 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, 120 S. Ct. 1587, 146 L. Ed. 2d 518 (2000) (Breyer, J., concurring); *see also, e.g.*, *Coleman*, 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") (citations and internal quotation marks omitted); *Murray v. Carrier*, 477 U.S. 478, 496, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.") (alteration added); *Smith v. Murray*, 477 U.S. 527, 537, 106 S. Ct. 2661, 91 L. Ed. 2d 434 (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, 115 S. Ct. 851, 130 L. Ed. 2d 808 (1995) (in turn quoting *Murray*, 477 U.S. at 496)).

Jenkins v. Allen, 2016 U.S. Dist. LEXIS 116977, *37-38 (Ala. N.D., Aug. 31, 2016).

Additionally, section 2254, as previously discussed, requires a habeas petitioner to exhaust all available state law remedies prior to receiving federal review. "[T]o exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." *Lucas v. Secretary, Dep't of Corrections*, 682 F.3d 1342, 1352 (11th Cir. 2012) (citations omitted); *see also Williams v. Allen*, 542 F.3d 1326, 1345 (11th Cir. 2008) (to satisfy exhaustion requirement, "we do require that a petitioner presented his claims to the state court such that a reasonable reader would understand each claim's ... specific factual foundation") (citation omitted). It is not sufficient "that a somewhat similar state-law claim was made." *Kelley v. Secretary, Dep't of Corrections*, 377 F.3d 1317, 1344-45 (11th Cir. 2004). What is necessary is that "the petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Powell v. Allen*, 602 F.3d 1263, 1269 (11th Cir. 2010) (citation and internal marks omitted). That said, "habeas petitioners are permitted to clarify the arguments presented to the state courts on federal collateral review provided that those arguments remain unchanged in substance." *Kelley*, 377 F.3d at 1344. Such clarifications cannot alter the nature or legal theory of the claim. *See, e.g., Pietri v. Florida Dep't of Corrections*, 641 F.3d 1276, 1289 (11th Cir. 2011) (affirming dismissal of unexhausted claim of ineffectiveness of appellate counsel, which was separate and distinct from substantive claim that petitioner had raised in state court).

Reeves's Claim 6 was last reviewed by the Circuit Court on Reeves's Rule 32 petition and was deemed procedurally barred; coupled with Reeves's failure to assert the same substantive claim in his appeal to the Alabama Court of Criminal Appeals, the Court is thus barred from review of Reeves's claim.[39] *See Boyd v. Commissioner, Alabama Dep't.*

[39] Reeves makes no argument in attempt to overcome his procedural default or failure

of Corrs., 697 F. 3d 1320, 1355 (11th Cir. 2012) (The Eleventh Circuit has "squarely held that claims barred under Rule 32.2(a)(3) and (a)(5) are procedurally defaulted from federal habeas review.") (citations omitted); *O'Sullivan v. Boerckel*, 526 U.S. 838, 842-43, 119 S. Ct. 1728, 144 L. Ed. 2d 1 (1999) (holding unexhausted claim was procedurally defaulted pursuant to §2254(c) and barred from federal habeas review). Accordingly, Reeves's claim is due to be dismissed as it is unexhausted and procedurally barred.

In the alternative, Reeves's claim is without merit.

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to raise the claim in his appeal, rather he contends the claim was fully presented in the state courts. Specifically, Reeves asserts that he raised the claim in his appeal to the Court of Criminal Appeals, citing his brief at Vol. 29, JR-90, pp. 86-87. (Doc. 23-29 at 100-101). A review of Reeves's appeal indicates, however, that the cited portion is in fact under Section B., 5., Appellate Counsel was Deficient in Failing to Raise Claims on Direct Appeal. Without a showing of "cause and prejudice", federal review is precluded.

"[A] habeas petitioner may overcome a procedural default if he can show adequate cause and actual prejudice, or, alternatively, if the failure to consider the merits of his claim would result in a fundamental miscarriage of justice." *Borden v. Allen*, 646 F.3d 785, 808 n.26 (11th Cir. 2011); *see also Bishop v. Warden, GDCP*, 726 F.3d 1243, 1258 (11th Cir. 2013). "As a general matter, 'cause' for procedural default exists if the prisoner can show that some objective factor external to the defense impeded counsel's efforts to comply with the State's procedural rule." *Bishop*, 726 F.3d at 1258 (citations and internal quotation marks omitted). While ineffective assistance of counsel can constitute cause, *McCleskey v. Zant*, 499 U.S. 467, 493-94, 111 S. Ct. 1454, 113 L.Ed.2d 517 (1991) ("constitutionally ineffective assistance of counsel is cause"), Reeves must also show prejudice. "To establish 'prejudice,' a petitioner must show that there is at least a reasonable probability that the result of the proceeding would have been different." *Spencer v. Sec'y*, 609 F.3d 1170, 1180 (11th Cir. 2010) (citation omitted); *see also Lucas v. Warden, Georgia Diagnostic and Classification Prison*, 771 F.3d 785, 801 (11th Cir. 2014) ("For prejudice, Lucas must demonstrate a reasonable probability that his conviction or sentence would have been different ...."). As an alternative to showing cause and prejudice, a prisoner may overcome a procedural default by showing a fundamental miscarriage of justice. "For a state prisoner to establish a fundamental miscarriage of justice, he must prove that he is innocent." *Spencer v. United States*, 773 F.3d 1132, 1139 (11th Cir. 2014) (citations omitted).

Notably, Reeves makes no argument that he is innocent and the Court's determination that Reeves's claim lacks merit prevents him from establishing prejudice.

A review of the trial transcript, namely the penalty phase, is replete with references to the jury's verdict as a recommendation or advisory.[40] According to Reeves, these instructions and comments mislead the jury as to its role in the sentencing process and violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments and the precedent of *Caldwell*, *Ring*, and *Hurst*. In *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), the Court held the capital sentence was invalid when the sentencing jury was lead to believe that the responsibility for determining the appropriate of a death sentence rested with the appellate court's later review instead of with the jury. In *Ring v. Arizona*, 536 U.S. 584, 589 (2002) the Court held the aggravating factor necessary for sentencing must be established by jury. And in *Hurst v. Florida*, 577 U.S. __, 136 S. Ct. 616, 622 (2016), the Court held Florida's capital-sentencing scheme was unconstitutional because it authorized a sentence of death based on a finding by the trial judge, rather than by the jury, that an aggravating circumstance existed. Reeves's claim focuses primarily on the holding in *Caldwell v. Mississippi*.

In *Caldwell*, the Supreme Court "conclude[d] that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Caldwell v. Mississippi*, 472 U.S. 320, 328-329, 105 S. Ct. 2633, 2639, 86 L. Ed. 2d 231, 239 (1985). The jury in *Caldwell* was instructed by the prosecution at trial that their decision was "not the final decision" and that their decision was automatically reviewable by the Supreme Court. *Id*. at 325-26. The Court found that

[40] During the penalty phase, the trial court instructed the jury no less than thirteen times that its verdict was a recommendation. (*See* Doc. 23-8 at 195; Vol. 8, TR 1215, 1221-26)

the prosecution's argument was inaccurate because it was "misleading as to the nature of the appellate court's review and because it depicted the jury's role in a way fundamentally at odds with the role that a capital sentence must perform." *Id*. at 336. The Court further found the prosecution's comments "urged the jurors to view themselves as taking only a preliminary step toward the actual determination of the appropriateness of death - - a determination which would eventually be made by others and for which the jury was not responsible." *Id*.

> To establish a *Caldwell* violation, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Romano v. Oklahoma*, 512 U.S. 1, 9, 114 S. Ct. 2004, 129 L. Ed. 2d 1 (1994) (quoting *Dugger v. Adams*, 489 U.S. 401, 407, 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989)). "The infirmity identified in *Caldwell* is simply absent" in a case where "the jury was not affirmatively misled regarding its role in the sentencing process." *Romano*, 512 U.S. at 9. In this case, Miller's claim of *Caldwell* error must fail because the court correctly informed the jurors of their advisory function under Alabama law.

Miller v. Dunn, No. 2:13-00154-KOB, U.S. Dist. LEXIS 46132, *209, 2017 WL 1164811 (Ala. N.D., March 29, 2017). Reeves fails to establish a *Caldwell* violation as the jury instructions given comply with the Alabama sentencing statute and, thus, did not "affirmatively mislead" the jury in its role nor "improperly describe the role assigned to the jury." *Ramano*, 512 U.S. at 9. The court provided the jury with instructions such as:

> Now you're going to render an advisory verdict recommending one of those two sentences that the Defendant shall receive based on the law I give you now and later and based on the evidence presented to you in this hearing. . . . The final responsibility under the law for sentencing will be mine."

(Doc. 23-8 at 87-88, TR 1107). And,

> Now in the state of Alabama the jury merely makes the recommendation. The ultimate decision is left to the Court as to whether or not the court will follow the jury's recommendation at a later phase in which the jury is not involved."

(Doc. 23-4 at 41; Vol. 4, JR-8, TR 173). Such instructions correctly state the sentencing law of Alabama which refers to the jury's verdict as a "recommendation". *See* ALA. CODE § 13A-5-46 (1975) (defining the role of "the jury to return a verdict recommending a sentence"). Notably, until 2017 the statute used the term "advisory verdict" in the place of "verdict" throughout the majority of the statute. *See id*., amend. notes; *see also Miller v. Dunn*, 2017 U.S. Dist. LEXIS at *209-210, 2017 WL 1164811 (N.D. Ala., S.D., March 29, 2017) (explaining Alabama's sentencing statute as "describing the jury's sentencing role as 'advisory' ten separate times"). None of the instructions or comments made during the trial can be read as misleading the jury as to its responsibility to decide a verdict or diminish the gravity of it. Indeed, the trial court instructed the jury:

> The fact that the determination of whether ten or more of you can agree to recommend a sentence of death or seven or more of you can agree to recommend a sentence of life in prison without parole can be reached by a single ballot should not influence you to act hastily or without due regard to the seriousness of this proceeding. You should hear and consider the views of your fellow jurors. Before you vote you should carefully weigh, sift, and consider the evidence and all of it realizing that a human life is at stake.

(Doc. 23-8 at 204; Vol. 8, JR-28, p. 1224). "It is well established [in Alabama] that 'the comments of the prosecutor and the instructions of the trial court accurately informing the jury of the extent of its sentencing authority and that its sentence verdict was 'advisory' and a 'recommendation' and that the trial court would make the final decision as to sentence does not violate *Caldwell*.'" *Taylor v. Culliver*, No. 4:09-cv-00251-KOB-TMP, 2012 U.S. Dist. LEXIS 1381021, *293, 2012 WL 4479151 (N.D. Ala., M.D., Sept. 26, 2012) (citing *Martin v. State*, 548 So.2d 488, 494 (Ala. Crim. App.), *affirmed*, 548 So.2d 496 (Ala. 1988), *cert. denied*, 493 U.S. 970, 110 S. Ct. 419, 107 L. Ed. 2d 383 (1989); *White v. State*, 587 So.2d 1218 (Ala. Crim. App. 1990), *affirmed*, 587 So.2d 1236 (Ala. 1991); *cert. denied*, 502 U.S. 1076, 112 S. Ct. 979, 117 L. Ed. 2d 142 (1992); *Kuenzel v.*

State, 577 So.2d 474 (Ala. Crim. App. 1990), *affirmed*, 577 So.2d 531 (Ala. 1991), *cert. denied*, 502 U.S. 886, 112 S. Ct. 242, 116 L. Ed. 2d 197 (1991)).

Accordingly, the court's instruction and the prosecution's comments were not misleading in violation of *Caldwell* nor the Eighth Amendment. *See also, Phillips v. State,* 2018 Ala. LEXIS 105 (prosecutor's statements nor trial court's instructions improperly described jury's role); *Doster v. State*, 72 So. 3d 50 (Ala. Crim. App. 2010) (trial court did not diminish jury's role in sentencing by referring to its verdict as a recommendation), *cert. denied by*, 132 S. Ct. 760, 181 L. Ed. 2d 490 (2011); *Miller v. Dunn,* 2:13-00154-KOB, 2017 U.S. Dist. LEXIS 46132, 2017 WL 1164811 (N.D. Ala., S.D., March 29, 2017) (finding proper the court's instructions to jury that sentencing verdict was "advisory" under Alabama law). Thus, this claim lacks merit.

7. Whether Death Sentence Violates the Sixth Amendment.

In his petition, Reeves claims that his death sentence violates the Supreme Court's holding, in *Hurst v. Florida* and *Ring v. Arizona,* that allowing a judge to make the factual findings necessary to support a death sentence violates the Sixth Amendment. (Doc. 24 at 74). Specifically, Reeves argues that "although the jury found Mr. Reeves guilty of capital murder, he was not "death eligible" unless and until one or more aggravating circumstances were found by the court to have been proven beyond a reasonable doubt" and that the jury verdict form does not allow the jury to specify the aggravating factor(s) found. (Doc. 24 at 78). This claim was presented in Reeves's Rule 32 petition, and the state court found it was procedurally barred from post-conviction review because it could have been and was not raised at trial or on direct appeal. (Doc. 23-16 at 167; Vol. 16, JR-65, p. 33).

Affirming the Circuit Court's denial, the Alabama Court of Criminal Appeals stated:

> In affirming the circuit court's judgment, we recognize that the United States Supreme Court recently vacated this Court's judgment in *Johnson v. State*, [Ms. CR-10-1606, May 20, 2014] So. 3d , 2014 Ala. Crim. App. LEXIS 35 (Ala. Crim. App. 2014), a case in which the death penalty had been imposed, and remanded the cause for further consideration in light of its opinion in *Hurst v. Florida*, 577 U.S. , 136 S. Ct. 616, 193 L. Ed. 2d 504 (2016). *See Johnson v. Alabama*, ___ U.S. ___, 136 S. Ct. 1837, 194 L. Ed. 2d 828, 2016 U.S. LEXIS 3041 (2016). In *Hurst*, the United States Supreme Court held unconstitutional Florida's capital-sentencing scheme on the ground that it violated its holding in *Ring v. Arizona,* 536 U.S. 584, 122 S. Ct. 2428, 153 L. Ed. 2d 556 (2002), because Florida's statute authorized a sentence of death based on a finding by the trial judge, rather than by the jury, that an aggravating circumstance existed. The impact, if any, of *Hurst* on Alabama's capital-sentencing scheme has not yet been addressed by this Court or by the Alabama Supreme Court. We need not address it here because *Hurst* is not applicable in this case.
>
> The United States Supreme Court's opinion in *Hurst* was based solely on its previous opinion in *Ring*, an opinion the United States Supreme Court held did not apply retroactively on collateral review to cases that were already final when the decision was announced. *See Schriro v. Summerlin*, 542 U.S. 348, 124 S. Ct. 2519, 159 L. Ed. 2d 442 (2004). Because *Ring* does not apply retroactively on collateral review, it follows that *Hurst* also does not apply retroactively on collateral review. Rather, *Hurst* applies only to cases not yet final when that opinion was released, such as *Johnson*, *supra*, a case that was still on direct appeal (specifically, pending certiorari review in the United States Supreme Court) when *Hurst* was released. Reeves's case, however, was final in 2001, 15 years before the opinion in Hurst was released. Therefore, *Hurst* is not applicable here.
>
> Based on the foregoing, the judgment of the circuit court is affirmed.

Reeves, 226 So. 3d at 756-57; (Doc. 23-31 at 104-105; Vol. 31, JR-94, p. 103-104).

The Supreme Court has declared that "*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, 124 S. Ct. 2519, 159 L.Ed.2d 442 (2004). The *Ring* opinion was handed down on June 24, 2002. By contrast, the U.S. Supreme Court denied Reeves's petition for writ of certiorari, effectively concluding his direct appeals and rendering his conviction

and sentence final on direct review, nearly seven months earlier, on November 13, 2001.[41] (Doc. 23-11 at 136; Vol. 11, JR-41.) Thus, as a matter of law, the new procedural rule announced in *Ring* has no retroactive application to Reeves's case, which was already final on direct review when *Ring* was announced. *See, e.g., Battle v. United States*, 419 F.3d 1292, 1301 (11th Cir. 2005) ("*Ring* was decided after Battle's case was final on direct review. And *Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review. ... Thus, *Ring* — even if it otherwise extends to the facts of a case like this one — could not invalidate Battle's conviction and sentence now."); *Sibley v. Culliver*, 377 F.3d 1196, 1208 (11th Cir. 2004) ("[A] petitioner may not ... bring a habeas attack based on *Ring* violations that occurred before *Ring* was handed down."). Accordingly, the Court finds no error in the Alabama courts' rejection of Reeves's *Ring* claim on non-retroactivity grounds.[42]

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[41] For purposes of determining retroactivity, "[a] state conviction and sentence become final . . . when the availability of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied." *Glock v. Singletary*, 65 F. 3d 878, 838 (11th Cir. 1995) (citation omitted).

[42] The specific legal effect of *Ring* was to overrule prior Supreme Court jurisprudence that "allows a sentencing judge, sitting without a jury, to find an aggravating circumstance necessary for imposition of the death penalty." *Id.* at 609. "The holding of *Ring* is narrow: the Sixth Amendment's guarantee of jury trials requires that the finding of an aggravating circumstance that is necessary to imposition of the death penalty must be found by a jury." *Lee v. Commissioner, Alabama Dep't of Corrections*, 726 F.3d 1172, 1198 (11th Cir 2013). Indeed, the *Ring* Court made clear that it was not deciding whether the Sixth Amendment (1) required a jury to make findings as to mitigating circumstances, (2) required the jury to make the ultimate determination as to whether to impose a death sentence, or (3) forbade the state court from reweighing aggravating and mitigating circumstances. *Ring*, 536 U.S. at 597 n.4.

In Reeves's case, by its guilty verdict, the jury found one aggravating circumstance beyond a reasonable doubt, "[t]he capital offense was committed while the defendant was engaged or was an accomplice in the commission of ... robbery …" Ala. Code § 13A-5-49(4) (Doc. 23-2 at 6-7, 23; Vol. 2, JR-2, TR 219-220, JR-3, TR 236). Alabama law dictates that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing." Ala. Code § 13A-5-45;

On January 12, 2016,[43] the Supreme Court decided *Hurst v. Florida*, 136 S. Ct. 616, 193 L. Ed. 2d 504, 193 L.Ed.3d 504 (2016). In *Hurst*, the Court applied *Ring* to Florida's capital sentencing scheme and found it to be unconstitutional. The *Hurst* opinion stressed that "[l]ike Arizona at the time of *Ring*, Florida does not require the jury to make the critical findings necessary to impose the death penalty. Rather, Florida requires a judge to find these facts." 136 S. Ct. at 622. Therefore, "[i]n light of *Ring*, we hold that Hurst's sentence violates the Sixth Amendment." *Id.* The Court reasoned:

> "The Sixth Amendment protects a defendant's right to an impartial jury. This right required Florida to base Timothy Hurst's death sentence on a jury's verdict, not a judge's factfinding. Florida's sentencing scheme, **which required the judge alone to find the existence of an aggravating circumstance**, is therefore unconstitutional."

Id. at 624 (emphasis added).

The Eleventh Circuit and multiple district court opinions in this Circuit have found, *Hurst* is not retroactively applicable on collateral review.[44] *See Lambrix v. Secretary,*

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see also Lee, 726 F.3d at 1198 ("Nothing in *Ring* — or any other Supreme Court decision — forbids the use of an aggravating circumstance implicit in a jury's verdict."). Because the Alabama capital-sentencing scheme requires the jury to find the existence of at least one aggravating circumstance as a prerequisite to a death sentence, and because the jury in this case actually found Reeves guilty beyond a reasonable doubt of Robbery in the first degree, the state court did not err in finding that Reeves has no viable claim under *Ring* even if that decision applied to him (which it does not).

[43] The Alabama Court of Appeals denied Reeves's Rule 32 petition on June 10, 2016. (Vol. 30, JR-94).

[44] The framework set forth in *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060, 103 L.Ed.2d 334 (1989) establishes why *Hurst* cannot be applied retroactively. "Under the *Teague* framework, an old rule applies both on direct and collateral review, but a new rule is generally applicable only to cases that are still on direct review," with two narrow exceptions. *Id.* Those exceptions are that "[n]ew *substantive* rules generally apply retroactively" and that retroactive effect is given to a "small set of watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding." *Schriro v. Summerlin*, 542 U.S. 348, 351-52, 124 S. Ct. 2519, 159 L.Ed.2d 442 (2004) (citations and internal quotation marks omitted). *Hurst* did not announce a "new rule" at all, but simply applied *Ring v. Arizona* to Florida's capital sentencing statute. See *Hurst*, 136 S. Ct. at 622 ("In light of *Ring*, we hold that Hurst's

Florida Dep't of Corrections, 851 F.3d 1158, 1165 n.2 (11th Cir. 2017) ("Lambrix's two capital convictions and death sentences became final in 1986, sixteen years before *Ring* was decided. ... [T]here is no *Hurst* claim, much less a viable one, because under federal law *Hurst*, like *Ring*, is not retroactively applicable on collateral review."); *Miller v. Dunn*, 2:13-00154-KOB, 2017 U.S. Dist. LEXIS 46132, 2017 WL 1164811, *72 (N.D. Ala. Mar. 29, 2017) ("*Hurst* does not apply retroactively to Miller, because his conviction was final before the decision in *Hurst* was announced. ... *Hurst*, which applied *Ring* in Florida, is not retroactive."); *Smith v. Dunn*, 2:13-CV-00557-RDP, 2017 U.S. Dist. LEXIS 45274, 2017 WL 1150618, *69 (N.D. Ala. Mar. 28, 2017) ("*Hurst* did not articulate a new rule of law; rather, it applied *Ring*'s analysis to Florida's sentencing scheme," such that the retroactivity of *Hurst* tracks that of *Ring*). Thus, the Court finds no error in the Alabama courts' rejection of Reeves's *Hurst* claim on non-retroactivity grounds

Furthermore, *Hurst*, if applied, to Reeves's § 2254 Petition, would not alter the result of Reeves's Claim 7, which appears to stretch the holding of *Hurst*. To be clear, *Hurst* did not say that any capital scheme vesting the final sentencing decision in a judge, rather than a jury, is unconstitutional. *Hurst* did not make sweeping pronouncements that any system of judicial override is *per se* unconstitutional, nor did it hold that advisory verdicts in the penalty phase of capital cases are impermissible. Instead, *Hurst* is properly viewed as striking down one narrow feature of the Florida capital sentencing scheme - that which "required the judge alone to find the existence of an aggravating circumstance." *Hurst*, 136 S. Ct. at 624. To the extent that Reeves would read *Hurst* as standing for a

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sentence violates the Sixth Amendment."). Because *Hurst v. Florida* is simply a straightforward application of *Ring*, it does not announce a new rule of law; rather, its retroactivity is tethered to *Ring*.

broader proposition or a more sweeping denunciation of judicial-override provisions in capital sentencing statutes, the Court finds such a construction to be unwarranted and unsupported by the clear language of the opinion.

To the detriment of Reeves's claim, the Alabama capital sentencing scheme under which he was sentenced to death is materially different from the Florida statute at issue in *Hurst*. In Alabama, unlike in Florida at the time of *Hurst*, a defendant is not death-eligible unless a jury finds beyond a reasonable doubt the existence of an aggravating circumstance. *See In re Bohannon v. State*, 222 So.3d 525, 534 (Ala. 2016) ("the finding required by *Hurst* to be made by the jury, *i.e.*, the existence of the aggravating factor that makes a defendant death-eligible, is indeed made by the jury, not the judge, in Alabama"). Thus, the portion of the Florida capital sentencing scheme deemed constitutionally objectionable in *Hurst* is simply not present in Alabama. Multiple federal and state courts applying *Hurst* to the Alabama scheme have so concluded.[45]

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[45] *See, e.g., Dallas v. Dunn*, 2017 U.S. Dist. LEXIS 109749, 2017 WL 3015690, *28 (M.D. Ala. July 14, 2017) ("What distinguishes Petitioner's trial from the constitutionally defective capital murder trial[] in *Hurst* ... is the fact Petitioner's capital sentencing *jury* made all the factual determinations at the guilt-innocence phase of Petitioner's trial (*unanimously* and *beyond a reasonable doubt*) necessary to render Petitioner eligible for the death penalty under Alabama law .... The jury's factual findings at the guilt-innocence phase of Petitioner's capital murder trial rendered Petitioner *eligible* for the death penalty within the meaning of the Supreme Court's Eighth Amendment jurisprudence."); *Miller*, 2017 U.S. Dist. LEXIS 46132, 2017 WL 1164811, at *72 ("even if *Hurst* were to apply retroactively to Miller, this claim lacks merit" because "Alabama's capital sentencing scheme complies with the Sixth Amendment"); *Smith*, 2017 U.S. Dist. LEXIS 45274, 2017 WL 1150618, at *70 ("*Hurst* found fault with Florida's scheme specifically because Florida trial judges were tasked with independently finding the existence of aggravating circumstances. ... However, consistent with *Ring*, Alabama juries must find an aggravating circumstance beyond a reasonable doubt before a defendant is eligible to receive the death penalty. Alabama's capital sentencing scheme does not run afoul of *Ring* ...."); *Bohannon*, 222 So.3d at 532 ("*Ring* and *Hurst* require only that the jury find the existence of the aggravating factor that makes a defendant eligible for the death penalty — the plain language in those cases requires nothing more and nothing less. ... [B]ecause in Alabama a jury, not the judge, determines by a unanimous verdict the critical finding that an aggravating circumstance exists beyond a reasonable doubt to make a defendant death-

In Reeves's case, the record reflects he was charged with murder in commission of a robbery in the first degree, in violation of ALA. CODE § 13A-5-40(a)(2). (Doc. 23-1 at 10-11; Vol. 1, JR-1). This capital offense has a corresponding aggravating circumstance in the Alabama statutory scheme. Indeed, the robbery-murder offense described at § 13A-5-40(a)(2) pairs with the statutory aggravating circumstance that "[t]he capital offense was committed while the defendant was engaged or was an accomplice in the commission of ... robbery." ALA. CODE § 13A-5-49(4). By the terms of the Alabama statute, "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing." ALA. CODE § 13A-5-45(f). What this means is that when Reeves's jury unanimously found beyond a reasonable doubt that he was guilty of robbery-murder under § 13A-5-40(a)(2), they also unanimously found beyond a reasonable doubt the aggravating circumstance set forth at § 13A-5-49(4). Those jury findings as to the existence of aggravating circumstances are what made Reeves death-eligible in the Alabama capital sentencing scheme.[46] Thus, there is no *Hurst v. Florida*

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eligible, Alabama's capital-sentencing scheme does not violate the Sixth Amendment.").

[46] The jury was specifically instructed by the trial court:

> The law of this state provides a list of aggravating circumstances which may be considered by the jury in deciding the punishment if the jury is convinced beyond a reasonable doubt from the evidence that such aggravating circumstance exists in the case. If the jury is not convinced beyond a reasonable doubt based upon the evidence that one or more of the aggravating circumstances exists, then the jury must sentence the Defendant to life imprisonment without parole regardless of whether there are any mitigating circumstances in the case.
> . . .
> Th[e] issue is for you to determine. The aggravating circumstance which you may consider in this case if you find from the evidence that it has been proven beyond a reasonable doubt is that the capital offense was committed while the Defendant was engaged in the commission of robbery in the first

problem here because Reeves's jury found the aggravating circumstance of robbery (which rendered him eligible for the death penalty) beyond a reasonable doubt. *See Evans v. Sec'y, Fla. Dep't Of Corr.*, 699 F.3d 1249, 1260 (11th Cir. 2012) ("The jury's verdict necessarily contained [findings than an aggravating circumstance existed] because the jury was instructed that it could not recommend a death sentence unless it found beyond a reasonable doubt that one or more aggravating circumstances existed . . . ."); *United States v. Townsend*, 630 F.3d 1003, 1013-14 (11th Cir. 2011) (finding that because the court instructed the jury that it must make a prerequisite finding as to the existence of an element before convicting the defendant, the jury's guilty verdict necessarily meant the jurors found the element).

In his petition, Reeves also generally attacks the constitutionality of Alabama's death penalty statute. Reeves maintains that "Alabama is now an outlier in that it gives a judge the ultimate authority to sentence a defendant to death. Only in Alabama is a judge permitted to impose a death sentence in spite of a contrary jury recommendation." (Doc. 24 at 85). More than two decades ago, the Supreme Court rejected this argument, finding that the Alabama capital sentencing scheme "adequately channels the sentencer's discretion so as to prevent arbitrary results" because "[c]onsistent with established constitutional law, Alabama has chosen to guide the sentencing decision by requiring the jury and judge to weigh aggravating and mitigating circumstances." *Harris v. Alabama*, 513 U.S. 504, 511, 115 S. Ct. 1031, 130 L.Ed.2d 1004 (1995). In so finding, the *Harris* Court expressly held

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> degree. . . .
>
> Your finding that the Defendant is guilty of capital murder entailed the finding that the Defendant was guilty of robbery in the first degree. . . It is for you to determine how much weight to give to that particular matter.

(Doc. 23-8 at 192-94; Vol. 8, JR-28, p. 1212-14).

that "the Eighth Amendment does not require the State to define the weight the sentencing judge must accord an advisory jury verdict." *Id.* at 512.

The Court finds no authority suggesting that the U.S. Supreme Court or the Eleventh Circuit has changed course from the *Harris* holding. *See Waldrop v. Comm'r, Ala. Dep't of Corr.*, 711 F. App'x 900 (11th Cir. 2017), *cert. denied*, 2018 U.S. LEXIS 5613 (U.S. , Oct. 1, 2018) (petitioner's death sentence, imposed by judicial override over the jury's recommended sentence of life imprisonment, was upheld); *Madison v. Comm'r*, 677 F.3d 1333, 1336 (11th Cir. 2012) ("we find that Madison's claim that Alabama's judicial override scheme violates the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment is foreclosed by precedent"); *Brownlee v. Haley*, 306 F.3d 1043, 1077 (11th Cir. 2002) (recognizing that "Alabama's capital sentencing system is consonant with the Eighth Amendment even though it does not specify the precise weight that a judge must give to the jury's verdict"); *Hays v. State of Ala.*, 85 F.3d 1492, 1501 (11th Cir. 1996) (rejecting petitioner's argument that "the Alabama sentencing scheme dividing the responsibilities of jury and trial judge at the time he was sentenced was standardless," and concluding that "there was adequate channeling of discretion" in the Alabama scheme). Accordingly, this claim is foreclosed by binding precedent.

This claim is, thus, without merit.

V. Certificate of Appealability

Pursuant to Rule 11(a) of the Rules Governing § 2254 Cases, "[t]he district court must issue or deny a certificate of appealability when it enters a final order adverse to the applicant." Rule 11(a) of the Rules Governing 2254 Cases (December 1, 2009). A certificate of appealability may issue only where "the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). As to claims

rejected on the merits, a certificate of appealability should issue only when the petitioner demonstrates "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel,* 529 U.S. 473, 484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000). As to claims rejected on procedural grounds, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petitioner states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id*. The Court concludes that jurists of reason would not find debatable either the court's procedural rulings or its assessment of the constitutional claims as to Reeves's claims, with the exception of whether Reeves's trial counsel was ineffective for failing to hire an expert to investigate his intellectual disability.

"It is unquestioned that under the prevailing professional norms at the time of [Reeves's] trial, counsel had an 'obligation to conduct a thorough investigation of the defendant's background.'" *Porter v. McCollum*, 558 U.S. 30, 39, 130 S. Ct. 447, 175 L. Ed. 2d 398 (2009) (internal quotation omitted). It is undisputable that where counsel has reason to know of potential mitigating evidence, they are required to investigate. It is further undisputable that the trial court approved funds to hire an expert to investigate Reeves's intellectual disability, but the approved expert was never contacted. Reeves, thus, argues that counsel was ineffective for failing to investigate his intellectual disability. In dismissing his claim, the Court of Criminal Appeals concluded that based on the totality of the of the evidence before it, Reeves failed to overcome the "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and failed to establish that counsel's decision was not a reasonable strategic decision.

Strickland, 466 U.S. at 689. The state court primarily supported its decision on Reeves's failure to present the testimony of trial counsel at the Rule 32 hearing.

The Court concludes that jurists of reason could find it debatable whether Reeves's trial counsel was ineffective pursuant to *Strickland* for failing to hire an expert to investigate his intellectual disability. This determination is supported by the dissenting opinion of Justice Sotomayor to the United States Supreme Court's denial for writ of certiorari of Reeves's Rule 32 petition. *Reeves v. Alabama*, __ U.S. __, 138 S. Ct. 22, 199 L. Ed. 2d 341 (2017) (Sotomayor, J., dissenting). Justice Sotomayor, joined by Justices Ginsburg and Kagan, questioned the reasonableness of counsel's decision not to hire the court approved expert to investigate Reeves's intellectual disability, pursuant to the *Strickland*. Justice Sotomayor stated, "Reeves presented ample evidence in support of his claim that his counsel's performance was deficient, but the [Court of Criminal Appeals] never considered or explained why, in light of that evidence, his counsel's strategic decisions were reasonable." *Id*. at 28. The dissent further reasons that "[t]he Alabama Court of Criminal Appeals was not free to ignore this evidence simply because Reeves did not call his counsel to testify at the postconviction hearing." *Id*. Thus, the Court finds that Reeves has meet his burden to demonstrate that reasonable jurists could find debatable the district court's assessment of Reeves's ineffective assistance, Claim 3.b., for failing to hire an expert to investigate his intellectual disability. Therefore, Reeves is entitled to a Certificate of Appealability as to Claim 3.b.

Accordingly, any certificate of appealability filed by Reeves is DENIED, except as to Claim 3.b., which is hereby GRANTED. Since the Court has found that Reeves is entitled to a Certificate of Appealability as to Claim 3.b., if he appeals, and if he is indigent, he would be entitled to appeal *in forma pauperis*.

VI. Conclusion.

Based on the foregoing, the Court concludes that Reeves's petition for habeas corpus relief be denied, that this action be dismissed, and that judgment be entered in favor of the Respondent, and against the Petitioner, Matthew Reeves. It is further recommended that any motion for a Certificate of Appealability or for permission to appeal *in forma pauperis* be denied, except as to Claim 3.b., which is granted.

DONE and **ORDERED** this the **8th** day of **January**, **2019**.

s/Kristi K. DuBose
CHIEF UNITED STATES DISTRICT JUDGE

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

MATTHEW REEVES, **Plaintiff,**	:	
vs.	:	**CIVIL ACTION NO. 17-0061-KD-MU**
JEFFERSON D. DUNN, **Respondent.**	:	

ORDER

This matter is before the Court on Petitioner's Federal Rule of Civil Procedure 59(e) Motion to Alter or Amend the Court's Judgment denying his Petition for Writ of Habeas Corpus.[1] (Docs. 31, 43). For the reasons discussed herein, the motion is **DENIED.**

I. Procedural Background.

On January 8, 2019, the undersigned entered an Order (doc. 29) and Judgment (doc. 30) denying Matthew Reeves's Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254, in its entirety. (Docs. 1, 24). The ruling did grant a certificate of appealability ("COA") on one presented issue, Claim 3.b., whether counsel rendered ineffective assistance for failing to hire an expert to investigate his intellectual disability.

Reeves now moves for reconsideration of three specifically enumerated aspects of the January 8 Order and Judgement. Reeves requests the following relief: (1) reconsideration of the

[1] At the same time he filed his Rule 59(e) motion, Petitioner also filed a notice of appeal, which generally divests a district court of jurisdiction to take any action in a case except in aid of the appeal. *United States v. Diveroli*, 729 F.3d 1339, 1341 (11th Cir. 2013). However, the filing of a timely Rule 59(e) motion renders a notice of appeal ineffective until the district court enters an order dismissing the motion. *See* Fed. R. App. P. 4(a)(4)(B)(i); *Stansell v. Revolutionary Armed Forces of Columbia*, 771 F.3d 713, 745-46 (11th Cir. 2014). Thus, a district court retains jurisdiction to consider a timely Rule 59(e) motion despite a Petitioner's filing of a notice of appeal.

finding that Reeves is not intellectually disabled under *Atkins v. Virginia*, 536 U.S. 304 (2002), Claim 1; (2) reconsideration that the Alabama Court of Criminal Appeals reasonably rejected Reeves's claim that he received ineffective assistance of counsel during the penalty phase, Claim 3.c.; and (3) reconsideration that the Alabama Court of Criminal Appeals reasonably rejected Reeves's juror misconduct claim at the pleading stage without an evidentiary hearing, Claim 4. (Docs. 31, 43). Alternatively, Reeves requests that if Rule 59(e) relief is not granted, that the Court expand its Certificate of Appealability to include the presented issues to the Court of Appeals. (*Id*.).

II. Legal Standard for Motion to Reconsider.

The Eleventh Circuit has summarized the limited scope of relief that is available to a litigant under Rule 59(e):

> "The only grounds for granting [a Rule 59] motion are newly-discovered evidence or manifest errors of law or fact." *In re Kellogg*, 197 F.3d 1116, 1119 (11th Cir. 1999). "[A] Rule 59(e) motion [cannot be used] to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Michael Linet, Inc. v. Village of Wellington, Fla.*, 408 F.3d 757, 763 (11th Cir. 2005).

Arthur v. King, 500 F.3d 1335, 1343 (11th Cir. 2007); *see also Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) ("Reconsidering the merits of a judgment, absent a manifest error of law or fact, is not the purpose of Rule 59."); *Stone v. Wall*, 135 F.3d 1438, 1442 (11th Cir. 1998) ("The purpose of a Rule 59(e) motion is not to raise an argument that was previously available, but not pressed."); *Hughes v. Stryker Sales Corp.*, 2010 U.S. Dist. LEXIS 64439, 2010 WL 2608957, *2 (S.D. Ala. June 28, 2010) (rejecting notion that motions to reconsider "are appropriate whenever the losing party thinks the District Court got it wrong"). "They are neither appeal substitutes nor a 'dry run' to test arguments in anticipation of a forthcoming appeal." *Lee*, 2012 U.S. Dist. LEXIS 107328, 2012 WL 3137901, at *2.

To prevail on a motion to reconsider, '[t]he losing party must do more than show that a grant of the motion might have been warranted; he must demonstrate a justification for relief so compelling that the court was required to grant the motion.' *Maradiaga v. United States*, 679 F.3d 1286, 1291 (11th Cir. 2012) (citations and internal marks omitted)." *Lee v. Thomas*, No. CIV.A. 10-0587-WS-M, 2012 U.S. Dist. LEXIS 107328, 2012 WL 3137901, at *2 n.1 (S.D. Ala. Aug. 1, 2012) (Steele, J.).

III. Analysis.

Turning to Reeves's current motion, it is imperative to keep in mind the posture of this case – that is, Reeves petitioned this Court for habeas relief pursuant to 28 U.S.C. § 2254. This statute "imposes important limitations on the power of federal courts to overturn the judgments of state courts in criminal cases." *Shoop v. Hill*, 139 S. Ct. 504, 506, 202 L. Ed. 2d 461 (2019). A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly." *Greene v. Upton*, 644 F.3d 1145, 1154 (11th Cir. 2011) (citation omitted). Rather, "[t]o obtain habeas relief a state prisoner must show that the state court's ruling on the claim being presented in the federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Evans v. Secretary, Dep't of Corrections*, 703 F.3d 1316, 1326 (1th Cir. 2013) (citations omitted). Under § 2254(d) deference, "only if there is no possibility fairminded jurists could disagree that the state court's decision conflicts with the Supreme Court's precedents may relief be granted." *Johnson v. Secretary, DOC*, 643 F.3d 907, 910 (11th Cir. 2011) (citation and internal quotation marks omitted); *see also Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012) ("if some fairminded jurists could agree with the state court's decision, although others might

disagree, federal habeas relief must be denied") (citation omitted). "If this standard is difficult to meet, that is because it was meant to be." *Holsey*, 694 F.3d at 1257 (citation omitted); *see also Loggins v. Thomas*, 654 F.3d 1204, 1220 (11th Cir. 2011) ("[T]he deference due is heavy and purposely presents a daunting hurdle for a habeas petitioner to clear."). "Section 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal." *Harrington*, 562 U.S. at 102-03 (citation and internal quotation marks omitted).

It is under this highly deferential standard that Reeves's habeas petition was denied.

A. Reconsideration of Intellectual Disability under *Atkins*.

Petitioner Reeves's first ground for seeking relief under Rule 59(e) relates to Claim 1 of his habeas petition. In his habeas petition, Reeves alleges that he is intellectually disabled and his capital sentence, thus, violates the Eighth Amendment pursuant to the holding of *Atkins v. Virginia*, 536 U.S. 304 (2002). The record reveals that Reeves received IQ scores within a standard error of measurement ("SEM") range of 63 to 78, that the experts presented conflicting opinions at the Rule 32 hearing as to whether Reeves is intellectually disabled, and the state court credited the opinion of Dr. King over Dr. Goff in concluding that Reeves is not intellectually disabled. In the January 8 Order, this Court found that Reeves failed to carry his burden of proving that the state court's determination was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or that the decision "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). Relying primarily on *Moore v. Texas*, for the first time, Reeves asserts in his motion for reconsideration that the Court's rejection of his *Atkins* claim rested on manifest errors of law and fact because it impermissibly

relied on extrinsic factors unrelated to determining intellectual functioning to disregard the lower SEM range of IQ scores[2] and emphasized Reeve's perceived strengths in adaptive functioning over the acknowledged deficits.

In *Moore*, the Supreme Court vacated a Texas Criminal Court of Appeals judgment which determined Moore was not intellectually disabled based on evidentiary factors announced in *Ex parte Briseno*, 135 S.W. 3d 1 (Tex. Crim. App. 2004), rather than current medical diagnostic standards. *Moore v. Texas*, 137 S. Ct. 1039. *Briseno* utilized an outdated definition and diagnostic standard for assessing intellectual disability from the 1992 edition of the American Association on Mental Retardation's ("AAMR") manual. The *Briseno* test required that adaptive deficits be related to intellectual functioning deficits and identified seven evidentiary factors ("without citation to any medical or judicial authority") relevant to determining intellectual disability. 137 S. Ct. at 1046-47. The Texas appellate court utilized the *Briseno* factors in determining Moore failed to prove significant subaverage intellectual functioning with IQ scores of 78 and 74 (rejecting 5 of 7 IQ tests as unreliable). The appellate court "discounted the lower end of the standard-error range associated with" the score of 74 "observ[ing] that Moore's history of academic failure, and the fact that he took the test while 'exhibit[ing] withdrawn and depressive behavior' on death row might have hindered his performance." *Id*. at 1047. The appellate court then concluded Moore failed to prove he suffered significant limitations in adaptive functioning due to Moore's adaptive strengths, which included living on the streets, playing pool and mowing lawns for money, committing the crime in a sophisticated way and then fleeing, testifying and representing himself at trial, and developing skills in prison. *Id*. The Court granted certiorari to

[2] Reeves argues that like *Moore*, the court credited Dr. King's testimony regarding factors unrelated to IQ instead of relying solely on his IQ score of 68. (Doc. 31-1 at 8).

determine whether the appellate court's adherence to superseded medical standards and reliance on *Briseno* complied with the Eighth Amendment and Court precedent and held it did not.

The *Moore* Court found the appellate court considered "the presence of other sources of imprecision in administering the [IQ] test to [Reeves]" and noted that such unique factors "cannot narrow the test-specific standard-error range" and the appellate court was required based on the SEM range "to move on to consider Moore's adaptive functioning". *Id*. at 1049-50. The Court further concluded that the appellate court overemphasized Moore's perceived adaptive strengths in determining he did not suffer significant adaptive deficits. In particular, the Court identified traumatic experiences in Moore's life which the Texas appellate court discounted, like childhood abuse and academic failure, that clinicians consider "risk factors" and rely on in determining intellectual disability. Similarly, the Court found the appellate court "departed from clinical practice by requiring Moore to show that his adaptive deficits were not related to 'a personality disorder'", *id*. at 1051, when the medical community acknowledges the coexistence of personality disorders and mental health issues in the intellectually disabled. Lastly, the Court viewed the *Briseno* factors as "exceedingly subjective" and deemed such factors as "lay perceptions of intellectual disability." *Id*. In rejecting the *Briseno* factors, the Court indicated that no other state legislature approved the *Briseno* factors or anything similar and that Texas itself failed to follow *Briseno* in contexts other than the death penalty. The Court maintained that while states have flexibility in enforcing *Atkins*, they do not have 'unfettered discretion' or 'complete autonomy to define intellectual disability as they wished'. *Id*. at 1053 (quoting *Hall*, 134 S. Ct. at 1998-99). Specifically, "[t]he medical community's current standards supply one constraint on States' leeway in this area." *Id*. The Court thus held that:

> By rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseno*, including the wholly nonclinical *Briseno* factors, the

> CCA failed adequately to inform itself of the "medical community's diagnostic framework," *Hall*, 572 U. S., at ___-___, 134 S. Ct. 1986, 2000, 188 L. Ed. 2d 1007, 1025. Because *Briseno* pervasively infected the CCA's analysis, the decision of that court cannot stand.

Id. at 1053.

Notably, the 2017 decision of *Moore* was decided after the trial and appellate court determined Reeves was not intellectually disabled in 2009 and 2016, respectively, and cannot be considered "clearly established law" pursuant to § 2254(d)(1). *See Shoop v. Hill*, __ U.S.__, 139 S. Ct. 504, 502, 202 L. Ed. 2d 461, 465 (2019) ("The Court of Appeals' reliance on *Moore* was plainly improper under § 2254(d)(1), and we therefore vacate that decision and remand so that Hill's claim regarding intellectual disability can be evaluated based solely on holdings of this Court that were clearly established at the relevant time."). Consequently, Reeves's reliance on *Moore v. Texas* is misplaced and improper. Nevertheless, Reeves contends that *Moore* is applicable because the holding did not establish a new rule of law but "merely applied the law that the Supreme Court established in *Hall*." (Doc. 31-1 at 7, n.2). Such suggestion, however, extends *Hall* (and *Atkins*) beyond what the case(s) actually held, and this Court is bound to "determine whether its conclusions can be sustained based strictly on legal rules that were clearly established in the decisions of [the Supreme] Court at the relevant time." *Shoop*, 139 S. Ct. at 509. Accordingly, this Court is required to analyze Reeves's habeas petition and this motion based on that which was "clearly established" at the time the Alabama Court of Criminal Appeals rejected Reeves's intellectual disability claim. 28 U.S.C. § 2254(d)(1).

Based on the laws in place at the time of the state court's decision, denial of Reeves's intellectual disability claim does not rest on manifest errors of law or fact and Reeves's arguments are simply a rehash of old arguments. There is no "binding Supreme Court precedent, [that] *only* IQ tests that account for the SEM are relevant to the first prong [in determining significant

subaverage intellectual functioning.]" [3] (Doc. 31-1 at 9-10) (emphasis added). Nor did federal law exist condemning consideration of adaptive strengths when evaluating adaptive functioning. Rather, the law at the time of Reeves's decision instructed that:

> [t]he legal determination of intellectual disability is distinct from a medical diagnosis, but it is **informed by the medical community's diagnostic framework**. *Atkins* itself points to the diagnostic criteria employed by psychiatric professionals. And the professional community's teachings are of particular help in this case, where no alternative definition of intellectual disability is presented and where this Court and the States have placed substantial reliance on the expertise of the medical profession.

Hall, 572 U.S. 701, 134 S. Ct. 1986, 2000, 188 L. Ed. 2d 1007 (2014) (emphasis added); *see also* *Kansas* v. *Crane*, 534 U.S. 407, 413, 122 S. Ct. 867, 151 L. Ed. 2d 856 (2002) ("[T]he science of psychiatry . . . informs but does not control ultimate legal determinations . . ."). Indeed, the record reflects that the state court relied on the expertise of medical professionals, namely Drs. Goff and King, in determining Reeves is not intellectually disabled. Both doctors testified at the Rule 32 hearing as to their experience, testing procedures, and provided a diagnostic opinion based on clinical judgment. In accordance with the law at the time, the state court properly recognized that Reeves's IQ fell within "a range of scores on either side of the recorded score" and that his "true IQ score lies" somewhere within this SEM range. *Hall*, 572 U.S. at 712-13 ("The professionals who design, administer, and interpret IQ tests have agreed, for years now, that IQ test scores should

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[3] Reeves contends that IQ tests are the sole measure to be utilized in determining the intellectual functioning of an individual and cites to *Atkins*, *Hall*, and *Brumfield* as support. Such a rule, however, cannot be drawn from the holding of these cases or dicta within. Notably, *Atkins* recognized that an IQ score of 70 to 75 or lower is typically considered the cutoff IQ score for the intellectual function prong, *Atkins v. Virginia*, 536 U.S. 304, 305 n.5 (2002); *Hall* held that a strict cutoff IQ score of 70 violated the Eighth Amendment and the inherent imprecision of IQ scores meant that when IQ scores fall within the test's standard error of measurement defendant's must be allowed to present additional evidence of intellectual disability, *Hall*, U.S. 572 U.S. 701; and *Brumfield* declared that an IQ score of 75 "was squarely in the range of potential intellectual disability", *Brumfield v. Cain*, 135 S. Ct. 2269, 2278 (2015). None held that an IQ test score was the single, deciding factor in a court's determination of a defendant's intellectual functioning.

be read not as a single fixed number but as a range."). Based on this SEM range, as instructed by the established law at the time, Reeves was allowed to "present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id* at 713. The findings of these tests were interpreted by expert medical professionals. The medical experts, however, offered opposing diagnoses based on their clinical judgment,[4] and the court credited Dr. King's testimony over Dr.

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[4] The medical community routinely applies clinical judgment in diagnosing intellectual disability. In fact, the most current edition of the Diagnostic and Statistical Manual of Mental Disorders, Fifth Edition ("DSM-5) provides that:

> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real life situations and mastery of practical tasks. . . . Thus, clinical judgment is needed in interpreting the results of IQ test. . . . Adaptive functioning is assessed using both clinical evaluation and individualized, culturally appropriate, psychometrically sound measures. . . . Additional sources of information include educational, developmental, medical, and mental health evaluations. Scores from standardized measures and interview sources must be interpreted using clinical judgment.

DSM-5 at 37-38. Reeves's own expert, Dr. Goff, indicated that he too applies clinical judgment when assessing an individual's intellectual disability – he testified that he reviewed school records and medical records "to try and get an understanding of the individual." (Doc. 23-24 at 33). In explaining the necessity for and reasoning behind such review, Dr. Goff stated, "it's difficult to get an understanding of someone just spending five or six hours with them. . . . [S]ince we are talking about his cognitive status, it was important to look at all the school records that we had and any medical records that might reflect on his situation during the developmental period to determine whether or not he was having difficulties during the developmental period." (Doc. 23-24 at 33); *see also* James W. Ellis, *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 Hofstra L. Rev. 1307 (Summer 2018) citing the following support for the need for clinical judgment in intellectual disability assessments:

> Keith F. Widaman, Concepts of Measurement, in The Death Penalty and Intellectual Disability 55, 59 (Edward A. Polloway ed., 2015) ("The need for clinical judgment to combine all information to arrive at important diagnostic decisions is always a component of this assessment task."); Clinical Judgment 2014, supra note 253, at 7 ("The purpose of clinical judgment is to enhance the quality, validity, and precision of the clinician's decision or recommendation in situations related to diagnosis, classification, and planning supports."); *see also* American Educational Research Association, American Psychological Association & National Council on Measurement in Education, Standards for Educational and Psychological Testing, std. 10.1 comment at 164 (2d ed., 2014) ("Test score interpretation requires

Goff's.[5] Consequently, it cannot be said that the state court's decision (centered on Dr. King's clinical judgment that Reeves is not intellectually disabled (and that he does not suffer significant subaverage intellectual functioning nor substantial deficits in adaptive functioning)) was contrary to establish federal law or based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.[6]

> professionally responsible judgment that is exercised within the boundaries of knowledge and skill afforded by the professional's education, training, and supervised experience, as well as the context in which the assessment is being performed."); APA, DSM-5, *supra* note 65, at 37 ("Clinical training and judgment are required to interpret test results and assess intellectual performance."); Ruth Luckasson & Robert L. Schalock, Standards to Guide the Use of Clinical Judgment in the Field of Intellectual Disability, 53 Intellectual & Developmental Disabilities 240, 247 (2015) ("The clinical judgment standards … provide the basis for valid and precise decisions and recommendations … .").

James W. Ellis, *Evaluating Intellectual Disability: Clinical Assessments in Atkins Cases*, 46 Hofstra L. Rev. 1307, 1416 n.431 (Summer 2018).

[5] Recognizing that intellectually disability is a condition, not a number", *Hall*, 572 U.S. at 723, Dr. King applied clinical judgment in diagnosing that Reeves did not suffer significant subaverage intellectual or adaptive functioning and, ultimately, that Reeves was not intellectually disabled. *See Hall*, 572 U.S. at 723 (instructing that IQ scores are helpful "[b]ut in using these scores to assess a defendant's eligibility for the death penalty, a State must afford these test scores the same studied skepticism that those who design and use the tests do. . .").

[6] As discussed in the January 8 Order, the trial court credited the consistency of Reeves's full-scale IQ scores of 73 (administered when he was 14 years of age) and 71 (administered by Reeves's expert in preparation for the Rule 32 hearing) and Dr. King's opinion offered at the Rule 32 hearing. Dr. King testified that Reeves's full-scale IQ score of 68 was inconsistent with the administered Wide Range Achievement Test scores (showing Reeves read and spelled on a fifth-grade level and performed math on a fourth-grade level), suggesting Reeves functioned at a higher level than the IQ score indicated. (Doc. 23-25 at 24-26). Based on the WAIS and Wide Range Achievement Test, Dr. King was unable to reach a definitive conclusion regarding Reeves' intellectual ability but stated, "I was leaning in the direction of borderline intellectual functioning. . . . But considering all of the other test data, I came up with a conclusion that he functions in the borderline range of ability." (Doc. 23-25 at 26). According to Dr. King, the "other test data" included the battery of tests he administered, his clinical interview with Reeves, Dr. Goff's data, previous intellectual tests done on Mr. Reeves, and review of Reeves's records. (Doc. 23-25 at 35, 46). Dr. King concluded that Mr. Reeves intellectually functions in the borderline range of intellectual ability, a range of 70-84; such individuals "are able to take care of themselves and are educable and typically end up developing certain kinds of abilities and activities so that they can support themselves independently in society." (Doc. 23-25 at 35). Dr. King testified that

Reeves has failed to establish newly discovered evidence or manifest errors of law or fact. At best, Reeves reiterates arguments already made, which the Court already rejected. Rule 59(e) is not an appropriate vehicle to "relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Frantz v. Walled*, 513 F. App'x 815, 822 (11th Cir. 2013). In short, Reeves has not set forth any basis for Rule 59(e) relief, and his motion is denied as to this claim. Additionally, Reeves has failed to put forth a substantial showing of the denial of a constitutional right; thus, a Certificate of Appealability is not warranted as to this claim. *Slack v. McDaniel*, 529 U.S. 473, 483-484, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000).

B. Reconsideration of Ineffective Assistance of Counsel during Penalty Phase.

Petitioner Reeves's second ground for seeking relief relates to Claim 3.c. of his habeas petition. Reeves contends that the Court incorrectly concluded that trial counsel's decision not to

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such a finding was consistent with the previous intellectual tests done. (Doc. 23-25 at 46); *see also Brumfield*, 135 S. Ct. at 2278 (holding IQ score of 75 to be within the range of potential intellectual disability" and finding state court's contrary determination to be unreasonable were there was no "evidence of any higher IQ test score").

In concluding that Reeves does not suffer substantial adaptive deficits, the trial court wrestled with the conflicting opinions of experts and reconciled the discrepancy by analyzing the record evidence beyond administered tests, including:

> [Reeves's] technical abilities in brick masonry, welding, and automobile mechanics; Reeves's ability to work construction and do so reliably when he was not around his brother, Julius; Reeves's participation in a drug-sale enterprise in which he was able to make thousands of dollars a week that he then used to purchase personal items and a car; and particularly Reeves's cold and calculated actions surrounding the murder, including planning the robbery with his codefendants, hiding incriminating evidence after he had shot the victim, splitting the proceeds of the robbery with his codefendants, and bragging about the murder, claiming that he would earn a "teardrop" – a gang tattoo indicating that a gang member had killed someone – for the murder.

(Doc. 29 at 28, quoting the Alabama Court of Criminal Appeals).

hire a mitigation expert was not objectively unreasonable under *Strickland* and that he was not prejudiced by the decision. Specifically, Reeves argues that the Court should reconsider its holding that counsel was not ineffective during the penalty phase of the trial for three reasons: (1) that evidence of the reason for trial counsel's decision is not necessary to establish ineffective assistance of counsel; (2) that ample evidence was presented that established counsel did not make an informed or strategic decision; (3) that counsel possessed records concerning Reeves's background does not preclude a finding of deficient performance. These claims have previously been presented to the Court through Reeves's §2254 habeas petition and appear to be nothing more than an attempt to reargue previously dismissed claims. *Arthur v. King*, 500 F.3d 1335, 1343-44 (11th Cir. 2007) ("A Rule 59(e) motion cannot be used to relitigate old matters…."). The Court finds that relief was properly denied as reasoned in its January 8 Order but briefly addresses Reeves's claims for the sake of clarity.

To start, Reeves contends that the Court "contorted the *Strickland* test when it held Reeves must provide evidence that 'sheds . . . light on the reasoning behind counsel's actions' to prevail on his ineffective-assistance claim" and "that only 'evidence . . . that the complained of actions were not the result of reasonable strategy' can rebut *Strickland's* presumption of reasonableness." (Doc. 31-1 at 13, 15) (quoting the January 8 Order at p. 44). These misquotations of the January 8 Order are out of context and ignore the fundamental analysis conducted therein – that is that Reeves failed to carry his burden of showing that there was "[no] reasonable argument that counsel satisfied *Strickland's* deferential standard." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011). In fact, Reeves misconstrues this Court's review standard pursuant to §2254 in his motion to reconsider.

Importantly, under AEDPA, federal courts are prohibited from granting habeas relief for any claim adjudicated on the merits on state court, unless one of the exceptions listed in § 2254(d) applies. Relevant to Reeves's claim, is §2254(d)(1)'s exception that this Court is permitted to grant habeas relief if the state court decision "was contrary to, or involved an unreasonable application of, clearly established federal law." 28 U.S.C. § 2254(d)(1). The applicable federal law in question here is *Strickland*. To establish a claim of ineffective assistance of trial counsel under *Strickland*, the petitioner "must show both deficient performance by counsel and prejudice." *Premo v. Moore*, 562 U.S. 115, 121, 131 S. Ct. 733, 178 L. Ed. 2d 649 (2011) (internal quotes omitted). "To establish deficient performance, a person challenging a conviction must show that counsel's representation fell below an objective standard of reasonableness," and "[a] court considering a claim of ineffective assistance must apply a strong presumption that counsel's representation was within the wide range of reasonable professional assistance." *Id.* (internal quotes omitted). "The question is whether an attorney's representation amounted to incompetence under prevailing professional norms, not whether it deviated from best practices or common custom." *Harrington v. Richter*, 562 U.S. 86, 105, 131 S. Ct. 770, 178 L. Ed. 2d 624 (2011) (internal quotes omitted). To establish prejudice for purposes of *Strickland*, the petitioner must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

When challenging counsel's effectiveness pursuant to § 2254(d), as is Reeves, however, the burden of proof is "all the more difficult" because the petitioner must "[e]stablish[] that the state court's application of *Strickland* was unreasonable[.]" *Richter*, 562 U.S. at 105.

> The standards created by *Strickland* and § 2254(d) are both "highly deferential," *id.*, at 689, 104 S. Ct. 2052, 80 L. Ed. 2d 674; *Lindh* v. *Murphy*, 521 U.S. 320, 333, n. 7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles*, 556 U.S., at 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at 123, 129 S. Ct. 1411, 173 L. Ed. 2d 251. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. **The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.**

Id. (emphasis added).

In the January 8 Order, the Court reviewed the state court decision pursuant to the standard laid out above and determined that counsel conducted a mitigation investigation (obtaining voluminous records related to Reeves's academic, medical, and mental health background) and presented the discovered evidence during the penalty phase, such that there was a reasonable argument that counsel satisfied *Strickland's* deferential standard, and Reeves failed to satisfy his burden of arguing or showing otherwise. The Court explained:

> Without the testimony of counsel explaining their strategy, Reeves was left to show that counsel's decisions were unreasonable and prejudiced the outcome of his case, *Harvey v. Warden, Union Corr., Inst.,* 629 F.3d 1228, 1245 (11th Cir. 2011) ("To give trial counsel proper deference, this circuit presumes that trial counsel provided effective assistance. . . and it is the petitioner's burden to persuade us otherwise."), and Reeves failed to carry his burden. . . . Reeves certainly [attempted to provide facts to demonstrate counsel's unreasonableness, as he] put forth briefs and argument regarding what trial decisions counsel made; however, this evidence sheds no light on the reasoning behind counsel's action and, standing alone, this evidence is insufficient to prove counsel was ineffective. Review of the trial court's decision reveals that the court considered the total evidence of record for each [ineffective assistance] claim and concluded it fell short of objectively establishing deficient performance. . . . With the record void of evidence (including the testimony of counsel) that the complained of actions were not the result of reasonable strategy, the court interpreted the evidence, as required, with deference to counsel's decisions and competency.

(Doc. 29, 43-44; January 8 Order). In short, the Court concluded that Reeves failed to show that counsel's decision to not hire a mitigation expert was objectively unreasonable given the totality

of the record evidence.[7] Put another way, one could conclude based on the volumes of evidence counsel obtained *and* the contents of those documents, *along with* the evidence actually put forth during the penalty phase, that counsel's decision not to hire a mitigation expert was objectively reasonable. *See Richter*, 562 U.S. at 105 (discussing "whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard").

Reeves disputes this conclusion, asserting that counsel's petitioning of funds to hire a mitigation expert and subsequent failure to do so, coupled with counsel's failure to interview Dr. Ronan prior to her testimony confirms "trial counsel could not have reasonably decided to rely on Dr. Ronan's testimony as the sole expert in the penalty phase rather than retaining Dr. Goff or another mitigation expert, as the Court suggests." (Doc. 31-1 at 16). This rationale, however, ignores or overlooks the totality of the facts of record. In determining whether counsel's decision

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[7] Relying on *Wiggins* and *Porter*, Reeves asserts that deficient performance can be found despite counsel's testimony that a decision made was a strategic choice, and he argues the Court's holding in the January 8 Order was therefore a manifest error of law. (Doc. 31-1 at 13). In *Wiggins v. Smith,* 539 U.S. 510 (2003), the Supreme Court held the decision not to expand mitigation investigation was unreasonable in light of what was discovered in the records, and the record of the sentencing proceedings underscored the unreasonableness of counsel's conduct and suggested inattention rather than strategic decisions. The Court concluded that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id*. at 533. In *Porter v. McCullum*, 558 U.S. 30, 40 (2009) (per curiam), reviewing *de novo*, the Court unanimously held counsel's failure to uncover and present any evidence of Porter's mental health or mental impairment, his family background, or his military service was deficient performance.

Again, Reeves misconstrues the Court's reasoning and his burden of proof. Unlike *Wiggins* and *Porter*, the record shows that Reeves's counsel performed a mitigation investigation and presented substantial mitigating facts to the jury during the penalty phase. While more mitigation evidence may have been available, Reeves has failed to establish that "[c]ounsel's investigation into [his] background did not reflect reasonable professional judgment." *Wiggins*, 539 U.S. at 534. Additionally, the record provides ample support that it was reasonable for counsel to not hire a mitigation expert given the volumes of information counsel obtained, the contents of the information gathered, and that it was presented to the jury during the penalty phase.

to not hire a mitigation expert was ineffective assistance, the Court "begins with the premise that 'under the circumstances, the challenged action[] might be considered sound trial strategy.'" *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (quoting *Strickland*, *supra*, at 689).

The state court record reflects that Blanchard McLeod, Jr. and Marvin W. Wiggins were appointed as defense counsel for Reeves by the trial court. Attorney McLeod first petitioned the trial court on September 16, 1997, for approval of funds for the hiring of a clinical neuropsychologist, Dr. Goff, "to evaluate, test, and interview [Reeves] for testimony at the trial". (Doc. 23-1 at 70). Argument was heard regarding the motion on September 17, 1997, where Attorney McLeod voiced his reasoning for requesting the funds and the State questioned the value and necessity of such appointment. The following are excerpts from the proceeding:

> McLEOD: We have, however, filed a motion by recommendation of the Capital Mitigation Resources Program which has been assisting us with this matter because of the tremendous conflicting information we have received through probably I would anticipate more than 150 to 200 pages of material with reference to psychological and psychiatric evaluations, et cetera, for the mitigation phase of this proceeding, we would need the services of a neuropsychiatrist and neuropsychologist that has previously been ordered in other capital cases as Mr. Greene so adequately reminded me. And we are asking for the same because in this instance the State has put us on notice that they are going for the death penalty. And the amount of material that we have received through discovery from the school and the Department of Youth Services is beyond our ability to deal with and feel that Dr. Goff would be competent to deal with that matter. . . .
> (Doc. 23-3 at 91).
> . . .
> GREENE [(State Prosecutor)]: I am still taking the same position. This is a helper. I mean the defense attorney can't read the reports and do whatever he intends to do?
> (Doc. 23-3 at 93).
> . . .
> GREENE: [M]y point is you are asking for a whole lot of money to what avail, to help this man testify that the kid didn't do well in school or something? I mean you've got teachers who can testify to that if that's true. If all we are doing is hiring a very expensive investigator as to his background and psychology, I think we are wasting everybody's time. And it looks like that's what we did last time. And that's the reason I challenge it. . . . If we are over here to hire you an expensive

> helper, I think we are paying the two of y'all who are very competent, especially you with your background.
> (Doc. 23-3 at 94-95).
> . . .
> McLEOD: To testify to this Defendant's prior problems, to testify as to the prior treatment that has been given to him, to testify as to what logic and justification we can have as to why rather than the death penalty life would be a very - -
> (Doc. 23-3 at 96-97).
> . . .
> GREENE: I go back to my same point. [No] psychologist or psychiatrist is going to get up here and testify that this man should or should not get a penalty of death because of some psychological reason. He can testify about what he found, what problems the man had. Whatever benefit that has to the jury is fine. The problem is he's going to be trying to - - what you want to try to do is offer him as some sort of person who is going to tell them because of psychological reasons he should get this or that, and that's for the jury and the Judge. He's not going to be allowed to testify to that. . . . But you can get that same testimony from whoever prepared these records or whoever did these tests. You are trying to just get another expensive helper.
> (Doc. 23-3 at 97-98).
> . . .
> McLEOD: Fifteen years of records of which I can't even - - the State just simply dumped them on me.
> (Doc. 23-3 at 98).

The motion was ultimately denied on September 17, 1997. (Doc. 23-1 at 73). McLeod, however, filed an Application for Rehearing of the appointment on September 30, 1997, which was granted on October 16, 1997. (*Id*. at 74-77, 81). In between the filing of the Application of Rehearing on the Motion to Hire a Neuropsychologist, attorney McLeod filed a motion to withdraw from the case on October 13, 1997 (*id*. at 78-79), and Attorney Thomas Goggans was appointed to replace McLeod on October 27, 1997. (*Id*. at 80).

In analyzing the objective reasonableness of counsel's decision not to hire a mitigation expert, the record supports that such a hiring cannot be deemed commonplace at the time of

Reeves's trial. First, the motion was initially denied where other petitions for funds were granted.[8] Second, the exchange between the State prosecutor and defense counsel at the motion hearing evidences that reasonable attorneys could - and did - disagree about the necessity and benefit of such an appointment. Indeed, the State prosecutor implied that the hiring of a mitigation expert would be excessive and nothing more than a hiring a "helper", and defense counsel indicated that he needed assistance in deciphering and sorting through the voluminous records concerning Reeves's background. Additionally, the record reflects that the attorney who desired and pursued the appointment of a mitigation expert, McLeod, withdrew as defense counsel, and attorney Thomas Goggans subsequently petitioned the court to order the release of all of Reeves's mental health records from Taylor Harding Secure Medical Facility, including Dr. Kathy Ronan's court ordered evaluation. (Doc. 23-1 at 88). Attorney Groggans also submitted discovery requests of any and all inculpatory and exculpatory evidence possessed by the State. (Doc. 23-1 at 90-98). One could reasonably conclude, based on Groggans' discovery motions related to obtaining mitigation evidence, that attorney Groggans chose a different route than attorney McLeod and decided to personally be responsible for investigating and putting forth a mitigation defense. Given the totality of the circumstances (including the depth of information contained in the records and the lack of new information discovered by Dr. Goff and Dr. Salekin at the Rule 32 hearing), counsel's actions reveal a thorough investigation into Reeves's background and reasonable professional judgment in construction of their mitigation strategy. *See Wiggins v. Smith*, 539 U.S. 510, 533, 123 S. Ct. 2527, 156 L. Ed. 2d 471 (2003) (noting *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence).

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[8] The trial court approved the request for extraordinary funds for the services of investigators with the Alabama Prison Project's Mitigation and Investigation Program, as well as funds for the hiring of a criminologist. (Doc. 23-1 at 15, 21, 59).

Reeves also asks this Court to reconsider its ruling that he failed to carry his burden of establishing that he was prejudiced by counsel's decision not to hire a mitigation specialist. Reeves asserts: (1) that if counsel had hired a mitigation specialist, "there is no dispute that the jury would have heard that Reeves is intellectually disabled, which is a mitigating factor under Alabama law, and that Reeves suffered from a number of risk factors that either were never presented to the jury or were inadequately explained"; and (2) that the Court failed to weigh the "totality of mitigating evidence", that is both Drs. Goff and Salekin's testimony, against the evidence in aggravation. (Doc. 43 at 10-12). Reeves argues that had counsel hired a mitigation expert, the judge and jury would have heard the following:

> Weapons, alcohol, and illegal drugs were often present in Reeves's house, giving him easy access to guns and alcohol. (Doc. 23-24 at 146).
>
> Reeves's mother . . . had depression, which often went untreated and rendered her unable to parent appropriately. (*Id*. at 152-53).
>
> The three male figures in Reeves's life taught him anti-social and violent behavior, and one of these figures handed him a loaded gun. (Doc. 23-15 at 129-30; Doc. 23-24 at 168-71).
>
> At a young age, Reeves head banged in order to abuse himself and Reeve's mother failed to follow the recommendations of mental health clinicians, was unaware of how much medication she gave Reeves, and often forgot to provide him with prescribed medication. (Doc. 23-24 at 185; Doc. 23-15 at 136-37).

Reeves contends that there is a "reasonable probability" the jury would have recommended life imprisonment without parole instead of the death penalty had it heard the above testimony. (Doc. 43 at 15-16).

At the penalty phase, counsel informed the jury that it would hear testimony describing Reeves's background and explaining what led him to become a person who could commit murder. (Doc. 23-8 at 92-96). Counsel called three witnesses. First, a detective, who testified to the

deplorable physical conditions of Reeves's home and the neighborhood and environment in which he was raised. Second, his mother, who testified to the family's poverty, his mental health, his academic history, his work history, his criminal history, and his family relationships. Third, Dr. Ronan, who testified as to her psychological opinion of Reeves based on her clinical evaluation for competency, as well as her interview with Reeves, and her full review of the record evidence (including mental health records, scholastic records, juvenile criminal records, and medical records). Through Dr. Ronan's testimony, the judge and jury heard much of the same information provided by Drs. Goff and Salekin. Specifically, Dr. Ronan testified that Reeves's mother was an alcoholic, that his mother "didn't follow up" with the treatment offered from Cahaba Heath Center or in "insuring that he continued to receive the medication" for his diagnosed condition of ADHD. (Doc. 23-8 at 142). Dr. Ronan further explained the chemical imbalance of ADHD and the negative consequences of noncompliance with medication treatment. (*Id*. at 144). The penalty phase judge and jury also heard that Reeves was sent off to jail as a juvenile for stealing cars, breaking in houses, fighting, and drugs (doc. 23-8 at 122); that he had numerous adult arrests for class C felonies (*id*. at 152); that Reeves had been smoking marijuana since he was twelve (*id*. at 123); that Reeves "had a lot of problems at school", like cussing at teachers and hitting other children (*id*. at 123-24); that Reeves's life aspiration was to sell drugs (*id*. at 124).

Dr. Ronan assessed Reeves's intelligence through the administration of the verbal portion of the Wexler Intelligence scale. Her findings were consistent with the results of the only previous IQ test Reeves had taken. (*Id*. at 144-146, 149). She further explained "that a person's intelligence and environment work together in affecting that person's life." (*Id*. at 149). She further opined that Reeves's lower intelligence and environment led to a personality disorder. (*Id*. at 151). This personality disorder included features of "repeatedly . . . violat[ing] legal boundaries or social

boundaries with disregard to consequences;" misreading social cues; difficulties in getting or establishing normal close bonds with people. (Doc. 23-8 at 150-51). She reasoned that his lower intelligence and personality disorder resulted in his being "where he is." (Doc. 23-8 at 151). Additionally, the judge instructed the jury during the penalty phase on the types of evidence it should consider mitigating circumstances, stating:

> I will now read to you a list of some of the mitigating circumstances which you may consider if you find from the evidence in trial or in sentencing hearing that such mitigating circumstances exist in this case, . . . the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law were substantially impaired could be a mitigating circumstance. . . . that the Defendant grew up in a poor home environment, . . . lacked appropriate developmental resources in growing up, . . . that the Defendant's level of intelligence is on the borderline, . . . that the Defendant when placed in a structured environment has responded positively, ... In addition to the mitigating circumstances that were specified by the law and those that I just read to you, mitigating circumstances shall include any aspect of a Defendant's character or record and any circumstance through the defense that the Defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

(Doc. 23-8 at 196-97).

The Eleventh Circuit has consistently held that counsel is ineffective for failing to conduct a reasonable investigation, not for failing to seek the assistance of experts. *Reaves v. Sec'y, Fla. Dep't of Corr.*, 872 F.3d 1137, 1160 (11th Cir. 2017) (citing *Barwick v. Sec'y, Fla. Dep't of Corr.*, 794 F.3d 1239, 1244 (11th Cir. 2015) ("When mental health is at issue, counsel does not offer ineffective assistance when it later becomes apparent that an expert who would have testified more favorably than the expert who was actually called may have existed.") (internal citation omitted).[9]

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[9] [S]*ee also Elledge v. Dugger*, 823 F.2d 1439, 1447 n.17 (11th Cir.), opinion withdrawn in part on denial of reh'g, 833 F.2d 250 (11th Cir. 1987) ("We emphasize that the duty is only to conduct a reasonable investigation. Counsel is not required to 'shop' for a psychiatrist who will testify in a particular way."); *cf. Byram v. Ozmint*, 339 F.3d 203, 210 (4th Cir. 2003) ("[A] failure to 'shop around' for a favorable expert opinion after an evaluation yields little in mitigating evidence does not constitute ineffective assistance."); *Walls v. Bowersox*, 151 F.3d 827, 835 (8th

Unlike the cases cited by Reeves, this is a case in which the new evidence of Drs. Goff and Salekin "would barely have altered the sentencing profile presented to the sentencing judge." *Strickland*, *supra*, at 700; *see also Glock v. Moore*, 195 F.3d 625, 636 (11th Cir. 1999) (concluding petitioner cannot show prejudice "where much of the new evidence that [petitioner] presents is merely repetitive and cumulative to that which was presented at trial."). While Dr. Ronan may not have discovered or testified to every detail discussed by Dr. Salekin, she did similarly identify many mitigating facts and explain to the jury how Reeves's background and lower intelligence must be considered when assessing how Reeves "got to where he is." (Doc. 23-8 at 151). Despite hearing testimony of Reeves's "dysfunctional" upbringing and home life and being instructed on how such factors are mitigating circumstances to be taken into consideration when determining the sentence to impose on a defendant, the jury nevertheless recommended a sentence of death. (Doc. 23-8 at 149). The distinguishing facts laid out by Drs. Goff and Salekin fail to paint a different picture of Reeves than that known to the jury; at best, their testimony simply adds a few shades of color. *See Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1260-61 (11th Cir. 2012) ("[T]he United States Supreme Court, this Court, and other circuit courts of appeals generally hold that evidence presented in postconviction proceedings is 'cumulative' or 'largely cumulative' to or 'duplicative' of that presented at trial when it tells a more detailed version of the same story told at trial or provides more or better examples or amplifies the themes presented to the jury.").

> Cir. 1998) ("Counsel is not required to continue looking for experts just because the one he has consulted gave an unfavorable opinion.") (quotation marks omitted); *Poyner v. Murray*, 964 F.2d 1404, 1419 (4th Cir. 1992) ("The mere fact that his counsel did not shop around for a psychiatrist willing to testify to the presence of more elaborate or grave psychological disorders simply does not constitute ineffective assistance.").

Reaves v. Sec'y, Fla. Dep't of Corr., 872 F.3d 1137, 1160 (11th Cir. 2017).

Consequently, the state court's rejection of Reeves's penalty phase ineffective assistance claim was not an unreasonable application of clearly established law. *White v. Woodall*, 572 U.S. 118, 134 S. Ct. 1377, 1702, 188 L. Ed. 2d 392 (2014) ("[A]n unreasonable application of [Supreme Court] holdings must be objectively unreasonable, not merely wrong; even clear error will not suffice."); *Williams v. Taylor*, 529 U.S. 362, 411, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000) (Under 2254(d)(1)'s 'unreasonable application' clause . . . a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.").

Likewise, the state court's "factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance," *Wood v. Allen*, 558 U.S. 290, 301, 130 S. Ct. 841, 175 L. Ed. 2d 738 (2010), or because jurist of reason could disagree about the court's conclusion. *Brumfield v. Cain*, 576 U.S. __, 135 S. Ct. 2269, 2277, 192 L. Ed. 2d 356 (2015) ("If reasonable minds reviewing the record might disagree about the finding in question, on habeas review that does not suffice to supersede the trial court's determination.") (internal quotation marks and alterations omitted). "[T]he fact 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 inevitable identify shortcomings in the performance of prior counsel." *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 647 (11th Cir. 2016) (quotation marks omitted).

Accordingly, Reeves has failed to identify manifest errors of law or fact, newly discovered evidence, or changes in law germane to his petition. For these reasons, Reeves's motion to

reconsider Claim 3.c is denied and no Certificate of Appealability is warranted as to this claim for relief.

C. Reconsideration of Juror-Misconduct Claim.

Petitioner Reeves's final ground for relief relates to Claim 4 of his habeas petition. Reeves argues that the Court misapplied clearly established law and seeks reconsideration of his juror misconduct claim. Specifically, Reeves asserts that the Court reversed the burden applicable to his claim by requiring him to not only plead but *prove* that the alleged juror misconduct affected the verdict by holding in its January 8 Order that "Reeves did not allege 'the nature of what reached the jury or may have influenced the verdict or vote.'" (Doc. 43 at 17). This, however, is a misstatement of the Court's holding.

The state court determined that Reeves's juror misconduct claims were insufficiently plead to warrant an evidentiary hearing pursuant to Ala. R. Crim. P. Rule 32.6(b). Rule 32.6(b) requires a petitioner to plead his claim with specificity, instructing:

> Each claim in the petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.

In applying the statutory rule, the Alabama Court of Criminal Appeals relied heavily on *Moody v. State*, 95 So. 3d 827 (Ala. Crim. App. 2011), and concluded that "at a minimum, [Reeves must] identify the juror who . . . committed the misconduct, must allege specific facts indicating what actions that juror took that the petitioner believes constituted the misconduct, and must allege specific facts indicating how that juror's actions denied the petitioner a fair trial." (Doc. 29 at 71). The appellate court reasoned that Reeves, in presenting his juror misconduct claim, failed to satisfy his burden of pleading with specificity when: (1) he failed to identify the juror who committed the

misconduct (other than by the reference of "Juror Jane Doe"); (2) failed to identify the juror who allegedly changed her sentencing vote due to Juror Jane Doe's private communication with he; (3) failed to identify what information Juror Jane Doe received from extraneous sources; and (4) failed to allege how the information prejudiced him. (*Id.*). On federal habeas review, this Court was required to "answer two questions . . . . First, whether [Reeves's] . . . Rule 32 petition and its attached exhibits pleaded enough specific facts that, if proven, amount to a valid . . . claim. Second, if [the court] answer[s] the first question in the affirmative, [it] must determine whether the Alabama Court of Criminal Appeals's decision to the contrary was unreasonable under §2254(d)." *Daniel v. Comm'r.*, 822 F.3d 1248, 1261 (11th Cir. 2016).

"[W]e are mindful that 'at the pleading stage of Rule 32 proceedings in Alabama, a Rule 32 petitioner does not have the burden of proving his claims" and that the facts alleged in his petition are assumed to be true. *Id*. (quotation and alterations omitted). We are also cognizant that "[t]o obtain habeas relief a state prisoner must show that the state court's ruling on the claim . . . was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (citations omitted). "[I]f some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief must be denied." *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F. 3d 1230, 1257 (11th Cir. 2012) (citation omitted). Review of Reeves's claim reveals that the pleading lacks full disclosure of necessary details to make "a colorable showing that the exposure actually occurred." *United States v. Ayarza-Garcia*, 819 F.2d 1043, 1051 (11th Cir. 1987); *accord*., *Hyde v. State*, 950 So. 2d 344, 356 (Ala. Crim. App. 2006) ("The full factual basis for the claim must be included in the petition itself."). Review also reveals that the state court did not hold, and neither does this Court, that

Reeves must provide or prove any of these factors in his pleading. Instead, the state court pointed out unidentified facts and determined the cumulative vagueness of the affidavit fell on the side of a conclusory allegation rather than full disclosure of the factual basis for the claim (as required by § 32.6(b)) and was insufficient to sustain his pleading burden. This Court explained that the duty to investigate juror misconduct claims exists on a spectrum and concluded the evidence provided by Reeves rested on the lower end of that spectrum. The Court, similarly, identified the missing details from Reeves's pleading and stated that "[t]he absence of details plead regarding the extrinsic influence creates an unfillable void for the court in determining the nature of what reached the jury or may have influenced the verdict vote." (January 8 Order, Doc. 29 at 76-77). In other words, Reeves failed to provide enough specific information to "make[] an adequate showing of extrinsic influence to overcome the presumption of jury impartiality." *United States v. Barshov*, 733 F.2d 842, 851 (11th Cir. 1984). The evidence presented supports that fairminded jurists could disagree as to whether or not Reeves provided a "clear and specific statement [of his claim] . . ., including full disclosure of the factual basis" of the claim as required by Alabama's pleading statute; thus, the Court held federal habeas relief was not warranted based on the deferential standard of §2254(d).

In his current Rule 59(e) motion, Reeves fails to identify manifest errors of law or fact, newly discovered evidence, or changes in law germane to his petition. Reeves primarily rehashes previously considered and rejected contentions relating to his claims of ineffective assistance. Rule 59(e) relief is not warranted where a party simply reiterates arguments previously considered and rejected in the underlying ruling. *See, e.g., Mincey v. Head*, 206 F.3d 1106, 1137 n.69 (11th Cir. 2000) (explaining that "[t]he function of a motion to alter or amend a judgment is not to serve as a vehicle to relitigate old matters"); *Atl. Specialty Ins. Co. v. Mr. Charlie Adventures, LLC*, 2015

U.S. Dist. LEXIS 58859, 2015 WL 2095650, at *2 (S.D. Ala. May 5, 2015) (explaining that it "is improper to utilize a motion to reconsider to ask a district court to rethink a decision once made, merely because a litigant disagrees" with the outcome). For these reasons, Rule 59(e) relief is denied.

In the alternative to reconsideration of his juror misconduct claim, Reeves requests that a COA be issued. This motion is also DENIED.

IV. Conclusion.

For the foregoing reasons, Petitioner Reeves's Motion to Alter or Amend the Court's Judgment is **DENIED**.

DONE and **ORDERED** this the **1st** day of **May**, **2019**.

s/Kristi K. DuBose
CHIEF UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES

MATTHEW REEVES *v.* ALABAMA

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS OF ALABAMA

No. 16–9282. Decided November 13, 2017

The petition for a writ of certiorari is denied.

JUSTICE SOTOMAYOR, with whom JUSTICE GINSBURG and JUSTICE KAGAN join, dissenting from the denial of certiorari.

Petitioner Matthew Reeves was convicted by an Alabama jury of capital murder and sentenced to death. He sought postconviction relief in state court based on, as relevant here, several claims of ineffective assistance of trial and appellate counsel.[1] Among those claims, Reeves argued that his trial counsel was ineffective for failing to hire an expert to evaluate him for intellectual disability, despite having sought and obtained funding and an appointment order from the state trial court to hire a specific neuropsychologist. His postconviction counsel subsequently hired that same neuropsychologist, who concluded that Reeves was, in fact, intellectually disabled. Reeves contended that this and other evidence could have been used during the penalty phase of his trial to establish mitigation.

The Alabama Circuit Court held an evidentiary hearing on Reeves' postconviction petition, at which Reeves pre-

[1] Reeves also argued in his postconviction petition that he was constitutionally ineligible for the death penalty pursuant to *Atkins* v. *Virginia*, 536 U. S. 304 (2002). The Alabama Court of Criminal Appeals rejected that claim, and Reeves does not challenge that decision in his petition for writ of certiorari. Instead, he maintains that regardless of whether he is ineligible for execution under *Atkins*, he has the right to effective assistance in presenting evidence of his intellectual disability as mitigation during the penalty phase of his trial. Pet. for Cert. 10, n. 2.

sented substantial evidence regarding his intellectual disability and his counsel's performance. He did not, however, call his trial or appellate counsel to testify. The court denied the petition, and the Alabama Court of Criminal Appeals affirmed. In doing so, the Court of Criminal Appeals explained that a petitioner seeking postconviction relief on the basis of ineffective assistance of counsel must question his counsel about his reasoning and actions. Without considering the extensive record evidence before it regarding Reeves' counsel's performance or giving any explanation as to why that evidence did not prove that his counsel's actions were unreasonable, the Court of Criminal Appeals held that Reeves' failure to call his attorneys to testify was fatal to his claims of ineffective assistance of counsel. The Alabama Supreme Court denied review.

There can be no dispute that the imposition of a categorical rule that counsel must testify in order for a petitioner to succeed on a federal constitutional ineffective-assistance-of-counsel claim contravenes our decisions requiring an objective inquiry into the adequacy and reasonableness of counsel's performance based on the full record before the court. Even Alabama does not defend such a rule. Instead, the dispute here is whether the Alabama Court of Criminal Appeals in fact imposed such a rule in this case. I believe it plainly did so. For that reason, I respectfully dissent from the denial of certiorari.

I

At his capital trial, Reeves was initially appointed two attorneys, Blanchard McLeod, Jr., and Marvin Wiggins, to represent him. Before trial, McLeod and Wiggins filed a motion requesting that the court appoint Dr. John R. Goff, a clinical neuropsychologist, as an expert "to evaluate, test, and interview" Reeves and require the State to provide them with the necessary funds to hire Dr. Goff. 1 Record in No. 98–77 (Ala. Crim. App.), pp. 64–65 (Direct

Appeal Record). The trial court denied the motion, *id.,* at 67, and McLeod and Wiggins requested rehearing. In the rehearing request, the attorneys explained that they "possesse[d] hundreds of pages of psychological, psychometric and behavioral analysis material" and "[t]hat a clinical neuropsychologist or a person of like standing and expertise [was] the only avenue open to the defense to compile [and] correlate this information, interview [Reeves,] and present this information in an orderly and informative fashion to the jury during the mitigation phase of the trial." *Id.,* at 68–69.

During a hearing on the request, McLeod represented that hiring Dr. Goff was critical to the attorneys' preparation for the mitigation phase of Reeves' trial. He urged the importance of retaining Dr. Goff right away, as Dr. Goff would require time to review the existing records, interview people familiar with Reeves, and meet with Reeves several times prior to testifying. 3 Direct Appeal Record, Tr. in No. CC–97–31 (C. C. Dallas Cty., Ala.), pp. 9–10. As support for that point, McLeod recounted that, in a recent capital case in which another trial court had granted an "identical" motion to appoint Dr. Goff, the counsel there had filed "at a very late date" such that Dr. Goff "did not have the time to adequately prepare" for that defendant's hearing, and the death penalty was imposed. *Id.,* at 10. The trial court reconsidered and granted the funding and appointment requests. 1 *id.,* at 75.

Shortly thereafter, McLeod withdrew as counsel and was replaced by Thomas Goggans. Wiggins, however, remained as counsel on the case, and he and Goggans represented Reeves at trial.

Despite having received funding and an appointment order from the court, Reeves' trial counsel never contacted Dr. Goff, nor did they hire any other expert to evaluate Reeves for intellectual disability, notwithstanding the "hundreds of pages" of materials they possessed. 13 Rec-

ord in No. CC–97–31.60 (Rule 32 Record), pp. 66–67; 4 *id.,* at 697; 5 *id.,* at 862.

After the guilt phase of the trial concluded, the jury convicted Reeves of capital murder. During the penalty phase, Reeves' trial counsel called three mitigation witnesses. First, they called Detective Pat Grindle, the officer in charge of investigating the murder, who gave a physical description of Reeves' childhood home based on his search of the house during the investigation. 8 Direct Appeal Record, Tr. 1118–1122; ___ So. 3d ___, 2016 WL 3247447, *3 (Ala. Crim. App., June 10, 2016). Next, petitioner's mother testified about Reeves' childhood, including that he had repeated two grades, was put in "special classes," received mental health services starting in second or third grade, and was expelled in eighth grade. 8 Direct Appeal Record, Tr. 1127. She also testified that, when he was young, Reeves had "little blackout spells" and would report "seeing things," and that he was shot in the head a few months before the murder for which he was convicted. *Id.,* at 1127, 1131, 1137, 1120–1150. Finally, Reeves' counsel called Dr. Kathleen Ronan, a court-appointed clinical psychologist, with whom counsel met and spoke for the first time shortly before she took the witness stand. 4 Rule 32 Record 609. Dr. Ronan had evaluated Reeves for the purposes of assessing his competency to stand trial and his mental state at the time of the offense, but had not conducted a penalty-phase evaluation or evaluated Reeves for intellectual disability. *Ibid.* Dr. Ronan testified that she had given Reeves only the verbal part of an intelligence test, noting that this was the "portion [of the test that] taps into the issues that were being asked by the Court," and had concluded based on that partial assessment that he was at "the borderline of mental retardation." 8 Direct Appeal Record, Tr. 1165.

The jury deliberated for less than an hour. 8 Direct Appeal Record 1227. By a vote of 10 to 2, they recom-

mended that Reeves be sentenced to death.[2] 2 *id.,* at 233. The trial judge then considered the aggravating and mitigating circumstances and found two mitigating factors: Reeves' age and lack of significant prior criminal history. *Id.,* at 236. He expressly refused to find that Reeves' "capacity . . . to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Ala. Code §13A–5–51(6) (2015); 2 Direct Appeal Record 237. The trial judge found that the aggravating circumstances outweighed the two mitigating ones and sentenced Reeves to death. *Id.,* at 239.

After his conviction and sentence were affirmed on direct appeal, during which Goggans continued to represent him, Reeves, with the assistance of new counsel, sought postconviction relief in state court pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. He alleged, *inter alia*, ineffective assistance of both his trial and appellate counsel. Among his claims were that his trial counsel were ineffective for failing to hire Dr. Goff or another neuropsychologist to evaluate him for intellectual disability, failing to present expert testimony of intellectual disability during the penalty phase to establish a mitigating circumstance, and failing to conduct an adequate mitigation investigation.

The Alabama Circuit Court held a 2-day hearing on Reeves' Rule 32 petition. Reeves did not call McLeod, Wiggins, or Goggans to testify.[3] He did, however, call Dr. Goff, who had evaluated Reeves for purposes of his post-

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[2] Had only one more juror voted against imposing the death penalty, the jury could not have recommended death. Ala. Code §13A–5–46(f) (2015).

[3] Reeves implies in his petition for writ of certiorari that one reason he did not call Wiggins to testify was that Wiggins had become a state-court judge by the time the Rule 32 proceedings had started and thus would have had to testify before one of his judicial colleagues about whether his prior professional conduct had been deficient.

conviction petition. Dr. Goff testified based on his review of Reeves' childhood and adolescent records and the results of a battery of tests designed to assess IQ, neuropsychological functioning, cognitive abilities, and adaptive functioning. He concluded that Reeves had significantly subaverage intellectual functioning and significant deficits in multiple areas of adaptive functioning, both of which manifested before Reeves was 18 years old, and that Reeves therefore was intellectually disabled. 2016 WL 3247447, *11–*12. Dr. Goff further testified that, had Reeves' trial counsel asked him to evaluate Reeves years earlier for purposes of testifying at trial, he would have performed similar evaluations and reached the same conclusion. 13 Rule 32 Record 21–22, 66–68; 4 *id.,* at 704.

Reeves also introduced testimony from Dr. Ronan about the limitations of her earlier evaluation. She stated in an affidavit that even though she had been asked "*only* to evaluate [Reeves] for the purposes of Competence to Stand Trial and Mental State at the Time of Offense, i.e., for the trial phase of the case," and "was not requested to complete a sentencing phase evaluation" or "extensive clinical evaluation regarding mental retardation," Reeves' counsel nonetheless "called [her] to testify at the sentencing phase." *Id.,* at 609. Dr. Ronan explained that "[t]he evaluation for [c]apital sentencing would contain different components than those for the trial phase evaluations, and would be more extensive in terms of testing and background investigation." *Id.,* at 610. She confirmed that Reeves' counsel would have known about these differences, because she "informed [them] as to the limitations of any testimony during [c]apital sentencing, in that the original evaluation was not performed for that purpose." *Id.*, at 609.

In addition, Reeves presented a report and testimony from Dr. Karen Salekin, a forensic and developmental psychologist who conducted a mitigation evaluation. 13

id., at 111, 118, 125. Dr. Salekin testified about her assessment of the risk factors in Reeves' life and stated that, based on her review of the evidence presented at trial, Dr. Ronan and Reeves' mother had failed to identify several of those factors and had inadequately addressed the impact of others during their testimony at the sentencing hearing. *Id.,* at 130–190. Among those factors were the harmful influence of Reeves' brother and Reeves' exposure to domestic violence, guns, and substance abuse as a child. *Id.,* at 140, 144–150.

The State presented one rebuttal witness, Dr. Glen David King, a clinical and forensic psychologist who testified that, based on his testing and the information available to him, Reeves "was in the borderline range of intellectual ability, but was not intellectually disabled." 2016 WL 3247447, *18. On cross-examination, Dr. King acknowledged that Reeves had achieved a score of 68 on an IQ test Dr. King administered, and on that basis, suffered from significant subaverage intellectual functioning. *Ibid.* Dr. King also testified on cross-examination that his testing revealed that Reeves' adaptive functioning skills in three categories—domestic activity, prevocational/vocational activity, and self-direction—were in the 25th percentile of developmentally disabled individuals. *Id.,* at *17–*18; 14 Rule 32 Record 265–268, 273–280; 2 *id.,* at 385.

Following the Rule 32 hearing, the Circuit Court held that Reeves failed to prove his ineffective-assistance claims. The Alabama Court of Criminal Appeals affirmed on the basis that Reeves did not present testimony of his former counsel. The court stressed that "'to overcome the strong presumption of effectiveness, *a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning*.'" 2016 WL 3247447, *29 (quoting *Stallworth* v. *State*, 171 So. 3d 53, 92 (Ala. Crim. App. 2013); emphasis in original). "The burden was on Reeves to prove by a preponderance of the

evidence that his counsel's challenged decisions were not the result of reasonable strategy," the court explained. 2016 WL 3247447, *31. "[B]ecause Reeves failed to call his counsel to testify, the record is silent as to the reasons trial counsel" made various decisions, including the choice "not to hire Dr. Goff or another neuropsychologist to evaluate Reeves for intellectual disability" and the choice "not to present testimony from such an expert during the penalty phase of the trial . . . in order to establish a mitigating circumstance." *Ibid.* The court therefore concluded, without any consideration of the ample evidence before it of Reeves' counsel's actions and reasoning, that the presumption of effectiveness had not been disturbed and rejected Reeves' ineffective-assistance claims. *Id.,* at *32. The Alabama Supreme Court denied review.

Reeves petitioned for a writ of certiorari. He contended that the state appellate court's position that a defendant must present his counsel's testimony to establish that his counsel's performance was deficient is unreasonable under and at odds with *Strickland* v. *Washington*, 466 U. S. 668 (1984). I agree. Because I further agree that the proceeding below was tainted by this constitutional error, I would grant the petition and summarily reverse.

II

A

Strickland established the legal principles governing ineffective-assistance-of-counsel claims. Namely, a defendant must show both deficient performance and prejudice. *Id.,* at 687. It is the first prong of the *Strickland* test that is at issue here. In assessing deficiency, a court presumes that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.,* at 690. The burden to rebut that strong presumption rests with the defendant, *id.,* at 687, who must present evidence of what his counsel did or

did not do, see *Burt* v. *Titlow*, 571 U. S. ___, ___ (2013).

This Court has never, however, required that a defendant present evidence of his counsel's actions or reasoning in the form of testimony from counsel, nor has it ever rejected an ineffective-assistance claim solely because the record did not include such testimony. Rather, *Strickland* and its progeny establish that when a court is presented with an ineffective-assistance-of-counsel claim, it should look to the full record presented by the defendant to determine whether the defendant satisfied his burden to prove deficient performance. The absence of counsel's testimony may make it more difficult for a defendant to meet his burden, but that fact alone does not absolve a court of its duty to look at the whole record and evaluate the reasonableness of counsel's professional assistance in light of that evidence.

That *Strickland* does not require testimony from counsel to succeed on an ineffective-assistance claim is clear from past decisions in which this Court has found deficient performance *despite* such testimony, based on review of the full record. For example, in *Wiggins* v. *Smith*, 539 U. S. 510 (2003), the Court considered the decision of two attorneys "to limit the scope of their investigation into potential mitigating evidence." *Id.,* at 521. Counsel justified their limited investigation as reflecting a tactical judgment to pursue an alternative strategy, *ibid.*, but the Court did not simply accept that explanation at face value. Instead, it "conduct[ed] an objective review of their performance." *Id.,* at 523. In reviewing "[t]he record as a whole," *id.,* at 531, the Court considered, among other evidence, that the State had made funds available for the retention of a forensic social worker to prepare a social history report, yet counsel had decided not to commission such a report, *id.,* at 516–517, 524. Based on the record, the Court concluded that the attorneys' conduct was unreasonable, "not reasoned strategic judgment" as they had

testified. *Id.,* at 526.

In *Porter* v. *McCollum*, 558 U. S. 30 (2009) (*per curiam*), the Court again addressed a claim of an attorney's alleged failure to investigate and present mitigating evidence. Counsel there also testified at the postconviction hearing about his preparation for the penalty phase, but the Court still looked at the full record to assess whether the defendant had nevertheless demonstrated deficient performance. For instance, the Court pointed to court-ordered competency evaluations in the record that discussed the defendant's academic history, military service, and wounds sustained during combat, and observed, based on that evidence, that counsel had "ignored pertinent avenues for investigation of which he should have been aware." *Id.,* at 40. Again, here, trial counsel's testimony about his reasoning did not defeat the ineffective-assistance-of-counsel claim, given the Court's consideration of the evidence in the record as a whole.

As *Porter* and *Wiggins* illustrate, trial counsel's testimony is not sufficient to find adequate performance when the full record rebuts the reasonableness of the proffered justification. It cannot be, then, that such testimony is necessary in every case. Where counsel does not testify but the defendant offers other record evidence, a court can simply presume that counsel would have justified his actions as tactical decisions and then consider whether the record rebuts the reasonableness of that justification.

Not only is the imposition of a *per se* rule requiring testimonial evidence from counsel inconsistent with our precedent, it is also at odds with the Court's observation in *Massaro* v. *United States*, 538 U. S. 500 (2003), that ineffective-assistance claims need not always be brought on collateral review because "[t]here may be cases in which trial counsel's ineffectiveness is so apparent from the record that appellate counsel will consider it advisable to raise the issue on direct appeal" or an appellate court will

address the deficiencies *sua sponte*. *Id.,* at 508. As a challenge on direct appeal is made without any further factual development, *Massaro* necessarily recognized that an ineffective-assistance-of-counsel claim can be proved even absent counsel's testimony.

Lastly, that courts have a duty to look to the whole record when considering whether a defendant has met his burden makes good practical sense. There are many reasons why counsel may be unable or unwilling to testify about his reasoning, including death, illness, or memory loss. Such circumstances should not in and of themselves defeat an ineffective-assistance claim.

B

Alabama rightly does not attempt to defend the Court of Criminal Appeals' rule on its merits. Instead, the State asserts that Reeves misreads the decision below. The Court of Criminal Appeals, it maintains, did not hold that trial counsel's testimony is required to prove an ineffective-assistance claim. Brief in Opposition 14. Rather, in the State's view, the court "made the sound decision that Reeves failed to prove his ineffective assistance of counsel claims" because he "failed to present any evidence, including the testimony of trial counsel, to prove that his attorney's strategic decisions were unreasonable." *Id.,* at 16. That position, however, is belied by the record before the court and the decision's express language and analysis. Reeves presented ample evidence in support of his claim that his counsel's performance was deficient, but the court never considered or explained why, in light of that evidence, his counsel's strategic decisions were reasonable. It rested its decision solely on the fact that Reeves had not called his counsel to testify at the postconviction hearing.

In the course of explaining the requirement that a defendant must overcome the strong presumption that counsel acted reasonably with "*evidence* to the contrary," 2016

WL 3247447, *28 (emphasis in original), the decision below plainly stated, with emphasis, that "'to overcome the strong presumption of effectiveness, *a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning*,'" *id.,* at *29 (quoting *Stallworth*, 171 So. 3d, at 92). That pronouncement was followed by citations to other Alabama Court of Criminal Appeals cases with explanatory parentheticals noting that those decisions had held "that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question . . . counsel regarding their reasoning." 2016 WL 3247447, *29 (citing *Broadnax* v. *State*, 130 So. 3d 1232, 155–156 (2013); *Whitson* v. *State*, 109 So. 3d 665, 676 (2012); *Brooks* v. *State*, 929 So. 2d 491, 497 (2005); *McGahee* v. *State*, 885 So. 2d 191, 221–222 (2003)).

This was not mere stock language. The appellate court unquestionably applied this requirement to Reeves' claims. At the outset of its analysis, it announced that "Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel." 2016 WL 3247447, *30. As described above, the court explained that "because Reeves failed to call his counsel to testify, the record [was] silent" as to his counsel's reasons and actions, and the presumption of effective assistance therefore could not be rebutted. *Id.,* at *31, *32. In total, the court emphasized that Reeves did not call his counsel to testify at five different points in the opinion. *Id.,* at *4, *28, *30, *31, *32.

Unlike the whole-record analysis undertaken in *Wiggins* and *Porter*, the Alabama Court of Criminal Appeals never considered whether the other, non-counsel-testimony evidence before it could rebut the presumption of reasonable professional assistance. Its failure to do so is baffling given that there was ample such evidence in the record below, all of which Reeves pointed the court to in his brief.

See Brief for Appellant in No. CR–13–1504, pp. 58–82.

For instance, the Court of Criminal Appeals had before it trial counsel's two motions for the appointment and funding of Dr. Goff, in which they explained why his assistance and testimony would be critical to the case; the representations made by Reeves' counsel during the pretrial hearing on the rehearing motion; and the trial court's order granting the request. From those motions and representations, the court knew that trial counsel had in their possession voluminous materials bearing on Reeves' intellectual impairments. The court further knew from the record and Dr. Goff's testimony at the Rule 32 hearing that, despite the appointment order and funding, Reeves' counsel never contacted him and never obtained any other intellectual disability evaluation in preparation for trial.

The court also knew from Dr. Ronan's affidavit that the first time Reeves' counsel spoke with her was shortly before she took the stand and that she had not conducted a penalty-stage evaluation, evaluated Reeves for intellectual disability, or administered a complete IQ test. Moreover, it knew that a capital sentencing evaluation would have involved different components and been more extensive, and that Reeves' attorneys were informed as to such differences.

The court, too, knew that Dr. Salekin had presented significant mitigation evidence at the Rule 32 hearing that was not set forth in any testimony during the sentencing-phase hearing.

The Alabama Court of Criminal Appeals was not free to ignore this evidence simply because Reeves did not call his counsel to testify at the postconviction hearing. On this point, *Strickland* could not be more clear:

> "[A] court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged

> conduct on the facts of the particular case, viewed as of the time of counsel's conduct. A convicted defendant making a claim of ineffective assistance must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance." 466 U. S., at 690.

Reeves identified the omissions of his counsel that he alleged were constitutionally deficient. He presented evidence of what his counsel knew, which included several red flags indicating intellectual disability; what his counsel believed to be necessary for his defense, which included funding for an expert to evaluate him for intellectual disability; what his counsel did, which included repeatedly asking for and securing such funding; and what his counsel did not do, which included failing to then use that funding to hire such an expert and failing to present evidence of intellectual disability as mitigation. In so doing, Reeves upheld his end of the evidentiary bargain. The Alabama Court of Criminal Appeals, on the other hand, did not. It never explained, in light of the substantial record before it, why the choices Reeves' counsel made were reasonable.

Strickland and its progeny demand more. In light of the constitutional error below, I would grant the petition for writ of certiorari, reverse, and remand so that the Court of Criminal Appeals could explain why, given the full factual record, Reeves' counsel's choices constituted reasonable performance. Instead, the Court has cleared the way for Reeves' execution. That is a result with which I cannot agree.

I respectfully dissent from the denial of certiorari.

REL: 06/10/2016

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2015-2016

CR-13-1504

Matthew Reeves

v.

State of Alabama

Appeal from Dallas Circuit Court
(CC-97-31.60)

KELLUM, Judge.

Matthew Reeves appeals the circuit court's denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his capital-murder conviction and sentence of death.

In 1998, Reeves was convicted of murder made capital because it was committed during the course of a robbery in the first degree, see § 13A-5-40(a)(2), Ala. Code 1975. By a vote of 10-2, the jury recommended that Reeves be sentenced to death for his capital-murder conviction. The trial court followed the jury's recommendation and sentenced Reeves to death. This Court affirmed Reeves's conviction and sentence on appeal. Reeves v. State, 807 So. 2d 18 (Ala. Crim. App. 2000). The Alabama Supreme Court denied certiorari review, and this Court issued a certificate of judgment on June 8, 2001. The United States Supreme Court subsequently denied certiorari review on November 13, 2001. Reeves v. Alabama, 534 U.S. 1026 (2001).

In our opinion affirming Reeves's conviction and sentence, this Court set out the facts of the crime as follows:

> "The State's evidence tended to show the following. On November 27, 1996, the appellant (who was 18 years old at the time) and his younger brother, Julius, visited Brenda Suttles and Suttles's 15-year-old cousin, Emanuel, at Suttles's house on Lavender Street in Selma. There, according to Suttles, everyone agreed to go out 'looking for some robberies.' (R. 684.) Shortly after noon that day, the foursome left Suttles's house on foot and walked to a nearby McDonald's restaurant, where they

saw Jason Powell driving by in his car. The appellant's brother, Julius, flagged Powell down, and Powell agreed to give the group a ride.

"Brenda Suttles and Emanuel Suttles testified that after the foursome got into Powell's car, Julius Reeves suggested that they go to White Hall, a town in neighboring Lowndes County, to rob a drug dealer. According to Brenda Suttles, everyone in the car agreed to the plan. (Powell, who also testified at trial, denied hearing the discussion about a robbery.) Before leaving Selma, the group stopped at an apartment on Broad Street. Julius Reeves went inside the apartment and returned to the car a short time later carrying a shotgun, which he handed to the appellant. With Powell driving, the group then headed for White Hall.

"Before they reached White Hall, however, Powell's car broke down on a dirt road off Highway 80. Shortly thereafter, a passing motorist, Duane Smith, stopped and told the group that he was in a hurry to meet some friends to go hunting, but that he would return around sunset and would take them to get help then. For the next couple of hours, the group sat in Powell's car and listened to music, until another passing motorist, Willie Johnson, stopped in his pickup truck and offered to tow Powell's car to Selma. Using some chains that he kept in his pickup truck, Johnson hooked Powell's car to the back of his truck. With Julius Reeves riding in the truck with him and the others in Powell's car, Johnson towed the car to the Selma residence where the appellant and Julius lived with their mother.

"When they arrived at the Reeveses' house, Julius Reeves got out of Johnson's truck and told the others that Johnson wanted $25 for towing them. However, no one had any money to pay Johnson. Julius Reeves then offered to give Johnson a ring as payment if Johnson would drive him to his

girlfriend's house to get the ring. Johnson agreed and he unhooked Powell's car from his truck. According to Jason Powell and Emanuel Suttles, Julius Reeves at this point told the others that Johnson was going to be their robbery victim. While Jason Powell and Emanuel Suttles stayed behind with Powell's car in front of the Reeveses' house, Julius Reeves got back in the cab of the truck with Johnson, and Brenda Suttles climbed into the rear bed of the truck. Testimony indicated that when Johnson started the truck, the appellant jumped into the rear bed of the truck with the shotgun, hiding the weapon behind his leg as he did so.

"When they arrived at Julius's girlfriend's house in Johnson's truck, Julius went inside and retrieved the ring he had promised to give Johnson as payment. According to Brenda Suttles, when Julius came out of the house, he walked to the rear of Johnson's truck and told her and the appellant that he was not going to let Johnson keep the ring. After Julius got back in the cab of the truck, Johnson drove everyone back to the Reeveses' house.

"Jason Powell and Emanuel Suttles, who had remained at the house with Powell's car, testified that sometime around 7:00 p.m., they saw Johnson's truck drive by the house and turn into an alley -- known as Crockett's Alley -- behind the house. According to Brenda Suttles, who was in the rear bed of the truck with the appellant, just as the truck came to a stop in the alley, she heard a loud 'pow' sound. (R. 704.) Suttles testified that when she looked up, the appellant was withdrawing the barrel of the shotgun from the open rear window of the truck's cab. Johnson had been shot in the neck and was slumped over in the driver's seat. Suttles testified that Julius Reeves jumped out of the truck's cab and asked the appellant what he had done, and that the appellant then told Julius and Suttles to go through Johnson's pockets to 'get his money.' (R. 704.) Suttles stated that Julius then

pulled Johnson out of the truck and went through his pockets, giving the money he found in the pockets to the appellant. After Julius had gone through Johnson's pockets, Suttles helped him put Johnson back in the truck's cab. According to Suttles, Johnson was bleeding heavily and making 'gagging' noises. (R. 721.)

"Jason Powell and Emanuel Suttles testified that they heard the gunshot after Johnson's truck pulled into Crockett's Alley and that a short time later they saw the appellant, Julius Reeves, and Brenda Suttles run out of the alley and into the Reeveses' house. The appellant was carrying a shotgun, they said. They followed the appellant, Julius Reeves, and Brenda Suttles into the Reeveses' house and saw the appellant place the shotgun under a bed in his bedroom. The appellant told Julius and Brenda Suttles to change out of their bloodstained clothes and shoes, and he took the clothes and shoes and stuffed them under a dresser in his bedroom. According to Emanuel Suttles, as the appellant, Julius, and Brenda changed their clothes, they were 'jumping and hollering' and celebrating about 'all the stuff [they] got' from Johnson. (R. 842.) Jason Powell testified that he heard the appellant say, 'I made the money.' (R. 786.)

"After changing their clothes, the appellant, Julius Reeves, and Brenda Suttles ran to Suttles's house. On the way, the appellant stopped to talk to his girlfriend, telling her that if she should be questioned by the police, to tell them that he had been with her all day. At Suttles's house, the appellant divided the money taken from Johnson -- approximately $360 -- among himself, Julius Reeves, and Brenda Suttles. Testimony indicated that throughout the evening, the appellant continued to brag about having shot Johnson. Several witnesses who were present at Suttles's house that evening testified that they saw the appellant dancing, 'throwing up' gang signs, and pretending to pump a

shotgun. Brenda Suttles testified that as the appellant danced, he would jerk his body around in a manner 'mock[ing] the way that Willie Johnson had died.' (R. 713.) The appellant was also heard to say that the shooting would earn him a 'teardrop,' a gang tattoo acquired for killing someone. (R. 720.)

"Yolanda Blevins, who was present during the post-shooting 'celebration' at Suttles's house, testified that the appellant called her into the kitchen and told her that he had shot a man in a truck after catching a ride with him. Blevins noticed that there was what appeared to be dried blood on the appellant's hands. LaTosha Rodgers, who was also present at Suttles's house, testified that the appellant told her that he had 'just shot somebody' in the alley. (R. 924.)

"At around 2:00 a.m. on November 28, 1996 (approximately seven hours after the shooting), Selma police received a report of a suspicious vehicle parked in Crockett's Alley. When police officers investigated, they found Johnson's body slumped across the seat of his pickup truck. There was a pool of blood on the ground on the driver's side of the truck. Several coins and a diamond ring were on the ground near the truck. On the floorboard of the truck, police found wadding from a shotgun shell. The pockets of Johnson's pants had been turned inside out and were empty. Testimony at trial indicated that Johnson was a longtime employee of the Selma Housing Authority and that on the afternoon of November 27, 1996, he had cashed his paycheck, which had been in the amount of $500.

"At the shooting scene on the morning of November 28, police also discovered a trail of blood leading from Johnson's truck to the Reeveses' house. Randy Tucker, a canine-patrol officer with the Selma Police Department, testified that his dog tracked the blood trail from the pool of blood next to

Johnson's truck, down Crockett's Alley, through the yard at 2126 Selma Avenue (the residence next to the alley), and ultimately to the front steps of the Reeveses' house at 2128 Selma Avenue.

"Pat Grindle, the detective in charge of investigating Johnson's murder, went to the Reeveses' house after learning that the blood trail led there. Det. Grindle testified that he obtained the consent of the appellant's mother, Marzetta Reeves, to search the house. In a bedroom shared by the appellant and Julius, Det. Grindle found bloodstained clothes and bloodstained shoes; under a bed in this bedroom, Det. Grindle found a shotgun. In searching the kitchen, Det. Grindle found a pair of bloodstained pants. After making these discoveries, Det. Grindle questioned Marzetta Reeves and several other persons who were in the house at that time. Det. Grindle stated that he learned that the bloodstained clothes and shoes belonged to Julius Reeves, Brenda Suttles, and the appellant. Det. Grindle then went to Suttles's house in an attempt to locate the three. At Suttles's house, Det. Grindle found the appellant lying on a couch in a front room. The appellant was placed under arrest, and the officers seized a balled-up bloodstained jacket he was using as a headrest on the couch. Det. Grindle later returned to the Reeveses' residence, where he seized a 12 gauge shotgun shell from a garbage can in the bathroom.

"An autopsy revealed that Johnson had died from a shotgun wound to his neck that severed the carotid artery, causing him to bleed to death over a period of several minutes. Bloodstain patterns in Johnson's truck indicated that he was sitting upright in the driver's seat, facing forward, when he was shot from behind, through the open rear window. The bloodstain patterns also indicated that the driver's side door had been opened and closed shortly after Johnson was shot.

> "Testimony indicated that the appellant's fingerprints were found on the shotgun that Det. Grindle had seized from under the bed in the appellant's bedroom. Brenda Suttles's and Julius Reeves's fingerprints were found on a fender of Johnson's truck. Joseph Saloom, a firearms expert with the Alabama Department of Forensic Sciences, testified that the shotgun shell seized from the bathroom at the Reeveses' residence was of the type commonly fired from the shotgun seized from the appellant's bedroom. Saloom stated that the shotgun-shell wadding found on the floorboard of Johnson's truck was of the type commonly found in the kind of shotgun shell seized from the bathroom at the Reeveses' residence."

Reeves, 807 So. 2d at 24-26.[1]

Reeves timely filed his Rule 32 petition on October 30, 2002.[2] He filed an amended petition on February 26, 2003, and a second amended petition on August 31, 2006. The circuit court, Reeves, and the State treated the second amended petition as superseding the previous petitions, and we do the

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[1]This Court may take judicial notice of its own records, and we do so in this case. See Nettles v. State, 731 So. 2d 626, 629 (Ala. Crim. App. 1998), and Hull v. State, 607 So. 2d 369, 371 n.1 (Ala. Crim. App. 1992).

[2]Rule 32.2(c), Ala. R. Crim. P., was amended effective August 1, 2002, to reduce the limitations period from two years to one year. However, in cases in which the certificate of judgment was issued before July 31, 2001, as here, the two-year limitations period applies. See Ex parte Gardner, 898 So. 2d 690, 691 (Ala. 2004).

same.[3] See, e.g., Smith v. State, 160 So. 3d 40, 47-49 (Ala. Crim. App. 2010). In his petition, Reeves raised claims of ineffective assistance of both trial and appellate counsel, of trial court error, and of juror misconduct. Reeves also alleged that he was intellectually disabled and that, therefore, his death sentence was unconstitutional under Atkins v. Virginia, 536 U.S. 304 (2002).[4] The State filed an answer to the petition on October 28, 2006. The circuit court conducted an evidentiary hearing on the petition on November 28-29, 2006. At the hearing, Reeves called two witnesses to testify, and the State called one witness. Reeves did not call his trial and appellate attorneys to testify. The

[3]All references in this opinion to the petition shall be considered references to the second amended petition filed on August 31, 2006.

[4]In Atkins, the United States Supreme Court used the term "mental retardation." However, more recently in Hall v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014), the United States Supreme Court recognized that psychiatrists and other experts had stopped using the term "mental retardation" and had begun using the term "intellectual disability," and the Court used the terms "intellectual disability" and "intellectually disabled" throughout its opinion in Hall and again in its subsequent opinion in Brumfield v. Cain, ___ U.S. ___, 135 S.Ct. 2269 (2015). This Court followed that trend in Lane v. State, [Ms. CR-10-1343, April 29, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016) (opinion after remand by the United States Supreme Court), and we do so in this opinion.

parties also submitted numerous documentary exhibits. On May 7, 2008, the State filed a proposed order denying Reeves's petition. On September 9, 2008, Reeves filed a written objection to the State's proposed order and a post-hearing brief. On October 26, 2009, the circuit court issued an order denying Reeves's petition.

The record indicates that the parties were not notified of the circuit court's ruling until January 2013. Reeves then filed another Rule 32 petition pursuant to Rule 32.1(f), Ala. R. Crim. P., requesting an out-of-time appeal from the circuit court's October 26, 2009, order denying his first petition. The circuit court ultimately granted Reeves an out-of-time-appeal on May 30, 2014. This appeal followed.

In a Rule 32 proceeding, both the burden of pleading and the burden of proof are on the petitioner. See Rule 32.3, Ala. R. Crim. P. ("The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief."). "On direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence." Ferguson v. State, 13

So. 3d 418, 424 (Ala. Crim. App. 2008). Therefore, "[t]he general rules of preservation apply to Rule 32 proceedings," Boyd v. State, 913 So. 2d 1113, 1123 (Ala. Crim. App. 2003), and this Court "will not review issues not listed and argued in brief." Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995). Additionally, "[i]t is well settled that 'the procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed.'" Nicks v. State, 783 So. 2d 895, 901 (Ala. Crim. App. 1999) (quoting State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)).

The general rule is that "when the facts are undisputed [or] an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). On the other hand, "where there are disputed facts in a postconviction proceeding and the circuit court resolves those disputed facts, '[t]he standard of review on appeal ... is whether the trial judge abused his discretion when he denied the petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003) (quoting Elliott v. State, 601 So. 2d 1118,

1119 (Ala. Crim. App. 1992)). Even when the disputed facts arise from a combination of oral testimony and documentary evidence, we review the circuit court's findings for an abuse of discretion and afford those findings a presumption of correctness. See Parker Towing Co. v. Triangle Aggregates, Inc., 143 So. 3d 159, 166 (Ala. 2013) (noting that the ore tenus rule "applies to 'disputed issues of fact,' whether the dispute is based entirely upon oral testimony or upon a combination of oral testimony and documentary evidence" (citation omitted)). Moreover, with limited exceptions not applicable here, this Court may affirm a circuit court's judgment on a Rule 32 petition if it is correct for any reason. See Bryant v. State, 181 So. 3d 1087 (Ala. Crim. App. 2011); Moody v. State, 95 So. 3d 827, 833 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein.

With these principles in mind, we address each of the issues Reeves raises on appeal.

I.

Reeves contends that the circuit court erroneously adopted verbatim that portion of the State's proposed order

addressing his claim of intellectual disability. Reeves concedes that the circuit court did not adopt the State's proposed order in its entirety. Nonetheless, he argues that the circuit court's verbatim adoption of the language from the State's proposed order as to even one claim indicates "an absence of careful and independent judicial consideration" of that claim and requires reversal. (Reeves's brief, p. 36.) Reeves maintains that the circuit court's findings on his intellectual-disability claim are not that of the circuit court itself, but solely of the State and, therefore, cannot stand. We disagree.

"Alabama courts have consistently held that even when a trial court adopts verbatim a party's proposed order, the findings of fact and conclusions of law are those of the trial court and they may be reversed only if they are clearly erroneous." McGahee v. State, 885 So. 2d 191, 229–30 (Ala. Crim. App. 2003). "While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." Bell v. State, 593

So. 2d 123, 126 (Ala. Crim. App. 1991). "[T]he general rule is that, where a trial court does in fact adopt the proposed order as its own, deference is owed to that order in the same measure as any other order of the trial court." Ex parte Ingram, 51 So. 3d 1119, 1122 (Ala. 2010). Only "when the record before this Court clearly establishes that the order signed by the trial court denying postconviction relief is not the product of the trial court's independent judgment" will the circuit court's adoption of the State's proposed order be held erroneous. Ex parte Jenkins, 105 So. 3d 1250, 1260 (Ala. 2012).

For example, in Ex parte Ingram, supra, the circuit court adopted verbatim the State's proposed order summarily dismissing Robert Shawn Ingram's Rule 32 petition. In the order, the court stated that it had considered "'the events within the personal knowledge of the Court'" and that it had "'presided over Ingram's capital murder trial and personally observed the performance of both lawyers throughout Ingram's trial and sentencing.'" Ex parte Ingram, 51 So. 3d at 1123 (citation and emphasis omitted). However, the judge who summarily dismissed the petition had not, in fact, presided

over Ingram's trial and had no personal knowledge of the trial. The Alabama Supreme Court described these errors in the court's adopted order as "the most material and obvious of errors," 51 So. 3d at 1123, and "patently erroneous," 51 So. 3d at 1125, and concluded that the errors "undermine[d] any confidence that the trial court's findings of fact and conclusions of law [we]re the product of the trial judge's independent judgment." 51 So. 2d at 1125.

In Ex parte Scott, [Ms. 1091275, March 18, 2011] ___ So. 3d ___ (Ala. 2011), the circuit court adopted verbatim as its order the State's answer to Willie Earl Scott's Rule 32 petition. The Alabama Supreme Court stated:

> "[A]n answer, by its very nature, is adversarial and sets forth one party's position in the litigation. It makes no claim of being an impartial consideration of the facts and law; rather it is a work of advocacy that exhorts one party's perception of the law as it pertains to the relevant facts."

Ex parte Scott, ___ So. 3d at ___. The Court then held that "[t]he trial court's verbatim adoption of the State's answer to Scott's Rule 32 petition as its order, by its nature, violates this Court's holding in Ex parte Ingram" that the findings and conclusions in a court's order must be those of the court itself. Ex parte Scott, ___ So. 3d at ___.

Unlike Ex parte Ingram and Ex parte Scott, the record in this case does not clearly establish that the portion of the circuit court's order denying Reeves's intellectual-disability claim was not the product of the court's own independent judgment. The circuit court's order contains no patently erroneous statements as was the case in Ex parte Ingram,[5] and the circuit court here adopted a portion of the State's proposed order, not a portion of the State's answer, as was the case in Ex parte Scott. After thoroughly reviewing the record, we conclude that the circuit court's findings on Reeves's intellectual-disability claim were its own and were not merely an unexamined adoption of the proposed order submitted by the State. See, e.g., Ex parte Jenkins, 105 So. 3d at 1260; Van Pelt v. State, [Ms. CR-12-0703, August 14, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015); Spencer v. State, [Ms. CR-12-1837, February 6, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015); and Mashburn v. State, 148 So. 3d 1094 (Ala. Crim. App. 2013). Therefore, we find no error on the part of the circuit court in adopting verbatim that portion of the State's

[5]In fact, in this case, unlike Ex parte Ingram, the circuit judge who ruled on the petition was the same judge who had presided over Reeves's trial.

proposed order addressing Reeves's intellectual-disability claim.

II.

Reeves also contends that the circuit court erred in denying his claim of intellectual disability under Atkins v. Virginia, 536 U.S. 304 (2002). He argues that he suffers from significantly subaverage intellectual functioning and significant deficits in multiple areas of adaptive functioning, all of which manifested before he reached the age of 18, and that the circuit court's findings and conclusions to the contrary were erroneous. Therefore, Reeves concludes, his death sentence is unconstitutional, and the circuit court erred in not granting him relief on this claim in his petition. We disagree.

> "'"In the context of an Atkins claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded."' Byrd [v. State], 78 So. 3d [445,] 450 [(Ala. Crim. App. 2009)] (quoting Smith [v. State, [Ms. 1060427, May 25, 2007]], ___ So. 3d [___, ___ (Ala. 2007)]). 'The question of [whether a capital defendant is mentally retarded] is a factual one, and as such, it is the function of the factfinder, not this Court, to determine the weight that should be accorded to expert testimony of that issue.' Byrd, 78 So. 3d at 450 (citations and quotations omitted). As the Alabama Supreme Court has explained, questions regarding weight and

> credibility determinations are better left to the circuit courts, '"which [have] the opportunity to personally observe the witnesses and assess their credibility."' Smith, ___ So. 3d at ___ (quoting Smith v. State, [Ms. CR-97-1258, Sept. 29, 2006] ___ So. 3d. ___, ___ (Ala. Crim. App. 2006) (Shaw, J., dissenting) (opinion on return to third remand)).
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> "'This court reviews the circuit court's findings of fact for an abuse of discretion.' Byrd, 78 So. 3d at 450 (citing Snowden v. State, 968 So. 2d 1004, 1012 (Ala. Crim. App. 2006)). '"'"'A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision.'"'"' Byrd, 78 So. 3d at 450-51 (quoting Hodges v. State, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005), quoting in turn State v. Jude, 686 So. 2d 528, 530 (Ala. Crim. App. 1996), quoting in turn Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 12 (Ala. 1979), quoting in turn Premium Serv. Corp. v. Sperry & Hutchinson, Co., 511 F.2d 225 (9th Cir. 1975))."

Carroll v. State, [Ms. CR-12-0599, August 14, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015).

In Atkins, the United States Supreme Court held that the execution of intellectually disabled persons violates the prohibition against cruel and unusual punishment in the Eighth Amendment to the United States Constitution. The Court in Atkins did not establish a national standard for determining whether a person is intellectually disabled for purposes of the Eighth Amendment, but left to the states "'the task of

developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences.'" Atkins, 536 U.S. at 317 (quoting Ford v. Wainwright, 477 U.S. 399, 416–17 (1986)). The Court did note, however, the following clinical definitions of intellectual disability:

> "The American Association on Mental Retardation (AAMR)[6] defines mental retardation as follows: 'Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.' Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
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> "The American Psychiatric Association's definition is similar: 'The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many

[6]In 2007, the American Association on Mental Retardation changed its name to the American Association on Intellectual and Developmental Disabilities.

> different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system.' Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). 'Mild' mental retardation is typically used to describe people with an IQ level of 50–55 to approximately 70. Id., at 42–43."

536 U.S. at 308 n.3. The Court also noted that an intelligence quotient ("IQ") between 70 and 75 "is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition." Id. at 309 n.5.

Subsequently, in Hall v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014), the United States Supreme Court recognized that IQ test scores, alone, are not determinative of intellectual disability or even of the intellectual-functioning prong of intellectual disability because IQ testing has a margin of error or standard error of measurement ("SEM"). The Court held unconstitutional Florida's strict IQ score cutoff of 70 for establishing intellectual disability. The Florida Supreme Court had held that a person who attained an IQ score above 70 was, as a matter of law, not intellectually disabled and was prohibited from presenting any further evidence to support a claim of intellectual disability. See Hall v. State, 109 So. 3d 704 (Fla. 2012), citing Cherry v. State, 959 So. 2d 702,

712-13 (Fla. 2007). In holding this strict IQ score cutoff of 70 unconstitutional, the United States Supreme Court recognized that IQ test scores are "imprecise" and have a "'standard error of measurement'" that "is a statistical fact [and] a reflection of the inherent imprecision of the test itself." Hall, 572 U.S. at ___, 134 S.Ct. at 1995. The Court noted that the SEM, which the Court recognized to be plus or minus five points on standard IQ tests, "reflects the reality that an individual's intellectual functioning cannot be reduced to a single numerical score," Hall, 572 U.S. at ___, 134 S.Ct. at 1996, and that, therefore, IQ test scores are not "final and conclusive evidence of a defendant's intellectual capacity," and "should be read not as a single fixed number but as a range." Hall, 572 U.S. at ___, 134 S.Ct. at 1995.

Because of the inherent imprecision in IQ testing, the Court noted, "[f]or professionals to diagnose -- and for the law then to determine -- whether an intellectual disability exists once the SEM applies and the individual's IQ score is 75 or below the inquiry would consider factors indicating whether the person had deficits in adaptive functioning." Hall, 572 U.S. at ___, 134 S.Ct. at 1996. In other words,

"an individual with an IQ test score 'between 70 and 75 or lower,' Atkins, [536 U.S.] at 309 n.5, may show intellectual disability by presenting additional evidence regarding difficulties in adaptive functioning." 572 U.S. at ___, 134 S.Ct. at 2000. The Court concluded that

> "when a defendant's IQ test score falls within the test's acknowledged and inherent margin of error, the defendant must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits.
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> "It is not sound to view a single factor as dispositive of a conjunctive and interrelated assessment. See DSM-5, at 37 ('[A] person with an IQ score above 70 may have such severe adaptive behavior problems ... that the person's actual functioning is comparable to that of individuals with a lower IQ score.')."

572 U.S. at ___, 134 S.Ct. at 2001.[7] See also Brumfield v. Cain, ___ U.S. ___, ___, 135 S.Ct. 2269, 2278 (2015) (holding

[7]In a two-sentence passing argument in its brief on appeal, the State asserts that Hall, decided in 2014, does not apply retroactively to cases on collateral review. In support of its position, the State relies on In re Henry, 757 F.3d 1151, 1158 (11th Cir. 2014), in which the United States Court of Appeals for the Eleventh Circuit held that Hall "announce[d] a new rule of constitutional law," but held that the new rule does not apply retroactively on collateral review for purposes of 28 U.S.C. § 2244(b). We disagree with the Eleventh Circuit's characterization of Hall as a new rule of constitutional law. We view Hall, not as a new rule of constitutional law, but simply as an application of existing law, i.e., Atkins, to a specific set of facts.

that the petitioner was entitled to a hearing on his intellectual-disability claim because, when accounting for the SEM, his IQ score of 75 was "squarely in the range of potential intellectual disability").

Shortly after Atkins was first released, the Alabama Supreme Court adopted "the broadest definition" of intellectual disability based on "[t]hose states with statutes prohibiting the execution of" intellectually disabled defendants. Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002). The Court explained:

> "Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significantly subaverage intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18)."

Ex parte Perkins, 851 So. 2d at 456.

Later, in Smith v. State, [Ms. 1060427, May 25, 2007] ___ So. 3d ___ (Ala. 2007), the Alabama Supreme Court reiterated and clarified Alabama's definition of intellectual disability:

> "In Ex parte Perkins, [851 So. 2d 453 (Ala. 2002),] we concluded that the 'broadest' definition of mental retardation consists of the following three factors: (1) significantly subaverage

intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age 18). 851 So. 2d at 456. All three factors must be met in order for a person to be classified as mentally retarded for purposes of an Atkins claim. Implicit in the definition is that the subaverage intellectual functioning and the deficits in adaptive behavior must be present at the time the crime was committed as well as having manifested themselves before age 18. This conclusion finds support in examining the facts we found relevant in Ex parte Perkins and Ex parte Smith[, [Ms. 1010267, March 14, 2003] ___ So. 3d ___ (Ala. 2003),] and finds further support in the Atkins decision itself, in which the United States Supreme Court noted: 'The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning."' 536 U.S. at 308 n.3, 122 S.Ct. 2242 (second emphasis added). Therefore, in order for an offender to be considered mentally retarded in the Atkins context, the offender must currently exhibit subaverage intellectual functioning, currently exhibit deficits in adaptive behavior, and these problems must have manifested themselves before the age of 18.

"The definition set forth in Ex parte Perkins is in accordance with the definitions set forth in the statutes of other states and with recognized clinical definitions, including those found in the American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders (4th ed. 1994). The Manual of Mental Disorders lists four degrees of mental retardation: mild, moderate, severe, and profound. Id. at 40-41. All four degrees of mental retardation require that all three prongs of the Ex parte Perkins test be satisfied before an individual can be diagnosed as mentally

> retarded; thus, if the defendant proves that he or she suffers any degree of mental retardation, the defendant is ineligible for the death penalty. However, a classification of 'borderline intellectual functioning' describes an intelligence level that is higher than mental retardation, id. at 45 and, thus, does not render a person ineligible for the death penalty."

___ So. 3d at ___ (emphasis added).

The Alabama Supreme Court's definition of intellectual disability adopted in Ex parte Perkins comports with both Atkins and Hall, supra. Although the definition references an IQ score of 70, that referenced score is not a strict cutoff for intellectual disability, and Alabama does not preclude a court's consideration of the SEM when considering a person's IQ score. See Lane v. State, [Ms. CR-10-1343, April 29, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016) (opinion after remand by the United States Supreme Court). Nor does Alabama preclude a person from presenting additional evidence regarding intellectual disability merely because that person attained an IQ score above 70. Indeed, this Court, subsequent to Ex parte Perkins, twice recognized that a person may be intellectually disabled even if that person attains an IQ score above 70 on a test, see Jackson v. State, 963 So. 2d 150 (Ala. Crim. App. 2006) (holding that Rule 32 petitioner was intellectually

disabled even though he achieved a score above 70 on one of four IQ tests he had taken), and Tarver v. State, 940 So. 2d 312, 318 (Ala. Crim. App. 2004) (remanding for a hearing to determine intellectual disability where record indicated that Rule 32 petitioner had IQ scores of 76, 72, and 61), and we three times recognized the SEM in evaluating an Atkins claim. See Smith v. State, 112 So. 3d 1108 (Ala. Crim. App. 2012); Byrd v. State, 78 So. 3d 445 (Ala. Crim. App. 2009); and Brown v. State, 982 So. 2d 565 (Ala. Crim. App. 2006). Additionally, in Ex parte Smith, [Ms. 1010267, March 14, 2003] ___ So. 3d ___, ___ (Ala. 2003), the Alabama Supreme Court noted that an IQ score of 72 "seriously undermines any conclusion that [a person] suffers from significantly subaverage intellectual functioning as contemplated under even the broadest definitions," but it did not hold that an IQ score of 72 precludes a finding that a person suffers from significantly subaverage intellectual functioning or precludes a finding of intellectual disability. Both this Court's and the Alabama Supreme Court's post-Atkins opinions make clear that a court should look at all relevant evidence in assessing an intellectual-disability claim and that no one piece of

evidence, such as an IQ test score, is conclusive as to intellectual disability.[8]

At the evidentiary hearing, Reeves introduced a plethora of records from his childhood and adolescent years, including school records, medical records, mental-health records, juvenile-court records, Department of Youth Services records, and county-health-department records. Those records reflect that Reeves was habitually truant and engaged in defiant and aggressive behavior in school, that he had a lengthy criminal history, and that he had been committed to the Department of Youth Services. The records further reflect that Reeves began

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[8]Although in Hall the United States Supreme Court cited Alabama as a state that "also may use a strict IQ score cutoff at 70," 572 U.S. at ___, 134 S.Ct. at 1996 (emphasis added), it did so based on a single comment by this Court in Smith v. State, 71 So. 3d 12, 20 (Ala. Crim. App. 2008), that the Alabama Supreme Court's definition of intellectual disability did not include consideration of the SEM. However, this Court held in Smith that the petitioner had failed to plead his claim of intellectual disability, and our statement that consideration of the SEM was precluded was entirely dicta. In any event, this Court recently recognized in Lane v. State, [Ms. CR-10-1343, April 29, 2016] ___ So. 3d ___ (Ala. Crim. App. 2016) (opinion after remand by the United States Supreme Court), that this Court's statement in Smith was not supported by the Alabama Supreme Court's post-Atkins opinions and was erroneous, and we overruled Smith "[t]o the extent that Smith ... precludes a trial court from considering a margin of error or SEM when evaluating a defendant's IQ test score for purposes of an Atkins claim." ___ So. 3d at ___.

mental-health treatment in 1986, when he was 8 years old. Reeves was initially diagnosed with attention deficit disorder with hyperactivity and was later also diagnosed with conduct disorder. Nonetheless, Reeves was described as "extremely goal-directed." (C. 1556.) When Reeves began treatment, his intelligence level was "estimated to be low average range." (C. 1515.) Two years later, "it [wa]s estimated that his intelligence is somewhat below average, but not within the [intellectual-disability] range." (C. 1543.)

The records further reflect that Reeves had to repeat the first, third, and fourth grades and that he was "socially" promoted to the seventh grade when he was 14 years old based only on his "level of maturity." (C. 1688.) However, the records indicate that although Reeves failed the first grade, when he repeated that grade, he got A's and B's and made the honor roll. (C. 1513.) Additionally, Reeves's mother reported that when he was 11 years old, Reeves was tested for placement into special-education classes, but that he "did not qualify." (C. 1543.) Reeves was later placed in special-education classes for emotional conflict. When he was 14 years old, Reeves was administered the Wechsler Intelligence

Scale for Children, Revised ("WISC-R"), and he attained a verbal IQ score of 75, a performance IQ score of 74, and a full-scale IQ score of 73. At that time, Reeves was classified as being in the borderline range of intellectual functioning, but was described as having "severe deficiencies in non-verbal social intelligence skills and his ability to see consequences." (C. 1590.) Reeves was subsequently expelled from school for behavioral reasons.

Reeves also presented testimony from John R. Goff, a neuropsychologist who evaluated Reeves for purposes of the postconviction proceedings to determine whether Reeves was intellectually disabled. As part of his evaluation, Dr. Goff examined Reeves's childhood and adolescent records and administered a battery of tests to Reeves. First, Dr. Goff administered the Wechsler Adult Intelligence Scale, Third Edition ("WAIS-III"), on which Reeves attained a verbal IQ score of 71, a performance IQ score of 76, and a full-scale IQ score of 71.

However, Dr. Goff stated that Reeves's full-scale IQ score of 71 should be adjusted downward for the SEM, which he initially said was plus or minus 2 points but later said on

cross-examination was plus or minus 5 points, and for the "Flynn Effect." Dr. Goff explained that the first requirement for a diagnosis of intellectual disability is significantly subaverage intellectual functioning, which generally requires the person to have an IQ of approximately 70 or below. However, Dr. Goff said that research had shown that scores on IQ tests tend to get higher year after year by approximately 0.3 points per year. According to Dr. Goff, this increase in scores, known as the "Flynn Effect," requires that the IQ test be "normed" periodically so that the mean score on the test stays the same. Dr. Goff testified that the WAIS-III was last "normed" in 1996, 10 years before he administered the test to Reeves. According to Goff, the "Flynn Effect" is recognized as valid and requires that 0.3 points be deducted from the full-scale IQ score achieved on an IQ test for each year since the test was last normed.

Reeves's "adjusted" full-scale IQ score on the WAIS-III, Dr. Goff said, was 66. To reach this conclusion, Dr. Goff subtracted three points for the "Flynn Effect" and subtracted an additional two points for the SEM. However, Dr. Goff said that for purposes of diagnosing Reeves as intellectually

disabled "[i]t doesn't matter" whether his full-scale IQ score was adjusted "because the criteria is that the IQ score has to be around 70 [and] he qualifies because 71 is around 70."[9] (R. 43.) Dr. Goff also testified that Reeves's full-scale IQ score of 73 on the WISC-R that was administered to him in 1992, if adjusted solely for the "Flynn Effect," would have been 67.6. Dr. Goff testified that Reeves's IQ score in 1992 was "statistically identical" to his IQ score in 2006. (R. 45.) Additionally, Dr. Goff said, Dr. Kathy Ronan, who had evaluated Reeves in 1997 before Reeves's trial to determine Reeves's competency to stand trial and his mental state at the time of the offense, had administered the verbal portion of the Wechsler Adult Intelligence Scale, Revised ("WAIS-R"), the predecessor to the WAIS-III, and that Reeves had achieved a verbal IQ score of 74 at that time. Dr. Goff said that if that score were adjusted for the "Flynn Effect," it would be 69.2.

On cross-examination, Dr. Goff admitted that an article had been published in 2006, the year the evidentiary hearing

[9]We note that, in his written report, Dr. Goff stated that Reeves's full-scale IQ score of 71 placed him "within the borderline range of psychometric intelligence." (C. 699.)

was held, by Dr. James Flynn, the psychologist after whom the "Flynn Effect" was named, in which Dr. Flynn admitted that the "Flynn Effect" had not, in fact, been generally accepted as scientifically valid. Dr. Goff also admitted on cross-examination that he did not begin adjusting IQ scores for the "Flynn Effect" until approximately a year and a half before the evidentiary hearing, even though the first article about the phenomenon was published in 1984, some 22 years before the hearing. He also admitted that the "scoring manual" for the WAIS-III does not require the use of the "Flynn Effect" to get an accurate IQ score, and that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") does not mention the "Flynn Effect"; the DSM-IV mentions only the SEM of plus or minus five points. Dr. Goff also said that he would not have adjusted Reeves's IQ score for the "Flynn Effect" if he had evaluated Reeves in 1997, before Reeves's trial, but he maintained that he would still have concluded that Reeves was intellectually disabled. Without the "Flynn Effect," but considering the SEM, Dr. Goff said, Reeves's full-scale IQ score would fall between 66 and 76. Finally, Dr. Goff stated that Reeves would not qualify to be

institutionalized for intellectual disability based on his IQ scores, although Reeves "might qualify" for placement in a group home for the intellectually disabled. (R. 85.)

Dr. Goff testified that he also administered two tests to Reeves to determine whether he was malingering on the IQ test -- the "Test of Malingered Memory" and the "21-Item Test." (R. 48.) Dr. Goff said that these tests indicated that Reeves was not malingering, but "was putting forth a genuine effort." (R. 49.)

Dr. Goff also administered a portion of the Halstead-Reitan Neuropsychological Test battery, which assesses a person's neuropsychological functioning and cognitive abilities. Dr. Goff said that Reeves scored poorly on those tests and that Reeves did not even complete one of the tests because "[h]alfway through ... he had made enough errors so that it wasn't necessary to continue the test because we had come to the conclusion that he couldn't do it." (R. 39.) Dr. Goff said that Reeves's performance on the Halstead-Reitan tests was "not inconsistent with" and "would tend to" support a conclusion that Reeves was intellectually disabled. (R. 40.)

Dr. Goff further testified that he administered "the abbreviated version of the second edition of the Wechsler Individual Achievement Test," which assesses functional academics, one of the areas of adaptive functioning considered in evaluating whether someone is intellectually disabled. (R. 37.) Dr. Goff stated that this test indicated that Reeves could read at a third-grade level, that he could do math at a fourth-grade level, and that he could spell at a fifth-grade level, thus showing a deficit in functional academics. Dr. Goff described Reeves as illiterate because Reeves could not read at a fifth-grade level. Dr. Goff stated that Reeves was able to do basic multiplication and two-digit subtraction and addition, but stated that he could not do multi-digit multiplication, use decimals, or do division. When questioned by the circuit court, Dr. Goff said that generally a person with a low IQ will also have deficits in functional academics. However, Dr. Goff said, most mildly intellectually disabled people can learn to read at about a fifth- or sixth-grade level and that that level of reading would not qualify as a significant deficit in functional academics.

Dr. Goff testified that another test for adaptive functioning is the Adaptive Behavior Assessment System Test ("ABAS test"), which Dr. Goff said, is administered not to the individual being evaluated but to someone who is close to and familiar with the individual being evaluated. The ABAS test is "normed against the general population" to determine how a person's abilities compare to the general population, as opposed to just the intellectually disabled population. (R. 59.) Dr. Goff administered this test to Beverly Seroy, who appears to have been the former stepmother of Reeves's brother, Julius, and with whom Reeves had lived off and on for a period of time before the murder. Dr. Goff testified that he interviewed Seroy for 45 minutes before administering the test to her to determine whether she knew Reeves well enough to complete the test. Dr. Goff said that Seroy had told him that "she thought she knew [Reeves] very well." (R. 62.) Dr. Goff also said that Seroy was able to provide him with "some historical information" about Reeves. (R. 62.) Thus, Dr. Goff concluded, Seroy was an appropriate person to whom to

administer the ABAS test.[10] Dr. Goff further testified that he did not administer the ABAS test to Reeves's mother because (1) he did not know how to contact her; (2) he had been told that she was mentally ill; and (3) mothers are "not necessarily" the best people to administer the test to because, he said, they either tend to "overestimate the capacities of their offspring" or tend to "underestimate the capacities of their offspring." (R. 70.) When questioned by the circuit court about the ABAS test, which indicated that Seroy had "simply guessed" on 19 of the 24 questions regarding the "work" area of adaptive functioning, Dr. Goff stated that Seroy's guessing "does cast some doubt as to the validity of that particular finding," i.e., the finding by Dr. Goff that Reeves had significant deficits in the work area of adaptive functioning. (R. 71.)

Dr. Goff testified that the results of the ABAS test indicated that Reeves had significant deficits in the following areas of adaptive functioning: health and safety,

[10]In contrast, in his written report, Dr. Goff stated that Seroy "was not present for the most part during [Reeves's] formative years" and "[i]t was, therefore, necessary to obtain a substantial amount of information from [Reeves] and from the records in regard to the history." (C. 697.)

which Dr. Goff described as whether a person looks both ways before crossing the street, whether a person knows how to get to a hospital if necessary, and whether a person can take care of personal health needs, such as brushing teeth, taking medications, and getting an annual physical; self-care, which Dr. Goff said overlaps with health and safety, but also includes such things as whether the person can prepare food, can pay the bills, or can get a haircut when necessary without being told; self-direction; functional academics; leisure activities, which Dr. Goff described as how a person spends his or her free time, i.e., whether the person spends it productively or in goal-directed activities or whether the person "just kind of like hang[s] out and do[esn't] ever do anything in [his or her] leisure time activities" (R. 57); and work, which Dr. Goff described as whether the person has a job, whether the person arrives on time to the job, and whether the person gets along with coworkers. Dr. Goff's written report indicates that Reeves scored in the 16th percentile in the area of communication; in the 9th percentile in the areas of community use and home living; in the 5th percentile in the areas of functional academics, self-

direction, leisure, and social skills; in the 4th percentile in the area of work; and in the 2nd percentile in the areas of health and safety and self-care. (C. 701.) Dr. Goff admitted on cross-examination that he did not consider Reeves's actions surrounding the murder in assessing Reeves's adaptive functioning; Dr. Goff said that Reeves's actions surrounding the murder were not relevant to determining whether Reeves was intellectually disabled. Dr. Goff also admitted on cross-examination that it was "not surprising" that Reeves's adaptive functioning was "low" because, he said, "[m]ost people in prison have low adaptive skills." (R. 88.)

Based on Reeves's "adjusted" IQ scores, the results of the ABAS test, and all the other information before him, Dr. Goff concluded that Reeves suffered from significantly subaverage intellectual functioning and significant deficits in multiple areas of adaptive functioning and that both manifested themselves before Reeves was 18 years old. Therefore, Dr. Goff concluded that Reeves was intellectually disabled.

Reeves also presented testimony from Karen Salekin, a forensic and developmental psychologist, who conducted a

mitigation investigation for purposes of the postconviction proceedings. Dr. Salekin's testimony centered around her investigation of mitigating evidence, specifically, her assessment of risk factors in Reeves's life -- i.e., factors that negatively influenced Reeves's development -- and protective factors in Reeves's life -- i.e., factors that positively influenced Reeves's development. The bulk of that testimony need not be repeated for purposes of this issue. Pertinent to Reeves's intellectual-disability claim, Dr. Salekin testified that Reeves's school records indicated that he had struggled in school from an early age and that he had "lower intelligence." (R. 179.) However, she said that Reeves's largely "untreated" attention-deficit disorder with hyperactivity contributed to his struggles in school. (R. 179.) Dr. Salekin also testified that Reeves had attained a full-scale IQ score of 73 in 1992. She concurred with Dr. Goff that the "Flynn Effect" is recognized as valid and requires that IQ scores be adjusted downward.

Dr. Salekin further testified that Reeves's brother, Julius, had had a negative impact on Reeves, and that, although younger than Reeves, Julius was the leader of the

two. Dr. Salekin stated that her investigation revealed that Reeves was kind and considerate and that he could follow directions when he was not around Julius and that it was only when he was around Julius that his behavior deteriorated. For example, Dr. Salekin testified that Jerry Ellis had employed Reeves at his construction company for approximately three months around the time of the crime. Dr. Salekin said that Ellis reported that Reeves was a good employee -- Reeves arrived at work on time, was responsive to directions, was motivated, had a "really good work ethic," and "was responsible." (R. 140.) However, Reeves was employed by Ellis only during the time Julius was in a juvenile-detention facility. Dr. Salekin said that once Julius was released from juvenile detention, Reeves never went back to work. Dr. Salekin also testified that her investigation revealed that Reeves lived "intermittently" with Beverly Seroy because his mother's house was too crowded. (R. 193.) Dr. Salekin said that Seroy provided Reeves with structure when he lived with her, requiring that Reeves obey the rules, do his homework, do chores, and abide by a curfew. Dr. Salekin said that Seroy reported that Reeves did well when he lived with her, often

helping her take care of her own children, and that Seroy "trusted [Reeves] implicitly" to babysit her children. (R. 194.) At one point, Dr. Salekin said, Seroy even hired a tutor to help Reeves with his schoolwork and would drive Reeves to the library so that he could earn his GED.[11]

In rebuttal, the State called Glen David King, a clinical and forensic psychologist who also evaluated Reeves for the postconviction proceedings to determine whether Reeves was intellectually disabled. Dr. King, like Dr. Goff, had looked at various records relating to Reeves and administered a battery of tests to Reeves. Dr. King also had looked at the testimony of Reeves's mother during Reeves's trial and at Dr. Goff's data. Dr. King testified that he administered to Reeves the WAIS-III and that Reeves attained a verbal IQ score of 69, a performance IQ score of 73, and a full-scale IQ score of 68. Dr. King described the "Flynn Effect" as "a theoretical position" that there is "an increase in performance" on IQ tests "such that IQ scores seem to rise gradually over a period of time." (R. 242.) However, Dr.

[11]No evidence was presented that Reeves, in fact, earned his GED.

King said that the "Flynn Effect" is not required to be taken into account when evaluating someone for intellectual disability and that the "Flynn Effect" is "not settled" in the "psychological community." (R. 244-45.)

Dr. King also administered the Wide Range Achievement Test to determine Reeves's reading, spelling, and math abilities. Dr. King said that the test indicated that Reeves could read at a fifth-grade level, that he could spell at a fifth-grade level, and that he could do arithmetic at a fourth-grade level. With respect to arithmetic, Dr. King said, Reeves was able to do addition, subtraction, multiplication, and simple division. Dr. King said that Reeves's scores on the achievement test were "higher than ordinarily would be predicted by the IQ test" he had administered to Reeves. (R. 224.) In other words, Reeves's achievement-test scores "indicate[d] a level of functioning higher than the IQ scores actually indicated." (R. 224.) Dr. King said that because of the discrepancy between Reeves's scores on the IQ test and the achievement test, those scores were not adequate, by themselves, for him to reach a conclusion as to whether Reeves was intellectually disabled.

Dr. King also administered all but one of the tests that are included in the Halstead-Reitan Neuropsychological Test battery.[12] The Halstead-Reitan tests, Dr. King said, are used to determine if a person has any impairment in brain function. Dr. King said that Reeves had no impairment in "sensory perceptional functioning," which he said indicates whether a person is properly receiving external stimuli. (R. 236.) Dr. King said that Reeves had some impairment in his motor functioning. Although he had "good motor strength in his upper limb[s]," Reeves had impairment in fine motor coordination, such as tapping his fingers. (R. 237.) Dr. King stated that he could not explain "exactly why" Reeves had impairment in fine motor coordination, although sometimes deficits in this test will appear when the test is administered to a person with lower IQ. With respect to attention, concentration, and memory, Dr. King testified that Reeves had good attention and concentration, but that he scored "below average" with respect to memory. (R. 239.) Nonetheless, Dr. King said, Reeves was able to recall in

[12]Dr. King said that he did not administer the tactile-form-recognition test.

"fairly good detail ... historical events such as where he went to school and what happened when and who represented him at trial and things of that nature." (R. 239.) With respect to "language skills," Dr. King said, Reeves was "below average." (R. 240.) With respect to "visual spacial skills," which Dr. King described as "[t]he ability to copy designs," Dr. King testified that Reeves had "some impairment." (R. 240.) Specifically, Dr. King said that Reeves was "actually able to copy designs very accurately most of the time [but he had] problems with more complex designs." (R. 240-41.) As for "reasoning and logical analysis," which Dr. King described as "higher cortical functioning, ability to engage in abstract reasoning, concept formation, problem solving, taking new information and being able to apply it to solve problems," Reeves "performed well below average." (R. 241.) Dr. King stated that this indicated only that Reeves was "slower to learn new things," not that he "can't learn," and that, in his opinion, Reeves had "some impairment" in this area. (R. 241.) Dr. King testified that Reeves's results on the Halstead-Reitan tests were consistent with Reeves's being in the

borderline range of intellectual functioning, as opposed to the intellectual-disability range of functioning.

Dr. King also administered to Reeves the Adaptive Behavior Scale, Residential and Community, Second Edition ("ABS-RC-II"). Dr. King stated that this test is one of the tests recommended by the American Association on Intellectual and Developmental Disabilities for measuring adaptive functioning. The test measures skill level in several different "domains." (R. 226.) To score the test, Dr. King said, the test giver uses information provided by the test subject, the test giver's observations, and information from other individuals who know the test subject. Dr. King stated that the ABS-RC-II is "normed" or scored, not against the population as a whole, but against those in the borderline range of intellectual functioning and those who are intellectually disabled. Dr. King said that this is because "the AAMR has taken the position that in order to diagnose somebody as mentally retarded, their adaptive abilities have to be substantially below that particular group for which [the test] is normed." (R. 267.) However, on cross-examination, Dr. King conceded that the Mental Retardation Definition

Classification and Systems of Support, 10th edition, a text published by the American Association on Intellectual and Developmental Disabilities, states: "For diagnosis, significant limitations in adaptive behaviors should be established through the use of standardized measures normed on the general population including people with disabilities and people without disabilities." (R. 274.)

Dr. King obtained scores on the ABS-RC-II from Reeves in 10 different "domains" of adaptive functioning. Dr. King testified that Reeves scored in the 99th percentile in the domain of independent functioning, which Dr. King described as "behaviors that have to do with things like use of table utensils, personal hygiene, being able to dress oneself, and a sense of direction, for example, use of transportation," essentially things "that an individual who can function independently would have to engage in every day in order to take care of themselves." (R. 227.) Reeves scored in the 98th percentile in the domain of physical development, which Dr. King said simply examines whether a person has any physical disability. In the numbers and time domain, Reeves also scored in the 98th percentile. Reeves was able to tell

time and do addition, subtraction and multiplication. As noted previously, Dr. King also testified that Reeves was able to do simple division.

In the domain of language development, Reeves scored in the 84th percentile. Dr. King said that Reeves has much better verbal communication than written communication, but that Reeves was nonetheless able "at least to get his idea across" in written form. (R. 229.) For example, Dr. King cited a letter Reeves had written in which Reeves had indicated that he was not interested in going to school because he could make more money selling drugs. Dr. King stated that, although "[t]he syntax of the letter was not really very good," Reeves was nonetheless able to get his "message across" in the letter. (R. 229.)

Reeves also scored in the 84th percentile in the responsibility and socialization domains. The responsibility domain, Dr. King said, includes such things as "[t]aking care of personal belongings, general responsibility, personal responsibility, like maintaining self control, understanding concepts of being on time." (R. 232.) Socialization, Dr. King said, included such things as "[c]ooperation,

consideration for others, awareness of others, interaction with others, participation in group activities." (R. 233.) Dr. King also said that in the many hours he spent with Reeves, Reeves was "quite cooperative and easy to get along with." (R. 233.)

Reeves scored in the 63rd percentile in the domain of economic activity, which "has to do with the handling of money, banking activities, budgeting, being able to run errands, purchasing things, being able to use shopping resources." (R. 228.) With respect to this domain, Dr. King said that Reeves was able to handle his own money, to pay bills, and to purchase personal items, but that Reeves had never used a credit card.

In the domestic-activity domain, Reeves scored in the 25th percentile. Dr. King said the domestic-activity domain includes such things a "room cleaning, doing laundry, table setting, food preparation, table clearing." (R. 230.) Dr. King said that, based on all the information he had, Reeves had never been required to do any type of domestic activity growing up and had been incarcerated since he was 18 years old. Therefore, Dr. King said, "he scored very low on those

kinds of activities because I couldn't in good conscience rate him highly on those things. I didn't have any data to support it." (R. 230.)

Reeves also scored in the 25th percentile in the domains of prevocational/vocational activity and self-direction. Prevocational/vocational activity, Dr. King said, "has to do with job complexity, work, school, job performance and work school habits." (R. 230.) Dr. King said that Reeves scored low in this domain because "[h]e did not get to the age where he might be able to master use of complex job tools or equipment" and because school records indicated that Reeves often missed school and had "pretty poor school habits." (R. 230-31.)

Self-direction, Dr. King said, "has to do with showing initiative, attention, persistence and directing one's own activities." (R. 231.) Dr. King said that he scored Reeves low in this domain but that since the testing, he had had the opportunity to speak with Detective Pat Grindle, an officer with the Selma Police Department, who had known Reeves "quite well" since Reeves was about nine years old. (R. 231.) Dr. King said that Det. Grindle told him that from an early age,

Reeves "was involved in a lot of drug activity and was actually directing the behaviors and activities of others in this drug related activity." (R. 231-32.) The degree of Reeves's involvement in drug activity, including not only what Det. Grindle reported but also Reeves's admission to Dr. King that he made between $1500 and $2000 a week selling drugs and was able to purchase his own car, Dr. King said, "would indicate much more self-direction than the way that I rated him." (R. 232.)

Based on his testing of Reeves and all the other information before him, Dr. King concluded that Reeves was in the borderline range of intellectual ability, but was not intellectually disabled.

On cross-examination, Dr. King admitted that he did not speak to any of Reeves's family members in conducting his evaluation. However, he said that there was information in many of the records he examined that was inconsistent with a finding of intellectual disability. Specifically, Dr. King said that Reeves's repeated IQ scores of over 70, and his placement in "emotional conflict classes" in school as opposed to placement in "special education for mental retardation

services" were inconsistent with a finding of intellectual disability. (R. 253.) Dr. King also stated on cross-examination that, based strictly on the IQ test he administered, Reeves satisfied the first prong for determining intellectual disability -- significantly subaverage intellectual functioning -- because Reeves achieved a full-scale IQ score of 68.

In its order, the circuit court found that Reeves had failed to satisfy his burden of proving that he was intellectually disabled. After summarizing the testimony presented at the hearing and the relevant law, the court explained:

> "There is no dispute that Reeves's IQ is sub-average. However, the expert testimony about Reeves's adaptive functioning was conflicting. Before addressing the merits of Reeves's mental retardation claim, this Court believes it should first discuss the conflicting expert testimony about the Flynn Effect.
>
> "Dr. Goff and Dr. Salekin indicated that the Flynn Effect is accepted in the scientific community while Dr. King stated that it was not. The Court notes that Dr. Goff testified that Dr. Flynn published his findings in 1984. However, Dr. Goff did not start utilizing the Flynn Effect until 2005 -- years after the Flynn Effect came into existence. There was no dispute that neither the publishers of the IQ tests administered on Reeves nor the DSM-IV require that the Flynn Effect must be utilized in

determining a person's intellectual functioning. While there was testimony that appellate courts outside of Alabama have addressed the application of the Flynn Effect, this Court is unaware of any Alabama caselaw requiring use of the Flynn Effect.[13] It does not appear to this Court that the issue of whether the Flynn Effect should be considered when reviewing an individual's IQ score, at least in Alabama, is settled in the scientific community.

"Reeves achieved a full scale IQ score of 73 on a test administered when he was 14 years old. The full scale IQ score of 71 achieved by Reeves on the test administered by Dr. Goff is consistent with his prior IQ score of 73. See Ex parte Smith, [Ms. 1010267, March 14, 2003] ___ So. 3d ___ (Ala. 2003) (holding that a full scale IQ score of 72 'seriously undermines any conclusion that [a defendant] suffers from significantly sub-average intellectual functioning contemplated under even the broadest definitions [of mental retardation]'). Further, Reeves testified during a pretrial suppression hearing and the Court recalls nothing indicating that Reeves's intellectual functioning was significantly sub-average. See Clisby v. Alabama, 26 F.3d 1054, 1056 (llth Cir. 1994) (holding that Clisby's testimony gave the trial judge 'an opportunity to gauge roughly his intelligence'). This Court concludes that Reeves's intellectual functioning, while certainly sub-average, is not significantly sub-average.

"A review of the trial transcript indicates that Reeves does not suffer from significant or substantial limitations in his adaptive functioning. Testimony at trial indicated that Reeves was a gang member. Further, Reeves's mother testified that

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[13]The circuit court issued the order in 2009, years before this Court first addressed the "Flynn Effect."

while Reeves attended Job Corp he earned certificates in welding, brick masonry, and auto mechanics -- jobs that would require some degree of technical skill. Reeves's mother also testified that after he returned from Job Corp that Reeves worked for Jerry Ellis doing carpentry and roofing. While he worked for Mr. Ellis, Reeves would get up as early as 5:30 a.m. to be ready for work. It was only after his younger bother Julius returned from being confined in the juvenile facility at Mt. Meigs that Reeves chose to stop working for Mr. Ellis. According to his mother, Reeves went with Julius because he was afraid his brother would get shot. Reeves had extensive contact with juvenile authorities and with law enforcement prior to his arrest for the victim's murder. In a pretrial mental evaluation, Dr. Kathy Ronan diagnosed Reeves as suffering from Adaptive Paranoia -- that is, he adapted his behavior in order to survive in the dangerous environment in which he lived. Reeves reported to Dr. King that he sold drugs and sometimes made between $1500 and $2000 per week. Reeves used the money from his drug dealing to purchase clothes, food, and a car.

"The record also reveals that Reeves and his codefendants planned to commit a robbery. It is undisputed that Reeves actively participated in the planning of the robbery. There was no evidence presented at the evidentiary hearing suggesting that Reeves's participation in the planning of the robbery or the ultimate murder and robbery of the victim was the result of being coerced or threatened by another person. The evidence from trial, including the compelling testimony from one of Reeves's codefendants, proved beyond a reasonable [doubt] that it was Reeves, and Reeves alone, that decided to murder the victim. After he shot the victim, Reeves hid incriminating items of evidence, including the murder weapon and bloody clothes that he and his codefendants had worn. In addition, Reeves split the proceeds with his codefendants, was

> boastful to others about shooting the victim, and seemed proud that he might get a tear drop -- a gang symbol indicating that a gang member had killed another person. See Ex parte Smith, [___ So. 3d at ___] (wherein the court considered Smith's actions after committing murder as a factor in concluding that Smith 'does not suffer from deficits in his adaptive functioning').
>
> "'In the context of an Atkins claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded and thus ineligible for the death penalty.' Ex parte Smith, [Ms. 1060427, May 25, 2007] ___ So. 3d ___, ___ (Ala. 2007). After considering the evidence presented at Reeves's trial and the evidence presented at the evidentiary hearing, this Court concludes that Reeves failed to meet his burden of proving by a preponderance of evidence that he is mentally retarded and that his death sentence violates the Eighth Amendment. Rule 32.3, Ala. R. Crim. P. This claim for relief is, therefore, denied."

(C. 949-53.)

With respect to the intellectual-functioning prong of intellectual disability, Reeves contends that "[i]t is undisputed that [he] has significantly subaverage intellectual functioning" and that the circuit court erred in finding that he did not. (Reeves's brief, p. 41.) Specifically, Reeves asserts that the circuit court erred in rejecting the "Flynn Effect" and in not deducting points from his IQ scores to account for that phenomenon. Reeves also appears to assert

that the circuit court was required to find that he suffered from significantly subaverage intellectual functioning because, he says, all three of his IQ scores fell within the range of significantly subaverage intellectual functioning, i.e., between 70 and 75 or below, when considering the SEM, and one of his scores was below 70 even without consideration of the SEM.[14]

We reject Reeves's argument that the circuit court erred in rejecting the "Flynn Effect" and in not deducting points

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[14]Reeves also maintains in passing that consideration of the SEM makes his IQ scores "even lower" than reported. (Reeves's brief, p. 44.) However, contrary to Reeves's belief, consideration of the SEM would not make his IQ scores "even lower." In Byrd v. State, 78 So. 3d 445, 452 (Ala. Crim. App. 2009), this Court "reject[ed the appellant's] request that we presume that a capital defendant's IQ falls at the bottom of the range of the confidence interval or 'margin of error.'" See also Carroll v. State, [Ms. CR-12-0599, August 14, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015). Although Byrd was released long before the United States Supreme Court's opinion in Hall, nothing in Hall requires a court to presume that a person's IQ score falls in the bottom of the SEM of plus or minus five points. As noted above, in Hall, the Supreme Court merely recognized that the SEM is a fact that means an IQ score is not determinative of intellectual functioning and must be considered, not as a fixed number, but as a range. See Ledford v. Warden, Georgia Diagnostic & Classification Prison, [No. 14-15650, March 21, 2016] ___ F.3d ___, ___ (11th Cir. 2016) ("[T]he standard error of measurement is a bi-directional concept that does not carry with it a presumption that an individual's IQ falls to the bottom of his IQ range.").

from his IQ scores to account for that phenomenon. This Court has repeatedly held that a circuit court is not required to accept, consider, or apply the "Flynn Effect" in determining intellectual disability. See Carroll v. State, [Ms. CR-12-0599, August 14, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015) ("[T]he circuit court could have reasonably rejected the 'Flynn Effect.'"); Smith v. State, 112 So. 2d 1108, 1131 (Ala. Crim. App. 2012) ("[T]his Court has previously held on several occasions that a trial court need not accept the 'Flynn Effect' as binding, and that it has not been accepted as scientifically valid by all courts."); and Albarran v. State, 96 So. 3d 131, 200 (Ala. Crim. App. 2011) ("[T]he circuit court could have reasonably rejected the 'Flynn Effect.'"). As noted above, Dr. King testified that it is not required that the "Flynn Effect" be taken into account when evaluating someone for intellectual disability and that the "Flynn Effect" is "not settled" in the "psychological community." (R. 244-45.) Although Dr. Goff and Dr. Salekin both testified that the "Flynn Effect" is generally recognized as valid, Dr. Goff admitted that he did not use the "Flynn Effect" for over 20 years after it was first discovered. He also admitted that

Dr. Flynn himself, the psychologist who had discovered the "Flynn Effect," had stated in a recent article that the "Flynn Effect" had not, in fact, been generally accepted as valid. Finally, Dr. Goff admitted that the "scoring manual" for the WAIS-III does not require the use of the "Flynn effect" to get an accurate IQ score and that the Diagnostic and Statistical Manual of Mental Disorders, Fourth Edition ("DSM-IV") also does not mention the "Flynn Effect" or require its application to IQ scores. Therefore, the circuit court did not err in rejecting the "Flynn Effect" and in not deducting points from Reeves's IQ scores to account for that phenomenon.

We also reject Reeves's argument that the circuit court erred in not considering the SEM. Nothing in the circuit court's order indicates that the court did not consider the SEM in evaluating Reeves's claim. Although the circuit court did not specifically mention the SEM in its order, it did state that it had considered all the evidence presented at the evidentiary hearing and that evidence included testimony about the SEM.

We further reject Reeves's argument that the circuit court was required to find that he suffered from significantly

subaverage intellectual functioning because, he says, all of his IQ scores fell within the range of significantly subaverage intellectual functioning when the SEM is considered one of his IQ scores was below 70 even without consideration of the SEM. As noted above, in Hall, the United States Supreme Court recognized that an IQ score, alone, is not determinative of intellectual disability or even of the intellectual-functioning prong of intellectual disability. The Court explained that because of the imprecision in intelligence testing, an IQ score should be considered a range, not a fixed number. Subsequently, the United States Court of Appeals for the Fifth Circuit explained:

> "The consideration of SEM as discussed by the Supreme Court, however, is not a one-way ratchet. The imprecision of IQ testing not only provides that IQ scores above 70 but within the SEM do not conclusively establish a lack of significantly subaverage general intellectual functioning, but also that IQ scores below 70 but within the SEM do not conclusively establish the opposite. In other words, a sentencing court may find a defendant to have failed to meet the first prong of the AAMR's definition of intellectual disability even if his IQ score is below 70 so long as 70 is within the margin of error and other evidence presented provides sufficient evidence of his intellectual functioning."

Mays v. Stephens, 757 F.3d 211, 218 n.17 (5th Cir. 2014). The United States Court of Appeals for the Eleventh Circuit has similarly recognized that

> "[t]he standard error of measurement accounts for a margin of error both below and above the IQ test-taker's score. As the Fifth Circuit recently concluded, the U.S. Supreme Court's consideration of the standard error of measurement 'is not a one-way ratchet.' Mays v. Stephens, 757 F.3d 211, 218 n.17 (5th Cir. 2014). We agree with the Fifth Circuit that the standard error of measurement is merely a factor to consider when assessing an individual's intellectual functioning -- one that may benefit or hurt that individual's Atkins[v. Virginia, 536 U.S. 304 (2002),] claim, depending on the content and quality of expert testimony presented. Further, the standard error of measurement is a bi-directional concept that does not carry with it a presumption that an individual's IQ falls to the bottom of his IQ range.
>
> "While Hall[v. Florida, 572 U.S. ___, 134 S.Ct. 1986 (2014),] requires lower courts at least to consider the standard error of measurement when evaluating intellectual functioning, it does not, as Ledford contends, require lower courts to find that an IQ score of 75 or below necessarily satisfies the significantly subaverage intellectual functioning prong. In fact, the Supreme Court steers us away from such rigid assertions by emphasizing that an IQ score represents a 'range, not a fixed number.' Hall, 572 U.S. at ___, 134 S.Ct. at 1999.
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> "A district court's actual application of the standard error of measurement -- i.e. whether the concept would make a finding of significantly subaverage intellectual function more likely, less likely, or have no effect on the court's determination -- is a matter of fact-finding

> informed by testimony from expert witnesses. See Connor [v. GDCP Warden], 784 F.3d [752,] 766 [(11th Cir. 2015)]; Thomas [v. Allen], 607 F.3d [749,] 758 [(11th Cir. 2010)]. So long as the district court's findings regarding how the standard error of measurement informs its ultimate intellectual functioning determination are plausible in light of the record evidence viewed in its entirety, there will be no clear error."

Ledford v. Warden, Georgia Diagnostic & Classification Prison, [No. 14-15650, March 21, 2016] ___ F.3d ___, ___ (11th Cir. 2016).

In this case, Reeves had full-scale IQ scores of 68, 71, and 73. Considering the SEM, these scores indicate that Reeves's IQ could be as low as 63 or as high as 78. Reeves's expert, Dr. Goff, concluded, based on Reeves's IQ scores as well as all other information before him, that Reeves suffered from significantly subaverage intellectual functioning. On the other hand, the State's expert, Dr. King, concluded, based on Reeves's IQ scores and all other information before him, that Reeves falls within the borderline range of intellectual functioning. The circuit court, after considering all the evidence presented at the hearing, and after observing Reeves when Reeves testified at a pretrial hearing, resolved the conflicting expert testimony as to Reeves's intellectual

functioning adversely to Reeves, finding that, although Reeves's intellectual functioning was subaverage, it was not significantly subaverage as required to meet the first prong of intellectual disability. "Conflicting evidence is always a question for the finder of fact to determine, and a verdict rendered thereon will not be disturbed on appeal." Padgett v. State, 668 So. 2d 78, 86 (Ala. Crim. App. 1995). There is ample evidence in the record to support the circuit court's finding and we will not disturb the circuit court's resolution of the conflicting expert testimony. Therefore, we find no abuse of discretion on the part of the circuit court in concluding that Reeves failed to prove by a preponderance of the evidence that he suffered from significantly subaverage intellectual functioning.

As for the adaptive-functioning prong of intellectual disability, Reeves contends that he "presented evidence of significant deficits in at least six areas of adaptive functioning and therefore [he] meets" the requirements for the second prong of intellectual disability -- significant deficits in at least two areas of adaptive functioning -- and that the circuit court erred in not so finding. (Reeves's

brief, p. 45.) Specifically, Reeves asserts that the circuit court "erroneously discounted Dr. Goff's findings by pointing to anecdotal tasks that Mr. Reeves can perform, such as his purported planning of the crime, his earning of Job Corps certificates in welding, brick masonry, and auto mechanics, his extremely brief construction employment, and his purported drug selling activities," none of which, Reeves claims, undermines or refutes Dr. Goff's opinion that Reeves suffers from significant deficits in multiple areas of adaptive functioning. (Reeves's brief, pp. 50-51.) At oral argument, Reeves further argued that even discounting Dr. Goff's testimony, Dr. King testified that on the ABS-RC-II test, Reeves scored in the 25th percentile in the prevocational/vocational, self-direction, and domestic-activity domains, thus conclusively establishing that Reeves suffered significant deficits in those three areas of adaptive functioning. Therefore, Reeves concludes, the circuit court was required to find that he suffered from significant deficits in at least two areas of adaptive functioning.

Reeves's arguments in this regard appear to be based solely on his scores on the ABAS test administered by Dr. Goff

and the ABS-RC-II test administered by Dr. King. However, contrary to Reeves's apparent belief, a circuit court is not required to find that a person suffers from significant deficits in adaptive functioning merely because that person's scores on a standardized test indicate such deficits. Just as an IQ test is necessarily imprecise and, therefore, not determinative of the intellectual-functioning prong of intellectual disability, standardized tests for adaptive functioning are also necessarily imprecise and, therefore, are not determinative of the adaptive-functioning prong of intellectual disability. Cf., United States v. Davis, 611 F. Supp. 2d 472, 493 (D. Maryland, 2009) (noting that "nearly all methods of assessing an individual's adaptive functioning -- particularly in a retroactive analysis -- are imperfect" and that, therefore, "the typical approach used in forensic assessments of adaptive functioning is to collect information from a multitude of sources and look for convergence of findings in order to confirm one's conclusions"); and Singleton v. Astrue, [No. 2:11CV512-CSC, February 29, 2012) (M.D. Ala. 2012) (not reported) (noting that scores on the ABAS-II test are not determinative as to adaptive functioning

for purposes of qualification for social security disability). Although standardized tests for adaptive functioning are certainly useful in assessing a person's adaptive functioning, a court should assess such test scores in light of the circumstances of each case and in light of all other relevant evidence regarding adaptive functioning, including the person's actions at the time of the crime.

In this case, the evidence regarding Reeves's adaptive functioning was conflicting. Although Reeves scored low in the domains of domestic activity, self-direction, and work on the ABS-RC-II test administered by Dr. King and in the areas of self-direction, work, leisure activities, health and safety, self-care, and functional academics on the ABAS test administered by Dr. Goff, thus indicating significant deficits in those areas of adaptive functioning, other evidence was presented that either called into question the validity of those scores and/or indicated that Reeves's deficits in those areas were not, in fact, <u>significant</u>.

For example, Dr. King testified that Reeves scored in the 25th percentile in the domain of domestic activity because Reeves had never been required to do any type of domestic

activity growing up and had been incarcerated since he was 18 years old. Dr. Goff testified that it is not unusual for someone who is incarcerated to have low adaptive functioning. Dr. King also testified that he would have scored Reeves higher in the self-direction domain if he had known at the time that he evaluated Reeves that, from an early age, Reeves had been "involved in a lot of drug activity and was actually directing the behaviors and activities of others in this drug related activity." (R. 231-32.) Additionally, Reeves was described in his juvenile mental-health records as "extremely goal-directed," even at a young age. (C. 1556.)

Dr. King further testified that he believed that Reeves's low score in the work domain was because Reeves "did not get to the age where he might be able to master use of complex job tools or equipment" before he went to prison, and because school records indicated that Reeves often missed school and had "pretty poor school habits." (R. 230-31.) Dr. Goff concurred, stating that Reeves's deficit in the work area "may be because he had a lack of opportunity." (R. 62.) Dr. Goff further testified that the validity of Reeves's low score in this area was questionable in light of the fact that Beverly

Seroy, the person to whom he administered the ABAS test, had simply guessed on the majority of questions in this area. Additionally, as the circuit court noted in its order, Reeves had obtained certificates in brick masonry, welding, and automobile mechanics, all of which require some level of technical skill, and the record indicates that Reeves held a construction job while his brother was incarcerated and that he was a good employee. Furthermore, the evidence indicated that Reeves's "poor school habits" were more a product of his defiant behavior in school than of any deficits in adaptive functioning.

Additionally, although Reeves scored low in the health and safety, self-care, and leisure-activity areas on the ABAS test administered by Dr. Goff, on the ABS-RC-II test administered by Dr. King, Reeves achieved the highest score possible in the domain of independent functioning, which included such things as self-care and health and safety, and Reeves also scored high in the domains of responsibility and socialization. Moreover, the evidence indicated that Reeves sold drugs to make money and that he used that money to buy

personal belongings for himself, including a car, and to help pay the household bills.

Finally, Reeves scored in the 5th percentile in the area of functional academics on the ABAS test administered by Dr. Goff, and Dr. Goff testified that Reeves was functionally illiterate and could read only at a third-grade level and, therefore, that Reeves suffered from a significant deficit in this area. However, Dr. Goff indicated that the ability to read at about a fifth- or sixth-grade level would not qualify as a significant deficit in functional academics. Dr. King testified that Reeves was able to read at a fifth-grade level, thus indicating that Reeves did not have a significant deficient in functional academics.

Simply put, the circuit court in this case was faced with conflicting evidence regarding Reeves's adaptive functioning, including conflicting expert testimony. Reeves's expert, Dr. Goff, testified that Reeves suffered from significant deficits in six areas of adaptive functioning. On the other hand, the State's expert, Dr. King, indicated that, although Reeves scored low on the ABS-RC-II test in three areas of adaptive functioning, those scores were questionable for various

reasons. It was for the circuit court to resolve the conflicting evidence and the conflicting expert testimony, and it obviously resolved the conflicts adversely to Reeves. In doing so, the court appropriately looked at evidence regarding Reeves's adaptive functioning other than the expert testimony -- such as Reeves's technical abilities in brick masonry, welding, and automobile mechanics; Reeves's ability to work construction and do so reliably when he was not around his brother, Julius; Reeves's participation in a drug-sale enterprise in which he was able to make thousands of dollars a week that he then used to purchase personal items and a car; and particularly Reeves's cold and calculated actions surrounding the murder, including planning the robbery with his codefendants, hiding incriminating evidence after he had shot the victim, splitting the proceeds of the robbery with his codefendants, and bragging about the murder, claiming that he would earn a "teardrop" – a gang tattoo indicating that a gang member had killed someone – for the murder See, e.g., Ex parte Smith, [Ms. 1080973, October 22, 2010] ___ So. 3d ___, ___ (Ala. 2010) ("We find especially persuasive Smith's behavior during the commission of these murders.") There is

ample evidence in the record to support the circuit court's finding that Reeves did not suffer from significant deficits in at least two areas of adaptive functioning, and we will not disturb the circuit court's resolution of the conflicting evidence. Therefore, we find no abuse of discretion on the part of the circuit court in finding that Reeves failed to prove by a preponderance of the evidence that he suffered from significant deficits in at least two areas of adaptive functioning.[15]

For these reasons, the circuit court properly denied Reeves's claim of intellectual disability.

III.

Reeves next contends that the circuit court erred in denying several of his claims of ineffective assistance of trial and appellate counsel.

> "'In order to prevail on a claim of ineffective assistance of counsel, a defendant must meet the two-pronged test articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984):

[15]Because we find no error in the circuit court's findings regarding the first two prongs of intellectual disability, we need not examine the third prong -- whether the deficits manifested before the age of 18.

> "'"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."

"'466 U.S. at 687, 104 S.Ct. at 2064.

"'"The performance component outlined in Strickland is an objective one: that is, whether counsel's assistance, judged under 'prevailing professional norms,' was 'reasonable considering all the circumstances.'" Daniels v. State, 650 So. 2d 544, 552 (Ala. Cr. App. 1994), cert. denied, [514 U.S. 1024, 115 S.Ct. 1375, 131 L.Ed.2d 230 (1995)], quoting Strickland, 466 U.S. at 688, 104 S.Ct. at 2065. "A court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct." Strickland, 466 U.S. at 690, 104 S.Ct. at 2066.

"'The claimant alleging ineffective assistance of counsel has the burden of showing that counsel's assistance was ineffective. Ex parte Baldwin, 456 So. 2d 129 (Ala. 1984), aff'd, 472 U.S. 372, 105 S.Ct. 2727, 86 L.Ed.2d 300 (1985). "Once a petitioner has identified the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall 'outside the wide range of professionally competent assistance.' [Strickland,] 466 U.S. at 690, 104 S.Ct. at 2066." Daniels, 650 So. 2d at 552. When reviewing a claim of ineffective assistance of counsel, this court indulges a strong presumption that counsel's conduct was appropriate and reasonable. Hallford v. State, 629 So. 2d 6 (Ala. Cr. App. 1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); Luke v. State, 484 So. 2d 531 (Ala. Cr. App. 1985). "This court must avoid using 'hindsight' to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance." Hallford, 629 So. 2d at 9. See also, e.g., Cartwright v. State, 645 So. 2d 326 (Ala. Cr. App. 1994).

> "'"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, 104 S.Ct. at 2065 (citations omitted). See Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987).

> "'"Even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless he establishes that 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the

> proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.' [Strickland,] 466 U.S. at 694, 104 S.Ct. at 2068."

"'Daniels, 650 So.2d at 552.

> "'"When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer -- including an appellate court, to the extent it independently reweighs the evidence -- would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."

"'Strickland, 466 U.S. at 697, 104 S.Ct. at 2069, quoted in Thompson v. State, 615 So. 2d 129, 132 (Ala. Cr. App. 1992), cert. denied, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 418 (1993).

> "'....'

"Bui v. State, 717 So. 2d 6, 12-13 (Ala. Cr. App. 1997), cert. denied, 717 So. 2d 6 (Ala. 1998)."

Dobyne v. State, 805 So. 2d 733, 742-44 (Ala. Crim. App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001).

"The standards for determining whether appellate counsel was ineffective are the same as those for determining whether

trial counsel was ineffective." Jones v. State, 816 So. 2d 1067, 1071 (Ala. Crim. App. 2000), overruled on other grounds, Brown v. State, 903 So. 2d 159 (Ala. Crim. App. 2004). "The process of evaluating a case and selecting those issues on which the appellant is most likely to prevail has been described as the hallmark of effective appellate advocacy." Hamm v. State, 913 So. 2d 460, 491 (Ala. Crim. App. 2002). As this Court explained in Thomas v. State, 766 So. 2d 860 (Ala. Crim. App. 1998), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005):

> "As to claims of ineffective appellate counsel, an appellant has a clear right to effective assistance of counsel on first appeal. Evitts v. Lucey, 469 U.S. 387, 105 S.Ct. 830, 83 L.Ed.2d 821 (1985). However, appellate counsel has no constitutional obligation to raise every nonfrivolous issue. Jones v. Barnes, 463 U.S. 745, 103 S.Ct. 3308, 77 L.Ed.2d 987 (1983). The United States Supreme Court has recognized that '[e]xperienced advocates since time beyond memory have emphasized the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible, or at most on a few key issues.' Jones v. Barnes, 463 U.S. at 751-52, 103 S.Ct. 3308. Such a winnowing process 'far from being evidence of incompetence, is the hallmark of effective advocacy.' Smith v. Murray, 477 U.S. 527, 536, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986). Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal. Pruett v. Thompson, 996 F.2d 1560, 1568 (4th Cir. 1993), cert. denied, 510

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

766 So. 2d at 876.

Moreover, in reviewing claims of ineffective assistance of counsel, this Court need not consider both prongs of the Strickland test. See Thomas v. State, 511 So. 2d 248, 255 (Ala. Crim. App. 1987) ("In determining whether a defendant has established his burden of showing that his counsel was ineffective, we are not required to address both considerations of the Strickland v. Washington test if the defendant makes an insufficient showing on one of the prongs."). Because both prongs of the Strickland test must be satisfied to establish ineffective assistance of counsel, the failure to establish one of the prongs is a valid basis, in and of itself, to deny the claim. As the United States Supreme Court explained:

> "Although we have discussed the performance component of an ineffectiveness claim prior to the prejudice component, there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In

> particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."

Strickland, 466 U.S. at 697.

In his petition, Reeves raised numerous claims of ineffective assistance of trial and appellate counsel; however, he does not pursue all of those claims in his brief on appeal. Those claims that Reeves raised in his petition but does not pursue on appeal are deemed abandoned and will not be considered by this Court. See Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995) ("We will not review issues not listed and argued in brief."). As for the ineffective-assistance-of-counsel claims that Reeves does pursue on appeal, the circuit court found that Reeves had failed to prove these claims by a preponderance of the evidence. We agree.

The record from Reeves's direct appeal indicates that attorneys Blanchard McLeod and Marvin Wiggins were initially appointed to represent Reeves. McLeod withdrew approximately

three months before trial, and Thomas Goggans was appointed as a replacement. Reeves was represented at trial by Goggans and Wiggins. Goggans continued to represent Reeves on appeal. At the Rule 32 evidentiary hearing, Reeves did not call McLeod, Goggans, or Wiggins to testify. In its order, the circuit court found that Reeves had failed to prove his claims of ineffective assistance of trial and appellate counsel, in part, because he had failed to call Goggans and Wiggins to testify at the evidentiary hearing. On appeal, Reeves argues that the circuit court erred in finding that his failure to call his attorneys to testify resulted in his failing to prove his ineffective-assistance-of-counsel claims because, he says, "there is no requirement that trial counsel testify." (Reeves's brief, p. 62.) Specifically, Reeves argues that because the Strickland test is an objective one, testimony from counsel is not necessary to prove any claim of ineffective assistance of counsel.

However, Reeves's argument fails to take into account the requirement that courts indulge a strong presumption that counsel acted reasonably, a presumption that must be overcome

by evidence to the contrary. In Broadnax v. State, 130 So. 3d 1232 (Ala. Crim. App. 2013), this Court stated:

> "It is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record. Indeed, 'trial counsel should ordinarily be afforded an opportunity to explain his actions before being denounced as ineffective.' Rylander v. State, 101 S.W.3d 107, 111 (Tex. Crim. App. 2003). This is so because it is presumed that counsel acted reasonably:
>
> > "'The presumption impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced. "Counsel's competence ... is presumed, and the [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under prevailing professional norms and that the challenged action was not sound strategy." Kimmelman v. Morrison, 477 U.S. 365, 106 S.Ct. 2574, 2588, 91 L.Ed.2d 305 (1986) (emphasis added) (citations omitted). An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment." Williams [v. Head,] 185 F.3d [1223,] 1228 [(11th Cir. 1999)]; see also Waters [v. Thomas,] 46 F.3d [1506,] 1516 [(11th Cir. 1995)] (en banc) (noting that even though testimony at habeas evidentiary hearing was ambiguous, acts at trial

> indicate that counsel exercised sound professional judgment).'
>
> "Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000). '"If the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."' Dunaway v. State, [Ms. CR-06-0996, December 18, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009) (quoting Howard v. State, 239 S.W.3d 359, 367 (Tex. App. 2007))."

130 So. 3d at 1255-56.

Subsequently, in Stallworth v. State, 171 So. 3d 53 (Ala. Crim. App. 2013) (opinion on return to remand), this Court explained:

> "Further, the presumption that counsel performed effectively '"is like the 'presumption of innocence' in a criminal trial,"' and the petitioner bears the burden of disproving that presumption. Hunt v. State, 940 So. 2d 1041, 1059 (Ala. Crim. App. 2005) (quoting Chandler v. United States, 218 F.3d 1305, 1314 n.15 (11th Cir. 2000) (en banc)). 'Never does the government acquire the burden to show competence, even when some evidence to the contrary might be offered by the petitioner.' Id. '"'An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [of effective representation]. Therefore, "where the record is incomplete or unclear about [counsel]'s actions, [a court] will presume that he did what he should have done, and that he exercised reasonable professional judgment."'"' Hunt, 940 So. 2d at 1070-71 (quoting Grayson v. Thompson, 257 F.3d 1194, 1218 (11th Cir. 2001), quoting in turn Chandler, 218 F.3d at 1314 n.15, quoting in turn Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999)). Thus, to

overcome the strong presumption of effectiveness, a Rule 32 petitioner must, at his evidentiary hearing, question trial counsel regarding his or her actions and reasoning. See, e.g., Broadnax v. State, 130 So. 3d 1232, 1255-56 (Ala. Crim. App. 2013) (recognizing that '[i]t is extremely difficult, if not impossible, to prove a claim of ineffective assistance of counsel without questioning counsel about the specific claim, especially when the claim is based on specific actions, or inactions, of counsel that occurred outside the record[, and holding that] circuit court correctly found that Broadnax, by failing to question his attorneys about this specific claim, failed to overcome the presumption that counsel acted reasonably'); Whitson v. State, 109 So. 3d 665, 676 (Ala. Crim. App. 2012) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question appellate counsel regarding their reasoning); Brooks v. State, 929 So. 2d 491, 497 (Ala. Crim. App. 2005) (holding that a petitioner failed to meet his burden of overcoming the presumption that counsel were effective because the petitioner failed to question trial counsel regarding their reasoning); McGahee v. State, 885 So. 2d 191, 221-22 (Ala. Crim. App. 2003) ('[C]ounsel at the Rule 32 hearing did not ask trial counsel any questions about his reasons for not calling the additional witnesses to testify. Because he has failed to present any evidence about counsel's decisions, we view trial counsel's actions as strategic decisions, which are virtually unassailable.'); Williams v. Head, 185 F.3d at 1228; Adams v. Wainwright, 709 F.2d 1443, 1445-46 (11th Cir. 1983) ('[The petitioner] did not call trial counsel to testify ... [; therefore,] there is no basis in this record for finding that counsel did not sufficiently investigate [the petitioner's] background.'); Callahan v. Campbell, 427 F.3d 897, 933 (11th Cir. 2005) ('Because [trial counsel] passed away before the Rule 32 hearing, we have no evidence of what he did to prepare for the penalty

> phase of [the petitioner's] trial. In a situation like this, we will presume the attorney "did what he should have done, and that he exercised reasonable professional judgment."')."

171 So. 3d at 92-93 (emphasis added). See also Clark v. State, [Ms. CR-12-1965, March 13, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015) (holding that Rule 32 petitioner had failed to prove that his appellate counsel was ineffective for not raising issues on appeal where the petitioner did not call his appellate counsel to testify at the Rule 32 evidentiary hearing regarding counsel's reasons for not raising those issues).

In this case, Reeves's failure to call his attorneys to testify is fatal to his claims of ineffective assistance of counsel. Reeves reasserts on appeal the following claims of ineffective assistance of trial and appellate counsel that he raised in his petition:

> (1) That his trial counsel were ineffective for not hiring Dr. Goff, or another neuropsychologist, to evaluate Reeves for intellectual disability and for not then presenting testimony from that expert during the penalty phase of the trial that Reeves was intellectually disabled in order to establish a mitigating circumstance;
>
> (2) That his trial counsel were ineffective for relying during the penalty phase of his trial on the testimony of Dr. Ronan, the court-appointed

psychologist who examined Reeves before trial to determine his competency to stand trial and his mental state at the time of the offense, to present mitigation evidence;

(3) That his trial counsel were ineffective for not objecting during the penalty phase of the trial to Dr. Ronan's testimony on cross-examination that Reeves was not intellectually disabled;

(4) That his trial counsel were ineffective for not conducting an adequate mitigation investigation and for not presenting what he claimed was substantial mitigation evidence during the penalty phase of the trial;

(5) That his trial counsel were ineffective for not objecting at trial to

> (a) the prosecutor's allegedly urging the jury during closing arguments at the penalty phase of the trial to consider non-statutory aggravating circumstances to impose a death sentence;
>
> (b) the prosecutor's introducing evidence and making argument during both the guilt and penalty phases of the trial that Reeves was involved in a gang;
>
> (c) the prosecutor's allegedly referring to the jury's penalty-phase verdict as a recommendation; and
>
> (d) the trial court's instructing the jury that its penalty-phase verdict was a recommendation; and

(6) That his appellate counsel was ineffective for not raising on appeal the following claims:

> (a) that the prosecutor improperly urged the jury during closing arguments at the penalty phase of the trial to consider nonstatutory aggravating circumstances to impose a death sentence;
>
> (b) that the prosecutor improperly introduced evidence and made argument during both the guilt and penalty phases of the trial that Reeves was involved in a gang;
>
> (c) that the prosecutor improperly referred to the jury's penalty-phase verdict as a recommendation; and
>
> (d) that the trial court improperly instructed the jury that its penalty-phase verdict was a recommendation.[16]

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[16]We note that Reeves also reasserts on appeal the claim from his petition that his trial counsel were ineffective for allegedly not investigating the possibility that Reeves was not the shooter. However, Reeves mentions this claim only in passing in a single sentence in his brief, and he makes no argument at all in his brief regarding why he believes the circuit court's denial of this claim was error. Reeves's argument regarding this ineffective-assistance-of-counsel claim fails to comply with Rule 28(a)(10), Ala. R. App. P., and it is well settled that the "[f]ailure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented." C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011). Therefore, Reeves's claim that his trial counsel was ineffective for allegedly not investigating the possibility that Reeves was not the shooter is deemed waived and will not be considered by this Court. Additionally, we note that Reeves also argues in his brief on appeal that his trial and appellate counsel were ineffective for not challenging at trial and on appeal the constitutionality of Alabama's capital-sentencing scheme. Although Reeves raised a claim in his petition that Alabama's capital-sentencing scheme was

The decisions by counsel that Reeves challenges in claims (1), (2), (3), (5), and (6), as set out above -- what experts to hire, what witnesses to call to testify, what mitigation evidence to present, what objections to make and what issues to raise at trial, and what issues to raise on appeal -- are typically considered strategic decisions, and do not constitute per se deficient performance. See, e.g., Walker v. State, [Ms. CR-11-0241, February 6, 2015] ___ So. 3d ___ (Ala. Crim. App. 2015) ("'An attorney's decision whether to retain witnesses, including expert witnesses, is a matter of trial strategy.' People v. Payne, 285 Mich. App. 181, 190, 774 N.W.2d 714, 722 (2009). '[I]n general, the "decision not to hire experts falls within the realm of trial strategy."'

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unconstitutional under Ring v. Arizona, 536 U.S. 584 (2002), nowhere in his petition did Reeves assert that his trial or appellate counsel were ineffective for not raising a challenge to the constitutionality of Alabama's capital-sentencing scheme at trial or on appeal. A substantive challenge to the constitutionality of a statute is not the same as a claim of ineffective assistance of counsel. Therefore, because Reeves did not raise in his petition claims that his trial and appellate counsel were ineffective for not challenging the constitutionality of Alabama's capital-sentencing scheme, those claims are not properly before this Court for review and will not be considered. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition.").

State v. Denz, 232 Ariz. 441, 445, 306 P.3d 98, 102 (2013), quoting Yohey v. Collins, 985 F.2d 222, 228 (5th Cir. 1993)."); Johnson v. State, [Ms. CR-05-1805, September 28, 2007] ___ So. 3d ___, ___ (Ala. Crim. App. 2007) ("'[I]n the context of an ineffective assistance claim, "a decision regarding what witnesses to call is a matter of trial strategy which an appellate court will not second-guess."' Curtis v. State, 905 N.E.2d 410, 415 (Ind. Ct. App. 2009). '[T]he decision of which witnesses to call is quintessentially a matter of strategy for the trial attorney.' Boyle v. McKune, 544 F.3d 1132, 1139 (10th Cir. 2008)."); Dunaway v. State, [Ms. CR-06-0996, December 18, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009) ("'The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy.' Hill v. Mitchell, 400 F.3d 308, 331 (6th Cir. 2005)."), rev'd on other grounds, [Ms. 1090697, April 18, 2014] ___ So. 3d ___ (Ala. 2014); Lane v. State, 708 So. 2d 206, 209 (Ala. Crim. App. 1997) ("This court has held that '[o]bjections are a matter of trial strategy, and an appellant must overcome the presumption that "conduct falls within the wide range of reasonable professional

assistance," that is, the presumption that the challenged action "might be considered sound trial strategy."' Moore v. State, 659 So. 2d 205, 209 (Ala. Cr. App. 1994)."); and Thomas v. State, 766 So. 2d 860, 876 (Ala. Crim. App. 1998) ("[A]ppellate counsel has no constitutional obligation to raise every nonfrivolous issue. ... Appellate counsel is presumed to exercise sound strategy in the selection of issues most likely to afford relief on appeal."), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005).

The burden was on Reeves to prove by a preponderance of the evidence that his counsel's challenged decisions were not the result of reasonable strategy, i.e., the burden was on Reeves to present evidence overcoming the strong presumption that counsel acted reasonably. However, because Reeves failed to call his counsel to testify, the record is silent as to the reasons trial counsel (1) chose not to hire Dr. Goff or another neuropsychologist to evaluate Reeves for intellectual disability and chose not to present testimony from such an expert during the penalty phase of the trial that Reeves was intellectually disabled in order to establish a mitigating

circumstance; (2) chose to rely during the penalty phase of the trial on the testimony of Dr. Ronan to present mitigation evidence; (3) chose not to object to Dr. Ronan's testimony on cross-examination during the penalty phase of the trial that Reeves was not intellectually disabled; and (4) chose not to object at trial to the prosecutor's allegedly urging the jury during closing arguments at the penalty phase of the trial to consider nonstatutory aggravating circumstances to impose a death sentence, to the prosecutor's introducing evidence and making argument during both the guilt and penalty phases of the trial that Reeves was involved in a gang, to the prosecutor's allegedly referring to the jury's penalty-phase verdict as a recommendation, and to the trial court's instructing the jury that its penalty-phase verdict was a recommendation. The record is also silent as to the reasons appellate counsel chose not to raise on appeal the claims that the prosecutor improperly urged the jury during closing arguments at the penalty phase of the trial to consider non-statutory aggravating circumstances to impose a death sentence, that the prosecutor improperly introduced evidence and argued during both the guilt and penalty phases of the

trial that Reeves was involved in a gang, that the prosecutor improperly referred to the jury's penalty-phase verdict as a recommendation, and that the trial court improperly instructed the jury that its penalty-phase verdict was a recommendation. Where "'"the record is silent as to the reasoning behind counsel's actions, the presumption of effectiveness is sufficient to deny relief on [an] ineffective assistance of counsel claim."'" Broadnax, 130 So. 3d at 1256 (citations omitted).

As for Reeves's claim that his trial counsel were ineffective for not conducting an adequate mitigation investigation and for not presenting what he claimed was substantial mitigation evidence during the penalty phase of the trial, claim (4), as set out above, we point out that Reeves's claim in this regard is not that counsel failed to conduct any mitigation investigation or that counsel failed to present any mitigation evidence during the penalty phase of the trial. Rather, Reeves's claim is that counsel did not conduct an adequate investigation and either did not present during the penalty phase of the trial all mitigating evidence that may have been available or did not present the mitigating

evidence in the manner he believes would have been most appropriate.

"[T]rial counsel's failure to investigate the possibility of mitigating evidence [at all] is, per se, deficient performance." Ex parte Land, 775 So. 2d 847, 853 (Ala. 2000), overruled on other grounds, State v. Martin, 69 So. 3d 94 (Ala. 2011). However, "counsel is not necessarily ineffective simply because he does not present all possible mitigating evidence." Pierce v. State, 851 So. 2d 558, 578 (Ala. Crim. App. 1999), rev'd on other grounds, 851 So. 2d 606 (Ala. 2000). When the record reflects that counsel presented mitigating evidence during the penalty phase of the trial, as here, the question becomes whether counsel's mitigation investigation and counsel's decisions regarding the presentation of mitigating evidence were reasonable.

> "'[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place....' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009). Thus, '[a]lthough [the] claim is that his trial counsel should have done something more, we [must] first look at what the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000)."

Broadnax, 130 So. 3d at 1248 (emphasis added).

At the evidentiary hearing, Reeves presented testimony from Karen Salekin, a forensic clinical psychologist who performed a mitigation investigation, regarding the mitigation evidence he believes his counsel should have presented and the manner in which he believes that evidence should have been presented. However, Reeves presented no evidence at the evidentiary hearing regarding what mitigation investigation his trial counsel conducted, because Reeves failed to call trial counsel to testify. Although Reeves argues that counsel's investigation was not adequate, because the record is silent as to the extent of counsel's actual investigation, we must presume that counsel exercised reasonable professional judgment in conducting the investigation and that counsel's decisions resulting from their investigation were also reasonable. The silent record before this Court regarding counsel's investigation and their resulting decisions as to what evidence to present during the penalty phase of the trial and how to present that evidence is not sufficient to overcome the strong presumption of effective assistance. See, e.g., Woods v. State, 13 So. 3d 1, 37 (Ala. Crim. App. 2007) (holding, on appeal from four capital-murder convictions and

a sentence of death, that the appellant had failed to establish that his counsel's mitigation investigation constituted deficient performance where the record contained "no evidence about the scope of counsel's mitigation investigation" but contained indications that counsel had at least conducted some mitigation investigation).[17]

For the reasons set forth above, Reeves failed to satisfy his burden of proof as to his claims of ineffective assistance of counsel. Therefore, the circuit court properly denied those claims.

IV.

Reeves next contends that the circuit court erred in summarily dismissing his claims of juror misconduct without allowing him to present evidence to support them.

In his petition, Reeves alleged that during his trial one of the jurors who sat on his jury improperly communicated with her husband about the trial and improperly watched and read

[17]Although Woods was in a different procedural posture than this case -- it was a direct appeal from multiple convictions and a death sentence -- the principle that a record that is silent regarding the scope of counsel's mitigation investigation will not support a finding that counsel's performance is deficient is equally applicable here.

media coverage of the trial. Reeves further alleged that, during the penalty-phase deliberations, after the jury had entered an informal vote of nine in favor of the death penalty and three in favor of life imprisonment without the possibility of parole, that same juror escorted another juror -- a juror who Reeves claimed was young and emotional and had originally voted for life imprisonment without the possibility of parole -- out of the jury deliberation room and spoke to that juror in private. When the two jurors returned, Reeves alleged, the young and emotional juror changed her vote and voted for the death penalty, resulting in a jury verdict of 10 in favor of the death penalty and 2 in favor of life imprisonment without the possibility of parole. Finally, Reeves alleged that this same juror repeatedly told the other members of the jury that Reeves's family "would 'come after' the jurors after the trial" and stressed to the other jurors that "the decision to impose the death penalty truly belonged to the judge rather than the jury." (C. 585.) In support of these claims, Reeves attached to his petition an affidavit from another juror who sat on Reeves's jury, juror G.B., in

which G.B. averred essentially the same facts as Reeves alleged in his petition.

At the conclusion of the Rule 32 evidentiary hearing, the following exchange occurred:

> "[Reeves's counsel]: ... Judge, there was one other thing. I think when you ruled on the issue of juror misconduct, you indicated that we could put on the record --
>
> "THE COURT: I did, and it slipped my mind.
>
> "[Reeves's counsel]: And [cocounsel] is going to go ahead and do that."

(R. 285-86.) Reeves's counsel then made an offer of proof regarding the evidence that would be presented regarding the juror-misconduct claims if the court had allowed such evidence.

Although the record contains no order by the circuit court summarily dismissing Reeves's juror-misconduct claims before the evidentiary hearing, the above exchange indicates that the court had ruled on the claims before the hearing, apparently concluding that the claims did not warrant an evidentiary hearing. In its final order denying Reeves's petition, the court found that Reeves's juror-misconduct claims were precluded by Rules 32.2(a)(3) and (a)(5), Ala. R.

Crim. P., because they could have been, but were not, raised and addressed at trial and on appeal. Therefore, we consider Reeves's juror-misconduct claims as having been summarily dismissed without Reeves's being afforded an opportunity to present evidence to support those claims.

We agree with Reeves's argument on appeal that the circuit court erred in finding that his juror-misconduct claims were precluded by Rules 32.2(a)(3) and (a)(5) on the ground that they could have been, but were not, raised and addressed at trial and on appeal. See, e.g., Ex parte Hodges, 147 So. 3d 973 (Ala. 2011); Ex parte Harrison, 61 So. 3d 986 (Ala. 2010); Ex parte Burgess, 21 So. 3d 746 (Ala. 2008). However, the circuit court's error in this regard does not require a remand for further proceedings in this case because we conclude that Reeves's juror-misconduct claims were not sufficiently pleaded to warrant an evidentiary hearing and, therefore, that the circuit court properly refused to allow Reeves to present evidence on this claim at the Rule 32 hearing.

Rule 32.3, Ala. R. Crim. P., states that "[t]he petitioner shall have the burden of pleading and proving by a

preponderance of the evidence the facts necessary to entitle the petitioner to relief." Rule 32.6(b), Ala. R. Crim. P., states that "[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." To sufficiently plead a claim of juror-misconduct, a Rule 32 petitioner must, at a minimum, identify the juror who the petitioner believes committed the misconduct, must allege specific facts indicating what actions that juror took that the petitioner believes constituted misconduct, and must allege specific facts indicating how that juror's actions denied the petitioner a fair trial. See, e.g., Moody v. State, 95 So. 3d 827, 859 (Ala. Crim. App. 2011) (holding that Rule 32 petitioner had failed to satisfy his burden of pleading his claim of juror misconduct when the petitioner "failed to identify a single juror who he believed did not answer questions truthfully during voir dire," failed to "identify which questions he believe[d] the jurors did not

answer truthfully," and "failed to plead what 'extraneous' information he believes was considered during the jury's deliberations or how that information prejudiced him.").

In this case, Reeves failed to identify in his petition the juror he believed committed the misconduct; he referred to the juror only as "Juror Jane Doe." (C. 584-85.) He also failed to identify the juror who allegedly changed her vote during the penalty-phase deliberations after allegedly speaking with Juror Jane Doe privately. G.B.'s affidavit[18] also failed to identify Juror Jane Doe or the juror who allegedly changed her vote during the penalty-phase deliberations. In a footnote in his petition, Reeves admitted that he knew the identity of both jurors; he alleged that "[s]ignificant efforts have been undertaken to identify Juror Jane Doe" and that "by speaking with certain jurors who served on Mr. Reeves's trial and have been willing to speak with Mr.

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[18]"Although a Rule 32 petitioner is not required to include attachments to his or her petition in order to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b), when a petitioner does so, those attachments are considered part of the pleadings." Conner v. State, 955 So. 2d 473, 476 (Ala. Crim. App. 2006). See also Ex parte Lucas, 865 So. 2d 418 (Ala. 2002) (attachments to a Rule 32 petition are considered part of the pleadings).

Reeves's current counsel, the identities of these jurors are believed to be known." (C. 585.) Nonetheless, Reeves failed to identify either juror in his petition. In addition, although Reeves alleged that Juror Jane Doe had spoken to her husband about the case and had watched and read media reports about the case, Reeves failed to identify exactly what information Juror Jane Doe received from her husband or from the media reports or how this unidentified information prejudiced him.

Because Reeves failed to identify in his petition Juror Jane Doe, the juror he believed was improperly influenced during the penalty phase of the trial, or the specific "extraneous" information he believed Juror Jane Doe improperly considered, all of Reeves's juror-misconduct claims were insufficient to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b). Moreover, Reeves's claim that Juror Jane Doe repeatedly told the other members of the jury that Reeves's family "would 'come after' the jurors after the trial" and stressed to the other jurors that "the decision to impose the death penalty truly belonged to the judge rather than the jury" also fails to state a material issue of fact or

law upon which relief could be granted. (C. 585.) Reeves's claim in this regard is based on the debates and discussions of the jury, not on extraneous facts considered by it.[19] As this Court explained in Bryant v. State, 181 So. 3d 1087 (Ala. Crim. App. 2011):

> "It is well settled that 'matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision.' Sharrief v. Gerlach, 798 So. 2d 646, 653 (Ala. 2001). 'Rule 606(b), Ala. R. Evid., recognizes the important "distinction, under Alabama law, between 'extraneous facts,' the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the 'debates and discussions of the jury,' which are protected from inquiry."' Jackson v. State, 133 So. 3d 420, 431 (Ala. Crim. App. 2009) (quoting Sharrief, supra at 652). '[T]he debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts.' Sharrief, 798 So. 2d at 653. Thus, 'affidavit[s or testimony] showing that extraneous facts influenced the jury's deliberations [are] admissible; however, affidavits concerning "the debates and discussions of the case by the jury while deliberating thereon" do not fall within this exception.' CSX Transp., Inc. v. Dansby, 659 So. 2d 35, 41 (Ala. 1995) (quoting Alabama Power Co. v. Turner, 575 So. 2d 551, 557 (Ala. 1991))."

[19]Reeves did not allege in his petition that Juror Jane Doe's statement to the jury that Reeves's family would "come after" the jurors after trial was based on extraneous information she had received.

181 So. 3d at 1126-27. To allow "consideration of this claim of juror misconduct -- which is based entirely on the debate and deliberations of the jury -- 'would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny.'" Bryant, 181 So. 3d at 1128 (quoting Jones v. State, 753 So. 2d 1174, 1204 (Ala. Crim. App. 1999)).

For these reasons, the circuit court properly dismissed Reeves's claims of juror misconduct without affording Reeves an opportunity to present evidence.[20]

V.

Finally, Reeves contends that the circuit court erred in denying, on procedural grounds, the claim in his petition that lethal injection constitutes cruel and unusual punishment in

[20]Although the lack of specificity and the failure to state a material issue of fact or law upon which relief could be granted were not the reasons for the circuit court's denial of these claims, we may nonetheless affirm the circuit court's judgment on this ground. See Moody v. State, 95 So. 3d 827, 833-34 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein.

violation of the Eighth Amendment to the United States Constitution.

We agree with Reeves that the circuit court erred in finding his constitutional challenge to lethal injection to be precluded by Rules 32.2(a)(3) and (a)(5). Although typically such a constitutional challenge to a sentence would be subject to the preclusions in Rule 32.2(a)(3) and (a)(5), in this case Reeves was convicted and sentenced in 1998 and his convictions and sentences were affirmed on appeal in 2000, years before Alabama adopted lethal injection as its primary method of execution. See Act No. 2002-492, Ala. Acts 2002. At the time Reeves was convicted and sentenced to death and during his direct appeal, Alabama's method of execution was electrocution. It is well settled "that trial counsel cannot be held to be ineffective for failing to forecast changes in the law." Dobyne v. State, 805 So. 2d 733, 748 (Ala. Crim. App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001). Because Reeves's trial and appellate counsel could not have been expected to forecast Alabama's change in its method of execution, Reeves could not have challenged the constitutionality of lethal injection at trial and on appeal.

Therefore, the circuit court erred in finding this claim to be precluded by Rules 32.2(a)(3) and (a)(5).

However, the circuit court's error in this regard does not require this cause to be remanded for further proceedings. First, it is not clear from Reeves's petition whether Reeves challenged in his petition the constitutionality of lethal injection per se or the constitutionality of Alabama's specific lethal-injection drug protocol. Because we cannot determine from the allegations in his petition exactly which claim Reeves asserted, his claim in this regard necessarily fails to satisfy the pleading requirements in Rule 32.3 and Rule 32.6(b).

Moreover, to the extent that Reeves is challenging the constitutionality of lethal injection per se, that claim has been expressly rejected by this Court numerous times. See, e.g., Townes v. State, [Ms. CR-10-1892, December 18, 2015] ___ So. 3d ___, ___ (Ala. Crim. App. 2015), and the cases cited therein. To the extent that Reeves is challenging Alabama's specific drug protocol for lethal injection, the drug protocol Reeves mentioned in his petition -- sodium thiopental, pancuronium bromide, and potassium chloride -- is no longer

the drug protocol Alabama uses for lethal injection. Therefore, Reeves's challenge in his petition to that drug protocol is moot. Additionally, it appears that in his brief on appeal Reeves is attempting to challenge Alabama's current drug protocol for lethal injection, specifically Alabama's use of midazolam as a substitute for sodium thiopental. That challenge, however, was not raised in Reeves's petition and is, therefore, not properly before this Court for review. See Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997) ("An appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition."). In any event, the United States Supreme Court has upheld as constitutional the use of midazolam for lethal injection. See Glossip v. Gross, ___ U.S. ___, 135 S.Ct. 2726 (2015). Therefore, Reeves is due no relief on this claim.[21]

[21]Although these were not the reasons the circuit court denied this claim, we may nonetheless affirm the circuit court's judgment on these grounds. See Moody v. State, 95 So. 3d 827, 833-34 (Ala. Crim. App. 2011), and McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007), and the cases cited therein.

VI.

For the foregoing reasons, the judgment of the circuit court denying Reeves's Rule 32 petition is due to be affirmed.

In affirming the circuit court's judgment, we recognize that the United States Supreme Court recently vacated this Court's judgment in Johnson v. State, [Ms. CR-10-1606, May 20, 2014] ___ So. 3d ___ (Ala. Crim. App. 2014), a case in which the death penalty had been imposed, and remanded the cause for further consideration in light of its opinion in Hurst v. Florida, 577 U.S. ___, 136 S.Ct. 616 (2016). See Johnson v. Alabama, [Ms. 15-7091, May 2, 2016] ___ U.S. ___, ___ S.Ct. ___ (2016). In Hurst, the United States Supreme Court held unconstitutional Florida's capital-sentencing scheme on the ground that it violated its holding in Ring v. Arizona, 536 U.S. 584 (2002), because Florida's statute authorized a sentence of death based on a finding by the trial judge, rather than by the jury, that an aggravating circumstance existed. The impact, if any, of Hurst on Alabama's capital-sentencing scheme has not yet been addressed by this Court or by the Alabama Supreme Court. We need not address it here because Hurst is not applicable in this case.

The United States Supreme Court's opinion in Hurst was based solely on its previous opinion in Ring, an opinion the United States Supreme Court held did not apply retroactively on collateral review to cases that were already final when the decision was announced. See Schiriro v. Summerlin, 542 U.S. 348 (2004). Because Ring does not apply retroactively on collateral review, it follows that Hurst also does not apply retroactively on collateral review. Rather, Hurst applies only to cases not yet final when that opinion was released, such as Johnson, supra, a case that was still on direct appeal (specifically, pending certiorari review in the United States Supreme Court) when Hurst was released. Reeves's case, however, was final in 2001, 15 years before the opinion in Hurst was released. Therefore, Hurst is not applicable here.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Burke, and Joiner, JJ., concur.

IN THE CIRCUIT COURT OF DALLAS COUNTY, ALABAMA

STATE OF ALABAMA, *

*

Plaintiff/Respondent, FILED *

*

vs. OCT 26 2009 CASE NO. CC-1997-31

MATTHEW REEVES, CHERYL STRONG RATCLIFF DALLAS COUNTY CIRCUIT CLERK *

Defendant/Petitioner. *

ORDER DENYING RULE 32 PETITION

THIS MATTER, having come before the Court upon the Petition of Matthew Reeves for relief pursuant to Rule 32 of the *Alabama Rules of Criminal Procedure,* and the Court having conducted an Evidentiary Hearing pursuant to Rule 32, and after considering the evidence and arguments of the parties at the Evidentiary Hearing together with the evidence at the Trial of this case, **finds as follows:**

The brutal murder of Willie Johnson on Thanksgiving Day 1996, and the events immediately before and after the killing, are set forth in this Court's Sentencing Order filed August 21, 1998.

The Court made the following Findings of Fact at that time:

"On November 26, 1996, the victim in this case, Willie Johnson, stopped his vehicle to assist some motorists he believed to be in need of help. A short time later, Mr. Johnson was dead, victim of a robbery and homicide at the hands of the Defendant, Matthew Reeves.

Perhaps the most compelling testimony regarding the facts of this case and the involvement of the Defendant and co-defendants came from 21 year-old Brenda Suttles. Suttles testified that on the day of the murder she, along with the Defendant, Matthew Reeves, his Brother, Julius Reeves, and an individual named Immanuel, set out to commit a robbery. As they set out to commit the robbery, they came into contact with an individual named Tony who gave them a ride to a location where Julius Reeves secured the murder weapon.

A general discussion ensued with regard to a robbery, and it was decided that the group would travel to Whitehall, Alabama, to commit the robbery. During the trip to Whitehall, the vehicle in which the group was traveling developed mechanical problems and the group was left stranded on the side of the road.

It was at this time that Willie Johnson happened upon the group and towed the vehicle back to Selma and to the Defendant Reeves' home. Mr. Johnson advised Julius Reeves that he would charge $25 for towing them from Whitehall to Selma, and it was determined that none in the group had the money to pay. However, Julius Reeves advised Mr. Johnson that if he drove the group to Katrina White's house, he would give Mr. Johnson a ring for payment of his services. Upon returning from Katrina White's house, Mr. Johnson was instructed to drive his truck into Crockett's Alley which is a location between Selma and Alabama Avenues in Selma, Alabama.

Brenda Suttles testified that the group intended to rob Mr. Johnson at this time, and as he stopped his truck in the alley, Matthew Reeves placed the shotgun in through the sliding back window of the truck and fired one shot into the neck of Willie Johnson. It was at this time that Julius Reeves and Brenda Suttles pulled Willie Johnson from the truck and robbed him of his money.

The testimony of Brenda Suttles with regard to the group's activities after the robbery and murder was compelling as well. She stated that the group took the money and divided it, and throughout the night the Defendant Matthew Reeves partied and danced to rap music and occasionally mocked the horrible death of the victim by flinching and jerking. She also stated that Matthew Reeves had boasted about his commission of the murder, in that it would earn him a "teardrop," a gang-related sign that indicates a gang member has committed murder.

Upon further review of the Record at Trial, the Court looks to the testimony of Brenda Suttles which illustrates that the conduct of Reeves was the result of a pre-meditated plan rather than an impulsive act. She testified that they (Matthew Reeves, Julius Reeves, Immanuel Suttles, and Suttles) got together during the afternoon hours of Thanksgiving, and "went looking for some robberies."

A short time later, Julius Reeves secured the shotgun used to murder Willie Johnson and gave it to Matthew Reeves who kept it in his possession the entire afternoon carefully concealing it as he boarded Willie Johnson's truck, thereafter placing it to Willie Johnson's head and firing the shot that took Willie Johnson's life.

Matthew Reeves did not relinquish the weapon at this time, but cared for it and concealed it in his room at his home as he exchanged his bloody clothing for clean clothes, and ordered his confederates to change their bloody clothing as well.

Testimony from the trial of this case clearly established that the robbery was pre-mediated and the gun used by Matthew Reeves was secured for his purposes. Not only did Matthew Reeves pull the trigger and cause the death of Willie Johnson, but ordered his brother, Julius, and friend, Brenda Suttles, to go into the pockets of the deceased Willie Johnson, and take his money. The Defendant Reeves was not only responsible for hiding his own shoes and clothing, but hid the shoes and clothing of the other participants together with the gun used in the murder. Subsequently, it was Reeves who divided up the money and boasted of the murder and his ultimate acceptance into a gang as displayed by a teardrop he would earn from the murder.

Finding of Facts During the Penalty Phase:

The defense offered three witnesses during the penalty phase; Detective Pat Grindle, Marzetta Reeves, Defendant's mother, and Dr. Kathaleen Ronan. These witnesses testified regarding the

Defendant's formative years, and the turbulent environment in which he was raised. Detective Grindle talked of his professional relationship with the Defendant and the Defendant's brother reaching back to the age of 9 or 10 years old, when Matthew Reeves first became familiar to law enforcement.

He described the home in which Matthew Reeves was raised; there were a series of photographs that depicted a dilapidated structure with obvious structural failings to the roof. This testimony clearly represented to the Jury the difficult environment in which Matthew Reeves was raised.

Marzetta Reeves was called to describe the family structure and formative years of Matthew Reeves' childhood. She testified that in 1996, ten people lived in the four bedroom house. Matthew lived with her all his life and only met his father on 2 occasions.

She described his struggles in school, and testified that he repeated the first and third or fourth grade and ultimately was socially promoted to the seventh grade.

Academic and social issues continued to plague Matthew throughout his school career until he finally was expelled from the public school system. However, his mother reported that during his early years in school, his teachers reported he was doing well but should have one-on-one help.

Marzetta Reeves attempted to give Matthew some academic assistance and sought mental health counseling. She described numerous facilities in which Matthew was placed; specifically, a

boot camp in Chalkville, Alabama, and group home in Mobile, Alabama. She reported that the counselors indicated to her that he did well in the group home environment, and subsequently secured certificates in welding, auto mechanics, and brick masonry through Job Corp.

The final witness called by the defense was Kathaleen N. Ronan, a Clinical Psychologist employed at Taylor Hardin Secure Medical Facility in Tuscaloosa, Alabama. Dr. Ronan was ordered by the Circuit Court of Dallas County, Alabama, to evaluate the defendant on an out-patient basis for his competency to stand trial and mental state at the time of the alleged offense. This evaluation took place on June 3, 1997. Dr Ronan explained to the Jury her evaluation as follows:

"The next step is to conduct what we call mental status examination. This is to see how an individual is functioning right now. Can they concentrate? Are they attentive to the topics of discussion? Are they showing any kind of mental illness symptoms that would make them unable to communicate effectively. Do they know where they are? Do they know who they are? Do they know what the date is, why they are talking to you? What is their general fund of information? Do they know things that, you know, most of us have grown up with and know really well, like the colors of the American flag or in what direction does the sun rise? Do they have just some basic information available? If given a hypothetical social situation, can they reason what they are supposed to do? So we get an idea as to whether or not the person has any major interference due to some king of psychiatric symptoms. And then and I ask them specifically about symptoms. And have you ever had hallucinations, seen or heard things other people tell you they can't see or hear or had any firm beliefs that are not based on reality such as delusions And I will go through basically all of the symptoms that a person might experience.

At that point, I usually will ask the person to tell me everything that they can recall about the time that the offense took place. Some people say they can't remember. Some people will give a detailed account. Some people will go on and on and on for

a very long time talking about it. It depends. In Mr. Reeves' case he did give me a detailed but somewhat brief explanation about his behavior during that time frame.

The very final step is to administer what is called the competency to stand trial assessment instrument, which is basically a structured interview asking the person what they know about court procedures. For instance, what is capital murder? What does that mean? What could happen to you if you were found guilty? How do you think your case is going to turn out and why? What does a defense attorney do? What is his main role? What is the role of the District Attorney? What is a plea bargain, a whole realm of different questions to see if this person understands about the court process and what they're facing. And usually at that point the evaluation is concluded unless there is any further testing. Now in Mr. Reeves' case I did give him one part of the Wexler Intelligence Test. . .

Well, I didn't get as much information from him about his background, but there certainly was extensive documentation about his background. He came from a very turbulent upbringing. There was not a great deal of structure in the home or guidance or supervision. He presented with a number of behavioral difficulties in school. There were constant attempts on the part of the school to communicate with his mother - the father was not present in the home - in order to try to get him into appropriate programs and to control his behaviors. . .

Well, turbulence in my opinion would mean that there was not a lot of structure, that a child basically raises themselves. They may run in and out of the home or on the streets, not have a lot of structure. They may be subjected to abusive situations, neglectful situations. There was no stability of relationships for the child. They were in an environment which would I guess under normal conditions be considered pretty dangerous. . .

Q I believe you mentioned that you gave Matthew Reeves some type of intelligence test of some sort?

A Yes, sir.

Q What did you administer to do that?

A Well, the most widely used intelligence test is called the Wexler Intelligence Scale. And there is a child's version, and there is an adult's version. And he received the child, the adult's version this time. He had received the child's version in the past.

Q What were the results of your testing?

A I gave him a verbal portion only. I didn't give him the entire test because the verbal portion tape into the issues that were being asked by the Court, somebody's ability to understand, their verbal reasoning, more so than the eye, hand coordination part of it. The results showed that he was in what we call the borderline range of intelligence meaning that he was two steps or two what we call standard deviations below normal. And it's the borderline of mental retardation. The verbal IQ score that I got was - I believe it was a 74. And he had received the child's version of the same test when he was young, and his verbal IQ then was 75. So that just shows that basically nothing had happened. His IQ had stayed about the same. . .

Q And you stated that his IQ was borderline range?

A That's correct.

Q So he wasn't actually mentally retarded?

A He was not in a level that they would call him mental retardation, no."

Rule 32 Findings of Fact

Dr. John Goff was called first by the Petitioner. He evaluated Reeves on February 2, 2006, and administered a battery of tests including the WAIS III. The result Dr. Goff obtained was a full-scale IQ score of 71; a verbal IQ score of 75, and a performance IQ score of 76. However, when Dr. Goff applied the Flynn Effect, a phenomenon he defined as an inflation of IQ scores observed by Dr. James Flynn, he testified that Reeves' actual IQ was 66.

Goff then reviewed all other known IQ test results of Reeves as far back as 1992, and found Reeves' full-scale score was 73; verbal IQ was 75, and performance IQ 74. However, he then applied then Flynn phenomenon and arrived at an IQ of 67.6.

Goff then applied the same phenomenon to Dr. Ronan's WAIS-R result of 74, which was the verbal IQ administered to Reeves in 1997. After applying the Flynn Effect, he opined that Reeves' IQ would be 69.2. Dr. Goff also administered certain tests to Reeves in an effort to determine whether Reeves exhibited significant or substantial deficits in adaptive functioning. Dr. Goff concluded that the adaptive behavior assessment system test which tested communications, functional academics, self-direction, leisure activities, social skills, community use, home living, health and safety, self-care and work, indicated specific substantial skills deficits in work activities, health and safety, self-direction, as well as his ability to deal with money (See Pg. 62). Finally, Dr. Goff testified that these deficits were manifested during the developmental period before 18 years of age, and that the academic and school records supported this finding.

Dr. Karen Salekin, a Clinical Psychologist, was offered and accepted as an expert in Psychology and, in particular, Forensic Psychology and Developmental Psychology. She said that there were a number of people available in 1998 who were qualified clinicians that performed mitigation analysis. Among those mentioned by Dr. Salekin as qualified and available was Dr. Kathaleen Ann Ronan, who, in fact, testified on behalf of Reeves in the penalty phase of the Trial.

She reviewed medical and school records, interviewed friends and family members in order to determine the risk and protective

factors that would have positively or negatively influenced Reeves' development.

In reviewing the testimony at Trial of Marzetta Reeves and Dr. Ronan, Dr. Salekin criticized the testimony as being, "a hodgepodge of information put out without context." They, "just kind of point out that these risk factors exist and did not discuss it in terms of how that affected Matthew's development over the course of the time."

The balance of Dr. Salekin's testimony outlined the risk factors that existed in Reeves' life, their affect on his developmental trajectory and that they were not offered to the jury as mitigation testimony. She also pointed out two protective factors she found to exist in Reeves' life. She concluded, however, that these risk factors, existing together over the course of time negatively impacts a person's functioning in the school and social environment, as well as their employability. This, Dr. Salekin testified, is all compounded by a low level of intellectual functioning.

The State of Alabama offered the testimony of Dr. Glenn David King, a Clinical and Forensic Psychologist, as well as an attorney at law. Dr. King was retained by the State to perform a mental exam and evaluation on the Petitioner, Matthew Reeves, and to make a neuro-psychological evaluation. He met with Reeves on September 6, and again on September 27, 2006. Dr. King initially administered the WAIS III, and reported Reeves' verbal IQ score of

69; performance IQ score of 73, and full scale IQ score of 68.

The wide range achievement test indicated Reeves read and spelled on a fifth grade level and performed math on a fourth grade level. Based on the WAIS and Wide Range Achievement Test, Dr. King did not reach a definitive conclusion regarding Reeves' intellectual ability though, "I was leaning in the direction of borderline intellectual functioning." However, after considering all of the other test data, Dr. King concluded that Reeves functions in a borderline range of ability.

Dr. King acknowledged that any diagnosis of mental retardation must also consider a measure of adaptive functioning, and any indication of the existence or non-existence of mental retardation prior to the age of 18 years. This was achieved by application of the ABS-RC Second Edition (Adaptive Behavior Scale Residential and Community) an instrument approved by the American Association of Mental Retardation.

He evaluated ten domains: Independent functioning, physical development, economic activity, language development, numbers and time, domestic activity, prevocation and vocation, self-direction, responsibility, and socialization. After administering the test, reviewing records and interviewing Reeves, Dr. King opined that Reeves intellectually functions in the borderline range and his I.Q. would fall in the range of 70 to 84.

Dr. King further evaluated Reeves to determine any impairment in brain function by administering the Halstead-Reitan

Neuropsychological Test Battery. This series of tests administered to determine any brain pathology such as tumor, cerebral vascular accident or traumatic brain injury. After administering the sub-tests to determine sensory perceptual functional testing, motor functioning, attention concentration and memory, language skills, visual spatial skills, and reasoning and logical analytical skills, Dr. King concluded that Reeves was not mentally retarded. He further explained the theoretical position of the Flynn Effect, but did not apply the Flynn Effect to the evaluation of the Defendant. Dr. King stated that the application of the Flynn Effect is not required when evaluating someone's mental status although there does appear to be some research to establish the theory. Based upon Dr. King's review of the data and research accumulated by Flynn, there appears to be unreliable data to effectively apply the theory when evaluating someone's mental status.

Finally, Dr. King, upon reviewing the data of Dr. Goff and accumulating his own data, concludes that the Defendant Reeves functions in the borderline range of intellectual ability and that he functioned in the borderline range prior to the age of 18.

Dr. King stated that the Defendant would not have been mentally retarded before the age of 18.

The Court, based on the evidence and arguments of the attorneys at the Evidentiary Hearing, has considered all of the allegations of the Petitioner's Rule 32 Petition for Relief and Conviction, specifically, viz:

I. Claim that Reeves is mentally retarded.

II. Claim that Reeves was denied the effective assistance of counsel during the Sentencing phase of his Trial in that:

(a) Trial Counsel failed to procure necessary expert assistance regarding Mr. Reeves' low cognitive functioning and potential mental retardation in addition to general mitigation evidence.

(b) Trial Counsel provided ineffective assistance of counsel in relying on Dr. Ronan during the Sentencing phase of Mr. Reeves' Trial.

(c) Trial Counsel failed to object to improper opinion testimony from Dr. Ronan during the Sentencing phase of Mr. Reeves' Trial.

(d) Trial Counsel failed to investigate and present any meaningful mitigation evidence.

(e) Trial Counsel failed to illicit critical mitigating evidence from Mr. Reeves' Mother when she testified during the Sentencing phase of Mr. Reeves' Trial.

(f) Trial Counsel failed to investigate for and present witnesses to show significant mitigating evidence that was available.

(g) Trial Counsel failed to present any mitigating evidence regarding Mr. Reeves' redeeming qualities and humanity.

III. Mr. Reeves' right to a fair and impartial jury was violated by juror misconduct during deliberations.

IV. Claim of instructional errors of the Trial Court denied Mr. Reeves a fair trial and appropriate sentencing determination.

V. The prosecution's misconduct and improper arguments during Trial deprived Mr. Reeves of his rights in that:

(b) The extensive reference to supposed gang membership prejudiced Mr. Reeves' Jury;

(c) The Prosecution unconstitutionally diminished the Jury's

sense of responsibility;

(d) The Prosecution submitted non-statutory aggravating circumstances to the Jury.

VI. Trial counsel were ineffective by failing to raise and preserve meritorious claims for appeal in that:

(a) Counsel failed to prevent or otherwise object to prejudicial errors;

(b) Trial counsel failed to provide Mr. Reeves with effective assistance of counsel by failing to investigate the possibility that Mr. Reeves did not shoot Mr. Johnson;

(c) Counsel failed to provide Mr. Reeves with effective assistance of counsel on Appeal.

VII. Alabama Statutory Sentencing Scheme violates the United States Constitution and the Alabama Constitution.

VIII. Alabama's method of execution by lethal injection as applied by the State of Alabama results in the infliction of cruel and unusual punishment in violation of the United States Constitution and the Constitution of the State of Alabama.

I. CLAIM THAT REEVES IS MENTALLY RETARDED.

In Part I, paragraphs 28-42 of Reeves' second amended Rule 32 petition, Reeves claims that because he is mentally retarded he cannot be executed under the United States Supreme Court's holding in Atkins v. Virginia, 536 U.S. 304 (2002). In Atkins, the United States Supreme Court held that the execution of mentally retarded capital offenders violates the Eighth Amendment's prohibition against cruel and unusual punishment. The Atkins Court observed

that "clinical definitions of mental retardation require not only sub-average intellectual functioning, but also significant limitations in adaptive skills." Id. at 318. The Atkins Court declined to create a national standard that reviewing courts should apply in determining whether a capital offender is mentally retarded and not eligible for a death sentence. Instead, the Court left to the States "the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." Id.

The Alabama Legislature has not yet developed a procedure or courts to apply in determining whether a capital defendant is mentally retarded and, thus, ineligible for execution. This Court must, therefore, turn to the opinions of the appellate courts of Alabama for guidance in resolving this issue.

In Ex parte Perkins, 851 So.2d 453, 456 (Ala. 2002), the Alabama Supreme Court set forth the following standard for reviewing a mental retardation claim:

> Those states with statutes prohibiting the execution of a mentally retarded defendant require that a defendant, to be considered mentally retarded, must have significant sub-average intellectual functioning (an IQ of 70 or below), and significant or substantial deficits in adaptive behavior. Additionally, these problems must have manifested themselves during the developmental period (i.e., before the defendant reached age 18).

"[A]ll three prongs of the test set forth in Ex parte Perkins must be satisfied in order for a person to be considered mentally retarded." Ex parte Smith, 2007 WL 1519869, at *--- (Ala. May 25, 2007). "A classification of 'borderline intellectual functioning'

describes an intelligence level that is higher than mental retardation, …, and, thus, does not render a person ineligible for the death penalty." Ex parte Smith, 2007 WL 1519869, at *--- (Ala. May 25, 2007).

The Alabama Court of Criminal Appeals has examined numerous factors in determining whether a person suffers from significant or substantial limitations in adaptive functioning. See Stallworth v. State, 868 So.2d 1128, 1182 (Ala. Crim. App. 2001)(where relying on Stallworth's employment history, his history of social relationships, and his use of community resources - such as qualifying for food stamps - the Alabama Court of Criminal Appeals rejected Stallworth's claim that he had significant deficits in adaptive functioning); Lewis v. State, 889 So.2d 623, 695-698 (Ala. Crim. App. 2003)(finding that Lewis' academic history, employment history, relationship with his wife, and post-crime craftiness all weighted against a find that he had significant deficits in adaptive functioning); Clemons v. State, 2003 WL 22047260 (Ala. Crim. App. June 24, 2005)(setting forth the following factors to consider when evaluating adaptive functioning: employment history, ability to have interpersonal relationships, extent of involvement in criminal activity, post-crime craftiness, and use of community resources); Brown v. State, 2006 WL 1125007, at *32-36 (Ala. Crim. App. Apr. 26, 2006)(full scale IQ of 76 and the following evidence indicating that defendant had no deficits in adaptive functioning: that he could pick the locks of his handcuffs as well as his jail

cell, had learned to swallow razor blades and regurgitate them without injury to himself, and asserted to a police officer that he had gotten away with offenses in the past by getting sent to mental facilities and would do so in his current case); Periata v. State, 897 So.2d 1161, 1206-1207 (Ala. Crim. App. 2003)("[E]ven though the record indicates that he was in several learning disability classes and has a history of criminal activity, we do not believe that those facts alone are sufficient to show that he has significant of substantial deficits in adaptive behavior"); Yeomans v. State, 898 So.2d 878, 900-902 (Ala. Crim. App. 2004)(noting, in case involving IQ scores ranging from 67 to 83, that "though the Defendant had a tumultuous upbringing and was currently functioning in the low average range of intelligence, he has and does function 'normally' in society").

There is no dispute that Reeves' IQ is sub-average. However, the expert testimony about Reeves' adaptive functioning was conflicting. Before addressing the merits of Reeves' mental retardation claim, this Court believes it should first discuss the conflicting expert testimony about the Flynn Effect.

Dr. Goff and Dr. Salekin indicated that the Flynn Effect is accepted in the scientific community while Dr. King stated that it was not. The Court notes that Dr. Goff testified that Dr. Flynn published his findings in 1984. However, Dr. Goff did not start utilizing the Flynn Effect until 2005 - years after the Flynn Effect came into existence. There was no dispute that neither the

publishers of the IQ tests administered on Reeves nor the DSM-IV require that the Flynn Effect must be utilized in determining a person's intellectual functioning. While there was testimony that appellate courts outside of Alabama have addressed the application of the Flynn Effect, this Court is unaware of any Alabama case law requiring use of the Flynn Effect. It does not appear to this Court that the issue of whether the Flynn Effect should be considered when reviewing an individual's IQ score, at least in Alabama, is settled in the scientific community.

Reeves achieved a full scale IQ score of 73 on a test administered when he was 14½ years old. The full scale IQ score of 71 achieved by Reeves on the test administered by Dr. Goff is consistent with his prior IQ score of 73. See Ex parte Smith, 2003 WL 1145475, *9 (Ala. March 14, 2003)(holding that a full scale IQ score of 72 "seriously undermines any conclusion that [a defendant] suffers from significantly sub-average intellectual functioning contemplated under even the broadest definitions [of mental retardation]"). Further, Reeves testified during a pretrial suppression hearing and the Court recalls nothing indicating that Reeves' intellectual functioning was significantly sub-average. See Clisby v. Alabama, 26 F.3d 1054, 1056 (11th Cir. 1994)(holding that Clisby's testimony gave the trial judge "an opportunity to gauge roughly his intelligence"). This Court concludes that Reeves' intellectual functioning, while certainly sub-average, is not significantly sub-average.

A review of the trial transcript indicates that Reeves does not suffer from significant or substantial limitations in his adaptive functioning. Testimony at trial indicated that Reeves was a gang member. Further, Reeves' mother testified that while Reeves attended Job Corp he earned certificates in welding, brick masonry, and auto mechanics - jobs that would require some degree of technical skill. Reeves' mother also testified that after he returned from Job Corp that Reeves worked for Jerry Ellis doing carpentry and roofing. While he worked for Mr. Ellis, Reeves would get up as early as 5:30 a.m. to be ready for work. It was only after his younger bother Julius returned from being confined in the juvenile facility at Mt. Meigs that Reeves chose to stop working for Mr. Ellis. According to his mother, Reeves went with Julius because he was afraid his brother would get shot. Reeves had extensive contact with juvenile authorities and with law enforcement prior to his arrest for the victim's murder. In a pretrial mental evaluation, Dr. Kathy Ronan diagnosed Reeves as suffering from Adaptive Paranoia - that is he adapted his behavior in order to survive in the dangerous environment in which he lived. Reeves reported to Dr. King that he sold drugs and sometimes made between $1500 and $2000 per week. Reeves used the money from his drug dealing to purchase clothes, food, and a car.

The record also reveals that Reeves and his co-defendants planned to commit a robbery. It is undisputed that Reeves actively participated in the planning of the robbery. There was no evidence

presented at the evidentiary hearing suggesting that Reeves' participation in the planning of the robbery or the ultimate murder and robbery of the victim was the result of being coerced or threatened by another person. The evidence from trial, including the compelling testimony from one of Reeves' co-defendants, proved beyond a reasonable that it was Reeves, and Reeves alone, that decided to murder the victim. After he shot the victim, Reeves hid incriminating items of evidence, including the murder weapon and bloody clothes that he and his co-defendants had worn. In addition, Reeves split the proceeds with his codefendants, was boastful to others about shooting the victim, and seemed proud that he might get a tear drop - a gang symbol indicating that a gang member had killed another person. See Ex parte Smith, 2003 WL 1145475, at *10 (where in the court considered Smith's actions after committing murder as a factor in concluding that Smith "does not suffer from deficits in his adaptive functioning").

"In the context of an Atkins claim, the defendant has the burden of proving by a preponderance of the evidence that he or she is mentally retarded and thus ineligible for the death penalty." Ex parte Smith, 2007 WL 1519869 at *--- (Ala. May 25, 2007). After considering the evidence presented at Reeves' trial and the evidence presented at the evidentiary hearing, this Court concludes that Reeves failed to meet his burden of proving by a preponderance of evidence that he is mentally retarded and that his death

sentence violates the Eighth Amendment. Rule 32.3, Ala.R.Crim.P. This claim for relief is, therefore, denied.

II. Claim that Reeves was denied the effective assistance of counsel during the sentencing phase of his Trial.

The Court, in consideration of Petitioner's claim of ineffective assistance of counsel during the sentencing phase, recognizes that the Sixth Amendment to the United States Constitution guarantees every criminal defendant the right to counsel.

The Supreme Court of the United States in *Strickland vs. Wash*, 466 U.S. 668 (1984) established the standard governing claims of ineffective assistance of counsel and held that the defendant must prove by a preponderance of the evidence that counsel's performance was deficient and that counsel's deficient performance prejudiced his defense.

(a) Trial Counsel failed to procure necessary expert assistance regarding Mr. Reeves' low cognitive functioning and potential mental retardation in addition to general mitigation evidence.

This Court by Order dated October 20, 1997, approved funds for the purpose of hiring a neuropsychologist. Soon after the funds were approved, Defense Counsel McLeod withdrew, and the Court appointed Goggans and Wiggins.

The Court notes at this point that the Petitioner during his Evidentiary Hearing, failed to call either Goggans or Wiggins in support of their claim of ineffective assistance of counsel.

Therefore, this Court will review this claim in light of this failure and consider only that which is in the Record.

Trial Counsel made a decision to rely on the testimony of Dr. Kathy Ronan rather than retain Dr. John Goff.

When Dr. Ronan's testimony is considered in its entirety together with the records collected by Trial Counsel, there was no indication of a diagnosis of mental retardation. As a matter of fact, Dr. Ronan on cross-examination by Assistant District Attorney Wilson was asked,

"Q. So he wasn't actually mentally retarded?

A. He was not in a level that they would call him mental retardation, no."

Furthermore, the Reeves Trial took place four years before the United States Supreme Court issued its Opinion in *Atkins vs. Virginia*, 536 U.S. 304(202). Therefore, the Court nor the Jury would have been required to consider mental retardation as a mitigating circumstance. The **Court finds** that the Petitioner failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. II(a), Failure to prove necessary expert assistance.

(b) Trial Counsel provided ineffective assistance of counsel in relying on Dr. Ronan during the Sentencing phase of Mr. Reeves' Trial.

Dr. Kathleen Ronan at the time of Trial in 1998 was an employee at the Taylor Harden Secure Medical Facility in Tuscaloosa, Alabama. As a licensed clinical psychologist and

certified forensic examiner, she had specialized training to conduct evaluations for the Court, such as competence to stand trial and mental state at the time of the alleged offense. Upon Order of this Court, she conducted a forensic evaluation of the Petitioner and testified during the penalty phase of the Trial.

The Affidavit of Dr. Ronan has been reviewed by the Court and considered in its entirety. The Court notes of particular interest, Dr. Ronan's explanation of her testimony cited above where she declared the Petitioner was not mentally retarded.

Again, the Court must point out that the Petitioner failed to call either Goggans or Wiggins in support of his Petition.

Dr. Ronan's testimony during the sentencing phase of the Trial when considered with all exhibits and documents available to her at the time including the Report prepared by her, establishes that it was reasonable for Defense Counsel to rely on her testimony and work as the sole source of mitigation evidence during the sentencing phase of his Trial. "The fact that Petitioner can find a professional witness years after his Trial that is willing to testify favorably at a post-conviction hearing in no way establishes that Trial Counsel's performance was deficient. "*Horsley vs. Alabama,* 45 Fed.3rd 1486, 1495 (11th Cir. 1995).

The Court finds that other testimony was offered during the penalty phase from Detective Pat Grindle and Marzetta Reeves (the Petitioner's Mother) that established for the Jury the difficult nature of the Petitioner's background together with his struggles

socially. The testimony clearly establishes those things that could have had an adverse affect on his development.

Taking this together with all testimony offered by Dr. Ronan during the penalty phase, one can only conclude that the Jury and this Court were given a fair evaluation of the Petitioner. Therefore, the **Court finds** that Petitioner failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. II(b), Reliance of Dr. Ronan during the sentencing phase.

(c) Trial Counsel failed to object to improper opinion testimony from Dr. Ronan during the Sentencing phase of Mr. Reeves' Trial.

This Court had previously decided the credentials of Dr. Kathleen Ronan and the Record is clear regarding her educational background and experience at the time of the penalty phase of this Trial. Dr. Ronan was asked on cross-examination by Assistant District Attorney Wilson, if the Petitioner was mentally retarded. Dr. Ronan's response has been cited above, and the Court has considered the Affidavit of Dr. Ronan and comment on the same. The fact that Dr. Ronan now wishes to change her testimony with regard to the Petitioner, does not demonstrate that Trial Counsel's performance was deficient.

The Court notes, again, with regard to this allegation that Petitioner did not call Trial Counsel Goggans and Wiggins at his Evidentiary Hearing.

"Whether and when to object is a matter of trial strategy." *Hunt vs. State*, 940 So.2d 1041, 1064 (Ala. Crim. App. 2005)

This Court has also considered the records that were introduced by Reeves' Trial Counsel, including school records and records of past mental health treatment. In addition, the Court considered the Scale I.Q. Score of 73 when Reeves was 14 years old, together with the Evaluation of Dr. Daniel Hoke who concluded Reeves suffered from a conduct disorder and had severe borderline intellectual functioning. However, there was no diagnosis of mental retardation, and considering that together with Dr. Ronan's evaluation and testing, it would have been reasonable for Trial Counsel to conclude that Reeves was not mentally retarded and further conclude that there was no reason to object during Dr. Ronan's cross-examination. Therefore, the **Court finds** that the Petitioner failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. II(c), Failure to object during Dr. Ronan's cross-examination.

(d) Trial Counsel failed to investigate and present any meaningful mitigation evidence.

The Court must note, once again, that Petitioner failed to call Goggans and Wiggins in support of his claim of ineffective assistance of counsel, and this Court finds this failure to be significant in terms of evaluating all claims of ineffective assistance of counsel.

Petitioner maintains that Trial Counsel did nothing to investigate his background, mental health or his neurological and cognitive impairment, and that he was prejudiced by this. However, the Record contains significant documentation from the Cahaba Center for Mental Health and Mental Retardation, Selma City Schools Special Education Program covering the adolescent and pre-adolescent years of the Petitioner, as well as assessments from the Department of Youth Services. All of these documents were admitted into evidence and presented to the Jury as mitigation evidence.

At least 2 jurors concluded after hearing the evidence in mitigation that the aggravating circumstance that he intentionally murdered the victim during the course of a robbery, did not outweigh the statutory and non-statutory mitigating circumstances, and voted for life without parole. This Court specifically found on the Record from the mitigation evidence that he grew up in a poor home environment and lacked appropriate developmental resources growing up. All of which was elicited through the testimony of Detective Grindle and Ms. Reeves.

The Court finds the mitigation evidence presented by Reeves' Trial Counsel was consistent with the type of mitigating evidence presented in other capital cases in Dallas County at the time of Reeves' Trial in 1998. *Grayson vs. Thompson,* 257 F.3rd 1194, 1215-1216 (11th Cir. 2001).

Therefore the **Court finds** that based on prevailing professional norms existing in Dallas County in 1998, that Trial

Counsel's performance was reasonable and that Petitioner has failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. II(d), Failure to investigate and present meaningful mitigation evidence.

(e) Trial Counsel failed to elicit critical mitigating evidence from Mr. Reeves' Mother when she testified during the Sentencing phase of Mr. Reeves' Trial.

The **Court finds** this claim to have been abandoned in that Petitioner offered no testimony in support of the allegation, and further, failed to call Trial Counsel Goggans and Wiggins.

(f) Trial Counsel failed to investigate for and present witnesses to show significant mitigating evidence that was available.

Petitioner maintains that Trial Counsel should have spoken with family members and others who knew Petitioner throughout Petitioner's life. In particular, Petitioner alleges that his Aunt, Beverly Seroy, knew of the significant hardship and difficulties Mr. Reeves had faced throughout his life. Petitioner maintains that because Trial Counsel failed to contact and present this witness, the Jury and Court were left to consider only Mr. Reeves' age at the time of the crime as a mitigating factor.

The Court has previously noted the other mitigating factors, one of which was the significant hardship and difficulties Mr. Reeves faced throughout his life.

Petitioner failed to call Ms. Seroy to testify at his Evidentiary Hearing. Therefore, her potential trial testimony was not offered to this Court. The Court does note that Drs. Goff and

Salekin in preparation of their evaluation and mitigation assessment, referenced interviews with Ms. Seroy.

Once again, Petitioner failed to call his Trial Counsel Goggans and Wiggins in support of his Petition.

The **Court finds** this claim to have been abandoned in that Petitioner offered no testimony in support of the allegation from Ms. Seroy, Reeves or Reeves' Trial Counsel.

(g) Trial Counsel failed to present any mitigating evidence regarding Mr. Reeves' redeeming qualities and humanity.

The Court, once again, finds that the Petitioner abandoned this claim by failing to present testimony at the Evidentiary Hearing supporting this claim.

Petitioner asserts in his Petition that trial counsel failed to present evidence to the Jury in mitigation of an incident regarding Reeves defending a female relative and receiving a gunshot wound to the head. Petitioner claims this was evidence of his humanity and redeeming qualities and that the failure to provide this evidence and the evidence of the gunshot wound to his head, resulted in ineffective assistance of counsel.

In fact, the Record is clear that Marzetta Reeves testified in mitigation to the head wound, but medical documentation admitted at the Trial of this case from Caraway Methodist Medical Center reveals that there was "no evidence of the bullet entering the cranial vault." The medical records indicate, at best, a flesh wound with a slight fracture to the right frontal temporal bone.

Petitioner was released from the Intensive Care Unit within 24 hours of admission, and was discharged home in good condition within 48 hours of admission. Marzetta Reeves' testimony during the penalty phase clearly established Matthew's redeeming qualities and humanity as she testified at length about the Petitioner's concerns for his brother, Julius, and his constant effort to protect Julius after Julius was released from a juvenile detention facility.

To assert that trial counsel failed to reveal the redeeming qualities and humanity of Petitioner, is without merit and wholly disingenuous.

Therefore, this Court finds that Petitioner failed to prove by a preponderance of the evidence ineffective assistance of counsel as alleged in Sec. 2(g), Failure to prove mitigating evidence regarding Petitioner's redeeming qualities of humanity.

III. Mr. Reeves' right to a fair and impartial Jury was violated by juror misconduct during deliberations.

The **Court finds** that the claims of juror misconduct are procedurally barred from post-conviction review because they could have been but were not raised at Trial, and because they could have been but were not raised on direct appeal.

IV. Instructional errors of the Trial Court denied Mr. Reeves a fair trial and appropriate sentencing determination.

The **Court finds** that this claim is procedurally barred from post-conviction review because it could have been but was not

raised at Trial, and because it could have been but was not raised on direct appeal.

V. The Prosecution's misconduct and improper arguments during Trial deprived Mr. Reeves of rights guaranteed by Alabama law and the United States Constitution.

The **Court finds** that these claims are procedurally barred from post-conviction review because they could have been but were not raised at Trial, and because they could have been but were not raised on direct appeal.

VI. Claims that Reeves' trial counsel were ineffective by not preserving alleged errors for appellate review.

This Court notes that whether or not to object is often a matter of trial strategy and is presumed to be reasonable.

This Court also, once again, finds that the Petitioner failed to call trial counsel at the Evidentiary Hearing, and further finds that the Petitioner has abandoned these claims for ineffective assistance of counsel.

Nevertheless, Petitioner claims that Reeves' trial counsel were ineffective for the failing to object when the Prosecution allegedly urged the Jury to consider non-statutory aggravating circumstances, viz:

(i) The Prosecution improperly argued for the Jury to send a message to prevent crime, and improperly argued for the Jury to disregard mitigating evidence;

(ii) The Prosecution improperly raised the specter of lawlessness as a reason to impose death;

(iii) The Prosecution improperly argued that death should be imposed based on religious reasons;

(iv) Prosecution improperly argued Reeves' future dangerousness as a basis to impose death; and,

(v) The cumulative effect of the prosecutors' arguments raised a substantial possibility the Jury was influenced to render a death sentence based on improper considerations.

The **Court finds** from the Record that each enumerated claim of ineffective assistance of trial counsel is without merit and is due to be denied.

The Record clearly establishes that the Prosecution presented its impressions from the evidence and argued legitimate inferences that were drawn from the evidence. Therefore, Trial Counsel were not ineffective for failing to object to permissible argument.

The Record also clearly establishes that the Prosecutor in this case, in the penalty phase closing argument, replied in kind to statements made by the Defense Counsel in Defense Counsel's closing argument. A full review of the closing argument by both prosecution and defense counsel, for instance, clearly establishes that the prosecutor did not argue that Jurors should recommend death based on religious factors, but in fact, encouraged the Jury to base its penalty phase verdict on the facts of the case.

Finally, Petitioner claims that the Prosecution improperly argued Reeves' future dangerousness as a basis to impose the death penalty. This Court finds that the Prosecutor's remark during the penalty phase closing argument regarding the future dangerousness of the Petitioner is a valid sentencing factor.

Therefore, the claim that the cumulative effect of the Prosecutors' arguments raised a substantial possibility the Jury

was influenced to render a death sentence based on improper considerations, is without merit.

B. Claim that Trial Counsel were ineffective for failing to object when the prosecution improperly introduced evidence that Reeves was in a gang.

Evidence was presented by the State which proved that one possible motive for Reeves to murder the victim was to earn a "tear drop," a gang symbol indicating an individual had killed someone. Because Reeves' gang membership was material and relevant, this Court finds the allegation of ineffective assistance of trial counsel for having failed to object to the evidence is without merit and is due to be denied.

C. Claims that Trial Counsel were Ineffective for failure to object when this Court and the Prosecution informed the Jury that its penalty phase verdict was advisory.

The **Court finds** that this allegation of ineffective assistance of trial counsel is without merit and is due to be denied. The law of the State of Alabama is well established and has been repeatedly upheld that informing jurors their penalty phase verdict is a recommendation, is not improper. There is no impropriety in the trial court's reference to the Jury that its sentencing verdict is a recommendation.

D. Claim that Trial Counsel were ineffective for not investigating the possibility that Reeves did not shoot the victim.

The **Court finds** this claim of ineffective assistance of trial counsel is without merit and is due to be denied.

Reeves presented no evidence at his Evidentiary Hearing that would have caused any reasonable person to conclude someone other than Matthew Reeves shot the victim.

E. Claim that Reeves received ineffective assistance from his appellate counsel on direct appeal.

The **Court finds** that this claim of ineffective assistance of appellate counsel is without merit and is due to be denied.

The fact that the Jury was informed that its penalty phase verdict was a recommendation was not improper because it was a correct statement of law. Because this Court's instruction and the Prosecution's comments were correct statements of law, if Reeves' appellate counsel had raised this issue on Appeal, there is no reasonable possibility the penalty phase of trial would have been reversed. Furthermore, evidence that Reeves was in a gang was relevant, and thus admissible, to prove his motive and/or intent for murdering the victim. Because testimony about Reeves' gang membership was admissible, the Court concludes that even if his appellate counsel had raised this issue on direct appeal, there is no reasonable possibility Reeves conviction would have been reversed.

The **Court finds** that this claim of ineffective assistance of appellate counsel is without merit, and therefore, due to be denied.

VII. Claims that the capitol sentencing scheme in Alabama violates the United States and Alabama Constitutions.

The **Court finds** that these claims are procedurally barred from post-conviction review because it could have been but was not raised at Trial, and because it could have been but was not raised on direct appeal.

VIII. The Claim that lethal injection as applied in Alabama Constitutes cruel and unusual punishment.

The **Court finds** that this claim is procedurally barred from post-conviction review because it could have been but was not raised at Trial, and because it could have been but was not raised on direct appeal.

IT IS ORDERED, ADJUDGED, and DECREED that the Defendant's **Rule 32 Petition** is due to be denied.

DONE and ORDERED, this the 26th day of October 2009.

THOMAS ap R. JONES, JUDGE
FOURTH JUDICIAL CIRCUIT

1/7/13
CC: AG HAYDEN
ATTY. GOD; LOBS2