# IN THE SUPREME COURT OF ALABAMA

**September 11, 2020**

1190647

Ex parte Antonio Devoe Jones. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Antonio Devoe Jones v. State of Alabama) (Houston Circuit Court: CC-00-353.60; Criminal Appeals : CR-13-1552).

## CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on September 11, 2020:

**Writ Denied. No Opinion.** Bolin, J. - Bryan, Sellers, Stewart, and Mitchell, JJ., concur. Parker, C.J., dissents. Shaw, Wise, and Mendheim, JJ., recuse themselves.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

**I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.**

**Witness my hand this 11th day of September, 2020.**

Julia Jordan Weller

Clerk, Supreme Court of Alabama

# COURT OF CRIMINAL APPEALS
# STATE OF ALABAMA

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May 15, 2020

**CR-13-1552** **Death Penalty**

Antonio Devoe Jones v. State of Alabama (Appeal from Houston Circuit Court: CC00-353.60)

## NOTICE

You are hereby notified that on May 15, 2020, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

D. Scott Mitchell

D. Scott Mitchell, Clerk
Court of Criminal Appeals

**cc:** Hon. Henry T. "Sonny" Reagan, II, Circuit Judge
Hon. Carla H. Woodall, Circuit Clerk
Carmen F. Howell, Attorney
Steven A Miller, Attorney - Pro Hac
Denise Michelle Ware, Attorney - Pro Hac
Kevin Wayne Blackburn, Asst. Attorney General
Audrey K. Jordan, Asst. Attorney General

**Rel: November 22, 2019**



# ALABAMA COURT OF CRIMINAL APPEALS

**OCTOBER TERM, 2019-2020**

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**CR-13-1552**

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**Antonio Devoe Jones**

**v.**

**State of Alabama**

**Appeal from Houston Circuit Court**
**(CC-00-353.60)**

On Remand from the Alabama Supreme Court

KELLUM, Judge.

The appellant, Antonio Devoe Jones, an inmate currently incarcerated on Alabama's death row, appeals the circuit court's summary dismissal 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.

Facts and Procedural History

In 2004, Jones was convicted of murdering Ruth Kirkland during the course of a burglary. See § 13A-5-40(a)(4), Ala. Code 1975. The jury, by a vote of 11 to 1, recommended that Jones be sentenced to death. The trial court sentenced Jones to death. This Court affirmed Jones's conviction and sentence on direct appeal. Jones v. State, 987 So. 2d 1156 (Ala. Crim. App. 2006). The Alabama Supreme Court denied certiorari review, and this Court issued the certificate of judgment on January 25, 2008. The United States Supreme Court denied certiorari review on October 6, 2008. Jones v. Alabama, 555 U.S. 833 (2008).

On direct appeal, this Court set out the facts of the crime:

> "The State's evidence tended to show that on the afternoon of December 31, 1999, 80-year-old Ruth Kirkland drove her 1990 white Cadillac automobile to the grocery store to purchase groceries. Mrs. Kirkland, who had lived alone since the death of her husband, was a petite woman, who had suffered a stroke, leaving her with a limp and a weak right arm. As a result of the stroke, Mrs. Kirkland used a walker or a cane to get around. It was generally

known in the community that Mrs. Kirkland kept money inside her house.

"According to testimony at trial, because of her condition, it took Mrs. Kirkland several trips to carry her groceries inside, and it became dark before she got all her groceries into her house. Because Mrs. Kirkland did not like to be outside after dark, she left the remaining groceries in her car for the night.

"Some time later, Antonio Jones went to Mrs. Kirkland's house, turned off the circuit breakers outside, and went inside. From the evidence, the police were unable to determine whether Jones broke into the house or whether Mrs. Kirkland opened the door to investigate the power failure, allowing Jones to enter unimpeded.

"Upon gaining entry to the house, Jones beat and kicked Mrs. Kirkland as she attempted to defend herself. Jones broke Mrs. Kirkland's wrists as she attempted to ward off his blows. In addition to using his hands and feet to assault Mrs. Kirkland, Jones also used one of Mrs. Kirkland's walking canes and a broken chair leg to savagely beat Mrs. Kirkland. Splatters of Mrs. Kirkland's blood were found in various locations and pieces of her broken cane were found in several different rooms.

"At some point, Jones dumped the contents of Mrs. Kirkland's purse on the floor. Mrs. Kirkland kept the keys to her car in her purse. He also searched the house for the money Mrs. Kirkland reportedly kept in her house, ransacking the house, leaving open several drawers and cabinets. Mrs. Kirkland's body was found near the armoire where she kept her money. Jones took Mrs. Kirkland's car keys -- and possibly other undetermined items -- and left Mrs. Kirkland's house driving her white Cadillac.

"That same evening, Linda Parrish, Mrs. Kirkland's daughter, became concerned when she was unable to contact her mother by telephone. Mrs. Parrish asked her son, Brent Parrish -- a Dothan police officer -- to go by Mrs. Kirkland's house and check on her. Officer Parrish arrived at his grandmother's house shortly before 8:00 p.m. He noticed that no lights were on inside the house and that Mrs. Kirkland's white Cadillac was missing. As he approached the house, Officer Parrish discovered that the back door was open. Officer Parrish notified the police and waited for help to arrive. When the other officers arrived, the police entered Mrs. Kirkland's house and discovered her body lying on the floor.

"Concluding that Mrs. Kirkland's assailant had taken her automobile, the police began searching for the white Cadillac. Around 9:00 p.m., an officer spotted a white Cadillac matching the description of Mrs. Kirkland's. The officer activated his emergency lights, signaling the driver to stop; however, the driver failed to stop. The officer requested assistance, and several other patrol cars responded. Eventually, the police were able to stop the car near a K-Mart discount department store on the north side of Dothan. Inside the car were Jones; his sister, Lakeisha Jones; Lakeisha's baby; and Lakeisha's boyfriend. Jones, whose clothes and shoes were bloodstained, was taken into custody. During a search of the car, police discovered a number of items, including Mrs. Kirkland's remaining groceries, two of Mrs. Kirkland's walking canes, and a torn and empty envelope from SouthTrust Bank apparently given to Mrs. Kirkland when she made a withdrawal. Neither Lakeisha nor her boyfriend knew anything about Mrs. Kirkland's murder. Lakeisha did, however, tell the police that Jones was acting strangely when he picked them up earlier that evening.

"Jones was transported to the Dothan Police Department. At some point, Jones voluntarily stated that he knew where to find bloody clothes related to Mrs. Kirkland's murder. Officer Jon Beeson then informed Jones of his constitutional rights in accordance with Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966). Jones declined to sign a waiver-of-rights form, but he did agree to accompany police officers to a bridge on Honeysuckle Road where, he claimed, the true killers of Mrs. Kirkland had disposed of their bloody clothing. Before taking Jones to the bridge, officers had him remove the clothes and shoes he was wearing when he was taken into custody. Jones agreed, and he changed clothes. The clothing he had been wearing was taken to the Alabama Department of Forensic Sciences for testing.

"Thereafter, the police took Jones to the bridge on Honeysuckle Road, where they unsuccessfully searched for the reported bloody clothing. The officers also searched for footprints in the area and found none. After daylight, the officers returned to the site but again found no evidence that would support Jones's claims.

"Back at the police station, Jones asked to speak to Officer Beeson again. Before talking with Jones, Beeson informed Jones of his Miranda rights a second time. At 2:55 a.m. on January 1, 2000, Jones signed a waiver-of-rights form, acknowledging that he understood his rights and that he had not been threatened or promised anything in exchange for his statement. Jones told Beeson that three other men had killed Mrs. Kirkland. Jones denied any involvement in Mrs. Kirkland's killing; he claimed that he was not present when Mrs. Kirkland was killed and that the blood on his clothes came from being around the three killers. Additionally, Jones claimed that the white Cadillac he was driving belonged to his grandfather.

> "Around 5:30 a.m., Jones asked to speak with Officer Beeson again, stating that he wanted to tell Beeson the 'whole story.' Sgt. Jim Stanley told Jones that Beeson was unavailable, and Jones indicated that he wished to tell Stanley 'the rest of the story.' Sgt. Stanley took Jones into his office, where they were joined by Officer Donovan Kilpatrick. Before allowing Jones to give his statement, Sgt. Stanley asked Jones if he remembered his Miranda rights. Jones indicated that he did. Jones proceeded to give the officers additional information regarding Mrs. Kirkland's murder. As Jones related his version of events, Sgt. Stanley made notes of what Jones told them. During Jones's second statement, he admitted being present at Mrs. Kirkland's house during the murder. Jones claimed, however, that the other three men had entered the house with the intent to commit a robbery. He claimed that when he entered Mrs. Kirkland's house, one of the three men was beating her with a walking cane. According to Jones, he took the cane away from Mrs. Kirkland's assailant and telephoned 911 for emergency assistance in an attempt to save Mrs. Kirkland. Jones also claimed that the other three men took Mrs. Kirkland's car. He claimed that after he telephoned for assistance and turned the circuit breakers back on, he became scared and fled the scene on foot. Only later, Jones claimed, did he meet up with the other three who at that time were driving Mrs. Kirkland's car. When the officers attempted to verify Jones's claims, they discovered that the three men Jones claimed had killed Mrs. Kirkland all had alibis. Likewise, no 911 emergency calls had been received from Mrs. Kirkland's home that night."

Jones, 987 So. 2d at 1158-60 (footnotes omitted).[1]

[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).

On January 23, 2009, Jones timely filed the instant Rule 32 petition.[2] He filed an amended petition in April 2013. In July 2013, the State filed its response and moved to dismiss the petition. On June 19, 2014, the circuit court issued a 72-page order summarily dismissing the amended petition, and Jones appealed. By order dated December 12, 2017, this Court dismissed the appeal on the ground that Jones's notice of appeal was untimely filed. On certiorari review, the Alabama Supreme Court reversed this Court's judgment and remanded the case for this Court to consider the appeal as timely filed. Ex parte Jones, [Ms. 1170546, April 26, 2019] ___ So. 3d ___ (Ala. 2019).

Standard of Review

Rule 32.7(d), Ala. R. Crim. P., authorizes a circuit court to summarily dismiss a Rule 32 petition

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

[2]The time for filing a Rule 32 petition in a case in which the death penalty has been imposed was changed by Act No. 2017-417, Ala. Acts 2017. However, that Act does not apply retroactively. See § 3, Act No. 2017-417, Ala. Acts 2017.

See also Hannon v. State, 861 So. 2d 426, 427 (Ala. Crim. App. 2003); Cogman v. State, 852 So. 2d 191, 193 (Ala. Crim. App. 2002); Tatum v. State, 607 So. 2d 383, 384 (Ala. Crim. App. 1992). "'"'[W]here 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.'"'" Shaw v. State, 148 So. 3d 745, 764-65 (Ala. Crim. App. 2013) (quoting Bryant v. State, 181 So. 3d 1087, 1102 (Ala. Crim. App. 2011), quoting other cases). On direct appeal, this Court reviewed the trial proceedings for plain error. See Rule 45A, Ala. R. App. P. However, the plain-error standard of review does not apply in a postconviction proceeding. See, e.g., Ferguson v. State, 13 So. 3d 418, 424 (Ala. Crim. App. 2008). Additionally, "[t]he procedural bars of Rule 32 apply with equal force to all cases, including those in which the death penalty has been imposed." Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995). With certain exceptions not applicable here, "this Court may affirm the judgment of the circuit court for any reason, even if not

for the reason stated by the circuit court." Acra v. State, 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

The majority of the claims on Jones's petition were claims of ineffective assistance of counsel, and the circuit court summarily dismissed some of those claims on the ground that they were insufficiently pleaded. To prevail on a claim of ineffective assistance of counsel, the petitioner must meet the standard articulated by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984). The petitioner must show: (1) that counsel's performance was deficient, and (2) that the petitioner was prejudiced by counsel's deficient performance. 466 U.S. at 687. "To meet the first prong of the test, the petitioner must show that his counsel's representation fell below an objective standard of reasonableness. The performance inquiry must be whether counsel's assistance was reasonable, considering all the circumstances." Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987). "'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.'" Lawhorn v. State, 756 So. 2d 971, 979 (Ala. Crim. App. 1999) (quoting Hallford v. State, 629 So. 2d 6, 9 (Ala. Crim. App. 1992)). "A court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689. As the United States Supreme Court explained:

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

Strickland, 466 U.S. at 689 (citations omitted). To meet the second prong of the test, the petitioner "must show that there

is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. "It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Id. at 693. "The likelihood of a different result must be substantial, not just conceivable." Harrington v. Ricter, 562 U.S. 86, 112 (2011).

"The petitioner shall have the burden of pleading ... the facts necessary to entitle the petitioner to relief." Rule 32.3, Ala. R. Crim. P.

> "[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."

Rule 32.6(b), Ala. R. Crim. P. "The 'notice pleading' requirements relative to civil cases do not apply to Rule 32 proceedings. 'Unlike the general requirements related to civil cases, the pleading requirements for postconviction

petitions are more stringent. ...'" Washington v. State, 95 So. 3d 26, 59 (Ala. Crim. App. 2012).

> "'Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief.' Boyd v. State, 746 So. 2d 364, 406 (Ala. Crim. App. 1999). In other words, it is not the pleading of a conclusion 'which, if true, entitle[s] the petitioner to relief.' Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993). It is the allegation of facts in pleading which, if true, entitle a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala. R. Crim. P., to present evidence proving those alleged facts."

Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003).

> "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003). To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability

> that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S.Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). "The sufficiency of pleadings in a Rule 32 petition is a question of law [and] '[t]he standard of review for pure questions of law in criminal cases is de novo.'" Ex parte Beckworth, 190 So. 3d 571, 573 (Ala. 2013) (quoting Ex parte Lamb, 113 So. 3d 686, 689 (Ala. 2011)).

Analysis

I.

Jones contends that the circuit court erred in summarily dismissing his claims that his trial counsel were ineffective during the guilt phase of his capital-murder trial. Jones was represented at trial, and on direct appeal, by Clark Parker and Thomas Brantley.

A.

Jones argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for relying on what he characterizes as a "legally invalid defense." (Jones's brief, p. 14.) Jones alleged in his amended petition

that counsel erroneously relied on the fact that no property had been taken from Kirkland's house to argue that there was no evidence of a burglary when evidence of a theft is not an element of burglary.

In dismissing this claim, the circuit court stated:

> "Jones alleges that his trial counsel were ineffective for arguing that the State did not prove burglary because nothing was taken from inside the victim's home, where the victim's car was stolen from her carport. ... This claim is not facially meritorious.
>
> "Jones cites no authority for his allegation that trial counsel is constitutionally deficient for pursing an argument that ultimately did not work. Trial counsel's decision to highlight that nothing within the victim's home was taken was entirely consistent with the defense's theory that Jones may have been at the murder scene, but did not murder the victim.
>
> "For these reasons, Jones would not show deficient performance or prejudice upon these facts. ... Accordingly, this claim is dismissed."

(C. 1244.)

The record from Jones's direct appeal indicates that counsel moved for a judgment of acquittal, in part, on the ground that the State had presented no evidence indicating that Jones had the intent to commit a theft in Kirkland's residence, as was charged in the indictment. During closing argument, counsel argued that there was no evidence that

anything had been taken from Kirkland's house or that Jones had even been in Kirkland's house because Jones's fingerprints were not found in the house. Nothing in the record suggests that Jones's counsel did not know the law regarding burglary, and the arguments made by counsel were consistent with Jones's statements to police that he did not participate in the events that resulted in the victim's murder. Therefore, summary dismissal of this claim was proper.

B.

Jones argues that the circuit court erred in dismissing his claim that he was deprived of the effective assistance of counsel because, he alleged, one of his attorneys, Clark Parker, had a drinking problem and had been arrested for driving under the influence of alcohol ("DUI") while he was representing Jones. He argues that Parker's drinking problem infected every stage of the proceedings against Jones and that his other attorney, Thomas Brantley, was aware of Parker's drinking problem but failed to notify the trial court. Although Jones makes a general argument that Parker was ineffective because of alcohol, he cites to no specific instances where Parker's alleged drinking affected his performance during Jones's trial. In essence, Jones argues

that Parker's performance was per se ineffective because he drank alcohol during Jones's trial.

In dismissing this claim, the circuit court stated:

> "The United States District Court for the Northern District of Illinois examined a similar issue in United States v. Lloyd, 983 F. Supp. 738, 742 (N.D. Ill. 1997). Lloyd claimed that one of his two trial attorney, F. Lee Bailey, was drunk during portions of his trial. The district court held that a claim alleging ineffective assistance due to a drunk attorney must allege how counsel's alleged alcohol impairment actually caused constitutionally deficient performance and prejudice. Id. at 743.
>
> "While Jones pleads in detail that Parker had an alcohol problem, Jones does not plead that an act or omission by Parker was caused by Parker's being drunk. Accordingly, Jones fails to plead sufficient facts to support a finding of deficient performance. Likewise, Jones does not plead with adequate specificity that he was prejudiced by Parker's allegedly impaired performance.
>
> "Furthermore, as the district court noted in Lloyd, 983 F. Supp. at 743, Lloyd had another attorney who he did not allege was impaired by alcohol during trial. Like Lloyd, Jones had a second attorney. Tom Brantley represented Jones and actually served as Jones's primary counsel. This fact weighed against a finding of a Strickland [v. Washington, 466 U.S. 668 (1984),] violation in Lloyd as it does here. Id. This claim is dismissed."

(C. 1205-06.)

In United States v. Lloyd, 983 F. Supp. 738 (N.D. Ill. 1997), the United States District Court considered whether defense counsel was ineffective because, Lloyd alleged,

counsel was drunk during parts of Lloyd's trial. The federal court stated:

> "[Lloyd] thus gives us no basis to infer that [counsel's] conduct at trial left some important stone unturned or some thematic question unanswered in the jurors' minds. In short, [Lloyd] has not demonstrated anything near the deprivation of 'fundamental fairness' which he must show before we will consider his underlying claims. ...
>
> "....
>
> "... [W]e note that [F. Lee] Bailey was not [Lloyd's] only attorney. In a case such as this one, where the ineffective assistance claim requires this Court to distinguish between the 'strategic mistakes' of effective counsel and the 'uninformed blunders' of ineffective counsel, [United States v.] Jackson, 930 F. Supp. [1228] at 1233 [N.D. Ill. 1996)], we believe that a petitioner with multiple attorneys must, as a practical matter, make a particularly strong showing that counsel's putative errors were of the latter type. Thus, even if [trial counsel's] trial prowess arguably fell below the level which Strickland [v. Washington, 466 U.S. 668 (1984)] requires, [second counsel's] ability to monitor and correct any of [trial counsel's] mistakes makes Mario's case a tougher one to make. Cf. Stoia v. United States, 109 F.3d 392, 398-99 (7th Cir. 1997) (discussing multiple attorneys and ineffective assistance in the conflict of interest context)."

Lloyd, 983 F. Supp. at 743. See also Commonwealth v. Burton, 491 Pa. 13, 21, 417 A.2d 611, 615 (1980) ("[O]ther than implying that his counsel's drinking resulted in counsel's failure to object to the questioning of defense witness Bowen

about his prior arrests and convictions, an allegation of ineffectiveness we have already disposed of, Burton does not assert any instance in which counsel's drinking resulted in ineffective assistance.).

"It is well-settled that alcoholism, mental illness, and other conditions are not enough to show ineffective assistance of counsel in the absence of a specific showing of deficient performance resulting from these conditions." Snow v. Pfister, 240 F. Supp. 3d 854, 876 (N.D. Ill. 2016).

> "We agree with the District Court that the general allegations of alcohol use do not require a departure from Strickland's [v. Washington, 466 U.S. 668 (1984)] two-prong standard -- a point conceded by [the appellant] in his new-trial memorandum. Alcohol or drug use by trial counsel can certainly be relevant to both parts of an ineffectiveness inquiry, especially if amplified or systemic, or on close questions of strategy and jury perception. But on these facts, alleged substance abuse is not, without more, one of the rare forms of dereliction amounting to the per se denial of a defendant's Sixth Amendment right to the effective assistance of counsel."

United States v. Washington, 869 F.3d 193, 204 (10th Cir. 2017). "[U]nder Strickland the fact that an attorney used drugs is not, in and of itself, relevant to an ineffective assistance claim. The critical inquiry is whether, for whatever reason, counsel's performance was deficient and

whether that deficiency prejudiced the defendant." Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985).

> "[I]n order for an attorney's alcohol addiction to make his assistance constitutionally ineffective, there must be specific instances of deficient performance attributable to alcohol. See Bonin v. Calderon, 59 F.3d 815, 838 (9th Cir. 1995); Caballero v. Keane, 42 F.3d 738, 740 (2d 1994); Berry v. King, 765 F.2d 451, 454 (5th Cir. 1985); Young v. Zant, 727 F.2d 1489, 1492-93 (11th Cir. 1984). In this case, there is no evidence of specific instances of defective performance caused by [counsel's] alcohol abuse. Furthermore, it is significant that [the appellant] was not represented by [counsel] alone -- he had the benefit of two court-appointed lawyers assisting in his defense. And no attack is made on the professional capacity of [the second attorney]. See Lopez-Nieves v. United States, 917 F.2d 645, 647 (1st Cir. 1990) ('[T]he presence of a second attorney during the proceedings seriously undermines appellant's claim of ineffective assistance of counsel.')."

Frye v. Lee, 235 F.3d 897, 907 (4th Cir. 2000). See also Snow v. Pfister, 240 F. Supp. 3d 854, 876 (N.D. Ill. 2016), quoting United States v. Dunfee, 821 F. 3d 120, 128 (1st Cir. 2016) ("Where a 'defendant was represented by multiple attorneys, an ineffective assistance challenge is particularly difficult to mount.'").

It is not per se ineffective for a lawyer to have used alcohol or drugs during the representation of a client and, as noted above, Jones failed to plead in his amended petition

specific instances where the consumption of alcohol rendered Parker's performance deficient. Also, Jones was represented by a second attorney who Jones does not allege drank alcohol during the trial. Because Jones failed to plead any specific instances where Parker's actions or inactions were deficient as a result of his alleged drinking, Jones failed to sufficiently plead his claim. Therefore, summary dismissal of this claim was proper.

C.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel had a conflict of interest because the same district attorney prosecuting Jones had charged Parker with DUI and Brantley had represented Parker in the DUI proceedings.

In his amended petition, Jones alleged that Parker had been arrested for DUI in April 2004, after Jones had been convicted of capital murder and the jury had recommended a sentence of death, but before the trial court had sentenced him; that Brantley represented Parker in the DUI proceedings and Parker was convicted of DUI in November 2004; and that he was never informed of Parker's arrest and subsequent

conviction even though Brantley and Parker continued to represent him on appeal.

In dismissing this claim, the circuit court stated:

> "Jones alleges that his trial counsel, Clark Parker and Tom Brantley, were actually conflicted because Parker was charged with DUI by Doug Valeska, who prosecuted Jones for capital murder, and because Brantley represented Parker in the DUI proceedings. Assuming the facts pleaded were proved by a preponderance of the evidence at an evidentiary hearing, Jones would not establish that his trial counsel were conflicted. For the reasons stated below, this claim is not facially meritorious; therefore, it is dismissed.
>
> "A defendant claiming that his trial counsel had an actual conflict must show 'that his counsel actively represented conflicting interests,' or that his counsel 'made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other.' M.S. v. State, 822 So. 2d 449, 453 (Ala. Crim. App. 2000).
>
> "Jones alleges that Parker -- and Brantley, acting as Parker's lawyer -- had an 'incentive and duty' to protect Parker's interests. Of course, as Jones's lawyer, Brantley also had an 'incentive and duty' to protect Jones's interests. The prosecution of Parker for DUI by the same prosecutor who was prosecuting Jones does not itself give rise to an actual conflict. Essentially, Jones makes a bald allegation that his trial counsel could have made decisions against Jones's interests to 'curry favor' with Doug Valeska. However, Jones does not plead that there was an agreement between his trial counsel and Valeska for trial counsel to do anything in exchange for special treatment of Parker in his DUI case. Nor does Jones plead with adequate specificity that trial counsel actually did

> something that was against Jones's interest, or failed to do something that would have benefitted Jones, because of the alleged conflict.
>
> "The record shows that Jones's trial counsel filed appropriate motions on his behalf and adequately represented him at trial. For these reasons, this claim is not facially meritorious and therefore is dismissed."

(C. 1206-08.)

The record from Jones's direct appeal reflects that Jones was convicted of capital murder on March 12, 2004; that, on March 15, 2004, the jury recommended that he be sentenced to death; and that the sentencing hearing before the trial court was conducted on June 8, 2004. On April 11, 2004, Parker was arrested for DUI. Parker pleaded not guilty on April 23, 2004, and was convicted of DUI in the district court on November 23, 2004. Counsel's brief on direct appeal was filed with this Court in March 2005, months after Parker's conviction.

Jones relies on the case of United States v. DeFalco, 644 F.2d 132 (3d Cir. 1979), to support his claim that an actual conflict of interest existed in this case that automatically rendered counsel's performance deficient. In DeFalco, counsel was appointed to represent DeFalco on direct appeal. Unbeknownst to DeFalco, counsel had been "indicted three

times," had entered into plea negotiations, and had entered into a "guilty plea for himself in the same court and with the tangential involvement of the sentencing judge from which his client's appeal is prosecuted." 644 F.2d at 136. The DeFalco court held: "We are persuaded that, even without proof of an actual conflict of interest, legitimate decisions of counsel were rendered suspect because of the potential for conflicting loyalties to himself and his client." 644 F.2d at 137.

However, DeFalco was released before the United States Supreme Court released its decision in Cuyler v. Sullivan, 446 U.S. 335 (1980), and is readily distinguishable from the facts of this case. In Cuyler, the Supreme Court held that there must be an actual conflict of interest, not a potential conflict of interest, in order to render counsel's assistance ineffective. In applying the standard announced by the United States Supreme Court in Cuyler, the United States Court of Appeals for the Sixth Circuit explained:

> "The instant case involves a specific type of ineffectiveness claim, that of conflict of interest, which is also examined under a slightly different standard from that used in a traditional ineffectiveness claim. The Supreme Court set forth the standard for determining conflict of interest cases in Cuyler v. Sullivan, 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and summarized it again in Strickland as follows:

> "'In Cuyler ... [we] held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts ... it is reasonable for the criminal justice system to maintain a fairly rigid rule of presumed prejudice for conflicts of interest. Even so, the rule is not quite the per se rule of prejudice that exists for the Sixth Amendment claims mentioned above [actual or constructive denial of the assistance of counsel altogether]. Prejudice is presumed only if the defendant demonstrates that counsel 'actively represented conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'
>
> "Strickland, 466 U.S. at 692, 104 S.Ct. at 2067 (emphasis added) (quoting Cuyler, 446 U.S. at 345–50, 100 S.Ct. at 1716–19). This Circuit has interpreted the Cuyler test as directing courts 'to determine, on the facts of each case, whether there is an actual conflict of interest and whether that conflict has caused ineffective performance in violation of the provisions of the Sixth Amendment....' Smith v. Bordenkircher, 671 F.2d 986, 987 (6th Cir.), cert. denied, 459 U.S. 848, 103 S.Ct. 107, 74 L.Ed.2d 96 (1982)."

Thomas v. Foltz, 818 F.2d 476, 480 (6th Cir. 1987).

In a scenario similar to the one in this case, the United States Court of Appeals for the Seventh Circuit stated:

> "[The appellant] claims that he did not get a fair trial. ... The first is that his lawyer had a conflict of interest. He was under investigation for bribing police officers to reduce charges against his clients. The prosecutor's office -- the same office that prosecuted [the appellant] -- had given the lawyer immunity in exchange for cooperation and had promised, if the lawyer fulfilled his part of the bargain, to help him retain his license to practice law. A situation of this sort (the criminal defendant's lawyer himself under criminal investigation), which unfortunately is all too common, see, e.g., United States v. Balzano, 916 F.2d 1273, 1292–93 (7th Cir. 1990); United States v. Levine, 794 F.2d 1203 (7th Cir. 1986), can create a conflict of interest. It may induce the lawyer to pull his punches in defending his client lest the prosecutor's office be angered by an acquittal and retaliate against the lawyer. Such retaliation would be unethical; but still the defense lawyer may fear it, at least to the extent of tempering the zeal of his defense of his client somewhat. Yet presumably the fear would have to be shown before a conflict of interest could be thought to exist. But let us pass that point by and assume that the situation in this case as we have outlined it created a conflict of interest. The existence of a conflict does not automatically entitle the defendant to habeas corpus on the ground that he was deprived of his constitutional right to the effective assistance of counsel. Unless the conflict was brought to the trial judge's attention, the defendant must point to specific instances in which the lawyer would have done something different in his conduct of the trial had there been no conflict of interest. Cuyler v. Sullivan, 446 U.S. 335, 348, 100 S.Ct. 1708, 1718, 64 L.Ed.2d 333 (1980); United States v. Cirrincione, 780 F.2d 620, 630–31 (7th Cir. 1985)."

Thompkins v. Cohen, 965 F.2d 330, 332 (7th Cir. 1992). See also United States v. Cirrincione, 780 F.2d 620, 629 (7th Cir. 1985) ("An actual conflict of interest that adversely affected the defendants' lawyers' performance must be evidenced by specific instances in the record.").

The Colorado Supreme Court has also stated:

> "[W]e conclude that no actual conflict of interest was created by the pendency of these charges. Prosecution for failure to obey a traffic signal and failure to present proof of insurance does not put counsel in fear of his or her own zealous advocacy or in a position 'inherently conducive to and productive of divided loyalties.' See People v. Castro, supra, 657 P.2d [932] at 945 [(Colo. 1983)]; cf. United States v. DeFalco, supra, 644 F.2d [132] at 136 [(3d Cir. 1979)] (federal mail fraud charges create 'inherent emotional and psychological barriers' to counsel's ability to compete 'vigorously with the government').
>
> "Nor does defendant show any adverse effect on counsel's representation. Defendant does not point to any instance where counsel's actions might have been hindered by concern for his own traffic violation charges. See Cuyler v. Sullivan, [446 U.S. 335 (1980)]; United States v. Baker, 256 F.3d 855 (9th Cir. 2001) (bare allegation of conflict based on attorney's cooperation and plea on unrelated charges insufficient basis on which to predicate actual conflict); United States v. Balzano, 916 F.2d 1273 (7th Cir. 1990) (no conflict where defendant did not show actual effect on trial); Sanchez v. State, 296 Ark. 295, 756 S.W.2d 452 (1988) (same); cf. United States v. McLain, [823 F.2d 1457 (11th Cir. 1987)] (actual conflict where defense counsel had personal interest in extending duration of defendant's trial)."

People v. Mata, 56 P.3d 1169, 1173 (Colo. 2002).

Here, Jones did not plead in his amended petition any specific instances where counsel's representation was affected by Parker's arrest and prosecution for DUI. In fact, Jones had been convicted and a sentencing recommendation had been made by the jury before Parker was arrested for DUI. Parker's case was pending in the district court, before a different judge, and not the same judge presiding over Jones's capital-murder case. Also, counsel filed the appellate brief in this Court months after Parker had been convicted of DUI; thus, counsel's actions on appeal could not have possibly been affected by his "pending" DUI charges.

Therefore, summary dismissal of this claim was proper.

D.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not obtaining a blood-spatter expert to challenge the testimony given by State's witness Katherine McGeehan.

In his amended petition, Jones alleged that his counsel should have retained blood-spatter expert Gene N. Gietzen, who he said was available in 2004, to refute "McGeehan's testimony that 'high velocity' bloodstains can result from 'a pool of

blood being hit very hard' causing 'the blood to fly in the air and the higher the velocity the smaller the stain.'" (C. 510.) According to Jones, Gietzen would have testified that high-velocity bloodstains are "most frequently" seen with gunshot wounds; that blunt-force trauma -- the cause of Kirkland's death -- generally produces medium-velocity bloodstains; that he saw no high-velocity bloodstains in the photographs of the crime scene; and that there would likely be a significant amount of larger medium-velocity bloodstains on an assailant inflicting blunt-force trauma, not the "'pinpoint' bloodstain" found on Jones's clothing. (C. 511-12.)

Although Jones identified in his petition the name of the expert he believed counsel should have retained and specifically identified the testimony he believed the expert would have provided, he failed to allege sufficiently specific facts to overcome the presumption that counsel's not retaining a blood-spatter expert was sound trial strategy, and he made only bare allegations of prejudice, i.e., that McGeehan's testimony was of "extreme importance" to the State's case and that a blood-spatter expert was "essential to undermining the State's case" because "the only physical evidence in this case

suggesting that [he] was ever in direct contact with the victim was the State's DNA analysis of a 'pinpoint' bloodstain allegedly obtained from [his] clothing." (C. 512.)

As Jones conceded in his petition, however, it was the evidence indicating that the DNA of the bloodstains on Jones's clothing belonged to Kirkland, not McGeehan's testimony about blood-spatter, that linked Jones to the murder.[3] In fact, Jones's claim appears to be premised on the incorrect assumption that McGeehan testified that the "pinpoint" bloodstains on his clothing were, in fact, high-velocity bloodstains. She did not. After McGeehan testified that there were several small "pinpoint" bloodstains on Jones's clothing, the following occurred:

> "[Prosecutor]: Do you have an opinion, once again, if you can tell me, how you use the terminology pinpoint stains, how they could be transferred from one human being on clothing like that in your opinion if you have one? And the design that you saw you use pinpoint. What could cause that?
>
> "[McGeehan]: That can be caused by blood floating in the air at a high velocity or -- there's a couple of ways that it can be caused, but blood

[3]McGeehan tested various pieces of evidence to determine the presence of blood, but another forensic scientist, Phyllis Rollan, conducted the DNA testing. We note that Jones's counsel did request funds to hire a serologist or DNA expert.

being -- a pool of blood being hit very hard can cause blood to fly in the air and the higher the velocity the smaller the stain.

"[Prosecutor]: Is it consistent there's a large amount of blood, in other words, all over my clothes, on me particularly hypothetically because I'm showing you here on my pants and I bump up against those white pants hypothetically, would I get pinpoint touching like that?

"[McGeehan]: No. That type of staining would be considered transferred stains, and it would be -- depending on the amount of blood on the item you touched and how long that touch or that contact is made would depend on how much blood would transfer from the bloody item to the other item, and that would be more of a smear or a soaking stain. It would not be small pinpoint stains."

(Trial R. 638-39.) On cross-examination, the following occurred:

"[McGeehan]: In this case the majority of the stains were small pinpoint stains.

"[Jones's counsel]: And [the prosecutor] asked you earlier about how the method or the way that those stains got there that would have been flying through the air I believe you described it as.

"[McGeehan]: I described that as possible, yes.

"[Jones's counsel]: Do you -- and I believe you said also that the -- that it would be traveling at a high rate of speed? Do I recall that correctly?

"[McGeehan]: Small pinpoint stains can come from high velocity.

"[Jones's counsel]: Now, you don't have any way to know exactly how those stains got there, do you?

"[McGeehan]: No, I do not.

"[Jones's counsel]: And is it possible that these stains could have gotten on some of this clothing from a person stepping into a pool of blood and making a splash? Is that not possible? Just as if someone --

"[McGeehan]: I step -- it would not -- those stains would probably not be there was a step. Possibly a running or a stomp.

"[Jones's counsel]: Yes.

"[McGeehan]: But not a casual step.

"[Jones's counsel]: And I should have characterized that. A stomp or a forceful motion with a foot down, a stomp is a good way to describe it, can splatter that and send it airborne, is that correct?

"[McGeehan]: Yes.

"[Jones's counsel]: That's possible. And also it can be slung off of an object that the blood is on, could it not? Just like if you take a paint brush and sling a paint brush, is that possible?

"[McGeehan]: Yes. Small stains can come from another object moving at a high velocity being slung off in various methods, yes."

(Trial R. 688-89.)

As the above-quoted portion of the record reflects, McGeehan testified that there were a number of ways to create "pinpoint" bloodstains like those found on Jones's clothing and that blood floating in the air at a high velocity was one

way. However, she never testified that the "pinpoint" stains found on Jones's clothing were, in fact, high-velocity bloodstains. She also did not testify that there were high-velocity bloodstains found at the crime scene or that the infliction of blunt-force trauma would result in high-velocity bloodstains and not medium-velocity bloodstains on the assailant's clothing. Gietzen's testimony, as pleaded in Jones's amended petition, would not have refuted McGeehan's testimony. Moreover, McGeehan's testimony, both on direct examination and cross-examination, was consistent with Jones's statement to police that he was present at the time of the murder but did not participate in it.

> "The decision of how to deal with the presentation of an expert witness by the opposing side, including whether to present counter expert testimony, to rely upon cross-examination, to forgo cross-examination and/or to forgo development of certain expert opinion, is a matter of trial strategy which, if reasonable, cannot be the basis for a successful ineffective assistance of counsel claim."

Thomas v. State, 284 Ga. 647, 650, 670 S.E.2d 421, 425 (2008).

Under these circumstances, we cannot say that Jones pleaded sufficient facts to overcome the presumption that counsel's not retaining a blood-spatter expert was sound trial strategy or to establish that he was prejudiced by counsel's

performance. Therefore, summary dismissal of this claim was proper.

E.

Jones argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not challenging the admissibility of DNA evidence.

In dismissing this claim, the circuit court stated:

> "Jones argues that trial counsel were deficient in failing to demand a ... hearing to challenge the admissibility of the DNA evidence, but a hearing is unnecessary when there are no legitimate challenges to the DNA evidence. The record shows that a proper predicate was laid for the introduction of DNA evidence. None of the arguments Jones raised would have resulted in the exclusion of DNA evidence in this case.
>
> "Jones also argues that the State did not meet admissibility requirements for DNA evidence because it did not introduce any evidence of the rate of error for its technique, but, as Jones admits in his amended petition, the Alabama Court of Criminal Appeals has held that 'the absence of testimony regarding the factor [error rate] will not, alone, render DNA evidence inadmissible.' Lewis v. State, 889 So. 2d 623, 672 (Ala. Crim. App. 2003).
>
> "Jones also argues that trial counsel should have challenged the chain of custody of the DNA evidence, but Jones's trial counsel would have been unsuccessful if they had challenged the chain of custody. As an initial matter, Jones does not contend that the alleged missing link in the chain -- Holli Spiers -- would not have been able to provide direct testimony had a challenge to the chain of custody been made.

"The State's reliance on circumstantial evidence of the chain of custody was adequate. See e.g., Smith v. State, 677 So. 2d 1240, 1245 (Ala. Crim. App. 1995) ('If the State, or any other proponent of demonstrative evidence, fails to identify a link ... the result is a 'missing' link, and the item is inadmissible. If, however, the State has shown each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the 'link,' as to one or more criteria or as to one or more links, the result is a 'weak' link. When the link is 'weak,' a question of credibility and weight is presented, not one of admissibility.'). 'In the absence of any evidence to the contrary, the trial judge was entitled to assume that this official would not tamper with the sack and can or their contents. Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties.' Thomas v. State, 824 So. 2d 1, 45-46 (Ala. Crim. App. 1999) (overruled on other grounds by Ex parte Carter, 889 So. 2d 528 (Ala. 2004)). Under these precedents, DNA evidence was properly admitted in this case.

"Jones further argues that effective trial counsel would have challenged admissibility under the Confrontation Clause and the hearsay rules. Specifically, Jones argues that the Confrontation Clause was violated because [Hollie] Spiers -- the laboratory technician who cut a patch containing a blood sample from Jones's sweatpants that was subjected to DNA testing -- did not testify. However, neither the Confrontation Clause nor the hearsay rules are implicated where there is no testimonial evidence at issue. See Davis v. Washington, 547 U.S. 813, 824 (2006) (stating that Confrontation Clause jurisprudence is 'applied only in the testimonial context.'). Here, Spiers did not prepare a report. The State's DNA expert, Phyllis Rollan, testified at trial and was subject to cross-

> examination. Hence, an objection on these grounds would have been overruled.
>
> "....
>
> "For these reasons, Jones fails to plead a facially meritorious claim; accordingly, this claim is dismissed."

(C. 1225-29.)

We agree with the circuit court. The record from Jones's direct appeal reflects that Phyllis Rollan testified extensively about her qualifications and the DNA testing procedures employed by the Alabama Department of Forensic Sciences, as well as the controls used to ensure the accuracy of DNA tests. Her testimony was sufficient to satisfy the requirements for the admissibility of DNA evidence. See § 36-18-30, Ala. Code 1975. In addition, the lack of testimony from Hollie Spiers -- the laboratory technician who cut the samples from Jones's clothing -- did not result in a missing link in the chain of custody nor did it violate Jones's right to confrontation. "Counsel cannot be said to be ineffective for not filing a motion for which there is no legal basis." Boyd v. State, 746 So. 2d 364, 397 (Ala. Crim. App. 1999). Moreover, because the DNA evidence was properly admitted, we

cannot say that trial counsel were ineffective for not requesting a pretrial hearing on the matter.

Therefore, summary dismissal of this claim was proper.

F.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not objecting to numerous instances of what he alleged was prosecutorial misconduct.

> "'[E]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer.' Brooks v. State, 456 So. 2d 1142, 1145 (Ala. Crim. App. 1984). '"[D]ecisions of when and how to raise objections are generally matters of trial strategy."' Daniels v. State, 296 Ga. App. 795, 800, 676 S.E.2d 13, 19 (2009) (quoting Holmes v. State, 271 Ga. App. 122, 124, 608 S.E.2d 726, 729 (2004))."

Washington v. State, 95 So. 3d 26, 66 (Ala. Crim. App. 2012). "'Isolated failures to object are typically not sufficient grounds for a finding of ineffective assistance.'" Id. (quoting Nadal v. State, 348 S.W.3d 304, 321 (Tex. App. 2011)). Moreover, this Court has stated:

> "'[I]nterruptions of arguments, either by opposing counsel or the presiding judge, are matters to be approached cautiously.' United States v. Young, 470 U.S. 1, 13, 105 S.Ct. 1038, 84 L.Ed.2d 1

> (1985). 'A decision not to object to a closing argument is a matter of trial strategy.' Drew v. Collins, 964 F.2d 411, 423 (5th Cir. 1992). To constitute error a prosecutor's argument must have 'so infected the trial with unfairness as to make the resulting [verdict] a denial of due process.' Darden v. Wainwright, 477 U.S. 168, 181, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)."

Benjamin v. State, 156 So. 3d 424, 454 (Ala. Crim. App. 2013).

1.

First, Jones contends that his trial counsel should have objected to what he says was the improper admission of victim-impact evidence. He asserts that this evidence was prejudicial and totally irrelevant to his guilt and resulted in reversible error.

Although some of the evidence cited by Jones in his amended petition could arguably be considered victim-impact evidence, its admission was, at most, harmless.

> "It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance for us to hold, based on the record before us, that [Jones] did not receive a fair trial simply because the jurors were told what they probably had already suspected -- that [the victim] was not a 'human island,' but a unique individual whose murder had inevitably had a profound impact on [his] children, spouse, parents, friends, or dependents (paraphrasing a portion of Justice Souter's opinion concurring in the judgment in Payne v. Tennessee, 501 U.S. 808, 838, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991))."

Ex parte Rieber, 663 So. 2d 999, 1006 (Ala. 1995). "[W]hen, after considering the record as a whole, the reviewing court is convinced that the jury's verdict was based on the overwhelming evidence of guilt and was not based on any prejudice that might have been engendered by the improper victim-impact testimony, the admission of such testimony is harmless error." Ex parte Crymes, 630 So. 2d 125, 126 (Ala. 1993). "'Harmless error does not rise to the level of the prejudice required to satisfy the Strickland test.'" State v. Kerley, 260 So. 3d 891, 902 (Ala. Crim. App. 2017) (quoting Gaddy v. State, 952 So. 2d 1149, 1160 (Ala. Crim. App. 2006)).

Therefore, summary dismissal of this claim was proper.

2.

Jones also contends that his trial counsel should have objected to the admission of what he describes as "aggravating factors" and the prosecutor's comments on that evidence. (Jones's brief, p. 59.) Specifically, he argues that evidence was presented about, and the prosecutor frequently referred to, the severity of the beating Kirkland suffered before her death.

In dismissing this claim, the circuit court stated:

> "Jones ... alleges that his trial counsel were ineffective for not objecting to evidence of the brutality of the murder offered during the guilt phase. He argues that the evidence was not relevant in the guilt phase because it was relevant in the penalty phase to prove the Alabama Code [1975,] § 13A-5-49(8), aggravating circumstances that the crime was 'especially heinous, atrocious, or cruel.' This claim is not facially meritorious.
>
> "A prosecutor is allowed to make reasonable inferences from facts in evidence. ... The complained-of evidence was mere res gestae evidence. Accordingly, Jones would not be able to establish deficient performance and prejudice on these facts at an evidentiary hearing. Therefore, this claim is dismissed."

(C. 1243.) We agree.

"The pain and suffering of the victim is a circumstance surrounding the murder -- a circumstance that is relevant and admissible during the guilt phase of a capital trial." McCray v. State, 88 So. 3d 1, 38 (Ala. Crim. App. 2010). And the prosecutor's comments were proper comments on the evidence. "Whatever is in evidence is subject to comment by the prosecutor, and he may argue every legitimate inference therefrom." Lewis v. State, 24 So. 3d 480, 503 (Ala. Crim. App. 2006), aff'd, 24 So. 3d 540 (Ala. 2009). "Counsel cannot be ineffective for failing to raise an issue that has no merit." Bush v. State, 92 So. 3d 121, 140 (Ala. Crim. App. 2009).

Therefore, summary dismissal of this claim was proper.

3.

Jones contends that his trial counsel should have objected when, he says, the prosecutor improperly vouched for Jones's guilt during voir dire, opening statement, and closing argument.

In dismissing this claim, the circuit court stated:

> "Jones alleges that trial counsel should have objected to alleged improper vouching by the prosecutor. He takes certain remarks by the prosecutor out of context in an effort to show that the prosecutor vouched for Jones's guilt, but the record shows that the prosecutor did not actually vouch for Jones's guilt. Whether to object here was a matter of trial strategy. See Ray [v. State], 80 So. 3d [965] at 995 [(Ala. Crim. App. 2011)]. Counsel's decision not to object was not objectively unreasonable, and the facts pleaded would not establish prejudice.
>
> "As for the remaining allegations in this claim, the prosecutor's actions at most amounted to harmless error. Again, counsel was not objectively unreasonable for not objecting, and even if the facts pleaded here are true, Jones would not establish prejudice at an evidentiary hearing."

(C. 1223-24.) We agree.

We have reviewed the complained-of comments and conclude that they did not so infect the trial with such unfairness as to deny Jones due process. See Darden v. Wainwright, 477 U.S. 168 (1986). We agree with the circuit court that the comments

were, at most, harmless. In addition, the jurors were instructed that arguments of counsel are not evidence. As noted previously, "'[h]armless error does not rise to the level of the prejudice required to satisfy the Strickland test.'" State v. Kerley, 260 So. 3d 891, 902 (Ala. Crim. App. 2017) (quoting Gaddy v. State, 952 So. 2d 1149, 1160 (Ala. Crim. App. 2006)).

Therefore, summary dismissal of this claim was proper.

G.

Jones argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not timely making an objection pursuant to Batson v. Kentucky, 476 U.S. 79 (1986), but, instead, waiting until after the jury had been sworn and the venire had been excused before making the objection.

However, the record from Jones's direct appeal reflects that trial counsel timely made a Batson objection after the jury was struck but before it was sworn. Although the trial court declined to hear the objection at that time and did not conduct a hearing until after the jury had been sworn and the venire dismissed, counsel's objection was nonetheless timely. Moreover, in dismissing this claim, the circuit court found

that Jones's Batson objection had been properly overruled and that, therefore, Jones was not prejudiced even if counsel's objection had been untimely. We agree.

The record from Jones's direct appeal reflects that there were 69 prospective jurors on the venire; that the State struck 25 prospective jurors, 6 of whom were black; and that 2 black jurors sat on the petit jury.[4] Jones made a Batson objection immediately after the jury was struck, and the trial court conducted a hearing after the jury had been sworn and the venire released. At the hearing, the prosecutor provided his reasons for striking the six black prospective jurors: Prospective Juror C.M. was struck because she failed to disclose during voir dire that she had been convicted of driving without a driver's license and that she had a brother who worked as a security guard at the Houston County jail; Prospective Juror B.L.M., was struck because he had been convicted of assault; Prospective Juror P.S. was struck because she stated during voir dire that she had been represented by defense counsel and "he had got her off" (Trial

[4]For purposes of this Batson analysis, alternate jurors are included. See Ashley v. State, 651 So. 2d 1096, 1099 (Ala. Crim. App. 1994).

R. 232); Prospective Juror S.L. was struck because she had been convicted of harassing communications; Prospective Juror C.P. was struck because he knew one of the defense attorneys and had a relative who had mental-health problems; and Prospective Juror C.W. was struck because he stated during voir dire that his house had been burglarized and that no one had been arrested for the crime, and he laughed loudly during this questioning and did not appear to take the proceedings seriously. With respect to C.W., one of the other prosecutors also stated that C.W. had laughed very loudly during the questioning about him being the victim of a crime, but Jones's counsel indicated that they did not witness any laughing. The trial court denied counsel's Batson objection.

All of the prosecutor's reasons for striking the black prospective jurors were race-neutral. See, e.g., Snyder v. Louisiana, 552 U.S. 472, 477 (2008) ("[R]ace-neutral reasons for peremptory challenges often invoke a juror's demeanor (e.g., nervousness, inattention), making the trial court's first-hand observations of even greater importance."); Ex parte Brown, 686 So. 2d 409 (Ala. 1996) (holding that the fact that a prospective juror has a criminal history or has a relative who has a criminal history is a race-neutral reason

for a peremptory strike); Graham v. State, [Ms. CR-15-0201, July 12, 2019] ___ So. 3d ___, ___ (Ala. Crim. App. 2019) (holding that the fact that a prospective juror has been the victim of a crime or has a relative who has been the victim of a crime is a race-neutral reason for a peremptory strike); and Whatley v. State, 146 So. 3d 437, 456 (Ala. Crim. App. 2010) ("A juror's knowing defense counsel is a valid race-neutral reason for striking a juror."). In addition, the record from Jones's direct appeal does not indicate that the struck jurors shared only the characteristic of race. There was nothing in the type or manner of the prosecutor's statements or questions during voir dire indicating an intent to discriminate against black prospective jurors, and there was no lack of meaningful voir dire directed at black prospective jurors. Moreover, black and white prospective jurors were not treated differently. "It is well settled that '[a] trial court's ruling on a Batson motion depends on its credibility determinations.' ... In other words, this Court 'will give a trial court's ruling great deference. ...'" Wilson v. State, 142 So. 3d 732, 757 (Ala. Crim. App. 2010). Because the trial court properly denied Jones's Batson objection, even had counsel's objection been untimely Jones was not prejudiced.

Therefore, summary dismissal of this claim was proper.

H.

Jones argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not challenging for cause two prospective jurors who, he claimed, were biased against him. Specifically, Jones argues that trial counsel should have challenged Prospective Juror S.W. on the ground that S.W. had a sister who had been murdered approximately 10 years before Jones's trial and stated during voir dire that this would affect his ability to be impartial. He also argues that trial counsel should have challenged for cause Prospective Juror H.P. on the ground that H.P. knew Officer Donovan Kilpatrick, a State's witness, and that he would be inclined to trust his testimony.

The record from Jones's direct appeal reflects the following exchange with S.W. during voir dire:

"[S.W.]: My sister was murdered.

"[Jones's counsel]: How long ago was that?

"[S.W.]: About nine or ten years ago.

"[Jones's counsel]: Do you think that fact would affect you as sitting in this case as a juror?

"[S.W.]: (Nodded.)"

(Trial R. 160.) However, the record does not indicate whether this "nod" was an affirmative or a negative response to counsel's question, and S.W. stated nothing else about this during voir dire. The record does show that prospective jurors were asked if anyone had any bias that would prevent them from being impartial in the case and that S.W. did not indicate that he had any such bias. "To justify a challenge for cause, there must be a proper statutory ground or '"some matter which imports absolute bias or favor, and leaves nothing to the discretion of the trial court."'" Ex parte Davis, 718 So. 2d 1166, 1171 (Ala. 1998) (quoting Clark v. State, 621 So. 2d 309, 321 (Ala. Crim. App. 1992), quoting in turn, Nettles v. State, 435 So. 2d 146, 149 (Ala. Crim. App.), aff'd, 435 So.2d 151 (Ala. 1983)). S.W.'s answers did not warrant his removal for cause.

H.P. stated during voir dire that he worked with and was friends with Off. Kilpatrick. The following then occurred:

> "[Jones's counsel]: You would place a lot of weight in what he said on the stand, wouldn't you?
>
> "[H.P.]: Probably so, yes.
>
> "[Jones's counsel]: Do you think you could sit on this case and be unbiased and -- especially when listening to Mr. Kilpatrick's testimony, the fact that you're his friend and work with him on a daily

> basis, it would be hard for you to do that, wouldn't it? It would be hard for you to be objective?
>
> "[H.P.]: Probably so, yes."

(Trial R. 183.) "It is only where the potential juror would '"unquestioningly credit the testimony of law enforcement officers over that of defense witnesses,"' that would render a prospective juror incompetent to serve." Duke v. State, 889 So. 2d 1, 23 (Ala. Crim. App. 2002), vacated on other grounds by Duke v. Alabama, 544 U.S. 901 (2005). H.P. did not indicate that he would unquestioningly credit Off. Kilpatrick's testimony over that of a witness for the defense or that he was biased. Rather, he stated only that he would "probably" place a lot of weight on Off. Kilpatrick's testimony and that it would "probably" be difficult for him to be objective. H.P.'s answers did not warrant his removal for cause.

"[C]ounsel could not be ineffective for failing to raise a baseless objection." Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001). Because there was no basis to challenge for cause S.W. or H.P., summary dismissal of this claim was proper.

I.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for making what he claims were insensitive statements during voir dire. Specifically, he argues that counsel stated that they were afraid of Jones and that those "statements legitimized the insidious notion that it was permissible for the jurors to convict Jones based on their personal fears, without the requirement of due process." (Jones's brief, p. 75.)

In dismissing this claim, the circuit court stated:

> "Jones argues that his trial counsel were ineffective because they made the following comments during voir dire:
>
> > "'We all hate to pick up the paper or hear on the news, that someone in the community has been murdered, much less an elderly lady. I'm one of those people. I despise reading that. It makes me sick at my stomach and scares me. I'm wondering, you know, am I going to be next. I'm not far. Probably already am a senior citizen. ... We fear that we one day might be a victim or our children might be a victim. How many of you ... would convict [Jones] of capital murder ... simply out of fear that he may have committed this or ... simply out of fear that you suspect he may have but not convinced beyond a reasonable doubt? There's people that would do that. I might be one of them.'

"(R. 147-49).

> "This claim is meritless on its face. The record demonstrates that trial counsel's comments were designed to ferret out potential jurors who may vote to convict Jones based on fear and not the evidence in the case or the appropriate beyond-a-reasonable-doubt standard. Jones's allegation, if true, would not establish deficient performance or prejudice at an evidentiary hearing. Therefore, this claim is dismissed."

(C. 1218-19.) We agree.

> "'Generally, "[a]n attorney's actions during voir dire are considered to be matters of trial strategy," which "cannot be the basis" of an ineffective assistance claim "unless counsel's decision is ... so ill chosen that it permeates the entire trial with obvious unfairness."'
>
> "Neill v. Gibson, 263 F.3d 1184, 1193 (10th Cir. 2001) (quoting Nguyen v. Reynolds, 131 F.3d 1340, 1349 (10th Cir. 1997)). 'Counsel, like the trial court, is granted "particular deference" when conducting voir dire.' Keith v. Mitchell, 455 F.3d 662, 676 (6th Cir. 2006)."

Washington v. State, 95 So. 3d at 64.

Therefore, summary dismissal of this claim was proper.

J.

Jones argues that the circuit court erred in summarily dismissing his claim that his trial counsel were ineffective for "botching the pretrial publicity issue." (Jones's brief, p. 75.) Specifically, Jones argues that his trial counsel

were ineffective for not asking prospective jurors about their exposure to media coverage of the crime and that, therefore, counsel could not effectively conduct voir dire.

In dismissing this claim, the circuit court stated:

> "Jones does not specifically plead what effective trial counsel would have asked prospective jurors about their exposure to media coverage or what the jurors's response would have been. ... Furthermore, the media coverage Jones describes, if proved, would not establish that it was impossible for Jones to receive a 'fair and impartial' trial in Houston County.
>
> "For these reasons, the facts pleaded in Jones's amended Rule 32 petition would not establish deficient performance and prejudice at an evidentiary hearing. Accordingly, this claim is meritless on its face and is dismissed."

(R. 1215.) We agree with the circuit court. Jones failed to allege in his petition what questions he believed counsel should have asked prospective jurors, and, other than a bare allegation that "the majority of the jurors almost certainly had been exposed to publicity surrounding the case," he failed to identify in his petition a single prospective juror who had been exposed to media coverage of the crime. (C. 459.) He also made only a bare allegation that counsel's failure to adequately question prospective jurors "den[ied] him the ability to discover actual prejudice due to media saturation"

without alleging any specific facts indicating that, but for counsel's performance, there is a reasonable probability that the outcome of his trial would have been different.

Moreover, the record from Jones's direct appeal reflects that the trial court questioned prospective jurors about their exposure to media coverage:

> "THE COURT: Have you read, heard, or seen anything about the facts in this case that would bias your mind and prejudice your verdict and prevent you from giving a fair and impartial trial both to the State of Alabama and to [Jones], if you were selected as a juror to try this case?
>
> "(Hands raised.)
>
> "....
>
> "[Prospective Juror T.L.]: I have some relatives that actually live on the street that this lady lived on.
>
> "THE COURT: You have some relatives that live on Stadium Street. Do you know anything about the facts in this case or heard or read or seen anything?
>
> "[Prospective Juror T.L.]: I just heard there was a lady on the street that got killed.
>
> "THE COURT: That's all you know. And would that have any effect on the way you look at the case?
>
> "[Prospective Juror T.L.]: No, sir.
>
> "THE COURT: Would it prejudice you in any way either for the State or for [Jones]?

"[Prospective Juror T.L.]: No, sir.

"....

"[Prospective Juror C.S.]: I knew Ms. Kirkland personally and professionally.

"THE COURT: If you would, would you approach the bench, please, ma'am?

"(At which time the following proceedings were held at the bench outside of the hearing of the jury venire.)

"[Prospective Juror C.S.]: I worked at SouthTrust. I knew her from there. I've known her basically all my life.

"....

"THE COURT: I'm going to excuse [C.S.] as far as this case is concerned.

"....

"THE COURT: Did I see another hand?

"THE COURT: Your name?

"[Prospective Juror W.W.]: I have met Ms. Kirkland's daughter. She lives beside my daughter. And I also met another family member in Florida in January of this year.

"THE COURT: Would that bias your mind and prejudice your verdict the fact that you know the family and be impartial and --

"[Prospective Juror W.W.]: No.

"THE COURT: It would not?

"[Prospective Juror W.W.]: No."

(R. 46-50.) This was the extent of the prospective jurors who indicated that they had heard or had any knowledge concerning the facts of the case. The trial court also asked prospective jurors if any had a fixed opinion that would prevent them from being impartial and no one responded. The prospective jurors also completed lengthy juror questionnaires that included questions about their exposure to media coverage.

Therefore, summary dismissal of this claim was proper.

K.

Jones also argues that the circuit court erred in dismissing his claim that his trial counsel were ineffective for not arguing that his statements to police should have been suppressed on the ground that he was physically assaulted by police to secure the statements.

In dismissing this claim, the circuit court stated:

> "Jones alleges that the police coerced his statements 'by violently ramming his head into a door.' He claims his trial counsel should have argued for exclusion of his statements on this ground. This claim is not facially meritorious.
>
> "Jones fails to plead that his counsel knew or explain why they should have known of the alleged assault by police. See Alderman v. State, 647 So. 2d 28, 33 (Ala. Crim. App. 1994) (noting that a petitioner alleging a claim of ineffective assistance must plead that counsel had 'knowledge of facts giving rise to the claim asserted.'). Jones

argues that counsel should have interviewed him and reviewed the transcript of his statement in which he complains of a headache. However, an assault like the one described is not something that counsel would routinely ask a client about. There would have to be some reason to ask, and Jones offers no reason other than the transcript in which he complains of a headache. This Court cannot find, even if the facts pleaded are true, that trial counsel performed deficiently because they did not ask Jones why he had a headache during a police interview. Furthermore, Jones does not allege that he told his counsel that his statement to police was beaten out of him, something one would imagine a defendant would tell his counsel in a capital murder trial.

"Finally, Jones alleges that his sister, Lakeisha Jones, witnessed the alleged assault and could have told counsel about it if only they had asked her, but again Jones does not allege a reason why counsel should have asked Lakeisha Jones about any incident involving police brutality. Certainly, one would suspect that Lakeisha Jones would tell Jones's trial counsel about such an incident, if it actually happened and she knew about it.

"For the foregoing reasons, Jones's allegations that his trial counsel were constitutionally ineffective in moving to suppress his statements are not facially meritorious. Accordingly, these claims are summarily dismissed."

(C. 1211-12.) We agree.

The United States Supreme Court has held:

"The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant."

Strickland v. Washington, 466 U.S. 668, 691 (1984). See also Crum v. State, 611 So. 2d 495, 497 (Ala. Crim. App. 1992) ("Absent information from his client alerting him to a latent defect in the prior conviction that renders that conviction unavailable to enhance sentence, counsel is not ineffective for failing to challenge the use of a facially-valid prior conviction for enhancement purposes. The appellant's Rule 32 petition did not allege that he informed his attorney at the guilty plea proceedings that the prior convictions upon which the State relied to enhance his sentence occurred during his minority and were not preceded by advice regarding his right to apply for youthful offender treatment.").

Here, Jones failed to allege in his amended petition that his trial counsel were aware that he had been assaulted by police in order to secure his statements. "'Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis must be included in the petition itself.'" Lee v. State, 44 So. 3d 1145, 1153 (Ala. Crim. App. 2009) (quoting Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006)). Therefore, summary dismissal of this claim was proper.

L.

Jones argues that the circuit court erred in summarily dismissing his claim that his trial counsel were ineffective for not timely objecting to the admission of his second statement to police. Specifically, Jones argues that, "[a]t trial, when the officer who allegedly took Jones's unrecorded statement testified, counsel did not object until after the officer's testimony" and that, therefore, this Court reviewed the issue of the admissibility of that statement under the plain-error standard of review. (Jones's brief, p. 82.)

On direct appeal, this Court addressed the admissibility of Jones's second statement:

> "Initially, we note that no objection was raised regarding Officer Beeson's rebuttal testimony concerning Jones's second statement until the end of his testimony, at which time defense counsel requested that Beeson's testimony be struck. Because, however, Jones was sentenced to death, we will review the admissibility of the statement under the plain-error standard.
>
> "As previously stated, at no point while he was making the second statement did Jones admit any involvement in Mrs. Kirkland's killing. Indeed, Jones claimed that Mrs. Kirkland had been killed by three other men whom he had come into contact with later that evening. Accordingly, Jones's statement was not a compelled confession protected by the Fifth Amendment. 'A false statement made by an accused, in an offer to exculpate or divert suspicion from himself or to explain away apparently

> incriminating circumstances, is provable without regard to the rules governing the admissibility of confessions.' 2 Charles W. Gamble, McElroy's Alabama Evidence § 200.02(4)(c) (5th ed. 1996) (footnote omitted). Further, the State did not offer this statement as evidence of Jones's guilt, but, rather, to rebut his claim that he was with [Malik Ali] Hasan on the night Mrs. Kirkland was killed. Therefore, because the State did not offer Jones's statement for the purpose of establishing Jones's guilt or to show that Jones otherwise incriminated himself, the State was not obliged to establish that the statement was voluntarily given as a prerequisite for its admission into evidence. See, e.g., Ringstaff v. State, 451 So. 2d 375, 384 (Ala. Crim. App. 1984); McGehee v. State, 171 Ala. 19, 55 So. 159 (1911); Franklin v. State, 145 Ala. 669, 39 So. 979 (1906).
>
> "In any event, the trial court properly admitted Jones's statement because it was knowingly and voluntarily given. ...
>
> "....
>
> "... Because the State offered ample evidence indicating that Jones was informed of his Miranda rights, chose to waive those rights and voluntarily consented to be interviewed by Officer Beeson, and that Officer Beeson made neither threats nor implied promises of leniency, the trial court correctly determined that Jones's second statement was voluntary and admissible."

Jones, 987 So. 2d at 1164-65. We also addressed the admissibility of Jones's other statements and concluded:

> "Jones was properly advised of his Miranda rights, and none of his statements to law-enforcement officials was the product of either threats or implied promises of leniency. ... Based on the totality of the circumstances, the trial

> court correctly determined that Jones's statements were voluntarily made. ....
>
> "Moreover, in light of the fact that none of Jones's statements contained an outright confession to killing Mrs. Kirkland, together with the physical evidence connecting him to the offense -- Jones was found driving Mrs. Kirkland's car shortly after her body was discovered, wearing clothes stained with Mrs. Kirkland's blood -- any error in allowing testimony regarding Jones's statements was harmless beyond a reasonable doubt."

Jones v. State, 987 So. 2d at 1166.

Even had counsel timely objected to admission of the statement and even had this Court reviewed the admissibility of that statement under the preserved-error standard of review rather the plain-error standard of review, this Court's conclusion would have been the same. Therefore, Jones was not prejudiced by counsel's failure to object to his second statement until after it had been admitted and summary dismissal of this claim was proper.

II.

Jones argues that the circuit court erred in summarily dismissing his claims that his trial counsel were ineffective during the penalty phase of his capital-murder trial.

A.

Jones argues that the circuit court erred in summarily dismissing his claim that his trial counsel were ineffective for not adequately investigating and presenting additional mitigation evidence. Jones alleged in his amended petition that trial counsel failed to present mitigation evidence regarding his dysfunctional family life, the extreme poverty in which he was raised, the instability of his home life, his drug use, and his physical abuse by his mother and grandmother. Jones also alleged that counsel failed to hire a mitigation expert.

In dismissing this claim, the circuit court stated:

> "Jones alleges that his trial counsel were ineffective in investigating and presenting mitigation evidence at the penalty phase. Jones has presented mitigation evidence in his amended petition that was not presented by trial counsel at the penalty phase of the trial. Some of the evidence, he argues, could have been presented through three family witnesses and clinical psychologist Dr. Robert DeFrancisco, all of whom testified at the penalty phase. Other evidence, he alleges, could have been presented through additional family witnesses, one of his former medical doctors, and a mitigation expert. Assuming the facts pleaded as true, Jones would not show deficient performance or prejudice at an evidentiary hearing; therefore, this claim is not facially meritorious.
>
> "....

"In the sentencing order in this case, the trial court considered and found, in addition to Jones's age, the following nonstatutory mitigating circumstances:

"1. The defendant was reared in a single-parent home with no relationship with his father.

"2. The defendant was hyperactive as a child.

"3. The defendant's family was visited by DHR [Department of Human Resources] several times during his childhood.

"4. The defendant did not resist arrest.

"5. The defendant had learning disabilities as a child and was a special education student.

"6. The defendant was reared in lower end of socio-economic scale.

"7. The defendant suffered emotional and psychological problems.

"(C. 316-17.)

"The mitigation evidence presented during the penalty phase was the kind of evidence typically presented during the penalty phase of a capital murder trial. Jones's trial counsel selected mitigation evidence that 'develop[ed] an image of [Jones] as a human being who was generally a good public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives.' Collier [v. Turpin], 177 F.3d [1184] at 1202 [(11th Cir. 1999)].

"....

"As discussed above, the record shows that Jones's trial counsel presented a variety of

> mitigating evidence at the penalty phase. Jones argues that additional evidence -- such as evidence of 'beatings' Jones received and that he lived in houses with cockroaches and rats -- should have been presented. For purposes of its analysis here, this Court assumes that Jones was indeed subjected to corporal punishment and that he lived in houses with pest problems, along with all of the other mitigating evidence that was not presented at Jones's trial. However, this Court also considers the strong aggravating evidence in this case.
>
> "The trial court found the existence of three aggravating circumstances: (1) the capital offense was committed during a burglary; (2) the capital offense was especially heinous, atrocious, or cruel ('HAC') compared to other capital offenses; and (3) Jones was under a sentence of imprisonment when he committed the capital offense. With regard to the HAC aggravator, the trial court specifically noted in the sentencing order that 'Dr. [Alfredo] Paredes testified that an 80 year old disabled women was brutally beaten. He established that these injuries were painful and most preceded her death. This type of cruelty was unnecessary given the age and physical infirmities experienced by the victim.'
>
> "Given that trial counsel presented appropriate mitigating evidence and that there was serious aggravating evidence in this case, there is no reasonable probability that the outcome of Jones's trial would have been different had trial counsel presented the additional mitigating evidence Jones discusses in his amended Rule 32 petition.
>
> "For these reasons, Jones could not establish deficient performance and prejudice upon these facts at an evidentiary hearing. Accordingly, this claim is dismissed."

(C. 1245-54.) We agree.

"Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact." Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000). Several witnesses testified at the penalty phase of Jones's trial. Jill Whitsett,[5] Jones's mother, testified that Jones never had a relationship with his father; that there was no father at home for Jones; that she and the family were on welfare and food stamps; that the Department of Human Resources visited her house "from time to time" when Jones was growing up; that she had been accused of child abuse in Houston County; that she had a child born with syphilis who died; that Jones had been diagnosed as hyperactive when he was young; that Jones had been seen by a psychiatrist and a psychologist; that Jones was placed on the medications Prozac, Tenex, Ritalin, and Zoloft; that Jones's behavior improved with the medication; that Jones became calmer with the medication; that the school told her that Jones needed to be placed in a special class because he was "dumb" and that Jones was placed in special-education classes.

[5]Jones's mother's name is spelled "Whitsett" in the record in this appeal. However, in the record in Jones's direct appeal, her name was spelled "Witsett."

On cross-examination, Whitsett testified that "human resources" came to her house on four or five occasions, that Jones had gotten in trouble at school for fighting, and that she took Jones out of school when he was in the 11th grade. Whitsett further testified that the medication Jones took bothered him at night so she took him off the medications.

Edwina Culp, an adult-education instructor at Alfred Saliba Family Services Center, testified that she met Jones when he was studying to get his general-equivalency diploma in January 1998. She said that he stayed in that program until April 1999. Culp testified that, based on her observations, Jones was kind and meek; he was not aggressive or a troublemaker; he stayed to himself; and he cooperated with her. She further testified that Jones was 16 years old when she met him but that his education was at a sixth- to eighth-grade level. It was her understanding that Jones had an attention-deficit disorder.

Marilyn Walker, Jones's maternal aunt, testified that Jones and his mother and sister lived with her and her husband in Dothan for years. She said that Jones was always a good person when he was on his medication and was not violent, "[b]ut when he didn't take his medicine, he was just a totally

different person. You could tell he just get upset and angry for no reason." (Trial R. 1393.) Walker further testified that Jones was truant and lied a lot and that he had taken his grandmother's automobile and it was destroyed. Walker testified that Jones's mother provided a decent home for him. On cross-examination, Walker testified that, as a result of the death of one of Jones's siblings, the family got a $70,000 settlement that helped Jones's mother take care of Jones and his siblings. Walker had no problems with Jones, she said, because Jones respected her.

Lakeisha Jones, Jones's sister, testified that Jones was a good brother to her; that if she got in trouble she would go to Jones; that Jones was helpful; that Jones took medication to make him calm; that from "time to time" he would not take his medication; and that when he did not take his medication he was more hyperactive. She also testified that Jones's mother took him off his medication when Jones was about 15 or 16 years old.

Dr. Robert DeFrancisco, a clinical forensic psychologist, testified that he conducted a clinical evaluation of Jones. He testified that Jones's IQ was 81 and that Jones was a "gap child." After explaining the term "gap child," Dr.

DeFrancisco testified that he reviewed Jones's medical records and that Jones was hyperkinetic. He described the effect of Jones's medication on his ability to "learn and to behave." Dr. DeFrancisco then testified:

> "[I]n [Jones's] case, he has no father, he has a mother that's a drunk and a drug addict. He has no role models. And you add that into his school failure, he has no mental help at home, all he's around is drug abuse by his own admission and own history will tell you his history is awful. He basically raised himself. What do you expect from someone like this?"

(Trial R. 1437.) He further stated:

> "Under the right guidance and instruction, [Jones] can be a productive person. He is not stupid. He is not mentally retarded. And he is not crazy. He's totally misguided. And he has suffered from a horrible, horrible childhood. And I'm not justifying anything he's done. I'm explaining to you the fact that behavior does not occur in a vacuum. You just can't look at an act. You have to understand the individual. That is my job. I'm trying to give you some understanding of this person who didn't care about himself because we as society didn't care about him as well. We are failing miserably with people like Antonio Jones."

(Trial R. 1438.)

In closing argument at the penalty phase, Jones's counsel argued that there were several mitigating circumstances based on the evidence that had been presented at the penalty phase, but counsel's main argument was Jones's medical condition.

Counsel also argued for mercy and said that, based on Dr. DeFrancisco's testimony, Jones would function well in a structured environment like prison. The record from Jones's direct appeal also reflects that counsel requested and received funds for an investigator to, among other things, search for mitigating evidence such as "Jones's medical history, educational history, employment and training history, family and social history, his correctional history, and any religious or cultural influences." (Trial C. 201.)[6] Counsel asserted in their motion for funds that they "must direct an investigator to obtain records from all doctors, hospitals, schools, employers, and correctional facilities and interview people with knowledge of these aspects of Mr. Jones's background." (Trial C. 201.) Counsel also requested and received funds to secure "expert psychiatric and psychological assistance." (Trial C. 207.)

This is not a case where counsel conducted no investigation into mitigation or where no mitigation evidence was presented.

---

[6]This Court held in Hall v. State, 979 So. 2d 125 (Ala. Crim. App. 2007), that counsel is not ineffective for delegating to a subordinate the responsibility for investigating.

> "[T]rial counsel is afforded broad authority in determining what evidence will be offered in mitigation.' State v. Frazier (1991), 61 Ohio St. 3d 247, 255, 574 N.E.2d 483. We also reiterate that post-conviction proceedings were designed to redress denials or infringements of basic constitutional rights and were not intended as an avenue for simply retrying the case. ... Further, the failure to present evidence which is merely cumulative to that which was presented at trial is, generally speaking, not indicative of ineffective assistance of trial counsel. State v. Combs (1994), 100 Ohio App.3d 90, 105, 652 N.E.2d 205."

Jells v. Mitchell, 538 F.3d 478, 489 (6th Cir. 2008). "'[C]ounsel does not necessarily render ineffective assistance simply because he does not present all possible mitigating evidence.'" Boyd v. State, 913 So. 2d 1113, 1139 (Ala. Crim. App. 2003) (quoting Williams v. State, 783 So. 2d 108, 117 (Ala. Crim. App. 2000)).

> "[A] claim of ineffective assistance of counsel for failure 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. Troy v. State, 57 So. 3d 828, 835 (Fla. 2011). Although the evidence offered by [the petitioner] at the evidentiary hearing was not exactly the same as that presented during the penalty phase, in consideration of the testimony of Dr. Cunningham, the majority of the evidence presented at the evidentiary hearing was referenced at trial."

Frances v. State, 143 So. 3d 340, 356 (Fla. 2014).

> "'"[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." Nields v. Bradshaw, 482 F.3d 442, 454 (6th Cir. 2007) (quoting Broom v. Mitchell, 441 F.3d 392, 410 (6th Cir. 2006)).' Eley v. Bagley, 604 F.3d 958, 968 (6th Cir. 2010). 'This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel.' United States v. Harris, 408 F.3d 186, 191 (5th Cir. 2005). 'Although as an afterthought this [defendant's father] provided a more detailed account with regard to the abuse, this Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for failing to present cumulative evidence.' Darling v. State, 966 So. 2d 366, 377 (Fla. 2007)."

Daniel v. State, 86 So. 3d 405, 429–30 (Ala. Crim. App. 2011).

> "'[I]n order to establish prejudice [under Strickland], the new evidence that a [postconviction] petitioner presents must differ in a substantial way -- in strength and subject matter -- from the evidence actually presented at sentencing.' Hill v. Mitchell, 400 F.3d 308, 319 (6th Cir. 2005), cert. denied, 546 U.S. 1039, 126 S.Ct. 744, 163 L.Ed.2d 582 (2005). In other cases, we have found prejudice because the new mitigating evidence is 'different from and much stronger than the evidence presented on direct appeal,' 'much more extensive, powerful, and corroborated,' and 'sufficiently different and weighty.' Goodwin v. Johnson, 632 F.3d 301, 328, 331 (6th Cir. 2011). We have also based our assessment on 'the volume and compelling nature of th[e new] evidence.' Morales v. Mitchell, 507 F.3d 916, 935 (6th Cir. 2007). If the testimony 'would have added nothing of value,' then its absence was not prejudicial. [Bobby v.] Van Hook, [558 U.S. 4, 12,] 130 S.Ct. [13,] 19 [(2009)]. In short, 'cumulative mitigation evidence' will not suffice. Landrum v. Mitchell, 625 F.3d 905, 930 (6th

> Cir. 2010), petition for cert. filed (Apr. 4, 2011) (10-9911)."

Foust v. Houk, 655 F.3d 524, 539 (6th Cir. 2011).

> "'"Prejudicial ineffective assistance of counsel under Strickland cannot be established on the general claim that additional witnesses should have been called in mitigation. See Briley v. Bass, 750 F.2d 1238, 1248 (4th Cir. 1984); see also Bassette v. Thompson, 915 F.2d 932, 941 (4th Cir. 1990). Rather, the deciding factor is whether additional witnesses would have made any difference in the mitigation phase of the trial." Smith v. Anderson, 104 F. Supp. 2d 773, 809 (S.D. Ohio 2000), aff'd, 348 F.3d 177 (6th Cir. 2003). "There has never been a case where additional witnesses could not have been called." State v. Tarver, 629 So. 2d 14, 21 (Ala. Crim. App. 1993).'"

Hunt v. State, 940 So. 2d 1041, 1067-68 (Ala. Crim. App. 2005).

In Wiggins v. Smith, 539 U.S. 510 (2003), the United States Supreme Court stated:

> "In Strickland [v. Washington, 466 U.S. 668 (1984)], we made clear that, to establish prejudice, a 'defendant must show 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.' Id., at 694, 104 S.Ct. 2052. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

539 U.S. at 534. See also Stafford v. Saffle, 34 F.3d 1557, 1564 (10th Cir. 1994).

The great majority of mitigation evidence that Jones alleged in his amended petition should have been, but was not, presented by counsel was, in fact, presented at the penalty phase of Jones's trial. We, like the circuit court, are confident that the alleged omitted mitigation evidence would have had no impact on the verdict in this case. Therefore, summary dismissal of this claim was proper.

B.

Jones argues that the circuit court erred in summarily dismissing his claim that his trial counsel were ineffective for not objecting to what he characterizes as numerous instances of prosecutorial misconduct during the penalty phase of his trial.

> "An ineffectiveness of counsel claim does not lend itself to a search of the record to pick the instances in which an objection could have been made. Stringfellow v. State, 485 So. 2d 1238 (Ala. Cr. App. 1986). An attorney looking at a trial transcript can always find places where objections could have been made. Hindsight is not always 20/20, but hindsight is always ineffective in evaluating performance of trial counsel."

State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993).

1.

Jones contends that his trial counsel should have objected when, he says, the prosecutor impermissibly commented

on his right to remain silent. Specifically, Jones challenges the following statement made by the prosecutor during closing argument: "Did you watch [Jones] during the trial when they testified, when his own mother was crying? He was cold as he could be." (Trial R. 622.)

In dismissing this claim, the circuit court stated:

> "[T]he prosecutor did not impermissibly comment on Jones's right to remain silent. The record reflects that the prosecutor was asking the jury to consider Jones's physical reaction to the testimony of another witness, which is permissible. See James v. State, 564 So. 2d 1002 (Ala. Crim. App. 1989) (holding that a defendant's conduct or demeanor during trial is a proper subject of comment; Haywood v. State, 501 So. 2d 515 (Ala. Crim. App. 1986) (same); Wherry v. State, 402 So. 2d 1130 (Ala. Crim. App. 1981) (same)."

(C. 1257.) We agree.

The prosecutor's comment was not a comment on Jones's right to remain silent. "The conduct of the accused or the accused's demeanor during the trial is a proper subject of comment." Wherry v. State, 402 So. 2d 1130, 1133 (Ala. Crim. App. 1981). "The prosecutor [is] entitled to make a comment on the demeanor of [the defendant] in the courtroom." Woodall v. Commonwealth, 63 S.W.3d 104, 125 (Ky. 2001). See also Thompson v. State, 153 So. 3d 84, 175 (Ala. Crim. App. 2012). "[C]ounsel could not be ineffective for failing to raise a

baseless objection." Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001).

Therefore, summary dismissal of this claim was proper.

2.

Jones contends that his trial counsel should have objected when, he says, the prosecutor argued improper aggravating circumstances by stating that Kirkland's grandson was a police officer, that Jones had filed a federal lawsuit, and that Jones used "curse words."

In dismissing this claim, the circuit court stated:

> "Jones alleges that trial counsel should have objected to the prosecutor mentioning that the victim's grandson was a police officer, that Jones had filed a federal lawsuit, and that Jones used curse words. Jones argues that these comments constituted impermissible aggravating evidence. Yet, the record shows that the prosecutor did not rely on any of these comments in arguing aggravating circumstances to the jury. Again, the jury was properly instructed on aggravating and mitigating circumstances."

(C. 1258.) We agree. The prosecutor did not argue any improper aggravating circumstances, and the jury was properly instructed on the aggravating circumstances the State relied on in the penalty phase. In addition, some of the above comments constituted victim-impact evidence, and "we have repeatedly held that victim-impact evidence is admissible at

the penalty phase of a capital trial." Lee v. State, 44 So. 3d 1145, 1174 (Ala. Crim. App. 2009). "[C]ounsel could not be ineffective for failing to raise a baseless objection." Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001).

Therefore, summary dismissal of this claim was proper.

3.

Jones also contends that trial counsel should have objected to the prosecutor questioning Dr. Alfredo Paredes, the pathologist who conducted the autopsy on Kirkland, about other capital murders.

At the penalty phase, the State submitted to the jury the aggravating circumstance that the murder was "especially heinous, atrocious, or cruel compared to other capital offenses." Section 13A-5-49(8), Ala. Code 1975 (emphasis added). The jury was properly instructed on the application of this aggravating circumstance. If any error did occur in the prosecutor's questioning of Dr. Paredes, we conclude that the error was harmless beyond a reasonable doubt. "'Harmless error does not rise to the level of the prejudice required to satisfy the Strickland test.'" State v. Kerley, 260 So. 3d 891, 902 (Ala. Crim. App. 2017) (quoting Gaddy v. State, 952 So. 2d 1149, 1160 (Ala. Crim. App. 2006)).

Therefore, summary dismissal of this claim was proper.

4.

Jones contends that his trial counsel should have objected when the prosecutor stated during closing argument that there was no evidence that Jones's family had a history of drug use. However, as the State correctly argues in its brief, this claim was not raised in Jones's amended petition; therefore, it is not properly before this Court and will not be considered.

> "'It is well settled that "[a]n appellant cannot raise an issue on appeal from the denial of a Rule 32 petition which was not raised in the Rule 32 petition." Arrington v. State, 716 So. 2d 237, 239 (Ala. Crim. App. 1997).' Mashburn v. State, 148 So. 3d 1094, 1106 (Ala. Crim. App. 2013). See also Ex parte Clemons, 55 So. 3d 348, 351 (Ala. 2007) ('We cannot, however, consider the issue whether the trial court erred in failing to consider Clemons's borderline intellectual capacity as a mitigating factor in the sentencing phase of his trial because the issue was not presented to the trial court in Clemons's Rule 32 petition.'); Dunaway v. State, [198 So. 3d 530] (Ala. Crim. App. 2009) ('This issue was not raised in Dunaway's consolidated amended Rule 32 petition. Therefore, it is not properly before this Court.'); Hooks v. State, 21 So. 3d 772, 795 (Ala. Crim. App. 2008) ('These claims were not raised in Hooks's third amended postconviction petition.')."

Stallworth v. State, 171 So. 3d 53, 74-75 (Ala. Crim. App. 2013).

Jones contends that his trial counsel should have objected when, he says, the prosecutor misstated the law on mitigating evidence. Specifically, Jones argues that the prosecutor improperly characterized mitigating evidence as "excuses." (Jones's brief, p. 68.) During rebuttal closing argument, the prosecutor stated: "And [defense counsel] evidently he wants to stand up here and says because he didn't have a father, didn't have a father figure, he has low intelligence. These are excuses." (Trial R. 1497.)

> "This Court has long recognized that a prosecutor cannot improperly denigrate mitigation during a closing argument. See Brooks v. State, 762 So. 2d 879, 904 (Fla. 2000) (holding that characterizing mitigating circumstances as 'excuses' was an improper denigration of the case offered in mitigation). However, we do not reach the assertion in this claim that counsel was ineffective under Strickland because we find no error in the postconviction court's determination that Williamson failed to meet the prejudice prong of Strickland. The sentencing judge found three aggravating circumstances: (1) Williamson was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person; (2) the capital felony was committed while Williamson was engaged or was an accomplice in the commission of or an attempt to commit burglary, robbery, and kidnapping; and (3) the capital felony was especially HAC. As detailed above, he found evidence supporting eleven nonstatutory mitigating factors and gave each factor some or little weight. In reviewing the comments in light of the record, we

> do not conclude that the brief mention of the word 'excuses' undermines confidence in the outcome."

Williamson v. State, 994 So. 2d 1000, 1014-15 (Fla. 2008).

Similarly, here, "even if counsel should have objected to the prosecutor's arguments, [we conclude that] the absence of objections did not affect the outcome of the trial." Stallworth v. State, 171 So. 3d 53, 67 (Ala. Crim. App. 2013). The jury was properly instructed on "their responsibility and the proper role mitigating evidence was to play in the discharge of that responsibility," State v. Feaster, 156 N.J. 1, 87, 716 A. 2d 395, 438 (1998), and "jurors are presumed to follow, not disregard, the trial court's instructions." Brooks v. State, 973 So. 2d 380, 409 (Ala. Crim. App. 2007).

Therefore, summary dismissal of this claim was proper.

6.

Jones also contends that the cumulative effect of counsel's failure to object to multiple incidents of alleged prosecutorial misconduct prejudiced him and warrants a new trial. When discussing the application of cumulative error to claims of ineffective assistance of counsel, this Court has stated:

> "Other states and federal courts are not in agreement as to whether the 'cumulative effect'

analysis applies to Strickland claims. As the Supreme Court of North Dakota noted in Garcia v. State, 678 N.W.2d 568, 578 (N.D. 2004):

> "'Garcia argues that even if trial counsel's individual acts or omissions are insufficient to establish he was prejudiced, the cumulative effect was substantial enough to meet Strickland's test. See Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995) ("In making this showing, a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet Strickland's test"); but see Scott v. Jones, 915 F.2d 1188, 1191 (8th Cir. 1990) ("cumulative error does not call for habeas relief, as each habeas claim must stand or fall on its own").'"

"See also Holland v. State, 250 Ga. App. 24, 28, 550 S.E.2d 433, 437 (2001) ('Because the so-called cumulative error doctrine is inapplicable, each claim of inadequacy must be examined independently of other claims, using the two-prong standard of Strickland v. Washington.' (footnote omitted)); Carl v. State, 234 Ga. App. 61, 65, 506 S.E.2d 207, 212 (1998) ('Georgia does not recognize the cumulative error rule.'); Fisher v. Angelone, 163 F.3d 835, 852 (4th Cir. 1998) ('Not surprisingly, it has long been the practice of this Court to individually assess claims under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). See, e.g., Hoots v. Allsbrook, 785 F.2d 1214, 1219 (4th Cir. 1986) (considering ineffective assistance claims individually rather than considering their cumulative impact.).').

"We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel. However, the Alabama Supreme Court has held that the

> cumulative effect of prosecutorial misconduct necessitated a new trial in Ex parte Tomlin, 540 So. 2d 668, 672 (Ala. 1988) ('We need not decide whether either of the two errors, standing alone, would require a reversal; we hold that the cumulative effect of the errors probably adversely affected the substantial rights of the defendant and seriously affected the fairness and integrity of the judicial proceedings.'). Also, in Ex parte Bryant, [951 So. 2d 724] (Ala. 2002), the Supreme Court held that the cumulative effect of errors may require reversal.
>
> "If we were to evaluate the cumulative effect of the ineffective assistance of counsel claims, we would find that Brooks's substantial rights were not injuriously affected. See Bryant and Rule 45, Ala. R. App. P."

Brooks v. State, 929 So. 2d 491, 514 (Ala. Crim. App. 2005).

Similarly, here, if we were to evaluate the cumulative effect counsel's alleged errors, we would conclude that Jones's substantial rights were not violated. Therefore, summary dismissal of this claim was proper.

III.

Jones argues that his appellate counsel were ineffective for not raising certain issues on appeal. Specifically, Jones alleged in his amended petition that his appellate counsel should have raised the following issues on appeal: (1) that the State violated Batson v. Kentucky, 476 U.S. 79 (1986); (2) that the prosecutor engaged in prosecutorial misconduct; (3) that the death penalty is unconstitutional because Jones

was only 18 years old when he committed the murder; and (4) that the trial court improperly placed the burden of proof on him at the suppression hearing.

When considering claims of ineffective assistance of appellate counsel, this Court has stated:

> "'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).'"

Moody v. State, 95 So. 3d 827, 836 (Ala. Crim. App. 2011) (quoting Thomas v. State, 766 So. 2d 860, 876 (Ala. Crim. 1998), overruled on other grounds, Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005)).

> "If a legal issue 'would in all probability have been found to be without merit' had counsel raised the issue on direct appeal, the failure of appellate counsel to raise the meritless issue will not render appellate counsel's performance ineffective. Rutherford v. Moore, 774 So. 2d 637, 643 (Fla. 2000)."

Frances v. State, 143 So. 3d 340, 357 (Fla. 2014).

In dismissing this claim, the circuit court stated:

> "The record does not establish that purposeful racial discrimination occurred during jury selection, so appellate counsel is not deficient for deciding not to raise Batson on direct appeal. However, Jones raised Batson in his petition for a writ of certiorari in the Alabama Supreme Court. In capital cases, the Alabama Supreme Court has granted certiorari on a Batson issue, even when the issue was not raised in the Court of Criminal Appeals. See e.g., Ex parte Sharp, [151 So. 3d 329] (Ala. 2009). Appellate counsel did not waive Jones's Batson argument by failing to raise it in the Court of Criminal Appeals.
>
> "....
>
> "Jones references other portions of his amended petition in which he argues that prosecutorial misconduct occurred. Specifically, Jones references

Section II.O, II.D.2, II.D.6, II.P., and III.D of his amended Rule 32 petition. In the sections of this order that correspond to those sections, this Court finds that there was no prosecutorial misconduct, or if there was, it was harmless. For these reasons, this Court finds that Jones could not prove deficient performance of trial or appellate counsel or prejudice on the facts pleaded, assuming they are true, at an evidentiary hearing. Accordingly, this claim is dismissed.

"....

"Jones makes that same argument [that appellate counsel was ineffective for not arguing that the death penalty was unconstitutional due to his age and mental capacity] with regard to his trial counsel. ... Because Jones was eighteen years old when he committed murder, he is eligible for the death penalty and is due no relief under Roper [v. Simmons, 543 U.S. 551 (2005)]. Accordingly, Jones could not show at an evidentiary hearing that his appellate counsel were deficient in deciding not to raise an argument based on Roper. Likewise, Jones would not show prejudice.

"....

"Jones alleges that his appellate counsel should have argued on appeal that the trial court erred in requiring him to establish at trial that his statements to police were voluntary. This claim is not facially meritorious.

"The record does not reflect that the trial court required Jones to establish that his statements were voluntary. The trial court instructed the defense to go forward with its motion to suppress, but the court did not indicate that it required Jones to prove that the statements were voluntary.

> "For these reasons, Jones would be unable to prove deficient performance or prejudice upon these facts at an evidentiary hearing. Accordingly, this claim is dismissed."

(R. 1265-68.) We agree with the circuit court.

The Batson claim and the claims of prosecutorial misconduct have been addressed previously in this opinion and found not to constitute error or, at the most, to constitute harmless error. Also, Jones was 18 years of age when he committed the murder. The United States Supreme Court in Roper v. Simmons, 543 U.S. 551 (2005), held that it was unconstitutional to execute a defendant for a crime that was committed when the defendant was under the age of 18. Thus, the death penalty is not unconstitutional as applied to Jones. Last, there is no indication that the trial court applied the incorrect standard when evaluating the admissibility of Jones's statements to police. In fact, at the beginning of the suppression hearing, Jones's counsel specifically stated: "Judge, I believe when we filed the motion, the burden shifted to the State." (Trial R. 252-325.) Regardless, on direct appeal, this Court held that the statements were properly admitted into evidence and that, even if error occurred, the admission of the statements was harmless. Appellate counsel

cannot be ineffective for not raising on appeal an issue that has no merit.

Therefore, summary dismissal of this claim was proper.

IV.

Jones argues that the State violated Brady v. Maryland, 373 U.S. 83 (1963), and Napue v. Illinois, 360 U.S. 264 (1959), when, he says, it suppressed evidence and knowingly used false evidence at trial.[7] Specifically, Jones alleged in his amended petition that the State suppressed evidence of a report regarding an interrogation that occurred before Jones was advised of his rights under Miranda v. Arizona, 384 U.S. 436 (1966), and that, during this interrogation, Jones was assaulted by police. Jones further alleged that the State knowingly used false testimony from Jones's mother, Jill Whitsett, that she did not use drugs or alcohol despite the

[7]Jones raised additional Brady violations in his amended petition; however, he does not pursue those claims on appeal. See Ferguson v. State, 13 So. 3d 418, 436 (Ala. Crim. App. 2008) ("[C]laims presented in a Rule 32 petition but not argued in brief are deemed abandoned.").

fact that Whitsett's husband had been prosecuted for the sale of a controlled substance.[8]

In dismissing these claims, the circuit court stated:

> "[Jones] alleges that the State elicited false testimony of a defense witness. Specifically, Jones alleges that the prosecutor would have known that the testimony of Jones's mother, Jill Whitsett, that she did not use drugs or abuse alcohol was untrue, because the State prosecuted Jill Whitsett's husband, Demetrius Whitsett, for sale of a controlled substance, and her husband was arrested at her house. Jones cites Napue [v. Illinois, 360 U.S. 264 (1959)], which is distinguishable because the prosecutor in Napue called a witness for the State who falsely testified that he had received no promise or consideration in return for his testimony, though in fact the prosecutor had promised witness consideration, and the prosecutor did nothing to correct false testimony of witness. Napue, 360 U.S. at 265.
>
> "The prosecutor was under no duty to provide information on Demetrius Whitsett's prosecution, especially considering Jill Whitsett was not the State's witness. It is unclear based upon Jones's pleading whether the prosecutor actually remembered Demetrius Whitsett's prosecution at the time of Jones's trial. But even if he did remember, simply because Demetrius Whitsett sold drugs does not mean that Jill Whitsett used drugs and alcohol. Jones does not allege that the prosecutor or Jill Whitsett were present when Demetrius Whitsett was arrested at this home, and there is no allegation that the prosecutor knew about Demetrius Whitsett's federal prosecution.

[8]We noted that Whitsett was called by Jones and not the State.

> "[Jones] alleges that the State did not provide 'any report' of a police interrogation that occurred the night Jones was arrested for capital murder. However, Jones does not allege that any report actually exists. The record shows that the State provided appropriate discovery regarding the interrogation of Jones, and the trial court heard argument on whether the interrogation violated Jones's constitutional rights. The trial court decided that Jones's rights were not violated."

(C. 1262-63.) We agree with the circuit court.

> "To prove a Brady violation, a defendant must show:(1) that the prosecution suppressed evidence, (2) that the evidence was of a character favorable to the defense, (3) that the evidence was material [or the defendant was prejudiced]."

Jefferson v. State, 645 So. 2d 313, 315 (Ala. Crim. App. 1994).

> "'There is no Brady violation where the information in question could have been obtained by the defense through its own efforts.' Johnson [v. State], 612 So. 2d [1288] at 1294 [(Ala. Crim. App. 1992) ]; see also Jackson v. State, 674 So. 2d 1318 (Ala. Cr. App. 1993), aff'd in part and rev'd in part on other grounds, 674 So. 2d 1365 (Ala. 1995). '"Evidence is not 'suppressed' if the defendant either knew ... or should have known ... of the essential facts permitting him to take advantage of any exculpatory evidence." United States v. LeRoy, 687 F.2d 610, 618 (2d Cir. 1982)[, cert. denied, 459 U.S. 1174, 103 S.Ct. 823, 74 L.Ed.2d 1019 (1983)].' Carr v. State, 505 So. 2d 1294, 1297 (Ala. Cr. App. 1987) (noting, 'The statement the appellant contends was suppressed in this case was his own, and no reason was set forth to explain why he should not have been aware of it.'). Where there is no suppression of

> evidence, there is no Brady violation. Carr, 505 So. 2d at 1297."

Freeman v. State, 722 So. 2d 806, 810-11 (Ala. Crim. App. 1998). No Brady violation occurs when the facts alleged to have been suppressed were within the knowledge of the defendant. Clearly, information that Jones was interrogated and assaulted before he was advised of his Miranda rights was information within Jones's knowledge.

> "'[A] conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment....' Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).
>
> "[T]he knowing use of material false evidence by the state in a criminal prosecution does violate due process. Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108 (1972); Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217, 1221 (1959); Mooney v. Holohan, 294 U.S. 103, 112, 55 S.Ct. 340, 341-42, 79 L.Ed. 791, 794 (1935); Skipper v. Wainwright, 598 F.2d 425, 427 (5th Cir.) (per curiam), cert. denied, 444 U.S. 974, 100 S.Ct. 469, 62 L.Ed.2d 389 (1979). This rule applies equally when the state, although not soliciting perjured testimony, allows it to go uncorrected after learning of its falsity. Giglio, 405 U.S. at 153, 92 S.Ct. at 766, 31 L.Ed.2d at 108; Napu[e], 360 U.S. at 269, 79 S.Ct. at 1177, 3 L.Ed.2d at 1221. In addition, "[i]t is of no consequence that the falsehood [bears] upon the witness' credibility rather than directly upon [the] defendant's guilt." Napue, 360 U.S. at 269, 79 S.Ct. at 1177, 3 L.Ed.2d at 1221 (quoting People v. Savvides, 1 N.Y.2d 554, 557, 136 N.E.2d 853, 854,

> 154 N.Y.S.2d 885, 887 (1956)); see Giglio, 405 U.S. at 154, 92 S.Ct. at 766, 31 L.Ed.2d at 108."

Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984).

> "To prove a Giglio v. United States, 405 U.S. 150, 92 S.Ct. 763, 31 L.Ed.2d 104 (1972), violation [or a Napue v. Illinois, 360 U.S. 264 (1959), violation], the petitioner must show that: (1) the State used the testimony; (2) the testimony was false; (3) the State knew the testimony was false; and (4) the testimony was material to the guilt or innocence of the accused. Williams v. Griswald, 743 F.2d [1533] at 1542 [(11th Cir. 1984)]. '[T]he defendant must show that the statement in question was "indisputably false," rather than merely misleading.' Byrd v. Collins, 209 F.3d 486, 517 (6th Cir. 2000) (quoting United States v. Lochmondy, 890 F.2d 817, 823 (6th Cir. 1989)). 'The burden is on the defendants to show that the testimony was actually perjured, and mere inconsistencies in testimony by government witnesses do not establish knowing use of false testimony.' Lochmondy, 890 F.2d at 822. '[I]t is not enough that the testimony is challenged by another witness or is inconsistent with prior statements, and not every contradiction in fact or argument is material.' United States v. Payne, 940 F.2d 286, 291 (8th Cir. 1991) (citing United States v. Bigeleisen, 625 F.2d 203, 208 (8th Cir. 1980)). '[T]he fact that a witness contradicts himself or herself or changes his or her story does not establish perjury.' Malcum v. Burt, 276 F. Supp. 2d 664, 684 (E.D. Mich. 2003) (citing Monroe v. Smith, 197 F. Supp.2d 753, 762 (E.D. Mich. 2001))."

Perkins v. State, 144 So. 3d 457, 469–70 (Ala. Crim. App. 2012).

Here, Whitsett's testimony that she did not use drugs or alcohol was elicited by Jones's counsel, not the State, during the penalty phase of the trial. Although Jones alleged in his amended petition that the State knew the testimony was false because Whitsett's husband had been arrested for the unlawful distribution of a controlled substance, as the circuit court pointed out, "simply because Demetrius Whitsett sold drugs does not mean that Jill Whitsett used drugs and alcohol." (C. 1263.) Nor does it indicate that the State knew that Whitsett's testimony was false.

Therefore, summary dismissal of these claims was proper.

V.

Finally, Jones argues that the circuit court erred in adopting the State's proposed order as its own. He relies on Ex parte Ingram, 51 So. 3d 1119 (Ala. 2010), and Ex parte Scott, 262 So. 3d 1266 (Ala. 2011), to support his argument.

> "'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). '[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)."

Riley v. State, 270 So. 3d 291, 297-98 (Ala. Crim. App. 2018).

In Ex parte Ingram, the Alabama Supreme Court found reversible error in the circuit court's adoption of the State's proposed order where the circuit court made patently erroneous statements that it had personal knowledge of the case and had "'presided over Ingram's capital murder trial and personally observed the performance of both lawyers throughout Ingram's trial and sentencing,'" 51 So. 3d at 1123 (citation and emphasis omitted), when, in fact, it had not. In Ex parte Scott, the Alabama Supreme Court found reversible error in the circuit court's adoption of the State's answer to the petition, which, "by its very nature, is adversarial and sets forth one party's position in the litigation." 262 So. 3d at 1274.

However, the circuit court's order here is not infected with the errors that warranted reversal in Ex parte Ingram and Ex parte Scott. To the contrary, there is nothing in the

order that suggests that it was not the product of the circuit court's own independent judgment. Therefore, we find no error in the circuit court's adoption of the State's proposed order.

VI.

Based on the foregoing, the judgment of the circuit court summarily dismissing Jones's Rule 32 petition is affirmed.

AFFIRMED.

Windom, P.J., and McCool and Minor, JJ., concur. Cole, J., recuses himself.

AlaFile E-Notice

38-CC-2000-000353.60

Judge: TEH

To: HOWELL CARMEN FRANCIS
cfhowell@gmail.com

# NOTICE OF ELECTRONIC FILING

IN THE CIRCUIT CRIMINAL COURT OF HOUSTON COUNTY, ALABAMA

STATE OF ALABAMA V. JONES ANTONIO DEVOE
38-CC-2000-000353.60

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**IN THE CIRCUIT COURT OF HOUSTON COUNTY, ALABAMA**

| | | |
|---|---|---|
| ANTONIO DEVOE JONES, | ) | |
| | ) | |
| Petitioner, | ) | |
| | ) | |
| v. | ) | Case No. CC-2000-353.60 |
| | ) | |
| STATE OF ALABAMA, | ) | |
| | ) | |
| Respondent. | ) | |

**FINAL ORDER**

Having considered the record on appeal in this case, Petitioner Jones's first and amended Rule 32, Ala. R. Crim. P., petitions, the State's answers, the State's motion to dismiss the amended petition, and oral argument on the State's motion to dismiss, the Court hereby grants the State's motion and summarily **DISMISSES** Jones's amended Rule 32 petition.

**INTRODUCTION**

Jones was convicted of capital murder on March 12, 2004, for the December 31, 1999 murder of Ruth Kirkland. (R. 841-43.) Jones was sentenced to death. Following the completion of his direct appeals, Jones timely filed a petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.

In Jones's amended petition, he alleges that instances of deficient performance on the part of his trial counsel rendered his trial fundamentally unreliable and that the State failed to meet its discovery obligations at trial. Jones filed his Rule 32 petition on January 23, 2009. The State filed an answer on February 25, 2009. This Court entered an order summarily dismissing the petition for lack of prosecution on August 4, 2010. The case was later reinstated by agreement of the parties. At that time, Jones was given until May 2, 2011, to file an amended petition. Jones later requested additional time to file an amended petition and was given additional time, up to July 1, 2011. However, Jones did not file an amended petition by July 1, 2011.

On July 12, 2012, the Court set an evidentiary hearing for October 18, 2012, in this case for the purpose of getting the case moving. The Court does not want to be misunderstood as having found, implicitly or explicitly, any of Jones's claims to be facially meritorious simply because an evidentiary hearing was set in this case. The Court is aware of the Alabama Supreme Court's holding in Ex parte McCall, 30 So. 3d 400, 404 (Ala. 2008). "By holding

[an evidentiary] hearing, the trial court implicitly found that the issues presented were material issues of law or fact which would entitle McCall to relief, Rule 32.7(d) [Ala. R. Crim. P.], and, under Rule 32.9(d), the trial court therefore had a responsibility to make findings of fact as to each of those issues." Id. (brackets and quotation marks omitted; emphasis added). However, this Court has not held an evidentiary hearing in this case; therefore, McCall does not apply, and Rule 32.9(d)'s written-findings requirement has not triggered.

Jones requested a continuance of the October 2012 hearing, which was granted. A hearing was set for November 29, 2012. Jones again requested a continuance, and the Court again granted his request.

Jones filed an amended Rule 32 petition on April 4, 2013. The State answered Jones's amended petition and moved to summarily dismiss it on July 2, 2013. The Court heard argument on the State's motion to dismiss on November 1, 2013.

For the reasons stated below, this Court grants the State's motion to dismiss and hereby **DISMISSES** Jones's Amended Rule 32 Petition.

## LEGAL PRINCIPLES CONSIDERED

Rule 32.3 of the Alabama Rules of Criminal Procedure, provides:

> The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by preponderance of the evidence.

Further, Rule 32.6(b) of the Alabama Rules of Criminal Procedure provides:

> 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.

To be entitled to an evidentiary hearing, a petition must be meritorious on its face.

> A petition for [postconviction relief] is "meritorious on its face" only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts), Thomas v. State, [274 Ala. 531, 150 So. 2d 387 (1963)]; Ex parte Phillips, 276 Ala. 282, 161 So. 2d 485 (1964); Stephens v. State, 420 So. 2d 826 (Ala. Crim. App. 1982), sufficient to show that the petitioner is entitled to relief if those facts are true.

Ex parte Clisby, 501 So. 2d 483, 486 (Ala. 1986).

Rule 32.7(d), Ala. R. Crim. P., provides for the summary disposition of a petition for postconviction relief as follows:

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

The United States Supreme Court in Strickland v. Washington, 466 U.S. 668 (1984), set out a two-prong test to be used by courts in judging claims of ineffective assistance of counsel. First, a defendant must identify the specific acts or omissions that he alleges were not the result of reasonable professional judgment on counsel's part and show that these acts or omissions fall "outside the wide range of professionally competent assistance." Id. at 690. If he meets this burden, he then must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. "A reasonable probability is a probability sufficient to

undermine confidence in the outcome." Id.; see Ex parte Lucas, 865 So. 2d 418, 421 (Ala. 2002) (upholding the trial court's denial of a Rule 32 petition on the basis that "'when a simple reading of a Rule 32 petition shows that, assuming the allegations of the petition to be true, it is obviously without merit . . . , the trial court may summarily dismiss the petition without requiring any response from the State'") (internal citation omitted).

In a Rule 32 proceeding, the petitioner has the burden of pleading "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis for those grounds." Ala. R. Crim. P. 32.3, 32.6(b). Thus, the petitioner must include in his petition a full disclosure of the facts that, if true, would establish both deficient performance and prejudice. If the petitioner fails to specifically plead these facts, summary dismissal is appropriate. See Bracknell v. State, 883 So. 2d 724, 727-28 (Ala. Crim. App. 2003). Courts do not have to consider the deficient performance prong if they find that facts do not support the prejudice prong, and vice versa. See McWilliams v. State, 897 So. 2d 437, 441-42 (Ala. Crim. App. 2004).

## ANALYSIS

### I. INEFFECTIVE-COUNSEL CLAIMS RELATED SPECIFICALLY TO ATTORNEY CLARK PARKER

#### A. THE CLAIM THAT JONES WAS "SEVERELY PREJUDICED" BY PARKER'S ALLEGED "ALCOHOL-RELATED IMPAIRMENT"

Clark Parker was one of the two attorneys appointed to represent Jones in his capital murder trial. Jones argues that Parker had an alcohol problem during the trial and that Parker was impaired during his representation of Jones. (Am. Pet. at ¶¶ 15-22.) This claim is not facially meritorious; therefore, this claim is dismissed.

The United States District Court for the Northern District Of Illinois examined a similar issue in United States v. Lloyd, 983 F. Supp. 738, 742 (N.D. Ill. 1997). Lloyd claimed that one of his two trial attorneys, F. Lee Bailey, was drunk during portions of his trial. The district court held that a claim alleging ineffective assistance due to a drunk attorney must allege how counsel's alleged alcohol impairment actually caused constitutionally deficient performance and prejudice. Id. at 743.

While Jones pleads in detail that Parker had an alcohol problem, Jones does not plead that an act or omission by

Parker was caused by Parker's being drunk. Accordingly, Jones fails to plead sufficient facts to support a finding of deficient performance. Likewise, Jones does not plead with adequate specificity that he was prejudiced by Parker's allegedly impaired performance.

Furthermore, as the district court noted in Lloyd, 983 F. Supp. at 743, Lloyd had another attorney who he did not allege was impaired by alcohol during trial. Like Lloyd, Jones had a second attorney. Tom Brantley represented Jones and actually served as Jones's primary counsel. This fact weighed against a finding of a Strickland violation in Lloyd, as it does here. Id.

This claim is dismissed.

**B. THE ALLEGATION THAT ATTORNEYS PARKER AND BRANTLEY LABORED UNDER AN ACTUAL CONFLICT OF INTEREST**

Jones alleges that his trial counsel, Clark Parker and Tom Brantley, were actually conflicted because Parker was charged with DUI by Doug Valeska, who prosecuted Jones for capital murder, and because Brantley represented Parker in the DUI proceedings. (Am. Pet. at ¶¶ 23-49.) Assuming the facts pleaded were proved by a preponderance of the evidence at an evidentiary hearing, Jones would not

establish that his trial counsel were conflicted. For the reasons stated below, this claim is not facially meritorious; therefore, it is dismissed.

A defendant claiming that his trial counsel had an actual conflict must show "that his counsel actively represented conflicting interests," or that his counsel "made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other." M.S. v. State, 822 So. 2d 449, 453 (Ala. Crim. App. 2000) (internal citation omitted).

Jones alleges that Parker — and Brantley, acting as Parker's lawyer — had an "incentive and duty" to protect Parker's interests. Of course, as Jones's lawyer, Brantley also had an "incentive and duty" to protect Jones's interests. The prosecution of Parker for DUI by the same prosecutor who was prosecuting Jones does not itself give rise to an actual conflict. Essentially, Jones makes a bald allegation that his trial counsel could have made decisions against Jones's interests to "curry favor" with Doug Valeska. However, Jones does not plead that there was an agreement between his trial counsel and Valeska for

trial counsel to do anything in exchange for special treatment of Parker in his DUI case. Nor does Jones plead with adequate specificity that trial counsel actually did something that was against Jones's interests, or failed to do something that would have benefited Jones, because of the alleged conflict.

The record shows that Jones's trial counsel filed appropriate motions on his behalf and adequately represented him at trial. For these reasons, this claim is not facially meritorious and therefore is dismissed.

## II. CLAIMS ALLEGING THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE DURING THE GUILT PHASE OF HIS TRIAL

Jones alleges that his trial counsel were ineffective during the guilt phase of his capital murder trial. (Am. Pet. at ¶¶ 50-349.) This claim is not facially meritorious; therefore, it is dismissed. Jones's claim is organized in several subclaims, which are considered independent claims for relief. See, e.g., Washington v. State, 95 So. 3d 26, 58 (Ala. Crim. App. 2012); Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds by Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005) (both recognizing that a claim of

ineffective assistance of counsel is a general claim that often consists of subcategories or subclaims and that each subcategory or subclaim is considered an "independent claim"). Therefore, this Court addresses each claim individually.

### A. THE CLAIM THAT TRIAL COUNSEL WERE INEFFECTIVE IN ARGUING FOR THE SUPPRESSION OF JONES'S STATEMENTS TO POLICE

Jones challenges his trial counsel's effectiveness in arguing for the suppression of his statements to police. Jones first alleges that trial counsel should have argued that his rights under Miranda v. Arizona, 384 U.S. 436 (1966), were violated and second alleges that police coerced his statements by assaulting him. (Am. Pet. at ¶¶ 55-72.) These allegations are not facially meritorious.

First, the record refutes Jones's allegation that trial counsel did not argue that his Miranda rights were violated. Trial counsel filed a pretrial motion requesting suppression of Jones's custodial statements on Miranda grounds. (C. 182-83.) The motion was denied. (C. 257.) Furthermore, the record shows that Jones was properly Mirandized. (R. 286-87.)

The Alabama Court of Criminal Appeals reviewed Jones's Miranda claim for plain error and found that Jones was properly Mirandized and that his statements were voluntary and properly admitted. Jones v. State, 987 So. 2d 1156, 1162-65 (Ala. Crim. App. 2006). Though a finding of no plain error on direct appeal does not automatically foreclose Jones from arguing that he was prejudiced by his counsel's performance at the suppression hearing, the Court of Criminal Appeals' finding is relevant here. See Ex parte Taylor, 10 So. 3d 1075, 1078 (Ala. 2005) ("Although it may be the rare case in which the application of the plain-error test and the prejudice prong of the Strickland test will result in different outcomes, a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel."). Jones has not alleged facts that, if true, would establish that his is a "rare case." Id.

Second, Jones alleges that the police coerced his statements "by violently ramming his head into a door." (Am. Pet. at ¶ 67.) He claims his trial counsel should

have argued for exclusion of his statements on this ground. This claim is not facially meritorious.

Jones fails to plead that his counsel knew or explain why they should have known of the alleged assault by police. See Alderman v. State, 647 So. 2d 28, 33 (Ala. Crim. App. 1994) (noting that a petitioner alleging a claim of ineffective assistance must plead that counsel had "knowledge of facts giving rise to the claim asserted"). Jones argues that counsel should have interviewed him and reviewed the transcript of his statement in which he complains of a headache. However, an assault like the one described is not something that counsel would routinely ask a client about. There would have to be some reason to ask, and Jones offers no reason other than the transcript in which he complains of a headache. This Court cannot find, even if the facts pleaded are true, that trial counsel performed deficiently because they did not ask Jones why he had a headache during a police interview. Furthermore, Jones does not allege that he told his counsel that his statement to police was beaten out of him, something one would imagine a defendant would tell his counsel in a capital murder trial.

Finally, Jones alleges that his sister, Lakeisha Jones, witnessed the alleged assault and could have told counsel about it if only they had asked her, but again Jones does not allege a reason why counsel should have asked Lakeisha Jones about any incident involving police brutality. Certainly, one would suspect that Lakeisha Jones would tell Jones's trial counsel about such an incident, if it actually happened and she knew about it.

For the foregoing reasons, Jones's allegations that his trial counsel were constitutionally ineffective in moving to suppress his statements are not facially meritorious. Accordingly, these claims are summarily dismissed.

**B. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR NOT ASSERTING HIS RIGHT TO A SPEEDY TRIAL**

Jones argues that his right to a speedy trial was violated because he awaited trial for fifty months and trial counsel did not assert his right. (Am. Pet. at ¶¶ 73-80.) This claim is not facially meritorious; therefore, it is dismissed.

There is no merit to Jones's claim that he was denied his right to a speedy trial. "Counsel is not ineffective for failing to object to an issue that has no merit."

Washington v. State, 95 So. 3d 26, 71 (Ala. Crim. App. 2012). A speedy trial motion based only on the facts pleaded in Jones's amended petition would have been denied.

In Barker v. Wingo, 407 U.S. 514 (1972), the United States Supreme Court set out factors to consider in judging whether a defendant's right to speedy trial has been violated: (1) the length of the delay, (2) the reasons for the delay, (3) the defendant's assertion of his right to a speedy trial, and (4) the degree of prejudice to the defendant.

Jones pleads only that there was a fifty-month delay in his trial. However, "the length of delay is merely a starting point for a balancing of the remaining [Barker] factors" and "is itself not dispositive." Yocum v. State, 107 So. 3d 219, 227 (Ala. Crim. App. 2012). Jones does not explain the reasons for the delay. Rather, he makes a bald allegation that the State is to blame. (Am. Pet. at ¶ 75.) Consequently, this claim is not facially meritorious and therefore is dismissed.

### C. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR NOT SECURING A CHANGE OF VENUE

Jones alleges that his trial counsel were ineffective in litigating his motion for a change of venue and that the motion should have been granted because of "extensive media saturation." (Am. Pet. at ¶ 83.) This claim is not facially meritorious. Accordingly, it is dismissed.

Jones argues that his trial counsel failed to adequately voir dire potential jurors about their exposure to media coverage, and that they failed to prepare the motion for a change of venue. Assuming the facts pleaded by Jones as true, Jones would not prove at an evidentiary hearing that his trial counsel's performance fell below professional standards or that he was entitled to a change of venue. Therefore, Jones has failed to plead facts sufficient to prove deficient performance and prejudice at an evidentiary hearing.

Under Alabama Code § 15-2-20(a), a defendant is entitled to a change of venue to another county only if he can show to the reasonable satisfaction of the trial court that a "fair and impartial" trial cannot be had in the county in which the indictment is found. Merely because jurors are not totally ignorant of the facts and issues

involved in this particular case does not mean that an unbiased verdict could not be obtained. See Langham v. State, 494 So. 2d 910, 913 (Ala. Crim. App. 1986).

First, Jones does not specifically plead what effective trial counsel would have asked prospective jurors about their exposure to media coverage or what the jurors' responses would have been. Second, trial counsel presented evidence in an attempt to show adequate negative pretrial publicity to warrant a change of venue. Jones does not allege why trial counsel's efforts on this front were not constitutionally effective. Rather, he alleges that trial counsel could have done more in litigating the change-of-venue motion. But, even if Jones is right that trial counsel could have done more, that does not establish deficient performance. Furthermore, the media coverage Jones describes, if proved, would not establish that it was impossible for Jones to receive a "fair and impartial" trial in Houston County.

For these reasons, the facts pleaded in Jones's amended Rule 32 petition would not establish deficient performance and prejudice at an evidentiary hearing. Accordingly, this claim is meritless on its face and is dismissed.

**D. THE CLAIM THAT TRIAL COUNSEL WERE INEFFECTIVE DURING JURY SELECTION**

Jones argues (1) that trial counsel's own comments during jury selection prejudiced him, (2) that counsel failed to prevent a "death-prone" jury from being empanelled, (3) that counsel failed to ensure that the prosecutor did not engage in racial discrimination during jury selection, (4) that counsel failed to strike for cause biased jurors, (5) that counsel did not utilize individual voir dire for "sensitive" questioning, and (6) that counsel failed to object to alleged prosecutorial misconduct during jury selection. (Am. Pet. at ¶¶ 113–153.) For the reasons stated below, these claims are meritless on their face; therefore, they are dismissed.

When reviewing claims of ineffective assistance of counsel related to counsel's performance during voir dire examination, this Court gives "great deference to the counsel's decisions." Perkins v. State, No. CR-08-1927, 2012 WL 5381345, at *10 (Ala. Crim. App. Nov. 2, 2012). "Counsel is accorded particular deference when conducting voir dire. An attorney's actions during voir dire are considered to be matters of trial strategy." Id. (citing Nguyen v. Reynolds, 131 F.3d 1340, 1349 (10th Cir. 1997))

(citing Teague v. Scott, 60 F.3d 1167, 1172 (5th Cir. 1995)) (internal quotation marks and ellipsis omitted). "Few decisions at trial are as subjective or prone to individual attorney strategy as juror voir dire, where decisions are often made on intangible factors." Id. "A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill-chosen that it permeates the entire trial with obvious unfairness." Id.

"Where a postconviction motion alleges that trial counsel was ineffective for failing to raise or preserve a cause challenge, the defendant must demonstrate that a juror was actually biased." Id. (citing Carratelli v. State, 961 So. 2d 312, 324 (Fla. 2007)). "Because [Jones's] claim of ineffective assistance of counsel is founded, [in part,] upon a claim that counsel failed to strike a biased juror, [he] must show that the juror was actually biased against him." Id. (citing Miller v. Francis, 269 F.3d 609, 616 (6th Cir. 2001)) (brackets omitted).

"Seasoned trial counsel often decline to object for strategic purposes. They fear that frequent objections

irritate the jury and highlight the evidence complained of, resulting in more harm than good. Without evidence of the reasons for trial counsel's failure to object, a movant does not overcome the presumption that the failure to object was a strategic choice made by competent counsel." Ray v. State, 80 So. 3d 965, 995 (Ala. Crim. App. 2011) (internal quotation marks and ellipses deleted).

**1. The claim that Jones's trial counsel rendered ineffective assistance in comments about the murder.**

Jones argues that his trial counsel were ineffective because they made the following comments during voir dire:

> We all hate to pick up the paper or hear on the news that someone in the community has been murdered, much less an elderly lady. I'm one of those people. I despise reading that. It makes me sick at my stomach and scares me. I'm wondering, you know, am I going to be next. I'm not far. Probably already am a senior citizen. . . . We fear that we one day might be a victim or our children might be a victim. How many of you . . . would convict Tony of capital murder . . . simply out of fear that he may have committed this or . . . simply out of fear that you suspect he may have but not convinced beyond a reasonable doubt? There's people that would do that. I might be one of them.

(R. 147-49; Am. Pet. at ¶¶ 115–118.)

This claim is meritless on its face. The record demonstrates that trial counsel's comments were designed to

ferret out potential jurors who may vote to convict Jones based on fear and not the evidence in the case or the appropriate beyond-a-reasonable-doubt standard. Jones's allegation, if true, would not establish deficient performance or prejudice at an evidentiary hearing. Therefore, this claim is dismissed.

**2. The claim that Jones's trial counsel provided ineffective assistance in failing to object to "the prosecutor's successful efforts to empanel a conviction-prone, death-prone jury."**

Jones argues that his trial counsel were ineffective for failing to object when the prosecutor asked the venire during voir dire whether they "believe[d] that the death penalty should be enforced in this state if the evidence warrants it beyond a reasonable doubt and the aggravating circumstances outweigh he mitigating circumstances?" (Am. Pet. at ¶¶ 119–123, citing R. 64-65.) This claim is meritless on its face.

The cases Jones cites do not prohibit the prosecutor's question here. Jones's trial counsel had no basis for an objection. Even if the question was improper, the prosecutor asked the question to just one row of potential jurors, which weighs against a finding of prejudice. Lastly, Jones fails to identify actual jurors who were

"death-prone" or "conviction-prone." Jones thus cannot show prejudice.

Consequently, this claim is meritless on its face and therefore is dismissed.

**3. The claim that Jones's trial counsel provided ineffective assistance in failing to object when the trial court discharged struck jurors prior to holding a Batson hearing.**

Jones argues that his trial counsel were ineffective in failing to object when the trial court dismissed potential jurors who had been struck by the State before the court conducted a Batson hearing. (Am. Pet. at ¶¶ 124-129.) He also argues that dismissing jurors meant that they could not be re-empanelled in the event that Batson relief were awarded. This claim is not facially meritorious.

The record shows that Jones's Batson objection was properly overruled. Thus, no jurors were due to be re-empanelled, and Jones cannot show prejudice. Furthermore, had Batson relief been warranted, a new jury would have been struck and Jones would not have had to go forward to trial with a jury that was formed through racial discrimination. For these reasons, this claim is dismissed.

**4. The claim that Jones's trial counsel rendered ineffective assistance in failing to challenge jurors for cause because they allegedly stated that they could not be fair and impartial.**

Jones argues that his trial counsel were ineffective in failing to challenge Jurors S.W. and H.P. for cause because they allegedly indicated that they could not be fair and impartial. (Am. Pet. at ¶¶ 130–137.) Jones contends that S.W. could not be fair and impartial because his sister was murdered "nine or ten years" before Jones's trial and that H.P. could not be fair and impartial because he worked with Officer Donovan Kilpatrick, who was one of the officers involved in Jones's case. This claim is not facially meritorious; hence, it is dismissed.

Regarding counsel's decision not to strike Juror S.W., the record shows that several prospective jurors disclosed that they had friends or family who had been recent crime victims, yet counsel did not move to strike for cause any of these individuals. Counsel apparently did not find this to be a compelling reason to challenge a juror for cause. Similarly, counsel apparently chose not to exercise a peremptory strike on S.W. Though this Court does not know the reasons why counsel did not strike S.W. from the venire, striking a jury is a matter of strategy. Perkins,

2012 WL 5381345, at *10. Jones does not plead facts that would show that counsel's decision here was objectively unreasonable.

Concerning counsel's decision not to strike Juror H.P., the record demonstrates that a challenge for cause would have been overruled. Trial counsel moved to strike for cause the following jurors: Juror L.W., because she was the warden of a jail where Jones was housed; Juror J.S., because he was friends with trial counsel and the victim's son-in-law; and Juror H.S., because he worked with the victim's son-in-law. Yet, the trial court overruled each challenge. (R. 213-16.) This Court finds that the trial court likely would have overruled a challenge of H.P. for cause because H.P. merely worked with Officer Kilpatrick.

For these reasons, this claim is not facially meritorious; therefore, it is dismissed.

**5. The claim that trial counsel were ineffective for failing to utilize individual voir dire for "sensitive questioning."**

Jones alleges that his trial counsel provided ineffective assistance by not individually questioning jurors about their prior victimizations. (Am. Pet. at ¶¶ 138-139.) This claim is not is facially meritorious.

Jones alleges he was prejudiced by his trial counsel's questions about victimization because the jurors' responses "unscientifically suggested that burglary [— an aggravating circumstance alleged in this case —] was rampant in Dothan and played well into the prosecution's later admonition to the jury to send a message to the community." (Am. Pet. at ¶ 139.) However, Jones does not allege that the responses of potential jurors led any particular juror to believe that burglary was rampant in Dothan or how that belief prejudiced Jones in his trial. Also, counsel's questions were not objectively unreasonable. Accordingly, this claim is not facially meritorious and therefore is dismissed.

**6. The claim that trial counsel were ineffective for not objecting to alleged prosecutorial misconduct during jury selection.**

Jones alleges that his trial counsel were ineffective for not objecting to instances of alleged prosecutorial misconduct. (Am. Pet. at ¶¶ 140–153.) This claim is not facially meritorious.

Jones alleges that trial counsel should have objected to alleged improper vouching by the prosecutor. He takes certain remarks by the prosecutor out of context in an effort to show that the prosecutor vouched for Jones's

guilt, but the record shows that the prosecutor did not actually vouch for Jones's guilt. Whether to object here was a matter of trial strategy. See Ray, 80 So. 2d at 995. Counsel's decision not to object was not objectively unreasonable, and the facts pleaded would not establish prejudice.

As for the remaining allegations in this claim, the prosecutor's actions at most amounted to harmless error. Again, counsel was not objectively unreasonable for not objecting, and even if the facts pleaded here are true, Jones would not establish prejudice at an evidentiary hearing.

### E. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE IN INVESTIGATING AND PRESENTING A "COHERENT DEFENSE" IN CLOSING ARGUMENTS

Jones contends that his trial counsel did not conduct an adequate investigation and did not present a "coherent defense" in closing arguments. (Am. Pet. at ¶¶ 154-67.) This claim is meritless on its face.

"'Closing argument is an area where trial strategy is most evident.' . . . 'Entirely satisfactory representation may include a brief closing argument intended to focus the

jury's attention on a single item of strategy which counsel deems most likely to achieve a favorable verdict.'" Washington, 95 So. 3d at 55 (citations omitted).

Here, Jones does not address the defense that trial counsel actually presented, which was to argue that the State had not met its burden of proof as to capital murder. Jones alleges that trial counsel should have additionally argued that he was not involved at all in the crime, but Jones's own statements — not to mention other reliable evidence — clearly proved that he was involved in the murder. These strategies clearly would not have affected the outcome of Jones's trial, and trial counsel certainly was not objectively unreasonable in failing to employ them. Accordingly, Jones would be unable to prove deficient performance and prejudice upon these facts at an evidentiary hearing. As such, this claim is dismissed.

### F. THE CLAIM THAT JONES'S TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CHALLENGE THE ADMISSIBILITY AND ACCURACY OF THE STATE'S DNA EVIDENCE

Jones alleges that his trial counsel were ineffective for failing to assert several challenges to the admissibility of DNA evidence from the victim's blood,

which was found on Jones's sweatpants. (Am. Pet. at ¶¶ 168-204.) This claim is not facially meritorious.

Jones argues that trial counsel were deficient in failing to demand a preliminary hearing to challenge the admissibility of the DNA evidence, but a hearing is unnecessary when there are no legitimate challenges to the DNA evidence. The record shows that a proper predicate was laid for the introduction of DNA evidence. None of the arguments Jones raised would have resulted in the exclusion of DNA evidence in this case.

Jones also argues that the State did not meet admissibility requirements for DNA evidence because it did not introduce any evidence of the rate of error for its technique, but, as Jones admits in his amended petition, the Alabama Court of Criminal Appeals has held that "the absence of testimony regarding the factor [error rate] will not, alone, render DNA evidence inadmissible." Lewis v. State, 889 So. 2d 623, 672 (Ala. Crim. App. 2003).

Jones also argues that trial counsel should have challenged the chain of custody of the DNA evidence, but Jones's trial counsel would have been unsuccessful if they had challenged the chain of custody. As an initial matter,

Jones does not contend that the alleged missing link in the chain — Holli Spiers — would not have been able to provide direct testimony had a challenge to the chain of custody been made.

The State's reliance on circumstantial evidence of the chain of custody was adequate. See, e.g., Smith v. State, 677 So. 2d 1240, 1245 (Ala. Crim. App. 1995) ("If the State, or any other proponent of demonstrative evidence, fails to identify a link . . . the result is a 'missing' link, and the item is inadmissible. If, however, the State has shown each link, but has done so with circumstantial evidence, as opposed to the direct testimony of the 'link,' as to one or more criteria or as to one or more links, the result is a 'weak' link. When the link is 'weak,' a question of credibility and weight is presented, not one of admissibility."). "In the absence of any evidence to the contrary, the trial judge was entitled to assume that this official would not tamper with the sack and can or their contents. Where no evidence indicating otherwise is produced, the presumption of regularity supports the official acts of public officers, and courts presume that they have properly discharged their official duties."

Thomas v. State, 824 So. 2d 1, 45-46 (Ala. Crim. App. 1999) (overruled on other grounds by Ex parte Carter, 889 So. 2d 528 (Ala. 2004)). Under these precedents, DNA evidence was properly admitted in this case.

Jones further argues that effective trial counsel would have challenged admissibility under the Confrontation Clause and the hearsay rules. Specifically, Jones argues that the Confrontation Clause was violated because Spiers — the laboratory technician who cut a patch containing a blood sample from Jones's sweatpants that was subjected to DNA testing — did not testify. However, neither the Confrontation Clause nor the hearsay rules are implicated where there is no testimonial evidence at issue. See Davis v. Washington, 547 U.S. 813, 824 (2006) (stating that Confrontation Clause jurisprudence is "applied only in the testimonial context"). Here, Spiers did not prepare a report. The State's DNA expert, Phyllis Rollan, testified at trial and was subject to cross-examination. Hence, an objection on these grounds would have been overruled.

Lastly, Jones argues that effective trial counsel would have objected to the prosecutor's alleged mischaracterization of the statistical methods used in DNA testing.

Jones does not specifically plead what trial counsel's objection would have been or that the objection would have been sustained. Even if an objection had been sustained, it would not have resulted in the exclusion of the DNA evidence itself. Additionally, the jury was instructed that the arguments of counsel are not evidence, and the jury is presumed to follow instructions. See Burgess v. State, 827 So. 2d 134, 162 (Ala. Crim. App. 1998). Therefore, Jones cannot show prejudice.

For these reasons, Jones fails to plead a facially meritorious claim; accordingly, this claim is dismissed.

### G. THE CLAIM THAT JONES'S TRIAL COUNSEL FAILED TO ADEQUATELY CHALLENGE THE STATE'S BLOOD SPATTER EXPERT

Jones alleges that his trial counsel were ineffective for (1) failing to challenge Alabama Department of Forensic Sciences expert Katherine McGeehan's competence to testify on matters related to blood spatter, (2) failing to adequately cross-examine McGeehan, and (3) failing to retain a blood spatter expert to help in challenging McGeehan's testimony. (Am. Pet. at ¶¶ 205-230.) This claim is not facially meritorious.

The record refutes this claim. Initially, McGeehan did not give unqualified expert testimony. The record shows that the State laid the proper predicate for McGeehan to testify as an expert, and trial counsel also questioned her about her qualifications in the specific areas that she was testifying. (R. 692-94.) McGeehan explained her qualifications, and there was no reason to challenge her qualifications any further.

Jones criticizes his trial counsel's cross-examination of McGeehan for making reference to a "stomp" when the prosecutor said in his opening argument that the evidence would show that the victim was "stomped." (Am. Pet. at ¶¶ 210-211.) However, the record makes it clear that trial counsel was not referring to a "stomp" on the victim, but rather a "stomp" in a pool of blood that might have caused the blood spatter on Jones's clothes. (R. 688-92.)

Regarding Jones's argument that McGeehan testified inaccurately about "high velocity" bloodstains, McGeehan's testimony was that pinpoint bloodstains "can come from high velocity" injuries and that they also could come from a forceful "stomp" in a pool of blood. (R. 688-89.) McGeehan went on to testify that "[s]mall stains can come

from another object moving at a high velocity being slung off in various methods." (R. 689.) Eliciting this testimony was consistent with trial counsel's strategy to show that Jones may have been present at the murder scene while someone else killed the victim.

Finally, Jones argues that his trial counsel were ineffective for not hiring a blood spatter expert. More specifically, he alleges that an expert would have "exposed the errors in Ms. McGeehan's opinions described above" and would have assisted trial counsel in cross-examination of McGeehan. However, Jones does not specifically plead what a blood spatter expert's testimony would have been. The record shows that there were no errors in McGeehan's opinions.

For these reasons, Jones would be unable to prove deficient performance and prejudice on these facts at an evidentiary hearing. As such, this claim is dismissed.

### H. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO PROCURE A FINGERPRINT EXPERT

Jones argues that his trial counsel were ineffective in failing to hire a fingerprint expert. (Am. Pet. at ¶¶ 231–234.) This claim is not facially meritorious.

Jones does not plead with adequate specificity what evidence a fingerprint expert would have presented or how that evidence would have changed the outcome of his trial. Additionally, Jones fails to identify a fingerprint expert who was available to testify in his 2004 trial. See, e.g., Yeomans v. State, No. CR-10-0095 2013 WL 1284361, at *7 (Ala. Crim. App. Mar. 29, 2013) (holding postconviction claim that trial counsel was ineffective for not procuring expert testimony to be insufficiently pleaded where petitioner "did not identify, by name, any expert who could have presented that specific testimony"). Specific pleading of a specific expert and what his expected testimony would be is important because "experts are not fungible." State v. Delgado, 718 A.2d 437, 440 (Conn. App. 1998). "There are many subjects about which experts with apparently fungible qualifications can and do offer, with comparably intense conviction, mutually exclusive views." Intermedics, Inc. v. Ventritex, Inc., 139 F.R.D. 384, 396 (N.D. Cal. 1991).

For these reasons, Jones would be unable to show deficient performance and prejudice at an evidentiary

hearing even if he proved the facts pleaded here to be true. Accordingly, this claim is dismissed.

### I. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO CHALLENGE CHAIN OF CUSTODY FOR EVIDENCE

Jones raises two allegations that his trial counsel were ineffective for failing to challenge the chain of custody for evidence presented by the State. (Am. Pet. at ¶¶ 235-237.) Neither allegation is facially meritorious.

First, Jones argues that his trial counsel should have objected to the release of the victim's car after the offense. However, he fails to allege that trial counsel knew about the release and could have objected in time to prevent the release of the vehicle. Additionally, Jones fails to plead what evidence, if any, would have been obtained from the vehicle and how the evidence would have affected the outcome of his trial.

Second, Jones argues that his trial counsel should have objected to the admission of a crime scene videotape produced by police. He fails to allege that, had an objection been made, the State could not have provided links to the chain of custody. Regarding prejudice, Jones

argues that the videotape "could have been altered, redacted, enhanced, or changed." (Am. Pet. at ¶ 237.) However, Sergeant Jim Stanley affirmed at trial that the videotape "[h]adn't been marked, altered, or changed in any way." (R. 474-75.)

Assuming the facts pleaded here as true, Jones would not prove deficient performance and prejudice at an evidentiary hearing. Accordingly, this claim is dismissed.

### J. THE ALLEGATION THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO STOP "UNQUALIFIED EXPERT TESTIMONY"

Jones contends that his trial counsel were ineffective for failing to object to: (1) the testimony of the victim's daughter, a nurse, who testified that blood becomes darker in color and drier after leaving the body and that blunt force trauma "could" cause a victim to urinate, and (2) the testimony of the victim's grandson, a police officer, who also testified that he has noticed that blood becomes darker over time. (Am. Pet. at ¶¶ 238–240.) This claim is not facially meritorious. (R. 382, 395-96.)

Rule 701 of the Alabama Rules of Evidence allows lay testimony where the testimony is "(a) rationally based on

the perception of the witness and (b) helpful to a clear understanding of the witness's testimony or the determination of a fact in issue." The testimony of both witnesses "was []rationally based on [their] perception . . . [and] knowledge of the circumstances surrounding [the] murder." Ex parte Sharp, No. 1080959, 2009 WL 4506564, at *7 (Ala. Dec. 4, 2009) (affirming where nurse witness testified that the victim appeared to have been raped) (citing Burke v. Tidwell, 101 So. 599 (1924) (lay witness permitted to testify that a person was "drunk")).

The record shows that the State did not present the nurse or the police officer's testimony as Rule 702 expert testimony and that the testimony was proper lay testimony; therefore, Jones would not prove deficient performance and prejudice based upon these facts, if they were presented at an evidentiary hearing. Consequently, this claim is dismissed.

### K. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO "GUARD AGAINST" THE INTRODUCTION OF EXPERT TESTIMONY DESIGNED TO BOLSTER THE CREDIBILITY OF ANOTHER WITNESS

Jones contends that trial counsel rendered ineffective assistance by failing to object to the State's introduction of forensic scientist Katherine McGeehan's testimony on the ground that her testimony improperly bolstered the credibility of the State's DNA expert, Phyllis Rollan. (Am. Pet. at ¶¶ 241-243.) This claim is not facially meritorious.

The test for improper vouching is whether the jury could reasonably believe that the State or its witness was indicating a personal belief in a witness's credibility. See United States v. Sims, 719 F.2d 375, 377 (11th Cir. 1983). This test may be satisfied in two ways. First, the State may place the prestige of the government behind the witness by making explicit personal assurances of the witness's veracity. Id. Second, the State may implicitly vouch for the witness's veracity by indicating that information not presented to the jury supports the testimony. Id. The record shows that neither the State nor McGeehan made personal assurances regarding Rollan's veracity. The record also shows that neither the State nor

McGeehan suggested the existence of information not presented to the jury.

Additionally, the complained-of testimony amounted to, at most, harmless error.

For these reasons, Jones would not establish deficient performance and prejudice based upon these facts at an evidentiary hearing; therefore, this claim is dismissed.

### L. THE ALLEGATION THAT JONES'S TRIAL COUNSEL DID NOT "ADEQUATELY INVESTIGATE" MALIK HASAN AND PREPARE FOR HIS TESTIMONY

Jones alleges that trial counsel did not adequately investigate and prepare for Malik Hasan's testimony. (Am. Pet. at ¶¶ 244-249.) The defense called Hasan in an effort to show reasonable doubt as to Jones's guilt in this case. This claim is not facially meritorious.

Jones fails to specifically plead what his trial counsel should have done in its investigation of Hasan or what additional testimony could have been presented through Hasan. He actually intimates that trial counsel should not have called Hasan to testify at all. However, the decision to call Hasan to testify was consistent with trial counsel's strategy to establish reasonable doubt that

someone else committed the murder. Additionally, Jones does not plead facts that would show that calling Hasan left the jury with a "binary choice" that either Jones or Hasan committed the murder. (Am. Pet. at ¶ 248.)

Accordingly, Jones would not prove deficient performance and prejudice upon these facts if they were presented at an evidentiary hearing; therefore, this claim is dismissed.

**M. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE BECAUSE THEY DID NOT CALL WITNESSES TO TESTIFY THAT JONES WAS FASCINATED WITH CARS AND HAD A HISTORY OF JOYRIDING**

Jones alleges that his trial counsel were ineffective for not calling at least one of six individuals who could have testified in the guilt phase that he was fascinated with cars and that he had a history of joyriding in cars that he did not own. (Am. Pet. at ¶¶ 250-262.) This claim is not facially meritorious.

Evidence of joyriding, like evidence of prior drug use, is a "double-edged sword." Housel v. Head, 238 F.3d 1289, 1296 (11th Cir. 2001). Jones was charged with capital murder during a robbery. The State's theory at trial was that Jones robbed the victim of her car in the course of

the murder. Evidence of Jones's love for joyriding and fascination with cars "could [have] hurt as much as [it could have] help[ed] the defense." Id. Jones's trial counsel was not objectively unreasonable for failing to present testimony that Jones enjoyed joyriding in cars or was fascinated by cars.

For these reasons, Jones would not prove deficient performance and prejudice based upon these facts, if the facts were proved at an evidentiary hearing; consequently, this claim is dismissed.

**N. THE CLAIM THAT JONES'S TRIAL COUNSEL FAILED TO INVESTIGATE AND PREVENT JUROR MISCONDUCT**

Jones alleges that his trial counsel were ineffective for failing to voir dire Juror T.P. after T.P. approached the prosecutor and attempted to speak to the prosecutor during a break and because counsel's objection to T.P.'s possible sleeping during the trial was "half-hearted." (Am. Pet. at ¶¶ 263-268.) This claim is not facially meritorious.

The record does not show that Juror T.P. actually spoke to the prosecutor, and Jones does not allege otherwise. Rather, Jones alleges that T.P. only attempted to speak to

the prosecutor. (Am. Pet. at ¶ 263.) If T.P. never spoke with the prosecutor, it was unnecessary for trial counsel to voir dire T.P. Furthermore, there was no prejudice in failing to voir dire T.P.

With regard to the allegation that Juror T.P. was asleep during trial, the record does not show — and Jones does not allege — that T.P. was actually asleep at any point during the trial. Rather, the record shows that trial counsel objected when they thought that T.P. might be asleep, and the trial judge overruled the objection, saying "I don't think he's asleep. He's just resting his eyes." (R. 826.)

The facts pleaded in this claim, if true, would not prove deficient performance and prejudice. Accordingly, this claim is dismissed.

### O. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT TO ALLEGED PROSECUTORIAL MISCONDUCT

Jones contends that his trial counsel provided ineffective assistance in failing to object to alleged instances of prosecutorial misconduct. (Am. Pet. at ¶¶ 269-318.) This claim is not facially meritorious.

"Objections are a matter of trial strategy, and an appellant must overcome the presumption that 'counsel's 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. Crim. App. 1994) (quoting Strickland, 466 U.S. at 687-88).

The transcript shows that none of the comments at issue were actually improper. Still, it is a matter of strategy whether to object even to improper comments, especially where, like here, at most the comments were harmless error. Assuming the facts pleaded as true, Jones would not establish deficient performance and prejudice at an evidentiary hearing. Accordingly, this claim is dismissed.

**P. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT TO ALLEGED "PENALTY PHASE EVIDENCE" PRESENTED DURING THE GUILT PHASE**

Jones alleges that his trial counsel were ineffective by failing to object to alleged victim impact testimony during the guilt phase. (Am. Pet. at ¶¶ 321-326.) This claim is not facially meritorious.

"It is well settled that victim-impact statements are admissible during the guilt phase of a criminal trial only if the statements are relevant to a material issue of the guilt phase." Gissendanner v. State, 949 So. 2d 956, 965 (Ala. Crim. App. 2006) (quotation marks and internal citations omitted). Even so, in judging whether a defendant was prejudiced by such a statement, a court must consider "the record as a whole" and decide whether "the jury's verdict was based on the overwhelming evidence of guilt and was not based on any prejudice that might have been engendered by the improper victim-impact testimony." Id.

The record shows that there was no improper victim impact testimony. None of the witnesses described the impact of the crime on their lives. See Stanley v. State, No. CR-06-2236, 2011 WL 1604794, at *28 (Ala. Crim. App. Apr. 29, 2011) (finding no victim impact testimony where witness "did not describe the impact of the crime on her life") (vacated on grounds not relevant here). Still, the testimony did not distract the jury or keep it from performing its duties. Therefore, these facts would not

establish deficient performance and prejudice at an evidentiary hearing, and this claim is dismissed.

Jones also alleges that his trial counsel were ineffective for not objecting to evidence of the brutality of the murder offered during the guilt phase. (Am. Pet. at ¶¶ 327-37.) He argues that the evidence was not relevant in the guilt phase because it was relevant in the penalty phase to prove the Alabama Code § 13A-5-49(8) aggravating circumstance that the crime was "especially heinous, atrocious, or cruel." This claim is not facially meritorious.

A prosecutor is allowed to make reasonable inferences from facts in evidence. See, e.g., Johnson v. State, No. CR-99-1349, 2009 WL 3171220, at *19 (Ala. Crim. App. Oct. 2, 2009) ("During closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference."). The complained-of evidence was mere res gestae evidence. Accordingly, Jones would not be able to establish deficient performance and prejudice on these facts at an evidentiary hearing. Therefore, this claim is dismissed.

### Q. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE IN HOW THEY CHALLENGED THE BURLGARY ELEMENT OF THE CAPITAL MURDER CHARGE

Jones alleges that his trial counsel were ineffective for arguing that the State did not prove burglary because nothing was taken from inside the victim's home, where the victim's car was stolen from her carport. (Am. Pet. at ¶¶ 338-349.) This claim is not facially meritorious.

Jones cites no authority for his allegation that trial counsel is constitutionally deficient for pursuing an argument that ultimately did not work. Trial counsel's decision to highlight that nothing within the victim's home was taken was entirely consistent with the defense's theory that Jones may have been at the murder scene, but did not murder the victim.

For these reasons, Jones would not show deficient performance or prejudice upon these facts at an evidentiary hearing. Accordingly, this claim is dismissed.

### R. JONES'S ASSERTION THAT HE WAS PREJUDICED BY TRIAL COUNSEL'S ALLEGED ERRORS DURING THE GUILT PHASE

Jones asserts that he suffered prejudice due to trial counsel's alleged errors committed during the guilt phase. (Am. Pet. at ¶¶ 348-349.) These paragraphs do not

represent an independent claim for relief. However, to the extent Jones intends them as such, they are dismissed.

## III. CLAIMS ALLEGING THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE DURING THE PENALTY AND SENTENCING PHASES OF JONES'S TRIAL

Paragraphs 350 through 366 of Jones's amended petition appear to be introductory paragraphs related to the individual claims found in Claim III. To the extent that Jones intends these paragraphs to be independent claims, they are dismissed.

### A. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE IN THEIR INVESTIGATION AND PRESENTATION OF MITIGATION EVIDENCE

Jones alleges that his trial counsel were ineffective in investigating and presenting mitigation evidence at the penalty phase. (Am. Pet. at ¶¶ 367-480.) Jones has presented mitigation evidence in his amended petition that was not presented by trial counsel at the penalty phase of the trial. Some of the evidence, he argues, could have been presented through three family witnesses and clinical psychologist Dr. Robert DeFrancisco, all of whom testified at the penalty phase. Other evidence, he alleges, could

have been presented through additional family witnesses, one of his former medical doctors, and a mitigation expert. Assuming the facts pleaded as true, Jones would not show deficient performance or prejudice at an evidentiary hearing; therefore, this claim is not facially meritorious.

As an initial matter, Jones cites the American Bar Association ("ABA") Guidelines for conducting an appropriate investigation into potential mitigating evidence in death cases. As the Alabama Court of Criminal Appeals recently held, "whether [a Rule 32 petitioner's] trial attorneys' investigation into potential mitigating evidence adhered to the ABA Guidelines is not dispositive of whether counsel's investigation was reasonable." McWhorter v. State, No. CR-09-1129, 2011 WL 4511231, at *36 (Ala. Crim. App. Sept. 30, 2011). The court in McWhorter also held that the ABA Guidelines "may provide guidance as to what is reasonable in terms of counsel's representation, but they are not determinative." Id. (quotation mark and brackets omitted).

Moreover, the United States Supreme Court has stated:

> Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. A particular decision not to investigate must be

> directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. Our principal concern in deciding whether counsel exercised reasonable professional judgment is not whether counsel should have presented a mitigation case. Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence was itself reasonable. In assessing counsel's investigation, we must conduct an objective review of their performance, measured for reasonableness under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from counsel's perspective at the time.

Wiggins v. Smith, 539 U.S. 510, 521–23 (2003) (brackets and quotation marks omitted).

Jones argues that the scope of his trial counsel's investigation into mitigating evidence was objectively unreasonable. However, as the Supreme Court stated in Bobby v. Van Hook, 130 S. Ct. 13, 19 (2009), while rejecting a similar argument:

> This is not a case in which the defendant's attorneys failed to act while potentially powerful mitigating evidence stared them in the face, cf. Wiggins, 539 U.S., at 525, 123 S. Ct. 2527, 156 L. Ed. 2d 471, or would have been apparent from documents any reasonable attorney would have obtained, cf. Rompilla v. Beard, 545 U.S. 374, 389–393, 125 S. Ct. 2456, 162 L.Ed.2d 360 (2005). It is instead a case, like Strickland itself, in which defense counsel's "decision not to seek more" mitigating evidence from the defendant's background "than was already in hand" fell "well within the range of professionally reasonable judgments."

This is a case where additional mitigating evidence "would barely have altered the sentencing profile presented to the sentencing judge." Strickland, 688 U.S. at 700. Jones's trial counsel investigated his social, educational, criminal, and medical histories and presented that evidence in the penalty phase.

Jones's mother, Jill Whitsett, was the first mitigation witness called. She testified (1) that Jones had no father figure in the home, (2) that the family was poor and on welfare, (3) that Jones had a brother who was born with syphilis[1] and later died, (4) that Jones took prescription medication for hyperactivity and that his condition improved with medication, (5) that Jones had difficulty in school, including that Jones was assigned to special education classes and had a learning disability, (6) that the Alabama Department of Human Resources ("DHR") was called several times to investigate conditions at Jones's home, and (7) that Jones had a job.[2] (R. 1349-64.)

[1]The sexually-transmitted infection "syphilis" is misspelled in the transcript as "Cephaelis," which is actually, according to Wikipedia, a plant.

[2] It is worth noting that, at one point in Whitsett's testimony, she said, "I can't do this," and asked to be excused. (R. 1356.)

Edwina Culp, an adult education volunteer at a family learning center, testified that she helped Jones study to obtain a General Education Diploma (GED). Culp stated that Jones's test scores fluctuated. She gave her opinion that hyperactivity and emotional conflict play heavy roles in a student's ability to retain information. Regarding Jones's character, Culp testified that Jones was "kind," "meek," "not aggressive," and "not a troublemaker." (R. 1379.) She also testified that Jones "cooperated" with her and would do what he was asked, "to the best of his ability." (Id.) Last, Culp told the jury that Jones performed scholastically at a sixth- to eighth-grade level.

Marilyn Walker, Jones's aunt, testified next. She stated that society would benefit from Jones being sentenced to life without parole rather than death. Walker also testified that Jones was a "good person" and "non-violent" so long as he took his medication. (R. 1392-93.)

Lakeisha Jones, Jones's sister, testified that Jones could contribute positively as an inmate in prison. Like Walker, Lakeisha Jones testified that Jones was "helpful" and "calmer" on his medication. (R. 1402.) Additionally, Lakeisha Jones testified that her brother would "take up

for [her]" because he did not want her to fight at school. (R. 1401.)

Last, trial counsel called clinical forensic psychologist Dr. Robert DeFrancisco, who testified to Jones's educational, social, and medical problems. Dr. DeFrancisco called Jones a "gap child." (R. 1432.) He explained that Jones's IQ placed him between educably mentally retarded students and average students. He further explained that, in his opinion, the education system did not adequately educate "gap children." This led, in his opinion, to behavioral problems in "gap children" like Jones.

Dr. DeFrancisco testified that he had reviewed Jones's medical records. He found that Jones was given prescription medication for hyperkinesis, though he opined that medication does not cure the educational problems caused by hyperkinesis. (R. 1435.) Dr. DeFrancisco also opined that Jones could do well in a structured environment like prison. (R. 1443.)

In the sentencing order in this case, the trial court considered and found, in addition to Jones's age, the following non-statutory mitigating circumstances:

1. The defendant was reared in a single-parent home with no relationship with his father.

2. The defendant was hyperactive as a child.

3. The defendant's family was visited by DHR several times during his childhood.

4. The defendant did not resist arrest.

5. The defendant had learning disabilities as a child and was a special education student.

6. The defendant was reared in lower end of socio-economic scale.

7. The defendant suffered emotional and psychological problems.

(C. 316-17.)

The mitigation evidence presented during the penalty phase was the kind of evidence typically presented during the penalty phase of a capital murder trial. Jones's trial counsel selected mitigation evidence that "develop[ed] an image of [Jones] as a human being who was generally a good family man and a good public citizen, who had a background of poverty but who had worked hard as a child and as an adult to support his family and close relatives." Collier, 177 F.3d at 1202.

Furthermore, Jones alleges that his trial counsel were ineffective for not emphasizing his experience in drug manufacturing or that he stuck up for his sister by

fighting other children on several occasions. Evidence of Jones's history of violence or drug dealing was more likely to hurt his case than help it. See Wood v. Allen, 542 F.3d 1281, 1313 (11th Cir. 2008) ("[W]e have rejected prejudice arguments where mitigation evidence would have opened the door to damaging evidence."); see, e.g., Lenz v. Warden of Sussex I State Prison, 593 S.E.2d 292, 304 (Va. 2004) (calling evidence of history of drug dealing a "two edged sword").

Turning to prejudice, under Strickland, a defendant is prejudiced by his counsel's deficient performance if "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694. Jones must allege facts that, if true, "show that but for his counsel's [alleged] deficiency, there is a reasonable probability he would have received a different sentence. To assess that probability, we consider the totality of the available mitigation evidence — both that adduced at trial, and the evidence adduced in the habeas proceeding — and reweigh it against the evidence in aggravation." Porter v. McCollum,

558 U.S. 30, 41 (2009) (internal quotation marks, citations, and brackets omitted).

As discussed above, the record shows that Jones's trial counsel presented a variety of mitigating evidence at the penalty phase. Jones argues that additional evidence — such as evidence of "beatings" Jones received and that he lived in houses with cockroaches and rats — should have been presented. (Am. Pet. at ¶ 385.) For purposes of its analysis here, this Court assumes that Jones was indeed subjected to corporal punishment and that he lived in houses with pest problems, along with all of the other mitigating evidence that was not presented at Jones's trial. However, this Court also considers the strong aggravating evidence in this case.

The trial court found the existence of three aggravating circumstances: (1) the capital offense was committed during a burglary, (2) the capital offense was especially heinous, atrocious, or cruel ("HAC") compared to other capital offenses, and (3) Jones was under a sentence of imprisonment when he committed the capital offense. (C. 315.) With regard to the HAC aggravator, the trial court specifically noted in the sentencing order that

"Dr. Paredes testified that an 80-year-old disabled woman was brutally beaten. He established that these injuries were painful and most preceded her death. This type of cruelty was unnecessary given the age and physical infirmities experienced by the victim." (Id.)

Given that trial counsel presented appropriate mitigating evidence and that there was serious aggravating evidence in this case, there is no reasonable probability that the outcome of Jones's trial would have been different had trial counsel presented the additional mitigating evidence Jones discusses in his amended Rule 32 petition.

For these reasons, Jones would not establish deficient performance and prejudice upon these facts at an evidentiary hearing. Accordingly, this claim is dismissed.

**B. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE BECAUSE THEY FAILED TO RETAIN A FORENSIC PATHOLOGIST**

Jones alleges that his trial counsel were ineffective because they did not obtain the assistance of a forensic pathologist. (Am. Pet. at ¶¶ 481-483.) This claim is not facially meritorious.

Jones fails to specifically plead what a forensic pathologist's testimony would have been at trial. Nor does

he identify a forensic pathologist who would have been available for his trial. Identifying an available expert is especially important to a prejudice analysis because "experts are not fungible." Delgado, 718 A.2d at 440; see Intermedics, 139 F.R.D. at 396 ("There are many subjects about which experts with apparently fungible qualifications can and do offer, with comparably intense conviction, mutually exclusive views.").

Furthermore, the record shows that the State's forensic pathologist was subjected to meaningful cross-examination by trial counsel.

For these reasons, Jones would not prove deficient performance and prejudice upon these facts at an evidentiary hearing; hence, this claim is dismissed.

### C. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR NOT CHALLENGING THE CHAIN OF CUSTODY OF THE VICTIM'S BODY

Jones alleges that his trial counsel were ineffective for not challenging the chain of custody of the victim's body before autopsy reports and other testimony regarding the victim's injuries were admitted into evidence. (Am.

Pet. at ¶¶ 484-485.) This claim is not facially meritorious.

First, Jones fails to plead facts that would show that his trial counsel were unreasonable in deciding not to challenge chain of custody. Trial counsel had no reason to suspect that there was a problem with chain of custody, and Jones does not allege that the State would have been unable to establish chain of custody. Second, Jones avers that "it is plausible that certain of the injuries or marks sustained by Ms. Kirkland's body were incurred during the transportation process." (Am. Pet. at ¶ 485.) However, Jones does not allege that any injuries or marks were created during transportation, nor does he allege evidence of prejudice.

For these reasons, Jones would be unable to show deficient performance and prejudice on these facts at an evidentiary hearing; therefore, this claim is dismissed.

### D. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO OBJECT TO INSTANCES OF ALLEGED PROSECUTORIAL MISCONDUCT DURING THE PENALTY PHASE

Jones contends that his trial counsel were ineffective for failing to object to multiple instances of alleged

prosecutorial misconduct during the penalty phase. (Am. Pet. at ¶¶ 486-509.) Specifically, Jones argues that his trial counsel should have objected (1) "when the prosecutor unlawfully infringed upon Mr. Jones' right against self-incrimination, (2) misstated the law, (3) argued facts not in evidence, (4) relied on nonstatutory aggravating circumstances, and (5) made inflammatory remarks." (Id. at 486.) At most, the alleged instances of prosecutorial misconduct were harmless errors. This claim is not facially meritorious.

First, the prosecutor did not impermissibly comment on Jones's right to remain silent. (Am. Pet. at ¶ 488.) The record reflects that the prosecutor was asking the jury to consider Jones's physical reaction to the testimony of another witness, which is permissible. See James v. State, 564 So. 2d 1002 (Ala. Crim. App. 1989) (holding that a defendant's conduct or demeanor during trial is a proper subject of comment); Haywood v. State, 501 So. 2d 515 (Ala. Crim. App. 1986) (same); Wherry v. State, 402 So. 2d 1130 (Ala. Crim. App. 1981) (same).

Second, the prosecutor did not misstate the law regarding mitigating evidence. Jones argues that the

prosecutor misstated the law in telling the jury that evidence of Jones's low intelligence and evidence that he did not have a father in his home were "excuses." (Am. Pet. at ¶ 489.) However, "[t]he prosecutor has the right to argue his opinion from the record." Henderson v. State, 584 So. 2d 841, 857 (Ala. Crim. App. 1988). The jury was properly instructed that the arguments of counsel were not evidence, and the trial court properly instructed the jury on the law regarding the balancing of aggravating and mitigating circumstances.

Third, Jones alleges that trial counsel should have objected to the prosecutor's mentioning that the victim's grandson was a police officer, that Jones had filed a federal lawsuit, and that Jones used curse words. (Am. Pet. at ¶¶ 493-500.) Jones argues that these comments constituted impermissible aggravating evidence. Yet, the record shows that the prosecutor did not rely on any of these comments in arguing aggravating circumstances to the jury. Again, the jury was properly instructed on aggravating and mitigating circumstances.

Fourth, Jones alleges that trial counsel should have objected to Dr. Paredes's penalty-phase testimony as

cumulative. (Am. Pet. at ¶¶ 501-509.) However, this objection would have been overruled because the testimony was relevant to the HAC aggravator, which the State had the burden of proving at the penalty phase.

Fifth, contrary to Jones's arguments, the prosecutor's questioning of Dr. Paredes regarding other capital defendants and their crimes was appropriate and relevant to the HAC aggravator.

For these reasons, Jones would not establish deficient performance and prejudice at an evidentiary hearing; accordingly, this claim is dismissed.

### E. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO REQUEST APPROPRIATE JURY INSTRUCTIONS ON MITIGATING FACTORS

Jones alleges that additional jury instructions would have been necessary had trial counsel presented the additional mitigating evidence discussed in Claim III.A. (Am. Pet. at ¶¶ 510-512.) However, for the reasons discussed above, assuming the facts pleaded in Claim III.A as true, trial counsel was not ineffective for not presenting additional mitigating evidence. Because additional mitigating evidence was not presented, trial

counsel cannot be held responsible for not asking for an instruction on additional evidence.

For these reasons, Jones would not prove deficient performance and prejudice upon these facts at an evidentiary hearing; hence, this claim is dismissed.

### F. THE CLAIM THAT JONES'S TRIAL COUNSEL WERE INEFFECTIVE FOR FAILING TO ARGUE THAT HE IS INELIGIBLE FOR THE DEATH PENALTY DUE TO HIS AGE AND MENTAL ABILITIES

Jones alleges that his trial counsel were ineffective for not arguing that he is ineligible for the death penalty due to his age and mental abilities, under Roper v. Simmmons, 543 U.S. 551, 569 (2005). (Am. Pet. at ¶¶ 513-520.) This claim is not facially meritorious.

First, Roper was not decided until the year after Jones's trial; hence, it was unavailable to trial counsel. Second, "Roper established a bright-line demarcation [under the age of 18] for application of the standard announced therein, rather than a standard which could be applied to a defendant's 'mental age' on a case-by-case basis." Thompson v. State, No. CR-05-0073, 2012 WL 520873, at *79 (Ala. Crim. App. Feb. 17, 2012) (quoting State v. Campbell, 983 So. 2d 810, 830 (La. 2008)). Because Jones was not

under eighteen when he committed the murder, he is clearly eligible for the death penalty, under Roper.

For these reasons, Jones would not show deficient performance and prejudice upon these facts at an evidentiary hearing; consequently, this claim is dismissed.

## IV. JONES'S ALLEGATIONS THAT THE STATE DID NOT MEET ITS DISCOVERY OBLIGATIONS

Jones contends that the State did not meet its discovery obligations, in violation of Brady v. Maryland, 373 U.S. 83, 87 (1963). (Am. Pet. at ¶¶ 521-546.) He also argues that the State violated Napue v. Illinois, 360 U.S. 264, 270 (1959), by relying on allegedly false testimony of a witness for the defense.

These claims are procedurally barred under Rules 32.2(a)(3) and (a)(5) because they could have been, but were not, raised at trial or on direct appeal. See McWhorter, 2011 WL 4511231, at *58 ("Rule 32.2(a)(3) and (5) [of the Alabama Rules of Criminal Procedure] would preclude Pierce's [Brady] claim if it could have been raised at trial or on appeal.") (quoting Ex parte Pierce, 851 So. 2d 606, 614 (Ala. 2000)).

In the event that an appellate court disagrees with this Court's application of the procedural bars here, this Court also finds that none of Jones's allegations are facially meritorious.

Claim IV.A alleges that the State elicited false testimony of a defense witness. Specifically, Jones alleges that the prosecutor would have known that the testimony of Jones's mother, Jill Whitsett, that she did not use drugs or abuse alcohol was untrue, because the State prosecuted Jill Whitsett's husband, Demetrius Whitesett, for sale of a controlled substance, and her husband was arrested at her house. Jones cites Napue, which is distinguishable because the prosecutor in Napue called a witness for the State who falsely testified that he had received no promise of consideration in return for his testimony, though in fact the prosecutor had promised witness consideration, and the prosecutor did nothing to correct false testimony of witness. Napue, 360 U.S. at 265.

The prosecutor was under no duty to provide information on Demetrius Whitsett's prosecution, especially considering Jill Whitsett was not the State's witness. It is unclear

based upon Jones's pleading whether the prosecutor actually remembered Demetrius Whitsett's prosecution at the time of Jones's trial. But even if he did remember, simply because Demetrius Whitsett sold drugs does not mean that Jill Whitsett used drugs and alcohol. Jones does not allege that the prosecutor or Jill Whitsett were present when Demetrius Whitsett was arrested at his home, and there is no allegation that the prosecutor knew about Demetrius Whitsett's federal prosecution.

Claim IV.B alleges that the State did not provide "any report" of a police interrogation that occurred the night Jones was arrested for capital murder. (Am. Pet. at ¶ 536.) However, Jones does not allege that any report actually exists. The record shows that the State provided appropriate discovery regarding interrogation of Jones, and the trial court heard argument on whether the interrogation violated Jones's constitutional rights. The trial court decided that Jones's rights were not violated.

Claim IV.C alleges that the State impermissibly withheld statements of other suspects, but Jones fails to plead what information is in the alleged statements. Claim IV.D alleges that the State withheld audio or transcript

copies of Officer Parrish's radio calls at the murder scene, but Jones does not plead the content of Officer Parrish's alleged radio calls or how they qualify as Brady evidence. Claim IV.E alleges that the State withheld fingerprint evidence, but Jones fails to plead that there actually was any fingerprint evidence withheld or what it would prove. Claim IV.F alleges that the State withheld evidence of police interviews of restaurant employees who could rebut the evidence of blood on Jones's clothing, but Jones fails to plead the content of the alleged interviews and how the interviews would have been discoverable under Brady.

For these reasons, this Court finds that Jones's claims are not facially meritorious.

## V. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF JONES'S APPELLATE COUNSEL

Jones raises several allegations of ineffective assistance of appellate counsel in paragraphs 547 through 583 of his amended Rule 32 petition. The claims are not facially meritorious.

**A. THE CLAIM THAT JONES'S APPELLATE COUNSEL FAILED TO RAISE "NUMEROUS MERITORIOUS ISSUES ON DIRECT APPEAL"**

**1. Jones's claim that his appellate counsel were ineffective for failing to pursue a Batson v. Kentucky, 476 U.S. 89 (1986), claim on direct appeal.**

This claim is contained in paragraphs 551 through 567 of Jones's amended Rule 32 petition. This claim is not facially meritorious.

As the United States Supreme Court stated in Jones v. Barnes, 463 U.S. 745, 746 (1983):

> Experienced advocates 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. Selecting the most promising issues for review has assumed a greater importance in an era when the time for oral argument is strictly limited in most courts and when page limits on briefs are widely imposed.

The record does not establish that purposeful racial discrimination occurred during jury selection, so appellate counsel is not deficient for deciding not to raise Batson on direct appeal. However, Jones raised Batson in his petition for a writ of certiorari in the Alabama Supreme Court. In capital cases, the Alabama Supreme Court has granted certiorari on a Batson issue, even when the issue was not raised in the Court of Criminal Appeals. See,

e.g., Ex parte Sharp, No. 1080959, 2009 WL 4506564, at *10 (Ala. Nov. 4, 2009). Appellate counsel did not waive Jones's Batson argument by failing to raise it in the Court of Criminal Appeals.

Additionally, the Alabama Supreme Court often grants certiorari on Batson issues raised in cert petitions filed by death-row inmates. See, e.g., id.; Ex parte Floyd, No. 1080107, 2012 WL 4465562 (Ala. Sept. 28, 2012); Ex parte Smith, No. 1080973, 2010 WL 4148528 (Ala. Oct. 22, 2010); Ex parte Walker, 972 So. 2d 737 (Ala. 2007). However, the Alabama Supreme Court did not grant Jones's petition for a writ of certiorari. It is noteworthy that the Batson arguments he puts forth in his amended Rule 32 petition are virtually identical to the arguments presented to and passed over by the Alabama Supreme Court.

For these reasons, Jones would not prove deficient performance and prejudice on these facts, if true, at an evidentiary hearing.

**2. Jones's claim that his appellate counsel were ineffective for deciding not to raise prosecutorial misconduct claims.**

Jones references other portions of his amended petition in which he argues that prosecutorial misconduct occurred.

(Am. Pet. at ¶¶ 568-569.) Specifically, Jones references Sections II.O, II.D.2, II.D.6, II.P, and III.D of his amended Rule 32 petition. In the sections of this order that correspond to those sections, this Court finds that there was no prosecutorial misconduct, or if there was, it was harmless. For those reasons, this Court finds that Jones would not prove deficient performance of trial or appellate counsel or prejudice on the facts pleaded, assuming they are true, at an evidentiary hearing. Accordingly, this claim is dismissed.

**3. Jones's claim that his appellate counsel were ineffective for deciding not to argue that it would be unconstitutional to execute him due to his age and mental capacity.**

Jones makes that same argument here with regard to his appellate counsel as he made with regard to his trial counsel in Claim III.F. (Am. Pet. at ¶¶ 570-576.) As discussed above, "Roper established a bright-line demarcation [under the age of 18] for application of the standard announced therein, rather than a standard which could be applied to a defendant's 'mental age' on a case-by-case basis." Thompson, 2012 WL 520873, at *79 (quoting Campbell, 983 So. 2d at 830). Because Jones was eighteen years old when he committed murder, he is eligible for the

death penalty and is due no relief under Roper. Accordingly, Jones would not show at an evidentiary hearing that his appellate counsel were deficient in deciding not to raise an argument based on Roper. Likewise, Jones would not show prejudice.

### B. THE CLAIM THAT JONES'S APPELLATE COUNSEL FAILED TO ARGUE THAT THE TRIAL COURT ERRED IN IMPROPERLY REQUIRING THE DEFENSE TO ESTABLISH THAT HIS STATEMENTS WERE VOLUNTARY

Jones alleges that his appellate counsel should have argued on appeal that the trial court erred in requiring him to establish at trial that his statements to police were voluntary. (Am. Pet. at ¶¶ 577-581.) This claim is not facially meritorious.

The record does not reflect that the trial court required Jones to establish that his statements were voluntary. The trial court instructed the defense to go forward with its motion to suppress, but the court did not indicate that it required Jones to prove that the statements were voluntary.

For these reasons, Jones would be unable to prove deficient performance or prejudice upon these facts at an evidentiary hearing. Accordingly, this claim is dismissed.

### C. JONES'S ALLEGATION THAT HE WAS PREJUDICED BY HIS APPELLATE COUNSEL'S ALLEGED ERRORS

At the conclusion of Jones's ineffective-appellate-counsel claim, he alleges that he was prejudiced by his appellate counsel's failures. (Am. Pet. at ¶¶ 582-583.) This section of Jones's amended petition does not represent an independent claim for relief. To the extent that Jones intends it as such, it is dismissed.

## CONCLUSION

Jones is not entitled to either an evidentiary hearing or relief on any of the claims in his amended Rule 32 petition because the claims are procedurally barred from review under Rule 32.2(a) of the Alabama Rules of Criminal Procedure, fail to state a facially meritorious claim under Rule 32.7(d), or fail to meet the specificity in pleading requirements of Rules 32.3 and 32.6(b).

Jones was properly convicted of capital murder and sentenced to death. He received a fair trial and is not entitled to any relief from his capital murder conviction or death sentence.

Accordingly, this Court hereby summarily **DISMISSES** Jones's entire amended petition for relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.

DONE THIS THE 19th day of June, 2014.

*/s/ Thomas E. Head, III*
CIRCUIT JUDGE

**IN THE CIRCUIT COURT FOR HOUSTON COUNTY, ALABAMA**

| | | |
|---|---|---|
| ANTONIO DEVOE JONES, | * | |
| Petitioner, | * | |
| v. | * | No. CC-2000-353.60 |
| STATE OF ALABAMA, | * | |
| Respondent | * | |

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AMENDED PETITION FOR RELIEF FROM JUDGMENT PURSUANT TO RULE 32 OF THE ALABAMA RULES OF CRIMINAL PROCEDURE

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Petitioner Antonio Devoe Jones ("Mr. Jones" or "Tony"), now incarcerated on death row at Holman State Prison in Atmore, Alabama, hereby submits his Amended Petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure and petitions for relief from his unconstitutionally obtained conviction and sentence of death. In support of this petition, Mr. Jones states the following:

## INTRODUCTORY STATEMENT

1. As set forth below, a "perfect storm" of errors renders Mr. Jones' conviction and death sentence constitutionally invalid. The junior lawyer responsible for most case preparation at the guilt phase was Clark Parker ("Mr. Parker"). He had never before handled a capital case, yet most case preparation was delegated to him by the senior partner, Thomas Brantley ("Mr. Brantley"). Mr. Parker's lack of experience was exacerbated by his heavy drinking and an impending emotional crisis leading up to and through both the guilt and penalty phases of Mr. Jones' trial. Mr. Parker would show up for court each day drunk or hung over. Before the trial,

Mr. Brantley learned that Mr. Parker had done very little to prepare, was undergoing an emotional crisis, and drinking heavily. Having done little to prepare himself, Mr. Brantley decided to try the case by the "seat of his pants" rather than disclose their lack of trial preparation and Mr. Parker's impairment to their client or the Court. By the time of Mr. Jones' sentencing – a critical stage – Mr. Parker was mounting his defense against criminal charges relating to his drinking and Mr. Brantley was representing Mr. Parker in relation to those charges. Neither Mr. Brantley nor Mr. Parker disclosed this egregious conflict to Mr. Jones. To make matters worse, the same prosecutor was prosecuting both Mr. Jones and Mr. Parker.

2. The guilt phase – from voir dire, to jury selection, motion practice, to putting on witnesses – displayed jaw-dropping incompetence and lack of preparation. This included invitations to each potential juror to disregard the applicable legal standard in criminal cases, expressing personal fear of being killed by their own client, fear he would kill children, failing to strike biased jurors, failing to present appropriate motions, not objecting to inadmissible DNA evidence, not objecting to repeated prosecutorial misconduct, calling defense witnesses with no knowledge of what they would say, repeatedly eliciting detrimental testimony from their own witnesses, and generally asserting an incoherent defense with no strategy or thought behind it.

3. The penalty phase was equally a fiasco. The defense failed to conduct a proper investigation of Mr. Jones' upbringing and history. Crucial mitigation evidence, all of which was easily known at the time, included Mr. Jones having been beaten hundreds of times starting at age five, living in rat/bug infested homes, and being enlisted into his stepfather's drug business as a teenager. Counsel failed to introduce into evidence easily admissible social service, educational, psychological, and testing records, all of which would have corroborated key mitigation witness testimony. By virtue of this series of errors, the prosecutor was able to

invite the jury to disregard crucial mitigation evidence precisely because no corroboration was presented.

4. The final culmination of these cascading errors was counsel's failure to tender appropriate jury mitigation instructions for jury consideration. Had things been done properly, the jury would have heard testimony, viewed documentary evidence, and deliberated about the long list of mitigating factors – all of which would have been supported by very strong, corroborating testimony and exhibits. Instead, what they were given to deliberate was banal, ho-hum factors, not supported by a fraction of the available evidence.

5. On appeal, counsel raised virtually none of the issues presented in this Motion. The ineffective assistance of counsel detailed in this Amended Petition is as egregious as any in which the United States Supreme Court, lower federal, and Alabama appellate courts have vacated convictions and the penalty of death.

6. Furthermore, the trial and sentencing were tainted by numerous instances of prosecutorial misconduct, including knowing reliance on false testimony, suppression of favorable evidence, impermissible comment on the defendant's decision not to testify, and the use of inflammatory penalty phase evidence at the guilt phase, among others.

## PROCEDURAL HISTORY

7. Antonio Devoe Jones was indicted by the April 2000 term of the Houston County Grand Jury for one count of capital murder for intentionally causing the death of Ruth Kirkland during the course of a burglary. (C. 11.) [1]

[1] This petition follows the following format throughout for citations to the record:
Clerk's record on appeal: (C. [page]);
Court reporter Carla Woodall's Transcript of Motion Hearing: (M. [page]);
Trial proceedings: (R. [page]);
Court reporter Carla Woodall's Transcript of Sentencing Hearing: (S. [page]).

8. On March 27, 2003, the Honorable Jerry White, Houston County Circuit Judge, appointed trial counsel, Thomas Brantley and Clark Parker, to represent Mr. Jones due to his inability to afford private counsel. (C. 23.)

9. On the afternoon of March 12, 2004, Mr. Jones was convicted of capital murder. (C. 285-86, R. 1293-94.) Following a weekend recess, there was a short penalty hearing in which defense counsel presented four perfunctory, unprepared lay witnesses and one expert witness. (R. 1296-1535.) That same day, the jury returned an 11-1 vote in favor of the death penalty after deliberating for just thirty-seven minutes. (C. 287-88, R. 1531.) On June 8, 2004, Judge White accepted the jury's vote and sentenced Mr. Jones to death. (C. 310-17.)

10. On August 25, 2006, the Alabama Court of Criminal Appeals affirmed Mr. Jones' conviction and sentence. *Jones v. State*, 987 So. 2d 1156 (Ala. Crim. App. 2006). On October 20, 2006, that Court denied Mr. Jones' application for rehearing. *See id.*

11. On January 25, 2008, the Alabama Supreme Court denied Mr. Jones' petition for a writ of certiorari, *Ex parte Jones*, No. 1060155 (Ala. Jan. 25, 2008), as did the United States Supreme Court on October 6, 2008. *Jones v. Alabama*, 129 S. Ct. 2008).

12. On January 23, 2009 a Petition for Relief from Judgment under Rule 32 was filed. On March 19, 2013, this Court granted an extension until April 4, 2013 in which to file an Amended Petition.

13. Mr. Jones now timely files this Amended Petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.

## APPLICABLE LAW

14. Mr. Jones' defense counsel, Thomas Brantley and Clark Parker, rendered deficient legal representation throughout Mr. Jones' capital murder trial. Their actions and omissions denied Mr. Jones his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution, Article I, Section 6 of the Alabama Constitution, and Alabama law. *See Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984). A criminal defendant is entitled to effective legal representation at all phases of trial. *Strickland*, 466 U.S. at 668; *Gideon v. Wainwright*, 372 U.S. 335 (1963). Indeed, the adversarial system of justice depends on effective defense counsel. *United States v. Cronic*, 466 U.S. 648 (1984). To effectively prepare for a capital trial, counsel must conduct a reasonable investigation, investigate and challenge all assertions by the State, and subject the State's case to rigorous examination and testing. *Strickland*, 466 U.S. at 688; *Wiggins*, 539 U.S. at 487-88 (trial counsel ineffective where failure to adequately investigate precluded making informed strategic decision).

## GROUNDS SUPPORTING PETITION FOR RELIEF

### I. Mr. Jones was deprived of the effective assistance of counsel due to the alcohol-related impairment of his principal trial lawyer.

#### A. Mr. Jones was severely prejudiced by the alcohol-related impairment of his principal trial lawyer, which infected every stage of the proceedings.

15. In order to fully understand the manner in which Mr. Jones was deprived of effective assistance of counsel, it is essential to know that the lawyer who had primary responsibility for preparing Mr. Jones' defense – Clark Parker – had a serious drinking problem prior to and during the guilt phase, the penalty phase, and Mr. Jones' direct appeal. In addition to his lead role in preparing for trial, Mr. Parker took the lead during the guilt phase and in the appeal. Mr. Parker gave the defense's opening statement, Mr. Parker cross examined key factual and expert witnesses, and Mr. Parker delivered the closing argument leading to Mr. Jones' conviction for capital murder. Mr. Parker was also assigned primary drafting responsibilities for

Mr. Jones' direct appeal, and represented Mr. Jones at the oral argument in the Alabama Court of Criminal Appeals. Mr. Parker's drinking problem directly interfered with his ability to prepare for trial, to investigate fundamental and effective avenues of defense, and to subject the State's case to rigorous examination and testing. *See, e.g., Strickland v. Washington*, 466 U.S. 668, 687-8 (1984). The ineffectiveness of the defense crafted by Mr. Parker is detailed in this Amended Petition.

16. Thomas Brantley, the senior trial attorney and co-counsel working with Mr. Parker, was aware of Mr. Parker's drinking problem and failed to intervene to either timely take responsibility away from Mr. Parker or otherwise seek appropriate relief from the trial court. Mr. Brantley has attributed Mr. Parker's drinking during this critical period to Mr. Parker's inability to cope with a tumultuous personal life while simultaneously being overwhelmed by serving as lead counsel in Mr. Jones' capital murder trial.

17. On April 11, 2004, Mr. Parker's drinking problem became a more complex issue when he was arrested in Houston County for driving under the influence ("DUI"). The arrest was 27 days after the jury recommended the death penalty for Mr. Jones, and eleven days before Mr. Parker was scheduled to appear for Mr. Jones' sentencing hearing on April 22, 2004. (Exhibit L, Case Action Summary, Case No. CC-2005-01.)

18. On April 19, 2004, Mr. Brantley entered his appearance as counsel for Mr. Parker in his DUI case. (*See id.*, Case Action Summary Consultation, Case No. CC-2005-01, p. 3.) That criminal prosecution was handled by the Houston County district attorney, Douglas Valeska, who was simultaneously prosecuting Mr. Jones. (*Id.*) The pending criminal charges against Mr. Parker and Mr. Brantley's representation of his colleague on those charges, gave rise

to conflicts of interest with Mr. Jones on behalf of both lawyers. Those conflicts were not disclosed to Mr. Jones.

19. Mr. Parker pled not guilty on April 23, 2004, but he continued to represent Mr. Jones at sentencing and on appeal. On November 23, 2004, Mr. Parker was convicted by the district court and sentenced to be imprisoned for 12 months, which sentence was suspended during 24 months of probation. (*See id.*, Notice of Appeal from District Court to Circuit Court, Case No. TR-04-910.) On the same day, he appealed to the circuit court. (*Id.*) Furthermore, in an information filed in the circuit court on December 11, 2004 and signed by Mr. Valeska, the State charged Mr. Parker with a first offense under Alabama Code § 32-5A-101(a)(2). (*See id.*, Information, Case No. TR-04-910.) The information made no reference to Mr. Parker's prior DUI conviction. That conviction, also for "DUI – liquors" occurred in 1987 in Houston County. (*See id.* Ala. Dept. Public Safety Driver History Abstract, Clark Parker.) An order dated September 1, 2005 reduced Mr. Parker's jail time to 30 days, which was suspended subject to the lesser condition of one year without a "serious traffic offense." (*See id.*, Sentencing Order, No. CC-2005-01.)

20. At the time of the March 2004 murder trial, Mr. Parker was a relatively new partner at Mr. Brantley's firm. But it was Mr. Parker who was primarily responsible for gathering information, preparing witnesses, and ensuring that the defense team was ready for trial. Mr. Parker's influence was not limited to the guilt phase. He also participated in the penalty phase and assisted with Mr. Jones' unsuccessful appeal until withdrawing in July 2006, one month before the appellate court issued its opinion. *See Jones v. State*, 987 So. 2d 1156, 1158 (Ala. Crim. App. 2006).

21. Mr. Brantley reported that, prior to and during the period when the trial was conducted, Mr. Parker generally drank alcohol at night and showed up for work in the mornings either still drunk or hung-over.

22. Despite Mr. Brantley's knowledge of his partner's impaired state, Mr. Parker was given a leading role in the defense at the trial of Mr. Jones, and Mr. Parker participated in all phases of the process leading to the death penalty and its affirmance on appeal. As a result, and as detailed below, trial counsel's performance was constitutionally deficient and severely prejudiced Mr. Jones, depriving him of effective assistance of counsel and ultimately a fair trial.

### B. Mr. Jones' conviction was rendered unconstitutional because both of his trial lawyers labored under an actual conflict of interest arising from the criminal charges against Mr. Parker.

23. Mr. Jones' trial – the guilt and sentencing phases – and appeal were fundamentally unfair and in violation of his Sixth Amendment right to counsel because his attorneys operated under an actual conflict of interest that adversely affected their representation. While he attempted to represent Mr. Jones before the trial and appellate courts, Mr. Parker was being prosecuted for driving under the influence. Mr. Valeska, who prosecuted Mr. Jones, simultaneously prosecuted Mr. Parker. Mr. Brantley, who served as co-counsel with Mr. Parker at every stage of Mr. Jones' proceedings, simultaneously represented Mr. Parker in his criminal case. These facts – of which Mr. Jones was never notified – created a conflict of interest that tainted each subsequent stage of the proceedings.

#### 1. The conflicts arising from Mr. Parker's prosecution violated Mr. Jones' Sixth Amendment rights.

24. At the same time Mr. Parker was representing Mr. Jones in a capital murder trial and appeal, Mr. Parker was himself being prosecuted by the same Houston County District Attorney for driving under the influence. Mr. Parker's contemporaneous criminal prosecution,

by Mr. Valeska and defended by Mr. Brantley, presented a conflict of interest rendering the Parker/Brantley representation of Mr. Jones fundamentally unfair and unconstitutionally ineffective as a matter of law. "[E]very person is entitled not only to the assistance of counsel, but also to the effective assistance of counsel." *Taylor v. State*, 291 Ala. 756, 760 (1973); *Powell v. Alabama*, 287 U.S. 45, 53 (1932); U.S. Const. amend. VI; Ala. Const. art. I, § 6.

25. The right to effective assistance of counsel necessarily includes the right to conflict-free representation. *See*, *e.g.*, *Cuyler v. Sullivan*, 446 U.S. 335, 345 (1980); *Jones v. State*, 937 So. 2d 96, 99 (Ala. Crim. App. 2005). A conflict of interest exists when "representation of [a] client may be materially limited by . . . the lawyer's own interests." Ala. Rules of Prof. Conduct, Rule 1.7(b).

26. In the criminal context, an actual (as opposed to a merely potential) conflict of interest presents such a serious threat to the defense that prejudice is presumed; the trial is so thoroughly tainted that the defendant need not show that the outcome would have been different absent the conflict. *McConico v. Alabama*, 919 F.2d 1543, 1548 (11th Cir. 1990); *see also Brooks v. State*, 686 So. 2d 494, 503 (Ala. Crim. App. 1996); *Browning v. State*, 607 So. 2d 339, 343 (Ala. Crim. App. 1992).

27. "'An actual conflict of interest occurs when a defense attorney places himself in a situation inherently conducive to divided loyalties.'" *Browning*, 607 So. 2d at 342 (quoting *Zuck v. Alabama*, 588 F.2d 436, 439 (5th Cir. 1979)). A conflict becomes "actual," rather than "potential," when the defendant can "demonstrate that [it] adversely affected his lawyer's performance." *M.S. v. State*, 822 So. 2d 449, 453 (Ala. Crim. App. 2000) (quoting *Cuyler*, 446 U.S. at 350). "To prove that an actual conflict of interest adversely affected his counsel's performance, a defendant must make a factual showing 'that his counsel actively represented

conflicting interests.'" *Id*. Because of the insidious nature of such a conflict, a showing that it adversely affected counsel's performance in some way is sufficient; the courts then presume that the defendant has been prejudiced.

28. Here, there was an actual conflict of interest shortly after the jury verdict and before Mr. Jones' capital sentencing hearing. Once Mr. Parker's ongoing drinking problem resulted in his being criminally cited for DUI, he and Mr. Brantley had the incentive and duty to protect Mr. Parker's personal interests to avoid time in prison and the likely resulting lost earnings. There was an actual conflict where the manner of handling of Mr. Jones' defense, in a case of higher profile and greater significance to the prosecutor than Mr. Parker's DUI, could be used to curry favor with the prosecutor.

29. It was during the weeks before Mr. Jones was sentenced to death, that the attorneys for the prosecution and the defense in his case became involved in Mr. Parker's criminal prosecution. On April 19, 2004, Mr. Brantley filed his appearance to represent Mr. Parker in the DUI proceedings and served discovery on Mr. Valeska, even as Mr. Brantley should have been preparing for Mr. Jones' sentencing. On June 8, 2004, the lawyers turned back to Mr. Jones' case – all three argued at Mr. Jones' sentencing, and Mr. Jones was sentenced to death.

30. Mr. Parker's conflict of interest was nearly as personal to his partner and co-counsel, Mr. Brantley, as it was to Mr. Parker. To Mr. Brantley, this was not just another criminal defendant, Mr. Parker was his law and business partner. Mr. Brantley's personal income would also be affected by Mr. Parker's imprisonment. Mr. Brantley had a professional interest in seeing his partner, whose career was closely intertwined with his own, acquitted of

this embarrassing charge or punished as lightly as possible. *See* Ala. Rules Prof. Conduct Rule 1.10(a).

**2. Mr. Parker's simultaneous DUI prosecution and the resulting actual conflict of interest were not disclosed to Mr. Jones.**

31. At no time did anyone tell Mr. Jones about the parallel criminal proceeding by Mr. Valeska's office against Mr. Parker. This failure to disclose was itself constitutionally impermissible, and compounded the fundamental unfairness of the proceedings.

32. The Sixth Amendment requires a trial court to inquire into a conflict of interest of which it becomes aware. *Wood v. Georgia*, 450 U.S. 261, 272 (1981); *see also United States v. Carmichael*, 381 F. Supp. 2d 1317, 1323 (M.D. Ala. 2005) (the court "has an independent obligation to protect [the right to conflict-free representation] by conducting an inquiry when it is made aware of an alleged conflict"). Here, the court did not address the conflict, and no one – not Mr. Parker, Mr. Brantley, or Mr. Valeska raised the issue.

33. In the months after Mr. Jones was sentenced to death, Mr. Parker and Mr. Brantley continued to manage Mr. Parker's own criminal case, even as they prepared for Mr. Jones' appeal. Through the summer and fall of 2004, as they also shepherded Mr. Parker's DUI case through conviction and appeal, Mr. Parker and Mr. Brantley sought multiple extensions to file Mr. Jones' appellate brief due, among other things, to the pending trial date in Mr. Parker's DUI case.[2] They eventually filed the brief – late, despite the numerous extensions – on March 11, 2005. That was only three days before Mr. Parker's DUI case was set for hearing in the circuit court on the appeal that resulted in his reduced sentence. (Exhibit L, Motion to Continue dated March 14, 2005, Case No. CC-2005-1.) The brief could fairly be described as wholly

[2] The appellate court granted a 60-day extension for the filing of the brief in support of Mr. Jones' appeal on November 22, 2004 – the day before Mr. Parker's DUI case was set for trial. (Exhibit B, 11/22/04 Court Order.) The appellate court granted another 30-day extension on January 12, making the appellate brief due February 23, 2005. (Exhibit C, 1/12/05 Court Order.)

inadequate, raising only three issues on appeal, one of which was based on Mr. Parker's since admitted misunderstanding of the elements of a burglary. (*See* section II.Q. below, incorporated herein by reference.) Mr. Parker and Mr. Brantley failed to raise any issues of prosecutorial misconduct identified and alleged in this Amended Petition. (Exhibit D, 3/11/05 Brief of the Appellant.) The failure to raise any issues of prosecutorial misconduct on appeal of Mr. Jones' death penalty was directly related to the interests of Mr. Parker and Mr. Brantley to secure a more favorable resolution of the criminal charges pending against Mr. Parker.

34. Mr. Parker's appeal of his DUI conviction to the circuit court was heard on September 1, 2005 – after briefing on Mr. Jones' appeal was completed. (Exhibit L, Sentencing Order, Case No. CC-2005-01.) Although Mr. Parker was found guilty in the circuit court, this time the original suspended sentence was reduced from one year to one month, and Mr. Parker's original two-year probation period was reduced to one year without a "serious traffic offense." *Id*. In contrast, the hapless appeal of Mr. Jones' conviction was rejected in its entirety. Mr. Valeska's politically-valuable death penalty conviction was affirmed.

**3. This actual conflict of interest adversely affected Mr. Jones' representation at sentencing.**

35. The penalty phase is a critical stage of a criminal proceeding, for which a defendant is entitled to effective assistance of counsel. *Golden v. Newsome*, 755 F.2d 1478, 1482 (11th Cir. 1985). At the time of Mr. Jones' sentencing, Mr. Brantley had just entered a not-guilty plea on Mr. Parker's behalf in the DUI case, and was preparing to serve discovery on Mr. Valeska. The conflict was alive and active at that critical time. Mr. Parker and Mr. Brantley had reason to curry Mr. Valeska's favor in hopes of receiving favorable treatment in Mr. Parker's case.

36. Mr. Parker's direct conflict of interest and Mr. Brantley's imputed conflict deterred them from raising powerful arguments, supported by readily available evidence, that could have swayed the judge at Mr. Jones' sentencing.

37. For example, the conflict was a disincentive to investigating or challenging Mr. Valeska's blatantly false assertion at trial that Mr. Jones' family had no history of drug use. (R. 1445–46, 1479–80). Mr. Valeska made that claim in the closing argument at trial, and Mr. Parker and Mr. Brantley had nearly three months from the end of the jury trial until the sentencing hearing to respond to Mr. Valeska's misrepresentation. Interviews of family members or review of the Houston County prosecutor's records would have revealed that, while he was the head of the household where Mr. Jones resided, his stepfather, Demetrius Whitsett, was convicted of drug offenses prosecuted by Mr. Valeska's office. (*See* Exhibit R, D. Whitsett Criminal Records, Case No. CC-97-1231.) The prosecutor had knowledge of the drug conviction and pervasiveness of drugs in Mr. Jones' childhood home when he misled the jury and the court during the penalty phase of the trial to believe that evidence did not exist – for the purpose of obtaining a death sentence. Counsel's failure to investigate or challenge Mr. Valeska's demonstrably false and misleading argument before the sentencing hearing adversely affected Mr. Jones' defense. An opportunity was lost, which could have provided powerful mitigation evidence while undercutting Mr. Valeska's credibility before the trial court.

38. The conflict of interest deterred both defense attorneys from zealously advocating on behalf of Mr. Jones at the sentencing hearing. Mr. Brantley's argument consisted of little more than a disjointed listing of the small amount of mitigation evidence that he and Mr. Parker had presented at the penalty phase of the trial. Mr. Parker attempted to show the victim was unconscious when many of her injuries were inflicted, but his argument actually reinforced

the State's position by highlighting the most graphic and horrifying aspects of the victim's injuries. (S. at 11–12). Mr. Parker and Mr. Brantley failed to present a coherent narrative of the teenager's nomadic life story or his squalid childhood environment that would tend to mitigate any sentence of death. The failure of the two defense attorneys to zealously advocate on Mr. Jones' behalf during the sentencing proceeding cannot be separated from their active conflict of interest in securing a favorable resolution of the criminal charges then pending against Mr. Parker.

39. As is discussed in greater detail below, if such a presentation had been made effectively based on the available facts, there is at least a reasonable probability that Mr. Jones would have been sentenced to life imprisonment without parole. But under Alabama law, where a conflict like this one exists, Mr. Jones need not even show such a probability. Mr. Parker and Mr. Brantley's actual conflict of interest, coupled with its adverse effects on their representation, constitutes ineffective assistance of counsel and entitles Mr. Jones to a presumption of prejudice as a matter of law. *McConico*, 919 F.2d at 1548. ("A petitioner need not show that the result of the trial would have been different without the conflict of interest, only that the conflict had some adverse effect on counsel's performance."). This reason alone is sufficient for the Court to grant the relief sought in this Amended Petition.

**4. This actual conflict of interest adversely affected Mr. Jones' representation on appeal.**

40. In addition, because the criminal charges against Mr. Parker remained pending throughout the appeal of Mr. Jones' conviction to the Court of Criminal Appeals, the conflict continued and adversely affected Mr. Parker and Mr. Brantley's performance. The adverse effect on Mr. Jones' right to effective counsel presented by the conflicts of interest during appeal was at least as great as during the trial stage.

> Although allegations of error in a criminal case are directed at the trial court, they are, more often than not, presented in terms that the error was caused or importuned by the government. Thus, the substance of a criminal appeal usually consists of complaints against both the trial court and the government. *For there to be the minimal level of attorney competence on the prosecution of an appeal, counsel must be totally unshackled in his presentation to the appellate court. It is essential that the advocate owe no fealty that conflicts, or even appears to conflict, with the paramount ethical loyalty he owes his client.*

*United States v. DeFalco*, 644 F.2d 132, 136 (3d Cir. 1979) (emphasis added).

41. During this period, when the defense attorneys continued to have an interest in currying the favor of Mr. Valeska and the prosecutor's office, Mr. Parker and Mr. Brantley failed to raise a number of substantial issues on appeal of Mr. Jones' conviction.

42. Astonishingly for a capital appeal, only three issues were raised. Further, one of those issues was based upon an argument that was completely fallacious as a matter of law: Mr. Parker and Mr. Brantley argued in the opening brief on appeal, as they did in the trial court, that "the State failed to produce evidence that a theft had occurred . . . in that the victim's car was not in the victim's dwelling and there was no evidence that anything was taken from within the victim's dwelling." (Exhibit D, 3/11/05 Brief of the Appellant, at 67.) Mr. Parker later admitted that he had simply misunderstood the elements of the crime of burglary.

43. The Court of Criminal Appeals affirmed the conviction and sentence, and correctly described the elements of burglary. *Jones v. State*, 987 So. 2d 1156, 1168 (Ala. Crim. App. 2006) (noting that the State need only prove that the defendant "merely unlawfully entered a dwelling *with the intent* to commit a crime) (emphasis original). In addition to this fundamental mistake of basic criminal law, Mr. Parker and Mr. Brantley also failed to raise ***any*** of the numerous instances of prosecutorial misconduct as issues on direct appeal. For example,

counsel failed to raise the following issues on appeal, all of which reflected poorly on the prosecutor, Mr. Valeska:

- Mr. Valeska violated Mr. Jones' Fifth Amendment rights by improperly commenting on Mr. Jones' decision not to testify at trial, *see infra* at II.O.10, incorporated herein by reference;
- Mr. Valeska violated *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) in selecting jurors pursuant to discriminatory criteria, *see infra* at V.A.1, incorporated herein by reference;
- Mr. Valeska improperly death-qualified the jury, *see infra* at II.D.2, incorporated herein by reference;
- Mr. Valeska improperly vouched for the integrity of the State's case and its witnesses throughout the trial, *see infra* at II.D.6, II.O.6, incorporated herein by reference;
- Mr. Valeska improperly suggested that the elderly are entitled to greater protection under Alabama law, *see infra* at II.D.6, incorporated herein by reference;
- Mr. Valeska mischaracterized the statistical basis of the State's DNA evidence, *see infra* at II.D.6, incorporated herein by reference;
- Mr. Valeska improperly introduced penalty phase evidence during the guilt phase of the trial, including victim impact evidence and evidence of allegedly heinous, atrocious, or cruel aggravating circumstances, *see infra* at II.O.3, II.P, incorporated herein by reference.

44. These, and many other instances of prosecutorial misconduct detailed throughout this Amended Petition, *see infra* at II.D, II.O, and III.D (all incorporated herein by reference), could and should have been raised by Mr. Parker and Mr. Brantley on direct appeal (*see* Section V.A.2, incorporated herein by reference). Their failure to raise the courts' denial of Mr. Jones' *Batson* motion as an issue on appeal is particularly troubling. That example of prosecutorial misconduct was challenged in the trial court but – after their conflicts arose as a result of Mr. Parker's DUI – Mr. Parker and Mr. Brantley failed to pursue the *Batson* issues, or any other act of prosecutorial misconduct, on appeal. Omitting the prosecutorial misconduct from the appeal

was because of their interest in securing a favorable resolution of the criminal charges pending against Mr. Parker.

45. Regardless of whether Mr. Parker and Mr. Brantley objected to each instance of prosecutorial misconduct at trial, any such issue could still have been raised and reviewed under a plain error standard. *Jones*, 987 So. 2d at 1164. Here, each of these instances of prosecutorial misconduct, considered alone or as a whole, could have provided grounds for reversal, had they been raised on appeal. The failure to raise any issues of prosecutorial misconduct is attributable to their interest in a favorable resolution of the charges pending against Mr. Parker. Accordingly, Mr. Parker and Mr. Brantley had an actual, active conflict of interest that rendered them ineffective at both the trial and appellate stages.

46. The effect of this actual conflict with the interests of Mr. Jones is further demonstrated by the fact that Mr. Brantley's firm engaged in much more zealous advocacy on behalf of Mr. Jones once Mr. Parker's DUI case had been resolved. On December 1, 2006, well after Mr. Parker's criminal prosecution had concluded, after his sentence had been reduced, and after he left the firm (and begun winding up the practice of law entirely), Mr. Brantley's firm filed Mr. Jones' petition for certiorari to the Alabama Supreme Court. That petition stands in stark contrast to the weak appellate brief counsel filed during the period in which the criminal charges were pending against Mr. Parker, and their conflict of interest with Mr. Jones existed.

47. In the petition for certiorari, Mr. Brantley's firm raised 21 enumerated issues, all of which could and should have been raised on appeal to the Court of Criminal Appeals. (*See* Exhibit F, 12/1/06 Petition for Writ of Certiorari to the Alabama Court of Criminal Appeals). Mr. Parker's error regarding the elements of burglary was not repeated in the petition. Of

course, there was no obligation on the part of the Supreme Court to grant discretionary review, and, as a result, these substantial additional issues were never addressed in the appellate process.

48. In addition to these and many more obvious omissions apparent by comparison to the petition for certiorari, it is clear that Mr. Parker and Mr. Brantley's halfhearted representation of Mr. Jones in the Court of Criminal Appeals was attributable to and itself constitutes an adverse effect of the conflict of interest arising out of the pending criminal charges against Mr. Parker. After obtaining 90 days of extensions of the date their appellate brief was due, Mr. Parker and Mr. Brantley failed to comply with the new deadline. They simply forgot to file the opening brief in an appeal from a capital murder conviction. (Exhibit B, 11/22/04 Court Order.) Only after receiving a notice from the appellate court of their failure to timely file a brief did Mr. Parker and Mr. Brantley submit their brief, on March 11, 2005. They did, however, during this time manage to contest and successfully reduce Mr. Parker's own sentence for driving under the influence.

49. Mr. Parker and Mr. Brantley's failure to prepare an adequate appellate brief, including their failure to raise Mr. Valeska's numerous instances of prosecutorial misconduct as issues on appeal, constituted an adverse effect of their conflict of interest, raises a presumption of prejudice, and requires reversal. *McConico*, 919 F.2d at 1548; *see also, Cuyler*, 446 U.S. 335, 349 (1980).

**II. Mr. Jones was denied effective assistance of counsel at the guilt phase of his trial.**

50. A criminal defendant is entitled to effective legal representation. *Strickland*, 466 U.S. 668; *Gideon v. Wainwright*, 372 U.S. 335 (1963). Indeed, the adversarial system of justice depends on effective defense counsel. *United States v. Cronic*, 466 U.S. 648, 666 (1984). Mr. Jones' trial attorneys were ineffective at all stages of the criminal proceedings against him and did not subject the prosecution's case to meaningful adversarial testing. Trial counsel's

performance fell below "an objective standard of reasonableness" and failed "to make the adversarial process work." *Strickland*, 466 U.S. at 688. Trial counsel's errors cannot be construed as part of a sound trial strategy. Trial counsel's deficient performance "undermine[d] confidence in the outcome" of Mr. Jones' case. *Id.* There is a reasonable probability that, but for counsel's deficient performance, the determinations of guilt and penalty would have been different. *Rompilla v. Beard*, 545 U.S. 374 (2005); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000); *Strickland v. Washington*, 466 U.S. 668 (1984).

51. Mr. Jones contends that trial counsel's deficiencies, including deficiencies related to Mr. Parker's drinking problem, failures to investigate and prepare, and numerous other deficiencies enumerated throughout this amended petition had an all-encompassing impact on trial counsel's actions and inactions during the guilt phase of this trial.

52. The trial attorneys' ineffectiveness at the guilt phase emanated from their failures to properly investigate the facts surrounding the offense and to properly prepare for trial. Trial counsel, particularly in defending a capital case, have an obligation to thoroughly investigate the prosecution's case so as to be able to subject it to rigorous examination and adversarial testing. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982). This duty further obliges defense counsel to investigate all possible avenues of defense. *Williams (Terry) v. Taylor*, 529 U.S. 362 (2000) (finding ineffective assistance of counsel for failing to investigate and present available evidence); *Strickland v. Washington*, 466 U.S. 668 (1984); *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986) (finding ineffective assistance of counsel where defense counsel failed to investigate alibi witnesses). Trial counsel's obligation to conduct an adequate investigation extends to the penalty phase as well. *Wiggins v. Smith*, 539 U.S. 510, 523, 534-38 (2003).

53. Trial counsel in capital cases have an obligation "to conduct thorough and independent investigations relating to the issues of both guilt and penalty." ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.7 (Investigation) (2003).[3] The investigation regarding guilt must be conducted "regardless of any admission or statement by the client concerning the facts of the alleged crime, or overwhelming evidence of guilt, or any statement by the client that evidence bearing upon guilt is not to be collected or presented." *Id*.

54. By virtue of the individual and cumulative effect of the errors enumerated below, Mr. Jones was denied his right to effective assistance of trial counsel in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, Article I, Sections 1, 6, 8, and 15 of the Alabama Constitution, and other applicable law. For the sake of expediency, Mr. Jones hereby expressly incorporates all of the foregoing paragraphs, including Section I, into his guilt phase ineffectiveness allegations.

**A. Counsel failed to properly challenge the admission of Mr. Jones' statements on all available grounds.**

**1. Counsel failed to properly challenge the admission of Mr. Jones' statements on *Miranda* grounds.**

55. Counsel deficiently and prejudicially failed to demand that the State establish a *Miranda* predicate before all of Mr. Jones' custodial statements were admitted into evidence. For a statement to be admissible, the State must prove that the defendant waived his *Miranda* rights and the statement was acquired voluntarily. *See Miranda v. Arizona*, 384 U.S. 436 (1966); *Ex parte Jackson*, 836 So. 2d, 979, 982 (Ala. 2002) (holding that the "burden is on the State to show voluntariness and a *Miranda* predicate before such a statement can be admitted").

[3] *See also* ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 11.4.1 (1989); ABA Standards for Criminal Justice: Defense Function Standard 4-4.1, 4-6.1, in ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

56. After his arrest, the police interrogated Mr. Jones, before any *Miranda* warning was given, and multiple times throughout the night and morning following his arrest. There is no dispute that the police failed to read a *Miranda* warning to Mr. Jones prior to the first interrogation at the police station around 9:00 p.m. (R. 277-78.) With respect to the second conversation that occurred around 1:35 a.m., the State failed to provide any evidence that Mr. Jones waived his *Miranda* rights. To the contrary, the only factual evidence establishes that Mr. Jones *refused* to sign a *Miranda* waiver. (R. 289.) The police improperly used information from both of these un-Mirandized statements to gather additional evidence. (R. 278–79.)

57. Because testimonial fruits of a statement given without *Miranda* warnings are inadmissible, trial counsel should have objected on *Miranda* grounds to the admission of Mr. Jones' subsequent statements, but they failed to do so. As a result, the State was permitted to rely upon the statements in proving its case.

58. At the end of the suppression hearing, counsel did challenge the statements on voluntariness grounds, but they failed to argue that the statements should be suppressed pursuant to *Miranda v Arizona*, 384 U.S. 436 (1966). (R. 318-21.) Furthermore, while the State has previously contended that "Trial counsel filed a pretrial motion requesting suppression of Jones' custodial statements on *Miranda* grounds," (Exhibit I, Proposed Order to State's Motion to Dismiss Rule 32 Petition, ¶ 35), the Court of Criminal Appeals in fact "note[d] that no objection was raised regarding Officer Beeson's rebuttal testimony concerning Jones' second statement until the end of his testimony," which resulted in the Court of Criminal Appeals applying only a plain-error standard of review. *Jones v. State*, 987 1156, 1164 (Ala. Crim. App. 2006). The fact that the statements were challenged in a suppression hearing and that the trial objection was raised belatedly shows there was no strategic reason not to have objected earlier during trial.

59. Had counsel properly and timely objected at trial on *Miranda* grounds, there is a reasonable probability that the trial court would have suppressed Mr. Jones' statements. Absent those statements, there was no admission that Mr. Jones had been at the scene of the murder. The other prosecution evidence would be less persuasive to the jurors, and could be explained as connecting Mr. Jones only to the vehicle, rather than the scene. In the absence of the admissions in the custodial statements, there is a reasonable probability that the jurors would have had a reasonable doubt about Mr. Jones' guilt and that he would not have been convicted of capital murder or sentenced to death.

**2. Counsel's failure to timely and properly object to the admission of Mr. Jones' statements prejudiced Mr. Jones' appeal of the trial court's denial of his motion to suppress by causing the appellate court to use a more deferential standard of review.**

60. Counsel's failure to timely and properly object at trial to the admissibility of Mr. Jones' statements materially prejudiced Mr. Jones' ability to appeal the trial court's denial of his motion to suppress. As the appellate court noted: "Although Jones' failure to object at trial will not preclude this Court's review of an issue in this case, it will, nevertheless, weigh against any claim of prejudice he makes on appeal." *Jones v. State*, 987 1156, 1162 (Ala. Cr. App. 2006). Indeed, the appellate court specifically noted that "no objection was raised regarding Officer Beeson's rebuttal testimony concerning Jones' second statement until the end of his testimony . . . . Because, however, Jones was sentenced to death, we will review the admissibility of the statement under the plain-error standard." *Id.* at 1164. However, as the appellate court noted, "[t]he standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal." *Id.* at 1162 (citation omitted). Thus, counsel's failure to object in the trial court significantly prejudiced Mr. Jones by causing the appellate court to apply a much more deferential standard in

reviewing the trial court's decision not to suppress Mr. Jones' statements. Had counsel objected in the trial court, the appellate court would have applied a less deferential standard of review, *id.*, and would have almost certainly reversed Mr. Jones' conviction and remanded for a new trial.

61. That the appellate court would have reached a different result under a more searching standard of review is reflected in the fact that its opinion is otherwise entirely inconsistent with decisions from the United States Supreme Court and the Supreme Court of Alabama. In finding Mr. Jones' statements to be admissible, the appellate court placed substantial reliance on the fact that Mr. Jones did not "confess," but intended his statements to be exculpatory. *Jones*, 987 So. 2d at 1164-66. The appellate court's reliance on that distinction, however, flies in the face of the United States Supreme Court's instruction in *Miranda* that "no distinction may be drawn between inculpatory statements and statements alleged to be merely 'exculpatory.'" *Miranda*, 384 U.S. at 477.

62. The appellate court's rationale is also at odds with the Alabama Supreme Court's holding in *Harrison v. State*, 358 So. 2d 763, 765 (Ala. 1978), where the court wrote: "we hold that, in any 'custodial interrogation,' the duty is on the state to prove, in accordance with the mandates of *Miranda*, that the *Miranda* warnings were given, in order to use, at trial, any statements, exculpatory or inculpatory, where, as here, there was an objection thereto." *See also Hodges v. Stake*, 926 So. 2d 1060, 1071 (Ala. Crim. App. 2005) ("It is well established that the prosecution may not use statements, whether exculpatory or inculpatory, of the defendant unless it demonstrates the use of procedural safeguards effective to secure the privilege against self-incrimination.") (internal quotations omitted).

63. Moreover, the appellate court's use of the distinction between inculpatory and exculpatory statements pervaded its analysis of Mr. Jones' statements. *See* Jones, 987 So. 2d at

1164 ("A false statement made by an accused, in an offer to exculpate or divert suspicion from himself or to explain away apparently incriminating circumstances, is provable without regard to the rules governing the admissibility of confessions,") (citation omitted); *id.* at 1165 ("In light of the fact that Jones continued to deny any involvement in Mrs. Kirkland's killing after Officer Beeson made the reference regarding the electric chair, his comments cannot be said to have 'overborne' Jones will and forced him into confessing."); *id*. at 1166 ("The record indicates that Jones repeatedly lied to law-enforcement officials in order to protect himself from punishment. Thus, Jones' claim that his third statement was the result of coercion is without merit.").

64. The only explanation for the appellate court's use of this distinction in a complete departure from prior decisions of higher courts is that the appellate court believed it had a freer hand due to a less-demanding standard of review that was more deferential to the trial court than if counsel had properly and timely objected at trial. *See Jones*, 987 So. 2d at 1164 (stating that the court would apply the plain-error standard of review because counsel failed to timely object to the admission of Mr. Jones' statements at trial). Had counsel timely and properly objected in the trial court, there is a reasonable probability that the appellate court would not have distinguished between inculpatory and exculpatory statements but would have followed controlling precedent and reversed Mr. Jones' conviction.

65. The appellate court's determination on direct appeal that there was no plain error does not foreclose a finding during post-conviction proceedings that Mr. Jones suffered prejudice under *Strickland v. Washington,* 466 U.S. 668 (1984) for ineffective assistance of counsel in failing to preserve the appellate standard requiring greater scrutiny of the admissibility of the statements. *See ex Parte Taylor*, 10 So. 3d 1075 (Ala. 2005).

### 3. Counsel failed to investigate and present readily available evidence that Mr. Jones' statements were the products of physical coercion and intimidation by the police.

66. In yet another example of counsel's failure to adequately investigate and prepare for Mr. Jones' trial, they failed to obtain or introduce available evidence showing that Mr. Jones' statements were the results of physical coercion and intimidation by the police. This failure prejudiced Mr. Jones both at trial and on appeal. The appellate court found that "[b]ased on the totality of the circumstances, the trial court correctly determined that Jones' statements were voluntarily made." *Jones*, 987 So. 2d at 1166. However, due to the failure of trial counsel to investigate and present all relevant facts, neither the trial court nor the appellate court was presented with a record that fairly, fully, and accurately contained the "totality of the circumstances." Specifically, counsel failed to either investigate or present evidence establishing that the police physically assaulted Mr. Jones while he was in custody and during interrogation.

67. The police caused serious physical injury to Mr. Jones' by violently ramming his head into a door. This incident was witnessed by Mr. Jones' sister, LaKeisha Jones, who was also in custody at the time and kept in the same room as him. Had counsel effectively interviewed Ms. Jones prior to trial, they would have learned this fact and introduced it both during the suppression hearing and also at trial to undermine the State's evidence. In addition, counsel failed to learn or present evidence that Mr. Jones' mother saw the injury to Mr. Jones' head when she visited him after his arrest.

68. The record also shows that the injury to Mr. Jones' head was not minor, but that the pain from that injury adversely impacted his ability to deal with his interrogators. Mr. Jones referenced his head injury *seven times* during his second statement:

- "Man, I got a headache." (C. 351);

- "Can I get an aspirin or something, sir, cause I'm . . . I'm about out already." (C. 362);
- "My head is hurting." (C. 372);
- "Damn, my head hurts. Damn, my head." (C. 372);
- "Man, my head hurts. Y'all ain't got no aspirin, Tylenol or nuthin'?" (C. 372);
- "See my head hurts." (C. 374);
- "My head is hurting now. I can't take too much." (C. 384).

Mr. Jones was in such distress that he repeatedly requested pain medication to alleviate his suffering. (C. 362, 372.) These pleas were completely ignored by the police officers conducting the interview. Not only did they not provide Mr. Jones' with aspirin or another pain reliever as he requested, they did not inquire as to whether Mr. Jones' head injury affected his ability to understand what was happening or make knowing voluntary, and intelligent decisions regarding his statement.

69. This is objective evidence that the pain from Mr. Jones' head injury made it impossible for him to make a voluntary, knowing, and intelligent decision about his statement. That statement should not have been admitted at his capital murder trial. *See Mincey v. Arizona*, 437 U.S. 385 (1978) (finding confession involuntary because *inter alia* defendant was in pain). Furthermore, the officers' treatment of Mr. Jones – both in causing his injury and in ignoring his obvious suffering – created an atmosphere that undermined Mr. Jones' personal dignity and overbore his will to remain silent. *See Miranda*, 384 U.S. at 445-58 (describing police interrogation techniques designed to subtly create an atmosphere of police domination as destructive of the human dignity guaranteed by the privilege against self-incrimination).

70. Additionally, investigation leading to target questioning of police witnesses during the suppression hearing would have revealed that while Mr. Jones was in custody and

being interrogated, the police repeatedly kicked him in the chest so hard that he fell backwards out of his chair. Thus, regardless of whether any *Miranda* warnings given prior to the second statement were effective, the second statement was involuntary because the police used coercive tactics that overbore Mr. Jones' will to remain silent. *Mincey*, 437 U.S. 385.

71. Further, the evidence that Mr. Jones' will was overborne is even more compelling when these acts of physical assault are viewed in combination with the psychological intimidation the police used against Mr. Jones – threatening to send him to the electric chair. During Mr. Jones' second statement Officer Beeson told the teenager, "I'm sitting here holding your life in my hands." (C. 378.) He then effectively stated that he would send Mr. Jones to the electric chair. (C. 378.) This statement went beyond telling Mr. Jones that he was facing capital charges. Rather, it exploited Mr. Jones' youth, lack of education, and already expressed fear of the death penalty, and the message conveyed to him that the police officers personally had control over whether or not he would receive that penalty. This comment heightened the atmosphere of fear in which police – who had already physically assaulted Mr. Jones – now stated that they controlled Mr. Jones' fate and necessarily produced a compulsion for him to speak. That threat, coupled with the acts of physical coercion that counsel failed to present, overbore Mr. Jones' will and rendered all of his subsequent statements involuntary. *See Harris v. Dugger*, 874 F.2d 756, 761 (11th Cir. 1989) (noting that for a statement to be voluntary it "must not be extracted by any sort of threats"); *Ex parte Pardue*, 661 So. 2d 268, 270 (Ala. 1994) (same).

72. The fact that Mr. Jones did not "confess" to the murder does not demonstrate that his will was not overborne; it is sufficient that he felt compelled to speak at all and forgo his right to remain silent. *See Miranda*, 384 U.S. at 477; *Harrison*, 358 So. 2d at 765; *Hodges*, 926

So. 2d at 1071. Here his inconsistent recorded exculpatory statements and Mr. Jones' purported unrecorded partial confession that he was present at the crime scene were used by the prosecution at trial. Had counsel performed an adequate investigation and introduced the police officers' acts of physical coercion against Mr. Jones, there is a reasonable probability that his statements would have been suppressed and that he would not have been convicted of capital murder or sentenced to death.

### B. Counsel failed to assert Mr. Jones' right to a speedy trial despite the fifty (50) month delay in the commencement of his case.

73. Mr. Jones' counsel were ineffective because they failed to assert his right to a speedy trial. The Sixth Amendment to the United States Constitution provides, "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial." U.S. Const. amend. VI; *see also Barker v. Wingo*, 407 U.S. 514, 530 (1972). The guarantee of a speedy trial is a "fundamental right" on footing with any of the basic liberties described in the Bill of Rights. *Klopfer v. North Carolina*, 386 U.S. 213, 223 (1967). Here, trial counsel's failure to assert this right resulted in an unjustified delay in the commencement of Mr. Jones' trial for over four years that prejudiced Mr. Jones by subjecting him to oppressive pretrial incarceration and unnecessary anxiety as well as impairing his defense.

#### 1. The lengthy delay in bringing Mr. Jones to trial results in a presumption of prejudice.

74. As a threshold matter, the length of the delay means that Mr. Jones is entitled to a presumption of prejudice as a result of his trial counsel's failure to assert his right to a speedy trial. *See Wingo*, 407 U.S. at 530-31. Under Alabama law, the delay of more than 50 months between Mr. Jones' arrest on December 31, 1999, and the commencement of his trial on March 8, 2004, is more than sufficient to meet the presumptive prejudice standard. *See Howard v. State*, 678 So. 2d 302, 304 (Ala. Crim. App. 1996) (29-month delay was presumptively

prejudicial); *Vincent v. State*, 607 So. 2d 1290 (Ala. Crim. App. 1992) (31-month delay was presumptively prejudicial). Because Mr. Jones was presumptively prejudiced by his counsel's failure to exercise his right to a speedy trial, the court must consider the reason for the delay, Mr. Jones' assertion of his right, and the magnitude of the prejudice to Mr. Jones. *See Wingo*, 407 U.S. at 530-33.

**2. The delay has not been explained.**

75. The delay in bringing Mr. Jones' case to trial has not been explained. Notably, while trial counsel was deficient for failing to assert Mr. Jones' right to a speedy trial, the delay itself is attributable to the State. Because trial counsel was not appointed until March 27, 2003, none of the delays throughout the first 38 months are attributable to Mr. Jones. (C. 1.) The State has not explained its delay in bringing Mr. Jones to trial; but even a negligent delay is a violation, because the ultimate responsibility for the delay lies with the State. *Wingo*, 407 U.S. at 531.

**3. Counsel failed to assert Mr. Jones' right to a speedy trial despite the fact that Mr. Jones himself tried to assert that right.**

76. Counsel's failure to assert Mr. Jones' right to a speedy trial is all the more deficient because Mr. Jones himself repeatedly attempted to assert it. (C. 14, 15, 16, 18, 19.) On four separate occasions, Mr. Jones sent letters to the circuit judge and circuit clerk requesting that they advance proceedings in his case. *Id*. In those letters, he specifically attempted to assert his right to a speedy trial. On June 10, 2002, Mr. Jones wrote, "Your Honor, I have a capital case and ***time is always of the essence*** when dealing with capital cases. My knowledge of the law is limited and I've been locked up since December 31, 1999." (C. 14 (emphasis added).)

**4. The delay in bringing Mr. Jones to trial resulted in actual, not just presumptive, prejudice, including four years of oppressive**

**incarceration, needless anxiety and concern about his case, and an impaired defense.**

77. Mr. Jones suffered extensive prejudice as a result of his counsel's failure to assert his right to a speedy trial. The United States Supreme Court has identified three interests that the right to a speedy trial protects: (1) prevention of oppressive pretrial incarceration, (2) minimizing anxiety and concern of the accused, and (3) limiting the possibility that the defense will be impaired. *See Wingo*, 407 U.S. at 514. Here, Mr. Jones was prejudiced by injuries to each of these three interests. Four-plus years of incarceration prior to receiving a trial is inherently oppressive. As a result of that lengthy pre-trial incarceration, during which time little progress was made on his case, Mr. Jones suffered needless anxiety and concern about his defense, as reflected in Mr. Jones' letters to the judge and clerk. (C. 14, 15, 16, 18.) Finally, counsel's failure to assert Mr. Jones' right to a speedy trial resulted in an impaired defense. Numerous witnesses were unable to recall crucial pieces of evidence. (*See, e.g.,* R. 464, 466, 491–92, 496, 497, 500, 503, 528-29, 760, 767, 788-89, 806-07, 810-11, 816-17, 850–51, 872, 877, 879, 884-86, 908.) Indeed, even the prosecutor himself admitted that this considerable delay negatively impacted the reliability of evidence, because some witnesses might not be capable of accurately remembering information because the offense occurred over four years prior. (*See, e.g.,* R. 489, 537.) The witnesses' inability to remember critical details significantly hindered Mr. Jones' ability to make out his case and effectively cross-examine State witnesses.

78. Perhaps most importantly, the more than four-year delay in bringing Mr. Jones to trial greatly undermined and reversed important mitigating evidence. His youth, as an 18-and-a-half-year-old teenager, was gone, and by the time of trial, Mr. Jones had been transformed by the delays into a nearly 23 year-old man. As a matter of law, his youth was entitled to great weight. At the time of his arrest, Mr. Jones was just a few months past the age that would automatically

render him constitutionally ineligible for the death penalty. *Roper v. Simmons*, 543 U.S. 551 (2005). He was not even yet of the age of majority under Alabama law on December 31, 1999, at the time of the offense). Ala. Code § 26-1-1. But the judge and the jury did not see the youthful teenager who allegedly committed the offense and was interrogated by 20 and 30-year veterans of the police force. Instead, they saw a man, hardened by more than four years of incarceration. He was 23% older at the time of trial than at the time of the offense. Thus, the delay precluded the jury from giving this mitigating circumstance its due weight. The prosecutor took advantage of the matured appearance of the defendant by asking the jurors to look at him and imagine the defendant, obviously the significantly older and stronger man, in relation to the frail senior-citizen victim. (*See* R. 1184 ("She was in her home in Houston County defenseless, weak, unable to protect herself. Someone that's six foot a hundred and eighty-five pounds, you see him as he sits here in the courtroom, destruction and death came."); *see also, e.g.,* R. 1187-88.)

79. There is no strategic or tactical reason to explain trial counsel's failure to raise the denial of Mr. Jones' right to a speedy trial. The delays created by the State and greatly benefiting the State's case, already existed when counsel were appointed.

80. Had Mr. Jones' counsel asserted his right to a speedy trial, they would have established that the State's delay in bringing this case to trial resulted in oppressive pretrial incarceration, considerable anxiety, and impaired Mr. Jones' defense. Trial counsel's failure to do so resulted in violations of his rights to a speedy trial, due process, a fair trial, and a reliable sentence protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, the corresponding provisions of the Alabama Constitution, and Alabama law. Had Mr. Jones' counsel asserted his right to a speedy trial, there is a reasonable probability that the

case against Mr. Jones would have been dismissed or that he would not have been convicted of capital murder or sentenced to death.

### C. Counsel failed to secure a change of venue despite extensive media coverage of the crime.

81. Counsel were ineffective in failing to secure a change of venue. A criminal defendant is entitled to a trial by an impartial jury "free from outside influences." *Sheppard v. Maxwell*, 384 U.S. 333, 351 (1966). Due process mandates that when there is pervasive, inflammatory pre-trial publicity, a defendant is entitled to a change of venue. *Rideau v. Louisiana*, 373. U.S. 723 (1963). Alabama law also entitles a defendant to a change of venue where a fair and impartial jury cannot be seated. Ala. Code § 15-2-20; *Arthur v. State*, 472 So. 2d 650, 659 (Ala. Crim. App. 1984), *rev'd on other grounds*, 472 So. 2d 665 (Ala. 1985).

82. Here, the crime was reported as a "brutal murder" and was the repeat banner-headline story on the front page of *The Dothan Eagle* daily newspaper, in a close-knit community. The crime was highly publicized due to the timing (on the eve of the new millennium), the police connection (the victim's grandson was a Dothan police officer who discovered the crime), and the nature of the offense.

83. Due to extensive media saturation, the trial court granted defense counsel's motion to discover news coverage from *all* local news organizations. (C. 102–06.) Counsel, however, failed to adequately investigate and prepare for their motion for change of venue. As a result, of counsel's failures, Mr. Jones was tried before a jury drawn from a community in which there had been extensive media coverage of the crime and its impact on the community, in violation of his constitutional right to an impartial jury. *See* Ala. Const. art. I, § 6; U.S. Const. amend. VI.

### 1. Counsel failed to voir dire potential jurors regarding the impact of media coverage.

84. Trial counsel flat-out forgot to ask the potential jurors about the effect of the extensive publicity on them. At trial, counsel expressly asked that the judge to reserve ruling on the motion for change of venue until after voir dire, as counsel claimed juror responses would enable counsel to prove the prejudice flowing from the media's coverage of the offense. (C. 165–66.) The court granted counsel's request. Yet, during voir dire, counsel failed to ask any questions pertaining to media saturation and its impact.

85. Counsel's failure to engage in such questioning could not have resulted from a reasonable trial strategy because the record shows they expressly intended to inquire about the issue on voir dire, and the court set the change of venue motion for hearing after voir dire specifically for that purpose. Counsel, however, overlooked their own stated objective. There was no change in strategy or any sound tactical basis for the omission. Any claim that this glaring oversight might have been intentional is eliminated by counsel's own panicked request *after* the jury selection to engage in voir dire on the subject of media saturation. (R. 251 (counsel belatedly asked to "poll the jury to determine whether they have been – whether they have heard news accounts or anything of that nature, read the newspaper, been exposed to publicity about the case")). By that point, however, it was too late, and the judge, who had approved such questioning before the jury selection process, denied the tardy request. (R. 251.)

86. The "most important way to guard against the effects of pretrial publicity is to conduct an extensive examination of the jurors, during jury selection." *Madden v. State*, 628 So. 2d 1050, 1051-52 (Ala. Crim. App. 1993). Counsel missed this "most important" opportunity to examine the jury pool regarding the prejudicial effect of pretrial publicity, thereby causing Mr.

Jones to go to trial before a jury that in all likelihood had prejudicial, preconceived notions about his involvement in Ms. Kirkland's death.

87. Further reinforcing the significance of counsel's failure to conduct voir dire on this subject is that, due to the inadequacy of general questions glossing over the impact of publicity, historically "[c]ourts have condemned the use of general voir dire questions concerning pretrial publicity when the majority of the jurors have been exposed to publicity surrounding a case." *See Lam Luong v. State*, No. CR-08-1219, 2013 WL 598119, at *22 (Ala. Crim. App. Feb. 15. 2013). Here, as detailed below, the majority of the jurors almost certainly had been exposed to publicity surrounding the case due to its coverage in *The Dothan Eagle*, which counsel failed to inquire about. Under such circumstances, counsel could not even arguably rely upon general questioning on the subject of publicity by the prosecutor or court because "simply asking members of the jury venire to indicate by a show of hands whether the publicity would impair their ability to render an impartial decision did not adequately protect the defendant's constitutional rights." *Id.* at *23. Here, "the nature and extent of the media coverage mandated that individual voir dire be conducted." *Id.* at 24. Counsel, however, failed to conduct *any,* not even general, voir dire.

**2. Counsel failed to adequately investigate and prepare for the change of venue motion.**

88. Further establishing that counsel's failure to voir dire regarding media saturation was not part of a reasonable trial strategy, after jury selection Mr. Parker futilely elicited testimony at a hearing in support of his request for a change of venue. Yet, even with respect to the evidence Mr. Parker did present, he was ineffective.

89. Although counsel had obtained permission from the judge to obtain discovery from "all" news organizations in the area, counsel presented testimony from just a single

individual, from a single television station. (R. 325.) Mr. Parker failed to obtain and present readily available evidence from the local newspaper about the coverage of the crime and its impact on the community.

**a. Counsel failed to adequately prepare their media witness and failed to elicit readily available testimony that would have established media saturation immediately prior to trial.**

90. Moreover, the testimony of the only media witness, Wayne May, revealed that Mr. Parker failed to meaningfully engage the witness prior to trial and ensure he came equipped with appropriate statistics and other information critical to prove their venue claim. Mr. Parker's failure to so properly engage the witness resulted in Mr. May bringing with him just rough excerpts of certain television news reports. (R. 326.) Due to counsel's failings, the unprepared journalist was unable to present specific testimony about precisely how many news stories in total relating to the crime had been broadcast on the local station and when those stories had run, other than to acknowledge that the station had run at least thirty stories on the case. (R. 326, 328-31.)

91. Mr. Parker's failure to prepare for this witness' testimony is established by Mr. Parker's direct examination:

> Q Did you bring some documents with you with regard to publication of reports or broadcasts?
>
> A Yes, sir. It's a rough sample of what we've done with this case over the past four years.
>
> Q And how many broadcasts have you published?
>
> A Well, now, I didn't have a chance to run a complete copy . . . .
>
> * * * *
>
> Q And all these documents that we've got, these are with regard to the subsequent documents, these are scripts?

A Yes, sir. Yes, sir. ***That's just a rough sampling I pulled out in five minutes this morning. Just ran to the computer, punched up a couple of things, and tried to get something to go by***.

(R. 326, 330 (emphasis added).) This testimony establishes that, despite having sought discovery from all news sources months prior to the trial, Mr. Parker failed to adequately prepare the witness and that, prior to that very moment, had never even seen or reviewed the exhibits he sought to use at trial as evidence to support the change of venue motion.

92. In fact, had Mr. Parker properly prepared for this important witness, he could have easily elicited testimony from Mr. May showing that the television coverage of the crime and Mr. Jones' trial was not limited to the period immediately following the crime, but also occurred in the months leading up to the trial. For example, Mr. Parker could have easily elicited testimony from Mr. May showing that in the months leading up to the trial, the television station broadcast a story reporting the details of the crime, the highly prejudicial alleged existence of DNA evidence, and the very fact of extensive media coverage:

> 22-year-old Antonio Jones was arrested on New Year's Eve of 1999 while driving the victim's car. 80-year-old Ruth Kirkland had been beaten to death in her home just a few hours earlier . . . and her Cadillac had been stolen. Sources say D-N-A evidence links Jones to the crime. Defense Attorneys told Judge Jerry White this morning they want the trial moved because of all the publicity surrounding the case. They want a hearing on the motion held closer to the trial date. Jury selection is scheduled to begin January 12th.

(C. 403 (Change of Venue Hearing: Defense Exhibit 1).) Mr. Parker was holding this information in his hands, but failed to elicit any testimony about it.

93. Mr. Parker also failed to elicit testimony regarding a virtually identical television broadcast, containing the same highly prejudicial information, which occurred ***just a week before trial***. Mr. May's television station told its viewers that "[a]n accused killer stands trial in Dothan next week. . . . Antonio Jones could get the death penalty if he's convicted." (C. 404 (Change of Venue Hearing: Defendant's Exhibit 1).) This broadcast repeated the details of the crime and the

highly prejudicial alleged existence of DNA evidence, and concluded by saying "Jury selection is scheduled to begin Monday at the Houston County Courthouse." (Exhibit J, Media/Articles.) Again, Mr. Parker was holding in his hands this highly relevant evidence of media saturation and prejudice of the jury pool, but he failed to elicit testimony about it or otherwise bring it to the trial court's attention. Mr. May's inability to deliver credible, specific testimony underscored counsel's failure to notify the witness of the purpose for his testimony; explain what information he would be required to provide; and what data he would need to compile in order to competently testify about the frequency and scope of coverage. Without any further evidence, and after only five pages of direct examination by Mr. Parker, the trial court denied the defense's change of venue motion. (R. 332.)

94. Recognizing that the defense made a fundamental blunder by failing to voir dire the jurors about their individual exposure to and opinions from news about the murder, the prosecution seized upon the opportunity to rhetorically ask the media witness whether he could prove that any of the *empaneled* jurors were exposed to and/or impacted by media coverage in the area. (R. 332.) Of course, the witness could not, but the prosecution's point was made: defense counsel had missed their opportunity to make that inquiry of the venire. *See Irvin v. Dowd*, 366 U.S. 717, 725-28 (1961) (reversing conviction where pretrial publicity was so extensive that it precluded jurors from rendering a fair and impartial determination); *Madden*, 628 at 1051-52.

**b. Counsel failed to obtain and present readily available evidence of media coverage of the crime and its impact on the community.**

95. Additionally, counsel was deficient because they utterly failed to obtain readily available evidence of media saturation from the local newspaper, *The Dothan Eagle*, in which the crime repeatedly made ***front page, headline news.*** Indeed, the murder was reported, among

other things, in at least five front page stories, and Mr. Jones' photograph appeared on the front page at least twice. No reasonably diligent counsel would have failed to investigate *The Dothan Eagle* for evidence of media saturation and community impact. Indeed, approximately 65% of the population of Houston County lived in the City of Dothan.[4]

96. On January 1, 2000, the first day of the new millennium, *The Dothan Eagle* ran a headline story called "Elderly Dothan woman found murdered at home: Stadium Street woman stabbed and beaten." The article reported that "Three adults and a child were apprehended Friday night riding in a car stolen from an elderly Dothan woman who was found murdered in her dining room . . . . It looks like she's got some stab wounds and some blunt force trauma to the head . . . . Nothing appeared to be missing from the home except the 1990 Cadillac . . . . The victim's grandson found her body . . . . As Dothan police investigators processed the crime scene inside the house, patrol officers spotted the victim's Cadillac." (Exhibit J, Media/Articles.) The article included a photograph of a white Cadillac. This article was readily available to counsel, but they failed to present it at the change of venue hearing.

97. On Sunday, January 2, 2000, *The Dothan Eagle* ran a ***front-page headline story*** about the murder called, "Last Death in Wiregrass a brutal murder." The story reported:

> Ruth Kirkland was one of those people you just know you would have liked. . . . On Friday night, though, someone came in the backdoor of her Stadium Street home and apparently beat her to death. The 80 year-old woman . . . was ***the last person of the millennium to be pronounced dead in Houston County***. An 18-year old Dothan man, Antonio Jones, was arrested and booked into Houston County Jail on a charge of capital murder in connection with the death. . . . If found guilty, he could be sentenced to death in the electric chair. . . . "It was brutal," said [the] Houston County Coroner . . . . Kirkland was killed, apparently for her 1990 Cadillac . . . . Police apprehended Jones several hours after

[4] According to the U.S. Census Bureau, Profile of General Demographic Characteristics for the 2000 Census, the population of the City of Dothan was 57,737 and the population of Houston County was 88,787. *See* http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/00_SF1/DP1/1600000US0121184; *see also* http://factfinder2.census.gov/bkmk/table/1.0/en/DEC/00_SF1/DP1/0500000US01069. There was no daily newspaper in Houston County, other than *The Dothan Eagle*.

> Kirkland's grandson, Dothan police officer Brent Parrish discovered something amiss when he went to check on Kirkland. . . . Investigators discovered Kirkland lying in the brown, brick house's dining room. She was pronounced dead after 11 p.m. Friday . . . . The Cadillac was the only thing missing from the house. . . . The killing and its similarity to other crimes in Dothan has caused investigators to see if Jones could be linked to other crimes . . . including unsolved murders in the area.

(Emphasis added.) Ms. Kirkland's obituary was reported by the newspaper that same day. (Exhibit J, Media/Articles.) This sensationalized article, wrongly implying Mr. Jones could be responsible for a series of "unsolved murders in the area," was readily available to counsel, but they failed to present it at the change of venue hearing.

98. On January 4, 2000, *The Dothan Eagle* again led with a ***front-page headline story*** about Mr. Jones, titled "Capital murder suspect appears in court." The story included a front-page photograph of Mr. Jones standing in court, and it repeated many of the alleged facts regarding the murder. A call-out box referenced a second article on the third page calling for a "***district wide safety meeting***." (Exhibit J, Media/Articles.) (emphasis added.)

99. That second front-page article reported the widespread impact the murder had on the community: "Concerns about the New Year's Eve murder of an elderly Stadium Street woman . . . has prompted District IV Commissioner Jason Rudd to call a ***special meeting*** to address safety." The story quoted Rudd as saying: "We're going to have a get together and were going to talk about safety . . . The Dothan Police Department is going to be our special guest." According to the article, "Rudd has received calls from several residents concerned about their safety," which prompted him to schedule the meeting "at the Doug Tew Community Center." (Exhibit J, Media/Articles.) This article was readily available to counsel, but they failed to present it at the change of venue hearing.

100. On January 5, 2000, *The Dothan Eagle* ran not one, but ***two front page stories***, about the murder, both under the headline, "On the defensive."

101. In the first article, "Neighborhood's residents watching out after New Year's Eve murder," the newspaper reported the impact of the murder on the community and linked the crime to "illegal drug usage." The article quoted a resident as saying, "we can't build enough jails to hold all these people." (Exhibit J, Media/Articles.)

102. The second January 4 front-page article concerned District Commissioner Rudd's district-wide "special meeting" regarding safety, which was "on everyone's mind." The article repeated that Rudd had received calls from concerned residents after "80-year old Ruth Kirkland was found murdered in her Stadium Street home on New Year's Eve." According to the article, the special meeting was so well attended that people were "crammed" into the community center. The article reported that Dothan Police Captain John Givens spoke to the crowd that evening. (Exhibit J, Media/Articles.) Counsel knew about that meeting, (R. 326–27), but never asked how many jurors were at the meeting.

103. Both of these January 4 articles were readily available to counsel, but they failed to present the articles at the change of venue hearing.

104. On January 19, 2000, *The Dothan Eagle* ran yet another a ***front-page headline story*** about the murder, called "Capital murder case forwarded to grand jury: Police say suspect gave different stories after his arrest." The article reported that Mr. Jones was "charged in the brutal New Year's Eve slaying of a Stadium Street woman," and had "told police someone else had committed the murder and that he had tried to intervene and get help for the victim." The article further reported that Mr. Jones "sat handcuffed in a Houston County courtroom," while "three Dothan police officers" testified during the preliminary hearing. According to the article, "Before the hearing began, Jones strained to get a look at crime scene photos . . . including at least one which showed the severe injuries 80-year old Ruth Kirkland suffered while being

beaten to death with a cane and a chair." The article also reported that officer Donovan Kilpatrick – who would later testify at trial – "testified blood splatters were found on the ceiling of the room where Kirkland was beaten to death." The article stated that "marks on her body were consistent with the shape of a broken wooden cane found at the scene," that she "suffered severe trauma to the back of her head, a broken rib, a fracture to her arm and puncture wounds to a hand." According to the article, "Kirkland's body was found on New Year's Eve Night. Her Cadillac was missing from her carport and was later spotted by Dothan Patrol Officer David Elkins, who carried out a traffic stop and found Jones behind the wheel . . . ." (Exhibit J, Media/Articles.)

105. The same article then went on to relate Jones' interrogation by the Dothan Police Department, stating that Jones had first said four other people picked him up in the Cadillac but later "changed his story," saying that "he had ridden to Kirkland's house with the men who killed her, but he waited outside in a car." According to the article, Mr. Jones told Officer Kilpatrick that "the other men turned off the power before going into Kirkland's house and he later turned the power back on, then went inside and tried to make them stop hitting Kirkland," and tried to call an ambulance. The article also reported that, "during a search of the car, officers found photographs showing Jones in the stolen Cadillac. A receipt indicated the pictures were developed at a local store on New Year's Eve and paid for at 5:30 p.m. on the night Kirkland was murdered." The article stated that "When Jones was arrested, he was wearing white sweat pants, black shoes and a red shirt, all of which were splattered with blood." (Exhibit J, Media/Articles.) This article was readily available to counsel, but they failed to present it at the change of venue hearing.

106. Counsel's failure to obtain and present these articles in support of the change of venue motion cannot have been part of a sound trial strategy. Their failure to obtain and present these articles deprived Mr. Jones of evidence that, if presented to the trial judge, would have resulted in a change of venue.

**3. Counsel's failures to secure a change of venue or to question local jurors about their prior knowledge of the crime prejudiced Mr. Jones by forcing him to be tried before a jury drawn from a community that was saturated by media coverage of the crime and its impact on the community in violation of his constitutional right to an impartial jury.**

107. As a result, Mr. Jones was tried before a jury drawn from a community that had been influenced by inflammatory media coverage of the crime and its impact on the community. "In connection with pretrial publicity, there are two situations which mandate a change of venue: 1) when the accused has demonstrated 'actual prejudice' against him on the part of the jurors; 2) when there is 'presumed prejudice' resulting from community saturation with such prejudicial pretrial publicity that no impartial jury can be selected." *Sheppard v. Maxwell,* 384 U.S. 333 (1966); *Rideau v. Louisiana,* 373 U.S. 723 (1963); *Estes v. Texas,* 381 U.S. 532 (1965); *Ex parte Grayson,* 479 So. 2d 76, 80 (Ala. 1985), *cert. denied*, 474 U.S. 865 (1985); *Coleman v. Zant,* 708 F.2d 541 (11th Cir. 1983).[5]

108. Here, counsel's failure to voir dire the venire on the subject of media saturation prejudiced Mr. Jones by denying him the ability to discover actual prejudice due to media saturation. A defendant must show that "one or more jurors who decided the case entertained an opinion, before hearing the evidence adduced at trial, that the defendant was guilty," and that those jurors could not lay those pre-formed opinions aside to render a verdict based upon the

[5] For purposes of clarification, the Court should distinguish between the "prejudice" caused by counsel's ineffectiveness and the "prejudice" caused by media saturation.

evidence presented at trial. *Coleman v. Zant,* 708 F.2d at 544 (citing *Irvin v. Dowd,* 366 U.S. 717, 727-28 (1961).

109. Counsel failed to engage in any meaningful voir dire on this subject, let alone the "individual voir dire," historically required due to the magnitude of the crime and its impact on the community, as revealed in the media publicity and community organizing that followed the crime. *See Lam Luong*, 2013 WL 598119, at *24. Counsel, therefore, failed to identify those jurors who had preconceived notions of Mr. Jones' guilt that they were unable to put aside.

110. Mr. Jones also suffered a presumption of a prejudiced jury due to counsel's failures to voir dire potential jurors, elicit readily available testimony regarding media coverage in the months leading up to and immediately prior to trial, and introduce the articles from *The Dothan Eagle.* "Prejudice is presumed from pretrial publicity when pretrial publicity is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held." *Coleman v. Kemp*, 778 F.2d 1487, 1490 (11th Cir. 1985); *Holladay v. State*, 549 So. 2d 122, 125 (Ala. Cr. App. 1988), aff'd, 545 So. 2d 135 (Ala. 1989). To determine whether "presumed prejudice" exists, the court should consider the "totality of the surrounding facts." *Irvin v. Dowd*, 366 U.S. at 721 *Patton v. Yount*, 467 U.S. 1025 (1984).

111. There was a substantial likelihood of actual prejudice in Mr. Jones' case in light of the extensive media coverage and community meetings. In an appellate decision from Houston County, which involved less publicity about a murder and no community meetings, questioning of the panel of prospective jurors revealed that "12 of the 70 initial venire members had read or seen" media reports about the case, and "3 of those indicated that they had formed opinions about the case that they could not set aside." *McCray v. State*, 88 So. 3d 1, 70-71 n.29

(Ala. Crim. App. 2010) ("Only 6 articles appeared in *The Dothan Eagle* and only 21 total news stories were broadcast . . . ."). In *McCray*, the trial court's decision to deny a change of venue was affirmed because the effect of the media saturation was fully explored in voir dire, and affected jurors were dismissed for cause. Here, Mr. Jones had no opportunity to know whether twelve or three or some other number of his jurors had formed unshakable opinions about the case from the publicity that they did not believe they could set aside. Because his attorneys forgot to ask, we will never know for certain. But there is a likelihood appropriate questioning would have netted findings that the larger volume of pretrial publicity resulted in bias in a greater number of jurors than in *McCray*.

112. Here, *The Dothan Eagle* articles, combined with the testimony of Mr. May that counsel should have elicited, would have established that the crime and Mr. Jones' alleged involvement was discussed extensively within the Houston County community and elicited a hostile community response, about which the community was expressly reminded in the months and week prior to trial. Had counsel adequately investigated and prepared for the change of venue hearing, the trial court would have recognized that the community was saturated with media coverage of the event – both at the time of the crime and at the time of trial – and granted a change of venue to ensure Mr. Jones' right to a fair trial and impartial jury. Absent a change of venue, the court and the parties would have learned the effect of the extensive media coverage, and the media-biased jurors could have been identified and excused.

### D. Counsel were deficient during jury selection, which deprived Mr. Jones of a fair and impartial jury.

113. Counsel prejudiced Mr. Jones and rendered ineffective assistance of counsel during the entire jury selection phase of trial. The importance of voir dire in protecting an individual's constitutional rights is well established. "[P]art of the guarantee of a defendant's

right to an impartial jury is an adequate voir dire to identify unqualified jurors." *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *see also Gray v. Mississippi*, 481 U.S. 648, 668 (1987) (noting that jury selection "goes to the very integrity of the legal system"); *Rosales-Lopez v. United States*, 451 U.S. 182, 188 (1981) ("Without an adequate voir dire the trial judge's responsibility to remove prospective jurors who will not be able impartially to follow the court's instructions and evaluate the evidence, cannot be fulfilled."); *United States v. Ford*, 824 F.2d 1430, 1435 (5th Cir. 1987) (holding that "the selection of the jury [is] an essential component of the trial itself 'because the impartiality of the adjudicator goes to the very integrity of the legal system'") (citing *Gray*, 481 U.S. at 668).

114. Further, jury selection has a heightened importance in capital cases. *See Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."). Thus, when the State seeks the death penalty, there must be assurances that the jury is capable of making a fair and evidence-based determination at both phases of trial. Here, counsel's ineffectiveness during voir dire deprived Mr. Jones of a fair and impartial jury. Had counsel engaged in effective voir dire, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**1. Counsel made prejudicial statements during voir dire, by communicating his personal horror at the alleged crime, his fear of being murdered by his own client, Mr. Jones, a fear that his and the jurors' children might be the next victims, and that it was proper to convict Mr. Jones on a standard less than beyond a reasonable doubt.**

115. As an initial matter, *defense* counsel's own statements during voir dire were prejudicial to Mr. Jones. During voir dire, counsel told every potential juror that counsel himself was disgusted by the crime, feared for his life, and might even convict Mr. Jones without due process:

> We all hate to pick up the paper or hear on the news that someone in the community has been murdered, much less an elderly lady. I'm one of those people. I despise reading that. It makes me sick at my stomach and scares me. I'm wondering, you know, am I going to be next. I'm not far. Probably already am a senior citizen. . . . We fear that we one day might be a victim or our children might be a victim. How many of you . . . would convict Tony of capital murder . . . simply out of fear that he may have committed this or … simply out of fear that you suspect he may have but not convinced beyond a reasonable doubt? There's people that would do that. I might be one of them. (R. 147-149)

116. These comments, by Mr. Jones' *own* counsel, were extraordinarily prejudicial. Counsel poisoned the well for his client during the earliest stages of the case. Counsel communicated to everyone who would sit on the jury counsel's own personal horror at the alleged crime; his personal fear of being murdered by his own client, Mr. Jones; and a collective fear that his and the jurors' children might be the next victims. Counsel's comments are inexplicable and, on their face, prejudicial to Mr. Jones' right to an impartial jury.

117. But counsel did not stop there. Instead, counsel went on to compound his error by informing the jury that even he – the person charged with protecting the accused's right to due process – might convict Mr. Jones on a standard less than beyond a reasonable doubt. Counsel's comments disparaging the requirement of proof beyond a reasonable doubt eroded one of Mr. Jones' most fundamental and valuable constitutionally protected rights. *In re Winship*, 397 U.S. 358, 363-64 (1970) ("We explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."); *Knotts v. State*, 686 So. 2d 431, 459 (Ala. Cr. App. 1995). Mr. Brantley's inexplicable statement about the standard of proof, which undeniably was essential to his client's defense, also directly undermined the opening statement given shortly thereafter by Mr. Parker. Although he had little to say about the facts of the case or what his defense would be, Mr. Parker chose to emphasize that the State had to prove its case

beyond a reasonable doubt. (R. 1222.) That is the very standard his co-counsel had marginalized during voir dire.

118. The entire purpose of voir dire is to seat an *unbiased* jury, *see Morgan*, 504 U.S. at 729, but counsel *biased* the jury against his own client by making these highly improper and prejudicial statements. Had counsel not made these damning statements about his own client and the standard of proof, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**2. Counsel failed to object to the prosecutor's successful efforts to empanel a conviction-prone, death-prone jury.**

119. Counsel were ineffective because they failed to object to the prosecutor's improper (and ultimately successful) efforts to empanel a conviction-prone jury by improperly death-qualifying the venire. While acknowledging *Lockhart v. McCree*, 476 U.S. 162, 187-88 (1986) and *Witherspoon v. Illinois*, 391 U.S. 510 (1968), here the prosecutor improperly death-qualified the jury. Alabama and federal law only allow for the State to have a jury that is *willing* to apply the death penalty, not one that *will* do so. *See Taylor v. State*, 442 So. 2d 128, 131 (Ala. Crim. App. 1983) (citing *Witherspoon*, 391 U.S. at 521). As the United States Supreme Court stated in *Witherspoon*, "a State may not entrust the determination of whether a man should live or die to a tribunal organized to return a verdict of death." 391 U.S. at 521.

120. Here, during voir dire, the district attorney sought assurances from the prospective jury that they *would* impose the death penalty if the elements were proven: "Everybody on this row can guarantee that you believe the death penalty ***should be enforced*** in this state if the evidence warrants it beyond a reasonable doubt and the aggravating circumstances outweigh the mitigating circumstances? Correct?" (R. 64-65) (emphasis added). The prosecutor's question was improper and prejudicial because it sought assurances from all potential jurors that the death

penalty would be meted out. *See Taylor*, 442 at 132 (citing *Witherspoon*, 391 U.S. at 522 n.21). Defense counsel should have objected, and their failure to do so prejudiced Mr. Jones by allowing the prosecutor to empanel a death-qualified jury.

121. The nature of the prejudice Mr. Jones suffered is well-known. As the United States Supreme Court has acknowledged, death-qualified jurors have "perspectives on the criminal justice system" that are "systematically different" from other potential jurors. *Lockhart*, 476 U.S. at 188. Specifically, death-qualifying a jury excludes a "disproportionate number of blacks and women" and results in "pro-prosecution" jurors who are:

- more likely to believe that a defendant's decision not to testify is indicative of guilt;
- more mistrustful of defense attorneys;
- more ready to convict;
- less concerned about the danger of an erroneous conviction;
- predisposed to believe that the accused is guilty.

*Id.* at 187-88.

122. Here, prospective jurors were excluded because they were opposed to the death penalty. (C. 253-55, R. 207–10.) Excluding those prospective jurors on that basis violated Mr. Jones' rights to due process, equal protection, a jury comprised of a fair cross section of the community, an impartial jury, a fair trial and a reliable sentencing guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and Alabama law. Death qualification also substantially reduces jury diversity. African Americans and other racial minorities, women, persons of certain religions, and members of other cognizable groups will be less likely to survive the process. *See* James R. Acker et al., *The Empire State Strikes Back: Examining Death – and Life – Qualification of Jurors and Sentencing Alternatives Under New York's Capital-Punishment Law*, 10 Crim. Just. Pol'y Rev. 49, 69 (1999) (death-qualification causes greater than 50% reduction in proportion of non-whites eligible for capital jury service).

123. Mr. Jones was thus prejudiced by his counsel's failure to object to the exclusion of those jurors, which resulted in a jury that was predisposed to believe he was guilty, more likely to believe his constitutionally protected decision not to testify indicated his guilt, more distrustful of Mr. Jones' attorneys, more ready to convict him; and less concerned about the danger of doing so erroneously. Additionally, the prosecutor's comments were improper and prejudicial because the prosecutor misstated the law and sought assurances from all potential jurors that the death penalty would be meted out. Had Mr. Jones' counsel objected, there is a reasonable likelihood that a more balanced jury would have been seated and Mr. Jones would not have been convicted of capital murder or sentenced to death.

**3. Counsel failed to ensure that Mr. Jones was tried by jurors selected pursuant to nondiscriminatory criteria by failing to object when the court discharged the struck jurors prior to holding a *Batson* hearing.**

124. Counsel were ineffective because they failed to ensure that Mr. Jones received the benefit of a proper *Batson* hearing because counsel failed to object to the trial court's decision to dismiss improperly struck jurors prior to holding a *Batson* hearing. (R. 223–24.) Counsel's failure to object resulted in a jury constituted through a process of racial discrimination by the prosecutor, in violation of Mr. Jones' constitutional rights to equal protection and a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986) (defendant has right to be tried by jury "whose members are selected pursuant to nondiscriminatory criteria."); Ala. Code § 12-16-55 ("all qualified citizens have the opportunity, in accordance with this article, to be considered for jury service in this state and an obligation to serve as jurors when summoned for that purpose.").

125. As explained in Section V.A.1, incorporated herein by reference, the prosecutor violated *Batson* by using his peremptory strikes in a racially discriminatory manner.

126. The Alabama Supreme Court has held that the trial court must conduct a *Batson* hearing "before the jury is sworn to try the case." *Ex Parte Branch*, 526 So. 2d 609, 625 (Ala. 1987). Thus, the trial judge may rule on a *Batson* motion after the jury is sworn only when both parties agree to conduct the *Batson* hearing at a later time. *Id.* at 625.

127. Although counsel requested a *Batson* hearing, counsel failed to object when the trial court swore in the jury panel and discharged the struck jurors *before* holding a *Batson* hearing. (R. 223-224.) When the trial court finally held a hearing, counsel asked the trial court to re-empanel the improperly struck African-American jurors, (R. 229), but that remedy was impossible where those jurors had already been discharged and left the courthouse.

128. Counsel's failure to object to the discharge of the struck jurors before the *Batson* hearing prejudiced Mr. Jones in at least two significant ways. First, it rendered the *Batson* hearing effectively moot, because the trial court lacked the ability to recall the improperly struck jurors and ensure that Mr. Jones received a properly constituted jury. The judge could not, as a practical matter, grant the motion, no matter what the State's reasons for striking were, because doing so would necessitate breaking up the empaneled jury and bringing back the other jurors who had already gone home. This failure of trial counsel prejudiced Mr. Jones by depriving him of his constitutional opportunity to ensure an unbiased jury. Had counsel objected, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

129. Second, counsel's failure to object to the discharge improperly struck jurors prior to the *Batson* hearing made it more difficult for Mr. Jones to challenge the State's pretextual reasons for striking African-American jurors. For example, during the *Batson* hearing, a debate between the State and the defense ensued as to whether a particular juror, Clifford Wright, was

laughing when he reported having been the victim of a burglary. Both sides adamantly asserted opposing positions and the court had difficulty resolving the issue. Had the court not dismissed the prospective juror, he could have been taken under voir dire and defense counsel could have either established that he did not laugh at all or that the expression was from frustration with his own plight when reporting he was a victim of an unsolved crime. (R. 156.) Because the defense failed to object, this opportunity was missed, and the issue was erroneously resolved in favor of the State.[6] Had counsel objected, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**4. Counsel failed to strike for cause jurors who expressly stated that they could not be fair and impartial.**

130. Counsel were ineffective because they failed to remove several jurors who expressly stated that they could not be fair and impartial. Alabama and federal law are clear that a juror must be excused if there is even a reasonable likelihood they will be unable to render a fair and impartial verdict. *See Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."); *Ex parte Ellington*, 580 So. 2d 1367 (Ala. 1990) (test for striking juror for cause is probable prejudice); Ala. R. Crim. P. 18.4(e).

131. Because several jurors expressly stated that they could not follow the law and render an objective determination, counsel should have moved to strike them for cause. There is simply no sound trial strategy in failing to excuse jurors who are clearly biased against the accused. Counsel's failure to excuse these biased jurors for cause denied Mr. Jones his rights to

[6] As discussed below, defense counsel compounded its ineffectiveness by failing to raise the trial court's erroneous denial of Mr. Jones' *Batson* motion as an issue on appeal.

a fair trial, impartial jury, reliable sentencing determination, and free exercise of his peremptory strikes.

**a. Juror Shawn Walker**

132. During voir dire, defense counsel asked all prospective jurors whether they "had a close friend, relative or loved one who has been the victim of a crime in the past ten years." (R. 157.) Numerous individuals responded, but one potential juror clearly stood out. In response to counsel's question, Juror Shawn Walker explained, "[m]y sister was murdered . . . about nine or ten years ago." (R. 160.) Juror Walker confirmed that this tragedy would impact his ability to fairly and impartially serve as a juror on this case, agreeing "that fact would [sic] effect [me] as sitting in this case as a juror." (R. 160.) Though a juror must be struck if he is unable to render an impartial verdict, defense counsel inexplicably failed to challenge Juror Walker for cause. Had counsel done so, the court would have been obligated to strike Juror Walker as he expressed not just probable bias, but a certainty that he could not serve impartially.

133. Perhaps even more disturbing is that counsel had a second opportunity to identify and correct this error during the round of preemptory strikes, but counsel again missed the opportunity to dismiss this biased juror. Any effective counsel, exercising minimal diligence, would have been sure to strike this juror for cause, so as to avoid using a peremptory strike. But, failing that, any reasonable counsel would have assuredly then struck the juror peremptorily. In this case, counsel did neither.

134. As a result, Shawn Walker - a juror who expressly informed counsel that his experience of having his sister murdered would preclude him from rendering a fair and impartial verdict in this murder case - sat on Mr. Jones' jury. (R. 246-47.) This failure prejudiced Mr. Jones by depriving him of his right to be tried by an unbiased jury panel.

**b. Juror Hershel Peterson**

135. Defense counsel also failed to strike Juror Hershel Peterson for cause despite his admitted bias. Mr. Peterson explained during voir dire that he was very familiar with one of the prosecution's key witnesses, Officer Donovan Kilpatrick. (R. 181-83.) Officer Kilpatrick was involved in acquiring Mr. Jones' statements following his arrest. During voir dire, Mr. Peterson explained that he was friends with, and worked with, Officer Kilpatrick, who Mr. Peterson saw every day. (R. 181-83.) Mr. Peterson reported that he "would place a lot of weight in what [Kilpatrick] said on the stand" and it would probably "be hard for [him] to be objective." (R. 183.)

136. Despite revealing his clear bias in favor of the State's witness, defense counsel failed to move to strike Mr. Peterson for cause. Had defense counsel so moved the court, Juror Peterson would have been struck and the defense would not have been forced to exercise a peremptory strike against him. *See, e.g., General Motors Corp. v. Jernigan*, 883 So. 2d 646, 669-72 (Ala. 2003).

137. Had counsel ensured Mr. Walker was struck from the venire and not had to use a preemptory strike to excuse Mr. Peterson, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**5. Counsel failed to relegate sensitive questioning to individual voir dire.**

138. Defense counsel compounded their ineffectiveness and the attendant prejudice to Mr. Jones' defense by asking venire members, *in open court*, whether they had ever been victims of crimes and asking them to reveal the nature of the offense. (R. 154-60.) It is commonplace to save such questions for individual voir dire, but counsel failed to guard against broad exposure to this prejudicial information. As a result, about ten prospective jurors professed being victims, mostly of burglary, which was the aggravating offense charged in this case. (R. 154-60.)

139. Their responses unscientifically suggested that burglary was rampant in Dothan and played well into the prosecution's later admonition to the jury to send a message to the community. (R. 1509) ("Tell people in this community that eighty-year old women are just as important as Mr. Brantley says some eighteen-year-old is who took the law into his own hands . . . . It's important you send a message twelve to zero in this case.").[7]

**6. Counsel failed to object to the prosecutor's misconduct during jury selection.**

140. Throughout jury selection, the prosecution engaged in misconduct that tainted the voir dire process. Counsel failed to object to the prosecution's actions.

**a. Counsel failed to object to the prosecutor's improper vouching as to the guilt of the accused.**

141. Prosecutors are prohibited from vouching as to the guilt of the accused. Yet here the prosecutor did so repeatedly, and counsel failed to object. The United States Supreme Court in *United States v. Young,* 470 U.S. 1, 18-19 (1985), specifically condemned a prosecutor's vouching for the credibility of a witness or expressing a personal opinion concerning a defendant's guilt. As the Supreme Court stated:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence.

[7] *See also* R. 1509: "[H]ave the courage, the courage in this case to make sure they know everywhere in this community."

*Id.* Here, both of these dangers were realized as the prosecutor asked the prospective jurors to rely upon the prosecutor's own experience trying cases and the prosecutor's knowledge of the underlying facts. Mr. Valeska told the jurors:

- "I've tried more than four hundred and fifty jury trials" (R. 88);
- "I've tried a lot of cases" (*id.* at 64); and
- "I think I will be able to allegedly prove the things, I guarantee you I promise you allegedly what we say" (*id.* at 67).

142. Similarly prejudicial was the prosecutor's statements during voir dire that the jury should expect to get to the penalty phase in this case. (R. 57–58, 59–60.) Before Mr. Jones' trial even began, the prosecutor impliedly asked the jury to skip the guilt phase and begin thinking about the sentencing stage of the trial:

> [W]e will ask you to tell Judge White his *punishment in this case should be death. Death.* I want to make sure that we're *thinking about that right now* because Judge White asked you some questions about that. And you will have two options in this case, death or life without parole.

(R. 58) (emphasis added.)

> I expect we will get to the penalty phase in this case.

(R. 60.)

143. It was highly inappropriate for the District Attorney to ask the jury to focus on sentencing when it was not yet known whether Mr. Jones would be found guilty. Such statements impermissibly relieved the jury of their sense of responsibility, *see Caldwell v. Mississippi*, 472 U.S. 320 (1985), by allowing them to believe that the guilt phase decision was a foregone conclusion - one that had already been decided by the government.

144. Counsel's failure to object to the prosecutor's comments cannot be considered part of any "sound trial strategy." *King v. State*, 518 So. 2d 191, 196 (Ala. Crim. App. 1987)

(finding failure to object to prosecutor's vouching "fell outside the range of reasonable trial strategy and was an error").[8]

145. *See also* Section II.O.6, below, incorporated herein by reference (describing counsel's failure to object to the prosecutor's improper vouching for the integrity of the State's case during closing argument).

146. The prejudice this failure caused to Mr. Jones' case cannot be understated. The prosecutor's improper vouching conveyed the impression to the jury that the prosecutor had additional information that supported the State's case and thus prejudiced Mr. Jones' right to be tried solely on the basis of the evidence presented at trial. *See Young*, 470 U.S. at 18-19. The prosecutor's vouching also improperly influenced the jury to trust the State's judgment rather than their own. *See id.* The prosecutor's vouching also reduced the jurors' sense of responsibility by making them believe that guilt was a foregone conclusion, and that they need only focus on sentencing. *See Caldwell*, 472 U.S. 320. Indeed, in a similar context, Alabama courts have recognized that a prosecutor's vouching is not harmless error, even where the evidence of guilt is "strong and convincing," because courts "cannot say that the [vouching] error did not contribute to the verdict beyond a reasonable doubt." *See Guthrie v. State*, 616 So. 2d 914, 931 (Ala. Crim. App. 1993) (citing *Chapman v. California*, 386 U.S. 18 (1967)). Similarly here, the foregoing prejudice constitutes ineffective assistance of counsel under *Strickland* because, had counsel objected to the prosecutor's improper vouching, the jury would

[8] Although the *King* court went on to affirm the defendant's conviction, the court did so because five eyewitnesses testified against the defendant, providing "overwhelming" evidence of the defendant's guilt. Here, there were no such eyewitnesses and, more importantly, Alabama courts subsequently rejected this approach, stating that "The proper inquiry here is not whether the evidence of guilt is overwhelming, but whether a substantial right of the [defendant] has or probably has been adversely affected." *Guthrie*, 616 So. 2d at 931 (reversing judgment and granting new trial).

not have been improperly influenced in this fashion and there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**b. Counsel failed to object to the Prosecutor's voir dire comments suggesting that elderly persons enjoy greater protection under Alabama's capital punishment laws.**

147. Counsel were similarly ineffective for failing to object to the prosecutor's voir dire questions that suggested that elderly persons enjoy greater protection under Alabama's capital punishment laws. Contrary to the prosecutor's contention, neither Alabama's capital murder statute nor its capital sentencing statute provide for special protection of elderly persons. *See* Ala. Code § 13A-5-40. However, the prosecutor informed jurors otherwise, asking them if they disagreed that children and elderly persons are entitled to special protection, (R. 91–92), and later imploring the jury to return a verdict of death because law accords eighty-year-old women greater protection. (R. 1508.) Mr. Jones was prejudiced because, by allowing the prosecutor to make such unsupported contentions, counsel permitted the jury to begin this trial believing that the victim's age was of special importance in resolving the issues at bar. Counsel should have objected and required the court to instruct the venire that Ms. Kirkland's age has no special significance under the law.

**c. Counsel failed to object to the Prosecutor's use of voir dire to preview his opening statement.**

148. Counsel also improperly allowed the prosecution to use voir dire as an extended preview of its opening statement. The Alabama Rules of Criminal Procedure limit voir dire examination to questions about information that would provide a basis for a challenge for cause or enable the parties to knowledgeably exercise their strikes. Ala. R. Crim. P. 18.4(d); *see also Peoples v. State*, 375 So. 2d 561, 563 (Ala. Crim. App. 1979) ("[Q]uestions that border on argument should be avoided while prospective jurors are being interrogated by the parties"). The

prosecutor, however, spent much of the voir dire process asking few non-rhetorical questions, instead arguing to jurors what he expected to prove at trial. (*See, e.g.,* R. 68 (prosecutor explaining, during voir dire, that he expects to prove, among other things, that Mr. Jones had a specific intent to kill "by beating her with a chair or a cane causing more than fifty or sixty bruises, contusions, lacerations, tears, fractures of her ribs and arms); *see also id.* at 57, 60, 69.) Counsel's failure to object to this impermissible use of voir dire allowed the State a head start in arguing its themes and evidence against Mr. Jones during jury selection.

**d. Counsel failed to object to the prosecutor's mischaracterization of DNA evidence during voir dire.**

149. Counsel committed a serious failure in not objecting to the prosecutor's mischaracterization of DNA statistics and matching evidence during voir dire. As an initial matter, as discussed further in Section II.F, incorporated herein by reference, counsel should have objected to this line of questioning because the court had not yet held a preliminary hearing regarding the admissibility of DNA evidence at Mr. Jones' trial. *See ex parte Hutcherson*, 677 So. 2d 1205 (Ala. 1996); *Turner v. State*; 746 So. 2d 355 (Ala. 1998). Moreover, counsel should have specifically objected to the prosecutor's gross misstatement of the statistical methods used in DNA testing. During voir dire, the prosecutor, Mr. Valeska, had the following exchange with prospective jurors:

> MR. VALESKA: . . . . If you had to have a liver transplant, heart transplant, or a kidney transplant and your surgeons and your doctors have said, we have now found a donor that matches up doing the DNA testing and that we have determined from doing the DNA testing there's one chance out of seven hundred and thirty million times we can do this operation that it would not match. In other words, ***there's seven hundred and thirty million times everything is going to be***

***perfect, it's going to match***. And, thank you, Judge. Then would you –

A JUROR: If the DNA matched, yes.

A JUROR: It's got to match.

MR. VALESKA: That's what I'm saying.

(R. 99.) In this exchange, the prosecutor misled the jurors about the statistical theory behind the State's DNA evidence. There is no such match.

150. The prosecutor's mis-explanation of the already sufficiently complex area of DNA statistical methodology was fundamentally different from what the State's own DNA expert witness, Phyllis Rollan, testified, when she explained her statistical conclusions: "If you were to reach into a random population of approximately seven hundred and thirty million people, you would expect to pull out one person that would have this DNA profile." (R. 1084.) Even if that opinion were admissible, it is a far cry from saying, as the prosecutor did, that "there's seven hundred and thirty million times everything is going to be perfect, it's going to match." (R. 99.) Moreover, the prosecutor improperly conflated so-called DNA "matching" with DNA population frequency statistics, despite the fact that the two are distinct types of evidence, both scientifically and under Alabama law. *See Hutcherson*, 677 So. 2d at 1207.

151. Counsel's failure to object to the prosecutor's mischaracterization of DNA statistics and matching evidence cannot be considered part of any sound trial strategy. Indeed, Mr. Jones' counsel identified the State's DNA evidence as a "crucial issue" in determining Mr. Jones' guilt or innocence and understood that the State's case would "hinge" upon using DNA evidence as part of its efforts to show that Mr. Jones participated in the murder. (C. 217-220.) Allowing the prosecutor to confound the jury as to the nature of the statistical methods underlying DNA evidence so as to make the jury believe that "there's seven hundred and thirty

million times everything is going to be perfect, it's going to match," simply cannot have been part of any reasonable trial strategy.

152. The prejudice flowing from this failure of counsel to object to the prosecutor's mischaracterization of DNA evidence during voir dire is that, from the very first time the jurors heard about DNA in this case, they were misled about how to understand the already complicated statistical theory underlying the State's evidence. The Alabama Supreme Court has expressly recognized the risk "that the prejudicial impact of the statistics might unduly impact on the jury." *Hutcherson*, 677 So. 2d at 1207. Indeed, "[t]he prejudicial impact of both DNA 'matching' evidence and DNA population frequency statistics creates such a possibility for prejudicial impact upon the jury" that the improper admission of DNA evidence "can never be harmless error." *Id.* at 1209.[9]

153. The jury, influenced by the prosecutor's incorrect and overstated mis-explanation of the statistics during voir dire, was given reason to believe that the statistical evidence they heard meant that the State's DNA evidence purporting to "match" the sample with Ms. Kirkland had only a 1 in 730 million chance of being wrong. That is not what the population frequency supports. The population frequency is not the error rate or the accuracy of the State's test itself. Yet that is the impression the prosecutor intended to and likely did create. Counsel should have objected to the prosecutor's mischaracterization of this crucial evidence of reliability. Had they done so, there is a reasonable probability Mr. Jones would not have been convicted or sentenced to death.

[9] Counsel's additional failure to object to the admissibility of the State's DNA evidence is addressed in Section II.F.

### E. Counsel failed to properly investigate the case and present a coherent defense theme.

154. The preview of the State's case during voir dire was reinforced by the prosecution's opening statement, to which the defense seemed to have no response. Mr. Parker's opening statement was centered on abstract general concepts of criminal law: that the prosecution had the burden of proof and the defendant had the right not to incriminate himself. But no defense theme, facts, or reason was suggested about why the jurors should have any doubt that Mr. Jones was the murderer.

155. In the opening, Mr. Parker included virtually nothing about the facts of the case, other than to echo the prosecution's theme that "there was a brutal murder. And it's very – of an elderly lady." (R. 357). There was no indication in the opening that the defense knew any more about the case than what the jury had just heard from the prosecution's opening statement.

156. Mr. Parker referred to jurors starting with a "blank chalkboard" or a "billboard" and said, "By the end of the trial there's going to be something up there." (R. 359.) He never suggested to the jurors what the defense contended should be on the board.

157. Sadly, Mr. Parker emphasized that Mr. Jones had no evidence by stating: "The fact that a person that has no evidence of their own to present, I want you to consider that as well." (R. 361-62.) In doing so, Mr. Parker not only drew attention to the fact that the defense had no evidence (which was due to Mr. Parker's and Mr. Brantley's failure to prepare), Mr. Parker asked the jury to "consider" the fact that the defense had no evidence. By comparison, had the prosecutor made that argument, it would have been improper burden shifting. Mr. Parker then exacerbated the situation by repeating that the prosecution had all the evidence. "They have all the evidence. They have all the facts. They have all the witnesses." (R. 358.)

158. In closing, Mr. Parker argued that the very small amount of blood on Mr. Jones' clothing was inconsistent with his being the one who did the beating. (R. 1219-22). But Mr. Parker failed to explain the significance of that evidence to the jurors. He said nothing about how the lack of actual involvement in the beating precluded a finding of capital murder under Alabama law or the jury instructions. And there was no suggestion in the closing of who did the beating if the defendant did not.

159. Even a cursory review of the evidence in this case confirms that trial counsel failed to develop or highlight fundamental flaws in the prosecution's case. The available evidence would have supported at least the two obvious defense themes that were set forth by Mr. Jones himself in his statements to the police. The two obvious options were: (1) the defense could deny any involvement in the crime, or (2) the defense could admit Mr. Jones was present and deny he participated in the murder. Mr. Parker and Mr. Brantley did not need to look far to find these themes. They are included in the police's records of the two custodial statements attributed to Mr. Jones.

160. In Mr. Jones' 2:55 a.m. to 4:35 a.m. recorded statement on January 1, 2000, as shown in the 60-page transcript, he steadfastly denied being at the scene of the murder and explained the car was transferred to him by other teenaged acquaintances. (*See, e.g.,* C. 340-41 (referencing Portaque Morris, Robert Carroll, and others).) There was substantial circumstantial evidence to support this theory. Properly presented, these facts could be stated along the following lines to support a finding of reasonable doubt:

a. The State's theory of the case was that Ms. Kirkland was murdered to conceal a burglary or theft. In other words, the motive for the murder was to eliminate evidence (potential testimony) connecting the murderer to Ms. Kirkland and her residence.

b. The burglary was committed by someone with a strategy to avoid detection. There were no fingerprints detected by the State, so the burglar or burglars may

have been wearing gloves. The beating splattered blood all over the interior of the dining area of the house, including the floor, furniture, walls, and even the ceiling. Ms. Kirkland was beaten at close range with a wooden cane and with a solid dining room chair, both of which were broken to pieces during the beating. The murderer would likely have been covered in blood (a valid defense argument made during closing but never mentioned in opening) and needed an escape from the house without anyone noticing the blood. Because Ms. Kirkland's car was taken, the murderer likely arrived on foot and not by car.

c. While being seen in the murder victim's car covered with blood presented a substantial risk to the murderer, it was superior to walking the streets of Dothan covered with blood.

d. But as soon as feasible, the murderer, who the State contended committed the murder to avoid detection for a burglary or theft, would want to get out of that car, a conspicuous large white Cadillac.

e. Who better than Antonio Jones to dump the car on? Tony was the slow kid at school. He had been a stutterer, who was made fun of by other kids. He was diagnosed with attention deficit hyperactivity disorder in grade school and periodically was given medication that made him extremely lethargic. His intelligence was in the bottom 5 percent of normal, and he dropped out of school completely after the 9th grade.

f. Tony, an 18-year-old teenager who loved cars but had none of his own, was glad to have use of the big old Cadillac for an early-evening cruise.

g. Even though he had no driver's license, he picked up a friend, his little sister, and her 2-year-old son. They drove to McDonald's, where Tony's girlfriend worked, and around Dothan in the Cadillac. Mr. Jones was cruising the streets of Dothan for hours after the murder, providing rides to various friends as well as his sister and nephew.

h. This undisputed conduct, supported by the testimony of the police witnesses, is absolutely inconsistent with the State's theory that Tony was the one who committed a murder for the purpose of eliminating evidence that he was at Ms. Kirkland's house. He spent hours showing anyone on the streets in Dothan who cared to look that he was in Ms. Kirkland's car.

i. The actual murderer could not have found a better mark than Antonio Jones, a not very swift and a teenager known by the police to come from a troubled family headed by his stepfather, who had a history of drug dealing.

j. Tony was wearing no gloves when he was arrested. He had his fingerprints all over the steering wheel and the car. Tony was wearing white sweat pants that would have clearly shown the presence of large spots of blood if he had been the murderer.

k. When the police stopped him at nine o'clock, Tony, his sister and 2-year-old toddler nephew, and Tony's friend, Acaris Gordon, were still cruising.

l. Tony was nervous when the police pulled him over. He had no driver's license. But he made no effort to avoid being stopped or to flee. The police were shocked that their murder suspect did not try to get away.

m. The police had Tony in custody and questioned him repeatedly from 9:00 p.m. December 31, 1999 into the New Year at 5:30 a.m. on January 1, 2000. Although the police recorded a lengthy discussion with their suspect starting at 2:55 a.m., Tony denied any involvement in the crime. In that recording, he also repeatedly complained of pain he was suffering from being struck in the head while in police custody. But he was given no medical attention or medication during the recorded hour-and-40-minute interrogation.

n. After 5:30 a.m., after the all-night questioning of the disoriented, unsophisticated, and not especially bright teenager, after Tony had been awake for nearly 24 hours, and after hours of discussion of the location, victim and other details of the crime by the police, the police claim Tony admitted being present when others assaulted Ms. Kirkland.

o. There is no recording of this claimed admission that he was present at the crime scene. The officer who took the statement, and who had been working on the case all night and morning, claimed he was unprepared to use a tape recorder. Only the police version of that claimed limited admission exists. The police had no difficulty earlier recording the 2:55 a.m. statement in which Tony repeatedly denied being present. They also took recorded statements from Tony's sister, LaKeisha (4:06 a.m.), from Acaris Gordon (6:30 a.m.), from Portaque Morris (5:35 a.m.) and Tylon Smith (3:44 a.m.) all of whom denied involvement in the murder in those recordings.

p. The police admit there was never any confession to murder from Tony during all of that questioning by numerous 20 and 30-year-veteran law enforcement officers.

q. Around 10 p.m. on December 31, 1999, the police took Tony's clothes, including his pants and shoes, and a jacket from the car, to be DNA tested. Those items sat in the State's forensic lab for years before they were finally DNA tested. The law enforcement officers in the lab found nothing on the shoes sufficient to be tested for DNA. The State claims Mr. Jones' pants showed a small amount of the murder victim's DNA after he had been driving the Cadillac for hours. That is the same Cadillac that the true murderer, likely heavily splattered with Ms. Kirkland's blood, had turned over to Tony shortly after the murder.

r. Tony's clothes did not have blood splattered all over. The State claims to have detected "pinpoints" of blood on the toes of Tony's shoes and his white pants.

s. The State's witness, Katherine McGeehan, claims these pinpoint stains were

consistent with "high velocity" blood spatter. But, as is well-known among qualified blood spatter experts, high velocity blood spatter is not consistent with the kind of blunt force trauma that occurred in Ms. Kirkland's death. *See* Stuart H. James and William G. Eckert, *Interpretation of Bloodstain Evidence at Crime Scenes* (1999). High velocity blood spatter refers to high-speed events such as gunshot wounds or power-tool contact, not blunt force trauma, which is considered medium velocity. *Id.* Whoever murdered Ms. Kirkland had to be physically very close to her, and would have gotten large drops of blood on their clothing as was evident on the walls, furniture and ceiling in the room. This was medium velocity spattering. There were no medium velocity bloodstains on Tony's white pants.

t. The State's DNA analyst, Phyllis Rollan, admits the one sample from Tony's pants, which contained the DNA they say is consistent with Ms. Kirkland's DNA, was also contaminated with DNA from another person. Due to the manner in which the State collected and tested the sample, there is no way to determine whether the visible pinpoint contained the DNA supposedly consistent with Ms. Kirkland, or whether that came from touching something with her DNA that was in her car, such as blood from the murderer.

u. The State's DNA analysts also admits the DNA from the blood on the jacket retrieved from the Cadillac and tested by the State, was from some unknown female other than Ms. Kirkland.

v. The police never tested the red interior of the car for blood. The car was returned to Ms. Kirkland's daughter, Linda Parrish, less than one month after it was impounded (R. 398: 1-8) and before the defense had any opportunity to inspect it.

w. The prosecution's case is based primarily on two facts: (1) comments from a teenager coming in a confused and inconsistent unrecorded statement after Mr. Jones had experienced a painful head injury while in custody and had endured an entire night of interrogation and still denied participating in any harm to Ms. Kirkland, and (2) a test of fabric from the defendant's pants conducted years after the crime that found DNA consistent with that of Ms. Kirkland along with the DNA of another unknown person, either of which may have come from a pinpoint of dark material on the fabric sample.

x. There is no evidence that Antonio Jones intended to kill, injure or harm anyone on December 31, 1999.

This is the type of theme on the question of guilt that could have been developed and presented by effective counsel based on the facts of the case. With appropriate expert witnesses for the defense, adequate investigation, or successful motions to bar some of the unreliable opinions from the State's witnesses, the theme could be developed further.

161. Selecting the second option, conceding presence at the scene, would have been a higher-risk defense. Reasonable defense counsel likely would not have elected that approach without substantial factual and expert forensic testimony to support it. And in the absence of overwhelming credibility issues with the theory that Mr. Jones was not present at the murder scene, the first alternative would have been the preferred theme. Nevertheless, at trial counsel seemed to vacillate between the two theories and never clearly advocated either. The opening statement gave no explanation of the facts of the case at all.

162. The second alternative approach to the defense would be higher risk, but it could still avoid the death penalty. If Mr. Jones were found to have been present, and to have intended only to commit a burglary, under Alabama law, he would not be guilty of a capital offense, absent direct participation in the murder.

163. Technical guilt of felony murder, where intent exists only for the associated felony, is not a capital offense in Alabama. Capital murder is defined by the Code of Alabama § 13A-5-40. The definition of capital offenses encompasses the commission of murder during a kidnapping (§ 13A-5-40(a)(1)), a robbery in the first degree (§ 13A-5-40(a)(2)), a rape in the first or second degree (§ 13A-5-40(a)(3)), or a burglary in the first or second degree (§ 13A-5-40(a)(4)). In those instances, the capital offense is specifically defined as "committed by the defendant."

164. The Alabama courts have clarified the need to prove specific intent in a capital case: "no defendant is guilty of a capital offense unless he had an intent to kill, and that intent to kill cannot be supplied by the felony murder doctrine." *Brown v. State*, CR-08-0805, (Ala. Crim. App. 2010) (quoting *Beck v. State*, 396 So. 2d 645, 662 (Ala. 1981), internal quotes removed). Therefore, for a defendant to receive the death penalty in a case where a death occurred during

the commission of another crime, such as burglary, the state requires a showing of intent to kill, not simply an intent to commit the underlying felony.

165. The Alabama statute also states that an accomplice or one "who does not personally commit the act of killing" will not be guilty of capital murder unless the accomplice was a complicit in the murder, itself. Ala. Code § 13A-5-40(c). Complicity, defined under § 13A-2-23, requires that the accomplice had the intent to promote or assist in the murder, not just the underlying felony. An accomplice, may receive the death penalty, but only if that person was an accomplice to the intentional killing. *Ex parte Raines*, 429 So. 2d 1111, 1112 (Ala. 1982), *cert. denied*, 460 U.S. 1103 (1983); s*ee also Brown v. State*, 72 So. 3d 712, 715 (Ala. Crim. App. 2010).

166. Many of the same themes outlined in the numbered theme summary paragraphs above would also fit with this alternative theory of defense. To be viable, the defense would also have required evidence from an expert in blood spatter – which defense counsel failed to obtain. With the testimony and analysis of such an expert, (*see* Section II.G.2, incorporated herein by reference), the defense would have been able to use the physical evidence to more strongly support the fact that Mr. Jones did not participate in the murder and was not near Ms. Kirkland at the time she was beaten, even if one were to assume the small pinpoints of blood on his pants and shoes were her blood.

167. While the second approach would have essentially conceded conviction on lesser grounds, it could have resulted in Mr. Jones' not being convicted of capital murder. The problem is, it was never clear which, if either, of these defenses was being asserted by Mr. Jones' counsel at trial due to their unfocused presentation. Neither defense was referenced in the opening. And, at various times during trial, the attorneys seemed to be experimenting with each

theme. Experimentation is what mock trials are for; not capital trials where the accused's life is at stake. There was no consistency and no credibility to defense counsel's trial presentation.

### F. Counsel was deficient by failing to challenge the admissibility and accuracy of the State's DNA evidence, which was the only physical evidence linking Mr. Jones to Ms. Kirkland.

168. The sole physical evidence at trial directly linking Mr. Jones to Ms. Kirkland was the State's DNA analysis of a single pinpoint of blood allegedly obtained from Mr. Jones' white sweatpants, a pinpoint so small that the sample was consumed in the DNA testing process. Although counsel acknowledged prior to trial that the State's DNA evidence would be "crucial" to proving its case, counsel failed to challenge the admissibility or reliability of the testimony of the State's DNA expert, Phyllis Rollan. Had counsel done so, Ms. Rollan's testimony likely would not have been admitted, and the jury, lacking any direct physical evidence that Mr. Jones ever came into contact with Ms. Kirkland, likely would not have convicted Mr. Jones of capital murder or sentenced him to death. *See Ex Parte Hutcherson* 677 So. 2d 1205, 1209 (Ala. 1996) ("A specific example of how DNA evidence probably influenced the jury in this case is [the DNA expert's] testimony. The only evidence linking [the defendant] to the sodomy charge was [the expert's] testimony that semen found in the victim's rectum "matched" [the defendant's]."); *Barnes v. State*, 704 So. 2d 487, 497 (Ala. Crim. App. 1997) (where DNA testing was the only evidence that defendant "had been in physical contact with" the victim, admission of DNA testing "was devastating to his defense" and "highly prejudicial").

#### 1. Counsel failed to demand a preliminary hearing outside the presence of the jury as required by Alabama law.

169. Despite knowing the "crucial" role that DNA evidence would play at the trial, (C. 217-220), counsel failed to request that Ms. Rollan's testimony be subject to a preliminary hearing, outside the presence of the jury, as required by Alabama law. In *Turner v. State*, the

Alabama Supreme Court held "that if the admissibility of DNA evidence is contested, the trial court ***must*** hold a hearing, outside the presence of the jury," to determine the admissibility of the evidence. 746 So. 2d 355, 359 (Ala. 1998) (emphasis added).

170. In so holding, the Alabama Supreme Court affirmed the continuing validity of that portion of its holding in *Ex Parte Perry*, 586 So. 2d 242, 248 (Ala. 1991), that "It is the view of this court that given the complexity of the DNA multi-system identification tests and the powerful impact that they may have on a jury, passing muster under [the applicable evidentiary standard] alone is insufficient to place this type of evidence before a jury without a preliminary, critical examination of the actual testing procedures performed in a particular case."[10] (Citation omitted.)

171. The Alabama Supreme Court reiterated that warning in *Ex Parte Hutcherson*, in which it warned that "this Court's reasoning in *Perry* for establishing standards to be met before the court admits DNA evidence is that DNA evidence is relatively new and ***the resulting prejudice to the defendant is sufficiently great***. Therefore, ***a foundation must be laid as to the overall admissibility of the evidence***." 677 So. 2d at 1207 (Ala. 1996) (emphasis added); *see also id.* at 1209 (reversing lower courts because "the trial court erred in failing to conduct a hearing outside the presence of the jury on the admissibility of the DNA evidence").

172. The trial court has no choice. The procedural requirement of a preliminary hearing, outside the presence of a jury, is mandatory. *Id.* at 1209 ("*Perry* sets out the predicate for properly admitting DNA evidence, and it must be followed in order to ensure the reliability and trustworthiness of the evidence."); s*ee also Barnes*, 704 So. 2d at 497 (ordering new trial

[10] *Perry* was decided under the *Frye* standard for admissibility of expert testimony. In *Turner*, the Alabama Supreme Court recognized that, with respect to the admissibility of DNA evidence, the state legislature had expressly required application of the *Daubert* standard of admissibility for all DNA evidence.

where "the State was allowed to introduce DNA evidence after allowing the foundation for such evidence to be presented at trial and in front of the jury").

173. Here, counsel's failure to demand a preliminary hearing prejudiced Mr. Jones by allowing the State to attempt to lay the complex foundation for its DNA evidence in front of the jury and without the necessary preliminary, critical examination of the actual testing procedures.

**2. Counsel failed to object to the admissibility of the State's DNA evidence, which did not satisfy the requirements of *Daubert* because the State failed to introduce any evidence of the rate of error for its technique.**

174. Counsel's failure to demand an evidentiary hearing was compounded when counsel failed to object that the State failed to meet the admissibility requirements for DNA evidence under Alabama and federal law. Alabama Code § 36-18-30 expressly prohibits DNA-based testimony unless it meets the criteria for admissibility set forth in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993). In *Daubert*, the United States Supreme Court held that for any given "particular scientific technique" trial courts must consider, among other things, "the known or potential rate of error." *Id*. at 594; *see also Turner*, 746 So. 2d at 359 (courts should consider "whether the technique's 'known or potential rate of error' . . . are acceptable").

175. Here, the prosecutor failed to elicit any testimony from Ms. Rollan regarding the known or potential rate of error for the specific scientific technique, polymerase chain reaction ("PCR"), she used to perform DNA testing in this case. Counsel, however, failed to object to this basic failure by the prosecutor to lay the foundation required by *Daubert*, *Turner*, and Alabama Code § 36-18-30.[11]

[11] While Mr. Jones acknowledges *Lewis v. State*, 889 So. 2d 623, 672 (Ala. Crim. App. 2003) (stating that "the absence of testimony regarding this factor [error rate] will not, alone, render DNA evidence inadmissible), that statement appears to be inconsistent with the express requirements of Alabama and federal law as set forth in Alabama Code § 36-18-30, *Turner*, and *Daubert.*

176. Had counsel challenged Ms. Rollan regarding error rate, Ms. Rollan would have testified that her laboratory did not calculate the known or potential rate of error.

177. Moreover, as counsel knew prior to trial, the sample allegedly collected from Mr. Jones' clothing was a ***contaminated*** "mixture." (R. 1094.) Ms. Rollan, however, did not provide any testimony regarding *any* of the *Daubert* factors to specifically address the reliability of the PCR-method of DNA extraction when dealing with such mixed samples, even though PCR-based DNA extraction "is susceptible to error caused by contamination leading to amplification of the wrong DNA." National Research Council, *The Evaluation of Forensic DNA Evidence* 84 (1996) [hereinafter "*Forensic DNA Evidence*"]. Ms. Rollan expressly cited and acknowledged the publications of the National Research Council as sources for the reliability of the PCR method. (R. 1005.)

178. As a result, the jury was improperly permitted to hear Ms. Rollan's highly prejudicial testimony, the only evidence tending to show Mr. Jones was ever in physical contact with the victim. *See Hutcherson* 677 So. 2d at 1207; *Barnes*, 704 at 497. Had counsel objected and demanded that the State's DNA analysis be subjected to the kind of rigorous and critical examination mandated by Alabama and federal law, the trial judge would have had to exclude Ms. Rollan's testimony pursuant to *Daubert*, *Turner*, and Alabama Code § 36-18-30, and Mr. Jones very likely would not have been convicted of capital murder or sentenced to death.

**3. Counsel failed to object to the State's DNA evidence on grounds that the State failed to establish a proper chain of custody for the contaminated blood sample allegedly obtained from Mr. Jones' clothing.**

179. Counsel was ineffective in failing to object to the prosecutor's failure to establish the chain of custody for the blood sample allegedly obtained from Mr. Jones' clothing, which was indisputably contaminated.

180. The State has the burden of showing that there has been no break in the chain of custody to establish a sufficient predicate for admission into evidence. *Suttle v. State*, 565 So. 2d 1197, 1199 (Ala. Crim. App. 1990). "The purpose for requiring that the chain of custody be shown is to establish a reasonable probability that there has been no tampering with the evidence." *Id.* at 1198 (citation omitted). Here, the State's failure to establish the chain of custody is particularly prejudicial because the blood sample was allegedly obtained from Mr. Jones' clothing by a non-testifying laboratory assistant who also handled articles of blood-stained clothing removed from the victim's body.

**a. The individual who allegedly obtained the blood sample from Mr. Jones' clothing did not testify at trial.**

181. The blood sample that formed the basis of Ms. Rollan's DNA opinion was allegedly obtained from cuttings of Mr. Jones' sweat pants, which cuttings Ms. Rollan received from the State's forensic scientist, Katherine McGeehan. (R. 1022.) Ms. McGeehan, however, did not actually make the cuttings – one of her assistants, Holli Spiers, did. (R. 624, 626-27, 922, 1021.) Ms. Spiers did not testify at trial, and Ms. McGeehan did not testify that she was present when the cuttings were made. At trial the prosecutor elicited the following testimony from Ms. McGeehan:

Q You actually made the cuttings?

A No, I did not.

Q Done in your presence or by your direction of another individual?

A They were done under my direction.

(R. 627.) In responding as she did, Ms. McGeehan expressly confined her answer to the portion of the prosecutor's question regarding whether the cuttings were made at Ms. McGeehan's direction. No foundation was laid to establish that Ms. McGeehan actually witnessed the

cuttings being made from the sweat pants, or that she was even in the room when her assistant, Ms. Spiers, did so.

182. There was no testimony from Ms. Spiers to provide the "missing link" or establish that the sample had not been tampered with or contaminated. In fact, the sample was contaminated.

183. As such, the State failed to establish a chain of custody for the blood sample that formed the basis for Ms. Rollan's DNA analysis. Accordingly, Ms. Rollan's testimony was inadmissible. *See Suttle*, 565 So. 2d at 1198-99. Had counsel objected, the trial judge would have excluded this highly prejudicial evidence from being heard by the jury. Further, even if the State would have called Ms. Spiers to testify, counsel could have undermined the credibility of the State's crucial DNA evidence by eliciting testimony regarding the opportunities for cross-contamination of the sample, as discussed in the next section. Either way, had counsel objected Mr. Jones likely would not have been convicted of capital murder or sentenced to death.

**b. The individual who obtained the blood sample from Mr. Jones' clothing also handled bloody clothing from the victim, resulting in a contaminated sample of a type that was particularly susceptible to false-positive results in the specific type of DNA technique Ms. Rollan used.**

184. The State's failure to establish the chain of custody through testimony by Ms. Spiers was especially prejudicial where the evidence at trial established the sample was contaminated. *See Suttle*, 565 So. 2d at 1198 ("The purpose for requiring that the chain of custody be shown is to establish a reasonable probability that there has been no tampering with the evidence.") (Citation omitted.)

185. The "missing link" in the chain of custody, Ms. Spiers, also handled bloody clothing from the victim. Among other things, Ms. Spiers handled the victim's blouse, (Tr. 922), and bloody brassiere. (R. 624.)

186. At trial, Ms. Rollan, the State's DNA expert, testified that the sample from the sweatpants was contaminated, because both male and female DNA were present in the sample. The test revealed both X and Y chromosomes. While counsel did cross-examine Ms. Rollan on this subject, he failed to tie it to the State's failure to establish a chain of custody:

> Q And so the Y is saying that there's some DNA from a male that got mixed in with it, correct?
>
> A It is somehow in the sample from the blood in human DNA from the sweatpants.
>
> Q You don't know where it came from, do you?
>
> A I know it came from that sample.
>
> Q You don't know how it got into that sample?
>
> A I know that it was on the sweatpants. ***It didn't get in the sample in my laboratory***.

(R. 1093; *see also id.* 1075-76 (emphasis added).) Mr. Parker asked no follow-up questions.

187. According to the National Research Council, which Ms. Rollan expressly relied upon as authority for her PCR testimony (R. 1005), "***Mixed samples are contaminated by their very nature***." *Forensic DNA Evidence* 84 (emphasis added). "The important consequences of . . . contamination are that samples might appear to be mixtures of material from several persons and, in the worst case, that only the contaminating type might be detected. The concern is greater with PCR-based typing methods because PCR can amplify small amounts of DNA. A false match could occur if the genetic type of the contaminating materials by chance matched the

genetic type of a principal (such as a suspect) in the case, or, worse, if the contaminant came from the suspect in the case." *Id.* at 83.

188. Ms. Rollan used the PCR (polymerase chain reaction) method in this case to "amplify" the minute amount of DNA available from the "pinpoint" sample allegedly obtained from Mr. Jones' sweatpants. (R. 1007-08; *see id.* at 637.) "Any procedure that uses PCR is susceptible to error caused by contamination leading to amplification of the wrong DNA. The amplification process is so efficient that a few stray molecules of contaminating DNA can be amplified along with the intended DNA," which can result in "false-positives." *Forensic DNA Evidence* at 71. In this case, where Mr. Jones had been using Mr. Kirkland's car for hours after it was first used by the murderer, his pants could easily have contained some traces of her DNA that could be amplified in testing. The pinpoint dot could have been another substance entirely, but the dissolved sample may well have had Ms. Kirkland's DNA elsewhere in the fabric.

189. Counsel's failure to object to the absence of proof of a chain of custody for the critical clothing sample highly prejudiced Mr. Jones by allowing the jury to hear and be influenced by ***unreliable*** expert testimony based upon a ***contaminated*** sample that, using the PCR method, was associated with ***heightened risk of error*** that was not disclosed to the judge or jury. They were actually told the opposite: that the testing was error-free. (*See* R. 1227–28.) Had counsel objected or otherwise challenged the State's failure to establish the chain of custody for the sample, or adequately challenged the State's failure to establish the reliability and accuracy of the PCR technique in light of the contaminated sample, the evidence would have been excluded or severely undermined, and Mr. Jones likely would not have been convicted of capital murder or sentenced to death.

**4. Counsel failed to object to the State's DNA evidence on grounds that it violated the Confrontation Clause and the hearsay rule.**

190. The State's failure to call Ms. Spiers to testify also violated Mr. Jones' rights under the Confrontation Clause of the Sixth Amendment, but counsel failed to object.

191. The Confrontation Clause, found in the Sixth Amendment to the United States Constitution, provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." The United States Supreme Court "has emphasized that the Confrontation Clause reflects a preference for face-to-face confrontation at trial and that 'a primary interest secured by [the provision] is the right of cross-examination.'" *Ohio v. Roberts*, 448 U.S. 56, 63 (1980), (quoting *Douglas v. Alabama*, 380 U.S. 415, 418 (1965) (footnote omitted)). Thus, even "evidence which would normally be admissible under an exception to the hearsay rule may still be inadmissible because it violates the confrontation clause of the Sixth Amendment." *Grantham v. State*, 580 So. 2d 53, 55 (Ala. Crim. App. 1991); *see Crawford v. Washington*, 541 U.S. 36 (2004).

192. Once again, *Barnes v. State*, 704 So. 2d 487, 494 (Ala. Crim. App. 1997) is instructive. There, the Court of Criminal Appeals reversed a conviction based upon DNA testing (the only evidence physically linking the defendant to the victim) because the individual who collected the evidence did not testify at trial:

> Barnes argues that because Dr. Riddick collected the evidence, his presence at trial was necessary. Although Barnes's objection was labeled as a "hearsay objection" and was treated by the trial court only as a hearsay objection, Barnes mainly objected to the introduction of the evidence regarding the autopsy specimens without the testimony of Dr. Riddick. Barnes argues that he should have been able to confront and question Dr. Riddick regarding the specimens before they were introduced because Dr. Riddick was the person who actually collected the specimens. We agree.

193. Similarly here, Mr. Jones was deprived of the ability to confront and question Ms. Spiers regarding the collection of the specimen, i.e., the cutting of his pants, and the circumstances in which it was done, before the evidence was introduced.

194. Generally, "[v]iolations of the confrontation clause are, like many other constitutional errors, subject to a harmless error analysis." *Grantham*, 580 So. 2d at 58 (citing *Delaware v. Van Arsdall*, 475 U.S. 673, 680–84 (1986)). Nevertheless, the Alabama Supreme Court has held that the erroneous admission of DNA evidence "***can never be harmless error***," even in the presence of otherwise overwhelming evidence of guilt. *Hutcherson*, 677 So. 2d at 1209; *see also Ex Parte Phillips*, 962 So. 2d 159, 160 (Ala. 2006) (following *Hutcherson*). Thus, as the *Barnes* court concluded, on similar facts, "we cannot find that the introduction of the specimens taken . . . was harmless beyond a reasonable doubt." 704 So. 2d at 496-97 (citing *Hutcherson*, 677 So. 2d 1174).

195. Had counsel objected to the State's DNA evidence due to Ms. Spiers' failure to testify, the trial judge would have been required to exclude the evidence. *See id.* (trial court committed reversible error in admitting DNA samples without allowing defendant opportunity to cross-examine individual that collected specimen). Thus, had trial counsel objected, the jury would not have heard the "devastating" evidence purporting to link Mr. Jones to the victim and he likely would not have been convicted of capital murder or sentenced to death.

**5. Counsel failed to object to Ms. Rollan's statistical conclusions on hearsay and Confrontation Clause grounds.**

196. Counsel was also ineffective in failing to object to Ms. Rollan's statistical conclusions on hearsay and Confrontation Clause grounds. Had they done so, the State's devastating DNA evidence would have been excluded and Mr. Jones likely would not have been convicted of capital murder or sentenced to death.

197. At trial, Ms. Rollan testified that "[t]his combination of DNA types occurs in approximately one of seven hundred thirty million Caucasian individuals and one of one point four six billion African-American individuals." (R. 1025.) Those seemingly impressive statistical calculations were derived from the laboratory's population database. (R. 1012-14.) Ms. Rollan further testified that the "population database was actually studied by a population geneticist out of Houston, and it was determined that our population was not skewed one way or the other in the African-American or the Caucasian populations." (R. 1013.)

198. Defense counsel failed to object on either hearsay or Confrontation Clause grounds. Under very similar facts, in *Barnes*, the Court of Criminal Appeals reversed the defendant's conviction where the defendant "made a hearsay objection to [the DNA expert's] testimony that the data used to compile Alabama's population frequency statistics, upon which her opinions and mathematical calculations were based, had been approved by a renowned expert in the field of population genetics." 704 So. 2d at 497. Ms. Rollan made virtually the same objectionable hearsay statement here, likely referring to the same population geneticist. Counsel, however, failed to object to this hearsay statement.

199. Mr. Jones' attorneys also failed to object to Ms. Rollan's testimony on Confrontation Clause grounds. As with Ms. Spiers, the State's failure to introduce testimony by the unnamed population geneticist deprived Mr. Jones of the opportunity to confront him or her and cross-examine the findings and conclusions regarding the adequacy of Alabama's DNA population database. *See id.*; *see also Ohio v. Roberts*, 448 U.S. 56, 63 (1980); *Grantham v. State*, 580 So. 2d 53, 55 (Ala. Crim. App. 1991); *Crawford v. Washington*, 541 U.S. 36 (2004). This failure to object resulted in the introduction of devastating DNA evidence that "can never

be harmless error." *Hutcherson*, 677 So. 2d at 1209; *see also Ex Parte Philips*, 962 So. 2d at 160.

**6. Counsel failed to object to the prosecutor's mischaracterization of the statistical methods used in DNA testing.**

200. Counsel also failed to object to the prosecutor's gross misstatement of the statistical methods used in DNA testing, which resulted in the jurors being misled about how to interpret and understand this highly complex and prejudicial evidence.

201. As discussed in Section II.D.6.d, incorporated herein by reference, during voir dire, the prosecutor misled the jury by mischaracterizing the State's DNA evidence as: "In other words, there's seven hundred and thirty million times everything is going to be perfect, it's going to match." (R. 99.) Counsel, however, failed to object.

202. The prosecutor's mis-explanation of the already sufficiently complex area of DNA statistical methodology was fundamentally different from what the State's own DNA expert witness, Phyllis Rollan, testified, when she explained her statistical conclusions: "If you were to reach into a random population of approximately seven hundred and thirty million people, you would expect to pull out one person that would have this DNA profile." (R. 1084.) Even were that opinion admissible, it is a far cry from saying, as the prosecutor did, that "there's seven hundred and thirty million times everything is going to be perfect, it's going to match." (R. 99.) Moreover, the prosecutor improperly conflated so-called DNA "matching" with DNA population frequency statistics, despite the fact that the two are distinct types of evidence, both scientifically and under Alabama law. *See Hutcherson*, 677 So. 2d at 1207.

203. The prejudice flowing from this failure of counsel to object to the prosecutor's mischaracterization of DNA evidence during voir dire is that, from the very first time the jurors heard about DNA in this case, they were misled about how to understand the already

complicated statistical theory underlying the State's evidence. The Alabama Supreme Court has expressly recognized the risk "that the prejudicial impact of the statistics might unduly impact on the jury." *Hutcherson*, 677 So. 2d at 1207. Indeed, "[t]he prejudicial impact of both DNA 'matching' evidence and DNA population frequency statistics creates such a possibility for prejudicial impact upon the jury" that the improper admission of DNA evidence "can never be harmless error." *Id.* at 1209.

204. Had counsel objected to the State's DNA evidence on any or all of the foregoing grounds, that highly prejudicial evidence would not have been admitted and the jury likely would not have convicted Mr. Jones of capital murder or sentenced him to death.

**G. Counsel failed to adequately challenge the State's blood spatter expert.**

205. Throughout Mr. Jones' recorded statement, Sergeant Jonathan Beeson continually questioned him as to how he acquired specks of blood on his pants and shoes. (C. 338-94, R. 1156-58.). The implication was that Mr. Jones was lying when he asserted he had nothing to do with Ms. Kirkland's death and explaining that the tiny spots must have come from some other source, such as from inside Ms. Kirkland's car.

206. At trial, the State sought to reinforce this point through its blood spatter expert, Katherine McGeehan. Ms. McGeehan acknowledged that she identified only "pinpoints" of blood on Mr. Jones' clothing. (R. 637, 648.) Indeed, such a small amount of blood was found on Mr. Jones' shoes that DNA testing was not possible. (R. 354.) This was in marked contrast to the copious amounts of blood found at the crime scene. As the prosecutor described the crime scene:

> What occurs is blood was all over the carpet. . . See the blood splattering on the ceiling, on the walls, over here by the hutch where the blood is cast off and thrown in ***big clumps*** and it hits here and it goes here and ***it's so thick it starts rolling down*** like that. It's on the ceiling. (R. 349-50) (emphasis added).

> That's her blood. There's blood on the checkbook, the glasses. Blood splattered on the wall. The blood splattering with the tremendous amount of force and speed in relationship to the pictures. That's her blood. Her very life was splattered across as it hit this wall. Hit with force and destruction. It goes up before the ***giant clumps, amounts, clot and start coming down this way with other splattering***. Splattering on the table. Splattering on the ceiling. Splattering in the kitchen. All throughout her house. (R. 1186.)
>
> [L]ook at these photographs, the excessive amount of blood was in different areas, different places, pools. (R. 1219.)

Despite the fact that the crime scene had blood all over the carpet, on the ceiling, on the walls, on the furniture, on the checkbook and glasses, and on the table, and in the form of "big clumps . . . so thick it starts rolling down" and in "giant clumps," and despite the fact that the State's forensic pathologist, Dr. Paredes, described a beating during which over 80 blows were inflicted on the victim, Ms. McGeehan testified that the "pinpoints" identified on Mr. Jones' shoes were consistent with the State's theory of the crime. She testified that the "pinpoints" were "caused by blood floating in the air at a high velocity . . . the higher the velocity the smaller the stain." (R. 638, 648, 688.)

**1. Counsel failed to challenge Ms. McGeehan's qualifications to offer expert opinion on the interpretation of blood spatter pattern.**

207. As an initial matter, counsel were deficient in failing to challenge Ms. McGeehan's qualification to offer an opinion regarding the interpretation of blood spatter pattern. Based upon the record, Ms. McGeehan was not qualified to offer such an opinion as there was no testimony regarding her expertise, if any, in this area.

208. Further, the prosecutor requested only that Ms. McGeehan be declared an expert to "give her opinion on the testing and analysis in relationship to whether it was human blood or components of blood." (R. 619.) Indeed, as discussed below, Ms. McGeehan's lack of qualification in this area was revealed in her fundamental misunderstanding of the term "high

velocity" in the context of blood spatter pattern interpretation, as well as her incorrect testimony that "high velocity" bloodstains could result from a "stomp" of a foot. (R. 689.)

209. Had counsel objected to Ms. McGeehan's qualification to offer an opinion on the interpretation of bloodstain patterns, the judge would have likely excluded her from testifying on this subject. For example, Ms. McGeehan would not have been allowed to testify that the bloodstain on Mr. Jones' pants could not have been transferred there from the clothing of another person (such as the real killer), as Mr. Jones told the police. (R. 638-39; C. 38.) Further, Ms. McGeehan would not have been allowed to offer an opinion whether or not "if someone struck with a cane or chair with high velocity and close proximity could pinpoint splattering gotten on his shoes in your opinion?" (R. 660-61.) This testimony substantially prejudiced Mr. Jones as it was the only testimony on the subject that the jury heard and because, as discussed below, it was also incorrect.

**2. Mr. Parker's cross-examination of the State's expert was ineffective, counterproductive and prejudicial to Mr. Jones.**

210. On cross-examination, Mr. Parker was totally ineffective. Instead of challenging Ms. McGeehan on the inconsistency between the evidence at the crime scene of large clumps of blood and the absence of any such evidence on Mr. Jones' clothes, Mr. Parker actually reinforced the State's position by suggesting that pinpoint blood stains could be made by "[a] stomp or a forceful motion with a foot down, a stomp is a good way to describe it." (R. 689.)

211. Mr. Parker's questioning was particularly prejudicial to Mr. Jones in light of the prosecutor's opening statements "that the injuries will be consistent with someone who had taken their foot and stomped her or kicked her right here in the face," (R. 348), and that "she had been beat to death by blunt-force trauma and was consistent with the hitting and striking of a chair and a stomping," as well as "she was stomped in the breasts." (R. 349.)

212. But Mr. Parker did not stop there, he went on to suggest that small blood pinpoints could result from being "slung off of an object that the blood is on," (R. 689), prejudicially creating the impression for the jury that the "pinpoint" blood stains on Mr. Jones' clothing could have resulted from blood being slung from a murder weapon. This line of questioning by Mr. Parker was unsupported by expert testimony, unscientific, unhelpful, and actually highly prejudicial to Mr. Jones.

213. Further, Mr. Parker's suggestion that a "high velocity" type of bloodstain could be caused by a "stomp" was flat-out wrong. Ms. McGeehan's testimony that blunt trauma of the type involved in this murder would result in "high velocity" bloodstains was also wrong. A high velocity bloodstain would typically result from an event in the nature of a gunshot wound or a high-speed machinery accident. *See* Stuart H. James and William G. Eckert, *Interpretation of Bloodstain Evidence at Crime Scenes* (1999) (explaining that blunt force trauma produces "medium velocity" bloodstains whereas "high velocity" bloodstain is most frequently associated with gunshot injury). The fact that Ms. McGeehan agreed with Mr. Parker further underscores her lack of qualifications to offer an opinion in this area.

214. Instead, Mr. Parker should have challenged Ms. McGeehan about her failure to testify that the "high velocity" blood spatter pattern she identified was consistent with blunt force trauma of the type the State described. *See Interpretation of Bloodstain Evidence at Crime Scenes* (explaining that blunt force trauma produces "medium velocity" bloodstains whereas "high velocity" bloodstain is most frequently associated with gunshot injury).

215. Mr. Parker also should have questioned Ms. McGeehan to establish that a death due to blunt force trauma by a close-ranged assailant of the kind the prosecutor described would have resulted in the assailant being covered in blood, just as the prosecution argued the walls,

ceiling, floor, hutch, table, and kitchen were. (R. 349-50, 1186, 1219.) Indeed, as police officer Beeson stated: "That head explodes and that blood splatters all over the place." (C. 377.) Mr. Parker also failed to challenge a fundamental error in Ms. McGeehan's analysis: Ms. McGeehan testified that the "pinpoints" she observed "come from high velocity." (R. 688; *see also* R. 638, 648.) A qualified blood spatter pattern expert would have known that blunt force trauma is considered to be "medium velocity." *See Interpretation of Bloodstain Evidence at Crime Scenes.* Mr. Parker failed to expose these flaws in Ms. McGeehan's analysis, which would have significantly undermined her credibility in the jury's eyes.

216. Mr. Parker's failure to challenge Ms. McGeehan and develop this exculpatory evidence through her was highly prejudicial to Mr. Jones' case. The *only* evidence in this case suggesting that Mr. Jones was ever in physical contact was the State's DNA analysis of a "pinpoint" blood stain allegedly obtained from Mr. Jones' clothing. Separate and apart from counsel's failure to challenge the numerous defects in the State's DNA evidence (described elsewhere in this petition), no reasonable counsel would have left unchallenged the implication from Ms. McGeehan's testimony that the blood spatter pattern allegedly observed on Mr. Jones' clothing was consistent with the brutal, blunt force trauma that resulted in the death of the victim. Had counsel challenged Ms. McGeehan on these points, her testimony would have been undermined and there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**3. Counsel failed to retain a blood spatter expert who could have assisted in the development of an effective, non-prejudicial cross-examination and testified that the evidence was not consistent with the State's theory that Mr. Jones killed Ms. Kirkland.**

217. Additionally, counsel were ineffective for failing to procure the assistance of a blood spatter expert. Counsel failed to procure the necessary expert assistance needed to

effectively challenge the State's case. A criminal defendant's right to the benefit of expert assistance is constitutionally recognized and protected. *See Ake v. Oklahoma*, 470 U.S. 68 (1985); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Gayle v. State*, 591 So. 2d 153 (Ala. Crim. App. 1991). Had counsel acquired the assistance of a blood spatter expert, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

218. Counsel could have retained a blood spatter expert such as Gene N. Gietzen. A copy of Mr. Gietzen's curriculum vitae is attached hereto as Exhibit K. Mr. Gietzen was available in 2004 and would have been willing to testify. Counsel's failure to retain Mr. Gietzen, or a similar expert, prejudiced Mr. Jones in several ways.

219. If counsel had retained Mr. Gietzen, or a similar blood spatter expert, he would have pointed out Ms. McGeehan's lack of qualifications, could have assisted Mr. Parker in developing an effective cross-examination of Ms. McGeehan, or at the very least prevented Mr. Parker from making the blunders during cross-examination that were prejudicial to his own client.

220. Had counsel retained Mr. Gietzen or a similar blood spatter expert, the expert would have exposed the errors in Ms. McGeehan's opinions described above.

221. Mr. Gietzen would have testified that generally accepted bloodstain analysis is inconsistent with Ms. McGeehan's testimony that "high velocity" bloodstains can result from "a pool of blood being hit very hard" causing "the blood to fly in the air and the higher the velocity the smaller the stain." (R. 638.) This misinformed testimony reveals a fundamental error in Ms. McGeehan's opinion. Mr. Gietzen would have testified that Ms. McGeehan failed to understand that, in the context of bloodstain interpretation, the velocity of force refers to the impacting

object rather than the speed of the blood droplet. *See Interpretation of Bloodstain Evidence at Crime Scenes*.

222. Mr. Gietzen would have testified that "High velocity bloodstain is most frequently associated with gunshot injury, but it is seen in cases involving explosions, power tool and machinery injuries as well as in some automotive accidents." *Interpretation of Bloodstain Evidence at Crime Scenes*. None of these events was involved in the Kirkland murder.

223. Mr. Gietzen would have testified that "blunt force trauma," which was what the State's pathologist identified as the cause of the victim's injuries (*see, e.g.,* R. 927, 928, 941), produces "medium velocity" bloodstains and that "Impact velocities associated with beatings and stabbings fall within this range." *Interpretation of Bloodstain Evidence at Crime Scenes*.

224. Mr. Gietzen would have testified that, based upon his review of photographs of this crime scene, he observed no bloodstains that he would classify as "high velocity."

225. Mr. Gietzen would have testified, based upon his experience investigating crime scenes where blunt force trauma was inflicted upon the victim's head, that once the scalp is bleeding profusely, with additional blows to the same area, the blood will be projected away from the victim's body, generally in a radiating direction.

226. Mr. Gietzen would have testified that "Multiple blows to the head with a blunt instrument typically create considerable amount of medium velocity bloodspatter." *Interpretation of Bloodstain Evidence at Crime Scenes*.

227. Mr. Gietzen would have testified that, because blunt force injuries are caused by an assailant who is close enough to the victim to inflict the blows, the assailant would be expected to receive significant larger medium-velocity bloodstains on his clothes. *Interpretation of Bloodstain Evidence at Crime Scenes*.

228. Mr. Gietzen would have testified that, in addition to larger bloodstains, hair and tissue would also have been deposited on the assailant.

229. Mr. Gietzen's testimony would have undermined the credibility of the State's expert, Ms. McGeehan, whose testimony otherwise was essentially unchallenged.

230. Given the extreme importance of the blood spatter testimony in this case, no reasonable counsel would have decided not to retain a blood spatter expert. As discussed above, the *only* physical evidence in this case suggesting that Mr. Jones was ever in direct contact with the victim was the State's DNA analysis of a "pinpoint" blood stain allegedly obtained from Mr. Jones' clothing. Rebutting the State's evidence regarding the purported consistency of the stain pattern with the brutal, bloody beating death of the victim was essential to undermining the State's case. Had counsel retained Mr. Gietzen or a similar blood spatter expert, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**H. Counsel failed to retain the assistance of a fingerprint expert.**

231. Defense counsel were ineffective in failing to procure the assistance of a fingerprint expert to, at a minimum, assist in preparing to cross-examine the State's fingerprint expert. As noted above, a criminal defendant's right to the benefit of expert assistance is constitutionally recognized and protected. *See Ake v. Oklahoma*, 470 U.S. 68 (1985); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Gayle v. State*, 591 So. 2d 153 (Ala. Crim. App. 1991). Had counsel acquired the assistance of these experts, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder.

232. At trial, part of counsel's scattershot theory was that someone else committed the crime. (*See, e.g.*, R. 1204–05 (highlighting lack of fingerprint evidence).) Mr. Jones

consistently asserted that fact from the time he was arrested up through his trial. (*See, e.g.,* C. 340-41 (referencing Portaque Morris, Robert Carroll, and others)); R. 1101-45; R. 1107, 1112 (defense counsel lamely accused Malik Hasan of murdering Ms. Kirkland.).) As counsel were well aware, crime scene investigators in this case lifted numerous prints that were submitted to the Alabama Department of Forensics for testing. At trial, the State asserted through their expert, Shannon Fitzgerald, that many potential fingerprints could not be lifted and those raised could not be linked to any known individuals. (R. 1174-76.)

233. Because counsel did not acquire the assistance of a fingerprint expert, they were unable to effectively challenge the State's contention that prints could not be lifted from many of the items taken from the victim's home. Nor could they contradict the State's assertion that the prints could not be linked to other suspects, including those individuals referenced above. Without the assistance of an expert, counsel, themselves not experts in fingerprint evidence, endeavored to cross-examine the State's expert based on their uninformed understanding of the science behind it. (Counsel cross-examined the State's expert for only three transcript pages. (R. 1176-79.).) Ultimately, the jury was left to rely on the State's expert's assessment of this evidence. Failing to procure the assistance of their own expert or to expose the State's fingerprint analysis to any substantive scrutiny had a prejudicial effect on Mr. Jones by depriving him of the opportunity to engage in independent review of the expert's conclusions.

234. Further, according to Mr. Fitzgerald's report, "In order to adequately compare" three of the latent prints, "a better set of fully rolled inked fingerprints and joint prints is needed on all individuals in this case." (Exhibit N, 2/17/00 Report of Shannon Fitzgerald Report.) The latent prints that Mr. Fitzgerald was unable to adequately examine were all from the victim's vehicle, which Mr. Jones told police he had been given by others. (*See, e.g.,* C. 340-41.)

Although the police did not obtain a full set of rolled prints, with the aid of a fingerprint expert the defense could have done so and established affirmatively that certain of the prints were not those of Mr. Jones. But counsel did not obtain the assistance of such an expert.

**I. Counsel failed to challenge the State's inability to establish a chain of custody for critical evidence.**

**1. Counsel's failure to challenge the State's decision to release the victim's automobile before it was tested for the presence of the victim's blood or made available to the defense for independent testing resulted in the improper admission of evidence collected from the vehicle.**

235. Counsel were also ineffective for failing to object to the State's release of custody of the victim's automobile. The victim's car was a critical piece of evidence. Indeed, considerable evidence allegedly recovered from inside the automobile was admitted at trial. (*See, e.g.*, R. 593.) Moreover, there was significant debate about the amount of blood and whose blood, if any, was present in the car. (R. 534-35.) The vehicle itself was subject to fingerprint and DNA testing by the State. (R. 354, 875.) Yet, a short time after the offense, the car was released from police custody and given to the victim's daughter. (R. 397–98.)

236. This effective destruction of crucial evidence about the source of blood on Mr. Jones' clothes was highly improper because counsel in this case were not even appointed until years later. Accordingly, they were denied the opportunity to reliably test the vehicle and its contents. *See Gurley v. State*, 639 So. 2d 557 (Ala. Crim. App. 1993) (reversing capital conviction because trial court improperly allowed witness to testify about charred remnants of wallet that had allegedly been taken from victim at the time of death, which the State lost or destroyed before the defendant had an opportunity to test it). Despite the clear prejudice suffered by the defense, counsel failed to object. Had they done so, the State would have been precluded from admitting the evidence acquired from the car.

**2. Counsel failed to object to the State's failure to establish a chain of custody for the crime scene video.**

237. Furthermore, defense counsel deficiently and prejudicially failed to object to the admission of the police videotape of the crime scene despite the fact that the State did not establish its chain of custody. (R. 474-75.) *See Ex parte Holton*, 590 So. 2d 918, 920 (Ala. 1991). Without establishing a chain of custody, the videotape was inadmissible because it could have been altered, redacted, enhanced, or changed in ways that would have distorted the crime scene or the victim's body. *See Spradley v. State*, __ So. 3d __, 2011 WL 4511226, *4-6 (Ala. Crim. App. 2011) (State failed to establish proper foundation for admission of video recordings and still photographs, and erroneous admission of such recordings was not harmless); *see also Logue v. State*, 529 So. 2d 1064, 1068 (Ala. Crim. App. 1998) ("The purpose of laying a proper foundation for the admission of a tape recording is to show that the [depiction on the tape] was accurately recorded and preserved."). Counsel's objection would have compelled the State to prove the chain of custody or, absent a proper chain, the videotape would have been inadmissible. Instead, counsel's inaction allowed the jury to view unreliable evidence in determining culpability. Had counsel properly challenged the chain of custody of the victim's body, her automobile, and the crime scene video, there is a reasonable probability Mr. Jones would not have been convicted of capital murder or sentenced to death.

**J. Counsel failed to prevent the jury from considering unqualified expert testimony offered by the victim's family.**

238. Defense counsel deficiently and prejudicially failed to object to unqualified expert testimony offered by the victim's family. Before an individual may offer specialized knowledge on a subject, he or she must be qualified as an expert witness. *See Townsend v. General Motors Corp.*, 642 So. 2d 411, 423 (Ala. 1994); Ala. R. Evid. 702. In this case, however, the State

introduced expert testimony from lay witnesses, the victim's own family members, and counsel failed to object.

239. During the guilt phase of trial, the prosecution elicited specialized knowledge from the victim's family members. He repeatedly prefaced his questions to the victim's daughter by stating, "as a nurse," or "being trained as a nurse." The police-officer grandson was asked questions, "in your opinion as a police officer." (R. 420.) It was through opinion questions to the daughter that the prosecutor unlawfully elicited inadmissible testimony that in her opinion the blunt force her mother endured would have caused her mother to urinate, (R. 395-96), a fact which Mr. Valeska then used to inflame the jury during closing argument, (R. 1237), even though it was irrelevant to the issue of guilt. Similarly, the victim's daughter and grandson improperly expressed their opinions regarding the rate of change in blood color over a specified period of time. (R. 382, 421.)

240. This testimony was admitted even though no showing had been made that the victim's daughter's nursing experience qualified her to testify whether blunt force trauma victims urinate when they endure such injuries, nor had any showing been made that the victim's grandson's experience as a narcotics officer qualified him to testify regarding the rate of change in blood color over a specified period of time. Had counsel objected and demanded that these individuals be qualified as experts, or at a minimum that a foundation be laid to explain the basis for this specialized knowledge, this prejudicial evidence, which was particularly harmful because it came from the victim's family members, would not have been admitted and there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

### K. Counsel failed to guard against the introduction of expert testimony designed to bolster the credibility of another state witness.

241. Counsel deficiently and prejudicially failed to object to the prosecutor's introduction of testimony intended to bolster the credibility of the State's expert witness. Pursuant to Alabama law, evidence may not be offered to bolster the testimony of a witness unless that witness's character has been impeached. *See Lassiter v. State*, 47 So. 2d 230, 231 (Ala. Ct. App. 1950) (quoting *Morgan v. State*, 6 So. 761-62 (Ala. 1889)). The State did so here, and counsel failed to object.

242. At the guilt phase of trial, the State introduced the testimony of Katherine McGeehan, a forensic scientist. (R. 608.) Though the State's DNA expert, Phyllis Rollan, had yet to testify, during Ms. McGeehan's qualification testimony, the prosecution asked if she had "an opinion out of all the DNA scientists in Alabama who has done more DNA testing, which scientists in Alabama, in other words, the experts?" (R. 612.) The prosecution followed up by asking if this would include Phyllis Rollan. Ms. McGeehan replied that "all of them are highly-qualified scientists." (R. 613.) Ms. McGeehan then supplied testimony that included information regarding Phyllis Rollan's background and experience.

243. Because the State considered Ms. Rollan's DNA evidence a critical piece of evidence in this case, testimony offered to bolster Ms. Rollan's credibility and thus her results was highly prejudicial. Accordingly, it was unreasonable for defense counsel to fail to object to the improper introduction of testimony offered to bolster the credibility of a key State witness. *See Dorsey v. Chapman*, 262 F.3d 1181, 1186 (11th Cir. 2001); *Snowden v. Singletary*, 135 F.3d 732, 737-38 (11th Cir. 1998). Had counsel done so, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

### L. Counsel failed to adequately investigate Malik Hasan and prepare for his testimony.

244. The defense called Malik Hasan as a witness, and Mr. Brantley baselessly accused him of having killed Ms. Kirkland on December 31, 1999. (R. 1107). This failed attempt at grandstanding in front of the jury had to cause fundamental damage to the credibility of the defense in the eyes of the jurors.

245. Despite having requested a subpoena to secure Mr. Hasan's appearance at the trial, defense counsel did nothing to prepare for Mr. Hasan's testimony and admitted as much to the trial court. (R. 1072-1075). Mr. Brantley told the judge that he was concerned about calling Mr. Hasan as a witness because he did not know what the witness would say, and he attempted to transfer the risk and the decision to offer this unknown evidence to his own client, Mr. Jones. For that, the court rebuked Mr. Brantley, reminding him, "you're the lawyer, not him." (*Id*. at 1075).

246. In a revealing display of defense counsel's failure to prepare for trial, Mr. Brantley explained his concern was that Mr. Hasan might testify he had been incarcerated on the night Ms. Kirkland was killed, effectively eliminating him as the potential killer. (R. 1074). No reasonable counsel would have called a witness to the stand, intending to accuse that witness of committing a murder that happened at a time when counsel feared the witness was incarcerated. A minimal amount of diligence, inspecting readily available public prison records, would have revealed whether or not Mr. Hasan was incarcerated at the time of the murder.

247. Further, in seemingly attempting to establish innocence by accusing Mr. Hasan as the murderer, the defense undertook the burden of proving a fact which they had no basis to believe could be proven and no obligation to prove. Mr. Brantley admitted to the court he had no idea what Mr. Hasan would testify to once on the stand.

248. This strategy or approach prejudiced Mr. Jones by creating an unnecessary binary choice for the jury to make: either Mr. Hasan was guilty or Mr. Jones was. There was no evidence Mr. Hasan was involved in the killing of Ms. Kirkland. The binary choice presented by the defense undermined the defendant's ability to rely on reasonable doubt. The record is replete with evidence from which reasonable doubt could arise. But the reasonable doubt evidence was overshadowed by the drama in Mr. Brantley's accusations addressed to Mr. Hasan.

249. Mr. Parker later exacerbated Mr. Brantley's needless creation of a binary choice. During his closing argument, Mr. Parker fundamentally misstated the decision the jurors were to make. He gave the jury a binary choice: "What you're here to do is try to find out who did it and make that determination." (R. 1199.) He returned to the same point near the end of the closing. "But you folks are the ones that say who did it." (R. 1223.) Counsel's straying from the reasonable doubt standard was ineffective.

### M. Defense counsel failed to present evidence that Mr. Jones had a history of joyriding and a fascination with vehicles.

250. Mr. Jones was arrested driving the victim's Cadillac within hours of her body being discovered. His consistent position, through the first seven and a half hours of interrogations and his hour and a half long recorded statement, was that the keys to the Cadillac belonging to the murder victim were given to him by his street friends and he was merely "joy riding." (*See, e.g.,* C. 340-42.)

251. At trial, the State introduced Mr. Jones' post-arrest statements. His possession of the vehicle was used by the prosecutor as evidence that he committed the murder. The prosecution also used various inconsistencies in Mr. Jones' version of the events as being indicative that he was lying as to the true reason why he possessed the vehicle, e.g., he had murdered the owner. (*See* R. 1157 (prosecutor elicited testimony from Officer Beeson that Mr.

Jones said he got the car from his brother, Portaque Morris, and that it belonged to his grandfather); R. 547-48 (prosecutor eliciting testimony from Mr. Jones' sister that no one in their family owned a Cadillac).) Once the State attacked his credibility, the defense was allowed to offer evidence rehabilitating Mr. Jones' explanation of why he had the car. *See Baxter v. State*, 723 So. 2d 810, 819-20 (Ala. Crim. App. 1988); *Willis v. State*, 449 So. 2d 1258, 1260 (Ala. Crim. App. 1984).

252. There were at least six witnesses who were available to testify that Mr. Jones had a history of "joy riding" and a fascination with cars, starting when he was very young. Mr. Jones' family would have testified about how he loved to drive and never turned down an offer to run an errand if it involved driving. The defense failed to follow up any leads they received in this regard.

253. Mary Bell Jones, Mr. Jones' grandmother, would have testified that Mr. Jones was "car crazy" and loved anything that moved. He loved to "joyride," even though he had no driver's license.

254. Elaine Crook, an aunt, would have testified that Mr. Jones had a fascination with moving vehicles of any kind. Anything that moved would capture his attention. As a child, he was obsessed with go-carts and bicycles. Mr. Jones went joyriding in Ms. Crook's husband's Isuzu Rodeo as a teenager. Mr. Jones was easily led and would certainly take a car or bicycle offered to him, without asking any questions.

255. Rochelle Brown, an aunt, would have testified that Mr. Jones frequently went joyriding. No one was injured in any of these instances.

256. Mr. Jones' uncle, Desario Antrel "Andy" Jones, would have testified that Mr. Jones loved cars and NASCAR racing. He wanted to become a racecar driver.

257. Jill Whitsett, his mother, would have testified how Mr. Jones loved cars.

258. Jarrius Jones, Mr. Jones' younger brother, would have testified that messing with Mr. Jones' cars was the only thing that made him really mad.

259. The prosecution called Mr. Jones' half-sister, LaKeisha Jones, as a witness at trial. She was in the Cadillac with Mr. Jones when he was arrested. Given the opportunity to examine this potentially important defense witness in the State's case, Mr. Parker made no effort to elicit available and favorable testimony from the witness. Ms. Jones would have been able to provide important exculpatory evidence about the events surrounding the use of the Cadillac, including that Mr. Jones was giving rides to friends and family members, that Mr. Jones had no driver's license, that he still voluntarily stopped for the police rather than attempting to evade them, and that he had been driving around in the conspicuous Cadillac to McDonalds and other very public places for an extended period that day. Mr. Jones was joyriding with his sister and friends.

260. The failure to develop this evidence went to the heart of the guilt determination. Accepting a car on the street is not something most people and likely most jurors would do. But it was totally in character for Mr. Jones, once his background was understood. Had the jury learned that that Mr. Jones had a near-obsessive affinity for cars even though he did not own one, and had his history of joyriding been explained, it is probable that at least some jurors would have viewed his statements about accepting the car as having the ring of truth.

261. What was required to raise reasonable doubt was an explanation for Mr. Jones' possession of the car independent of having stolen it as part of a murder. Once evidence of an alternative explanation for his presence in the vehicle was presented through the evidence that was readily available, the State's argument would have been seriously undermined. The State's

evidence showing a connection with Ms. Kirkland largely boiled down to possession of the car and trace amounts of DNA on Mr. Jones' pants that could have come from the car. Innocent possession of the car was essential to the defense.

262. Defense counsel's failure to introduce any evidence cutting against the State's theory was prejudicial under the facts of this case. Mr. Jones' possession of the victim's car was one of the very few circumstantial facts that supported the State's theory connecting him to Ms. Kirkland. Here, there was no confession, the defendant's fingerprints or DNA were not found at the crime scene, there were no witnesses to the murder, and he repeatedly denied killing her. The evidence of his joyriding was important to explain his willingness to accept use of a car from an acquaintance on the street, and tends to negate the State's theory of guilt. Had the evidence establishing these facts been introduced, it is likely a more favorable verdict would have been returned.

### N. Counsel failed to protect Mr. Jones' right to a fair and honest jury determination by failing to investigate and prevent juror misconduct.

#### 1. Counsel failed to investigate Juror Ponder's attempts to speak directly with the prosecutor.

263. Counsel were deficient with respect to Juror Tommy Ponder by failing to take him under voir dire after his interactions with the prosecutor during the course of the trial. Despite the trial court's warnings, during a recess, Juror Ponder approached Mr. Valeska and attempted to speak with him. (R. 219.) Despite these efforts by the juror to speak directly with the prosecutor outside of the courtroom, defense counsel failed to investigate the circumstances surrounding this incident. This juror's desire to speak with Mr. Valeska could have signaled a range of concerns from a general bias in favor of the State to inside information about the case, but counsel did not ask to voir dire the juror nor did they probe any further. Reasonably effective counsel would have investigated this juror and these circumstances to ensure Mr.

Ponder was capable of making a fair and impartial determination and that he had not tainted his fellow jurors. As the United States Supreme Court has explained, "[i]n a criminal case, ***any*** private . . . contact . . . directly or indirectly, with a juror during a trial is, for obvious reasons, deemed presumptively prejudicial." *Remmer v. United States*, 347 U.S. 227, 229 (1954). Importantly, once any such private contact has occurred, "the burden rests heavily upon the Government to establish, after notice to ***and hearing*** of the defendant, that such contact with the juror was harmless." *Id.*; *see, e.g., Kerdpoka v. State of Georgia*, 724 S.E.2d 419, 425 (Ga. Ct. App. 2012) (court conducted individual voir dire of each juror to explore potential influence of private contact with juror).

264. While trial courts "have some flexibility in structuring an inquiry into this kind of problem," a trial court also "abuses its discretion if the record contains no evidence on which the court could have relied." *United States v. Warner*, 498 F.3d 666, 680 (7th Cir. 2007). Here, counsel failed to request the hearing Mr. Jones was entitled to, *Remmer*, 347 U.S. at 229, to inquire into the nature of Mr. Ponder's contact and its potential influence on the jury. Because counsel failed to do so, the State was not properly put to its burden of establishing that the contact was not prejudicial, *see id.,* and Mr. Jones was further deprived of the ability to demonstrate actual influence because there was no hearing, *see Fullwood v. R.C. Lee*, 290 F.3d 663, 679 (4th Cir. 2002), as well as no record on which the trial court could rely, *see Warner*, 498 F.3d at 680. Counsel's need to request such a hearing was heightened in this capital case. It has long been acknowledged that "[w]here life or liberty is involved more care is required, and courts are more ready to interfere where it appears that a juror has acted irregularly than in a civil case." *Jones v. Warner*, 81 Ill. 343, at *4 (1876).

265. Had counsel requested the hearing to which Mr. Jones was entitled, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death. *See Minor v. State*, 914 So. 2d 372 (Ala. Crim. App. 2004) (defendant need only show that a jury's verdict might have been affected by a juror's outside contact with another person).[12]

**2. Counsel allowed Juror Ponder to sleep through the presentation of testimony and exhibits.**

266. Counsel were also ineffective for failing to ensure that jurors pay meaningful attention to the evidence. During the guilt phase, it became apparent that Juror Tommy Ponder was sleeping. His head was tilted back, his eyes were closed, and his mouth was open. Because he missed the presentation of testimony and exhibits, this juror was ill-equipped to render a fair and impartial decision based upon the evidence and should have been dismissed. *See, e.g., United States v. Smith*, 550 F.2d 277, 285-86 (5th Cir. 1977) (dismissal of sleeping jurors warranted because it prevents them performing their duties); *Rocker v. State*, 443 So. 2d 1316, 1320 (Ala. Crim. App. 1983). Effective counsel, desiring to protect their client's rights, would not have hesitated to bring this serious matter to the court's attention. However, Mr. Jones' attorneys failed to do so on their own initiative. Rather, they did so only after Mr. Jones prodded them to address the matter. (R. 826.)

267. Further, when counsel finally alerted the trial court, they did so in a manner that suggested they were annoyed that Mr. Jones was insisting upon protecting his constitutional rights. (R. 826 ("We've got a juror over there that's asleep, and my client is requesting me to bring that to the attention of the Court.").) In response, the court undoubtedly cognizant of

[12] The fact that Juror Ponder served as an alternate, (R. 1287–88), does not undermine the potential for him tainting his fellow jurors. *See Minor v. State*, 914 So. 2d 372 (Ala. Crim. App. 2004) (defendant need only show that jury's verdict might have been affected by a juror's outside contact with another person).

counsel's half-hearted objection, stated, "I don't think he's asleep. He's just resting his eyes." (R. 826.) Though it was impossible for the court to know the juror was not sleeping and instead was just "resting his eyes," counsel let it go at that. They did not contest the court's assertion, inquire of others in the courtroom, or ask to take the juror under voir dire. Had counsel engaged in voir dire of this juror, they would have learned that he had in fact been sleeping and missed parts of the trial.

268. Defense counsel should have asked the judge to admonish the jury to remain attentive, as any reasonable counsel handling a capital trial would have done. With just that smallest bit of effort, counsel could have protected against the prejudicial effect of sleeping and inattentive jurors. Indeed, although Juror Ponder was eventually dismissed as an alternate, (R. 1287–88), the other jurors who viewed a fellow juror sleeping during the trial without a reprimand from the court or the attorneys would have developed a diminished sense of responsibility, believing that their decision did not require particular care. Had counsel objected, the trial court would have been forced to issue an instruction demanding that jurors give close scrutiny to the evidence and there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

### O. Counsel failed to object to numerous instances of prosecutorial misconduct that infected every stage of the proceedings.

269. A prosecutor's sole responsibility is to seek justice; therefore, he is prohibited from inflaming the jury, making improper suggestions or assertions of personal knowledge, and generally engaging in conduct prohibited by law. *See e.g., Berger v. United States*, 295 U.S. 78, 88 (1935); *Thomas v. State*, 90 So. 878, 880 (Ala. 1921). During the guilt phase of Mr. Jones' trial, the prosecutor engaged in numerous acts of misconduct. But, because defense counsel failed to object to the prosecutor's improper actions, the jury was permitted to consider this

unlawful evidence and his impermissible arguments in assessing Mr. Jones' guilt. Had counsel objected, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**1. The District Attorney has a history of prosecutorial misconduct, of which trial counsel was aware.**

270. The District Attorney who prosecuted Mr. Jones, Mr. Valeska, has a longstanding reputation for deploying improper tactics and strategies to obtain convictions. His conduct, and that of his office, has been the subject of much litigation, and has been repeatedly criticized by the courts.

271. For example, in *McNair v. State*, 653 So. 2d 320 (Ala. Crim. App. 1992), the Court of Criminal Appeals remanded for a new sentencing hearing after finding that the prosecutor, Mr. Valeska, engaged in numerous improper tactics and cautioned that his improper conduct would not be condoned. *Id.* at 337-38; *see also, e.g., Jennings v. State*, 588 So. 2d 540, 542 (Ala. Crim. App. 1991) (reversing conviction because Mr. Valeska's improper methods of impeaching defendant so prejudiced the accused in the eyes of the jury that the accused was denied a fair trial); *Blackmon v. State*, 574 So. 2d 1037, 1041 (Ala. Crim. App. 1990) (Mr. Valeska made improper references to potential sentencing in closing); *Ward v. State*, 440 So. 2d 1227, 1230 (Ala. Crim. App. 1983) (Mr. Valeska improperly bolstered testimony of witness by arguing facts not in evidence; conviction affirmed because defense counsel failed to object); *Hammonds v. State*, 777 So. 2d 750, 764-65 (Ala. Crim. App. 1999) (Mr. Valeska improperly commented on defendant's decision not to testify but, unlike here, trial court gave curative instruction), aff'd, 777 So. 2d 777 (Ala. 2000); *Miller v. State*, 431 So. 2d 586, 590-91 (Ala. Crim. App. 1983) (Mr. Valeska improperly asked witness about the race of defendant's companion; no prejudice because counsel timely objected and prevented the question from being

answered); *Hammond v. State*, 776 So. 2d 884, 892 (Ala. Crim. App. 1998) (reversing judgment due to Mr. Valeska's improper comments); *Henderson v. State*, 612 So. 2d 1256, 1260 (Ala. Crim. App. 1992) (Houston County prosecutor showed jury a pair of ladies' panties during opening argument that were not admitted into evidence, introduced evidence of unrelated offenses, and commented on defendant's decision not to testify); *Drayton v. State*, 596 So. 2d 51 (Ala. Crim. App. 1991) (improper comment on failure to call witnesses available to both sides); *Middleton v. State*, 495 So. 2d 726, 729 (Ala. Crim. App. 1986) (Houston County prosecutor drew attention to absence of codefendant and questioned failure of codefendant to testify in defendant's trial); *Cotton v. State*, 481 So. 2d 413, 417 (Ala. Crim. App. 1985) (cross-examination of defendant concerning prior bad acts was reversible error); *Crook v. State*, 469 So. 2d 690, 694 (Ala. Crim. App. 1985) (prosecutor repeatedly referenced inadmissible evidence, but court affirmed because defense counsel objected and obtained curative instructions); *Doyle v, State*, 487 So. 2d 996, 998 (Ala. Crim. App. 1986) (prosecutor made "clearly improper" remarks during closing about potential punishment, but court affirmed because defense counsel objected and the court warned the prosecutor to "stick to the evidence"); *Williams v. State*, 620 So. 2d 82, 85 (Ala. Crim. App. 1992) (reversing because prosecutor used peremptory strike in discriminatory fashion against African-American venire member).

272. Of particular note, in *Sheely v. State*, 629 So. 2d 23, 25 (Ala. Crim. App. 1993), Mr. Valeska improperly made statements during the guilt phase that the crime was especially heinous and atrocious. The appellate court, however, held that the defendant had waived the issue because defense counsel, *Mr. Brantley*, failed to object. Mr. Brantley knew or should have known the importance of objecting to the prosecutor's misconduct as well as the prejudicial

effect that flows from the failure to do so – but nevertheless failed to object on numerous occasions.

**2. Counsel failed to protect against the prosecutor's misconduct during jury selection, depriving Mr. Jones of his right to be tried by a fair and impartial jury.**

273. As discussed in Section II.D.6 and II.D.2, incorporated herein by reference, which is incorporated herein by reference in its entirety, counsel failed to object to numerous acts of prosecutorial misconduct during jury selection. Counsel's failure to object deprived Mr. Jones of his right to be tried by a fair and impartial jury.

**3. Counsel failed to object to the prosecutor's misconduct during opening statements.**

274. Counsel failed to object to numerous improper statements by the prosecutor during opening statements. Had counsel objected, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**a. Counsel failed to object to the prosecutor's groundless and irrelevant statements regarding the magnitude of the crime.**

275. The prosecutor told the jury:

> [This is] the most horrible death that has ever occurred in this circuit to an eighty year old woman. (R. 355.)

276. This statement was improper and prejudicial for several reasons. First, there is no evidence which would allow the prosecution to state that in the history of Houston County, no crimes of similar magnitude ever occurred to another eighty year old woman. Dr. Paredes' testimony on this issue was limited to his personal knowledge, while Houston County was founded in 1903. Second, the magnitude of the crime was irrelevant during the guilt phase. Third, this statement is one of many examples in which the prosecutor improperly sought to turn the victim's age into a non-statutory aggravating circumstance, which also is not relevant at the

guilt phase. Indeed, by asking the jury to take Ms. Kirkland's age into consideration, the prosecutor improperly encouraged the jury to consider an invalid aggravating circumstance in violation of state and federal law. *Espinoza v. Florida*, 505 U.S. 1079 (1992) (weighing of invalid aggravating factor violates Eighth Amendment); *Ponder v. State*, 688 So. 2d 280 (Ala. Crim. App. 1996). Counsel should have objected to this statement by the prosecutor. Had they done so, the jury would not have been inflamed during the guilt phase of the trial by irrelevant information about the victim's age or the magnitude of the crime.

**b. Counsel failed to object to the prosecutor's statements regarding victim impact.**

277. Counsel also failed to object during opening statements when the prosecutor improperly sought to play on the jury's passions by referencing speculative victim impact evidence during opening statements. The prosecutor continually asked the jury to consider what Ms. Kirkland's life was like – what she thought, what she liked, and her relationships with her family:

> She was concerned about her safety all her life. She was kind of afraid to live alone, but she continued to live alone because was independent and determined. (R. 333.)

278. The prosecutor also sought to arouse sympathy for the victim by drawing the jury's attention to Ms. Kirkland's stroke and highlighting her drive and determination as she recovered from it:

> [S]he had the stroke and [she] had been in good condition and so they didn't check on her every day. And [Ms. Kirkland] laid in the house approximately three days before somebody found her. (R. 335.)

> The stroke effected [sic] her tremendously, but she was a very determined woman after the stroke. They said she would never walk again, but she got on those kind of machines, treadmills, you get on. She was determined to walk again and get around and take care of herself. And she did that. (R. 333.)

279. This victim impact discussion in the first phase of the trial is simply irrelevant to any legitimate consideration of evidence by the jury, injects prejudicial and inflammatory considerations, and undermines the reliability of the verdict. *See Payne v. Tennessee*, 501 U.S. 808 (1991) (finding that the Eighth Amendment does not erect a *per se* bar to victim impact evidence at the penalty phase) (emphasis added); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Hutto v. State*, 178 So. 2d 810 (Ala. 1965) (reversible error for the district attorney to show that the decedent had children); *see also Spaziano v. Florida*, 468 U.S. 447 (1984). Counsel failed to object to these acts of prosecutorial misconduct, which allowed the prosecutor to improperly testify to facts not in evidence and encourage the jury to convict Mr. Jones based on evidence irrelevant to Mr. Jones' guilt or innocence.

**c. Counsel failed to object when the prosecutor unlawfully injected a racial dynamic into the case.**

280. Defense counsel also failed to object when the prosecutor interjected a racial dynamic into the case. Despite having no relevance, the prosecutor continually highlighted Mr. Jones' race as well as the race of those accompanying him in the car when he was stopped by police. (R. 351, 353.) Most notably, the prosecutor not so subtly contrasted the race of the victim with that of Mr. Jones by using the victim's car as a proxy, stating:

> And what occurs is one of the police officers sees this ***white*** Cadillac with Anthony [sic] Jones in the vehicle with another ***black*** female in the front seat and another ***black*** female in the back seat and also what occurred [sic] a five year old young ***black*** child in the vehicle.

(R. 351) (emphasis added.) Aside from generally seeking to inflame the jury, *see Berger*, 295 U.S. at 88, the prosecutor's appeal to race was highly inappropriate in that it had no relevance. *See, e.g., Perez v. State*, 689 So. 2d 306, 307 (Fla. Ct. App. 1997) ("It is, of course, highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues into any part of our judicial system. It is

particularly reprehensible when this is done by a representative of the state in a criminal prosecution.") Counsel failed to object to this effort to play on racial discrimination by the prosecutor.

#### 4. Counsel failed to object to the prosecutor testifying in place of the State's witnesses, thereby allowing the prosecutor to substitute his own words for those of the witnesses while denying Mr. Jones the opportunity for cross-examination.

281. Counsel failed to object to the prosecutor testifying in place of his witnesses through the improper use of leading questions. *See* Ala. R. Evid. 611(c). "The use of leading questions is limited in order to prevent the substitution of the language of the attorney for the thoughts of the witness as to material facts in dispute." *Williams v. State*, 733 N.E.2d 919, 922 (Ind. 2000). Here, counsel's failure to object to the prosecutor's numerous improper leading questions prejudiced Mr. Jones by allowing the prosecutor to put words in the mouths of witnesses and depriving Mr. Jones of the opportunity for cross-examination. Had counsel objected, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

##### a. Counsel failed to object to the prosecutor's improper examination of police officer Andy Hughes.

282. One of the State's primary witnesses was Andy Hughes. Mr. Hughes offered critical evidence relating to Mr. Jones' arrest, his interrogation, and evidence seized from his person. (R. 506-37.) To ensure the accuracy of this important information, it was critical that Mr. Hughes testify from his own memory. Instead, what Mr. Hughes delivered was largely an echoing of statements offered by the prosecutor. *See* Ala. R. Evid. 611(c) ("Leading questions should not be used on the direct examination of a witness.") For much of the testimony, the officer was simply agreeing with statements offered by Mr. Valeska. (R. 506-37.) In fact, just

over half of Mr. Valeska's approximately 140 questions on direct examination were answered with a "yes" or "no" response. (R. 506-37.)

283. For example, the prosecutor elicited the following testimony from Mr. Hughes:

Q Can you tell the jury, Sergeant Hughes, the color of blood when it first comes out of the human body versus a later point in time, does it change colors?

A Yes.

Q Does it go to from a red to a dark or brown or almost black?

A Yes.

Q If I use the term blood splatter, have you ever had an occasion to work or be involved in a homicide when there was blood splatter on the wall, clothing, or any metal, or the ceilings, or wood? Have you seen that before December 31, 1999?

A Yes, I have.

Q Now, have you seen blood splattering on the clothes of human beings wearing in the close proximity if someone was assaulted or killed?

A Yes, I have.

Q When you had custody of Antonio Jones, the man at the table in this courtroom today with his lawyers, with Sergeant Gonzales, did you have occasion to see what kind of clothing he was wearing?

A Yes.

Q Do you remember, in other words, I know it's been a long time, what kind of clothing he was wearing?

A Yes, I do.

Q What kind of shoes was he wearing?

A Canvas-type shoes.

Q Light or dark?

A Dark-colored shoes.

Q Did you notice anything on the shoes yourself as you observed him while he was in CID with Gonzales? Any kind of specks or splattering on the shoes?

A Yes, I did.

(R. 515-16.)

284. This was highly unreliable and denied Mr. Jones his right to cross examine the witness, as it was impossible for him to cross examine Mr. Valeska. *See* U.S. Const., amend. VI; *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986). Had defense counsel objected, Mr. Hughes would have been forced to testify from his own knowledge and this would have fundamentally undermined the State's case.

**b. Counsel failed to object to the prosecutor's improper examination of Mr. Jones' sister, LaKeisha Jones.**

285. Counsel also failed to object to the prosecutor's improper leading examination of Mr. Jones' sister, LaKeisha Jones, who testified for the State. Of the approximately eighty-two (82) questions asked by the prosecutor on direct examination of LaKeisha Jones, approximately sixty-two (62), or 75%, elicited a "yes" or "no" response. (*See* R. 547-557.) Because Ms. Jones offered no additional responses to most of the questions asked by the District Attorney, her testimony consisted largely of affirmations of whatever questions the District Attorney posed. By allowing the prosecution to testify through its witness in violation of Alabama Rule of Evidence 611(c), counsel allowed the prosecutor to substitute his own words for those of Ms. Jones. Further, because Mr. Jones could not cross-examine the prosecutor, Mr. Jones was denied his Sixth Amendment right to confront the witnesses against him. *See* U.S. Const., amend. VI; *Delaware v. Van Arsdall*, 475 U.S. 673, 678-79 (1986).

**5. Counsel failed to object to the prosecutor's improper testimonial statements.**

286. Mr. Jones' attorneys were similarly deficient in failing to object to the prosecutor's rampant testimonial statements. Throughout the trial, the prosecutor repeatedly interjected, offering to stipulate to facts that a witness was about to offer into testimony. (R. 256, 273, 325–26, 530, 873–75.) Under Alabama law, a party has a right to prove his case as he so

pleases. Accordingly, unless Mr. Jones requested one, it was improper for the State to offer a stipulation in open court because it amounted to unsworn and unconfronted testimony that Mr. Jones was unable to rebut. *See Duncan v. State*, 624 So. 2d 1084, 1086 (Ala. Crim. App. 1993) ("In Alabama, a party is not required to accept his adversary's stipulation, but may insist on proving the fact.").

287. This technique was used effectively by Mr. Valeska to emphasize his view that certain evidence was not harmful to the prosecution. He was essentially allowed to comment on the evidence in mid-trial through his offers of stipulations. (*See, e.g.,* R. 256 ("Judge, we'll stipulate there was a recorded statement by the Defendant taken by Beeson."); R. at 530 ("I will stipulate at the time he was stopped at the car he was wearing a red shirt."); R at 874–75 (interrupting Mr. Brantley's questioning to provide commentary, via a stipulation, on the absence of fingerprint evidence).) In addition, the prosecutor's interruptions constituted improper coaching and bolstering of his witnesses. Had defense counsel objected, Mr. Jones would have been permitted to engage in meaningful cross-examination of the State's witnesses, which would have precluded the State from proving its capital murder case.

**6. Counsel failed to object to the prosecutor's improper vouching for the integrity of the State's case.**

288. The trial attorneys were ineffective for failing to object to the prosecutor's statements personally vouching for the credibility of his case. Prosecutors are prohibited from vouching as to the guilt of the accused. The United States Supreme Court in *United States v. Young,* 470 U.S. 1, 18-19 (1985), specifically condemned a prosecutor's vouching for the credibility of a witness or expressing a personal opinion concerning a defendant's guilt. As the Court stated:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such

> comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence. *Id.*

289. Throughout Mr. Jones' trial, the prosecutor improperly vouched for the integrity of the State's case. The prosecutor told the jury they should rely upon the prosecutor's experience and judgment (R. 64, 67, 88), and that he had solved the case when he made the decision to indict Mr. Jones (R. 1229). Mr. Valeska personally vouched for the credibility of officers who testified at trial, saying they did an outstanding job investigating this case (R. 350, 1198), and he informed the prospective jury they should expect to make it to the sentencing stage (R. 58-60). Alabama and federal courts have routinely guarded against such prejudicial statements from the prosecution because the jury is apt to give them undue weight.

**a. Counsel failed to object to the prosecutor's improper vouching for the guilt of the accused during voir dire.**

290. The prosecutor began vouching for the integrity of the State's case from the very beginning of the proceedings. During voir dire, the prosecutor asked the prospective jurors to rely upon both his own experience and judgment:

> "I've tried more than four hundred and fifty jury trials" (R. 88:14-17);
>
> "I've tried a lot of cases" (R. at 64); and
>
> "I think I will be able to allegedly prove the things, I guarantee you I promise you allegedly what we say" (R. at 67).

Defense counsel's failure to object to this improper prosecutorial vouching cannot be considered part of any "sound trial strategy." *King v. State*, 518 So. 2d 191, 196 (Ala. Crim. App. 1987) (finding failure to object to prosecutor's vouching "fell outside the range of reasonable trial

strategy and was an error").[13]

**b. Counsel failed to object to the prosecutor's vouching that he had solved the case prior to indictment, which improperly sent the message that the jury should trust in the government's decision to prosecute Mr. Jones as proof of guilt.**

291. At trial, one of Mr. Jones' primary defenses seemed to be that someone else committed the crime. (*See, e.g.*, R. 1204–05 (highlighting lack of fingerprint evidence).) Indeed, Mr. Jones had consistently asserted that fact from the time he was arrested. (*See, e.g.,* C. 340-41 (referencing Portaque Morris, Robert Carroll, and others); R. 1101-44.) And, at trial, lacking adequate investigation, defense counsel accused Malik Hasan of murdering Ms. Kirkland. (R. 1112.)

292. The prosecutor did not limit his argument to the evidence presented in the case, but rather informed the jury the case had been solved by his office before the indictment process began. (R. 1229.) Mr. Valeska told the jury they could rely on his judgment as a District Attorney, stating his decision not to indict anyone other than Mr. Jones was evidence Mr. Jones committed this offense:

> Well, let me ask you, good people. *Did your district attorney indict* Malik Hasan for capital murder? *Did your district attorney indict* Robert Carroll for capital murder of Ms. Kirkland? *Did your district attorney indict* Portaque Morris for capital murder? What's the answer? No, he didn't. *And you know why he did not? The capital murderer sits right over there.* The one and only one who did this.

(R. 1229 (emphasis added).) The prosecutor's assessment of the quality of its investigation and charging process prejudicially induced the jury to "trust the Government's judgment rather than its own view of the evidence." *Young*, 470 U.S. at 13-19. Counsel, however, failed to object.

[13] Although the *King* court went on to affirm the defendant's conviction, the court did so because five eyewitnesses testified against the defendant, providing "overwhelming" evidence of the defendant's guilt. Here, there were no such eyewitnesses and, more importantly, Alabama courts subsequently rejected this approach, stating that "The proper inquiry here is not whether the evidence of guilt is overwhelming, but whether a substantial right of the [defendant] has or probably has been adversely affected." *Guthrie v. State*, 616 So. 2d 914, 931 (Ala. Crim. App. 1993) (reversing judgment and granting new trial).

**c. Counsel failed to object to the prosecutor's statements during jury selection that vouched for Mr. Jones' guilt by sending the improper message that the jury need not worry about guilt, but should focus instead on whether Mr. Jones should be sentenced to death or life in prison.**

293. Similarly prejudicial was the District Attorney's statements during voir dire that "I expect we will get to the penalty phase in this case," (R. 60), that "I want to make sure we're thinking about that [death] right now," (R. 58), and that "you will have two options in this case, death or life without parole," (R. 58.) In making these statements, the prosecutor conveyed his personal expectation to the jury, implying there was no need for the jury to concern themselves with the possibility that Mr. Jones was not guilty but instead should instead focus on the decision to recommend death.

294. It was highly inappropriate for the District Attorney to ask the jury to focus on sentencing when it was not yet known whether Mr. Jones would be found guilty. Those statements impermissibly relieved the jury of their sense of responsibility, *see Caldwell v. Mississippi*, 472 U.S. 320 (1985), by allowing them to believe that the guilt phase decision was a foregone conclusion – one that had already been made by the government. Counsel, however, failed to object.

**d. Counsel failed to object to the prosecutor's vouching for the credibility of testifying police officers and the integrity of their investigation.**

295. Counsel also failed to object to the prosecutor's repeated vouching for the credibility of key testifying officers and the integrity of their investigation. During opening statement Mr. Valeska improperly vouched for Dothan police officer Donovan Kilpatrick, who the prosecutor subjectively described as a "fine officer." (R. 350.) In conjunction with his statements that "[t]he police did an outstanding job," (R. 1198), the prosecutor improperly asked the jury to rely on his assessment of the credibility and integrity of the case. His attempts to

characterize and credit the testimony of Officer Kilpatrick were especially prejudicial because Kilpatrick was one of the officers who testified about Mr. Jones' purported confession that he was at the scene and the absence of any recording and the substance of this most critical statement – a significant weakness in the State's case. (R. 835-43.) Mr. Jones argued evidence of the unrecorded conversation was unreliable as the purported admission was recounted solely through the testimony of officers. (R. 853-58.) Because the jury's consideration of Mr. Jones' statement turned on credibility determinations, it was highly inappropriate for the District Attorney to vouch for the officer who was central to securing Mr. Jones' statement. *See Ex parte Parker*, 610 So. 2d 1181, 1183 (Ala. 1992) (improper for prosecutor to vouch for witness credibility). Counsel, however, failed to object.

**e. The prosecutor's unchecked vouching, due to failures to object, prejudiced Mr. Jones by relieving jurors of their sense of responsibility and depriving Mr. Jones of an opportunity for cross-examination.**

296. All of this improper vouching by the prosecutor was highly prejudicial because it relieved jurors of their sense of responsibility by suggesting their decision had already been made by a higher authority. *Young*, 470 U.S. at 18-19; *Berger*, 295 U.S. at 88; *Brooks v. Kemp*, 762 F.2d 1383, 1410 (11th Cir. 1985) ("[I]t is wrong for the prosecutor to undermine [the jury's] discretion by implying that he, or another high authority, has already made the careful decision required. This kind of abuse unfairly plays upon the jury's susceptibility to credit the prosecutor's viewpoint."); *Ex parte Parker*, 610 So. 2d at 1183 (improper for prosecutor to vouch for witness credibility); *Arthur v. State*, 575 So. 2d 1165, 1185 (Ala. Crim. App. 1990) ("The prosecutor also cannot imply to the jury that he or his office had already made the judgment that this case, above most other capital cases, warrants the death penalty."); *Hall v. United States*, 419 F.2d 582, 587 (5th Cir. 1969) (statement that "we try to prosecute only the

guilty" is improper because it takes "guilt as a pre-determined fact"); *Guthrie v. State*, 616 So. 2d 916, 932 (Ala. Crim. App. 1993) (comment that from the beginning, "everybody" had agreed that the case was a death-penalty case could reasonably be interpreted as an invitation to the jury to "adopt the conclusion of others, ostensibly more qualified to make the determination, rather than deciding on its own").

297. The prejudice this failure caused to Mr. Jones' case was substantial. The prosecutor's improper vouching conveyed the impression to the jury that the prosecutor had additional information that supported the State's case and thus prejudiced Mr. Jones' right to be tried solely on the basis of the evidence presented at trial. *See Young*, 470 U.S. at 18-19. The prosecutor's vouching also improperly influenced the jury to trust the State's judgment rather than their own. *See id.* The prosecutor's vouching also reduced the jurors' sense of responsibility by making them believe that guilt was a foregone conclusion, and that they need only focus on sentencing. *See Caldwell*, 472 U.S. 320. When such assertions come from the prosecutor, the defendant is denied the opportunity to defend against them. *See United States v. Hosford*, 782 F.2d 936, 938-39 (11th Cir. 1986) (improper for prosecutor who has independent personal knowledge about facts that will be controverted at trial to use this inside information to imply to the jury that he has special knowledge or insight); *Smith v. State*, CR-97-1258, 2000 WL 1868419 (Ala. Crim. App. Dec. 22, 2000) ("Such conduct on the part of the prosecutor amounts to a subtle form of testimony against the defendant, as to which the defendant may have no effective means of cross-examination. Hence, the rule is founded upon the possible danger that the jury, impressed by the prestige of the office of the District Attorney, will accord great weight to the beliefs and opinions of the prosecutor") (citation omitted). Indeed, in a similar context, Alabama courts have recognized that a prosecutor's vouching is not harmless error, even

where the evidence of guilt is "strong and convincing," because courts "cannot say that the [vouching] error did not contribute to the verdict beyond a reasonable doubt." *See Guthrie*, 616 So. 2d at 931 (citing *Chapman v. California*, 386 U.S. 18 (1967)). Similarly here, the foregoing prejudice constitutes ineffective assistance of counsel under *Strickland* because, had counsel objected to the prosecutor's improper vouching, the jury would not have been improperly influenced in this fashion and there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**7. Counsel failed to object to the prosecutor's introduction of facts not in evidence.**

298. Defense counsel also failed to guard against the prosecutor's introduction of facts not in evidence. It was improper for the prosecutor to argue facts not in evidence, *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974), for it denied Mr. Jones an opportunity to rebut or explain such assertions. *Skipper v. South Carolina*, 476 U.S. 1, 7 n. 1 (1986) (citation omitted).

299. During opening statements, the prosecutor claimed to know the deceased victim's thoughts. "[Ms. Kirkland] was concerned about her safety all her life. She was kind of afraid to live alone, but she continued to live alone because she was independent and determined." (R. 333.) He further remarked that "She liked to read. And she would smoke her cigarettes sitting in her chair." (R. 337.) The State offered no evidence to support these assertions. These statements were clearly calculated to garner sympathy and passion. But, counsel failed to object and demand that the court instruct the jury to ignore these inflammatory comments.

300. Likewise, during closing arguments, the prosecutor again asserted what Ms. Kirkland was thinking and what she could see during the incident:

> And she looked up and saw it splattered all over. The very blood that flowed through her veins. (R. 1198.)

But no evidence was introduced as to what Ms. Kirkland was thinking or what she saw. These

assertions were clearly part of the District Attorney's plan to inflame the jury as a means of ensuring it brought back a conviction and sentence of death. Counsel, however, failed to object.

301. Defense counsel also failed to object when, during closing arguments, the prosecutor, trying to deal with the State's failure to identify any of Mr. Jones' fingerprints at the scene of the crime, decided to make up evidence. Arguing facts not in evidence and claiming – without any support – that the prosecutor knew Mr. Jones wore gloves during the commission of the crime, Mr. Valeska improperly asserted: "You know why they couldn't find them [fingerprints]? *I can tell you why.* He wore gloves. He wore gloves." (R. 1195 (emphasis added).) "They are not going to be in there because he had gloves on." (R. 1230.) There was no evidence showing that Mr. Jones wore gloves at any time on the night of the murder, but counsel failed to object.

302. Such repeated assertions about evidence that did not exist or was never introduced, impermissibly evaded the requirement that Mr. Jones be permitted to challenge the evidence against him. *See United States v. Owens*, 484 U.S. 554, 557 (1988) (Confrontation Clause firmly establishes counsel must have an adequate opportunity to cross-examine adverse witnesses). Had counsel objected to these emotionally charged statements, the jury would have been forced to make a determination based solely on the evidence, and there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**8. Counsel failed to object to the prosecutor's statement that unreliable testimony from the State's witnesses could be excused due to the length of time it took for the case to go to trial.**

303. Mr. Jones' attorneys failed to object to the prosecution's suggestion that unreliable or inaccurate testimony from the State's witnesses could be excused due to the length of time that passed before the case went to trial. During its case-in-chief, the prosecutor

repeatedly stated that it was understandable if State witnesses could not remember certain facts because "it's been four years" since the crime. (*See, e.g.,* R. 489, 537.) These comments encroached on the jury's province by excusing failed memory and bolstering the credibility of witnesses in spite of their failure to recall key facts. This constant refrain attempted to take advantage of the fact the case was not timely prosecuted for reasons unrelated to the defense or Mr. Jones. The prosecutor exploited this delay for the very reason that the Constitution prohibits delays. *See Doggett v. United States*, 505 U.S. 647 (1992). Defense counsel's failure to object to this misconduct by the prosecutor is even more deplorable in light of counsel's failure to assert Mr. Jones' right to speedy trial. (*See* Section II.B, incorporated herein by reference.) Had counsel objected, the jury would have been precluded from considering this unreliable testimony, and Mr. Jones would not have been convicted of capital murder or sentenced to death.

**9. Counsel failed to object to the prosecutor's arguments made for the purpose of inflaming the jury.**

304. Throughout Mr. Jones' capital trial, the prosecutor presented arguments designed to engender jurors' sympathy and passion. A prosecutor's sole responsibility is to seek justice; therefore, he is prohibited from inflaming the jury, making improper suggestions or assertions of personal knowledge, and generally engaging in conduct prohibited by law. *See, e.g., Berger v. United States*, 295 U.S. 78, 88 (1935). Counsel, however, failed to object to the prosecutor's numerous efforts to inflame the passions of the jury.

**a. The prosecutor asked the jury to consider emotional or sentimental evidence of the victim's life story that was irrelevant to the issue of guilt.**

305. Counsel failed to object when the prosecutor improperly sought to play on the jury's passions by presenting speculative victim impact evidence at the guilt phase of the trial, asking the jury to consider what Ms. Kirkland's life was like, her thoughts, fears, likes, and

family relationships. (R. 333, 1181-82, 1191.) The prosecutor also sought to arouse sympathy for the victim by drawing the jury's attention to Ms. Kirkland's stroke and highlighting her drive and determination as she recovered from it. (R. 333, 335.) That evidence, of course, was irrelevant to the issue of guilt and injected prejudicial and inflammatory considerations, undermining the reliability of the verdict. *See Payne v. Tennessee*, 501 U.S. 808 (1991) (finding that the Eighth Amendment does not erect a per se bar to victim impact evidence *at the penalty phase*) (emphasis added); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Hutto v. State*, 178 So. 2d 810 (Ala. 1965) (reversible error for the district attorney to show that the decedent had children); *see also Spaziano v. Florida*, 468 U.S. 447 (1984). Had counsel objected, the jury would have been precluded from considering this prejudicial and inflammatory testimony and Mr. Jones would have been less likely to be convicted of capital murder or sentenced to death.

**b. The prosecutor improperly injected a racial dynamic into the case, contrasting the victim's race with that of Mr. Jones, before a principally white jury.**

306. Counsel failed to object when the prosecutor unlawfully interjected a racial dynamic into the case, contrasting the race of the victim with that of Mr. Jones and his companions. (R. 351, 353.) The only purpose for the prosecutor to make this contrast was to inflame the jury, which was mainly white. *See Berger*, 295 U.S. at 88. The prosecutor's appeal to race was highly inappropriate in that it had no relevance. *See, e.g., Perez v. State*, 689 So. 2d 306, 306 (Fla. App. 3d Dist. 1997) ("It is, of course, highly improper to interject even a reference to, let alone an accusation of racism which is neither justified by the evidence nor relevant to the issues into any part of our judicial system. It is particularly reprehensible when this is done by a representative of the state in a criminal prosecution."). Had counsel objected, the jury would have been precluded from considering this unreliable testimony and Mr. Jones would have been less likely to be convicted of capital murder or sentenced to death.

**c. The prosecutor sought to inflame the jury by introducing evidence of the victim's relationship to the Dothan Police Department.**

307. Counsel failed to object to irrelevant, prejudicial, and inflammatory references to the relationship between the deceased and the Dothan Police Department, where her grandson was employed. (R. 334, 338, 339, 340, 365, 400, 426, 432, 437, 438, 441, 444, 782, 793, 1475.) Particularly inappropriate was the fact that the victim's grandson, former officer Brent Parrish, testified while wearing a police uniform despite the fact that he did not normally wear a uniform as a part of his job at the time of trial. (R. 444.)

308. Defense counsel's failure to object to these seemingly endless references to the police connection, as well as to Brent Parrish's wearing a police uniform while testifying, allowed the State to create a highly charged atmosphere likely to inflame and persuade the jury to act on passion rather than the evidence. Had counsel objected, the jury would have been precluded from considering these facts in making their determination, and Mr. Jones would likely not have been convicted of capital murder or sentenced to death.

**10. Counsel failed to guard against the prosecutor's improper comments on Mr. Jones' silence.**

309. Mr. Jones' counsel rendered unconstitutionally ineffective assistance by failing to object to the prosecutor's improper comment on Mr. Jones' decision not to testify in his own defense. The prosecutor's comment directly violated Mr. Jones' Fifth Amendment freedom from self-incrimination.

310. In his closing argument during the guilt phase, Mr. Valeska, improperly drew the jury's attention to the fact Mr. Jones did not testify. These comments plainly constituted reversible error. Had defense counsel objected to these comments at trial, Mr. Jones would have been entitled to an immediate curative instruction to the jury, if not a mistrial. Additionally, the

issue would have been preserved for appeal, which would have resulted in reversal had the trial court's curative instruction been insufficient or the objection overruled. Had counsel objected, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**a. The prosecutor's comment on Mr. Jones' silence constituted reversible error that required an immediate objection as well as an immediate and strong response from the trial court.**

311. A defendant's freedom from self-incrimination includes the right not to testify, and the right not to have his decision not to testify used against him. U.S. Const., amend. V; *Griffin v. California*, 380 U.S. 609, 613–14 (1965); *Malloy v. Hogan*, 378 U.S. 1, 8 (1964); Ala. Const., art. I, § 6 ("in all criminal prosecutions, the accused . . . shall not be compelled to give evidence against himself"); Ala. Code § 12-21-220 (1975) ("On the trial of all . . .criminal proceedings, the person on trial shall, at his own request, but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him nor be the subject of comment by counsel"); *Whitt v. State*, 370 So. 2d 736, 738 (Ala. 1979).

312. Central to the defendant's exercise of the freedom not to testify is the recognition that no adverse inference may be drawn from a defendant's silence. *Griffin*, 380 U.S. at 614-15. The State, therefore, is prohibited from making any comment relating to a defendant's exercise of his Fifth Amendment right. *Id.* It is well settled in Alabama that a prosecutor's direct comment on a defendant's decision not to testify, where the court does not immediately act to cure it, requires reversal. *Whitt*, 370 So. 2d at 739. Mr. Valeska's remark was just such a direct comment.

313. With comments that can fairly be described as sarcastic, the prosecutor impermissibly drew the jury's attention to Mr. Jones' decision not to take the stand. During closing arguments in the guilt phase, Mr. Valeska attempted to shore up the gaps in his case

(such as the lack of a confession and lack of fingerprints at the scene) by insinuating that Mr. Jones had all the answers but did not testify:

> Throw out all the DNA. Who was in the house? Who is the one that touched the cane? Who gave a description of the house? Who was driving her car? Who has the pictures? ***He sits right over there.***
>
> ***And I missed the testimony.*** (R. 1237) (emphasis added).

314. Alabama law makes clear that these express references to the defendant's decision not to testify constituted direct, impermissible comments on his silence, and thus reversible error. "Where there is a direct reference to [a] defendant's failure to testify, it constitutes ***ineradicable prejudicial error*** requiring reversal." *Ex parte Tucker*, 454 So. 2d 552, 553 (Ala. 1984) (emphasis added). *See also Ex parte Davis*, 718 So. 2d 1166, 1173 (Ala. 1998) ("jury would naturally and necessarily construe" the statement as a direct comment on the defendant's decision not to testify); *United States v. Muscatell*, 42 F.3d 627, 631-32 (11th Cir. 1995).

315. Numerous decisions from the Alabama courts are instructive. The comments do not need to be as direct as Mr. Valeska's "I missed the testimony." Some prejudicial statements do not even directly mention testimony. For example, in *Ex parte Yarber*, 375 So. 2d 1231, 1233–34 (Ala. 1979), the Alabama Supreme Court reversed a conviction because the prosecutor, during closing argument, asked:

> Where was Bud Yarber? . . . Was he somewhere else? Have you heard anything? . . . Where was Bud Yarber?

Similarly, in *Whitt*, 370 So. 2d at 737, the Alabama Supreme Court reversed a conviction because the prosecutor improperly stated:

> The only person alive today that knows what happened out there that night is sitting right there.

Mr. Valeska's comments were far less discrete than these. *See also Meade v. State*, 381 So. 2d

656, 656 (Ala. Crim. App. 1980) (reversible error where prosecutor said "I have been sitting here watching the defendant and I don't know how he expects to defend himself"); *Ex parte Purser*, 607 So. 3d 301, 305–06 (Ala. 1992) (reversible error where prosecutor stated that only the victim and the defendant could say what happened); *Lockett v .State*, 505 So. 2d 1281, 1286 (Ala. Crim. App. 1986)(reversible error where prosecutor said "the defendant can tell you what happened"). Mr. Valeska's improper comments in this case go beyond those previously found to be improper and constituting reversible error. Counsel, however, failed to object.

**b. Counsel's failure to object to the prosecutor's improper comment on Mr. Jones' silence severely prejudiced Mr. Jones, denying him the opportunity for a mistrial, immediate and strong curative instructions.**

316. Because counsel failed to object to the State's clearly impermissible comment, Mr. Jones was denied the opportunity to move for a mistrial or, at the very least, receive an immediate curative instruction to the jury. As a result, the prosecution was allowed to suggest, without immediate correction, that the jury was permitted to draw an adverse inference from Mr. Jones' decision to exercise his Constitutional right not to take the stand.

317. Further, although the judge *later* included in the standard guilt-phase no-adverse-inference jury instruction, that was not sufficient to cure the error. Under similar circumstances, comments have been held so "prejudicial as to be ineradicable." *Ex parte Tucker*, 454 So. 2d 552, 553 (Ala. 1984). That especially true where, as here, there was no an *immediate* curative instruction. Instead, the instruction came later, after all the closing arguments, further prejudicing Mr. Jones by reminding the jury of the fact that he had not testified and that the prosecutor had ridiculed him for not testifying. *See, e.g.*, *Hill v. Turpin*, 135 F.3d 1411, 1419 (11th Cir. 1998); *Ex parte Wilson*, 571 So. 2d 1251, 1261 (Ala. 1990) (where trial court fails to

act promptly to cure comment on defendant's decision not to testify, conviction must be reversed).

318. Because of the virtually *per se* nature of Alabama's treatment of comments like Mr. Valeska's, counsel's failure to object cannot be dismissed as a valid strategic or tactical decision, and plainly prejudiced Mr. Jones. *See, e.g.*, *Matire v. Wainwright*, 811 F.2d 1430, 1438–39 (11th Cir. 1987) (failure to raise issue of comment on defendant's silence on appeal constituted ineffective assistance of counsel because of state rule requiring virtually per se reversal). Counsel's failure to raise an objection to this improper comment was so deficient that it constituted a failure to function even as minimally competent "counsel" guaranteed by the Sixth Amendment. Had counsel objected, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**P. Counsel failed to guard against the admission of penalty phase evidence during the guilt phase of trial.**

319. Counsel were deficient and prejudiced Mr. Jones' rights at trial by failing to prohibit the introduction of penalty phase evidence during the guilt phase of trial. It is well-settled that prosecutorial appeals to "passion and prejudice are offensive to the dignity and good order with which all proceedings in court should be conducted." *See Viereck v. United States*, 318 U.S. 236, 247-48 (1943); *Rogers v. State*, 157 So. 2d 13, 18 (Ala. 1963) (reversing where prosecutor's argument "calculated to engender unduly the sympathies of the jury on the one hand, or to inflame their minds with prejudice and passion upon the other hand"); *Thomas v. State*, 90 So. 878, 880 (Ala. App. 1921) (arguments calculated to inflame the jury "have no place in a trial where on the one hand life a defendant's life or his liberty is involved").

320. It is especially problematic for a trial court to admit irrelevant evidence calculated to inflame the passions of the jury during a capital trial. *See Tucker v. Zant*, 724 F.2d 882, 888

(11th Cir. 1984) (unlawful for prosecutor to inflame "jury's passions, play[] on its fears, or otherwise goad[] it into an emotional state more receptive to the call for imposition of death"); *Hance v. Zant*, 696 F.2d 940, 951 (11th Cir. 1983) ("With a man's life at stake, a prosecutor should not play on the passions of the jury."); *Ex parte Crymes*, 630 So. 2d 125, 126 (Ala. 1993) ("Testimony that has no probative value on any material question of fact or inquiry is inadmissible."); *see also* Ala. R. Evid. 403 (even if probative, evidence may be discarded if outweighed by its prejudicial nature.) Here, evidence of the brutality of Ms. Kirkland's death and its impact upon her family were irrelevant to the jury's guilt phase determinations. Thus, the only purpose for the prosecutor to introduce that evidence was to arouse the sympathy of the jury, improperly increasing the likelihood of conviction for capital murder.

**1. Counsel failed to prohibit the admission of victim impact evidence during the guilt phase, allowing the jury to be improperly influenced by irrelevant, emotionally charged evidence instead of being limited to evidence relevant to Mr. Jones' guilt.**

321. Mr. Jones' attorneys deficiently and prejudicially failed to object to the introduction of sympathetic victim impact evidence at the guilt phase. State and federal law clearly limit the admission of victim impact evidence to the penalty phase of trial. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (victim impact evidence is only relevant to a jury's decision as to whether death is the appropriate punishment). Thus, the Alabama Supreme Court has warned prosecutors "that the introduction of victim impact evidence during the guilt phase of a capital murder trial can result in reversible error." *Ex parte Rieber*, 663 So. 2d 999, 1006 (Ala. 1995). In violation of this well-settled law, the State introduced such evidence at the guilt phase of Mr. Jones' trial, and counsel failed to object.

322. Throughout the course of the guilt phase, the prosecution introduced and relied on evidence bearing on the impact that Ms. Kirkland's death had on her family. (R. 392, 438-39,

1185, 1198.) Specifically, the District Attorney introduced evidence about yearly family gatherings at Christmas hosted by Ms. Kirkland and how Ms. Kirkland cared deeply about her family, as revealed by her carrying pictures of them in her wallet. The prosecutor elicited guilt phase testimony from the victim's grandson, Brent Parrish – a Dothan police officer – describing family gatherings around the holidays. (R. 438-39.) He specifically described which homes the Kirkland/Parrish family gathered at on Christmas Eve at Ms. Kirkland's house, and Christmas Day, recalling that the last time he saw his grandmother she was in a good mood as the family was together celebrating the holiday. (R. 438–39.)

323. It is difficult to imagine more sentimental, powerful – and prejudicial – imagery than a family's gathering around the holidays, in the same home where the victim was killed. The prosecutor then brought the jury back to this inadmissible evidence during closing argument for the guilt phase, directly and improperly asking the jury to consider the impact of the loss to the Kirkland family:

> *On Christmas Eve they were at her house on the 24th. The family was there celebrating.* And then Christmas Day they were at Brent's parents' house. The Christmas-type season. Jovial. Live. Happy to be alive. Happy she was still on the face of the earth. Hoping many years to live to see with her family.

(R. 1185 (emphasis added).)

324. Similarly, the guilt phase admission of pictures of Ms. Kirkland's deceased son and her sister's granddaughter, (R. 392), had no relevance to the issue of guilt. Nonetheless, a picture of the Linda Parrish's deceased brother and the little girl were submitted into evidence and brought back to the jury room, without objection from counsel. (R. 392.)

325. The District Attorney, unimpeded by objections, kept pouring on the improper and emotional images. He impermissibly asked the jury to consider the impact of Ms. Kirkland's death on her police-officer grandson, stating:

> [The officers] walked in. And they touched her little neck with the blood all over it and the tremendous, horrible scene and the most violent death and touched her neck, and they came back out and they looked for Brent [the victim's grandson]. They looked for Brent. And they said, Brent, we're sorry. We're sorry.

(R. 1198.) Because none of this evidence had any relevance to the jury's determination of guilt, its only purpose was to prejudicially arouse sympathy among the jurors. *Hutto v. State*, 178 So. 2d 810 (Ala. 1965) (reversible error for the district attorney to show that the decedent had children).

326. Though this evidence had no relevance, when the only issue was whether Mr. Jones was responsible for Ms. Kirkland's death, counsel failed to object to the majority of this evidence or to the prosecution's reliance upon it in closing. Moreover, on the one occasion that counsel did object (after already allowing no less than five questions on the subject of holiday gatherings), counsel failed to insist that the judge rule on the objection and failed to request that the judge instruct the jury to ignore that evidence. (R. 439.) Had counsel objected and requested a ruling the one time he did object, the jury would have been precluded from considering this emotionally charged evidence. Had counsel objected, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**2. Counsel failed to object to the admission of evidence during the guilt phase of trial that related to the "Especially Heinous, Atrocious, or Cruel" aggravating circumstances.**

327. Counsel also deficiently and prejudicially failed to object to the introduction of evidence relating to the "especially heinous, atrocious, or cruel" aggravating circumstance. While evidence that focuses on the heinous nature of a capital crime is arguably relevant to the jury's penalty phase determination, *see* Ala. Code § 13A-5-49(8), it is irrelevant to determining culpability at the guilt phase, *see* Ala. R. Evid. 403.

328. Because counsel failed to object to the introduction of this evidence or to Mr. Valeska's comments about the evidence, the prosecutor was able to rely upon this irrelevant, distracting, and sympathetic testimony and to emphasize the graphic exhibits in asking the jury to conclude that Mr. Jones was responsible for Ms. Kirkland's death. (R. 348-50, 1186-96, 1234, 1237-38, 1240-41.) Had the jury not been influenced by this emotional evidence, there is a reasonable probability that Mr. Jones would not have been convicted of capital murder.

329. In this case, a large portion of the State's guilt phase presentation impermissibly focused upon the allegedly heinous nature of the offense. From the beginning, the prosecutor asked jurors to consider the extent of the injuries and the amount of suffering in determining whether Mr. Jones was guilty. During opening arguments, he graphically recounted all of the victim's injuries, describing them in detail, and asking the jury to note that she was alive throughout, a fact that had no relevance to the issue of guilt, but would stir the jurors' emotions such that they were made to feel someone had to be held accountable. (R. 348-50.) Counsel failed to object to these improper statements during opening.

330. The prosecutor repeated these improper remarks during closing, when he told the jury to consider that Ms. Kirkland was beaten to death slowly, was still alive throughout the ordeal, and that no one was there to help her while she suffered – all without objection from counsel. (R. 1183, 1192, 1194.) Counsel again failed to object when the prosecutor further aroused the jurors passions by calling to their attention that Ms. Kirkland was beaten "so bad that she wet her pants. She could not control herself. . . ." (R. 1238; *see also* R. 1237: "This is Ms. Kirkland's underwear. This her [sic] that blood soaked through. Human beings, this is her own urine.")

331. As a further example, counsel failed to object when the prosecutor elicited the following penalty phase evidence from the State's pathologist, Dr. Parades:

> Q Now, Dr. Parades, can you tell the ladies and gentlemen of the jury, the injuries she received no doubt in your mind she was alive when she received every one of those?
>
> A Absolutely she was alive.
>
> Q And can you tell us, was she conscious in your opinion?
>
> A She was --
>
> Q From what you saw?
>
> A She must have been conscious, yes . . . (R. 950.)

332. Whether or not the victim was conscious was irrelevant to the determination of the accused's guilt. *See Tucker*, 724 F.2d at 888; *Ex parte Crymes*, 630 So. 2d 125, 126 (Ala. 1993) ("Testimony that has no probative value on any material question of fact or inquiry is inadmissible."); *see also* Ala. R. Evid. 403.

333. Dwelling on these inadmissible and repulsive details is a tactic calculated to interfere with the jurors' obligation to decide the case on the basis of evidence of the defendant's guilt. These arguments were all about emotional and irrational rage. The prosecutor asked the jurors to "think about it as you're sitting there [sic] back there, take your watch, and look at each other and [count the seconds] and think what it was like for Ruth Kirkland as she went through the whipping, the beating, the stomping, the kicking . . . ." (R. 1240-41.) He asked them to consider the psychological torture Ms. Kirkland experienced as she died: "[Blood splattering] all throughout her house. As an eighty year old woman begged for her life . . . What is fear? Physical fear? Emotional fear? What was Ms. Ruth thinking about at that point in time?" (R. 1186.) This is raw emotion. None of this was probative of the guilt phase question of whether Mr. Jones committed offense, but counsel failed to object.

334. Perhaps the most revealing and prejudicial aspect of the prosecutor's guilt phase closing occurred when he ***expressly*** asked the jury to consider the statutory aggravator when he stated, "she was slowly bleeding and dying the most horrible, horrendous, ***heinous, and atrocious, and cruel*** death on her own carpet looking up and thinking these are my chairs, this is my home. . . ." (R. 1196-97 (emphasis added); *see also* R. 1234 (referring to "heinous, atrocious, or cruel beating, evil, wicked, shockingly beating to death of an elderly lady").)

335. The prosecutor's irrelevant and prejudicial references continued: "She knew she couldn't get out . . . . And that animal that that man that sits over there was after her inflicting pain. ***Shear evil, wicked, and for sure enjoyment of his own pleasure."*** (R. 1187). There is no evidence to support this irrelevant argument.

336. Mr. Valeska asked the jurors to put themselves in the place of the victim. "And what the pain and injury she felt as he struck and hit her and she's trying to get away. He's trying to get her attention." (R. 1188); "She was alive. She was crawling trying to get away." (R. 1189); "She was still alive. Lying there." (R. 1192); "There was nobody. Nobody in the world that reached out to these poor hands and held her hands and told her it's going to be all right. . . . It will be okay. ***You're suffering physically, emotionally, and mentally***." (R. 1194). Such explicit and repeated emotional arguments appealing to a person's sense of personal fear are inadmissible and these general topics are statutorily confined to the penalty phase of a capital trial. *See* Ala. Code 13A-5-49(8).

337. Had counsel objected to these statements, the jury would not have gone into deliberations on the guilt phase of Mr. Jones' trial having been exposed to these prejudicial, emotionally charged, and aggravating circumstances. Accordingly, had counsel objected, there

is a reasonable probability that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**Q. Counsel's election to devote a substantial portion of their efforts at the trial and on appeal to a legally invalid defense based on a misunderstanding of the law, was prejudicial to Mr. Jones' defense.**

338. A substantial portion of the defense effort at trial centered on a misguided effort to highlight facts tending to show that no property was actually taken from inside Ms. Kirkland's house. That the Cadillac was kept in a carport outside the house, that there was some cash left in the house in plain sight, that nothing could be identified as missing from the spilled purse, and similar facts were developed in Mr. Parker's cross examinations and discussed at length in his closing argument. Mr. Parker sought to show there was no evidence that any money was taken, (R. 342, 422-24), and the victim's change purse in the car still had cash inside of it when found by officers. (R. 342, 767-68.) He emphasized Ms. Kirkland's car was routinely parked away from the house and the lack of direct evidence the car keys were taken from inside the house. (R. 409-11.)

339. The closing relied heavily on this argument – that there was a lack of evidence of actual theft from the residence – filling many pages of the transcript of the closing. (R. 1200-05, 1232-33). However, as the prosecutor correctly pointed out to the jurors, and as the jury instructions demonstrated, theft is not a necessary element of the crime of burglary. (R. 1231, 1255-1256). Mr. Parker was under the mistaken impression that a completed theft was needed in order for a burglary to be committed.

340. The elements of burglary are included in criminal law classes in the first year of law school. Entering a dwelling with ***intent*** to commit a crime is all that is needed to establish a burglary. The Alabama statute is typical, and it requires only that a defendant "knowingly and unlawfully enters or remains unlawfully in a dwelling with the intent to commit a crime

therein." Ala. Code § 13A-7-6. As the Alabama courts have made clear, "To constitute a burglary, it is not necessary that a theft be actually committed." *McGuillon v. State*, 477 So. 2d 477, 484 (Ala. Crim. App. 1985).

341. Showing that nothing was actually taken from the house was irrelevant. In order to succeed with the defense Mr. Parker was pursuing, he needed evidence that, if Mr. Jones was in the house, he was there legally or without the intent to commit a crime. No such evidence or argument was offered.

342. This same fallacious argument was also raised on appeal, in the belated brief filed by Mr. Brantley and Mr. Parker. This was one of only three issues asserted in the appeal. Even after hearing the jury instructions and the State's closing argument, the defense attorneys continued with a legally invalid defense.

343. Mr. Jones was convicted of capital murder during a burglary under Section 13A-5-40(a)(4) of the Code of Alabama. (C. 11-12,286.) So it was essential that his counsel understand what burglary is.

344. There is a somewhat analogous decision of the Supreme Court in *Ex parte David Ray Duren,* 590 So. 2d 369 (Al. 1991). There the defense attorney knowingly presented a legally invalid defense, after having made a decision that no legally valid defense was available. *Id.* at 373. The attorney argued the defendant did not intend to kill the murder victim but rather her companion. Because Alabama recognizes the theory of transferred intent, that was not a defense. *Id.* at 371. However, the defense attorney explained he "knew that, due to the doctrine of transferred intent, this was not a legally valid defense," and he gave several reasons supporting his decision to take that approach before the jury. That deliberate and reasoned decision-making was relied on by the Court to expressly find the "decision was not

unreasonable" and counsel was "trying to make the best of a bad situation for his client." *Id.* at 373.

345. The same cannot be said of Mr. Brantley and Mr. Parker's presentation of a legally invalid defense in this case. There was no reasoned tactical decision to present a defense that was known to be legally baseless. Mr. Parker has admitted that it was only after making this argument that he later found out the law only requires intent and not an actual theft.

346. The risk and prejudice to Mr. Jones in making the no-actual-theft argument was substantial. That argument essentially conceded his presence at the murder scene, and seemed to also concede that he committed the murder. The only argument being made to protect Mr. Jones from capital murder was that the aggravating factor, the burglary, was not present. That argument had no chance of success. If Mr. Jones was in the house and committed the murder, there is no rational basis for counsel to argue the necessary intent was absent. No effective counsel would have bought into that baseless theory of defense. It was an unacceptable mistake that clearly led to Mr. Jones' conviction for capital murder and sentence of death.

347. As the appellate court concluded, once it is conceded that the defendant was in the house and committed the murder, "it is readily apparent that Jones entered Mrs. Kirkland's house with the intent to commit a theft." *Jones v. State*, 987 So. 2d 1156, 1168 (Ala. Crim. App. 2006). If counsel had not taken this legally invalid and high-risk approach to the defense, it is likely that Mr. Jones would not have been convicted of capital murder or sentenced to death.

**R. Counsel's profound ineffectiveness at the guilt phase prejudiced Mr. Jones.**

348. The above referenced errors, cumulatively as well as individually, denied Mr. Jones the effective assistance of counsel at the guilt phase of his capital trial in violation of the Alabama Constitution, and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the

United States Constitution, *See United States v. Cronic*, 466 U.S. 648, 659 (1984); *Dobbs v. Zant*, 506 U.S. 357, 359 (1993) (explaining that "an inadequate or harmful closing argument, *when combined . . . with* a failure to present mitigating evidence, may be highly relevant to the ineffective-assistance determination . . . ."") (emphasis added); *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001) (counsel ineffective in murder capital case for failing to adequately prepare and present defense; prejudice found where court considered counsel's error's in the aggregate), *vacated on other grounds*, 268 F.3d 485 (7th Cir.); *Daniel v. Thigpen,* 742 F. Supp. 1535, 1561 (M.D. Ala. 1990).

349. But for counsel's deficient performance, Mr. Jones would not have been convicted of capital murder and sentenced to death. *Strickland v. Washington,* 466 U.S. 668 (1984); *Williams v. Taylor*, 529 U.S. 362, 399 (2000) (holding state court correct in concluding that "the entire post-conviction record, *viewed as a whole and cumulative of* mitigation evidence presented originally" raised reasonable probability that result of sentencing proceeding would have been different) (emphasis added).

## III. Mr. Jones was denied effective assistance during the penalty and sentencing phases of his trial due to, among other things, counsel's failure to investigate and present readily available mitigation evidence.

350. During the penalty phase, the trial court and the jury must consider "any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Accordingly, trial counsel must investigate and present such information. *Brownlee v. Haley*, 306 F.3d 1043, 1067 (11th Cir. 2002) (counsel ineffective where failed to obtain or present evidence of psychiatric disorders and history of drug abuse). They "ha[ve] a duty to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence." *Porter v. Singletary*, 14 F.3d 554, 557 (11th Cir. 1994); *see also Baxter v.*

*Thomas*, 45 F.3d 1501 (11th Cir. 1995) (finding counsel ineffective in penalty phase due to lack of investigation into mental health mitigating evidence); *Harris v. Dugger*, 874 F.2d 756 (11th Cir. 1989) (finding counsel ineffective because of lack of investigation into family background and other mitigating evidence); *Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (finding counsel ineffective for failure to request readily discoverable documentary mitigating evidence).

351. A petitioner alleging ineffective assistance of counsel at the penalty phase of a capital case must demonstrate that (1) his counsel performed deficiently, and (2) his counsel's deficient performance resulted in prejudice. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 687 (1984)).

352. To establish deficient performance, the petitioner must demonstrate that his counsel's performance "'fell below an objective standard of reasonableness.'" *Wiggins*, 539 U.S. at 521 (quoting *Strickland*, 466 U.S. at 688). Thus, "the proper measure of attorney performance [is] simply reasonableness under prevailing professional norms." *Id.*

353. When a petitioner alleges that his counsel performed deficiently by failing to present available mitigating evidence, the inquiry is whether the investigation supporting counsel's decisions with regard to the presentation of evidence "was itself reasonable." *Smith v. State*, 85 So. 3d 1063, 1082 (Ala. Crim. App. 2010) (quoting *Wiggins v. Smith*, 539 U.S. 510, 523 (2003)). *See also Johnson v. Sec'y, DOC*, 643 F.3d 907, 931 (11th Cir. 2011) ("The question under *Strickland* is not whether [the defendant's] trial counsel's overall performance at the sentence stage was exemplary or even average, but whether he conducted an adequate background investigation or reasonably decided to end the background investigation when he did."). "'In cases where sentencing counsel did not conduct enough investigation to formulate an accurate life portrait of a defendant, [courts] have held the representation beneath professionally

competent standards.'" *State v. Gamble*, 63 So. 3d 707, 713 (Ala. Crim. App. 2010) (citation omitted). .

354. Under the prevailing professional norms of 2004—the year in which Mr. Jones' trial was held—capital defense counsel had a duty to seek "all reasonably available mitigating evidence," *Wiggins v. Smith*, 539 U.S. 510, 524 (2003), and to "'formulate an accurate life portrait of [the] defendant,'" *Gamble*, 63 So. 3d at 713 (citation omitted). *See Wiggins*, 539 U.S. at 524 (holding that counsel was ineffective for "abandon[ing] their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources.").

355. Counsel must not only investigate all relevant guilt phase evidence, including charging documents, potential witnesses, information held by law enforcement, physical evidence, and the crime scene, but because "Alabama's sentencing scheme broadly allows the accused to present evidence in mitigation" at the penalty phase, *Harris v. State*, 947 So. 2d 1079, 1115 (Ala. Crim. App. 2004), *overruled in part by*, *Ex parte Jenkins*, 972 So. 2d 159, 164 (Ala. 2005) (internal quotation marks emitted), counsel must also investigate the defendant's medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences. See ABA Guidelines 10.7 Commentary. Under Alabama law, mitigation evidence may consist of anything that could be considered mitigating, without limitation or definition. Ala Code Section 13A-5-52. Mitigating evidence is admissible without regard to the rules of evidence, such as the rules on hearsay. *Green v. Georgia*, 442 U.S. 95, 97 (1979) (per curium); *Roberts v. State*, 735 So. 2d 1244, 1265-66 (Ala. Crim. App. 1997).

356. Thus, Mr. Jones' counsel were required, at the very least, to collect available records regarding the defendant and his family members and to conduct interviews with the defendant, his family members, and others so as to obtain a reliable portrait of (1) the places and conditions in which the defendant was raised, (2) the defendant's family, medical, mental health, and educational history; and (3) the individuals who influenced the defendant's life and the ways in which they did so. *See Williams v Taylor*, 529 U.S. 362, 395 (2000) (holding that counsel performed deficiently because "[t]hey failed to conduct an investigation that would have uncovered extensive records graphically describing [the defendant's] nightmarish childhood"); *Johnson*, 643 F.3d at 932 (holding that counsel performed deficiently because counsel failed to "thoroughly question[] [the defendant] about his childhood and background" and accepted the denials of family members regarding substance abuse without corroborating them); *Williams v. Allen*, 542 F.3d 1326, 1340 (11th Cir. 2008) (holding that counsel performed deficiently because they failed to conduct sufficient interviews with the defendant's family members and failure to present additional family members was a result of negligence and not strategy); *Gamble*, 63 So. 3d at 715 (holding that counsel performed deficiently when they "failed to request any of the multitude of records concerning [the defendant] and his family that were readily available"); American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 10.7 (2003) ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty.") (hereinafter "ABA Guidelines").[14]

357. Beyond those tasks, counsel inherit additional duties once they discover "red flags" indicating problems in the client's life or development. *Rompilla v. Beard*, 545 U.S. 374,

[14] The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases outline counsel's duties in additional detail. *See id.* Guideline 10.7.

392 (2005); *see Williams v. Allen*, 542 F.3d at 1340 ("[T]he information that trial counsel did acquire would have led a reasonable attorney to investigate further."). Thus, "[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. In *Wiggins*, the pre-sentence investigation report and some Department of Social Services records revealed that the defendant had a miserable childhood and spent most of his life in foster care. The defendant's counsel failed to investigate further despite those red flags, and they were found ineffective as a result. *Id.* at 527, 538; s*ee also Williams v. Allen*, 542 F.3d at 1340 (holding that counsel performed deficiently when they failed to pursue leads revealed in the pre-sentence investigation report).

358. It is standard practice in Alabama and elsewhere for capital defense counsel to retain a mitigation specialist to work with counsel on the penalty phase investigation. *See State v. Gamble*, 63 So. 3d 707, 716 (Ala. Crim. App. 2010) (affirming the circuit court's finding that "there was no legitimate reason not to seek the services of a mitigation specialist"). Also, the American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Capital Cases, which the United States Supreme Court has referred to as "guides to determining what is reasonable," *Wiggins*, 539 U.S. at 523, state that capital defense teams must include a mitigation specialist. Guideline 4.1(A)(1).

359. Even where some evidence is presented, representation is ineffective if testimony is presented in a truncated fashion and only constitutes only a "hollow shell" of the mitigation evidence that was available. *Collier v. Turpin*, 177 F.3d 1184 (11th Cir. 1999); *Middleton v. Dugger*, 849 F 2d 491 (11th. 1988) (failure to present evidence of childhood brutal treatments

and neglect); *Armstrong v. Dagger*, 833 F.2d 1430 (11th Cir. 1987) (failure to present evidence of petitioners character). Similarly, where counsel presents some evidence but does more harm than good, representation is ineffective. *King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984).

360. Attorneys who fail to conduct or lead a reasonable investigation cannot make a reasonable strategic decision about what to present and what not to present. *State v. Smith*, 85 So. 3d 1063, 1082 (Ala. Crim. App. 2010) ("[I]t is clear that labeling a decision as 'strategic' does not render that decision above reproach; rather, counsel must have performed an adequate enough investigation to make an informed and educated decision. '[A] strategic decision that is based on an incomplete investigation may not be strategic or reasonable.'") (citation omitted); *see Williams*, 529 U.S. at 396 (explaining that counsel have an obligation "to conduct a thorough investigation of the defendant's background" and cannot make a strategic decision not to introduce records when they did not obtain the records); *see also Williams v. Allen*, 542 F.3d at 1337 ("'[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.'") (quoting *Strickland*, 466 U.S. at 690-91).

361. To establish that counsel's deficient performance resulted in prejudice at the penalty phase of a capital case, the petitioner must demonstrate "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the [sentencing] proceeding would have been different." *Wiggins*, 539 U.S. at 534. The petitioner "need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Strickland*, 466 U.S. at 694. Instead, he simply must show that there is a reasonable probability that they jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death.

362. Courts have found prejudice in cases in which the defendant's counsel failed to present available mitigating evidence regarding the defendant's life and background. *See Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) ("Had [the defendant's] counsel been effective, the judge and jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'") (quoting *Wiggins*, 539 U.S. at 535)). Specifically, courts have found prejudice where the omitted evidence would have demonstrated that the defendant was raised in an environment of:

a. **instability**, *see Hardwick v. Crosby*, 320 F.3d 1127, 1177 (11th Cir. 2003) (finding prejudice where counsel failed to present evidence of the defendant's "unstable" and "dysfunctional" background, including evidence of petitioner's mental health, alcohol, drug abuse, physical abuse and mental abuse); *Gamble*, 63 So. 3d at 720 (finding prejudice where counsel failed to present evidence that the defendant and his sister moved frequently and "were passed around among their relatives"); *Lewis v. Dretke*, 355 F.3d 364 (5th Cir. 2003) (presentation of incomplete evidence where grandmother testified but examination failed to thoroughly develop true picture of tortured childhood experience and where unexamined siblings could have been called);

b. **poverty**, *see Rompilla v. Beard*, 545 U.S. 374, 392 (2005) (finding prejudice where the defendant's childhood home "had no indoor plumbing" and the defendant "slept in the attic with no heat"); *Ferrell v. Hall*, 640 F.3d 1199, 1230 (11th Cir. 2011) (finding prejudice where counsel failed to present witnesses who could have explained that "[the defendant and his family] lived in run-down shacks, how they were repeatedly evicted from their homes, how when the defendant was only five one of these homes burned to the ground, and how the boys often went hungry");

c. **physical abuse**, *see Porter*, 130 S. Ct. at 454 (2009) (finding prejudice where counsel failed to present evidence of the defendant's "childhood history of physical abuse"); *Williams v. Taylor*, 529 U.S. at 395 (finding prejudice where counsel failed to present evidence that the defendant had been "severely and repeatedly beaten" as a child); *Williams v. Allen*, 542 U.S. at 1342 (finding prejudice where counsel failed to present evidence that the defendant's household was "one in which severe beatings and other forms of violence occurred on a near constant basis"); and

d. **substance abuse**, *see Gamble*, 63 So. 3d at 719-20 (finding prejudice where the defendant's parents and guardians had severe substance abuse problems and forced the defendant to assist in drug sales when he was a child); *see also Walbey v. Quarterman*, 309 Fed. App'x 795, 797, 803-06 (5th Cir. 2009) (finding

prejudice where counsel failed to present evidence that the defendant ingested drugs and alcohol "before age 5").

e. **cognitive limitations or mental health problems**, *see Porter*, 130 S. Ct. at 454 (finding prejudice where counsel failed to discover and present evidence regarding the defendant's "brain abnormality, difficulty reading and writing, and limited schooling"); *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1355 (11th Cir. 2011) (finding prejudice where the defendant "had only a seventh-grade education and had learning deficits").

363. The fact that counsel presented *some* mitigating evidence at trial does not foreclose a finding of prejudice. *See Sears v. Upton*, 130 S. Ct. 3259, 3266 (2010) ("We have never limited the prejudice inquiry under *Strickland* to cases in which there was only' little or no mitigation evidence' presented."). Indeed, courts have found prejudice even where trial counsel's presentation addressed the critical mitigation issues but failed to do so thoroughly and with reliable evidence. *See Cooper*, 646 F.3d at 1354 (finding prejudice where "'[t]he description, details, and depth of abuse in [the defendant's] background that were brought to light in the evidentiary hearing in the state collateral proceeding far exceeded what the jury was told'") (quoting *Johnson*, 643 F.3d at 936).

364. In reviewing the prejudice element of an ineffective assistance of counsel claim, courts must evaluate "the totality of the available mitigating evidence." *Williams v. Taylor*, 529 U.S. 362, 397 (2000). The prejudice inquiry is not whether there is a reasonable probability of a different result if counsel had discovered and presented one individual item of omitted evidence or another individual item of omitted evidence. Rather, the inquiry is whether there is a reasonable probability of a different result if counsel had presented all the evidence they would have discovered if they had conducted a reasonable investigation. *See Williams v. Taylor*, 529 U.S. at 397 (holding that the state court erred by failing to consider the totality of the evidence); *Strickland*, 466 U.S. at 695 ("[A] court hearing an ineffectiveness claim must consider the

totality of the evidence before the judge or jury."); *Gamble*, 63 So. 3d at 721-22 (evaluating the cumulative effect of the various types of mitigating evidence that counsel failed to discover).

365. In assessing counsel's deficiencies, the reviewing court must evaluate "the pattern of counsel's deficiencies … in their totality," not weighing each error individually. *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (7th Cir. 2006). *Wiggins v. Smith*, 539 U.S. 510 (2003), holds that counsel's conduct falls short where the investigation did not encompass "'efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating circumstances that may be introduced by the prosecutor.'" *Wiggins*, 539 U.S. at 525 (citation omitted). Prejudice was found because counsel could have discovered powerful evidence of physical torment and a horrible upbringing.

> Had the judge and jury been able to place [the defendant's] life history 'on the mitigating side of the scale' and appropriately reduced the ballast on the aggravating side of the scale, there is clearly a reasonable probability that advisory jury - and the sentencing judge – "would have struck a different balance,"… *Porter*, 130 S. Ct. at 454 (quoting *Wiggins*, 539 U.S. at 537).

Similarly, in *Hooks v. Workman*, 689 F.3d 1148, 1203 (10th Cir. 2012), prejudice was found where:

> Evidence of family and social history was sorely lacking; the mental health evidence presented was inadequate and quite unsympathetic; and [counsel] not only failed to rebut the prosecution's case in aggravation but actually bolstered it…"

366. As explained in significant detail below, this is a case in which counsel's penalty phase investigation fell far below the objective standard of reasonableness and trial counsel's deficiencies "were so serious as to deprive [Mr. Jones] of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 687. If counsel had conducted a reasonable investigation and

discovered the available mitigating evidence, and there is a reasonable probability that they jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death. *See Strickland*, 466 U.S. at 694; *Williams*, 529 U.S. at 420 (rejecting lower court's holding that "mere" difference in outcome was not enough to find prejudice under Strickland). For the sake of expediency, Mr. Jones hereby expressly incorporates Section I, *supra*, into his penalty phase ineffectiveness allegations.

**A. Defense counsel prejudiced Mr. Jones and rendered ineffective assistance of counsel during the sentencing phase by failing to properly prepare expert and lay witnesses, failing to properly investigate and present mitigation evidence, and failing to object to prosecutorial misconduct.**

367. Mr. Jones' defense counsel failed in <u>every aspect</u> of the penalty phase. They failed to adequately investigate Mr. Jones' background, failed to introduce mitigating evidence in their actual possession or which was readily discovered, and, compounding their failures in developing and presenting mitigating evidence, elicited extremely damaging testimony from their own witnesses.

368. Trial counsel failed to adequately investigate even the most readily-available sources. Although Mr. Jones' family members repeatedly attempted to contact trial counsel in advance of Mr. Jones' trial, their efforts were mostly unsuccessful. Before trial, counsel spoke with only two of Mr. Jones' relatives, and then only in a series of brief interactions: Mr. Jones' mother, Jill Whitsett and his sister, LaKeisha Jones. A third relative, Mr. Jones' aunt, Marilyn Walker, received a subpoena and appeared to testify during the penalty phase but counsel did not interview her in advance of that testimony. These three women were the only family members called to testify in the penalty phase. Due to the meager pre-trial preparation, trial counsel failed to elicit favorable mitigation evidence within these witnesses' knowledge. Instead, further highlighting counsel's ineffectiveness, elicited extremely damaging testimony from these

witnesses. Section III.A.1, incorporated herein by reference, explores the evidence that would have been available from these witnesses to trial counsel had they accurately investigated, prepared and questioned these witnesses.

369. In addition to failing to perform in depth interviews of these three family members, trial counsel failed to interview any other of Mr. Jones' family members. During the brief interviews with Jill and LaKeisha, defense counsel only elicited limited information, such as the name of one of Mr. Jones' teachers, Edwina Culp (who was called to testify in the penalty phase). And while Jill and LaKeisha provided contact information for additional family members, including Mr. Jones' grandmother, Mary Bell Jones, there was no follow up with those potential witnesses. As is described further below, in addition to his grandmother, Mr. Jones had numerous relatives who could have offered mitigating evidence, including, though not limited to: Mr. Jones' uncles, Desario "Andy" Jones, Ricky Jones, James Jerome Rich, and Anthony Brown, Sr.; his brothers, Gregory and Jarrius Jackson; his aunts, Elaine Crook and Rochelle Brown; his cousins, Erika and Chanterelle Jones; his father Reginald Jones; or his stepfathers, Demetrius Whitsett and Gregory Jackson. All of these witnesses were readily identifiable and available to trial counsel yet counsel failed to contact any of them. As is set forth at length in Section III.A.2, incorporated herein by reference, those family members would have provided valuable mitigation evidence.

370. Counsel also failed to adequately investigate and present record evidence. These included records pertaining to education, employment, welfare, birth, alcohol and drug abuse, and the Department of Human Resources ("DHR"). While defense counsel did obtain some documentary evidence via subpoenas, including: DHR records; and Dothan City Schools disciplinary records, not a single one of these records was admitted into evidence. Defense

counsel thus failed to present the mitigating evidence contained within those documents by either seeking to admit the records into evidence or reviewing them with any of the witnesses they called. Additionally, trial counsel failed to obtain additional readily-available evidence, including criminal records for Mr. Jones' mother and his stepfather Demetrius Jones which would have provided evidence of extreme instability in Mr. Jones' home. Furthermore, counsel failed to seek any records from Florida schools, Florida child protection services or other Florida sources despite knowing that Mr. Jones had spent a significant part of his childhood living in Florida. Had counsel acquired these records and effectively presented the mitigating evidence they contained, there is a reasonable probability that they jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death.

371. Inexplicably, defense counsel failed to retain a mitigation specialist to perform a thorough mitigation investigation. As a result, the only investigation that took place was the one done by defense counsel and an inexperienced investigator they retained shortly before trial and who performed minimal pre-trial investigative work consisting mainly of reviewing the records described above. Their failure to properly investigate precluded them from making strategic decisions and detrimentally impacted their performance at both the guilt and penalty phases of Mr. Jones' capital trial.

372. Trial counsel also repeatedly failed to object to the District Attorney's misconduct throughout the penalty phase, allowing the prosecution to distort the evidence presented and invent non-statutory "aggravating factors" that appealed to the jury's emotions. Trial counsel's errors culminated in their failure to tender appropriate jury instructions from which the jury could easily have found that the mitigating evidence outweighed the aggravating circumstances. One juror voted against the death penalty. Only two more were needed to eliminate the death

recommendation. But for trial counsel's unprofessional errors, there is a reasonable probability that a jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death.

373. Trial counsel also failed to request appropriate jury instructions regarding mitigation. As set forth in this Amended Petition, evidence was available to support additional mitigation instructions on extreme physical abuse, extreme emotional abuse and extreme drug abuse. Rather than proving and obtaining jury instructions on the most powerful mitigation factors, trial counsel asked for and obtained those presenting far weaker mitigation factors, with inadequate proof presented even on those.

374. Thus, Mr. Jones' can easily establish that his trial counsel performed deficiently by failing to present available mitigating evidence. *State v. Gamble*, 63 So. 3d 707, 713 (Ala. Crim. App. 2010) ("In cases where sentencing counsel did not conduct enough investigation to formulate an accurate life portrait of a defendant, [courts] have held the representation beneath professionally competent standards."). Further, Mr. Jones was prejudiced by his counsel's failure to present available mitigating evidence regarding Mr. Jones' life and background. *See Porter v. McCollum*, 130 S. Ct. 447, 454 (2009) ("Had [the defendant's counsel] been effective, the judge and jury would have learned of the 'kind of troubled history we have declared relevant to assessing a defendant's moral culpability.'" (quoting *Wiggins*, 539 U.S. at 535)).

375. Once he has established that his counsel's performance was deficient, Mr. Jones must next demonstrate that he was prejudiced by his counsel's failures. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). In preparation for filing this Amended Petition and for Mr. Jones' Rule 32 hearing, undersigned counsel for Mr. Jones have sought to conduct the type of investigation that trial counsel should have conducted in preparation for the penalty phase of his trial. While this

investigation is by no means complete, this section sets forth the numerous mitigating facts that Mr. Jones' family members could have testified to at his trial – and will testify to at the Rule 32 hearing. The sheer volume and nature of the mitigating evidence available but not presented establishes that trial counsel's deficiencies prejudiced Mr. Jones and that there is a reasonable probability that the jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death if trial counsel had presented all the evidence they would have discovered if they had conducted a reasonable investigation. *Williams v. Taylor*, 529 U.S. 362, 397 (2000) (courts must evaluate "the totality of the available mitigating evidence" in determining prejudice due to ineffective assistance of counsel); *Gamble*, 63 So. 3d at 721-22 (evaluating the cumulative effect of the various types of mitigating evidence that counsel failed to discover).

**1. Counsel failed to adequately elicit favorable evidence from Jill Whitsett, LaKeisha Jones, and Marilyn Walker during the penalty phase.**

376. Following Mr. Jones' arrest, but well before trial, Jill Whitsett, Mr. Jones' mother, persistently called defense counsel's office. It was only two weeks before trial and only after numerous phone calls and attempts to contact counsel did Mr. Jones' attorneys finally interview Jill, her daughter LaKeisha Jones and Mr. Jones' aunt, Marilyn Walker. These were the only three family members the defense ever interviewed and the only family members called as mitigation witnesses.

377. Trial counsel's questioning of all three was perfunctory, lasting only a few hours, and utterly failed to elicit the type of evidence repeatedly deemed to be crucial to the penalty phase. They acquired minimal useful information and what little information they did obtain, they failed to make use of by following up with other family members and non-relatives.

Consequently, trial counsel's "decision" to only call these three family members cannot be considered strategic. *Wiggins*, 539 U.S. at 487-88 (trial counsel ineffective where failure to adequately investigate precluded making informed strategic decision). Indeed, for the decision to have been meaningful, trial counsel would have been required to have alternatives from which to choose. But, because counsel failed to reach out to anyone else or to properly interview those few family members they did speak to, they instead gambled that those three relatives would offer the most useful information at trial. Thus, trial counsel performed deficiently. *See Williams v. Allen*, 542 F.3d 1326, 1340 (11th Cir. 2008) (holding that counsel performed deficiently because they failed to conduct sufficient interviews with the defendant's family members and failure to present additional family members was a result of negligence and not strategy).

378. Moreover, counsel's deficient interactions with the three individuals they did call to testify resulted in each witness being improperly utilized during the penalty phase testimony. Consequently, all three women offered little useful evidence not because they had none to share but because counsel failed to apprise them of the purpose and scope of mitigation evidence to be presented during the penalty phase. *See Collier v. Turpin*, 177 F.3d 1184, 1201-02 (11th Cir. 1999) (trial counsel's performance failed to meet the standard of objective reasonableness required by the Sixth Amendment where counsel presented no more than a "hollow shell of the testimony necessary for a particularized consideration of relevant aspects of the character and record of [a] convicted defendant before the imposition upon him of a sentence of death.") Indeed, their combined direct examination testimony lasted just twenty transcript pages. (R. 1347-59, 1390-93, 1399-1403.)

379. To make matters worse, rather than elicit helpful evidence, the defense attorneys repeatedly elicited the most harmful evidence conceivable, including opinions from two of the three family members that Mr. Jones had no worth as a human being – something condemned in *Sears v. Upton*, 130 S. Ct. 3259, 3262 (2010) (defense counsel's presentation backfired when evidence it affirmatively introduced was used by prosecution to counter evidence of mitigation).

**Mitigating Evidence Available From Mr. Jones' Mother, Jill Whitsett**

380. While Mr. Jones' mother, Jill, met with defense counsel prior to testifying at the penalty phase, her interviews were perfunctory and none lasted longer than an hour. Trial counsel failed to explain to Jill what type of evidence would be useful in mitigation and, as her trial testimony evinces, she firmly believed that only positive information about Mr. Jones' background and upbringing would warrant a sentence of life imprisonment. (R. 1347-59.) As a result, even though she was well aware of her son's dysfunctional upbringing and his numerous struggles, Jill did not volunteer any significant detail pertaining to his turbulent life, transient lifestyle, the impact of family trauma on his emotional and mental development, his pervasive exposure to drug use, and her inability to address his numerous issues, even as they reached a breaking point.

381. In order to illustrate the scope of the mitigation evidence that trial counsel's deficient investigation failed to uncover, set forth below is a side-by-side comparison of some of the testimony trial counsel elicited from Jill during the penalty phase in contrast to the mitigating evidence that Jill could have offered had trial counsel properly investigated and asked the correct questions. Further, the chart highlights some of the damaging testimony that trial counsel, due to their lack of pre-trial preparation, elicited from Jill. The chart is only meant to highlight some of the most egregious mitigating evidence that trial counsel failed to discover and present. Set forth

immediately below are additional facts that Jill could have testified to in mitigation in order to paint an accurate life portrait of Mr. Jones.

| Testimony Elicited at Trial | Highlights of Evidence Not Elicited |
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| Mr. Brantley's questioning began with a perfunctory inquiry as to where Jill lived when Tony was growing up. Jill answered by stating she lived in Houston County for approximately 16 years and moved to Panama City, FL when Tony was about eight to nine years old. (R. 1348-49.) Of a total of 20 transcript pages of family testimony, this empty portion of Jill's direct exam fills 1¼ of the pages. | Had she been asked to provide detail, Jill would have testified that she lived in at least twenty-five different homes with Tony and the rest of her children. *See* Section III.A.4, incorporated herein by reference. They often moved because their electricity was shut off or they were being evicted. As many as ten people lived in a single home, with as many as five people sleeping in one room.<br><br>Some of their homes were rat infested and insect ridden. They would try to kill the rats by throwing things at them or throwing them in the fireplace. Sometimes the rats would not die and would escape from the fireplace and run through the apartment while on fire. When this occurred, some of Tony's family members would scream "the rats are gonna burn down the house."<br><br>Thus, Tony was prejudiced by counsel's failure to introduce evidence of the instability and extreme poverty that Tony experienced. *See Hardwick v. Crosby*, 320 F.3d 1127, 1177 (11th Cir. 2003); *Gamble*, 63 So. 3d at 720; *Rompilla v. Beard*, 545 U.S. 374, 392 (2005); *Ferrell v. Hall*, 640 F.3d 1199, 1230 (11th Cir. 2011). |

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| Mr. Brantley asked Jill about Tony's lack of a father figure.<br><br>Q: And did Tony ever have a relationship with his father.<br><br>A: No, sir.<br><br>Q: Did that give you problems on down the road with Tony, the fact that he didn't have a father figure in the household?<br><br>A: Some. (R. 1349.) | The questioning was grossly incomplete and failed to elicit the mitigating evidence that Mr. Brantley should have been elicited. He failed to ask any questions about the man who actually raised Tony since the age of 11 – Demetrius "Meechie" Whitsett. Demetrius is a repeat felon and career drug dealer who regularly beat Tony and his mother while recruiting Tony to join his drug business as early as fifteen. (*See* Section III.A.5, incorporated herein by reference.)<br><br>Thus, Tony was prejudiced by counsel's failure to introduce evidence of the instability and exposure to drugs that Tony experienced. *See Gamble*, 63 So. 3d at 719-20 (finding prejudice where the defendant's parents and guardians had severe substance abuse problems and forced the defendant to assist in drug sales when he was a child). |
| Mr. Brantley asked Jill whether DHR visited her home from time to time. Specifically, on the issue of abuse, he asked:<br><br>Q: On one occasion here in Houston County they came to your house and – with regards to you're abusing your children, didn't they? *I'm not saying you did it*, but that's the reason they were there?<br><br>A: Yes, sir. (R. 1352.) | This testimony left the misleading impression that DHR visited the home only once. Trial counsel was in possession of DHR records showing numerous visits starting when Tony was a baby. Trial counsel exonerated the witness as to her role in egregious child abuse ("I'm not saying you did it").<br><br>Mr. Brantley failed to elicit that Tony was beaten hundreds of times by his mother, his grandmother, his aunts, and Demetrius for a variety of reasons including forgetting his bible verses, using swear words, or failing to cut up and bag Demetrius's drugs correctly. (*See* Section III.A.5, incorporated herein by reference.) Rather than stating in his question "I'm not saying you did it," Tony's counsel was required to develop the evidence of life time abuse and hardship pertaining to his client.<br><br>Thus, Tony was prejudiced by counsel's failure to introduce evidence of the severe and constant physical abuse that Tony experienced. *See Porter*, 130 S. Ct. at 454; |

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| | *Williams v. Taylor*, 529 U.S. at 395; *Williams v. Allen*, 542 U.S. at 1342. |
| Mr. Brantley also asked Jill to render ***her*** opinion as to the quality of Tony's childhood and upbringing rather than eliciting facts about his childhood and upbringing.<br><br>Q: Now, without getting into whether you did it or not, do you believe a home environment you had for Tony was a good home environment for him?<br><br>A: It was the best I had. (R. 1352.) | Through this utterly inept questioning, the appearance was rendered that Tony had a normal upbringing, raised by a mother who did her best. Her self-serving opinion as to her own competency as a mother was not relevant. The only competent approach was to develop the facts, not ask ***her opinion*** as to whether she believed she was a good mother.<br><br>Thus Tony was prejudiced by counsel's presentation of evidence that was more harmful than mitigating. *See*, *e.g.*, *King v. Strickland*, 748 F.2d 1462 (11th Cir. 1984). |
| Mr. Brantley asked her if she took Tony to Dr. Ted Williams, Dr. Nelson Mandel, and Dr. Ann Jacobs. She answered yes. (R. 1354.) Mr. Brantley elicited that Tony was given Prozac, Tenex, Ritalin, and Zoloft. The medications made him much calmer. (R. 1356.) | Defense counsel failed to elicit that she had taken him off his prescription medications years before Tony allegedly committed the crime. They failed to elicit that the medications made him drowsy and caused him to drool so other drugs had to be given to counter these effects.<br><br>Most importantly, counsel failed to link the deprivation of medicine through expert *medical* testimony to the underlying criminal conduct at issue. LaKeisha, his sister, testified that he was much 'calmer' when he was being medicated. This establishes that counsel understood the beneficial effect the medications had on Tony's behavior. What was required was a psychiatrist who could testify as to the effect on his behavior by having been taken off the drugs so long. At a Rule 32 hearing, testimony will be offered by Dr. DeFrancisco, or other medical expert, as to the effects the drugs at issue would have had on Tony and the effect of the absence of the drugs.<br><br>Thus, Tony was prejudiced by counsel's failure to introduce evidence of Tony's cognitive limitations and mental health problems. *See Porter*, 130 S. Ct. at 454; |

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| | *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d 1328, 1355 (11th Cir. 2011). |
| The next question illustrates the utter lack of witness preparation and one of several examples where defense counsel elicited harmful information about their client:<br><br>Q: You think he could be helpful to other inmates?<br><br>A: Yes, sir. ***I don't know.*** (R. 1358.) | Defense counsel elicited even Tony's mother's reservations as to whether he could be of any value in prison. As explained below, Tony demonstrated human qualities that should have been addressed.<br><br>Thus, Tony was prejudiced by counsel's presentation of evidence that was more harmful than mitigating. *See*, *e.g.*, *King v. Strickland*, 748 F. 3d 1462 (11th Cir. 1984). |

**Additional Mitigating Evidence Jill Whitsett Could Have Offered**

382. **Dysfunction, Extreme Poverty, and Instability:**

a. Tony's family life was shaped by traumatic events that pervaded his childhood. These events permanently disrupted his family structure, leaving the adults in his life emotionally unavailable for him, and absence that became increasingly critical in light of Tony's developmental difficulties. When Tony was a toddler, his eighteen-month old brother, Marvin, died in the hospital after being hospitalized with burns.

b. When Tony was a toddler, the trailer where he lived with his family was destroyed in a fire started by one of the Jones children who was playing with matches unsupervised. *See* Section III.A.4, incorporated herein by reference.

c. In fact, a jury would have considered Jill's testimony that she dropped out of high school in the tenth grade and had five children between ages 17 to 22 with four different men. The Jones children lacked a stable father-figure. Tony's biological father, Reginald Jones, was never married to Jill and was virtually absent from his son's life. (*See* III.A.2, ¶¶ 429-430, incorporated herein by reference.) Reginald never paid child support for Tony, thereby exacerbating the family's impoverished state.

d. They jury was never aware that Jill moved her family back and forth between at least twenty-five residences spanning from Dothan, AL to Panama City, FL for years (*see* Section III.A.4, incorporated herein by reference), and that DHR visited their home at least twice. If DHR saw that there was food in the home, they would leave. She suspected that her mother, Mary Bell Jones, called DHR with allegations of abuse and neglect. Although defense counsel submitted evidence of DHR visits

during the penalty phase, counsel provided no context for three records, rendering the essentially meaningless for the jury.

383. **Drugs:**

a. Had counsel properly prepared Jill to testify, she would have understood the importance of testifying openly about the widespread and prolonged use of drugs in the Jones' family home. She would have also explained to the Jury that Mr. Jones' childhood, including his formative years, were spent in various houses where illicit drugs were regularly sold illegally. (*See* Section III.A.5, incorporated herein by reference.) She would have testified that his childhood exposure to illegal substances led him to begin using drugs at an early age, he was beaten on a weekly basis for the majority of his life, and lived in multiple roach and rodent infested residences.

b. Jill never worked and, therefore, depended on welfare, food stamps, disability checks, and the drug dealing profits from her future husband – Demetrius "Meechie" Whitsett. (*See* Section III.A.5, incorporated herein by reference.) Jill met Demetrius at a night club in Panama City. He was eight years younger than Jill and only nine years older than Tony. He was a known drug dealer and, as a review of court records would have revealed, soon after Jill met him, Demetrius was incarcerated on drug trafficking charges. (*See* Section III.A.5, incorporated herein by reference.) She began dating Demetrius while he was still incarcerated in Florida and married him two weeks later. Although Demetrius was violent, jealous, and controlling, Jill chose to remain with him despite the detrimental impact on her family. Demetrius did not allow anyone in the Jones family to have friends or go out. Demetrius was a repeat felon that beat Jill in front of her children.

384. **Learning Disabilities and Mental Health:**

a. Jill would have informed that jury that Tony was a "special needs" child who stuttered. He did not start walking until he was almost a year old. After he finally learned to walk, he had to wear leg braces to straighten his legs. Years later, when Tony was in the third or fourth grade, his physicians diagnosed him with Attention Deficit Hyperactivity Disorder ("ADHD"). The psychiatric medications he took to minimize the effects of his ADHD "messed him up." Jill subsequently began receiving disability checks on Tony's behalf.

385. **Physical Abuse**:

a. Mr. Brantley similarly failed to elicit testimony from Jill describing how Tony was also beaten by various family members at least once a week for a variety reasons from age five until his eighteenth birthday. That

amounts to hundreds of beatings. This number is conservative because Tony's aunts and his grandmother also beat him with numerous objects including belts and electrical extension cords. Tony's grand-mother would swear at him and also hit him with her hand.

b. Tony was beaten repeatedly for a variety of reasons. Jill beat Tony because she wanted him to know his bible verses, and she would not be around forever to make sure that he learned them. She pasted a copy of the 23 Psalm on his wall and would quiz Tony about it. If he made mistakes, he would be beaten.

c. Tony was also beaten for cursing. If he said "f**k" he would be beaten four times because that word had four letters. If he said "f**k you" he would be beaten seven times. Tony was beaten for not telling the truth, receiving bad grades, and fighting with other kids. Jill would most often have Demetrius beat Tony although she personally did so many times herself. When Tony got mad at Jill and Demetrius or decided that he could no longer endure the roaches, rats, drugs, beatings, emotional abuse, and constant hunger, he would run to his grandmother's house or she would come and get him.

d. Demetrius would also beat Tony for another reason. When Tony was approximately fifteen, Demetrius enlisted him into his drug selling business, calling it "man's work." (*See* Section III.A.5, incorporated herein by reference.) If Tony made errors cutting or bagging drugs, Demetrius would beat Tony. In fact, Demetrius exposed the entire family to the drug business by selling drugs out of their houses and local businesses. From the time Tony was young, Demetrius would take Tony's family to Florida to buy and sell drugs. Jill would cry in front of her children when she thought the police were following them.

386. **Tony's Character:**

a. Tony was very protective of his family and frequently watched them overnight just to make sure they were safe. Although Tony loved all of his siblings, he was closest to his sister, LaKeisha, and was very protective of her. LaKeisha was hearing impaired and wore a box with a string wrapping around her neck and a headphone to her ears. Tony became infuriated when anyone teased or bullied her and fought with anyone that tried to pick on her. Tony would also get mad if a teacher stopped him from seeing LaKeisha during the school day and would curse at anyone who attempted to impede his visit. As a result, Tony and LaKeisha were frequently suspended from school.

b. Jill would have testified about Tony's love of animals. On one occasion, Tony and his mom called the police because a stray puppy that Tony adopted fell ill. Tony's uncle and best friend, Desario "Andy" Jones,

would have provided similar testimony had defense counsel called him as a witness.

**Mitigating Evidence Available From Mr. Jones' Sister, LaKeisha Jones**

387. LaKeisha Jones is Tony's half-sister. As with her mother, LaKeisha's interactions with her brother's counsel were perfunctory and she was asked only superficial questions. As a result of counsel's deficient investigation, during the penalty phase, Mr. Brantley's entire defense examination of LaKeisha filled only four and a half pages. Trial counsel did nothing to develop the Jones' family history of violence and multigenerational poverty. As a result, LaKeisha's knowledge of Tony's traumatic and chaotic upbringing never surfaced and thus was not considered by the jury in mitigation.

388. Set forth below is a side-by-side comparison of some of the testimony trial counsel elicited from LaKeisha during the penalty phase in contrast to the mitigating evidence that LaKeisha could have offered had trial counsel properly investigated and presented the available evidence. The chart is only meant to highlight some of the most egregious mitigating evidence that trial counsel failed to discover and present. Set forth immediately below this chart are additional facts that LaKeisha could have testified to in mitigation in mitigation in order to paint an accurate life portrait.

| Testimony Elicited at Trial | Highlights of Evidence Not Elicited |
|---|---|
| Mr. Brantley asked LaKeisha perfunctory questions about whether she believed Tony could contribute positively to prison life. She answered yes. (R. 1400.) | Had defense counsel been competent, they would have elicited testimony about how Tony protected her from bullies who teased her because of her hearing aid as well as others who tried to make unwanted sexual advances towards her.<br><br>Thus, Tony was prejudiced by counsel's failure to introduce positive evidence regarding Tony's character. *See* Ala Code Section 13A-5-52. |

| | |
|---|---|
| She was asked whether his not taking medications affected his behavior. She testified he was calmer when under medication. (R. 1401-02.) | Defense counsel did not link the lack of medical treatment to his violent conduct.<br><br>Thus, Tony was prejudiced by counsel's failure to introduce evidence of Tony's cognitive limitations and mental health problems. *See Porter*, 130 S. Ct. at 454; *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d at 1355. |

**Additional Mitigating Evidence LaKeisha Jones Could Have Offered**

389. **Dysfunction, Extreme Poverty, and Instability:**

a. LaKeisha could have provided key testimony corroborating the Jones family's impoverished upbringing. She would have testified that the Jones family lived in numerous different places during her childhood. Not only did the Jones family live in several different locations in Dothan, AL, Jill moved her and her brothers back and forth between Dothan and Panama City, FL. (*See* Section III.A.4, incorporated herein by reference.) While shuffling kids between both cities, her mother partied a lot and had a lot of different boyfriends.

b. LaKeisha and her brothers would go hungry a lot. She would have recalled numerous occasions where she and her three other siblings would have to share a small pack of noodles intended to feed only one person because there was nothing else in the house to eat and Jill failed to provide them with additional food. Each child's portion of the small pack of noodles did nothing ease their hunger so they remained hungry. As a result, DHR would come to their house claiming that their mother was unfit. LaKeisha suspected that her grandmother – Mary Bell Jones – called them.

c. The jury would have learned that Tony's eighteen month old brother, Marvin Jones, died tragically as a result of hospital negligence. Marvin's death was extremely difficult for the family and their mother did not take it well. Jill would tell LaKeisha that Marvin had come back from death and "visited" her twice.

390. **Tony's Character:**

a. LaKeisha would have provided insight into her special relationship with Tony and confirmed his role as the protector of the Jones family. Tony tried to be "the man of the house" and would stay up at night just to watch over the family. He was very generous and would therefore split any

money or candy he received with LaKeisha and their brothers. She "looked up" to Tony and followed him everywhere.

b. LaKeisha wore a hearing aid when she was younger. She felt that the hearing aid made her look "retarded," so she did not want to wear it. People would tease and bully her but Tony was always there to protect her. In fact, Tony would punish anyone if "they messed with her." He would set times for them to meet at school so that he could look at her and make sure that she was okay. Tony would get very upset if he was unable able to meet her at the scheduled visit.

c. LaKeisha would have also testified about an incident where Tony came to her defense after a classmate tried to stick his hand under her skirt. During the penalty phase, the District Attorney elicited testimony from Tony's mother that Tony had gotten in trouble for fighting at school because Tony "always fight [sic] for [LaKeisha]." (R. 1362-63), Defense counsel did not seek any further explanation regarding this testimony so it remained uncontextualized. LaKeisha would have provided valuable testimony regarding the true cause of some of the fights but the jury never learned that Tony was fighting in defense of his sister because defense counsel failed to elicit this testimony.

391. **Drugs:**

a. LaKeisha would have corroborated her mother's testimony that Demetrius "Meechie" Whitsett was a drug dealer and saw him make drug sales. (*See* Section III.A.5, incorporated herein by reference.) She witnessed everyone in the house smoking marijuana on a regular basis.

**Mitigating Evidence Available From Mr. Jones' Aunt, Marilyn Walker**

392. Marilyn is Tony's aunt. Unlike Jill and LaKeisha, Marilyn was not interviewed by either Mr. Brantley or Mr. Parker prior to appearing to testify during the penalty phase. She was unaware that she would be called to testify until she received a subpoena in the mail. Prior to taking the stand, neither Mr. Brantley nor Mr. Parker told her that the jury had already convicted her nephew of capital murder.

393. As with Tony's mother and sister, Mr. Brantley's direct examination of Marilyn both omitted crucial information and elicited extremely harmful testimony. Her entire direct

examination fills eight transcript pages. The chart below sets forth some of the testimony trial counsel elicited from Marilyn, and the prejudicial effect of counsel's defective examination.

| Testimony Elicited at Trial | Highlights of Evidence Not Elicited |
|---|---|
| Mr. Brantley asked Ms. Walker whether Tony had worth as a human being:<br><br>Q: Now, do you believe that Tony possess worth as a human being and merit and goodness to the point he can contribute positively in a prison environment? Do you believe that?<br><br>A. No, I do not.<br><br>Caught unaware, defense counsel tried to recover:<br><br>Q: Now, tell us, what, if anything, do you believe that he could do to contribute to the other inmates down there as far as helping them, getting along with them, talking to them?<br><br>A: First, let me say, if he commit this crime, if he commit this crime, whatever punishment is given him, he deserves the punishment.<br>(R. 1391-92.) | Ms. Walker was the second family member from whom the defense elicited testimony that Tony had no worth as a human being. The answers were purely the result of no witness preparation. Ms. Walker will testify she did not know why she was testifying and was confused by the question.<br><br>Marilyn's response was extremely prejudicial, suggesting to the jury that even Tony's family did not care whether he lived or died. The prejudice from counsel's uninformed choice to call Marilyn was compounded when on cross-examination, the District Attorney had Marilyn repeat her damaging testimony:<br><br>Q. I want to go back to this if I could. And this is the last question or one or two. If he did this crime he should be punished is what you said.<br><br>A. That's what I said.<br>(R. 1398-99.)<br><br>Thus, Tony was prejudiced by counsel's presentation of evidence that was more harmful than mitigating. *See*, *e.g.*, *King v. Strickland*, 748 F. 3d 1462 (11th Cir. 1984). |
| Mr. Brantley asked whether Mr. Jones' behavior improved when he was on his medications. She answered:<br>He was always a good person as long as – he was, first of all, on medication. As long as he took his medication, he was a good person… (R. 1392-93.) | This was an extremely important basis for mitigation, which had a very high likelihood to influence the jurors. These details should have been developed through family members who observed the effect of the medications on Mr. Jones. Competent defense counsel would have supplemented the record with additional medical testimony.<br><br>Thus, Tony was prejudiced by counsel's failure to introduce evidence of Tony's cognitive limitations and mental health |

| | |
|---|---|
| | problems. *See Porter*, 130 S. Ct. at 454; *Cooper v. Sec'y, Dept. of Corr.*, 646 F.3d at 1355. |

**Additional Mitigating Evidence Marilyn Walker Could Have Offered**

394. **Learning Disabilities and Mental Health:**

a. Marilyn could have testified that Tony was a quiet child. Tony was a follower rather than a leader. Ms. Walker also thought that Tony was a "little slow." She knew that he suffered from Attention Deficit Hyperactivity Disorder ("ADHD").

395. **Dysfunction, Extreme Poverty, and Instability:**

a. Tony's mom liked to party and go clubbing. She would either leave the children by themselves or bring multiple men to the house. As a result, Ms. Walker would drop by frequently to check on Tony and his siblings. She frequently discovered that Jill's children were hungry and that there was no food for the children to eat because Tony's mother had run out of food stamps.

b. Ms. Walker would have corroborated testimony that Jill moved her family back and forth between Panama City, FL and Dothan, AL frequently when Mr. Jones was growing up. (*See* Section III.A.4, incorporated herein by reference.) While in Panama City, Tony and his siblings lived with another family forcing Tony to live with seven other people in a three-bedroom apartment in the projects. Jill Whitsett also began dating her future husband – Demetrius "Meechie" Whitsett while he was still incarcerated in Florida.

396. **Drugs:**

a. As soon as Demetrius got out of jail, the Jones family moved back to Dothan, AL and Demetrius began selling drugs out of the same house he shared with Jill and her children. Other times, he would deliver the drugs with the help of some of his fellow drug dealers. (*See* Section III.A.5, incorporated herein by reference.) When Demetrius was not selling drugs, he smoked marijuana with Ms. Walker while the children were present. She would have admitted under the oath that the children saw and smelled the marijuana.

397. **Physical Abuse:**

a. Ms. Walker also observed Demetrius and Jill beating Mr. Jones. They would use their hands, belts, and extension cords. In one instance, she saw Tony's bleeding from wounds caused by a beating. Marilyn first

observed Tony being beaten when he was six to eight years old. Tony would cry and scream when being beaten. Additionally, Demetrius also beat Jill and the rest of her children and, at times, Tony would jump in to try to protect his mother from the beatings.

**2. Trial counsel deficiently and prejudicially failed to interview or call as witnesses additional family members who would have provided additional testimony about the abuse, neglect, and extreme poverty Mr. Jones experienced.**

398. Tony's counsel was similarly deficient in failing to contact other family members who could have provided critical mitigation evidence. A proper penalty phase investigation requires that counsel "locate and interview the client's family members, [as well as] virtually everyone else who knew the client and his family, including neighbors, teachers, clergy, case workers, doctors, correctional, probation or parole officers, and others." ABA Guidelines 10.7 Commentary.

399. Set forth below is evidence that some of Tony's closest family members could have offered had trial counsel contacted them, and that they will be able to offer at Mr. Jones' Rule 32 hearing. Among these key witnesses are Mary Bell Jones, Tony's grandmother; Elaine Crook and Rochelle Brown, Tony's maternal aunts; Desario "Andy" Jones, Tony's maternal uncle and best friend; Gregory and Jarrius Jackson, Tony's brothers; Gregory Jackson, his stepfather who was married to Tony's mother for a few years; and James Jerome Rich, Anthony Brown, Sr., and Ricky Jones; his maternal uncles.

400. As set forth below, the evidence these family members could have offered would have been wide-ranging, revealing physical abuse, extreme poverty, instability and dysfunction in the home, repeated exposure to drugs, and mental health and cognitive issues. As such, trial counsel's failure to discover and present it was prejudicial. *See Hardwick,* 320 F.3d at 1177; *Gamble*, 63 So. 3d at 719-20; *Rompilla,* 545 U.S. at 392; *Ferrell,* 640 F.3d at 1230; *Porter*, 130

S. Ct. at 454 (2009); *Williams v. Taylor*, 529 U.S. at 395; *Williams v. Allen*, 542 U.S. at 1342; *Cooper,* 646 F.3d at 1355. Had counsel properly investigated and presented to the jury this readily-available mitigating evidence, there is a reasonable probability that they jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death. *See Strickland*, 466 U.S. at 494.

**Mitigating Evidence Available From Mr. Jones' Grandmother, Mary Bell Jones**

401. Mary Bell Jones is Tony's grandmother. She was not interviewed by the defense and was not called to testify. Had she been called as a witness, she too would have provided invaluable mitigation evidence.

402. **Dysfunction, Extreme Poverty, and Instability:**

a. She would have corroborated testimony from Jill, Marilyn, and LaKeisha regarding the family's multiple residences and generational poverty. While in Dothan, the family moved between several different residences, living alternately in a trailer, in houses on South Park Street, Woods Street, Catalpa Avenue, and Boulevard Street, or in the projects at McRae Homes. When the family ran out of money, Jill and all four children would move in with Mary Bell Jones, who was at the time still raising her own younger children and other grandchildren. (*See* Section III.A.4, incorporated herein by reference.) Tony, due in large part to his developmental problems, could never adjust to this instability.

b. She would have corroborated testimony from other family members about the impact Marvin's death had on the entire Jones family. She received a call from the medical center that there was a staph infection outbreak and that she should bring Marvin some slippers. She was later informed of his death due to accidental overdose at the hospital she was scrambling to buy slippers. After Tony learned of his brother's death, he cried a lot and typically ran into his room and continued crying. It was very difficult for Tony to understand what was going on. Tony wanted go to the hospital and pick up his younger breath long after he had passed away. Even though the Jones family needed counseling to cope with Marvin's death, no one ever received any. Jill was remorseful for neglecting young Marvin, preoccupied with her own insecurities, and oblivious to the pain that her other children were experiencing. While all of these events were happening, Tony himself was in serious need of counseling to deal with the loss and required specialized services to help him with his developmental difficulties. However, he received neither.

c. Mary Bell would have testified about one incident where she had to drive to Panama City, FL to pick up Tony because Jill got caught making Tony steal from either a Target or K-Mart. According to Jill Whitsett's readily available criminal record, on October 13, 1993, the Panama City, Florida Police arrested Jill for shoplifting at a K-Mart after she placed stolen socks in her purse and put stolen clothes under her dress. Rather than abide by the terms of her judgment and sentence, she failed to pay her cost of supervision and applicable fines, failed to complete her community service, and failed to complete a Shoplifter's Anonymous course. Mary Bell watched Jill's children while Jill was supposedly completing her community service. After a warrant was issued for Jill's arrest, she convinced the Court to convert her community service hours into a $637.50 fine. (*See* Exhibit M, Jill Whitsett Criminal Records.)

403. **Learning Disabilities and Mental Health:**

a. Tony was hyperactive growing up and began taking medication in the second or third grade. At times, Tony would take too much medication and would sit around and stare. She believed that the medication helped Tony's hyperactivity and did not understand why he stopped taking it.

b. Tony ran away a lot to escape his nightmarish living conditions. He would leave for two or three days and no one would know where he went. He would simply appear at whatever residence the Jones family was living in at the time wearing dirty clothes.

404. **Physical Abuse:**

a. Tony's grandmother would have explained that she reported Jill to the DHR due to her daughter's neglect of her grandchildren. Mary Bell called the Department of Human Resources ("DHR") on Tony's mother on multiple occasions. She felt that Mr. Jones and his siblings did not have enough food and that Demetrius beat Tony. She would have described an incident where Tony ran away due to Demetrius's beatings.

b. Mary Bell would have provided further testimony about the negative effect Demetrius "Meechie" Whitsett had on Tony's family. (*See* Section III.A.5, incorporated herein by reference.) She would have explained that while Demetrius was the only consistent male figure in Tony's life when he was growing up, this was to Tony's detriment. Demetrius was a mean man with violent tendencies. Demetrius and Jill were the primary reasons Tony ran away from home so much.

405. **Drugs:**

a. Mary Bell would also have testified Tony's mother, Jill, habitually used drugs while Tony was growing up.

b. Additionally, she would have testified that Demetrius provided for the family by selling drugs from whatever residence the Jones family lived in at the time and all of the children were old enough to know what was going on. The family's frequent trips back and forth from Dothan, AL to Panama City, FL were related to Demetrius's drug dealing. (*See* Section III.A.5, incorporated herein by reference.) Tony and his siblings knew that Demetrius was a drug dealer and Demetrius openly sold drugs from the family's residences. She would have further testified that when he was a teenager, Tony regularly accompanied Demetrius on drives through the neighborhood to sell drugs, and Demetrius regularly provided Tony with marijuana. Demetrius forced Tony to become an errand boy, which required him to ferry drugs between local drug dealers and drug buyers.

c. Mary Bell would have testified that Demetrius provided drugs to Tony's uncle Andy, who was the same age as Tony.

**Mitigating Evidence Available From Mr. Jones' Aunt, Elaine Crook**

406. Elaine Crook, Tony's aunt, was intimately familiar with Tony's troubled childhood. Had counsel contacted Elaine, she would have testified that she had intimate knowledge about Tony's background because Tony and his uncle, Desario "Andy" Jones, spent numerous summers with her as children.

407. **Learning Disabilities and Mental Health**

a. Tony stuttered growing up and was not used to anyone paying attention to him. He was hyper-active, took Ritalin, and required a lot of her attention.

408. **Dysfunction, Extreme Poverty, and Instability:**

a. Elaine would also have testified about Tony's desperate living conditions in Dothan, AL and Panama City, FL. Tony and his family moved back and forth between the two cities on multiple occasions. (*See* Section III.A.4, incorporated herein by reference.) During the time Tony lived in Panama City, FL, Elaine noticed that Tony and his siblings were suffering from malnutrition. This instability had a severe impact on Tony because he was not receiving the specialized services that he needed, he was not learning in the schools that he attended, and he had to leave the schools almost as soon as he began to adjust to each new setting.

b. Elaine was troubled by Tony's environment in Dothan, AL. She knew that Tony was not used to living in a clean, structured home. Many of

Tony's Dothan, AL homes were overrun with cockroaches. He would run away a lot and sleep under these houses rather than going inside.

c. She too would have testified about the negative impact Marvin's death had on the Jones family. The Jones family never sought therapy to cope with the incident and refuses to speak to even speak about it.

409. **Drugs:**

a. Elaine will describe Jill as a "bad parent" who frequently used hard drugs.

b. Elaine would have testified that she and other family members allowed Tony access to alcohol as early as age fourteen.

**Mitigating Evidence Available From Mr. Jones' Brother, Jarrius Jackson**

410. Jarrius Jackson is Tony's half-brother. He was never interviewed by defense counsel and did not testify at Tony's trial. Had defense counsel interviewed or called Jarrius as a witness, he would have testified about the important role Tony played in his life and would have described what their life was like growing up with Demetrius Whitsett.

411. **Tony's Character:**

a. Jarrius would have testified that Tony was a central figure in the family and that he had been forced to take over Tony's role since his incarceration. Tony tried to keep him focused and taught him to be respectful to his elders. Tony also taught him to control his temper, clean up, and do well in school.

b. Tony was very close with their sister LaKeisha. He was LaKeisha's guardian and would protect her from anyone that attempted to harm her. People teased LaKeisha because she wore a hearing aid.

412. **Learning Disabilities and Mental Health:**

a. Jarrius recalled that Tony stuttered a lot when they were younger and that Tony was in special education classes.

413. **Dysfunction, Extreme Poverty, and Instability:**

a. Tony had to be the central male figure in the home because neither his nor his siblings' fathers participated in their lives. Therefore, he and his siblings were forced to choose between two paths: smoking dope or selling dope. In their view, those were the only two options available to them in Dothan, Alabama. As a result, Jarrius left Dothan, AL simply

because he did not want his children to grow up like he did. His living conditions were so deplorable growing up living with his mother Jill and grandmother Mary Bell that he would wake up early in the morning and try to leave the house before anyone could notice his absence.

b. Jarrius would have testified about DHR visiting their home and his mom forcing them to cleanup prior to their arrival.

414. **Drugs:**

a. Jarrius and the rest of the family knew that Demetrius sold crack cocaine. Demetrius also had drug dealing relationships with Tony and Jarrius. Demetrius would take Jarrius on drug runs.

b. Jarrius would also have corroborated testimony about multiple police drug raids on the Jones' home. The police normally raided their home during the day but his mom would try to clean everything up before his sister and brothers returned from school.

**Mitigating Evidence Available From Mr. Jones' Brother, Gregory Jones-Jackson**

415. Gregory Jones-Jackson is Tony's younger half-brother. Defense counsel failed to contact him prior to Tony's trial.

416. **Tony's Character:**

a. Tony would take him and their younger brother Jarrius everywhere he went. Gregory would have described Tony as a good guy and one who would never have committed the type of crime he was convicted of. Tony often fought for his sister LaKeisha battling with schoolmates who attempt to make fun of her for wearing a hearing aid.

417. **Dysfunction, Extreme Poverty, and Instability:**

a. Gregory would have testified about how the Jones family lived in an area of Dothan, AL called the "Bottom" where local street gangs like the CRIPS got into gun battles in the middle of the street. (*See* Section III.A.4, incorporated herein by reference.)

b. Gregory would have corroborated testimony about DHR coming to the Jones home and inquiring about their living arrangements. DHR's inquiry began when someone saw welts on his sister LaKeisha.

418. **Learning Disabilities and Mental Health:**

a. Gregory would have testified about the effects Tony's medication had on his behavior. Tony became lethargic and would fall asleep all of the time. The side effects were so extreme that Tony could not go anywhere while

medicated because the medications would make him immobile. Therefore, Mary Bell and his mother decided to take Tony off his medication.

419. **Drugs:**

a. Demetrius "Meechie" Whitsett entered the family when Gregory was 11 years old. He recalled his mother trying to convince Demetrius to stop selling drugs. Once, while living in Florida, the police forcibly entered their apartment and ransacked it in search of drugs while he and his siblings were at school. They returned home from school and found their apartment in disarray. The police never found anything because Demetrius did not store his drugs in the house. Gregory also recalled another incident when he was 16 or 1 and the police raided the Jones home again. Demetrius was arrested again for selling drugs.

420. **Physical abuse:**

a. Gregory also recalled being beaten by Demetrius. He also recalled receiving extreme forms of punishment from his mother. She would place his sister and brothers on the bed, place a foot or leg or their back, and flog their buttocks.

**Mitigating Evidence That Would Have Been Available From Mr. Jones' Uncle, Desario "Andy" Jones**

421. Desario "Andy" Jones was Tony's maternal uncle. Andy was interviewed by post-conviction counsel in 2009 and has since passed away. He was born a month after Tony and was Tony's closest male friend while growing up. Set forth below is testimony he would have been able to offer on behalf of Tony during the penalty phase.

422. **Tony's character:**

a. To Andy, Tony was a protector, a friend, and a brother. Andy would have testified that Tony was a good person and would never have committed a violent act against someone unless provoked. Tony loved pets and bugs. He was not the type of person who bullied others or initiated fights; he would only intervene on behalf of his family.

423. **Learning Disabilities and Mental Health:**

a. Andy would have corroborated mitigation testimony that Tony started taking medicine for hyperactivity in middle school which made him sleepy and "zombie-like."

424. **Drugs:**

a. Andy also would have provided additional testimony about Demetrius's drug dealing. Andy met Demetrius shortly after Demetrius had been released from prison in Panama City, FL. Demetrius and the rest of the Jones family moved next door to Andy. Andy knew Demetrius sold drugs and personally witnessed large numbers of cars visiting their home. Andy himself purchased marijuana from Demetrius and encouraged his friends to do so.

**Mitigating Evidence Available From Mr. Jones' Aunt and Uncle, Rochelle Brown and Anthony Brown, Sr.**

425. Rochelle Brown is Tony's maternal aunt and Anthony Brown, Sr. is her husband.

The Browns often looked after Tony while his mother, Jill, was at work.

426. **Dysfunction, Extreme Poverty, and Instability:**

a. Had either witness been called by the defense, they would have testified that despite being a quiet, loveable child, Mr. Jones grew up on welfare, was passed around to multiple family members, ran away from home, and was forced to move on multiple occasions because his mother could not manage her money appropriately.

b. Rochelle would have testified that Tony ran away from home as early as eight years old. Both Rochelle and Anthony would drive around the neighborhood looking for Tony but they would never find him. He would return home a couple of days later.

c. Rochelle would have testified about Mr. Jones' mother partying at clubs, dating multiple men, and leaving others to watch her children. Tony even complained to Rochelle that his mother did not treat him well.

d. Rochelle's testimony could have further corroborated testimony that Tony and his siblings moved back and forth to Panama City (*see* Section III.A.4, incorporated herein by reference), and repeatedly went without food. On one occasion, Rochelle went to Panama City, FL with Tony's grandmother, Mary Bell, and found Tony and his siblings without food. In response, Mary Bell took the kids and returned to Dothan, AL.

e. The Browns would also have corroborated testimony describing the impact that Marvin Jones' death had on the entire family. Marvin was only 18 months at the time of his death. The Browns would have described an incident where Marvin accidently poured hot liquid on himself while his mother was home. He was subsequently rushed to the hospital and later died of what Rochelle thought was a drug overdose. Jill

received a large settlement because of Marvin's death. At the time of the incident, Jill was married to Gregory Jackson even though he was not Marvin's father and they separated after Marvin's death. Tony and LaKeisha were forced to deal with the death of their younger brother alone as their mother's partying dramatically increased. Jill left her kids at home alone or with any relative who would keep them while she was out.

f. Rochelle (as well as Mary Bell and Elaine) would have reported that Jill received a medical malpractice settlement from the hospital after Marvin died but rather than take the opportunity to provide for her other children, she squandered this money almost immediately. She bought cars for herself and other relatives, including her sister, Marilyn. She took week-long trips to New York with a man known to snort cocaine and use other illicit drugs. On account of these excursions, she became an even more absent parent, even though there was no stable father in the children's lives. The proceeds from the hospital settlement lasted just months. Jill did not invest in anything lasting, nor did she seek counseling for herself or for her children.

427. **Physical Abuse:**

a. The Browns felt that Tony never received the personal attention he needed. Tony would say things to Rochelle indicating that he was not being treated very well at home. Mr. Brown would have testified that Mr. Jones was never affirmed by his mother for having a gift or talent and that his mother never communicated to him that he was loved unconditionally or that he was intrinsically valuable.

b. Instead, the Browns would have testified that he was repeatedly beaten with belts and extension cords and never received an explanation for why he was being beaten. The beatings would leave scares, welts, and bruises on his body. Anthony would also testify that his mother would come home, wake up Tony, and beat him for things he had done earlier in the day.

c. The Browns would have further testified specifically about the severe beatings Tony received from his stepfather Demetrius. Tony resented being beaten by Demetrius but held in his anger due to fear of his stepfather.

428. **Drugs:**

a. Anthony would have testified that he knew Demetrius to sell marijuana and powder cocaine from the home he shared with Tony and even taught Tony how to serve as a "lookout" while standing guard at various posts.

b. Rochelle would have testified that Tony's mother used powder cocaine.

**Mitigating Evidence Available From Mr. Jones' Father, Reginald Jones**

429. Reginald Jones, Tony's father, would have testified about the trivial role he played in Tony's life.

430. **Dysfunction and Instability:**

a. Reginald moved from New Orleans, Louisiana to Dothan, Alabama when he was in the sixth grade. In Dothan, Reginald became a high school football star and began having casual sex with a number of women, including Jill. Reginald would have testified that learned Jill was giving birth to Tony because Reginald broke his ankle so he went to the hospital and discovered that Jill and another woman were giving birth to his two children at the same time in the same hospital.

b. Reginald would have further testified and corroborated testimony from Jill and Mary Bell that Reginald only saw Tony a few times while growing up. Jill and her sister Marilyn told him that he should not "come around" to see Tony because they were mad about the number of women he dated. On the few occasions he did get to see Tony, he could only do so at certain times because Tony was either in school or had to be home before curfew. Reginald even had to sneak to take Tony trick-or-treating.

c. Reginald moved to Louisiana after graduating from high school. After moving to Louisiana, Reginald would have testified that he only saw Tony once more, when Tony was 15 or 16. He tried to get Tony to come to Louisiana to stay with him but Tony did not want to leave his family behind. Reginald gave Tony less than $100 and never saw him face to face again.

**Additional Witnesses From Whom Mitigating Evidence Might Have Been Available**

431. In preparation for the penalty phase, trial counsel had a duty to conduct a thorough investigation that included interviews of family members and others with potentially mitigating evidence. *See Williams v. Allen*, 542 F.3d 1326, 1340 (11th Cir. 2008) (holding that counsel performed deficiently because they failed to conduct sufficient interviews with the defendant's family members and failure to present additional family members was a result of negligence and not strategy). In addition to the family members listed above, trial counsel also failed to contact and examine numerous other individuals who played meaningful roles in Tony's

life, including neighbors, friends, teachers, doctors, social workers, counselors, and acquaintances.

432. Additional family members from whom mitigating evidence could have been gathered include Mr. Jones' uncles Ricky Jones and James Jerome Rich; his cousins, Erika and Chanterelle Jones; and his stepfathers, Demetrius Whitsett and Gregory Jackson. Additionally, Mr. Jones' friends and acquaintances should have been interviewed, including, Camilla Bolden, Acaris Gordon, Jeffrey Dozier, Onario Thompson, Rashad Thompson, and April Brunson; his physicians, Dr. Ted Williams (a pediatrician who saw Tony for a myriad of mental health treatments), Dr. Roby Hicks, and Dr. Sam C. West (psychiatrists who saw Tony for mental health evaluation); Tony's counselors and teachers at the schools he attended; and the Department of Human Resources social workers who visited Mr. Jones' family throughout his childhood.

433. Reed Smith Attorneys Steven A. Miller and Richard K. Wray filed Verified Applications for Admission to Practice on January 30, 2013 and have since committed substantial resources to Mr. Jones' post-conviction relief. Although counsel has been able to gather the crucial mitigation evidence outlined above, undersigned counsel is still seeking additional information regarding the mitigating evidence that might have been in these witnesses' possession through discovery and further investigation and will supplement this section of the petition with those details as soon as they become available.

**3. Defense counsel deficiently and prejudicially failed to investigate and introduce mitigating evidence contained in DHR records in their possession.**

434. The defense was in possession of several pages of Alabama Department of Human Resources ("DHR") files reporting on Mr. Jones' troubled family beginning in 1982, when Mr. Jones was an infant. (*See* Exhibit E, DHR Records.) These reports were not

introduced at trial, despite containing extensive mitigating evidence that could have been corroborated by the testimony of Mr. Jones' family members. Among the issues raised in the DHR reports:

a. DHR documented unstable, impoverished, emotionally abusive, and possibly neglectful home when Mr. Jones was an infant, and his mother herself still a child. (Exhibit E, DHR case reports, 1/28/82 – ((illegible)/28/85.)

b. DHR documented that Mr. Jones' mother was pregnant with another child, due in June 1982, only months after Mr. Jones was born. (Exhibit E, DHR case report, 1/28/82.)

c. DHR documented that, when Mr. Jones was an infant, he and his mother had to live with his grandmother, who was emotionally abusive. (Exhibit E, DHR case report, 1/28/82.)

d. When Mr. Jones was one year old, his mother left her mother's home with him and spent months living in an unknown location. (Exhibit E, DHR case reports, 2/24/82; 3/9/82.)

e. When Mr. Jones was three, his maternal grandmother reported to DHR that his mother, Jill, was an inadequate care provider and did not adequately supervise her children. (Exhibit E, DHR case report, 8/31/84.)

f. When Mr. Jones was three, his mother had another child, Marvin, who was born with syphilis and required regular medical care, which his maternal grandmother worried his mother could not provide. (Exhibit E, DHR case report, 8/31/84.)

g. When Mr. Jones was four, in July 1985, the family's home (shared with Jill Jones, three other children, and Gregory Jackson) burned down, displacing the family. (Exhibit E, DHR case report, 7/16/85.)

h. When Mr. Jones was four, his younger brother Marvin, died in the hospital after suffering grease burns at home. (Exhibit E, DHR case report, (illegible)/28/85.)

i. When Mr. Jones was 9, DHR investigated allegations (made by his maternal grandmother). Mr. Jones' grandmother alleged that Jill Jones, with her children, had moved in with a drug user, left the children home alone or with the drug user, refused to get a job, and generally failed to care for the children. DHR made no finding of neglect (Exhibit E, DHR Report of Suspected Case of Child Abuse/Neglect, 3/5/90.)

j. When Mr. Jones was 10, DHR investigated allegations made by a neighbor that his mother neglected him and his siblings by leaving them home alone in the evening, selling their food stamps rather than feeding the children, and leaving them to roam their apartment complex alone during the day. The report also alleged that Mr. Jones' mother used drugs. While the children reported that their mother did not do drugs, Tony expressed a familiarity with drugs and people in the neighborhood who did drugs. The report further detailed the instability of the Jones household, with some of Mr. Jones' siblings being in the custody of other relatives, including his grandmother, rather than living with Mr. Jones and his mother. DHR made no finding of neglect (Exhibit E, DHR Report of Suspected Case of Child Abuse / Neglect, 8/13/91.)

435. The DHR record evidence was neither investigated by counsel in interviews with family members nor presented by defense counsel as mitigation evidence. Only fleeting reference during direct examination was made to the DHR visits to Mr. Jones' home. (R. at 1351-52.) The DHR history was in fact far more extensive and trial counsel's failure to introduce any such evidence allowed the prosecutor to argue that there was no evidence of a troubled background:

> You heard from the testimony the Defense witnesses got up there, from his mother, his aunt, that he didn't have a bad life. That the house had been checked on by human resources. The reports were not founded in any manner or fashion. Not one time did the Defense ask any members of his family, were you using drugs. Mother, did anybody in the family use drugs. Did they drink alcohol. Did they treat him bad. Did he have a bad life. (R. 1474.)

436. Further, the extensive DHR history raised numerous "red flags" regarding mitigating evidence in Mr. Jones' development and background that <u>required</u> further investigation. *See Rompilla,* 545 U.S. at 392; *see Williams v. Allen*, 542 F.3d at 1340 ("[T]he information that trial counsel did acquire would have led a reasonable attorney to investigate further."). Trial counsel's failure to follow up on the extensive DHR history was patently unreasonable. *Wiggins*, 539 U.S. at 527 ("In 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.") Much like defense counsel in *Wiggins*, who was found ineffective for failing to investigate mitigating evidence found in a pre-sentence investigation report and some Department of Social Services records. Mr. Jones' trial counsel failed to investigate further despite glaring red flags in the DHR reports. *Id.* at 527, 538. *See also Williams v. Allen*, 542 F.3d at 1340 (holding that counsel performed deficiently when they failed to pursue leads revealed in the pre-sentence investigation report).

437. Counsel's deficient investigation resulted in their failure to discover and present to the jury mitigating evidence, including evidence of abuse, neglect, abject poverty, instability, and drug use by his mother. Had counsel presented such mitigating evidence to the jury, there is a reasonable probability that they jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death. *See Strickland*, 466 U.S. at 494.

#### 4. Defense Counsel Was Deficient in Failing to Develop Readily-Available Evidence of Instability in Mr. Jones' Childhood, Resulting In Prejudice to Mr. Jones.

438. As further evidence of counsel's prejudicial failures, counsel failed to investigate and/or elicit testimony regarding all of the different places Mr. Jones lived while growing up. Mr. Jones lived in more than twenty-five different residences before his arrest at age eighteen. He never knew how long he would be living in one place or with whom he would be living the next day. Many of the residences were in disrepair or infested with rats; others were in projects dominated by drugs and prostitution. They did not ask Mr. Jones' mother Jill, his sister LaKeisha Jones, his aunts Elaine and Marilyn or his grandmother Mary Bell about the family's specific residences despite the fact that ample records were readily available including: DHR records, school records, as well as the criminal records of both Jill and Demetrius Whitsett (which counsel never obtained).

439. At the penalty phase of the trial, counsel elicited testimony from Jill that lead the jury to believe that her frequent moves between Panama City, Florida, and Dothan, Alabama were orderly, peaceful, beneficial to her family, and well-planned. (R. 1348-49.) Counsel even referred to Mr. Jones' childhood environment as "that house," as if Mr. Jones grew up in a fixed and stable setting. (R. 1495.) However, if counsel had asked Jill, LaKeisha, Elaine, Marilyn, or Mary Bell about the places Mr. Jones lived when growing up—or if counsel had consulted the available DHR, school, and criminal records—they would have learned that Mr. Jones' upbringing was defined by instability. Specifically, counsel would have learned the following from those five witnesses and the aforementioned records:

| No. | ESTIMATED DATE(S) | ADDRESS | COMMENT(S) |
|---|---|---|---|
| 1 | 1981 | 1017 Blackshear Drive<br>Dothan, AL 36303 | When Mr. Jones was an infant, he lived at 1017 Blackshear Drive in Dothan, Alabama, with his mother Jill, his grandmother Mary Bell Jones, his uncle Andy Jones, his uncle James "JJ" Rich, and other family members. Jill and Mary Bell Jones could have testified regarding that fact.<br><br>On several occasions, Jill took Mr. Jones and his sister LaKeisha Jones, whose father was Jill's boyfriend Brian Duckett, to live in other places for weeks at a time. As DHR stated in a report dated March 9, 1982, "[Jill] Jones has been out of the county for at least two weeks that we know of and we've been given no indication that she's returning." But then Jill and the children returned to Blackshear Drive, again living with Mary Bell Jones and other family members. Jill and Mary Bell Jones could have testified to that fact. |
| 2 | 1984 | Park Way Trailer Park<br>Dothan, AL | Around 1984, Jill and her children moved to the Park Way Trailer Park in Dothan, Alabama. They moved to get away from Jill's family. Gregory Jackson, whom Jill had married, also lived with them. Jill |

| | | | |
|---|---|---|---|
| | | | Whitsett could have testified to those facts. |
| 3 | 1985 | 1017 Blackshear Street Dothan, AL 36303 | The trailer burned to the ground on July 15, 1985, so they moved back to Blackshear Drive with Mary Bell Jones and other family members. A DHR report dated July 16, 1985, confirms the date of the trailer fire. Beyond the DHR records, Jill Whitsett could have testified to those facts. |
| 4 | 1987 | 84 McRae Homes Dothan, AL 36301 | At the entrance to the McRae projects, there were drug dealers on the right, prostitutes on the left, and a lady selling popsicles in the middle. Jill, Gregory Jackson, and the children lived in the McRae projects for several years. |
| 5 | 1988 | 708 Montana Street Dothan, AL 36303 | |
| 6 | 1988 | 713 Catalpa Ave. Dothan, AL 36301 | Jill and the rest of her children moved in with Mary Bell after Jill's electricity was repeatedly cut-off for nonpayment. |
| 7 | 1989 | 13 McRae Homes Dothan, AL 36301 | Following the brief stay on Catalpa Avenue, Jill and her children moved back to McRae Homes. But this time they lived with Larry Williams, Jill's boyfriend. They lived in 28 McRae Homes, 13 McRae Homes, and 23 McRae Homes. A DHR record dated August 13, 1991, and titled Report of Suspected Case of Child Abuse/Neglect lists 23 McRae Homes as their address. |
| 8 | 1989 | 23 McRae Homes Dothan, AL 36301 | |
| 9 | 1989 | 1004 Linden Street Dothan, AL 36303 | |
| 10 | 1990 | 1001 N Bell Street Dothan, AL 36303 | |
| 11 | 1991 | 708 Montana Street Dothan, Alabama | Jill and her children move in with Marilyn Walker, Jill's sister, prior to moving to Panama City, FL. |
| 12 | 1992 | 1025 Everitt Ave, #E-2 Panama City, FL, 32401 | In or around 1992, Jill and her children moved to Panama City, Florida. There, they lived in the Gardner Dickinson housing projects at 1025 Everitt Avenue. The probable cause affidavit from Jill's theft case in Panama City, which was case number 93-8004 in Bay County, Florida, lists 1025 Everitt Avenue as Jill's address. |
| 13 | 1993 | 1343-C Roosevelt Dr. Panama City, FL | Jill and her children then moved to 1343 Roosevelt Drive in Panama City, Florida. |

| | | | |
|---|---|---|---|
| | | | The violation of probation affidavit from Jill's theft case, dated April 12, 1994, lists the Roosevelt Drive address. |
| 14 | 1993 | 704 Bay Ave.<br>Panama City, FL | Jill and her children then moved into 704 Bay Avenue in Panama City, Florida. The house at 704 Bay Avenue had giant rats, and Jill shot at them with a gun. She tried to put the bread on the top of the doorframe so the rats could not get it, but they got it anyway. Beyond the records, Jill could have testified to those facts. |
| 15 | 1995 | 624 Catalpa Ave.<br>Dothan, AL 36301 | In 1995, Jill and her children left Panama City and moved back to Dothan. They lived with Mary Bell Jones at 624 Catalpa Avenue in Dothan, Alabama. A Juvenile Court Services Referral Form to DHR dated October 30, 1995, lists 624 Catalpa Avenue as Mr. Jones' address. |
| 16 | 1996 | 622 Catalpa Ave.<br>Dothan, AL 36301 | In 1996, they moved to another place on Catalpa Avenue in Dothan—specifically, 622 Catalpa Avenue. Demetrius "Meechie" Whitsett, whom Jill had married while he was in jail for possession of crack cocaine with intent to distribute in case number 93-1827 in Bay County, Florida, joined them at this address upon his release. Jill and Mary Bell Jones could have testified to those facts. |
| 17 | 1997 | 211 Virginia Drive #1<br>Dothan, AL 36301 | Jill, Demetrius Whitsett, and the children then moved to 211 Virginia Drive in Dothan, Alabama. Demetrius Whitsett dealt drugs out of the house and was arrested for doing so on January 29, 1997, as documented in case number CC-97-5513 in Houston County. Mr. Jones' Dothan High School file confirms that Mr. Jones lived at the Virginia Drive address in 1997. Beyond those records, Jill Whitsett and Mary Bell Jones could have testified to those facts. |
| 18 | 1997 | 473 East Andrews Ave. Ozark, Alabama | Shortly after Demetrius Whitsett's January 1997 arrest, Mr. Jones lived for a brief period of time at a boys' home at 473 East Andrews Avenue in Ozark, Alabama. Around that same time, Jill and her children, at times including Tony, moved to 1528 South Park Avenue in Dothan, Alabama. That address is listed on Demetrius Whitsett's Consolidated |
| 19 | 1997 | 1528 S. Park Ave. | |

| | | | |
|---|---|---|---|
| | | | Appearance Bond in case number CC-97-5513 in Houston County. The landlord sought to evict Jill, Demetrius Whitsett, and the children on November 25, 1998, as demonstrated by case number DV-98-0883 in Houston County. |
| 20 | 1998 | 102 Woods Drive<br>Dothan, AL 36301 | Jill and her children then moved in with Mary Bell Jones at 102 Woods Drive in Dothan, Alabama. That address is listed on Mr. Jones' Southeast Alabama Medical Center records dated January 22, 1999. In addition to the records, Jill could have testified to those facts. |

440. In addition to those addresses, undersigned counsel are aware that Mr. Jones lived at; a house infested with rats on Edgewood Avenue in Dothan, Alabama; a residence on Boulevard Street in Dothan, Alabama; 680 Leslie Avenue in Mobile, Alabama; and at least four other boys' homes or youth facilities. Undersigned counsel are seeking additional information on those places through discovery and further investigation and intend to supplement this section of the petition with those details as soon as they become available.

441. The constant moving described above was extremely harmful to Mr. Jones' development. As a child, it left him with uncertainty as to whether he would have food to eat or a place to sleep the following day. It disrupted his education by forcing him to change schools repeatedly, exposed him to negative influences, and eliminated the possibility of long-term positive influences. Enduring such ghastly living conditions was particularly traumatic for Mr. Jones – an individual born into multi-generational poverty and subsequently diagnosed with behavioral and mental health issues at an early age.

442. Trial counsel's failure to learn that Mr. Jones had a completely unstable upbringing that included constant moving and more than twenty-five residences constitutes ineffective assistance of counsel. *See Hardwick*, 320 F.3d at 1177 (finding prejudice where

counsel failed to present evidence of the defendant's "unstable" and "dysfunctional" background); *Gamble*, 63 So. 3d at 720 (finding prejudice where counsel failed to present evidence that the defendant and his sister moved frequently). This is particularly true given the misleading evidence counsel presented at trial and the other risk factors that were present through Mr. Jones' upbringing, as described in the other sections of this petition.

443. Had counsel properly investigated and presented to the jury this glaring evidence of instability and dysfunction in Mr. Jones' background, all clear mitigation evidence, there is a reasonable probability that the jury would not have recommended the death penalty. *See Strickland*, 466 U.S. at 494.

**5. Defense counsel deficiently and prejudicially failed to discover and present Demetrius Whitsett's criminal background, which was mitigating evidence of drugs in Mr. Jones' home.**

444. While Tony was living in Panama City, Florida with his mother and siblings, his mother met and began dating Demetrius Whitsett, a man who was eight years her junior (and only nine years older than Tony) and a convicted drug dealer. Shortly before he was supposed to move into the same household as Jill and Tony, Demetrius was again arrested and incarcerated for drug-related offenses in Florida. Despite his incarceration, Tony's mother married Demetrius while he was imprisoned. Upon his release from prison, Demetrius moved to Alabama and Tony lived in the same household as him.

445. Defense counsel offered no evidence regarding Demetrius's long history of drug convictions or of Tony's exposure to the drug trade from an early age. A review by defense counsel of court records in Alabama and Florida would have established that, during the time Tony lived in the same household as Demetrius, Demetrius sold crack cocaine and was repeatedly arrested and incarcerated. Further, Demetrius's involvement in the drug trade was no secret to anyone in the Jones family. Had defense counsel inquired about and elicited such

testimony, any and all of Tony's siblings could have testified to Demetrius's drug dealing and related criminal convictions, as well as Demetrius's drafting Tony into the drug trade.

446. In 1990, when Demetrius was 17 years old, he was arrested in Bay County, Florida for possession of a controlled substance and possession of drug paraphernalia. (Exhibit O, Court Order Report of Disposition, Case No. 90-2618.) He was placed on probation for a period of four years (*id*.); however, his probation was revoked in July 1992 for failing to meet the conditions of his probation, including failing to perform drug testing or perform mandatory community service. (Exhibit O, Violation Report Form, State of Florida Department of Corrections, Case No. 846264.) Demetrius's probation officer noted that Demetrius had "[N]o regards for the judicial system." (*Id*.) Also in July 1992, Demetrius pled guilty to one count each of delivery of cocaine to a person under 18, resisting arrest, and driving while his license was suspended/revoked. (Exhibit P, Judgment dated July 24, 1992, Case No. 92-627.) He was sentenced to five and a half years' incarceration for the new offenses and violation of probation. (Exhibit O, Sentence report dated July 24, 1992, Case No. 90-2618; Exhibit P, Plea, Waiver and Consent, July 24, 1992, Case No. 92-627.)

447. Had they been interviewed by defense counsel and called to testify on this issue, family members Jill, Mary Bell, Marilyn, Jarrius, Anthony, and Rochelle could all have testified that Demetrius forced Tony to work with him in the drug trade. Demetrius's conviction for delivery of cocaine to a person under 18 would have provided evidence to corroborate such testimony – Demetrius was convicted of delivering crack cocaine to a minor in order for that minor to engage in the sale of crack cocaine. (*See* Exhibit P, Information dated April 2, 1992, Case No. 92-0627.) By failing to adequately investigate the prevalence of drugs in Tony's

household, defense counsel's failure to adequately investigate and present this potentially mitigating evidence.

448. By September 1993, Demetrius had been released from prison and was again arrested in Bay County for possession of a controlled substance (in Demetrius's case, crack cocaine) with intent to distribute. (Exhibit Q, April 20, 1994 Judgment, Case No. 93-1827, Bay County, Florida.) For this offense, Demetrius was sentenced to four and a half years' incarceration. (*Id.* at Sentence, Case No. 93-1827.) Upon his release from prison, Demetrius moved to Alabama and moved into the home that Tony lived in with his mother and siblings.

449. Demetrius was again arrested for drug offenses in Alabama. Records reveal that Demetrius was indicted for selling marijuana in January 1997 to an undercover agent on or near the premises of a residence located at 211 Virginia Drive in Dothan. (*See* Exhibit R, Complaint dated May 9, 1997, Warrant No. WR 97 005513; Indictment by Grand Jury, Case No. CC-97-1231.) The address where Demetrius made the drug sale was the same address where Tony, who was fifteen at the time, resided with his mother and siblings. Demetrius pled guilty and was sentenced to twelve years confinement. (*See* Exhibit R, Conviction Report Case No. CC-97-1231.)

450. By the time Tony's trial began in March 2004, Demetrius had been charged with additional drug offenses and, in November 2004, was sentenced to 12 years' imprisonment in federal prison for drug possession with intent to distribute. (*See* Exhibit S, Case No. 03000560CFMA file, Bay County, Florida; 8/23/04 Judgment in a Criminal Case, Case No. 5:04cr35-001/MCR, United States District Court for the Northern District of Florida.)

451. Defense counsel was ineffective in failing to investigate and present evidence of Demetrius' drug convictions and activities while living in the same home as Tony. The

evidence was readily available and would have served as powerful evidence of the dysfunctional home environment in which Tony was raised, surrounded by drugs and other instability. *See Gamble*, 63 So. 3d at 719-20 (finding prejudice where the defendant's parents and guardians had severe substance abuse problems and forced the defendant to assist in drug sales when he was a child); *see Hardwick,* 320 F.3d at 1177 (finding prejudice where counsel failed to present evidence of the defendant's "unstable" and "dysfunctional" background).

452. Had counsel properly investigated and presented to the jury this glaring evidence of exposure to drugs, instability and dysfunction in Tony's background, there is a reasonable probability that they jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death. *See Strickland*, 466 U.S. at 494.

**6. The defense failed to properly investigate and present evidence of long term emotional issues.**

453. Mr. Jones suffered from emotional issues as early as kindergarten. The trial attorneys had a report from Ann Jacobs, Ph.D., referencing conditions issues as early as kindergarten, and hence, they had the type of critical information about Mr. Jones' mental health issues which "stared" defense counsel in the face. *Wiggins*, 539 U.S. at 527-28.

454. Dr. Jacobs is a licensed psychologist who evaluated Mr. Jones in 1995, when he was 14, upon a referral from the Houston County Juvenile Court Services. In her report of Psychological Evaluation dated December 4, 1995, she noted that his behavioral issues commenced in kindergarten. (Exhibit G, 12/4/95 Psychological Evaluation at AJ 00024.) When he became angry, he flew into a rage. (*Id*.) He also experienced crying spells when enraged and made suicidal statements. (Exhibit G at AJ 00025.) Mr. Jones exhibited schizoid qualities, his contact with reality was tenuous and he was depressed. (Exhibit G at AJ 00026.) He was also

learning disabled. (*Id*.) Dr. Jacobs formally diagnosed Mr. Jones with Early Childhood Onset Conduct Disorder and Depression. (Exhibit G at AJ 00027.)

455. Defense counsel had a copy of Dr. Jacobs' report but did not call her as a witness, although she did receive a trial subpoena. According to trial counsel's notes, Dr. Jacobs stated that she did not recall Mr. Jones and, as a result, she was excused from appearing to testify. Dr. Jacobs practices in Dothan, Alabama and was available to testify. Even if she did not recall having evaluated Mr. Jones, that was not a basis for not calling her to testify. Her report was signed and she could have identified her signature. (Exhibit G at AJ 00027.) She then could have testified about her report under the highly relaxed evidentiary rules governing the sentencing phase in death penalty cases. Alabama Rule of Evidence 803(5); *Sears v. Upton*, 130 S. Ct. 3259 (2010); *Green v. Georgia*, 442 U.S. 95, 97 (1979); *Roberts v. State*, 735 So. 2d 1244, 1265-66 (Ala. Ct. App. 1997). Her testimony would have provided important evidence regarding the effect that the disorders she observed when she evaluated Mr. Jones would have had on him and his behavior. The decision not to call her cannot be deemed strategic considering the defense's ineffective efforts to present some mental health issues through Dr. DeFrancisco's testimony. (*See, e.g.*, R. 1434, 1442.)

456. Dr. Jacobs' report also placed the defense on notice of Mr. Jones' mental health history, with issues as early as kindergarten, which would have triggered an obligation to investigate further and seek additional school, medical and mental health records and evidence from Mr. Jones' relatives, acquaintances, physicians, and others. *See Rompilla,* 545 U.S. at 392; *Williams v. Allen*, 542 F.3d at 1340 ("[T]he information that trial counsel did acquire would have led a reasonable attorney to investigate further."); *see also Wiggins*, 539 U.S. at 527 ("[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.").

457. At a minimum, even if Dr. Jacobs had not been called, trial counsel could have introduced records from DHR, school and other sources under the applicable evidentiary rules. All were easily admissible under relaxed standards governing capital sentencing. *See, e.g., Sears v. Upton*, 130 S. Ct. at 3263 (finding ineffective assistance of counsel where defense failed to present mitigation evidence that was admissible under the Due Process Clause. "We have…recognized that reliable hearsay evidence that is relevant to a capital defendant's mitigation defense should not be excluded by rote application of a state hearsay rule.*"*); *Green v. Georgia*, 442 U.S. at 97 (per curiam) ("Regardless of whether the proffered testimony comes within Georgia's hearsay rule, under the facts of this case its exclusion constituted a violation of the Due Process Clause…. The excluded testimony was highly relevant to a critical issue in the punishment phase of the trial"); *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973) ("In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.").

458. Dr. Jacobs' report constituted evidence of significant, long term mental illness that should have been investigated and presented in mitigation. Defense counsel's deficient investigation resulted in prejudice to Mr. Jones. *See Porter*, 130 S. Ct. at 454 (finding prejudice where counsel failed to discover and present evidence regarding the defendant's "brain abnormality, difficulty reading and writing, and limited schooling"); *Cooper*, 646 F.3d at 1355 (finding prejudice where the defendant "had only a seventh-grade education and had learning deficits"). There is a reasonable probability that if the defense counsel had conducted a proper investigation and presented the available mitigating evidence of Mr. Jones' history of mental

illness and cognitive impairment, the jury would not have recommended the death penalty and Mr. Jones would not have been sentenced to death. *See Strickland*, 466 U.S. at 494.

**7. The defense failed to properly investigate and present evidence of long term mental illness via their expert witness, Dr. Robert DeFrancisco.**

459. Instead of calling Dr. Jacobs, the defense relied heavily on Robert DeFrancisco, Ph.D. to present mitigation evidence from an expert witness' perspective. Unfortunately, this aspect of the case was handled as incompetently as the rest of the case. With regards to Dr. Jacobs' report (which Dr. DeFrancisco did receive), counsel failed to elicit the underlying facts and details, including emotional illness starting in kindergarten. Counsel did not advise Dr. DeFrancisco of Mr. Jones' social history. Defense counsel did not even meet with Dr. DeFrancisco to prepare him to testify. *Although Dr. DeFrancisco has testified hundreds of times, this is the only time he recalls in his career where the lawyers calling him as a witness did not prepare him for his testimony.*

460. Dr. DeFrancisco was retained by the defense for the sole purpose of performing "psychological evaluation and forensic evaluation for Mental State at the Time of the Offense". (C. 299-305.) His examination of the defendant was limited to determining whether "he certainly would be capable of assuming the role of Defendant at this time." (C. 305.) Dr. DeFrancisco did not consider himself to be a mitigation witness and did not conduct a mitigation investigation. Because of the limited nature of his inquiry, he spent a total of 2.5 hours with Mr. Jones and administered only two tests. (C. 300.) He was not asked to perform a psychopathy test or a comprehensive reading test (R. 1453); was not asked to seek independent corroboration of Mr. Jones' drug or substance abuse (R. 1454); was not given his school records or Dr. Williams' records (R. 1455, 1443); did not independently investigate his family history of drug abuse, trauma, and instability (R. 1457); and did not review his county jail records. (R. 1459,

1478-79.) Dr. DeFrancisco did not know that Mr. Jones was been beaten hundreds of times since early childhood and grew up in a drug ridden, utterly impoverished household. He did not know that Mr. Jones' stepfather taught him to become a drug dealer while a teenager. He did not know the details of the extreme poverty and deprivation in which he was raised. Dr. DeFrancisco also did not know of the repeated acts of kindness to family members rendered by Mr. Jones growing up. He was unaware that he would try to protect his younger sister when she was bullied and teased at school because she wore obtrusive hearing aids. He did not know that Mr. Jones would attempt to protect his mother when she was being beaten by his stepfather. These facts are particularly significant in connection with defense counsel's inexcusable questioning as to whether Mr. Jones is a "sociopath." (*See* Section III.A.8, incorporated herein by reference.)

461. During his testimony at the penalty phase, Dr. DeFrancisco merely answered the questions asked. He was not asked to explain details of Mr. Jones' emotional illnesses and the documented linkage of extreme poverty, physical abuse, emotional abuse and drug abuse to conduct.

462. Dr. DeFrancisco, in addition to being board certified in forensic psychology, is also certified in psychopharmacology. He is an expert on the medications utilized to treat mental illness. He has been qualified as an expert by the Alabama courts to testify in the field of medicines use to treat mental illnesses and their effectiveness and side effects. He was never questioned about his psychopharmacological expertise. Had he been asked to do so, he would have described the medications that had been prescribed for Tony (Ritalin, Zoloft, Tenex, and Wellbutrin) and their effects.

463. Dr. DeFrancisco could further have testified that, if the evidence established that Mr. Jones' mother discontinued giving him his medications or lowered his dosage against doctor's orders, that omission would also have aggravated his mental health condition. The above testimony will be supplemented by an additional expert on the medications. Although counsel has been able to gather the crucial mitigation evidence outlined above, undersigned counsel is still seeking additional information regarding trial counsel's failure to properly investigate and present evidence of long term mental illness via Dr. DeFrancisco and will supplement this section of the petition with those details as soon as they become available.

**8. Dr. DeFrancisco's truncated and incomplete testimony does not cure the ineffectiveness of counsel or resulting prejudice.**

464. The ineffectiveness of counsel caused by their failure to elicit evidence from Dr. Jacobs, family members and introduce documentary records is not cured by the fact that counsel defense called Dr. DeFrancisco, or others, as witnesses. Even where some evidence is presented, when it is done so in a truncated fashion and constitutes only a "hollow shell" of the mitigation evidence that was available, representation is ineffective. *Collier v. Turpin*, 177 F. 3d 1184 (11th Cir. 1999). The Supreme Court has clearly stated that claims of ineffective assistance of counsel are not limited to cases in which no mitigation evidence was presented. *Sears v. Upton*, 130 S. Ct. at 3266 ("We have never limited the prejudice inquiry under *Strickland* to cases in which there was only 'little or no mitigation evidence' presented."); *see also Cooper*, 646 F. 3d at 1354 (finding prejudice where "'[t]he description, details and depth of abuse in [the defendant's] background that were brought to light in the evidentiary hearing far exceeded what the jury was told.'") (quoting *Johnson,* 643 F.3d at 936). The precedent is clear: where incomplete evidence was presented regarding a defendant's mental illness, representation was both ineffective and prejudice is established. *See, e.g., Porter*, 130 S. Ct. at 454 (finding prejudice where counsel

failed to discover and present evidence regarding the defendant's "brain abnormality, difficulty reading and writing, and limited schooling"); *Cooper*, 646 F.3d at 1355 (finding prejudice where the defendant "had only a seventh-grade education and had learning deficits").

465. The Direct examination of Dr. DeFrancisco failed to elicit key evidence of which defense counsel and the witness were aware. Most importantly, it was never elicited that Mr. Jones problems started in kindergarten. Trial counsel knew this because they possessed Dr. Jacobs' report. The defense also utterly failed to have Dr. DeFrancisco explain to the jury what mental illness were at play and those illnesses' origins. They also failed to elicit the causal connections between the mental illnesses suffered by Mr. Jones and his upbringing. The misplaced emphasis was on why he did not succeed academically in school due to his low IQ and hyperactivity. (R. 1431-36.) Their glaring failure was to muster the detailed evidence that Mr. Jones had enormous issues from early childhood, with a likely explanation being severe abuse and neglect. What was required in order to effectively present the mitigation evidence was a multi-hour tutorial for the jury and judge so that they would understand Mr. Jones' afflictions and causal factors. Instead, the presentation was "seat of the pants" and cursory.

466. The prejudice that resulted from defense counsel's failure to have Dr. DeFrancisco supplement his presentation from available records in detail, and to independently present and that evidence, is objective. In his closing argument for the penalty phase, the prosecutor argued that the defense failed to establish mitigating factors *due to the lack of evidence that was presented*:

> Dr. DeFrancisco, what he tells you is it important, what the Defendant tells you, his demeanor. Oh, yes, he had a drug problem, alcohol, cocaine, marijuana. He took all these drugs. I said, excuse me, excuse me, did you ever hear the Defense one time, one stinking time ask his own witness, his own mother, his own aunt, his own sister about whether he had a drug problem in any manner or fashion, he used drugs, cocaine, marijuana in any manner or fashion. Zero. None.

(R. 1479.)

> You heard from the testimony the Defense witnesses got up there, from his mother, his aunt, that he didn't have a bad life. That the house had been checked on by human resources. The reports were not founded in any manner or fashion. Not one time did the Defense ask any members of his family, were you using drugs. Mother, did anybody in the family use drugs. Did they drink alcohol. Did they treat him bad. Did he have a bad life.

(R. 1474.)

467. But for the failures of the defense counsel, no such prosecution closing argument would have been possible. Rather than allowing the prosecutor to point out that the mitigation case was not proven by the defense, it would have been corroborated by witness after witness, buttressed by third party records.

468. Lawyers in capital cases are ineffective where they bolster the State's aggravation case or vilify their own client. *Hooks v. Workman*, 689 F.3d 1148, 1203 (10th Cir. 2012) (prejudice found where "mental health evidence presented was inadequate and quite unsympathetic; and [counsel] not only failed to rebut the prosecution's case in aggravation but actually bolstered it…"). Here, Mr. Jones' lawyers asked the most harmful question imaginable in a death penalty case:

> Q: What is a sociopath?
>
> A: A sociopath is person who acts out, commits crimes without conscious, without remorse, without guilt. Do you want me to expound on that?
>
> Q: Well, let me ask you this. In your determination is Antonio Jones a sociopath?
>
> A. So say – I would say he has sociopathic traits and trends which are understood by his background and his basic personality makeup. Yes, he has those traits.

(R. 1440.)

469. Dr. DeFrancisco did not know he would be asked these questions and he was taken by surprise. At a Rule 32 hearing he will testify that his answer was inaccurate and incomplete given the absence of information he was provided. He did not know that Mr. Jones showed a pattern of protective behavior to loved ones, including his sister and mother. Dr. DeFrancisco was unaware that Mr. Jones protected his mother from physical assault by Demetrius. He did not know that Mr. Jones tried to protect his sister in school against bullies who teased her about her hearing aids. These qualities are inconsistent with sociopathy and Dr. DeFrancisco would have answered the question in a very different manner if he had received this information. He would have testified that Mr. Jones did have healthy emotional impulses and the persons like him could have benefitted from long term therapy where they gain insights into proper behavior. Such evidence would have been valuable mitigation. Instead, the jury heard only evidence that Mr. Jones was a sociopath, evidence that vilified Mr. Jones and could only have bolstered the State's aggravation case. *Hooks*, 689 F.3d at 1203.

470. Once they blundered into this line of questioning, trial counsel was ineffective by failing to place his disorder in context. Available to them were DHR records showing numerous interventions, the report of Dr. Jacobs showing his illnesses originated as early as age six (when children are not volitional), as well heart wrenching details about how he was raised (hundreds of beatings, rat infested homes, moving 20-plus times, being hungry, being emotionally abused, etc.).

471. Had Dr. DeFrancisco been properly prepared to testify and had counsel engaged in a thorough and meaningful direct examination of this expert witness, the jury would have been presented with valuable mitigation evidence and there is a reasonable probability that the jury

would not have recommended the death penalty and Mr. Jones would not have been sentenced to death. See Strickland, 466 U.S. at 494.

472. Had counsel performed at the required standards a robust and coherent view of how Mr. Jones' developmental and emotional illnesses would have been developed to the allow the jury and judge to "reduce the ballast on the aggravating side of the scale." Porter, 130 S. Ct. at 454. The mitigation evidence was relevant "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring).

**9. The Defense Failed to Properly Prepare and Examine Edwina Culp.**

473. Defense counsel's lack of preparation was again apparent during the examination of Edwina Culp, Mr. Jones' GED teacher at the Alfred Saliba Family Services Center. Rather than eliciting and capitalizing on favorable testimony Ms. Culp could offer, trial counsel deficiently and prejudicially examined her. Indeed, counsel's eight-page-long direct examination consisted of only three pages of particularized testimony. The other five pages consisted of qualifying testimony and generalized questions. (R. 1372-80.)

474. When counsel did ask particularized questions, they either asked questions that Ms. Culp was unqualified to answer or questions that were devoid of context. For example, Ms. Culp testified that she taught Mr. Jones between 1998 and 1999 and that Mr. Jones was "kind," "meek," "not aggressive," "not a troublemaker," and quiet. (R. 1379.) Trial counsel, however, failed to appreciate the value and import of this testimony and, as a result, failed to provide context for the jury's understanding.

475. At other times, counsel asked Ms. Culp questions that she was unqualified to answer. Counsel asked her whether someone with an intelligence quotient (IQ) of eighty-one

would have difficulty retaining information. (R. 1378.) Counsel failed to point out that the IQ test of Mr. Jones that was in question had been hastily administered and that, therefore, its results were unreliable. Furthermore, Ms. Culp was unable to offer favorable testimony in response and instead equivocated because she was not qualified to answer the question. (R. 1378.) When counsel asked Ms. Culp whether Mr. Jones' classification (between the sixth and eighth grade level, at age sixteen) was common in the general population, Ms. Culp replied that she was not qualified to answer the question. (R. 1387.)

476. Further, when counsel asked Ms. Culp about Mr. Jones' disabilities, she said she thought that he had Attention Deficit Disorder (ADD). (R. 1388.) Counsel's lack of familiarity with Mr. Jones' background precluded them from recognizing the mistake and correcting Ms. Culp's testimony by introducing evidence that Mr. Jones in fact had been diagnosed with Attention Deficit Hyperactivity Disorder (ADHD). Nevertheless, Ms. Culp was allowed to conjecture on the general effect of ADD until the trial court sustained the prosecution's objection that she was unqualified to do so. (R. 1389.) On cross examination, the prosecution asked about Mr. Jones' excessive absences from school. (R. 1382.) Because trial counsel had failed to adequately investigate the issue during interviews of Mr. Jones and his family, they were unaware that the absences were due in part to Mr. Jones' mother's insistence that he not attend school while he was incapacitated by the heavy dosage of mind-altering medications that he was taking and were, as a result, unable to offer testimony rebutting any negative impact Ms. Culp's testimony might have had. Furthermore, Ms. Culp's lack of qualification to provide testimony regarding the effect of Mr. Jones' diagnosis underscored the defense's need for an expert who could actually provide that potentially mitigating evidence.

477. Had Ms. Culp been properly prepared to testify and had counsel engaged in a thorough and meaningful direct examination of this witness, the jury would have been presented with valuable mitigation evidence and there is a reasonable probability that the jury would not have recommended the death penalty. *See Strickland*, 466 U.S. at 494.

**10. Defense counsel's failures to investigate and present mitigating evidence were individually and cumulatively prejudicial.**

478. Had counsel conducted an adequate investigation, the jury would have been presented with the "'kind of troubled history [courts] have declared relevant to assessing a defendant's moral culpability.'" *Porter*, 130 S. Ct. at 454 (quoting *Wiggins*, 539 U.S. at 535). Courts have found prejudice where, as here, due to a deficient investigation, defense counsel fails to discover and present evidence of instability, poverty, physical abuse, substance abuse and exposure, and mental and cognitive issues. *See, e.g., Hardwick*, 320 F.3d at 1177; *Gamble*, 63 So. 3d at 719-20; *Rompilla*, 545 U.S. at 392 ("no indoor plumbing" and the defendant "slept in the attic with no heat"); Ferrell, 640 F.3d at 1230; Porter, 130 S. Ct. at 454; *Williams v. Taylor*, 529 U.S. at 395; *Williams v. Allen*, 542 U.S. at 1342; *Cooper*, 646 F.3d at 1355; *Sewell v. Anderson*, 663 F.3d 783, 796 (6th Cir. 2011) (prejudice found where "[i]n contrast [the presented mitigation case] family members offered first-hand, eye witness accounts of specific examples of extreme poverty and abuse").

479. Here, because of the sheer ineptitude of trial counsel's investigation and presentation of testimony, the defense presented an utterly inaccurate picture of an essentially stable home environment, something that the prosecutor jumped on in his closing:

> You heard from the testimony the Defense witnesses got up there, from his mother, his aunt, that he didn't have a bad life. That the house had been checked on by human resources. The reports were not founded in any manner or fashion. Not one time did the Defense ask any members of his family, were you using drugs. Mother, did anybody in the family use drugs. Did they drink alcohol. Did they treat him bad. Did he have a bad life." (R. 1474.)

480. What little evidence was offered in mitigation was woefully inadequate and ineffectively presented. *Foust v. Houk*, 655 F.3d 524 (6th Cir. 2011) (prejudice found where "the testimony at the mitigation hearing 'only scratched the surface of [petitioner's] horrific childhood'") (citation omitted); *Cooper*, 646 F.3d at 1353 (prejudice was found where counsel failed to adequately interview family members with knowledge of abuse and the mother's testimony "did not begin to describe the horrible abuse" described by the petitioner's brother and sister); *James v. Ryan*, 679 F.3d 780, 810 (9th Cir. 2011) (prejudice was found where "federal habeas counsel developed a detailed picture of [petitioner's] troubled childhood, his mental illness, and his downward spiral of depression and drug abuse in the year before the murder. Such a portrait, attention to [petitioner's] 'character and record,' as well as the 'possibility of compassionate or mitigating factors stemming from the diverse failures of humankind' is a 'constitutionally indispensable part of the process of inflicting the penalty of death'") (citation omitted); *Bond v. Beard*, 539 F.3d 256, 280 (3d Cir. 2008) (post-conviction testimony "painted a very different picture than that presented at the penalty hearing." The evidence showed that the defendant "endur[ed] an extremely troubled and deprived childhood." The Court noted that "Strickland permits relief where, as here, trial counsel presented some mitigation evidence but could have introduced evidence that was upgraded dramatically in quality and quantity.").

**B. Trial counsel were ineffective because they failed to retain the assistance of a forensic pathologist.**

481. Counsel were also ineffective in failing to secure the services of an independent forensic pathologist to rebut the State's expert. As noted above, a criminal defendant's right to the benefit of expert assistance is constitutionally recognized and protected. *See Ake v. Oklahoma*, 470 U.S. 68 (1985); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Gayle v. State*, 591 So. 2d

153 (Ala. Crim. App. 1991). Had counsel acquired the assistance of a forensic pathologist, there is a reasonable probability that they jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death.

482. During the guilt phase of Mr. Jones' trial, the State called Dr. Alfredo Paredes,[15] a forensic pathologist, to testify regarding his examination of the victim's bodies and the cause of death. (R. 909.) Dr. Paredes testified that the victim's injuries occurred while she was standing up. The defense sought to prove that the victim's injuries could have occurred while she was unconscious and laying down. However, without an expert of their own, members of the jury were not inclined to adopt the defense's seemingly unsupported theory over what appeared to be scientific evidence. Further, defense counsel compounded their failure to present expert testimony by bafflingly arguing during the defense's opening statement in the sentencing phase, that "[i]f a person is unconscious when their body is being mutilated, they are not aware, they don't know what's going on. *If they are aware of it, it's the worse crime and deserves more punishment*, and that's why the statute provides for that." (R. 1308.) (emphasis added). Considering that the only expert testimony was from Dr. Paredes, who testified the victim had been conscious for at least part of the beating, defense counsel effectively conceded that his client should be sentenced to death if the jury accepted Dr. Paredes' testimony. By not presenting an alternative to Dr. Paredes' testimony, the defense essentially left no alternative for the jury but to accept Dr. Paredes' testimony.

483. Had counsel hired an independent pathologist, this expert could have established that the victim's injuries could have been sustained in a different manner than that asserted by the State, including while the body was in state custody. (*See infra* Section III.C, incorporated herein by reference. ) Further, an independent pathologist could have established that a person

[15] In the record, Dr. Paredes's last name is incorrectly spelled "Parades."

of Ms. Kirkland's age and condition would likely have been rendered unconscious soon after the beating began. However, the absence of a defense forensic pathologist left unrebutted Dr. Paredes' conclusion that Ruth Kirkland sustained most of her injuries while standing, that she was conscious during most of the assault, that some of the fractures did not occur during transportation, that some of the injuries were not bruises common to old age, and that these injuries caused her death.

### C. Counsel's failure to challenge the lack of evidence of the chain of custody for the victim's body resulted in the improper admission of autopsy reports and other testimony regarding the victim's injuries.

484. During the guilt phase, Dr. Alfredo Paredes testified that the victim died from blunt force trauma, resulting from several body blows, including skull injuries and multiple rib fractures. (R. 909-78.) However, the validity of Dr. Paredes' examination, which assumed that all of Ms. Kirkland's bruises and injuries were caused by her assailant, was critically undermined by the State's failure to prove the chain of custody for the victim's body. Indeed, there is simply no evidence to establish who retrieved the body from the crime scene, how it was handled, where it was transported, how it was stored, and how it eventually arrived in Dr. Paredes' custody two days after it was taken from the crime scene. (R. 1095.)

485. Without this evidence, it is plausible that certain of the injuries or marks sustained by Ms. Kirkland's body were incurred during the transportation process. *See Ex parte Holton*, 590 So. 2d 918, 920 (Ala. 1991) (reaffirming that the State must establish a chain of custody without breaks in order to lay a sufficient predicate for admission of evidence). Defense counsel failed to object to Dr. Paredes' testimony on chain of custody grounds. Had they, the trial court would have been required to prohibit the admission of the autopsy reports and testimony

regarding the victim's alleged injuries and the jury would have concluded that Ms. Kirkland's injuries did not reflect intentional murder.

### D. Defense counsel failed to guard against prosecutorial misconduct at the penalty and sentencing phases.

486. Defense counsel's ineffectiveness at the penalty phase was not limited to their failure to investigate and present mitigation evidence. They also failed to object to several instances of prosecutorial misconduct. They abdicated their constitutional obligation to Mr. Jones and rendered the adversarial process meaningless, resulting in a death recommendation after only thirty-seven minutes of deliberation. (R. 1530.) Counsel failed to object when the prosecutor unlawfully infringed upon Mr. Jones' right against self-incrimination, misstated the law, argued facts not in evidence, relied on nonstatutory aggravating circumstances, and made inflammatory remarks. But for counsel's inaction, the jury would not have been exposed to prosecutorial misconduct – or the trial court would have given curative instructions – and there is a reasonable probability that Mr. Jones would not have been sentenced to death.

487. Defense counsel deficiently and prejudicially failed to object to the prosecutor's unlawful comments on Mr. Jones' silence. It is well settled that a "comment on the refusal to testify is a remnant of the 'inquisitorial system of criminal justice,' which the Fifth Amendment outlaws." *Griffin v. California*, 380 U.S. 609, 614 (1965) (adding, "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege of making its assertion costly."); *see also Mitchell v. United States*, 526 U.S. 314, 329 (1999) (holding that the *Griffin* "rule against negative inferences at a criminal trial apply with equal force at sentencing…. to protect a defendant from being the unwilling instrument of his or her own condemnation").

488. During his penalty phase closing, the prosecutor, speaking about Mr. Jones, asked the jury, "[d]id you watch him during the trial when they testified, when his own mother was crying? He was cold as he could be. Didn't effect [sic] him in any manner or fashion. In no way." (R. 1479.) This comment violated *Griffin* because only Mr. Jones could have rebutted the prosecutor's argument, and the prosecutor may not ask the jury to draw negative inferences from a defendant's silence. Counsel, however, failed to protect Mr. Jones' constitutional right and allowed the jury to rely on his silence as a factor in their sentencing determination. *See Arthur v. State*, 575 So. 2d 1165, 1186 (Ala. Crim. App. 1990) (noting that "comment on the defendant's failure to testify is to be scrupulously avoided"). Had counsel objected, the jury would have been precluded from drawing inferences from Mr. Jones' silence and there is a reasonable probability that they jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death.

489. Defense counsel deficiently and prejudicially failed to object to the District Attorney's misstatement of the law regarding mitigation. The District Attorney specifically referred to the mitigating circumstances at issue in the case as "excuses." He stated, "[a]nd Mr. Brantley evidently he wants to stand up here and says because [Mr. Jones] didn't have a father, didn't have a father figure, he has low intelligence. These are excuses." (R. 1497.) Later, he stated: "Used to be a sin was a sin. Now DeFrancisco says it ain't nothing but a syndrome, *an excuse*, *a justification*." (R. 1499.) The prosecutor's statement not only misstated Dr. DeFrancisco's testimony, it misstated the law.

490. Mitigating circumstances are not excuses. An excuse relieves a person of criminal guilt. *See Black's Law Dictionary* 649 (9th ed. 2009). A mitigating circumstance "does not bear on the question of a defendant's guilt" and "does not justify or excuse a wrongful act or

offense." *Id.* at 277. Instead, a mitigating circumstance weighs in favor of a lesser degree of punishment *without* excusing the crime; it is any fact or condition that provides "a basis for a sentence of life imprisonment without parole instead of death." Ala. Code § 13A-5-52. *See also Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("A process that accords no significance to relevant facets of the character and record of the individual offender or the circumstances of the particular offense excludes from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind.").

491. A capital defendant has an Eighth Amendment right to present "relevant mitigating evidence, including evidence . . . that falls short of constituting a legal excuse." *Waters v. Thomas*, 46 F.3d 1506, 1524 (11th Cir. 1995); *see also Eddings v. Oklahoma*, 455 U.S. 104, 113-16 (1982) (holding that a capital defendant has a right to present evidence that is "useful in explaining" his behavior even if it does not "excuse" that behavior).

492. Here, by equating mitigating circumstances with excuses, the District Attorney misstated the law. Yet defense counsel failed to object to that misstatement. Counsel did not have a tactical or strategic reason for their failure. Had counsel properly objected, the jury's understanding of mitigation would not have been tainted, and there is a reasonable probability that the jury would not have recommended the death penalty. *See Strickland*, 466 U.S. at 494.

493. Defense counsel deficiently and prejudicially failed to object to arguments about vulnerable victim, police officer grandson, and deterrence. Defense counsel deficiently and prejudicially failed to object to the District Attorney's argument that the jury should consider the victim's familial relationship to a police officer, focus on the age of the victim, and vote for death for the purpose of deterring others.

494. The District Attorney specifically referred to the fact that the victim's grandson was a police officer, (R. 1475), and also argued as follows:

> [Senior citizens] built this community. They invested in this community. You know who they are. You know them when you see them on the street. Whether they walk down the street and they use a cane and they are white or black and whether they cross the street, they are senior citizens. We owe them the constitution. We owe them justice and law. Take the sword of justice in this case, take this cane, and ram it right through his guilty heart and give him death and have the courage, the courage in this case to make sure they know everywhere in this community . . . . Tell people in this community the eighty-year-old women are just as important as Mr. Brantley says some eighteen-year-old is who took the law into his own hands and became judge, jury, and executioner. It's important you send a message twelve to zero in this case.

(R. 1508-09.) *See also* S. 7 (the District Attorney arguing at the judicial sentencing proceeding that the death penalty was appropriate in this case "to deter others").

495. The prosecutor's statements were meant to inflame the jury members and appeal to their emotions while simultaneously encouraging them to sentence Mr. Jones to death for reasons that are wholly immaterial and improper. Under Alabama law, a victim's age and familial relationship to a police officer are irrelevant to the sentencing determination in a capital case because they constitute non-statutory aggravation. *See Knight v. State*, 907 So. 2d 470, 483 (Ala. Crim. App. 2004) ("'A trial court may consider only those aggravating circumstances listed in § 13A-5-49 in fixing the death penalty.'") (citations omitted); Ala. Code § 13A-5-49 (identifying the aggravating circumstances). For the same reason, it is improper for a prosecutor to argue that the jury should vote for death to "send a message" to others. In addition, any argument about deterring others necessarily contemplates a non-individualized sentence and therefore violates the Eighth Amendment. *See Woodson*, 428 U.S. at 304 (holding that for sentencing purposes a capital defendant must be judged as a "uniquely individual human being").

Nevertheless, defense counsel failed to object to the District Attorney's improper arguments. They did not have a strategic reason for that failure.

496. Had counsel properly objected to the District Attorney's arguments invoking improper sentencing considerations, the jury would have limited its sentencing analysis to the statutory aggravating circumstances and the mitigating circumstances. There is a reasonable probability that if the jury had conducted a proper analysis, it would not have recommended the death penalty and Mr. Jones would not have been sentenced to death. *See Strickland*, 466 U.S. at 494.

497. Defense counsel deficiently and prejudicially failed to object to improper testimony regarding Mr. Jones having filed a lawsuit and using profanity. Defense counsel failed to object to prosecutorial misconduct in introducing non-Aggravating factors. The State relied on only two aggravating factors in seeking the death penalty; commission of a capital offense while engaging in a burglary; and committing a specially heinous, atrocious or cruel murder. (R. 1299-1300.) Under Alabama law the State is limited to the aggravating factors it can present. *See Knight*, 907 So. 2d at 483 ("'A trial court may consider only those aggravating circumstances listed in § 13A-5-49 in fixing the death penalty.'") (citations omitted).

498. After the defense rested its mitigation case, the State called Houston County Jail Administrator Lucy Williams as a rebuttal witness. Her testimony was mainly geared to rebut the poorly presented testimony by certain family members that Mr. Jones might have value in a prison environment working with other prisoners. (R. 1405-1414.) However, the State greatly exceeded the allowable scope of rebuttal evidence by presenting evidence on factors having nothing to do with right to put someone to death or the belief of family members he might help other prisoners. As evidence of Mr. Jones' bad prison behavior, the prosecutor elicited

testimony that Mr. Jones not only filed a lawsuit, but that it was a federal lawsuit. (R. 1408.) Filing lawsuits is constitutionally protected and cannot constitute a basis for consideration of the death penalty. Seeking judicial redress is a constitutionally protected right and does not constitute any evidence whatsoever relevant to the State's request to put someone to death. *Bounds v. Smith*, 430 U.S. 817, 821 (1977) ("It is now established beyond doubt that prisoners have a constitutional right of access to the courts.") By pointing out to the jury that it was a federal suit, the prosecutor made a thinly veiled reference to historical tension between the federal courts and certain regions of the country.

499. The prosecutor also elicited testimony that Mr. Jones used curse words (R. 1363, 1395) and then used this fact to suggest to the jury that Mr. Jones character as "a bully [who] likes to intimidate, do things, chooses what he wants…" (R. 1480) warranted sentencing him to death. This too is constitutionally permitted and cannot serve as the basis for a death penalty. A person's use of obscene language is protected under the first amendment and is equally irrelevant to the death penalty. *See Cohen v. California*, 403 U.S. 15, 25-26 (1971). Filing lawsuits and swearing are not recognized under Alabama law as aggravating factors. Adequate defense counsel would have objected, moved to strike any responsive answer, and sought curative instructions.

500. The presentation of improper aggravating factors is grounds for reversal. *Brownlee v. Haley*, 306 F.3d 1043 (11th Cir. 2002). While trial counsel attempted to keep out evidence that Mr. Jones had filed a lawsuit, they objected only that the evidence was irrelevant as it went to Mr. Jones' conduct. (R. 1406-1408.) Unfortunately, due to the defense's own earlier line of questioning regarding how Mr. Jones would contribute in prison, the court allowed the testimony to come in as rebuttal. (R. 1408.) At no point did trial counsel argue that this was

evidence being improperly introduced as non-statutory aggravating factors. Had counsel objected to the introduction of improper aggravating factors, there is a reasonable probability that the jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death. *Brownlee*, 306 F.3d 1076-79; *Strickland*, 466 U.S. at 494.

501. Defense counsel deficiently and prejudicially failed to object to duplicitous and cumulative testimony introduced by the State at the penalty phase. The State called Dr. Paredes at the penalty phase to provide the same testimony he provided at the guilt phase even though all the guilt-phase evidence was incorporated at the penalty phase. Indeed, at both phases, Dr. Paredes described the victim's injuries, (R. 928-78, 1310-27); explained the cause of her death, (R. 949, 1328); and suggested that she was alive and conscious during the incident, (R. 950, 1309-10).

502. Rule 403 of the Alabama Rules of Evidence prohibits evidence if its probative value is "substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence."

503. Dr. Paredes' penalty-phase testimony was cumulative and prejudicial because the State had already presented the same testimony at the guilt phase. Also, as explained above, the State failed to establish a chain of custody for the handling of the victim's body. (*See* Section III.C, incorporated herein by reference.) Without any strategic reason, counsel did not object to Dr. Paredes' penalty-phase testimony on either of those grounds.

504. Had counsel objected to Dr. Paredes' penalty-phase testimony for the reasons explained above, the State would not have been permitted to overwhelm the jury with excessive testimony about the victim's injuries. Without that excessive testimony, there is a reasonable

probability that the jury would not have recommended the death penalty and Mr. Jones would not have been sentenced to death.

505. Defense counsel deficiently and prejudicially failed to object to the District Attorney's improper argument regarding the sentences imposed in other cases. The District Attorney addressed the facts of four other capital cases when examining Dr. Paredes in an effort to demonstrate that the offense in this case was heinous, atrocious, and cruel as compared to other cases. (R. 1328-30.) Ala. Code § 13A-5-49(8) (defining the aggravating circumstance that an offense was especially heinous, atrocious, and cruel). However, the District Attorney then took the additional step of informing the jurors in his closing argument that the defendants in those cases received the death penalty. He stated:

> You remember I asked before Dr. Parades? I asked about Artez Hammonds with Marilyn Mitchell. I asked about Ms. Keel. I asked about Beckworth and Walker who killed Bessie Thweatt. I asked about Ella Foy Riley who was killed in Abbeville. And Dr. Parades took all those four capital murder cases that I prosecuted, each and every one of them, and they got death, that this was the worse [sic] case that he had ever seen for a human being that had beat to death and suffered in this manner or fashion.

(R. 1497.)

506. Alabama law and the Eighth Amendment prohibit consideration of the sentences imposed in other cases in a capital sentencing proceeding. As the Alabama Court of Criminal Appeals explained in *Coulter v. State*, 438 So. 2d 336 (Ala. Crim. App. 1982):

> In the sentencing phase of the trial, the fact that [another defendant] did not receive the death penalty is no more relevant as a mitigating factor for the defendant than the fact that [another defendant] did receive the death penalty would be as an aggravating circumstance against him. Simply put, [another defendant's] sentence has no bearing on the defendant's character or record and it is not a circumstance of the offense.

*Id*. at 345, *aff'd*, 438 So. 2d 352 (Ala. 1983)*; see Ex parte Tomlin*, 909 So. 2d 283, 287 (Ala. 2003) (same principle); see also *Woodson*, 428 U.S. at 304 (holding that for sentencing purposes a capital defendant must be judged as a "uniquely individual human being").

507. Here, the District Attorney violated the law by informing the jury of the sentences imposed in other cases. The District Attorney's argument was that the jury should recommend the death penalty for Mr. Jones because other defendants who committed similar or worse crimes received the death penalty. That argument was improper. Nevertheless, Mr. Jones' counsel failed to object to it. In fact, they compounded the improper testimony by essentially agreeing with it in the defense's opening statement to the penalty phase when Mr. Parker paraphrased Dr. Paredes' view of the case by stating that "[t]his may very well be the worse one [beating] that he's [Dr. Paredes] seen. *And I would imagine so*." (R. 1304.) (emphasis added).

508. Their failure to object was not a strategic matter. They simply misunderstood the applicable law. *See Kimmelman v. Morrison*, 477 U.S. 365, 385-87 (1986) (holding that an attorney performed deficiently where he failed to file a motion because he did not understand the applicable law).

509. Had counsel objected to the District Attorney's argument, the trial court would have ensured that the jury did not consider the sentences imposed in other cases and did not vote for a death sentence in an effort to be consistent with other cases. Therefore, there is a reasonable probability that, but for counsel's failure to object to the District Attorney's improper argument, the jury would not have recommended the death penalty and Mr. Jones would not have been sentenced to death. *See Strickland*, 466 U.S. at 494.

**E. The defense failed to request appropriate jury instructions.**

510. Related to counsel's failure to investigate and present powerful evidence was their very serious failure to request appropriate mitigation jury instructions. Only three mitigation

factors were presented to the jury for deliberation at the request of the defense. These were: hyperactivity or hyperkinesia; growing up without the benefit of a father or father figure; growing up in a home periodically requiring assistance of the Department of Human Resources. (C. 275-84.) All of this was unpersuasive because counsel never developed the evidence that might support the jury finding facts supporting these mitigation findings. This prejudice was established by the prosecutor's own words, who effectively argued that there was no evidence Mr. Jones had a tragic upbringing. (R. 1473-74).

511. Had defense counsel presented the readily discoverable and available evidence, the jurors would have been given a lengthy set of ***additional*** jury instructions which it could have used to find that the mitigating factors outweighed the aggravating factors. These would have included: having been beaten by virtually every adult member of his family since age five – literally hundreds of times; chronic use of drugs; drug usage encouraged by adult family members; being enlisted to help his step father in his illegal drug dealing occupation; extremely low end intellectual functioning; extreme poverty and an upbringing that can only be described as tragic.

512. The failure to tender appropriate jury instructions was as serious an error as could occur. Once the jury found the existence of an aggravating factor beyond a reasonable doubt, it was required to weigh the aggravating factors against the mitigating factors. They were not given the most persuasive factors on which the jury could have deliberated, nor did they competently prove those that were given. As in *Wiggins*, the proper balancing of the scales between aggravating and mitigating factors did not occur.

**F. Counsel failed to argue that the death penalty is unconstitutional in this case because Mr. Jones was barely past 18 years of age and suffers from mental illness and low intelligence.**

513. Counsel was deficient in failing to argue to the trial court that the death penalty is unconstitutional for Mr. Jones who was 18 years old at the time of the crime and suffers from severely diminished mental capacity.

514. The same social science data that prompted the United States Supreme Court to declare the death penalty unconstitutional for those younger than 18 applies with equal force to those just over age 18, as Mr. Jones was at the time of this crime. *See Roper v. Simmons*, 543 U.S. 551, 569 (2005). That is especially true when a teenager has mental health issues, including untreated ADHD and serious learning impairments, as was the case here. (C. 315-17, R. 1429-43.) The lack of maturity and an "underdeveloped sense of responsibility," in such individuals results in "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569.

515. Recognizing that teenagers engage in reckless behavior, the State of Alabama has chosen to make the age of majority in the State nineteen, see Ala. Code 5 26-1-1 (1975), the minimum age for jury service nineteen, *see* Ala. Code § 12-16-60(a)(1) (1975), and prohibits the purchase of alcohol to any individual under the age of twenty-one. *See* Ala. Code § 28-1-5 (1975).

516. Where Mr. Jones is within months of being conclusively determined to be ineligible for the death penalty due to his youth and immaturity, his diminished mental capacity surely renders him ineligible for the death penalty. Due to the ineffectiveness of his counsel only a small portion of the available evidence about Mr. Jones mental deficiencies was introduced. Nevertheless, there was uncontroverted evidence in the record that he spent much of his childhood in special education classes, struggled academically, and only attended school until the eleventh grade. (C. 299-305, R. 1356-57, 1428-36.) Evidence also established that he has an IQ

of 81 and is functioning at the fifth or sixth grade level. (R. 1430, C. 302.) Counsel should have argued on appeal that this evidence placed the 18-year-old Mr. Jones within the class of offenders encompassed by the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Had such an argument been made, it is likely the court would have reversed the death sentence in this case.

517. The combination of Mr. Jones' age at the time of the offense and his level of intellectual functioning place him on the borderline of eligibility for the death penalty with respect to each category. The combination of the two renders him ineligible. *See, e.g., Brownlee*, 306 F.3d at 1052, 1070-75 (concluding that relief is warranted for those whose characteristics border "right on the edge" of death penalty ineligibility because they "suffer[] some of the same limitations of reasoning, understanding, and impulse control" as those that fall within the class.").

518. Mr. Jones' "diminished capacity[y] 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," places him squarely within the class of offenders the Supreme Court has concluded are exempt from sentences of death. *Atkins*, 536 U.S. at 318.

519. For these reasons, the imposition of a death sentence in this case is both inappropriate and a violation of Mr. Jones' rights to due process and to be free from cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, corresponding portions of the Alabama Constitution, and Alabama law. Had counsel argued this to the trial court, there is a reasonable probability Mr. Jones would not have been sentenced to death.

520. Trial counsel was also ineffective by failing to argue this combination of mitigating factors to the jury. *See* Ala Code Section 13A-5-52 (in the penalty phase, defendants are permitted to offer "any aspect of a defendant's character or record and any of the circumstances of the offense … and any other relevant mitigating circumstance…"); *Gamble*, 63 So. 3d at 713 (counsel are required to "formulate an accurate life portrait of [the] defendant"). The failure to present mitigating evidence regarding a defendant's cognitive abilities has been found to be prejudicial. *Porter*, 130 S. Ct. at 454. Had counsel argued to the jury in the penalty phase that Mr. Jones should not be sentenced to death because the combination of Mr. Jones' age at the time of the offense and his level of intellectual functioning place him on the borderline of eligibility for the death penalty with respect to each category, there is a reasonable probability that they jury would not have recommended the death penalty and that Mr. Jones would not have been sentenced to death. *See Strickland*, 466 U.S. at 494.

## IV. The State withheld favorable and material evidence from the defense, while knowingly introducing false evidence to obtain a death sentence, in violation of federal and state law.

521. The State withheld evidence that was favorable and material to Mr. Jones despite counsel's requests. (C. 81-83, 121-23, 124-32.) *See Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Giglio v. United States*, 405 U.S. 150 (1972). Further, the prosecutor knowingly and falsely denied that there was drug use in Mr. Jones' childhood home. *See Napue v. Illinois*, 360 U.S. 264, 270 (1959); *Ex parte Womack*, 541 So. 2d 47, 59 (Ala. 1988). The State's conduct in this regard violated Mr. Jones' rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution, the Alabama Constitution, and Alabama law. These violations require that Mr. Jones' conviction and death sentence be vacated and he be granted a new trial because the constitutions of the United States and the State of Alabama require it, Ala. R. Crim.

P. 32.1(a), and because these violations present newly discovered material facts that were not known to Mr. Jones or his counsel at trial. Ala. R. Crim. P. 32.1(e).

### A. The State violated *Brady v. Maryland* and *Napue v. Illinois* by relying on false testimony about drug use in Mr. Jones' childhood home.

522. Mr. Jones' conviction was unconstitutional and must be reversed because District Attorney Valeska misled the jury about crucial mitigating evidence during the penalty phase. Mr. Jones' mother, Jill Whitsett, testified at the sentencing phase, and told the jury that she did not use illicit drugs or abuse alcohol. (R. 1347.) In reality, Ms. Whitsett had not only used illegal drugs herself, she had purchased and given illicit drugs to her own children, including Mr. Jones, for their use. In fact, the head of Mr. Jones' household, his stepfather, Demetrius Whitsett, was a long-time drug dealer who was well known to and had been convicted of drug offenses by Mr. Valeska's office.

523. When the defense's forensic psychologist, Dr. Robert DeFrancisco, contradicted Ms. Whitsett's testimony about drug use, (R. 1436, 1442), Mr. Valeska not only repeated Ms. Whitsett's statement that she did not use drugs or alcohol, (R. 1445–46), but used this disputed evidence that he knew to be false in his closing argument:

> The man [Dr. DeFrancisco] said in the report that society had wrong [Mr. Jones]. Society had wronged him. That he had had a tough life. *You heard from the testimony the Defense witnesses got up there, from his mother, his aunt, that he didn't have a bad life.* That the house had been checked on by human resources. *The reports were not founded in any manner or fashion.* Not one time did the Defense ask any members of his family, were you using drugs. Mother, did anybody in the family use drugs. Did they drink alcohol. Did they treat him bad. Did he have a bad life.

(R. 1473–74, emphasis added.)

> Were you sitting in the courtroom watching his mother when those things were coming out [in Dr. DeFrancisco's testimony] about

> how horrible a mother she was, how she reacted over there? She got up and left the courtroom. *She wasn't a bad mother.*

(R. 1479–80; emphasis added.)

524. These statements were objectively false, and Mr. Valeska, the District Attorney, knew that they were false. Only a few years before Mr. Jones was arrested, the Houston County District Attorney's Office had prosecuted Demetrius Whitsett for the sale of controlled substance after he was arrested at the home Jill and Demetrius Whitsett shared with Jill's son, Mr. Jones. (*See* Exhibit MR Complaint dated May 9, 1997, Warrant No. WR 97 005513; Indictment by Grand Jury, Case No. CC-97-1231). Additionally, at the time of Mr. Jones' prosecution, Demetrius Whitsett was under federal indictment for trafficking crack cocaine.

525. As a result, the State had ample information to corroborate Dr. DeFrancisco's testimony regarding drug use in the family home and the type of environment in which Mr. Jones was raised. It was not a good life. For Mr. Valeska to represent otherwise to the jury was a direct violation of Mr. Jones' Fourteenth Amendment right to due process.

526. Due process is violated when a prosecutor suppresses evidence favorable to the accused that is material to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 88 (1963). Due process is also violated when the prosecution knowingly uses false evidence, including false testimony, *Napue v. Illinois*, 360 U.S. 264, 269-70 (1959) ("a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction"); *Ex parte Womack*, 541 So. 2d 47, 59 (Ala. 1988), A due process violation also occurs when the prosecutor is silent in the face of testimony that he knows to be false. *Alcorta v. Texas*, 355 U.S. 28, 31 (1958). Where information is clearly favorable to the accused, the prosecutor must disclose it even if the defense does not request it. *U.S. v. Agurs*, 427 U.S. 97, 107 (1976). All knowledge held by a

prosecutor's office is imputed to the prosecutor himself, and is sufficient to trigger the duty to disclose. *Giglio v. U.S.*, 405 U.S. 150, 154 (1972).

527. Evidence is "material" for *Brady* purposes if "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995). Materiality is not limited to substantive issues; evidence that affects a witness' credibility is also material for *Brady* purposes. *U.S. v. Bagley*, 473 U.S. 667, 677 (1985); *Giglio*, 405 U.S. at 154.

528. The evidence about the pervasiveness of unlawful activity in Mr. Jones' childhood home was clearly material to the issue of his punishment. Mr. Valeska had knowledge of the history of drugs in Mr. Jones' childhood home when he allowed Ms. Whitsett's false testimony to pass without challenge, and then adopted the false testimony in his effort to have the death penalty imposed. In January 1997 – when Mr. Jones was 15 – Mr. Whitsett was arrested for selling marijuana to an undercover police officer, a Class B felony for which he was eventually sentenced to 12 years in prison. The arrest occurred at the home Mr. Whitsett shared with Mr. Jones, his mother, and his siblings. (*See* Exhibit R, Complaint dated May 9, 1997, Warrant No. WR 97 005513; Indictment by Grand Jury, Case No. CC-97-1231). He was prosecuted by the Houston County District Attorney's Office, where Mr. Valeska himself served as District Attorney. (Exhibit R, Case Action Summary, Case No. CC-97-1231). That arrest of Mr. Jones' stepfather for dealing drugs out of his house occurred when Mr. Jones was fifteen years old, just three years before Mr. Jones' arrest in this case.

529. Furthermore, in the course of prosecuting Mr. Whitsett, Mr. Valeska's office surely became aware of his extensive criminal history, including a 1990 conviction in Florida for possession of a controlled substance (Exhibit O, Court Order Report of Disposition, Case No.

90-2618), a 1992 Florida conviction for delivery of cocaine to a person under 18 and resisting arrest (Exhibit P, Judgment dated July 24, 1992, Case No. 92-627), and a 1993 Florida conviction for possession of crack cocaine with intent to distribute (Exhibit Q, Judgment dated April 20, 1994, Case No. 93-1827.) This history, all of which was known to Mr. Valeska, makes clear that, contrary to the prosecution's closing argument, Mr. Jones was raised in a household dominated by illegal drugs.

530. The evidence of illegal drug use in Mr. Jones' childhood home and illegal drug sales by family members would have cast the sentencing in such a different light that there is a reasonable probability that, had Mr. Valeska not suppressed and actively denied that evidence, Mr. Jones would not have been sentenced to death. The substantive value of this evidence was significant, as the influence of drugs in the home colored much of Mr. Jones' childhood experience.

531. Furthermore, Mr. Valeska used his false denial of drug use in the home to wrongly attack the credibility of Dr. DeFrancisco, the defense's sole expert witness regarding sentencing. (R. 1479–80). Mr. Valeska's suppression of this information, and his use of it to send Mr. Jones to his death by negating a mitigating factor and discrediting the defense's expert witness, violate due process and require reversal. *Kyles*, 514 U.S. at 435.

532. To the extent that the defense could or should have raised the issue of Mr. Whitsett's drug convictions, this is yet another instance of the ineffective assistance of counsel that tainted Mr. Jones' trial and sentencing. Mr. Parker and Mr. Brantley's failure to directly challenge Ms. Whitsett's and Mr. Valeska's false statements, whether caused by mere inattention or by a failure to make an adequate investigation into their client's background, cannot have been

a tactical decision, and prejudiced Mr. Jones by allowing Mr. Valeska to falsely negate a mitigating factor while also wrongly discrediting the defense's expert witness.

533. Mr. Jones' conviction and sentence must be vacated in light of this constitutional violation, as required by the constitutions of the United States and the State of Alabama. Ala. R. Crim. P. 32.1(a). Furthermore, Alabama Rule of Criminal Procedure 32.1(e) requires that Mr. Jones' sentence be vacated because: these newly discovered material facts about the state's use of false testimony were not known to Mr. Jones or his counsel at trial; these new facts are not cumulative to known facts; these facts do not amount to mere impeachment evidence; and Mr. Jones would probably not have been sentenced to death had the proper facts been before the court. Ala. R. Crim. P. 32.1(e).

**B. The State violated *Brady* by withholding evidence surrounding Mr. Jones' custodial interrogation.**

534. Mr. Jones' conviction was unconstitutional in violation of *Brady* because the State suppressed evidence of police interrogation before Jones was alleged to have waived his *Miranda* rights. This evidence, had it been made available to the defense, would have rendered Mr. Jones' eventual statement to police inadmissible as fruit of the earlier statements, and thus presented a reasonable probability of acquittal.

535. Mr. Jones was arrested around 9 p.m. on December 31, 1999. (R. 809). His clothes were removed at the police station around 10:11 p.m. (*Id*. at 523, 537). Officers Jon Beeson and Frank Meredith testified at trial that the police obtained the first *Miranda* "waiver" – though it was unsigned – from Mr. Jones at 1:35 a.m. on January 1, 2000 (*Id*. at 285, 809). Officer Beeson testified that "the original waiver" was obtained "at one-thirty-five [] when we did the driving around." (*Id*. at 1160). The police interrogated Mr. Jones between 9 p.m. and

1:35 a.m. before they began "driving around." They received material information that led to subsequent searches and that officers used during later interrogations.

536. The prosecution did not provide any report of a police interrogation between 9 p.m. and 1:35 a.m., nor did the prosecution provide a complete account explaining this time gap. LaKeisha Jones, who was also in custody at that time, saw her brother's head smashed against a door during that period. No report of that incident was disclosed. Because any statement obtained before 1:35 a.m. would have violated the requirements of *Miranda v. Arizona*, 384 U.S. 436 (1966), the subsequent statements, which were fruits of the first, would have been similarly suppressed.

537. Mr. Jones' conviction and sentence must be vacated in light of this constitutional violation, as required by the constitutions of the United States and the State of Alabama. Ala. R. Crim. P. 32.1(a). Furthermore, Alabama Rule of Criminal Procedure 32.1(e) requires that Mr. Jones' conviction be vacated because: the state's suppression of evidence was not known to Mr. Jones or his counsel at trial; the newly discovered facts are not cumulative to known facts; these facts do not amount to mere impeachment evidence; and these facts establish that Mr. Jones is innocent. Ala. R. Crim. P. 32.1(e).

### C. The State violated *Brady* by suppressing evidence of other suspects investigated by police.

538. Mr. Jones' conviction was unconstitutional in violation of *Brady* because the State suppressed evidence of several other people who police investigated in connection with the offense. But the State did not provide the defense with any information – such as audio or video tape recordings, transcripts, or police reports – about all other suspects' statements. In fact, the prosecutor claimed during a pretrial hearing that he need not provide the defense with information about any state witnesses who were unlikely to testify. (M. 13-4). This self-

imposed standard has no bases in Alabama's Rules of Evidence, and does not comport with the *Brady* disclosure requirements. The evidence was discoverable because it would have corroborated Mr. Jones' version of events, thereby exculpating Mr. Jones and creating a reasonable probability of acquittal.

539. Mr. Jones' conviction and sentence must be vacated in light of this constitutional violation, as required by the constitutions of the United States and the State of Alabama. Ala. R. Crim. P. 32.1(a). Furthermore, Alabama Rule of Criminal Procedure 32.1(e) requires that Mr. Jones' conviction be vacated because: the state's suppression of evidence was not known to Mr. Jones or his counsel at trial; the newly discovered facts are not cumulative to known facts; these facts do not amount to mere impeachment evidence; and these facts establish that Mr. Jones is innocent. Ala. R. Crim. P. 32.1(e).

**D. The State violated *Brady* by suppressing evidence of radio calls documenting when police first entered the crime scene.**

540. Mr. Jones' conviction was unconstitutional in violation of *Brady* because the state suppressed evidence of radio calls made by and to Officer Brent Parrish, the victim's grandson, who was the first police officer at the scene. Mr. Parrish was on duty with Officer Doug McGill when he received a call from his mother, asking him to check on his grandmother. (R. 425–26). Mr. Parrish testified that when he arrived, he saw her door ajar and immediately called for assistance over his police radio. (*Id*. at 340, 441).

541. Radio calls are routinely recorded, but the state did not provide the defense with either the recording or a transcript of Mr. Parrish's call for assistance. This information as material to: (1) impeach Officer Parrish's testimony that he did not enter his grandmother's house despite the impulse to discover whether she was in danger and he could render help; (2) impeach Officer McGill's testimony that the two officers waited for backup before entering the

house and, contrary to police training and procedure, did not enter the house to determine whether someone inside needed police or medical attention; and (3) establish the timeline of the police investigation – an especially important task in light of the difficulty several state's witnesses had recalling that night's events at trial.

542. Mr. Jones' conviction and sentence must be vacated in light of this constitutional violation, as required by the constitutions of the United States and the State of Alabama. Ala. R. Crim. P. 32.1(a). Furthermore, Alabama Rule of Criminal Procedure 32.1(e) requires that Mr. Jones' conviction be vacated because: the state's suppression of evidence was not known to Mr. Jones or his counsel at trial; the newly discovered facts are not cumulative to known facts; these facts do not amount to mere impeachment evidence; and these facts establish that Mr. Jones is innocent. Ala. R. Crim. P. 32.1(e).

**E. The State violated *Brady* by suppressing evidence of unidentified fingerprints at the crime scene and on the murder weapons.**

543. Mr. Jones' conviction was unconstitutional in violation of *Brady* because the state suppressed evidence of unmatched fingerprints that were found on the cane and chair leg that were purportedly used in the assault. The State called Shannon Fitzgerald, a latent print examiner, during its rebuttal, to testify as to fingerprints found at the scene. (*Id*. at 1169.) Mr. Fitzgerald testified that he could not find any known match to the fingerprints he found. (*Id*. at 1174–76).

544. The State, however, did not disclose to the defense any evidence about whether the prints matched Ms. Kirkland, Robert Carroll, or any of the officers that responded to the scene. The presence of Ms. Kirkland's or any other person's prints on the cane or chair leg would have seriously undermined the state's theory that Mr. Jones was an assailant. This evidence, if disclosed, may have shown that the responding officers carelessly entered the scene

of the murder of Officer Parrish's grandmother, and may have contaminated the scene in the process. Mr. Jones' conviction and sentence must be vacated in light of this constitutional violation, as required by the constitutions of the United States and the State of Alabama. Ala. R. Crim. P. 32.1(a). Furthermore, Alabama Rule of Criminal Procedure 32.1(e) requires that Mr. Jones' conviction be vacated because: the state's suppression of evidence was not known to Mr. Jones or his counsel at trial; the newly discovered facts are not cumulative to known facts; these facts do not amount to mere impeachment evidence; and these facts establish that Mr. Jones is innocent. Ala. R. Crim. P. 32.1(e).

**F. The State violated *Brady* by suppressing evidence of police interviews of restaurant employees who could rebut evidence of blood on Mr. Jones' clothing.**

545. Mr. Jones' conviction was unconstitutional in violation of *Brady* because the state suppressed evidence of police interviews of employees of a McDonald's restaurant that Mr. Jones had visited shortly before his arrest. Officer Andy Hughes testified that, when he arrested Mr. Jones, he noticed blood spots on his sweatpants and sneakers. (*Id*. at 507–28). However, Mr. Jones' sister, LaKeisha Jones, who was in the car when he was arrested, testified that she saw no blood. (*Id*. at 558). The police department's interviews with McDonald's employees could have corroborated Ms. Jones' testimony that there was no blood on Mr. Jones' clothing, as well as corroborating the timeline of events. None of this evidence was ever made available to Mr. Jones, however. The State's suppression of this evidence was in clear violation of Mr. Jones' *Brady* right to disclosure of favorable evidence.

546. Mr. Jones' conviction and sentence must be vacated in light of this constitutional violation, as required by the constitutions of the United States and the State of Alabama. Ala. R. Crim. P. 32.1(a). Furthermore, Alabama Rule of Criminal Procedure 32.1(e) requires that Mr. Jones' conviction be vacated because: the state's suppression of evidence was not known to Mr.

Jones or his counsel at trial; the newly discovered facts are not cumulative to known facts; these facts do not amount to mere impeachment evidence; and these facts establish that Mr. Jones is innocent. Ala. R. Crim. P. 32.1(e).

**V. Mr. Jones was denied effective assistance of counsel on appeal.**

547. Mr. Parker and Mr. Brantley were also ineffective in handling Mr. Jones' direct appeal. It is well established that "a criminal defendant has a constitutional right to counsel during the first appeal as of right." *Williams v. Turpin*, 87 F.3d 1204, 1209 (11th Cir. 1996) (citing *Evitts v. Lucey*, 469 U.S. 387, 398 (1985); *Douglas v. People*, 372 U.S. 353, 356-57 (1963)). "The standards for determining whether appellate counsel was ineffective are the same as those for determining whether trial counsel was ineffective." *Powers v. State*, 38 So. 3d 764, 769 (Ala. Crim. App. 2009).

548. As discussed in Section I, incorporated herein by reference, Mr. Parker and Mr. Brantley suffered from a conflict of interest during the appeal as a result of Mr. Parker's prosecution by Mr. Valeska, the same prosecutor that prosecuted Mr. Jones. That conflict of interest precluded them from fully challenging the State's case on appeal, including the omission of numerous instances of prosecutorial misconduct.

549. Further, Mr. Parker and Mr. Brantley were extraordinarily inattentive to the appeal of Mr. Jones' capital murder conviction and death sentence. As further discussed in Section I, through the summer and fall of 2004, Mr. Parker and Mr. Brantley sought multiple extensions to file Mr. Jones' appellate brief due, among other things, to the pending trial date in Mr. Parker's DUI case. Even then, they missed the deadline for filing Mr. Jones' appellate brief. It was only after the appellate court reminded them that the brief was due that they filed Mr. Jones' brief. (*See* Exhibit A, Correspondence with Court of Criminal Appeals.)

550. The brief Mr. Parker and Mr. Brantley filed was wholly deficient, and raised only three issues on appeal, including an entirely fallacious argument based on Mr. Parker's misunderstanding of the elements of burglary. (Exhibit D, 3/11/05 Brief of the Appellant.)

### A. Mr. Jones' counsel failed to raise numerous meritorious issues on direct appeal.

#### 1. Counsel failed to raise the trial court's denial of Mr. Jones' *Batson* motion as an issue on appeal.

551. Counsel were deficient on appeal in failing to raise the trial court's erroneous denial of Mr. Jones' *Batson* motion. As discussed in Section II.D.3, which is incorporated herein by reference, the prosecutor committed a *Batson* violation but the trial court denied Mr. Jones' motion. Had counsel raised this issue on appeal, the Court of Criminal Appeals would have reversed Mr. Jones' conviction. *See Eagle v. Linahan*, 279 F.3d 926 (11th Cir. 2001) (appellate counsel ineffective for failing to raise preserved, meritorious *Batson* claim on direct appeal).

552. During jury selection, the prosecutor used his peremptory strikes in a racially discriminatory manner. The prosecutor's misconduct is supported by the presence of many factors the Alabama Supreme Court recognized in *Ex parte* Branch, 526 at 622-24.

#### a. The prosecutor's pattern of strikes reveals racial discrimination.

553. The prosecutor excluded 75% of the qualified prospective African-American jurors. (R. 224-30.) *See Cochran v. Herring*, 43 F.3d 1404, 1410 (11th Cir. 1995) (finding Batson violation where prosecutor removed 78% of black prospective jurors).

#### b. The prosecutor's office has a history of engaging in racially discriminatory jury selection.

554. This prosecutor's office has been reversed at least six times for *Batson* violations. *See McCray v. State*, 738 So. 2d 911, 914 (Ala. Crim. App. 1998) (Houston county prosecutor's "admission that race was the motivating and deciding factor in the state's removal of at least one

prospective black juror from the venire" required reversal); *Morris v. City of Dothan*, 659 So. 2d 979 (Ala. Crim. App. 1994); *Ashley v. State*, 651 So. 2d 1096 (Ala. Crim. App. 1994) (prosecutor had not refuted prima facie case of discrimination); *Andrews v. State*, 624 So. 2d 1095 (Ala. Crim. App. 1993) (reason for challenged strike not sufficiently race neutral where no voir dire on matter); *Williams v. State*, 620 So. 2d 82 (Ala. Crim. App. 1992) (same); *Rogers v. State*, 593 So. 2d 141, 141-42 (Ala. Crim. App. 1991) (reversing on *Batson* grounds where District Attorney's Office struck all African-Americans from jury venire).

**c. The prosecutor's manner of questioning during voir dire was desultory.**

555. The prosecutor engaged in nothing more than desultory voir dire, with very little follow up to his general questions. (R. 55-121.) Identified jurors were not asked to provide answers to specific questions. The State, however, cannot immunize itself from a *Batson* analysis by asking general questions and then speculating as to what more specific questions would have elicited. *Batson*, 476 U.S. at 97; *Ex parte Branch*, 526 So. 2d 609, 623 (Ala. 1987).

**d. The prosecutor's proffered reasons establish his race-based disparate treatment.**

556. The prosecutor's disparate treatment is further revealed by the fact that prosecutor's proffered reasons for striking black jurors were equally applicable to white jurors that the prosecutor did not strike. *See Yancey v. State*, 813 So. 2d 1 (Ala. Crim. App. 2001) (reversing, in part, because District Attorney's proffered reasons for striking revealed disparate treatment); *Madison v. State*, 545 So. 2d 94 (Ala. Crim. App. 1987) (reversing where prosecutor's reasons for striking black jurors were not applied equally to white jurors). For example, when asked to state his reasons for striking Ms. Sewell, a black juror, the prosecutor asserted that he struck Ms. Sewell because she had "a tie to Mr. Brantley [defense counsel] that he had represented her in the past." (R. 232-33.) Yet, the prosecutor did not strike either Mr.

Sanders or Mr. Watson, both white jurors, who also had ties to defense counsel. (R. 74-75.) The fact that Ms. Sewell was struck by the State was especially surprising given that her only other response during jury questioning recounted the burglary of her home. (R. 156-57.) Similarly, although the prosecutor purportedly struck Mr. Peterson, in part, because he knew one of the experts that had worked with Mr. Jones, (R. 235), the prosecutor did not strike white jurors who knew experts that had worked with Mr. Jones, (R. 79-81).

**e. The prosecutor's engaged in disparate examination.**

557. Alabama and federal courts have routinely recognized that disparate questioning evidences the State's attempt to strike black jurors. *See Miller-El v. Dretke*, 545 U.S. 231, 255 (2005); *Branch*, 526 So. 2d at 624. Here, the prosecutor directly questioned jurors who had not volunteered responses, singling out jurors who were African-American. (R. 65-67.) Neither black juror who was singled out sat on Mr. Jones' jury. (R. 222.)

558. Additionally, counsel improperly permitted the prosecution to isolate and single out African-American venire members. During general voir dire, the prosecutor, Mr. Valeska asked very few questions directed at individual venire members. However, when he did address specific individuals, he focused primarily, upon African-Americans. (See e.g. R. 60-67, 106.)

559. In particular, the prosecutor probed six of the twelve African-American venire members. Mr. Valeksa's direct questioning of white venire members occurred at a far lower rate than the fifty percent ratio of African-Americans. This practice of alienating particular jurors is highly impermissible. Defense counsel's silence allowed the prosecution to goad particular jurors into offering responses that he could later use as purported race-neutral reasons for striking African-American venire members.

**f. The prosecutor removed the majority of eligible black potential jurors.**

560. The prosecutor removed six of the eight black jurors left after strikes for cause. (R. 224-30.) Thus, the prosecutor successfully precluded 75% of the eligible black jurors from sitting on Mr. Jones' jury.

**g. The prosecutor's reasons for striking the six black potential jurors were pretextual.**

561. The prosecutor's proffered reasons for striking the six black venire members were pretextual. *Miller-El*, 545 U.S. at 248-49, 65; *Batson*, 476 U.S. at 97-98; *Branch*, 526 So. 2d at 624. Here, the prosecutor failed "to engage in any meaningful voir dire examination" with black jurors on the subjects about which he claimed concern. *Ex parte Travis*, 776 So. 2d 874, 881 (Ala. 2000). That failure constitutes "evidence suggesting that the explanation is a sham and a pretext for discrimination." *Id*. As discussed below, the prosecutor's illogical and baseless reasons for striking back jurors cannot support a finding that his strikes were race neutral.

*(i) Juror Wright*

562. Despite the fact that Juror Wright had himself been the victim of a robbery, the prosecutor struck this African-American potential juror.[16] (R. 156, 235-37.) When asked about his victimization, Mr. Wright explained that within the past five years someone broke into his home and stole all of his VCRs. (R. 156.) The prosecutor claimed that Mr. Wright laughed as he recounted his own robbery. (R. 235-37.) As its basis for striking Mr. Wright, the prosecutor asserted that Mr. Wright's alleged laughter regarding his own victimization indicated that he could not take this case seriously. (R. 235-37.) Yet, the record makes clear that Mr. Wright took his victimization seriously enough to report the incident to police. (R. 156.) Consequently, the more natural and logical explanation for his alleged laughter was its expression serving as a

[16] The State also struck Juror Sewell, a black juror, who was a burglary victim. (R. 156-57.)

manifestation of his frustration with his assailants never having been caught. (R. 156.) Regardless, the State had no way of knowing the motive behind Mr. Wright's laughter because it failed to question him on the subject. *See Ex parte Travis*, 776 So. 2d at 881 (prosecutor failed "to engage in any meaningful voir dire examination" with potential juror on subjects about which prosecutor claimed concern).

*(ii) Juror McGriff*

563. Similarly illogical is the prosecutor's explanation for striking Juror McGriff. The prosecutor asserted that he struck Ms. McGriff because she had a nephew[17] who worked as a corrections officer at the jail where Mr. Jones was housed. (R. 231.) The State asserted that her nephew probably had contact with Mr. Jones and it was leery of this connection because Mr. Jones was likely to put on jailers to testify to his demeanor.

564. This proffered reason was pretextual. First, the prosecutor failed to ask any questions to explore Ms.' McGriff's connection with Mr. Jones. The State never explored her relationship with her nephew, her knowledge of his work, or, specifically, his contact with. Mr. Jones.[18] Second, the prosecutor's proffered reason is belied by the fact that if Ms. McGriff had any bias as a result of her nephew's law enforcement work, it would almost certainly be bias in *favor of the State*, not Mr. Jones.

*(iii) Juror Peterson*

565. Aside from the questions that resulted in the disparate striking of Juror Peterson, *see supra,* the prosecutor also asserted that he was striking Juror Peterson because his brother

[17] The State's inability to properly identify the family member also reveals the transparency of its purported reasons. The State referred to the family member as either Ms. McGriff's brother or husband. (R. 231.) The family member was, in fact, Ms. McGriff's nephew. (R. 132.)

[18] The prosecutor also asserted, as his basis for striking Ms. McGriff, that its records indicated that she failed to acknowledge that she operated a vehicle without a license. (R. 230-31.) Again, the prosecutor failed to explore its alleged area of concern. As a result, Ms. McGriff was denied the opportunity to explain why she did not answer the question.

sought mental help and he was sympathetic to those with mental health problems. (R. 233.) Yet, the record clearly shows that Juror Peterson never stated that he was sympathetic. While justifying this strike, the prosecutor argued that he would have struck Juror Moulton, a white juror, who also had a family member with mental health problems, had she not been struck for cause. (R. 234.) However, that explanation is unsatisfactory because unlike Juror Peterson, Juror Moulton expressly informed the prosecutor , "And *I do have sympathy* for people that have mental health problems." (R. 200) (emphasis added). By failing to ask any follow-up questions of Juror Peterson, the State never learned the nature of Juror Peterson's brother's mental status or how it impacted this potential juror's life and feelings. The prosecutor cannot insert words into the mouths of potential jurors in order to justify his strikes, especially where the prosecutor failed to engage in more probing questioning.

*(iv) Juror Moore*

566. Similarly, the prosecutor's general questioning cannot justify his strike of Juror Moore. The prosecutor allegedly struck Juror Moore because he *may* have been kin to Erica Jones, who visited Mr. Jones in prison. (R. 232.) The latter piece of information (that Erica Jones was visiting Mr. Jones) was acquired by the State internally, not through questioning of Mr. Moore. (R. 232.) By failing to ask follow-up questions, the prosecutor never learned whether Mr. Moore was in fact related to Erica Jones, whether he knew that Eric Jones was connected to Mr. Jones, or whether had knowledge that she visited him. His ability to serve as a juror turned not on the answers to general questions that were asked of him, but on unknown answers to these more directed questions that were not asked. Likewise, the prosecutor's assertion that it struck Mr. Moore, in part, on account of his conviction for assault in the third degree is unsatisfactory. (R. 231–32.) Without asking any questions, the prosecutor failed to show how Mr. Moore's conviction was relevant to the case at bar. Yet, third degree assault

applies to a broad range of activity, which may or may not have any bearing on Mr. Moore's ability to impartially evaluate the facts of the present case. *See* Ala. Code § 13X-6-22(a). Without more questioning, the prosecutor had no information about the nature of Mr. Moore's offense and thus no basis for striking.

567. As noted above, the State cannot immunize itself from a *Batson* analysis by asking general questions and then speculating as to what more specific questions would have elicited. *Batson*, 476 U.S. at 97; *Branch*, 526 So. 2d at 623. Moreover, many of the responses offered by the prosecutor in this case are simply illogical in that the justifications are not supported by the record or that the responses militate in favor of the prosecutor keeping struck jurors. In light of the long history of racial discrimination by this District Attorney's office, it is self-evident that the prosecutor's proffered justifications were simply "a sham and a pretext for discrimination." *See Ex parte Travis*, 776 So. 2d at 881. The prosecutor violated *Batson*. Had counsel raised this issue on appeal, the appellate court would have reversed Mr. Jones' conviction.

**2. Counsel failed to raise the numerous instances of prosecutorial misconduct on appeal.**

568. Counsel were deficient in failing to raise the numerous other instances of prosecutorial misconduct as an issue on appeal. As discussed in Sections II.O, II.D.2, II.D.6, II.P, and III.D, which are incorporated herein by reference, this District Attorney's office has a history of misconduct that has been recognized by the appellate courts. The prosecutor's misconduct at Mr. Jones' trial included the following, all of which counsel failed to raise on appeal:

- Commenting on Mr. Jones' decision not to testify;
- Vouching for the integrity of the State's case and its witnesses;
- Injecting a racial dynamic into the case;

- Testifying in place of the State's witnesses and made other testimonial statements;
- Introducing penalty phase evidence during the guilt phase of trial;
- Inflaming the jury;
- Improperly death-qualifying the jury;
- Incorrectly telling the jury that the elderly are entitled to greater protection under Alabama law;
- Mischaracterizing the statistical basis of the State's DNA evidence;

569. Despite these numerous instances of prosecutorial misconduct. Counsel failed to raise any on appeal. Had counsel raised the prosecutor's misconduct on appeal, there is a reasonable probability that the appellate court would have reversed Mr. Jones' conviction.

**3. Counsel failed to argue on appeal that the death penalty is unconstitutional in this case because Mr. Jones was only 18 years old and has diminished mental capacity.**

570. Counsel was deficient in failing to argue on appeal that the death penalty is unconstitutional for Mr. Jones who was 18 years old at the time of the crime and suffers from severely diminished mental capacity.

571. The same social science data that prompted the United States Supreme Court to declare the death penalty unconstitutional for those younger than 18 applies with equal force to those just over age 18, as Mr. Jones was at the time of this crime. *See Roper v. Simmons*, 543 U.S. 551, 569 (2005). That is especially true when a teenager has mental health issues, including untreated ADHD and serious learning impairments, as was the case here. (C. 316-17, R. 1429-43). The lack of maturity and an "underdeveloped sense of responsibility," in such individuals results in "impetuous and ill-considered actions and decisions." *Roper*, 543 U.S. at 569.

572. Recognizing that teenagers engage in reckless behavior, the State of Alabama has chosen to make the age of majority in the State nineteen, see Ala. Code 5 26-1-1 (1975), the minimum age for jury service nineteen, *see* Ala. Code § 12-16-60(a)(1) (1975), and prohibits the

purchase of alcohol to any individual under the age of twenty-one. *See* Ala. Code § 28-1-5 (1975).

573. Where Mr. Jones is within months of being conclusively determined to be ineligible for the death penalty due to his youth and immaturity, his diminished mental capacity surely renders him ineligible for the death penalty. Due to the ineffectiveness of his counsel only a small portion of the available evidence about Mr. Jones mental deficiencies was introduced. Nevertheless, there was uncontroverted evidence in the record that he spent much of his childhood in special education classes, struggled academically, and only attended school until the eleventh grade. (C. 299-305, R. 1356-57, 1428-36.) Evidence also established that he has an IQ of 81 and is functioning at the fifth or sixth grade level. (R. 1430, C. 302.) Counsel should have argued on appeal that this evidence placed the 18-year-old Mr. Jones within the class of offenders encompassed by the Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002). Had such an argument been made, it is likely the court would have reversed the death sentence in this case.

574. The combination of Mr. Jones' age at the time of the offense and his level of intellectual functioning place him on the borderline of eligibility for the death penalty with respect to each category. The combination of the two renders him ineligible. *See, e.g., Brownlee v. Haley*, 306 F.3d 1043, 1052, 1070-75 (11th Cir. 2002) (concluding that relief is warranted for those whose characteristics border "right on the edge" of death penalty ineligibility because they "suffer[] some of the same limitations of reasoning, understanding, and impulse control" as those that fall within the class.").

575. Mr. Jones' "diminished capacity 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," places him squarely within the class of offenders the Supreme Court has concluded are exempt from sentences of death. *Atkins*, 536 U.S. at 318.

576. For these reasons, the imposition of a death sentence in this case is both inappropriate and a violation of Mr. Jones' rights to due process and to be free from cruel and unusual punishment pursuant to the Eighth and Fourteenth Amendments to the United States Constitution, corresponding portions of the Alabama Constitution, and Alabama law. Had counsel raised this issue on appeal, there is a reasonable probability that the appellate court would have vacated his death sentence.

**B. Mr. Jones' counsel were ineffective in failing to argue on appeal that the trial court erroneously placed the burden of proof on Mr. Jones' during the hearing on the suppression of his statements.**

577. Additionally, Mr. Jones' appellate counsel were ineffective in their presentation of issues they did raise on appeal. Despite the numerous meritorious issues available, Mr. Parker and Mr. Brantley raised only three issues on direct appeal, including one argument that was fallacious as a matter of law. (Exhibit D, 3/11/05 Brief of the Appellant.)

578. On appeal, Mr. Parker and Mr. Brantley argued that the trial court erred in finding that Mr. Jones' statements had been voluntarily made. Counsel's sole argument in that regard was that the trial court failed to give due weight to the coercive effect of the electric chair. Counsel failed to argue, however, that the trial court erroneously placed the burden of proof on Mr. Jones during the suppression hearing.

579. At the beginning of the suppression hearing, defense counsel correctly asserted that, once it had been raised, the State had the burden to prove the voluntariness of Mr. Jones' statements as a predicate to their admission. (R. 251–52.) However, the trial judge insisted that

because it was a defense motion, the defense bears the burden. (R. 251–52.) This is incorrect as a matter of law.

580. It is well-established that the State bears the burden of proving statements were voluntary. *See Missouri v. Seibert*, 542 U.S. 600, 609 n.1 (2004) (noting that the prosecution bears the burden of proving the Miranda waiver and the voluntariness of the confession); *Jackson*, 836 So. 2d 979, 982 ("The burden is on the State to show voluntariness . . . "). Although typically "trial court's ruling on a motion to suppress will not be disturbed unless it is palpably contrary to the great weight of the evidence," *id.*, 836 So. 2d at 982, the trial court's error in allocating the burden of proof made any fact finding unreliable and deference by the appellate court inappropriate.

581. Had counsel challenged the trial court's error in placing the burden of proof on Mr. Jones for his motion to suppress, the Court of Criminal Appeals would have reversed Mr. Jones' conviction.

**C. Counsel's deficiencies at the appellate phase prejudiced Mr. Jones.**

582. The above referenced errors, cumulatively as well as individually, denied Mr. Jones the effective assistance of counsel at the appellate stage in violation of the Alabama Constitution, and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, *See United States v. Cronic*, 466 U.S. 648, 659 (1984); *Dobbs v. Zany*, 506 U.S. 357, 359 (1993); *Miller v. Anderson*, 255 F.3d 455 (7th Cir. 2001) (finding prejudice in the aggregate); *Daniel v. Thigpen,* 742 F. Supp. 1535, 1561 (M.D. Ala. 1990).

583. But for counsel's deficient performance on appeal, Mr. Jones' conviction and death sentence would have been reversed.

## CONCLUSION

584. Antonio Jones was denied his rights to due process, a fair trial, and a reliable sentence as guaranteed by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the corresponding provisions of the Alabama Constitution, and Alabama law because the prosecution did not disclose exculpatory and impeachment under Brady.

585. Mr. Jones was also deprived the effective assistance of counsel throughout his entire trial. Mr. Jones' defense counsel failed to subject the prosecution's case to adversarial testing at either the culpability or sentencing phase, investigate substantial mitigation evidence that were available, and present meaningful evidence to mitigate the sentence.

586. This Court, after a full evidentiary hearing of all the claims raised herein or any supplement to this petition, should be set aside Mr. Jones' conviction and sentence and grant him a new trial.

## PRAYER FOR RELIEF

FOR THESE REASONS, and such other reasons as may appear to the Court upon further pleading and a full evidentiary hearing, Mr. Jones respectfully requests this Court to grant the following relief:

(A) conduct a full evidentiary hearing at which petitioner may offer proof concerning allegations of constitutional violations at his trial;

(B) provide petitioner with sufficient funds to present witnesses, experts, and other evidence in support of the allegations in this petition;

(C) after a full and complete heating, order that petitioner be relieved of his unconstitutionally obtained capital conviction and death sentence; and

(D) grant any additional or alternative relief as may seem just, equitable, and proper under state and federal law.

Respectfully submitted on this the 4th day of April, 2013.

*Counsel for Antonio Devoe Jones*

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**IN THE TWENTIETH JUDICIAL CIRCUIT COURT OF ALABAMA**

**HOUSTON COUNTY CIRCUIT COURT**

ANTONIO DEVOE JONES,

Petitioner,

v. No. CC-2000-353.60

STATE OF ALABAMA,

Respondent.

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## VERIFICATION

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I affirm under penalty of perjury that, upon information and belief, the foregoing is true and correct.

Signed on April 4, 2013

Steven A. Miller
*One of Antonio D. Jones' Attorneys*

Subscribed and sworn to before me this

the 4th day of April, 2013.

Notary Public

"OFFICIAL SEAL"
MARIA DEL CARMEN GUERRA
NOTARY PUBLIC, STATE OF ILLINOIS
MY COMMISSION EXPIRES 11/10/2013

My commission expires on 11-10-2013

Certificate of Service

I hereby certify I have electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to those attorneys registered on this 4th Day of April, 2013, to wit, the attorneys of record named below.

**/s/ Carmen F. Howell**
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