APPENDIX

APPENDIX

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[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11535

D.C. Docket No. 4:13-cv-02150-RDP

CASEY A. MCWHORTER,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT
OF CORRECTIONS, et al.

Respondents - Appellees.

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

(August 18, 2020)

Before WILSON, MARTIN, and ED CARNES, Circuit Judges.

MARTIN, Circuit Judge:

Casey McWhorter, an Alabama death row prisoner, appeals the District Court's denial of his 28 U.S.C. § 2254 petition for a writ of habeas corpus. Mr. McWhorter raises two issues in this appeal: (1) whether his constitutional right to an impartial jury was violated by the presence of a biased juror; and (2) whether trial counsel was ineffective for failing to investigate and present mitigating evidence. After careful consideration, and with the benefit of oral argument, we affirm the denial of Mr. McWhorter's habeas petition.

I. BACKGROUND AND PROCEDURAL HISTORY

A. TRIAL AND OFFENSE CONDUCT

In 1993, Mr. McWhorter was indicted and charged in Alabama state court with intentionally killing Edward Williams by shooting him with a rifle during the course of a robbery. He was represented at trial by Thomas Mitchell and James Berry. The guilt phase of trial began on March 17, 1994. Five days later, the jury found Mr. McWhorter guilty. After a brief recess, the penalty phase began.

During the penalty phase, the State and Mr. McWhorter's counsel made opening statements and the State resubmitted the evidence it presented in its case in chief. Mr. McWhorter's counsel argued that McWhorter "had a difficult childhood," and grew up to be "a pretty good kid, but that he got mixed up with the wrong crowd." Counsel went on to call four witnesses during its penalty phase presentation. First, counsel called Vonnie Salee. Ms. Salee previously worked

with Mr. McWhorter at the Food World grocery store, and testified that McWhorter was one of the better bag boys and was a hard worker. Next, counsel called Van Reid. Mr. McWhorter had worked for Mr. Reid as a busboy, and Reid described McWhorter as a good kid and a dependable worker.

Third, counsel called Elsie Garrison, Mr. McWhorter's aunt. Ms. Garrison testified that Mr. McWhorter was about 2 years old when his parents divorced. Later, when Mr. McWhorter was around 16, he came to live with Ms. Garrison because his mother believed he was using drugs. Ms. Garrison described her nephew as a very bright, intelligent, compassionate young man who had a difficult childhood, but emphasized that he "is not a bad boy." She ended her testimony by asking the jury to spare Mr. McWhorter's life.

Finally, counsel called Carolyn Rowland, Mr. McWhorter's mother. Ms. Rowland described Mr. McWhorter's childhood. She said she divorced Mr. McWhorter's father, Tommy McWhorter, remarried David Rowland, and moved the family to Tennessee. Because Mr. McWhorter was so young when his parents divorced, he believed that his stepfather, Mr. Rowland, was his father. This illusion was pierced after the family moved back to Alabama and Ms. Garrison told Mr. McWhorter he had two fathers. Ms. Rowland said this news did not seem to have an effect on Mr. McWhorter at the time, but she explained that complications arose later. She said as Mr. McWhorter got older, his biological

father instructed him that he did not have to listen to his stepfather. Mr. McWhorter's refusal to listen progressed to the point that Mr. and Mrs. Rowland "couldn't talk to him." Around the same time, when Mr. McWhorter was about 16 years old, he began socializing with a new set of friends and Ms. Rowland noticed a change in her previously respectful son. Ms. Rowland closed her testimony by asking the jury to spare her son's life.

After about an hour of deliberating, the jury told the trial court it could not reach an agreement on the sentence. The court explained that it was not trying "to force or coerce [the jury] to reach a verdict," but reminded the jurors about the importance of reaching a verdict. Later that day, after further deliberations, the jury returned and rendered a verdict recommending the death penalty by a 10-to-2 vote. The trial court followed the jury's recommendation and sentenced Mr. McWhorter to death.

B. STATE POSTCONVICTION

After exhausting his direct appeals, Mr. McWhorter, through new counsel, filed a state postconviction motion under Alabama Rule of Criminal Procedure 32. Two of the claims Mr. McWhorter raised are relevant here. First, he claimed he was denied an impartial jury. He said that a juror, Linda Burns, deliberately provided a false answer on the voir dire questionnaire. The question asked whether Ms. Burns knew anyone who had been a victim of a crime, and she failed

to disclose that her father died under suspicious circumstances. Second, Mr. McWhorter claimed his trial counsel was ineffective for failing to investigate and present mitigation evidence during the penalty phase of his trial. The state court held an evidentiary hearing on Mr. McWhorter's Rule 32 motion from August 26–28, 2009. Mr. McWhorter presented a significant amount of evidence.

Mr. McWhorter called four witnesses in connection with his biased jury claim. He called Ms. Burns, the purportedly biased juror, who testified about the circumstances of her father's death as well as her thoughts at the time she answered the voir dire questionnaire. We discuss Ms. Burns's testimony in more detail below. Mr. McWhorter also called April Stonecypher, another of the jurors at his trial. Ms. Stonecypher testified that during deliberations, Ms. Burns "started telling a story about how years before . . . her father had been murdered, and that . . . she now had to walk around in the same town where this man was that killed her father." Ms. Stonecypher said that Ms. Burns was crying when she said this. And Mr. Mitchell and Mr. Berry, Mr. McWhorter's trial counsel, testified about their process of selecting jurors during voir dire.

Mr. Mitchell and Mr. Berry also testified in connection with Mr. McWhorter's ineffective assistance claim. Both described their "good kid, wrong crowd" theory of mitigating evidence. Counsel explained that they interviewed Mr. McWhorter, his mother, aunt, and sister; gathered background information;

and hired a neuropsychologist, Dr. Douglas Robbins. Because Dr. Robbins found that Mr. McWhorter's neuropsychological testing results were "unremarkable," counsel said they chose not to have him testify at the penalty stage. Dr. Robbins testified at the Rule 32 hearing and confirmed his (lack of) mental health findings, explaining that he did not find any evidence of brain damage.

Mr. McWhorter presented additional witnesses who he said would have furthered counsel's "good kid, wrong crowd" theory. Frank Baker, Mr. McWhorter's former math teacher and basketball coach, testified that McWhorter was an average student who didn't cause trouble in class and worked hard to improve his basketball game and be part of the team. Kenneth Burns, another former teacher, testified that Mr. McWhorter was "a good kid" and an average student who worked diligently to get Bs and Cs. Mr. McWhorter's friend, Amy Battle, also testified that McWhorter was a "great kid" who was "funny and outgoing and flirty."

Mr. McWhorter also presented evidence of his significant history of substance abuse. Mr. Rowland, Mr. McWhorter's stepfather, testified that McWhorter was a great kid until he reached the age of 10. It was at that point that Mr. McWhorter's attitude changed and he started huffing gasoline and freon. Mr. Rowland also said Mr. McWhorter stole Rowland's truck. Mr. McWhorter was sent to a detention home for 30 days. Following these incidents, Mr. McWhorter

lived with his aunt, Ms. Garrison, for 3–4 months and then with his friend Abraham Barnes's family.

Two members of Mr. McWhorter's family, Larry Evans and Michael Evans, provided more details about McWhorter's childhood substance abuse. Larry said that on a few occasions he, Mr. McWhorter, and other young family members huffed gasoline until they passed out. Larry also testified that huffing gasoline "would make you where you can't remember." Michael's testimony about Mr. McWhorter's drug use was similarly disconcerting. He said that he and Mr. McWhorter huffed gasoline several times a day on the weekends for 2–3 years. The Evanses also testified that Mr. McWhorter's grandfather, Jesse Evans, was a physically violent alcoholic. They said that Mr. McWhorter "could have" been around Jesse when he was hitting McWhorter's grandmother, because McWhorter often visited his grandparents on the weekends.

Mr. McWhorter's high school friends gave more testimony about his substance abuse. Tiffany Long, who dated Mr. McWhorter when she was 15, testified that she and McWhorter "drank pretty much every time [they] were together." Abraham Barnes, who was "like [a] brother[]" to Mr. McWhorter, said the two teenagers drank "[w]hen we were awake . . . . If we weren't in school . . . , we were drinking." When they were drinking, they took turns playing Russian

roulette with a loaded pistol. Mr. Barnes testified that he and Mr. McWhorter did these things because they never thought they would live to see adulthood.

Next, Ms. Garrison testified and expanded on the testimony she gave during the penalty phase, explaining the difficulties Mr. McWhorter experienced as a child. She said Tommy McWhorter (Mr. McWhorter's biological father) drank a lot, did not work, neglected McWhorter, and abused McWhorter's mother. Ms. Garrison said when Mr. McWhorter was about 10 years old, he started rebelling against his mother and stepfather. Mr. Rowland responded by "whip[ping]" him. On one occasion, Ms. Garrison saw bruises from one of these whippings and reported the Rowlands to social services. After that, Mr. McWhorter's behavior got worse. He went from not listening, to sneaking out of the house, to stealing his stepfather's car.[1] Shortly after he took the car, Ms. Garrison took Mr. McWhorter in. To provide him with some structure, she required that he follow her rules, including abstaining from alcohol. Nevertheless, after a few months, Ms. Garrison found Mr. McWhorter so drunk that she thought he was dead. He also stole Mr. Rowland's truck again and crashed it. After crashing the truck, Mr. McWhorter went back to living with the Rowlands.

[1] As a result of this incident, Ms. Rowland sent Mr. McWhorter to stay with his grandparents a few days each week.

Finally, two experts testified about the effects of Mr. McWhorter's difficult childhood and substance abuse on his mental health. Janet Vogelsang, a licensed clinical social worker, performed a "biopsychosocial assessment" of Mr. McWhorter and his family. Ms. Vogelsang explained that she gathered a vast amount of information that shed light on how Mr. McWhorter was "shaped" and "molded." Based on her research, Ms. Vogelsang opined that Mr. McWhorter was "robb[ed] . . . of the opportunity to have a strong male role model;" was neglected by his biological father; and had no adult supervision during his early teenage years. Ms. Vogelsang said these combined events all had a huge impact on Mr. McWhorter and corresponded with the escalation in his drinking and drug use.

Dr. Ralph Tarter, a neuropsychologist who specializes in adolescent alcoholism and the relationship between alcoholic parents and their children, testified as well. Dr. Tarter did not perform a psychological evaluation of Mr. McWhorter, but he reviewed the record and opined that Dr. Robbins (who concluded that McWhorter's neurological test was unremarkable, and whom trial counsel did not have testify) did not ask all the "crucial" questions necessary for a complete evaluation. Dr. Tarter said that without obtaining a complete evaluation it was not possible to get a full understanding of Mr. McWhorter's clinical profile. Nevertheless, Dr. Tarter agreed with Dr. Robbins that Mr. McWhorter's evaluation showed he had a "high energy level, poor behavioral control and limited

intellectual capacity to override that deficiency." Dr. Tarter, however, said that he would have performed additional tests based on these results. Additional tests would have "identif[ied] and measure[d] the severity of neuropsychologic deficit," which is a "chemical" dysfunction in the brain, as opposed to structural brain damage. Finally, Dr. Tarter said, based on reports about Mr. McWhorter's biological father, McWhorter was genetically predisposed to become an alcoholic. The fact that Mr. McWhorter grew up in an unstable environment and huffed gasoline at a young age made this genetic risk more significant.

After hearing all of this evidence, the state court denied Mr. McWhorter's petition on both the biased jury claim and the ineffective assistance claim. The state court first found that Mr. McWhorter did not meet his burden to show that Ms. Burns believed her father was the victim of a crime and failed to disclose that fact during voir dire. The court explained that "[d]espite the rumors of murder that she heard as a child, Burns had reason to believe that her father's death was not a homicide." It also determined that Mr. McWhorter was not prejudiced by Ms. Burns's presence on the jury. In finding that Mr. McWhorter failed to show Ms. Burns's decisions "might have been affected by her father's death," the state court relied on Ms. Burns's "unequivocal" testimony "that her father's death did not affect her role as a juror."

Second, the state court dismissed Mr. McWhorter's ineffective assistance claim that trial counsel failed to investigate mitigating evidence. It found that trial counsel's "good kid, wrong crowd" strategy was a reasonable strategy, and that counsel presented testimony to support that strategy during the guilt and penalty phases. The court specifically noted that Dr. Robbins's report "provided no useful mitigation evidence" and did not fault trial counsel for not presenting mental-health-related evidence. It also analyzed counsel's decision not to present the testimony of each individual witness and concluded that counsel's performance was not deficient in each instance.

Mr. McWhorter appealed the denial of his Rule 32 motion to the Alabama Court of Criminal Appeals ("CCA"). The CCA affirmed the denial of Mr. McWhorter's biased jury claim, reasoning that although Ms. Burns "appeared to waver in her responses to postconviction counsel's questioning . . . we cannot say that [she] failed to respond truthfully to the question posed on the juror questionnaire." McWhorter v. State, 142 So. 3d 1195, 1218–19 (Ala. Crim. App. 2011). The CCA further held there was "no indication that McWhorter might have been prejudiced by [Ms. Burns's] failure to respond that her father was a victim of a crime on the juror questionnaire or to a voir dire question." Id. at 1221.

The CCA also affirmed the denial of Mr. McWhorter's ineffective assistance claim. It quoted the state court's reasoning:

> Experienced trial counsel collected the comprehensive background information . . . , Dr. Robbins's evaluation, and other documents, and formulated a reasonable strategy that they believed could save McWhorter's life: McWhorter was a good boy, who fell in with the wrong crowd, and he made a terrible mistake but does not deserve the death penalty,

Id. at 1237. The CCA ultimately upheld the state court's finding that trial counsel's mitigation strategy was reasonable. Id. at 1238, 1245. The CCA was also "confident that the mitigating evidence presented at the postconviction hearing—but omitted from the penalty phase of McWhorter's capital-murder trial—would have had no impact on the sentence in this case." Id. at 1250. The CCA's decision is the decision we review under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). See 28 U.S.C. § 2254(d); see also Morton v. Sec'y, Fla. Dep't of Corr., 684 F.3d 1157, 1165–66 (11th Cir. 2012).

C. FEDERAL HABEAS

Mr. McWhorter filed his federal habeas petition in the United States District Court for the Northern District of Alabama on November 25, 2013. The District Court denied Mr. McWhorter's petition for the same reasons relied on by the state courts. In denying the biased jury claim, the District Court held that the CCA's "findings – that McWhorter failed to prove that Juror Burns intentionally gave an answer she knew to be false, and failed to prove that Ms. Burns' answer prejudiced him in any way – are consistent with" clearly established Supreme Court

precedent. McWhorter v. Dunn, No. 4:13-CV-02150-RDP, 2019 WL 277385, at *26 (N.D. Ala. Jan. 22, 2019). When explaining its decision to deny Mr. McWhorter's ineffective assistance claim, the District Court said the state court's findings are supported by the record, id. at *43, and it was not unreasonable for the CCA to "conclude that the additional evidence offered by McWhorter would not have resulted in a different sentence," id. at *48.

II. STANDARD OF REVIEW

We review de novo a district court's denial of a habeas corpus petition. Ward v. Hall, 592 F.3d 1144, 1155 (11th Cir. 2010). A petitioner is entitled to habeas relief only if his claim is meritorious and the state court's resolution of that claim was contrary to, or an unreasonable application of, clearly established Supreme Court precedent, or was based on an unreasonable determination of the facts presented in the state court proceeding. 28 U.S.C. § 2254(d).

"Contrary to" means the state court applied "a rule different from the governing law set forth in [Supreme Court] cases," or it decided a case differently than the Supreme Court has done "on a set of materially indistinguishable facts." Bell v. Cone, 535 U.S. 685, 694, 122 S. Ct. 1843, 1850 (2002). A state court's resolution of a claim is an "unreasonable application" of federal law when its decision (1) "identifies the correct governing legal rule from [the Supreme] Court's cases but unreasonably applies it to the facts of the particular state prisoner's case,"

or (2) "either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." Williams v. Taylor, 529 U.S. 362, 407, 120 S. Ct. 1495, 1520 (2000). The Supreme Court has said an "unreasonable determination of the facts" occurs "when the direction of the evidence, viewed cumulatively, was 'too powerful to conclude anything but [the petitioner's factual claim],' and when a state court's finding was 'clearly erroneous.'" See Landers v. Warden, 776 F.3d 1288, 1294 (11th Cir. 2015) (first quoting Miller-El v. Dretke, 545 U.S. 231, 265, 125 S. Ct. 2317, 2339 (2005), then quoting Wiggins v. Smith, 539 U.S. 510, 529, 123 S. Ct. 2527, 2539 (2003)) (alteration in original).

III. DISCUSSION

A. BIASED JURY CLAIM

Mr. McWhorter's biased jury claim centers around his theory that Ms. Burns lied during voir dire when she said she did not know anyone who was the victim of a crime. The backstory is as follows. When Ms. Burns was a child, her father, Olive Daniels, went out one night with two other men, Langford Crawley and Charles Taylor, to a pond in an abandoned rock mine. The next morning, an officer came to Ms. Burns's house and told her family that Mr. Taylor had been beaten to death and Mr. Daniels was missing. A police diver then found Mr.

Daniels dead at the bottom of the pond with bruises around his neck. However, the autopsy concluded that Mr. Daniels's cause of death was drowning. Mr. Crawley was charged with and convicted of the murder of Mr. Taylor, but no charges were ever brought against him for Mr. Daniels's death.

During voir dire at Mr. McWhorter's trial, the prospective jurors were given a questionnaire. Ms. Burns answered question 21 as follows:

> 21. Have you, any member of your family or anyone you know ever been the victim of a crime? yes
>
> If yes, who and what relationship? Steve Burns Brother-in-law
>
> What was the crime? Drugs
>
> Was anyone arrested in connection with the crime? yes
>
> Was anyone convicted in connection with the crime? yes

When Mr. McWhorter's counsel questioned Ms. Burns about her response to question 21, she agreed with counsel's suggested clarification and said that her brother-in-law had been convicted of a drug crime. At no point in time did Ms. Burns disclose that her father died under suspicious circumstances. She was ultimately selected as a juror.

Mr. McWhorter says his constitutional rights were violated because he was deprived of an unbiased jury by Ms. Burns's failure to disclose the facts surrounding her father's death. He first claims the CCA unreasonably agreed with the state court's finding that Ms. Burns was not intentionally dishonest when she

answered the juror questionnaire. Second, he claims the CCA's application of Alabama's biased jury standard was contrary to clearly established federal law.

In reviewing Mr. McWhorter's claims, we first describe the standard he must meet to show that Ms. Burns was biased and that bias affected his Sixth Amendment right to an impartial jury. Next, we hold that the state court's determination that Ms. Burns was not intentionally dishonest was not unreasonable because her testimony about how she believed her father died was equivocal. Finally, we hold that the state court's application of Alabama's version of the biased-jury analysis was not contrary to clearly established federal law.

1. Legal Standard

Voir dire protects the Sixth Amendment right to an impartial jury "by exposing possible biases, both known and unknown, on the part of potential jurors." McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 554, 104 S. Ct. 845, 849 (1984). In McDonough, the Supreme Court held that to obtain a new trial when a juror gives a "mistaken, though honest response" to a voir dire question, the defendant (1) "must first demonstrate that a juror failed to answer honestly a material question on voir dire," and (2) "then further show that a correct response would have provided a valid basis for a challenge for cause." Id. at 555–56, 104 S. Ct. at 849–50. This is because "[t]he motives for concealing

information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial." Id. at 556, 104 S. Ct. at 850.

The first prong of the McDonough test requires us to determine whether Ms. Burns was intentionally dishonest in answering the questionnaire; "that is, whether [she] was aware of the fact that [her] answers were false." United States v. Perkins, 748 F.2d 1519, 1531 (11th Cir. 1984). The second prong—whether a correct response would have provided a valid basis for a challenge for cause—requires us to determine whether Ms. Burns's nondisclosure resulted from actual bias that would disqualify her. Id. at 1532; see United States v. Carpa, 271 F.3d 962, 967 (11th Cir. 2001) (per curiam). Bias may be shown in two ways: "by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." Perkins, 748 F.2d at 1532 (quotation marks omitted). Often, the juror's dishonesty in and of itself is "a strong indication" that she was not impartial. See id.

2. The CCA Did Not Unreasonably Determine that Ms. Burns Was Not Dishonest.

Mr. McWhorter argues that the CCA unreasonably determined that Ms. Burns was not intentionally dishonest. He relies on two points to show Ms. Burns's alleged dishonesty: (1) her failure to disclose during voir dire that she believed her father was murdered; and (2) her "tearful[]" statements, made to other jurors during deliberations, about her belief that her father's murderer received

lenient treatment. In support of these claims, Mr. McWhorter points to the testimony of Ms. Burns describing "her lifelong belief that her father had been murdered." And, to the extent that Ms. Burns's testimony was equivocal about whether she believed this was true, Mr. McWhorter says "any doubt" is erased by Ms. Stonecypher's testimony that a crying Burns told the other jurors that her father had been murdered.[2]

Based on our review of Ms. Burns's testimony at the Rule 32 hearing, we conclude her testimony was equivocal as to whether she believed her father had been murdered. For instance, Ms. Burns said she "always thought that [her] father was killed" by Mr. Crawley. But at other points during the hearing, she reiterated the opposite and agreed that she believed her father had drowned based on the official cause of death and that her only basis for thinking her father had been murdered came from family rumors during her childhood.

As the CCA pointed out, whether Ms. Burns was dishonest turns on her understanding what it means to be a "victim" of a crime. McWhorter, 142 So. 3d at 1218–19. Ms. Burns's lack of understanding, both at trial and years later at the

[2] Traditionally, the failure to disclose information and the insertion of extraneous information into deliberations are analyzed as separate instances of misconduct. Perkins, 748 F.2d at 1531, 1533 (analyzing separately allegations of nondisclosure of information during voir dire and insertion of extraneous information into jury deliberations). Mr. McWhorter is appealing only the nondisclosure claim here because, as he acknowledges, the Rule 32 court admitted Ms. Stonecypher's testimony about Ms. Burns's deliberation statements only with respect to McWhorter's nondisclosure claim, not his extraneous evidence claim.

Rule 32 hearing, is evident from the record. For example, Ms. Burns responded to the juror questionnaire by saying her brother-in-law had been the victim of the crime of drugs—while later explaining, in response to questions from trial counsel, that her brother-in-law was convicted of a drug crime. And when Mr. McWhorter's postconviction counsel tried to flesh out her understanding at the Rule 32 hearing, Ms. Burns testified as follows:

> Q. Now, when you said a moment ago that you weren't thinking about your father's death when you answered that item on the questionnaire; is that correct?
>
> A. Yes.
>
> Q. Well, you also said a moment ago, didn't you, that you believe your father was not a victim because no one had been officially charged in your father's murder?
>
> A. Now, wait. You say my father was not a victim?
>
> Q. That you -- I believe -- did you say a moment ago to [the prosecutor] that you didn't believe your father was a victim because no one had been officially charged with killing him?
>
> A. Yes, I said that.
>
> Q. Now, did you answer the question in the way you did, namely, not mentioning your father because no one had been officially charged with killing him?
>
> A. No one -- I guess, because no one had been charged with his death.
>
> . . .
>
> Q. Now, was this belief or knowledge that no one had been officially charged the reason why you didn't mention him in response to this question on the questionnaire?
>
> A. Well, I don't know. I still -- I'm still confused about what you're asking me. I'm sorry. I did not put his name on there because he was not murdered. He was drowned.

Ms. Burns's "varied responses [about the] question on voir dire testify to the fact that jurors are not necessarily experts in English usage." McDonough, 464 U.S. at 555, 104 S. Ct. at 849. Because the record indeed reflects that Ms. Burns's testimony was equivocal, the state court's finding that Burns was not intentionally dishonest was not based on an unreasonable determination of the facts under § 2254(d). See McDonough, 464 U.S. at 555–56, 104 S. Ct. at 849–50 (declining to invalidate trial based on juror's "mistaken, though honest response").

Mr. McWhorter insists that, despite Ms. Burns's equivocal voir dire statements, we can resolve this issue in his favor and conclude she was dishonest. He points to Ms. Stonecypher's testimony that Ms. Burns told the other jurors that "her father had been murdered" years before the trial. In response, the State argues that we cannot consider Ms. Stonecypher's testimony about Ms. Burns's deliberation statements under Alabama Rule of Evidence 606(b).[3] We need not reach that issue here. Ms. Burns's testimony about her state of mind during voir dire provides evidence to support the Rule 32 court's factual findings and credibility determinations. See Brumfield v. Cain, 576 U.S. 305, 313–14, 135 S.

[3] Rule 606(b) provides that "a juror may not testify in impeachment of the verdict . . . as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon that or any other juror's mind or emotions as influencing the" juror's decision. However, this rule does allow a juror to testify "on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror."

Ct. 2269, 2277 (2015) ("We may not characterize these state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." (alteration adopted) (quotation marks omitted)). Therefore, the CCA's finding that Ms. Burns did not "fail[] to respond truthfully" to the voir dire questionnaire, McWhorter, 142 So. 3d at 1218–19, was not an unreasonable determination of the facts.

3. The CCA's Failure to Apply the *McDonough* Test Was Not Contrary to Clearly Established Law.

In analyzing the second prong of Mr. McWhorter's biased jury claim, the CCA required him to show "that he 'might have been prejudiced' by the jurors' failure to respond truthfully to a question posed on voir dire." McWhorter, 142 So. 3d at 1219 (quoting Ex parte Stewart, 659 So. 2d 122, 124 (Ala. 1993) (per curiam)). Mr. McWhorter thus challenges the CCA's failure to apply the second prong of the McDonough test—that "a correct response would have provided a valid basis for a challenge for cause," 464 U.S. at 556, 104 S. Ct. at 850—because he asserts that failure is contrary to clearly established law.

Alabama courts have not adopted either prong of the McDonough test. See Brown v. State, 807 So. 2d 1, 9 n.6 (Ala. Crim. App. 1999) (per curiam). Instead, Alabama courts say the proper standard for determining whether juror misconduct warrants a new trial "is whether the misconduct might have prejudiced, not whether it actually did prejudice, the defendant." Ex parte Dobyne, 805 So. 2d

763, 771 (Ala. 2001). Whether this rule—and the CCA's application of it in Mr. McWhorter's case—is "contrary to" McDonough under § 2254(d) depends on whether it "contradicts the governing law set forth in [the Supreme Court's] cases." Price v. Vincent, 538 U.S. 634, 640, 123 S. Ct. 1848, 1853 (2003) (quotation marks omitted).

The CCA's analysis appears to be in accordance with McDonough. The CCA acknowledged that under Alabama's might-have-prejudiced standard, the "form" of prejudice that would entitle Mr. McWhorter to relief would be the nondisclosure's "effect, if any, to cause the party to forgo challenging the juror for cause or exercising a peremptory challenge to strike the juror." McWhorter, 142 So. 3d at 1211 (quotation marks omitted); see also id. at 1212 (addressing McWhorter's claims "[i]n light of the foregoing"). The CCA then asked whether the facts showed "there was probable prejudice," and looked to certain factors, including "temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about." Id. at 1211 (quotation marks omitted).

This analysis by the CCA mirrors the analysis our Court has followed under McDonough, which looks to facts "showing . . . a close connection" between the biased juror and the circumstances of the case. See Carpa, 271 F.3d at 967. Said

another way, both Alabama's might-have-prejudiced standard and McDonough depend on whether the juror's bias may have influenced the verdict against the defendant. Compare McDonough, 464 U.S. at 554, 104 S. Ct. at 849 (holding that a "touchstone of a fair trial is an impartial trier of fact") with Ex parte Dobyne, 805 So. 2d at 771 (explaining that the focus of whether a defendant was prejudiced is grounded in whether the juror might have unlawfully influenced the verdict).

Neither did the CCA unreasonably apply these standards. In concluding that Ms. Burns's nondisclosure on the juror questionnaire did not prejudice Mr. McWhorter, the CCA relied on the Rule 32 court's finding that Burns "was unequivocal that her father's death did not affect her role as a juror." McWhorter, 142 So. 3d at 1221 (quotation marks omitted). The CCA also cited favorably to facts established in the Rule 32 proceedings. Those facts included that Mr. Daniels's death was not close in time to when Mr. McWhorter was tried; Ms. Burns's failure to provide the information was "less likely to have affected her role as a juror" due to her uncertainty over the circumstances of her father's death; and she testified she did not want to "vindicate the death of her father through this trial." Id. (quotation marks omitted). In conducting this type of analysis, our Court has looked to similar factors, including whether the juror expressly admitted bias, was intentionally dishonest, or was "closely connected to the case or to either party." See Carpa, 271 F.3d at 967; BankAtlantic v. Blythe Eastman Paine

Webber, Inc., 955 F.2d 1467, 1473 (11th Cir. 1992). The CCA, in effect, performed the same analysis required by McDonough.

Because the CCA's analysis was not contrary to McDonough under § 2254(d)(1), and because, as we have already described, Mr. McWhorter failed to carry his burden on the first prong of the McDonough test, we need not reach the merits of whether there would have been a valid basis to challenge Ms. Burns for cause pursuant to McDonough's second prong. Cf. BankAtlantic, 955 F.2d at 1473 (declining to reach the first prong "because the district court properly found that BankAtlantic failed to show that correct responses from [the jurors] would have provided a valid basis for a challenge for cause"). Thus, we affirm the District Court's dismissal of Mr. McWhorter's biased jury claim.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Mr. McWhorter also appeals the CCA's denial of his claim of ineffective assistance based on trial counsel's failure to investigate and present additional mitigating evidence. He argues that the CCA unreasonably applied clearly established federal law in deciding that counsel's performance was not deficient. He also claims the CCA made an unreasonable determination of the facts when it concluded that he did not suffer prejudice from counsel's actions.

1. Legal Standard

To prevail on an ineffective assistance of counsel claim, a habeas petitioner must show both that his counsel's performance was deficient and that counsel's deficient performance prejudiced him. See Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 2064 (1984). The Supreme Court has explained that the Strickland inquiry requires a "probing and fact-specific analysis." Sears v. Upton, 561 U.S. 945, 955, 130 S. Ct. 3259, 3266 (2010) (per curiam).

Counsel's performance is deficient if it "fell below an objective standard of reasonableness." Strickland, 466 U.S. at 688, 104 S. Ct. at 2064. We apply a "strong presumption" that counsel's representation was "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." Id. at 689, 104 S. Ct. at 2065 (quotation marks omitted). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable," but "strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." Id. at 690–91, 104 S. Ct. at 2066. "In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Id. at 691, 104 S. Ct. at 2066.

To establish prejudice in challenging a death sentence, a petitioner must show that "there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. at 695, 104 S. Ct. at 2069. In making the prejudice determination with respect to penalty phase evidence, a reviewing court must "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, 130 S. Ct. 447, 453–54 (2009) (per curiam) (alteration adopted) (quotation marks omitted). The fact that counsel presented some mitigation evidence does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." Sears, 561 U.S. at 955, 130 S. Ct. at 3266.

2. The CCA Did Not Unreasonably Apply Federal Law When Determining That Counsel's Investigation Was Not Deficient.

Mr. McWhorter challenges the quantity and quality of the mitigating evidence counsel investigated and ultimately presented. The CCA denied this claim, agreeing with the Rule 32 court's factual findings and holding that counsel formulated a reasonable trial strategy. McWhorter, 142 So. 3d at 1245, 1247–48. In this appeal, Mr. McWhorter asserts that trial counsel was ineffective in several ways. First, he says counsel's performance was deficient because counsel chose to present two witnesses that "barely knew" him and two witnesses "with apparent

bias." Appellant's Brief at 53–54. Second, he says counsel's performance was deficient because counsel failed to investigate and present two categories of additional mitigating evidence: (a) evidence that fit with counsel's "good kid, wrong crowd" theory, and (b) evidence that he had been abused as a child; substance abuse evidence; evidence that he had a difficult home life; and mental health evidence.

First we address Mr. McWhorter's challenge to trial counsel's decision to present the four witnesses—Van Reid, Vonnie Salee, Elsie Garrison, and Carolyn Rowland—who did testify at the penalty stage. Trial counsel testified that, based on the information provided by Mr. McWhorter and his family, their strategy for both the guilt and penalty phases was to convince the jury that Mr. McWhorter was a good boy who got mixed up with the wrong crowd. Following the guilt phase, counsel felt Mr. McWhorter's case was "in a very, very deep hole": the jury knew McWhorter's co-defendants had pled guilty, they had heard McWhorter "basically" confess to the crime, and they saw a video of the crime scene. Because the jury had already found Mr. McWhorter guilty, counsel felt the only thing going in their favor at the penalty stage was McWhorter's youth. But counsel knew they couldn't just rely on his age and appearance and they presented the four witnesses they previously decided fit with their "good kid, wrong crowd" strategy.

Counsel testified about their reasons for choosing these four witnesses. Mr. Reid knew Mr. McWhorter "closer to the age in which he was accused of committing this crime," as opposed to some of McWhorter's teachers or friends from childhood. Mr. Reid had come recommended by Ms. Garrison, and Reid's testimony that Mr. McWhorter was a good kid and good worker fit in with counsel's penalty-phase theory. Ms. Salee was chosen because people "just instinctively like or . . . are drawn to" her. She also worked at the courthouse, so when the state court judge explained their relationship to the jury, counsel felt that "gave an endorsement to the jury that, hey, this is a good witness." Counsel asked Ms. Rowland and Ms. Garrison to testify because they were likable, had a close connection with Mr. McWhorter, and the jury "might tend to show some mercy" based on the sympathy they felt for McWhorter's mother and aunt.

After reviewing the record, the choice to call Mr. Reid, Ms. Salee, Ms. Rowland, and Ms. Garrison "might be considered sound trial strategy." Strickland, 466 U.S. at 689, 104 S. Ct. at 2065 (quotation marks omitted). Mr. McWhorter's conclusory statements that his two former employers "barely knew" him, and that his mother and aunt had "apparent bias" does not overcome this presumption. See Kimmelman v. Morrison, 477 U.S. 365, 384, 106 S. Ct. 2574, 2588 (1986) ("Counsel's competence . . . is presumed, and the [petitioner] must rebut this presumption by proving that his attorney's representation was unreasonable under

prevailing professional norms and that the challenged action was not sound strategy." (citation omitted)).

Second, we address counsel's failure to investigate and present additional mitigating evidence. We break this into two categories: the "good kid, wrong crowd" evidence; and the substance abuse, childhood history, family abuse, and mental health evidence.

We turn first to Mr. McWhorter's argument that counsel should have offered additional testimony consistent with their "good kid, wrong crowd" theory. These additional witnesses include Mr. McWhorter's friend, Ms. Battle; his coach and teacher, Mr. Baker; and his teacher, Mr. Burns. See Oral Argument Recording at 49:45–51:25 (May 28, 2020). Counsel testified they did not attempt to interview any of Mr. McWhorter's friends because "[m]ost of his friends [at the time] were either in jail . . . or they were witnesses against him." Neither did counsel attempt to speak with any of Mr. McWhorter's teachers or coaches. To assess whether counsel exercised objectively reasonable judgment by not interviewing potential witnesses like these, we must consider whether counsel knew about these avenues of investigation. See Wiggins, 539 U.S. at 527, 123 S. Ct. at 2538.

It does not appear counsel knew to contact Ms. Battle, Mr. Baker, or Mr. Burns. It is not evident from this record that Mr. McWhorter or his family members told counsel to speak with these witnesses. Rather, when counsel met

with Mr. McWhorter's family to gather information, the family explained that McWhorter "had a lot of friends" and his friends' parents "bragged about how well-behaved he was." These family members did not, however, provide any additional information. Nor is there other information in the record that shows counsel should have plausibly known to pursue these specific witnesses. Thus, this is not a case in which counsel ignored evidence in their possession that they failed to pursue. See Wiggins, 539 U.S. at 527, 123 S. Ct. at 2538. We cannot say the failure to investigate the potential mitigation testimony of Ms. Battle, Mr. Burns, and Mr. Baker was unreasonable.[4] See Stewart v. Sec'y, Dep't of Corr., 476 F.3d 1193, 1210–11 (11th Cir. 2007) (holding that counsel's investigation was reasonable because they were not informed about any childhood abuse or mistreatment).

Next we discuss whether Mr. McWhorter's counsel missed any "red flags" in connection with the remaining mitigation topics. These topics include childhood abuse evidence; substance abuse evidence; evidence that Mr. McWhorter had a difficult home life; and mental health evidence. In order to

[4] We take a moment to note, however, that to the extent Mr. McWhorter's trial counsel suggested this sort of evidence fell outside the universe of acceptable mitigation evidence, that understanding is at odds with our precedent. The rule is that mitigating evidence includes "any aspect of a 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, 98 S. Ct. 2954, 2965 (1978); see also Hardwick v. Crosby, 320 F.3d 1127, 1163 (11th Cir. 2003) ("The purpose of [mitigation] investigation is to find witnesses to help humanize the defendant, given that a jury has found him guilty of a capital offense." (quotation marks omitted)).

perform this analysis, we must first determine "whether a reasonable investigation should have uncovered such mitigating evidence." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988) (emphasis omitted). "If so, then a determination must be made whether the failure to put this evidence before the jury was a tactical choice by trial counsel." Id. (emphasis omitted). If the choice was strategic, it "must be given a strong presumption of correctness, and the inquiry is generally at an end." Id. "If, however, the failure to present the mitigating evidence was an oversight, and not a tactical decision," then we must determine whether Mr. McWhorter suffered prejudice from that oversight. See id.

Trial counsel interviewed Mr. McWhorter a number of times. Counsel also interviewed Ms. Carolyn Rowland, Melinda Rowland (Mr. McWhorter's sister), and Ms. Garrison. They provided counsel with a long list of information about Mr. McWhorter. This information included things like the names of other family members, friends, and mentors; medical information; details about Mr. McWhorter's childhood and home life, including instances of both "excessive" and "appropriate" discipline; and family criminal history. In response to the question of whether Mr. McWhorter suffered any mental illness or disorder, his family told counsel that he "[h]ad a gas-sniffing habit and freon sniffing habit," but did not provide other information. Neither did Mr. McWhorter give counsel any reason to think he was suffering from mental health problems. Even so, counsel also hired

Dr. Robbins to determine whether Mr. McWhorter suffered from any mental impairments.

Based on the above investigation, it is apparent that counsel had knowledge of the mitigation topics Mr. McWhorter claims should have been presented. Now we must determine whether the choice not to present each topic was tactical, or whether it was an oversight. See Middleton, 849 F.2d at 493.

We can easily do away with Mr. McWhorter's claim that substance abuse evidence and evidence of his biological father's problems should have been presented. Counsel testified that they chose not to present evidence of Mr. McWhorter's substance abuse, or about his family members' substance abuse, or of his biological father's personal problems because it may have done more harm than good. This "strategy choice was well within the range of professionally reasonable judgments." Strickland, 466 U.S. at 699, 104 S. Ct. at 2070.

Similarly, counsel testified about their reasons for not presenting mental health evidence. Even though they hired a neuropsychologist, counsel did not have Dr. Robbins testify because, in Robbins's opinion, Mr. McWhorter's neuropsychological testing results were "unremarkable." Counsel worried that if Dr. Robbins testified "there's absolutely nothing wrong" with Mr. McWhorter, that would undermine the possibility that the jury might think he "must have been crazy" to commit such a senseless crime.

Based on our review of counsel's knowledge, their choice to present evidence consistent with their "good kid, wrong crowd" theory and their choice not to call Dr. Robbins were each tactical. See Strickland, 466 U.S. at 690, 104 S. Ct. at 2066 ("[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable . . . ."). We therefore hold that counsel's investigation into these witnesses was not unreasonable.

Finally, Mr. McWhorter claims that the abuse he suffered as a child and his difficult home life should have triggered counsel to investigate further. Specifically, he points to the facts that his grandfather was abusive towards his grandmother and that his stepfather gave him a "whipping" severe enough to leave bruises that caused his aunt to call the Department of Human Resources. However, counsel's failure to investigate this evidence was not unreasonable. As to his grandfather's violent tendencies, there is no evidence to show that counsel knew they should speak with the Evans side of Mr. McWhorter's family. See Stewart, 476 F.3d at 1210–11 (holding that failure to investigate evidence of which counsel had no knowledge was reasonable).

As to the "whipping" evidence, counsel did not think it was necessary to investigate further because the Department of Human Resources "didn't find any grounds to take any action" against either Mr. or Ms. Rowland. We have held that abandoning an investigation into a particular area of mitigating evidence before

"making a fully informed decision" cannot be a reasonable strategy. See Wiggins, 539 U.S. at 527–28, 123 S. Ct. at 2538. But this case doesn't fall in the category of those with counsel who "abandoned their investigation at an unreasonable point." Daniel v. Comm'r, Ala. Dep't of Corr., 822 F.3d at 1272 (quotation marks omitted). Here, counsel did follow up. They asked Ms. Garrison and Ms. Rowland about the incident. Based on the responses they got, counsel did not see any reason to ask the Department of Human Resources for copies of the records. We have recognized that "under some circumstances an attorney may make a strategic choice not to conduct a particular investigation." Dobbs v. Turpin, 142 F.3d 1383, 1387 (11th Cir. 1998) (quotation marks omitted). Because we cannot say counsel's failure to ask for the Department of Human Services records was unreasonable, this is one of those circumstances.

* * *

In Mr. McWhorter's case, the CCA held that "although the evidence about McWhorter's childhood is indeed disturbing, it does not necessarily mean that trial counsel was ineffective for failing to offer the additional evidence." McWhorter, 142 So. 3d at 1248. For the reasons described above, we hold that the CCA's conclusion was not based on an unreasonable application of clearly established federal law. Because Mr. McWhorter has failed to meet his burden in showing

counsel's performance was deficient, we need not address the prejudice prong of the Strickland inquiry. See Ward, 592 F.3d at 1163.

IV. CONCLUSION

In sum, we affirm the District Court's denial of Mr. McWhorter's federal habeas petition. The state court's factual determination that Ms. Burns was not intentionally dishonest is not unreasonable. And, although the evidence of Mr. McWhorter's substance abuse—beginning at age 10—is compelling, counsel's decision not to present this evidence because it was contrary to their "good kid, wrong crowd" strategy was also reasonable on this record. Finally, we cannot say the CCA unreasonably applied clearly established federal law in connection with the other mitigating evidence presented at the Rule 32 hearing when it affirmed the denial of Mr. McWhorter's ineffective assistance claim.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11535-P

CASEY A MCWHORTER,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents - Appellees.

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

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, MARTIN, and ED CARNES, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Panel Rehearing is also denied. (FRAP 40)

ORD-46

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11535-P

CASEY A MCWHORTER,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents - Appellees.

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

ORDER:

The unopposed motion for extension of time to and including September 14, 2020, in which to file Appellant's petition for rehearing or rehearing en banc is GRANTED.

DAVID J. SMITH
Clerk of the United States Court of
Appeals for the Eleventh Circuit

ENTERED FOR THE COURT - BY DIRECTION

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-11535-P

CASEY A MCWHORTER,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL OF THE STATE OF ALABAMA,

Respondents - Appellees.

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

ORDER:

Casey A. McWhorter seeks a certificate of appealability from the District Court's denial of his petition for a writ of habeas corpus under 28 U.S.C. § 2254.

This order GRANTS a certificate of appealability on the following issues:

1. Whether Mr. McWhorter's constitutional right to an impartial jury was violated by the presence of a biased juror.

2. Whether trial counsel conducted an inadequate penalty phase mitigation investigation, such that trial counsel rendered ineffective assistance under the standard set out in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984).

Mr. McWhorter's motion for a certificate of appealability is otherwise DENIED.

UNITED STATES CIRCUIT JUDGE

2019 WL 277385
Only the Westlaw citation is currently available.
United States District Court,
N.D. Alabama, Middle Division.

Casey A. MCWHORTER, Petitioner,
v.
Jefferson S. DUNN, Commissioner, Alabama Department of Corrections, [1] Respondent.

Case No. 4:13-CV-02150-RDP
|
Signed 01/22/2019

Attorneys and Law Firms

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MEMORANDUM OPINION

R. DAVID PROCTOR, UNITED STATES DISTRICT JUDGE

***1** Petitioner Casey A. McWhorter has petitioned for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his 1994 capital murder conviction and death sentence in Alabama state court. McWhorter alleges that a variety of constitutional violations require reversal of his conviction and/or sentence. The parties have fully briefed McWhorter's claims. (Docs. 14, 20). After careful consideration of the record, the pleadings, and the applicable provisions of 28 U.S.C. § 2254, the court finds that McWhorter has not shown that he is due an evidentiary hearing, and he is not entitled to habeas relief. Accordingly, and for the reasons stated below, his petition for a writ of habeas corpus is due to be denied.

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I. PROCEDURAL HISTORY

***2** In May 1993, McWhorter was indicted in the Marshall County Circuit Court on one count of capital murder for the shooting death of Edward Lee Williams. (Vol. 1, Tab 1 at 10).[2] The indictment charged that McWhorter intentionally killed Mr. Williams by shooting him with a rifle during the course of a robbery, in violation of § 13A-5-40(a)(2). (*Id.*). McWhorter was represented at trial by Thomas E. Mitchell and James R. Berry. (Vol. 3, Tab 8 at 98-99).

The guilt phase of the trial began on March 17, 1994. (Vol. 6 at 706; Vol. 7, Tab 11 at 921). On March 22, 1994, the jury found McWhorter guilty as charged. (Vol. 11, Tab 20 at 1758). After a brief recess, the penalty phase of the trial began. (*Id.*, Tab 21 at 1764). Later that day, the jury recommended by a vote of 10-2 that McWhorter be sentenced to death. (Vol. 1, Tab 1 at 9; Vol. 12, Tab 30 at 1852). At the May 13, 1994 sentencing hearing, the trial court followed the jury's recommendation and sentenced McWhorter to death. (Vol. 12, Tab 32 at 1872).

Mitchell and Berry continued to represent McWhorter on direct appeal. (Vol. 14, Tab 37). McWhorter raised a variety of issues on appeal, including claims that the trial court erred by (1) failing to instruct the jury on lesser included offenses, (2) excluding a venireperson from serving on the jury, (3) coercing the jury into returning a death sentence after the jury was deadlocked, and (4) directing prospective jurors to give a specific answer to a crucial *voir dire* question. (*Id.*).

The Alabama Court of Criminal Appeals affirmed McWhorter's conviction and sentence on August 27, 1999, and denied his application for rehearing on December 3, 1999. *McWhorter v. State*, 781 So.2d 257 (Ala. Crim. App. 1999). On August 11, 2000, the Alabama Supreme Court affirmed the judgment of the Alabama Court of Criminal Appeals. *Ex parte McWhorter*, 781 So.2d 330 (Ala. 2000). The United States Supreme Court denied McWhorter's petition for a writ of certiorari on April 16, 2001. *McWhorter v. Alabama*, 532 U.S. 976, 121 S.Ct. 1612, 149 L.Ed.2d 476 (2001).

***3** On April 11, 2002, McWhorter, through new counsel,[3] timely filed a Rule 32 petition in the Marshall County Circuit Court. (Vol. 19, Tab 49). McWhorter filed an amended petition on February 28, 2005.[4] (Vol. 21, Tab 56). On October 19, 2006, the trial court summarily dismissed a number of McWhorter's claims. (Vol. 36, Tab 80). On August 26-28, 2009, an evidentiary hearing was held on the remaining claims.[5] (Vol. 25, Tab 66 - Vol. 29). On March 29, 2010, the trial court entered a final order denying McWhorter's Rule 32 petition. (Vol. 36, Tab 81).

McWhorter appealed the denial of his Rule 32 petition to the Alabama Court of Criminal Appeals. That court affirmed the trial court on September 30, 2011, and denied his application for rehearing on February 10, 2012. *McWhorter v. State*, 142 So.3d 1195 (Ala. Crim. App. 2011).[6] On November 22, 2013, the Alabama Supreme Court denied McWhorter's petition for a writ of certiorari and affirmed the judgment. *Id.*

On November 25, 2013, McWhorter, through counsel,[7] filed a § 2254 petition in this court. (Doc. 1). Respondent filed an answer and brief on February 10, 2014. (Docs. 14, 15). McWhorter filed a reply brief on April 11, 2014. (Doc. 20).

II. THE OFFENSE OF CONVICTION

In its opinion on direct appeal, the Alabama Court of Criminal Appeals quoted the trial court's sentencing order setting out the facts of the crime:

> The court finds beyond a reasonable doubt that approximately three weeks before February 18, 1993, the 18-year-old defendant conspired with 15 and 16 year old codefendants (the 15-year-old codefendant being the son of the victim) to kill the victim in order to rob him of a substantial sum of money and to obtain other property from his home. This conspiracy was discussed from time to time until February 18, 1993. On that date a fourth party, who was aware of the plot, dropped the defendant and the 16-year-old codefendant off on a highway a few blocks from the victim's home at about 3:00 p.m. The fourth party and the 15-year-old son of the victim rode around until they met the defendant and the other codefendant at a pre-arranged spot at 8:00 o'clock that evening.
>
> The defendant and the 16-year-old proceeded on foot to the victim's home and let themselves in the unlocked empty house. They knew that the victim was not expected home for approximately three to four hours. They spent this three-to four-hour period of time in the home going through it, gathering up various items that they wanted to keep and making silencers for two .22 rifles which were there in the home. One silencer was made out of a plastic jug and filled

with napkins and attached to the rifle by duct tape. The other was made by wrapping a pillow around the barrel of the second rifle and holding it in place with duct tape and electrical wire. The rifles were 'test-fired' into a mattress to see if the silencers were accomplishing the desired effect. When the victim arrived home, he first saw the 16-year-old, grabbed the rifle he was holding and began to struggle over it. At that point, the defendant fired the first shot into the victim's body. Between the two conspirators on the scene, the victim was shot at least 11 times. After the victim was down on the floor, the defendant fired at least one more round into his head to assure that he was dead. They took his wallet and various other items from the home and left in the victim's pickup truck. They met the other two parties at the pre-arranged spot, took the victim's truck out into the woods and stripped it. The spoils were divided between the four individuals. The toxicologist testified that the victim died of multiple gunshot wounds, there being 11 entrance wounds and 2 exit wounds. The aorta and another major blood vessel were pierced, causing approximately half a gallon of blood to accumulate in the chest cavity and at least one bullet was removed from the brain.

***4** The defendant's guilt was evidenced not only by his confession but by the testimony of the fourth party who drove the defendant to the area near the victim's home and met him again at 8:00 p.m. and by the testimony of a friend to whose home the defendant carried part of the spoils and to whom the defendant confessed the substance of his guilt. All of the physical evidence was consistent with the above account.

McWhorter v. State, 781 So.2d 257, 265-66 (Ala. Crim. App. 1999).

III. THE SENTENCE

The following excerpts are taken from the written order of the sentencing court:

C. The Aggravating Circumstances

.

In regard to the aggravating circumstances the Court finds the following:

(1) The defendant was not under a sentence of imprisonment when he committed the capital offense. This aggravating circumstance under Section 13A-5-49(1) of the Code of Alabama is not found to exist and is not considered.

(2) The defendant has not been convicted of another capital offense or of a felony involving the use or threat of violence. Therefore, the Section 13A-5-49(2) aggravating circumstance does not exist and is not considered.

(3) The defendant did not knowingly create a great risk of death to many persons. Therefore, the Section 13A-5-49(3) aggravating circumstance does not exist and is not considered.

(4) The capital offense was committed while the defendant was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit robbery within the meaning of Section 13A-5-49(4). Therefore, the Section 13A-5-49(4) aggravating circumstance does exist and is considered.

(5) The capital offense was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody within the meaning of 13A-5-49(5). Therefore, the Section 13A-5-49(5) aggravating circumstance does not exist and is not considered.

(6) The capital offense was not committed for pecuniary gain within the meaning of Section 13A-5-49(6). Therefore, the Section 13A-5-49(6) aggravating circumstance does not exist and is not considered.

(7) The capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Therefore, the Section 13A-5-49(7) aggravating circumstance does not exist and is not considered.

(8) The capital offense was not especially heinous, atrocious or cruel compared to other capital offenses within the narrow meaning of Section 13A-5-49(8) and within the narrow meaning of *Kyser v. State*, 398 So. 2d 330 (Ala. 1981). Therefore, the Section 13A-5-49(8) aggravating circumstance does not exist and is not considered.

The Court considers only the aggravating circumstance contained in Section 13A-5-49(4) of the *Code*, that is the capital offense was committed by a person during the commission of or attempt to commit or flight after

committing or attempting to commit robbery, for the purposes of sentencing.

D. The Mitigating Circumstances

The defendant presented some evidence of mitigating circumstances at the sentencing phase of the trial. The Court has thoroughly and conscientiously considered all statutorily enumerated mitigating circumstances as well as any non-statutory mitigating circumstances which might reasonably appertain to this case.

In regard to mitigating circumstances, the Court finds the following:

(1) The defendant does not have a significant history of prior criminal activity within the meaning of Section 13A-5-51(1). Therefore, the Section 13A-5-51(1) mitigating circumstance does exist and is considered.

***5** (2) The capital offense was not committed while the defendant was under the influence of extreme mental or emotional disturbance. Therefore, the Section 13A-5-51(2) mitigating circumstance does not exist and is not considered.

(3) The victim was not a participant in the defendant's conduct and he did not therefore consent to it. Therefore, the Section 13A-5-51(3) mitigating circumstance does not exist and is not considered.

(4) The defendant was the principal, or at least one of them, who actually shot the victim and therefore his participation in the capital offense was not relatively minor. Therefore, the Section 13A-5-51(4) mitigating circumstance does not exist and is not considered.

(5) The defendant did not act under extreme duress or under the substantial domination of another person when he committed the capital offense. Therefore, the Section 13A-5-51(5) mitigating circumstance does not exist and is not considered.

(6) The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was not substantially impaired at the time he committed the capital offense. Therefore, the Section 13A-5-51(6) mitigating circumstance does not exist and is not considered.

(7) The defendant was 18 years of age at the time he committed the capital offense. Therefore, the Section 13A-5-51(7) mitigating circumstance does exist and is considered.

The Court is unaware of any non-statutory mitigating circumstances which exist or should be considered other than a far less than perfect childhood following the divorce of his parents, a good reputation with at least some individuals and a substantially good work record for a person of his age[,] all of which has [sic] been considered by the Court as non-statutory mitigating circumstances.

E. The Jury's Recommendation

.

The jury's advisory verdict recommended a sentence of death. The jury's vote was two for life without parole and ten for death by electrocution.

F. The Sentence.

Having weighed the one statutory aggravating circumstance against all of the statutory and non-statutory mitigating circumstances, and having given careful consideration to the jury's advisory recommendation, the court finds that the aggravating circumstance in this case far outweighs the mitigating circumstances and that the punishment should be death.

It is therefore **ordered, adjudged and decreed** that the defendant Casey A. McWhorter is guilty of Code of Alabama 1975 Section 13A-5-40(a)(2) Capital Murder as charged in the indictment.

It is further **ordered, adjudged and decreed** that the defendant Casey A. McWhorter is sentenced to death by electrocution.

(Vol. 2 at 388-94).

IV. THE SCOPE OF FEDERAL HABEAS REVIEW

"The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States.' " *Wilson v. Corcoran*, 562 U.S. 1, 5, 131 S.Ct. 13, 178 L.Ed.2d 276 (2010) (quoting 28 U.S.C. § 2254(a)). As such, this court's review of claims seeking habeas relief is limited to questions of federal constitutional and statutory law. Claims that turn

solely upon state law principles fall outside the ambit of this court's authority to provide relief under § 2254. *See Alston v. Department of Corrections*, 610 F.3d 1318, 1326 (11th Cir. 2010) (holding that a claim addressing either "an alleged defect in a collateral proceeding," or a state court's "interpretation of its own law or rules," does not provide a basis for federal habeas relief) (citations omitted).

A. Exhaustion of State Court Remedies: The First Condition Precedent to Federal Habeas Review

***6** A habeas petitioner is required to present his federal claims to the state court and to exhaust all of the procedures available in the state court system before seeking relief in federal court. 28 U.S.C. § 2254(b)(1); *Medellin v. Dretke*, 544 U.S. 660, 666, 125 S.Ct. 2088, 161 L.Ed.2d 982 (2005) (holding that a petitioner "can seek federal habeas relief only on claims that have been exhausted in state court"). That requirement ensures that state courts are afforded the first opportunity to address federal questions affecting the validity of state court convictions and, if necessary, correct violations of a state prisoner's federal constitutional rights. As the Eleventh Circuit has explained:

> In general, a federal court may not grant habeas corpus relief to a state prisoner who has not exhausted his available state remedies. 28 U.S.C. § 2254(b)(1)(A) ("An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that ... the applicant has exhausted the remedies available in the courts of the State...."). "When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction.... The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Smith v. Newsome*, 876 F.2d 1461, 1463 (11th Cir. 1989) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)).
>
> Exhaustion of state remedies requires that the state prisoner "fairly presen[t][8] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365, 115 S.Ct. 887, 130 L.Ed.2d 865 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971)) (internal quotation marks omitted). The Supreme Court has written these words:
>
> > [T]hat the federal claim must be fairly presented to the state courts.... it is not sufficient merely that the federal habeas applicant has been through the state courts.... Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies.
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> *Picard*, 404 U.S. at 275, 92 S.Ct. at 512. *See also Duncan*, 513 U.S. at 365, 115 S.Ct. at 888 ("Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment.").
>
> Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues. "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 5-6, 103 S.Ct. 276, 277, 74 L.Ed.2d 3 (1982) (citations omitted).
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> *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998) (first and third alterations and redactions in original) (footnote added).

B. The Procedural Default Doctrine: The Second Condition Precedent to Federal Habeas Review

1. General principles

***7** It is well established that if a habeas petitioner fails to raise his federal claim in the state court system at the time and in the manner dictated by the state's procedural rules, the state court can decide the claim is not entitled to a review on the merits. Stated differently, "the petitioner will have *procedurally defaulted* on that claim." *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) (emphasis added). The so-called "procedural default" doctrine was explained by the Supreme Court in *Woodford v. Ngo,* 548 U.S. 81, 126 S.Ct. 2378, 165 L.Ed.2d 368 (2006), as follows:

> In habeas, the sanction for failing to exhaust properly (preclusion of review in federal court) is given the separate name of procedural default, although the habeas doctrines of exhaustion and procedural default "are similar in purpose and design and implicate similar concerns," *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7, 112 S.Ct. 1715, 118 L.Ed.2d 318 (1992). *See also* *Coleman v. Thompson*, 501 U.S. 722, 731-732, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). In habeas, state-court remedies are described as having been "exhausted" when they are no longer available, regardless of the reason for their unavailability. See *Gray v. Netherland*, 518 U.S. 152, 161, 116 S.Ct. 2074, 135 L.Ed.2d 457 (1996). Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted, *ibid.*, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding. *Id.*, at 162, 116 S.Ct. 2074; *Coleman, supra*, at 744-751, 111 S.Ct. 2546.
>
> *Woodford,* 548 U.S. at 92-93, 126 S.Ct. 2378.

Generally, if the last state court to examine a claim states clearly and explicitly that the claim is barred because the petitioner failed to follow state procedural rules, and that procedural bar provides an adequate and independent state ground for denying relief, then federal review of the claim also is precluded by federal procedural default principles. *See* *Coleman v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991); *Cone v. Bell*, 556 U.S. 449, 465, 129 S.Ct. 1769, 173 L.Ed.2d 701 (2009) ("[W]hen a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review.").

> The federal courts' authority to review state court criminal convictions pursuant to writs of habeas corpus is severely restricted when a petitioner has failed to follow applicable state procedural rules in raising a claim, that is, where the claim is procedurally defaulted. *Federal review of a petitioner's claim is barred by the procedural default doctrine if the last state court to review the claim states clearly and expressly that its judgment rests on a procedural bar*, *Harris v. Reed*, 489 U.S. 255, 263, 109 S.Ct. 1038, 1043, 103 L.Ed.2d 308 (1989), *and that bar provides an adequate and independent state ground for denying relief. See* *Id.* at 262, 109 S.Ct. at 1042-43; *Johnson v. Mississippi*, 486 U.S. 578, 587, 108 S.Ct. 1981, 1987, 100 L.Ed.2d 575 (1988). The doctrine serves to ensure petitioners will first seek relief in accordance with state procedures, *see* *Presnell v. Kemp*, 835 F.2d 1567, 1578-79 (11th Cir. 1988), *cert. denied*, 488 U.S. 1050, 109 S.Ct. 882, 102 L.Ed.2d 1004 (1989), and to "lessen the injury to a State that results through reexamination of a state conviction on a ground that a State did not have the opportunity to address at a prior, appropriate time." *McCleskey v. Zant*, 499 U.S. 467, 111 S.Ct. 1454, 1470, 113 L.Ed.2d 517 (1991).
>
> ***8** *Johnson v. Singletary*, 938 F.2d 1166, 1173 (11th Cir. 1991) (emphasis added). [9]

Federal deference to a state court's clear finding of procedural default under its own rules is strong:

> "[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. Through its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Harris*, 489 U.S. at 264 n.10, 109 S.Ct. 1038 (emphasis in original). *See also* *Alderman v. Zant*, 22 F.3d 1541, 1549-51 (11th Cir. 1994) (where a Georgia habeas corpus court found that the petitioner's claims were procedurally barred as successive, but also noted that the claims lack merit based on the evidence, "this ruling in the alternative did not have an effect ... of blurring the clear determination by the [Georgia habeas corpus] court that the allegation was procedurally barred"), *cert. denied*, 513 U.S. 1061, 115 S.Ct. 673, 130 L.Ed.2d 606 (1994).

Bailey v. Nagle, 172 F.3d 1299, 1305 (11th Cir. 1999) (alterations and emphasis in original).

The Supreme Court defines an "adequate and independent" state court decision as one that " 'rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.' " *Lee v. Kemna,* 534 U.S. 362, 375, 122 S.Ct. 877, 151 L.Ed.2d 820 (2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)) (emphasis in *Lee*). The questions of whether a state procedural rule is "independent" of the federal question and "adequate" to support the state court's judgment, so as to have a preclusive effect on federal review of the claim, " 'is itself a federal question.' " *Id.* (quoting *Douglas v. Alabama*, 380 U.S. 415, 422, 85 S.Ct. 1074, 13 L.Ed.2d 934 (1965)).

To be considered "independent" of the federal question, "the state court's decision must rest solidly on state law grounds, and may not be 'intertwined with an interpretation of federal law.' " *Judd v. Haley,* 250 F.3d 1308, 1313 (11th Cir. 2001) (quoting *Card v. Dugger*, 911 F.2d 1494, 1516 (11th Cir. 1990)). An example of intertwining would be when "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." *Ake v. Oklahoma*, 470 U.S. 68, 75, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985). Stated differently, if "the state court must rule, either explicitly or implicitly, on the merits of the constitutional question" before applying the state's procedural rule to a federal constitutional question, then the rule is *not* independent of federal law. *Id.*

***9** To be considered "adequate" to support the state court's judgment, the state procedural rule must be both " 'firmly established and regularly followed.' " *Lee v. Kemna,* 534 U.S. at 375, 122 S.Ct. 877 (quoting *James v. Kentucky*, 466 U.S. 341, 348, 104 S.Ct. 1830, 80 L.Ed.2d 346 (1984)). In other words, the rule must be "clear [and] closely hewn to" by the state for a federal court to consider it as adequate. *James*, 466 U.S. at 346, 104 S.Ct. 1830. That does not mean that the state's procedural rule must be rigidly applied in every instance, or that occasional failure to do so will render the rule inadequate. "To the contrary, a [state's] discretionary [procedural] rule can be 'firmly established' and 'regularly followed' C even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, 558 U.S. 52, 60-61 (2009). Rather, the adequacy requirement means only that the procedural rule "must not be applied in *an arbitrary or unprecedented fashion.*" *Judd*, 250 F.3d at 1313 (emphasis added).

Thus, in summary, if the procedural rule is not firmly established, or if it is applied in an arbitrary, unprecedented, or manifestly unfair fashion, it will not be considered adequate, and the state court decision based upon such a rule can be reviewed by a federal court. *Card*, 911 F.2d at 1517. Conversely, if the rule is deemed adequate, the decision will not be reviewed by this court.

2. Overcoming procedural default

Generally, there are three circumstances in which an otherwise valid state-law ground will *not* bar a federal habeas court from considering a constitutional claim that was procedurally defaulted in state court: (1) where the petitioner demonstrates that he had good "cause" for not following the state procedural rule, *and*, that he was actually "prejudiced" by the alleged constitutional violation; *or* (2) where the state procedural rule was not "firmly established and regularly followed"; *or* (3) where failure to consider the petitioner's claims will result in a "fundamental miscarriage of justice." *See* *Edwards v. Carpenter*, 529 U.S. 446, 455, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) (Breyer, J., concurring); *see, e.g.*, *Coleman*, 501 U.S. at 749-50, 111 S.Ct. 2546 (holding that a state procedural default "will bar federal habeas review of the federal claim, unless the habeas petitioner can show cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice") (citations and internal quotation marks omitted); *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."); *Smith v. Murray*, 477 U.S. 527, 537, 106 S.Ct. 2661, 91 L.Ed.2d 434 (1986) (same); *Davis v. Terry*, 465 F.3d 1249, 1252 n.4 (11th Cir. 2006) ("It would be considered a fundamental miscarriage of justice if 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.' ") (quoting *Schlup v. Delo*, 513 U.S.

298, 327, 115 S.Ct. 851, 130 L.Ed.2d 808 (1995) (in turn quoting *Murray*, 477 U.S. at 496, 106 S.Ct. 2639)).

a. The "cause and prejudice" standard

"A federal court may still address the merits of a procedurally defaulted claim if the petitioner can show cause for the default *and* actual prejudice resulting from the alleged constitutional violation." *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010) (citing *Wainwright v. Sykes*, 433 U.S. 72, 84-85, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977)) (emphasis added). This so-called "cause *and* prejudice" standard is clearly framed in the conjunctive; therefore, a petitioner must prove both parts.

i. "Cause"

To show "cause," a petitioner must prove that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in the state courts. *Carrier*, 477 U.S. at 488, 106 S.Ct. 2639; *see also* *Amadeo v. Zant*, 486 U.S. 214, 221-22, 108 S.Ct. 1771, 100 L.Ed.2d 249 (1988).

> ***10** Objective factors that constitute cause include " 'interference by officials' " that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." In addition, constitutionally "[i]neffective assistance of counsel ... [on direct review] is cause." Attorney error short of ineffective assistance of counsel [on direct review], however, does not constitute cause and will not excuse a procedural default.

McCleskey v. Zant, 499 U.S. 467, 493-94, 111 S.Ct. 1454, 113 L.Ed.2d 517 (1991) (citations omitted) (first alteration in original, all other alterations added).

While "[a]ttorney error [on direct review] that constitutes ineffective assistance of counsel" has long been accepted as "cause" to overcome a procedural default, the constitutional ineffectiveness of post-conviction counsel on collateral review generally will not support a finding of cause and prejudice to overcome a procedural default. *Coleman*, 501 U.S. at 754, 111 S.Ct. 2546. This is the case because "[t]here is no right to counsel in state post-conviction proceedings." *Id.* at 752, 111 S.Ct. 2546 (citing *Pennsylvania v. Finley*, 481 U.S. 551, 107 S.Ct. 1990, 95 L.Ed.2d 539 (1987); *Murray v. Giarratano*, 492 U.S. 1, 109 S.Ct. 2765, 106 L.Ed.2d 1 (1989)).

Even so, in two recent landmark cases, the Supreme Court extended its prior decision in *Coleman* by deciding that, as a matter of equity, and, under specific, limited circumstances, errors by counsel on post-conviction collateral review could establish the necessary "cause" to overcome a procedurally defaulted claim. In the first such case, *Maples v. Thomas*, 565 U.S. 266, 132 S.Ct. 912, 181 L.Ed.2d 807 (2012), the Supreme Court found that post-conviction counsel's gross professional misconduct (*e.g.*, abandonment of the petitioner) severed the agency relationship between counsel and the petitioner and, thus, established the necessary "cause" to overcome a procedural default. *Id.* at 281, 132 S.Ct. 912.

In the second case, *Martinez v. Ryan*, 566 U.S. 1, 132 S.Ct. 1309, 182 L.Ed.2d 272 (2012), the Supreme Court held that post-conviction counsel's failure to raise an ineffective assistance of trial counsel claim at an initial review collateral proceeding could serve as the necessary "cause" to overcome the procedural default of that type of claim when the state prohibits it from being raised during the direct review process. *Id.* at 11-12, 132 S.Ct. 1309.

ii. "Prejudice"

In addition to proving the existence of "cause" for a procedural default, a habeas petitioner must show that he was actually "prejudiced" by the alleged constitutional violation. He must show "not merely that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and *substantial* disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982) (emphasis added); *see also* *McCoy v. Newsome*, 953 F.2d 1252, 1261 (11th Cir. 1992) (per curiam). If the "cause" is of the type described in *Martinez v. Ryan*, then the reviewing court should consider whether the petitioner can demonstrate "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit."

Martinez, 566 U.S. at 12-15, 132 S.Ct. 1309 (citing for comparison *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029, 154 L.Ed.2d 931 (2003) (describing standards for certificates of appealability to issue)).

b. The "fundamental miscarriage of justice" standard

In a "rare," "extraordinary," and "narrow class of cases," a federal court may consider a procedurally defaulted claim in the absence of a showing of "cause" for the default if *either*: (a) a fundamental miscarriage of justice "has probably resulted in the conviction of one who is actually innocent," *Smith*, 477 U.S. at 537-38, 106 S.Ct. 2661 (quoting *Carrier*, 477 U.S. at 496, 106 S.Ct. 2639); *or* (b) the petitioner shows "by *clear and convincing* evidence that[,] but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." *Schlup*, 513 U.S. at 323-27 & n.44, 115 S.Ct. 851 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992)) (emphasis in *Schlup*); *see also, e.g.*, *Smith*, 477 U.S. at 537-38, 106 S.Ct. 2661.

C. The Statutory Overlay: The Effect of the Antiterrorism and Effective Death Penalty Act of 1996 on Habeas Review

***11** The writ of habeas corpus "has historically been regarded as an extraordinary remedy." *Brecht v. Abrahamson*, 507 U.S. 619, 633, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993). That is especially true when federal courts are asked to engage in habeas review of a state court conviction pursuant to 28 U.S.C. § 2254.

> Direct review is the principal avenue for challenging a conviction. "When the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence. The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, *is secondary and limited. Federal courts are not forums in which to relitigate state trials.*"

Id. (emphasis added) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983)). "Those few who are ultimately successful [in obtaining federal habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Fay v. Noia*, 372 U.S. 391, 440-41, 83 S.Ct. 822, 9 L.Ed.2d 837 (1963).

"Accordingly, ... an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Brecht*, 507 U.S. at 634, 113 S.Ct. 1710. That is due to the fact that, under the federal system of governments created by the United States Constitution,

> [t]he States possess primary authority for defining and enforcing the criminal law. In criminal trials they also hold the initial responsibility for vindicating constitutional rights. Federal intrusions into state criminal trials frustrate both the States' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.

Engle v. Isaac, 456 U.S. 107, 128, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). [10]

Congress legislated these principles in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended preexisting habeas law. [11] Indeed, several provisions of AEDPA require federal courts to give even greater deference to state court determinations of federal constitutional claims than before.

1. 28 U.S.C. § 2254(e)(1)

***12** Section 2254(e)(1) requires district courts to presume that a state court's factual determinations are correct, unless the habeas petitioner rebuts the presumption of correctness with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *see also, e.g.*, *Fugate v. Head*, 261 F.3d 1206, 1215 (11th Cir. 2001) (observing that § 2254(e)(1) provides "a highly deferential standard of review for factual determinations made by a state court"). Section 2254(e)(1) "modified a federal habeas court's

role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403-04, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000)).

The deference that attends state court findings of fact pursuant to Section 2254(e)(1) applies to all habeas claims, regardless of their procedural stance. Thus, a presumption of correctness must be afforded to a state court's factual findings, even when the habeas claim is being examined *de novo*. *See Mansfield v. Secretary, Department of Corrections*, 679 F.3d 1301, 1313 (11th Cir. 2012) (acknowledging the federal court's obligation to accept a state court's factual findings as correct, if unrebutted by clear and convincing evidence, and proceeding to conduct a *de novo* review of the habeas claim).

The presumption of correctness also applies to habeas claims that were adjudicated on the merits by the state court and, therefore, those claims are subject to the standards of review set out in 28 U.S.C. § 2254(d)(1) or (d)(2) discussed in the following section.

2. 28 U.S.C. § 2254(d)

"By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011). It does not matter whether the state court decision contains a lengthy analysis of the claim, or is a summary ruling "unaccompanied by explanation." *Id.*

Further, the "backward-looking language" of the statute requires an examination of the state court decision on the date it was made. *Cullen v. Pinholster*, 563 U.S. 170, 131 S.Ct. 1388, 179 L.Ed.2d 557 (2011). That is, "[s]tate court decisions are measured against [the Supreme] Court's precedents as of 'the time the state court renders its decision.' " *Id.* at 182, 131 S.Ct. 1388 (quoting *Lockyer v. Andrade*, 588 U.S. 63, 71-72 (2003)).

Finally, "review under § 2254(d)(1) [and (d)(2)] is limited to the record that was before the state court that adjudicated the claim on the merits." *Id.* at 181, 131 S.Ct. 1388. Therefore, a federal habeas court conducting 2254(d) review should not consider new evidence "in the first instance effectively *de novo*." *Id.* at 182, 131 S.Ct. 1388.

A closer look at the separate provisions of 28 U.S.C. § 2254(d)(1) and (d)(2) reveals that when a state court has made a decision on a petitioner's constitutional claim, habeas relief cannot be granted unless it is determined that the state court's adjudication of the claim either:

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

28 U.S.C. § 2254(d). [12]

***13** The "contrary to" and "unreasonable application" clauses of § 2254(d) have been interpreted as "independent statutory modes of analysis." *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006) (citing *Williams,* 529 U.S. at 405-07, 120 S.Ct. 1495). [13] When considering a state court's adjudication of a petitioner's claim, therefore, the habeas court must not conflate the two modes of analysis.

a. The meaning of § 2254(d)(1)'s "contrary to" clause

A state court determination can be "contrary to" clearly established Supreme Court precedent in at least two ways:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court

> confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Williams, 529 U.S. at 405, 120 S.Ct. 1495. *See also, e.g.*, *Brown v. Payton*, 544 U.S. 133, 141, 125 S.Ct. 1432, 161 L.Ed.2d 334 (2005) (same); *Early v. Packer*, 537 U.S. 3, 8, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002) (per curiam) (same); *Putman v. Head*, 268 F.3d 1223, 1240-41 (11th Cir. 2001) (same).

As the Eleventh Circuit has noted, the majority opinion in *Williams* does not limit the construction of § 2254(d)(1)'s "contrary to" clause to the two examples set forth above. [14] Instead, the statutory language "simply implies that 'the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court.' " *Alderman*, 468 F.3d at 791 (quoting *Williams*, 529 U.S. at 405, 120 S.Ct. 1495).

b. The meaning of § 2254(d)(1)'s "unreasonable application" clause

***14** A state court's determination of a federal constitutional claim can result in an "unreasonable application" of clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Williams, 529 U.S. at 407, 120 S.Ct. 1495. *See also, e.g.*, *Putman*, 268 F.3d at 1240-41 (same).

It is important to note that "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Williams*, 529 U.S. at 410, 120 S.Ct. 1495 (emphasis in original). A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law *erroneously* or *incorrectly.* Rather, that application must also be unreasonable." *Id.* at 411, 120 S.Ct. 1495 (emphasis added).

In other words, the question that should be asked is not whether the state court "correctly" applied Supreme Court precedent when deciding the federal constitutional issue, but whether the state court's determination was "unreasonable." *Id.* at 409, 120 S.Ct. 1495 ("[A] federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable."). *See also, e.g.*, *Bell*, 535 U.S. at 694, 122 S.Ct. 1843 (observing that the "focus" of the inquiry into the reasonableness of a state court's determination of a federal constitutional issue "is on whether the state court's application of clearly established federal law is objectively unreasonable," and stating that "an unreasonable application is different from an incorrect one"); *Harrington v. Richter*, 562 U.S. 86, 100-103, 131 S.Ct. 770, 178 L.Ed.2d 624 (2011) (same). [15]

In order to demonstrate that a state court's application of clearly established federal law was "objectively unreasonable," the habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Id.* at 786-87. Stated another way, if the state-court's resolution of a claim is debatable among fairminded jurists, it is not objectively unreasonable.

***15** "By its very language, [the phrase] 'unreasonable application' refers to mixed questions of law and fact, when a state court has 'unreasonably' applied clear Supreme Court precedent to the facts of a given case." *Neelley v. Nagle*, 138 F.3d 917, 924 (11th Cir. 1998) (citation and footnote omitted). Mixed questions of constitutional law and fact are those decisions "which require the application of a legal standard to the historical-fact determinations." *Townsend v. Sain*, 372 U.S. 293, 309 n.6, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

c. The meaning of § 2254(d)(2)'s clause addressing an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding"

Title 28 U.S.C. § 2254(d)(2) "imposes a 'daunting standard – one that will be satisfied in relatively few cases.' " *Cash v. Maxwell*, 565 U.S. 1138, 132 S.Ct. 611, 612, 181 L.Ed.2d 785 (2012) (Sotomayor, J., respecting denial of certiorari) (quoting *Maxwell v. Roe*, 628 F.3d 486, 500 (9th Cir. 2010)). As the Supreme Court has noted,

> in related contexts, "[t]he term 'unreasonable' is no doubt difficult to define." *Williams v. Taylor,* 529 U.S. 362, 410, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). It suffices to say, however, that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Cf.* *Id.*, at 411, 120 S.Ct. 1495.

Wood v. Allen, 558 U.S. 290, 301, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010). Therefore, "even if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's ... determination.' " *Id.* (quoting *Rice v. Collins,* 546 U.S. 333, 341-42, 126 S.Ct. 969, 163 L.Ed.2d 824 (2006)) (alteration in original). Conversely, "when a state court's adjudication of a habeas claim result[s] in a decision that [i]s based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, this Court is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them." *Adkins v. Warden, Holman Correctional Facility*, 710 F.3d 1241, 1249 (11th Cir. 2013) (quoting *Jones v. Walker*, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008)) (en banc) (alterations in original).

d. Evaluating state court factual determinations under 28 U.S.C. §§ 2254(d)(2) and (e)(1)

As set out previously, 28 U.S.C. § 2254(d)(2) regulates federal court review of state court findings of fact. That provision limits the availability of federal habeas relief on any claims by a state prisoner that are grounded in a state court's factual findings, unless the state court's findings were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

Moreover, it must be remembered that 28 U.S.C. § 2254(e)(1) provides that factual determinations made by a state court are "presumed to be correct," and that the habeas petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." *See* 28 U.S.C. § 2254(e)(1); *Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010) (holding that the presumption of correctness attending a state court's findings of fact can be overcome only by clear and convincing evidence).

Nevertheless, there is Eleventh Circuit authority which indicates that the manner in which subsections 2254(d)(2) and(e)(1) relate to one another remains an open question. *See Cave v. Secretary for Department of Corrections*, 638 F.3d 739, 744-45 (11th Cir. 2011) (" '[N]o court has fully explored the interaction of § 2254(d)(2)'s 'unreasonableness' standard and § 2254(e)(1)'s 'clear and convincing evidence' standard.' ") (quoting *Gore v. Secretary for Department of Corrections*, 492 F.3d 1273, 1294 n.51 (11th Cir. 2007)).

***16** Even so, the Eleventh Circuit's earlier opinion in *Ward v. Hall* clearly held that federal habeas courts "must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence." *Id.* at 1177 (citing § 2254(e)(1); *Parker v. Head*, 244 F.3d 831, 835-36 (11th Cir. 2001)). That same opinion also observed that 28 U.S.C.

§ 2254(e)(1) "commands that for a writ to issue because the state court made an 'unreasonable determination of the facts,' the petitioner must rebut 'the presumption of correctness [of a state court's factual findings] by clear and convincing evidence.' " *Ward*, 592 F.3d at 1155 (alteration in original).

D. The Burden of Proof and Heightened Pleading Requirements for Habeas Petitions

Federal habeas "exists only to review errors of constitutional dimension." *McFarland v. Scott*, 512 U.S. 849, 856, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994); *see also* 28 U.S.C. § 2254(a). [16] Further, "[w]hen the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Barefoot v. Estelle*, 463 U.S. 880, 887, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983). Two consequences flow from those fundamental propositions.

First, the habeas petitioner bears the burden of overcoming the presumption of "legality" that attaches to the state court conviction and sentence, and of establishing a factual basis demonstrating that federal post-conviction relief should be granted. *See, e.g.*, 28 U.S.C. §§ 2254(d) and (e)(1); [17] *Hill v. Linahan*, 697 F.2d 1032, 1036 (11th Cir. 1983) ("The burden of proof in a habeas proceeding is always on the petitioner.") (citing *Henson v. Estelle*, 641 F.2d 250, 253 (5th Cir. 1981)).

Second, the habeas petitioner must meet "heightened pleading requirements." *McFarland v. Scott*, 512 U.S. 849, 856, 114 S.Ct. 2568, 129 L.Ed.2d 666 (1994); *Borden v Allen*, 646 F.3d 785, 810 (11th Cir. 2011) (holding that Section 2254 requires "fact pleading," and not merely "notice pleading"). The mere assertion of a ground for relief, without sufficient factual detail, does not satisfy either the petitioner's burden of proof under 28 U.S.C. § 2254(e)(1), or the requirements of Rule 2(c) of the *Rules Governing Section 2254 Cases in the United States District Courts*, which requires a state prisoner to "specify all the grounds for relief available to the petitioner," and to then "state the facts supporting each ground." Rule 2(c)(1) and (2), *Rules Governing Section 2254 Cases in the United States District Courts*. *See also* 28 U.S.C. § 2242 (stating that an application for writ of habeas corpus "shall allege the facts concerning the applicant's commitment or detention").

***17** In short, a habeas petitioner must include in his statement of each claim sufficient supporting facts to justify a decision for the petitioner if the alleged facts are proven true. *See, e.g.*, *Blackledge v. Allison*, 431 U.S. 63, 75 n.7, 97 S.Ct. 1621, 52 L.Ed.2d 136 (1977) (observing that a habeas petition must "state facts that point to a 'real possibility of constitutional error' ") (quoting Advisory Committee Notes to Rule 4 of the *Rules Governing Section 2254 Cases in the United States District Courts*). *Cf.* *Diaz v. United States*, 930 F.2d 832, 835 (11th Cir. 1991) (holding in a case premised upon 28 U.S.C. § 2255 that, despite the liberal construction due a *pro se* petitioner's allegations, dismissal was appropriate because the movant did not allege "facts that, if proven, would entitle him to relief"). [18]

In addition, "[c]itation of the controlling constitutional, statutory, or other bases for relief for each claim also should be stated." 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 11.6, at 654 (5th ed. 2005). As another district court has held:

> It is not the duty of federal courts to try to second guess the meanings of statements and intentions of petitioners. Rather the duty is upon the individual who asserts a denial of his constitutional rights to come forth with a statement of sufficient clarity and sufficient supporting facts to enable a court to understand his argument and to render a decision on the matter.

Nail v. Slayton, 353 F.Supp. 1013, 1019 (W.D. Va. 1972).

E. Ineffective Assistance of Counsel Claims [19]

Federal ineffective assistance of counsel claims are specifically limited to the performance of attorneys who represented a state prisoner at trial, or on direct appeal from the conviction. *See* 28 U.S.C. § 2254(i) ("The ineffectiveness or incompetence of counsel during Federal

or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). *See also* *Coleman v. Thompson*, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991) ("There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings.").

The Supreme Court's "benchmark" standard for determining ineffective assistance is well established. The question is whether a trial or appellate attorney provided representational assistance to a state prisoner that was so professionally incompetent as to create issues of federal constitutional proportions. In other words, the court asks "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). If an objective answer to that question is "yes," then counsel was constitutionally ineffective. *Strickland* requires that the issue be approached in two steps:

> ***18** A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. *First*, *the defendant must show that counsel's performance was deficient.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, *the defendant must show that the deficient performance prejudiced the defense.* This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687 (emphasis added); *see also, e.g.*, *Williams*, 529 U.S. at 390, 120 S.Ct. 1495 (same); *Grayson v. Thompson*, 257 F.3d 1194, 1215 (11th Cir. 2001) (same).

Both parts of the *Strickland* standard must be satisfied: that is, a habeas petitioner bears the burden of proving, by "a preponderance of competent evidence," that (1) the performance of his trial or appellate attorney was *deficient*; *and* (2) that such deficient performance *prejudiced his defense.* *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). Thus, a federal court is not required to address both parts of the *Strickland* standard when the habeas petitioner makes an insufficient showing on one of the prongs. *See, e.g.*, *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) ("Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.") (citation to *Strickland* omitted).

1. The performance prong

"The burden of persuasion is on the petitioner to prove by a preponderance of the evidence that counsel's performance was unreasonable." *Stewart v. Secretary, Department of Corrections*, 476 F.3d 1193, 1209 (11th Cir. 2007) (citing *Chandler*, 218 F.3d at 1313). To satisfy the performance prong of the *Strickland* test, a defendant must prove that counsel made errors so serious that he or she was not functioning as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. The standard for gauging attorney performance is "reasonableness under prevailing professional norms." *Id.* at 688, 104 S.Ct. 2052; *see also, e.g.*, *Williams*, 529 U.S. at 390-91, 120 S.Ct. 1495 (same); *Darden v. Wainwright*, 477 U.S. 168, 184, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986) (same); *Chandler*, 218 F.3d at 1313 (same). "The test of reasonableness is not whether counsel could have done something more or different," but whether counsel's performance "fell within the broad range of reasonable assistance at trial." *Stewart*, 476 F.3d at 1209 (citing

Chandler, 218 F.3d at 1313). Furthermore, courts must "recognize that 'omissions are inevitable, but, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' " *Id.* (quoting *Burger v. Kemp*, 483 U.S. 776, 794, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)). The Sixth Amendment does not guarantee a defendant the very best counsel or the most skilled attorney, but only an attorney who performed reasonably well within the broad range of professional norms. "The test has nothing to do with what the best lawyers would have done. Nor is the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992).

The reasonableness of counsel's performance is judged from the perspective of the attorney at the time of the alleged error and in light of all the circumstances. *See, e.g.*, *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001) (giving lawyers "the benefit of the doubt for 'heat of the battle' tactical decisions"); *Mills v. Singletary*, 161 F.3d 1273, 1285-86 (11th Cir. 1998) (noting that *Strickland* performance review is a "deferential review of all of the circumstances from the perspective of counsel at the time of the alleged errors").

***19** Under this standard, there are no "absolute rules" dictating what reasonable performance is or what line of defense must be asserted. [*Chandler*, 218 F.3d] at 1317. Indeed, as we have recognized, "[a]bsolute rules would interfere with counsel's independence — which is also constitutionally protected — and would restrict the wide latitude counsel have in making tactical decisions." *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001).

Michael v. Crosby, 430 F.3d 1310, 1320 (11th Cir. 2005) (first alteration added, second alteration in original). Judicial scrutiny of counsel's performance must be "highly deferential," because representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. *See* *Strickland*, 466 U.S. at 697, 104 S.Ct. 2052. Indeed, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *, 104 S.Ct. 2052Id.* at 689.

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

Strickland, 466 U.S. at 689, 104 S.Ct. 2052 (emphasis added) (citations and internal quotation marks omitted); *see also, e.g.*, *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) ("When reviewing whether an attorney is ineffective, courts should always presume strongly that counsel's performance was reasonable and adequate.") (internal quotation marks omitted).

"Based on this strong presumption of competent assistance, the petitioner's burden of persuasion is a heavy one: '*petitioner must establish that no competent counsel would have taken the action that his counsel did take.*' " *Stewart*, 476 F.3d at 1209 (quoting *Chandler*, 218 F.3d at 1315) (emphasis added). "Even if many reasonable lawyers would

not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds *unless it is shown that no reasonable lawyer*, *in the circumstances*, *would have done so*." *Rogers*, 13 F.3d at 386 (emphasis added).

2. The prejudice prong

"A petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high." *Van Poyck v. Florida Department of Corrections*, 290 F.3d 1318, 1322 (11th Cir. 2002). *See also, e.g.*, *Gilreath v. Head*, 234 F.3d 547, 551 (11th Cir. 2000) (holding that a habeas petitioner "must affirmatively prove prejudice, because '[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial' ") (quoting *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052) (alteration in original). "It is not enough for the [habeas petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052; *see also* *Harrington*, 562 U.S. at 111-112, 131 S.Ct. 770 ("The likelihood of a different result must be *substantial*, not just conceivable.") (emphasis added) (citing *Strickland*, 466 U.S. at 693, 104 S.Ct. 2052).

***20** Instead, to prove prejudice, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694, 104 S.Ct. 2052; *see also* *Williams*, 529 U.S. at 391, 120 S.Ct. 1495 (same). When that standard is applied in the context of the death sentence itself, " 'the question is whether there is a reasonable probability that, absent the errors, the sentencer [*i.e.*, in Alabama, the trial court judge] ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Stewart*, 476 F.3d at 1209 (quoting *Strickland*, 466 U.S. at 695, 104 S.Ct. 2052).

That is a high standard, and in order to satisfy it a petitioner must present competent evidence proving "that trial counsel's deficient performance deprived him of 'a trial whose result is reliable.' " *Brown v. Jones*, 255 F.3d 1272, 1278 (11th Cir. 2001) (quoting *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052). In other words, "[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect." *Johnson*, 256 F.3d at 1177 (quoting *Eddmonds v. Peters*, 93 F.3d 1307, 1313 (7th Cir. 1996) (in turn quoting *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986))) (internal quotation marks omitted).

3. Deference accorded state court findings of historical fact and decisions on the merits when evaluating ineffective assistance of counsel claims

State court findings of historical fact made in the course of evaluating a claim of ineffective assistance of counsel are subject to a presumption of correctness under 28 U.S.C. § 2254(d)(2) and (e)(1). *See, e.g.*, *Thompson v. Haley*, 255 F.3d 1292, 1297 (11th Cir. 2001). To overcome a state-court finding of fact, the petitioner bears the burden of proving contrary facts by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Additionally, under AEDPA, a federal habeas court may grant relief on a claim of ineffective assistance of counsel *only if* the state-court determination involved an "unreasonable application" of the *Strickland* standard to the facts of the case. *Strickland* itself, of course, also requires an assessment of whether counsel's conduct was professionally unreasonable. Those two assessments cannot be conflated into one. *See* *Harrington,* 562 U.S. at 101-02, 131 S.Ct. 770. Thus, habeas relief on a claim of ineffective assistance of counsel can be granted with respect to a claim actually decided by the state courts only if the habeas court determines that it was "objectively unreasonable" for the state courts to find that counsel's conduct was not "professionally unreasonable." As the *Harrington* Court explained:

> "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. [356] , [371-372], 130 S.Ct. 1473, 1485, 176 L.Ed.2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented

at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S. at 689-690, 104 S.Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S.Ct. 2052; see also *Bell v. Cone*, 535 U.S. 685, 702, 122 S.Ct. 1843, 152 L.Ed.2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S.Ct. 838, 122 L.Ed.2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S. at 690, 104 S.Ct. 2052.

***21** Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *Id.*, at 689, 104 S.Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles [v. Mirzayance]*, 556 U.S. at [125], 129 S.Ct. at 1420 [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S. at [123], 129 S.Ct. at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland's* deferential standard.

Harrington, 562 U.S. at 105, 131 S.Ct. 770; *see also* *Premo v. Moore*, 562 U.S. 115, 121-23, 131 S.Ct. 733, 178 L.Ed.2d 649 (2011).

V. McWHORTER'S CLAIMS

McWhorter asserts a number of claims in his petition. The court addresses each of them below.

A. McWhorter's Claim That He Was Denied the Right to an Impartial Jury Because a Juror Intentionally Hid Critical Facts During *Voir Dire*

During *voir dire*, defense counsel presented the potential jurors with a questionnaire. In question 21, the veniremembers were asked: "Have you or any member of your family or anyone you know ever been the victim of a crime?" (Doc. 1 at 11). Anyone answering "yes" to that question was directed to identify the type of crime, their relationship to the victim, and whether there was an arrest or conviction. (*Id.*). Juror Linda Burns answered "no" to question 21. (*Id.*). The defense later learned that Ms. Burns' father had drowned when she was a child, and there was some confusion as to whether it was an accident or the result of a crime. (*Id.* at 12-15).

1. The Parties' Arguments

McWhorter alleges that Juror Burns intentionally hid critical facts from the defense during *voir dire*, violating his right to a fair trial by a panel of "indifferent jurors," in violation of *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) and *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). (Vol. 1 at 10-26). McWhorter unsuccessfully raised this claim in his Rule 32 petition and on appeal from the denial of his Rule 32 petition. The Rule 32 court denied the claim after conducting an evidentiary hearing at which Juror Burns testified extensively. (Vol. 25, Tab 60 at 40-90; Vol. 26 at 110-26).

Respondent counters that McWhorter is not entitled to relief because, in addressing this claim on appeal from the denial of his Rule 32 petition, the Alabama Court of Criminal Appeals

properly applied clearly established federal law and denied the claim. (Doc. 14 at 11-15).

2. Analysis

McWhorter argues that the decision of the Alabama Court of Criminal Appeals was contrary to and involved an unreasonable application of *Irvin v. Dowd*, 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (1961) and *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984). In *Irvin*, the Court held that "[i]n essence, 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." 366 U.S. 717, 722, 81 S.Ct. 1639, 6 L.Ed.2d 751 (citing *In re Oliver*, 333 U.S. 257, 68 S.Ct. 499, 92 L.Ed. 682 (1948) and *Tumey v. State of Ohio*, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927)).

In *McDonough*, the Court concluded that "[*v*]*oir dire* examination serves to protect that right by exposing possible biases, both known and unknown, on the part of potential jurors." 464 U.S. at 554, 104 S.Ct. 845. "[T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on *voir dire*, and then further show that a correct response would have provided a valid basis for a challenge for cause." *Id.* at 556, 104 S.Ct. 845.

***22** The first prong requires a determination of whether the juror answered honestly, "that is, whether he was *aware* of the fact that his answers were false." *United States v. Perkins*, 748 F.2d 1519, 1531 (11th Cir. 1984). The second prong – whether a correct response would have provided a valid basis for a cause challenge – requires the party seeking a new trial because of a juror's nondisclosure during *voir dire* to show actual bias. *Id.* at 1532.

During the Rule 32 evidentiary hearing, Juror Burns testified extensively about the death of her father:

> [POSTCONVICTION COUNSEL:] [Juror L.B.], once again, could you tell us what happened to your father, and could you indicate, you know, what, if anything, is based on things you saw and what is based on what you heard?
>
> [JUROR L.B.:] Okay. My mother and my two brothers and I were woke up one morning about 2:00 o'clock in the morning.
>
> This is still hard for me.
>
> [POSTCONVICTION COUNSEL:] I understand.
>
> [JUROR L.B.:] And we was told that my father and two other men were at a rock mine pond. And my mother went and got my uncle up, which was my daddy's brother. And he took us up there. And they would not let us go down there.
>
> And about 11:00 o'clock that morning, a police officer came to our house and told us that they were fixing to blow the dam, and that they believed that my father was—had run. There was another man that was killed there that day. He was beat to death.
>
> And so they told us that they were going to send a diver down one more time and if they didn't find anything then they were going to blow the dam. When they sent a diver down, they found my father. And he was dead, naturally.
>
> We were told that there were bruises around his neck, but when the autopsy came back it was said that he was drowned. The other man was beaten to death. And there was a trial. The other man that was there, he went and got the – his family and then went to the police station and got them and brought them back. Or they went out to the scene is all I know.
>
> I had just always thought that my father was killed because the other man was killed, and he was good friends with him, so I thought that he had been killed. And being a kid you always think that. You don't ever know. And so that's why I always thought my father was killed.
>
> [POSTCONVICTION COUNSEL:] Now, you said that someone told you that your father had bruises on his neck. Who told you that?
>
> [JUROR L.B.:] My uncles. My daddy's brothers.
>
> [POSTCONVICTION COUNSEL:] Now, at the time, you were about 12 years old, right?
>
> [JUROR L.B.:] Yes.

....

[POSTCONVICTION COUNSEL:] Your memories of what happened to your father were and still are traumatic, something that's hard for you to talk about, isn't it?

[JUROR L.B.:] Yes.

[POSTCONVICTION COUNSEL:] And isn't it true that at some point along the way you have got emotional closure when someone told you that he worked on the case, and even though he couldn't get enough evidence to prove your father was murdered, that having worked on the case he did believe it?

[JUROR L.B.:] Believe that my father was murdered or that he drowned?

[POSTCONVICTION COUNSEL:] That your father was murdered?

[JUROR L.B.:] No. You got it backwards.

[POSTCONVICTION COUNSEL:] Okay. Well, you were – at the time that you – in 1994, at the time that you served on the jury in Casey McWhorter's case, did you believe that your father had been murdered?

***23** [JUROR L.B.:] No.

[POSTCONVICTION COUNSEL:] You did not?

[JUROR L.B.:] No.

[POSTCONVICTION COUNSEL:] What was it, if anything, that happened between the time you were at trial, when you say you did [sic] believe he was murdered, and the time of Casey McWhorter's trial that led you to change your mind?

[JUROR L.B.:] I dated a guy that was going to law school, and he looked into the case of my father, and he told me that my father had drowned; that the autopsy had showed that my father had drowned.

[POSTCONVICTION COUNSEL:] Yes. And did he explain that because the autopsy showed that your father had drowned they were unable to prove that he had been murdered?

[JUROR L.B.:] No.

[POSTCONVICTION COUNSEL:] And isn't it true that the man we're talking about, the lawyer, said that because the autopsy couldn't prove the murder because it said drowned, that he still believed, based on all the evidence he knew about, that it was a murder?

[JUROR L.B.:] No.

....

On cross-examination, Juror L.B. testified:

[STATE:] And do you remember that Question Number 21 he showed you, the question that says, '[W]ere you or anybody in your family a victim of a crime'?

[JUROR L.B.:] Uh-huh. Right.

[STATE:] And you did not answer that your father was a victim of a crime, right?

[JUROR L.B.:] Right. Did not.

[STATE:] Is it fair to say that you did not answer that your father was a victim of a crime because no one, in fact, had been charged with a crime in the death of your father?

[JUROR L.B.:] That's right.

[STATE:] And no one had ever been convicted in the death of your father, correct?

[JUROR L.B.:] That's right.

[STATE:] And you had personal knowledge that the autopsy officially said that he drowned?

[JUROR L.B.:] Right.

[STATE:] And that there was no indication other than what you had just heard through family rumors that he actually had been murdered?

[JUROR L.B.:] Yes.

[STATE:] So far as you were concerned, you were being completely honest and truthful when you answered that question?

[JUROR L.B.:] Yes, I was.

....

[STATE:] Just to be clear, [Juror L.B.], you did not deliberately hide the story of your father's death when you were answering the jury questionnaire?

[JUROR L.B.:] No.

[STATE:] The way the question was worded on the jury questionnaire was, were you or any of your family members the victim of a crime, not just a victim?

[JUROR L.B.:] Right, yes.

[STATE:] And that there must have – without a criminal charge, without a criminal conviction, even, that you cannot have a family member who was a victim of a crime?

[JUROR L.B.:] Yes.

....

[POSTCONVICTION COUNSEL:] Did you – but you believed, after hearing what everything that you heard about the incident, that your father had been killed, didn't you?

[JUROR L.B.:] Yes.

....

[JUROR L.B.:] Okay. Is because I had always been told as a child that my father was killed by his family because they were the big bad boys, okay? And I'd always believed that. You know, because you don't think of your father as drowning. You just don't think of that. And I just always thought that my father was killed.

***24** I knew the man, and I knew his family, and I just thought that if he killed one, he'd kill both.

[POSTCONVICTION COUNSEL:] And is that what you thought in 1994 at the time that you served on the jury?

[JUROR L.B.:] I still believed that the man had something to do with my father's death. Whether he directly killed him or not, I do not know. Only God knows that. But I think he had something indirectly to do with it, yes.

[POSTCONVICTION COUNSEL:] You do. And was that a strong feeling on your part?

[JUROR L.B.:] Yes.

....

[POSTCONVICTION COUNSEL:] [Juror L.B.], can you tell us what you said to your fellow jurors regarding the death of your father?

[JUROR L.B.:] That the man that had killed my father – I thought that had killed my father and another man did not serve the full time that he was in there. I don't even know how many years that he gave him. I thought it was ten and he only served like three or four and that he should have served more.

....

[JUROR L.B.]: No. I didn't think he had killed my father. I think he had something to do with the death of my father. Whether or not he individually killed him, I do not know.

[POSTCONVICTION COUNSEL:] Well, did you believe that he, together with someone else, played a part in the killing?

[JUROR L.B.:] Well, when you say killing, the other man was killed. My father was drowned. Now, whether or not he was drowned on purpose, I do not know.

[POSTCONVICTION COUNSEL:] Did you –

[JUROR L.B.:] But I do know that he did play a part in the other death because he told him he did. He pled guilty to the other death.

[POSTCONVICTION COUNSEL:] And did you believe at that time that there was that it's quite possible that your father had been intentionally drowned?

[JUROR L.B.:] Yes. He could have been.

[POSTCONVICTION COUNSEL:] And that was your belief at that time in 1994?

[JUROR L.B.:] Well, that's been my belief all my life.

[POSTCONVICTION COUNSEL:] So you believed it all your life and up through and including the trial?

[JUROR L.B.:] Yeah.

McWhorter, 142 So.3d 1195, 1214-17 (2011).

The circuit judge who heard her testimony found that:

> She explained that she did not know how her father died. It was apparent from [Juror L.B.'s] testimony why she

> did not answer in the affirmative when asked whether she had a family member who had been the "victim of a crime." [Juror L.B.] testified that a friend, a law student, investigated the death and found an autopsy report that attributed her father's death to drowning, and she testified that, because no one ever was charged with a crime related to her father's death, much less convicted of one, that her father could not have been "the victim of a crime."
>
> ....
>
> Because [Juror L.B.] knew that her father's autopsy report indicated that he died by drowning and because she knew that no one ever had been charged with any crime related to her father's death, she reasonably did not disclose the story of her father's death in response to the defense's question of whether she or a member of her family had been the "victim of a crime." Thus, [Juror L.B.] did not commit juror misconduct.

Id. at 1218.

The Alabama Court of Appeals gave "great weight" to the trial court's credibility determination, concluding that McWhorter failed to prove that Juror Burns intentionally failed to answer question 21 honestly:

> ***25** The record on direct appeal reveals that Juror L.B. did not indicate on her juror questionnaire or during *voir dire* that her father was a victim of a crime. She, however, indicated at all times when she was questioned at trial that she could be fair and impartial. At the postconviction evidentiary hearing, postconviction counsel questioned Juror L.B. extensively about her father's death. Although at times Juror L.B. appeared to waver in her responses to postconviction counsel's questioning or seemed confused about his questioning, as we indicated above, we cannot say that Juror L.B. failed to respond truthfully to the question posed on the juror questionnaire and by McWhorter's trial counsel during *voir dire* examination, especially in light of Juror L.B.'s testimony on cross-examination that established that she knew her father's death was the result of a drowning and that she did not believe he was a victim of a crime. Thus, based on these facts, this Court cannot conclude that the circuit court abused its discretion in denying McWhorter's claim because he failed to prove by a preponderance of the evidence that Juror L.B. was guilty of juror misconduct.

Id. at 1218-19.

The circuit judge also found that McWhorter failed to establish that Juror Burns' answer to question 21 prejudiced him in any way:

> Even if [Juror L.B.]'s failure to disclose the story of her father's death constitutes juror misconduct, McWhorter has failed to establish prejudice. This claim is denied, in the alternative, for that reason.
>
> Under Alabama law, the standard for determining whether juror misconduct warrants a new trial is "whether the misconduct might have prejudiced, not whether it actually did prejudice, the defendant." *Ex parte Dobyne*, 805 So.2d 763, 771 (Ala. 2001). "[T]he question whether the jury's decision might have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case." *Ex parte Apicella*, 809 So.2d 865, 871 (Ala. 2001) (emphasis in original).
>
> In determining whether a criminal defendant might have been prejudiced by a veniremember's failure to respond appropriately to a question, the Supreme Court of Alabama and the Alabama Court of Criminal Appeals have looked at the following factors: "temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about." *Dobyne*, 805 So.2d at 772; *Tomlin v. State*, 695 So.2d 157, 170 (Ala. Crim. App. 1996).
>
> [Juror L.B.] was unequivocal that her father's death did not affect her role as a juror in McWhorter's capital murder

trial. The following testimony occurred during the State's cross-examination of [Juror L.B.]:

> ASSISTANT ATTORNEY GENERAL: [Juror L.B.], is it fair to say that when—that when you voted for guilty for Mr. McWhorter you based that on the evidence at trial?
>
> [JUROR L.B.]: Yes.
>
> ASSISTANT ATTORNEY GENERAL: And when you voted for death, you based that on the evidence presented during the guilt phase?
>
> [JUROR L.B.]: Yes, sir, I did.

This Court believes [Juror L.B.]; therefore. McWhorter cannot show that [Juror L.B.]'s decisions as a juror 'might have been affected' by her father's death.

Looking to the factors listed in *Dobyne*, [Juror L.B.]'s role as a juror likely was not affected by her father's death. First, as to "temporal remoteness," [Juror L.B.] was an 11-year-old child when her father died, but McWhorter's trial did not take place until she was an adult, approximately 30 years later. (E.H. 77, 118.) Second, as for "the ambiguity of the question propounded," the question itself was straightforward enough, but [Juror L.B.]'s lack of certainty over how her father died made the story of his death less likely to have affected her role as a juror. Third, as to [Juror L.B.]'s "inadvertence or willfulness in falsifying or failing to answer," she affirmed that her father was not "at all in her mind" when she answered the questionnaire and that she "did not have an ax to grind" or want to "vindicate the death of her father through this trial." (E.H. 116, 119.)

***26** [Juror L.B.]'s testimony during the evidentiary hearing establishes not only that she did not commit juror misconduct by failing to respond appropriately to questions asked by defense counsel during *voir dire* but also that she based her decisions as a juror in this case solely on the facts presented, and not at all on her father's death. As such, this claim is denied.

Id. at 1220-22.

The Alabama Court of Criminal Appeals likewise found McWhorter was not prejudiced by Juror Burns' answer to question 21:

> Here, Juror L.B. testified at the evidentiary hearing that she based her verdict on the testimony presented and on the trial court's instructions. More importantly, she said that the events surrounding her father's death had no bearing on her guilt-phase or penalty-phase verdict in McWhorter's case. We, like the circuit court, find no indication that McWhorter might have been prejudiced by Juror L.B.'s failure to respond that her father was a victim of a crime on the juror questionnaire or to a *voir dire* question. Accordingly, McWhorter is due no relief on this claim.

Id. at 1221.

The appellate court's findings – that McWhorter failed to prove that Juror Burns intentionally gave an answer she knew to be false, and failed to prove that Ms. Burns' answer prejudiced him in any way – are consistent with both *Irvin* and *McDonough*. McWhorter has not shown that the decision of the Alabama Court of Criminal Appeals was contrary to, or an unreasonable application of either case.

McWhorter also argues that the trial court's "virtually verbatim" adoption of the state's proposed order denying his Rule 32 petition was unreasonable. (Doc. 1 at 21). He points out that "[s]uch adoption has been criticized by the U.S. Supreme Court. *See* *Anderson v. Bessemer City*, 470 U.S. 564, 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985)." (Doc. 1 at 21). He maintains that "[t]he consequence of the Court's verbatim adoption of the State's proposed order is most evident in the fact that the Court's opinion (like the State's proposed order) made no mention of the testimony cited above by Juror L.B. and Juror Stonecypher concerning the statements made by Juror L.B. to her fellow jurors during penalty-phase deliberations." (*Id.*).

When McWhorter presented this claim on appeal from the denial of his Rule 32 petition, the Alabama Court of Criminal Appeals denied it:

We also feel compelled to address a claim McWhorter presents in his brief and in his reply to this Court in a two-sentence argument. McWhorter argues that "it was apparent that [the circuit court] adopted the State's proposed findings of fact, almost verbatim ... only five phrases differed in any way from the State's proposed order." (McWhorter's brief, p. 18.) He appears to argue that the circuit court erred in adopting, with only minor modifications, the State's proposed order denying his Rule 32 petition. Specifically, in his reply, McWhorter asserts that because the circuit court's order was "largely a wholesale adoption of the State's proposed findings of facts and conclusions of law" it was not entitled to deference on the juror-misconduct claim. (McWhorter's reply, p. 9.)

Both McWhorter and the State submitted proposed orders. Shortly thereafter, the circuit court entered an order denying McWhorter's postconviction petition, adopting the State's previously submitted proposed order, with only minor modifications. McWhorter filed an objection on the grounds that the circuit court had adopted the State's proposed order, which the circuit court overruled by notation on the case action summary.

***27** ....

In this case, the circuit judge who denied McWhorter's postconviction petition did not preside at McWhorter's trial; however, in the order denying McWhorter's postconviction petition the court did not profess to have personal knowledge of the performance of McWhorter's trial counsel. Further, the circuit court in this case did not base its order denying McWhorter's postconviction petition upon the State's initial answer to the postconviction petition. Instead, after numerous pleadings, and after the postconviction evidentiary hearing on McWhorter's Rule 32 claims, the court allowed submission of briefs. Both the State and McWhorter submitted proposed orders, and McWhorter submitted a post-hearing brief. McWhorter did not object in his post-hearing brief to the possibility of the circuit court's adopting the State's proposed order. The circuit court did not issue its final order until several weeks after both the State and McWhorter had submitted their proposed orders and McWhorter had filed his post-hearing brief.

Consequently, in light of these facts, we conclude that the circuit court's order is its own and not merely an unexamined adoption of a proposed order submitted by the State. Moreover, for the reasons set forth above in regard to the juror-misconduct claims and below as to the other claims McWhorter raises on appeal, we hold that the circuit court's findings are not "clearly erroneous."

McWhorter, 142 So.3d at 1224-29.

Although in *Anderson v. City of Bessemer*, 470 U.S. at 572, 105 S.Ct. 1504, the Supreme Court criticized the trial court's verbatim adoption of findings of fact prepared by prevailing parties, it ultimately held "that even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." *Anderson*, 470 U.S. at 572, 105 S.Ct. 1504. In reviewing McWhorter's claim on appeal from the denial of his Rule 32 petition, the Alabama Court of Criminal Appeals noted that McWhorter claimed in a "two-sentence argument," that "it was apparent that [the circuit court] adopted the State's proposed findings of fact, almost verbatim ... only five phrases differed in any way from the State's proposed order." *McWhorter*, 142 So.3d at 1224-25 (quoting McWhorter's appellate brief, Vol. 33, Tab 71 at 18). The court specifically found that "the circuit court's order is its own and not merely an unexamined adoption of a proposed order submitted by the State," and that the circuit court's findings were not "clearly erroneous." *Id.* at 1229.

McWhorter has failed to demonstrate that the appellate court's holding on this claim (that the Rule 32 court's findings of fact were not "clearly erroneous"), as it was presented in the state courts, is contrary to or an unreasonable determination of clearly established Federal law, or that it was based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

McWhorter further argues that by ignoring this evidence, the Rule 32 hearing court failed to fulfill its obligation to make independent findings and conclusions, as required by *Jefferson v. Upton*, 560 U.S. 284, 130 S.Ct. 2217, 176 L.Ed.2d 1032 (2010). In *Jefferson*, the Court applied the pre-AEDPA version of § 2254, holding that the state court had denied the death-penalty petitioner a full, fair, and adequate hearing, because: (1) the state court had adopted factual findings drafted exclusively by the state's attorneys, pursuant to an ex parte request from the state court judge; (2) the state court did not notify the petitioner of the request made to opposing counsel; and (3) the findings proposed by the state recounted evidence from a non-existent witness. *See* 560

U.S. at 292, 130 S.Ct. 2217. But McWhorter's case is both legally and factually distinguishable from *Jefferson*.

***28** In rejecting a similar claim in *Jones v. GDCP Warden*, the Eleventh Circuit held:

> First, *Jefferson* never could have held, nor did it presume to hold, that this kind of adopted order is not entitled to AEDPA deference. *Jefferson* addressed a claim arising under the pre-AEDPA version of § 2254; the *Jefferson* Court was therefore operating under a different statute than the one controlling this case. Moreover, even absent that legal distinction, the facts of this case are critically different from *Jefferson*. There, the state court adopted a proposed order that it had obtained *ex parte* from the State, without notice to Jefferson. Here, notably, the state court requested that both Jones and the State prepare proposed orders. The court conducted an evidentiary hearing in August and September 2004, at which Jones was represented ably by his habeas counsel, who presented several witnesses and 125 exhibits spanning about 5,000 pages. The state court then took a year and a half to consider the party's submissions and only issued its order denying habeas relief in March 2006. In stark contrast to *Jefferson*, the circumstances here demonstrate that Jones received a full and fair hearing on all of his habeas claims.

Jones, 815 F.3d 689, 715 (11th Cir. 2016). Simply put, *Jones* concluded that the legal analysis in *Jefferson* does not apply to the post-AEDPA version of § 2254.

This case is also factually distinct from *Jefferson*. *See Jones*, 815 F.3d at 715 (declining to apply *Jefferson* because "the facts of this case are critically different from *Jefferson*"). Specifically, in this case, as in *Jones*, the Rule 32 court requested that both McWhorter and the state submit briefs or proposed opinions after receiving transcripts of the evidentiary hearing. (Vol. 29 at 726-27; Vol. 32, Tab 70 at 116). Similarly, the Rule 32 court conducted an evidentiary hearing on McWhorter's petition on August 26-28, 2009. (Vol. 25, Tab 66 - Vol. 29). At that hearing, McWhorter was represented by counsel, who presented sixteen witnesses and a variety of exhibits. (Vol. 25, Tab 66 - Vol. 32). McWhorter submitted his memorandum of law to the court on December 2, 2009. (Vol. 32, Tab 70 at 117-193).

On February 23, 2010, the state submitted its proposed final order denying McWhorter's petition. (Vol. 24, Tab 65 at 1037-1114). The Rule 32 court issued its order denying the petition on March 29, 2010. (Vol. 24, Tab 65 at 1115-91). Thus, like the petitioner in *Jones*, and in contrast to the petitioner in *Jefferson*, the circumstances here demonstrate that McWhorter received a full and fair hearing on his petition. The *Jefferson* decision does not entitle McWhorter to relief.

B. McWhorter's Claim That He Was Sentenced to Death Based on Extraneous Evidence

1. The Parties' Arguments

McWhorter next claims that juror Linda Burns "infected all the other jurors with her obvious bias against what she perceived to be a convicted killer getting too light a sentence." (Doc. 1 at 28). More specifically, he contends that:

> In the jury room, Juror L.B. relived her experiences when her father was killed. She did so in dramatic and memorable fashion, when the jurors were deadlocked on whether to impose death, and after they had received an *Allen* charge. Juror L.B. related that when the man who killed her father was paroled, he returned to the community where Juror L.B. lived,

> and she also told her fellow jurors that she knew how hard it was for the families of victims to see the killers of their loved ones walk the streets. She asked the other jurors if they could live with themselves if McWhorter were paroled in seven years as her father's killer was.

***29** (*Id.*). He argues that this "extraneous evidence improperly introduced into the jury room actually and severely prejudiced" him, because immediately after she shared her story, several jurors changed their votes, resulting in the recommended death sentence. (*Id.* at 29). According to McWhorter, Juror Burns' remarks during deliberations, about her father's death, deprived him of his rights to due process, confrontation, a fair trial, and an impartial jury, in violation of *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). (Doc. 1 at 27-29).

Respondent first argues that this claim is procedurally defaulted because McWhorter failed to "fairly present" it to the Alabama Court of Criminal Appeals on appeal from denial of his Rule 32 petition. (Doc. 14 at 15-17). Specifically, Respondent maintains that "[a] review of McWhorter's merits brief to the Alabama Court of Criminal Appeals will reflect that he relied on state law and that he cited neither federal cases nor the Constitution of the United States in support of his argument. (Vol. 33, Tab # R-71, pp. 38-41)." (Doc. 14 at 15-16).

In his brief to the Alabama Court of Criminal Appeals, McWhorter argued the hearing court improperly dismissed his extraneous evidence claim without a hearing:

> The Amended Petition alleges that the killing of Ms. Burns's father gave rise not only to the biased juror claim (V-A), but, because Ms. Burns discussed that killing during the jury's sentencing deliberations with the other jurors, it also gave rise to a claim that McWhorter's federal and state constitutional rights were violated because the jury considered extraneous evidence during its deliberations – namely, Ms. Burns's account of her father's death and its aftermath.

(Vol. 33, Tab 71 at 38). In light of this language, it is at least arguable that McWhorter's allegation that his "federal and state constitutional rights were violated because the jury considered extraneous evidence during its deliberations" was sufficient to "fairly present" this claim to the appellate court. Therefore, the court will consider this claim on the merits.

Respondent alternatively argues that McWhorter is not entitled to relief because the Alabama Court of Criminal Appeals correctly denied the claim on the merits. (Doc. 14 at 17). In addressing this claim, the appellate court held:

> McWhorter argues that the circuit court erred in summarily dismissing claim V(B) of his amended petition in which he alleged that the jury considered "extraneous evidence" during deliberations.... [H]e claims that Juror L.B.'s information about her fathers's death was "extraneous evidence" and that the circuit court erred in denying [this] claim.... The State responds that claim V(B) of McWhorter's petition failed to state a material issue of fact or law because, it says, McWhorter "failed to plead admissible evidence or evidence that, if true, would establish that he suffered prejudice."
>
> ....
>
> It is well settled that "matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision." *Sharrief v. Gerlach*, 798 So.2d 646, 653 (Ala. 2001). "Rule 606(b), Ala. R. Evid., recognizes the important 'distinction, under Alabama law, between "extraneous facts," the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the "debates and discussions of the jury," which are protected from inquiry.' " *Jackson v. State*, 133 So.3d 420, 431 (Ala. Crim. App. 2009) (quoting *Sharrief*, 798 So.2d at 652). "[T]he debates and discussions of the jury, without regard to their propriety or lack thereof, are not extraneous facts." *Sharrief*, 798 So.2d at 653. Thus, "affidavit[s or testimony] showing that extraneous facts influenced the jury's deliberations [are] admissible; however, affidavits concerning 'the debates and discussions of the case by the jury while deliberating thereon' do not fall within this

exception." *CSX Transp., Inc. v. Dansby*, 659 So.2d 35, 41 (Ala. 1995) (quoting *Alabama Power Co. v. Turner*, 575 So.2d 551, 557 (Ala. 1991)).

***30** In terms of this claim of juror misconduct, the statements allegedly made by Juror L.B. and the impact those statements may have had on the jury in its deliberations are not extraneous facts. Juror L.B.'s story about her father does not qualify under the exception for "extraneous information." *See* Rule 606(b), Ala. R. Evid. *But see Taite v. State*, 48 So.3d 1 (Ala. Crim. App. 2009). Therefore, it is insulated from inquiry and cannot form the basis of a valid claim for postconviction relief under Rule 32.

As this Court stated in addressing a similar issue in *Jones v. State*, 753 So.2d 1174 (Ala. Crim. App. 1999):

> [W]e reject Jones's claim that his "death sentence was the result of coercive influences brought into the jury deliberations which were outside the scope of the evidence and judicial control." (Appellant's brief at p. 97.) Specifically, he argues that a juror's statement that 'if we give him life that maybe in a few years that he would be up for parole' improperly persuaded others to sentence him to death. (R. 275-76.)
>
> Testimony at the Rule 32 hearing indicated that before reaching its 12-0 advisory verdict recommending a sentence of death, the jury voted several times. Several ballots resulted in a 10-2 determination to recommend death. One of the two individuals who initially voted against death testified that she changed her vote in favor of death after J.M. made the statement regarding parole.
>
> "A juror cannot impeach his verdict by later explaining why or how the juror arrived at his or her decision." *Adair v. State*, 641 So.2d 309, 313 (Ala. Cr. App. 1993).
>
> Moreover, Rule 606(b), Ala. R. Evid., provides, in pertinent part:
>
> > Upon an inquiry into the validity of a verdict or indictment, a juror may not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror as to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.
>
> We find no merit to Jones's claim because it was based on prohibited testimony. A consideration of the claim would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny. *See Ex parte Neal*, 731 So.2d 621 (Ala. 1999); and *Barbour v. State*, 673 So.2d 461, 469-470 (Ala. Cr. App. 1994), *aff'd*, 673 So.2d 473 (Ala. 1995), *cert. denied*, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996)."

753 So.2d at 1203-04 (footnote omitted). Similarly, here, a consideration of this claim of juror misconduct – which is based entirely on the debate and deliberations of the jury – "would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny." *Jones*, 753 So.2d at 1204. Therefore, this claim fails to state a material issue of fact or law upon which relief could be granted, and dismissal was proper under Rule 32.7(d).

***31** *McWhorter v. State*, 142 So.3d 1195, 1221-24 (Ala. Crim. App. 2011) (footnotes omitted) (alterations in original).

2. Analysis

McWhorter argues that the appellate court's decision was contrary to and an unreasonable application of *Turner v. Louisiana*, 379 U.S. 466, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). (Doc. 1 at 27, 29). He claims that the decision was "contrary to federal law because the State court drew the 'extraneous evidence' line based on where the statements were made, rather than on the nature of the statements and thus held the statements were 'therefore ... insulated from inquiry.' " (Doc. 20 at 23) (quoting *McWhorter*, 142 So.3d

at 1223) (omission in original). He claims that the appellate court "unreasonably applied clearly established federal law by holding that Juror L.B.'s statements about her personal experiences did not qualify as 'extraneous evidence.' " (*Id.*) (citing *McWhorter*, 142 So.3d at 1222-23).

In *Turner*, the Court held that a jury must base its verdict only on evidence coming "from the witness stand in a public courtroom where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel." 379 U.S. at 472-73, 85 S.Ct. 546. The Alabama Court of Criminal Appeals' discussion of the rule of evidence prohibiting a juror from testifying about the process of deliberation was grounded in the salient point that Juror Burns' comments to the jury were not "extraneous evidence" injected into the deliberations. Ms. Burns' comments about how she felt seeing the man possibly involved with her father's death walking the streets after being released from jail were part of the deliberative process itself, not something "extraneous" to the jury's deliberations. As such, the appellate court correctly concluded that the evidence offered on this issue was nothing more than prohibited juror testimony about the debate and deliberations of the jury.

The Alabama Court of Criminal Appeals' determination that Juror Burns's comments during the jury's deliberations were not "extraneous evidence" was neither contrary to nor an unreasonable application of *Turner*.

C. McWhorter's Claim That He Was Denied His Constitutional Right to Effective Assistance of Counsel

In introducing this claim, McWhorter has made clear that he "asserts a single ineffective assistance of counsel claim and does not present multiple, separate claims." (Doc. 1 at 30). He argues that he "should be permitted to prove each of the alleged facts as part of the overall ineffective assistance claim" because when considered together, they "easily satisfy the ineffectiveness standard." (*Id.*).

McWhorter made this same argument on appeal from the denial of his Rule 32 petition. (Vol. 33, Tab 71 at 41-44). After initially questioning whether the argument was properly before it,[20] the court denied the claim on the merits:

> McWhorter's argument is flawed in that he fails to demonstrate that a series of individual allegations of deficient performance – although found not to be deficient in themselves – could nevertheless be deficient when considered collectively. Further, an aggregate weighing is not required by Alabama law. *See Taylor* [*v. State*], [157] So.3d [131] at —— [Ala.Crim.App.2010], and the cases cited therein. Therefore, even if the claim is properly before this Court for review, McWhorter is not entitled to any relief on this claim.

***32** *McWhorter*, 142 So.3d at 1235.

McWhorter does not allege that the appellate court's decision was contrary to or an unreasonable application of clearly established federal law. However, as the Eleventh Circuit Court of Appeals has recognized, where individual claims of error or prejudice are without merit, a cumulative error claim must fail because "we have nothing to accumulate." *Morris v. Sec'y, Dep't. of Corr.*, 677 F.3d 1117, 1132 (11th Cir. 2012). Thus, the court must address McWhorter's ineffective assistance of counsel claims individually to see if they present any constitutionally deficient performance.

1. Inadequate Investigation and Failure to Present Mitigating Evidence

In the penalty phase of McWhorter's trial, counsel called four witnesses to testify on McWhorter's behalf: Vonnie Salee, Van Reid, Elsie Garrison, and Carolyn Rowland. Vonnie Salee testified that she had worked at Food World when McWhorter was a bag boy there. (Vol. 11, Tab 25 at 1772). She testified that he was a hard worker, while many of the other "kids goofed off"; he was nice to the customers; she felt like she was a mother figure to McWhorter; and that the "whole store was in absolute shock" when McWhorter was charged with murder. (*Id.* at 1772-76).

Van Reid, the owner of Reid's Restaurant, testified that McWhorter worked for him as a busboy for "a month or so." (*Id.* at 1776-77). He described McWhorter as a dependable worker who did a good job. (*Id.* at 1777-78).

McWhorter's aunt, Elsie Garrison, asked the jury to spare his life. (*Id.* at 1786). She testified that McWhorter's parents divorced when he was almost two years old. (*Id.* at 1780). After the divorce, McWhorter's mother remarried and she, her new husband, and McWhorter moved out of state for four to five years. (*Id.*). Garrison had no contact with McWhorter while he was living out of state, but she had regular contact with him after he returned to Alabama. (*Id.* at 1780-81). McWhorter came to live with her when he was almost sixteen years old because he was unhappy, unsure what he wanted to do with his life, and felt like he was not being treated fairly at home. (*Id.* at 1781). Garrison took McWhorter for a drug test after he was accused of using drugs in school, and the results were negative for drugs. (*Id.* at 1782). McWhorter began to miss his mother while he was living with Garrison, so he returned home in December 1992. (*Id.* at 1782-83). During that December, McWhorter became "antsie" because it was Christmas time and he was still a child at heart. (*Id.* at 1783). A few months after McWhorter moved out of Garrison's house, Daniel Miner, McWhorter's codefendant, apparently followed McWhorter to her house. (*Id.* at 1783-85). Garrison ended her testimony by telling the jury that McWhorter had a "very disturbed childhood," but is a "very bright, a very intelligent young man" who had a lot of tough breaks; that McWhorter got involved with the wrong people but is not a "bad boy at heart"; and that McWhorter is one of the most compassionate young men she has ever known. (*Id.* at 1785-86).

***33** Finally, McWhorter's mother, Carolyn Rowland, also asked the jury to spare McWhorter's life. (*Id.* at 1794). She testified that her divorce from McWhorter's father was not particularly bitter or troublesome; she married David Rowland after the divorce; they moved to Tennessee for four or five years; McWhorter and Rowland had a "pretty good relationship" at the time, but McWhorter was not aware that Rowland was not his birth father until they moved back to Alabama; the discovery that Tommy McWhorter was his birth father did not seem to affect McWhorter at the time, but McWhorter hardly ever saw Tommy McWhorter; Tommy McWhorter told McWhorter that he did not have to listen to his stepfather, which caused problems for McWhorter; McWhorter was a "pretty good kid" until he became friends with Daniel Miner, Marcus Carter, and Lee Williams; when McWhorter got to know Miner, Carter, and Williams, he "got worse" about listening to his parents, and no longer cared about his appearance; and McWhorter is a good boy who respects people, but got in with the wrong friends. (*Id.* at 1788-97).

a. The Parties' Arguments

McWhorter alleges that trial counsel were constitutionally ineffective for failing to uncover crucial mitigating evidence concerning his life, character, and mental health. (Doc. 1 at 34-45). Specifically, he claims that:

> Trial counsel conducted only the most rudimentary pre-trial factual investigation consisting of 40 hours of work. Aside from speaking with McWhorter, trial counsel conducted only one interview session. In that single session, McWhorter's mother (Carolyn Rowland), aunt (Elsie Garrison), and 16-year-old half sister (Melinda Rowland) were interviewed together (the "Triple Interview"). The Triple Interview was brief (approximately two hours), late (11 days before trial began), and joint (three people at once). *See* Hearing Transcript at R139/24-25, R145/18-24 (T. Mitchell). Allotting two hours to witness interviews in a death penalty case is plainly insufficient, and in this case prevented counsel from uncovering numerous facts essential to McWhorter's trial. Because the Triple Interview occurred so late [ ] in the process, trial counsel could not pursue leads generated during the interview. Because trial counsel conducted the Triple Interview jointly, the witnesses were reluctant to speak freely. *See, e.g.*, Hearing Transcript at R265/8-11, R266/7-14 (E. Garrison) (describing how Ms. Garrison did not feel comfortable talking with trial counsel about McWhorter's difficult relationship with his mother while his mother was present in the room).
>
> At the Triple Interview, counsel used only a standard mitigation questionnaire that asked general background questions about McWhorter. This stock questionnaire should have been the start – not the entirety – of counsel's mitigation investigation, and should have been administered months earlier. *See* *Williams v. Taylor*, 529 U.S. 362, 395, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000) (faulting trial counsel for failing to "begin to prepare for th[e] [sentencing] phase of the proceeding until a week before the trial"); *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995) ("In cases where sentencing counsel did not conduct enough investigation to

formulate an accurate life profile of a defendant, we have held the representation beneath professionally competent standards." (citations omitted)).

Trial counsel failed to seek McWhorter's medical records, school records, juvenile offender records, social services records, or any other easily accessible records from authorities. Trial counsel failed to obtain the criminal records of McWhorter's family members. Hearing transcript at 140-42 (Mitchell), 556-57 (Berry). Trial counsel failed to interview anyone outside of the Triple Interview – not teachers, friends, coaches or neighbors – who could provide evidence about McWhorter. Trial counsel failed to hire a mitigation specialist or investigator.

(Doc. 1 at 34-36) (footnote omitted).

McWhorter maintains that counsel could have uncovered and presented an array of evidence that would have "deepened and sharpened trial counsel's theory of the case so that the jury could not simply disregard it." (*Id.* at 31). He claims that the evidence counsel should have discovered and presented at trial would have established that:

***34** (a) [ ] McWhorter's father, a lifelong criminal who was convicted of, among other crimes, statutory rape for a sexual assault on a 15-year-old girl, *see* Hearing Exhibit 23, ROA Supplement 1-2, at C318,[21] had abandoned McWhorter when McWhorter was a baby, *see* Hearing Transcript R228/23-230/8 (E. Garrison Testimony);[22]

(b) [ ] McWhorter spent most weekends of his youth at the home of his maternal grandfather, see Hearing Transcript at R 390/3-9 (L. Evans),[23] a man who dominated McWhorter's mother's family and was convicted of homicide for shooting and killing the boyfriend of one of his daughters in front of the Evans family, *see* Hearing Transcript at R387/7-24, Hearing Exhibit 22, at ROA Supplement 1-2, at C288;[24]

(c) [W]hippings, administered by both his mother and stepfather, were a standard form of punishment in McWhorter's childhood home. *See, e.g.*, Hearing Transcript at R230/14-20 (E. Garrison);[25] R363/23 (D. Rowland);[26]

(d) [W]hen McWhorter was just ten years old, his aunt took him to the Department of Human Resources ("DHR") to report dark bruises she found on McWhorter's legs and buttocks, due to the whipping by his mother and stepfather. Hearing Transcript at R233/4-10 (E. Garrison).[27] The DHR report of the incident included pictures of the resulting abuse. *See* DHR Records, Hearing Exhibit 11, ROA Supplement 1-1 at C49;[28]

(e) [ ] McWhorter's family was so unsupportive of him that he was forced to live with his aunt's family, and thus to change schools, *see* Hearing Transcript R240/21-241/8 (E. Garrison);[29]

(f) [ ] McWhorter regularly sniffed gasoline and freon from the age of eight, and continued until he was at least 14 years old. *See* Hearing Transcript at R401/1 – 403/19 (M. Evans);[30] R390/10 – 392/8 (L. Evans);[31] R363/3 – 365/5 (D. Rowland);[32]

(g) [I]n later teenage years, McWhorter was so significantly disturbed that several times he played Russian roulette with real pistols and bullets, *see* Hearing Transcript at R510/4-13 (A. Barnes),[33] and regularly drank and used illegal drugs, including marijuana, acid, and cocaine, *see* Hearing Transcript at R507/12-13, R507/23-25 (A. Barnes).[34]

(h) [N]otwithstanding the unsupportive environment in which he was raised, through junior high school McWhorter was a dedicated student and athlete, capable of working hard and doing what was expected of him in order to fit into the school environment. *See* Hearing Transcript at R434/23–435/4 (K. Burns);[35] R424/22-425/24 (F. Baker).[36] Notably, one of McWhorter's teachers (Burns) testified that McWhorter's behaved noticeably worse on Monday mornings, lending credence to the fact that McWhorter was visibly affected by the horrors that he witnessed during weekends with his maternal grandfather's family. *See Id.* at R435/20-21;[37]

(i) [N]otwithstanding all of his problems and travails, McWhorter remained a kind and loyal friend, even after he was imprisoned. *See* R440/3-11; *Id.* R448/16-20; *Id.* 450/6-20 (A. Battle).[38]

(Doc. 1 at 38-41) (footnotes in original omitted).

***35** McWhorter further argues that counsel could have called expert witnesses in the penalty phase, who would have testified to evidence collected from McWhorter's family; he

was genetically predisposed to substance abuse, given the alcoholism of his father and grandfather and the early onset of his own substance abuse; the same "mental condition" that predisposed McWhorter to substance abuse also made it difficult for him to control his behavior; and he "likely" had brain damage as a result of substance abuse. (*Id.* at 41-42).

McWhorter also contends there is a reasonable probability that had trial counsel presented this information in the penalty phase, the jury would not have made the same recommendation. (*Id.* at 42).

Respondent counters that this claim is due to be denied because the Alabama Court of Criminal Appeals denied it on the merits, and McWhorter cannot show that the decision was contrary to, or an unreasonable application of, federal law. (Doc. 14 at 19-42).

b. Analysis

McWhorter raised his failure to investigate and present mitigating evidence claim in his Amended Rule 32 petition. (Vol. 21, Tab 56 at 521-49). The trial court held an evidentiary hearing from August 26-28, 2009, at which McWhorter presented sixteen witnesses who he claims should have been called by counsel at the penalty phase of his trial. (Vol. 25, Tab 66 - Vol. 29). The trial court entered a final order denying the petition on March 29, 2010. (Vol. 24, Tab 65 at 1139-91). The Alabama Court of Criminal Appeals affirmed the denial the claim. *McWhorter*, 142 So.3d at 1229-50.

In denying this claim, the Alabama Court of Criminal Appeals set out the pertinent law:

> Allegations of ineffective assistance of counsel are governed by the principles set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. 466 U.S. at 687, 104 S.Ct. 2052; *Ex parte Lawley*, 512 So.2d 1370, 1372 (Ala. 1987).
>
> > Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. *Cf.* *Engle v. Isaac*, 456 U.S. 107, 133-34, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." *See* *Michel v. Louisiana*, [350 U.S. 91], at 101 [76 S.Ct. 158, 100 L.Ed. 83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.
>
> *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052 (citations omitted). As the United States Supreme Court further stated:
>
> > "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy

> measure of deference to counsel's judgments."

***36** *Strickland*, 466 U.S. at 690-91, 104 S.Ct. 2052.

> ....
>
> The purpose of ineffectiveness review is not to grade counsel's performance. *See* *Strickland [v. Washington]*, [466 U.S. 668,] 104 S.Ct. [2052] at 2065, 80 L.Ed.2d 674 [(1984)]; *see also* *White v. Singletary*, 972 F.2d 1218, 1221 (11th Cir. 1992) ("We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately."). We recognize that "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, [466 U.S. at 693,] 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or "what is prudent or appropriate, but only what is constitutionally compelled." *Burger v. Kemp*, 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987).

Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir. 2000) (footnote omitted).

"As the Supreme Court explained in Strickland, the issue of what investigation decisions are reasonable 'depends critically' on the defendant's instructions...." *Cummings v. Secretary, Dep't of Corr.*, 588 F.3d 1331, 1357 (11th Cir. 2009).

> Moreover,
>
> there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result.

Strickland, 466 U.S. at 697, 104 S.Ct. 2052. "It is firmly established that a court must consider the strength of the evidence in deciding whether the *Strickland* prejudice prong has been satisfied." *Buehl v. Vaughn*, 166 F.3d 163, 172 (3d Cir. 1999).

In *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the United States Supreme Court addressed a claim that counsel was ineffective for failing to adequately investigate and present mitigation evidence. The *Wiggins* Court found that counsel's performance was ineffective because counsel failed to investigate and present evidence that Wiggins had a dysfunctional and bleak upbringing, that he suffered from substantial physical and sexual abuse, and that he had mental deficiencies. The Court stated:

> ***37** Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. *Penry v. Lynaugh*, 492 U.S. 302, 319, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse"); *see also* *Eddings v. Oklahoma*, 455 U.S. 104, 112, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982) (noting that consideration of the offender's life history is a "part of the process of inflicting the penalty of death"); *Lockett v. Ohio*, 438 U.S. 586, 604, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978) (invalidating Ohio law that did not permit consideration of aspects of a defendant's background).

539 U.S. at 535, 123 S.Ct. 2527. The Court further stated:

> In finding that [trial counsel's] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052. We base our conclusion on the much more limited principle that "strategic choices made after less than complete investigation are reasonable" only to the extent that "reasonable professional judgments support the limitations on investigation." *Id.*, at 690-691. A decision not to investigate thus "must be directly assessed for reasonableness in all the circumstances." *Id.*, at 691.
>
> Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records – evidence that would have led a reasonably competent attorney to investigate further.

539 U.S. at 533-34, 123 S.Ct. 2527.

In *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the United States Supreme Court found that counsel's performance was deficient because counsel did not begin to investigate mitigation evidence until a week before trial and counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams's nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395, 120 S.Ct. 1495.

McWhorter, 142 So.3d at 1229-32.

The Alabama Court of Criminal Appeals also summarized trial counsel's actions:

> In examining this ineffectiveness claim, the circuit court described what McWhorter's attorneys did during the penalty phase. The court's findings were based primarily on the testimony of the attorneys – Mitchell and Berry. As set out above, the testimony at the evidentiary hearing indicated that to prepare for the penalty phase, Mitchell and Berry interviewed McWhorter, his mother Rowland, his aunt Garrison, and his half sister Melinda Rowland. They interviewed the latter three in what McWhorter refers to in the postconviction proceeding as the "triple interview." During this interview, counsel completed a document entitled "Client Background Information," which included McWhorter's family history, his medical and mental-health history, his substance-abuse history, his criminal history, and his education history. An investigator was not hired for the penalty-phase preparation because, according to McWhorter's attorneys, a strategy could be formulated with McWhorter and his family's assistance.
>
> ***38** McWhorter's trial attorneys hired Dr. Douglas Robbins, a neuropsychologist, to evaluate McWhorter for any mental disease, mental disorder, or any evidence of psychopathology. As stated above, Dr. Robbins's evaluation provided no useful mitigation evidence.
>
> Counsel obtained some hospital records. Counsel was aware that DHR had once investigated an allegation of physical abuse involving McWhorter. Additionally, as set out above, counsel had documentation of McWhorter's IQ scores, which indicated he had an IQ of 88.
>
> Mitchell and Berry testified that they thought McWhorter would have had to climb out of a "deep hole" to persuade the judge and jury to spare his life. The two codefendants had pleaded guilty, and the jury had heard evidence of gang activity. McWhorter's attorneys decided that "about the only thing" McWhorter had "going for him" was that he was "clean cut" and "a good-looking young man" who had fallen in with the wrong crowd and had made a terrible mistake but did not deserve the death penalty.
>
> As indicated above, counsel presented the testimony of Rowland, Garrison, Reid, and Salee during the penalty phase. Counsel testified as to why each was chosen to testify in accordance with counsel's strategy. The circuit court found that this strategy was a reasonable one and that counsel had conducted a reasonable investigation.

Id. at 1233-34.

The Alabama Court of Criminal Appeals issued a detailed opinion denying McWhorter's failure-to-investigate claim:

> The circuit court found as follows regarding McWhorter's ineffective-assistance-of-counsel claim:
>
> > As an initial matter, McWhorter's trial counsel both testified at length to their strategy for the penalty phase. The Court sets out that strategy below and finds it to be reasonable under *Strickland*. All of the remaining independent claims contained in Claim XII of McWhorter's amended Rule 32 petition are meritless because they contend that trial counsel should have investigated and presented evidence that either would have been cumulative to evidence presented or would have been inconsistent with evidence presented to support trial counsel's reasonable strategy. In his amended Rule 32 petition, McWhorter failed to mention, much less challenge, the trial strategy that trial counsel actually used.
> >
> > The testimony of McWhorter's trial counsel, Thomas Mitchell and James Berry, at the evidentiary hearing indicates that they rendered effective assistance of counsel during the penalty and sentencing phases of his trial. Mitchell and Berry both testified that, to prepare McWhorter's mitigation case, they interviewed McWhorter, his mother, Carolyn Rowland, his aunt, Elsie Garrison, and his half sister, Melinda Rowland. (E.H. 139, 143, 154, 176, 190-91, 553, 557.) McWhorter and his family were fully cooperative and supportive, according to both counsel's testimony. (E.H. 191, 193, 557.)
> >
> > During a pre-trial interview with McWhorter's family, Mr. Mitchell completed a document titled 'Client Background Information' based on the information he learned from that interview. (E.H. 145.) The document was admitted into evidence at the evidentiary hearing as McWhorter's Exhibit 7. (E.H. 146.) Exhibit 7 contains questions and answers covering myriad topics, like McWhorter's early childhood development, his environmental factors; such as, living conditions, medical issues as a youth, and relationship information; his institutional data; such as, education history, his medical and mental health history, his substance abuse history, his criminal history, and his family history. Mr. Mitchell decided not to hire an investigator for the penalty-phase preparation because he reasonably could formulate a strategy for the penalty phase without an investigator and with McWhorter and his family's assistance. (E.H. 193.)

***39** In addition to the information provided by McWhorter and his family, trial counsel hired a neuropsychologist to evaluate McWhorter for any "mental disease," "mental disorder," or "any evidence of psychopathology" to use in McWhorter's defense. (E.H. 155, 171.) Trial counsel hired Dr. Douglas Robbins. Mitchell testified that he specifically was interested in learning from Dr. Robbins whether McWhorter exhibited "diminished capacity" and "susceptibility to influence" from others. (E.H. 171.) And, if McWhorter had brain damage, trial counsel wanted to use that fact in his defense. (E.H. 160.) However, Dr. Robbins's evaluation provided no useful mitigation evidence. (E.H. 175, 305.)

Trial counsel also considered various records. They obtained McWhorter's hospital records from his attempted suicide. (E.H. 557.) Mitchell testified that he was aware that Garrison once reported Carolyn Rowland to DHR because Garrison found bruises on McWhorter from a "whipping" that Carolyn Rowland gave him. (E.H. 158; McWhorter's Exhibit 7, page 5.) Trial counsel also had documentation of McWhorter's IQ scores, which indicated that he has an IQ of 88. (E.H. 140, 181.)

As Berry explained during the evidentiary hearing, McWhorter would have had to climb from a "deep hole" to persuade the judge and jury to spare his life. (E.H. 571-72.) Two codefendants already had pleaded guilty to charges stemming from the same crime. (*Ibid.*) The jury had heard evidence of gang activity. (E.H. 573.) Trial counsel believed that McWhorter had very little in his favor going into the penalty phase. "About the only thing we had going for Casey was a young man. He was a good-looking young man. And his youth was basically the only thing we had going for us," said Berry. (E.H. 576.) Mitchell's testimony reflected a similar opinion. Mitchell thought the main circumstances McWhorter had in his favor were his youth, that he was "clean cut," and that "he looked like Opie grown up a little bit from the Andy Griffith Show." Mitchell also remembered first meeting McWhorter and how he thought that McWhorter must have been 'crazy' to commit the crime with which he was charged. (E.H. 185-86.) Mitchell hoped that that the jury would think that, too, though he knew there was no evidence to support a mitigation

case based on McWhorter's mental disorders because McWhorter had none. (*Ibid.*)

Both counsel previously had represented defendants at capital murder trials. (E.H. 170, 544.) Mitchell, who served as McWhorter's lead counsel, had extensive relevant experience over his 11-year legal career. (E.H. 169.) Mitchell testified that he had represented defendants during approximately 25 felony jury trials, 8 to 10 of which were murder trials, prior to representing McWhorter. (E.H. 169-70.) The overwhelming majority of Berry's practice around the time of McWhorter's trial was criminal work, and Mitchell testified that about half of his practice was criminal around 1994. (E.H. 169, 566.)

Experienced trial counsel collected the comprehensive background information reflected in McWhorter's Exhibit 7, Dr. Robbins's evaluation, and other documents, and formulated a reasonable strategy that they believed could save McWhorter's life: McWhorter was a good boy, who fell in with the wrong crowd, and he made a terrible mistake but does not deserve the death penalty. (E.H. 186, 571.) The trial transcript reflects that strategy in the testimony trial counsel presented during the penalty and sentencing phases.

After conducting a reasonable investigation and forming a reasonable trial strategy, trial counsel decided to present the testimony of four witnesses during the penalty phase: Carolyn Rowland, Elsie Garrison, Van Reid, and Vonnie Salee. Carolyn Rowland, McWhorter's mother, and Garrison, his aunt, were selected because they knew McWhorter well and because their pain felt over McWhorter's capital murder trial was "obvious," and trial counsel hoped to evoke sympathy from the jury. (E.H. 190.) Garrison testified during the penalty phase that McWhorter once was wrongly accused of using drugs, so she had him drug tested. The test confirmed that there were no drugs in McWhorter's system. (R. 1782.) She also testified that McWhorter was "compassionate," but that he got caught up with the wrong crowd, including Daniel Miner, a codefendant in this case. (R. 1784-85.) Carolyn Rowland also testified that McWhorter had been a "good kid" until he started spending time with Daniel Miner, Lee Williams, and Marcus Carter, all of whom were codefendants in this case. (R. 1792-93.)

***40** Garrison recommended Van Reid. (E.H. 189.) Reid knew McWhorter around the time of the murder because McWhorter worked as a busboy at Reid's restaurant, and Reid knew McWhorter to be a young man who did his job well. (E.H. 190; R. 1176-77.) Vonnie Salee was picked to testify partly because she was "very likable." (E.H. 188.) Salee, like Reid, also knew McWhorter to be a good worker. (R. 1772.) McWhorter bagged groceries at the grocery store where Salee was a cashier. (*Ibid.*) She recalled that McWhorter once had rubbed the shoulders of an older lady cashier who complained that her shoulders and back were hurting. (R. 1773.)

Trial counsel's "good boy, wrong crowd" strategy also was applied to the sentencing phase before Judge Gullahorn. Trial counsel presented additional testimony from Garrison and Carolyn Rowland, along with Janice Miller, McWhorter's aunt by marriage. The trial transcript and the evidentiary hearing transcript show that trial counsel presented meaningful testimony during the penalty and sentencing phases that was consistent with their strategy, and they refrained from presenting additional evidence that would have detracted from their strategy.

(C. 1159-65.)

Specifically, as to the "triple interview," and the timeliness of the mitigation investigation, the primary cases on which McWhorter relies are *Correll v. Ryan*, 539 F.3d 938, 945 (9th Cir. 2008), and *State v. Gamble*, 63 So.3d 707 (Ala. Crim. App. 2010). Those cases are clearly distinguishable from this case. Although the "triple interview" in *Correll* is somewhat similar to the "triple interview" in this case, *Correll* is distinguishable because in that case trial counsel put on no evidence during the penalty phase – he did not call a single witness, and he waived the presentation of mitigating evidence. Additionally, there was evidence indicating the trial counsel in *Correll* spent a total of five minutes interviewing the defendant in *Correll* regarding mitigation evidence. In McWhorter's case, his trial counsel introduced the evidence described above and did substantially more than did trial counsel in *Correll*. Likewise, in *Gamble*, no witnesses were called to testify in Gamble's behalf during the penalty

phase. As mentioned above, McWhorter's attorneys called several witnesses to testify during the penalty phase of his capital-murder trial and adhered to their trial strategy as discussed with McWhorter and his family.

Regarding the records documenting McWhorter's family history and his medical and school records, the circuit court denied relief on these claims for several reasons. First, as to the records of McWhorter's family history, the records related to his father, and social-services records, the court found that McWhorter failed to meet the specificity requirements of Rule 32.6(b), Ala. R.Crim. P., because he failed to identify what records counsel should have obtained. Regarding his parents' divorce records, the circuit court also concluded that McWhorter pleaded "only vaguely what those records would have proved." (C. 1181.) The circuit court also denied relief because, it found, McWhorter failed to meet his burden of proving that his trial counsel's performance was deficient in regard to information on his family history, specifically, information about his father, and information contained in his educational and medical records. The circuit court also denied relief on the educational-records claim, the medical-records claim, and the records-related-to-his-father claim because, the court found, McWhorter had failed to establish that he was prejudiced by his trial counsel's penalty-phase performance. Specifically, when denying relief on these claims, the postconviction court stated:

> *xiii. The Claim That Trial Counsel Should Have Obtained Records Documenting McWhorter's Family History*
>
> ***41** McWhorter's claim that his trial counsel were ineffective for failing to obtain records documenting his family history is contained in paragraph 193 of his amended Rule 32 petition.
>
> This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter first does not identify what records trial counsel allegedly was ineffective for failing to obtain other than "divorce records." As for the divorce records, McWhorter pleads only vaguely what those records would have proved, stating those records would have "corroborated the disintegration of Casey's parents' union and Tommy McWhorter's subsequent two marriages." But McWhorter does not plead how he was prejudiced when it is clear from the pleading itself that these records only would have "corroborated" some unidentified witness's testimony. As such, this claim is denied because it is insufficiently pleaded.
>
> In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. Concerning divorce records, trial counsel conducted an interview of McWhorter's mother, Carolyn Rowland, where they learned of McWhorter's parents' divorce. There was no need for trial counsel to obtain documentation verifying the divorce when Carolyn Rowland, for example, could and did testify to facts related to the divorce. Carolyn Rowland told trial counsel during that pre-trial Interview with McWhorter's family that her divorce with Tommy McWhorter was not "bitter." (E.H. 181-82.) She testified to that fact during the penalty phase, too. (R. 1789.) Because records were not necessary to establish facts relevant to McWhorter's parents' divorce, trial counsel were not ineffective for failing to obtain them. As such, this claim is denied.
>
> *xiv. The Claim That Trial Counsel Should Have Obtained Educational Records*
>
> McWhorter's claim that his trial counsel were ineffective for failing to obtain educational records is contained in paragraphs 194 through 195 of his amended Rule 32 petition.
>
> This claim is denied because McWhorter failed to meet his burden of proof. McWhorter asserts in his petition that educational records would have shown school transfers and his "declining academic performance." As discussed at length above, McWhorter's family, including his mother and aunt, fully cooperated with trial counsel's mitigation investigation. Trial counsel did not need to obtain educational records in order to show that McWhorter's grades were poor at times or that he transferred schools. In fact, Elsie Garrison testified to McWhorter's high school transfers. (R. 1786-87.) McWhorter does not allege what additional information educational records would have uncovered. Trial counsel's performance, therefore, was not deficient, and McWhorter did not suffer prejudice. As such, this claim is denied.
>
> *xv. The Claim That Trial Counsel Should Have Obtained Medical Records*
>
> McWhorter's claim that his trial counsel were ineffective for failing to obtain medical records is contained in

paragraphs 196 through 198 of his amended Rule 32 petition.

This claim is denied because McWhorter failed to meet his burden of proof. McWhorter asserts in his petition that medical records would have established that "before age three, Casey had an unusually high number of accidents and medical problems," that he was involved in a life [sic].

***42** McWhorter's claim that his trial counsel were ineffective for failing to obtain DHR records is contained in paragraphs 199 through 202 of his amended Rule 32 petition.

This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter first does not plead specifically what the DHR records would contain. Instead, the petition states, "Most likely, from what counsel have learned, the document relates to an allegation that Petitioner was an abused or neglected child." (Pet. at para. 200.) Because McWhorter does not plead what was in the DHR records, this claim is insufficiently pleaded.

In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. Though McWhorter asserts, in conclusory fashion, that the DHR records contain that he was an "abused or neglected child," the evidence presented at the evidentiary hearing did not support that allegation. Plus, trial counsel did not need to obtain the records from DHR because Garrison, who cooperated fully with trial counsel, filed the DHR report on Carolyn Rowland for leaving bruises on McWhorter after "whipping" him. (McWhorter's Exhibit 7, page 5.) Garrison's complaint was the only document in the DHR records presented at the evidentiary hearing. (McWhorter's Exhibit 11.) No further action was taken by DHR. (McWhorter's Exhibit 7, page 5; E.H. 158.) DHR records would not have changed trial counsel's reasonable mitigation strategy. Trial counsel's performance, therefore, was not deficient, and McWhorter did not suffer prejudice. As such, this claim is denied.

xvii. The Claim That Trial Counsel Should Have Obtained Records Related To Tommy McWhorter

McWhorter's claim that his trial counsel were ineffective for failing to obtain records related to his father, Tommy McWhorter, is contained in paragraphs 203 through 204 of his amended Rule 32 petition.

This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter does not plead specifically what agency's records trial counsel should have obtained. Therefore, this claim is insufficiently pleaded.

In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. Trial counsel did not need records to learn of Tommy McWhorter's past. Trial counsel discussed with McWhorter's family facts related to Tommy McWhorter. But, according to McWhorter's family, McWhorter and his father "did not have much contact." (E.H. 181.) Carolyn Rowland also told trial counsel that her divorce with Tommy McWhorter was not "bitter." (E.H. 181-82.) She testified to that fact during the penalty phase, too. (R. 1789.) Trial counsel, therefore, decided that Tommy McWhorter's life did not impact McWhorter enough to be pertinent to the penalty phase.

In addition, the facts that trial counsel knew about Tommy McWhorter would have been inconsistent with their mitigation strategy. Trial counsel knew that Tommy McWhorter was a violent alcoholic and a criminal, but they did not want those facts presented to the jury because they feared that the jury would infer that "the apple doesn't fall far from the tree" and that McWhorter, therefore, was a "bad seed." (E.H. 158-59, 579-80.) Plus, trial counsel thought the jury would be interested in hearing mitigation evidence related to McWhorter's life, and not his father's. (E.H. 579-80.) Strategic decisions are "virtually unassailable, especially when they are made by experienced criminal defense attorneys," like McWhorter's counsel. *Williams v. Head*, 185 F.3d [1223] at 1242 (11th Cir. 1999).

***43** Thus, Tommy McWhorter's records would not have changed trial counsel's reasonable mitigation strategy. Trial counsel's performance, therefore, was not deficient, and McWhorter did not suffer prejudice. As such, this claim is denied.

(C. 1181-87.)

The circuit court's findings are supported by the record and law. McWhorter's claim that his attorneys failed to adequately present mitigating evidence is essentially

a claim that his attorneys should have presented more mitigating evidence. As this Court has stated:

> "[F]ailure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment." *Coleman [v. Mitchell]*, 244 F.3d [533] at 545 [(6th Cir. 2001)]; *see also* *Rompilla v. Beard*, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Our circuit's precedent has distinguished between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation where the presumption of reasonable performance is more difficult to overcome:
>
> > [T]he cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by *Strickland* will be hard to overcome.
>
> *Campbell v. Coyle*, 260 F.3d 531, 552 (6th Cir. 2001) (quotation omitted) ...; *see also* *Moore v. Parker*, 425 F.3d 250, 255 (6th Cir. 2005). In the present case, defense counsel did not completely fail to conduct an investigation for mitigating evidence. Counsel spoke with Beuke's parents prior to penalty phase of trial (although there is some question as to how much time counsel spent preparing Beuke's parents to testify), and presented his parents' testimony at the sentencing hearing. Defense counsel also asked the probation department to conduct a presentence investigation and a psychiatric evaluation. While these investigatory efforts fall far short of an exhaustive search, they do not qualify as a complete failure to investigate. *See* *Martin v. Mitchell*, 280 F.3d 594, 613 (6th Cir. 2002) (finding that defense counsel did not completely fail to investigate where there was "limited contact between defense counsel and family members," "counsel requested a presentence report," and counsel "elicited the testimony of [petitioner's] mother and grandmother"). Because Beuke's attorneys did not entirely abdicate their duty to investigate for mitigating evidence, we must closely evaluate whether they exhibited specific deficiencies that were unreasonable under prevailing professional standards. *See* *Dickerson v. Bagley*, 453 F.3d 690, 701 (6th Cir. 2006).

Beuke v. Houk, 537 F.3d 618, 643 (6th Cir. 2008). "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments." *Wiggins*, 539 U.S. at 521-22. "A defense attorney is not required to investigate all leads...." *Bolender v. Singletary*, 16 F.3d 1547, 1557 (11th Cir. 1994). "A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance." *Atkins v. Singletary*, 965 F.2d 952, 960 (11th Cir. 1992). "The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness." *Mitchell v. Kemp*, 762 F.2d 886, 889 (11th Cir. 1985).

***44** 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. In particular, what investigation decisions are reasonable depends critically on such information.

Strickland v. Washington, 466 U.S. at 691, 104 S.Ct. 2052. "The reasonableness of the investigation involves 'not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further.' " *St. Aubin v. Quarterman*, 470 F.3d 1096, 1101 (5th Cir. 2006), quoting in part *Wiggins*, 539 U.S. at 527, 123 S.Ct. 2527.

Ray, 80 So.3d at 984. In addition,

> [W]e "must recognize that trial 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. [*Laugesen*] v. *State*, [(1967), 11 Ohio Misc. 10, 227 N.E.2d 663]; *State v. Lott*, [(Nov. 3, 1994), Cuyahoga App. Nos. 66338, 66389, 66390]. 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 is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Counsel must be permitted to weed out some arguments to stress others and advocate effectively." *Haliburton v. Sec'y for the Dep't of Corr.*, 342 F.3d 1233, 1243-44 (11th Cir. 2003) (quotation marks and citations omitted); *see Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1348-50 (11th Cir. 2005) (rejecting ineffective assistance claim where defendant's mother was only mitigation witness and counsel did not introduce evidence from hospital records in counsel's possession showing defendant's brain damage and mental retardation or call psychologist who evaluated defendant pre-trial as having dull normal intelligence); *Hubbard v. Haley*, 317 F.3d 1245, 1254 n. 16, 1260 (11th Cir. 2003) (stating this Court has "consistently held that there is 'no absolute duty ... to introduce mitigating or character evidence' " and rejecting claim that counsel were ineffective in failing to present hospital records showing defendant was in "borderline mentally retarded range") (brackets omitted) (quoting *Chandler* [*v. United States*], 218 F.3d [1305] at 1319 [(11th Cir. 2000)]).'

Wood v. Allen, 542 F.3d 1281, 1306 (11th Cir. 2008). "The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy." *Hill v. Mitchell*, 400 F.3d 308, 331 (6th Cir. 2005).

Dunaway, [198] So.3d at [547].

....

***45** In this case, the trial court found that the evidence McWhorter offered at the postconviction evidentiary hearing was either inconsistent with the "good boy, wrong crowd" theory or would have been cumulative to evidence already offered during the penalty phase. In *State v. Gamble*, 63 So.3d 707 (Ala. Crim. App. 2010), a case on which McWhorter relies, this Court specifically distinguished both types of cases:

> This is not a case in which the omitted mitigating evidence was cumulative to evidence that was presented, *see Ferguson v. State*, 13 So.3d 418 (Ala. Crim. App. 2008), or in which counsel investigated and made an informed strategic decision not to present evidence concerning Gamble's upbringing, *see Waldrop v. State*, 987 So.2d 1186 (Ala. Crim. App. 2007). Here, counsel's investigation was so inadequate that they failed to discover any mitigation evidence to present at the penalty phase – although the Rule 32 evidentiary hearing clearly showed that there was a plethora of evidence that could have been presented on Gamble's behalf.

Gamble, 63 So.3d at 721.

In two sentences in McWhorter's brief to this Court, citing *Gamble*, he also claims error because his trial counsel failed to hire a mitigation specialist. (McWhorter's brief, p. 52.) *Gamble*, however, is distinguishable from this case in regard to the hiring of a mitigation investigator. In *Gamble*, counsel failed to present any mitigation evidence during the penalty phase. 63 So.3d at 721. In this case, counsel conducted an interview with McWhorter and his family, presented the testimony of four witnesses, and hired a neuropsychologist to evaluate McWhorter for any mental disease or disorder.

Moreover, although the evidence about McWhorter's childhood is indeed disturbing, it does not necessarily mean that trial counsel was ineffective for failing to offer the additional evidence. This Court in *Davis v. State*, 44

So.3d 1118 (Ala. Crim. App. 2009), stated the following in evaluating a similar claim alleging the ineffective assistance of counsel:

> "As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias." *Bergmann v. McCaughtry*, 65 F.3d 1372, 1380 (7th Cir. 1995).
>
> Once counsel conducts a reasonable investigation of law and facts in a particular case, his strategic decisions are "virtually unchallengeable." [*Strickland v. Washington*, 466 U.S. 668] at 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 [(1984)]. Tactical or reasonable professional judgments are not deficient but a failure to investigate a material matter due to inattention may be deficient. When the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry "is not whether counsel should have presented a mitigation case" but "whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable." *See* *Wiggins* [*v. Smith*], 539 U.S. [510] at 523, 123 S.Ct. 2527, 156 L.Ed.2d 471 [(2003)] (internal citations omitted).

Powell v. Kelly, 562 F.3d 656, 670 (4th Cir. 2009). *See also Villegas v. Quarterman*, 274 Fed.Appx. 378, 382 (5th Cir. 2008). Evidence of a difficult childhood has been characterized as a "double-edged" sword. *See* *Bacon v. Lee*, 225 F.3d 470, 481 (4th Cir. 2000). "[E]mphasizing a client's deprived childhood does not have a very beneficial impact on a northwest Florida jury, given the fact that many jurors have had difficult lives, but have not turned to criminal conduct." *Card v. Dugger*, 911 F.2d 1494, 1511 (11th Cir. 1990). What one juror finds to be mitigation another juror may find aggravating. "[M]itigation may be in the eye of the beholder." *Stanley v. Zant*, 697 F.2d 955, 969 (11th Cir. 1983). *See also* *Ford v. Schofield*, 488 F.Supp.2d 1258, 1346 (N.D. Ga. 2007) ("The Supreme Court has stated that the reasonableness of counsel's actions should be evaluated based on 'strategic choices made by the defendant and on information supplied by the defendant.' *Burger v. Kemp*, 483 U.S. 776, 795, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)...."); *Carroll v. State*, 815 So.2d 601, 615 (Fla. 2002) ("By failing to respond to counsel's requests to provide trial counsel with the names of witnesses who could assist in presenting mitigating evidence, Carroll may not now complain that trial counsel's failure to pursue such mitigation was unreasonable."); *Rose v. State*, 617 So.2d 291, 295 (Fla. 1993) ("In light of the harmful testimony that could have been adduced from Rose's brother and the minimal probative value of the cousins' testimony, we are convinced that the outcome would not have been different had their testimony been presented at the penalty phase.").

***46** Copeland testified that he made a strategic decision to rely on a plea for mercy. It is clear from both attorneys' testimony that they conducted an investigation and were aware of Davis's background and upbringing. Copeland stated that he did not believe evidence of Davis's performance in school would have had any value because of the nature of the murders. Based on the unique circumstances presented in this case we cannot say that counsel's actions were unreasonable. Moreover, the testimony at the evidentiary hearing was neither strong nor compelling. Davis was over the age of 25 at the time of the murders. One of Davis's brothers who testified at the postconviction proceedings was 14 years of age at the time of Davis's trial. Another brother who testified was in prison at the time of Davis's trial. Davis's mother painted a different picture of Davis's childhood than did Davis's siblings. Many witnesses admitted that they knew that Davis was selling drugs from his home in Gibbs Village. Other witnesses had not seen Davis for many years. The testimony offered at the postconviction hearing would have been entitled to little weight.

Davis, 44 So.3d at 1141-42.

Furthermore, this is not a situation where McWhorter's trial counsel conducted no investigation like counsel in *Porter v. McCollum*, 558 U.S. 30, 130 S.Ct. 447, 453-54, 175 L.Ed.2d 398 (2009), where counsel failed to uncover evidence of the defendant's mental health, family background, and serious drinking problem and did not obtain certain records; or like counsel in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), where counsel had information that alluded to the defendant's troubled and difficult childhood but failed to conduct a more thorough investigation; or like counsel

in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where counsel did not begin to investigate mitigation evidence until a week before trial and failed to uncover critical records about the defendant.

Given the particularly egregious facts of the underlying crime – for example, McWhorter's planning the crime for three weeks, lying in wait for several hours, and methodically creating homemade silencers and test-firing them beforehand, etc. – and given that McWhorter admitted to much of the crime, McWhorter has failed to demonstrate that his attorneys rendered ineffective assistance by not offering the additional evidence described above. Evidence of a difficult childhood and drug and alcohol abuse is a two-way street. Such evidence can be helpful in mitigation but it can also be harmful to the defense's case. Additionally, given the methodical, deliberate manner in which McWhorter committed the crime, expert testimony indicating that McWhorter had difficulty in preventing impulsive decisions would not have made any difference. Accordingly, we find no error in the circuit court's conclusion that counsel's performance was not deficient.

D.

McWhorter also argues that the circuit court erred in finding that trial counsel's performance did not prejudice him. He contends that if evidence of the physical abuse he suffered, the violence to which he was exposed, his sniffing gasoline and freon from a young age, and his emotional state in the period preceding the crime, had been presented to the trial court, he might have been sentenced to life imprisonment without parole.

In assessing claims of ineffective assistance of counsel in the penalty phase of a capital trial, we apply the standard discussed in *Wiggins v. Smith*, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003):

> In *Strickland* [*v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.
>
> 539 U.S. at 534, 123 S.Ct. 2527.

In sentencing McWhorter to death, the trial court found one aggravating circumstance – that the capital offense was committed while McWhorter was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit a robbery. *See* § 13A-5-49(4), Ala.Code 1975. Here, the circuit court found that the omitted mitigating evidence presented at the postconviction evidentiary hearing would not have outweighed the aggravating circumstance. This Court has also reviewed the mitigating evidence trial counsel allegedly failed to discover and present against the aggravating circumstances presented. After a complete review, we are confident that the mitigating evidence presented at the postconviction hearing – but omitted from the penalty phase of McWhorter's capital-murder trial – would have had no impact on the sentence in this case. *See* *Wiggins*, 539 U.S. at 534, 123 S.Ct. 2527. Consequently, McWhorter was due no relief on his claim that his trial counsel was ineffective for not presenting the additional mitigating evidence in the penalty phase of his capital-murder trial.

***47** *McWhorter*, 142 So.3d at 1238-50.

McWhorter argues that the appellate court's adjudication of this claim was contrary to and an unreasonable application of *Strickland*. (Doc. 20 at 35-38). To establish a violation of *Strickland*, McWhorter must show that counsel's failure to present the additional mitigation evidence was unreasonable, and that but for counsel's failure to present this evidence, he would not have been sentenced to death. McWhorter has not met this burden.

The appellate court reviewed the actions taken by trial counsel in representing McWhorter. The court noted that counsel interviewed McWhorter, his mother, his aunt and is half-sister, all of whom were cooperative and supportive. Counsel gleaned much information from a "Client Background Information" form completed by McWhorter's family, covering a myriad of topics such as early childhood development, living conditions, medical issues as a child, relationship information, education history, medical and mental health history, substance abuse history, criminal

history, and family history; hired a neuropsychologist to evaluate McWhorter for any mental disease or disorder, or any evidence of psychopathology, diminished capacity, susceptibility to influence by others, or brain damage; and obtained and considered a variety of records, including hospital records from McWhorter's attempted suicide. Trial counsel, experienced criminal attorneys, also were aware that McWhorter's IQ was 88 and that his mother had been reported to DHR for "whipping" him hard enough to leave bruises. Given the information uncovered in their investigation, and because McWhorter's codefendant had already pleaded guilty and the jury had already heard evidence of gang activity during the trial's guilt phase, counsel believed it would be an uphill battle to persuade the jury to spare McWhorter's life. As a result, counsel made a judgment call and formulated the strategy they believed was most likely to save McWhorter's life: to portray McWhorter as a good boy who fell in with the wrong crowd and made a terrible mistake, but did not deserve the death penalty. The state court determined that counsel's investigation and strategic choice aimed at saving McWhorter's life were reasonable, and thus concluded that McWhorter had not met the deficient performance prong of *Strickland*. The state court's determination was not unreasonable.

Similarly, McWhorter is unable to establish that counsel's failure to uncover and present additional evidence in the penalty phase prejudiced him under *Strickland*. McWhorter faults trial counsel for failing to introduce the following evidence: parental abuse and neglect; McWhorter's suicidal behavior, including playing Russian roulette; and McWhorter's significant drug usage, demonstrating that he was maladjusted and indicating that his behavioral problems might have resulted from a genetic predisposition. (Doc. 1 at 42-45). He argues there is a reasonable probability that had this evidence been presented, the jury would have recommended life imprisonment rather than death. That argument misses the mark.

***48** As the appellate court correctly noted:

> In *Strickland* [*v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (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. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence.

McWhorter, 142 So.3d at 1250 (quoting *Wiggins v. Smith*, 539 U.S. 510, 534, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003)).

After hearing all of the evidence that was not introduced in the guilt phase of his trial, the trial court found that the omitted evidence would not have outweighed the aggravating circumstance that McWhorter killed the victim while committing a robbery. The Alabama Court of Criminal Appeals reweighed that evidence and also concluded that, even if the additional evidence had been presented, it would have had no effect on the death sentence. Given the overwhelming evidence of McWhorter's guilt, the fact that the crime was pre-planned, and the fact that McWhorter and his codefendant waited in the victim's house for several hours, preparing silencers for the guns they intended to use to kill the victim when he returned home, it is not unreasonable to conclude that the additional evidence offered by McWhorter would not have resulted in a different sentence.

Thus, the appellate court's determinations that trial counsel were not deficient and that, in any event, McWhorter was not prejudiced by trial counsel's failure to present additional mitigating evidence, were neither contrary to nor an unreasonable application of *Strickland*.

2. Failure to Object to McWhorter's Being Transported to and from the Courtroom in Handcuffs

a. The Parties' Arguments

McWhorter next claims that throughout his trial, "authorities transported him to and from the courtroom in handcuffs ... applying and removing McWhorter's handcuffs ... in full view of the jury." (Doc. 1 at 45). He argues that this "undermined his presumption of innocence and likely impacted the jury's impression of him" and the "resulting shame and embarrassment likely endured, burdening his courtroom interactions with counsel and his emotional connection to the jury." (*Id.* at 45-46). He maintains that trial counsel were ineffective for failing to object to the routine shackling without a strategic reason. (*Id.* at 47).

In his amended Rule 32 petition, McWhorter alleged the following:

> 96. On each day of the trial, the jurors could see [McWhorter] being led into the courtroom manacled, in handcuffs. Jurors could see [McWhorter's] handcuffs being put on and removed.
>
> 97. Trial counsel never objected to this procedure.
>
> 98. The shackling procedure stripped [McWhorter] of the presumption of innocence that is constitutionally afforded to all defendants. One of the 'basic components of a fair trial is the presumption of innocence.' *Estelle v. Williams*, 425 U.S. 501, 503, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976). 'To implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process.' *Id.* Shackling tends not only to undermine the defendant's presumption of innocence, but 'is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.' *Illinois v. Allen*, 397 U.S. 337, 344, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970).
>
> ***49** 99. "All of the authorities we have studied are agreed that to bring a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with our notion of a fair trial, for it creates in the minds of the jury a prejudice which will likely deter them from deciding the prisoner's fate impartially." *Clark v. State*, 280 Ala. 493, 195 So.2d 786, 787 (Ala. 1967).
>
> 100. When shackling occurs, it must be subjected to "close judicial scrutiny," to determine if there was an "essential state interest" furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed. *Elledge v. Dugger*, 823 F.2d 1439, 1451 (11th Cir. 1987) (citations omitted). Although "[G]reat weight must be accorded the discretion of the trial court" in determining what security measures are necessary, constitutional limits must be maintained, *Goodwin v. State*, 495 So.2d 731, 733 (Ala. Crim. App. 1986), by balancing the state interest in security with the potential for prejudice to the defendant.
>
> 101. [McWhorter] posed no risk to justify his being shackled throughout his trial. His behavior was neither boisterous nor recalcitrant. In fact, he sat quietly throughout the proceedings. He made no threats at any point during the trial, or leading up to it, and there was therefore no persuasive reason why handcuffs could not be removed before he entered the courtroom, or why he could not have been permitted to exit the courtroom without being shackled.
>
> 102. The decision to exhibit [McWhorter] in shackles, each day of the trial, was an uninformed one, and made without considering less-restrictive security measures. It violated [McWhorter's] rights to due process, a fair trial, and a reliable sentencing protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law.
>
> 103. By failing to object to the shackling procedure, or to make an appropriate record, trial counsel not only failed to preserve the issue for consideration on direct appeal, they also failed to measure up to an objective standard of reasonableness in their representation of [McWhorter], in that they permitted the fairness of the trial to be undermined and compromised, and permitted [McWhorter's] Alabama and Federal Constitutional rights to be violated as set forth above, without any strategic reason for acting as they did.

McWhorter, 142 So.3d at 1261-62.

The Rule 32 judge stated the following in the final order denying McWhorter's amended petition:

> McWhorter alleges that jurors saw him led to the courtroom wearing handcuffs and that trial counsel did not object. McWhorter does not plead specifically how this prejudiced him, so this claim fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. Also, this Court holds that McWhorter cannot show prejudice because "it is not ground for mistrial that the accused appeared before the jury in handcuffs when his appearance was only part of going to and from the courtroom." *Dunaway v. State*, [198] So.3d [530, 560] (Ala. Crim. App. 2009) (affirming the dismissal of Dunaway's substantially similar [ineffective assistance of counsel] claim for failure to object where testimony at Dunaway's Rule 32 hearing only showed that an alternate juror saw the handcuffs).

***50** *McWhorter*, 142 So.3d at 1262-63. The Alabama Court of Criminal Appeals affirmed the dismissal of this claim. *Id.* at 1263-64.

Respondent argues that the Alabama Court of Criminal Appeals decision on this claim is not contrary to or an unreasonable application of *Strickland*. In dismissing this claim, the appellate court held:

> In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that "counsel's performance was deficient" and that this deficiency was so severe that the defendant was deprived of a fair trial. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. "The 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." 466 U.S. at 694, 104 S.Ct. 2052.
>
> In Alabama, it has consistently been held that
>
> > "[b]ringing a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with our notion of a fair trial." *Brock v. State*, 555 So.2d 285, 288 (Ala. Crim. App. 1989), *on return to remand*, 580 So.2d 1390 (Ala. Crim. App. 1991). The decision to restrain a defendant rests with the trial judge, and, absent an abuse of discretion, this Court will not disturb his ruling on appeal. *Id.* at 289. "Ultimately, however, it is incumbent upon the defendant to show that less drastic alternatives were available and that the trial judge abused his discretion by not implementing them." *Id.* (internal citation and quotation marks omitted). "It is not always reversible error for a defendant to be handcuffed or shackled in front of the jury." *Perkins v. State*, 808 So.2d 1041, 1079 (Ala. Crim. App. 1999), *aff'd*, 808 So.2d 1143, 1145 (Ala. 2001)."
>
> *McCall v. State*, 833 So.2d 673, 676 (Ala. Crim. App. 2001) (holding that, although the trial judge failed to state his reasons for requiring an inmate witness to testify in shackles and prison clothing, defendant failed to show that he had suffered any prejudice). *See also* *Brock v. State*, 555 So.2d 285, 289 (Ala. Crim. App. 1989) (holding that, although the facts of that case did not "explicitly indicate a fear by the court that the defendant would attempt to escape, it is not reversible error for a trial court to allow a defendant to be brought into the courtroom handcuffed"). "It is not ground for mistrial that the accused appeared before the jury in handcuffs when his appearance was only a part of going to and from the courtroom." *Justo v. State*, 568 So.2d 312, 318 (Ala. Crim. App. 1990) (quoting *Cushing v. State*, 455 So.2d 119, 121 (Ala. Crim. App. 1984)). Whether a defendant may be handcuffed for purposes of being taken to and from the courtroom is left to the discretion of the trial court. *McWilliams v. State*, 640 So.2d 982 (Ala. Crim. App. 1991).
>
> We affirm the circuit court's dismissal of the claims. McWhorter has not presented any facts to support this claim; the claim is based on bare assertions and conclusions. Consequently, McWhorter has not met either the burden of pleading imposed by Rule 32.3 or the specificity requirements of Rule 32.6(b), Ala. R.Crim. P. McWhorter has not shown that trial counsel's performance was outside "the wide range of reasonable professional assistance," *Strickland*, 466 U.S. at 689, 104 S.Ct. 2052, nor has McWhorter shown that there is a reasonable probability that, if trial counsel had made an objection to the handcuffs, the result of the trial would have been different. Accordingly, summary dismissal of this claim was proper.
>
> ***51** *McWhorter*, 142 So.3d at 1263-64.

b. Analysis

The Alabama Court of Criminal Appeals found that in presenting this claim McWhorter had not met the burden of pleading imposed by Rule 32.3 or the specificity requirements of Rule 32.6(b). *Id.* at 1263. The Eleventh Circuit has held that a Rule 32 dismissal for lack of specificity is a merits determination. *Borden v. Allen*, 646 F.3d 785, 812-13 (11th Cir. 2011). As such, this court must conduct a deferential AEDPA review of the state court's decision pursuant to 28 U.S.C. § 2254(d).

After review, the court concludes that the state appellate court's decision was neither contrary to nor an unreasonable application of *Strickland*. To prevail on a *Strickland* claim, McWhorter must show that counsel's performance was deficient and that he was prejudiced by the deficient performance. 466 U.S. at 687, 104 S.Ct. 2052. To prove counsel's performance was deficient, McWhorter must

establish that being transported to and from the courtroom in handcuffs violated his right to a fair trial. However, the "well established rule in this circuit is that a 'brief and fortuitous encounter of the defendant in handcuffs is not prejudicial and requires an affirmative showing of prejudice by the defendant.' *Wright v. Texas*, 533 F.2d 185, 187 (5th Cir. 1976); *United States v. Bankston*, 424 F.2d 714 (5th Cir. 1970); *Hardin v. United States*, 324 F.2d 553 (5th Cir. 1963)." *Allen v. Montgomery*, 728 F.2d 1409, 1414 (11th Cir. 1984).

McWhorter failed to establish that he was prejudiced by being handcuffed while transported to and from the courtroom. Thus, counsel were not deficient for failing to object to the handcuffs. Furthermore, even assuming McWhorter could establish deficient performance by showing that counsel's failure to object to McWhorter being transported in handcuffs was objectively unreasonable (and, to be clear, he has not made that showing), he has not shown prejudice, *i.e.*, that the result of the trial would have been different if counsel had made such an objection. Thus, McWhorter is not entitled to relief on this claim.

3. Failure to Object to the Trial Court's Preparation of a Sentencing Order Prior to the Sentencing Hearing

Immediately after the May 13, 1994 sentencing hearing, the trial judge informed McWhorter that he was not going to postpone sentencing him, but would do it "at this time." (Vol. 12, Tab 31 at 1871). The judge stated: "I have prepared and will file a complete order making numerous findings that I incorporate herein into this sentencing." (*Id.*). He then sentenced McWhorter to death. (*Id.* at 1872). The trial judge signed the sentencing order the same day. (Vol. 36, Tab 76).

a. The Parties' Arguments

McWhorter claims that counsel were ineffective for failing to object to the "trial judge's failure to consider [his] sentencing arguments by drafting his opinion *prior to* the sentencing hearing." (Doc. 1 at 48).

McWhorter unsuccessfully raised this claim in his Rule 32 petition. (Vol. 21, Tab 56 at 512). The trial court denied the claim in its final order denying McWhorter's Rule 32 petition:

***52** This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter does not plead what objection effective trial counsel would have made or how he was prejudiced by Judge Gullahorn's drafting a sentencing order prior to the sentencing hearing. When questioned about this claim at the evidentiary hearing, [trial counsel] said, "I don't know what objection I would make." And, McWhorter failed to show what objection should have been made. It was McWhorter's burden to plead the relevant objection. McWhorter did not do that; therefore, this claim is denied because it is insufficiently pleaded.

In the alternative, this claim is denied because it fails to state a valid claim for relief or present a material issue of fact or law, under Rule 32.7(d) of the Alabama Rules of Criminal Procedure. Judge Gullahorn's decision to draft a sentencing order prior to the sentencing hearing did not violate any state or federal law, and it did not prejudice McWhorter. McWhorter failed to prove that Judge Gullahorn did not consider the evidence and arguments presented during the sentencing hearing. Judge Gullahorn was free to scrap his draft sentencing order after he heard evidence and arguments during sentencing hearing. Because Judge Gullahorn obviously was not convinced by the evidence and arguments presented, he sentenced McWhorter to death at the conclusion of the sentencing hearing. It is likely that no objection would have been sustained. Trial counsel were not deficient for not raising an objection with no ground to support it, and McWhorter was not prejudiced. Therefore, this claim is without merit and is denied by this Court.

(Vol. 24, Tab 65 at 1150-51). McWhorter did not appeal the denial of this claim to the Alabama Court of Criminal Appeals. (*See* Vol. 33, Tab 71 at 1-89).

Respondent argues that because McWhorter did not raise this claim on appeal from the denial of his Rule 32 petition, it is unexhausted and, therefore, procedurally barred from review in this court. (Doc. 14 at 45-46).

b. Analysis

First, and as an initial matter, this court finds McWhorter has failed to satisfy the requirement that a petitioner exhaust his federal claims in state court before presenting them in a

federal habeas petition. *See* 28 U.S.C. § 2254(b)(1)(A). To properly exhaust this claim, McWhorter was required to "give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process." *O'Sullivan v. Boerckel*, 526 U.S. 838, 845, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999). In Alabama, a complete round of the established appellate review process includes an appeal to the Alabama Court of Criminal Appeals, an application for rehearing to that court, and a petition for a writ of certiorari in the Alabama Supreme Court. *See* *Smith v. Jones*, 256 F.3d 1135, 1140-41 (11th Cir. 2001); *Pruitt v. Jones*, 348 F.3d 1355, 1359 (11th Cir. 2003) (applying the exhaustion requirement to state post-conviction proceedings as well as direct appeals).

After the trial court denied this claim, McWhorter was required to present the claim to the Alabama Court of Criminal Appeals, but he did not. A claim that was not presented to the state court and can no longer be litigated under state procedural rules is procedurally barred from federal review. *See* *Boerckel*, 526 U.S. at 839-40, 848, 119 S.Ct. 1728; *Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). Alabama law does not allow successive collateral petitions and provides a one-year limitations period for filing such petitions. *See* Ala. R. Crim. P. 32.2(b) and (c). Because McWhorter cannot return to state court to file an untimely appeal from the denial of his Rule 32 petition or another postconviction motion, this claim is procedurally defaulted. McWhorter makes no argument that he can show cause for, or prejudice from, the default of this claim. Thus, the claim is barred from review in this court.

***53** Additionally, and in the alternative, the court notes that even if it were to consider this claim on its merits, it would clearly fail. McWhorter cannot show that the Rule 32 court unreasonably denied his ineffective assistance of counsel claim for at least two reasons. First, McWhorter's trial counsel were not deficient for failing to object to the trial judge's decision to draft his sentencing order prior to his sentencing hearing because no Alabama or federal law forbids that practice. As the Rule 32 court explained, the trial judge remained "free to scrap his draft sentencing order after he heard evidence and arguments during sentencing hearing." (Vol. 24, Tab 65 at 1150-51).

Second, McWhorter was not prejudiced by his counsel's failure to object the pre-drafted sentencing order for the same reason that his trial counsel were not deficient: there is nothing improper about drafting a sentencing order before a sentencing hearing and, therefore, any objection by McWhorter's counsel would have been unavailing. The drafting of such an order does not in any way cabin the judicial officer into a particular ruling. The judge was free to rethink the issue, revise or scrap the draft, or take any of a number of other steps. Under § 2254(d), McWhorter simply cannot show that the state court's decision was contrary to or an unreasonable application of clearly established federal law, as determined by the U.S. Supreme Court.

4. The Rule 32 Court's Exclusion of Evidence Does Not Warrant an Evidentiary Hearing in this Court

a. The Parties' Arguments

McWhorter also claims that "[a]dditional evidence demonstrating trial counsel's shortcomings was never heard because the Hearing Court improperly excluded it on hearsay grounds." (Doc. 1 at 49). He argues that this court "must" consider that evidence here in determining whether trial counsel were ineffective.

Specifically, McWhorter argues that:

> In order to demonstrate to the Hearing Court trial counsel's inadequate investigation and deficient performance at sentencing, McWhorter sought to introduce the testimony of Janet Vogelsang and Dr. Tarter. McWhorter argued that the testimony of Vogelsang and Tarter should have been offered by his counsel at his sentencing. State law gave McWhorter the right to introduce out-of-court statements other than those made by the testifying witness at his sentencing hearing. Ala. R. Evid. 1101(b)(3) (excluding application of the Rules of Evidence from sentencing proceedings). However, the Hearing Court severely limited the testimony of both Vogelsang and Tarter on the ground that state law did not permit hearsay testimony in Rule 32 proceedings, which prevented McWhorter from demonstrating trial counsels' unconstitutionally deficient performance.
>
> The Hearing Court significantly curbed the testimony of Vogelsang, who conducted extensive interviews with McWhorter's family, and was prepared to testify, as she would have at his sentencing, about the remarkable levels of violence and drugs that permeated McWhorter's family

and surroundings as he grew up, and the effects this had on McWhorter. Vogelsang would have testified that being surrounded by family members who used alcohol and drugs, as well as abusive persons, would likely have perverted McWhorter's insight, judgment and decision making – thus placing him at risk for serious trouble.

The Hearing Court ruled that Vogelsang could not testify to anything that had not already been presented at the Rule 32 Hearing because under Alabama's evidence law, "[e]xperts without firsthand knowledge generally may not base opinions upon facts or data that have not themselves been admitted into evidence." Hearing Transcript at R526/13-15. As a consequence, Vogelsang was prevented from explaining how the extraordinary circumstances under which McWhorter grew up negatively affected his insight, judgment and decision making, making him a high-risk candidate for trouble. Offer of Proof, Hearing Exhibit 31, ROA Supplement 3, at C106-110. The Hearing Court's erroneous exclusion of this evidence kept the Hearing Court from considering it in assessing McWhorter's ineffective assistance claim.

***54** The Hearing Court's ruling also severely limited the testimony of Dr. Tarter. Without the improper ruling, Dr. Tarter would have drawn on Vogelsang's testimony to explain that McWhorter's genetic risks for substance abuse and related psychological conditions were extremely high, and that it would have taken a very strong and positive environment as well as counseling and other treatment in order to countervail those risks. *Id.* at C110-111.

McWhorter argued that the testimony of Dr. Tarter and Vogelsang was relevant to show trial counsel's inadequate investigation, and therefore should have been admitted. McWhorter was entitled to introduce evidence that trial counsel should have presented at the penalty phase of McWhorter's trial. At the Rule 32 Hearing, this evidence could have included hearsay. *See* Hearing Transcript at R30-31, R66-71, R253-54, R523-27. Because the Hearing Court erroneously excluded this testimony, it was unable to consider it in evaluating McWhorter's ineffective assistance of counsel claim.

(Doc. 1 at 49-52).

b. Analysis

When McWhorter raised this claim on appeal from the denial of his Rule 32 petition, the Alabama Court of Criminal Appeals affirmed, finding that the testimony in question was properly excluded under Alabama law. *McWhorter*, 142 So.3d at 1253-55. To the extent McWhorter may be challenging the state courts' rulings that this evidence was properly excluded under Alabama law, his claim is foreclosed because a state court's interpretation of its own laws provides no basis for federal habeas relief. *See, e.g.*, *Beverly v. Jones*, 854 F.2d 412, 416 (11th Cir. 1988) (state court construction of state law is binding on federal courts entertaining petitions for habeas relief); *Bradshaw v. Richey*, 546 U.S. 74, 76, 126 S.Ct. 602, 163 L.Ed.2d 407 (2005) (same); *Pulley v. Harris*, 465 U.S. 37, 42, 104 S.Ct. 871, 79 L.Ed.2d 29 (1984) (perceived errors of state law provide no basis for federal habeas relief); *Callahan v. Campbell*, 427 F.3d 897, 932 (11th Cir. 2005) ("It is a fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters.").

Rather than raising this claim about the alleged improper exclusion of testimony by Dr. Ralph Tarter and Ms. Janet Vogelsang as an independent claim for relief, McWhorter appears to advance the claim as a basis for seeking an evidentiary hearing in this court. In particular, he makes the following argument in support of an evidentiary hearing on his claim that trial counsel were ineffective because they failed to investigate and present mitigating evidence:

> Typically, federal courts may not conduct evidentiary hearings in habeas cases where the applicant has "failed to develop" the factual basis of a claim in state court proceedings. 28 U.S.C. § 2254(e)(2). A petitioner cannot be said to have "failed to develop" relevant facts, however, if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings. *Williams v. Taylor*, 529 U.S. 420, 437, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000) (*Williams I*). Where a petitioner was "unable to develop his claim in state court despite diligent effort," a federal court may order an evidentiary hearing. *Id.*

(Doc. 1 at 52).

Section 2254(e)(2) provides as follows:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that –
>
> (A) the claim relies on –
>
> ***55** (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2).

The question is whether McWhorter can properly present this claim in this court. Absent certain unique circumstances, a habeas court is barred from holding an evidentiary hearing if the petitioner fails to develop the factual basis of a failure to investigate claim in the state court. *Williams v. Alabama*, 791 F.3d 1267, 1276 (11th Cir. 2015) (citing 28 U.S.C. § 2254(e)(2)). Consistent with its opening clause, § 2254(e)(2) "applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings.' " *Id.* (quoting *Williams v. Taylor*, 529 U.S. 420, 430, 120 S.Ct. 1479, 146 L.Ed.2d 435 (2000)). "Failure" connotes some "omission, fault or negligence" on the part of the petitioner. *Id.* (quoting *Taylor*, 529 U.S. at 431, 120 S.Ct. 1479). Thus, "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, *attributable to the prisoner or the prisoner's counsel.*" *Id.* (emphasis added) (quoting *Taylor*, 529 U.S. at 432, 120 S.Ct. 1479 and citing *Breedlove v. Moore*, 279 F.3d 952, 960 (11th Cir. 2002) ("[A] petitioner cannot be said to have 'failed to develop' relevant facts if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings.")).

Having said that, McWhorter can only be said to have failed to develop the factual basis of his failure to investigate claim if there is lack of diligence, or some greater fault, attributable to him or his counsel. In assessing this question, the court asks whether McWhorter "made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend ... upon whether those efforts could have been successful." *Id.* at 1277 (quoting *Taylor*, 529 U.S. at 435, 120 S.Ct. 1479).

McWhorter argues that he was diligent because he "sought to present evidence of trial counsel's ineffective assistance at every stage of his state proceedings." (Doc. 1 at 52). He maintains that the trial court refused to allow him to present additional testimony from Dr. Tarter and Ms. Vogelsang on the ground that hearsay testimony is not allowed in Rule 32 proceedings.[39] When McWhorter objected to the Rule 32 court limiting the testimony of Ms. Vogelsang, the court overruled the objection, noting that under Alabama law, "[e]xperts without firsthand knowledge generally may not base opinions upon facts or data that have not themselves been admitted into evidence." (Vol. 28 at 526-27).

***56** As the Alabama Court of Criminal Appeals pointed out, McWhorter could easily have remedied this by calling as witnesses his family members, friends and others with first-hand knowledge of the facts and data necessary to enable the expert witnesses to provide their complete opinions. *McWhorter*, 142 So.3d at 1256-57. However, these witnesses were not called, and as a result, the experts were not allowed to provide opinions based upon facts and data provided to those experts outside of court. Under these circumstances, the court cannot say that McWhorter and his Rule 32 counsel acted with diligence in trying to elicit further testimony from either Dr. Tarter or Ms. Vogelsang. Importantly, McWhorter does not allege that his Rule 32 counsel were constitutionally ineffective for failing to call additional witnesses at the evidentiary hearing. McWhorter is not entitled to an evidentiary hearing on his failure-to-investigate claim.

D. McWhorter's Claim That the State Failed to Disclose Evidence Directly Relevant to Mitigation in Violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963)

1. The Parties' Arguments

McWhorter contends that the prosecution violated his rights to due process, a fair trial, and a reliable sentencing by failing to inform him of certain exculpatory evidence in violation of *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Specifically, he claims that

> less than two months before [his] trial, a jailhouse informant named Timothy Rice disclosed to state prosecutors that McWhorter's co-defendant, Daniel Miner, admitted to firing the shot that killed the victim, Lee Williams. ROA 3, at C503. Rice told the prosecution that McWhorter shot Williams only once in the leg, and that the remaining, and fatal, shots were fired by Miner. McWhorter alleged that the prosecution's willful suppression of this evidence precluded McWhorter from ever presenting this information to the jury and resulted in severe prejudice to McWhorter's defense.

(Doc. 1 at 55). McWhorter argues that this evidence was "indisputably highly favorable material evidence of paramount importance to the jury's penalty phase deliberations" and "would tend to reduce [his] culpability and penalty." (*Id.*) (citing *Brady*).

Respondent argues that this claim is procedurally barred from review in this court and that, in any event, the claim fails on the merits.

2. Analysis

McWhorter raised his *Brady* claim concerning Timothy Rice's statement for the first time in his Rule 32 petition. The Rule 32 court summarily dismissed the claim pursuant to Rule 32.7(d) of the Alabama Rules of Criminal Procedure. (Vol. 23 at 865; Vol. 24, Tab 65 at 1126). On appeal, the Alabama Court of Criminal Appeals affirmed the Rule 32 court's summary dismissal of the claim because it was procedurally barred and because it was insufficiently pleaded. *McWhorter*, 142 So.3d at 1257. The court concludes that the claim is procedurally defaulted and that, even were it to consider the claim on the merits, the claim would fail.

a. Procedural Default

The Alabama Court of Criminal Appeals held that McWhorter's *Brady* claim was procedurally barred under Alabama Rule of Criminal Procedure 32.2(a)(3) and (a)(5) "because it could have been raised at trial and on appeal but was not." *McWhorter*, 142 So.3d at 1257. Rule 32.2(a) is titled "Preclusion of Grounds" and provides that a petitioner "will not be given relief under this rule based upon any ground" "[w]hich could have been but was not raised at trial" or "[w]hich could have been but was not raised on appeal." Ala. R. Crim. P. 32.2(a)(3), (a)(5). The Court of Criminal Appeals explained that Rule 32.2(a)(3), (5) bars a petitioner's claim unless the petitioner shows "that the information [forming the basis of his claim] was not known, and could not reasonably have been discovered, at trial or in time to raise the issue in a motion for new trial or on appeal." *McWhorter*, 142 So.3d at 1261 (alteration in original). The court concluded that Rule 32.2(a)(3) and (a)(5) required McWhorter "to plead that his claim [was] based on newly discovered evidence and could not have been raised at trial or on direct appeal." *Id.* at 1260. The court found that "McWhorter failed to include in his petition any facts indicating that the State's alleged suppression of Rice's statement taken two months before trial continued until such time as the claim could not have been raised in a posttrial motion or on appeal." *Id.* "Because McWhorter did not allege any facts in his Rule 32 petition indicating when he learned of the existence of Rice's alleged statement or indicating that the discovery of the statement did not occur until after the time for filing a motion for a new trial or an appeal had lapsed," the court concluded that his *Brady* claim was "procedurally barred." *Id.*

***57** Under the procedural default doctrine, "[a] state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). However, a federal claim rejected on state procedural grounds is procedurally defaulted only "if the state procedural ruling rests upon 'adequate and

independent' state grounds." *Ward v. Hall*, 592 F.3d 1144, 1156 (11th Cir. 2010). The court must therefore determine whether the procedural rule the Court of Criminal Appeals applied to bar McWhorter's *Brady* claim – that a Rule 32 Petition must contain allegations negating the preclusive bars of Rule 32.2(a)(3) and (a)(5) to survive summary dismissal – constitutes an "adequate and independent" state law ground for procedural default purposes.

The Eleventh Circuit applies a three-part test to determine whether a state court's procedural ruling is adequate and independent for purposes of procedural default doctrine: (1) "the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim"; (2) "the state court's decision must rest entirely on state law grounds and not be intertwined with an interpretation of federal law"; and (3) "the state procedural rule must be adequate, i.e., firmly established and regularly followed and not applied in an arbitrary or unprecedented fashion." *Id.* at 1156-57 (internal quotation marks omitted). There is no question the first two elements are met here. The Court of Criminal Appeals expressly stated that McWhorter's *Brady* claim "was procedurally barred because it could have been raised at trial and on appeal but was not" and cited Rule 32.2(a)(3) and (a)(5) for that proposition. *McWhorter*, 142 So.3d at 1257. And the state court's procedural ruling rested solely on its finding that McWhorter's Rule 32 petition "did not allege any facts ... indicating when he learned of the existence of Rice's alleged [exculpatory] statement." *Id.* at 1260. Thus, the only question is whether the procedural rule applied by the state court to bar McWhorter's *Brady* claim was "adequate."

One reason a state procedural bar might be "inadequate" is if the state court erroneously applied the state procedural rule to bar a federal claim that should not in fact be barred under a correct interpretation of the state procedural rule. [40] *See Ward*, 592 F.3d at 1156 (explaining that "adequate" state procedural rules must not be applied "in an arbitrary or unprecedented fashion"). McWhorter contends the Court of Criminal Appeals erroneously applied Rule 32.2(a)(3) and (a)(5) to bar his *Brady* claim because those provisions do not require a habeas petitioner to affirmatively assert, at the pleading stage, that he could not have raised the claim at trial or on appeal. (Doc. 20 at 43). He thus appears to argue that the state procedural bar is not "adequate" to bar his federal claim because the Court of Criminal Appeals committed state-law error in applying the bar.

McWhorter is correct that the procedural rule applied to bar his *Brady* claim – that a Rule 32 Petition must contain affirmative allegations negating the preclusive bars of Rule 32.2(a)(3) and (a)(5) to survive summary dismissal – has since been squarely rejected by the Alabama Supreme Court. *See Ex parte Beckworth*, 190 So.3d 571, 575 (Ala. 2013) (holding that habeas petitioners have no burden to plead facts negating the preclusive bars of Rule 32.2(a)(3) and (a)(5) to survive summary dismissal of their petition). But the test for deciding if a state procedural rule is "adequate" is whether the rule was "firmly established and regularly followed *at the time it was applied*," not at some later time. *Edwards v. Carpenter*, 529 U.S. 446, 450, 120 S.Ct. 1587, 146 L.Ed.2d 518 (2000) (emphasis added) (internal quotation marks omitted) (describing the holding of *Ford v. Georgia*, 498 U.S. 411, 423-424, 111 S.Ct. 850, 112 L.Ed.2d 935 (1991)). [41] And there is no question that the rule applied to bar McWhorter's *Brady* claim was firmly established and regularly applied, both in 2005 when he filed his Amended Rule 32 Petition and in 2011 when the state appellate court ruled on the claim. *See Beckworth v. State*, 190 So.3d 527, 541 (Ala. Crim. App. 2009) (holding that a summarily dismissed *Brady* claim was procedurally barred because petitioner "failed to include in his petition any facts indicating when he learned of [the alleged exculpatory statement] or indicating that he did not learn about the statement in time to raise the issue in a posttrial motion or on appeal"); *Bryant v. State*, 181 So.3d 1087, 1123 (Ala. Crim. App. 2011) (same); *Ray v. State*, 80 So.3d 965, 973-74 (Ala. Crim. App. 2011) (same); *Davis v. State*, 44 So.3d 1118, 1143-44 (Ala. Crim. App. 2009) (same); *Windsor v. State*, 89 So.3d 805, 825 (Ala. Crim. App. 2009) (same); *Smith v. State*, 71 So.3d 12, 35 (Ala. Crim. App. 2008) (same); *Boyd v. State*, 913 So.2d 1113, 1142 (Ala. Crim. App. 2003); *Williams v. State*, 782 So.2d 811, 818 (Ala. Crim. App. 2000) (same). The fact that the Alabama Supreme Court later abrogated that rule in 2013, *see Ex parte Beckworth*, 190 So.3d at 575, has no bearing on whether the rule was an "adequate" state ground of decision at the time it was applied to bar McWhorter's

Brady claim. McWhorter's *Brady* claim is procedurally defaulted.

***58** Any doubts about whether McWhorter's *Brady* claim is procedurally defaulted are resolved by binding Eleventh Circuit precedent. In *Boyd*, the Eleventh Circuit considered a *Brady* claim nearly identical to the one at issue here—*i.e.*, that the prosecution failed to turn over exculpatory statements made by the petitioner's codefendants. 697 F.3d at 1334. The state court had rejected the *Brady* claim as procedurally barred for the same reason the Alabama Court of Criminal Appeals rejected *McWhorter*'s claim here: because the petitioner "did not assert in his petition that the claim was based on newly discovered evidence or that any alleged suppression by the State continued until such time as the claim could not have been raised at [his] trial." *Boyd*, 913 So.2d at 1142. The Eleventh Circuit held that Boyd's *Brady* claims were procedurally defaulted, *Boyd*, 697 F.3d at 1335, and that holding is controlling here.

McWhorter does not argue that he can show cause or prejudice to excuse his procedural default or that failure to consider his *Brady* claim would result in a "fundamental miscarriage of justice." *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). Moreover, as explained below, because McWhorter cannot establish the prejudice necessary to succeed on his *Brady* claim, he also cannot establish prejudice to excuse the procedural default of his *Brady* claim. *See* *Wright v. Hopper*, 169 F.3d 695, 703 (11th Cir. 1999). The court also finds that McWhorter has not shown the "fundamental miscarriage of justice" exception to the procedural default doctrine applies.

b. Merits

Even if McWhorter's *Brady* claim, "somehow, were not procedurally barred," this court's review of the claim would still be governed by § 2254(d)'s deferential standard of review. *Boyd*, 697 F.3d at 1335. And under that standard, the court has no trouble concluding that the state appellate court's rejection of McWhorter's *Brady* claim was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

The Eleventh Circuit has summarized the *Brady* doctrine as follows:

> A *Brady* violation has three components: "[1] The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; [2] that evidence must have been suppressed by the State, either willfully or inadvertently; and [3] prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82, 119 S.Ct. 1936, 144 L.Ed.2d 286 (1999). Evidence is not considered to have been suppressed if "the evidence itself ... proves that [the petitioner] was aware of the existence of that evidence before trial." *Felker v. Thomas*, 52 F.3d 907, 910 (11th Cir. 1995). The prejudice or materiality requirement is satisfied if "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.Ed.2d 481 (1985); *see also* *Kyles v. Whitley*, 514 U.S. 419, 433, 115 S.Ct. 1555, 131 L.Ed.2d 490 (1995). Materiality is determined by asking whether the government's evidentiary suppression undermines confidence in the guilty verdict. *See* *Kyles*, 514 U.S. at 434, 436-37 & n. 10, 115 S.Ct. 1555.

Boyd, 697 F.3d at 1334-35 (alterations and omission in original).

McWhorter has failed to satisfy the prejudice component with respect to his *Brady* claim. He claims that if the defense had been aware of Rice's statement, "trial counsel would have called Rice as a witness, thereby effectively bolstering the argument that Miner – not McWhorter – fired the fatal shot and was the most vicious participant in the crime." (Doc. 1 at 55). But if the defense had called Rice to testify, any testimony regarding what he had been told by Miner would have been inadmissible hearsay. *See Snyder v. State*, 683 So.2d 45, 46-47 (Ala. Crim. App. 1996). And suppressed evidence is prejudicial "only if the suppressed information is itself admissible evidence or would have led to admissible evidence." *Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994). McWhorter has identified no admissible evidence that may have been gleaned from the

disclosure of Rice's inadmissible statement. He therefore cannot establish prejudice. *Id.*

***59** It is true that Rice's testimony regarding Miner's statement could have been admitted to impeach testimony by Miner that McWhorter fired the fatal shots. *Trawick v. State*, 86 So.3d 1105, 1109 (Ala. Crim. App. 2011). But Miner did not testify at McWhorter's trial, so the court cannot know whether Miner might have offered testimony inconsistent with his alleged prior statement to Rice that would have permitted Rice to testify as an impeachment witness. And where a witness did not testify at trial, a court cannot speculate about what the witness might have said to determine whether the witness's testimony might have resulted in favorable, admissible evidence sufficient to establish a *Brady* violation. *Wright*, 169 F.3d at 703.

Finally, even if Miner had testified, and even if he had offered testimony inconsistent with his alleged prior statement to Rice that would have enabled Rice to testify as an impeachment witness, the court is still unable to conclude that the production of Rice's statement by the prosecution would have created "a reasonable probability" that the result of McWhorter's guilt- or penalty-phase proceedings would have been different. *Id.* at 701. The evidence of McWhorter's guilt – including his own confession, physical and ballistic evidence, and the testimony of others to whom he confessed – was overwhelming. *McWhorter*, 781 So.2d at 265-66. The court is not convinced that the hearsay testimony of a jailhouse informant – offered not for its truth but to impeach another witness – would have likely changed the outcome of the guilt or penalty phases of McWhorter's trial. And it certainly cannot say that the state court would have been unreasonable to deny McWhorter's *Brady* claim because he failed to show prejudice. Accordingly, McWhorter is not entitled to relief on this claim.

E. McWhorter's Claim That the Trial Court Erred by Failing to Instruct the Jury on Lesser Included Offenses

At the conclusion of the guilt phase of the trial, the trial judge instructed the jury on the elements of capital murder during the course of a robbery. (Vol. 11, Tab 19 at 1724-27, 1747-50).[42] The court also instructed the jury that if it found the state failed to prove beyond a reasonable doubt any one or more of the elements of the offense of murder during robbery in the first degree, it would be the jury's duty to find McWhorter not guilty of capital murder. (*Id.* at 1727, 1733, 1750). The trial judge provided the jury with a verdict form listing only two possible verdicts: guilty of capital murder, and not guilty of capital murder. (Vol. 11, Tab 19 at 1733). McWhorter objected to the court's refusal to charge the jury on lesser included offenses. (*Id.* at 1662-64, 1751).

1. The Parties' Arguments

Here, McWhorter claims that the trial court's failure to instruct the jury on "any lesser included offenses, particularly the lesser included offense of felony murder (which was not a capital offense at the time)," violated his right to due process, impermissibly enhancing the risk of a guilty verdict on the capital offense. (Doc. 1 at 57, 63) (citing *Wiggerfall v. Jones*, 918 F.2d 1544 (11th Cir. 1990)). He offers the following argument in support of his claim:

> The trial court refused to instruct the jury that McWhorter could be convicted of intentional murder (not requiring an intent to rob), or of manslaughter (not requiring intent to rob or kill). Likewise, the court refused to instruct that McWhorter could not be convicted of capital murder if he "intended only a robbery, not a murder," a refusal that correlated with its refusal to instruct that felony murder was a lesser-included offense. (Felony murder as defined by Alabama Code § 13A-6-2(a)(3) clearly was a lesser-included offense of capital murder in this case under Alabama Code §§ 13A-5-40(b) and 13A-5-41.).

***60** At McWhorter's trial, the jury heard evidence that McWhorter was intoxicated during the crime. The State relied on a confession McWhorter made to Detective Maze of the Albertville Police Department while recovering in a hospital intensive care unit with an IV and other equipment hooked up to him, on the morning after the crime. In his initial statement, McWhorter stated that his codefendants convinced him to go to the victim's house on a Wednesday night to "take everything out of it," and then on Thursday "I got pretty much drunk and we went and did all this. I don't remember being at the house. I really don't. This I promise to God I don't." Trial Transcript at 1438. McWhorter also stated that he did not remember whether he shot the victim because "I was so drunk." *Id.* at 1438-39.

The state courts held in part that the jury could not rationally credit this testimony because it came only in the form of McWhorter's own statement. 781 So.2d at 339.

However, this is not a proper legal basis for discrediting the evidence. The State offered McWhorter's entire statement into evidence, seeking to have the inculpatory portions credited and the exculpatory portions discredited. Both portions were in evidence, and the jury was entitled to credit one portion as much as the other.

The state courts also pointed to internal inconsistencies in McWhorter's statement, and to the absence of corroborating evidence that McWhorter was intoxicated. But the state courts overlooked other evidence, apart from intoxication, raising doubt about McWhorter's intent to kill. The State called two of McWhorter's associates to testify to other inculpatory statements McWhorter had made. One, Abraham Barnes, testified that McWhorter told him that when the victim, Lee Williams Sr., came into the premises, the victim took accomplice Daniel Miner's gun, leading McWhorter to shoot the victim because otherwise the victim would have shot Daniel. And, the State's key witness, Marcus Carter, who described how he essentially orchestrated the robbery from behind the scenes, testified that he believed only a robbery would take place, not a killing; he considered McWhorter's prior talk of killing to be "idle comments." Because of McWhorter's youth at the time of the crime, and the fact that teenagers frequently engage in "idle talk," the jury could have reasonably concluded, as Marcus Carter did, that even if there were some discussions of killing Williams, McWhorter never seriously thought Williams was going to be killed and did not intend to kill him. In its closing argument, the State even argued to the jury, seeking to bolster Carter's credibility, that someone who knew about the robbery plan might not [ ] take the killing aspect of it seriously. Trial Transcript at 1679. Indeed, lack of murderous intent was the only plausible theory against capital murder, as the evidence of McWhorter's participation in a robbery that resulted in death was overwhelming.

Rational jurors considering this evidence, alongside conflicting evidence about which defendant had each of two guns at various points during the incident, could have found that McWhorter may have gone to the victim's house solely to commit robbery, without an intent to kill, and that the killing was done impulsively, during the robbery, with intoxication impairing McWhorter's judgment to the point that he never actually formed an intent to kill. *See McConnico v. State*, 551 So.2d 424 (Ala. Crim. App. 1988) (reversible error in murder case for trial judge to omit jury instruction on lesser included offense of manslaughter where there was evidence of intoxication); *Owen v. State*, 611 So.2d 1126 (Ala. Crim. App. 1992) (trial court's failure in capital murder case to instruct jury on intoxication was reversible error). Jurors accepting this theory would have had a basis to acquit McWhorter of capital murder and instead convict him of the lesser included offense of felony murder. While McWhorter's trial counsel did not argue this particular theory, they did request an instruction on the lesser included offense, and McWhorter was entitled to have the jury consider it whether or not his lawyers argued in support of the theory.

***61** In refusing to give a felony murder instruction, the court deprived the jury that convicted McWhorter of the "third option" of convicting McWhorter of unintentional homicide. *Wiggerfall*, 918 F.2d at 1549 (habeas relief granted where lesser included instruction was necessary to remedy "distorting effects of [an] 'all-or-nothing' scheme" like in *Beck*). Any juror who believed that McWhorter was too intoxicated to form the specific intent to kill, or otherwise caused Williams' death unintentionally, was forced to choose between convicting McWhorter of capital murder or setting him free. Yet no reasonable juror who believed that McWhorter caused the victim's death could have voted to acquit him of all charges. This is precisely the type of situation the U.S. Supreme Court recognized, in *Beck*, as likely to result in unwarranted capital murder convictions. As the Court reaffirmed in *Schad v. Arizona*, 501 U.S. 624, 645, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991), *Beck*'s requirement of a lesser included offense instruction reflects the "fundamental concern" that juries not be forced to choose between these two unacceptable alternatives:

> [A] jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all.

(Doc. 1 at 59-63).

McWhorter unsuccessfully presented this claim on direct appeal. Both the Alabama Court of Criminal Appeals and the Alabama Supreme Court found the trial court did not err in failing to instruct the jury on lesser included offenses. *McWhorter v. State*, 781 So.2d 257, 266-272 (Ala. Crim. App. 1999); *Ex parte McWhorter*, 781 So.2d 330, 333-343 (Ala. 2000). Respondent contends that the state courts properly

applied clearly established federal law in denying this claim. (Doc. 14 at 53-62).

In denying relief on this claim, the Alabama Supreme Court found as follows:

> II. *Lesser-Included-Offense Instructions*
>
> McWhorter argues that he presented evidence indicating he was intoxicated at the time of the killing, that the trial court instructed the jury that evidence of voluntary intoxication can support a finding of a lack of the intent necessary to a finding of capital murder, and that the trial court therefore erred in refusing to instruct the jury on manslaughter, felony murder, and "intentional murder" as lesser included offenses. This case raises the question of the quantum of proof sufficient to warrant a lesser-included-offense instruction based on the possibility that the jury may not find the intent necessary for a conviction of capital murder. McWhorter argues that the jury could have inferred from the evidence presented at trial that he was unable to form the intent to commit murder because, he says, he was extremely intoxicated at the time of the crime.
>
> The evidence shows that McWhorter and his accomplices carefully planned and carried out the crime. McWhorter and Daniel Minor lay in wait for hours at the victim's home and, while waiting, manufactured and tested homemade silencers to use on weapons found in the victim's home. When the victim arrived home, McWhorter and Minor used these weapons to commit the killing. Then they gathered some of the victim's belongings, loaded them into the victim's pickup truck, and drove the truck to a previously agreed upon meeting place. There, they divided the property stolen from the victim. McWhorter took his portion of the weapons and the victim's other property and hid that property and the weapons at the home of a friend.
>
> On February 19, 1993, the day after the crime, McWhorter gave a voluntary unsworn statement to Detective James Maze of the Albertville Police Department. Because McWhorter's claim that he was entitled to a charge on a lesser included offense is premised on his claim that at the time of the killing he was not aware of what he was doing, we quote his statement in its entirety:
>
> Maze: This is February 19, 1993. It's now 11:40 a.m. Interview with Casey Allen McWhorter. And you're 18 years old? 19?
>
> McWhorter: 18.
>
> ***62** Maze: What's your date of birth?
>
> McWhorter: 11-11-74.
>
> Maze: 11-11-74. Now, just a moment ago, I advised you of the Miranda warning and your rights, and you understand that. Is that correct, Casey?
>
> McWhorter: Yes, sir.
>
> Maze: They do call you Casey?
>
> McWhorter: Uh huh.
>
> Maze: And you're waivering [sic] your rights at this time? Yes or no?
>
> McWhorter: Yes.
>
> Maze: Okay. All right. Now what we're gonna be talking about is Edward, Mr. Edward Williams that lives [sic] at 1202 Hyatt Street here in Albertville. Do you know him?
>
> McWhorter: No, personally, no, I don't.
>
> Maze: Okay. Do you want to tell me what happened last night after 6:15, between 6:30 and 8 o'clock?
>
> McWhorter: I don't know nothing about him. I really don't.
>
> Maze: Was you over at his house?
>
> McWhorter: Not that I know of.
>
> Maze: All right. Yesterday evening, who was you with?
>
> McWhorter: I was by myself. I was at Carry's house.
>
> Maze: At whose house?
>
> McWhorter: Carry's.
>
> Maze: Carry who?
>
> McWhorter: Barnes.
>
> Maze: Carry Barnes?
>
> McWhorter: Uh-huh.
>
> Maze: Is that the woman's name?
>
> McWhorter: (Not audible)

Maze: Who was with you?

McWhorter: Just me. I was in the back room by myself thinking about everything.

Maze: In what respect, what was you thinking about?

McWhorter: My last girlfriend.

Maze: Who was your last girlfriend?

McWhorter: Tiffany.

Maze: Tiffany who?

McWhorter: Harper.

Maze: Where does she live at?

McWhorter: Ah, she just moved, and I ain't exactly sure where she lives.

Maze: What's her parents' name?

McWhorter: I don't know that.

Maze: Does she work anywhere?

McWhorter: Uh uh.

Maze: Does she go to school?

McWhorter: Uh huh.

Maze: Which school does she go to?

McWhorter: She goes to Albertville High School.

Maze: Tiffany Harper. When's the last time you seen Tiffany?

McWhorter: It's been, ah, a pretty good while.

Maze: Okay, what time did you get up yesterday morning up at [the] Barneses'? That'd be we're talking about Thursday morning now.

McWhorter: Ah, I got up, I guess, at about twelve or one.

Maze: Around noon?

McWhorter: Twelve or one o'clock, something like that.

Maze: All right, who was there when you got up?

McWhorter: There wasn't nobody there when I got up.

Maze: When did you last see Abraham [Barnes] that day?

McWhorter: That morning.

Maze: Approximately what time?

McWhorter: When he was leaving for school.

Maze: All right, Tommy, do you have anything? Also present is Chief Investigator Tommy Cole.

[Pause]

Maze: Okay, is there anything else that you want to say over on [sic] before we conclude here?

McWhorter: Lee and Daniel, they called me on the telephone and told me they was gonna go to his house, to Lee's dad's house, and they was gonna take everything out of it and they asked me if I wanted to go and I said 'I don't know' and then they convinced me into going and so –

Maze: This was on Wednesday evening?

McWhorter: So I got drunk Thursday.

Maze: Y'all were on a three-way telephone conversation, Lee was at his house, you was at your house, and Daniel was at his house. Is that correct?

McWhorter: Yes, sir.

Maze: Okay.

McWhorter: And then I got pretty much drunk and we went and did all this. I don't remember being at the house, I really don't, this I promise to God, I don't.

***63** Maze: Okay, was it just you and Daniel in the house?

McWhorter: Yeah.

Maze: Just you and Daniel?

McWhorter: Just me and Daniel.

Maze: Okay, which one of you done the shooting, firing of the weapon?

McWhorter: I think Daniel did, to be absolutely honest with you.

Maze: Okay, who made the silencers to go around the pillow [sic]?

McWhorter: I did.

Maze: You did that?

McWhorter: Yeah.

Maze: For both guns?

McWhorter: Cause I told him Wednesday night how to do it.

Maze: Okay.

McWhorter: He told me to do that, so I did that.

Maze: Okay, did y'all take any money off him?

McWhorter: Uh uh. I did not take any money off him. Now, Daniel and Lee might've gotten money cause—

Maze: Was Lee in the house?

McWhorter: Uh uh. Daniel got his checkbook and it had all his credit cards and stuff in it.

Maze: Okay.

Cole: Did anything happen to one of the guns at the time that the shooting was going on to make it—did anything happen?

McWhorter: I don't know.

Maze: Like misfire, jamming?

McWhorter: I couldn't tell you.

Maze: Okay, so you think, to the best of your knowledge, that Daniel done all the firing?

McWhorter: Yes, sir.

Maze: You could have, but you don't remember it?

McWhorter: I could have, but I, I don't recollect cause I, I was drunk.

Maze: Okay, y'all was waiting at the house on, ah, Mr. Williams to come home. Is that correct?

McWhorter: Yes.

Maze: You and Daniel was in the house when he came home?

McWhorter: Cause Lee had asked us to—

Maze: Had asked y'all to, ah, rob him and, ah—

McWhorter: Yes, sir.

Maze: Murder him?

McWhorter: Yes, sir.

Maze: Okay, what did you do with the .22 rifles you left, ah, with—

McWhorter: Mark [Marcus] Carter has some of 'em.

Maze: What's Mark got?

McWhorter: He's got a .410, he's got a 12 gauge sawed-off which was mine, anyway it wasn't taken from the house, and he's got another .22.

Maze: Rifles or pistols?

McWhorter: Rifles.

Maze: Okay, what'd you do with the .22 rifle that you carried to the Barneses' or up thataway?

McWhorter: I don't remember what happened to it.

Maze: Did you throw it in the creek or did you hide it around the Barneses' house?

McWhorter: I don't really remember.

Cole: Now, son, we need to get to the bottom of this.

McWhorter: If I can remember what I did with it, I'll tell you, I promise. I just got to get it all to come back.

Cole: Okay.

McWhorter: As soon as I remember, I'll tell you.

Maze: What all else did y'all take out of the house that you can remember? Did you take some CDs?

McWhorter: Yeah.

Maze: How about some orange boxes?

McWhorter: Daniel's got all the CDs. He's got the orange boxes too.

Maze: What one of the silencers—what'd you use to make one of the silencers to go over the gun—what'd you use to make that with?

McWhorter: Pillow.

Maze: Wrapped in how?

McWhorter: Duct tape.

Maze: Gray duct tape?

McWhorter: Yeah.

Maze: Where's that at, do you know?

McWhorter: Uh uh.

Maze: All right, what did you use to make the other one?

McWhorter: Milk jug.

Maze: What was in the milk jug?

McWhorter: Napkins.

Maze: Okay, how did you fix it to the barrel of the gun?

McWhorter: Duct tape.

***64** Maze: Okay, do you know where that jug's at?

McWhorter: No, sir, I sure don't.

Maze: Okay.

McWhorter: The last I seen it, it was at Daniel's house.

Maze: And after you and Daniel went to the house and, ah, took the stuff, the guns and checkbook and stuff, and shot Mr. Williams, y'all met Lee, his son, and another boy at, ah, a Carter boy at, ah, Albertville High School?

McWhorter: Yes.

Maze: Then what did y'all do, went and ditched the truck, yes or no?

McWhorter: Yes.

Maze: Okay, then what happened?

Cole: Did you take anything out of the truck?

McWhorter: We got, it was all the stuff out of the back of the truck.

Cole: Did you take any items from the truck itself, anything like the stereo from the truck?

McWhorter: Yeah, we got the stereo out of it.

Cole: What happened to it?

McWhorter: I'm not real sure. I put it in, ah, the floorboard of Mark's car.

Maze: Okay, where did Mark let you out at?

McWhorter: He brought me back up to Carry's, but he didn't go all the way to the house.

Maze: He let you out down there between the bridges?

Cole: You walked up the hill?

McWhorter: Yeah.

Maze: Is there anything else that you can remember about the shooting and robbery of Mr. Williams?

McWhorter: No.

Maze: Did, ah, Lee, his son, say why he wanted y'all to do this?

McWhorter: He just said that he was a bastard and, ah, couple of other choice words.

Maze: Did he at any time say that if y'all didn't do it there at the house that y'all better pop him while he was coming down the road?

McWhorter: Naw, he said shoot him when he comes in the door, he'll shoot you.

Maze: Okay.

McWhorter: And he said he was gonna give us money to do it.

Maze: Is there anything else, Casey, that you want to say about this?

McWhorter: No, sir.

Cole: At any time did you ever tell Lee Williams that his daddy didn't have as much money on him as he said he did or said he would have?

McWhorter: Lee said that he's got money on him at all times and Lee said for us to take that for doing it, and I said that he didn't have no money on him at all when I seen him later.

Maze: Is there anything else?

McWhorter: No.

Maze: This concludes the interview at 7:57 [sic; 11:57?].

[Pause]

Maze: Okay, we just went off there. I thought we was done, but Casey remembered some other information. Would you go over that again about y'all standing there and each one of you had a gun with a silencer on it when Mr. Williams come in?

McWhorter: I had the old .22. I don't know exactly how old it is, but it's older than the one Daniel had.

Maze: That's the one that's tube fed.

McWhorter: Yeah.

Maze: And one of 'em had the clip?

McWhorter: Daniel had the one with the clip.

Maze: Okay.

McWhorter: And then he come back there, he grabbed the gun, the end of Daniel's gun.

Maze: That's Mr. Williams grabbed the end of Daniel's gun in the hallway there beside the ladder?

McWhorter: Uh huh.

McWhorter: And then I was sitting there watching him and then he turned around and looked at me.

Maze: Where were you sitting?

McWhorter: Just right, the ladder was here, and I was right here.

Maze: Behind him?

McWhorter: Yeah, on in this other room with the door open.

Maze: In the living room part?

***65** McWhorter: No, it was in the back.

Maze: Right straight across from the bathroom or right?

McWhorter: Behind the bath.

Cole: Where there was an aluminum ladder sitting in this little hallway?

McWhorter: I was in the room right behind that.

Maze: Okay, where there was a bed and some clothes in there?

McWhorter: Yeah.

Maze: In there where y'all tested, fired the guns into the mattress?

McWhorter: Yeah.

Maze: That's where you were sitting?

McWhorter: Yeah, and as he grabbed Daniel's gun he was gonna turn around, and I shot him in the leg, and he started screaming, and then I pulled the trigger again and it didn't work then. Then I just heard all sorts of firing, and that's pretty much it.

Maze: Okay, is there anything else that you might think of before we go off again?

McWhorter: Not that I recall.

Maze: Okay, this concludes the interview at 12 noon.

McWhorter's statement is riddled with internal inconsistencies. While at the outset McWhorter claims a lack of memory, on account of intoxication, and even denies being at the victim's house on the night of the crime, he then furnishes detailed information about how the crime was committed. In his statement, McWhorter admitted that he had made the silencers for the two guns, and he was able to describe in detail what he used to make the silencers. When asked who fired the guns, McWhorter stated that he could not recall who fired the guns because he was drunk, but then was able to recall exactly what kind of guns they took from the victim's home.

McWhorter also stated that he shot the victim in the leg. He knew which gun he held while he and Minor were waiting for the victim to arrive home, and he described in detail the sequence of events that transpired when the victim entered his home. He remembered test-firing the guns, dividing and disposing of the victim's property, removing the stereo from the victim's truck, and where Marcus Carter dropped him off after the crime. His action on the night of the crime is wholly inconsistent with his self-serving statements suggesting he had a diminished capacity. McWhorter argues that he was extremely intoxicated before, during, and after the crime. At the preliminary hearing, Detective Maze testified that Abraham Barnes had told him that McWhorter had tried to commit suicide the night after the killing by taking some pills and drinking some alcohol. According to Barnes, McWhorter had been taken to a hospital several hours after the killing, after, Barnes said, he had attempted to commit suicide by ingesting pills and alcohol. However, other than his statement, McWhorter does not point to any evidence indicating he was intoxicated at the time of the commission of the crime. Carter, who drove Minor and McWhorter to the victim's house and who met them later in the evening, testified that he saw no indication that McWhorter had been drinking alcohol either before or after the crime and that McWhorter was not intoxicated on that night. Carter testified that, after the crime, when he met Minor and McWhorter at the designated place, McWhorter did not appear to have been drinking. McWhorter's statements to others on the night of the crime indicate that he was aware of his actions. Barnes testified that, on the night of the crime, McWhorter told him that he unloaded a clip into the victim and that he and Minor stole the victim's truck. Detective Maze testified that at noon the next day, when the statement was given, McWhorter did not appear to be under the influence of drugs or alcohol, even though McWhorter said he had been admitted to a hospital for an alcohol and drug overdose. No evidence in the record establishes when McWhorter ingested the alcohol that led to his hospitalization.

***66** The only evidence indicating McWhorter was intoxicated was McWhorter's own statement to the police. The trial court found that evidence insufficient to warrant giving instructions on lesser included offenses.

III. *Manslaughter*

McWhorter argues that the trial court erred in refusing to give a manslaughter instruction. An instruction on manslaughter would have been incompatible with McWhorter's defense. At trial, McWhorter did not argue that he was under the influence of alcohol or drugs at the time of the crime, and he did not request a voluntary-manslaughter instruction. Had an instruction been requested that would have conflicted with defense strategy, there is no error in the trial court's failure to give the instruction. *Bush v. State*, 695 So.2d 70, 113 (Ala. Crim. App. 1995). *See, also, Sockwell v. State*, 675 So.2d 4, 25 (Ala. Crim. App. 1993); *Gurley v. State*, 639 So.2d 557 (Ala. Crim. App. 1993). The Court of Criminal Appeals concluded that the trial court correctly refused to give the charge because, it concluded, the evidence suggested no reasonable theory that would support a manslaughter charge. [FN]

[FN.] Under these circumstances, we conclude that, under the plain-error doctrine, the trial court's failure to give a voluntary-manslaughter instruction was not error. *See Williams v. State*, [Ms. CR-98-1734, Dec. 10, 1999] [795] So.2d [753] (Ala. Crim. App. 1999).

IV. *Felony Murder and Intentional Murder*

McWhorter also argues that the trial court should have charged the jury on felony murder and intentional murder. He makes a two-pronged argument. First, he contends that the evidence supports a felony-murder theory because, he argues, he was a teenager and a jury could have reasonably concluded that, even if there was discussion of killing, he did not seriously believe that the victim would be killed. He argues that his statement supports the theory that Minor killed the victim and that McWhorter was only an accomplice. McWhorter argues that he has presented evidence that supports a felony-murder theory. He states that he intended only to rob the victim, not to kill him, and that he never thought the victim would be killed. Second, he contends that his evidence of intoxication justified a charge on the lesser included offenses of felony murder and intentional murder.

A. *Entitlement to an Instruction Based upon Evidence Having to do with Matters other than Intoxication*

Putting to one side for the moment the issue of intoxication, we see no reasonable theory that would have supported a charge on felony murder. The evidence showed that Casey

McWhorter, Lee Williams, and Daniel Minor carefully planned and carried out the crime. They had planned the crime at least three weeks before they carried it out.

In addition, McWhorter and Minor lay in wait for hours at the victim's house and made silencers for the weapons while they waited for him to arrive home. In addition, again putting to one side for the moment the issue of intoxication, we see no reasonable theory that would support a charge on the lesser included offense of intentional murder. As the Court of Criminal Appeals held, the evidence would support no theory on which the jury could have found an intentional murder but not a robbery. That court noted that McWhorter made no argument as to why the trial court should have charged the jury on intentional murder. Lee Williams had told McWhorter that the victim would have cashed his paycheck that day and therefore would have a large sum of money on his person and that, if McWhorter would kill him, McWhorter could have the money. In his statement, McWhorter said that Lee Williams told him that his father kept money on him at all times and that McWhorter and Minor could take the money for killing his father.

***67** ... McWhorter presented no evidence indicating that he did not intend to kill the victim. In fact, there was testimony indicating that McWhorter had agreed to kill the victim in exchange for any money the victim would have on his person that night. The evidence shows that McWhorter intentionally and consciously planned to rob and murder the victim. Therefore, McWhorter was not entitled to an instruction on felony murder, and the trial court did not err in refusing to give such an instruction, unless to refuse it was error in light of the issue of intoxication.

B. *Entitlement to an Instruction Based upon Evidence of Intoxication*

While voluntary intoxication is not a defense to a criminal charge, it can negate the specific intent necessary for an intentional murder, reducing the offense to manslaughter. *McConnico v. State*, 551 So.2d 424 (Ala. Crim. App. 1988). Relying on *Owen v. State*, 611 So.2d 1126 (Ala. Crim. App. 1992), for the proposition that a trial court commits reversible error by failing to instruct a jury on intoxication, McWhorter argues that if the crime involves specific intent and any evidence presented at trial indicates that the defendant was intoxicated at the time of the crime, then the defendant is entitled to have the jury instructed on the lesser included crime of manslaughter.

> While voluntary intoxication is never a defense to a criminal charge, it may negate the specific intent essential to a malicious killing and reduce it to manslaughter. § 13A-3-2, Code of Alabama (1975) (Commentary). " 'When the crime charged involves a specific intent, such as murder, and there is evidence of intoxication, the trial judge should instruct the jury on the lesser included offense of manslaughter.' *Gray v. State*, 482 So.2d 1318, 1319 (Ala. Cr. App. 1985)." *McNeill v. State*, 496 So.2d 108, 109 (Ala. Cr. App. 1986).
>
> 551 So.2d at 426. However, to negate the specific intent required for a murder conviction, the degree of the accused's intoxication must amount to insanity.

Smith v. State, 756 So.2d 892, 906 (Ala. Crim. App. 1997) (on return to remand). This Court, likewise, has held that the intoxication necessary to negate specific intent and, thus, reduce the charge, must amount to insanity. *Ex parte Bankhead*, 585 So.2d 112, 120-21 (Ala. 1991). *See, also*, *Crosslin v. State*, 446 So.2d 675 (Ala. Crim. App. 1983).

McWhorter argues that his case is similar to *Ashley v. State*, 651 So.2d 1096 (Ala. Crim. App. 1994). In Ashley, the Court of Criminal Appeals reversed a capital-murder conviction because the trial court had erred in refusing to give a manslaughter instruction after a witness testified that the defendant was intoxicated at the time of the crime. Ashley's ex-girlfriend testified that she had seen him at a bar approximately two hours before the stabbing and that he "looked like he was out of it" and "looked like he was on drugs." 651 So.2d at 1098. Another witness testified that Ashley looked "high" on the evening of the stabbing. *Id.*

This case is distinguishable from *Ashley*. McWhorter did not produce testimony regarding his alleged intoxication. In fact, his voluntary unsworn statement was the only evidence presented at trial regarding his intoxication. Although the trial court informed the jury that it could not convict McWhorter of capital murder if it found no specific intent, the evidence showed that the crime was carefully planned and carried out.

....

"[A] defendant is entitled to a charge on a lesser included offense if there is any reasonable theory from the evidence that would support the position," *Fletcher v. State*, 621 So.2d 1010, 1019 (Ala. Crim. App. 1993) (quoting *Ex parte Oliver*, 518 So.2d 705, 706 (Ala. 1987)), regardless of how "weak ... or doubtful in credibility" the evidence concerning the offense. *Chavers v. State*, 361 So.2d 1106, 1107 (Ala. 1978).

***68** A trial court should give a charge on voluntary intoxication "if 'there is an evidentiary foundation in the record sufficient for the jury to entertain a reasonable doubt on the element of intent.' " *Windsor v. State*, 683 So.2d 1027, 1037 (Ala. Crim. App. 1994) (quoting *Coon v. State*, 494 So.2d 184, 187 (Ala. Crim. App. 1986)). In *Windsor*, the Court of Criminal Appeals found that there was no evidence that the appellant was intoxicated and that, although there was evidence that he had been drinking alcohol on the day of the murder, there was no evidence as to the quantity of alcohol consumed that day by the time of the murder. 683 So.2d at 1037. The court found that "[t]here was no 'reasonable theory' to support an instruction on intoxication because there was no evidence of intoxication." *Id.* The court held that the trial court did not err in not instructing the jury on intoxication and manslaughter, because there was no evidence indicating that the defendant was intoxicated when the crime occurred.

The evidence offered by McWhorter as to his alleged intoxication was glaringly inconsistent with his own statement giving detailed descriptions of the events occurring at the crime scene. No evidence substantiated his claim to have been intoxicated at the time of the killing, and, indeed, the other evidence as to his condition at the time of the crime was totally consistent with the proposition that he was sober. We hold that McWhorter's self-serving statements suggesting he was intoxicated at the time of the killing, statements made in his internally inconsistent interview by Detective Maze, is, as a matter of law, insufficient to satisfy the rigorous standard of showing that the intoxication relied upon to negate the specific intent required for a murder conviction amounted to insanity. As previously noted, that standard is that "the intoxication necessary to negate specific intent and, thus, reduce the charge, must amount to insanity." *Ex parte Bankhead*, 585 So.2d 112, 121 (Ala. 1991).

Although the trial court refused to charge the jury on lesser included offenses, it charged the jury on voluntary intoxication. The trial court stated:

> I charge you, members of the jury, that if you find from the evidence that the Defendant was voluntarily intoxicated to the extent he could not form the necessary specific intent to rob Edward Lee Williams then you cannot convict the Defendant of capital murder.

Because there was no substantial evidence indicating that at the time of the crime McWhorter was intoxicated to such a degree that the intoxication amounted to insanity, the trial court's voluntary-intoxication charge was neither prejudicial nor necessary.

The Court of Criminal Appeals held that no reasonable theory would have supported a charge on the offense of intentional murder or felony murder. It found that the evidence presented at trial indicated either that McWhorter intentionally killed the victim in the course of a robbery or that he was not guilty. We hold that the trial court's failure to instruct the jury on felony murder and intentional murder was not error.

Ex parte McWhorter, 781 So.2d 330, 333-339 (Ala. 2000).

2. Analysis

McWhorter argues that the Alabama Supreme Court's decision involved an unreasonable application of *Beck v. Alabama*, 477 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980). (Doc. 20 at 49). The court disagrees.

In *Beck*, the Supreme Court held that a death sentence may not constitutionally be imposed "when the jury was not permitted to consider a verdict of guilt of a lesser included non-capital offense, and when the evidence would have supported such a verdict." 447 U.S. at 627, 100 S.Ct. 2382. "[W]hen the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense – the failure to give the jury the 'third option' of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction" for a capital crime, because it "interjects irrelevant considerations into the factfinding

process, diverting the jury's attention from the central issue of whether the State has satisfied its burden of proving beyond a reasonable doubt that the defendant is guilty of a capital crime." *Id.* at 637, 642, 100 S.Ct. 2382. "[F]orcing the jury to choose between conviction on the capital offense and acquittal creates a danger that it will resolve any doubts in favor of conviction." *Id.* at 632, 100 S.Ct. 2382.

***69** "*Beck* held that due process requires that a lesser included offense instruction be given when the evidence warrants such an instruction. But due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction." *Hopper v. Evans*, 456 U.S. 605, 611, 102 S.Ct. 2049, 72 L.Ed.2d 367 (1982) (emphasis in original). The Court most recently explained its *Beck* decision as follows:

> The concern addressed in *Beck* was "the risk of an unwarranted *conviction*" created when the jury is forced to choose between finding the defendant guilty of a capital offense and declaring him innocent of any wrongdoing. 447 U.S. at 637, 100 S.Ct. 2382 (emphasis added); *Id.*, at 638, 100 S.Ct. 2382; *see also* *Spaziano v. Florida*, 468 U.S. 447, 455, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984) (explaining that the "goal of the *Beck* rule" is "to eliminate the distortion of the factfinding process that is created when the jury is forced into an all-or-nothing choice between capital murder and innocence"); *Schad v. Arizona*, 501 U.S. 624, 646, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991) ("Our fundamental concern in *Beck* was that a jury convinced that the defendant had committed some violent crime but not convinced that he was guilty of a capital crime might nonetheless vote for a capital conviction if the only alternative was to set the defendant free with no punishment at all").

Bobby v. Mitts, 563 U.S. 395, 398, 131 S.Ct. 1762, 179 L.Ed.2d 819 (2011).

McWhorter contends that "the Alabama Supreme Court's decision was an unreasonable application of clearly established law [for] at least five reasons." (Doc. 20 at 49). First, he argues that:

> the Court's finding that the "evidence offered by McWhorter as to alleged intoxication was glaringly inconsistent with his own statement giving detailed descriptions of the events," is improper. *Ex parte McWhorter*, 781 So.2d at 342. The Court picked which part of McWhorter's statement it believed and which part it did not. Deciding which part of McWhorter's statement is credible was an issue for the jury and that is why there was a need for a lesser included instruction in this case. By rejecting the need for a manslaughter instruction, the Court invaded the province of the jury by making a finding of fact. *Schad*, 501 U.S. at 645, 111 S.Ct. 2491 (*Beck* requirement rests on the "fundamental concern" that juries not be forced to choose between sentencing a capital defendant to death, and setting him free at all).

(Doc. 20 at 49-50).

Under Alabama law, "voluntary intoxication is never a defense to a criminal charge," but it "may negate the specific intent essential to a malicious killing and reduce it to manslaughter. § 13A-3-2, Code of Alabama (1975) (Commentary)." *McConnico v. State*, 551 So.2d 424, 426 (Ala. Crim. App. 1988). "However, to negate the specific intent required for a murder conviction, the degree of the accused's intoxication must amount to insanity." *Whitehead v. State*, 777 So.2d 781, 832 (Ala. Crim. App. 1999), aff'd, 777 So.2d 854 (Ala. 2000) (quoting *Smith v. State*, 756 So.2d 892, 906 (Ala. Crim. App. 1998), aff'd, 756 So.2d 957 (Ala. 2000)).

McWhorter maintains that the trial judge should have given an instruction about manslaughter, so the jury (rather than the court) could have decided whether to believe the portions of his statement in which he claimed to have been intoxicated during the crime. However, Alabama law provides that a defendant is entitled to a jury instruction on a lesser included offense only if there is a "reasonable theory from the evidence that would support" the lesser charge, *Smith v. State*, 246 So.3d 1086, 1098 (Ala. Crim. App. 2017), and that rule "clearly does not offend federal constitutional standards," *Hopper*, 456 U.S. at 612, 102 S.Ct. 2049.

***70** The Alabama Supreme Court was not unreasonable in concluding there was no reasonable theory from the evidence to support a finding that McWhorter was intoxicated to the point of insanity and thus entitled to a

manslaughter instruction. The only evidence that McWhorter was intoxicated at all was found in his voluntary, unsworn statement to police. The brief portion of the statement in which he claimed he was drunk at the time of the killing and did not even remember being at the victim's house was wholly inconsistent with the remainder of his statement in which he described, in detail, the other events that took place the night of the crime. Marcus Carter testified that he saw no evidence that McWhorter was intoxicated or had even been drinking before or after the crime.[43] (Vol. 10 at 1491-92). Detective Maze testified that when he interviewed McWhorter the following day in the hospital, McWhorter appeared to understand what was going on, and did not seem to be under the influence of any drugs or alcohol. (Vo1. 9 at 1257). Further, despite having been in the hospital after the crime, there was no evidence indicating that McWhorter's admission to the hospital was in any way related to his claim that he was intoxicated during the crime.[44] McWhorter presented no medical records shedding light on the reason for his hospitalization and no expert testimony regarding his medical condition during his overnight hospital stay.[45]

Given these facts, it was not unreasonable for the Alabama Supreme Court to hold that there was no reasonable theory from the evidence capable of supporting the conclusion that McWhorter was intoxicated to the point of insanity during the killing. It follows that it was not unreasonable for the Alabama Supreme Court to affirm the state trial court's refusal to give a manslaughter instruction. The Alabama Supreme Court did not unreasonably apply *Beck*, and its conclusion that the "evidence offered by McWhorter as to alleged intoxication was glaringly inconsistent with his own statement giving detailed descriptions of the events" cannot be overturned on habeas review.

Second, McWhorter next claims that:

> [W]ith respect to the trial court's failure to give a manslaughter instruction, the Alabama Supreme Court found that "[a]n instruction on manslaughter would have been incompatible with McWhorter's defense." *Ex parte McWhorter*, 781 So.2d at 339. This finding is problematic because defense counsel never revealed on the record what its strategy was and, thus, the Court's finding has no basis in the record.

(Doc. 20 at 50). McWhorter is correct that defense counsel never specifically stated on the record at trial what his defense strategy was. However, defense counsel introduced nothing at trial tending to show that McWhorter was intoxicated at the time of the killing and made no argument that he was intoxicated during the killing. Rather, defense counsel focused on turning blame for the killing away from McWhorter and onto Marcus Carter. (Vol. 10 at 1555 - Vol. 11 at 1633, 1689-1711). And while defense counsel never specifically stated that their intention was to cast blame for the killing on Marcus Carter, it is clear from the record that was in fact the strategy employed. Thus, contrary to McWhorter's suggestion, it is not problematic at all that the state court found that a manslaughter instruction was incompatible with his trial strategy.

McWhorter's third argument that the Alabama Supreme Court unreasonably applied *Beck* is as follows:

> [T]he Court held that a manslaughter instruction was not requested. [*Ex Parte McWhorter*, 781 So.2d at 339]. This is wrong. At trial, defense counsel specifically cited *Fletcher v. State*, 621 So.2d 1010 (Ala. Crim. App. 1993), and informed the court that *Fletcher* was reversed because the trial court failed to instruct on the lesser included offense of manslaughter. Trial Tr. at 1665:1-1666:25. The trial court in this case made it clear to defense counsel at the time that they had properly preserved an objection to the Court's "refusal to charge anything other than capital murder and not guilty." Trial Tr. at 1664 (emphasis added).

***71** (Doc. 20 at 50).

During the charge conference, defense counsel requested charges on the lesser included offenses of ordinary murder and intentional murder showing extreme indifference to the life of another person:

> THE COURT: ... With the exception of the disagreement with the aiding and abetting portion, are there any serious problems with the charge as far as the Defense is concerned?
>
> Other than whatever it is you're going to request in this one more charge?
>
> (Discussion off the record between the Defense attorneys. In open court:)

[DEFENSE COUNSEL]: Yes, sir. We would request charges on the lesser included offense of intentional murder.

[DEFENSE COUNSEL]: Judge, that would be in accordance with 13A-6-2(a)(1) of the Code of Alabama.

THE COURT: Which says?

[DEFENSE COUNSEL]: I'll have to get the Code and read it to you, Judge.

THE COURT: All right. Hang on a second and I'll see if I can –

[DEFENSE COUNSEL]: I got the charge out of a book here, but I don't have the charge – code section.

THE COURT: 13A-6-21?

[DEFENSE COUNSEL]: Yes, sir. 2(a)(1).

THE COURT: That is plain old straight up murder. "A person commits the crime of murder if with intent to cause the death of another person, he causes the death of that person or another person."

In other words, in essence, you're asking for a charge of the lesser included offense of ordinary murder.

[DEFENSE COUNSEL]: Yes, sir.

[OTHER DEFENSE COUNSEL]: Yes, sir.

THE COURT: I don't believe that there is any reasonable theory under the evidence in which the Defendant could be guilty of that, although we're allowing some charges in which would seem to indicate that.

But I am content with the charges as they are if the state is.

[THE PROSECUTION]: Yes, sir.

THE COURT: You're [sic] request is denied, Counsel.

[DEFENSE COUNSEL]: Judge, I'd also like to ask for the charge of intentional murder showing extreme indifference to the life of another person under 13A-6-2(a)(2).

THE COURT: Same ruling and you have an exception.

[DEFENSE COUNSEL]: Judge, also request a charge as to the culpable mental state of the Defendant.

THE COURT: Counsel, I'll let you put that in a written requested charge.

[DEFENSE COUNSEL]: Thank you, sir.

[OTHER DEFENSE COUNSEL]: I don't have anything further at this time, Your Honor.

THE COURT: All right. It cuts us short, but let's try to be back in here at 1 o'clock. You all have whatever written you want and we'll take a look at it before we get into the argument at 1:15.

[DEFENSE COUNSEL]: Again, out of an abundance of caution, we are granted an exception to all the denials or refusals that the Court has given.

THE COURT: Counsel, if I've said so, you are. I – You know, I don't want to get blind-sided a year and a half down the road that –

[DEFENSE COUNSEL]: In case we haven't, Judge, at this point in time we would take – we would object and take exception to the refusal to grant the lesser included charges and the other charges refused.

THE COURT: I perceive you have properly taken an exception to my refusal to charge anything other than capital murder and not guilty.

***72** [DEFENSE COUNSEL]: Thank you, Judge.

(Lunch recess taken.)

(Afternoon session. 1:14 p.m. Defendant appearing in open court with his attorneys of record.)

(Assistant D.A. Jolley not present.)

THE COURT: Everybody is not here. Mr. Jolley is not here, but let's go ahead and see what you all have got in the way of written charges.

[DEFENSE COUNSEL]: (Indicating.)

THE COURT: Number 7 is a copy of Page 6-1 out of the state criminal charge book, intentional murder, under 13A-6-2(a)(1).

Unless the State has totally changed their mind, I'm going to refuse that charge.

[THE PROSECUTION]: Yes, sir.

> [DEFENSE COUNSEL]: Judge, would you hear one statement from the defense before you do that?
>
> THE COURT: Absolutely.
>
> [DEFENSE COUNSEL]: Judge, in the case of *Conley* versus the State which is 500 So. 2d 57, Alabama Criminal Appeals 1985, this case was reversed because the judge improperly failed to instruct the jury on the lesser included offense of murder in the capital robber/murder trial where there was evidence that could have supported the finding that the Defendant was guilty of simple murder.
>
> Also, in *Fletcher* versus the State which has just been released. It doesn't – I don't have a cite on it. It's just Alabama Criminal Appeal[s] 1993, again the case was reversed –
>
> (Mr. Jolley enters the courtroom.)
>
> [DEFENSE COUNSEL]: – because of the trial judge's failure to instruct the jury on the lesser included offense of manslaughter was reversible error where there was evidence that the Defendant was under the influence of crack cocaine at the time of the crime.
>
> We would submit that even though there's no evidence of any cocaine, that there is evidence pertaining to the intoxication.
>
> And that our cross examination this morning of the evidence technician, Sergeant Cartee, does contain sufficient theory that would allow a conviction of just simple murder rather than capital murder. So again, we'd ask for the lesser included offense.
>
> THE COURT: Counsel, I'm still going to deny you on that. You have an exception.
>
> [DEFENSE COUNSEL]: Thank you, sir.

(Vol. 11 at 1662-65).

McWhorter argues that it was wrong for the Alabama Supreme Court to hold that a manslaughter instruction was not requested because he "specifically cited *Fletcher v. State*, 621 So.2d 1010 (Ala. Crim. App. 1993), and informed the court that *Fletcher* was reversed because the trial court failed to instruct on the lesser included offense of manslaughter." (Doc. 20 at 50). However, it is abundantly clear from the record of the charge conference that defense counsel requested charges only on intentional/ordinary murder and intentional murder showing extreme indifference to the life of another person. Although defense counsel cited *Fletcher*, a case involving a lesser included charge on manslaughter, a reading of the transcript makes clear that, in context, the request was for an intentional murder charge, not a manslaughter charge. Thus, it was neither an unreasonable application of clearly established law nor an unreasonable factual determination for the court to conclude that a manslaughter charge was not requested. And even if McWhorter had requested a manslaughter charge, it was not unreasonable for the state court to conclude that the evidence did not warrant such a charge for the reasons explained above.

***73** McWhorter's fourth argument goes as follows:

> [Another] problem with the Alabama Supreme Court's decision is in the finding that McWhorter "did not produce testimony regarding his alleged intoxication." *Ex parte McWhorter*, 781 So.2d at 341. In other cases, the Alabama Supreme Court held that a lesser included instruction was required even where the State presents the supporting evidence. *Ex Parte Pruitt*, 457 So.2d 456, 457 (Ala. 1984). To hold otherwise undermines the core principle that the State has the burden of proof at a criminal trial. There was evidence before the jury that McWhorter was intoxicated at the time of the crime. It does not matter whether the prosecution or the defense presented such evidence. McWhorter should not have been forced to re-introduce evidence that was already before the jury in order for the court to permit the jury to consider it in his favor.

(Doc. 20 at 50-51).

McWhorter seems to imply that the Alabama Supreme Court discounted the portion of his statement in which he stated he was so drunk at the time of the killing that he did not even remember being at the victim's house, because the state introduced the statement into evidence rather than the petitioner himself. But that was clearly not the Alabama Supreme Court's position. In context, that court stated:

> McWhorter did not produce testimony regarding his alleged intoxication. In fact, his voluntary unsworn statement was the only evidence presented at trial regarding his intoxication. Although

> the trial court informed the jury that it could not convict McWhorter of capital murder if it found no specific intent, the evidence showed that the crime was carefully planned and carried out.

Ex parte McWhorter, 781 So.2d at 341. The point was that McWhorter's self-serving statement – that he was intoxicated – stood in direct contrast to the remainder of his statement, in which he described the events leading up to and after the killing in great detail. As previously discussed, there was nothing in evidence to indicate that McWhorter's alleged intoxication amounted to insanity so as to negate specific intent to kill. The Alabama Supreme Court's statement that McWhorter "did not produce testimony regarding his alleged intoxication" did not amount to an unreasonable application of *Beck*.

Sixth, McWhorter argues that:

> [T]he Alabama Supreme Court's opinion improperly and unfairly minimizes the extent to which evidence of intoxication was before the jury. McWhorter consumed so much alcohol on the day of the crime that within hours of the shooting, he was treated for alcohol overdose in the intensive care unit of the Boaz-Albertville Hospital. Trial Tr. at 1438-39. The Court's opinion acknowledges this fact but brushes it aside because the "only evidence presented at trial regarding his intoxication" was from his "voluntary unsworn Statement." This analysis is problematic because it is irrelevant how the evidence was presented to the jury. Had the trial court granted the request for a lesser included instruction, defense counsel would have been able to argue to the jury that McWhorter's intoxication rendered him unable to form the specific intent to kill.

***74** (Doc. 20 at 51).

McWhorter's argument finds no support in the record. Although he claims that he "consumed so much alcohol on the day of the crime that within hours of the shooting, he was treated for alcohol overdose in the intensive care unit of the Boaz-Albertville Hospital," (*id.*), there is nothing in the record indicating why McWhorter was hospitalized. The pages of the trial transcript cited by McWhorter are from part of Detective Maze's testimony where he was reading from McWhorter's statement. On those pages, Detective Maze read the portions of the statement in which McWhorter stated, "So I got drunk Thursday," and "then I got pretty much drunk and we went and did all this. I don't remember being at the house. I really don't this. I promise to God I don't." (Vol. 10 at 1438). There is no mention on the pages cited (*i.e.*, Vol. 10 at 1438-39) of the reason for McWhorter's hospitalization. In fact, there was no testimony in the entire trial indicating the cause of his hospitalization, and no medical records pertaining to his hospitalization were admitted or even referenced. Moreover, Detective Maze testified at the preliminary hearing that Abraham Barnes told him McWhorter was in the hospital because he tried to commit suicide *after* the killing. (Vol. 3, Tab 3 at 31-32).

Finally, McWhorter argues that if the trial court had granted his request for a manslaughter instruction, "defense counsel would have been able to argue to the jury that McWhorter's intoxication rendered him unable to form the specific intent to kill." (Doc. 20 at 51). However, he disregards the fact that there was no reasonable theory from the evidence to support the conclusion that at the time of the killing McWhorter was intoxicated to the point of insanity. Simply stated, there was no evidence to support a verdict convicting McWhorter of manslaughter (as opposed to capital murder).

For all these reasons, McWhorter has failed to show that the Alabama Supreme Court's ruling on this claim was an unreasonable application of *Beck*.

F. McWhorter's Claim That the Trial Court Improperly Excluded a Venireperson from Serving on the Jury in Violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)

After the initial qualification of all the jurors summoned for the week, but prior to *voir dire*, the trial judge invited all veniremembers to offer any excuses they had for not serving on a jury:

> THE COURT: All right. Ladies and gentlemen, in just a moment I will ask you if you have any excuses you should – would like to offer why you should not serve during this term.
>
> ...
>
> All right. Those of you that would like to offer an excuse, come around at this time please and just stand there at the bar.

(Vol. 3 at 183-84). Several jurors approached the judge to offer their excuses. (Vol. 3 at 183 - Vol. 4 at 227). When juror Susie McLain approached the judge, the following conversation took place:

> THE COURT: Yes, ma'am.
>
> JUROR McLAIN: I just don't believe in capital punishment.
>
> THE COURT: All right, ma'am. You can serve though on a regular case.
>
> JUROR McLAIN: Civil, uh-huh (Yes).
>
> ***75** THE COURT: What about a regular criminal case not having a capital murder involved?
>
> JUROR McLAIN: Well, if it's not involving, you know, killing somebody, something like that.
>
> THE COURT: I understand. Okay. Thank you, Ms. McLain. Appreciate it.
>
> JUROR McLAIN: Thank you.

(Vol. 4 at 207).

The record does not indicate that McLain was excused by the trial court, but her name was not on the list of veniremembers from which McWhorter's jury was selected (Vol. 4 at 238), and no further mention of her appears in the record.

1. The Parties' Arguments

McWhorter claims that the trial court violated his rights to due process and to a fair trial by excusing McLain "simply because she expressed an opinion against the death penalty." (Doc. 1 at 66). He explains that by excusing Ms. McLain without asking her "any questions regarding her ability to follow the law," the trial court deprived him of a fair and impartial jury. (*Id.*).

Respondent answers that McWhorter is not entitled to relief because the Alabama Court of Criminal Appeals properly applied clearly established federal law in denying this claim. (Doc. 14 at 63-65). In denying the claim, the Alabama Court of Criminal Appeals found:

> The appellant argues that the trial court improperly excluded a venireperson from serving on his jury in violation of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). The appellant submits that the potential juror was excused without any follow-up questioning by the trial court because she expressed a fixed opinion about the death penalty.
>
> The record indicates that, before the *voir dire* questioning, but following the initial qualification of the venire, the trial court said that if any members "would like to offer an excuse," then they should approach the bench. A number of potential jurors presented excuses of undue hardship, including the potential juror cited by the appellant in his argument.... Thereafter, the potential juror the appellant now argues should not have been excluded identified herself to the trial court and the following transpired:
>
> JUROR: I just don't believe in capital punishment.
>
> THE COURT: All right, ma'am. You can serve though on a regular case.
>
> JUROR: Civil, uh-huh. (Yes).
>
> THE COURT: What about a regular criminal case not having a capital murder involved?
>
> JUROR: Well, if it's not involving, you know, killing somebody, something like that.
>
> THE COURT: I understand. Okay. Thank you, ... I appreciate it.
>
> JUROR: Thank you.
>
> The trial court then continued with taking the veniremembers' excuses. The record does not indicate that this potential juror was excused by the trial court; however, no further mention of her appears in the record. This juror was not struck for cause by one of the parties. Rather, she was removed by the trial court pursuant to its discretion under § 12-16-63, Ala.Code 1975. This statute states the following concerning a trial court's excusing of prospective jurors from service when they are not disqualified:
>
> (b) A person who is not disqualified for jury service may be excused from jury service by the court only upon a showing of undue hardship, extreme inconvenience or public necessity, for a period the court deems necessary, at the conclusion of which the person may be directed to

reappear for jury service in accordance with the court's directions.

***76** *See also* §§ 12-16-60, 12-16-63(a). The trial court is vested with broad discretion in excusing potential jurors from service under this section. *See Giles v. State*, 632 So.2d 568, 574 (Ala. Cr. App. 1992). Trial courts have properly excused jurors pursuant to this section for a myriad of reasons. *See Madison v. State*, 718 So.2d 90, 100 (Ala. Cr. App. 1997) (potential juror excused because mother had recently undergone surgery and suffered with Alzheimer's disease; another potential juror excused because juror's mother was terminally ill); *Allen v. State*, 683 So.2d 38, 42 (Ala. Cr. App. 1996) (eight potential jurors were excused, most of whom were students at the University of Alabama with pending final exams); *Knotts v. State*, 686 So.2d 431, 480 (Ala. Cr. App. 1995) (veniremember excused by a "court strike" because there was an odd number of veniremembers remaining); *Giles v. State*, supra, at 574, (black potential juror properly excused because she was sole caretaker of an infant and a five-year-old child). *See also* *Gwin v. State*, 425 So.2d 500, 504 (Ala. Cr. App. 1982) (appellant's claim that judge had arbitrarily excused potential jurors was without merit). Moreover, a trial court is not required to ask follow-up questions or to have potential jurors elaborate on any possible preventions of their hardships. *See Madison v. State*, supra, at 100,.

The rationale behind allowing the trial court to excuse jurors lies in the predecessors to this statute, although the general terminology for the justifications for the excuses differed. As opposed to "undue hardship, extreme inconvenience, or public necessity," the earlier statutes called for removal beyond disqualification or exemption "for any other reasonable and proper cause to be determined by the Court." Code 1940, Tit. 30, § 5. This statute was construed to enable a trial court "in its discretion to excuse jurors 'for reasonable and proper cause.' " *Blackmon v. State*, 246 Ala. 675, 679, 22 So.2d 29 (1945) (a juror was excused because he had a fixed opinion).

> The Court's exercise of discretion in excusing jurors from duty in the trial of a capital case must be founded within reason, justice, and in consonance with the defendant's constitutional rights. The Court does not have the right to excuse a regular or special juror from service in a capital case capriciously, or for no reason at all.

Blackmon v. State, 246 Ala. at 679, 22 So.2d 29.

> Under this section, a trial court is given much discretion in attempting to provide a jury panel free of any member who might be biased or prejudiced in the slightest degree. *Calhoun County v. Watson*, 152 Ala. 554, 44 So. 702. Nor is this discretion limited in its exercise to the enumerated statutory grounds for challenge, but is general. *Louisville & Nashville R.R. Co. v. Young*, 168 Ala. 551, 53 So. 213.
>
> Over three centuries ago Lord Coke in capsule form gave a comprehensive answer to the question we're now considering when he wrote that to be considered impartial a juror must "be indifferent as he stands unsworn." *See* Co. Litt. 155b.
>
> In *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478, Justice Stone with his usual clarity of expression wrote:
>
> > ... This rule is necessary as a protection to the public interest, and as a guaranty of that purity and integrity in the administration of the law, which alone can inspire respect for, and confidence in our judicial tribunals.
>
> The action of a trial court in excusing a juror for other than statutory causes presents on review a mixed question of law and fact, and the findings of the trial court on the facts ought not be set aside by a reviewing court unless the error is manifest. *Reynolds v. United States*, 98 U.S. 145, 25 L.Ed. 244.
>
> *Cooper v. Magic City Trucking Service, Inc.*, 288 Ala. 585, 588-89, 264 So.2d 146 (1972). This policy was carried over to § 12-16-5, Ala.Code 1975.
>
> The right to excuse jurors is given to the Court by statute, T. 30, § 5, Code of Alabama 1940, Recomp. 1958; Code of Alabama 1975, § 12-16-5. The statute mandates that the trial court may excuse any juror if that juror is disqualified or exempt, or in the determination of the trial judge some reasonable cause or purpose exists for excusing the juror. Further, under this section [no] abuse of discretion is shown when jurors are excused without defense consent. *Mullins v. State*, 24 Ala.App. 78, 130 So. 527.

***77** The record clearly indicates that the trial judge in exercising his discretion to excuse jurors, was fulfilling his duty to provide both the State and the defendant with a fair and impartial jury. In doing so, he did not abuse the wide discretion granted to him for this purpose. *Biggs v. State*, 20 Ala.App. 449, 103 So. 706.

Rogers v. State, 365 So.2d 322, 331 (Ala. Cr. App. 1978).

Thus, under these guidelines, it was proper for a trial court to "ex mero motu" excuse a juror who had stated during his qualification that he would not convict on circumstantial evidence. *Williams v. State*, 241 Ala. 348, 349-50, 2 So.2d 423 (1941). *See also Coker v. State*, 144 Ala. 28, 31, 40 So. 516 (1906) (a trial court properly excused a juror who indicated that he would not "hang a man on circumstantial evidence" in a capital case). This Court also indicated in dicta that where a potential juror indicated during *voir dire* that he had spoken to a party before the trial, a trial court would be required to excuse such a juror in order to ensure a fair and impartial trial. *Baxley v. State*, 18 Ala.App. 277, 278-79, 90 So. 434 (1921).

In the present case, the appellant did not object to excusing this potential juror, and no plain error occurred. It is, moreover, clear that the appellant suffered no prejudice because of the removal of this juror; the juror could have properly been struck for cause by the State based on her views against capital punishment.

> To the average juror, who is unfamiliar with legal terms and concepts, *voir dire* questioning may be confusing and complicated.
>
> > "[T]he proper standard for determining when a prosecutive juror may be excluded for cause because of his ... views on capital punishment is ... whether the juror's views would 'prevent or substantially impair the performance of his duties as juror in accordance with his instructions and his oath.' " *Wainwright v. Witt*, 469 U.S. 412, 424, 105 S.Ct. 844, 852, 83 L.Ed.2d 841 (1985) (quoting *Adams v. Texas*, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)). It is not required that a prospective juror's bias in this regard be proved with "unmistakable clarity." *Id.*, 469 U.S. at 424, 105 S.Ct. at 852.
> >
> > [M]any veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law. [T]his is why deference must be paid to the trial judge who sees and hears the juror.
>
> *Id.*, at 421-26, 105 S.Ct. at 852-53 (footnote omitted).
>
> *Coral v. State*, 628 So.2d 954, 969-70 (Ala. Cr. App. 1992).

Boyd v. State, 715 So.2d 825, 842 (Ala. Cr. App. 1997). This potential juror was properly excused.

McWhorter, 781 So.2d at 272-275.

2. Analysis

McWhorter argues that the Alabama Supreme Court's decision was contrary to and involved an unreasonable application of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). In *Witherspoon*, the Supreme Court held that "a sentence of death cannot be carried out if the jury that imposed it was chosen by excluding potential jurors for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction." 391 U.S. at 522, 88 S.Ct. 1770. As the Court explained:

> ***78** The most that can be demanded of a venireman in this regard is that he be willing to consider all of the penalties provided by state law, and that he not be irrevocably committed,

> before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings.

Id. at 522 n.21.

This legal standard was later clarified in *Witt*:

> We therefore take this opportunity to clarify our decision in *Witherspoon*, and to reaffirm the above-quoted standard from *Adams [v. Texas*, 448 U.S. 38, 45, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980)] as the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment. That standard is whether the juror's views would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." We note that, in addition to dispensing with *Witherspoon*'s reference to "automatic" decisionmaking, this standard likewise does not require that a juror's bias be proved with "unmistakable clarity." This is because determinations of juror bias cannot be reduced to question-and-answer sessions which obtain results in the manner of a catechism. What common sense should have realized experience has proved: many veniremen simply cannot be asked enough questions to reach the point where their bias has been made "unmistakably clear"; these veniremen may not know how they will react when faced with imposing the death sentence, or may be unable to articulate, or may wish to hide their true feelings. Despite this lack of clarity in the printed record, however, there will be situations where the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law.... [T]his is why deference must be paid to the trial judge who sees and hears the juror.

Witt, 469 U.S. at 424-26, 105 S.Ct. 844 (footnotes omitted).

In *Uttecht v. Brown*, 551 U.S. 1, 127 S.Ct. 2218, 167 L.Ed.2d 1014 (2007), the Court reviewed its *Witherspoon-Witt* line of opinions and identified "four principles of relevance":

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. *Witherspoon*, 391 U.S. at 521, 88 S.Ct. 1770. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. *Witt*, 469 U.S. at 416, 105 S.Ct. 844. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. *Id.*, at 424, 105 S.Ct. 844. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts. *Id.*, at 424-434, 105 S.Ct. 844.

Uttecht, 551 U.S. at 9, 127 S.Ct. 2218.

"Reviewing courts owe deference to a trial court's ruling on whether to strike a particular juror 'regardless of whether the trial court engages in explicit analysis regarding substantial impairment; even the granting of a motion to excuse for cause constitutes an implicit finding of bias.' " *White v. Wheeler*, —— U.S. ——, 136 S.Ct. 456, 460, 193 L.Ed.2d 384 (2015) (quoting *Uttecht*, 551 U.S. at 7, 127 S.Ct. 2218). "The judgment as to 'whether a venireman is biased ... is based upon determinations of demeanor and credibility that are peculiarly within a trial judge's province. Such determinations [are] entitled to deference even on direct review; the respect paid such findings in a habeas proceeding certainly should

be no less.' " *Uttecht*, 551 U.S. at 7, 127 S.Ct. 2218 (quoting *Witt*, 469 U.S. at 428, 105 S.Ct. 844). "A trial court's 'finding may be upheld even in the absence of clear statements from the juror that he or she is impaired.' " *Wheeler*, 136 S.Ct. at 460 (quoting *Uttecht*, 551 U.S. at 7, 127 S.Ct. 2218).

***79** Further, in cases such as McWhorter's, where we must review the state court's ruling under the constraints imposed by AEDPA, this court "must accord an additional and 'independent, high standard' of deference." *Id.* (quoting *Uttecht*, 551 U.S. at 10, 127 S.Ct. 2218). "As a result, federal habeas review of a *Witherspoon-Witt* claim – much like federal habeas review of an ineffective-assistance-of-counsel claim – must be 'doubly deferential.' " *Id.* (quoting *Burt v. Titlow*, 571 U.S. 12, 15, 134 S.Ct. 10, 187 L.Ed.2d 348 (2013)).

The critical question related to this claim is whether the Alabama Court of Criminal Appeals' decision to affirm the trial court's excusal of McLain from the venire was "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Wheeler*, 136 S.Ct. at 461 (quoting *White v. Woodall*, 572 U.S. 415, 420, 134 S.Ct. 1697, 188 L.Ed.2d 698 (2014)). The trial court, who was in the best position to judge McLain's demeanor, apparently believed that her statement that she did not believe in capital punishment warranted excusing her from the venire from which McWhorter's jury was chosen. A fairminded jurist could conclude that the trial judge considered McLain's request to be excused from any capital jury, and that the court was fair in exercising its "broad discretion" in deciding to excuse her. *Id.* McLain's statements were at least ambiguous as to whether she would be able to give appropriate consideration in a case which involved the potential for imposition of the death penalty. Because there was "ambiguity in the prospective juror's statements," the trial court was "entitled to resolve it in favor of the State." *Uttecht*, 551 U.S. at 7, 127 S.Ct. 2218 (quoting *Witt*, 469 U.S. at 434, 105 S.Ct. 844). Thus, the Alabama Court of Criminal Appeals' finding that McLain was properly excused was neither contrary to nor an unreasonable application of *Witherspoon* and *Witt*.

G. McWhorter's Claim That the Trial Court Improperly Coerced the Jury into Returning a Death Sentence after the Jury Was Deadlocked

1. The Parties' Arguments

McWhorter argues that the trial court violated his right to a reliable sentencing determination by coercing the jury into recommending that he be sentenced to death. (Doc. 1 at 67). Specifically, he alleges that during the sentencing phase of the trial, when the jury informed the judge that it was unable to reach a verdict, "[i]nstead of instructing the jurors to keep deliberating and trying to reach agreement without surrendering their conscientiously-held positions, the trial court pressured the jury by unnecessarily discussing the cost and wastefulness of a potential retrial." (*Id.*).

In particular, McWhorter objects to the portion of the supplemental jury instruction in which the court stated as follows:

> Ladies and gentlemen, I can't help you on the facts in this case. That's for you. All of the parties want you to decide this case if you can. The State of Alabama, the defense, and the court system have gone to considerable expense for this trial.
>
> If you can't decide this case, I'll have to declare a mistrial and it will have to be all done over again. Not the guilt phase, but the sentencing phase. But basically we would have to go through substantially the same procedure for selecting a jury. Substantially all of the guilt evidence would have to be presented again since this jury would not have heard that evidence. The jury again would have to be sequestered and put up in a motel. Time will have passed. Recollections will have dimmed. Some witnesses may not be available and more expense will be incurred.

***80** (*Id.* at 68) (quoting Vol. 12, Tab 29 at 1848).

Petitioner maintains this instruction suggested that the jury reach a "particular verdict," "essentially" telling the jury that "their failure to achieve ten votes for death, or seven for life, was socially unacceptable." (*Id.* at 68, 69). He argues that it was improper for the court to instruct the jury about what would occur after a mistrial and to instruct the jury that it should consider the financial cost of another trial. (*Id.* at 69-70). He further asserts that the speed of the jury's decision

after it received the supplemental instruction proves that the instruction was coercive.[46] (*Id.* at 70) (citing *Lowenfield v. Phelps*, 484 U.S. 231, 240, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) ("We are mindful that the jury returned with its verdict soon after receiving the supplemental instruction, and that this suggests the possibility of coercion.")).

Respondent argues that McWhorter is not entitled to relief, pointing out that he unsuccessfully raised this claim on direct appeal. (Doc. 14 at 66-69). In denying the claim, the Alabama Court of Criminal Appeals found as follows:

> The appellant argues that the trial court improperly coerced the jury into returning a death sentence after the jury had told the court that it was unable to reach a verdict. Specifically, the appellant argues that when, during the sentencing phase of his trial, the jury informed the trial court that it was unable to reach a verdict, the court should have declared a mistrial pursuant to § 13A-5-46(g), Ala.Code 1975. The trial court then charged the jury that it should continue deliberations; the appellant argues that this resulted in error on three grounds: that the charge included incorrect and misleading statements that coerced the jury into arriving at a death verdict; that the charge emphasized the cost of another trial and that doing so coerced a death verdict; and that the trial court's action in failing to declare a mistrial coerced the jury into arriving at a death verdict.
>
> The record indicates that approximately an hour and one-half after the jury had begun deliberations in the sentencing phase of the appellant's trial, the bailiff notified the trial court that the jury wished to return to the courtroom. The trial court instructed the parties that the jury had apparently been unable to reach a verdict and that the trial court intended to bring them back into courtroom and "see if I can help them on the law, explain to them, of course, I can't help them on the facts, but impress upon them the desirability of them reaching a verdict on this phase of this trial and what would occur if they did not." The jury was then brought into the courtroom and the trial court asked the foreperson if there were any questions concerning the law from the jury. The foreperson responded that no one had raised any such questions and the trial court then stated:
>
> ***81** THE COURT: All right. Ladies and gentlemen, I can't help you on the facts in this case. That's for you.
>
> All of the parties want you to decide this case if you can. The State of Alabama, the defense, and the court system have gone to considerable expense for this trial.
>
> If you can't decide this case, I'll have to declare a mistrial and it will have to be all done over again. Not the guilt phase, but the sentencing phase.
>
> But basically we would have to go through substantially the same procedure [for] selecting a jury. Substantially all of the guilt evidence would have to be presented again since this jury would not have heard that evidence. The jury again would have to be sequestered and put up in a motel.
>
> Time will have passed. Recollections will have dimmed. Some witnesses may not be available and more expense will be incurred.
>
> A new jury may not have as much evidence as you have today to base a verdict on. And it's highly unlikely that a new jury would have any more or any better evidence than you ladies and gentlemen have before you.
>
> It's your duty to agree on a verdict if you can do so without violating your conscience or convictions based on the evidence in this case.
>
> You should deliberate patiently and long if necessary. You should have a full and free interchange of views with each other, and you should consider the issues submitted to you without prejudice or preformed bias.
>
> Ladies and gentlemen, cultivate a spirit of harmony and tolerance and arrive at a verdict if you can possibly do so.
>
> Look closely and weigh the testimony of the witnesses solely with the view of finding the truth shutting your eyes as to any personal results of your findings. Apply the facts as you find them to the law given to you by the Court.
>
> No jury out of – no juror out of pride of his own opinion should refuse to agree nor stand out in an unruly, obstinate, or unreasonable way. On the other hand, no juror should surrender their conscientious views founded on the evidence and the law declared by the Court.
>
> I ask humbly that you let each juror re-examine the grounds of their opinion and reason with the other jurors concerning the facts and with an honest desire to arrive

> at the truth and to render a true verdict according to the evidence.
>
> Ladies and gentlemen, lay aside all pride of opinion and judgment. Examine any difference of opinion that the[re] may be among you with a spirit of fairness. Reason together, talk over your differences, harmonize them if possible so that this case can be justly disposed of.
>
> Now, ladies and gentlemen, it's not my purpose to force or coerce you to reach a verdict in this case. What I've said to you mustn't be taken as any attempt on my part to require any of you to surrender your honest and reasonable convictions founded on the law and the evidence in this case.
>
> My sole purpose is to impress on you your duty and the desirability and importance of your reaching a verdict if you can conscientiously do so.
>
> On behalf of the parties and the court system, I respectfully ask you to deliberate longer and reach a verdict if possible.

Following this charge, defense counsel objected, stating that "[i]n spite of the Court's cautionary language, I think the overall effect of the charge is to give the jury an indication that the Court favors the imposition of the more serious penalty." The jury then retired to continue deliberations and, approximately an hour later, returned with an advisory verdict of death by a vote of 10-2.

***82** The appellant first argues that the trial court used incorrect and misleading statements to coerce the jury into a death verdict. The appellant argues that by announcing that it was unable to reach a verdict, the jury had essentially informed the judge that at least 10 jurors would not vote for a death sentence, and because Alabama law requires 10 votes for the imposition of the death sentence, the jury was effectively recommending a sentence of life imprisonment without parole. The appellant further argues that, because the trial court could have properly considered this to be a recommendation of a sentence of life imprisonment without parole, because there must have been less than 10 votes for death, the trial court's instruction that a mistrial would have to be declared if the jurors were unable to decide the case was an incorrect statement of the law. The appellant further alleges an inaccuracy in the trial court's instruction by his statement that, "[a]ll parties want you to decide this if you can. The State of Alabama, the defense, and...." The appellant argues the defense should not have been included because he objected following this charge. However, when this statement is viewed in the context of the entire instruction, it is clear that the trial court was referring to the parties' efforts involved in trying the case and the parties' wanting the jury to reach a proper verdict for sentencing if possible. The appellant's objection referred to the trial court's charge as being coercive. However, the trial court's comments were clearly made to ensure and promote judicial efficiency and judicial economy.

Moreover, the appellant's argument that the jury was essentially returning an advisory verdict of life imprisonment without parole is without merit. The record indicates that the jury never revealed the number of votes for death or for life imprisonment without parole when it returned to the courtroom. It is not clear whether every juror had reached a decision. There is also no indication that there were seven jurors who were voting for life imprisonment without parole as required by § 13A-5-46(f), Ala.Code 1975. The indication from the record is that the jury was unable to reach any verdict; therefore, it would not have been proper for the trial court to have treated the jury's return as a verdict for life imprisonment without parole.

> "The general rule in Alabama has been that it is not improper for the trial court to urge upon the jury the duty of attempting to reach an agreement or verdict as long as the judge does not suggest which way the verdict should be returned." *King v. State*, 574 So.2d 921, 927-28 (Ala. Cr. App. 1990), quoting *McMorris v. State*, 394 So.2d 392 (Ala. Cr. App. 1980), *cert. denied*, 394 So.2d 404 (Ala. 1981), *cert. denied*, 452 U.S. 972, 101 S.Ct. 3127, 69 L.Ed.2d 983 (1981). An *Allen v. United States*, 164 U.S. 492, 17 S.Ct. 154, 41 L.Ed. 528 (1896), charge, also known as a "dynamite charge," is permissible if the language of the charge is not coercive or threatening. *Grayson v. State*, 611 So.2d 422, 425 (Ala. Cr. App. 1992); *King v. State*, 574 So.2d at 928. *Gwarjanski v. State*, 700 So.2d 357, 360 (Ala. Cr. App. 1996). In *Ex parte Slaton*, 680 So.2d 909 (Ala. 1996), the jury, after it had begun its sentence-stage deliberations, sent the following question to the trial court: "What happens if we cannot come up with enough numbers to go either way?" The trial court responded by instructing them that "it would be highly desirable and important if

there is any way possible that a verdict be reached." The instructions emphasized harmony and consistency with conscience, and informed the jury that, if it was unable to reach the necessary numbers, "I think you know what the Court will have to do. I would have to declare a mistrial and the case might have to be tried again as far as the sentencing phase that you are in at this time." The Alabama Supreme Court held that such instructions were proper and stated:

> This Court has held that "a trial judge may urge a jury to resume deliberations and cultivate a spirit of harmony so as to reach a verdict, as long as the Court does not suggest which way the verdict should be returned and no duress or coercion is used." *Showers v. State*, 407 So.2d 169, 171 (Ala. 1981) (citation omitted). The trial judge urged the jury to "resume deliberations" and to "cultivate a spirit of harmony." The trial judge did not ask the jury what its vote was; he did not suggest which way the verdict should be returned; and he made no threat or coercion to suggest the jury had to return a verdict. The trial court did not violate Slaton's rights in giving this supplemental charge.

***83** 680 So.2d at 926. The trial court's instruction that it would have to declare a mistrial if the jury was not able to arrive at a proper sentencing verdict is a correct statement of law. This argument by the appellant is without merit.

Moreover, the appellant's argument that the charge was coercive because it instructed the jury to consider the financial cost of another trial is also unfounded. "It is not error for the trial court to call the jury's attention to the time and expense a new trial would entail. *Poellnitz v. State*, 48 Ala.App. 196, 263 So.2d 181 (1972); *Watson v. State*, 398 So.2d 320 (Ala. Cr. App. 1980); *Galloway v. State*, 416 So.2d 1103 (Ala. Cr. App. 1982)." *Wiggins v. State*, 429 So.2d 666, 669 (Ala. Cr. App. 1983) (wherein the trial court instructed the jury during the *Allen* charge that "as you know there's a considerable expense attached to any trial. I just want y'all to think about it ..."). Similarly, in *Miller v. State*, 645 So.2d 363, 365 (Ala. Cr. App. 1994), the trial court gave the jury a supplemental charge on the second day of deliberations to urge it to fulfill its oath and to render a fair verdict. In doing so, the Court stated that it did not wish to know the numerical division of the jury but noted that the majority might "consider that these other folks are as intelligent as you are, they've heard the same evidence in the case, and reconsider your position." The trial court also charged, "also remember that trials are expensive. It costs money to put this case on. Some jury will have to do it, it won't go away. It will have to be handled." *Id.*, at 365. The appellant in *Miller* objected on the grounds that the trial court's instructions implied to the jury that the Court " 'expected' a verdict" and thereby "coerced" the jury. *Id.*, at 366. This Court found no error in the trial court's instructions in that they were neither threatening nor coercive. This Court stated:

> As this court stated in *McMorris v. State*, 394 So.2d 392 (Ala. Cr. App. 1980), *writ denied*, 394 So.2d 404 (Ala. 1981), *cert. denied*, 452 U.S. 972, 101 S.Ct. 3127, 69 L.Ed.2d 983 (1981), "The general rule in Alabama has been that it is not improper for the trial court to urge upon the jury the duty of attempting to reach an agreement or verdict as long as the judge does not suggest which way the verdict should be returned." 394 So.2d at 403. An "*Allen* Charge" or "Dynamite Charge" is permissible if it is not coercive. *See Franklin v. State*, 502 So.2d 821 (Ala. Cr. App. 1986), writ quashed, 502 So.2d 828 (Ala. 1987). The trial court may also make reference to the expense of a new trial. *See Wiggins v. State*, 429 So.2d 666 (Ala. Cr. App. 1983).
>
> *King v. State*, 574 So.2d 921, 927-28 (Ala. Cr. App. 1990). Whether an "*Allen* Charge" is coercive must be evaluated in the "whole context" of the case. *Ex parte Morris*, 465 So.2d 1180, 1183 (Ala. 1985). In this case, the trial judge did not set any deadline for reaching a verdict. *See Adair v. State*, 641 So.2d 309 (Ala. Cr. App. 1993); *McGilberry v. State*, 516 So.2d 907, 910 (Ala. Cr. App. 1987). "Under Alabama law, 'a trial judge may urge a jury to resume deliberations and cultivate a spirit of harmony so as to reach a verdict, as long as the court does not suggest which way the verdict should be returned and no duress or coercion is used.' *Showers v. State*, 407 So.2d 169, 171 (Ala. 1981)." *Ex parte Giles*, 554 So.2d 1089, 1093 (Ala. 1987). "The Supreme Court and this court have held on numerous occasions that the 'Allen' or 'dynamite' charge is not error unless the language used is threatening or coercive." *Grayson v. State*, 611 So.2d 422, 425 (Ala. Cr. App. 1992), and cases cited therein.

***84** *Miller v. State*, supra, at 366,. Thus, the trial court did not err by emphasizing the cost of another trial.

Finally, the appellant alleges that the trial court erred in failing to declare a mistrial and that its failure to do so coerced the jury into a death verdict. In his brief on appeal, the appellant raises a "catch-all" argument that essentially argues the cumulative effect of error by having given this charge to the jury. However, we have found no error in this charge; it was not improper. In *Bates v. State*, 659 So.2d 201, 204-05 (Ala. Cr. App. 1994), this Court noted that such an instruction was not a "dynamite" charge and that it was in no way coercive or threatening as it was similar in its points made to the jury to the pattern jury instructions for Alabama.

> The preferable instruction for a "hung jury" is set forth in Alabama Pattern Jury Instructions - Criminal, Instruction I.8, Hung Jury:
>
> > Members of the jury, I am sorry to hear that you are unable to reach a verdict. The Court cannot release you at this time. You should make further efforts to arrive at a verdict. Each juror is entitled to his or her opinion of the evidence, but I know that you do not wish to put the State to the expense of another trial if it can be avoided. If you cannot agree, a mistrial would be declared and this case would have to be tried again. There is no reason to believe that another jury would have better or clearer evidence than has been presented to you.
> >
> > This does not mean that you surrender an honest conviction as to the weight or the effect of any evidence solely because of the opinion of other jurors or because of the importance of arriving at a decision. But you should give respectful consideration to each other's views and talk over any difference of opinion in a spirit of fairness and candor. If possible, you should resolve any differences and come to a common conclusion so that the case may be completed.
> >
> > I would be happy to give you an explanatory charge on the law.
> >
> > It is natural that differences of opinion will arise. When they do, each juror should not only express his opinion but the facts and reasons upon which he bases that opinion. By reasoning the matter out it may be possible for all jurors to agree. What I have said to you must not be taken as an attempt on the part of the Court to acquire or force you to surrender your honest and reasonable convictions founded upon the law and the evidence in this case. My sole purpose is to impress upon you your duty and the desirability and importance of reaching a verdict if you can conscientiously do so.
> >
> > You may retire and continue your deliberations.
>
> *Bates v. State*, supra, at 204-05,.
>
> The trial court's instructions to the jury, urging them to arrive at a proper verdict, during the sentencing phase of the appellant's trial were also similar in substance to the pattern instructions and were neither coercive, threatening, nor improper.

McWhorter v. State, 781 So.2d 257, 275-80 (Ala. Crim. App. 1999).

2. Analysis

McWhorter argues that the Alabama Court of Criminal Appeals' denial of his claim "was contrary to, and involved an unreasonable application of, clearly established U.S. Supreme Court precedent." (Doc. 1 at 71). The court disagrees. The clearly established law against coercive jury instructions is "sparse." *Wong v. Smith*, 562 U.S. 1021, 131 S.Ct. 10, 11, 178 L.Ed.2d 403 (2010) (Alito, J., dissenting).[47] At the time of McWhorter's direct appeal, *Lowenfield v. Phelps*, 484 U.S. 231, 237, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988) was the only Supreme Court decision addressing the constitutional rule against coercive jury instructions. *See Wong*, 131 S.Ct. at 11. In *Lowenfield*, the Supreme Court held that "[a]ny criminal defendant, and especially any capital defendant, being tried by a jury is entitled to the uncoerced verdict of that body." *Lowenfield*, 484 U.S. 241. The review of an allegation that the jury was improperly coerced requires the court to "consider the supplemental charge given by the trial court 'in its context and under all the circumstances.' " *Id.* at 237, 108 S.Ct. 546 (quoting *Jenkins v. United States*, 380 U.S. 445, 446, 85 S.Ct. 1059, 13 L.Ed.2d 957 (1965) (per curiam)). As Justice Alito noted in his dissent in *Wong*:

> ***85** As a result, the clearly established law in this area provides very little specific guidance. About all that can be said is that coercive

> instructions are unconstitutional, coerciveness must be judged on the totality of the circumstances, and the facts of *Lowenfield* (polling a deadlocked jury and reading a slightly modified *Allen charge) were not unconstitutionally coercive. See* 484 U.S. at 237-241, 108 S.Ct. 546.

Wong, 562 U.S. at 11-12. This general standard gives state courts "wide latitude for reasonable decisionmaking under AEDPA." *Id.* at 12 (citing *Yarborough v. Alvarado*, 541 U.S. 652, 664, 124 S.Ct. 2140, 158 L.Ed.2d 938 (2004) ("The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations.")).

McWhorter has not met the heavy burden of demonstrating that the Alabama Court of Criminal Appeals' decision was contrary to or an unreasonable application of *Lowenfield*. He first argues that when the jury informed the judge that it was unable to reach a verdict, the trial court "pressured the jury" rather than "instructing the jurors to keep deliberating and trying to reach agreement without surrendering their conscientiously-held positions." (Doc. 1 at 67). However, contrary to his assertion, the judge went out of his way to explain to the jurors that they were not expected to surrender their conscientious views to reach a verdict. Indeed, the trial judge expressly instructed the jury that "no juror should surrender their conscientious views"; "[w]hat I've said to you mustn't be taken as any attempt on my part to require any of you to surrender your honest and reasonable convictions"; and "[m]y sole purpose is to impress on you your duty and the desirability and importance of your reaching a verdict if you can conscientiously do so." (Vol. 12, Tab 29 at 1848, 1850).

McWhorter next argues that the jury instruction suggested that the jury reach a "particular verdict," "essentially" telling the jury that their failure to reach a verdict was "socially unacceptable." (Doc. 1 at 68-69). Yet, he points to nothing in the supplemental jury charge which even remotely suggests that any particular verdict should be reached. Nor is there anything in the instruction indicating that it would be unacceptable for the jury not to reach a verdict. Rather, the court simply urged the jury to "deliberate longer and reach a verdict if possible." (Vol. 12, Tab 29 at 1850).

McWhorter also challenges the portion of the supplemental jury charge in which the court stated: "[i]f you can't decide this case, I'll have to declare a mistrial and it will have to be done over again." (Vol. 12, Tab 29 at 1848). He claims that it was "improper," "speculative," "cumulative," and "wrong" for the court to instruct the jury about what would occur after a mistrial. (Doc. 1 at 69 and n.7). He points out that pursuant to Ala. Code § 13A-5-46(g)(1975), if a mistrial is declared in the penalty phase, it is "possible" that "both parties with the consent of the court may waive the right to have an advisory verdict from a jury, in which event the issue of sentence shall be submitted to the trial court without a recommendation from a jury." (Doc. 1 at 69, n.7; Ala. Code § 13A-5-46(g)(1975)).

***86** McWhorter argues that courts "routinely find improper jury instructions about what will occur after a mistrial." (Doc. 1, at 69). However, he cites only *United States v. Johnson*, 432 F.2d 626 (D.C. Cir. 1970) in support of his argument that it is an "unfortunate fiction" to instruct a jury that a new trial will occur after a mistrial, because the question of whether a mistrial will or will not be followed by a new trial is "so speculative." (*Id.*). But this argument is without merit. The Supreme Court has held that circuit court precedent "does not constitute 'clearly established Federal law, as determined by the Supreme Court.' " *Parker v. Matthews*, 567 U.S. 37, 48, 132 S.Ct. 2148, 183 L.Ed.2d 32 (2012) (quoting *Renico v. Lett*, 559 U.S. 766, 779, 130 S.Ct. 1855, 176 L.Ed.2d 678 (2010)). Therefore, *Johnson* cannot form the basis for habeas relief under AEDPA. *Id.* McWhorter has pointed to no clearly established Supreme Court precedent finding it unconstitutional for the trial court to instruct the jury that a case would be retried after a mistrial.

McWhorter further challenges the portion of the supplemental jury instructions mentioning the expense of the current trial and the potential expense of a retrial. In the supplemental instruction, the trial judge indicated that the parties and the court had "gone to considerable expense for this trial," and "more expense [would] be incurred" if the jury could not reach a verdict. (Vol. 12, Tab 29 at 1848). McWhorter contends that it was "entirely improper for the trial court, at the moment the jury was struggling with whether [he] should live or die, to instruct the jury that it should consider the financial cost of another trial." (Doc. 1 at 70). He argues that the cost of another trial has "absolutely nothing to do with the jury's sentencing decision." (*Id.*). In support of this

contention, McWhorter cites *United States v. Thomas*, 449 F.2d 1177, 1183-84 (D.C. Cir. 1971) for the proposition that instructing the jury about the expense of a retrial was coercive. In *Thomas*, the D.C. Circuit held that the trial court's supplemental jury instruction, which included a declaration that he was "not going to declare a mistrial, and thereby require a retrial of this case before some other jury," was coercive. *Thomas*, 449 F.2d at 1183-84. *Thomas* does not help McWhorter for two reasons. First, a D.C. Circuit decision does not constitute clearly established Federal law, as determined by the Supreme Court, so it provides no basis for habeas relief. And second, *Thomas* is, in any event, distinguishable. The supplemental jury instruction in *Thomas* did not mention the financial cost of a new trial. McWhorter has pointed to no clearly established Supreme Court law finding it coercive for the trial court to mention the financial cost of a potential retrial.

Finally, McWhorter argues that the coerciveness of the supplemental instruction is demonstrated by the fact that the previously deadlocked jury reached a decision in less than an hour. (Doc. 1 at 70). While the speed with which a jury returns a verdict after receiving a supplemental charge may suggest the possibility of coercion, it is not necessarily indicative of it. *See* *Lowenfield v. Phelps*, 484 U.S. 231, 240, 108 S.Ct. 546, 98 L.Ed.2d 568 (1988). After careful review of the trial court's supplemental charge to the jury, the court concludes that it was not coercive.

The supplemental instruction did not threaten the jury; it did not set a deadline; it did not give the jury the impression that they had to surrender their conscientiously held beliefs; it did not suggest to the jury that they reach a particular verdict; and it did not imply that failure to reach a verdict was unacceptable. Further, the trial court's brief reference to the possibility of and cost of a potential retrial did not place undue emphasis on those factors when considered in the context of the entire instruction. Rather, the supplemental instruction explained what would happen if the jury could not reach a verdict, asked the jurors to reexamine the evidence and their opinions, and stressed the importance of the jury reaching a verdict if they could conscientiously do so.

***87** The Alabama Court of Criminal Appeals found the trial court's supplemental jury charge was not coercive, threatening, or improper. This finding was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

H. McWhorter's Claim That the Trial Court Improperly Directed Prospective Jurors to Give a Specific Answer to a Crucial *Voir Dire* Question

The prospective jurors for McWhorter's trial were divided into five separate panels. During the *voir dire* questioning of the second panel, the trial judge stated to the panel:

> [I]f you were asked would you – If you convicted the Defendant of capital murder, would you automatically apply the death penalty, well, you know from what I've just told you that, no, you wouldn't automatically vote for the death penalty. You would have to weigh the aggravating against the mitigating circumstances to determine what was appropriate.

(Vol. 5 at 434).

During the *voir dire* questioning of the third panel, the trial judge stated:

> [I]f somebody – one of the attorneys were to ask you, would you automatically vote for the death penalty, you now know, no, that you would have a job of weighing to do as to what to recommend.

(*Id.* at 515).

During the *voir dire* questioning of the fourth panel, the trial judge stated to the panel:

> [I]f somebody said, if the Defendant was convicted of the capital offense, would you automatically vote for death? Well, now knowing what you

> know, would you certainly know that the answer would be no. That under the law as the Judge would give it, that you would first weigh those factors one against the other and no vote would be automatic in the sentencing phase.

(Vol. 6 at 624). McWhorter claims the trial judge's remarks essentially directed the jurors on those panels to answer a question in a certain way. That assertion is wide of the mark.

1. The Parties' Arguments

McWhorter argues that these statements "instructing jurors how to answer the question," denied defense counsel a meaningful opportunity to ask jurors if they would automatically impose the death penalty upon conviction, in violation of his rights to due process and a fair trial. (Doc. 1 at 71-72). He adds that:

> By directing jurors to say that they would not automatically impose the death penalty, the trial judge violated McWhorter's rights under *Witherspoon [v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968)] and *Morgan [v. Illinois*, 504 U.S. 719 (1992)]. Instructing jurors to give a specific answer to a crucial *voir dire* question effectively precluded McWhorter from asking jurors whether they would automatically impose the death penalty.

(*Id.* at 72).

Respondent counters that McWhorter is not entitled to relief, because the Alabama Court of Criminal Appeals properly applied clearly established federal law in denying this claim. (Doc. 14 at 69-72). In denying the claim, the Alabama Court of Criminal Appeals found:

> The appellant argues that the trial court improperly directed prospective jurors to give a specific answer to a *voir dire* question; specifically, the appellant argues that the trial court improperly instructed the jury in such a manner that the jurors believed they had to say that they would not automatically impose the death penalty. The appellant cites instructions given by the trial court during *voir dire* questioning of prospective jurors, wherein the trial court stated:
>
> ***88** [I]f somebody said, if the Defendant was convicted of the capital offense, would you automatically vote for death? Well, now knowing what you know now, you would certainly know that the answer would be no.
>
> No objection was made to this charge; therefore, it is reviewable under the plain-error standard. Rule 45A, Ala.R.App.P. The excerpt cited by the appellant has been taken out of context. A review of the entire *voir dire* examination of the jurors indicates that they were fully informed that a finding of guilt as to capital murder was not an automatic verdict for the death penalty, rather that they would be required to weigh the aggravating and mitigating circumstances in order to make this determination. Before giving the instruction cited by the appellant, the trial court fully explained to the potential jury what would be entailed in the trial stages, including the guilt and sentencing phases. He then instructed the jury that he had given it such information so that it would be better prepared to answer the *voir dire* questioning of the attorneys. He stated:
>
> Now, I have told you all that so that some of the questions the attorneys I think will probably ask you will make sense to you and you would be able to answer them intelligently. For example, if someone said, if the defendant was convicted of the capital offense, would you automatically vote for death? Well, now knowing what you know, you would certainly know that the answer would be no. That under the law as a judge would give it that you would first weight those factors one against the other and no vote would be automatic in the sentencing phase.
>
> ... Now, couple of other things I want you to understand in answering these questions. You have every right to have unpopular or different opinions from somebody else....
>
> Don't hesitate in these questions if you think that something you think or believe or feel is unpopular, don't

hesitate to say so. There is nothing wrong with having a bias or prejudice because of a particular thing.

The trial court also instructed the jurors that they should freely admit any problems, biases, or fixed opinions that they may have and that, if they so chose, they could inform the court of such problems or feelings privately. The appellant initially asked the veniremembers if they would automatically vote for the death penalty; no one answered that he or she would do so. Thereafter, defense counsel asked, "[L]et's suppose that you find the defendant to be guilty and let's suppose that you find that person to be guilty of capital murder, is there anyone here who did not understand the statement, instructions from the judge that a finding of guilty of capital murder is not an automatic death penalty?" No potential jurors indicated that they did not understand that instruction. Defense counsel thereafter asked individual veniremembers similar questions on *voir dire.* On several occasions he reemphasized that if the appellant were to be found guilty of capital murder the death penalty was not automatic.

"In construing a jury instruction, we do so in the context of the charges as a whole. *Haney v. State*, 603 So.2d 368, 411 (Ala. Crim. App. 1991), *aff'd*, 603 So.2d 412 (Ala. 1992), *cert. denied*, 507 U.S. 925, 113 S.Ct. 1297, 122 L.Ed.2d 687 (1993); *Baker v. United States*, 412 F.2d 1069 (5th Cir. 1969), *cert. denied*, 396 U.S. 1018, 90 S.Ct. 583, 24 L.Ed.2d 509 (1970)." *Slaton*, 680 So.2d at 896. "It is the charge in its totality and not some 'magic words' that must determine whether the defendant's rights have been protected or error committed." *Slaton*, 680 So.2d at 892, quoting *Finley v. State*, 606 So.2d 198, 201 (Ala. Cr. App. 1992). Although, looked at in isolation, the instruction given by the trial court may appear to direct the jury to a specific answer, this was clearly not the intent of the instruction.

> ***89** Looking to the entire oral charge, we find that the objectionable character of the portion objected to was cured and that the objection advanced on appeal is not well taken. The misleading quality of the court's instruction is self-correcting when considered in the context of the entire oral charge when the charge is considered as a whole. And when each instruction is considered in connection with the others. We think it a reasonable assumption that the jury took a common sense view of the instruction and gave to them their plainly apparent meaning.

Austin v. State, 555 So.2d 324, 329 (Ala. Cr. App. 1989), quoting *Harris v. State*, 412 So.2d 1278, 1281 (Ala. Cr. App. 1982).

Considering the *voir dire* as a whole, there is no reasonable likelihood that the venire applied these instructions improperly.

McWhorter, 781 So.2d at 280-81.

2. Analysis

McWhorter argues that the Alabama Supreme Court's decision was contrary to and involved an unreasonable application of *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968) and *Morgan v. Illinois*, 504 U.S. 719, 112 S.Ct. 2222, 119 L.Ed.2d 492 (1985). The Constitution does not "dictate a catechism for *voir dire*," but it does require that a defendant be afforded an impartial jury. *Morgan*, 504 U.S. at 729, 112 S.Ct. 2222.

> [P]art of the guarantee of a defendant's right to an impartial jury is an adequate *voir dire* to identify unqualified jurors. *Dennis v. United States*, 339 U.S. 162, 171-172, 70 S.Ct. 519, 523-524, 94 L.Ed. 734 (1950); *Morford v. United States*, 339 U.S. 258, 259, 70 S.Ct. 586, 587, 94 L.Ed. 815 (1950). "*Voir dire* plays a critical function in assuring the criminal defendant that his [constitutional] right to an impartial jury will be honored. 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." *Rosales-Lopez v. United States*, 451 U.S. 182, 188, 101 S.Ct. 1629, 1634, 68 L.Ed.2d 22 (1981) (plurality opinion). Hence, "[t]he exercise of [the trial court's] discretion, and the restriction upon inquiries at the request of counsel, [are] subject to the essential demands of fairness." *Aldridge v. United States*, 283 U.S. 308, 310, 51 S.Ct. 470, 471-472, 75 L.Ed. 1054 (1931).

Id. at 729-30. In *Morgan*, the Court held that a capital defendant is entitled to ask prospective jurors, even prior to the state's case-in-chief, whether they have predetermined

views on the death penalty that would disqualify them from serving on the jury. *Id.* at 731-36, 112 S.Ct. 2222 (citing *Witherspoon*).

McWhorter contends that his "opportunity to question the potential jurors" was foreclosed by the trial judge's "repeated, prior instructions to these potential jurors on how to answer that exact question." (Doc. 20 at 58). That is, he claims that the

> potential jurors' lack of an affirmative response to defense counsels' question indicates only that they understood the trial judge's instruction on how to answer any inquiry into their beliefs on the death penalty: with uniform silence that gave McWhorter no chance to determine whether his prospective jurors held such "dogmatic beliefs about the death penalty" that they were incapable of "uphold[ing] the law." *Morgan*, 504 U.S. at 735-36, 112 S.Ct. 2222.

(*Id.* at 58-59). McWhorter argues that when the potential jurors were asked whether they would automatically vote for the death penalty if he were convicted, they answered those questions in the negative—but that was only because of the judge's statements. However, this assertion is based purely on speculation.

The record plainly reflects that McWhorter had ample opportunity to question the potential jurors on their opinions about the death penalty. (Vol. 4 at 366-397; Vol. 5 at 398-427, 543-595; Vol. 6 at 641-706, 723-736; Vol. 7 at 823-882). McWhorter had ample opportunity to ask prospective jurors whether they had predetermined views on the death penalty that would disqualify them from serving on the jury, which is what *Morgan* requires. There is nothing in the record to indicate that any juror answered the defense's questions untruthfully, whether due to the comments made by the judge or for any other reason. In fact, a fair reading of the record indicates that the judge's comments were not made for the purpose of directing the potential jurors as to how to answer the parties' questions about whether they would automatically impose the death penalty, but rather informed them of what their obligations as jurors would be. McWhorter's argument that the judge's comments directed the prospective jurors about how to respond to *voir dire* questions is simply not supported by the record.

***90** The Alabama Court of Criminal Appeals' found that considering the *voir dire* as a whole, there was no reasonable likelihood that the venire took the court's statements as instructions that they were to answer no when asked if they would automatically vote for the death penalty if McWhorter were convicted. This finding was neither contrary to nor an unreasonable application of *Witherspoon* or *Morgan*.

VI. CONCLUSION

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

DONE and **ORDERED** this January 22, 2019.

All Citations

Not Reported in Fed. Supp., 2019 WL 277385

Footnotes

1 Since this action was filed, Jefferson S. Dunn has become the Commissioner of the Alabama Department of Corrections. Therefore, pursuant to Fed. R. Civ. P. 25(d), The Clerk of the Court is **DIRECTED** to **SUBSTITUTE** Jefferson S. Dunn for Kim T. Thomas as Commissioner of the Alabama Department of Corrections.

2 References to the record are designated "(Vol. _)." The court will list any page number associated with the court record by reference to the number in the upper right hand corner of the page, if available. Otherwise, the page number will correspond with the number at the bottom of the page. Additionally, citations to the record will include an easily identifiable tab number close to the cited material where available.

3 Hoyt L. Baugh, Jr., Laura R. Johnson, Robert C. Newman, Kafahni Nkrumah, and Colleen Q. Brady represented McWhorter when his original Rule 32 petition was filed. (Vol. 19, Tab 49 at 81-82).

4 The amended petition was filed by Hoyt L. Baugh, Jr. and Robert C. Newman as counsel for McWhorter. (Vol. 21, Tab 56 at 554).

5 McWhorter was represented at the evidentiary hearing by Robert C. Newman, Benjamin E. Rosenberg, Colleen Q. Brady, and David M. Bigge. (Vol. 25, Tab 66 at 1).

6 McWhorter was represented on appeal by Colleen Q. Brady, Michael Z. Goldman, Robert C. Newman, and Benjamin E. Rosenberg. (*Id.* at 1202).

7 McWhorter is represented in this court by Samuel H. Franklin, Benjamin E. Rosenberg and Robert C. Newman.

8 The phrases "fairly presented" and "properly exhausted" are synonymous. *O'Sullivan v. Boerckel*, 526 U.S. 838, 848, 119 S.Ct. 1728, 144 L.Ed.2d 1 (1999) (observing that the question is "not only whether a prisoner has exhausted his state remedies, but also whether he has *properly exhausted* those remedies, *i.e.*, whether he has *fairly presented* his claims to the state courts") ("properly" emphasized in original, all other emphasis added).

9 When the last state court rendering judgment affirms without an explanation, "the federal court should 'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale," and "should then presume that the unexplained decision adopted the same reasoning." *Wilson v. Sellers*, —— U.S. ——, 138 S.Ct. 1188, 1192, 200 L.Ed.2d 530 (2018). The state can "rebut the presumption by showing that the unexplained affirmance relied or most likely did rely on different grounds than the lower state court's decision, such as alternative grounds for affirmance that were briefed or argued to the state supreme court or obvious in the record it reviewed." *Id.*

10 "The reason most frequently advanced in our cases for distinguishing between direct and collateral review is the State's interest in the finality of convictions that have survived direct review within the state court system." *Brecht*, 507 U.S. at 635, 113 S.Ct. 1710 (citing *Wright v. West*, 505 U.S. 277, 293, 112 S.Ct. 2482, 120 L.Ed.2d 225 (1992); *McCleskey*, 499 U.S. at 491, 111 S.Ct. 1454; and *Wainwright*, 433 U.S. at 90, 97 S.Ct. 2497).

11 The Antiterrorism and Effective Death Penalty Act ("AEDPA") was signed into law by President Clinton on April 24, 1996. *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996). The present petition was filed after that date. Accordingly, the habeas statutes as amended by AEDPA apply to the claims asserted in this case. *See Id.* § 107(c), 110 Stat. at 1226; *McNair v. Campbell*, 416 F.3d 1291, 1297 (11th Cir. 2005) (applying AEDPA to habeas petitions filed after Act's effective date); *Hightower v. Schofield*, 365 F.3d 1008, 1013 (11th Cir. 2004) (same). *See also* *Martin v. Hadix*, 527 U.S. 343, 356, 119 S.Ct. 1998, 144 L.Ed.2d 347 (1999) (discussing retroactivity of AEDPA amendments to § 2254). *Cf.* *Lindh v. Murphy*, 521 U.S. 320, 327, 117 S.Ct. 2059, 138 L.Ed.2d 481 (1997) (holding that AEDPA's amendments do not apply to habeas petitions filed prior to the Act's effective date); *Johnson v. Alabama*, 256 F.3d 1156, 1169 (11th Cir. 2001) (same); *Thompson v. Haley*, 255 F.3d 1292, 1295 (11th Cir. 2001) (same).

12 Section 2254(d)(1)'s reference to "clearly established federal law, as determined by the Supreme Court of the United States" has been interpreted by the Supreme Court as referencing only "the *holdings*, as opposed to the *dicta*, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412, 120 S.Ct. 1495 (O'Connor, J., majority opinion) (emphasis added); *see also, e.g.*, *Carey v. Musladin*, 549 U.S. 70, 74, 127 S.Ct. 649, 166 L.Ed.2d 482 (2006) (same); *Osborne v. Terry*, 466 F.3d 1298, 1305 (11th Cir. 2006) (same); *Warren v. Kyler*, 422 F.3d 132, 138 (3rd Cir. 2005) ("[W]e do not

consider those holdings as they exist today, but rather as they existed as of the time of the relevant state-court decision.") (internal quotation marks and citation omitted).

13 *See also* *Williams*, 529 U.S. at 404, 120 S.Ct. 1495 (O'Connor, J., majority opinion) ("Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) '*contrary to* ... clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) '*involved an unreasonable application of* ... clearly established Federal law, as determined by the Supreme Court of the United States.' ") (emphasis added).

14 Indeed, as one commentator has observed, the possible permutations are not just two, but at least four in number:

> The word "contrary" denotes incompatibility or logical inconsistency. Two propositions are incompatible with one another if both cannot be true or correct. Thus, a state court decision is contrary to federal law if that decision and the applicable federal law cannot both be true or correct. Given this premise, there appear to be four possible combinations of state court adjudications and resulting decisions that are pertinent to this textual inquiry:
>
> • the state court applies the correct federal standard and arrives at a correct outcome;
> • the state court applies an incorrect federal standard and arrives at an incorrect outcome;
> • the state court applies an incorrect federal standard and arrives at a correct outcome; and,
> • the state court applies the correct federal standard and arrives at an incorrect outcome.

Allan Ides, *Habeas Standards of Review Under 28 U.S.C. § 2254(d)(1): A Commentary on Statutory Text and Supreme Court Precedent*, 60 WASH. & LEE L. REV. 677, 685 (2003) (footnotes omitted).

15 The Eleventh Circuit has observed that § 2254(d)(1)'s "unreasonable application" provision is the proper statutory lens for viewing the "run-of-the-mill state-court decision applying the correct legal rule." *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006).

> In other words, if the state court identified the correct legal principle but unreasonably applied it to the facts of a petitioner's case, then the federal court should look to § 2254(d)(1)'s "unreasonable application" clause for guidance. "A federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was *objectively* unreasonable."

Id. (quoting *Williams*, 529 U.S. at 409, 120 S.Ct. 1495).

16 Title 28 U.S.C. § 2254(a) provides that the "Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." It follows that claims pertaining solely to questions of state law fall outside the parameters of this court's authority to provide relief under § 2254.

17 As discussed previously, Section 2254(d) provides that the state courts' adjudication of a habeas petitioner's claims can be overturned only if the petitioner carries the burden of demonstrating that a particular determination *either* (1) "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law," *or* (2) that the ruling "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

Further, § 2254(e)(1) provides that:

> In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

18 *Cf.* *Hill v. Lockart*, 474 U.S. 52, 60, 106 S.Ct. 366, 88 L.Ed.2d 203 (1986) ("Petitioner did not allege in his habeas petition that, had counsel correctly informed him about his parole eligibility date, he would have pleaded not guilty and insisted on going to trial. He alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty.").

19 An introduction to ineffective assistance of counsel claims is included here because of the relationship between such claims – which are governed by a highly deferential standard of constitutional law – and 28 U.S.C. § 2254(d), which is itself an extremely deferential standard of habeas review.

20 The court noted that McWhorter did not "raise his cumulative-effect claim in his postjudgment motion." *McWhorter*, 142 So.3d at 1234.

21 Exhibit 23 pertains to Tommy McWhorter's 1990 DUI conviction. There is no mention of statutory rape. (*See* Vol. 31, Tab 68 at 318-33).

22 Elsie Garrison, McWhorter's aunt, testified at the evidentiary hearing that McWhorter's parents were "around 20" when McWhorter was born; Tommy McWhorter was an alcoholic; McWhorter's parents divorced when McWhorter was about two years old; and McWhorter and his father had very little contact with each other after the divorce. (Vol. 26 at 222-30).

23 Larry Evans, McWhorter's uncle, testified that his father, Jessie Evans (McWhorter's grandfather), was an abusive alcoholic. Evans stated that while he lived with Jesse Evans, McWhorter came over every other weekend, that he "probably stayed over sometimes", and that he and McWhorter huffed gasoline two or three times. (Vol. 27 at 385-391).

24 Jessie Evans pled guilty to first degree manslaughter on December 7, 1979, when McWhorter was 5 years old. (Vol. 31 at 288-317).

25 McWhorter's aunt Elsie Garrison testified that although she did not "know a lot about what happened at their house during that time," McWhorter told her that his stepfather was mean to him, his mother and stepfather "whipped" him; and they did not let him watch television. (Vol. 26 at 230).

26 McWhorter's step-father, David Rowland, testified that he once found McWhorter sniffing gasoline, so he took him to his mother, and she "g[a]ve him a whipping, put him in the tub." (Vol. 27 at 363-64).

27 Elsie Garrison testified that when McWhorter was about ten years old, she found out he had bruises on his "backside." McWhorter told her he fell out of a window, but she took photographs and reported it to DHR. She testified that McWhorter told her son that his step-father had beaten him. (Vol. 26 at 323-34).

28 The social service report indicates that Elsie Garrison reported the bruises on July 18, 1985, when McWhorter was 10 years old. Social services interviewed McWhorter's mother, Carolyn Rowland, who admitted to "whipping" him because he broke the window out of their trailer, but stated she did not realize she had whipped him that hard. Ms. Rowland admitted that she and her husband whipped McWhorter at times because he was difficult to manage and had been in constant trouble at school due to behavioral problems. When the caseworker followed up with McWhorter later, he reported that he had not "gotten anymore [sic] whippings." The case was eventually closed. (Vol. 33 at 44-51).

29 Elsie Garrison testified that when McWhorter was sixteen years old, he stole his stepfather's truck. Shortly afterwards, McWhorter moved in with Ms. Garrison for "around four months." McWhorter had to change schools while he lived with her. McWhorter did not follow Ms. Garrison's rules while he lived with her. He got drunk at times, and eventually stole his stepfather's truck again. (Vol 26 at 239-47).

30 Michael Evans, McWhorter's cousin, testified that he and McWhorter huffed gasoline and sometimes freon, at McWhorter's house, two or three times a day on weekends when he saw McWhorter. He indicated that this began when McWhorter was eight or nine years old and went on for two or three years, until they "finally got caught." (Vol. 27 at 401-03).

31 Larry Evans, McWhorter's uncle, testified that he and McWhorter huffed gasoline two or three times. (Vol. 27 at 390-91).

32 David Rowland, McWhorter's stepfather, testified that he caught McWhorter sniffing gasoline on one occasion, and at other times, he noticed there was no freon in the air conditioner in his car. (Vol. 27 at 363-65).

33 McWhorter's friend, Abraham Barnes, testified that he and McWhorter played Russian roulette on several occasions. (Vol. 28 at 510).

34 Abraham Barnes also testified that he and McWhorter drank a lot, and used a variety of drugs including pot, cocaine, and acid on occasion. (Vol. 27 at 507).

35 Kenneth Burns, one of McWhorter's teachers, testified that McWhorter was an average student, but worked hard in school to stay qualified to play basketball. He was generally a good kid, but did enjoy a bit of mischief from time to time. (Vol. 27 at 434-35).

36 Frank Baker, McWhorter's teacher and basketball coach, testified that McWhorter was an average student but did not cause a lot of trouble. He was a follower on the basketball team, but worked hard to improve and be a part of the team. (Vol. 27 at 422-26).

37 Kenneth Burns testified that there were "a few Mondays when [McWhorter] would come in when he wouldn't be on his best behavior," but by mid-morning he would be "back on track." (Vol. 27 at 435-36).

38 Amy Battle, McWhorter's close friend, testified that he was a supportive friend, even when he was in jail. (Vol. 27 at 439-50).

39 McWhorter did not object on hearsay grounds to any limitations placed on Dr. Tarter's testimony, so it is unclear why he included Dr. Tarter in this claim. (*See* Vol. 28 at 658-709; Vol. 29 at 710-725). However, to the extent McWhorter may be claiming that he would have tried to elicit more testimony from Dr. Tarter, but for the trial court's prior ruling that Ms. Vogelsang was not permitted to testify to conclusions based on facts and data that were not in evidence, the court will assume that McWhorter would seek to elicit additional testimony from Dr. Tarter in an evidentiary hearing in this court.

40 Candidly, the court has been unable to locate any authority holding that a state court's erroneous application of a state procedural rule to bar a federal claim renders the state ground for denying the claim "inadequate." The general rule is that "state-law violations provide no basis for federal habeas relief." *Estelle v. McGuire*, 502 U.S. 62, 68 n.2, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991). Nevertheless, the court entertains McWhorter's argument on this point out of an abundance of caution.

41 Alternatively, the relevant time for deciding whether a state procedural rule was firmly established and regularly followed might be the time at which the petitioner "failed to comply with" the rule. *Hurth v. Mitchem*, 400 F.3d 857, 864 (11th Cir. 2005); *see also* *Ward*, 592 F.3d at 1176 (considering whether Georgia's procedural default rule, which bars claims that could have been but were not raised at trial or on appeal from being raised in state habeas proceedings, was firmly established and consistently followed "at the time of [the petitioner's] trial and direct appeal"). In light of the fact that McWhorter's *Brady* claim was rejected because he failed to comply with a state *pleading requirement*, the time at which he failed to comply with the rule was when he filed his Amended Rule 32 Petition. But whether the relevant time is when he filed his Rule 32 Petition or when the Court of Criminal Appeals ruled on his claim, the rule applied to bar McWhorter's *Brady* claim was firmly established and regularly followed in either case.

42 The trial judge also gave the jury an instruction on voluntary intoxication. (*Id.* at 1732).

43 Marcus Carter drove McWhorter to the victim's house the night of the crime, dropped him off there, then met him later—immediately after the crime was committed. (Vol. 10 at 1451-1540).

44 Detective Maze testified at the preliminary hearing that Abraham Barnes told him McWhorter had overdosed on pills and alcohol the night after the crime, in an attempt to commit suicide, and that he was in the Boaz and Albertville Hospital. (Vol. 3, Tab 3 at 31-32).

45 There was no testimony at trial concerning the reason for McWhorter's hospitalization. In fact, defense counsel objected to that portion of Detective Maze's testimony which mentioned the fact that McWhorter was hospitalized after the crime. (Vol. 9 at 1214-16).

46 The jury began deliberations at approximately 3:15 p.m. (Vol. 12, Tab 29 at 1846). At 4:35 p.m., the bailiff notified the trial judge that the jury wished to return to the courtroom. (*Id.* at 1847). The judge issued a supplemental instruction, then the jury returned to continue deliberations. (*Id.* at 1847-51). The jury reached a verdict at 5:40 p.m. (*Id.* at 1851).

47 In *Wong*, the Court summarily denied the prison warden's petition for writ of certiorari. Justice Alito, joined by Chief Justice Roberts and Justice Scalia, issued the only written opinion, dissenting from the denial of certiorari.

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U.S. DISTRICT COURT
N.D. OF ALABAMA

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

CASEY A. McWHORTER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 4:13-CV-02150-RDP**
	)	
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	)	
	)	
Respondent.	)	

FINAL JUDGMENT

In accordance with the Memorandum Opinion entered contemporaneously herewith, and pursuant to Rule 58 of the Federal Rules of Civil Procedure, it is hereby **ORDERED**, **ADJUDGED**, and **DECREED** that the petition for writ of habeas corpus (Doc. 1) is **DENIED**, the request for an evidentiary hearing is **DENIED**, and the petition is **DISMISSED WITH PREJUDICE**.

This court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). The court finds that Petitioner's claims do not satisfy either standard for granting a certificate for appealability. Therefore, the court **DENIES** a certificate of appealability with regard to those claims. 28 U.S.C. § 2253(c).

Costs of this action are taxed against Petitioner and in favor of Respondent.

DONE and **ORDERED** this January 22, 2019.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

142 So.3d 1195
Court of Criminal Appeals of Alabama.

Casey A. McWHORTER
v.
STATE of Alabama.

CR–09–1129.
|
Sept. 30, 2011.
|
Rehearing Denied Feb. 10, 2012.
|
Certiorari Denied Nov. 22, 2013
Alabama Supreme Court 1110609.

Synopsis

Background: Following affirmance by the Court of Criminal Appeals, 781 So.2d 257, and the Supreme Court, 781 So.2d 330, of conviction of capital murder and sentence of death by electrocution, defendant petitioned for postconviction relief. The Circuit Court, Marshall County, No. CC–93–77.60, Liles C. Burke and F. Tim Riley, JJ., denied petition. Defendant appealed.

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

defendant failed to prove that juror was guilty of misconduct;

juror's statements regarding her father's death were not extraneous facts that could have been used to overturn the guilty verdict in capital-murder trial;

findings on alleged ineffective assistance of counsel at penalty phase of capital-murder trial were supported by the record and law;

summary dismissal of defendant's *Brady* claim was proper; and

trial counsel was not ineffective for failing to object to defendant's being transported in and out of the courtroom in the presence of the jury in handcuffs.

Affirmed.

Windom and Burke, JJ., recuse themselves.

Attorneys and Law Firms

***1202** Colleen Quinn Brady, New York, New York; Michael Z. Goldman, New York, New York; Robert C. Newman, New York, New York; and Benjamin E. Rosenberg, New York, New York, for appellant.

Troy King and Luther Strange, attys. gen., and Kevin Wayne Blackburn, asst. atty. gen., for appellee.

Opinion

JOINER, Judge. [1]

Casey A. McWhorter appeals the circuit court's denial of his petition for postconviction relief filed pursuant to Rule 32, Ala. R.Crim. P. We affirm.

In March 1994, McWhorter was convicted of capital murder in connection with the death of Edward Lee Williams because it was committed during the course of a first-degree robbery. *See* § 13A–5–40(a)(2), Ala.Code 1975. Following the penalty phase, the jury, by a vote of 10–2, recommended that McWhorter be sentenced to death. The circuit court accepted the jury's recommendation and sentenced McWhorter to death.

This Court affirmed McWhorter's conviction and sentence on direct appeal. *See McWhorter v. State,* 781 So.2d 257 (Ala.Crim.App.1999) ("*McWhorter I* "). The Alabama Supreme Court affirmed this Court's judgment, *Ex parte McWhorter,* 781 So.2d 330 (Ala.2000) ("*McWhorter II* "), and the United States Supreme Court subsequently denied certiorari review on April 16, 2001. *McWhorter v. Alabama,* 532 U.S. 976, 121 S.Ct. 1612, 149 L.Ed.2d 476 (2001).

On April 11, 2002, McWhorter, through counsel, filed a timely Rule 32 petition in the Marshall Circuit Court, attacking his conviction and death sentence. The case was assigned to Judge David Evans, who did not preside over McWhorter's trial and who retired in 2007. [2] The State filed an answer and a motion to dismiss McWhorter's petition. After several years of litigation, on February 28, 2005, McWhorter filed the amended Rule 32 petition that is the subject of this appeal, in which he reasserted and expanded the claims asserted in his original Rule 32 petition. On May

11, 2005, the State filed an answer ***1203** and a motion to dismiss certain claims in McWhorter's amended petition, and McWhorter responded. A postconviction evidentiary hearing was held on September 27, 2005, and Judge Evans subsequently issued an order, dated October 19, 2006, and filed on November 1, 2006, summarily dismissing several of the claims in McWhorter's amended petition on the grounds that the claims were insufficiently pleaded, were meritless on their face, or were procedurally barred.

McWhorter and the State also filed several motions for discovery that were not ruled on before Judge Evans retired in 2007. After Judge Evans retired, Judge Liles C. Burke, who was then a Marshall County district court judge, was appointed as a special circuit court judge, and he considered and ruled on the discovery motions. Judge Burke conducted a postconviction evidentiary hearing on August 26–28, 2009, on the remaining claims in McWhorter's petition that had not been summarily dismissed.

Following the postconviction hearing, McWhorter filed a brief for the circuit court's consideration. On March 29, 2010, the circuit court denied McWhorter's postconviction petition in a lengthy, 77–page written order. McWhorter subsequently filed an objection to the circuit court's order, which the circuit court denied. This appeal followed.

Background

This Court's decision on direct appeal provides a detailed account of the facts of McWhorter's crime as originally set out by the circuit court in its sentencing order. *See McWhorter I,* 781 So.2d at 265–66. Thus, we will not repeat those facts, many of which are not relevant to the issues now before this Court. In addition to the facts we state here, where further facts are necessary and relevant to the resolution of the postconviction claim presented, they will be set out in the corresponding section of this opinion. This Court has taken judicial notice of all of its records relating to McWhorter's previous proceeding. *See Nettles v. State,* 731 So.2d 626, 629 (Ala.Crim.App.1998); *Hull v. State,* 607 So.2d 369, 371 n. 1 (Ala.Crim.App.1992).

On appeal from the denial of his postconviction claims, McWhorter raises claims of juror misconduct during jury selection and deliberation; ineffective assistance of penalty-phase counsel in failing to object to the sentencing order and in failing to further investigate and present additional mitigating evidence; improper exclusion of evidence at the postconviction hearing on the grounds that it was hearsay or was not set forth in the amended Rule 32 petition; a *Brady* [3] violation for the State's alleged failure to disclose mitigation evidence; and ineffective assistance of trial counsel in failing to object to McWhorter's being transported in and out of the courtroom in handcuffs in view of the jury. McWhorter originally presented 12 claims in his amended Rule 32 petition. The circuit court summarily dismissed claims I–IV, V(B), V(C), VI–VIII, X, and XI. The circuit court conducted an evidentiary hearing on claims V(A) (juror misconduct) and claims IX(A) and XII (ineffective assistance of penalty-phase counsel) before denying those claims.

At the penalty-phase proceeding, McWhorter's attorneys' presented evidence in mitigation that McWhorter had had a difficult childhood and was a "good kid" who became involved with the wrong crowd. Vonnie Salee, who had worked with McWhorter at the Food World grocery store, testified that McWhorter was one of the better bag boys and was a hard ***1204** worker. Van Reid, who had employed McWhorter as a busboy at his restaurant, described McWhorter as a good kid and a dependable worker. Elsie Garrison, McWhorter's paternal aunt, testified that McWhorter was 2 when his parents divorced and that he lived with her when he was 16 years old because his mother believed he was using drugs, which belief Garrison stated proved to be false. Garrison described her nephew as a very bright, intelligent, compassionate young man who had had a difficult childhood. Carolyn Rowland, McWhorter's mother, stated that she divorced McWhorter's father, remarried shortly thereafter, and moved to Tennessee. According to Rowland, because McWhorter was so young when she divorced his father and moved to Tennessee that he believed that his stepfather, David Rowland, was his father. She stated that they moved back to Marshall County when McWhorter was five years old and he was told sometime shortly thereafter that his father was Tommy McWhorter. According to Rowland, as McWhorter matured in age, his biological father instructed him that he did not have to listen to David Rowland, his stepfather. Rowland described McWhorter as a good, respectful kid until he became involved with the wrong crowd when he was around 16 years old.

In its sentencing order, the trial court found one aggravating circumstance—that the capital offense was committed while McWhorter was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit a robbery. The trial court found two statutory mitigating

circumstances: (1) that McWhorter had no significant history of prior criminal activity, and (2) McWhorter's age—he was only 18 years old at the time of the offense. As to nonstatutory mitigating circumstances, the trial court found that McWhorter had had "a difficult childhood following the divorce of his parents, a good reputation, and a substantially good record for a person his age." *McWhorter I,* 781 So.2d at 330. After also considering the jury's advisory verdict of death, the trial judge concluded that the one statutory aggravating circumstance outweighed the statutory and nonstatutory mitigating circumstances and sentenced McWhorter to death.

Specifically, this Court, on direct appeal, stated as follows in considering the constitutionally of the trial court's sentencing order as to the aggravating circumstance and the mitigating circumstances:

> "In the present case, the trial court entered a sentencing order specifically setting out the statutory mitigating circumstances and stated that it had thoroughly and conscientiously considered all statutory and nonstatutory mitigating circumstances that reasonably pertained to the case, particularly the evidence presented by the appellant at trial, as well as the evidence of mitigating circumstances presented by the appellant at the sentencing phase. The trial court found that the appellant's age—he was 18 years old at the time of the offense—constituted a mitigating circumstance, but that the statutory mitigating circumstance concerning the appellant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of law at the time of the offense did not exist. The trial court further found, as nonstatutory mitigating circumstances, that the appellant had 'a far less than perfect childhood following the divorce of his parents, a good reputation with at least some individuals and a substantially good work record for a person his age.' The sentencing order further states that the trial court carefully weighed the one existing statutory aggravating circumstance, ***1205** i.e., that the capital offense was committed while the appellant was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit a robbery, against the statutory and nonstatutory mitigating circumstances. The trial court also carefully considered the jury's advisory recommendation of death, and found that the aggravating circumstance outweighed the mitigating circumstances. There is no indication in the record that the trial court abused its discretion in arriving at this determination and, because of the lack of evidence presented by the appellant concerning his possible intoxication, the trial court's finding that that mitigating circumstance did not exist was not improper."

McWhorter I, 781 So.2d at 310.

Postconviction Evidentiary Hearing

As to the juror-misconduct claims, McWhorter presented at the postconviction evidentiary hearing the testimony of Jurors L.B. and A.S., who both served on McWhorter's jury.[4] McWhorter claims that Juror L.B. committed juror misconduct because she did not disclose the story of her father's death when defense counsel asked the venire on a juror questionnaire and during voir dire if anyone had a family member who had been the victim of a crime. He asserts that the misconduct denied him the ability to use his peremptory strikes effectively and to make any challenges for cause.

Regarding the ineffective-assistance-of-counsel claims, McWhorter presented the testimony of Thomas E. Mitchell and James R. Berry, McWhorter's trial attorneys. Mitchell testified that he was appointed as lead counsel to represent McWhorter. He stated that, at the time of his appointment, he had been practicing law for 11 years and had handled approximately 10 murder trials. James Berry, who was appointed to serve as cocounsel, testified that, at the time of his appointment, he had been practicing law for 4 years and had handled approximately 10 jury trials, one being a capital-murder case in which the defendant received a sentence of life imprisonment without the possibility of parole.

As to the jury-selection process, Mitchell and Berry requested a juror questionnaire and an individual voir dire of the prospective jurors. Mitchell stated that the circuit court judge allowed the juror questionnaire and individual voir dire on a limited basis. As to question 21 on the juror questionnaire, which asked, "Have you or any member of your family or anyone you know ever been the victim of a crime?" he recalled following up with any prospective jurors who answered that question affirmatively.[5] He stated that he challenged some of the prospective jurors for cause after they were individually questioned concerning their response to question 21. Berry stated that he did not disagree with any of Mitchell's challenges.

Regarding penalty-phase preparation, Mitchell and Berry testified that they interviewed McWhorter and his mother Carolyn Rowland, his aunt Elsie Garrison, and his half sister Melissa Rowland.[6] According to Mitchell, they interviewed the three together so that they could all "[put] [their] heads together and play off of each other." (R. 164.) During the interview, ***1206** Mitchell testified that he completed a document entitled "Client Background Information." It included questions and answers on topics such as McWhorter's early childhood development; his environment, such as living conditions, medical issues, and relationship information; his education history and medical and mental-health history; and his substance-abuse history, criminal history, and family history. Mitchell testified that "[w]e didn't interview anybody except those witnesses that either Mr. McWhorter or his mother or his aunt or his sister recommended to us as people that they believed that could and would offer testimony favorable to him." (R. 153.) Mitchell and Berry stated that McWhorter's family informed them that most of McWhorter's friends were involved in gang activity or were also charged with murder and would not provide helpful mitigation testimony. None of McWhorter's family indicated to Mitchell that the "divorce was a big thing in Mr. McWhorter's life." (R. 182.) Both Mitchell and Berry testified that they believed that testimony about his father's criminal history or his family's alcohol abuse and physical and emotional abuse would not have been helpful in mitigation.

Mitchell and Berry stated that they decided not to hire an investigator for the penalty-phase preparation because they could formulate a strategy for the penalty phase with McWhorter's and his family's assistance, without an investigator. Mitchell and Berry testified, however, that they hired Dr. Douglas Robbins, a [neuropsychologist,] to evaluate McWhorter for any mental disease, mental disorder, or any evidence of psychopathology. According to Mitchell, Dr. Robbins's evaluation provided no useful mitigation evidence such as evidence of diminished capacity or of susceptibility to influence from others. Mitchell and Berry also stated there was no indication of brain damage resulting from McWhorter's alleged alcohol abuse, drug use, or ingesting or "huffing" freon or gasoline.[7] Both testified that McWhorter indicated that he never suffered brain damage or any brain injury that would result in mental impairment. Mitchell stated that he did not believe that alcoholism or drug abuse by McWhorter or his family members would have been helpful in mitigation because there were no resulting consequences from any use or abuse. (R. 205.)

Mitchell and Berry stated that they obtained hospital records from an incident in which McWhorter had attempted suicide. Mitchell testified that, although they were aware that the Department of Human Resources ("DHR") had once investigated an allegation of physical abuse involving McWhorter, they did not request those records because they had discussed the allegation with McWhorter's mother and aunt, both of whom discredited it. Additionally, Mitchell stated that they had documentation of McWhorter's IQ scores, which indicated he had an IQ of 88 at the time of testing.

According to McWhorter's trial attorneys' testimony, they decided that because McWhorter was a clean-cut, handsome young man, they would present a "good boy, wrong crowd" strategy to show during the penalty phase that McWhorter did not deserve the death penalty. Mitchell testified that they presented the testimony of four witnesses during the penalty phase: Rowland (McWhorter's mother), Garrison (McWhorter's aunt), Reid (the owner of a restaurant where McWhorter had been employed), and Salee (a cashier at a grocery store where McWhorter had been employed). Counsel selected Rowland and ***1207** Garrison because they knew McWhorter well and, counsel said, their pain over McWhorter's trial was "obvious." Counsel hoped their testimony would evoke sympathy from the jury. Both testified that McWhorter was a "good kid" who had fallen in with the wrong crowd, particularly the codefendants, who had already pleaded guilty. Mitchell stated that Reid and Salee were selected to testify because they knew McWhorter to be a good worker. Mitchell indicated that Salee was also chosen because she was described as "very likable."

At the postconviction evidentiary hearing, McWhorter also presented the testimony of several lay witness to testify about his background and childhood, including Garrison, McWhorter's aunt; Tiffany Long, McWhorter's high-school girlfriend; David Rowland, McWhorter's stepfather; Larry Evans, McWhorter's uncle; Michael Evans, McWhorter's cousin; Frank Baker, McWhorter's middle-school basketball coach; Kenneth Burns, McWhorter's middle-school science teacher; and Amy Battle and Abraham Barnes, McWhorter's high-school friends. Garrison described McWhorter's development and childhood and explained that McWhorter was shuffled between her house and Carolyn and David Rowland's house around the age of 8 and again at the age of 16. She explained that Tommy McWhorter, her brother, and McWhorter's biological father, abandoned McWhorter at an early age, never really acknowledged his son, and was a criminal and an alcoholic. Michael Evans

and Larry Evans indicated that McWhorter was exposed to violence during his adolescent years when he spent time during the weekends at his maternal grandparents' house. They explained that many members of McWhorter's mother's family were alcoholics and addicts. They stated that McWhorter's maternal grandfather, a known alcoholic, committed a homicide and regularly physically abused his wife and children. They also testified that they, along with McWhorter, sniffed gasoline and freon on occasion from the time McWhorter was 8 years old until he reached the age of 14.

David Rowland also testified that he caught McWhorter ingesting gasoline one time when McWhorter was about 14 years old. He stated that McWhorter became "unruly" when he was around 10 years old. (R. 363.) David Rowland testified that, when McWhorter was around 16, he stole Rowland's truck on one occasion. He stated that McWhorter's mother and he did not like McWhorter spending time with Marcus Carter, Daniel Minor, and Lee Williams, who were McWhorter's codefendants, during his senior year of high school just before the commission of the crime.

Abraham Barnes, Tiffany Long, and Amy Battle testified that McWhorter's emotional state declined shortly before the crime was committed. Battle testified that McWhorter was a kind and loyal friend. Barnes testified that McWhorter and he used drugs of all types beginning at around the age of 16. Barnes stated that McWhorter and he often played "roulette" with their pistols while they were drinking. [8] Long testified that she dated McWhorter for several months before he was arrested in February 1993. She stated that every time they were together they consumed alcoholic beverages. Long testified that she broke up with McWhorter shortly before the crime. She stated that McWhorter was extremely distraught over their break up and tried to reconcile with her several times in the weeks before the ***1208** crime. Long testified that McWhorter had learned in the fall of 1992 that his biological father had terminal cancer. McWhorter's middle-school teachers testified that he was a good kid and an average student who worked hard.

Dr. Ralph Tarter, a clinical psychologist and Janet Vogelsang, a clinical social worker, testified about how they could have served as expert witnesses to explain to the jury the significance of McWhorter's family and medical history on his behavior. Vogelsang testified that she has served as a mitigation specialist in numerous capital cases. Dr. Tarter testified that he believed McWhorter was affected by his dysfunctional family and history of substance abuse. The State presented the testimony of Dr. Douglas Robbins, a clinical [neuropsychologist,] who examined McWhorter and prepared a report.

Standard of Review

McWhorter initiated this postconviction proceeding. According to Rule 32.3, Ala. R.Crim. P., McWhorter has the sole burden of pleading and proof "by a *preponderance of the evidence*." Rule 32.3, Ala. R.Crim. P. (emphasis added). "Preponderance of the evidence" is defined as

> "[t]he greater weight of the evidence, not necessarily established by the greater number of witnesses testifying to a fact but by evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other."

Black's Law Dictionary 1220 (8th ed.2004). It is important, however, to distinguish between McWhorter's burden of *pleading* and his burden of *proving*.

> "[A]t the pleading stage of Rule 32 proceedings, a Rule 32 petitioner does not have the burden of proving his claims by a preponderance of the evidence. Rather, at the pleading stage, a petitioner must provide only 'a clear and specific statement of the grounds upon which relief is sought.' Rule 32.6(b), Ala. R.Crim. P."

Ford v. State, 831 So.2d 641, 644 (Ala.Crim.App.2001).

The burden of pleading, however, is a heavy one. *Hyde v. State,* 950 So.2d 344, 356 (Ala.Crim.App.2006). Rule 32.6(b), Ala. R.Crim. P., states that "[a] bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." In *Boyd v. State,* 913 So.2d 1113 (Ala.Crim.App.2003), we explained:

" '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.*"

913 So.2d at 1125. This Court has further explained:

> "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 ***1209** 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)."

Hyde, 950 So.2d at 356. "The pleading requirements of Rule 32 apply equally to capital cases in which the death penalty has been imposed." *Taylor v. State,* [Ms. CR–05–0066, October 1, 2010] —— So.3d ——, —— (Ala.Crim.App.2010).

If a postconviction petitioner has not met his burden of pleading facts that, if true, entitle him to relief, then Rule 32.7(d), Ala. R.Crim. P., provides for the summary disposition of a postconviction claim:

> "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 exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing."

Regarding summary dismissal, this Court has stated:

> "[A] circuit court may, in some circumstances, summarily dismiss a postconviction petition based on the merits of the claims raised therein. Rule 32.7(d), Ala. R.Crim. P., provides:
>
> " '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 exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition. Leave to amend shall be freely granted. Otherwise, the court shall direct that the proceedings continue and set a date for hearing.'
>
> " ' "Where a simple reading of the petition for post-conviction relief shows that, assuming every allegation of the petition to be true, it is obviously *without merit* or is precluded, the circuit court [may] summarily dismiss that petition." ' *Bishop v. State,* 608 So.2d 345, 347–48 (Ala.1992) (emphasis added) (quoting *Bishop v. State,* 592 So.2d 664, 667 (Ala.Crim.App.1991) (Bowen, J., dissenting)). See also *Hodges v. State,* [Ms. CR–04–1226, March 23, 2007] —— So.3d ——, —— (Ala.Crim.App.2007) (a postconviction claim is 'due to be summarily dismissed [when] it is meritless on its face')."

Bryant v. State, [Ms. CR–08–0405, February 4, 2011] —— So.3d ——, —— (Ala.Crim.App.2011). *See also Moore v. State,* 502 So.2d 819, 820 (Ala.1986). " 'In addition, "[t]he procedural bars of Rule 32[.2, Ala. R.Crim. P.] apply with equal force to all cases, including those in which the death penalty has been imposed." ' " *Burgess v. State,* 962 So.2d 272, 277 (Ala.Crim.App.2005) (quoting *Brownlee v. State,*

666 So.2d 91, 93 (Ala.Crim.App.1995), quoting in turn *State v. Tarver,* 629 So.2d 14, 19 (Ala.Crim.App.1993)).

"Once a petitioner, [however,] has met his burden of pleading so as to avoid summary disposition pursuant to Rule 32.7(d), Ala. R.Crim. P., he is then entitled to an opportunity to present evidence in order to satisfy his burden of proof" pursuant to Rule 32.9, Ala. R.Crim. P. *Ford,* 831 So.2d at 644. Furthermore, this Court, in regard to findings made by the circuit court at an evidentiary hearing in postconviction proceedings, has explained:

> ***1210** " 'The resolution of ... factual issue[s] required the trial judge to weigh the credibility of the witnesses. His determination is entitled to great weight on appeal.... "When there is conflicting testimony as to a factual matter ..., the question of the credibility of the witnesses is within the sound discretion of the trier of fact. His factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence." '

"*Calhoun v. State,* 460 So.2d 268, 269–70 (Ala.Crim.App.1984) (quoting *State v. Klar,* 400 So.2d 610, 613 (La.1981))."

Brooks v. State, 929 So.2d 491, 495–96 (Ala.Crim.App.2005).

" 'When reviewing a circuit court's denial of a Rule 32 petition, this Court applies an abuse-of-discretion standard.' " *Shouldis v. State,* 38 So.3d 753, 761 (Ala.Crim.App.2008) (quoting *Whitman v. State,* 903 So.2d 152, 154 (Ala.Crim.App.2004), citing in turn *McGahee v. State,* 885 So.2d 191 (Ala.Crim.App.2003)). "[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, [however,] that court's review in a Rule 32 proceeding is *de novo.*" *Ex parte White,* 792 So.2d 1097, 1098 (Ala.2001) (citing *State v. Hill,* 690 So.2d 1201, 1203 (Ala.1996)). "Moreover, 'when reviewing a circuit court's rulings made in a postconviction petition, we may affirm a ruling if it is correct for any reason.' " *Lee v. State,* 44 So.3d 1145, 1149 (Ala.Crim.App.2009) (quoting *Bush v. State,* 92 So.3d 121, 134 (Ala.Crim.App.2009)). Lastly, in a death-penalty case, "[o]n direct appeal we reviewed the record for plain error; however, the plain-error standard of review does not apply to a Rule 32 proceeding attacking a death sentence." *Ferguson v. State,* 13 So.3d 418, 424 (Ala.Crim.App.2008).

Guided by these principles, we review McWhorter's claims in turn.

I.

McWhorter argues his rights to a fair trial by an impartial jury, to the free exercise of peremptory challenges, and to due process were violated by the alleged misconduct of Juror L.B. He claims that the circuit court erred in denying and dismissing his juror-misconduct claims. (Claims V(A) and V(B) in McWhorter's amended Rule 32 petition.) As to Claim V(A), McWhorter asserts that he proved at the postconviction evidentiary hearing that Juror L.B. failed to disclose material information about herself during jury selection and that her failure to so disclose prejudiced him. (McWhorter's brief, p. 25.) Regarding Claim V(B), he alleges that it was sufficiently pleaded and meritorious on its face and thus entitled him to a postconviction evidentiary hearing. (McWhorter's brief, p. 38.)

This Court has articulated the following in reviewing juror-misconduct claims:

> " 'In [*Ex parte*] *Dobyne,* [805 So.2d 763 (Ala.2001),] this Court explained the standard for granting a new trial based on a juror's failure to answer questions on voir dire truthfully:
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> > " ' "The proper standard for determining whether juror misconduct warrants a new trial, as set out by this Court's precedent, is whether the misconduct might have prejudiced, not whether it actually did prejudice, the defendant. See *Ex parte Stewart,* 659 So.2d 122 (Ala.1993).... The 'might-have-been-prejudiced' standard, of course, casts a 'lighter' burden on the defendant than the actual-prejudice standard. *See Tomlin v. State, supra,* ***1211** 695 So.2d [157] 170 [(Ala.Crim.App.1996)]....
> >
> > " ' " 'It is true that the parties in a case are entitled to true and honest answers to their questions on voir dire, so that they may exercise their peremptory strikes wisely.... However, not every failure to respond properly to questions propounded during voir dire 'automatically entitles [the defendant] to a new trial or reversal of the cause on appeal.' *Freeman v. Hall,* 286 Ala. 161, 166, 238 So.2d 330, 335 (1970)....

As stated previously, the proper standard to apply in determining whether a party is entitled to a new trial in this circumstance is 'whether the defendant might have been prejudiced by a veniremember's failure to make a proper response.' *Ex parte Stewart,* 659 So.2d at 124. Further, the determination of whether a party might have been prejudiced, i.e., whether there was probable prejudice, is a matter within the trial court's discretion....

" ' " 'The determination of whether the complaining party was prejudiced by a juror's failure to answer voir dire questions is a matter within the discretion of the trial court and will not be reversed unless the court has abused its discretion. Some of the factors that this Court has approved for using to determine whether there was probable prejudice include: "temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about." '

" ' " *Union Mortgage Co. v. Barlow,* 595 So.2d [1335] at 1342–43 [(Ala.1992)]....

" ' " 'The form of prejudice that would entitle a party to relief for a juror's nondisclosure or falsification in voir dire would be its effect, if any, to cause the party to forgo challenging the juror for cause or exercising a peremptory challenge to strike the juror. *Ex parte Ledbetter,* 404 So.2d 731 (Ala.1981).... If the party establishes that the juror's disclosure of the truth would have caused the party either to (successfully) challenge the juror for cause or to exercise a peremptory challenge to strike the juror, then the party has made a prima facie showing of prejudice. *Id.* Such prejudice can be established by the obvious tendency of the true facts to bias the juror, as in *Ledbetter, supra,* or by direct testimony of trial counsel that the true facts would have prompted a challenge against the juror, as in *State v. Freeman,* 605 So.2d 1258 (Ala.Crim.App.1992)."

" ' *Dobyne,* 805 So.2d at 771–73 (footnote omitted; emphasis added).'

" *Dixon* [*v. State,* 55 So.3d 1257, 1260–61 (Ala.2010)].

" 'While we agree ... that a juror's silence during voir dire could be a basis for granting a new trial, we must stress that the initial decision on this issue is within the trial court's sound discretion. *Hayes v. Boykin,* 271 Ala. 588, 126 So.2d 91 (1960). Further, the trial court's decision on this matter will not be disturbed on appeal unless the appellant establishes that the decision was arbitrarily entered into or was clearly erroneous. *Id.*'

***1212** "*Carter v. Henderson,* 598 So.2d 1350, 1354 (Ala.1992). '[N]ot every failure of a venireman to respond correctly to a voir dire question will entitle the losing party to a new trial.' *Wallace v. Campbell,* 475 So.2d 521, 522 (Ala.1985).

" 'It is not "*any* failure of *any* prospective juror to respond properly to *any* question *regardless of the excuse or circumstances* [that] automatically entitles a party to new trial or reversal of the cause on appeal." *Freeman v. Hall,* 286 Ala. 161, 166, 238 So.2d 330 (1970) (emphasis in original).'

"*Washington v. State,* 539 So.2d 1089, 1095 (Ala.Crim.App.1988). '[T]he facts in each case must be considered individually and much will remain in the discretion of the trial judge.' *Parish v. State,* 480 So.2d 29, 32 (Ala.Crim.App.1985)."

Albarran v. State, 96 So.3d 131, 195 (Ala.Crim.App.2011).

In light of the foregoing, we address McWhorter's allegations of juror misconduct separately.

A.

McWhorter first argues that the circuit court abused its discretion in denying his claim that Juror L.B. committed juror misconduct because she did not disclose the story of her father's death when defense counsel asked the members of the venire on a juror questionnaire and during voir dire if anyone had a family member who had been the victim of a crime. He claims that the misconduct denied him the ability to use his peremptory strikes effectively and to make any challenges for cause. The State responds that McWhorter failed to establish

that Juror L.B.'s father had been the victim of a crime or that L.B. believed that her father was a victim of a crime.

McWhorter pleaded in his amended Rule 32 petition that Juror L.B.'s father had been the victim of a crime. In his amended petition, McWhorter specifically alleged:

> "61. During voir dire, several jurors failed to answer accurately defense counsel's direct and unambiguous questions, both oral and written. This failure deprived Mr. McWhorter of the effective use of his right to strike a petit jury from a panel of fair-minded, impartial prospective jurors; his right to have questions answered truthfully by prospective jurors so that his counsel could exercise peremptory strikes and challenge jurors for cause; and his rights to due process, a fair trial, and a reliable sentencing, all protected by the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law.
>
> "62. A defendant is entitled to receive truthful and accurate answers from jurors during voir dire, and when a juror fails to respond accurately during voir dire, reversible error occurs. The Sixth Amendment guarantees a criminal defendant a fair trial by a panel of impartial jurors. *Irvin v. Dowd,* 366 U.S. 717, 722 (1961). This right is violated and a new trial is required when a juror deliberately deceives the court about a matter which, if fully explored, would constitute a valid basis for a challenge for cause against that juror. *McDonough Power Equipment v. Greenwood,* 464 U.S. 548, 556 (1984). *See also Clark v. State,* 551 So.2d 1091 (Ala.1989) (where juror failed to disclose that he had served on a previous case, reversible error occurred); *Ex parte Ledbetter,* 404 So.2d 731 (Ala.1981); *Tomlin v. State,* 695 So.2d 157 (Ala.Crim.App.1996) (new trial required when juror failed to disclose on voir dire that he had been a ***1213** victim of crime); *Abercrombie v. State,* 574 So.2d 879 (Ala.Crim.App.1990) (where juror did not disclose that she had an interest in the conviction of the defendant, probable prejudice was shown, and the conviction had to be reversed); *State v. Gilbert,* 568 So.2d 876 (Ala.Crim.App.1990) (where juror did not disclose that she knew someone who had been sexually abused, and evidence was presented at a Rule 20 hearing [the precursor to Rule 32] that the juror did, in fact, know someone who had been sexually abused, the conviction and sentence had to be reversed).
>
> "63. One particular juror, [hereafter L.B.], failed to disclose that her father was murdered when she was twelve. She withheld this information in spite of defense counsel['s] questions on the juror questionnaire and on individual voir dire designed specifically to elicit such information. Question 21 of the jury questionnaire asked, 'Have you, any member of your family or anyone you know ever been *the victim* of a crime?' (Supp. R. 55) (emphasis added) The questionnaire went on to ask, 'If yes, who and what relationship?,' 'What was the crime?,' 'Was anyone arrested in connection with the crime?,' and 'Was anyone convicted of the crime?' (*Id.*) L.B. answered the first question 'yes,' but she went on to state that the supposed 'victim' was her 'brother-in-law,' the crime was 'drugs,' and that someone had been arrested and convicted. (*Id.*) Question 22 of the questionnaire asked, 'Have you, any member of your family or anyone you know ever been *accused* of a crime' (*Id.*) Juror L.B. answered that her 'brother-in-law' had been accused of 'drugs' eighteen months ago, was prosecuted in Marshall County, and 'was on probation.' (*Id.*) (emphasis added) In essence, Juror L.B. gave identical answers to the 'crime victim' question and the 'accused of a crime' question. The additional information provided by Juror L.B. in her answer to Question 22 would lead a reasonable reader to infer that Juror L.B.'s brother-in-law was not, in fact, a crime victim, but a person who had been accused of, and prosecuted for, a drug-related crime.
>
> "64. Juror L.B. wrote in response to Question 20 that she thought her father-in-law might have appeared as a witness in the 'Kathy Padgitt [sic]' case. (*Id.*) Kathy Padgett was the victim in a highly publicized capital murder trial that occurred in Marshall County only two years before Mr. McWhorter's trial. Juror L.B.'s answer to Question 20 suggested that she knew Kathy Padgett, a fact that she failed to disclose in Question 21.
>
> "65. The record reflects that defense counsel had serious concerns about Juror L.B.'s contradictory and confusing answers, and they tried hard to clarify whether Juror L.B. had any close connection to a person who had been a victim of a crime. Defense counsel specifically requested, and the trial judge granted, individual follow-up questioning of Juror L.B. (R. 414) First, defense counsel asked questions to confirm, and did confirm, that Juror L.B.'s brother-in-law had been convicted of a crime (and was not a crime victim), and that the conviction would not affect her ability to be a fair and impartial juror in this case. (R. 415) Second,

defense counsel inquired as to the extent of Juror L.B.'s relationship with Kathy Padgett. (R. 417) In answer to defense counsel's question, Juror L.B. stated, 'I had just moved up here. And I—did not know her that well. I knew her just by being in the church and that's—that's all I knew about her.' (*Id.*) Defense counsel ***1214** did not stop his questioning there, but went on to confirm that Juror L.B.'s connection to Kathy Padgett was 'strictly some slight knowledge' that would not 'make it difficult at all' for her to be impartial if she were chosen as a juror. (R. 417–18)

"66. Defense counsel had no way to obtain through independent means the information that Juror L.B.'s father was a murder victim. Had Mr. McWhorter known this fact, he would have challenged Juror L.B., for cause, as he did prospective juror V.W., who was excused for cause because his nephew was killed during an armed robbery. (R. 885, 892) Defense counsel also challenged and removed six other jurors who had connections to victims of crime. (R. 743, 744, 752, 881–82, 888–89, 894, 906–07; Supp. R. 106, 115, 118, 184, 205, 208) Because of Juror L.B.'s experience as the daughter of a murder victim, Mr. McWhorter was entitled to strike her for cause. And if she were not excused for cause, Mr. McWhorter would have used a peremptory strike to remove her, had he been accurately advised of her history.

"67. Juror L.B.'s failure to disclose that her father was murdered denied Mr. McWhorter his right to free exercise of his peremptory challenges. In addition, Juror L.B.'s presence on the jury deprived Mr. McWhorter of his rights to due process, adequate voir dire, and a fair and impartial jury under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law."

(C. 494–97.)

The circuit court conducted a postconviction evidentiary hearing and allowed McWhorter to present evidence of this claim. Juror L.B. testified that she did not share the details of her father's death on the juror questionnaire or during voir dire examination because she did not really know how her father died. A friend, who was a law student, had investigated Juror L.B.'s father's death before her jury service and had discovered that her father had died in an accidental drowning. Juror L.B. explained that because no one was ever charged with a crime related to her father's death, much less convicted, that she did not consider her father "the victim of a crime" and, therefore, did not tell the story of her father's death when asked on the juror questionnaire and during voir dire whether a family member had been "the victim of a crime." At the evidentiary hearing, Juror L.B. testified, in pertinent part, as follows:

"[POSTCONVICTION COUNSEL:] [Juror L.B.], once again, could you tell us what happened to your father, and could you indicate, you know, what, if anything, is based on things you saw and what is based on what you heard?

"[JUROR L.B.:] Okay. My mother and my two brothers and I were woke up one morning about 2:00 o'clock in the morning.

"This is still hard for me.

"[POSTCONVICTION COUNSEL:] I understand.

"[JUROR L.B.:] And we was told that my father and two other men were at a rock mine pond. And my mother went and got my uncle up, which was my daddy's brother. And he took us up there. And they would not let us go down there.

"And about 11:00 o'clock that morning, a police officer came to our house and told us that they were fixing to blow the dam, and that they believed that my father was—had run. There was another man that was killed there that day. He was beat to death.

***1215** "And so they told us that they were going to send a diver down one more time and if they didn't find anything then they were going to blow the dam. When they sent a diver down, they found my father. And he was dead, naturally.

"We were told that there were bruises around his neck, but when the autopsy came back it was said that he was drowned. The other man was beaten to death. And there was a trial. The other man that was there, he went and got the—his family and then went to the police station and got them and brought them back. Or they went out to the scene is all I know.

"I had just always thought that my father was killed because the other man was killed, and he was good friends with him, so I thought that he had been killed. And being a kid you always think that. You don't ever know. And so that's why I always thought my father was killed.

"[POSTCONVICTION COUNSEL:] Now, you said that someone told you that your father had bruises on his neck. Who told you that?

"[JUROR L.B.:] My uncles. My daddy's brothers.

"[POSTCONVICTION COUNSEL:] Now, at the time, you were about 12 years old, right?

"[JUROR L.B.:] Yes.

"....

"[POSTCONVICTION COUNSEL:] Your memories of what happened to your father were and still are traumatic, something that's hard for you to talk about, isn't it?

"[JUROR L.B.:] Yes.

"[POSTCONVICTION COUNSEL:] And isn't it true that at some point along the way you have got emotional closure when someone told you that he worked on the case, and even though he couldn't get enough evidence to prove your father was murdered, that having worked on the case he did believe it?

"[JUROR L.B.:] Believe that my father was murdered or that he drowned?

"[POSTCONVICTION COUNSEL:] That your father was murdered?

"[JUROR L.B.:] No. You got it backwards.

"[POSTCONVICTION COUNSEL:] Okay. Well, you were—at the time that you—in 1994, at the time that you served on the jury in Casey McWhorter's case, did you believe that your father had been murdered?

"[JUROR L.B.:] No.

"[POSTCONVICTION COUNSEL:] You did not?

"[JUROR L.B.:] No.

"[POSTCONVICTION COUNSEL:] What was it, if anything, that happened between the time you were at trial, when you say you did [sic] believe he was murdered, and the time of Casey McWhorter's trial that led you to change your mind?

"[JUROR L.B.:] I dated a guy that was going to law school, and he looked into the case of my father, and he told me that my father had drowned; that the autopsy had showed that my father had drowned.

"[POSTCONVICTION COUNSEL:] Yes. And did he explain that because the autopsy showed that your father had drowned they were unable to prove that he had been murdered?

"[JUROR L.B.:] No.

"[POSTCONVICTION COUNSEL:] And isn't it true that the man we're talking about, the lawyer, said that because the autopsy couldn't prove the murder because it said drowned, that he ***1216** still believed, based on all the evidence he knew about, that it was a murder?

"[JUROR L.B.:] No."

(R. 46–48, 52–54.)

On cross-examination, Juror L.B. testified:

"[STATE:] And do you remember that Question Number 21 he showed you, the question that says, '[W]ere you or anybody in your family a victim of a crime'?

"[JUROR L.B.:] Uh-huh. Right.

"[STATE:] And you did not answer that your father was a victim of a crime, right?

"[JUROR L.B.:] Right. Did not.

"[STATE:] Is it fair to say that you did not answer that your father was a victim of a crime because no one, in fact, had been charged with a crime in the death of your father?

"[JUROR L.B.:] That's right.

"[STATE:] And no one had ever been convicted in the death of your father, correct?

"[JUROR L.B.:] That's right.

"[STATE:] And you had personal knowledge that the autopsy officially said that he drowned?

"[JUROR L.B.:] Right.

"[STATE:] And that there was no indication other than what you had just heard through family rumors that he actually had been murdered?

"[JUROR L.B.:] Yes.

"[STATE:] So far as you were concerned, you were being completely honest and truthful when you answered that question?

"[JUROR L.B.:] Yes, I was.

"....

"[STATE:] Just to be clear, [Juror L.B.], you did not deliberately hide the story of your father's death when you were answering the jury questionnaire?

"[JUROR L.B.:] No.

"[STATE:] The way the question was worded on the jury questionnaire was, were you or any of your family members the victim of a crime, not just a victim?

"[JUROR L.B.:] Right, yes.

"[STATE:] And that there must have—without a criminal charge, without a criminal conviction, even, that you cannot have a family member who was a victim of a crime?

"[JUROR L.B.:] Yes."

(R. 116–17; 123–24.)

In addition, Juror L.B. testified to the following at the postconviction proceeding:

"[POSTCONVICTION COUNSEL:] Did you—but you believed, after hearing what everything that you heard about the incident, that your father had been killed, didn't you?

"[JUROR L.B.:] Yes.

"....

"[JUROR L.B.:] Okay. Is because I had always been told as a child that my father was killed by his family because they were the big bad boys, okay? And I'd always believed that. You know, because you don't think of your father as drowning. You just don't think of that. And I just always thought that my father was killed.

I knew the man, and I knew his family, and I just thought that if he killed one, he'd kill both.

"[POSTCONVICTION COUNSEL:] And is that what you thought in 1994 at the time that you served on the jury?

"[JUROR L.B.:] I still believed that the man had something to do with my father's death. Whether he directly killed him or not, I do not know. Only God knows that. But I think he had something indirectly to do with it, yes.

***1217** "[POSTCONVICTION COUNSEL:] You do. And was that a strong feeling on your part?

"[JUROR L.B.:] Yes.

"....

"[POSTCONVICTION COUNSEL:] [Juror L.B.], can you tell us what you said to your fellow jurors regarding the death of your father?

"[JUROR L.B.:] That the man that had killed my father—I thought that had killed my father and another man did not serve the full time that he was in there. I don't even know how many years that he gave him. I thought it was ten and he only served like three or four and that he should have served more.

"....

"[JUROR L.B.]: No. I didn't think he had killed my father. I think he had something to do with the death of my father. Whether or not he individually killed him, I do not know.

"[POSTCONVICTION COUNSEL:] Well, did you believe that he, together with someone else, played a part in the killing?

"[JUROR L.B.:] Well, when you say killing, the other man was killed. My father was drowned. Now, whether or not he was drowned on purpose, I do not know.

"[POSTCONVICTION COUNSEL:] Did you—

"[JUROR L.B.:] But I do know that he did play a part in the other death because he told him he did. He pled guilty to the other death.

"[POSTCONVICTION COUNSEL:] And did you believe at that time that there was that it's quite possible that your father had been intentionally drowned?

"[JUROR L.B.:] Yes. He could have been.

"[POSTCONVICTION COUNSEL:] And that was your belief at that time in 1994?

"[JUROR L.B.:] Well, that's been my belief all my life.

"[POSTCONVICTION COUNSEL:] So you believed it all your life and up through and including the trial?

"[JUROR L.B.:] Yeah."

(R. 51, 60, 112, 113.)

Additionally, Juror A.S., who was known as Juror A.K. at the time of trial, testified, and the following exchange occurred:

"[POSTCONVICTION COUNSEL:] During the deliberations on the sentencing phase was there something that [Juror L.B.] said about her father or other relative being murdered?

"[JUROR A.S.:] Yes.

"[POSTCONVICTION COUNSEL:] What did she say?

"....

"THE COURT: Let me help just a little bit. We really just want to know exactly what the juror told about her father.

"[JUROR A.S.]: [Juror L.B.] was standing, and she started telling a story about how years before—I'm not exactly sure how long before, but years before, her father had been murdered, and that, to my best recollection, he wasn't—I'm not sure if he went to jail or he didn't go to jail, but she now had to walk around in the same town where this man was that killed her father. And she was crying.

"[STATE]: Objection, Your Honor. It is going beyond the scope of your question at this point.

"THE COURT: It probably is, but I do think it's relevant for that purpose.

***1218** "[POSTCONVICTION COUNSEL:] And did she say anything else on this very same subject?

"[JUROR A.S.:] She had made a comment that, basically, you just don't know how it feels to have to walk around and be around this person that has done this.

"[POSTCONVICTION COUNSEL:] Referring to whom?

"[JUROR A.S.:] Referring to the person that had killed her father. And it just changed everything.

"[POSTCONVICTION COUNSEL:] Thank you very much. Nothing further.

"[STATE]: Move to strike the statement that it changed everything. That's speculation.

"[POSTCONVICTION COUNSEL]: I don't believe the witness was talking about changed the jury deliberations. I believe she was talking about [Juror L.B.] said it changed everything in her life.

"THE COURT: That was the way I took it.

"[STATE]: Okay.

"THE COURT: I will not consider it that it changed the jury's opinion of her.

"[POSTCONVICTION COUNSEL]: Okay. Nothing further."

(R. 465–67.)

After lengthy testimony at the hearing, the circuit court held, in a detailed order, that McWhorter failed to meet his burden to prove by a preponderance of the evidence at the hearing that Juror L.B. believed that her father was the victim of a crime and that she did not disclose that belief. *See* Rule 32.3, Ala. R.Crim. P. The circuit court, in its detailed order denying McWhorter's claim, referenced Juror L.B.'s testimony on both direct and cross-examination. Specifically, the circuit court found:

"She explained that she did not know how her father died. It was apparent from [Juror L.B.'s] testimony why she did not answer in the affirmative when asked whether she had a family member who had been the 'victim of a crime.' [Juror L.B.] testified that a friend, a law student, investigated the death and found an autopsy report that attributed her father's death to drowning, and she testified that, because no one ever was charged with a crime related to her father's death, much less convicted of one, that her father could not have been 'the victim of a crime.'

"....

"Because [Juror L.B.] knew that her father's autopsy report indicated that he died by drowning and because she knew that no one ever had been charged with any crime related to her father's death, she reasonably did not disclose the story of her father's death in response to the defense's question of whether she or a member of her family had been the 'victim of a crime.' Thus, [Juror L.B.] did not commit juror misconduct."

(C. 1130, 1136.)

The record on direct appeal reveals that Juror L.B. did not indicate on her juror questionnaire or during voir dire that her father was a victim of a crime. She, however, indicated at all times when she was questioned at trial that she could be fair and impartial. At the postconviction evidentiary hearing, postconviction counsel questioned Juror L.B. extensively about her father's death. Although at times Juror L.B. appeared to waver in her responses to postconviction counsel's questioning or seemed confused about his questioning, as we indicated above, we cannot say that Juror L.B. failed to respond truthfully to the question posed on the juror questionnaire and by McWhorter's trial counsel during voir dire examination, especially in ***1219** light of Juror L.B.'s testimony on cross-examination that established that she knew her father's death was the result of a drowning and that she did not believe he was a victim of a crime. Thus, based on these facts, this Court cannot conclude that the circuit court abused its discretion in denying McWhorter's claim because he failed to prove by a preponderance of the evidence that Juror L.B. was guilty of juror misconduct. *See* Rule 32.3, Ala. R.Crim. P. Furthermore, in regard to resolution of factual issues and the assessment of the credibility of witnesses, this Court has explained:

> " 'The resolution of ... factual issue[s] required the trial judge to weigh the credibility of the witnesses. His determination is entitled to great weight on appeal.... "When there is conflicting testimony as to a factual matter ..., the question of the credibility of the witnesses is within the sound discretion of the trier of fact. His factual determinations are entitled to great weight and will not be disturbed unless clearly contrary to the evidence." '
>
> "*Calhoun v. State,* 460 So.2d 268, 269–70 (Ala.Crim.App.1984) (quoting *State v. Klar,* 400 So.2d 610, 613 (La.1981))."

Brooks v. State, 929 So.2d 491, 495–96 (Ala.Crim.App.2005).

Therefore, because it is for the circuit court at the postconviction proceeding to resolve factual issues and to assess the credibility of the witnesses and because this Court gives the circuit court's determination in that assessment great weight on appeal, we conclude there is no indication that the circuit court abused its discretion in denying McWhorter relief on his claim related to Juror L.B.'s answers on her juror questionnaire and during voir dire examination. *See, e.g., Dunaway v. State,* [Ms. CR–06–0996, Dec. 18, 2009] —— So.3d ——, —— (Ala.Crim.App.2009) (granting no relief on capital-murder postconviction claims involving juror misconduct because the petitioner failed to meet his burden); *Hooks v. State,* 21 So.3d 772, 780–81 (Ala.Crim.App.2008) (same). [9]

Furthermore, the circuit court could have denied relief on this claim because McWhorter failed to establish prejudice. To prevail on a claim of juror misconduct, the petitioner must establish that he "might have been prejudiced" by the jurors' failure to respond truthfully to a question posed on voir dire. *See* *Ex parte Stewart,* 659 So.2d 122, 124 (Ala.1993).

> " 'We are mindful of the heavy responsibility placed on the trial court to maintain the statutory right which parties have to a full and truthful disclosure by jurors on voir dire. However, we must also be aware of inadvertent concealment and failure to ***1220** recollect on the part of prospective jurors.'
>
> "*Freeman v. Hall,* 286 Ala. 161, 167, 238 So.2d 330, 336 (1970)."

Albarran, 96 So.3d at 196.

Additionally, as this Court noted in *Smith v. State,* 838 So.2d 413, 468–69 (Ala.Crim.App.2002), regarding the interests a court must balance when determining whether a juror's failure to disclose material information during voir dire prejudiced a defendant:

> " '[T]he problem of jurors failing to disclose material information during voir dire is neither a recent development nor an unusual occurrence. In 1965 Dale Broeder published his seminal study on juror dishonesty during voir dire. The article included many case studies detailing why jurors fail to respond honestly during voir dire. For some jurors, the questions seemed too trivial to merit an honest response. Other jurors were simply too nervous to volunteer information during voir dire. For still others, the desire to serve outweighed the desire to tell the truth. One particular juror viewed selection as an honor and intended to use his jury experiences as a subject of barroom conversation. More recent research indicates that approximately twenty-five

> percent of jurors fail to reveal material information during voir dire.
>
> " 'Given the high frequency with which jurors fail to disclose material information, it should come as no surprise that a showing of juror dishonesty, made after the trial, does not necessarily lead to the granting of a new trial. As Professor David Crump has noted, courts must balance two strong and competing interests: fairness and finality. In the criminal context, fairness means the right to impartial jurors, the right to the intelligent use of peremptory strikes, and the right to be free from juror misconduct. Courts will consider some combination of these rights in deciding whether to grant a new trial.'
>
> "*When Jurors Lie: Differing Standards for New Trials,* 22 Am. J.Crim. L. 733, 734–35 (1995) (footnotes omitted)."

838 So.2d at 439.

Specifically, as to alleged prejudice, the circuit court found as follows:

> "Even if [Juror L.B.]'s failure to disclose the story of her father's death constitutes juror misconduct, McWhorter has failed to establish prejudice. This claim is denied, in the alternative, for that reason.
>
> "Under Alabama law, the standard for determining whether juror misconduct warrants a new trial is 'whether the misconduct might have prejudiced, not whether it actually did prejudice, the defendant.' *Ex parte Dobyne,* 805 So.2d 763, 771 (Ala.2001). '[T]he question whether the jury's decision *might* have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case.' *Ex parte Apicella,* 809 So.2d 865, 871 (Ala.2001) (emphasis in original).
>
> "In determining whether a criminal defendant might have been prejudiced by a veniremember's failure to respond appropriately to a question, the Supreme Court of Alabama and the Alabama Court of Criminal Appeals have looked at the following factors: 'temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about.' ***1221** *Dobyne,* 805 So.2d at 772; *Tomlin v. State,* 695 So.2d 157, 170 (Ala.Crim.App.1996).
>
> "[Juror L.B.] was unequivocal that her father's death did not affect her role as a juror in McWhorter's capital murder trial. The following testimony occurred during the State's cross-examination of [Juror L.B.]:
>
> > "ASSISTANT ATTORNEY GENERAL: [Juror L.B.], is it fair to say that when—that when you voted for guilty for Mr. McWhorter you based that on the evidence at trial?
> >
> > "[JUROR L.B.]: Yes.
> >
> > "ASSISTANT ATTORNEY GENERAL: And when you voted for death, you based that on the evidence presented during the guilt phase?
> >
> > "[JUROR L.B.]: Yes, sir, I did.
>
> "*This Court believes [Juror L.B.];* therefore. McWhorter cannot show that [Juror L.B.]'s decisions as a juror 'might have been affected' by her father's death.
>
> "Looking to the factors listed in *Dobyne,* [Juror L.B.]'s role as a juror likely was not affected by her father's death. First, as to 'temporal remoteness,' [Juror L.B.] was an 11–year–old child when her father died, but McWhorter's trial did not take place until she was an adult, approximately 30 years later. (E.H. 77, 118.) Second, as for 'the ambiguity of the question propounded,' the question itself was straightforward enough, but [Juror L.B.]'s lack of certainty over how her father died made the story of his death less likely to have affected her role as a juror. Third, as to [Juror L.B.]'s 'inadvertence or willfulness in falsifying or failing to answer,' she affirmed that her father was not 'at all in her mind' when she answered the questionnaire and that she 'did not have an ax to grind' or want to 'vindicate the death of her father through this trial.' (E.H. 116, 119.)
>
> "[Juror L.B.]'s testimony during the evidentiary hearing establishes not only that she did not commit juror misconduct by failing to respond appropriately to questions asked by defense counsel during voir dire but also that she based her decisions as a juror in this case solely on the facts presented, and not at all on her father's death. As such, this claim is denied."

(C. 1136–39; emphasis added.)

Here, Juror L.B. testified at the evidentiary hearing that she based her verdict on the testimony presented and on the trial court's instructions. More importantly, she said that the events surrounding her father's death had no bearing on her guilt-phase or penalty-phase verdict in McWhorter's case. We, like the circuit court, find no indication that McWhorter might have been prejudiced by Juror L.B.'s failure to respond that her father was a victim of a crime on the juror questionnaire or to a voir dire question. Accordingly, McWhorter is due no relief on this claim.

B.

Secondly, McWhorter argues that the circuit court erred in summarily dismissing claim V(B) of his amended petition in which he alleged that the jury considered "extraneous evidence" during deliberations. He asserts that the circuit court exceeded its discretion because, he says, his claim could not have been raised at trial or on appeal and was not procedurally barred. Thus, he says, the circuit court summarily dismissed his claim for the wrong reason pursuant to Rule 32.2(a)(3) and (5), Ala. R.Crim. P. Alternatively, he claims that Juror L.B.'s information about her fathers's death was "extraneous evidence" and that the circuit court erred in ***1222** denying claim V(B) by alternatively concluding that his claim failed to raise a material issue of fact or law pursuant to Rule 32.7(d), Ala. R.Crim. P. The State responds that claim V(B) of McWhorter's petition failed to state a material issue of fact or law because, it says, McWhorter "failed to plead admissible evidence or evidence that, if true, would establish that he suffered prejudice."

The circuit court, Judge Evans, originally summarily dismissed McWhorter's claim on alternate grounds because it could have been, but was not, raised at trial or on direct appeal and because it failed to raise a material issue of fact or law. *See* Rule 32.2(a)(3), (a)(5), and 32.7(d). Although Judge Burke reiterated Judge Evans's summary-dismissal grounds in his final order, he also found that Juror L.B.'s story of the circumstances surrounding her father's death was not "extraneous evidence" under Alabama law. In appears that, in essence, the circuit court dismissed the claim but also ruled on the merits, given the testimony it considered on McWhorter's claim V(A).

Specifically, Judge Burke's order found as follows:

> "Judge Evans's order of October 19, 2006, alternatively dismissed this claim because it failed to state a material issue of fact or law, in violation of Rule 32.7(d) of the Alabama Rules of Criminal Procedure. Judge Evans's order did not specify why this claim failed to meet the requirements of Rule 32.7(d). However, this Court finds that McWhorter was permitted to introduce testimony from Juror [L.B.] in support of Claim V(A) at the evidentiary hearing. Both this claim and Claim V(A) are based on the same so-called extraneous evidence: Juror [L.B.]'s story of the circumstances surrounding her father's death. But Juror [L.B.]'s story was not extraneous evidence under Alabama law. *See* *Ex parte Arthur,* 835 So.2d 981, 984, n. 2 (Ala.2002) (quoting *Sharrief v. Gerlach,* 798 So.2d 646, 653 (Ala.2001)) ('An extraneous fact is one "obtained by the jury or introduced to it by some process outside the scope of the trial." '); *see also,* *Bethea v. Springhill Memorial Hosp.,* 833 So.2d 1, 8 (Ala.2002) (holding that the discussions between jurors about personal experiences or knowledge, such as occurred in this case, do not constitute 'extraneous evidence' and, thus, are inadmissible under Rule 606(b) of the Alabama Rules of Evidence.). As such, this claim raises no material issue of fact or law and therefore was dismissed correctly by Judge Evans under Rule 32.7(d)."

(C. 1124–25.)

In this case, the circuit court alternatively dismissed McWhorter's juror-misconduct claim (claim V(B)) on the basis that it raised no material issue of fact or law. *See* Rule 32.7(d). This Court, when reviewing a circuit court's rulings on a postconviction petition, may affirm the ruling if it is correct for any reason. *Lee,* 44 So.3d at 1149.

It is well settled that "matters that the jurors bring up in their deliberations are simply not improper under Alabama law, because the law protects debates and discussions of jurors and statements they make while deliberating their decision." *Sharrief v. Gerlach,* 798 So.2d 646, 653 (Ala.2001). "Rule 606(b), Ala. R. Evid., recognizes the important 'distinction, under Alabama law, between "extraneous facts," the consideration of which by a jury or jurors may be sufficient to impeach a verdict, and the "debates and discussions of the jury," which are protected from inquiry.' " ***1223** *Jackson v. State,* 133 So.3d 420, 431 (Ala.Crim.App.2009) (quoting *Sharrief,* 798 So.2d at 652). "[T]he debates and discussions of the jury, without regard to their propriety or lack thereof,

are not extraneous facts." *Sharrief,* 798 So.2d at 653. Thus, "affidavit[s or testimony] showing that extraneous facts influenced the jury's deliberations [are] admissible; however, affidavits concerning 'the debates and discussions of the case by the jury while deliberating thereon' do not fall within this exception." *CSX Transp., Inc. v. Dansby,* 659 So.2d 35, 41 (Ala.1995) (quoting *Alabama Power Co. v. Turner,* 575 So.2d 551, 557 (Ala.1991)).

In terms of this claim of juror misconduct, the statements allegedly made by Juror L.B. and the impact those statements may have had on the jury in its deliberations are not extraneous facts. Juror L.B.'s story about her father does not qualify under the exception for "extraneous information." *See* Rule 606(b), Ala. R. Evid. [10] *But see Taite v. State,* 48 So.3d 1 (Ala.Crim.App.2009). [11] Therefore, it is insulated from inquiry and cannot form the basis of a valid claim for postconviction relief under Rule 32.

As this Court stated in addressing a similar issue in *Jones v. State,* 753 So.2d 1174 (Ala.Crim.App.1999):

> "[W]e reject Jones's claim that his 'death sentence was the result of coercive influences brought into the jury deliberations which were outside the scope of the evidence and judicial control.' (Appellant's brief at p. 97.) Specifically, he argues that a juror's statement that 'if we give him life that maybe in a few years that he would be up for parole' improperly persuaded others to sentence him to death. (R. 275–76.)
>
> "Testimony at the Rule 32 hearing indicated that before reaching its 12–0 advisory verdict recommending a sentence of death, the jury voted several times. Several ballots resulted in a 10–2 determination to recommend death. One of the two individuals who initially voted against death testified that she changed her vote in favor of death after J.M. made the statement regarding parole.
>
> " 'A juror cannot impeach his verdict by later explaining why or how the juror arrived at his or her decision.' *Adair v. State,* 641 So.2d 309, 313 (Ala.Cr.App.1993).
>
> "Moreover, Rule 606(b), Ala. R. Evid., provides, in pertinent part:
>
> > " 'Upon an inquiry into the validity of a verdict or indictment, a juror may ***1224** not testify in impeachment of the verdict or indictment as to any matter or statement occurring during the course of the jury's deliberations or the effect of anything upon that or any other juror's mind or emotions as influencing the juror as to assent to or dissent from the verdict or indictment or concerning the juror's mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may a juror's affidavit or evidence of any statement by the juror concerning a matter about which the juror would be precluded from testifying be received for these purposes.'
>
> "We find no merit to Jones's claim because it was based on prohibited testimony. A consideration of the claim would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny. See *Ex parte Neal,* 731 So.2d 621 (Ala.1999); and *Barbour v. State,* 673 So.2d 461, 469–470 (Ala.Cr.App.1994), aff'd, 673 So.2d 473 (Ala.1995), cert. denied, 518 U.S. 1020, 116 S.Ct. 2556, 135 L.Ed.2d 1074 (1996)."

753 So.2d at 1203–04 (footnote omitted). Similarly, here, a consideration of this claim of juror misconduct—which is based entirely on the debate and deliberations of the jury—"would destroy the integrity of the jury system, encourage the introduction of unduly influenced juror testimony after trial, and discourage jurors from freely deliberating, and inhibit their reaching a verdict without fear of post-trial harassment, publicity, or scrutiny." *Jones,* 753 So.2d at 1204. Therefore, this claim fails to state a material issue of fact or law upon which relief could be granted, and dismissal was proper under Rule 32.7(d).

Further, McWhorter did not meet his burden of pleading as required by Rules 32.3 and 32.6(b). Instead, he alleged only that Juror L.B.'s story during deliberations changed several jurors' votes but failed to allege which jurors changed their votes, what their votes were before hearing Juror L.B.'s story, or whether the story had anything to do with their changing their vote. [12] Thus, we find no error in the circuit court's denial of this claim.

We also feel compelled to address a claim McWhorter presents in his brief and in his reply to this Court in a two-

sentence argument. McWhorter argues that "it was apparent that [the circuit court] ***1225** adopted the State's proposed findings of fact, almost verbatim ... only five phrases differed in any way from the State's proposed order." (McWhorter's brief, p. 18.) He appears to argue that the circuit court erred in adopting, with only minor modifications, the State's proposed order denying his Rule 32 petition. Specifically, in his reply, McWhorter asserts that because the circuit court's order was "largely a wholesale adoption of the State's proposed findings of facts and conclusions of law" it was not entitled to deference on the juror-misconduct claim. (McWhorter's reply, p. 9.)

Both McWhorter and the State submitted proposed orders. Shortly thereafter, the circuit court entered an order denying McWhorter's postconviction petition, adopting the State's previously submitted proposed order, with only minor modifications. McWhorter filed an objection on the grounds that the circuit court had adopted the State's proposed order, which the circuit court overruled by notation on the case action summary.

This Court recently addressed a similar claim in *Miller v. State,* 99 So.3d 349 (Ala.Crim.App.2011), in which this Court set out the development of the caselaw in regard to the adoption of proposed orders:

> " ' "While the practice of adopting the state's proposed findings and conclusions is subject to criticism, the general rule is that even when the court adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous. *Anderson v. City of Bessemer City, N.C.,* 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518 (1985); *Hubbard v. State,* 584 So.2d 895 (Ala.Cr.App.1991); *Weeks v. State,* 568 So.2d 864 (Ala.Cr.App.1989), cert. denied, [498] U.S. [882], 498 U.S. 882, 111 S.Ct. 230, 112 L.Ed.2d 184 (1990); *Morrison v. State,* 551 So.2d 435 (Ala.Cr.App.), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990)."

" ' *Bell v. State,* 593 So.2d 123, 126 (Ala.Crim.App.1991). See also *Dobyne v. State,* 805 So.2d 733, 741 (Ala.Crim.App.2000); *Jones v. State,* 753 So.2d 1174, 1180 (Ala.Crim.App.1999).

" 'More recently in *Hyde v. State,* 950 So.2d 344 (Ala.Crim.App.2006), we stated:

> " ' " '[T]his Court has repeatedly upheld the practice of adopting the State's proposed order when denying a Rule 32 petition for postconviction relief. See, e.g., *Coral v. State,* 900 So.2d 1274, 1288 (Ala.Crim.App.2004), overruled on other grounds, *Ex parte Jenkins,* 972 So.2d 159 (Ala.2005), and the cases cited therein. '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)."

" ' 950 So.2d at 371.

" 'However, the Alabama Supreme Court has admonished that "appellate courts must be careful to evaluate a claim that a prepared order drafted by the prevailing party and adopted by the trial court verbatim does not reflect the independent and impartial findings and conclusions of the trial court." *Ex parte Ingram,* 51 So.3d 1119, 1124 (Ala.2010).

" 'In *Ingram,* the Supreme Court held that the circuit court's adoption of the State's proposed order denying ***1226** postconviction relief was erroneous because, it said, the order stated that it was based in part on the personal knowledge and observations of the trial judge when the judge who actually signed the order denying the postconviction petition was not the same judge who had presided over Ingram's capital-murder trial. "[T]he patently erroneous nature of the statements regarding the trial judge's 'personal knowledge' and observations of Ingram's capital-murder trial undermines any confidence that the trial judge's findings of fact and conclusions of law are the product of the trial judge's independent judgment...." *Ingram,* 51 So.3d at 1125.

" 'Our first opportunity to consider this issue after the Supreme Court's decision in *Ingram* came in *James v. State,* 61 So.3d 357 (Ala.Crim.App.2010) (opinion on application for rehearing). We upheld a circuit court's order, adopted verbatim from the State's proposed order, over a claim that in adopting the State's order the circuit court had violated *Ingram* and the United States Supreme Court's opinion in *Jefferson v. Upton,* 560

U.S. 284, 130 S.Ct. 2217, 176 L.Ed.2d 1032 (2010). We stated:

> " ' "The main concerns the Supreme Court found objectionable in *Ingram* are not present in this case; here, the same judge presided over both James's trial and the Rule 32 proceedings. Also, as we noted in our previous opinion in this case, the circuit court allowed both 'parties to submit proposed orders.'
>
> " ' "In *Jefferson v. Upton,* [560 U.S. 284, 130 S.Ct. 2217 (2010),] the United States Supreme Court remanded Jefferson's habeas corpus proceedings to the lower court for that court to determine whether the state court's factual findings warranted a presumption of correctness. The Supreme Court in granting relief stated:
>
> " ' " 'Although we have stated that a court's "verbatim adoption of findings of fact prepared by prevailing parties" should be treated as findings of the court, we have also criticized that practice. *Anderson* [*v. City of Bessemer City*], 470 U.S. [564] at 572, 105 S.Ct. 1504, 84 L.Ed.2d 518 [(1985)]. And we have not considered the lawfulness of, nor the application of the habeas statute to, the use of such a practice where (1) a judge solicits the proposed findings ex parte, (2) does not provide the opposing party an opportunity to criticize the findings or to submit his own, or (3) adopts findings that contain internal evidence suggesting that the judge may not have read them. Cf. *id.,* at 568, 470 U.S. 564, 105 S.Ct. 1504, 84 L.Ed.2d 518; Ga.Code of Judicial Conduct, Canon 3(A)(4) (1993) (prohibiting ex parte judicial communications)." '
>
> " '*James v. State,* 61 So.3d at 385 (on rehearing).
>
> " 'Here, the circuit judge who signed the order denying postconviction relief was the same judge who presided over Ray's guilt and penalty proceedings—the judge who sentenced Ray to death. None of the concerns the Supreme Court stressed in *Ingram* are present in this case. Moreover, for the reasons detailed in this opinion, we hold that the circuit court's findings are not "clearly erroneous." '
>
> " *Ray* [*v. State*], 80 So.3d [965] at 972 [(Ala.Crim.App.2011)].

***1227** "Shortly after this Court released *Ray,* the Alabama Supreme Court released its opinion in *Ex parte Scott,* [Ms. 1091275, March 18, 2011] —— So.3d —— (Ala.2011). In *Scott,* the Alabama Supreme Court held that a circuit court's order summarily dismissing a Rule 32 petition, which adopted verbatim the State's *answer* to the Rule 32 petition, violated the requirement that the order reflect the circuit court's independent findings and conclusions of law.

"In *Scott,* after the State filed its answer to Scott's Rule 32 petition, the circuit court requested and received an electronic copy of the State's answer. The circuit court subsequently issued a written order summarily denying Scott's Rule 32 petition. The circuit court's order essentially adopted verbatim the State's answer to the Rule 32 petition.

"Scott filed an objection to the circuit court's order, which the circuit court denied. This Court affirmed the circuit court's order denying Scott's Rule 32 petition. *Scott v. State,* [Ms. CR–06–2233, March 26, 2010] —— So.3d —— (Ala.Crim.App.2010). The Alabama Supreme Court granted Scott's petition for a writ of certiorari and held that the circuit court's adoption of the State's answer to the Rule 32 petition conflicted with its decision in *Ex parte Ingram,* 51 So.3d 1119 (Ala.2010). The Court reasoned:

> " 'Scott argues that the trial court's order contains the same citation to caselaw that had been overruled by this Court two years before the entry of the trial court's order and the same typographical errors as contained in the State's answer. Moreover, Scott contends that because the trial court adopted nearly verbatim the State's answer as its order, the order is infected with the adversarial zeal of the State's counsel. Thus, Scott argues that the trial court's order cannot reflect the independent and impartial findings of the trial court and cannot be the product of the trial court's independent judgment. As for Scott's claim that the presence in the trial court's order of the same typographical errors contained in the State's answer is evidence that the trial court's order is not a product of the independent judgment of the trial court, we note that Scott has directed this Court to only two examples of such typographical errors appearing in the approximately 58 pages of text that constitute the State's answer and the trial court's order.

This Court recognized in *Ex parte Ingram*[, 51 So.3d 1119 (Ala.2010),] that sometimes minor errors find their way into orders drafted by trial courts. We do not consider the few typographical errors at issue here, by themselves, as sufficient evidence upon which to base a conclusion that the trial court's order is not a product of the trial court's independent judgment. The fact that the same typographical errors appear in the same locations in both the State's answer and the trial court's order does, however, bolster this Court's conclusion reached *infra* that the trial court's order is not a product of its independent judgment. We also note that the State's answer and the trial court's order are both 58 pages in length. Again, although this fact alone is insufficient evidence upon which to base a conclusion that the order is not a product of the trial court's independent judgment, it bolsters this Court's conclusion reached *infra* that the trial court's order is not a product of its independent judgment.

***1228** " 'Further, Scott notes that in adopting the State's answer the trial court repeated in its order the State's citation to and reliance upon *Williams v. State,* 783 So.2d 108 (Ala.Crim.App.2000), a case that had been overruled by this Court approximately two years before the trial court entered its order in this case. In *Ex parte Taylor,* 10 So.3d 1075 (Ala.2005), this Court by implication overruled the Court of Criminal Appeals' holding in *Williams* that " 'a finding of no manifest injustice under the "plain error" standard on a direct appeal serves to establish a finding of no prejudice under the test for ineffective assistance of counsel provided in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984).' " *Williams,* 783 So.2d at 133 (quoting *State v. Clark,* 913 S.W.2d 399, 406 (Mo.Ct.App.1996) (footnote omitted)). The trial court did not cite *Williams* for purposes of that holding; rather, it is clear that *Williams* was cited in support of the trial court's conclusion that Scott had failed to satisfy his burden of pleading under Rule 32. There is no error in citing and relying upon a case for a particular proposition of law when that case has been reversed on a ground other than the specific proposition of law being relied upon. The trial court's citation to *Williams* in this case does not rise to the level of a material and obvious error as contemplated by the holding in *Ex parte Ingram,* supra. Accordingly, we do not consider the trial court's citation to *Williams* as evidence indicating that the trial court's order is not a product of the trial court's independent judgment.

" 'More troubling is Scott's contention that because the trial court adopted verbatim the State's answer as its order, the order is infected with the same adversarial zeal of the State's counsel as is the answer. Scott contends that, although an order prepared by a party for the proposed adoption by the trial court purports to be disinterested, the adversarial zeal of counsel all too often infects the adopted order of the trial court, which is supposed to contain disinterested findings. See *Cuthbertson v. Biggers Bros., Inc.,* 702 F.2d 454 (4th Cir.1983). Scott contends that an answer is a pleading that never is prepared with the pretense of impartiality. We agree. As Scott contends, an answer, by its very nature, is adversarial and sets forth one party's position in the litigation. It makes no claim of being an impartial consideration of the facts and law; rather, it is a work of advocacy that exhorts one party's perception of the law as it pertains to the relevant facts. The Court of Criminal Appeals acknowledged the nature of the State's answer in this case, stating that "the pleading clearly advocated and sought summary dismissal of the majority of Scott's claims." *Scott v. State,* ——So.3d at ——.

" 'This Court stated in *Ex parte Ingram* that the "appellate courts must be careful to evaluate a claim *that a prepared order* drafted by the prevailing party and adopted by the trial court verbatim *does not reflect the independent and impartial findings and conclusions of the trial court.*" *Ex parte Ingram,* 51 So.3d at 1124 (emphasis added). Here, we do not even have the benefit of an order proposed or "prepared" by a party; rather the order is a judicial incorporation of a party's pleading as the "independent and impartial findings and conclusions of the trial court." ***1229** *Id.* at 1124. The first and most fundamental requirement of the reviewing court is to determine "that the order and the findings and conclusions in such order are in fact those of the trial court." *Id.* at 1124. The trial court's verbatim adoption of the State's answer to Scott's Rule 32 petition as its order, by its nature, violates this Court's holding in *Ex parte Ingram.* Accordingly, we must reverse the Court of Criminal Appeals' judgment insofar as it affirms the trial court's adoption of the State's answer as its order, and we remand the case to the Court of Criminal Appeals

with directions to remand the case to the trial court for that court to reverse its order dismissing Scott's Rule 32 petition and to enter a new order in light of this opinion.'

"—— So.3d at ——."

Miller, 99 So.3d at 355–59. *See also* *Ray v. State,* 80 So.3d 965, 992 (Ala.Crim.App.2011).

Here, the fact situation is distinguishable from the fact situations in both *Ex parte Ingram* and *Ex parte Scott.* In this case, the circuit judge who denied McWhorter's postconviction petition did not preside at McWhorter's trial; however, in the order denying McWhorter's postconviction petition the court did not profess to have personal knowledge of the performance of McWhorter's trial counsel. Further, the circuit court in this case did not base its order denying McWhorter's postconviction petition upon the State's initial answer to the postconviction petition. Instead, after numerous pleadings, and after the postconviction evidentiary hearing on McWhorter's Rule 32 claims, the court allowed submission of briefs. Both the State and McWhorter submitted proposed orders, and McWhorter submitted a post-hearing brief. McWhorter did not object in his post-hearing brief to the possibility of the circuit court's adopting the State's proposed order. The circuit court did not issue its final order until several weeks after both the State and McWhorter had submitted their proposed orders and McWhorter had filed his post-hearing brief.

Consequently, in light of these facts, we conclude that the circuit court's order is its own and not merely an unexamined adoption of a proposed order submitted by the State. Moreover, for the reasons set forth above in regard to the juror-misconduct claims and below as to the other claims McWhorter raises on appeal, we hold that the circuit court's findings are not "clearly erroneous."

II.

McWhorter argues he was denied his constitutional right to effective assistance of counsel at the penalty phase. (Claim XII in McWhorter's amended Rule 32 Petition.) More particularly, McWhorter alleges that his counsel did not adequately investigate and present mitigation evidence and that his attorneys' performance was deficient during the penalty and sentencing phases. Before addressing McWhorter's specific arguments, we set forth the general principles of law regarding ineffective-assistance-of-counsel claims.

Allegations of ineffective assistance of counsel are governed by the principles set forth in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel, the petitioner must establish: (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. 466 U.S. at 687; *Ex parte Lawley,* 512 So.2d 1370, 1372 (Ala.1987).

***1230** "Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. *Engle v. Isaac,* 456 U.S. 107, 133–34, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.' See *Michel v. Louisiana,* [350 U.S. 91], at 101 [76 S.Ct. 158, 100 L.Ed. 83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way."

Strickland, 466 U.S. at 689 (citations omitted). As the United States Supreme Court further stated:

"[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable

> precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments."

Strickland, 466 U.S. at 690–91.

With regard to an attorney's duty to investigate, we have said:

> While counsel has a duty to investigate in an attempt to locate evidence favorable to the defendant, 'this duty only requires a *reasonable* investigation.' *Singleton v. Thigpen,* 847 F.2d 668, 669 (11th Cir.(Ala.) 1988), cert. denied, 488 U.S. 1019, 109 S.Ct. 822, 102 L.Ed.2d 812 (1989) (emphasis added). See *Strickland* [*v. Washington*], 466 U.S. [668] at 691, 104 S.Ct. [2052] at 2066, 80 L.Ed.2d 674 [(1984)]; *Morrison v. State,* 551 So.2d 435 (Ala.Cr.App.1989), cert. denied, 495 U.S. 911, 110 S.Ct. 1938, 109 L.Ed.2d 301 (1990). Counsel's obligation is to conduct a 'substantial investigation into each of the *plausible* lines of defense.' *Strickland,* 466 U.S. at 681, 104 S.Ct. at 2061 (emphasis added). 'A substantial investigation is just what the term implies; it does not demand that counsel discover every shred of evidence but that a reasonable inquiry into all plausible defenses be made.' *Id.,* 466 U.S. at 686, 104 S.Ct. at 2063.
>
> " '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 ***1231** choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.' "*Id.,* 466 U.S. at 691, 104 S.Ct. at 2066."

Jones, 753 So.2d at 1191.

> "The purpose of ineffectiveness review is not to grade counsel's performance. See *Strickland* [*v. Washington*], [466 U.S. 668,] 104 S.Ct. [2052] at 2065 [(1984)]; see also *White v. Singletary,* 972 F.2d 1218, 1221 (11th Cir.1992) ('We are not interested in grading lawyers' performances; we are interested in whether the adversarial process at trial, in fact, worked adequately.'). We recognize that '[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.' *Strickland,* [466 U.S. at 693,] 104 S.Ct. at 2067. Different lawyers have different gifts; this fact, as well as differing circumstances from case to case, means the range of what might be a reasonable approach at trial must be broad. To state the obvious: the trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.' *Burger v. Kemp,* 483 U.S. 776, 107 S.Ct. 3114, 3126, 97 L.Ed.2d 638 (1987)."

Chandler v. United States, 218 F.3d 1305, 1313 (11th Cir.2000) (footnote omitted).

"As the Supreme Court explained in *Strickland,* the issue of what investigation decisions are reasonable 'depends critically' on the defendant's instructions...." *Cummings v. Secretary, Dep't of Corr.,* 588 F.3d 1331, 1357 (11th Cir.2009).

Moreover,

> "there is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one. In particular, a court need not determine whether counsel's

> performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies. The object of an ineffectiveness claim is not to grade counsel's performance. If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed. Courts should strive to ensure that ineffectiveness claims not become so burdensome to defense counsel that the entire criminal justice system suffers as a result."

Strickland, 466 U.S. at 697. "It is firmly established that a court must consider the strength of the evidence in deciding whether the *Strickland* prejudice prong has been satisfied." *Buehl v. Vaughn,* 166 F.3d 163, 172 (3d Cir.1999).

In *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), the United States Supreme Court addressed a claim that counsel was ineffective for failing to adequately investigate and present mitigation evidence. The *Wiggins* Court found that counsel's performance was ineffective because counsel failed to investigate and present evidence that Wiggins had a dysfunctional and bleak upbringing, that he suffered from substantial physical and sexual abuse, and that he had mental deficiencies. The Court stated:

> "Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability. ***1232** *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989) (' "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background ... may be less culpable than defendants who have no such excuse" '); see also *Eddings v. Oklahoma,* 455 U.S. 104, 112 (1982) (noting that consideration of the offender's life history is a ' "part of the process of inflicting the penalty of death" '); *Lockett v. Ohio,* 438 U.S. 586, 604 (1978) (invalidating Ohio law that did not permit consideration of aspects of a defendant's background)."

539 U.S. at 535. The Court further stated:

> "In finding that [trial counsel's] investigation did not meet *Strickland*'s performance standards, we emphasize that *Strickland* does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. Nor does *Strickland* require defense counsel to present mitigating evidence at sentencing in every case. Both conclusions would interfere with the 'constitutionally protected independence of counsel' at the heart of *Strickland,* 466 U.S., at 689. We base our conclusion on the much more limited principle that 'strategic choices made after less than complete investigation are reasonable' only to the extent that 'reasonable professional judgments support the limitations on investigation.' *Id.,* at 690–691. A decision not to investigate thus 'must be directly assessed for reasonableness in all the circumstances.' *Id.,* at 691.
>
> "Counsel's investigation into Wiggins' background did not reflect reasonable professional judgment. Their decision to end their investigation when they did was neither consistent with the professional standards that prevailed in 1989, nor reasonable in light of the evidence counsel uncovered in the social services records—evidence that would have led a reasonably competent attorney to investigate further."

539 U.S. at 533–34.

In *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), the United States Supreme Court found that counsel's performance was deficient because counsel did not begin to investigate mitigation evidence until a week before trial and counsel "failed to conduct an investigation that would have uncovered extensive records graphically describing Williams's nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records." 529 U.S. at 395.

> "The United States Court of Appeals for the Eleventh Circuit has held that trial counsel's failure to investigate the possibility of mitigating evidence is, per se, deficient performance. See *Horton v. Zant,* 941 F.2d 1449, 1462 (11th Cir.1991) ('our case law rejects the notion that

a "strategic" decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them'), cert. denied, 503 U.S. 952, 112 S.Ct. 1516, 117 L.Ed.2d 652 (1992); see, also, *Jackson v. Herring,* 42 F.3d 1350, 1366–68 (11th Cir.) ('Although counsel need not "investigate every evidentiary lead," he *must* gather enough knowledge of the potential mitigation evidence to arrive at an "informed judgment" in making [the decision not to present such evidence].... ***1233** [A] legal decision to forgo a mitigation presentation cannot be reasonable if it is unsupported by sufficient investigation.') (emphasis added; citations omitted), cert. dismissed, 515 U.S. 1189, 116 S.Ct. 38, 132 L.Ed.2d 919 (1995)."

Ex parte Land, 775 So.2d 847, 853–54 (Ala.2000), *overruled on other grounds by* *State v. Martin,* 69 So.3d 94, 97 (Ala.2011).

In *Jackson v. Herring,* 42 F.3d 1350 (11th Cir.1995), the United States Court of Appeals for the Eleventh Circuit stated:

"In cases where sentencing counsel did not conduct enough investigation to formulate an accurate life profile of a defendant, we have held the representation beneath professionally competent standards. See, e.g., *Blanco* [*v. Singletary*], 943 F.2d [1477] 1501–03 [(11th Cir.1991)] (counsel's performance deficient where his sole attempt to procure mitigation witnesses for penalty phase was to leave messages for the witnesses and await their responses, and he thus ultimately conducted no interviews); *Harris* [*v. Dugger*], 874 F.2d [756] 763 [(11th Cir.1989)] (counsel deficient where he did not investigate defendant's family, scholastic, military and employment background); *Middleton* [*v. Dugger*], 849 F.2d [491] 493 [(11th Cir.1988)] (performance deficient where 'trial counsel conducted almost no background investigation, despite discussions with Middleton concerning the existence of such mitigating evidence' as psychiatric problems, brutal childhood, physical, sexual and drug abuse, and low I.Q.); *Armstrong* [*v. Dugger*], 833 F.2d [1430] 1433–34 [(11th Cir.1987)] (performance deficient where trial counsel's investigation of mitigating evidence was limited to single conversation with defendant and his parents, and another conversation with defendant's parole officer)."

42 F.3d at 1367.

In examining this ineffectiveness claim, the circuit court described what McWhorter's attorneys did during the penalty phase. The court's findings were based primarily on the testimony of the attorneys—Mitchell and Berry. As set out above, the testimony at the evidentiary hearing indicated that to prepare for the penalty phase, Mitchell and Berry interviewed McWhorter, his mother Rowland, his aunt Garrison, and his half sister Melinda Rowland. They interviewed the latter three in what McWhorter refers to in the postconviction proceeding as the "triple interview." During this interview, counsel completed a document entitled "Client Background Information," which included McWhorter's family history, his medical and mental-health history, his substance-abuse history, his criminal history, and his education history. An investigator was not hired for the penalty-phase preparation because, according to McWhorter's attorneys, a strategy could be formulated with McWhorter and his family's assistance.

McWhorter's trial attorneys hired Dr. Douglas Robbins, a neuropsychologist, to evaluate McWhorter for any mental disease, mental disorder, or any evidence of psychopathology. As stated above, Dr. Robbins's evaluation provided no useful mitigation evidence.

Counsel obtained some hospital records. Counsel was aware that DHR had once investigated an allegation of physical abuse involving McWhorter. Additionally, as set out above, counsel had documentation of McWhorter's IQ scores, which indicated he had an IQ of 88.

Mitchell and Berry testified that they thought McWhorter would have had to climb out of a "deep hole" to persuade the ***1234** judge and jury to spare his life. The two codefendants had pleaded guilty, and the jury had heard evidence of gang activity. McWhorter's attorneys decided that "about the only thing" McWhorter had "going for him" was that he was "clean cut" and "a good-looking young man" who had fallen in with the wrong crowd and had made a terrible mistake but did not deserve the death penalty.

As indicated above, counsel presented the testimony of Rowland, Garrison, Reid, and Salee during the penalty phase. Counsel testified as to why each was chosen to testify in accordance with counsel's strategy. The circuit court found

that this strategy was a reasonable one and that counsel had conducted a reasonable investigation.

Considering the above principles and the evidence that was presented at the postconviction hearing, we consider McWhorter's specific allegations of ineffective assistance of trial counsel presented on appeal.

A.

McWhorter appears to argue that the circuit court should have examined his allegations of ineffectiveness at the penalty phase as a *single* claim rather than as several separate claims. McWhorter argues that "[e]ven if the failure to call a *particular* witness did not constitute ineffective assistance of counsel, the correct question—which was never addressed by the Hearing Court—was whether it was constitutionally ineffective assistance of counsel to fail to call *any* of them." (McWhorter's brief, pp. 42–43.) McWhorter asserts that the United States Supreme Court has made it "clear that the evidence that trial counsel did not seek to introduce—that is, the evidence of counsel's ineffectiveness—must be weighed in the aggregate." (McWhorter's brief, p. 43.)

Initially, we question whether this argument is properly before this Court. McWhorter did not raise his cumulative-effect claim in his postjudgment motion. "The general rules of preservation apply to Rule 32 proceedings." *Boyd v. State,* 913 So.2d 1113, 1123 (Ala.Crim.App.2003). Although McWhorter did assert a claim at the conclusion of his amended petition that the cumulative effect of his numerous ineffective-assistance-of-counsel claims entitled him to relief, he did not argue this at the evidentiary hearing, and the circuit court did not address it in its order.

Regardless, even if this argument is properly before this Court, it is without merit. McWhorter cites *Porter v. McCollum,* 558 U.S. 30, 44, 130 S.Ct. 447, 453–54, 175 L.Ed.2d 398 (2009), for the proposition that "in considering the ineffectiveness of counsel a reviewing court should 'consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced at the habeas proceeding—*and reweigh it against the evidence in aggravation.*' " (McWhorter's brief, p. 43 (quoting *Porter,* 558 U.S. at 41, 130 S.Ct. at 453–54).) McWhorter's reliance on *Porter* is misplaced. The quoted portion from *Porter* occurs in the United State Supreme Court's analysis of whether counsel's deficient performance *prejudiced* the defendant, the second prong under *Strickland* analysis. The Supreme Court in *Porter* had *already determined* that counsel's failure to investigate mitigating evidence in that case was constitutionally deficient. McWhorter, however, cites the language from *Porter* in support of the proposition that all the available mitigation evidence should be evaluated to determine whether counsel's performance was deficient. Similarly, the other authorities McWhorter cites fail to support his argument that the circuit court must evaluate all the allegations of ineffective assistance as one claim asserting that counsel was ***1235** deficient. *See McGahee v. Alabama Dep't of Corr.,* 560 F.3d 1252, 1261–63 (11th Cir.2009) (addressing *Batson,* not deficiency prong, of *Strickland*); *Williams v. Allen,* 542 F.3d 1326, 1344 (11th Cir.2008) (addressing the prejudice prong not the deficiency prong in *Strickland* analysis); *Scott v. Schriro,* 567 F.3d 573, 586 (9th Cir.2009) (same as *Williams v. Allen*); *Rodriguez v. Hoke,* 928 F.2d 534, 538 (2d Cir.1991) (discussing "the cumulative effect of all of counsel's actions" in the context of the court's holding that the petitioner had not exhausted his state remedies).

In his reply, McWhorter acknowledges that this Court has recently stated that no Alabama appellate court has applied "the cumulative-effect analysis to claims of ineffective assistance of counsel." *Taylor v. State,* [Ms. CR–05–0066, Oct. 1, 2010] —— So.3d ——, —— (Ala.Crim.App.2010). Although McWhorter asserts that the *Taylor* court did, in fact, perform a cumulative-effects analysis, (McWhorter's reply, p. 13), we conclude that assertion is misplaced. As the *Taylor* court actually explained:

> "Taylor also contends that the allegations offered in support of a claim of ineffective assistance of counsel must be considered cumulatively, and he cites *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000). However, this Court has noted: 'Other states and federal courts are not in agreement as to whether the "cumulative effect" analysis applies to *Strickland* claims'; this Court has also stated: 'We can find no case where Alabama appellate courts have applied the cumulative-effect analysis to claims of ineffective assistance of counsel.' *Brooks v. State,* 929 So.2d 491, 514 (Ala.Crim.App.2005), *quoted in Scott v. State,* [Ms. CR–06–2233, March 26, 2010] —— So.3d ——, —— (Ala.Crim.App.2010); *see also McNabb v. State,* 991 So.2d 313, 332 (Ala.Crim.App.2007); and *Hunt v. State,*

940 So.2d 1041, 1071 (Ala.Crim.App.2005). More to the point, however, is the fact that even when a cumulative-effect analysis is considered, only claims that are properly pleaded and not otherwise due to be summarily dismissed are considered in that analysis. A cumulative-effect analysis does not eliminate the pleading requirements established in Rule 32, Ala. R.Crim. P. An analysis of claims of ineffective assistance of counsel, including a cumulative-effect analysis, is performed only on properly pleaded claims that are not summarily dismissed for pleading deficiencies or on procedural grounds. Therefore, even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate Taylor's obligation to plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32.

"Taylor is not entitled to relief on either claim of error raised."

Taylor, —— So.3d at ——.

In this case, McWhorter's argument is flawed in that he fails to demonstrate that a series of individual allegations of deficient performance—although found not to be deficient in themselves—could nevertheless be deficient when considered collectively. Further, an aggregate weighing is not required by Alabama law. *See Taylor,* —— So.3d at ——, and the cases cited therein. Therefore, even if the claim is properly before this Court for review, McWhorter is not entitled to any relief on this claim.

B.

McWhorter also argues that the circuit court "failed to consider" or address in its order the testimony of four witnesses: Abraham Barnes, Dr. Ralph Tarter, Kenneth ***1236** Burns, and Dr. Robbins. McWhorter summarizes the testimony of these four witnesses in his brief to this Court.

Initially, we note that McWhorter did not plead anything in regard to these witnesses in his amended petition, even though these witnesses testified at the postconviction proceeding. Additionally, McWhorter fails to provide sufficient authority to reverse the circuit court's judgment on the basis that it "failed to consider" the cited evidence. *See* Rule 28(a)(10), Ala. R.App. P.[13] Although McWhorter makes a conclusory argument that "each of these four witnesses provided unique and significant testimony concerning McWhorter's life, character, and mental health" and the circuit court's "failure to address this evidence ... violates the Supreme Court's ruling that the 'totality of the evidence' be considered," he does nothing else but simply state, in conclusory fashion, the testimony of the witnesses that he claims the circuit court failed to consider and page citations from the record. (McWhorter's brief, pp. 44, 47.) He cites one case for all four witnesses' testimony, alleging that it was error for trial counsel not to present testimony regarding McWhorter's suicide attempt. He makes a conclusory argument why he believes these witnesses' testimony was relevant. This Court recently addressed a similar issue in *Taylor,* —— So.3d ——:

"We are aware that application of Rule 28(a)(10) to find a waiver of arguments in an appellate brief has been limited to those cases in which the appellant presents general assertions and propositions of law with few or no citations to relevant legal authority, resulting in an argument consisting of undelineated general propositions unsupported by sufficient legal authority or argument. Although Rule 28(a)(10) is to be cautiously applied, it has been applied recently by the Alabama Supreme Court and by this Court when appropriate. *E.g., Ex parte Theodorou,* 53 So.3d 151 (Ala.2010); *Jefferson County Comm'n v. Edwards,* 32 So.3d 572 (Ala.2009); *Slack v. Stream,* 988 So.2d 516 (Ala.2008); *James v. State,* 61 So.3d 357 (Ala.Crim.App.2010) (opinion on remand from Alabama Supreme Court); *Scott v. State,* [Ms. CR–06–2233, March 26, 2010] —— So.3d —— (Ala.Crim.App.2010); *Baker v. State,* 87 So.3d 587 (Ala.Crim.App.2009); *Lee v. State,* 44 So.3d 1145 (Ala.Crim.App.2009); *Bush v. State,* 92 So.3d 121 (Ala.Crim.App.2009); and *Franklin v. State,* 23 So.3d 694 (Ala.Crim.App.2008).

"In *Scott v. State,* this Court stated:

" ' "Recitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed." *Hamm v. State,* 913 So.2d 460, 486 (Ala.Crim.App.2002). "An appellate court will consider only those issues properly delineated as such and will not search out errors which have not been properly preserved or assigned. This standard has been specifically applied to briefs containing general propositions devoid of delineation and support from

> authority or argument." *Ex parte Riley,* 464 So.2d 92, 94 (Ala.1985) (citations omitted). "When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an ***1237** appellant's legal research." *City of Birmingham v. Business Realty Inv. Co.,* 722 So.2d 747, 752 (Ala.1998).'

"*Scott v. State,* —— So.3d at ——. *See also Hamm v. State,* 913 So.2d 460, 486 n. 11 (Ala.Crim.App.2002) ('Applying the federal counterpart to Alabama's Rule 28, Ala. R.App. P., the United States Court of Appeals for the Eighth Circuit stated, "[W]e regularly decline to consider cursory or summary arguments that are unsupported by citations to legal authorities. See *United States v. Wadlington,* 233 F.3d 1067, 1081 (8th Cir.2000); *United States v. Gonzales,* 90 F.3d 1363, 1369 (8th Cir.1996); see also *United States v. Dunkel,* 927 F.2d 955, 956 (7th Cir.1991) ('Judges are not like pigs, hunting for truffles buried in briefs.')." *U.S. v. Stuckey,* 255 F.3d 528, 531 (8th Cir.2001).').

"As the State correctly argues in its brief on appeal, many 'arguments' in Taylor's brief consist of little more than a cursory summary of the claims from the petition....

"....

"Clearly, Taylor's cursory summary of the allegations of the petition—with a citation only to the paragraphs of the petition in many arguments of the brief, and in other portions of the brief only to paragraphs of the petition and undelineated general principles of law—does not comport with Rule 28(a)(10). For many of the issues raised in the brief, Taylor presents no discussion of the facts or the law in the form of an argument demonstrating why the circuit court's dismissal of the specific claims was in error. Accordingly, we hold that Taylor has waived for purposes of appellate review in this Court those arguments in his brief ... that fail to comply with the requirements of Rule 28(a)(10)."

—— So.3d at ——.

Here, too, we conclude that McWhorter's cursory summary of the witnesses' testimony and only a single citation to general legal authority, with no specific discussion of the facts or law in the form of an argument as to why he claims error, is not sufficient to comply with Rule 28(a)(10). Furthermore, McWhorter acknowledges in his brief to this Court that the circuit court does not have to address every "scrap" of evidence in its order. (McWhorter's brief, p. 44)

Moreover, even if McWhorter's brief in this regard did satisfy the requirements in Rule 28(a)(10), his argument is inconsistent with the defense theory of the case or would have been otherwise cumulative. The circuit court found that defense counsel's strategy in mitigation was reasonable and that additional evidence presented at the postconviction hearing would have been cumulative to evidence presented by trial counsel or would have been inconsistent with evidence presented to support trial counsel's reasonable strategy. Specifically, with regard to McWhorter's trial counsel's strategy the circuit court found as follows:

> "Experienced trial counsel collected the comprehensive background information reflected in ['Client Background Information'], Dr. Robbins's evaluation, and other documents, and formulated a reasonable strategy that they believed could save McWhorter's life: McWhorter was a good boy, who fell in with the wrong crowd, and he made a terrible mistake but does not deserve the death penalty. (E.H. 186, 571.) The trial transcript reflects that strategy in the ***1238** testimony trial counsel presented during the penalty and sentencing phases."

(C. 1163–64.)

The circuit court's findings are supported by the record. The testimony of these four witnesses would have been cumulative or inconsistent with the defense's strategy of the case. Barnes's testimony would have been wholly inconsistent with the "good boy, wrong crowd" strategy. Likewise, Dr. Tarter's testimony (about McWhorter's substance abuse) would have also been inconsistent with that strategy. Additionally, McWhorter fails to explain in his brief how or why Dr. Robbins's testimony would have been helpful. Although Burns's testimony might have been helpful, it too

would have been cumulative in many respects. Therefore, McWhorter has failed to demonstrate error because the circuit court did not specifically address these four witnesses in its detailed order denying relief based on McWhorter's ineffective-assistance-of-counsel claim. [14]

C.

McWhorter next argues that trial counsel was ineffective for failing to investigate and to present certain mitigation evidence at the penalty phase of his capital-murder trial. He contends that counsel should have started investigating earlier, should have spent more time investigating, should have interviewed more witnesses, and should have obtained more records, such as school records, social-services records, juvenile-offender records, and additional medical records. He also argues that trial counsel's investigation into the mitigating evidence failed to comply with the American Bar Association ("ABA") Guidelines for conducting an appropriate investigation into potential mitigating evidence in death-penalty cases.

Initially, we point out that whether McWhorter's trial attorneys' investigation into potential mitigating evidence adhered to the ABA Guidelines is not dispositive of whether counsel's investigation was reasonable. This Court has previously decided this issue adversely to McWhorter in *Miller,* 99 So.3d at 396–97.

> " 'We have held that the ABA Guidelines may "provide guidance as to what is reasonable in terms of counsel's representation, [but] they are not determinative." *Jones v. State,* 43 So.3d 1258, 1278 (Ala.Crim.App.2007).
>
> " 'The danger of adopting the ABA Guidelines as determinative on the issue of a lawyer's effectiveness was discussed by the United States Court of Appeals for the Fourth Circuit:
>
> > " ' "[T]o hold defense counsel responsible for performing every task that the ABA Guidelines say he 'should' do is to impose precisely the 'set of detailed rules for counsel's conduct' that the Supreme Court has long since rejected as being unable to 'satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant.' *Strickland,* 466 U.S. at 688–89, 104 S.Ct. 2052, 80 L.Ed.2d 674. Such a categorical holding would lead to needless and expensive layers of process with the unintended effect of compromising process.... Recognition of the ABA Guidelines as the minimum ***1239** prevailing community standard would transform defense lawyers' judgments into mindless defensive reactions to a potential habeas claim, divorced from the individualized needs of professional representation. Those needs call for more nuanced responses than can be provided by following preestablished mechanical rules of representation....
>
> > " ' "While the ABA Guidelines provide noble standards for legal representation in capital cases and are intended to improve that representation, they nevertheless can only be considered as part of the overall calculus of whether counsel's representation falls below an objective standard of reasonableness; they still serve only as 'guides,' *Strickland,* 466 U.S. at 688, 104 S.Ct. 2052, not minimum constitutional standards."
>
> " '*Yarbrough v. Johnson,* 520 F.3d 329, 339 (4th Cir.2008). See also *Torres v. State,* 120 P.3d 1184, 1189 (Okla.Crim.App.2005) ("[W]e will not find that capital counsel was per se ineffective simply because counsel's representation differed from current capital practice customs, even where the differences are significant. A defendant must still show that he was prejudiced by counsel's representation."). We agree with the United States Court of Appeals for the Fourth Circuit.
>
> " 'Also, the United States Supreme Court in *Wiggins* [*v. Smith,* 539 U.S. 510 (2003),] stated:
>
> > " ' " "[C]ounsel 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.
>
> > " ' " "... [O]ur principal concern in deciding whether [counsel] exercised 'reasonable professional judgmen[t]' 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.' "
>
> " '539 U.S. at 521–23.'
>
> "*Ray,* 80 So.3d at 983."

99 So.3d at 396–97.

The circuit court found as follows regarding McWhorter's ineffective-assistance-of-counsel claim:

> "As an initial matter, McWhorter's' trial counsel both testified at length to their strategy for the penalty phase. The Court sets out that strategy below and finds it to be reasonable under *Strickland.* All of the remaining independent claims contained in Claim XII of McWhorter's amended Rule 32 petition are meritless because they contend that trial counsel should have investigated and presented evidence that either would have been cumulative to evidence presented or would have been inconsistent with evidence presented to support trial counsel's reasonable strategy. In his amended Rule 32 petition, McWhorter failed to mention, much less challenge, ***1240** the trial strategy that trial counsel actually used.
>
> "The testimony of McWhorter's trial counsel, Thomas Mitchell and James Berry, at the evidentiary hearing indicates that they rendered effective assistance of counsel during the penalty and sentencing phases of his trial. Mitchell and Berry both testified that, to prepare McWhorter's mitigation case, they interviewed McWhorter, his mother, Carolyn Rowland, his aunt, Elsie Garrison, and his half sister, Melinda Rowland. (E.H. 139, 143, 154, 176, 190–91, 553, 557.) McWhorter and his family were fully cooperative and supportive, according to both counsel's testimony. (E.H. 191, 193, 557.)
>
> "During a pre-trial interview with McWhorter's family, Mr. Mitchell completed a document titled 'Client Background Information' based on the information he learned from that interview. (E.H. 145.) The document was admitted into evidence at the evidentiary hearing as McWhorter's Exhibit 7. (E.H. 146.) Exhibit 7 contains questions and answers covering myriad topics, like McWhorter's early childhood development, his environmental factors; such as, living conditions, medical issues as a youth, and relationship information; his institutional data; such as, education history, his medical and mental health history, his substance abuse history, his criminal history, and his family history. Mr. Mitchell decided not to hire an investigator for the penalty-phase preparation because he reasonably could formulate a strategy for the penalty phase without an investigator and with McWhorter and his family's assistance. (E.H. 193.)
>
> "In addition to the information provided by McWhorter and his family, trial counsel hired a neuropsychologist to evaluate McWhorter for any 'mental disease,' 'mental disorder,' or 'any evidence of psychopathology' to use in McWhorter's defense. (E.H. 155, 171.) Trial counsel hired Dr. Douglas Robbins. Mitchell testified that he specifically was interested in learning from Dr. Robbins whether McWhorter exhibited 'diminished capacity' and 'susceptibility to influence' from others. (E.H. 171.) And, if McWhorter had brain damage, trial counsel wanted to use that fact in his defense. (E.H. 160.) However, Dr. Robbins's evaluation provided no useful mitigation evidence. (E.H. 175, 305.)
>
> "Trial counsel also considered various records. They obtained McWhorter's hospital records from his attempted suicide. (E.H. 557.) Mitchell testified that he was aware that Garrison once reported Carolyn Rowland to DHR because Garrison found bruises on McWhorter from a 'whipping' that Carolyn Rowland gave him. (E.H. 158; McWhorter's Exhibit 7, page 5.) Trial counsel also had documentation of McWhorter's IQ scores, which indicated that he has an IQ of 88. (E.H. 140, 181.)
>
> "As Berry explained during the evidentiary hearing, McWhorter would have had to climb from a 'deep hole' to persuade the judge and jury to spare his life. (E.H. 571–72.) Two codefendants already had pleaded guilty to charges stemming from the same crime. (Ibid.) The jury had heard evidence of gang activity. (E.H. 573.) Trial counsel believed that McWhorter had very little in his favor going into the penalty phase. 'About the only thing we had going for Casey was a young man. He was a good-looking young man. And his youth was basically the only thing we had going for us,' said Berry. (E.H. 576.) Mitchell's testimony reflected a similar opinion. Mitchell thought the main circumstances McWhorter had in his favor ***1241**

were his youth, that he was 'clean cut,' and that 'he looked like Opie grown up a little bit from the Andy Griffith Show.' Mitchell also remembered first meeting McWhorter and how he thought that McWhorter must have been 'crazy' to commit the crime with which he was charged. (E.H. 185–86.) Mitchell hoped that that the jury would think that, too, though he knew there was no evidence to support a mitigation case based on McWhorter's mental disorders because McWhorter had none. (Ibid.)

"Both counsel previously had represented defendants at capital murder trials. (E.H. 170, 544.) Mitchell, who served as McWhorter's lead counsel, had extensive relevant experience over his 11–year legal career. (E.H. 169.) Mitchell testified that he had represented defendants during approximately 25 felony jury trials, 8 to 10 of which were murder trials, prior to representing McWhorter. (E.H. 169–70.) The overwhelming majority of Berry's practice around the time of McWhorter's trial was criminal work, and Mitchell testified that about half of his practice was criminal around 1994. (E.H. 169, 566.)

"Experienced trial counsel collected the comprehensive background information reflected in McWhorter's Exhibit 7, Dr. Robbins's evaluation, and other documents, and formulated a reasonable strategy that they believed could save McWhorter's life: McWhorter was a good boy, who fell in with the wrong crowd, and he made a terrible mistake but does not deserve the death penalty. (E.H. 186, 571.) The trial transcript reflects that strategy in the testimony trial counsel presented during the penalty and sentencing phases.

"After conducting a reasonable investigation and forming a reasonable trial strategy, trial counsel decided to present the testimony of four witnesses during the penalty phase: Carolyn Rowland, Elsie Garrison, Van Reid, and Vonnie Salee. Carolyn Rowland, McWhorter's mother, and Garrison, his aunt, were selected because they knew McWhorter well and because their pain felt over McWhorter's capital murder trial was 'obvious,' and trial counsel hoped to evoke sympathy from the jury. (E.H. 190.) Garrison testified during the penalty phase that McWhorter once was wrongly accused of using drugs, so she had him drug tested. The test confirmed that there were no drugs in McWhorter's system. (R. 1782.) She also testified that McWhorter was 'compassionate,' but that he got caught up with the wrong crowd, including Daniel Miner, a codefendant in this case. (R. 1784–85.) Carolyn Rowland also testified that McWhorter had been a 'good kid' until he started spending time with Daniel Miner, Lee Williams, and Marcus Carter, all of whom were codefendants in this case. (R. 1792–93.)

"Garrison recommended Van Reid. (E.H. 189.) Reid knew McWhorter around the time of the murder because McWhorter worked as a busboy at Reid's restaurant, and Reid knew McWhorter to be a young man who did his job well. (E.H. 190; R. 1176–77.) Vonnie Salee was picked to testify partly because she was 'very likable.' (E.H. 188.) Salee, like Reid, also knew McWhorter to be a good worker. (R. 1772.) McWhorter bagged groceries at the grocery store where Salee was a cashier. (Ibid.) She recalled that McWhorter once had rubbed the shoulders of an older lady cashier who complained that her shoulders and back were hurting. (R. 1773.)

"Trial counsel's 'good boy, wrong crowd' strategy also was applied to the sentencing phase before Judge Gullahorn. ***1242** Trial counsel presented additional testimony from Garrison and Carolyn Rowland, along with Janice Miller, McWhorter's aunt by marriage. The trial transcript and the evidentiary hearing transcript show that trial counsel presented meaningful testimony during the penalty and sentencing phases that was consistent with their strategy, and they refrained from presenting additional evidence that would have detracted from their strategy."

(C. 1159–65.)

Specifically, as to the "triple interview," and the timeliness of the mitigation investigation, the primary cases on which McWhorter relies are *Correll v. Ryan,* 539 F.3d 938, 945 (9th Cir.2008), and *State v. Gamble,* 63 So.3d 707 (Ala.Crim.App.2010). Those cases are clearly distinguishable from this case. Although the "triple interview" in *Correll* is somewhat similar to the "triple interview" in this case, *Correll* is distinguishable because in that case trial counsel put on *no evidence* during the penalty phase—he did not call a single witness, and he waived the presentation of mitigating evidence. Additionally, there was evidence indicating the trial counsel in *Correll* spent a total of five minutes interviewing the defendant in *Correll* regarding mitigation evidence. In McWhorter's case, his trial counsel introduced the evidence described above and did substantially more than did trial counsel in *Correll.* Likewise, in *Gamble,* no witnesses were called to testify in Gamble's behalf during the penalty phase. As mentioned above, McWhorter's attorneys called several witnesses to testify during the penalty phase of his capital-

murder trial and adhered to their trial strategy as discussed with McWhorter and his family.

Regarding the records documenting McWhorter's family history and his medical and school records, the circuit court denied relief on these claims for several reasons. First, as to the records of McWhorter's family history, the records related to his father, and social-services records, the court found that McWhorter failed to meet the specificity requirements of Rule 32.6(b), Ala. R.Crim. P., because he failed to identify what records counsel should have obtained. Regarding his parents' divorce records, the circuit court also concluded that McWhorter pleaded "only vaguely what those records would have proved." (C. 1181.) The circuit court also denied relief because, it found, McWhorter failed to meet his burden of proving that his trial counsel's performance was deficient in regard to information on his family history, specifically, information about his father, and information contained in his educational and medical records. The circuit court also denied relief on the educational-records claim, the medical-records claim, and the records-related-to-his-father claim because, the court found, McWhorter had failed to establish that he was prejudiced by his trial counsel's penalty-phase performance. Specifically, when denying relief on these claims, the postconviction court stated:

> "*xiii. The Claim That Trial Counsel Should Have Obtained Records Documenting McWhorter's Family History*
>
> "McWhorter's claim that his trial counsel were ineffective for failing to obtain records documenting his family history is contained in paragraph 193 of his amended Rule 32 petition.
>
> "This claim is denied because it fails to meet Rule 32.6(b)'s 'clear and specific' pleading requirement. McWhorter first does not identify what records trial counsel allegedly was ineffective for failing to obtain other than 'divorce records.' As for the divorce records, McWhorter pleads only vaguely what ***1243** those records would have proved, stating those records would have 'corroborated the disintegration of Casey's parents' union and Tommy McWhorter's subsequent two marriages.' But McWhorter does not plead how he was prejudiced when it is clear from the pleading itself that these records only would have 'corroborated' some unidentified witness's testimony. As such, this claim is denied because it is insufficiently pleaded.
>
> "In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. Concerning divorce records, trial counsel conducted an interview of McWhorter's mother, Carolyn Rowland, where they learned of McWhorter's parents' divorce. There was no need for trial counsel to obtain documentation verifying the divorce when Carolyn Rowland, for example, could and did testify to facts related to the divorce. Carolyn Rowland told trial counsel during that pre-trial Interview with McWhorter's family that her divorce with Tommy McWhorter was not 'bitter.' (E.H. 181–82.) She testified to that fact during the penalty phase, too. (R. 1789.) Because records were not necessary to establish facts relevant to McWhorter's parents' divorce, trial counsel were not ineffective for failing to obtain them. As such, this claim is denied.
>
> "*xiv. The Claim That Trial Counsel Should Have Obtained Educational Records*
>
> "McWhorter's claim that his trial counsel were ineffective for failing to obtain educational records is contained in paragraphs 194 through 195 of his amended Rule 32 petition.
>
> "This claim is denied because McWhorter failed to meet his burden of proof. McWhorter asserts in his petition that educational records would have shown school transfers and his 'declining academic performance.' As discussed at length above, McWhorter's family, including his mother and aunt, fully cooperated with trial counsel's mitigation investigation. Trial counsel did not need to obtain educational records in order to show that McWhorter's grades were poor at times or that he transferred schools. In fact, Elsie Garrison testified to McWhorter's high school transfers. (R. 1786–87.) McWhorter does not allege what additional information educational records would have uncovered. Trial counsel's performance, therefore, was not deficient, and McWhorter did not suffer prejudice. As such, this claim is denied.
>
> "*xv. The Claim That Trial Counsel Should Have Obtained Medical Records*
>
> "McWhorter's claim that his trial counsel were ineffective for failing to obtain medical records is contained in paragraphs 196 through 198 of his amended Rule 32 petition.

"This claim is denied because McWhorter failed to meet his burden of proof. McWhorter asserts in his petition that medical records would have established that 'before age three, Casey had an unusually high number of accidents and medical problems,' that he was involved in a life [sic].

"McWhorter's claim that his trial counsel were ineffective for failing to obtain DHR records is contained in paragraphs 199 through 202 of his amended Rule 32 petition.

"This claim is denied because it fails to meet Rule 32.6(b)'s 'clear and specific' pleading requirement. McWhorter first does not plead specifically what the DHR records would contain. Instead, the petition states, 'Most likely, from what counsel have learned, the document ***1244** relates to an allegation that Petitioner was an abused or neglected child.' (Pet. at para. 200.) Because McWhorter does not plead what was in the DHR records, this claim is insufficiently pleaded.

"In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. Though McWhorter asserts, in conclusory fashion, that the DHR records contain that he was an 'abused or neglected child,' the evidence presented at the evidentiary hearing did not support that allegation. Plus, trial counsel did not need to obtain the records from DHR because Garrison, who cooperated fully with trial counsel, filed the DHR report on Carolyn Rowland for leaving bruises on McWhorter after 'whipping' him. (McWhorter's Exhibit 7, page 5.) Garrison's complaint was the only document in the DHR records presented at the evidentiary hearing. (McWhorter's Exhibit 11.) No further action was taken by DHR. (McWhorter's Exhibit 7, page 5; E.H. 158.) DHR records would not have changed trial counsel's reasonable mitigation strategy. Trial counsel's performance, therefore, was not deficient, and McWhorter did not suffer prejudice. As such, this claim is denied.

"*xvii. The Claim That Trial Counsel Should Have Obtained Records Related To Tommy McWhorter*

"McWhorter's claim that his trial counsel were ineffective for failing to obtain records related to his father, Tommy McWhorter, is contained in paragraphs 203 through 204 of his amended Rule 32 petition.

"This claim is denied because it fails to meet Rule 32.6(b)'s 'clear and specific' pleading requirement. McWhorter does not plead specifically what agency's records trial counsel should have obtained. Therefore, this claim is insufficiently pleaded.

"In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. Trial counsel did not need records to learn of Tommy McWhorter's past. Trial counsel discussed with McWhorter's family facts related to Tommy McWhorter. But, according to McWhorter's family, McWhorter and his father 'did not have much contact.' (E.H. 181.) Carolyn Rowland also told trial counsel that her divorce with Tommy McWhorter was not 'bitter.' (E.H. 181–82.) She testified to that fact during the penalty phase, too. (R. 1789.) Trial counsel, therefore, decided that Tommy McWhorter's life did not impact McWhorter enough to be pertinent to the penalty phase.

"In addition, the facts that trial counsel knew about Tommy McWhorter would have been inconsistent with their mitigation strategy. Trial counsel knew that Tommy McWhorter was a violent alcoholic and a criminal, but they did not want those facts presented to the jury because they feared that the jury would infer that 'the apple doesn't fall far from the tree' and that McWhorter, therefore, was a 'bad seed.' (E.H. 158–59, 579–80.) Plus, trial counsel thought the jury would be interested in hearing mitigation evidence related to McWhorter's life, and not his father's. (E.H. 579–80.) Strategic decisions are 'virtually unassailable, especially when they are made by experienced criminal defense attorneys,' like McWhorter's counsel. *Williams v. Head*, 185 F.3d [1223] at 1242 (11th Cir.1999).

"Thus, Tommy McWhorter's records would not have changed trial counsel's reasonable mitigation strategy. Trial counsel's performance, therefore, was ***1245** not deficient, and McWhorter did not suffer prejudice. As such, this claim is denied."

(C. 1181–87.)

The circuit court's findings are supported by the record and law. McWhorter's claim that his attorneys failed to adequately present mitigating evidence is essentially a claim that his attorneys should have presented more mitigating evidence. As this Court has stated:

> " ' "[F]ailure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment." *Coleman* [*v. Mitchell*], 244 F.3d

[533] at 545 [(6th Cir.2001)]; see also *Rompilla v. Beard,* 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Our circuit's precedent has distinguished between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation where the presumption of reasonable performance is more difficult to overcome:

> " ' "[T]he cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by *Strickland* will be hard to overcome."

" ' *Campbell v. Coyle,* 260 F.3d 531, 552 (6th Cir.2001) (quotation omitted) ...; *see also* *Moore v. Parker,* 425 F.3d 250, 255 (6th Cir.2005). In the present case, defense counsel did not completely fail to conduct an investigation for mitigating evidence. Counsel spoke with Beuke's parents prior to penalty phase of trial (although there is some question as to how much time counsel spent preparing Beuke's parents to testify), and presented his parents' testimony at the sentencing hearing. Defense counsel also asked the probation department to conduct a presentence investigation and a psychiatric evaluation. While these investigatory efforts fall far short of an exhaustive search, they do not qualify as a complete failure to investigate. *See* *Martin v. Mitchell,* 280 F.3d 594, 613 (6th Cir.2002) (finding that defense counsel did not completely fail to investigate where there was "limited contact between defense counsel and family members," "counsel requested a presentence report," and counsel "elicited the testimony of [petitioner's] mother and grandmother"). Because Beuke's attorneys did not entirely abdicate their duty to investigate for mitigating evidence, we must closely evaluate whether they exhibited specific deficiencies that were unreasonable under prevailing professional standards. See *Dickerson v. Bagley,* 453 F.3d 690, 701 (6th Cir.2006).'

" *Beuke v. Houk,* 537 F.3d 618, 643 (6th Cir.2008). '[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying heavy measure of deference to counsel's judgments.' *Wiggins,* 539 U.S. at 521–22. 'A defense attorney is not required to investigate all leads....' ***1246** *Bolender v. Singletary,* 16 F.3d 1547, 1557 (11th Cir.1994). 'A lawyer can almost always do something more in every case. But the Constitution requires a good deal less than maximum performance.' *Atkins v. Singletary,* 965 F.2d 952, 960 (11th Cir.1992). 'The attorney's decision not to investigate must not be evaluated with the benefit of hindsight, but accorded a strong presumption of reasonableness.' *Mitchell v. Kemp,* 762 F.2d 886, 889 (11th Cir.1985).

> " '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. In particular, what investigation decisions are reasonable depends critically on such information.'

" *Strickland v. Washington,* 466 U.S. at 691. 'The reasonableness of the investigation involves "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." ' *St. Aubin v. Quarterman,* 470 F.3d 1096, 1101 (5th Cir.2006), quoting in part *Wiggins,* 539 U.S. at 527."

Ray, 80 So.3d at 984. In addition,

> " '[W]e "must recognize that trial 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. [*Laugesen*] *v. State,* [(1967), 11 Ohio Misc. 10, 227 N.E.2d 663]; *State v. Lott,* [(Nov. 3, 1994),

Cuyahoga App. Nos. 66338, 66389, 66390]. 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 is not required to present all mitigation evidence, even if the additional mitigation evidence would not have been incompatible with counsel's strategy. Counsel must be permitted to weed out some arguments to stress others and advocate effectively." *Haliburton v. Sec'y for the Dep't of Corr.,* 342 F.3d 1233, 1243–44 (11th Cir.2003) (quotation marks and citations omitted); see *Herring v. Sec'y, Dep't of Corr.,* 397 F.3d 1338, 1348–50 (11th Cir.2005) (rejecting ineffective assistance claim where defendant's mother was only mitigation witness and counsel did not introduce evidence from hospital records in counsel's possession showing defendant's brain damage and mental retardation or call psychologist who evaluated defendant pre-trial as having dull normal intelligence); *Hubbard v. Haley,* 317 F.3d 1245, 1254 n. 16, 1260 (11th Cir.2003) (stating this Court has "consistently held that there is 'no absolute duty ... to introduce mitigating or character evidence' " and rejecting claim that counsel were ineffective in failing to present hospital records showing defendant was in "borderline mentally retarded range") (brackets omitted) (quoting *Chandler* [*v. United States*], 218 F.3d [1305] at 1319 [(11th Cir.2000)]).'

***1247** "*Wood v. Allen,* 542 F.3d 1281, 1306 (11th Cir.2008). 'The decision of what mitigating evidence to present during the penalty phase of a capital case is generally a matter of trial strategy.' *Hill v. Mitchell,* 400 F.3d 308, 331 (6th Cir.2005)."

Dunaway, —— So.3d at ——.

Likewise,

" 'When claims of ineffective assistance of counsel involve the penalty phase of a capital murder trial the focus is on "whether 'the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Jones v. State,* 753 So.2d 1174, 1197 (Ala.Crim.App.1999), quoting *Stevens v. Zant,* 968 F.2d 1076, 1081 (11th Cir.1992). See also *Williams v. State,* 783 So.2d 108 (Ala.Crim.App.2000). An attorney's performance is not per se ineffective for failing to present mitigating evidence at the penalty phase of a capital trial. See *State v. Rizzo,* 266 Conn. 171, 833 A.2d 363 (2003); *Howard v. State,* 853 So.2d 781 (Miss.2003), cert. denied, 540 U.S. 1197 (2004); *Battenfield v. State,* 953 P.2d 1123 (Okla.Crim.App.1998); *Conner v. Anderson,* 259 F.Supp.2d 741 (S.D.Ind.2003); *Smith v. Cockrell,* 311 F.3d 661 (5th Cir.2002); *Duckett v. Mullin,* 306 F.3d 982 (10th Cir.2002), cert. denied [538 U.S. 1004], 123 S.Ct. 1911 (2003); *Hayes v. Woodford,* 301 F.3d 1054 (9th Cir.2002); and *Hunt v. Lee,* 291 F.3d 284 (4th Cir.), cert. denied, 537 U.S. 1045 (2002).'

"*Adkins v. State,* 930 So.2d 524, 536 (Ala.Crim.App.2001) (opinion on return to third remand). As we also stated in *McWilliams v. State,* 897 So.2d 437, 453–54 (Ala.Crim.App.2004):

" ' "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 this case, the trial court found that the evidence McWhorter offered at the postconviction evidentiary hearing was either inconsistent with the "good boy, wrong crowd" theory or would have been cumulative to evidence already offered during the penalty phase. In *State v. Gamble,* 63 So.3d 707

(Ala.Crim.App.2010), a case on which McWhorter relies, this Court specifically distinguished both types of cases:

> "This is not a case in which the omitted mitigating evidence was cumulative to evidence that was presented, *see Ferguson v. State,* 13 So.3d 418 (Ala.Crim.App.2008), or in which counsel investigated and made an informed strategic decision not to present evidence concerning Gamble's upbringing, *see Waldrop v. State,* 987 So.2d 1186 (Ala.Crim.App.2007). Here, counsel's investigation was so inadequate that they failed to discover any mitigation evidence to present at the penalty phase—although the ***1248** Rule 32 evidentiary hearing clearly showed that there was a plethora of evidence that could have been presented on Gamble's behalf."

Gamble, 63 So.3d at 721.

In two sentences in McWhorter's brief to this Court, citing *Gamble,* he also claims error because his trial counsel failed to hire a mitigation specialist. (McWhorter's brief, p. 52.) *Gamble,* however, is distinguishable from this case in regard to the hiring of a mitigation investigator. In *Gamble,* counsel failed to present any mitigation evidence during the penalty phase. 63 So.3d at 721. In this case, counsel conducted an interview with McWhorter and his family, presented the testimony of four witnesses, and hired a neuropsychologist to evaluate McWhorter for any mental disease or disorder.

Moreover, although the evidence about McWhorter's childhood is indeed disturbing, it does not necessarily mean that trial counsel was ineffective for failing to offer the additional evidence. This Court in *Davis v. State,* 44 So.3d 1118 (Ala.Crim.App.2009), stated the following in evaluating a similar claim alleging the ineffective assistance of counsel:

> " 'As a matter of trial strategy, counsel could well decide not to call family members as witnesses because family members can be easily impeached for bias.' *Bergmann v. McCaughtry,* 65 F.3d 1372, 1380 (7th Cir.1995).
>
> " 'Once counsel conducts a reasonable investigation of law and facts in a particular case, his strategic decisions are "virtually unchallengeable." [*Strickland v. Washington,* 466 U.S. 668] at 690, 104 S.Ct. 2052 [(1984)]. Tactical or reasonable professional judgments are not deficient but a failure to investigate a material matter due to inattention may be deficient. When the claim is that counsel failed to present a sufficient mitigating case during sentencing, the inquiry "is not whether counsel should have presented a mitigation case" but "whether the investigation supporting counsel's decision not to introduce mitigating evidence ... was itself reasonable." See *Wiggins* [*v. Smith*], 539 U.S. [510] at 523, 123 S.Ct. 2527 [(2003)] (internal citations omitted).'

"*Powell v. Kelly,* 562 F.3d 656, 670 (4th Cir.2009). See also *Villegas v. Quarterman,* 274 Fed.Appx. 378, 382 (5th Cir.2008). Evidence of a difficult childhood has been characterized as a 'double-edged' sword. See *Bacon v. Lee,* 225 F.3d 470, 481 (4th Cir.2000). '[E]mphasizing a client's deprived childhood does not have a very beneficial impact on a northwest Florida jury, given the fact that many jurors have had difficult lives, but have not turned to criminal conduct.' *Card v. Dugger,* 911 F.2d 1494, 1511 (11th Cir.1990). What one juror finds to be mitigation another juror may find aggravating. '[M]itigation may be in the eye of the beholder.' *Stanley v. Zant,* 697 F.2d 955, 969 (11th Cir.1983). See also *Ford v. Schofield,* 488 F.Supp.2d 1258, 1346 (N.D.Ga.2007) ('The Supreme Court has stated that the reasonableness of counsel's actions should be evaluated based on "strategic choices made by the defendant and on information supplied by the defendant." *Burger v. Kemp,* 483 U.S. 776, 795, 107 S.Ct. 3114, 97 L.Ed.2d 638 (1987)....'); *Carroll v. State,* 815 So.2d 601, 615 (Fla.2002) ('By failing to respond to counsel's requests to provide trial counsel with the names of witnesses who could assist in presenting mitigating evidence, Carroll may not now complain that trial counsel's failure to pursue such mitigation was unreasonable.'); *Rose v. State,* 617 So.2d 291, 295 (Fla.1993) ('In light of the harmful testimony ***1249** that could have been adduced from Rose's brother and the minimal probative

value of the cousins' testimony, we are convinced that the outcome would not have been different had their testimony been presented at the penalty phase.').

"Copeland testified that he made a strategic decision to rely on a plea for mercy. It is clear from both attorneys' testimony that they conducted an investigation and were aware of Davis's background and upbringing. Copeland stated that he did not believe evidence of Davis's performance in school would have had any value because of the nature of the murders. Based on the unique circumstances presented in this case we cannot say that counsel's actions were unreasonable. Moreover, the testimony at the evidentiary hearing was neither strong nor compelling. Davis was over the age of 25 at the time of the murders. One of Davis's brothers who testified at the postconviction proceedings was 14 years of age at the time of Davis's trial. Another brother who testified was in prison at the time of Davis's trial. Davis's mother painted a different picture of Davis's childhood than did Davis's siblings. Many witnesses admitted that they knew that Davis was selling drugs from his home in Gibbs Village. Other witnesses had not seen Davis for many years. The testimony offered at the postconviction hearing would have been entitled to little weight."

Davis, 44 So.3d at 1141–42.

Furthermore, this is not a situation where McWhorter's trial counsel conducted no investigation like counsel in *Porter v. McCollum,* 130 S.Ct. 447, 453–54 (2009), where counsel failed to uncover evidence of the defendant's mental health, family background, and serious drinking problem and did not obtain certain records; or like counsel in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003), where counsel had information that alluded to the defendant's troubled and difficult childhood but failed to conduct a more thorough investigation; or like counsel in *Williams v. Taylor,* 529 U.S. 362, 120 S.Ct. 1495, 146 L.Ed.2d 389 (2000), where counsel did not begin to investigate mitigation evidence until a week before trial and failed to uncover critical records about the defendant.

Given the particularly egregious facts of the underlying crime —for example, McWhorter's planning the crime for three weeks, lying in wait for several hours, and methodically creating homemade silencers and test-firing them beforehand, etc.—and given that McWhorter admitted to much of the crime, McWhorter has failed to demonstrate that his attorneys rendered ineffective assistance by not offering the additional evidence described above. Evidence of a difficult childhood and drug and alcohol abuse is a two-way street. Such evidence can be helpful in mitigation but it can also be harmful to the defense's case. Additionally, given the methodical, deliberate manner in which McWhorter committed the crime, expert testimony indicating that McWhorter had difficulty in preventing impulsive decisions would not have made any difference. Accordingly, we find no error in the circuit court's conclusion that counsel's performance was not deficient.

D.

McWhorter also argues that the circuit court erred in finding that trial counsel's performance did not prejudice him. He contends that if evidence of the physical abuse he suffered, the violence to which he was exposed, his sniffing gasoline and freon from a young age, and his emotional ***1250** state in the period preceding the crime, had been presented to the trial court, he might have been sentenced to life imprisonment without parole.

In assessing claims of ineffective assistance of counsel in the penalty phase of a capital trial, we apply the standard discussed in *Wiggins v. Smith,* 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003):

"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. In assessing prejudice, we reweigh the evidence in aggravation against the totality of available mitigating evidence."

539 U.S. at 534.

In sentencing McWhorter to death, the trial court found one aggravating circumstance—that the capital offense was committed while McWhorter was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit a robbery. *See* § 13A–5–49(4), Ala.Code 1975. Here, the circuit court found that the omitted mitigating evidence presented at

the postconviction evidentiary hearing would not have outweighed the aggravating circumstance. This Court has also reviewed the mitigating evidence trial counsel allegedly failed to discover and present against the aggravating circumstances presented. After a complete review, we are confident that the mitigating evidence presented at the postconviction hearing —but omitted from the penalty phase of McWhorter's capital-murder trial—would have had no impact on the sentence in this case. *See* *Wiggins,* 539 U.S. at 534. Consequently, McWhorter was due no relief on his claim that his trial counsel was ineffective for not presenting the additional mitigating evidence in the penalty phase of his capital-murder trial.

III.

McWhorter essentially makes four arguments with regard to the circuit court's exclusion of the testimony of David Rowland, Janet Vogelsang, and Dr. Ralph Tarter during the postconviction evidentiary hearing. (Claim XII in McWhorter's amended Rule 32 petition.) First, McWhorter argues that the exclusion of the testimony on hearsay grounds was improper because, he says, the testimony was not hearsay. Second, McWhorter contends that the evidence was "relevant to demonstrate trial counsel's inadequate investigation" and that "he was entitled to demonstrate what evidence trial counsel should have presented at the penalty phase of [his] trial." (McWhorter's brief, p. 75.) Third, McWhorter claims that the exclusion of evidence on hearsay grounds violated his constitutional right to present evidence in his favor. Last, McWhorter asserts that the circuit court erred in excluding evidence pursuant to Rule 32.6, Ala. R.Crim. P.

Initially, we question whether McWhorter preserved his argument with regard to the exclusion of hearsay evidence during both David Rowland's and Dr. Tarter's testimony. During Rowland's testimony the following exchange occurred:

"[POSTCONVICTION COUNSEL]: Did you talk to [McWhorter] about it?

"[David Rowland]: Yes, I did.

"[POSTCONVICTION COUNSEL]: What did you say to him and what did he say to you?

***1251** "[STATE]: Objection to hearsay, what he said outside these proceedings.

"[POSTCONVICTION COUNSEL]: I will withdraw it."

(R. 365.) After this objection, the State did not make any further hearsay objections while Rowland testified. Thus, McWhorter, by failing to obtain an adverse ruling from the circuit court, did not preserve this argument for review.

The State also did not make any hearsay objections during Dr. Tarter's testimony. (R. 659–725.) In his brief, McWhorter does not reference any specific adverse ruling of the circuit court during Dr. Tarter's testimony; rather, McWhorter makes a bare assertion that the circuit court's "ruling ... had considerable impact on the testimony of Dr. Tarter." (McWhorter's brief, p. 74.) It appears that McWhorter is arguing that, because the circuit court excluded a portion of Janet Vogelsang's testimony, Dr. Tarter's testimony was limited. The circuit court, however, never expressly limited Dr. Tarter's testimony on hearsay grounds. It is well settled that " '[i]n the absence of a ruling, a request for a ruling or an objection to the court's failure to rule, there is nothing preserved for appellate review.' " *Reynolds v. State,* 114 So.3d 61, 108 (Ala.Crim.App.2010) (quoting *Johnson v. State,* 542 So.2d 341, 345 (Ala.Crim.App.1989) (citations omitted)).

Because McWhorter withdrew his question to David Rowland when the State objected on hearsay grounds and because the State did not object on hearsay grounds during Dr. Tarter's testimony, there is no ruling from the circuit court that this Court can review for error. Accordingly, any issues McWhorter raises with regard to the exclusion of the testimony of both David Rowland and Dr. Tarter are not preserved for review.

McWhorter also contends that the circuit court improperly excluded the testimony of Janet Vogelsang. During the evidentiary hearing the following transpired:

"[POSTCONVICTION COUNSEL]: And were there any activities that you engaged in, in this case as a capital case, that were unique or unusual?

"[Janet Vogelsang]: There were. There was the opportunity in this case to interview some family members with a great deal of space in between. And so that was the opportunity —space of time. So that was an opportunity to look for consistency of information over a longer period of time than usual.

"And the other thing that was unique, I think, about the family history was that on his mother's side of the family,

going back several generations, these people were migrant workers, and they followed the harvest.

"[STATE]: Objection, Your Honor, to hearsay. We would object. We have no idea where this is coming from, this migrant workers. There's been no testimony that anybody's been a migrant worker in this case. This is pure hearsay that she is getting from some third party. Under Alabama caselaw, it's impermissible at a Rule 32 hearing.

"[POSTCONVICTION COUNSEL]: Your Honor, I would say under Rule 703, [Ala. R. Evid.,] under the opinions and testimony of expert witnesses, Ms. Vogelsang as having been qualified as an expert to render her opinions and findings in her biopsychosocial assessment, she may rely upon the facts or data in the particular case upon which an expert bases her opinion, or inference may be those perceived by or made known to the expert at or before the hearing. She has just listed all of the documents that she's reviewed and the people that ***1252** she has interviewed and the persons with whom she's consulted.

"[STATE]: Your Honor, we have three Rule 32, [Ala. R.Crim. P.,] Court of Criminal Appeals' cases that stand for the proposition I cited. One actually involves Dr. Vogelsang.

"THE COURT: Let me take a look at it.

"[STATE]: That would be [*Giles v. State,* 906 So.2d 963 (Ala.Crim.App.2004), *Hunt v. State,* 940 So.2d 1041 (Ala.Crim.App.2005)], and the final one is [*Waldrop v. State,* 987 So.2d 1186 (Ala.Crim.App.2007)].

"....

"[THE COURT]: All right. Tell me how we get around Rule 703, which, to me, looks like a prohibition upon hearsay knowledge coming in, even if it's relied upon by the expert.

"[POSTCONVICTION COUNSEL]: Tell me how I get around it? Because it is based on her opinion, based on the people that she—as an expert witness, she's permitted to testify about what she relied upon in basing her—

"[THE COURT]: She is under federal law. Alabama's rule actually takes the exact opposite of the federal rule, which is that if it's inadmissible as hearsay, then she cannot testify in her opinion.

"[POSTCONVICTION COUNSEL]: Well, in terms of the hearsay, we do not intend to have Ms. Vogelsang indicate who said anything, who is attributed to this. These are just her impressions and findings that are based upon her interviews. So it's not hearsay.

"[STATE]: Your Honor, that's the very definition of hearsay. They're based on third-party, out-of-court statements. And that's just a perfect example that this family's from migrant workers. That's classic hearsay, some third party told Ms. Vogelsang, and she just came into court to tell me that.

"[THE COURT]: Let me read the statement of the rule. 'Experts without firsthand knowledge generally may not base opinions upon facts or data that have not themselves been admitted into evidence.'

"[POSTCONVICTION COUNSEL]: And there has been no evidence, Your Honor.

"[THE COURT]: How do we cross that threshold?

"[POSTCONVICTION COUNSEL]: Our copy of [Rule] 703, Your Honor, is different from Your Honor's.

"[THE COURT]: I'm giving you a statement of the rule.

"[POSTCONVICTION COUNSEL]: May I see it?

"[THE COURT]: Yes.

"[POSTCONVICTION COUNSEL]: Your Honor, can we have a moment to talk about this?

"....

"[POSTCONVICTION COUNSEL]: For the record, first, we had earlier objected and taken the position that the rules of evidence, at least as to hearsay, should not apply to the mitigation phase. I understand the Court ruled that they did. We reiterate that objection, just for the record.

"And, second, we submit that we're entitled to, under the Federal Constitution, to make a full and complete record of all mitigation factors, and that Ms. Vogelsang's inability and any expert's inability to testify as to hearsay as an expert, limits that right. And we want to preserve that and object to it on that ground, as well.

***1253** "[THE COURT]: I understand. The objection is sustained."

(R. 522–27.)

A.

McWhorter first argues that the statement from Vogelsang was not hearsay because it was not being offered for the truth of the matter asserted. (McWhorter's brief, p. 75.) To support his argument McWhorter cites two cases—*Pylant v. State,* 263 S.W.3d 854 (Tenn.2008), and *Trimble v. State,* 693 S.W.2d 267 (Mo.Ct.App.1985). In both cases the appellate courts reversed the trial courts because they excluded hearsay evidence when it was being offered to show ineffective assistance of counsel because the statements were not being offered for the truth of the matter asserted. McWhorter, however, did not raise this argument in the circuit court. "The statement of specific grounds of objection waives all grounds not specified, and the trial court will not be put in error on grounds not assigned at trial." *Ex parte Frith,* 526 So.2d 880, 882 (Ala.1987). Thus, this argument is not properly before this Court for review.

B.

McWhorter also argues, in the alternative, that even if the statement was hearsay "he was entitled to demonstrate what evidence trial counsel should have presented at the penalty phase of [his] trial" because "at the penalty phase the evidence presented could have included hearsay." (McWhorter's brief, p. 75.) McWhorter contends that "the law plainly [supports] this argument." (McWhorter's brief, p. 75.)

McWhorter correctly asserts that hearsay is admissible during the penalty phase of trial because the rules of evidence do not apply to sentencing hearings. Rule 1101(b)(3), Ala. R. Evid. McWhorter's argument that the inapplicability of the rules of evidence during a sentencing hearing allows him to present hearsay evidence during a postconviction evidentiary hearing, however, is in direct conflict with Alabama law. *See Waldrop v. State,* 987 So.2d 1186 (Ala.Crim.App.2007). As this Court stated in *Waldrop:*

> "Waldrop argues that the circuit court erred in excluding hearsay mitigating evidence at his Rule 32 evidentiary hearing. He argues that because hearsay evidence is admissible at a sentencing hearing in a capital-murder trial, it is also admissible at a post-conviction proceeding attacking a death sentence.
>
> "However, Waldrop's argument is inconsistent with prior cases of this Court. As we stated in *Hunt v. State* [940 So.2d 1041 (Ala.Crim.App.2005)]:
>
> > " 'The Alabama Rules of Evidence apply to Rule 32 proceedings. Rule 804, Ala. R. Evid., specifically excludes hearsay evidence. We addressed this identical issue in *Giles v. State,* 906 So.2d 963 (Ala.Crim.App.2004), *overruled on other grounds, Ex parte Jenkins,* 972 So.2d 159 (Ala.2005), and stated:
> >
> > > " ' "Giles specifically argues that the circuit court erroneously failed to consider the hearsay testimony of two witnesses as to what Giles told them about a drug relationship between him and Carl Nelson. Giles argues that the circuit court misapplied the evidentiary rules governing capital sentencing because hearsay evidence is admissible at the sentencing portion of a capital-murder trial.
> > >
> > > " ' "However, what Giles fails to consider is whether the Rules of Evidence apply to Rule 32 proceedings. See Rule 101, Ala. R. Evid., and ***1254** Rule 1101(a), Ala. R. Evid., which states, in part, 'these rules of evidence apply in all proceedings in the Courts of Alabama....' Rule 1101(b), Ala. R. Evid., lists the proceedings exempt from application of the Rules of Evidence. Those proceedings include proceedings concerning preliminary questions of fact, grand jury proceedings, extradition proceedings, preliminary hearings in criminal cases, sentencing or probation revocation hearings, proceedings related to the issuance of a warrant of arrest, criminal summonses, or search warrants, bail proceedings, and contempt proceedings.
> > >
> > > " ' "The Rules of Evidence apply to post-conviction proceedings. *See DeBruce v. State,* 890 So.2d 1068 (Ala.Crim.App.2003). Rule 804, Ala. R. Evid., specifically excludes hearsay evidence. The circuit court correctly applied existing law and excluded the hearsay statements presented concerning an alleged drug relationship between Giles and one of the victims. After excluding the hearsay evidence, the circuit court was left with no lawful evidence to support this contention. Relief was correctly denied on this ground. *See DeBruce, supra.*"

> " ' 906 So.2d at 985–86. The circuit court committed no error in excluding the affidavits and the hearsay testimony of co-counsel.' "

Waldrop v. State, 987 So.2d at 1190. Thus, the rules of evidence apply to postconviction proceedings, and the circuit court should exclude inadmissible hearsay.

Here, the circuit court determined that the evidence Vogelsang was attempting to base her expert opinion on was inadmissible hearsay, and it sustained the State's objection. In Alabama, hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Rule 801(c), Ala. R. Evid. Hearsay evidence is inadmissible unless expressly allowed by statute or rule. Rule 802, Ala. R. Evid. The hearsay rules are not completely suspended, however, when an expert witness testifies. The Alabama Supreme Court has held:

> " ' "An expert may give his opinion based upon his own knowledge of the facts, stating these facts, then his opinion; or, he may give an opinion based upon a hypothetical question, based upon facts in evidence. In either case, the facts known to the expert or [hypothesized] must be facts in evidence. *Blakeney v. Alabama Power Co.,* 222 Ala. 394, 133 So. 16, 18 (1931)." '

"*Welch v. Houston County Hosp. Bd.,* 502 So.2d 340, 345 (Ala.1987), quoting *Thompson v. Jarrell,* 460 So.2d 148, 150 (Ala.1984). (Emphasis added in *Welch*). *See, also, Romine v. Medicenters of America, Inc.,* 476 So.2d 51 (Ala.1985)."

Ex parte Wesley, 575 So.2d 127, 129 (Ala.1990). In other words, an expert can testify based on hearsay, but only if the hearsay evidence has been admitted during the proceedings. In this case, the evidence McWhorter was attempting to elicit from Vogelsang had not been admitted into evidence; therefore, the circuit court correctly held that the evidence should have been excluded; that ruling is in compliance with both the rules of evidence and *Waldrop.*

McWhorter contends, however, that *Waldrop* is in direct conflict with the recent United States Supreme Court ruling in *Sears v. Upton,* 561 U.S. 945, 130 S.Ct. 3259, 177 L.Ed.2d 1025 (2010). McWhorter ***1255** argues that the cases conflict because *Sears* holds that

> " '[t]he fact that some ... evidence may have been "hearsay" does not necessarily undermine its value—or its admissibility—for penalty phase purposes,' and 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.' "

(McWhorter's reply, p. 19 (quoting *Sears,* 561 U.S. at 3263, 130 S.Ct. at 3263).) McWhorter, however, misinterprets *Sears.*

In *Sears,* a Georgia court held a hearing on Sears's postconviction-relief claim of ineffective assistance of counsel. After hearing the testimony presented in the postconviction evidentiary hearing, the Georgia court determined that Sears's trial counsel was constitutionally inadequate under *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but it could not determine whether the inadequate representation prejudiced Sears. The Supreme Court held that the Georgia court did not properly apply the *Strickland* test and remanded the case for the court to apply it correctly.

Although McWhorter correctly cites the Supreme Court's statement regarding the "rote application" of state hearsay rules, that was not the Court's holding. The Court's holding was to restate the correct standard for determining ineffective assistance of counsel, not to issue a blanket ruling that hearsay is always admissible in a postconviction hearing. Thus, *Waldrop* does not conflict with *Sears.*

Because McWhorter's argument is foreclosed by this Court's ruling in *Waldrop,* the circuit court did not abuse its discretion when it prevented Vogelsang from testifying as to hearsay statements that were not in evidence.

C.

McWhorter next argues that the exclusion of hearsay testimony violated his rights both under the federal and the state constitution. Specifically, McWhorter argues that the exclusion of hearsay statements during his postconviction hearing violated his right to present a complete defense. To support his position McWhorter again cites *Sears.* Here, McWhorter contends that *Sears* stands for the proposition

that "hearsay rules cannot be used to exclude evidence during postconviction hearings in capital cases," which, he says, is a principle rooted in the "defendant's well-recognized right under the compulsory process and due process clauses to present witnesses on his own behalf." (McWhorter's brief, pp. 77–78.) As stated above, McWhorter misinterprets *Sears*. *Sears* does not abrogate state hearsay rules during postconviction hearings; rather, the United States Supreme Court reiterated the *Strickland* test in *Sears* and reversed the lower court's judgment because it failed to properly apply that test.

To further support his argument McWhorter cites *Chambers v. Mississippi,* 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), and *Crane v. Kentucky,* 476 U.S. 683, 106 S.Ct. 2142, 90 L.Ed.2d 636 (1986), which, he says, hold that "the Constitution guarantees criminal defendants a meaningful opportunity to present a complete defense." (McWhorter's brief, p. 78.) McWhorter also cites *Gardner v. Florida,* 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), and *Skipper v. South Carolina,* 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), which, he says, hold that a defendant has the "right to place before the sentencer relevant evidence in mitigation of punishment." (McWhorter's brief, p. 78.) These cases, however, are also distinguishable from McWhorter's case.

***1256** In *Chambers,* a defendant's request to cross-examine a key witness was denied by the lower court based on a Mississippi common-law rule, which prevented a party from impeaching its own witness. The defendant attempted to call witnesses to testify to what they heard the key witness say; the lower court, however, excluded the testimony on the basis that it was hearsay. The Supreme Court held that the

> "testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. 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."

Chambers, 410 U.S. at 302.

In *Crane,* a defendant sought to introduce testimony about the environment in which the police secured his confession. Part of his defense was to show that because there was no physical evidence tying him to the crime the jury should not believe his confession. To support his defense, he sought to paint a picture of a young, uneducated boy who was kept against his will in a small, windowless room for a long period. The lower court, however, precluded him from putting on any testimony about the environment in which the interrogation took place. The Supreme Court held that a defendant has a meaningful opportunity to present a complete defense, which is an empty opportunity if the State were "permitted to exclude competent, reliable evidence bearing on the credibility of a confession when such evidence is central to the defendant's claim of innocence." *Crane,* 476 U.S. at 691.

In *Gardner,* the defendant was convicted of murder. During the sentencing phase of trial the lower court relied on a presentence investigation report to sentence the defendant to death. The report, however, contained confidential information that the lower court did not put in the record during the sentencing hearing. Additionally, the lower court did not disclose the information to the Supreme Court of Florida. The United States Supreme Court held that the record on appeal must disclose to the reviewing court the considerations that motivated a death sentence in every case in which it is imposed. *Gardner,* 430 U.S. at 362.

In *Skipper,* the defendant sought to introduce testimony during a sentencing hearing from two jailers and a jail visitor that the defendant "made a good adjustment" while he was in jail. The lower court excluded the evidence because of a state rule that provided that such evidence was irrelevant and inadmissible. The Supreme Court held that in capital cases the sentencer should "not be precluded from considering, as a mitigating factor, any aspect of a 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." *Skipper,* 476 U.S. at 4.

Here, although Vogelsang was precluded from testifying as to certain conversations she had with McWhorter's family members because the statements were hearsay, nothing precluded McWhorter from calling those family members as witnesses at the postconviction proceeding. The circuit court ruled that, as an expert, Vogelsang could not testify to her conclusions drawn from facts and data that were not in evidence. To remedy this, McWhorter simply had to elicit testimony ***1257** from the witnesses that would be necessary to put the facts and data into evidence that would allow Vogelsang to provide her complete opinion. This is different from the situations presented in *Chambers, Crane, Gardner,* and *Skipper,* where the lower courts precluded the defendants from putting on any evidence with regard to their respective defenses. The burden of presenting the evidence necessary to entitle a petitioner to postconviction relief rests squarely on the petitioner. *See* Rule 32.3, Ala. R.Crim. P. Because McWhorter did not put on all the witnesses needed to meet his burden, the circuit court did not infringe on his right to present a complete defense.

D.

Finally, McWhorter argues that the circuit court erred in excluding evidence under Rule 32.6(b). Specifically, McWhorter contends that "Rule 32.6(b) is a pleading rule, not an evidentiary rule; it cannot provide the basis for exclusion of evidence." (McWhorter's brief, p. 81.) He claims error because, he says, the circuit court limited the testimony of Abraham Barnes and Amy Battle, McWhorter's high-school friends, and Kenneth Burns, McWhorter's middle-school science teacher.

Our review of the record indicates that the circuit court did not exclude evidence based on Rule 32.6(b). Instead, the circuit court limited the testimony of the complained-of witnesses to the allegations contained in the amended Rule 32 petition. Specifically, the court ruled that the witnesses, even though not identified in the petition, could testify as to the assertions in the amended petition. Thus, the record refutes McWhorter's claim on this basis. Consequently, McWhorter is not entitled to relief on this assertion of error.

IV.

McWhorter argues that the circuit court erred in summarily dismissing his *Brady* claim because, he says, the State failed to disclose potentially exculpatory evidence that was relevant to mitigation. (Claim VI(A) in McWhorter's amended Rule 32 petition.) Specifically, McWhorter alleged that the State withheld information that "a jailhouse informant named Timothy Rice told the State's prosecutors that both McWhorter and his then-co-defendant, Daniel Miner, said that McWhorter had shot the victim, Lee Williams[,] once in the leg, and Miner fired the remaining shots, including the shots that killed Williams." (McWhorter's brief, pp. 84–85.)[15] This claim was not sufficiently pleaded, and it was procedurally barred because it could have been raised at trial and on appeal but was not. *See* Rule 32.3, Ala. R.Crim. P.; Rule 32.2(a)(3), (a)(5), Ala. R.Crim. P.

In McWhorter's amended petition, he alleged the following:

> "80. Despite the heightened obligation upon the State in this capital proceeding, despite a specific request from defense counsel, and despite the fact that the defense requested and the trial judge granted open file discovery, the State failed to provide exculpatory evidence in its possession to the defense. ***1258** District Attorney Thompson failed to disclose to defense counsel that less than two months earlier, on January 19, 1994, Assistant District Attorney Jolley took a statement from Timothy Rice, who at that time was incarcerated in the Marshall County Jail along with Mr. McWhorter and his codefendants. In exchange for his statement, Mr. Jolley offered Mr. Rice immunity from prosecution on any illegal activities revealed in his statement, so long as those activities did not implicate Mr. Rice in a crime of violence. Mr. Rice informed Mr. Jolley that he had talked separately with Mr. McWhorter, Mr. Miner, and Mr. Lee Williams, Jr., about what happened on the night of the crime. In their separate conversations with Mr. Rice, both Mr. McWhorter and Mr. Miner stated that Mr. McWhorter shot Mr. Williams once in the leg, but that

> Mr. Miner fired the rest of the shots, including the shots that actually killed Mr. Williams. This information was never disclosed to defense counsel. If the District Attorney had disclosed this information to defense counsel, it would have provided persuasive support for Mr. McWhorter's defense theory that Mr. Miner, and not Mr. McWhorter, was the primary shooter, and that Mr. McWhorter did not intend to murder Mr. Williams."

(C. 503.)

As this Court said in *Ray,* 80 So.3d at 973:

> "The United States Supreme Court in *Brady* held that 'the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith of the prosecution.' 373 U.S. at 87. 'To establish a *Brady* violation, [the petitioner] must demonstrate: (1) that the prosecution suppressed evidence; (2) that that evidence was favorable to [the defendant] or exculpatory; and (3) that the evidence was material.' *Ex parte Kennedy,* 472 So.2d 1106, 1110 (Ala.1985)."

The State asserted below, as it does now on appeal, that summary dismissal of McWhorter's Rule 32 petition was proper because McWhorter failed to assert that he could not have raised his *Brady* claim at trial or on direct appeal. *See* Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P. The State also argued that McWhorter's *Brady* claim was insufficiently pleaded and therefore was procedurally barred pursuant to Rule 32.7(d). The circuit court summarily dismissed McWhorter's *Brady* claim regarding Rice's alleged statement pursuant to Rule 32.7(d). (C. 865, 1126.)

In considering a similar claim in *Beckworth v. State,* [Ms. CR–07–0051, May 1, 2009] —— So.3d —— (Ala.Crim.App.2009), that the prosecutor had committed a *Brady* violation, this Court said:

> "Rule 32.3 states that '[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.' Rule 32.6(b) states that '[t]he petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings.' In *Boyd v. State,* 913 So.2d 1113, 1125 (Ala.Crim.App.2003), this Court stated:
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> > " ' "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 ***1259** 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.'
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> "In *Hyde v. State,* 950 So.2d 344 (Ala.Crim.App.2006), this Court recognized:
>
> > " '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).'
>
> "*Hyde v. State,* 950 So.2d at 356."
>
> *Beckworth,* —— So.3d at ——.
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> " 'Because this *Brady* claim was first presented in a Rule 32 petition, [McWhorter] can obtain relief only if it involves "newly discovered evidence." ' *Payne v. State,* 791 So.2d 383, 397 (Ala.Crim.App.1999). *See also* *Windsor v. State,* 89 So.3d 805, 825 (Ala.Crim.App.2009) ('Windsor did not allege that his *Brady* claims were based on newly

discovered evidence or that any alleged suppression by the State continued until such time as the claims could not have been raised at trial.'); *Bush v. State,* 92 So.3d 121, 149 (Ala.Crim.App.2009) ('[B]ecause this alleged *Brady* violation is raised in a postconviction petition, the petitioner must also satisfy the requirements for newly discovered evidence.'); *Davis v. State,* 44 So.3d 1118, 1144 (Ala.Crim.App.2009) ('Davis failed to plead and to prove the requirements for newly discovered evidence.')."

Ray, 80 So.3d at 973.

Rule 32.1(e) allows a petitioner to institute a Rule 32 proceeding on the grounds that "newly discovered material facts exist which require that the conviction or sentence be vacated by the court" if:

"(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;

"(2) The facts are not merely cumulative to other facts that were known;

"(3) The facts do not merely amount to impeachment evidence;

"(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and

"(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received."

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

A postconviction *Brady* claim raised in a Rule 32 petition must meet all five prerequisites of "newly discovered evidence" in Rule 32.1(e), Ala. R.Crim. P. *Payne v. State,* 791 So.2d 383, 398 (Ala.Crim.App.1999). Numerous recent opinions ***1260** of this Court have held that a petitioner's Rule 32 *Brady* claim is procedurally barred if the petitioner fails to plead that his claim is based on newly discovered evidence and could not have been raised at trial or on direct appeal. *See, e.g., Bryant v. State,* [Ms. CR–08–0405, Feb. 4, 2011] —— So.3d —— (Ala.Crim.App.2011); *Ray, supra*; *Davis, supra*; *Windsor, supra*; *Beckworth, supra*; *Smith v. State*, 71 So.3d 12 (Ala.Crim.App.2008); *Ferguson v. State,* 13 So.3d 418, 444–45 (Ala.Crim.App.2008).

In this case, McWhorter failed to include in his petition any facts indicating that the State's alleged suppression of Rice's statement taken two months before trial continued until such time as the claim could not have been raised in a posttrial motion or on appeal. Thus, he has failed to plead sufficient facts to support his claim for relief, and the claim is procedurally barred because it could have been, but was not, raised at trial or on appeal.

In *Hunt v. State,* 940 So.2d 1041, 1058 (Ala.Crim.App.2005), this Court, in considering the petitioner's claim that the State had committed a *Brady* violation, held:

"[T]he circuit court found that Hunt's *Brady* claim was precluded because Hunt failed to plead or to prove that this claim was based on newly discovered evidence. The circuit court's ruling is consistent with prior holdings of this Court. As we stated in *Williams v. State,* 782 So.2d 811, 818 (Ala.Crim.App.2000):

" 'The appellant's first argument is that the State withheld exculpatory information in violation of *Brady v. Maryland,* 373 U.S. 83 (1963).... The appellant did not assert that this claim was based on newly discovered evidence. Therefore, it is procedurally barred because he could have raised it at trial and on direct appeal, but did not. See Rule 32.2(a)(3) and (a)(5), Ala. R.Crim. P.; *Boyd v. State,* 746 So.2d 364 (Ala.Cr.App.1999); *Matthews v. State,* 654 So.2d 66 (Ala.Cr.App.1994); *Lundy v. State,* 568 So.2d 399 (Ala.Cr.App.1990).' "

See also Madison v. State, 999 So.2d 561 (Ala.Crim.App.2006) (a postconviction *Brady* claim raised in a Rule 32 petition must meet the prerequisites of newly discovered evidence set forth in Rule 32.1(e), Ala. R.Crim. P.). Because McWhorter did not allege any facts in his Rule 32 petition indicating when he learned of the existence of Rice's alleged statement or indicating that the discovery of the statement did not occur until after the time for filing a motion for a new trial or an appeal had lapsed, the claim was insufficiently pleaded, and it is procedurally barred. Therefore, summary dismissal of this *Brady* claim was proper under Rule 32.7(d).

McWhorter cites *Ex parte Pierce,* 851 So.2d 606 (Ala.2000), and *McGahee v. State,* 885 So.2d 191 (Ala.Crim.App.2003), for the proposition that the newly-discovered-evidence standard of Rule 32.1(e) does not apply to Rule 32 claims based on alleged violations of the defendant's constitutional rights. McWhorter's argument is misplaced because his *Brady* claim is procedurally barred. In *Pierce,* the Alabama Supreme Court held that Rule 32.1(e) did not apply to a juror-misconduct claim because the petitioner's claim was a constitutional claim under Rule 32.1(a). The Court, however, went on to State that "[a]lthough Rule 32.1(e) does not preclude Pierce's claim, Rule 32.2(a)(3) and (5) would preclude Pierce's claim if it could have been raised at trial or on appeal." *Pierce,* 851 So.2d at 614. The Court stated that Pierce's claim was barred under Rules 32.2(a)(3) and 32.2(a)(5) unless "he ***1261** established that the information [forming the basis of his claim] was not known, and could not reasonably have been discovered, at trial or in time to raise the issue in a motion for new trial or on appeal." *Pierce,* 851 So.2d at 616. Thus, although McWhorter does not have to prove that his *Brady* claim is based on "newly discovered material facts" as defined under Rule 32.1(e)(1)–(5), he must still plead facts indicating that his claim could not have been raised at trial or on direct appeal to avoid being procedurally barred under Rule 32.2(a)(3) and 32.2(a)(5). [16] This requires McWhorter to plead that the State's alleged concealment of Rice's statement "was not known, and could not reasonably have been discovered, at trial or in time to raise the issue in a motion for new trial or on appeal." *Pierce,* 851 So.2d at 616. *See also Hunt, supra*, *Boyd v. State,* 913 So.2d 1113 (Ala.Crim.App.2003), and *Windsor v. State,* 89 So.3d 805 (Ala.Crim.App.2009).

Finally, McWhorter also appears to argue that his *Brady* rights supersede the procedural requirements of Rule 32. *Hunt, Boyd, Windsor,* as well as other cases have all subjected *Brady* claims to Rule 32's procedural requirements. To prove that Rule 32's procedural requirements are unconstitutional, McWhorter would have to prove that Rule 32 "is fundamentally inadequate to vindicate the substantive rights involved." *District Attorney's Office of the Third Judicial District v. Osborne,* 557 U.S. 52, 53, 129 S.Ct. 2308, 2320, 174 L.Ed.2d 38 (2009). McWhorter does not make this argument in his brief.

McWhorter's *Brady* claim was not pleaded with sufficient specificity and lacked a full disclosure of the factual basis supporting the claim. Summary dismissal of the claim would have been proper, additionally, because the claim could have been raised at trial or on appeal, but was not, and thus was procedurally barred. McWhorter clearly failed to show that he was entitled to relief.

V.

Lastly, McWhorter argues that counsel was ineffective for failing to object to his being transported in and out of the courtroom in the presence of the jury in handcuffs. (Claim VIII in McWhorter's amended Rule 32 petition.) McWhorter contends that the circuit court erred in dismissing his petition without an evidentiary hearing. He alleges that this claim was sufficiently pleaded and is meritorious on its face. Thus, McWhorter argues, he was entitled to an evidentiary hearing on this issue.

In his amended petition, McWhorter alleged as follows in regard to this claim:

> "96. On each day of the trial, the jurors could see [McWhorter] being led into the courtroom manacled, in handcuffs. Jurors could see [McWhorter's] handcuffs being put on and removed.
>
> "97. Trial counsel never objected to this procedure.
>
> "98. The shackling procedure stripped [McWhorter] of the presumption of innocence that is constitutionally afforded to all defendants. One of the 'basic components of a fair trial is the presumption of innocence.' *Estelle v. Williams,* 425 U.S. 501, 503 (1976). 'To ***1262** implement the presumption, courts must be alert to factors that may undermine the fairness of the fact-finding process.' *Id.* Shackling tends not only to undermine the defendant's presumption of innocence, but 'is itself something of an affront to the very dignity and decorum of judicial proceedings that the judge is seeking to uphold.' *Illinois v. Allen,* 397 U.S. 337, 344 (1970).
>
> "99. 'All of the authorities we have studied are agreed that to bring a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with our notion of a fair trial, for it creates in the minds of the jury a prejudice which will likely

deter them from deciding the prisoner's fate impartially.' *Clark v. State,* 195 So.2d 786, 787 (Ala.1967).

"100. When shackling occurs, it must be subjected to 'close judicial scrutiny,' to determine if there was an 'essential state interest' furthered by compelling a defendant to wear shackles and whether less restrictive, less prejudicial methods of restraint were considered or could have been employed. *Elledge v. Dugger,* 823 F.2d 1439, 1451 (11th Cir.1987) (citations omitted). Although '[G]reat weight must be accorded the discretion of the trial court' in determining what security measures are necessary, constitutional limits must be maintained, *Goodwin v. State,* 495 So.2d 731, 733 (Ala.Crim.App.1986), by balancing the state interest in security with the potential for prejudice to the defendant.

"101. [McWhorter] posed no risk to justify his being shackled throughout his trial. His behavior was neither boisterous nor recalcitrant. In fact, he sat quietly throughout the proceedings. He made no threats at any point during the trial, or leading up to it, and there was therefore no persuasive reason why handcuffs could not be removed before he entered the courtroom, or why he could not have been permitted to exit the courtroom without being shackled.

"102. The decision to exhibit [McWhorter] in shackles, each day of the trial, was an uninformed one, and made without considering less-restrictive security measures. It violated [McWhorter's] rights to due process, a fair trial, and a reliable sentencing protected by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution, and Alabama law.

"103. By failing to object to the shackling procedure, or to make an appropriate record, trial counsel not only failed to preserve the issue for consideration on direct appeal, they also failed to measure up to an objective standard of reasonableness in their representation of [McWhorter], in that they permitted the fairness of the trial to be undermined and compromised, and permitted [McWhorter's] Alabama and Federal Constitutional rights to be violated as set forth above, without any strategic reason for acting as they did."

(C. 509–10.)

Judge Evans summarily dismissed the claim pursuant to Rule 32.7(d), Ala. R.Crim. P. Judge Burke stated as follows in the final order denying McWhorter's amended petition:

"Judge Evans's order of October 19, 2006, did not specify why this claim failed to state a material issue of fact or law, in violation of Rule 32.7(d). McWhorter alleges that jurors saw him led to the courtroom wearing handcuffs and that trial counsel did not object. McWhorter does not plead specifically how this prejudiced him, so this claim ***1263** fails to meet Rule 32.6(b)'s 'clear and specific' pleading requirement. Also, this Court holds that McWhorter cannot show prejudice because 'it is not ground for mistrial that the accused appeared before the jury in handcuffs when his appearance was only part of going to and from the courtroom.' *Dunaway v. State,* [Ms. CR–06–0996, Dec. 18, 2009] —— So.3d —— (Ala.Crim.App.2009) (affirming the dismissal of Dunaway's substantially similar [ineffective assistance of counsel] claim for failure to object where testimony at Dunaway's Rule 32 hearing only showed that an alternate juror saw the handcuffs)."

(C. 866, 1128.)

In order to prevail on a claim of ineffective assistance of counsel, a defendant must demonstrate both that "counsel's performance was deficient" and that this deficiency was so severe that the defendant was deprived of a fair trial. *Strickland,* 466 U.S. at 687. "The 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." 466 U.S. at 694.

In Alabama, it has consistently been held that

" '[b]ringing a prisoner before the bar of justice in handcuffs or shackles, where there is no pretense of necessity, is inconsistent with our notion of a fair trial.' *Brock v. State,* 555 So.2d 285, 288 (Ala.Crim.App.1989), *on return to remand,* 580 So.2d 1390 (Ala.Crim.App.1991). The decision to restrain a defendant rests with the trial judge, and, absent an abuse of discretion, this Court will not disturb his ruling on appeal. *Id.* at 289. 'Ultimately, however, it is incumbent upon the defendant to show that less drastic alternatives were available and that the trial judge abused his discretion by not implementing them.' *Id.* (internal citation and quotation marks omitted). 'It is not always reversible error for a defendant to be handcuffed or shackled in

front of the jury.' *Perkins v. State,* 808 So.2d 1041, 1079 (Ala.Crim.App.1999), *aff'd,* 808 So.2d 1143, 1145 (Ala.2001)."

McCall v. State, 833 So.2d 673, 676 (Ala.Crim.App.2001) (holding that, although the trial judge failed to state his reasons for requiring an inmate witness to testify in shackles and prison clothing, defendant failed to show that he had suffered any prejudice). *See also* *Brock v. State,* 555 So.2d 285, 289 (Ala.Crim.App.1989) (holding that, although the facts of that case did not "explicitly indicate a fear by the court that the defendant would attempt to escape, it is not reversible error for a trial court to allow a defendant to be brought into the courtroom handcuffed"). " 'It is not ground for mistrial that the accused appeared before the jury in handcuffs when his appearance was only a part of going to and from the courtroom.' " *Justo v. State,* 568 So.2d 312, 318 (Ala.Crim.App.1990) (quoting *Cushing v. State,* 455 So.2d 119, 121 (Ala.Crim.App.1984)). Whether a defendant may be handcuffed for purposes of being taken to and from the courtroom is left to the discretion of the trial court. *McWilliams v. State,* 640 So.2d 982 (Ala.Crim.App.1991).

We affirm the circuit court's dismissal of the claims. McWhorter has not presented any facts to support this claim; the claim is based on bare assertions and conclusions. Consequently, McWhorter has not met either the burden of pleading imposed by Rule 32.3 or the specificity requirements of Rule 32.6(b), Ala. R.Crim. P. McWhorter has not shown that trial counsel's performance was outside "the ***1264** wide range of reasonable professional assistance," *Strickland,* 466 U.S. at 689, 104 S.Ct. 2052, nor has McWhorter shown that there is a reasonable probability that, if trial counsel had made an objection to the handcuffs, the result of the trial would have been different. Accordingly, summary dismissal of this claim was proper.

Based on the foregoing, the judgment of the circuit court is affirmed.

AFFIRMED.

WELCH, P.J., and KELLUM, J., concur. WINDOM and BURKE, JJ., recuse themselves.

All Citations

142 So.3d 1195

Footnotes

1 This case was originally assigned to another member of this Court. It was reassigned to Judge Joiner on March 1, 2011, and was orally argued on May 17, 2011.

2 Judge William C. Gullahorn, Jr., presided over McWhorter's capital-murder trial. McWhorter's Rule 32 petition and amended petition were assigned to Judge David Evans. As indicated in the main opinion, Judge Evans granted the State's motion for partial summary dismissal, dismissing certain claims of McWhorter's amended petition. Judge Evans subsequently retired in early 2007. The case remained stagnant until Judge Liles C. Burke, then a Marshall County district court judge, was specially appointed to preside in the summer of 2008.

3 *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963).

4 We are using initials to protect the anonymity of the jurors.

5 McWhorter's postconviction evidentiary hearing Exhibit No. 1. (R. 42–43.)

6 McWhorter's materials to this Court refer to this interview as the "triple interview."

7 "Huffing" is inhaling volatile substances for their intoxicating effect.

8 Barnes explained that "roulette" was where they would put a bullet in the chamber of a gun, spin it, put the gun to their heads, and pull the trigger. (R. 510.)

9 McWhorter relies on *Ex parte Dixon,* 55 So.3d 1257 (Ala.2010). *Ex parte Dixon,* however, is distinguishable from this case, and McWhorter's reliance on it is misplaced. In *Ex parte Dixon,* the Alabama Supreme

Court applied the *Ex parte Dobyne,* 805 So.2d 763 (Ala.2001), factors and concluded that "the trial court exceeded its discretion in denying Dixon's motion for a new trial based on [juror] L.A.' s failure to disclose in response to a question on voir dire that criminal charges were pending against her." 55 So.3d at 1261. It further held that most of the factors indicated "that Dixon was prejudiced by [juror] L.A.'s failure to respond." *Id.* In *Ex parte Dixon,* the trial court did not make any written findings of fact or indicate on the record its basis for its decision to deny Dixon's motion for a new trial as to juror L.A.'s failure to respond to a voir dire question. 55 So.3d at 1260. In this case, however, the circuit court considered the *Dobyne* factors and entered a detailed order explaining why Juror L.B.'s "role as a juror likely was not affected by her father's death." (C. 1137–39.)

10 Rule 606(b) of the Alabama Rules of Evidence provides:

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

11 In *Taite v. State,* 48 So.3d 1 (Ala.Crim.App.2009), a juror's statement during deliberations that the defendant had been previously incarcerated was considered prejudice as a matter of law and actual prejudice to the defendant, and the conviction was reversed and the case was remanded for a new trial.

12 We note, as mentioned above in this opinion, that Juror A.S., who was known as Juror A.K. when she served on McWhorter's jury, testified as follows:

> "THE WITNESS: [L.B.] was standing, and she started telling a story about how years before I'm not sure exactly how long before, but years before her father had been murdered, and that, to my best recollection, he wasn't—I'm not sure if he went to jail or he didn't go to jail, but she now had to walk around in the same town where this man was that killed her father. And she was crying.
>
> "....
>
> "A. She had made a comment that, basically, you just don't know how it feels to have to walk around and be around this person that has done this."

(R. 462–67.) The State does not address her testimony in its brief, and the circuit court did not discuss her testimony in its order. (C. 1115–92.) In ruling on the discovery motions, the circuit court allowed Juror A.S. to testify on a limited basis.

13 Rule 28(a)(10), Ala. R.App. P., requires that arguments in an appellant's brief contain "citations to the cases, statutes, other authorities, and parts of the record relied on."

14 We note that to the extent the evidence would have been cumulative or inconsistent with the mitigation strategy, the circuit court's order addresses the evidence, albeit indirectly.

15 We note that McWhorter alleged several other *Brady* violations in his amended petition but did not raise them in his brief to this Court. The claims McWhorter presented in his amended petition but does not pursue on appeal are deemed to be abandoned. *See, e.g., Brownlee v. State,* 666 So.2d 91, 93 (Ala.Crim.App.1995) (" ' "[A]llegations ... not expressly argued on ... appeal ... are deemed by us to be abandoned." *United*

States v. Burroughs, 650 F.2d 595, 598 (5th Cir.), cert. denied, 454 U.S. 1037, 102 S.Ct. 580, 70 L.Ed.2d 483 (1981).' *Burks v. State,* 600 So.2d 374, 380 (Ala.Crim.App.1991). We will not review issues not listed and argued in brief. *Burks.*").

16 The Alabama Supreme Court's language in *Pierce* closely resembles the language of Rule 32.1(e)(1). Caselaw appears to conflate the "newly discovered" language of Rule 32.1(e) with the requirements of Rule 32.2(a)(3) and 32.2(a)(5) by upholding a petitioner's failure to plead "newly discovered evidence" as grounds for procedurally barring his claim under Rule 32.2.

IN THE CIRCUIT COURT OF MARSHALL COUNTY, ALABAMA

CASEY MCWHORTER	)	
	)	
Petitioner,	)	
	)	
v.	)	Case No. CC-93-77.60
	)	
STATE OF ALABAMA,	)	
	)	
Respondent.	)	

FINAL ORDER DENYING MCWHORTER'S AMENDED RULE 32 PETITION

Having considered Petitioner McWhorter's amended Rule 32 petition, the State's answer, the evidence presented at McWhorter's Rule 32 evidentiary hearing, the evidence presented at McWhorter's trial, the record on direct appeal, and all of the other pleadings that were filed in the above-styled cause, this Court makes the following findings of facts and conclusions of law and, hereby, **DENIES** all relief on McWhorter's amended Rule 32 petition.

Statement Of The Case

On May 14, 1993, the petitioner, Casey McWhorter was indicted by the Grand Jury of Marshall County, Alabama, for the capital offense of the murder of Edward Lee Williams during a robbery in the first degree, in violation of §

13A-5-40(a)(2) of the Code of Alabama (1975). (C. 10-12.)[1] The Honorable William C. Gullahorn presided over McWhorter's capital murder trial.

On March 22, 1994, a Marshall County jury found McWhorter guilty of the capital murder of Williams. (R. 1758.) That same day, the penalty phase began. Following the presentation of evidence, closing arguments, and instructions from Judge Gullahorn, the jury recommended by a vote of 10 to 2 that McWhorter should be sentenced to death. (C. 393-94; R. 1852.) On May 13, 1994, Judge Gullahorn followed the jury's recommendation and sentenced McWhorter to death. (C. 384-95; R. 1872.)

On August 27, 1999, the Alabama Court of Criminal Appeals affirmed McWhorter's capital murder conviction and death sentence. McWhorter v. State, 781 So. 2d 257 (Ala. Crim. App. 1999). On August 11, 2000, the Alabama Supreme Court affirmed his conviction and death sentence. Ex parte McWhorter, 781 So. 2d 330 (Ala. 2001). The United States

[1] References to the record will appear as follows: references to the clerk's record on direct appeal and references to the reporter's transcript on direct appeal will appear, respectively, as "C.__." and "R.__." The transcript of the Rule 32 evidentiary hearing will be referred to as "E.H.__."

Supreme Court denied his petition for writ of certiorari on April 16, 2001. McWhorter v. Alabama, 532 U.S. 976 (2001).

On April 11, 2002, Petitioner McWhorter timely filed his original Rule 32 petition in this Court. The next day, this case was assigned to the Honorable David Evans. On May 7, 2002, the State filed its answer. After several years of litigation, McWhorter filed an amended Rule 32 petition on February 8, 2005. The State answered that petition and moved for its partial summary dismissal on April 6, 2005. On October 19, 2006, Judge Evans granted the State's motion for partial summary dismissal, which disposed of most of McWhorter's claims because they were procedurally barred, they failed to present a material issue of fact or law, or they were insufficiently pleaded.

Judge Evans retired on January 15, 2007, and this case was stagnant until the summer of 2008. Around that time, this Court was specially appointed to preside. On August 12, 2008, a telephonic status conference with the parties spurred litigation. Soon thereafter, an evidentiary hearing on the remaining claims in McWhorter's amended petition was set for February 2, 2009. That hearing was continued until the summer. This Court held an

evidentiary hearing on August 26 through 28, 2009. McWhorter called the following witnesses at that hearing: Linda Burns, Thomas Mitchell, Elsie Garrison, Tiffany Long, David Rowland, Larry Evans, Michael Evans, Frank Baker, Kenneth Burns, Amy Battle, April Stonecypher, Abraham Barnes, James Berry, Dr. Ralph Tarter, Janet Vogelsang. The State called Dr. Douglas Robbins.

The Facts Of The Crime

The allegations set forth in McWhorter's amended Rule 32 petition "must be reviewed in the context of the evidence presented at trial." Thomas v. State, 766 So. 2d 860, 870 (Ala. Crim. App. 1998), overruled on other grounds, 766 So. 2d 975 (Ala. 2000). On direct appeal, the Alabama Court of Criminal Appeals, quoting Judge Gullahorn's sentencing order, summarized the facts of McWhorter's crime, as follows:

> The court finds beyond a reasonable doubt that approximately three weeks before February 18, 1993, the 18-year-old defendant conspired with 15 and 16 year old codefendants (the 15-year-old codefendant being the son of the victim) to kill the victim in order to rob him of a substantial sum of money and to obtain other property from his home. This conspiracy was discussed from time to time until February 18, 1993. On that date a fourth party, who was aware of the

plot, dropped the defendant and the 16-year-old codefendant off on a highway a few blocks from the victim's home at about 3:00 p.m. The fourth party and the 15-year-old son of the victim rode around until they met the defendant and the other codefendant at a pre-arranged spot at 8:00 o'clock that evening.

The defendant and the 16-year-old proceeded on foot to the victim's home and let themselves in the unlocked empty house. They knew that the victim was not expected home for approximately three to four hours. They spent this three-to four-hour period of time in the home going through it, gathering up various items that they wanted to keep and making silencers for two .22 rifles which were there in the home. One silencer was made out of a plastic jug and filled with napkins and attached to the rifle by duct tape. The other was made by wrapping a pillow around the barrel of the second rifle and holding it in place with duct tape and electrical wire. The rifles were 'test-fired' into a mattress to see if the silencers were accomplishing the desired effect. When the victim arrived home, he first saw the 16-year-old, grabbed the rifle he was holding and began to struggle over it. At that point, the defendant fired the first shot into the victim's body. Between the two conspirators on the scene, the victim was shot at least 11 times. After the victim was down on the floor, the defendant fired at least one more round into his head to assure that he was dead. They took his wallet and various other items from the home and left in the victim's pickup truck. They met the other two parties at the pre-arranged spot, took the victim's truck out into the woods and

"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."

With respect to the petitioner's burden of pleading, Rule 32.6(b) of the Alabama Rules of Criminal Procedure specifies that a Rule 32 petition "must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Rule 32.6(b) further provides that "a bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." Thus, Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief. Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003). "In other words, it is not the pleading of a conclusion 'which, if true, entitle[s] the petitioner to relief.' It is the allegation of facts in pleading which, if true, entitles 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." Ibid. (citations omitted).

Rule 32.7(d) of the Alabama Rules of Criminal Procedure provides, in relevant part, 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 exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition.

Ala. R. Crim. P. 32.7(d). Thus, Rule 32.7(d) of the Alabama Rules of Criminal Procedure provides that a Rule 32 circuit court may summarily dismiss claims in a Rule 32 petition that fail to satisfy the burden of pleading or fail to state a claim for relief or present a material issue of fact or law. See, e.g., Fincher v. State, 724 So. 2d 87, 89 (Ala. Crim. App. 1998).

Summarily Dismissed Claims

The following claims in McWhorter's amended Rule 32 petition were summarily dismissed by Judge Evans's order of October 19, 2006, because they were procedurally barred, they did not raise a material of fact or law, or they were insufficiently pleaded:

Procedurally Barred Claims

Claim I(A): The claim that prosecutors improperly questioned prospective jurors about whether they would consider McWhorter's age in considering his sentence. (Pet. at para. 20.) See Rules 32.2(a)(3) & (a)(4), Ala. R. Crim. P.

Claim I(B): The claim that prosecutors improperly questioned prospective jurors in an attempt to inflame and prime them to invoke the death penalty. (Pet. at para. 21.) See Rules 32.2(a)(2) & (a)(5), Ala. R. Crim. P.

Claim I(C): The claim that prosecutors improperly undermined the jurors' feelings of responsibility. (Pet. at para. 22.) See Rules 32.2(a)(3) & (a)(4), Ala. R. Crim. P.

Claim I(D): The claim that prosecutors improperly injected their personal opinions on the sufficiency of the evidence. (Pet. at para. 23.) See Rules 32.2(a)(3) & (a)(4), Ala. R. Crim. P.

Claim I(E): The claim that prosecutors improperly injected their personal opinions on the appropriateness of the death penalty. (Pet. at para. 24.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claim I(F): The claim that prosecutors improperly suggested that mitigating circumstances did not exist in this case. (Pet. at para. 25.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claim I(G): The claim that prosecutors improperly argued about the nature and appearance of the victim's injury and the presence of the family. (Pet. at para. 26.) See

Rules 32.2(a)(2) & (a)(4), Ala. R. Crim. P.

Claim I(H): The claim that prosecutors improperly commented on McWhorter's failure to testify. (Pet. at para. 27.) See Rules 32.2(a)(2) & (a)(4), Ala. R. Crim. P.

Claim I(I): The claim that prosecutors improperly argued that the jurors had a duty to convict McWhorter. (Pet. at para. 28.) See Rules 32.2(a)(3) & (a)(4), Ala. R. Crim. P.

Claim I(J): The claim that prosecutors improperly argued facts not in evidence. (Pet. at para. 29.) See Rules 32.2(a)(2) & (a)(4), Ala. R. Crim. P.

Claim I(K): The claim that prosecutors improperly introduced into evidence crime scene photographs, autopsy photographs, and a crime scene video. (Pet. at para. 30.) See Rules 32.2(a)(2) & (a)(4), Ala. R. Crim. P.

Claim I(L): The claim that prosecutors improperly introduced into evidence the bloody clothing of the victim. (Pet. at para. 31.) See Rules 32.2(a)(2) & (a)(5), Ala. R. Crim. P.

Claim I(M): The claim that prosecutors improperly introduced into evidence irrelevant evidence. (Pet. at para. 32-33.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claim I(N): The claim that prosecutors improperly used expert witnesses to introduce irrelevant evidence. (Pet. at para. 34.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claim II: The claim that the State violated McWhorter's rights to due process and to counsel and his privilege against self-incrimination by introducing an involuntary statement. (Pet. at para. 37-45.) See Rules 32.2(a)(2) & (a)(4), Ala. R. Crim. P.

Claim III: The claim that McWhorter's statement was obtained in violation of Miranda v. Arizona, 384 U.S. 436 (1966), and thus was unconstitutionally used against him at trial. (Pet. at para. 46-54.) See Rules 32.2(a)(2) & (a)(4), Ala. R. Crim. P.

Claim IV: The claim that McWhorter was denied his right to be present at the beginning of his trial. (Pet. at para. 55-60.) See Rules 32.2(a)(3) & (a)(4), Ala. R. Crim. P.

Claim V(B)[2]: The claim that, during deliberations, the jury considered extraneous evidence.

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[2] Judge Evans's order of October 19, 2006, alternatively dismissed this claim because it failed to state a material issue of fact or law, in violation of Rule 32.7(d) of the Alabama Rules of Criminal Procedure. Judge Evans's order did not specify why this claim failed to meet the requirements of Rule 32.7(d). However, this Court finds that McWhorter was permitted to introduce testimony from Juror Linda Burns in support of Claim V(A) at the evidentiary hearing. Both this claim and Claim V(A) are based on the same so-called extraneous evidence: Juror Burns's story of the circumstances surrounding her father's death. But Juror Burns's story was not extraneous evidence under Alabama law. See Ex parte Arthur, 835 So. 2d 981, 984, n.2 (Ala. 2002) (quoting Sharrief v. Gerlach, 798 So. 2d 646, 653 (Ala. 2001) ("An extraneous fact is one 'obtained by the jury or introduced to it by some process outside the scope of the trial.'"); see also, Bethea v. Springhill Memorial Hosp., 833 So. 2d 1, 8 (Ala. 2002) (holding that the discussions between jurors about personal

(Pet. at para. 68-72.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claim V(C)[3]: The claim that during the trial, a juror communicated ex parte with legal court personnel. (Pet. at para. 73-77.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claim VI(D): The claim that the State failed to disclose and turn over a tape recording of his confession. (Pet. at para. 84-85.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claim VII: The claim that McWhorter's rights to a fair trial were violated when a crucial witness for the State sat at the prosecutor's table as a representative of the State of Alabama. (Pet. at para. 88-91.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claim IX: The claim that the trial judge unconstitutionally prejudged McWhorter's

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experiences or knowledge, such as occurred in this case, do not constitute "extraneous evidence" and, thus, are inadmissible under Rule 606(b) of the Alabama Rules of Evidence.). As such, this claim raises no material issue of fact or law and therefore was dismissed correctly by Judge Evans under Rule 32.7(d).

[3] Judge Evans's order of October 19, 2006, alternatively dismissed this claim because it failed to meet Rule 32.6(b)'s "clear and specific" pleading requirement. In addition to Judge Evans's order, this Court notes that this claim alleges that Juror C.D. learned that her sister attempted suicide while C.D. was serving on the jury in this case. The petition then alleges, in cursory fashion, that C.D.'s concern for her sister "introduced improper, extraneous elements into her deliberations." (Pet. at para. 76.) As such, this claim is insufficiently pleaded.

sentence by writing his sentencing order before the sentencing hearing. (Pet. at para. 104.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claim X: The claim that the Alabama statute limiting court-appointed attorneys' fees to $1,000 compensation for out-of-court work in each phase of a capital case violates state and federal constitutional law. (Pet. at para. 108.) See Rules 32.2(a)(3) & (a)(4), Ala. R. Crim. P.

Claim XI-A: The claim that execution by electrocution is unconstitutional. (Pet. at para. 109-14.) See Rules 32.2(a)(3) & (a)(5), Ala. R. Crim. P.

Claims That Present No Material Issue of Fact or Law

Claim V(B)[4]: The claim that during deliberations, the jury considered extraneous evidence. (Pet. at para. 68-72.) See Rule 32.7(d), Ala. R. Crim. P.

Claim VI(A): The claim that the State failed to disclose an exculpatory statement from Timothy Rice. (Pet. at para. 79-80.) See Rule 32.7(d), Ala. R. Crim. P.

[4] See n.2, supra.

Claim VI(B)[5]: The claim that the State failed to disclose a deal with Marcus Carter for his testimony. (Pet. at para. 82, but only as to the allegation that the State violated its discovery obligation to turn over evidence of Carter's gang involvement.) See Rule 32.7(d), Ala. R. Crim. P.

Claim VII-A[6]: The claim that trial counsel were ineffective for failing to object when a crucial witness for the State sat at the

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[5] Judge Evans's order of October 19, 2006, did not specify why the allegation related to the State's failure to turn over evidence of Carter's gang involvement failed to state a material issue of fact or law, in violation of Rule 32.7(d). But the State's answer to this claim sheds light. This Court finds that the State did not violate its discovery obligations because McWhorter himself was a member of the same gang as Carter and therefore could have provided evidence of Carter's gang affiliation to his defense attorneys. Also, McWhorter's trial counsel made the jury aware that Carter was a gang member when they argued that fact during closing arguments. (R. 1701.) This Court notes, in addition, that the entire Claim VI(B) was dismissed, in the alternative, by that October 19, 2006 order due to insufficient pleading.

[6] Judge Evans's order of October 19, 2006, did not specify why this claim failed to state a material issue of fact or law, in violation of Rule 32.7(d). McWhorter alleges that he experienced prejudice when Detective Maze sat at the prosecutor's table. However, this Court holds, as the State argued in its answer, that no objection from trial counsel should have been sustained because the Alabama Court of Criminal Appeals repeatedly has held that law enforcement officers and investigators are exempt from the Rule. See Stallworth v. State, 868 So. 2d 1128, 1146 (Ala. Crim. App. 2001) (holding that a police investigator is "excepted from the rule requiring exclusion of all witnesses from the courtroom and [is] allowed to sit at the prosecution's table").

prosecutor's table as a representative of the State of Alabama. (Pet. at para. 92-95.) See Rule 32.7(d), Ala. R. Crim. P.

Claim VIII[7]: The claim that trial counsel were ineffective for failing to object to McWhorter being exhibited to the jury in handcuffs. (Pet. at para. 96-103.) See Rule 32.7(d), Ala. R. Crim. P.

Insufficiently Pleaded Claims

Claim V(C): The claim that, during the trial, a juror communicated ex parte with legal court personnel. (Pet. at para. 73-77.) See Rules 32.3 & 32.6(b), Ala. R. Crim. P.

Claim VI(B): The claim that the State failed to disclose a deal with Marcus Carter for his testimony. (Pet. at para. 82.) See Rules 32.3 & 32.6(b), Ala. R. Crim. P.

Claim VI(C): The claim that the State failed to disclose a deal with Abraham Barnes for

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[7] Judge Evans's order of October 19, 2006, did not specify why this claim failed to state a material issue of fact or law, in violation of Rule 32.7(d). McWhorter alleges that jurors saw him led to the courtroom wearing handcuffs and that trial counsel did not object. McWhorter does not plead specifically how this prejudiced him, so this claim fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. Also, this Court holds that McWhorter cannot show prejudice because "it is not ground for mistrial that the accused appeared before the jury in handcuffs when his appearance was only part of going to and from the courtroom." Dunaway v. State, CR-06-0996, 2009 WL 4980320, at *24 (Ala. Crim. App. Dec. 18, 2009)(affirming the dismissal of Dunaway's substantially similar IAC claim for failure to object where testimony at Dunaway's Rule 32 hearing only showed that an alternate juror saw the handcuffs)(brackets omitted).

his testimony. (Pet. at para. 83.) See Rules 32.3 & 32.6(b), Ala. R. Crim. P.

Claim XI-B: The claim that McWhorter's "consent" to be executed by lethal injection was not knowing and voluntary and that lethal injection is unconstitutional. (Pet. at para. 115-23.)

Claims For Which An Evidentiary Hearing Was Granted

In Judge Evans's order of October 19, 2006, all of the claims in McWhorter's amended Rule 32 petition were dismissed, except three: Claims V(A), IX-A, and XII. This Court held an evidentiary hearing where McWhorter was allowed to present evidence to prove those three claims. Claim V(A) is a juror misconduct claim, and Claims IX-A and XII are ineffective-assistance-of-counsel (IAC) claims. This Court dismisses all three claims below.

V(A). The Claim That Juror Linda Burns Did Not Respond Truthfully To Questions During Voir Dire

In paragraphs 61 through 67 of McWhorter's amended Rule 32 petition, he asserts that Juror Linda Burns did not disclose that her father had been murdered when defense counsel asked the venire on a questionnaire and during voir dire whether any of them had a family member who had been

"the victim of a crime." (Pet. at para. 63.) Burns testified at length at the evidentiary hearing. She explained that she did not know how her father died. It was apparent from Burns' testimony why she did not answer in the affirmative when asked whether she had a family member who had been "the victim of a crime." Burns testified that a friend, a law student, investigated the death and found an autopsy report that attributed her father's death to drowning, and she testified that, because no one ever was charged with a crime related to her father's death, much less convicted of one, that her father could not have been "the victim of a crime."

Under Rule 32.3 of the Alabama Rules of Criminal Procedure, it was McWhorter's burden to prove by a preponderance of the evidence at the evidentiary hearing that Burns believed that her father was "the victim of a crime" but did not disclose that belief during voir dire. McWhorter did not meet that burden. Furthermore, assuming that Burns committed juror misconduct by not disclosing the story, McWhorter failed to establish prejudice. Therefore, this claim is denied because it is meritless.

Burns testified during direct examination by McWhorter's Rule 32 counsel, Mr. Robert Newman, to the following circumstances surrounding her father's death:

> MR. NEWMAN: Ms. Burns, once again, could you tell us what happened to your father, and could you indicate, you know, what, if anything, is based on things you saw and what is based on what you heard?
>
> MS. BURNS: Okay. My mother and my two brothers and I were woke up one morning about 2:00 o'clock in the morning.
>
> This is still hard for me.
>
> MR. NEWMAN: I understand.
>
> MS. BURNS: And we was told that my father and two other men were at a rock mine pond. And my mother went and got my uncle up, which was my daddy's brother. And he took us up there. And they would not let us go down there.
>
> And about 11:00 o'clock that morning, a police officer came to our house and told us that they were fixing to blow the dam, and that they believed that my father was -- had run. There was another man that was killed there that day. He was beat to death.
>
> And so they told us that they were going to send a diver down one more time and if they didn't find anything then they were going to blow the dam. When they sent a diver down, they found my father. And he was dead, naturally.
>
> We were told that there were bruises around his neck, but when the autopsy came back it was said that he was drowned. The other man was beaten to death. And there was a trial. The other man that was there, he went and got the --

his family and then went to the police station and got them and brought them back. Or they went out to the scene is all I know.

I had just always thought that my father was killed because the other man was killed, and he was good friends with him, so I thought that he had been killed. And being a kid you always think that. You don't ever know. And so that's why I always thought my father was killed.

MR. NEWMAN: Now, you said that someone told you that your father had bruises on his neck. Who told you that?

MS. BURNS: My uncles. My daddy's brothers.

MR. NEWMAN: Now, at the time, you were about 12 years old, right?

MS. BURNS: Yes.

(E.H. 46-48.)

Despite the rumors of murder that she heard as a child, Burns had reason to believe that her father's death was not a homicide. Burns testified that she did not believe that her father had been murdered, at least in part, because her friend, a law student, researched her father's death and found that her father's autopsy records indicated that her father drowned.

MR. NEWMAN: Your memories of what happened to your father were and still are traumatic, something that's hard for you to talk about, isn't it?

MS. BURNS: Yes.

MR. NEWMAN: And isn't it true that at some point along the way you have got emotional closure when someone told you that he worked on the case, and even though he couldn't get enough evidence to prove your father was murdered, that having worked on the case he did believe it?

MS. BURNS: Believe that my father was murdered or that he drowned?

MR. NEWMAN: That your father was murdered?

MS. BURNS: *No. You got it backwards.*

MR. NEWMAN: Okay. Well, you were -- at the time that you -- in 1994, at the time that you served on the jury in Casey McWhorter's case, did you believe that your father had been murdered?

MS. BURNS: No.

MR. NEWMAN: You did not?

MS. BURNS: No.

MR. NEWMAN: What was it, if anything, that happened between the time you were at trial, when you say you did [sic] believe he was murdered, and the time of Casey McWhorter's trial that led you to change your mind?

MS. BURNS: I dated a guy that was going to law school, and he looked into the case of my father, and he told me that my father had drowned; that the autopsy had showed that my father had drowned.

MR. NEWMAN: Yes. And did he explain that because the autopsy showed that your father had drowned they were unable to prove that he had been murdered?

MS. BURNS: No.

. . .

MR. NEWMAN: And isn't it true that the man we're talking about, the lawyer, said that because the autopsy couldn't prove the murder because it said drowned, that he still believed, based on all the evidence he knew about, that it was a murder?

MS. BURNS: No.

(E.H. 52-54.)

But Burns also stated that she felt that the man who killed her father's friend had "something indirectly to do with" her father's death. (E.H. 60.) Later in her testimony, she said that she did not know whether her father "was drowned on purpose." (E.H. 113.)

While Burns seemed somewhat confused by questions during direct examination, she was firm in her answers during cross examination. The following testimony occurred during the State's first cross examination of Burns:

ASSISTANT ATTORNEY GENERAL: And do you remember that Question Number 21 he showed you, the question that says, were you or anybody in your family a victim of a crime?

MS. BURNS: Uh-huh. Right.

ASSISTANT ATTORNEY GENERAL: And you did not answer that your father was a victim of a crime, right?

MS. BURNS: Right. Did not.

ASSISTANT ATTORNEY GENERAL: Is it fair to say that you did not answer that your father was a victim of a crime because no one, in fact, had been charged with a crime in the death of your father?

MS. BURNS: That's right.

ASSISTANT ATTORNEY GENERAL: And no one had ever been convicted in the death of your father, correct?

MS. BURNS: That's right.

ASSISTANT ATTORNEY GENERAL: And you had personal knowledge that the autopsy officially said that he drowned?

MS. BURNS: Right.

ASSISTANT ATTORNEY GENERAL: And that there was no indication other than what you had just heard through family rumors that he actually had been murdered?

MS. BURNS: Yes.

ASSISTANT ATTORNEY GENERAL: So far as you were concerned, you were being completely honest and truthful when you answered that question?

MS. BURNS: Yes, I was.

(E.H. 116-17.) And the following testimony occurred during the State's second cross examination of Burns:

ASSISTANT ATTORNEY GENERAL: Just to be clear, Ms. Burns, you did not deliberately hide the story of your father's death when you were answering the jury questionnaire?

MS. BURNS: No.

> ASSISTANT ATTORNEY GENERAL: The way the question was worded on the jury questionnaire was, were you or any of your family members the victim of a crime, not just a victim?
>
> MS. BURNS: Right, yes.
>
> ASSISTANT ATTORNEY GENERAL: And that there must have -- without a criminal charge, without a criminal conviction, even, that you cannot have a family member who was a victim of a crime?
>
> MS. BURNS: Yes.

(E.H. 123-24.)

Because Burns knew that her father's autopsy report indicated that he died by drowning and because she knew that no one ever had been charged with any crime related to her father's death, she reasonably did not disclose the story of her father's death in response to the defense's question of whether she or a member of her family had been "the victim of a crime." Thus, Burns did not commit juror misconduct.

Even if Burns's failure to disclose the story of her father's death constitutes juror misconduct, McWhorter has failed to establish prejudice. This claim is denied, in the alternative, for that reason.

Under Alabama law, the standard for determining whether juror misconduct warrants a new trial is "whether the

misconduct might have prejudiced, not whether it actually did prejudice, the defendant." Ex parte Dobyne, 805 So. 2d 763, 771 (Ala. 2001). "[T]he question whether the jury's decision *might* have been affected is answered not by a bare showing of juror misconduct, but rather by an examination of the circumstances particular to the case." Ex parte Apicella, 809 So. 2d 865, 871 (Ala. 2001) (emphasis in original).

In determining whether a criminal defendant might have been prejudiced by a veniremember's failure to respond appropriately to a question, the Supreme Court of Alabama and the Alabama Court of Criminal Appeals have looked at the following factors: "temporal remoteness of the matter inquired about, the ambiguity of the question propounded, the prospective juror's inadvertence or willfulness in falsifying or failing to answer, the failure of the juror to recollect, and the materiality of the matter inquired about." Dobyne, 805 So. 2d at 772; Tomlin v. State, 695 So. 2d 157, 170 (Ala. Crim. App. 1996).

Burns was unequivocal that her father's death did not affect her role as a juror in McWhorter's capital murder

trial. The following testimony occurred during the State's cross examination of Burns:

> ASSISTANT ATTORNEY GENERAL: Ms. Burns, is it fair to say that when -- that when you voted for guilty for Mr. McWhorter you based that on the evidence at trial?
>
> MS. BURNS: Yes.
>
> ASSISTANT ATTORNEY GENERAL: And when you voted for death, you based that on the evidence presented during the guilt phase?
>
> MS. BURNS: Yes, sir, I did.

(E.H. 119.) This Court believes Ms. Burns; therefore, McWhorter cannot show that Burns's decisions as a juror "*might* have been affected" by her father's death.

Looking to the factors listed in Dobyne, Burns's role as a juror likely was not affected by her father's death. First, as to "temporal remoteness," Burns was an 11-year-old child when her father died, but McWhorter's trial did not take place until she was an adult, approximately 30 years later. (E.H. 77, 118.) Second, as for "the ambiguity of the question propounded," the question itself was straightforward enough, but Burns's lack of certainty over how her father died made the story of his death less likely to have affected her role as a juror. Third, as to Burns's "inadvertence or willfulness in falsifying or

failing to answer," she affirmed that her father was not "at all in her mind" when she answered the questionnaire and that she "did not have an ax to grind" or want to "vindicate the death of her father through this trial." (E.H. 116, 119.)

Burns's testimony during the evidentiary hearing establishes not only that she did not commit juror misconduct by failing to respond appropriately to questions asked by defense counsel during voir dire but also that she based her decisions as a juror in this case solely on the facts presented, and not at all on her father's death. As such, this claim is denied.

Ineffective Assistance Of Counsel

The rest of the claims set forth in McWhorter's amended Rule 32 petition are IAC claims. At the evidentiary hearing, McWhorter's counsel presented the testimony of 13 witnesses in an effort to prove his IAC claims, but McWhorter failed to meet his burden of proof.

Before addressing McWhorter's IAC claims, this Court will set forth the legal standard for reviewing IAC claims.

The Legal Standard For Evaluating IAC Claims

In Strickland v. Washington, 466 U.S. 668 (1980), the United States Supreme Court promulgated the standard by which IAC claims are to be judged. The Court explained that the benchmark for judging any claim of ineffectiveness must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 687. In addition, the Court set forth the following two-prong test that courts must apply in reviewing ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

In Grayson v. Thompson, 257 F.3d 1194 (11th Cir. 2001), and Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000) (En Banc), the Eleventh Circuit Court of Appeals addressed the issue of ineffective assistance of counsel

performance is appropriately highly deferential because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls." Id. at 1314 n.13 (citing Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994)). "It does not follow that any counsel who takes an approach we would not have chosen is guilty of rendering ineffective assistance . . . [n]or does the fact that a particular defense ultimately proved to be unsuccessful demonstrate ineffectiveness." Id. at 1314.

Because counsel's conduct is presumed to have been reasonable, the analysis under Strickland "has nothing to do with what the best lawyers would have done . . . (or) what most good lawyers would have done." Grayson, 257 F.3d at 1216. Instead, the proper method of evaluating counsel's performance is to determine "whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." Id. In other words, "to show that counsel's performance was unreasonable, the petitioner must establish that no competent counsel would have taken the action that his counsel did take." Id. See also Holladay, 209 F.3d at

1253 n.6 ("A tactical decision is ineffective only if it was so patently unreasonable that no competent attorney would have chosen it.").

This presumption of reasonableness "impacts on the burden of proof and continues throughout the case, not dropping out just because some conflicting evidence is introduced." Chandler, 218 F.3d at 1315 n.15. This presumption is like the "presumption of innocence" in a criminal trial and, thus, must be disproved by the petitioner. Id. "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption [because] where the record is incomplete or unclear about [counsel's] actions, [the court] will presume that he did what he should have done, and that he exercised reasonable professional judgment." Id.

Moreover, "a [reviewing] court must avoid using the distorting effects of hindsight and must evaluate the reasonableness of counsel's performance from counsel's perspective at the time." Chandler, 218 F.3d at 1316. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate

decisions regarding how best to represent a criminal defendant." Strickland, 466 U.S. at 688-89. It is obvious that "trial lawyers, in every case, could have done something more or something different. So, omissions are inevitable. But the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" Chandler, 218 F.3d at 1313 (citing Burger v. Kemp, 483 U.S. 776 (1987)).

In addition, the Eleventh Circuit, in Williams v. Head, 185 F.3d 1223, 1237 (11th Cir. 1999), recognized that a lawyer is not required to "pursue every path until it bears fruit or until all hope withers" in order to be effective. The Eleventh Circuit further opined that a lawyer's "decision to limit investigation is accorded a strong presumption of reasonableness." Id. (quoting Mills v. Singletary, 63 F.3d 99, 1021 (11th Cir. 1995)). In addressing the petitioner's IAC claim, the court held that strategic decisions, such as the one made by his appellate counsel not to request an additional mental evaluation, are "virtually unassailable, especially when they are made by experienced criminal defense attorneys." Id. at 1242.

With respect to the prejudice prong of Strickland, "it is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding." Grayson, 257 F.3d at 1225. Instead, "the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." Strickland, 466 U.S. at 694. Under the Strickland standard, "a reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. In Strickland, the Court further explained:

> When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence . . . the question is whether there is a reasonable probability that, absent the errors, the sentencer – including an appellate court, to the extent it independently reweighs the evidence – would have concluded that the balance of the aggravating and mitigating circumstances did not warrant death.

Id. at 695.

In United States v. Cronic, 466 U.S. 648, 656 (1984), the United States Supreme Court opined that "the right to the effective assistance of counsel is . . . the right of the accused to require the prosecution's case to survive

the crucible of meaningful adversarial testing." The Court further concluded that "when a true adversarial criminal trial has been conducted - even if defense counsel may have made demonstrable errors - the kind of testing envisioned by the Sixth Amendment has occurred." Id. See also Engle v. Isaac, 456 U.S. 107, 134 (1982). ("The Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not ensure that defense counsel will recognize and raise every constitutional claim.").

McWhorter's IAC Claims

As an initial matter, this Court notes that McWhorter called both of the attorneys — Mr. Thomas E. Mitchell and Mr. James Berry — who represented him during his capital murder trial to testify at his Rule 32 hearing. McWhorter inexplicably failed to question Mr. Mitchell and Mr. Berry about several of the claims in his amended Rule 32 petition.

The United States Supreme Court's decision in Strickland mandates that McWhorter's claims be reviewed with a presumption that his counsel were effective. For that reason, where the record is unclear — either because

an issue was not addressed or because counsel could not recall — this Court will presume that his counsel acted in a manner consistent with the "counsel" that is guaranteed by the Sixth Amendment. See, e.g., Williams, 185 F.3d at 1228 ("[W]here the record is incomplete or unclear about [counsel's] actions, we will presume that he did what he should have done and that he exercised reasonable professional judgment."); Chandler, 218 F.3d at 1315 n.15. In reviewing McWhorter's IAC claims, this Court will keep that presumption in mind.

McWhorter has failed to satisfy his burden of establishing that his counsel's performance was deficient and that he was prejudiced by their performance. Because he failed to prove that he was denied the effective assistance of counsel required by the Sixth Amendment to the United States Constitution, McWhorter's ineffective assistance of counsel claims are hereby denied. This Court will now address his IAC claims separately. This Court hereby makes the following findings of fact and conclusions of law with regard to McWhorter's IAC claims.

IX-A. The Claim That Trial Counsel Were Ineffective For Failing To Object To Judge Gullahorn's Drafting A Sentencing Order Prior To McWhorter's Sentencing Hearing

In Strickland v. Washington, 466 U.S. 668 (1980), the United States Supreme Court promulgated the standard by which IAC claims are to be judged. The Court explained that the benchmark for judging any claim of ineffectiveness must be "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Strickland, 466 U.S. at 687. In addition, the Court set forth the following two-prong test that courts must apply in reviewing ineffective assistance of counsel claims:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

In Grayson v. Thompson, 257 F.3d 1194 (11th Cir. 2001), and Chandler v. United States, 218 F.3d 1305 (11th Cir. 2000) (En Banc), the Eleventh Circuit Court of Appeals addressed the issue of ineffective assistance of counsel

under the Strickland standard. The standard set forth in Strickland, Chandler, and Grayson establishes a high bar for a petitioner to satisfy. Under the Strickland standard, a petitioner must demonstrate both deficient performance and prejudice to prevail on an ineffective assistance claim. Chandler, 218 F.3d at 1312. A petitioner must show that counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional conduct, there is a reasonable probability that the result of the proceeding would have been different. Id. at 1312-13 (citing Darden v. Wainwright, 477 U.S. 168 (1986)).

To establish that counsel's performance was deficient, a petitioner must show that "counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Grayson, 257 F.3d at 1215. To satisfy the second prong of the Strickland test, which requires a showing that counsel's deficient performance prejudiced his or her defense, the petitioner must establish that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Id. Because both parts

of the test must be satisfied before a violation of the Sixth Amendment can be found, a court need not address the performance prong if the defendant cannot satisfy the prejudice prong and vice-versa. Holladay v. Haley, 209 F.3d 1243, 1248 (11th Cir. 2000).

With respect to the first prong of the Strickland analysis, the burden of persuasion is on the petitioner to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable. Chandler, 218 F.3d at 1313. Under Strickland, the standard for judging counsel's performance is "reasonableness under prevailing professional norms." Grayson, 257 F.3d at 1215-16. There is a strong presumption that counsel's performance was within the "wide range of reasonable professional assistance." Id. at 1216. To satisfy his or her burden of persuasion, the petitioner therefore must establish that particular and identified acts or omissions of counsel "were outside the range of professionally competent assistance." Chandler, 218 F.3d at 1314.

Judicial scrutiny of counsel's performance "must be highly deferential." Chandler, 218 F.3d at 1314. "It is important to note that judicial scrutiny of an attorney's

McWhorter's claim that his trial counsel rendered ineffective assistance of counsel during the sentencing hearing that occurred on May 13, 1994, in front of Judge Gullahorn because trial counsel did not object when it was apparent that Judge Gullahorn already had drafted a sentencing order, but had not yet entered it. This claim is contained in paragraphs 105 through 107 of McWhorter's amended Rule 32 petition.

This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter does not plead what objection effective trial counsel would have made or how he was prejudiced by Judge Gullahorn's drafting a sentencing order prior to the sentencing hearing. When questioned about this claim at the evidentiary hearing, Mitchell said, "I don't know what objection I would make." And, McWhorter failed to show what objection should have been made. It was McWhorter's burden to plead the relevant objection. McWhorter did not do that; therefore, this claim is denied because it is insufficiently pleaded.

In the alternative, this claim is denied because it fails to state a valid claim for relief or present a

material issue of fact or law, under Rule 32.7(d) of the Alabama Rules of Criminal Procedure. Judge Gullahorn's decision to draft a sentencing order prior to the sentencing hearing did not violate any state or federal law, and it did not prejudice McWhorter. McWhorter failed to prove that Judge Gullahorn did not consider the evidence and arguments presented during the sentencing hearing. Judge Gullahorn was free to scrap his draft sentencing order after he heard evidence and arguments during the sentencing hearing. Because Judge Gullahorn obviously was not convinced by the evidence and arguments presented, he sentenced McWhorter to death at the conclusion of the sentencing hearing. It is likely that no objection would have been sustained. Trial counsel were not deficient for not raising an objection with no ground to support it, and McWhorter was not prejudiced. Therefore, this claim is without merit and is denied by this Court.

XII. The Claim That McWhorter's Trial Counsel Were Ineffective For Not Adequately Investigating And Presenting Mitigation Evidence And For Their Performance During The Penalty And Sentencing Phases Of His Capital Murder Trial

In paragraphs 124 through 223 of McWhorter's amended Rule 32 petition, he raised numerous individual IAC claims

challenging his trial counsel's performance in preparation for and during the penalty and sentencing phases. The majority of McWhorter's IAC claims were abandoned at the evidentiary hearing. The Court will set out and deny the independent claims contained in the sections of Claim XII claims that were abandoned or partially abandoned before denying each remaining claim that was addressed at the evidentiary hearing.

But first, the 6 paragraphs immediately following McWhorter's Claim XII heading, paragraphs 124 through 129, appear to serve as merely introductory paragraphs relating to the presentation of the grounds of the independent claims. To the extent that those paragraphs are meant as independent claims for relief, they do not sufficiently state claims upon which relief may be granted pursuant to Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. Therefore, those paragraphs are denied because they are insufficiently pleaded.

Abandoned Sections of Claim XII

The majority of the IAC claims contained in paragraphs 124 through 223 of McWhorter's amended Rule 32 petition were abandoned because McWhorter did not present any

evidence or argument to support them at his evidentiary hearing.

Under McWhorter's Claim XII.A heading in his amended Rule 32 petition, there are 18 sections containing independent claims.[8] Of those 18 sections, 7 sections were abandoned. All 7 sections contain claims that allege trial counsel were ineffective for not interviewing various people who would have testified during the penalty phase of McWhorter's capital murder trial. At the evidentiary hearing, McWhorter did not elicit testimony from any of the people identified in the following 7 sections of Claim XII.A of his amended Rule 32 petition: Section XII.A.i. (Carolyn Rowland), Section XII.A.iv. (Homer & Zella McWhorter), Section XII.A.v. (Brian Garrison), Section XII.A.vi. (Lisa McElroy), Section XII.A.vii. (Jessie & Jessie Evans), Section XII.A.ix. (Dawn & Eric Rowland, Marvin & Phyllis Rowland), and Section XII.A.xi. (Tess Berry, Mae McWhorter, and Nova Rea Teal).

[8] The first 12 sections of Claim XII.A are numbered i. through xii., but the 5 sections following are numbered i. through v., and the last section is not numbered. In this order, the Court references those last 6 sections as xiii. through xviii.

McWhorter was granted an evidentiary hearing on these claims in his amended Rule 32 petition, but he failed to present any evidence or argument in support of these claims at his Rule 32 hearing. In Thomas, 766 So. at 892, the Alabama Court of Criminal Appeals held that "claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result." Because McWhorter did not call any of the individuals identified in these 7 sections of his petition to testify, there is no evidence of what trial counsel would have learned had they interviewed them and presented them as witnesses during the penalty phase of McWhorter's capital murder trial. Therefore, McWhorter has abandoned these claims. Rule 32.3 of the Alabama Rules of Criminal Procedure squarely places the burden of proof on the petitioner in a post-conviction proceeding. Because he did not present any evidence or argument on these claims, McWhorter failed to satisfy his burden of proving deficient performance and prejudice, under Strickland. For that reason, these claims are denied.

In addition, McWhorter abandoned Claim XII.B at his evidentiary hearing. Claim XII.B, see paragraphs 210 through 215 of McWhorter's amended Rule 32 petition, contains four independent claims alleging that trial counsel were ineffective for failing to adequately prepare the four witnesses who testified during the penalty phase. McWhorter failed to ask trial counsel any relevant questions about preparing those four witnesses. Only one of the four witnesses, Elsie Garrison, testified at the evidentiary hearing, and trial counsel did not ask her any questions relevant to any factual allegations contained within Section XII.B. Therefore, McWhorter has abandoned the claims contained within Section XII.B. Rule 32.3 of the Alabama Rules of Criminal Procedure squarely places the burden of proof on the petitioner in a post-conviction proceeding. Because he did not present any evidence or argument on these claims, McWhorter failed to satisfy his burden of proving deficient performance and prejudice, under Strickland. For that reason, these claims are denied.[9]

[9] McWhorter's decision to abandon these claims is not surprising because there are no adequate factual assertions presented in Section XII.B of his amended Rule 32 petition.

The last totally abandoned section is Section XII.C, which is found in paragraphs 216 through 218 of McWhorter's amended Rule 32 petition. In this section, McWhorter asserts that trial counsel were ineffective for failing to obtain a copy of his taped-recorded confession. McWhorter never broached this topic with any witness during the evidentiary hearing, and he did not move for the admission of any exhibit related to this claim. Therefore, McWhorter has abandoned this claim. Rule 32.3 of the Alabama Rules of Criminal Procedure squarely places the burden of proof on the petitioner in a post-conviction proceeding. Because he did not present any evidence or argument on this claim, McWhorter failed to satisfy his burden of proving deficient performance and prejudice, under Strickland. For that reason, this claim is denied.[10]

Partially Abandoned Sections of Claim XII

Therefore, in the alternative, because these claims fail to meet Rule 32.6(b)'s "clear and specific" pleading requirement, they are denied.

[10] McWhorter's decision to abandon this claim is not surprising because there are not adequate factual assertions presented in Section XII.C of his amended Rule 32 petition to prove an IAC claim. Therefore, in the alternative, because this claim fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement, it is denied.

It is important to note that some of the sections contained in Claim XII of McWhorter's amended Rule 32 petition were abandoned, but only in part. All of those sections are found under McWhorter's Claim XII.A heading. In total, there are 4 sections that were partially abandoned. All 4 sections contain independent claims that allege trial counsel were ineffective for not interviewing various people who allegedly would have testified during the penalty phase of McWhorter's capital murder trial. At the evidentiary hearing, however, McWhorter elicited testimony from some, but not all, of the people identified in the following 4 sections of Claim XII.A of his amended Rule 32 petition: Section XII.A.iii. (Melinda Rowland), Section XII.A.viii. (Marty & Rodney McWhorter), Section XII.A.x. (Allen & Eric Orr, Jeremy & Jaimy Harris, Mitch Niamon, Stacy Tarvin, April James, Christy Hammock, and Angela Bonds), and Section XII.A.xii. (Ms. Kennemer[11] and Karen Thomas). Therefore, McWhorter has abandoned these claims. Rule 32.3 of the Alabama Rules of Criminal Procedure places the burden of proof squarely on the petitioner in a post-conviction proceeding. Because he did

[11] McWhorter does not provide Ms. Kennemer's first name.

not present any evidence or argument on these claims, McWhorter failed to satisfy his burden of proving deficient performance and prejudice, under Strickland. For that reason, these claims are denied.

McWhorter did, however, elicit testimony from 5 individuals identified in these 4 sections: David Rowland (Section XII.A.iii), Michael Evans (Section XII.A.viii), Tiffany Harper Long (Section XII.A.x), Amy Battle (Section XII.A.x), and Frank Baker (Section XII.A.xii). The claims related to those individuals are addressed below.

Remaining Sections of Claim XII

In essence, McWhorter alleges that his trial counsel should have done something more during the penalty phase of his trial — i.e., that they should have presented additional mitigation evidence. When a claim is raised that trial counsel should have done something more, the Court must first look at what counsel did. Chandler, 218 F.3d at 1320 ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact."). Moreover, "the mere fact that other witnesses might have been available or that other testimony might have been elicited from those

who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. at 1316 n.20. This Court will review the remaining sections of Claim XII with that presumption in mind.

As an initial matter, McWhorter's trial counsel both testified at length to their strategy for the penalty phase. The Court sets out that strategy below and finds it to be reasonable under Strickland. All of the remaining independent claims contained in Claim XII of McWhorter's amended Rule 32 petition are meritless because they contend that trial counsel should have investigated and presented evidence that either would have been cumulative to evidence presented or would have been inconsistent with evidence presented to support trial counsel's reasonable strategy. In his amended Rule 32 petition, McWhorter failed to mention, much less challenge, the trial strategy that trial counsel actually used.

The testimony of McWhorter's trial counsel, Thomas Mitchell and James Berry, at the evidentiary hearing indicates that they rendered effective assistance of counsel during the penalty and sentencing phases of his trial. Mitchell and Berry both testified that, to prepare

McWhorter's mitigation case, they interviewed McWhorter, his mother, Carolyn Rowland, his aunt, Elsie Garrison, and his half-sister, Melinda Rowland. (E.H. 139, 143, 154, 176, 190-91, 553, 557.) McWhorter and his family were fully cooperative and supportive, according to both counsel's testimony. (E.H. 191, 193, 557.)

During a pre-trial interview with McWhorter's family, Mr. Mitchell completed a document titled "Client Background Information" based on the information he learned from that interview. (E.H. 145.) The document was admitted into evidence at the evidentiary hearing as McWhorter's Exhibit 7. (E.H. 146.) Exhibit 7 contains questions and answers covering myriad topics, like McWhorter's early childhood development, his environmental factors; such as, living conditions, medical issues as a youth, and relationship information; his institutional data; such as, education history, his medical and mental health history, his substance abuse history, his criminal history, and his family history. Mr. Mitchell decided not to hire an investigator for the penalty-phase preparation because he reasonably could formulate a strategy for the penalty phase

without an investigator and with McWhorter and his family's assistance. (E.H. 193.)

In addition to the information provided by McWhorter and his family, trial counsel hired a neuropsychologist to evaluate McWhorter for any "mental disease," "mental disorder," or "any evidence of psychopathology" to use in McWhorter's defense. (E.H. 155, 171.) Trial counsel hired Dr. Douglas Robbins. Mitchell testified that he specifically was interested in learning from Dr. Robbins whether McWhorter exhibited "diminished capacity" and "susceptibility to influence" from others. (E.H. 171.) And, if McWhorter had brain damage, trial counsel wanted to use that fact in his defense. (E.H. 160.) However, Dr. Robbins's evaluation provided no useful mitigation evidence. (E.H. 175, 305.)

Trial counsel also considered various records. They obtained McWhorter's hospital records from his attempted suicide. (E.H. 557.) Mitchell testified that he was aware that Garrison once reported Carolyn Rowland to DHR because Garrison found bruises on McWhorter from a "whipping" that Carolyn Rowland gave him. (E.H. 158; McWhorter's Exhibit 7, page 5.) Trial counsel also had documentation of

McWhorter's IQ scores, which indicated that he has an IQ of 88. (E.H. 140, 181.)

As Berry explained during the evidentiary hearing, McWhorter would have had to climb from a "deep hole" to persuade the judge and jury to spare his life. (E.H. 571-72.) Two co-defendants already had pleaded guilty to charges stemming from the same crime. (Ibid.) The jury had heard evidence of gang activity. (E.H. 573.) Trial counsel believed that McWhorter had very little in his favor going into the penalty phase. "About the only thing we had going for Casey was a young man. He was a good-looking young man. And his youth was basically the only thing we had going for us," said Berry. (E.H. 576.) Mitchell's testimony reflected a similar opinion. Mitchell thought the main circumstances McWhorter had in his favor were his youth, that he was "clean cut," and that "he looked like Opie grown up a little bit from the Andy Griffith Show." Mitchell also remembered first meeting McWhorter and how he thought that McWhorter must have been "crazy" to commit the crime with which he was charged. (E.H. 185-86.) Mitchell hoped that that the jury would think that, too, though he knew there was no evidence to

support a mitigation case based on McWhorter's mental disorders because McWhorter had none. (Ibid.)

Both counsel previously had represented defendants at capital murder trials. (E.H. 170, 544.) Mitchell, who served as McWhorter's lead counsel, had extensive relevant experience over his 11-year legal career. (E.H. 169.) Mitchell testified that he had represented defendants during approximately 25 felony jury trials, 8 to 10 of which were murder trials, prior to representing McWhorter. (E.H. 169-70.) The overwhelming majority of Berry's practice around the time of McWhorter's trial was criminal work, and Mitchell testified that about half of his practice was criminal around 1994. (E.H. 169, 566.)

Experienced trial counsel collected the comprehensive background information reflected in McWhorter's Exhibit 7, Dr. Robbins's evaluation, and other documents, and formulated a reasonable strategy that they believed could save McWhorter's life: McWhorter was a good boy, who fell in with the wrong crowd, and he made a terrible mistake but does not deserve the death penalty. (E.H. 186, 571.) The trial transcript reflects that strategy in the testimony

trial counsel presented during the penalty and sentencing phases.

After conducting a reasonable investigation and forming a reasonable trial strategy, trial counsel decided to present the testimony of four witnesses during the penalty phase: Carolyn Rowland, Elsie Garrison, Van Reid, and Vonnie Salee. Carolyn Rowland, McWhorter's mother, and Garrison, his aunt, were selected because they knew McWhorter well and because their pain felt over McWhorter's capital murder trial was "obvious," and trial counsel hoped to evoke sympathy from the jury. (E.H. 190.) Garrison testified during the penalty phase that McWhorter once was wrongly accused of using drugs, so she had him drug tested. The test confirmed that there were no drugs in McWhorter's system. (R. 1782.) She also testified that McWhorter was "compassionate," but that he got caught up with the wrong crowd, including Daniel Miner, a co-defendant in this case. (R. 1784-85.) Carolyn Rowland also testified that McWhorter had been a "good kid" until he started spending time with Daniel Miner, Lee Williams, and Marcus Carter, all of whom were co-defendants in this case. (R. 1792-93.)

Garrison recommended Van Reid. (E.H. 189.) Reid knew McWhorter around the time of the murder because McWhorter worked as a busboy at Reid's restaurant, and Reid knew McWhorter to be a young man who did his job well. (E.H. 190; R. 1176-77.) Vonnie Salee was picked to testify partly because she was "very likable." (E.H. 188.) Salee, like Reid, also knew McWhorter to be a good worker. (R. 1772.) McWhorter bagged groceries at the grocery store where Salee was a cashier. (Ibid.) She recalled that McWhorter once had rubbed the shoulders of an older lady cashier who complained that her shoulders and back were hurting. (R. 1773.)

Trial counsel's "good boy, wrong crowd" strategy also was applied to the sentencing phase before Judge Gullahorn. Trial counsel presented additional testimony from Garrison and Carolyn Rowland, along with Janice Miller, McWhorter's aunt by marriage. The trial transcript and the evidentiary hearing transcript show that trial counsel presented meaningful testimony during the penalty and sentencing phases that was consistent with their strategy, and they refrained from presenting additional evidence that would have detracted from their strategy.

Turning to the remaining independent claims contained within Claim XII of McWhorter's amended Rule 32 petition, each claim is addressed in turn.

As an initial matter, the 7 paragraphs immediately following McWhorter's Claim XII.A heading, paragraphs 130 through 136, appear to serve as merely introductory paragraphs relating to the presentation of the grounds of the sub-claims. To the extent that those paragraphs are meant as independent claims for relief, they do not sufficiently state claims upon which relief may be granted pursuant to Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. Therefore, those paragraphs are denied because they are insufficiently pleaded.

ii. The Claim That Trial Counsel Should Have Investigated And Presented Additional Testimony From Elsie Garrison

McWhorter's claim that his trial counsel were ineffective for failing to adequately investigate and present additional testimony from his aunt, Elsie Garrison, is contained in paragraphs 145 through 147 of his amended petition.

In essence, McWhorter is alleging that his trial counsel should have done something more during the penalty

phase of his trial – i.e., that they should have elicited from Garrison additional mitigation evidence. When a claim is raised that trial counsel should have done something more, the court must first look at what counsel did. Chandler, 218 F.3d at 1320 ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact."). Moreover, "the mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. at 1316 n.20. This Court will review this claim with that presumption in mind.

To summarize, McWhorter alleges in his petition that trial counsel were ineffective for not eliciting from Garrison testimony (1) that McWhorter "struggle[d]" for acceptance from his father, (2) that McWhorter had an unstable childhood, (3) that McWhorter "surrender[ed]" to drug and alcohol addiction, (4) that McWhorter's father was a violent alcoholic who could not keep a steady job and had "frequent encounters with law enforcement," (5) that she loved and cared for McWhorter in spite of his flaws, and (6) that McWhorter, as a child, "would wake up crying

in the night," worried that "she had run away and left him." (Pet. at para. 145-47.)

Trial counsel's testimony during the evidentiary hearing shows that the testimony outlined above would have been inconsistent with their "good boy, wrong crowd" strategy. Strategic decisions are "virtually unassailable, especially when they are made by experienced criminal defense attorneys," like McWhorter's counsel. Williams v. Head, 185 F.3d 1223, 1242 (11th Cir. 1999).

Trial counsel discussed with McWhorter's family facts related to Tommy McWhorter. According to McWhorter's family, McWhorter and his father "did not have much contact." (E.H. 181.) Carolyn Rowland also told trial counsel that her divorce with Tommy McWhorter was not "bitter." (E.H. 181-82.) She testified to that fact during the penalty phase, too. (R. 1789.) In addition, the facts that trial counsel knew about Tommy McWhorter would have been inconsistent with their mitigation strategy. Trial counsel knew that Tommy McWhorter was a violent alcoholic and a criminal, but they did not want those facts presented to the jury because they feared that the jury would infer that "the apple doesn't fall far from

the tree" and that McWhorter, therefore, was a "bad seed." (E.H. 158-59, 579-80.) Plus, trial counsel reasonably thought the jury would be interested in hearing mitigation evidence related to McWhorter's life, and not his father's. (E.H. 579-80.)

As for evidence of McWhorter's drug and alcohol abuse, Mitchell testified that a Marshall County jury, in his professional opinion, would have "backlash[ed]" against McWhorter for introducing evidence of his drug and alcoholic abuse, a subject that the jury likely would have viewed "uncharitabl[y]," according to Mitchell. (E.H. 182.)

As for Garrison's testimony about McWhorter waking up in the night crying and wondering whether he had been abandoned, she affirmed at the evidentiary hearing that she did not know why McWhorter woke and said that "maybe [it was] a bad dream." (E.H. 269.) Because Garrison's testimony at the evidentiary hearing refuted the allegation made in McWhorter's amended Rule 32 petition, that allegation is denied.

Because the additional testimony alleged in this claim either was inconsistent with trial counsel's reasonable

strategy or was false, trial counsel cannot be deficient for failing to present this additional testimony. Furthermore, McWhorter was not prejudiced by trial counsel's strategic decision. McWhorter has failed to meet his burden of proof; therefore, his IAC claim is without merit. Accordingly, this claim is denied.

iii. The Claim That Trial Counsel Should Have Investigated And Presented Testimony From David Rowland

McWhorter's claim that his trial counsel were ineffective for failing to adequately investigate and present additional testimony from his step-father, David Rowland, is contained in paragraphs 148 through 149 of his amended Rule 32 petition. The other independent claim in Section XII.A.iii was abandoned and therefore was dismissed, see supra.

In essence, McWhorter is alleging that his trial counsel should have done something more during the penalty phase of his trial – i.e., that they should have called David Rowland to testify on his behalf during the penalty phase of his trial. When a claim is raised that trial

counsel should have done something more, the court must first look at what counsel did. Chandler, 218 F.3d at 1320 ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact."). Moreover, "the mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. at 1316 n.20. This Court will review this claim with that presumption in mind.

McWhorter alleges the trial counsel should have presented testimony that "would have provided the jury and judge with corroboration of Carolyn Rowland's and Elsie Garrison's accounts of Casey's problems in the home. In addition, David could have testified that Casey's character was such that David loved his stepson in spite of his problems." (Pet. at para. 149.)

This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter fails in his petition to identify what facts David Rowland knew and therefore could have testified to. Without a specific pleading, this Court is left to guess

what facts trial counsel could have presented through David Rowland's testimony that would relate to McWhorter's "problems."

In the alternative, this claim is denied because McWhorter has failed to meet his burden of proof. As laid out above, trial counsel reasonably chose not to highlight McWhorter's "problems" because that strategy weakened their strategy that McWhorter was a "good boy," not deserving of the death penalty. Strategic decisions are "virtually unassailable, especially when they are made by experienced criminal defense attorneys," like McWhorter's counsel. Williams v. Head, 185 F.3d 1223, 1242 (11th Cir. 1999). As such, McWhorter has failed to prove deficient performance. Furthermore, McWhorter has not proved Strickland prejudice.

viii. The Claim That Trial Counsel Should Have Investigated And Presented Testimony From Michael Evans

McWhorter's claim that his trial counsel were ineffective for failing to adequately investigate and present additional testimony from his cousin, Michael Evans, is contained in paragraphs 177 through 178 of his amended Rule 32 petition. The other independent claims in

Section XII.A.viii were abandoned and therefore were dismissed, see supra.

In essence, McWhorter is alleging that his trial counsel should have done something more during the penalty phase of his trial – i.e., that they should have called Evans to testify on his behalf during the penalty phase of his trial. When a claim is raised that trial counsel should have done something more, the court must first look at what counsel did. Chandler, 218 F.3d at 1320 ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact."). Moreover, "the mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. at 1316 n.20. This Court will review this claim with that presumption in mind.

McWhorter alleges the trial counsel should have presented testimony that, shortly before McWhorter's arrest, Evans "noticed changes in Casey's behavior and tried to get him to go back to school, or to get a job." (Pet. at para. 177.) McWhorter also alleges that Evans

would have testified that that his "care and concern for Casey is profound," that he "looked up to Casey," that he is "shy" and "reserved," while McWhorter is "outgoing," that McWhorter "encouraged [him] to come out of his shell," and that McWhorter taught him "many things, such as how to catch a fish and skin and fry it in the woods."

This claim is denied because it was abandoned. The Court did not group this claim with other claims that were abandoned and therefore dismissed because, unlike with those other claims, McWhorter in fact called Michael Evans to testify at the evidentiary hearing. However, McWhorter asked Evans no questions that were relevant to the facts that he alleges trial counsel should have elicited from Evans during the penalty phase of his capital murder trial. Rather, McWhorter's questioning of Evans focused on the abuse of alcohol and inhalants by McWhorter, Evans, and their family, the exact kind of evidence trial counsel testified that they chose not to present. (E.H. 398-405.) Accordingly, this claim is denied.

x. The Two Independent Claims That Trial Counsel Should Have Investigated And Presented Testimony From Tiffany Harper Long and Amy Battle

McWhorter's claims that his trial counsel were ineffective for failing to adequately investigate and present testimony from his ex-girlfriend, Tiffany Harper Long, and his friend, Amy Battle are contained in paragraphs 184 through 187 of his amended Rule 32 petition. The 9 other independent claims in Section XII.A.x were abandoned and, therefore, were dismissed, see supra.

In essence, McWhorter is alleging that his trial counsel should have done something more during the penalty phase of his trial – i.e., that they should have had the two people identified above to attend the penalty phase of his trial and testify on his behalf to the factual allegations contained within his petition. When a claim is raised that trial counsel should have done something more, the court must first look at what counsel did. Chandler, 218 F.3d at 1320 ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact."). Moreover, "the mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove

ineffectiveness of counsel." Id. at 1316 n.20. This Court will review these claims with that presumption in mind.

McWhorter alleges the trial counsel should have presented testimony through his ex-girlfriend, Tiffany Harper Long, that he was a "kind and loyal friend" and to the circumstances in McWhorter's life surrounding the time of their breakup. (Pet. at para. 184-85.)

This claim is denied because McWhorter has failed to meet his burden of proof. McWhorter failed to ask Long questions about whether McWhorter was "kind and loyal," but counsel for the State asked her questions on that subject, as follows:

> ASSISTANT ATTORNEY GENERAL: So you said that you and Casey dated between October of '92 and November 29th of '92?
>
> MS. LONG: Uh-huh.
>
> ASSISTANT ATTORNEY GENERAL: So y'all were together for two months, more or less?
>
> MS. LONG: Right.
>
> ASSISTANT ATTORNEY GENERAL: How do you remember specifically the day that you broke up?
>
> MS. LONG: Because he had cheated on me with a friend of mine.

(E.H. 336.) The record establishes, therefore, that McWhorter was neither "kind" nor "loyal" to Ms. Long, and,

it certainly is hard to imagine that Ms. Long would have been a good mitigation witness. As for the allegation that Ms. Long would have testified to circumstances in McWhorter's life just before the time of the murder, that allegation is insufficiently pleaded. Plus, assuming that McWhorter is referring to evidence of his drug and alcohol use, trial counsel testified that they would not have presented that type of evidence to a Marshall County jury. Trial counsel's reasons for not presenting that kind of evidence, see supra, are reasonable. Accordingly, they were not ineffective for not calling Long to testify. Therefore, the IAC claim as to Long's testimony is denied.

McWhorter also alleges the trial counsel should have presented testimony through his friend, Amy Battle, that he was a "kind and loyal friend." (Pet. at para. 184.)

This claim is denied because McWhorter has failed to meet his burden of proof. One additional witness who would have testified only that McWhorter was "kind" and "loyal" would not have changed the outcome of his trial. That evidence would have been cumulative to the evidence that was presented during the penalty phase of McWhorter's trial. Plus, trial counsel testified during the

evidentiary hearing that McWhorter's family told them about McWhorter's friends, so trial counsel's decision not to call friends was informed. (E.H. 577.) Trial counsel clearly opted to call witnesses who could testify not only that McWhorter was a "good boy" but also that he was a competent employee. (E.H. 586-87.) Strategic decisions are "virtually unassailable, especially when they are made by experienced criminal defense attorneys," like McWhorter's counsel. Williams, 185 F.3d at 1242 (11th Cir. 1999).

Because McWhorter has failed to prove that trial counsel were deficient for not presenting Long's testimony and has failed to prove prejudice, this claim is denied.

xii. The Claim That Trial Counsel Should Have Investigated And Presented Testimony From Frank Baker

McWhorter's claim that his trial counsel were ineffective for failing to adequately investigate and present testimony from former coach and teacher, Frank Baker, is contained in paragraphs 191 of his amended Rule 32 petition. The other independent claims in Section XII.A.xii were abandoned and, therefore, were dismissed, see supra.

In essence, McWhorter is alleging that his trial counsel should have done something more during the penalty phase of his trial – i.e., that they should have called Baker to testify on McWhorter's behalf during the penalty phase of McWhorter's trial. When a claim is raised that trial counsel should have done something more, the court must first look at what counsel did. Chandler, 218 F.3d at 1320 ("Although Petitioner's claim is that his trial counsel should have done something more, we first look at what the lawyer did in fact."). Moreover, "the mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." Id. at 1316 n.20. This Court will review this claim with that presumption in mind.

McWhorter alleges that trial counsel should have presented testimony through former coach and teacher, Frank Baker, that he struggled academically, had an aptitude for math, and was an "enthusias[tic,]" "hard-working," "loyal" teammate. (Pet. at para. 191.)

This claim is denied because McWhorter has failed to meet his burden of proof. McWhorter has not established

anything more than cumulative evidence. Baker testified at the evidentiary hearing that McWhorter worked on the basketball team despite not being the best player. (E.H. 425.) Certainly, that evidence would have been consistent with trial counsel's "good boy, wrong crowd" strategy, but it likely would not have changed the outcome of McWhorter's trial. As for evidence of McWhorter's aptitude in math, Baker's testimony was that McWhorter was an average C student and nothing more. (E.H. 422.) There was no testimony from Mr. Baker about McWhorter's performance in other subjects. As trial counsel testified during the evidentiary hearing, they did not call teachers during the penalty phase because they opted for other witnesses: Van Reid and Vonnie Salee, because they knew McWhorter closer to the time of the murder, and the teachers only could testify to how McWhorter was as a child. (E.H. 586.) Strategic decisions are "virtually unassailable, especially when they are made by experienced criminal defense attorneys," like McWhorter's counsel. Williams, 185 F.3d at 1242 (11th Cir. 1999). As such, trial counsel were not ineffective for failing to call Baker to testify during the penalty phase. Therefore, this claim is denied.

xiii. The Claim That Trial Counsel Should Have Obtained Records Documenting McWhorter's Family History

McWhorter's claim that his trial counsel were ineffective for failing to obtain records documenting his family history is contained in paragraph 193 of his amended Rule 32 petition.

This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter first does not identify what records trial counsel allegedly was ineffective for failing to obtain other than "divorce records." As for the divorce records, McWhorter pleads only vaguely what those records would have proved, stating those records would have "corroborated the disintegration of Casey's parents' union and Tommy McWhorter's subsequent two marriages." But McWhorter does not plead how he was prejudiced when it is clear from the pleading itself that these records only would have "corroborated" some unidentified witness's testimony. As such, this claim is denied because it is insufficiently pleaded.

In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. Concerning

divorce records, trial counsel conducted an interview of McWhorter's mother, Carolyn Rowland, where they learned of McWhorter's parents' divorce. There was no need for trial counsel to obtain documentation verifying the divorce when Carolyn Rowland, for example, could and did testify to facts related to the divorce. Carolyn Rowland told trial counsel during that pre-trial interview with McWhorter's family that her divorce with Tommy McWhorter was not "bitter." (E.H. 181-82.) She testified to that fact during the penalty phase, too. (R. 1789.) Because records were not necessary to establish facts relevant to McWhorter's parents' divorce, trial counsel were not ineffective for failing to obtain them. As such, this claim is denied.

xiv. The Claim That Trial Counsel Should Have Obtained Educational Records

McWhorter's claim that his trial counsel were ineffective for failing to obtain educational records is contained in paragraphs 194 through 195 of his amended Rule 32 petition.

This claim is denied because McWhorter failed to meet his burden of proof. McWhorter asserts in his petition that educational records would have shown school transfers

and his "declining academic performance." As discussed at length above, McWhorter's family, including his mother and aunt, fully cooperated with trial counsel's mitigation investigation. Trial counsel did not need to obtain educational records in order to show that McWhorter's grades were poor at times or that he transferred schools. In fact, Elsie Garrison testified to McWhorter's high school transfers. (R. 1786-87.) McWhorter does not allege what additional information educational records would have uncovered. Trial counsel's performance, therefore, was not deficient, and McWhorter did not suffer prejudice. As such, this claim is denied.

xv. The Claim That Trial Counsel Should Have Obtained Medical Records

McWhorter's claim that his trial counsel were ineffective for failing to obtain medical records is contained in paragraphs 196 through 198 of his amended Rule 32 petition.

This claim is denied because McWhorter failed to meet his burden of proof. McWhorter asserts in his petition that medical records would have established that "before age three, Casey had an unusually high number of accidents and medical problems," that he was involved in a life-

McWhorter's claim that his trial counsel were ineffective for failing to obtain DHR records is contained in paragraphs 199 through 202 of his amended Rule 32 petition.

This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter first does not plead specifically what the DHR records would contain. Instead, the petition states, "Most likely, from what counsel have learned, the document relates to an allegation that Petitioner was an abused or neglected child." (Pet. at para. 200.) Because McWhorter does not plead what was in the DHR records, this claim is insufficiently pleaded.

In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. Though McWhorter asserts, in conclusory fashion, that the DHR records contain that he was an "abused or neglected child," the evidence presented at the evidentiary hearing did not support that allegation. Plus, trial counsel did not need to obtain the records from DHR because Garrison, who cooperated fully with trial counsel, filed the DHR report on Carolyn Rowland for leaving bruises on McWhorter after

"whipping" him. (McWhorter's Exhibit 7, page 5.) Garrison's complaint was the only document in the DHR records presented at the evidentiary hearing. (McWhorter's Exhibit 11.) No further action was taken by DHR. (McWhorter's Exhibit 7, page 5; E.H. 158.) DHR records would not have changed trial counsel's reasonable mitigation strategy. Trial counsel's performance, therefore, was not deficient, and McWhorter did not suffer prejudice. As such, this claim is denied.

xvii. The Claim That Trial Counsel Should Have Obtained Records Related To Tommy McWhorter

McWhorter's claim that his trial counsel were ineffective for failing to obtain records related to his father, Tommy McWhorter, is contained in paragraphs 203 through 204 of his amended Rule 32 petition.

This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter does not plead specifically what agency's records trial counsel should have obtained. Therefore, this claim is insufficiently pleaded.

In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. Trial

counsel did not need records to learn of Tommy McWhorter's past. Trial counsel discussed with McWhorter's family facts related to Tommy McWhorter. But, according to McWhorter's family, McWhorter and his father "did not have much contact." (E.H. 181.) Carolyn Rowland also told trial counsel that her divorce with Tommy McWhorter was not "bitter." (E.H. 181-82.) She testified to that fact during the penalty phase, too. (R. 1789.) Trial counsel, therefore, decided that Tommy McWhorter's life did not impact McWhorter enough to be pertinent to the penalty phase.

In addition, the facts that trial counsel knew about Tommy McWhorter would have been inconsistent with their mitigation strategy. Trial counsel knew that Tommy McWhorter was a violent alcoholic and a criminal, but they did not want those facts presented to the jury because they feared that the jury would infer that "the apple doesn't fall far from the tree" and that McWhorter, therefore, was a "bad seed." (E.H. 158-59, 579-80.) Plus, trial counsel thought the jury would be interested in hearing mitigation evidence related to McWhorter's life, and not his father's. (E.H. 579-80.) Strategic decisions are "virtually

unassailable, especially when they are made by experienced criminal defense attorneys," like McWhorter's counsel. Williams, 185 F.3d at 1242 (11th Cir. 1999).

Thus, Tommy McWhorter's records would not have changed trial counsel's reasonable mitigation strategy. Trial counsel's performance, therefore, was not deficient, and McWhorter did not suffer prejudice. As such, this claim is denied.

xviii. The Claim That Trial counsel were Ineffective For Not Hiring A Mitigation Specialist

McWhorter's claim that his trial counsel were ineffective for failing to obtain the assistance of Jan Vogelsang, a licensed social worker employed as a mitigation specialist, is contained in paragraphs 205 through 209 of his amended Rule 32 petition.

This claim is denied because it fails to meet Rule 32.6(b)'s "clear and specific" pleading requirement. McWhorter does not plead specifically what facts Vogelsang would have presented during her testimony. Rather, the petition alleges general topics that Vogelsang's testimony would have covered. Rule 32.6(b) of the Alabama Rules of Criminal Procedure requires a pleading of all facts to be

considered in deciding whether relief is due. Therefore, this claim is insufficiently pleaded.

In the alternative, this claim is denied because McWhorter failed to meet his burden of proof. McWhorter alleges in his petition that Jan Vogelsang would have prepared an assessment of his and his family's "emotional and mental health problems," along with their "drug and alcohol abuse," "trauma" from an auto accident, etc. (Pet. at para. 206.) Trial counsel did not need Vogelsang to learn of the facts underlying her conclusions. As discussed thoroughly above, McWhorter's family provided ample family history information, including the kind contained in Vogelsang's report proffered, but not admitted, in this case.

In addition, trial counsel knew about the family's drug and alcohol abuse and criminal histories, but they did not want those facts presented to the jury because they feared that the jury would infer that "the apple doesn't fall far from the tree" and that McWhorter, therefore, was a "bad seed." (E.H. 158-59, 579-80.) Plus, trial counsel thought the jury would be interested in hearing mitigation evidence

related to McWhorter's life, and not his family's. (E.H. 579-80.)

Had trial counsel hired Vogelsang, they would have been forced to choose between using their reasonable "good boy, wrong crowd" strategy or using her assessment, which contains a great deal of negative information related to McWhorter and his family. Based on their testimony at the evidentiary hearing, trial counsel would have opted for the same strategy that they actually employed at McWhorter's trial had they hired Vogelsang. Strategic decisions are "virtually unassailable, especially when they are made by experienced criminal defense attorneys," like McWhorter's counsel. Williams, 185 F.3d at 1242 (11th Cir. 1999). Trial counsel's performance, therefore, was not deficient, and McWhorter did not suffer prejudice.

Furthermore, trial counsel were not deficient for failing to hire Vogelsang because it is not unreasonable that they were unaware of Vogelsang's services. Both trial counsel testified at the evidentiary hearing that they never had heard of a "mitigation specialist," much less Vogelsang. (E.H. 192, 593.) Vogelsang testified that she gains business through word of mouth and did not advertise

her services in Alabama around the time of McWhorter's trial, that she never has testified during an Alabama trial, and that her first time ever testifying in an Alabama court was at William Glenn Boyd's Rule 32 evidentiary hearing, which started on September 8, 1994, approximately 6 months after McWhorter was convicted of capital murder. (E.H. 638-41.) See also, Boyd v. State, 746 So. 2d 364, 374 (Ala. Crim. App. 1999).

Mitchell further testified that, now that he knows what a mitigation specialist does, looking back, he would not have hired one for this case. Mitchell testified, as follows:

> ASSISTANT ATTORNEY GENERAL: And knowing now what a mitigation specialist does, if you had known then -- if you can answer this question -- if you had known then what a mitigation specialist does, do you think in this case you would have hired one?
>
> MR. MITCHELL: I don't think so.
>
> ASSISTANT ATTORNEY GENERAL: And why not?
>
> MR. MITCHELL: I don't think that it would help. I don't think somebody like that who goes out and tries to hire or influence witnesses would help. You have trouble enough with good witnesses who are motivated and who are trying to tell the truth getting confused on the witness stand. And I really don't that [sic] in this business of trying to find people and trying to put words in their mouth is a sort of thing that helps in a case like this.

(E.H. 192-93.)

For the above-stated reasons, trial counsel's performance was not deficient, and McWhorter did not suffer prejudice; therefore, this claim is denied.

Conclusion

This Court has reviewed each of Petitioner McWhorter's claims individually and cumulatively and found no error. For the reasons stated above, this Court finds that Petitioner McWhorter is due no relief from his capital murder conviction and death sentence.

It is, hereby, **ORDERED**, **ADJUDGED**, and **DECREED** that McWhorter's amended Rule 32 petition is **DENIED**. It is further **ORDERED** that McWhorter shall have forty-two (42) days from the filing of this Order in the Marshall County Circuit Clerk's Office to file his notice of appeal.

DONE this 29 day of March, 2010.

Liles C. Burke
Specially Appointed Circuit Judge

cc. Mr. Kevin W. Blackburn, Assistant Attorney General
Mr. Robert C. Newman, Esq.

FILED
MAR 29 2010
CHERYL PIERCE
CIRCUIT / DISTRICT COURT
MARSHALL COUNTY, ALABAMA

Mr. Benjamin E. Rosenberg, Esq.
Mr. David M. Bigge, Esq.
Ms. Colleen Quinn Brady, Esq.

Petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit denied.

1

532 U.S. 976, 149 L.Ed.2d 476

Luis RODRIGUEZ, petitioner, v. UNITED STATES.

No. 00-8058.

April 16, 2001.

Case below, 223 F.3d 85.

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

2

532 U.S. 976, 149 L.Ed.2d 476

Casey McWHORTER, petitioner, v. ALABAMA.

No. 00-8327.

April 16, 2001.

Case below, 781 So.2d 330.

Petition for writ of certiorari to the Supreme Court of Alabama denied.

3

532 U.S. 976, 149 L.Ed.2d 476

Theodore DIZELOS, petitioner, v. UNITED STATES.

No. 00-8348.

April 16, 2001.

Case below, 217 F.3d 841.

Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit denied.

4

532 U.S. 976, 149 L.Ed.2d 476

Jervon L. HERBIN, petitioner, v. Janet C. HOEFFEL, et al.

No. 00-8409.

April 16, 2001.

Case below, 1 Fed.Appx. 2.

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

5

532 U.S. 976, 149 L.Ed.2d 476

William S. HOLLOWAY, petitioner, v. Gary L. JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division.

No. 00-8410.

April 16, 2001.

Petition for writ of certiorari to the United States Court of Appeals for the Fifth Circuit denied.

6

532 U.S. 976, 149 L.Ed.2d 477

Marcus FRYE, petitioner, v. Diminick MANTELLO, Superintendent, Coxsackie Correctional Facility.

No. 00-8414.

April 16, 2001.

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

IN THE CIRCUIT COURT OF MARSHALL COUNTY, ALABAMA

STATE OF ALABAMA

VS

CASEY A. MCWHORTER

CC-93-077A

SENTENCING ORDER

A. Statement Of The Case.

The defendant was arrested on February 19, 1993. On May 14, 1993, the defendant was indicted by the Grand Jury of Marshall County, Alabama, and charged with Capital Murder in a one count indictment. That count charged that the defendant intentionally caused the death of Edward Lee Williams by shooting him with a rifle in the course of committing a theft of currency belonging to Edward Lee Williams by threatening imminent use of force against Edward Lee Williams while armed with a deadly weapon, to wit, a rifle, in violation of Section 13A-5-40(a)(2) of the *Code of Alabama, 1975*. On June 8, 1993, the defendant appeared in open court, was adjudged indigent and counsel appointed. He was then presented with a written explanation of his rights, an explanation of what he was charged with and a statement of the possible punishments. On June 8, 1993, he also applied for youthful offender status. A hearing thereon was set for

July 6, 1993 and a youthful offender background investigation and report was ordered. Said report was dictated under the date of July 1, 1993. On July 6, 1993, following a hearing, the defendant was denied youthful offender status, was arraigned as an adult and pled not guilty. The case was set for October 22, 1993 for a status review. At arraingment the Court allowed the defendant 14 days to file special pleas or motions and also entered a "Standard Discovery Order" requiring the State to make discovery. On various dates, the State filed responses to the discovery orders of the Court. On October 22, 1993, the Court set the trial for March 14, 1994. Various defense motions were presented and ruled upon. On March 14, 1994, both sides declared "ready". Jury qualification began March 14, 1994 and continued until March 19, 1994 when a jury was selected as required by law, including two alternates. On March 17, 1994, trial began on the guilt phase and continued day by day (except Sunday, March 20, 1994) until March 21, 1994. The jury began their deliberations that day and those deliberations were recessed until March 22, 1994. On March 22, 1994, the jury found the defendant guilty of capital murder for the intentional killing during a robbery in the first degree as charged in the one count of the indictment. The defendant was adjudged guilty of said offense and the case recessed until later that day for the sentencing

phase of the trial. On March 22, 1994, the sentencing phase was started and completed whereupon the jury recommended death with the vote being ten for death and two for life without parole. The case was continued until the 13th day of May, 1994, for the sentence hearing and the probation officer was ordered to make a pre-sentence investigation and written report before such date. On May 13, 1994, a pre-sentence report was received and reviewed by the Court, defendant and his attorneys and a sentence hearing held. ~~The case was continued for sentencing~~ until

B. Facts Summarizing The Crime.

The court finds beyond a reasonable doubt that approximately three weeks before February 18, 1993 the 18 year old defendant conspired with 15 and 16 year old co-defendants (the 15 year old co-defendant being the son of the victim) to kill the victim in order to rob him of a substantial sum of money and to obtain other property from his home. This conspiracy was discussed from time to time until February 18, 1993. On that date a fourth party, who was aware of the plot, dropped the defendant and the 16 year old co-defendant off on a highway a few blocks from the victim's home at about 3:00 p.m.. The fourth party and the 15 year old son of the

victim rode around until they met the defendant and the other co-defendant at a pre-arranged spot at 8:00 o'clock that evening.

The defendant and the 16 year old proceeded on foot to the victim's home and let themselves in the unlocked empty house. They knew that the victim was not expected home for approximately three to four hours. They spent this three to four hour period of time in the home going through it, gathering up various items that they wanted to keep and making silencers for two .22 rifles which were there in the home. One silencer was made out of a plastic jug and filled with napkins and attached to the rifle by duct tape. The other was made by wrapping a pillow around the barrel of the second rifle and holding it in place with duct tape and electrical wire. The rifles were "test fired" into a mattress to see if the silencers were accomplishing the desired effect. When the victim arrived home, he first saw the 16 year old, grabbed the rifle he was holding and began to struggle over it. At that point, the defendant fired the first shot into the victim's body. Between the two conspirators on the scene, the victim was shot at least 11 times. After the victim was down on the floor, the defendant fired at least one more round into his head to assure that he was dead. They took his wallet and various other items from the home and

left in the victim's pick-up truck. They met the other two parties at the pre-arranged spot, took the victim's truck out into the woods and stripped it. The spoils were divided between the four individuals. The Toxicologist testified that the victim died of multiple gunshot wounds, there being 11 entrance wounds and 2 exits wounds. The aorta and another major blood vessel were pierced causing approximately half a gallon of blood to accumulate in the chest cavity and at least one bullet was removed from the brain.

The defendant's guilt was evidenced not only by his confession but by the testimony of the fourth party who drove the defendant to the area near the victim's home and met him again at 8:00 p.m. and by the testimony of a friend to whose home the defendant carried part of the spoils and to whom the defendant confessed the substance of his guilt. All of the physical evidence was consistent with the above account.

C. The Aggravating Circumstances.

In regard to the aggravating circumstances the Court finds the following:

(1) The defendant was not under a sentence of imprisonment when he committed the capital offense. This aggravating circumstance under

Section 13A-5-49(1) of the Code of Alabama is not found to exist and is not considered.

(2) The defendant has not been convicted of another capital offense or of a felony involving the use or threat of violence. Therefore, the Section 13A-5-49(2) aggravating circumstance does not exist, and it is not considered.

(3) The defendant did not knowingly create a great risk of death to many persons. Therefore, the Section 13A-5-49(3) aggravating circumstance does not exist and is not considered.

(4) The capital offense was committed while the defendant was engaged in the commission of or an attempt to commit or flight after committing or attempting to commit robbery within the meaning of Section 13A-5-49(4). Therefore, the Section 13A-5-49(4) aggravating circumstance does *exist and is considered.*

(5) The capital offense was not committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody within the

meaning of Section 13A-5-49(5). Therefore, the Section 13A-5-49(5) aggravating circumstance does not exist and is not considered.

(6) The capital offense was not committed for pecuniary gain within the meaning of Section 13A-5-49(6). Therefore, the Section 13A-5-49(6) aggravating circumstance does not exist and is not considered.

(7) The capital offense was not committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. Therefore, the Section 13A-5-49(7) aggravating circumstance does not exist and is not considered.

(8) The capital offense was not especially heinous, atrocious or cruel compared to other capital offenses within the narrow meaning of Section 13A-5-49(8) and within the narrow meaning of *Kyser v. State*, 398 So2d 330 (Ala.1981). Therefore, the Section 13A-5-49(8) aggravating circumstance does not exist and is not considered.

The Court considers only the aggravating circumstance contained in Section 13A-5-49(4) of the *Code*, that is, that the capital offense was

committed by a person during the commission of or attempt to commit or flight after committing or attempting to commit robbery, for the purposes of sentencing.

D. The Mitigating Circumstances.

The defendant presented some evidence of mitigating circumstances at the sentencing phase of the trial. The Court has thoroughly and conscientiously considered all statutorily enumerated mitigating circumstances as well as any non-statutory mitigating circumstances which might reasonably appertain to this case.

In regard to the mitigating circumstances, the Court finds the following:

(1) The defendant does not have a significant history of prior criminal activity within the meaning of Section 13A-5-51(1). Therefore, the Section 13A-5-51(1) mitigating circumstance does exist and is considered.

(2) The capital offense was not committed while the defendant was under the influence of extreme mental or emotional disturbance. Therefore, the

Section 13A-5-51(2) mitigating circumstance does not exist and is not considered.

(3) The victim was not a participant in the defendant's conduct and he did not therefore consent to it. Therefore, the Section 13A-5-51(3) mitigating circumstance does not exist and is not considered.

(4) The defendant was the principal, or at least one of them, who actually shot the victim and therefore his participation in the capital offense was not relatively minor. Therefore, the Section 13A-5-51(4) mitigating circumstance does not exist and is not considered.

(5) The defendant did not act under extreme duress or under the substantial domination of another person when he committed the capital offense. Therefore, the Section 13A-5-51(5) mitigating circumstance does not exist and it is not considered.

(6) The capacity of the defendant to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was not substantially impaired at the time he committed the capital offense.

Therefore, the Section 13A-5-51(6) mitigating circumstance does not exist and is not considered.

(7) The defendant was 18 years of age at the time he committed the capital offense. Therefore, the Section 13A-5-51(7) mitigating circumstance does exist and is considered.

The Court is unaware of any non-statutory mitigating circumstances which exist or should be considered other than a far less than perfect childhood following the divorce of his parents, a good reputation with at least some individuals and a substantially good work record for a person his age all of which has been considered by the Court as non-statutory mitigating circumstances.

E. The Jury's Recommendation.

The jury's advisory verdict recommended a sentence of death. The jury's vote was two for life without parole and ten for death by electrocution.

F. The Sentence.

Having weighed the one statutory aggravating circumstance against all of the statutory and non-statutory mitigating circumstances, and having given careful consideration to the jury's advisory recommendation, the court finds that the aggravating circumstance in this case far outweighs the mitigating circumstances and that the punishment should be death.

It is therefore **ordered, adjudged and decreed** that the defendant Casey A. McWhorter is guilty of Code of Alabama 1975 Section 13A-5-40(a)(2) Capital Murder as charged in the indictment.

It is further **ordered, adjudged and decreed** that the defendant Casey A. McWhorter is sentenced to death by electrocution. Pursuant to Alabama Rule of Appellate Procedure 8(b)(1) the date of execution is to be set by the Alabama Supreme Court at the appropriate time. The defendant is remanded to the custody of the Department of Corrections. His application for probtion is denied. He is taxed with costs and a $50.00 victim compensation assessment. An award of restitution or an order to repay attorneys fees would be meaningless under the circumstances.

It is further **ordered, adjudged and decreed** that under Section 13A-5-55 the defendant is entitled to an automatic appeal and the same is hereby entered by the Court for him. Further, under Rule 24 of the Alabama Rules of Appellate Procedure, the Court **orders** that the appointed trial counsel shall continue as defendant's counsel on appeal and the Court hereby **orders** the Court Reporter and the Clerk to prepare the record and transcript for such appeal at the expense of the State of Alabama.

This the 13 day of May, 1994.

WILLIAM C. GULLAHORN, JR.
Circuit Judge

United States Code Annotated
Title 28. Judiciary and Judicial Procedure (Refs & Annos)
Part VI. Particular Proceedings
Chapter 153. Habeas Corpus (Refs & Annos)

28 U.S.C.A. § 2254

§ 2254. State custody; remedies in Federal courts [Statutory Text & Notes of Decisions subdivisions I to XIV]

Effective: April 24, 1996
Currentness

<Notes of Decisions for 28 USCA § 2254 are displayed in multiple documents.>

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b)(1) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that--

(A) the applicant has exhausted the remedies available in the courts of the State; or

(B)(i) there is an absence of available State corrective process; or

(ii) circumstances exist that render such process ineffective to protect the rights of the applicant.

(2) An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.

(3) A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

(d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim--

(1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

(e)(1) In a proceeding instituted by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence.

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--

(A) the claim relies on--

(i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

(ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

(f) If the applicant challenges the sufficiency of the evidence adduced in such State court proceeding to support the State court's determination of a factual issue made therein, the applicant, if able, shall produce that part of the record pertinent to a determination of the sufficiency of the evidence to support such determination. If the applicant, because of indigency or other reason is unable to produce such part of the record, then the State shall produce such part of the record and the Federal court shall direct the State to do so by order directed to an appropriate State official. If the State cannot provide such pertinent part of the record, then the court shall determine under the existing facts and circumstances what weight shall be given to the State court's factual determination.

(g) A copy of the official records of the State court, duly certified by the clerk of such court to be a true and correct copy of a finding, judicial opinion, or other reliable written indicia showing such a factual determination by the State court shall be admissible in the Federal court proceeding.

(h) Except as provided in section 408 of the Controlled Substances Act, in all proceedings brought under this section, and any subsequent proceedings on review, the court may appoint counsel for an applicant who is or becomes financially unable to afford counsel, except as provided by a rule promulgated by the Supreme Court pursuant to statutory authority. Appointment of counsel under this section shall be governed by section 3006A of title 18.

(i) The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254.

CREDIT(S)

(June 25, 1948, c. 646, 62 Stat. 967; Pub.L. 89-711, § 2, Nov. 2, 1966, 80 Stat. 1105; Pub.L. 104-132, Title I, § 104, Apr. 24, 1996, 110 Stat. 1218.)

Notes of Decisions (8325)

28 U.S.C.A. § 2254, 28 USCA § 2254
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

United States Code Annotated
Constitution of the United States
Annotated
Amendment VI. Jury Trial for Crimes, and Procedural Rights (Refs & Annos)

U.S.C.A. Const. Amend. VI-Jury Trials

Amendment VI. Jury trials for crimes, and procedural rights [Text & Notes of Decisions subdivisions I to XXII]

Currentness

<Notes of Decisions for this amendment are displayed in multiple documents.>

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Notes of Decisions (5818)

U.S.C.A. Const. Amend. VI-Jury Trials, USCA CONST Amend. VI-Jury Trials
Current through P.L. 116-259. Some statute sections may be more current, see credits for details.

End of Document

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JUROR INFORMATION QUESTIONNAIRE

1. Your full name: Linda Ann Burns
2. Present address: 296 Baldwin Drive Arab AL 35016
3. How long have you lived in Marshall County? 45 yr
   How long have you lived at your present address? 9 months
4. Your place of birth: Dale County Hospital Age: 43 Race: W
5. What work do you do? Billing Clerk
6. Who is your employer? Progress Rail Services
   How long have you worked there? 2 yr
7. Marital Status: (X) Married ( ) Separated ( ) Divorced
   ( ) Widowed ( ) Single
   If you are/were married:
   For how many years? 45 Spouse's name: Michael K. Burns
   Spouse's employer: Progress Rail Services
   How long has he/she worked there? 1 yr.
   Spouse's job responsibilities: Over the road truck driven
8. What is your religious affiliation? Methodist
9. What church do you attend? New Brashers Chapel
10. What is your political party preference? Democrat
11. Please list the organizations to which you belong or of which you have been a member (social, fraternal, service, civic, religious, political, etc.) _____

12. For all of your children, please complete the following:

Age	Sex	School or occupation	At Home?
24	FM	House wife	No
19	FM	UAH - Huntsville AL	Yes
17	M	Arab High School	Yes

13. Please provide the following for your parents:

	Name	Birthplace	Employment
FATHER:	Olive Daniels	Pike County	Dead
MOTHER:	Dorothy Senn	Barbour County	Retired

14. If you ever served in the military, please complete the following:
    Branch: _____ Rank: _____ From: _____ To: _____
    Duties: _____
    If you were involved with military law enforcement or any court martials, please describe: _____

15. Have you had any employment besides your present one in the last ten years? Yes. If yes, please state where you have worked and give approximate dates:
    Boyd Brothers Trans. Birmingham AL. Dates: 9-10-84 - 2-10-92
    _____ Dates: _____

16. If you have lived at any other address during the last ten years, please give the address and approximate dates that you

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lived there.
Rt 5 Box 52 Arab, AL Dates: 5-27-89
237 Brashiers Chapel Rd Arab, AL Dates: 5-93
Rt 1 Clio AL Dates: 4-89

17. Please list the schools you have attended and approximate dates you were at each one:
Grade School: Pike County Elem. Brundidge AL Dates: 56
Junior High: Pike County Jr. High Brundidge Dates: 63
High School: Pike County High Brundidge AL Dates: 69
College: Dates:
Vocational/Trade School Sparks Tech - Eufaula AL Dates: 83
Professional School Dates:
Graduate School: Dates:
Degrees or diplomas you hold:

18. Have you ever served on a jury before? NO How many Times?
Was this: Grand Jury ( ) Trial Jury ( )
Criminal Case ( ) Civil Case ( )
What were the cases about?
When were they?
Did the jury reach a verdict?

19. Have you ever sued anyone or been sued?
What was the case about?

20. Have you or anyone in your immediate family appeared as a witness in any court case, before a Grand Jury or in any other type of proceeding? yes - think so If so, who appeared and what relationship did they have to you? Thomas Bodine - Father-in-law
When and where was the case? Guntersville - 2 yrs ago
Kathy Padgitt

21. Have you, any member of your family or anyone you know ever been the victim of a crime? yes
If yes, who and what relationship? Steve Burns Brother-in-law
What was the crime? Drugs
Was anyone arrested in connection with the crime? yes
Was anyone convicted of the crime? yes

22. Have you, any member of your family or anyone you know ever been accused of a crime? yes
If yes, who and what relationship? Steve Burns - Brother-in-law Larry Daniels (Nephew)
When did this happen? 15 ago
What were the charges involved? Drugs Robbery
Where did this happen? Marshall County Dale County Was there an arrest? yes What happened in court? Steve was on probation Larry was minor sent to Mt Megs for 1 yr.

23. Have you, anyone in your family or any personal friend ever studied or applied to become an attorney, police officer, probation officer or parole officer? NO If yes:
Who and what relationship?

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Position studied or applied for: _____
State whether they got the position and currently hold it?

_____

24. If you now know, or if you have known, anyone in any District Attorney's office, probation and parole department, police department and/or correctional office, please supply the person's name and the agency for which he or she works or did work. _____

_____

_____

25. Have you ever worked as an employee or volunteer in a law enforcement agency, prison, jail, correctional institution or mental health facility? No If so, state when and where: _____

26. Has a member of your family ever worked as an employee or volunteer in a law enforcement agency, prison, jail, correctional institution or mental health facility?
Who, and what relationship? _____
When and where? _____

_____

27. Please list your hobbies and spare time activities: _____
Sewing Spending time with grand children working in yards.

28. What newspapers do you read? Please state how many times per week you read each one? Arab Tribune Sand Mountain Reporter Guntersville Time

29. Do you regularly watch the local television news? yes
What station? _____ National News? _____ In what kind of news are you most interested? _____

_____

30. Do you regularly listen to the radio? yes
What stations? _____
In what kind of radio news are you most interested? ALL News

31. Please list the magazines and periodicals you read: _____
Lady's Home Journal

32. What are your favorite TV programs? 1. 90210
2. Melrose Place 3. Walker Texas Ranger

33. Are most of the people you usually see in your neighborhood:
White (X) Black ( ) Blacks and whites ( )

34. Is there any other information that you believe might be important for the court or for the lawyers to know about you as a possible juror? _____

_____

_____

_____

_____

Linda Ann Burns
JUROR (Please sign full name)

Date signed: 3-14 19 94.

26-1

IN THE 27th JUDICIAL CIRCUIT COURT

MARSHALL COUNTY, ALABAMA

ALBERTVILLE DIVISION

STATE OF ALABAMA,	)	
	)	
VS.	)	CASE NO. CC 93-077A
	)	
CASEY A. McWHORTER, DEFENDANT.	)	

THE ABOVE STYLED PROCEEDINGS having come on to be heard before Hon. William C. Gullahorn, Jr., Circuit Judge, sitting with a jury present, in Courtroom Number 1, Marshall County Courthouse, Guntersville, Alabama, on the 22nd day of March, 1994, the following proceedings were had and done:

A P P E A R A N C E S

Hon. Ronald P. Thompson, District Attorney, and Hon. A. Timothy Jolley, Assistant District Attorney, appearing in behalf of the State of Alabama.

Hon. Thomas E. Mitchell and Hon. James R. Berry, Attorneys at Law, appearing in behalf of the Defendant.

(Jury is continuing to deliberate.)
(Bailiff notifies the Court that the jury wishes to return into the courtroom.)
(9:35 a.m. Defendant appearing in open court with his attorneys of record.)

THE COURT: All right. If everybody is ready, we'll bring them back. I understand that they want to take a recess.

(Jury present.)

THE COURT: Good morning.

(Jurors respond.)

THE COURT: Ms. Jonus, I understand y'all are ready for a recess.

FOREPERSON JONUS: Yes, sir.

THE COURT: I apologize to you for the awkwardness of having to do it this way, but rest assured it's the only way we can do it.

I remind you of my previous instructions about not finding out anything at all or having anything at all happen that would influence you in any way.

Subject to the instructions I've previously given you, I'll give you a recess and ask that you please be back in the jury room at approximately ten till. Again, I remind you not to start deliberating until all 12 of you are

there in the room together.

Any questions or problems?

(No audible response.)

THE COURT: Before you go, may I see the attorneys, please?

(Bench conference on the record:)

THE COURT: I realize I'm giving a very strict interpretation of the rules. Any exceptions from the State?

MR. THOMPSON: No, sir.

THE COURT: From the Defense?

MR. MITCHELL: No, sir.

(In open court:)

THE COURT: Thank you, ladies and gentlemen.

(Jury leaves the courtroom.)

THE COURT: I'll mention something to the attorneys and this doesn't really have to be on the record. If you're going to leave the floor, let me know where you're going so I'll know where to find you.

MR. BERRY: I will next time, Judge.

THE COURT: We're in recess till they tell us something.

(Recess taken.)

(Jury returns to the jury room to continue deliberating.)

(*Bailiff notifies the Court that the jury has reached a verdict.*)

(10:45 a.m. Defendant appearing in open court with his attorneys of record.)

THE COURT: All right. Let's go on record. The bailiff informs me that we do have a verdict.

I will not allow anyone to make a disturbance. I -- I don't believe any would do that, but I certainly want that understood.

Mr. Hipp, if you would, bring them back, please?

(Jury present.)

THE COURT: Ms. Jonus, has the jury reached a verdict?

FOREPERSON JONUS: Yes, sir, we have.

THE COURT: Would you read that verdict to us, please, ma'am?

FOREPERSON JONUS: "We, the jury, find the Defendant, Casey A. McWhorter, guilty of capital murder as charged in the indictment."

THE COURT: Would you hand that to Mr. Hipp, please?

(Verdict form is handed to the bailiff who in turn hands it to the Court.)

THE COURT: Mr. Berry and Mr. Mitchell, that

is in fact the verdict that Ms. Jonus has signed on behalf of the jury.

Any motions at this time?

MR. BERRY: Poll the jury, Your Honor.

THE COURT: Ladies and gentlemen, as I explained to you, of course the Defendant has a right for this verdict to be the verdict of each and every juror.

In order to assure that, he has the right to have me question each juror individually whether or not that verdict is that individual juror's verdict.

I will do that by starting with Ms. Jonus and saying, Is that your verdict?

FOREPERSON JONUS: Yes, sir.

THE COURT: In so doing -- Let me explain what I'm doing. I'm asking Ms. Jonus individually if the verdict that the Defendant is guilty of capital murder is her individual verdict.

I'll then go to her left across the first row, the second row, and the third row. And I ask that each of you please respond out load.

Ms. Jonus, is that your verdict?

FOREPERSON JONUS: Yes, sir.

THE COURT: Ma'am, is that your verdict?

JUROR: Yes, sir.

THE COURT: Ma'am, is that your verdict?

JUROR: Yes.

THE COURT: Ma'am, is that your verdict?

JUROR: Yes, sir.

THE COURT: Then starting on the second row at the far right corner, ma'am, is that your verdict?

JUROR: Yes.

THE COURT: Ma'am, is that your verdict?

JUROR: Yes, sir.

THE COURT: Ma'am, is that your verdict?

JUROR: Yes, sir.

THE COURT: Ma'am, is that your verdict?

JUROR: Yes, sir.

THE COURT: Ma'am, is that your verdict?

JUROR: Yes, sir.

THE COURT: Then on the last row on the far right, ma'am, is that your verdict?

JUROR: Yes.

THE COURT: Ma'am, is that your verdict?

JUROR: Yes, sir.

THE COURT: Sir, is that your verdict?

JUROR: Yes, sir.

THE COURT: Any other motions by the Defendant at this time?

MR. MITCHELL: No, sir.

THE COURT: Mr. McWhorter, the jury having

returned a verdict of guilty as aforesaid, it's considered and adjudged by the Court as follows: (1) The indictment charges the Defendant with the crime of capital murder; (2) The Defendant entered a plea of not guilty; (3) Trial by jury was had on the issues joined; and (4) The verdict of the jury was as follows: "We, the jury, find the Defendant, Casey A. McWhorter, guilty of capital murder as charged in the indictment" signed "Jima E. Jonus, Foreperson"; and (5) That upon the verdict of the jury, it's considered and adjudged by the Court that the Defendant is guilty of said offense of capital murder.

Ladies and gentlemen, as you all are aware, there is a second phase to this proceeding.

I think you all are entitled to a recess. You've been at it for well over an hour since your last recess.

Please still at this stage do not discuss the case, let anybody discuss it in your presence, even between yourselves. Don't let anything happen that would appear that something was going on.

I'm going to give you a recess and ask that you be back in the jury room at 11:15. We have some other things that we'll be needing to do. We'll try to proceed at that time, okay? Any questions, any problems?

(No audible response.)

THE COURT: All right. Ladies and gentlemen, if you would please, subject to the same instructions I've given you, take a recess, reassemble in the jury room at 11:15. Thank you.

(Jury is leaving the courtroom.)

BAILIFF: They need to come back to this jury room or the other?

THE COURT: Probably be handy -- No, just go back to the other one 'cause they may have to stay there a while and be more comfortable.

BAILIFF: They left some things over there. That's the reason I asked.

THE COURT: Okay.

(Jury leaves the courtroom.)

THE COURT: Rex, if you would close that door, please (indicating).

All right. I think they're out of the hall. Are both sides ready for the sentencing phase of the trial? Any questions, problems, what-have-you?

(Discussion off the record between the Defense attorneys. In open court:)

MR. MITCHELL: Yes, Your Honor, we're ready subject to a little time to get some local witnesses here.

THE COURT: All right. My suggestion and I -- you know, I'm willing to listen to suggestions, is of

course they're coming back at 11:15, that I briefly explain to them what we're doing, and allow you all to make your opening statements. And then even if it's early, that we go ahead and break for lunch.

That would give you all a little more time to get your thoughts organized before you put the first witness on and time to get your first witnesses here.

I have no idea at this stage whether the State will simply re-present the guilt phase evidence or whether or not they have 12 witnesses, but I urge the Defendant to please be ready to go forward with their witnesses in the event the State doesn't put on any substantive testimony.

Is that --

MR. THOMPSON: Yes, sir.

THE COURT: -- agreeable to both sides? Any problems with that?

MR. MITCHELL: No, sir.

THE COURT: All right. We'll stand in recess until 11:15. I ask that everybody be in here and be ready to go, okay?

Let me mention this: I have no thought that either family would attempt to do anything improper with the jury, but the jury is on recess down in the break area now. I suggest to you all that probably this would be a poor time

to go down there, either family, and take a break.

If you do go down there, please sit as far away from the jury as you can. Avoid riding the elevator with them. You all are going to be uncomfortable, they're going to be uncomfortable, and somebody might think that something improper was happening, okay?

All right. We're in recess until 11:15.

(Recess taken.)

(11:20 a.m. Defendant appearing in open court with his attorneys of record.)

THE COURT: All right. Everybody ready?

MR. MITCHELL: Yes, sir.

MR. THOMPSON: Yes, sir.

THE COURT: Bring them back, please, Rex.

(Jury present.)

THE COURT: Ladies and gentlemen, just a few words of explanation about where we are in the case. I mentioned some of this to you ladies and gentlemen or perhaps to all of you while you were in the jury qualification stage.

I'm going to make just some very few remarks to you, then each side will be allowed to again state their case or state their position on this part of the case. Then you will hear evidence or whatever evidence either side cares to present. The evidence that you've already heard on

the guilt phase of the trial may also be considered by you.

The attorneys will then argue, both for the State and for the Defense, and then of course the State has the right to wind up the arguments, and I will give you another charge of the law.

Now, what I'm about to say and what I said during the qualifying stage is somewhat of an oversimplification. I'm mentioning this to you just so you will understand what this phase of the trial is about.

There are certain statutory aggravating circumstances. An aggravating circumstance being something that would indicate or might tend to indicate that the death penalty would be appropriate. The State may present evidence of one or more of such aggravating circumstances.

If there were no aggravating circumstances, then that would be the end of things.

But assuming the jury beyond a reasonable doubt finds one or more aggravating circumstances to exist, the jury would then consider whether or not certain mitigating circumstances exist.

Mitigating circumstances being circumstances which would indicate or tend to indicate that the appropriate punishment should be life without parole as opposed to death.

The jury will determine then what of those --

Well, some of those are statutory. They're -- Anything else that the jury chooses to consider that's based on the evidence in the case maybe considered by the jury as a mitigating circumstance.

The jury then, in their deliberations, will basically weigh the aggravating circumstance or circumstances against whatever mitigating circumstances they find to exist and make a recommendation to the Court as to the penalty in the case.

Now, that recommendation theoretically could be made on a single vote of the jury, but you're not required to do it that way. But you are required as part of your verdict to end up indicating what your final vote was.

To recommend death it would have to be unanimous, or 11 to 1 for death, or 10 to 2 for death. In other words, it would take ten of your number voting for death for that to be the recommendation.

On the other hand, to recommend life without parole, it would take at least seven of your number. Of course, 7, 8, 9, 10, 11, or 12 of you could vote that way, but it would take at least seven of you to recommend life without parole.

Now, ladies and gentlemen, my entire charge will take probably 20 minutes. What I have just explained to you is a close to accurate summary of what I will explain

to you in the charge portion.

There will be differences. Please, when you get down to deciding your recommendation, ignore what I've just told you because it's an oversimplification in some ways. Pay attention to my charge just before you get ready to retire far as being guided as to the law in the case.

Mr. Thompson or Mr. Jolley, if you would, please.

MR. THOMPSON: May it please the Court. Ladies and gentlemen, the Court has just stated to you the attorneys have the right to come before you in this phase of a capital case and again make opening remarks.

Mine will be very brief. I will tell you that the State is asking for the death penalty in this case. And you will be presented evidence by both the State and I assume by the Defendant as we go through this phase of the hearing.

The Court has used the terms aggravating and mitigating circumstances and the State will attempt to prove to you aggravating circumstances in this case.

Now, one aggravating circumstance that is defined in the Code is murder during the course of committing a robbery and you've already returned a verdict of guilty on that particular offense.

Another aggravating circumstance that is

enumerated in the Code is murder during the course of committing a burglary. And we will submit those two aggravating circumstances to you.

We do not plan, do not intend to present any new evidence to you, but will simply resubmit the evidence that you heard during the guilt phase of this trial for you to consider during the sentence phase of this trial.

I ask you again as I've asked you before to just simply listen and be -- pay attention as I have noticed that you've done throughout this trial to what is being offered to you in the way of evidence, what the Court charges you in the way of the law, and we again will respect your findings therein.

Thank you.

THE COURT: Mr. Berry or Mr. Mitchell?

MR. MITCHELL: May it please the Court. Ladies and gentlemen, at this point it is my opportunity as Defense Counsel to speak to you briefly about what we expect to show at this stage of this trial.

We expect to present evidence to show you why this young man's life should be spared. We expect to show that during his young life that he had a difficult childhood, had some problems as a child.

That he grew up to be a pretty good kid, but that he got mixed up with the wrong crowd and that that is

what brought us to be here today ultimately.

We expect to show that he's a young man, only 19 years old now. That he was 18 at the time these events happened. And we expect to show that he has human worth that justifies sparing his life.

Thank you.

THE COURT: All right. Ladies and gentlemen, rather than start into the evidence and then have to break for lunch, we're going to go ahead and break for lunch early.

Gentlemen, I will ask you to please be ready to go again by 1 o'clock.

Ladies and gentlemen, of course it takes you all as long as it takes to eat which, you know, I hope you can be ready and back by 1 o'clock so we can start then. Don't worry if you're not.

Please, I give you the same instructions I've given to you previously, don't let anything happen while you're out of the courtroom that would have any impact on you at all. Don't let anybody discuss the case in your presence or with you, and of course certainly suspend any discussions even between yourselves about the case until this portion has been resubmitted to you.

Do any of you have any questions or problems about what I'm asking?

(No audible response.)

THE COURT: All right. We're in recess till 1:00, Rex, if you all can try to be back by then.

(Jury leaves the courtroom.)

THE COURT: We're in recess until 1 o'clock.

(Lunch recess taken.)

(Afternoon session. 1:05 p.m. Defendant appearing in open court with his attorneys of record.)

THE COURT: All right. Everybody ready to bring them back and get started?

(No audible response.)

THE COURT: Please, Rex.

(Jury present.)

THE COURT: Good afternoon, ladies and gentlemen.

Mr. Thompson what says the State?

MR. THOMPSON: Your Honor, the State would resubmit the evidence that we have presented in our case in chief. And with that, that's all we have to offer on this phase of the trial.

THE COURT: All right. What says the Defense?

MR. MITCHELL: Your Honor, we'll call Ms. Vonnie Salee as our first witness.

THE COURT: Vonnie Salee?

MR. MITCHELL: Vonnie, yes, sir. In the clerk's office.

THE COURT: Vonnie -- Oh, I know who you're talking about.

Vonnie in the clerk's office, please, Rex.

Hi. Good afternoon.

THE WITNESS: Oh, can't I just go back?

THE COURT: Hold up your right hand, please, ma'am.

VONNIE SALEE,

The witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Have a seat, please.

THE WITNESS: Here?

THE COURT: Yes, ma'am.

THE WITNESS: I'm supposed to be on that side (indicating).

THE COURT: Ladies and gentlemen, I think it's obvious to all of you this witness is a long-time employee of the clerk's office and of course I work with her daily as do all of the attorneys.

And so if we seemed a little bit informal as far as she's concerned, please understand that she's a co-employee of -- really of all of the professionals here in

the courtroom.

Mr. Mitchell, if you would.

MR. MITCHELL: Thank you, Your Honor.

DIRECT EXAMINATION BY MR. MITCHELL:

Q Would you state your name for the record, please, ma'am?

A My name is Vonnie Salee.

Q All right. Ms. Salee, do you know the Defendant in this case, Casey McWhorter, the young man seated here at the counsel table (indicating)?

A Yes, I do.

Q How do you know him, please, ma'am?

A He was my bagboy at Food World?

Q I see. And when was that?

A I worked there three years and he -- I don't know how long ago it was. I've been gone about three months.

Q I understand. Okay. During the time that you were working there at Food World with Casey, did you have occasion to learn anything about him?

A He bagged my groceries well. He was there -- Most of the time, the kids goofed off. They -- they played. And Casey didn't play as much as the rest of them did.

Q Now, are you talking about the other bagboys?

A The other bagboys.

Q I see. All right. Did you observe his

interacting with other people, other employees?

A He was -- He was nice -- My one recollection is there was a lady named Patty and Patty was sort of a complainer and she -- we're all -- Most of us were old ladies there, and she would fuss about, oh, my back hurt or my shoulders ached or whatever and Casey came up and he sort of massaged her shoulders. Not in a -- not in a bad way, but in a -- in a way like I understand, I sympathize, I know how you feel. And he was -- he was nice to Patty to do that.

Q I see. What, if any, was the relationship between you and Casey?

A I was -- I was the old lady there. I was the oldest cashier there and -- and I was more like the mom to the -- to the bagboys.

THE WITNESS: Uhm, can I just like -- Can I just go on or am I just supposed to say yes or no?

THE COURT: Unless they stop --

THE WITNESS: I don't know what I'm supposed to do up here.

THE COURT: Unless they stop you, go ahead, yes, ma'am.

THE WITNESS: Okay.

A At Food World, there's a pecking order. There's the bosses, there's the office staff, and then there's the

cashiers, and then there's the bagboys. And if the bagboys are worth a flip, they ask them to go on and do other things. Like clean the bathrooms, stock the pre-stock, whatever.

And I assumed, because of this pecking order, that he was one of the better bagboys because he was always off cleaning something else. And if we got backed up, well, then he could come back up and help us get caught up. And they just say office -- I mean they'd say, uhm --

THE WITNESS: I'm talking too fast.

A They'd say, Package help to the front. And then he would appear and he'd catch us up and then he'd go back and clean some more.

Uhm, I was -- I don't know. I just was a cashier and he would bag my groceries and --

Q (By Mr. Mitchell) Okay. Was there an incident involving a rat that you told me about some time back?

A Yeah. Yeah, he was back doing some extra cleaning in the back and he moved some boxes. And when he came up, he was holding his finger like this (indicating) and I said, "Casey, what's the matter?"

And he says, "A rat bit me."

I said, "What kind of rat?".

And he says, "A big old gopher rat."

I said, "I know Food World doesn't have

gopher rats. We might have a little mouse," but -- I says, "You go wash yours hands with soap and water and tell them in the office in case it gets infected."

But I felt like he came to me as his mom. You know, like he would his mom.

My kids would do that to an older woman.

Q I see.

A That's what he did.

Q What was your reaction, if any, when you learned that these charges had been brought against Casey?

A We were absolutely shocked. The whole store was in absolute shock.

Q I see.

A We just -- We just didn't believe that it was the same person that we knew.

Q All right. Is there anything else about Casey that you'd like to tell these ladies and gentlemen of the jury?

A I -- No. I don't know what else to say. That's all I know.

Q All right. Thank you.

Mr. Thompson may have some questions.

MR. THOMPSON: We don't have any questions, Your Honor.

THE COURT: Vonnie, thank you for being here.

THE WITNESS: Thank you so much.

MR. MITCHELL: Your Honor, we'll call Mr. Van Reid, please.

THE COURT: Van Reid, please, Rex.

THE WITNESS: Right here (indicating).

THE COURT: Okay. Oh, I'm sorry, Mr. Reid. I --

THE WITNESS: Here I am.

THE COURT: If you would, hold up your right hand, please, sir?

VAN REID,

The witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Have a seat, please, sir.

DIRECT EXAMINATION BY MR. MITCHELL:

Q Would you state your name for the record, please, sir?

A Van Reid.

Q All right. And do you have a business here locally, Mr. Reid?

A Yes, I do.

Q And what is your business, sir?

A Ah, I have Reid's Restaurant.

Q All right. Is that the business out on 431, restaurant --

A Yes.
Q -- known to all of us?
A I hope so, yeah.
Q Yes, sir. All right. Mr. Reid, do you know Casey McWhorter, the young man seated here at the counsel table (indicating)?
A Yes, I do.
Q If you will, please, sir, tell these ladies and gentlemen of the jury how it is that you know him?
A Well, a -- a few years ago Casey was, ah, one of my busboys. He worked on weekends, ah, bussing tables.
Q I see. And how long was he there?
A Well, ah, I guess he was there a month or so. I really don't remember to be honest. Ah, I have a big turnover.
Q Been some time, has it?
A Yeah, it has. It's been a little while back. Here a while back, you know.
Q Did he seem like a pretty good kid?
A Oh yeah, yeah. He did a good job.
Q Was he a satisfactory employee?
A Oh yeah.
Q I see. Anything you'd like to tell these ladies and gentlemen of the jury about Casey?
A Ah, well, all I know is that, ah, when he was

working for me he was a good, ah, dependable worker. He was there when he was supposed to have been there. And he did his job and did it fine.

Q All right.

A That's about it.

Q All right, sir. Thank you, Mr. Reid. I appreciate you coming.

A Uh-huh (Yes).

Q Mr. Thompson and Mr. Jolley may have some questions for you.

MR. THOMPSON: Don't have anything.

THE COURT: Mr. Reid, thank you for being here.

THE WITNESS: Okay.

THE COURT: We appreciate it.

THE WITNESS: Thank you.

MR. MITCHELL: We'll call Elsie Garrison, Your Honor.

THE COURT: Please, ma'am, if you would (indicating). That's your left.

THE WITNESS: I'm sorry.

ELSIE GARRISON,

The witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Thank you, ma'am. Have a seat,

please.

DIRECT EXAMINATION BY MR. MITCHELL:

Q Would you state your name for the record, please, ma'am?

A Elsie Garrison.

Q Okay. You may have to speak up or maybe move a little bit closer to the microphone to be heard, Ms. Garrison.

A Okay.

Q Are you related in any way to Casey McWhorter, the young man seated here at the counsel table (indicating)?

A Yes, I am. He's my nephew.

Q All right. He's your nephew. His father was your brother?

A Yes.

Q I see. And here we're talking about his natural father, Tommy McWhorter; is that right?

A That's correct.

Q All right. Tommy McWhorter is dead now, is he not?

A Yes, he is.

Q He died recently?

A (Witness nods head affirmatively.)

Q When was that, please, ma'am?

A Valentine's Day.

Q Valentine's Day? All right. You have had occasion to, I guess we might say, keep or raise Casey at least some of the time during his lifetime, have you not?

A That's correct.

Q Okay. Is it true that Casey and his -- Well, Casey's mother, Carolyn Rowland, and his father, Tommy McWhorter, were divorced early in Casey's life?

A Yes.

Q I see. And do you recall about how old Casey was when that happened?

A He may have been almost two.

Q I see. And did they move somewhere following --

A Yes, sir, they did. They went out of state.

Q Okay. Now, "they." By "they," you mean Casey and Carolyn --

A Ah, David, Carolyn, and Casey, yes.

Q Okay. David Rowland would be Carolyn's second husband after she and Tommy were divorced?

A That's correct, yes, sir.

Q All right. Now, then, did you have touch with Casey after they moved out of state?

A Not for a number of years.

Q I see. And, oh, about how much -- how much time elapsed, if you can tell us, please, ma'am?

A In the neighborhood of four to five years.

Q All right. During that time, you didn't have much, if any, contact with Casey; is that what --

A None whatsoever.

Q I see. Now, then, at some later date, did Casey and David and Carolyn move back to Alabama?

A Yes, they did.

Q I see. And where did they live, please, ma'am?

A Ah, they lived in Arab.

Q I see. And after they returned to Alabama, did you have contact with them pretty regularly?

A Yes.

Q All right. How old was Casey when he came to stay with you?

A Ah, almost 16.

Q Almost 16 years old?

A I think so, yes, sir.

Q Okay. And what were the circumstances under which Casey came to stay or live with you?

A At that point, Casey was to the point that he didn't know what he wanted to do with his life. He had several decisions to make.

He felt like he wasn't being treated fairly at home. He felt like he was -- I don't know how to explain what I'm trying to say. Casey was a very unhappy young man at that point.

He had been accused of using drugs in the school which he did not do because I carried him to the doctor personally to get a drug test done. That set well on Casey's mind, that he was accused of something he didn't do.

Q I see. Where was he accused? Do you know, please, ma'am?

A Ah, I think it was in Asbury --

Q I see.

A -- when he was accused. Simply because he was laughing in class.

Q I see.

A The -- I'm sorry. The principal told Carolyn he thought Casey was on drugs.

Q I see. And you were concerned about that, were you?

A I was so concerned about that that I carried him for a drug test.

Q Where did you take him?

A Dr. Packard.

Q All right. And do you know what the results of that test were?

A There was no drugs in Casey's system at that time.

Q I see. All right. After that occasion, how long did Casey continue to live with you?

A He lived with me up until December of '92 I

believe.

Q I see. All right. During the month of December of that year, could you describe his behavior, Casey's behavior I'm asking about?

A He was antsie. Uhm, at that point he, ah -- it was Christmas. All kids get antsie at Christmas time. Ah, even though he was grown up and an adolescent, he was still a child at heart. Ah, we decorate for Christmas and he couldn't wait to get the tree up and things of this sort.

As far as him being, ah, mean, at that point, he wasn't. He couldn't decide whether he wanted to continue to stay with me or if he wanted to go back home because he really missed his mom.

Q I see.

A And they had made progress getting their lives together where they could communicate.

He could never communicate openly with them.

Q I see. During that month of December, did Casey seem at all fearful or apprehensive?

A No, sir.

Q Well, I'll ask you specifically, was there an occasion when someone came unexpectedly to your home?

A That particular time, yes. Uhm --

Q Who was it that came to your home?

A Daniel Miner.

Q I see. Now, I'll ask you, are you listed in the phone book?

A No, sir, I am not.

Q All right. Had Daniel Miner ever been to your home before that you're aware of?

A No, sir, he had not.

Q What were the circumstances under which he appeared?

A Ah, the day that Daniel came to my house, I was in complete shock. I didn't know Daniel from Adam at that point. Uhm, I had just recently bought a house and moved.

Casey was brought to my house by a cousin. Casey didn't know where I lived at that particular time, so he was brought there by a cousin.

Casey had been there less than ten minutes when Daniel Miner appeared at the door wanting to know where Casey was.

Q I see. Did his appearance surprise you?

A Very much so.

Q Why did it surprise you?

A Because I didn't know how he found out we lived there. Casey couldn't have told him where we lived because Casey didn't know. The only way he could have gotten there was to follow him.

Q I see.

A But may I say something?
Q Yes, ma'am.
A It wasn't in December. This was earlier the next year. Like in February.
Q Okay. Would have been the following February --
A Right.
Q -- or so?
A Right, right.
Q Okay. That's my mistake.
THE COURT: To make sure we're together, February of what year?
THE WITNESS: Of '93. Early -- Earlier on.
THE COURT: A little over a year ago.
THE WITNESS: Yes.
THE COURT: All right.
Q (By Mr. Mitchell) All right. Is there anything else that you'd like to tell these ladies and gentlemen of the jury about Casey?
A Just that Casey has had a very disturbed childhood. He is a very bright, a very intelligent young man.
He's had a lot of tough breaks. He got involved with the wrong people. Casey is not a bad boy at heart, not at all. He is one of the most compassionate young men I have ever seen.

And I know I'm prejudiced. I -- I admit that fully. I am very prejudiced toward Casey. But at the same time, I also realize that Casey has things that he -- things that he's done that he shouldn't have done, things that he's been involved in he should have no way been involved in. This much I do realize.

But I also say that Casey has had a very rough life. And to take his life away from him completely, I just, you know -- We've been living a nightmare for two years.

Q Okay. Ms. Garrison, would it be a fair statement to say that you think that Casey has some personal worth, some human worth left?

A Oh yes, definitely.

Q And are you asking these ladies and gentlemen of the jury to consider recommending sparing his life?

A Exactly.

Q Thank you, ma'am.

MR. MITCHELL: That's all I have.

CROSS-EXAMINATION BY MR. THOMPSON:

Q Ms. Garrison, let me ask you a couple of questions. During the time that Casey was living with you, where did he go to school?

A Marshall County. Or Guntersville High, I'm sorry.

Q Guntersville High School. And when he left your

home in December of '92, do you know if he transferred to another school system?

A I believe he transferred to Boaz.

Q And again, just so I can understand, if he left your house, left living with you, went back to his mother's sometime in December of '92, are you saying that from December of '92 to February of '93 you had moved?

A Yes.

Q Okay. And he just simply came back to visit you?

A Yes.

Q On -- In early February of '93?

A Yes.

Q And that was the occasion that Daniel Miner arrived within a few minutes --

A Yes.

Q -- after he arrived --

A Yes.

Q -- at your house.

A Yes.

Q Okay. Thank you.

REDIRECT EXAMINATION BY MR. MITCHELL:

Q Ms. Garrison, before you get away here, what was it about Daniel Miner that frightened you?

A Well, when he came to the door, "Is Casey" -- ah, "Is Casey here?"

"Yes, Casey's is here."

Uhm, "I'd like to see him."

And then he wanted Casey to go and Casey says, "I've got to help with this."

Daniel says, "We've got to go."

At that point, I didn't know what was going on.

Q I see.

A And I didn't see Casey any more to ask what was going on after that particular day.

Q All right. Thank you, Ms. Garrison?

THE WITNESS: Is that it?

THE COURT: Anything further, Mr. Thompson?

MR. THOMPSON: No, sir.

THE COURT: Thank you, Ms. Garrison. We appreciate you being here.

MR. MITCHELL: We'll call Carolyn Rowland, Your Honor.

THE COURT: If you would, please, ma'am.

CAROLYN ROWLAND,

The witness, having been first duly sworn, was examined and testified as follows:

THE COURT: Have a seat, please.

DIRECT EXAMINATION BY MR. MITCHELL:

Q You're Carolyn Rowland?

A Yes.
Q And you're Casey McWhorter's mother?
A Uh-huh (Yes).
Q All right. Ms. Rowland, I touched on this a little bit with Ms. Garrison, but for the sake of continuity, I'd like to just go over one or two points that I've already covered if I may.
You were married to Tommy McWhorter.
A Yes, sir.
Q And Tommy McWhorter was Casey's natural father?
A Yes, sir.
Q All right. After Casey's birth, you and Tommy McWhorter divorced; is that correct?
A Yes.
Q Okay. And was it a particularly bitter or troublesome divorce?
A No.
Q Okay. What -- But after the two of you were divorced, you remarried?
A Yes, sir.
Q Okay. To David Rowland?
A Uh-huh (Yes).
Q And Mr. Rowland is your present husband; is that correct?
A Yes, sir.

Q All right. After your marriage to Mr. Rowland, did you and Casey and Mr. Rowland move?

A Uh-huh (Yes).

Q Where did you move?

A Pulaski, Tennessee.

Q And how long did you --

THE COURT: Ms. Rowland, unless I miss -- missing it from here, I think these folks are having to strain to hear you. If you'd scoot up just a little bit. Don't let the mike spook you, but try to speak up just a little.

Q (By Mr. Mitchell) Okay. How long did you live in Pulaski?

A Uhm, we were there I guess four, five years.

Q All right. During that time, what sort of relationship, if any, developed between Casey and David Rowland, his stepfather?

A They had a pretty good relationship. Ah, Casey didn't know at the time that it wasn't his father. You know, we -- we moved and he felt like David was his father.

Q I see. Sort of grew up regarding David Rowland as his father?

A Yes, sir.

Q All right. Now, then, at some point, did you and Casey and Mr. Rowland have occasion to move back here to the

Guntersville/Sand Mountain area?

A Yes, sir.

Q All right. Do you recall about when that was?

A I'm not good on dates. It's hard to remember all those things.

Q Okay. Well, let's go at it this way: About how old was Casey when you moved back?

A He was about five.

Q About five years old? All right. Now Tommy McWhorter, his natural father, did Tommy McWhorter still live in this area?

A Yes, sir.

Q I see. And you told us earlier that Casey sort of grew up considering David Rowland his father.

After you moved back here, did the fact that Mr. Tommy McWhorter was present in this area dispel that illusion?

A Yes, it did. Uhm, Elsie, uhm, she came to see Casey and she took Casey to her home. And she told Casey that he was -- that he had -- he was -- had two fathers.

Q I see. Okay. And of course Tommy McWhorter was her brother.

A Yes.

Q Okay. Well, now, upon learning this, did it have any affect on Casey?

A It didn't seem to at the time.
Q I see. What was Mr. McWhorter's relationship with Casey after you and Mr. Rowland and Casey moved back here?
A Ah, to tell the truth, I mean Tommy never did have much to do with Casey. Even, you know, after we moved back, Casey hardly ever did see him.
Q Did you ever see any evidence to indicate that maybe Mr. McWhorter was jealous of Casey's relationship with your husband?
A I think he was.
Q I see. How did he show that?
A He would tell Casey that he didn't have to listen to what David told him.
Q I see.
A That he wasn't his father.
Q I see. Well, did that cause any problems?
A It did at times.
Q I see. What sort of problems, please, ma'am?
A It's just Casey just -- he just got to where he didn't think he had to listen to David.
Q I see.
A That he had no business telling him to do -- what he could do or anything.
Q Did Casey develop any bad habits?
A Casey was a pretty good kid until he became

friends with Daniel Miners (sic) and Mark and Lee. He done -- He was a pretty good kid.

Q I see. Well, what changes, if any, occurred after he got to know Daniel and Marcus and Lee?

A Casey was always real particular about the way he looked and being clean. And then when he started, you know, hanging around with Daniel Miner, he -- he just really didn't care what he looked like.

Q I see. What about his behavior? Any changes in his behavior other than in his personal appearance?

A He just got -- he got worse, you know. When we, you know, would talk to him about Daniel Miner and them, he didn't want to listen. He just -- He got worse with not listening to what we said.

Q Would it be a fair statement to say he reached the point where you couldn't talk to him as a parent would normally teenage --

A No, I couldn't talk to him. You know, whatever I'd say, you know, he wouldn't listen.

Q I see. What can you tell us, if anything, about Casey's value as a human being, Ms. Rowland? Your his mother. You ought to know him pretty well.

A I feel Casey respects people and that he's just a good boy. He's a good boy. He respects people.

And he had never got into anything until he

got in with Daniel Miner and Lee and Abraham. He was a good kid.

Q Do you think Casey has any human worth?

A Yes, I do.

Q Are you asking these ladies and gentlemen of the jury to spare his life?

A Yes, I am.

Q Thank you.

CROSS-EXAMINATION BY MR. THOMPSON:

Q Ms. Rowland, when did Casey first become friends with Daniel?

A When he was going to Boaz.

Q Okay. But when? How old was he?

A Like I said, Mr. Thompson, I -- I don't -- I mean I'm not good with years and dates and --

Q Okay. I'm not trying to pin you down. But, you know, when he was 14, 13, 12, 11, or, you know, something like that.

A He was about 16.

Q Okay. Was it right about the time he went to stay with Ms. Garrison?

A I don't know.

Q Okay. You've heard her testify that he came to live with her when he was 16?

A Casey was back and forth. He -- He might have

stayed with her a couple weeks and he'd come home.

When he did come home, Daniel would be calling our house or they would come and get him. He would come home and they would come and get him and take him back.

Q Well, did he -- Did he change schools? Did he change and go to school down in Guntersville?

A He went to go -- ah, Guntersville when he was with his aunt, Elsie.

Q How long did he go to Guntersville?

A I think he was there a year maybe.

Q But even during that time, are you saying that he continued to live with you a couple days and Ms. Garrison a couple days?

A He would come home and stay on the weekend, he would go back down there. And he -- Sometimes he'd come during the week.

Q So Casey had a continuing relationship with Daniel Miner of over two years before this incident happened; is that a correct statement?

A I don't really know.

Q What about --

A I just know that Casey, when he was going to Boaz, he had -- had met Daniel up there. And I don't know if he met him before that or not.

Q What about Marcus Carter? When did he meet

Marcus?

A I don't know that either.

Q Well, was it before or after he met Daniel?

A I don't know. I just know Mark and Daniel had came to our house a few times. And Casey were mad because we didn't want the -- the boys at our house.

We've got a 16-year-old daughter and Daniel would use vulgar language in front of her. And -- And we just didn't want them at our house. They --

Q When did he meet Lee Williams?

A I don't know that.

Q Ms. Rowland, you're saying really that his attitude, his way that he reacted to you and around your home seemed to change though when he met these three boys?

A Uh-huh (Yes).

Q But you're not sure when he met them.

A No, not exactly when he met them.

MR. THOMPSON: Nothing else.

REDIRECT EXAMINATION BY MR. MITCHELL:

Q Ms. Rowland, what are you basing that on? Are you basing that on the fact that when you first started seeing these boys come around?

A Yes.

Q All right. Do you know Marcus Carter?

A I -- Like I said, I met him two or three times at

my house.

Q I see. All right. Thank you.

MR. MITCHELL: I believe that's all I have.

MR. THOMPSON: No, sir, nothing else.

THE COURT: Thank you, Ms. Rowland. We appreciate it.

MR. MITCHELL: That's all we have, Your Honor.

THE COURT: Rebuttal by the State?

MR. THOMPSON: No, sir.

THE COURT: Ladies and gentlemen, let me ask you to please go to the jury room for just a moment. Do not discuss the case or anything about it.

(Jury leaves the courtroom.)

THE COURT: Two or three things, gentlemen, I wanted to cover with the jury out of the room.

Are both sides ready to argue and charge?

MR. MITCHELL: Yes, sir.

MR. THOMPSON: We're ready within five or so minutes of giving it some thought, if you don't mind.

THE COURT: Do you want a break to sort of organize your thoughts?

MR. THOMPSON: I think so.

MR. MITCHELL: That would be fine, Judge.

THE COURT: You all have both been furnished

with a copy almost verbatim of what I plan to say as far as a charge.

Do you see any necessity to talk further about that or want to make any comments or criticisms of it?

MR. THOMPSON: Judge, we --

MR. MITCHELL: Your Honor, we -- Excuse me.

MR. THOMPSON: Excuse me. We want to make sure that you changed the charge.

I think at one point in time you were showing possibility of two aggravating circumstances which might be murder/robbery and then murder for pecuniary gain.

THE COURT: Well, pecuniary gain is out of it. I would charge two aggravating circumstances, murder/robbery and murder/burglary.

And I would define -- I think I gave y'all a copy of this, but I may not have.

MR. THOMPSON: Okay.

THE COURT: I would point out to them that I defined robbery in the other change, but I would define burglary to them in this charge.

MR. THOMPSON: Okay.

MR. BERRY: Judge, at this time, I'm going to object charging the jury on the burglary charge in that that would be applying statutory aggravating circumstance Number 4 twice. And I believe that that would be improper. That

that would be double-dipping.

And that the way the law reads, the way I read it in the Code, that's only one aggravating circumstance, and that would be applying the same aggravating circumstance twice.

So I'd have to object to the application of the burglary.

Also the burglary was not charged in the indictment.

THE COURT: Don't believe in the indictment you have to mention the aggravating circumstances.

State comfortable with charging both of those?

MR. JOLLEY: Yes, sir.

MR. THOMPSON: Yes, sir.

THE COURT: All right. I'll overrule your exception, Counsel.

Again, as far as I'm concerned, you've got an exception to charging that, but I'm not going to tell you that you don't have to bring it up again when I ask for exceptions.

One other -- one -- One other minor change. At the very end of the charge -- And I think this is -- this favors the Defendant, but I'll be glad to hear any comment. I would charge them that they must assume that whatever

recommendation they make will, in fact, be carried out.

MR. MITCHELL: Yes, sir.

THE COURT: Both sides agree that's a proper charge of the law?

MR. THOMPSON: State that again.

THE COURT: In other words, they're told repeatedly that what they're making is a recommendation.

MR. THOMPSON: Yes, sir.

THE COURT: And I think they need to be warned that they must consider that recommendation as something that will probably happen.

MR. MITCHELL: Yes, sir.

MR. BERRY: I think that's what the Code says, Judge.

MR. MITCHELL: I agree.

MR. JOLLEY: Well, I think it -- I don't recall it saying that it is probably something that would be followed.

But I think it says that the, ah -- that the recommendation is to be considered by the Court. The Court has already made it clear I think to the jury that its recommendation would weigh heavily with the Court --

MR. THOMPSON: We would prefer that the Court word it that way, that its recommendation would way heavily on the Court --

MR. MITCHELL: We object, Your Honor. I think this --

THE COURT: I'm going to rule against the State on that and stress it stronger than the State wants it stressed.

Any other exceptions or comments on the charge?

MR. BERRY: Judge, the only other two that I wrote down is of course, if we need to redo it in front of the jury, we would raise the same objections that we did at the guilt stage. And also on --

THE COURT: Wait a second, Counsel. Just -- I don't want to get blind-sided on something. What in particular are you talking about?

MR. BERRY: As far as your instructions to the jury, Judge.

THE COURT: All right.

MR. BERRY: Are we talking about instructions to the jury now in the sentencing phase?

THE COURT: Yeah.

MR. BERRY: Whatever objections that we raised to your definitions; for example, of reasonable doubt or something like that.

THE COURT: Well, you have that because I don't intend to re-instruct them -- I intend to tell them of

course to be governed by that so -- and I believe you excepted to it earlier, so if your exception was good then, it is now.

MR. BERRY: The only other thing I saw, Judge, on Page 81 of the model charges, I think out of an abundance of caution I better object to the wording that reads in pertinent part that says, "...depends on whether any aggravating circumstance exists and if so."

That's -- The way I --

THE COURT: Let me find you, Counsel.

MR. BERRY: Judge, it should be --

THE COURT: Oh, it starts at the bottom of 81.

MR. BERRY: Yes. And then goes in relation to -- it says, "...the fact that which of those two punishments should be imposed upon the -- a defendant depends on whether any aggravating circumstances exist. And, if so, whether the aggravating circumstances outweigh the mitigating circumstances."

I object to that in that it would tend, in my reading, to indicate that the aggravating circumstances would be controlling in lieu of the mitigating circumstances.

THE COURT: No. I think what that's pointing out, and I think it does it correctly, is they first have to

determine whether any aggravating circumstance exists. If it does not, they never get to the mitigating part.

MR. BERRY: Judge, like I said, this -- this would be out of an abundance of caution.

THE COURT: I understand. I think I understand your exception and it's denied, and as far as I'm concerned, you have the exception.

MR. BERRY: Thank you, sir.

THE COURT: Anything further before I bring them in, give them a recess?

MR. MITCHELL: No, sir.

MR. THOMPSON: No, sir.

THE COURT: All right. Rex, if you would, please.

(Jury present.)

THE COURT: Ladies and gentlemen, before we get into the argument and charge, we're going to give you a recess to keep you from having to sit there with, you know, 45 minutes under your belt and another hour or so and getting it stretched out too long.

Please keep in mind during this recess the instructions I've given you not to discuss the case or allow it to be discussed in your presence or let anything else happen that would have any impact on you or even appear to have any impact on you. Don't let anything happen that

somebody could misinterpret.

I will ask that you please be back in the small jury room, this jury room here (indicating) at five minutes till.

Thank you, ladies and gentlemen.

(Jury leaves the courtroom.)

THE COURT: All right. Gentlemen, let's try to be ready to go at five till.

(Recess taken.)

(Defendant appearing in open court with his attorneys of record.)

THE COURT: Let's go back on record for just a moment. I failed to mention this directly, but both sides have gotten a copy of the proposed verdict.

Any -- Any problems with that?

MR. MITCHELL: No, sir.

THE COURT: I think it's in the statutory form.

(Discussion off the record between the D.A. and Assistant D.A. In open court:)

THE COURT: All right. We're back off record till the --

MR. THOMPSON: Judge, just a second.

THE COURT: All right.

(Discussion off the record between the

bailiff and the Court.)

(Discussion off the record between the D.A. and Assistant D.A. In open court:)

MR. JOLLEY: Judge, out of an abundance of precaution, I think the State is going to take the position in arguing its case that the facts show a murder during the course of a robbery and a murder during the course of a burglary, but those two situations would constitute one statutory aggravating circumstance as it's defined in the Code.

THE COURT: So you're asking me to charge only murder/robbery; is that correct?

MR. JOLLEY: No, sir.

MR. THOMPSON: We'd ask you to charge that the -- that aggravating circumstance Number 4 includes robbery and burglary.

THE COURT: Well, I understand what you -- I think I understand what you want me to do, but we're down to talking words.

And you're talking about one aggravating circumstance, but that the State must prove both?

MR. THOMPSON: No.

MR. JOLLEY: No.

MR. THOMPSON: No. Just do it on robbery. It's already proven and there won't be any question about

that. You won't have to charge on burglary.

THE COURT: All right.

MR. THOMPSON: The definition of burglary.

THE COURT: Now, I have to go back to the Defense. In effect they're acceding to your earlier exception where the Court will only charge one aggravating circumstance and that is robbery.

Does that cause -- Anything that the Defense wants to further say about that?

MR. BERRY: Judge, I think that was the essence of my objection, to apply -- my objection to applying Number 4 twice.

THE COURT: Yeah.

MR. BERRY: So are we essentially granting that?

THE COURT: My understanding is we're essentially granting that.

I spent an hour or so marking this thing up with plural "circumstances." I may trip all over myself in shorting -- shortening that down to one, you know, "is" and "are" and that sort of thing.

I'll at least apologize to the people present if my grammar seems poor. It's not intentionally.

All right. Rex, assuming that your juror is out of the restroom, bring them back in, please.

(Jury present.)

THE COURT: Ladies and gentlemen, you've now gotten to that portion or this portion of the case where the two sides, through their attorneys, have the right to argue or sum up their case.

Again, as in the guilt phase of the trial, the State has the right to both open and close those arguments with the Defendant arguing in the middle because, as I will explain to you in a little bit, the State has the burden of proof again.

Mr. Thompson or Mr. Jolley.

MR. THOMPSON: Mr. Jolley.

MR. JOLLEY: May it please the Court, Mr. Thompson, Mr. Mitchell, and Mr. Berry.

Ladies and gentlemen, once again I want to thank you, but in going through the proceedings that we've gone through this morning, I think it's apparent to everybody is that this is probably the most difficult -- obviously one of the most difficult, if not the most difficult -- decision that you've ever had to go through in your life.

And I understand that. We all understand that. Fortunately, I've never been placed in the position that you're in now of having to make that decision.

And it's something that none of us can take

lightly and it's something that none of us could really enjoy doing obviously. If I, as a prosecutor, actually enjoyed that sort of thing then I think there would be something wrong with me.

But I think that there would be something wrong with us as human beings if we enjoyed having to do that sort of thing to have to impose a death penalty in a case. But it's not something that any of us want to do, but yet it's something that we're called upon under the law in this case to have to do.

It's something that society has dictated that is to occur in certain cases. And it's a penalty that has been imposed by society, by our lawmakers.

And when you were questioned as jurors, because of your backgrounds, because of your impartiality, because of your flexibility in saying that you would look at the evidence and that you would look at the circumstances in the case and that you would weigh all of the evidence and decide whether or not to invoke the death penalty is why that you are serving on the jury in this case.

Now, ladies and gentlemen, this morning with all the witnesses that were called in this case, I feel for every one of those witnesses that had to testify. I feel for them because, you know, Casey McWhorter is a friend of theirs. Obviously it's difficult for them to have to appear

here and testify.

But now those people have known Casey McWhorter sometime of course and they told you how they feel about him. They're not impartial. Couldn't expect them to be.

I know that if I was in that situation and I was having to testify for someone asking you to choose life without parole instead of a death penalty, there's no way I could be impartial. There's no way that any of us could be impartial if we had to do that for a friend.

But that's why y'all are serving on this jury is because you're impartial. And as a juror, you took an oath that you would be impartial, and that you would listen to what the Judge tells you that the law is in this case.

And after considering whether or not the State has proven aggravating circumstance, we have to prove one, at least one aggravating circumstance.

The one that the Judge is going to charge you on in this case is murder committed during the course of an armed robbery. And the burden of proof that the Judge tells you is that the State has to prove the existence of that aggravating circumstance beyond a reasonable doubt.

We have done that. Your verdict is proof that we have done that. Because your verdict said that he was guilty of capital murder, murder committed during the

course of an armed robbery. The burden of proof was the same; beyond a reasonable doubt.

Now, when you are called upon to look at the existence of this aggravating circumstance -- and you know it's there, because your verdict spoke and said that it was -- you also will have to weigh the mitigating circumstances. And the Judge will explain those mitigating circumstances to you and what they are.

I think that in this case when you look at it, the age of the Defendant and the lack of any prior criminal history are the two mitigating circumstances that I see and I argue to you that are there.

But when you look at those, you say that -- the Judge will tell you that you just have to find beyond the preponderance of the evidence or you have to be reasonably satisfied that they exist for you to find them. Well, I'm not going to argue with those. They're there.

But then you also will hear the Judge tell you that in deciding whether or not the death penalty should be applied you are to weigh the existence, weigh those mitigating circumstances against the aggravating circumstances and see which one you give more weight to.

It's not merely a numerical tally. It's not since there's only one aggravating circumstance. And there may be two or if you decide three or whatever mitigating

circumstances that because the numbers are more that the mitigating circumstances outweigh the aggravating circumstance.

The weight that's to be given to those are just what you determine, and in using your good sense and your judgment should be applied under the facts of this case.

Now, in looking at these and considering them -- and I want you to think back on the testimony that you've heard during this trial -- you look at the crime scene as it existed; you look at how the man's life was taken; and you look at the method which was used to take the man's life; and you look at the fact that it was planned out; you look at the fact that it's premeditated; you look at the fact that it was done with malice, with plan, with design; you look at the fact that they waited in that house some three hours waiting on him to get home, not that he just happened to come home while they were burglarizing a house and happened to kill him and then take his property.

They could have done that. They could have gotten the property and left. But the evidence shows they waited and they had to wait some three hours. Three hours.

During that three-hour period, did Casey McWhorter, say, No, I'm packing it up. I'm going home. This is not for me.

Think about it. He had plenty of time to think about what he was about to do. He had plenty of time to say, No, I'm not going to go through with this. He had plenty of time to talk to the others and say, Look, this is the wrong thing to do. But he didn't do that.

And he wasn't in the truck riding around waiting for it to happen. He was inside that house and he was one of the trigger men.

They say, Oh, but he's just a boy. Is this the act of someone that's just a child at heart? You've heard testimony that Casey McWhorter is just a child at heart.

You think of the children that you know. You think of the youngsters that you know that are -- that were the age of Casey McWhorter when he committed this act and you ask yourself, Is he a child at heart?

Now, you've heard testimony from his mother about how he was a fine kid until he got with the wrong crowd. Well, is that an excuse? The fact that he started running around with the wrong people. The fact that he had been running around with these people apparently some year or two years before this event ever occurred.

We choose our friends in life. And often times when we get to age of 16 or 17 -- Now, you're able to carry your own common sense and your own experiences in life

into that jury room with you, ladies and gentlemen.

And you think about where you were and what you were doing when you were 16 and 17 years old. And you think about the responsibilities that you had and you think about the responsibilities that others around you had and you look and you remember were you a child at heart? Or were you accepting the responsibilities of someone that was growing up. Someone that was about ready to go out on their own. Someone that was about ready to take on the world. Someone who was about ready to start their own life.

I submit to you, ladies and gentlemen, that Casey McWhorter had made that choice. Yes, maybe he did use bad judgment, but he was not forced. You have not heard any evidence of forcing Casey McWhorter to do this act. He did it of his own free will.

And you have got to know from your own experience in life that he knew and expected the risk he was taking would result in the consequence that he is now in.

Ladies and gentlemen, his mama didn't put him in the predicament that he's in. No one put him in that predicament except he himself. Y'all didn't put him in that predicament.

So in weighing this, the law says that if you find that the aggravating circumstance in this case outweighs the mitigating circumstance you shall -- not may,

but you shall recommend the death penalty.

Thank you.

THE COURT: Defense?

MR. MITCHELL: May it please the Court. Ladies and gentlemen, you have heard the District Attorney's argument as to why you ought to put Casey McWhorter to death.

I'd like to, if I may, sort of bring this alive to you. You know, here we live in the -- I guess you might say television generation where we get a lot of our information second-hand.

We sit there in our living rooms and we see what they pour out to us on the TV screen and there're a lot of things that we're aware of as a result of television that comes to us, but it's not really real. It's not like as if we were actually sitting there and seeing it and living it.

When I was a kid, you used to go out in the yard and get a live chicken and cut its head off or ring its neck, however you did that, and you'd get a bucket of hot water and pick it up by its feet and dunk it in the hot water to loosen the feathers. And then you'd pick it and you'd take it in and your mother would cut it up and you'd cook it.

Well, today, a lot of folks think of a chicken in terms of a plucked and cold bird that's already

cut up and it's already on a Styrofoam tray and it's covered with plastic and it's in the meat cooler. That's the way they think of it.

They don't really think of that piece of property or that item of produce or whatever as being something that actually walks around on two legs out in the barnyard.

Well, I think we're -- I think the District Attorney is in a similar position when he asks you to put this young man to death. What he's asking you is sterile.

We're sitting here in a courtroom, all of us as civilized people. We're talking about philosophy of who did what, what the values are, what we ought to have done, arguing from hindsight.

You know hindsight is always 20-20. It's always easy to sit back and look wise and say, Well, this ought to have been done, or, This ought not to have been done. But none of us have that ability. None of us can go and turn the clock back and do over anything in our lives.

For that reason, I'd like to read something to you if I might and I think it may be sort of similar to going out in the barnyard and actually getting a chicken and cutting its head off and plucking it and cutting it up. More so than just going down to Foodland or Food World and buying it already in the Styrofoam container plucked, cut

up, and wrapped.

I'd like for you to consider firsthand what the District Attorney is asking you to do.

This is an account of the electrocution of John Lewis Evans by the State of Alabama on April 12th, 1983.

MR. JOLLEY: Objection.

THE COURT: Overruled.

MR. JOLLEY: Judge, if I might make an offer of proof.

I think we need to do it outside the presence of the jury.

THE COURT: All right. Ladies and gentlemen, please go to the jury room for just a moment.

(Jury leaves the courtroom.)

MR. JOLLEY: Judge, the Court of Criminal Appeals has ruled within the last six months that the effect of death by electrocution is not a mitigating circumstance and is improper in the closing argument of the sentencing phase of a death penalty case.

This very argument was used in that case.

THE COURT: Counsel, I have not read that case. I don't guess you've got a copy of it laying there in the stack, do you?

MR. JOLLEY: No, but I'll be glad to go get

it.

THE COURT: If you would, Counsel. I think this is essential and important.

MR. JOLLEY: Thank you.

(Assistant D.A. Jolley leaves the courtroom.)

(Discussion off the record between the Defense attorneys.)

(Assistant D.A. Jolley reenters the courtroom. In open court:)

MR. JOLLEY: Judge, it's so recent it's unreported. The attorney general is faxing me a copy of it right now.

THE COURT: Mr. Jolley, I -- I knew I had not seen it yet in the advance sheets.

I think my ruling on this issue is probably critical to the Defense's position. Am I in essence correct?

MR. MITCHELL: Yes, sir.

THE COURT: I hate to bifurcate this argument, I hate to stretch it out, but I think all we can do is wait and let me take a look at that case so I have some assurance that my ruling is correct and proper.

MR. MITCHELL: Yes, sir.

THE COURT: I don't think the jury has been

in here so long that they're getting the willies needing a cigarette or what-have-you so I propose that we just sit here off the record until we get down to it.

MR. BERRY: (Indicating.)

THE COURT: Yes, James.

MR. BERRY: Judge. Mr. Jolley, did the attorney general mean they were faxing it immediately or were going to fax it in the next two hours or what?

MR. JOLLEY: Immediately. The assistant A.G. that had the opinion was standing at the phone as I was talking to her and she was feeding it in the fax machine.

THE COURT: All right.

MR. BERRY: So it should be here just --

THE COURT: So we're -- The speed of light being what it is, it should be here shortly.

(Discussion off the record between the respective sides. In open court:)

THE COURT: All right. We're back on record.

MR. JOLLEY: They didn't send me all of it, but there were other issues involved.

THE COURT: All right.

MR. MITCHELL: Judge, you don't have all of the opinion?

THE COURT: That's what they're say -- That's what he's saying.

MR. JOLLEY: I'll be glad to get them --

THE COURT: Y'all are welcome to read it 30 seconds after me.

MR. JOLLEY: I'll be glad to get them to send the other pages of it.

THE COURT: Well, let me take a look at this and see if I feel like I need it. Feel like it's speaking to that issue.

Any of you want to read this part (indicating)?

(Mr. Mitchell retrieved it from the bench.)

THE COURT: Don't guess we've got the DeBruce case either. That's a -- That's a case released March -- We ought to have that. March 5th, 1993. That would be --

MR. JOLLEY: Judge, that one was released in May of '93 and it's not even in the advance sheets yet.

That's one of the reasons I no longer rely specifically on the advance sheets.

THE COURT: You've about convinced me, Counsel. You're right. That's a '93 case and it's not in the advance sheet yet.

I'm going to make the State unhappy and rule against them. I'm going to allow the argument. Objection is overruled.

Bring them back, please, Rex.

(Jury present.)

THE COURT: Please, sir.

MR. MITCHELL: "At 8:30 p.m. the first jolt of 1900 volts of electricity passed through Mr. Evans' body. It lasted 30 seconds. Sparks and flames erupted from the electrode tied to Mr. Evans' leg. His body slammed against the straps holding him in the electric chair and his fists clenched permanently.

"The electrode apparently burst from the strap holding it in place. A large puff of grayish smoke and sparks poured out from under the hood that covered Mr. Evans' face. An overpowering stench of burnt flesh and clothing began pervading the witness room. Two doctors examined Mr. Evans and declared that he was not dead.

"The electrode on the left leg was refastened. At 8:30 p.m. Mr. Evans was administered a second 30-second jolt of electricity. The stench of burning flesh was nauseating. More smoke emanated from his leg and head. Again the doctors examined Mr. Evans. The doctors reported that his heart was still beating. He was still alive.

"At that time, I asked the prison commissioner who was communicating on an open telephone line to Governor George Wallace to grant clemency on the grounds

that Mr. Evans was being subjected to cruel and unusual punishment. The request for clemency was denied.

"At 8:40 p.m. a third charge of electricity 30 seconds in duration was passed through Mr. Evans' body. At 8:44, the doctors pronounced him dead. The execution of John Evans took 14 minutes."

Ladies and gentlemen, I've always believed in the old adage that less is more. Sometimes you accomplish more by not saying too much. And I don't think I need to stand before you ladies and gentlemen of this jury and talk to you a long time.

I think that all of you have enough intelligence and enough sensibility to know that you don't want to send this boy (indicating) to his death.

Thank you.

THE COURT: Mr. Berry.

MR. BERRY: Please the Court, Mr. Jolley, Mr. Thompson.

Ladies and gentlemen, I would be untruthful if I did not tell you that this is by far and away the least happy task that I have to do. I think it's important that you know that you've been told about aggravating circumstances. I think it's important that you know that there're mitigating circumstances.

All -- And I think the -- Judge is going to

tell you in just a few minutes, he'll charge you as to what the law is. And I think the Judge is going to tell you that all -- underscore all -- aggravating circumstances are statutory. That means they're laid out in the Code of Alabama for you to consider.

The State has reviewed those. They tell you that they're going to ask the Judge to charge you in one aggravating circumstance. That being the commission of murder during robbery.

Mitigating circumstances that are also statutory mitigating circumstances, but there are other mitigating circumstances that are not statutory.

Of the mitigating circumstances that are statutory, the District Attorney has addressed two of them. Yes, Number 1 is that the Defendant had no significant history of prior criminal activity. That applies. That's not even being challenged by the State.

A second one that's not being challenged by the State is the Defendant's age at the time of the commission of this crime. He just turned 18. That was a little over a year ago. Now, he's just slightly over 19.

I have taken the opportunity to review the statutory mitigating circumstances that are listed. There's a total of seven that are listed. I think only two others possibly apply in this case. One would be what's listed as

statutory mitigating circumstance Number 4. And that was that the Defendant was an accomplice in the events. Yes, we think that applies.

Now, it's to -- for you to decide first, does it apply. Second, if it does apply, how much weight should you give it?

We think the other mitigating circumstances apply is that the Defendant acted under not -- it says "extreme duress or under the substantial domination of another person."

I think the testimony that you heard in the trial, guilt phase if that's what you want to call, of this case would indicate that that does apply to some degree if you believed what you've heard about the domination of Daniel Miner and Marcus Carter with regard to that young man.

So the Defense would submit to you that there are possibly four mitigating circumstances that you should consider. Of course the weight that you apply to those is strictly for you to decide.

Two the State has even confessed to you that apply, and I've identified the others.

Now, there are other mitigating circumstances that are not statutory. You've heard four witnesses take the stand to talk about their knowledge of this young man.

All very poignant. It's touching.

The State would have you believe that they're biased. Do you believe that Vonnie Salee is biased? She testified that the only way she knows him is he was her bagboy for the number of years she worked there. She has no reason to come in here and tell you a lie. It's for you to consider whether or not her testimony has any value and has any weight.

Now, it's very, very important that you pay attention to what Mr. Jolley said to you about the weights. It's absolutely correct.

If you, in your collective wisdom, decide that the one aggravating circumstance that the State has asked this Court to charge you with outweighs all the other mitigating circumstances, the four that we've identified plus all these other witnesses that you've heard, then yes it would be your plain and simple duty to do what the State has asked you to do and recommend to this Judge that this young man be sentenced to death by electrocution.

However, if you do not believe that that one mitigating circumstance outweighs -- I'm sorry. That one aggravating circumstance outweighs all of the mitigating circumstances that you've heard and that you've heard the testimony from these people on the stand, then your duty also it just as crystal clear. Then you should and shall

come back and recommend to this Judge that the Defendant be given life without possibility of parole.

I think the Judge will charge you that under the law that's the only two options that you have.

Don't intend to stand here and talk to you any more. It's been a long, laborious ten days or so. Again, I thank you for being here. Your service is invaluable. Your patience and your candor throughout this trial has been remarkable and I thank you for your attendance.

MR. THOMPSON: Please the Court, ladies and gentlemen. One last time. You've heard us as prosecutors and us as Defense attorneys come before you and make various statements as we've gone through the trial and now the sentence phase of this case.

You know, all of us -- I've been -- I've been a lawyer now over 24 years and I've been before juries on numbers of occasions and I guess when you come before a jury asking specifically that a jury award a death penalty in a capital case, it's probably the most difficult time that you have.

It's not that we're hard-hearted people, but we're asking I think in these circumstances that you as a jury what -- do what I would say is right. You do what's right under the circumstances. It's difficult. It's

difficult on you.

We asked you in the qualifying portion of getting ready to try this case what your feelings were on the death penalty and every one of you gave some view of how you felt about the death penalty. And those views were different, as they should be, because you're different people.

You're a jury that's representative of the citizens of Marshall County as you live in various parts and work in different places and go to different churches and have different family backgrounds. You have a lot of experiences and a lot of common experiences in life. But we're asking you to put all those things together and do what's right in this case.

There's an effort sometimes to put these things down on a personal basis, and it ought not to be put on a personal basis. It ought not to be something that becomes you as an individual juror versus Casey McWhorter over here (indicating) because that's not the way it is, not the way it's intended to be.

It's not personal because you didn't bring Casey McWhorter to this courtroom. And you didn't bring him into this courtroom to be tried on the offense of capital murder and you didn't create the situation that brought him to be tried on capital murder. And you didn't create the

situation that caused this sentence hearing to be in existence at this present time.

But because you're jurors and because you're jurors that have been chosen in this particular case, it falls your duty and your responsibility to make a recommendation to this Court as to whether or not this Defendant should receive a penalty of life without parole or death.

And I'm going to ask you in considering this last part of this case to just follow the law one more time. Don't let it become personal. Don't let it become a matter of emotions. But just follow the law one more time.

You've taken the facts, you've deliberated on those facts, and you've applied it to the law that the Court gave you yesterday as you decided in the factual situation of whether or not the person was innocent or guilt -- guilty.

Now take the charge that the Court gives you about aggravating and mitigating circumstances and look at those. And there's one aggravating circumstance out there and that's the crime which this individual is charged with and has been found guilty of committing; murder while in the course of committing a robbery. That's an aggravating circumstance.

And then look at whether or not there are any

mitigating circumstances or not. That again is a matter for you to look at and determine in your mind whether or not those even exist. Whether any of them even exist. And if you do, then weigh them.

And we're not -- This is not a weight of numbers. It's not looking, well, is there one over here and four over here. Therefore, the four is more than one. You don't weigh them that way. You look at them and you weigh them based upon what they represent.

You know, maybe a way of explaining that is saying that if you had a ten-pound bag of sugar laying here on the table and over here you had three little cups, each one of them holding an ounce of sugar, that's three and that's one, but the one is certainly greater than the three.

And look at it in that way. Look at it and weigh to you as the jury which is the greater. Does -- Does a factor of being a young man weigh greater than the factor of going in a man's home and lying in wait for him. And getting his guns and creating silencers to keep the neighbors from hearing and shooting and killing him and shooting him and shooting him and shooting him and shooting him in his own home. Do those --

MR. MITCHELL: Your Honor, I'm going to object to this as improper victim impact argument.

THE COURT: Overruled.

MR. THOMPSON: Does that aggravating circumstance outweigh the youth of that individual? Those are the things that you need to ask yourself.

You know, the Defense in this case has asked you to -- I think by their argument in this sentencing phase, they've asked you to ignore the facts in this case and instead use sympathy, impose sympathy in your decision process.

They've asked you to ignore the aggravating circumstance of murder during a robbery and let your emotions prevail in this case. And again, I would have to say to you that that's not what the law is in the case.

The Court is going to charge you and they're going to charge you on what Mr. Jolley said just a moment ago that if you find that the aggravating circumstance outweighs the mitigating circumstances, if any, then you shall vote to recommend the death penalty in this case.

And it -- You know, I know using the term "simple" maybe is not a good word to use in this kind of situation because when you're dealing with a person's life nothing is simple. But in essence, it's that simple. When you get in the jury room, if the aggravating circumstances outweigh the mitigating circumstances, if any, then you shall vote to recommend the death penalty.

And that's what we're asking you to do.

You know, I was thinking just a minute ago as Mr. Mitchell wanted to read to you what some journalist had said about witnessing a person being executed in the Alabama electric chair, what would some talented journalist have said about the death of Ed Williams? You don't reckon, you think it would be a pretty picture? You think some --

MR. MITCHELL: Your Honor, once again, I'm going to object to --

THE COURT: Overruled.

MR. MITCHELL: -- this as improper victim impact argument.

THE COURT: Overruled.

MR. THOMPSON: Do you think it would have a pretty picture for a talented writer to have sat there in the hallway of that home the night of February the 18th of 1993 and to have told you how Mr. Williams looked when he got shot the first time and then the second and then the third and then the fourth?

How he looked when he hit the ground, hit the floor in his house when he was shot and he was shot and he was shot? And then finally shot twice more in his head.

MR. MITCHELL: Your Honor, I'm going to object once again. This is improper argument.

THE COURT: Overruled.

MR. MITCHELL: May I have a continuing

objection, Your Honor?

THE COURT: Yes, sir.

MR. THOMPSON: Do you think it would have been pretty? Certainly not. Certainly not.

I'm sure that a talented writer would have made just as drastic a picture of that as they would have made of this individual that died in the electric chair of the State of Alabama.

But again, ladies and gentlemen, I come back to the point, this is not something to be ruled upon, voted upon because of the emotions of the incident. It's -- It's something to be voted on because of the facts that have been presented to you.

And I think those facts clearly and absolutely would say to you in this case that this Defendant should receive the death penalty from the State of Alabama. You didn't put him here, and you remember that.

We're asking for the death penalty in this case, ladies and gentlemen, not again because we're cold and hard-hearted people, but because it's right. It's just the right thing to do in this case based upon the facts and the circumstances and the aggravating causes and the mitigating causes.

So we ask you as a jury in this case to render a vote of the death penalty against Mr. Casey

McWhorter.

Thank you.

THE COURT: Ladies and gentlemen, it's my duty again to instruct you or charge you as to the law. I point out to you that the words I must use are very precise. I cannot freehand or offhand this charge. I admit to you I will be largely reading to you during this charge and I apologize to you for that.

In charging you, I want to remind you of the instructions I gave you yesterday concerning the basic law and defining the term "reasonable doubt" as well as your duties and functions as jurors.

If any one of you feels that it's necessary, I will recharge you as to each and every one of those principles of law.

I will not charge you as to the principles of law of the capital offense charged in the indictment because that question at this point is settled due to the fact that by your verdict you found this Defendant guilty of the capital offense.

Now, because I'm giving instructions to you does not mean that you're to assume as true any question of fact referred to in these instructions. Instead, it's left to you to determine what the facts are and what the recommended sentence should be.

The law of this State provides that punishment for the capital offense for which you convicted this Defendant is either death by electrocution or life imprisonment without eligibility for parole.

The law also provides that which of those two punishments should be imposed upon the Defendant depends on whether any aggravating circumstances exist. And if so, whether the aggravating circumstances outweigh the mitigating circumstances.

An aggravating circumstance is a circumstance specified by law which indicates or tends to indicate that the Defendant should be sentenced to death.

A mitigating circumstance is any circumstance that indicates or tends to indicate that the Defendant should be sentenced to life without parole instead of death.

The issue at this sentence hearing concerns the circumstances of aggravation and circumstances of mitigation that you should consider and weigh against each other in deciding what the proper punishment is in this case.

In making your recommendation concerning what the punishment should be, you must determine whether any aggravating circumstance exists. And if so, you must determine whether any mitigating circumstance or circumstances exist.

In making your determination concerning the existence of aggravating and mitigating circumstances, you should consider the evidence presented at this sentence hearing. You should also consider any evidence that was presented during the guilt phase of the trial that is relevant to the existence of any aggravating or mitigating circumstances.

The law in this state provides a list of aggravating circumstances which may be considered by the jury in recommending punishment if the jury is convinced beyond a reasonable doubt from the evidence that any one or more of such aggravating circumstances exist in this case.

Now again, the same definitions I gave to you yesterday in the guilt phase concerning reasonable doubt apply to this matter also.

If the jury is not convinced beyond a reasonable doubt based upon the evidence that one or more aggravating circumstances exist, then the jury must recommend that the Defendant's punishment be life imprisonment without parole regardless of whether or not there are any mitigating circumstances in the case.

Of the list of aggravating circumstances provided by law, there is one circumstance which you may consider in this case if you're convinced beyond a reasonable doubt based on the evidence that such

circumstance exists.

The fact that I instruct you on the aggravating circumstance or define it to you does not mean that the circumstance has been proven beyond a reasonable doubt in this manner. Whether any aggravating circumstance which I instruct you on or define for you has been proven beyond a reasonable doubt based on the evidence is a matter for you the jury alone to determine.

The aggravating circumstance which you may consider in this case, if you find from the evidence that it has been proven beyond a reasonable doubt, is as follows: That the capital offense was committed while the Defendant was engaged in or was an accomplice in the commission of robbery.

Now, as I've stated to you before, the burden of proof is on the State to convince you beyond a reasonable doubt as to the existence of any aggravating circumstance considered by you in determining what punishment is to be recommended in this case.

This means that before you can even consider recommending the Defendant's punishment be death that each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least that one aggravating circumstance exists.

In deciding whether the State has proven

beyond a reasonable doubt the existence of that aggravating circumstance, you should bear in mind the definition I gave you as to reasonable doubt.

The evidence upon which a reasonable doubt about an aggravating circumstance may be based is both the evidence you have heard in the guilt stage of this trial and the evidence you've heard in this sentencing hearing.

The evidence -- The Defendant rather -- Excuse me. Let me start again on that. The Defendant does not have to disprove anything about an aggravating circumstance. The burden is wholly upon the State to prove such circumstance beyond a reasonable doubt.

A reasonable doubt about an aggravating circumstance may arise from all of the evidence, from any part of the evidence or from a lack of or failure of the evidence.

You may not consider any aggravating circumstance other than the one aggravating circumstance on which I have instructed you. And you may not consider that aggravating circumstance unless you're convinced by the evidence beyond a reasonable doubt of the existence of that aggravating circumstance in this case.

If you should find that no aggravating circumstance has been proven beyond a reasonable doubt to exist in this case, then you must return a verdict

recommending that the Defendant's punishment be life imprisonment without parole. In that event, you need not concern yourself with the mitigating circumstance in this case.

If you find beyond a reasonable doubt that the aggravating circumstance on which I have instructed you does exist in this case then you must proceed to consider and determine the mitigating circumstances.

The law of this state provides a list of some of the mitigating circumstances which you may consider. But that list is not a complete list of the mitigating circumstances you may consider.

I will now read to you a list of some of the mitigating circumstances which you may consider and that includes: (1) The Defendant has no significant history of prior criminal activity; (2) The capital felony was committed while the Defendant was under the influence of extreme mental or emotional disturbance; (3) The victim was a participant in the Defendant's conduct or consented to the act; (4) The Defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor; (5) The Defendant acted under extreme duress or under the substantial domination of another person; (6) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the

requirements of law was substantially impaired.

Now, a person's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law is not the same as his ability to know right from wrong generally or to know that what he is doing at a given time or to know what he is doing is wrong.

A person may indeed know that doing the act that constitutes a capital offense is wrong and still not appreciate its wrongfulness because he does not fully comprehend or is not fully sensible to what he is doing or how wrong it is.

Further, for this mitigating circumstance to exist, the Defendant's capacity does not have to have been totally obliterated. It's enough that it was substantially lessened or substantially diminished.

Finally, this mitigating circumstance would exist even if the Defendant did appreciate the criminality of his conduct if his capacity to conform to the law was substantially impaired since a person may appreciate that his actions are wrong and still lack the capacity to refrain from doing it.

(7) The age of the Defendant at the time of the crime.

Now, a mitigating circumstance does not have to be included in the list that I have just read to you in

order for it to be considered by you.

In addition to the mitigating circumstances previously specified, mitigating circumstances shall include any aspect of a Defendant's character or record and any of the circumstances of the offense that the Defendant offers as a basis for a sentence of life imprisonment without parole instead of death.

A mitigating circumstance considered by you should be based on the evidence you have heard.

When the factual existence of an offered mitigating circumstance is in dispute, the State shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.

The burden of disproving it by a preponderance of the evidence means that you are to consider that a mitigating circumstance does exist unless taking the evidence as a whole it is more likely than not that the mitigating circumstance does not exist.

Therefore, if there is a factual dispute over the existence of a mitigating circumstance, then you should find and consider that mitigating circumstance unless you find the evidence is such that it's more likely than not that the mitigating circumstance does not exist.

Only an aggravating circumstance must be proven beyond a reasonable doubt, as I've stated to you many

times. The burden is on the State of Alabama to convince you from the evidence beyond a reasonable doubt that such an aggravating circumstance did exist.

In reaching your finding concerning the aggravating and mitigating circumstances in this case and in determining what to recommend that the punishment in this case should be, you must avoid any influence of passion, prejudice, or any other arbitrary factor.

Your deliberation and verdict should be based upon the evidence you have seen and heard and the law on which I have instructed you. There is no room for the influence of passion, prejudice, or any other arbitrary factors.

While it's your duty to follow the instructions which the Court has given you, no statement, question, ruling, remark, or other expression that I have made at any time during this trial, either during the guilt phase or during this sentence hearing, is intended to indicate any opinion of what the facts are or what the punishment should be.

It's your responsibility to determine the facts and to recommend the punishment. And in doing so, you should not be influenced in any way by what you may imagine to be my views on such subject.

The process of weighing aggravating and

mitigating circumstances against each other in order to determine the proper punishment is not a mechanical process.

Your weighing of the circumstances against each other should not consist of merely adding up the number of aggravate circumstances and comparing that number to the total number of mitigating circumstances.

The law of this state recognizes that it is possible in at least some situations that one or a few aggravating circumstances might outweigh a larger number of mitigating circumstances.

The law of this state also recognizes that it is possible in at least some situations that a large number of aggravating circumstances might be outweighed by one or a few mitigating circumstances.

In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case and you, the jury, are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all of the circumstances in this case.

You must do that in the process of weighing the aggravating circumstances against the mitigating circumstances.

In order to bring back a verdict recommending the punishment of death, at least ten of your number must

vote for death. In other words, a verdict of death must be either unanimous, or 11 for death and 1 for life without parole, or 10 for death and 2 for life without parole. Any number less than ten cannot recommended the death penalty.

In order to bring back a verdict recommending a sentence of life imprisonment without parole, there must be a concurrence of at least seven of your number for that sentence.

In other words, in order for a verdict to be returned recommending imprisonment for life without parole, it must be either unanimous, or 11 for life without parole and 1 for death, or 10 for life without parole and 2 for death, or 9 for life without parole and 3 for death, or 8 for life without parole and 4 for death, or 7 for life without parole and 5 for death. Any number less than seven cannot recommend life without parole.

Now, the fact that the determination of whether ten or more of you can agree to recommend the sentence of death or seven or more of you can agree to recommend a sentence of life without parole can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings.

You should hear and consider the views of your fellow jurors. Before you vote, you should carefully weigh, sift, and consider all the evidence and all of it

realizing that a human life is at stake.

And you should bring to bear your best judgment on the sole issue which is before you. The issue is whether the Defendant should be sentenced to life imprisonment without parole or death.

In addition to the recommendation of either death or life imprisonment without parole, your verdict form must contain the numerical vote. Not who voted which way, but the actual count.

Now, ladies and gentlemen, after a full and fair consideration of all the evidence in this case you are convinced beyond a reasonable doubt and to a moral -- excuse me. You are convinced beyond a reasonable doubt that at least one aggravating circumstance does exist, and that the aggravating circumstance outweighs the mitigating circumstances, your verdict would be: "We, the jury, recommend that the Defendant, Casey A. McWhorter, be punished by death. The vote is as follows:" blank number for "death," blank number "life without parole" and the signature of the foreperson.

However, if after full and fair consideration of all the evidence in the case you determine that the mitigating circumstances outweigh any aggravating circumstances that exist, or you're not convinced beyond a reasonable doubt that at least one aggravating circumstance

does exist, your verdict would be to recommend punishment of life in prison without parole and the form of your verdict would be: "We, the jury, find that the Defendant, Casey A. McWhorter, be punished by life imprisonment without parole. The vote is as follows:" Blank, which is a number for "death" and blank which is a number for "life without parole" and again the signature of the foreperson.

Ladies and gentlemen, while I have repeatedly said that what you're making is a recommendation to the Court I think you must assume in arriving at this verdict that whatever verdict you arrive at will in fact be carried out.

I have prepared for your convenience a verdict form conforming to my instructions (indicating). I think you can see the number where the number of votes for death or life without parole would be inserted on either of the verdict forms (indicating). The first verdict form being the verdict form where you would recommend death, the second one where you would recommend life without parole, and the place for the foreperson to sign in either event (indicating throughout).

May I see the attorneys, please?

(Bench conference on the record:)

THE COURT: Exceptions from the State?

MR. THOMPSON: Only the last part about that

it will in fact be carried out.

THE COURT: All right. I understand that.

MR. MITCHELL: No, sir, I don't know -- Have you got any?

MR. BERRY: Judge, same objections as the guilt stage instructions.

THE COURT: As to reasonable doubt?

MR. BERRY: Yes, Judge. And again as I stated on Page 81, objection to that depends on whether any aggravating circumstances exist and if so, as I previously explained to you in our charge conference.

THE COURT: All right. All of the exceptions are denied.

With those exceptions, are both sides satisfied?

MR. BERRY: Yes, Judge.

MR. MITCHELL: Yes, sir.

MR. THOMPSON: Yes, sir.

THE COURT: All right.

(In open court:)

THE COURT: Ladies and gentlemen, I will let the bailiff take you to the larger jury room. I think you'll be a little more comfortable in there.

Rex, here is the verdict form (indicating).

Please let us know when you have something to

tell us. Thank you.

(Jury retires to deliberate their verdict.)

THE COURT: Mr. Thompson, I apologize to you. Most of it was the sheriff's department and officers. Some of it was the Defendant's family. But this place looked like grand central station during your closing argument and I'm sorry about it, but I couldn't --

MR. THOMPSON: Oh, yeah.

THE COURT: -- think of anything to do that wouldn't make it worse.

MR. MITCHELL: Your Honor, do you want the Defendant to remain around here?

THE COURT: I think that's advisable. I -- You know, we're trying to get checked out of the motel rooms without costing another $1,000 for motel rooms. We can't do that until we get a verdict. And even a delay of 10 or 15 minutes on getting him over here might put us in that position.

MR. BERRY: Judge, it's 3:15 now.

THE COURT: My guess is that they will come back with a recommendation fairly shortly, but I really prefer him to stay over here.

MR. BERRY: All right.

THE COURT: Totally off the record.

(Recess taken while the jury is deliberating.)

(Bailiff notifies the Court that the jury wishes to return into the courtroom.)

(4:35 p.m. Defendant appearing in open court with his attorneys of record.)

THE COURT: Ladies and gentlemen, I understand from the bailiff that the jury has not been able to reach a verdict on this phase by the appropriate numbers.

It's my intention to bring them back in, see if I can help them on the law, explain to them of course I can't help them on the facts, but to impress upon them the desirability of them reaching a verdict on this phase of the trial and what would occur if they did not.

When I get through, of course, I'll be glad to take exceptions from either side.

If you would, Rex, please, bring them back.

(Jury present.)

THE COURT: Ms. Jonus, I don't want to hear any numbers, but my understanding is the jury has not been able to reach a verdict with the required numbers. Am I correct?

FOREPERSON JONUS: Yes, sir.

THE COURT: Is there anything about the law

that I could help the jury on?

FOREPERSON JONUS: I -- I asked them that before we left out and no one mentioned anything to me.

THE COURT: All right. Ladies and gentlemen, I can't help you on the facts in this case. That's for you.

All of the parties want you to decide this case if you can. The State of Alabama, the Defense, and the court system have gone to considerable expense for this trial.

If you can't decide this case, I'll have to declare a mistrial and it will have to be all done over again. Not the guilt phase, but the sentencing phase.

But basically we would have to go through substantially the same procedure for selecting a jury. Substantially all of the guilt evidence would have to be presented again since this jury would not have heard that evidence. The jury again would have to be sequestered and put up in a motel.

Time will have passed. Recollections will have dimmed. Some witnesses may not be available and more expense will be incurred.

A new jury may not have as much evidence as you have today to base a verdict on. And it's highly unlikely that a new jury would have any more or any better evidence than you ladies and gentlemen have before you.

It's your duty to agree on a verdict if you can do so without violating your conscience or convictions based on the evidence in this case.

You should deliberate patiently and long if necessary. You should have a full and free interchange of views with each other, and you should consider the issues submitted to you without prejudice or preformed bias.

Ladies and gentlemen, cultivate a spirit of harmony and tolerance and arrive at a verdict if you can possibly do so.

Look closely and weigh the testimony of the witnesses solely with the view of finding the truth shutting your eyes as to any personal results of your findings. Apply the facts as you find them to the law given to you by the Court.

No jury out of -- No juror out of pride of his own opinion should refuse to agree nor stand out in an unruly, obstinate, or unreasonable way. On the other hand, no juror should surrender their conscientious views founded on the evidence and the law declared by the Court.

I ask humbly that you let each juror re-examine the grounds of their opinion and reason with the other jurors concerning the facts and with an honest desire to arrive at the truth and to render a true verdict according to the evidence.

Ladies and gentlemen, lay aside all pride of opinion and judgment. Examine any difference of opinion that there may be among you with a spirit of fairness. Reason together, talk over your differences, harmonize them if possible so that this case can be justly disposed of.

Now, ladies and gentlemen, it's not my purpose to force or coerce you to reach a verdict in this case. What I've said to you mustn't be taken as any attempt on my part to require any of you to surrender your honest and reasonable convictions founded on the law and the evidence in the case.

My sole purpose is to impress on you your duty and the desirability and importance of your reaching a verdict if you can conscientiously do so.

On behalf of the parties and the court system, I respectfully ask you to deliberate longer and reach a verdict if possible.

May I see the attorneys, please?

(Bench conference on the record:)

THE COURT: Exceptions from the State?

MR. THOMPSON: No, sir.

THE COURT: Exceptions from the Defense?

MR. MITCHELL: Your Honor, we do respectfully except to the Court's charge. I think it -- in spite of the Court's cautionary language, I think the overall effect of

the charge is to give the jury an indication that the Court favors the imposition of the more serious penalty.

THE COURT: I understand your exception and you have it, but it's denied.

(In open court:)

THE COURT: Ladies and gentlemen, please go back and deliberate longer and let us know when you have something to tell us.

(Jury retires to continue their deliberations.)

THE COURT: Ladies and gentlemen, we'll be in recess until they tell us something further.

(Recess taken while the jury deliberates.)

(Bailiff notifies the Court that the jury has reached a verdict.)

(5:40 p.m. Defendant appearing in open court with his attorneys of record.)

THE COURT: Gentlemen, I remind you that after the verdict we have a couple of other things that have to be done on record including Ms. Norris.

They out there, Rex?

BAILIFF: No, sir, not yet.

THE COURT: Okay. When they get here, bring them on in.

BAILIFF: Do you want me to go ahead and bring them?

THE COURT: Go ahead. Whenever you've got them, bring them on in.

BAILIFF: Okay.

(Jury present.)

THE COURT: Ms. Jonus, has the jury been able to reach a verdict?

FOREPERSON JONUS: Yes, sir.

THE COURT: Would you read it to us, please, ma'am?

FOREPERSON JONUS: "We, the jury, recommend that the Defendant, Casey A. McWhorter, be punished by death. The vote is as follows: Ten death, two life without parole."

THE COURT: Would you hand that form to Mr. Hipp, please?

(Verdict form is handed to the bailiff who in turn hands it to the Court.)

THE COURT: Thank you.

Gentlemen, that is in fact the verdict that Mrs. Jonus has signed on behalf of the jury.

Do you have any motions at this time?

MR. MITCHELL: Poll the jury, Your Honor.

THE COURT: Ladies and gentlemen, again the

Defense --

MR. THOMPSON: Judge --

THE COURT: I'm not going to ask how anybody voted. That is -- That is private. You're not required now or ever to disclose that unless you choose to. But I am going to ask each juror just as I did before if that is the correct verdict of the jury.

In doing so, I am asking each juror whether or not by vote of ten to two this jury voted to recommend a death sentence.

Am I -- Does everybody understand the question I'm posing? Not how you voted, but whether or not that is in fact the verdict reached by the jury by a vote of ten to two.

Ms. Jonus, is that the verdict of the jury?

FOREPERSON JONUS: Yes, sir.

THE COURT: Ma'am, is that the verdict of the jury?

JUROR: Yes, sir.

THE COURT: Ma'am, is that the verdict of the jury?

JUROR: Yes, sir.

THE COURT: Ma'am, is that the verdict of the jury?

JUROR: Yes, sir.

THE COURT: Starting on the second row at your right end, ma'am, is that the verdict of the jury?

JUROR: Yes.

THE COURT: Ma'am, is that the verdict of the jury?

JUROR: Yes, sir.

THE COURT: Ma'am, is that the verdict of the jury?

JUROR: Yes, sir.

THE COURT: Ma'am, is that the verdict of the jury?

JUROR: Yes, sir.

THE COURT: Ma'am, is that the verdict of the jury?

JUROR: Yes, sir.

THE COURT: Then on the last row at the far right, ma'am, is that the verdict of this jury?

JUROR: Yes, sir.

THE COURT: Ma'am, is that the verdict of this jury?

JUROR: Yes, sir.

THE COURT: Sir, is that the verdict of this jury?

JUROR: Yes, sir.

THE COURT: Anything further?

MR. MITCHELL: No, sir, Your Honor.

THE COURT: All right. This case -- Mr. Thompson, do you have your pocket wallet which shows the May --

MR. THOMPSON: No, sir, I don't.

THE COURT: Well, they have glued this right over my calendars (indicating).

I'm going to continue this case until 10:30 a.m. on May the 13th, 1994 for the sentence hearing.

Does the Defendant apply for probation? I realize that that's inapplicable, but I don't know any provision which keeps him from applying for it.

MR. BERRY: So applied, Judge.

MR. MITCHELL: Yes, sir.

THE COURT: All right. On May 13th, 1994, at 10:30 a.m. the Court will have a sentence hearing on the Defendant's sentence and his application for probation and restitution.

That will not be the time at which the Court pronounces sentence, but at which time the Court will hear the sentence hearing.

The Court will order that the probation office make a presentence investigation and written report and present the same in accordance with the rules of the Alabama Supreme Court before that hearing.

I will also order the clerk to notify the family of the alleged victim of the time and place of that hearing. Of course I urge the district attorney's office to cooperate on that as well.

Is there anything further before we go off the record on this part and I dismiss the jury?

MR. THOMPSON: No, sir.

MR. MITCHELL: No, sir.

THE COURT: Now, I want to keep Mrs. Norris and I have something personal to say to Ms. Jonus after we get through here, but is there any reason I can't release the rest of the jury?

MR. MITCHELL: Not that I'm aware of.

MR. THOMPSON: No, sir.

THE COURT: All right. We're off of record except we're going to go back on for a few minutes.

Ms. Norris and Ms. Jonus, I want you all to stay for just a moment.

We're off record now.

(Jurors are released off the record except for Foreperson Jonus and Juror Norris.)

(Foreperson Jonus is released off the record.)

THE COURT: We need to go back on record. I

need to ask you a question or two. Please don't think anybody is fussing at you, okay?

We're back on record.

You are Sonia Cheryl Norris?

JUROR NORRIS: Yes, sir.

THE COURT: Ms. Norris, if I understand your questionnaire, you still maintain your residence with your parents here in Marshall County, but you're going to school over in Huntsville; am I correct?

JUROR NORRIS: I graduated.

THE COURT: Okay. I trust during that time you've had an apartment and spent some of the time in Huntsville and that sort of thing.

JUROR NORRIS: Some of the time, yes.

THE COURT: All right. But your driver's license and all the rest of it is still here in Marshall County.

JUROR NORRIS: Yes, sir.

THE COURT: You still consider Marshall County your county of residence if I understand it.

JUROR NORRIS: Yes, sir.

THE COURT: Any questions for Ms. Norris from either side?

MR. THOMPSON: No, sir.

Go ahead.

EXAMINATION BY MR. JOLLEY:

Q During the time that you were in school, did you still consider Marshall County your residence?

A Yes, sir.

Q Okay. Thank you.

MR. JOLLEY: That's all.

THE COURT: Defense?

EXAMINATION BY MR. BERRY:

Q Ma'am, when did you graduate from college?

A In June.

Q And where were you living in Huntsville?

A Ah, the address?

Q Yes, ma'am.

A 2237 Tollgate.

Q Did you receive your mail over there?

A No, sir.

Q Did you ever maintain a post office box or anything like that in that area?

A No, sir.

Q But --

A I did receive my Master Card bill there.

Q Okay. In Huntsville?

A Yes, sir.

Q At what address did you receive your Master Card bill? Your home?

A 2237 Tollgate.
Q All right. Did you -- Did you live alone or did you live in a dorm or what?
A No. I stayed with, ah, one of my girlfriends there.
Q How long did you live in Huntsville?
A Probably about -- I stayed there probably about four months.
Q All right. How many years were you in school there?
A Five years.
Q At Huntsville?
A Yes, sir.
MR. BERRY: Tom?
(Discussion off the record between the Defense attorneys. In open court:)
Q (By Mr. Berry) Have you ever voted in Madison County?
A No, sir.
Q City elections, county elections, or state elections.
A No, sir.
Q Okay.
A All my voting is here in Marshall County.
Q Okay. Thank you, ma'am.

THE COURT: Anything further for Ms. Norris?

MR. JOLLEY: No, sir.

THE COURT: Forgive us for that inquiry and for keeping you late. Everything I said to everybody else goes for you too and I bet you can catch the end of the line.

JUROR NORRIS: Okay.

THE COURT: Thank you again so much.

(Juror Norris leaves the courtroom.)

THE COURT: Anything to do before we go off of record and close it down until May 13th?

MR. BERRY: Yes, Judge, I'll go ahead and file an objection to that juror and challenge the juror on her residency.

THE COURT: Your challenge is overruled and denied.

Anything further?

MR. BERRY: No, Judge.

MR. MITCHELL: No, sir.

THE COURT: All right. I'll see you back on May the 13th. Of course that will be in Albertville.

END OF PROCEEDINGS ON SAID DATE

03:34:58PM 2 MR. NEWMAN: Yes.
03:34:58PM 3 THE COURT: Thank you, ma'am.
03:35:06PM 4 MR. NEWMAN: At this point, Your Honor, I
03:35:08PM 5 would ask for a recess to see whether our next witness
03:35:10PM 6 has arrived. She --
03:35:14PM 7 THE COURT: Let's just take ten minutes. We
03:35:16PM 8 all need a break anyway.
03:35:18PM 9 (Recess.)
03:35:18PM 10 MS. REILAND: Who is your next witness?
03:56:19PM 11 (At bench:)
03:56:19PM 12 MR. NEWMAN: The only witness we have left
03:56:26PM 13 today is Ms. April King who is the teacher driving up
03:56:35PM 14 from Gadsden.
03:56:36PM 15 MR. ROSENBERG: So she, I think, thought she
03:56:38PM 16 would be here about 4:00 and we have been checking and
03:56:41PM 17 she is not here.
03:56:42PM 18 There is, however, an issue, another issue about
03:56:44PM 19 witnesses, and that's with respect to the witness
03:56:47PM 20 Charlotte, I believe, Davis. She is the juror that
03:56:54PM 21 would come in not to testify about what was said, but
03:56:56PM 22 the effect of certain testimony or facts of this would
03:57:03PM 23 be on here. And the Court ruled yesterday that the
03:57:07PM 24 juror testimony, after studying Rule 606(b), et cetera,
03:57:10PM 25 would be admitted, but I understand the State they have

03:57:13PM 1 an objection. Is that a fair --
03:57:14PM 2 MR. JOHNSON: Yes. We have an objection with
03:57:17PM 3 Charlotte Davis.
03:57:19PM 4 MR. ROSENBERG: She could not be here today.
03:57:21PM 5 She is ill, and we're hoping we will have her here
03:57:24PM 6 tomorrow, and I think she will be very short, but we
03:57:26PM 7 thought that we ought to bring this up and argue before
03:57:31PM 8 the Court now.
03:57:32PM 9 THE COURT: Okay.
03:57:33PM 10 MR. ROSENBERG: That's that. So the reasons
03:57:37PM 11 set forth earlier in her testimony should be admitted.
03:57:40PM 12 It's not impeachment of the verdict because she says
03:57:42PM 13 the whole, as discussed at some length yesterday,
03:57:47PM 14 606(b) is to protect what was said inside the jury room
03:57:50PM 15 under at least certain circumstances. But she will not
03:57:54PM 16 say anything about what was said inside the jury room.
03:57:56PM 17 She's part of the mitigation case.
03:57:58PM 18 It's our burden to show that the evidence that's

03:58:03PM 19 educed here is a reasonable probability it would have
03:58:06PM 20 an affect on the jurors, and she would be a juror. And
03:58:14PM 21 it would summarize evidence. And it was projected here
03:58:16PM 22 that she could say whether it would have had an affect
03:58:18PM 23 on her decision.
03:58:19PM 24 MR. JOHNSON: Your Honor, may I state my
03:58:21PM 25 objection?

03:58:22PM 1 THE COURT: You can, but I do have one
03:58:23PM 2 question here. I had thought -- and you correct me,
03:58:25PM 3 because I can miss it. I thought I said that I would
03:58:28PM 4 only consider juror testimony merely on the issue of
03:58:35PM 5 whether Ms. Burns had shared that with the jury or not,
03:58:38PM 6 as opposed to how it affected them and how they -- I do
03:58:42PM 7 think that, you know, I don't think that it is
03:58:46PM 8 extraneous matter what she told them about her father.
03:58:51PM 9 And so it was my opinion that that could not be used in
03:58:56PM 10 their decisions about how they came to the verdict.
03:58:59PM 11 I think I said that I would allow it, though, to

03:59:02PM 12 show what Ms. Burns had said to prove what Ms. Burns
03:59:06PM 13 believed.
03:59:07PM 14 MR. NEWMAN: That's what April King
03:59:09PM 15 Stonecypher is going to say.
03:59:11PM 16 MR. ROSENBERG: This is about a different
03:59:13PM 17 juror.
03:59:14PM 18 MR. JOHNSON: Which juror? We have different
03:59:15PM 19 objections to different jurors. Are we talking about
03:59:18PM 20 April or Charlotte?
03:59:20PM 21 MR. ROSENBERG: Your Honor, I'm sorry.
03:59:22PM 22 Obviously, I wasn't clear.
03:59:23PM 23 THE COURT: Okay.
03:59:24PM 24 MR. ROSENBERG: The witness who is coming in
03:59:26PM 25 now we expect is Ms. April Stonecypher. And we

03:59:30PM 1 understand that she will testify about what was
03:59:35PM 2 precisely offered for the reasons the Court stated --
03:59:38PM 3 to the extent the Court stated, but what was said in
03:59:40PM 4 the jury room by Ms. Burns about her father. We

03:59:47PM 5 understood the Court's ruling to be that that was
03:59:49PM 6 relevant to show what Ms. Burns was thinking.
03:59:54PM 7 Ms. Davis will not say anything about that.
03:59:57PM 8 Ms. Davis will not say anything about the jury
04:00:00PM 9 deliberations.
04:00:03PM 10 MR. BLACKBURN: We have to Ms. Stonecypher
04:00:05PM 11 and Ms. Davis two different objections.
04:00:08PM 12 THE COURT: I think that was obvious.
04:00:11PM 13 MR. ROSENBERG: I think I have explained -- I
04:00:13PM 14 hope I have explained Ms. Stonecypher is consistent
04:00:15PM 15 with the Court's ruling, and we understood that's what
04:00:18PM 16 he could do today.
04:00:18PM 17 THE COURT: Okay.
04:00:19PM 18 MR. BLACKBURN: Our objection for
04:00:21PM 19 Ms. Stonecypher. You recall that when we lodged our
04:00:25PM 20 objection and the motion to exclude testimony under
04:00:29PM 21 606(b) the Court originally granted that. You then
04:00:34PM 22 turned around and said that we may be right that that
04:00:36PM 23 testimony may be excluded, but that you were going to
04:00:39PM 24 allow the one question to be asked. Did she tell
04:00:44PM 25 jurors that she thought her father was murdered, and

04:00:47PM 1 that was to prove her state of mind --
04:00:50PM 2 THE COURT: Exactly.
04:00:52PM 3 MR. BLACKBURN: -- when she answered the jury
04:00:54PM 4 questionnaire.
04:00:54PM 5 THE COURT: Right. Whether she was telling
04:00:56PM 6 the truth or telling a lie.
04:00:56PM 7 MR. BLACKBURN: Correct. And that question
04:00:58PM 8 was allowed, it was asked, and it was answered.
04:01:00PM 9 If we allow another person to come and testify to
04:01:02PM 10 that same fact, did she tell, not only is it hearsay,
04:01:05PM 11 but also I think that we should err on the side of
04:01:08PM 12 caution with 606(b), because, as Your Honor noted
04:01:11PM 13 earlier, you may be wrong about that. In fact, changed
04:01:15PM 14 her mind from earlier granting it.
04:01:18PM 15 And I think in this situation because they have
04:01:21PM 16 had an opportunity to ask the question, it's been
04:01:23PM 17 answered by Ms. Burns, it would be the wiser ruling to
04:01:27PM 18 go ahead and exclude that testimony at this point under
04:01:30PM 19 hearsay grounds, if nothing else, that, and also that
04:01:35PM 20 it's cumulative to Ms. Burns's testimony and under --
04:01:42PM 21 and sort of erring on the side of caution with 606(b).

04:01:47PM 22 MR. NEWMAN: Well, let me say three things:
04:01:50PM 23 First, if the Court is going to err on the side of
04:01:56PM 24 caution, the proper course would be to admit the
04:02:00PM 25 testimony with the understanding that the Court can

04:02:03PM 1 always decide later that it should not properly be the
04:02:07PM 2 subject of consideration rather than to exclude the
04:02:11PM 3 testimony and run the risk that it was improperly
04:02:14PM 4 excluded.
04:02:16PM 5 Second, it is not hearsay because it is not being
04:02:19PM 6 offered for the truth of what was stated, as we have
04:02:24PM 7 discussed, it's being offered to illustrate Juror
04:02:29PM 8 Burns's state of mind.
04:02:31PM 9 And, third, it is not cumulative, because when you
04:02:34PM 10 have one witness testify to something, it's not
04:02:37PM 11 cumulative to have a second witness testify to the same
04:02:40PM 12 subject matter. If we begin calling three or four or
04:02:43PM 13 five witnesses to testify to the same thing, it then
04:02:48PM 14 becomes cumulative.

04:02:49PM 15 But cumulativeness is a matter of the Court's
04:02:52PM 16 discretion. And I have never seen a case where calling
04:02:55PM 17 a second witness to testify to what one witness said
04:02:58PM 18 should be rejected as cumulative.
04:03:00PM 19 THE COURT: All right. Well, I obviously am
04:03:03PM 20 very familiar with the arguments today, and I hear
04:03:04PM 21 where you are. I am going to allow the one question
04:03:06PM 22 about what Ms. Burns said, but nothing about how it
04:03:11PM 23 affected them, impacted them, how they came to their
04:03:14PM 24 verdict. I agree with them that that is shield ed.
04:03:18PM 25 MR. NEWMAN: I have stricken from my

04:03:20PM 1 questions the ones about how it affected the juror.
04:03:24PM 2 THE COURT: Next juror.
04:03:26PM 3 MR. ROSENBERG: Charlotte Davis, the one who
04:03:28PM 4 will not be here today, will not say anything about the
04:03:31PM 5 discussions in the jury room or the evidence at trial.
04:03:35PM 6 She will be asked to -- if she's a juror and then asked
04:03:39PM 7 whether, if she had heard certain evidence which, we

will specify, was there a reasonable chance that would have affected her decision. And the reason -- and the evidence would be evidence that's been educed here concerning Mr. McWhorter that had not been educed at the trial or the sentencing phase.

And the reason is because it's our burden to show that the evidence we bring forth here, counsel was remiss in that finding, and is a reasonable probability it would have affected the verdict. The best way to show that is to have a witness, or a way to show it who says, yeah, it would have, or there is a reasonable chance it would have made a difference to me.

MR. JOHNSON: I have three objections, and the first and most important of which is that claim is nowhere in their petition. It's not here. I don't know where it came from. But there is a claim regarding Charlotte Davis, and I would ask Your Honor to look at it. It's pages 28 to 30. It's the claim

04:04:30PM 1 that a juror communicated ex parte with the court
04:04:33PM 2 personnel. It's about her contact with the bailiff and
04:04:36PM 3 with some court lady. There is --
04:04:40PM 4 MR. NEWMAN: That claim was --
04:04:41PM 5 MR. JOHNSON: Is also dismissed.
04:04:43PM 6 MR. NEWMAN: It was the State moved to
04:04:44PM 7 dismiss it as insufficiently specifically pled. We
04:04:48PM 8 tried to amend the petition to address that. The Court
04:04:51PM 9 nevertheless dismissed that claim. And if this case
04:04:57PM 10 goes up on appeal, we intend to argue that the claim
04:05:00PM 11 was properly dismissed, but for now, it has been
04:05:03PM 12 dismissed and we are not offering testimony on that
04:05:07PM 13 claim.
04:05:09PM 14 MR. JOHNSON: Where --
04:05:10PM 15 THE COURT: This is the only place that this
04:05:11PM 16 juror is mentioned?
04:05:14PM 17 MR. JOHNSON: Yes, Your Honor.
04:05:15PM 18 THE COURT: How do we ride that one into the
04:05:17PM 19 barn?
04:05:18PM 20 MR. ROSENBERG: Your Honor, we do it by
04:05:21PM 21 noting that the requirement that we must satisfy is the
04:05:24PM 22 evidence we educe the reasonably likely to or --
04:05:27PM 23 THE COURT: I'm with you on that, but I am
04:05:30PM 24 not cutting you off, but tell me how we get around our

04:05:33PM 25 specific pleading rule.

04:05:34PM 1 MR. ROSENBERG: Because the claim is alleged,
04:05:36PM 2 even though the witness will demonstrate it is not.
04:05:40PM 3 MR. JOHNSON: Your Honor -- what is the
04:05:42PM 4 claim?
04:05:43PM 5 MR. ROSENBERG: Clearly, if we allege the
04:05:44PM 6 claim, it is alleged, I submit. There's no requirement
04:05:47PM 7 that we state, because the legal requirement -- there's
04:05:49PM 8 no requirement we state the witnesses would be
04:05:52PM 9 pertinent to it.
04:05:53PM 10 THE COURT: Where is the claim?
04:05:55PM 11 MR. ROSENBERG: Because we state that was
04:05:58PM 12 ineffective assistance of counsel and cite to the
04:06:00PM 13 provision.
04:06:00PM 14 MR. NEWMAN: It's starting on page --
04:06:14PM 15 starting on page 50 and continuing through much of the
04:06:23PM 16 rest of the petition.
04:06:26PM 17 THE COURT: Well, I guess what I am saying

04:06:28PM 18 is, is there anything in this amended petition that
04:06:32PM 19 even -- that even says, even an unnamed juror would
04:06:39PM 20 have come to a different conclusion if they had had
04:06:42PM 21 this evidence?
04:06:43PM 22 MR. ROSENBERG: We say there is a reasonable
04:06:45PM 23 possibility that a person would have -- that it's -- we
04:06:48PM 24 state the standard. We don't identify. The petition
04:06:49PM 25 doesn't say that any particular named or unnamed juror

04:06:54PM 1 would have reached a different decision.
04:06:55PM 2 MR. JOHNSON: The petition doesn't even say
04:06:57PM 3 that a juror would have. I agree we can all disagree
04:07:00PM 4 and agree about -- about the specifics of the claim.
04:07:05PM 5 There's no claim here. It doesn't exist.
04:07:07PM 6 The first time we heard about it was in their
04:07:09PM 7 reply to our motion to exclude jurors is when that
04:07:12PM 8 argument suddenly popped up, which we received Tuesday?
04:07:19PM 9 MR. BLACKBURN: Monday or Tuesday, I believe.
04:07:22PM 10 MR. JOHNSON: That claim has never been

04:07:24PM 11 alleged. It has never been dismissed.

04:07:26PM 12 THE COURT: I will give you time to review

04:07:27PM 13 your petition, but I will tell you my gut at this point

04:07:30PM 14 is I am not going to allow it unless you can give me

04:07:33PM 15 something pretty big to hang my hat on.

04:07:38PM 16 MR. ROSENBERG: While we do so, and then we

04:07:40PM 17 will cite the provision that we think are the most

04:07:42PM 18 appropriate ones and Your Honor rule and at least we

04:07:45PM 19 can tell Ms. Davis one way or another whether to come.

04:07:47PM 20 THE COURT: Okay. All right.

04:10:46PM 21 (End of bench conference.)

22 APRIL STONECYPHER,

23 a witness, having been first duly sworn, was examined

24 and testified as follows:

25 DIRECT EXAMINATION

1 BY MR. NEWMAN:

04:11:11PM 2 Q. Good afternoon. Could you please provide your

04:11:14PM 3 full name for the Court?

04:11:15PM 4 A. April Stonecypher.

04:11:16PM 5 Q. And are you employed?

04:11:20PM 6 A. Sort of. I'm a student teacher. I'm a student.

04:11:28PM 7 Q. And where do you work as a student teacher?

04:11:31PM 8 A. Gadsden City School system.

04:11:32PM 9 Q. And were you working as a student teacher today

04:11:36PM 10 until coming here?

04:11:37PM 11 A. Yes.

04:11:38PM 12 Q. Could you tell us a little bit about what your

04:11:43PM 13 education is?

04:11:44PM 14 A. I actually have gone to Snead State Community

04:11:48PM 15 College, Gadsden State Community College, University of

04:11:51PM 16 West Alabama, and now I will be finishing in December

04:11:54PM 17 at Jacksonville State.

04:11:55PM 18 Q. Now, did you have some involvement in the trial of

04:12:00PM 19 Casey McWhorter here in Marshall County in 1994?

04:12:06PM 20 A. Yes.

04:12:07PM 21 Q. And in what way were you involved?

04:12:09PM 22 A. I was one of the jurors.

04:12:11PM 23 Q. And what was your name at that time?

04:12:18PM 24 A. At that time it was April King.

04:12:18PM 25 Q. Okay. Now, please just answer this question with

04:12:19PM 1 a yes or no. Did the jury have to deliberate twice in
04:12:25PM 2 the case: Once to decide if Casey was guilty, and then
04:12:28PM 3 again to recommend if the sentence should be life
04:12:32PM 4 imprisonment or death?
04:12:34PM 5 A. Yes.
04:12:38PM 6 Q. Now, during the deliberations on what the sentence
04:12:40PM 7 ought to be, was there something one juror said that
04:12:44PM 8 particularly stood out in your mind?
04:12:47PM 9 MR. BLACKBURN: Objection, Your Honor.
04:12:48PM 10 THE WITNESS: Yes.
04:12:49PM 11 MR. BLACKBURN: You specifically said that he
04:12:51PM 12 could ask the question that he asked of Ms. Burns and
04:12:53PM 13 that is not the question that you okayed earlier. He
04:12:57PM 14 specifically asked her just now what went on in jury
04:13:01PM 15 deliberations, which is what we --
04:13:04PM 16 MR. NEWMAN: I am trying to ask it in a
04:13:06PM 17 non-leading way. It is clear the witness will give the
04:13:08PM 18 same answer as if I had asked the particular question.
04:13:11PM 19 THE COURT: I just feel like if you ask the
04:13:14PM 20 same question, though, that you asked of the other that

04:13:17PM 21 they're going to let you lead if you just ask that one
04:13:20PM 22 question.
04:13:20PM 23 MS. REILAND: And, for the record, I don't
04:13:22PM 24 mind if you lead right for this question, in fact, I
04:13:26PM 25 would really like it.

04:13:26PM 1 THE COURT: We are going to let you lead on
04:13:28PM 2 this one.
04:13:30PM 3 BY MR. NEWMAN
04:13:33PM 4 Q. During the deliberations --
04:13:36PM 5 MR. BLACKBURN: Objection, Your Honor.
04:13:37PM 6 "During the deliberations." Can he please just ask the
04:13:40PM 7 question.
04:13:41PM 8 THE COURT: Let's let him ask the question
04:13:45PM 9 before you object.
04:13:46PM 10 BY MR. NEWMAN:
04:13:46PM 11 Q. During the deliberations and the sentencing phase
04:13:48PM 12 in the case, was -- well, withdraw that question.
04:13:53PM 13 Do you recall there being another juror named

04:13:57PM 14 Linda?

04:13:57PM 15 A. Yes.

04:13:58PM 16 Q. During the deliberations on the sentencing phase

04:14:02PM 17 was there something that Linda said about her father or

04:14:09PM 18 other relative being murdered?

04:14:11PM 19 A. Yes.

04:14:11PM 20 Q. What did she say?

04:14:13PM 21 MR. BLACKBURN: Objection, Your Honor. You

04:14:14PM 22 said he could ask that one question. It's asked and

04:14:17PM 23 answered.

04:14:17PM 24 THE COURT: Well, I think she can say. That

04:14:20PM 25 was the one question I wanted to know was what did the

04:14:22PM 1 juror say. So I will allow that. Go ahead. I will

04:14:27PM 2 admit it took him a while to get to that one question.

04:14:32PM 3 THE WITNESS: During the sentencing phase,

04:14:34PM 4 while the jurors were in the room, we had done a little

04:14:42PM 5 preliminary talk.

04:14:44PM 6 MR. BLACKBURN: Objection, Your Honor.

04:14:45PM 7 Unresponsive to the question.

04:14:47PM 8 THE COURT: It is non-responsive.

04:14:50PM 9 BY MR. NEWMAN

04:14:50PM 10 Q. I understand you're trying to give the background

04:14:52PM 11 of what was said, but --

04:14:53PM 12 THE COURT: Let me help just a little bit.

04:14:56PM 13 We really just want to know exactly what the juror told

04:14:59PM 14 about her father.

04:15:01PM 15 THE WITNESS: Linda was standing, and she

04:15:07PM 16 started telling a story about how years before -- I'm

04:15:14PM 17 not sure exactly how long before, but years before her

04:15:17PM 18 father had been murdered, and that, to my best

04:15:22PM 19 recollection, he wasn't -- I'm not sure if he went to

04:15:27PM 20 jail or he didn't go to jail, but she now had to walk

04:15:30PM 21 around in the same town where this man was that killed

04:15:33PM 22 her father. And she was crying.

04:15:36PM 23 MR. BLACKBURN: Objection, Your Honor. It is

04:15:38PM 24 going beyond the scope of your question at this point.

04:15:40PM 25 THE COURT: It probably is, but I do think

04:15:42PM 1 it's relevant for that purpose.
04:15:44PM 2 BY MR. NEWMAN
04:15:44PM 3 Q. And did she say anything else on this very same
04:15:47PM 4 subject?
04:15:49PM 5 A. She had made a comment that, basically, you just
04:15:54PM 6 don't know how it feels to have to walk around and be
04:15:59PM 7 around this person that has done this.
04:16:02PM 8 Q. Referring to whom?
04:16:04PM 9 A. Referring to the person that had killed her
04:16:06PM 10 father. And it just changed everything.
04:16:10PM 11 MR. NEWMAN: Thank you very much. Nothing
04:16:13PM 12 further.
04:16:13PM 13 MR. BLACKBURN: Move to strike the statement
04:16:16PM 14 that it changed everything. That's speculation.
04:16:19PM 15 MR. NEWMAN: I don't believe the witness was
04:16:21PM 16 talking about changed the jury deliberations. I
04:16:23PM 17 believe she was talking about Ms. Burns said it changed
04:16:27PM 18 everything in her life.
04:16:28PM 19 THE COURT: That was the way I took it.
04:16:30PM 20 MR. BLACKBURN: Okay.
04:16:30PM 21 THE COURT: I will not consider it that it
04:16:33PM 22 changed the jury's opinion of her.
04:16:36PM 23 MR. NEWMAN: Okay. Nothing further.

friends in mitigation?

A. I don't recall ever having a conversation with Mr. Mitchell about Casey's friends about them testifying. Most of his friends were charged with murder.

MS. REILAND: Your Honor, may have just a moment?

THE COURT: Yes.

MS. REILAND: I believe that's all I have.

THE COURT: Any further redirect?

MR. ROSENBERG: Yes, Your Honor. Briefly.

REDIRECT EXAMINATION

BY MR. ROSENBERG:

Q. Sir, do you recall testifying on cross-examination that the theory of the strategy in the penalty phase was that Casey was a nice kid who got mixed up with the wrong crowd?

A. In general terms, yes, sir.

Q. I'm sorry?

A. In general terms, yes, sir.

Q. And so it would be important in that regard to show his background as a nice kid; is that right?

11:35:54AM 1 A. Exactly, yes, sir.
11:35:55AM 2 Q. You couldn't rely on the fact that you thought his
11:35:57AM 3 appearance was good, right?
11:35:58AM 4 A. We wanted more than just his appearance and his
11:36:01AM 5 age, if we could get it.
11:36:02AM 6 Q. Sure. Okay. So did you go back and talk to, for
11:36:08AM 7 example, Mr. Baker, his junior high basketball coach?
11:36:13AM 8 Mr. Baker?
11:36:14AM 9 A. No.
11:36:14AM 10 Q. Did you go back and talk to any of the homeroom
11:36:16AM 11 teachers he had who would have talked about Casey?
11:36:19AM 12 A. Sir, I don't know how his homeroom teachers would
11:36:22AM 13 have anything to do with this, but, no, I did not speak
11:36:24AM 14 to them.
11:36:25AM 15 Q. So, as you sit here today, circumstances --
11:36:26AM 16 withdrawn.
11:36:27AM 17 At the time, it didn't occur to you that his
11:36:30AM 18 homeroom teachers in his school year would have had
11:36:34AM 19 something to say that he had been a good guy in the
11:36:36AM 20 past; is that right?

11:36:37AM 21 A. I saw no reason to believe that his homeroom
11:36:39AM 22 teachers would have contributed in any way pro or con
11:36:43AM 23 to the commission of capital murder.
11:36:45AM 24 Q. Okay. And did you see any reason at all that any
11:36:49AM 25 of the friends that he had grown up with, people he had

11:36:52AM 1 played on the basketball team, would have had anything
11:36:54AM 2 to say about whether he was a good guy or bad guy, that
11:36:56AM 3 that would have any relevant?
11:36:57AM 4 A. Counsel, I think that's stretching it. No, I did
11:37:00AM 5 not.
11:37:01AM 6 Q. Do you recall the witnesses who were called?
11:37:03AM 7 A. At the penalty phase? You would have to tell me
11:37:08AM 8 their names.
11:37:09AM 9 Q. Okay. Do you recall Mr. -- give me one moment do
11:37:41AM 10 you recall that you called Mr. Van Reid to the stand?
11:37:44AM 11 A. Yes.
11:37:44AM 12 Q. And do you recall that he testified on behalf of
11:37:46AM 13 Casey?

11:37:47AM 14 A. Yes.
11:37:47AM 15 Q. And do you recall that he testified -- how he knew
11:37:50AM 16 Casey?
11:37:51AM 17 A. I don't recall. You would have to tell me. He
11:37:55AM 18 testified, but I can't recall the details of his
11:37:58AM 19 testimony.
11:37:58AM 20 Q. Understandable, sir. Do you recall that he
11:38:00AM 21 testified that a few years ago -- and this is Page 1777
11:38:05AM 22 in the trial transcript -- "a few years ago Casey was
11:38:09AM 23 one of my busboys, worked on weekends?" Do you recall
11:38:13AM 24 he testified to that?
11:38:14AM 25 A. At Reid's Restaurant, yes.

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11:38:15AM 1 Q. And do you recall that he testified, "I guess,
11:38:17AM 2 he -- Casey -- was there a month or so, I don't really
11:38:20AM 3 don't remember, to be honest. I have a big turnover."
11:38:23AM 4 A. That -- if that's what the transcript shows, yes,
11:38:26AM 5 sir.
11:38:26AM 6 Q. And do you recall he testified he did a -- he was

11:38:29AM 7 a satisfactory employee and he did a good job and he
11:38:32AM 8 was a dependable worker?
11:38:34AM 9 A. Yes, sir.
11:38:34AM 10 Q. And is it your testimony that it was here that --
11:38:37AM 11 it was that testimony by Mr. Reid, for example, that
11:38:40AM 12 intended to show that Casey was a good guy?
11:38:43AM 13 A. It was one of four, yes, sir.
11:38:44AM 14 Q. And you don't think that his homeroom teachers,
11:38:48AM 15 his science teachers, his friends from childhood
11:38:51AM 16 wouldn't have been able to testify more forcefully that
11:38:54AM 17 he was a good guy?
11:38:55AM 18 A. Mr. Reid was closer to the time of when Casey was
11:38:58AM 19 convicted. Those were his earlier years. This was a
11:39:00AM 20 man who knew him closer to the age in which he was
11:39:04AM 21 accused of committing this crime.
11:39:07AM 22 Q. Well, he did testify, sir -- I can show it if you
11:39:09AM 23 would like -- that Casey worked there a few years ago.
11:39:13AM 24 He worked on weekends. He was there a month or so.
11:39:16AM 25 A. Yes, sir.

11:39:16AM 1 Q. So is it your testimony that someone who worked as
11:39:19AM 2 a busboy at a restaurant a few years ago, worked on
11:39:22AM 3 weekends for months, that that Mr. Reid knew Casey
11:39:29AM 4 better than any of his friends were?
11:39:30AM 5 A. Counselor, I presented the best testimony I could.
11:39:34AM 6 If you don't like it, I'm sorry, but that's the
11:39:37AM 7 testimony, counselor.
11:39:38AM 8 Q. Sir, you testified, with respect to the fee
11:39:42AM 9 declarations, Exhibit 26, that you would have submitted
11:39:46AM 10 a itemization with that; is that right?
11:39:52AM 11 A. There was a second page, yes, sir.
11:39:54AM 12 Q. Do you know what happened to that second page?
11:39:57AM 13 A. Well, of course not. I turned it into the state
11:39:59AM 14 of Alabama.
11:40:01AM 15 Q. And you didn't keep a copy in your offices?
11:40:04AM 16 A. I may have. I haven't looked to see.
11:40:06AM 17 Q. Let me ask you this, sir: Did there come a time
11:40:21AM 18 that you turned over your entire file in the case to
11:40:24AM 19 Mr. Randy Susskind?
11:40:26AM 20 A. I turned over my entire file to someone who
11:40:29AM 21 represented that he was with your -- somehow associated
11:40:32AM 22 with your firm, that you were handling the appeal of
11:40:35AM 23 his capital murder conviction.

11:40:36AM 24 Q. But -- and what you turned over -- and was that

11:40:39AM 25 someone associated with Equal Justice Institute? Does

11:40:42AM 1 that sound right?

11:40:43AM 2 A. Similar. It may have been what he told me, yes,

11:40:45AM 3 sir.

11:40:45AM 4 Q. And I mentioned the name Randy Susskind?

11:40:49AM 5 A. Yes. I remember Randy Susskind.

11:40:52AM 6 Q. And do you believe you sent his material to him?

11:40:54AM 7 A. My file to him, yes, sir.

11:40:56AM 8 Q. So all of your files -- you sent to him?

11:40:59AM 9 A. Yes. Everything that I had.

11:41:01AM 10 Q. Now, you testified that Mr. McWhorter -- you were

11:41:15AM 11 concerned about Mr. McWhorter being very interested in

11:41:17AM 12 the video; is that right?

11:41:18AM 13 A. I don't know if he was interested, just trying --

11:41:22AM 14 I don't know what. I didn't want him to lean forward,

11:41:24AM 15 so I told him to sit back.

11:41:25AM 16 Q. So you didn't think that the jury would understand

11:41:28AM 17 that he wanted to see a crucial piece of evidence
11:41:30AM 18 against him?
11:41:31AM 19 A. I did not want the jury seeing him leaning
11:41:34AM 20 forward, and them making the presumption that he was
11:41:37AM 21 anxious to see that crime scene video. I didn't think
11:41:40AM 22 that would be in his best interest.
11:41:41AM 23 Q. You didn't think it unusual, did you, that
11:41:47AM 24 Mr. McWhorter would have wanted to see clearly the
11:41:48AM 25 crime scene video?

11:41:49AM 1 A. I don't know why. I just didn't want him -- the
11:41:52AM 2 jury to think that he was anxious to see that.
11:41:57AM 3 Q. You testified, sir, you usually allotted one hour
11:42:01AM 4 for interviews. Do you recall that testimony?
11:42:02AM 5 A. Anytime we make an appointment, it's for one hour
11:42:05AM 6 minimum.
11:42:06AM 7 Q. Do you take notes of the interviews?
11:42:07AM 8 A. Yes.
11:42:08AM 9 Q. And so if there were notes and would you have kept

11:42:10AM 10 those notes of the interviews?

11:42:11AM 11 A. They would have been in my file that I turned over

11:42:14AM 12 to Mr. Susskind.

11:42:15AM 13 Q. If there were any such notes they would have been

11:42:18AM 14 turned over to Mr. Susskind?

11:42:20AM 15 A. Yes.

11:42:20AM 16 Q. And if there weren't any such notes, what

11:42:23AM 17 inference is there to be drawn there?

11:42:24AM 18 A. That I didn't take any notes.

11:42:26AM 19 Q. You didn't destroy it?

11:42:27AM 20 A. No.

11:42:27AM 21 Q. Now, you testified, sir, that the psycho

11:42:41AM 22 examination, the psycho neuro examination was intended

11:42:44AM 23 to do two things: To determine whether Casey was able

11:42:47AM 24 to assist as counsel, and whether he knew right from

11:42:52AM 25 wrong?

11:42:52AM 1 A. Yes.

11:42:52AM 2 Q. Is that right? Those are the only questions that

11:42:55AM 3 that psycho neuro examination was intended to resolve;
11:42:57AM 4 is that right?
11:42:57AM 5 A. Well, of course, I don't know the questions they
11:43:00AM 6 asked, but under Alabama law, the two things that have
11:43:02AM 7 to be determined is whether or not he is able to assist
11:43:07AM 8 his attorneys in the preparation of his case and his
11:43:11AM 9 defense, and at the time the alleged crime was
11:43:14AM 10 committed was he of competent sound mind to appreciate
11:43:17AM 11 the significance of his alleged conduct at that time.
11:43:21AM 12 Q. So your interest in that exam -- first of all, had
11:43:25AM 13 you commissioned the exam or Mr. Mitchell?
11:43:27AM 14 A. I think Tom and I talked about it. I think Tom
11:43:30AM 15 was the one who requested the exam. And Judge
11:43:36AM 16 Gullahorn granted that and ordered it performed.
11:43:37AM 17 Q. And the purpose of the exam is it -- correct --
11:43:39AM 18 the purpose of the exam, the reason that it was
11:43:41AM 19 commissioned by defense counsel was to find out the
11:43:44AM 20 answers to those two questions?
11:43:45AM 21 A. Well, the reason it was commissioned was,
11:43:48AM 22 hopefully, it would turn up something that we could use
11:43:50AM 23 in his defense. But, of course, we knew that those two
11:43:53AM 24 items were going to have to be answered because under
11:43:56AM 25 Alabama law that's the two items that have to be

11:43:59AM 1 answered.
11:44:00AM 2 Q. Now, you testified -- okay. You testified that
11:44:05AM 3 you were unaware that Casey had huffed gasoline?
11:44:07AM 4 A. I had no prior knowledge of that whatsoever.
11:44:12AM 5 Q. Let's take a look at, again, Exhibit 7, sir.
11:44:17AM 6 A. Yes.
11:44:18AM 7 Q. And I refer to Question 32. "Question: Has
11:44:53AM 8 client suffered mental illness or disorder that has
11:44:55AM 9 been, A, recognized by others? If so, list diagnoses
11:44:59AM 10 and describe symptoms." And the answer here is, "had a
11:45:02AM 11 gas sniffing habit and freon sniffing habit." Does
11:45:06AM 12 that refresh your recollection, sir?
11:45:08AM 13 A. I'm sure I read that, but I don't even recall even
11:45:12AM 14 -- even seeing that question.
11:45:14AM 15 Q. Do you recall, then, sir, whether you made further
11:45:19AM 16 inquiry into the nature of that habit?
11:45:21AM 17 A. None.
11:45:21AM 18 Q. Did you try to find out how much gas Casey had
11:45:25AM 19 sniffed?

11:45:25AM 20 A. No, sir.

11:45:25AM 21 Q. Did you try to find out when he had sniffed it?

11:45:28AM 22 A. No, sir.

11:45:28AM 23 Q. Did you try to find out how often -- excuse me --

11:45:32AM 24 withdrawn.

11:45:33AM 25 Did you try to find out what kind of gas he

11:45:35AM 1 sniffed?

11:45:35AM 2 A. Counselor, when I told you I had no knowledge of

11:45:38AM 3 this, I didn't do anything regarding that.

11:45:40AM 4 Q. So you did have knowledge of it, didn't you?

11:45:43AM 5 A. I'm sure -- I read this.

11:45:46AM 6 Q. Yes.

11:45:46AM 7 A. But that did not mean anything to me. I don't

11:45:49AM 8 recall doing anything pertaining to that.

11:45:51AM 9 Q. Now, you testified that most of Casey's friends

11:45:59AM 10 were charged with murder?

11:46:03AM 11 A. Except for Marcus Carter.

11:46:04AM 12 Q. Of course, sir, did you -- well, withdrawn. Let's

11:46:11AM 13 move on for one moment, sir.

11:46:14AM 14 Did you ever try to talk with any of Casey's

11:46:26AM 15 friends from before -- withdrawn. Let me go back.

11:46:32AM 16 You testified, sir, that your theory of the case

11:46:35AM 17 of the penalty phase was that he had been a good guy

11:46:39AM 18 who had gotten mixed up with the wrong crowd. Now,

11:46:43AM 19 sir, the friends you were just referring to who were

11:46:45AM 20 murdered, those were part of the wrong crowd, correct?

11:46:48AM 21 A. Yes.

11:46:49AM 22 Q. And you never went back to the good crowd of kids

11:46:51AM 23 that he had hung around with before; is that right?

11:46:54AM 24 A. I did not go back to his earlier years, no, sir.

11:46:56AM 25 Q. Now, you testified, finally, sir, in answer to the

11:47:01AM 1 questions from the State, that you felt that Tommy's

11:47:09AM 2 drinking -- Tommy McWhorter, his father, you were

11:47:13AM 3 aware, but thought it was not relevant?

11:47:15AM 4 A. That's correct.

11:47:15AM 5 Q. And also that his abusive behavior, you are aware

11:47:19AM 6 of that, Mr. Tommy McWhorter's abusive behavior, you
11:47:24AM 7 thought it was irrelevant?
11:47:25AM 8 A. To his wife, primarily, yes.
11:47:27AM 9 Q. You also testified about his grandparents --
11:47:29AM 10 maternal grandfather's alcoholism, and you felt that
11:47:32AM 11 wasn't relevant either, correct?
11:47:34AM 12 A. That's correct.
11:47:34AM 13 Q. Did you ever talk to a mitigation specialist in a
11:47:38AM 14 capital case to talk about possible mitigating factors
11:47:43AM 15 and how that might have been --
11:47:45AM 16 A. Counsel, in Alabama in 1994, I am not sure I knew
11:47:48AM 17 what a mitigation specialist was.
11:47:52AM 18 MR. ROSENBERG: Give me just one moment, Your
11:47:53AM 19 Honor.
11:48:08AM 20 Q. One other point. You testified in
11:48:13AM 21 cross-examination that one of the things, strikes
11:48:15AM 22 against you was that the co-defendants -- let me find
11:48:20AM 23 it. The two people had already pled guilty to the
11:48:26AM 24 crime; is that correct?
11:48:28AM 25 A. The strike against Casey was the two had already

11:48:32AM 1 pled guilty.
11:48:32AM 2 Q. Right. Isn't it a fact, sir, that neither of the
11:48:38AM 3 co-defendants had pled guilty by the time of the trial?
11:48:40AM 4 A. I don't think that's correct.
11:48:41AM 5 Q. You believe they had?
11:48:43AM 6 A. I believe -- I'm almost certain that they had been
11:48:46AM 7 offered a plea bargain and accepted the plea bargain.
11:48:49AM 8 And I think they had already pled guilty or were
11:48:52AM 9 scheduled to plead guilty. But they had already
11:48:54AM 10 accepted their punishment for their participation.
11:48:57AM 11 Q. And that wasn't a strike against Casey before the
11:49:02AM 12 jury, was it? The jury wouldn't have known about that?
11:49:03AM 13 A. No.
11:49:04AM 14 Q. The jury would have been told about their
11:49:06AM 15 confession?
11:49:07AM 16 A. I don't know if the jury -- the names certainly
11:49:10AM 17 would have come up because they were co-defendants of
11:49:13AM 18 this crime.
11:49:15AM 19 Q. So it's your understanding that their -- even if
11:49:17AM 20 they did not testify, their guilty pleas would have
11:49:21AM 21 been entered against Casey?
11:49:22AM 22 A. I don't think their guilty pleas would have been

11:49:24AM 23 entered, but I could have -- I would have had the
11:49:26AM 24 opportunity to have asked the State had they made any
11:49:31AM 25 arrangements or given them any preferential treatment

11:49:35AM 1 in order for them to mitigate their punishment, and
11:49:38AM 2 they asked them to testify against Casey.
11:49:40AM 3 Q. Uh-huh.
11:49:40AM 4 A. All of that could have been used and had to be
11:49:43AM 5 considered.
11:49:44AM 6 Q. You testified that you tried to talk with certain
11:49:57AM 7 people who were represented by counsel. I believe you
11:49:59AM 8 testified to that. Do you recall that?
11:50:00AM 9 A. Yes. The two young men. Their counsel refused to
11:50:04AM 10 let me talk to them.
11:50:05AM 11 Q. And didn't they refuse to let you talk to them
11:50:07AM 12 because their cases were still pending?
11:50:09AM 13 A. All of the cases would have went -- when I was
11:50:13AM 14 first appointed all three cases were still pending.
11:50:16AM 15 Q. Did there come a time while you were representing

11:50:18AM 16 Casey that their cases were not pending?

11:50:21AM 17 A. I'm certain it did, but I can't tell you when.

11:50:24AM 18 MR. ROSENBERG: Thank you. I have nothing

11:50:26AM 19 further.

11:50:27AM 20 MS. REILAND: We don't have any more

11:50:29AM 21 questions, Your Honor.

11:50:29AM 22 THE COURT: Good. May Mr. Berry be released?

11:50:33AM 23 MR. ROSENBERG: Thank you, Your Honor.

11:50:34AM 24 THE COURT: This is an excellent place to

11:50:37AM 25 break for lunch I would say, so let's be back at 1:15.

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11:50:41AM 1 (Lunch recess.)

12:57:36PM 2 THE COURT: Am I right you may want to submit

12:57:39PM 3 briefs based on testimony?

12:57:46PM 4 MR. BIGGE: We haven't conferred privately

12:57:49PM 5 about a schedule, but should we do that or go ahead and

12:57:53PM 6 talk to you about it now?

12:57:54PM 7 THE COURT: Either way.

12:57:59PM 8 MR. BLACKBURN: We can talk about it on the