No. 20-708

In the

Supreme Court of the United States

JOE NATHAN JAMES,
Petitioner,
v.
STATE OF ALABAMA,
Respondent.

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

BRIEF IN OPPOSITION

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Capital Case

QUESTION PRESENTED FOR REVIEW (RESTATED)

At James' trial, James sabotaged his own case from the beginning by refusing a plea offer that would have resulted in a sentence of life without parole. Further compromising counsel, James issued repeated, clear, and adamant instructions to counsel, directing them not to involve James' family and not to present any mitigating witnesses at all. These instructions were confirmed by a colloquy on the record in which James agreed that it was his desire to present no witnesses in mitigation. The questions presented are:

I. Should this Court grant certiorari review for James' claim that the Eleventh Circuit erred by relying on James' explicit instructions to his counsel that they should not investigate or present mitigation evidence?

II. Should this Court grant certiorari review for James' claim, which was abandoned on habeas appeal, that possible mental illness possibly impacted his ability to competently waive the presentation of mitigation evidence?

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STATEMENT OF THE CASE

Petitioner Joe Nathan James was convicted of the murder of Faith Hall, an ex-girlfriend he had previously stalked and abused. For his crime, James was sentenced to death.

A. Statement of the Facts

1. James stalked and murdered Faith Hall.

Joe Nathan James murdered Faith Hall in Jefferson County, Alabama, on August 15, 1994. James did not dispute that he caused Hall's death. In the ACCA's most recent reasoned opinion, the court described the facts as follows:

> The facts surrounding Hall's murder are essential to our review of James's claims of ineffective assistance of counsel. The State's evidence at James's 1999 trial tended to show that on August 15, 1992, James shot and killed Hall. Tammy Sneed testified that she and Hall had been out shopping and were returning to Sneed's apartment on August 15, 1992, when they noticed that James, whom Hall had dated, was following them in a vehicle. They parked at the apartment complex and Hall ran into Sneed's apartment. Bridget Gregory, a neighbor of Sneed's, testified that she saw them arrive and that she, Sneed, and Hall went to Sneed's apartment to talk about what to do about James. James had been following Hall since the two had stopped dating. After some discussion Gregory decided to go to her apartment and telephone the police. Sneed did not have a telephone in her apartment. Gregory said that when she opened the door to Sneed's apartment James pushed past her and entered the apartment armed with a pistol. She said that James confronted Hall about the man she had been out with the night before. Hall begged James to put the gun down because there were children in the apartment. Gregory testified that James pointed the gun at Hall, that he shot her, and that when Hall fell to the floor James shot her again.

> James then ran out the back door of the apartment. Sneed also testified that she witnessed James shoot Hall.

James v. State, 61 So. 3d 357, 361–62 (Ala. Crim. App. 2010).

Overwhelming evidence supported James' guilt. Hall's mother testified that James and her daughter had had a violent relationship, and that after they broke up James stalked and harassed Hall, often showing up at their home against her wishes and having to be "run [] off." (Vol. 2, R. 147-148; Vol. 3, R. 75-76.) Hall's ex-husband testified that James, fearful of their relationship, had threatened to kill them both. (Vol. 3, R. 25-26.)

Hall was killed at the apartment of her friend, Tammy Sneed. The day before the murder, a neighbor, Bridget Gregory, saw James sitting outside near Sneed's apartment while holding a gun, and testified that he told her he was waiting for a friend. (Vol. 3, R. 39-40.) Gregory further testified that that evening she saw Sneed and Hall running to Sneed's apartment. When Gregory went to Sneed's apartment to ask what the trouble was, Hall told Gregory that she feared James might kill her, and asked Gregory to call the police. (Vol. 3, R. 43-45.) As Gregory left to call the police, James pushed past her while holding the gun, and proceeded to push his way into the apartment before Sneed and Hall could shut the door. Moments later, Gregory heard several gunshots, and returned to the front door as James ran out the back. James ran to his car, which he had left running the entire time, and drove off. Gregory asked a group of onlookers to call the police. (Vol. 3, R. 47-51.)

Sneed stated that she and Hall had run to the apartment because they saw James' car parked nearby. (Vol. 3, R. 122-23). The rest of her testimony corroborated Gregory's version of events. (Vol. 3, R. 122-129). Once James was in the apartment, she and Hall asked him to put the gun away, and he complied by tucking into his belt. (Vol. 3, R. 127-128.) When James demanded Hall tell him "who's that nigger she had been fucking," Hall tried to run to the bathroom. (Vol. 3. 127.) James followed her; Sneed heard gunshots and went towards her front door, where Gregory had returned. (Vol. 3, R. 129.)

Police Officer Lawrence Billups testified that he passed petitioner driving within several blocks of the scene as he responded to the emergency call. (Vol. 3, R. 210-211.) The medical examiner testified that Hall died from multiple gunshot wounds after medical treatment failed to save her. The autopsy revealed that Hall had been shot in the biceps and chest, in the abdomen, and in her head. (Vol. 2, R. 153-162.)

2. James expressly waived his right to present mitigating evidence at the penalty phase of his retrial.

James' lead counsel at trial was Virginia Vinson, an experienced defense attorney who had "represented defendants in over 30 capital trials." *James v. State*, 61 So.3d 357 at 364-365. Second chair counsel, Gordon Warren, was a relatively new attorney, but had previously spent his career as a naval aviator and aircraft

accident investigator and was “very comfortable ... conducting investigations – and questioning people.” (Vol. 22, C. 138-139.)

At the beginning of the penalty phase, before the jury entered the courtroom, the following colloquy occurred:

> MS. VINSON: And also, Your Honor, just to put on the record, we have talked with Mr. James yesterday and Mr. Warren has talked with him this morning, we have talked with his mother and sister who are here, and it has been our decision not to present any witnesses during the sentencing.
>
> MR. ANDERTON: Does he agree to that?
>
> THE COURT: Is that correct, Mr. James?
>
> DEFENDANT: (Nods.)
>
> MS. VINSON: Mr. James, agrees with that.

(Vol. 4, Tab R-16, R. 9.) Faced with James’ express waiver of the right to present mitigating evidence, trial counsel fell back on an argument that the jury should spare James’ life because of his emotional immaturity, that the emotional turbulence of the events leading up to the crime made it a “crime of passion,” and urged the jury to spare James’ life because his crime was not one of “those crimes that are truly capital in nature.” (Vol. 4, Tab R-20, C. 25-31.)

3. James' lawyers testified at a state post-conviction proceeding that he wanted to stay on death row and expressly waived mitigating evidence

During the Rule 32 evidentiary hearing, James' counsel provided evidence by affidavit and live testimony regarding the circumstances of James' waiver. Warren explained that James told trial counsel on multiple occasions that he did want to present mitigation evidence through his family. (Vol. 22, R32 R. 181.) Mr. Warren testified that James adamantly instructed him not to involve his family in the trial. *Id.* at 163. As Judge Vinson explained, James went further, instructing counsel to call no witnesses at all in the penalty phase. (Vol. 23, R32 R. 263.) Warren also testified regarding James' reasons for refusing to cooperate or allow mitigation to be presented:

> I talked to [James] for a long time and the thing he kept coming back to was that he had it pretty good where he was on death row. He said he had his own television set that he could control and watch what he wanted. He didn't have to deal with twenty other guys voting on whether to watch football or baseball. He had plenty of reading material. He didn't have to watch his back and worry about someone sneaking up behind him and clubbing him or stabbing him because he was handled one on one exclusively on death row. ... He did not want to move in with the general population.

Id. at 374-375. Warren testified that he believed that James "was trying to sabotage his case." *Id.* Warren also testified that James' disinclination to move to general population was the major factor in his rejection of a plea agreement that would have led to a life sentence. (Vol. 1, R. 15; Vol. 22, R32 R. 184-187.) Warren recalled that:

> [W]hen he first told me that he did not want to take the plea agreement that had been arranged for him. This is one of the things that I have a vivid recollection of because I was shocked but I was also disappointed because I knew that he was – to put it in my verbiage, he was jumping out of the frying pan into the fire. ... And I talked to him for several minutes. ... And it just was one of the situations where I tried. I think I tried as hard as I could to at least let him think about it awhile and was he sure he was making the right decision.
>
> And that is when he told me – and I am getting to the answer. That is when he told me. And during that conversation he said, "Well, on death row I am treated better, I get my own TV, I get my own room, and he doesn't have to deal with the other people in the general population."

Id. Though James was present during the Rule 32 evidentiary hearing, he failed to offer any testimony or evidence to dispute trial counsel's explanation of the trial and James' role in hampering trial counsel's representation.

B. Proceedings and Disposition Below

On August 29, 1996, Joe Nathan James was convicted of capital murder pursuant to Ala. Code § 13A-5-40(a)(4) (1975). Following a sentencing hearing, the jury recommended, by a vote of 10-2, a sentence of death. The trial court sentenced James to death on November 4, 1996. On June, 19, 1998, the Alabama Court of Criminal Appeals (hereinafter "ACCA") reversed the conviction due to error in admitting inadmissible hearsay evidence, and ordered the cause remanded for a new trial. *James v. State*, 723 So.2d 776, 786 (Ala. Crim. App. 1998). The Alabama Supreme Court denied the State's petition for the writ of certiorari. *James v. State*, 723 So.2d 786 (Ala. 1998).

Upon retrial, James was again convicted of capital murder on June 16, 1999, pursuant to Ala. Code § 13A-5-40(a)(4) (1975). The jury voted unanimously to recommend the death penalty on June 17, 1999. The trial court, after complying with Ala. Code § 13A-5-47 (1975), sentenced James to death on July 9, 1999.

The ACCA affirmed James' conviction and sentence on April 28, 2000. *James v. State*, 788 So.2d 185 (Ala. Crim. App. 2000). The Alabama Supreme Court affirmed that decision on March 15, 1991. The United States Supreme Court denied James' petition for certiorari on May 21, 2001. *James v. Alabama*, 532 U.S. 1040 (2001).

James filed a Rule 32 petition in the Jefferson County Circuit Court on May 7, 2002. This was followed by a first amended petition on September 16, 2002, and a second amended petition on November 8, 2002. On June 16, 2003, the State filed its answer to the second amended petition, along with motions for the dismissal of several of James's claims. The Rule 32 court summarily dismissed a number of petitioner's claims on October 9, 2003.

On June 8, 2004 an evidentiary hearing was held on the remaining claims. The Rule 32 court dismissed all claims of the petitioner in a lengthy order, adopting the proposed order submitted by the State on October 28, 2004. After a reversal and remand for reasons not at issue in the present matter, the Court of Criminal Appeals ultimately affirmed the denial in *James v. State*, 61 So.3d 357, (Ala. Crim. App. 2010).

On October 29, 2010, James filed his Petition for Writ of Habeas Corpus in the District Court for the Northern District of Alabama. After briefing by the parties, the District Court denied relief in its final order issued on September 30, 3014. *James v. Culliver*, No. CV-10-S-2929-S, 2014 WL 4926178 (N.D. Ala. Sept. 30, 2014). The Eleventh Circuit affirmed the denial of relief. *James v. Warden*, 957 F.3d 1184, 1191–92 (11th Cir. 2020)

James' petition to this Court followed.

REASONS FOR DENYING THE WRIT

James' petition fails to meet this Court's requirement that there be "compelling reasons" for granting certiorari. Sup. Ct. R. 10. James' petition is splitless, heavily fact-bound, contains an abandoned claim, and fails to show that any of the grounds for granting certiorari review set out in Rule 10 exist. His claims were rejected by the Alabama Court of Criminal Appeals after a thorough consideration of the facts and circumstances of this case, and James has shown no conflict between that decision and a decision of any state court of last resort, any decision of a United States Court of Appeals, or any decision of this Court. Sup. Ct. R. 10. For the reasons set forth below, James' petition is without merit and this Court should deny the petition. *See* Sup. Ct. R. 10 ("A petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

I. The ACCA and Eleventh Circuit Reasonably Relied on the Fact that James Explicitly Directed Trial Counsel to Refrain from Investigating or Presenting Mitigating Evidence.

James argument for granting certiorari review does not present any circuit split or any conflict between the decision of the Eleventh Circuit and the decisions of this Court. Instead, James simply asks this Court to engage in fact-bound error correction of the denial of relief on his *Strickland* claims. Even then, James does not present this Court with any genuine error by the lower courts. James does not contest the fact that he instructed his trial counsel "not to present any evidence in the mitigation phase... ." (James' Petition, p. 9.) He also acknowledges that, under *Strickland*, the petitioner "bears the burden of proving his ineffective assistance claim." *Id*. at 8. Nonetheless, he attempts to shrug off his burden of proof by faulting the Eleventh Circuit for not "actually showing that there was no possibility that James could have changed his mind ... ." *Id.* at 7. As explained below, James entirely failed to carry his burden of showing either that trial counsel's investigation was deficient or that he would have allowed the presentation of mitigation evidence under any circumstances, and the courts below correctly denied relief based on those failures.

A. The ACCA Reasonably Determined that Trial Counsel's Investigation and Performance at the Penalty Phase was not Deficient.

Trial counsel were faced with a client who was so determined not to receive a life sentence that he refused a plea offer that would have resulted in a life sentence and instructed counsel not to present mitigation witnesses. As the Eleventh Circuit recognized, and as James concedes, James bore the burden to: "show a reasonable probability that, if he had been more fully advised about the mitigating evidence and its significance, he would have permitted trial counsel to present the evidence at sentencing." *James v. Warden*, 957 F.3d at 1191–92; *Pope v. Sec'y, Florida Dep't of Corr.*, 752 F.3d 1254, 1266 (11th Cir. 2014); (James' Petition, p. 8.) As did the ACCA, the Eleventh Circuit recognized that James entirely failed to meet this burden, despite having the opportunity to present evidence at an evidentiary hearing in state court:

> James has not shown that he would have changed his mind if his attorneys had had more mitigation evidence to offer. Indeed, no evidence in the record shows that he would have done so. He himself has never made such a statement—he did not testify on his own behalf during the sentencing proceeding, and when the trial judge asked whether he agreed with the decision not to present any witnesses in mitigation, he simply nodded his agreement. Nor did he testify during the state collateral proceedings, either at the evidentiary hearing (where he appeared by telephone) or by deposition or affidavit.

James, 957 F.3d at 1192–93. Despite that failure, James inexplicably flips the burden of proof on its head, faulting the Eleventh Circuit for not "showing" that he *wouldn't*

have changed his mind and making the bare claim that "there was mitigation evidence that could potentially have changed his mind... ." (James' Petition, pp. 7, 10.) James further faults the court for "read[ing] into James' motives [for directing counsel not to investigate or present mitigation] beyond what the evidence shows... ." *Id*. at 10. James' acknowledgment and subsequent repudiation of his own burden of proof is befuddling, but there is no need to parse out his current reasoning when the record of his instructions to trial counsel and his motives for giving those instructions are as plain as they are here.

While the Eleventh Circuit elected not to consider the deficient performance prong[1], the record makes it clear that trial counsel had an adequate reason for limiting their investigation: their client's explicit instructions. In evaluating the deficient performance prong, the ACCA correctly applied the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984). James' lead counsel at trial was Virginia Vinson, an experienced defense attorney who had "represented defendants in over 30 capital trials." *James v. State*, 61 So.3d 357 at 364-365. The ACCA recognized that: "When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger [than the ordinary

[1] The Eleventh Circuit elected not to do so because "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice." *James v. Warden*, 957 F.3d at 1191; *quoting Strickland*, 466 U.S. at 697.

presumption of reasonableness that is owed when applying *Strickland*].” *Id.* at 365 (citing *Chandler v. United States*, 218 F.3d 1305, 1316 (11th Cir. 2000)).

After applying the correct standard and the proper level of deference, the ACCA reasonably concluded that James had failed to demonstrate deficient performance under *Strickland*, *i.e.* that no reasonable attorney would have acted as trial counsel did. The ACCA addressed trial counsel’s mitigation investigation as follows:

> Vinson testified that she spoke to James’s grandmother, his mother, and one of his sisters, and encouraged them to testify on James's behalf in the penalty phase. James, she said, got angry when he found out that she had spoken to his family and instructed her not to call witnesses on his behalf at his sentencing hearing. Vinson stated in her affidavit that she spoke to James's mother several months before trial and that she did not want to get involved. Vinson testified that James’s sister did tell her that James had been abused but that when she asked James about it he denied that he had suffered any abuse. Vinson also said that she thought it would hurt James to call his sister to testify because she could also testify about violent acts James had committed in the past.
>
> The record of James’s trial shows that the following occurred before his sentencing hearing:
>
> > “[Vinson]: And also, Your Honor, just to put on the record, we have talked with Mr. James yesterday and Mr. Warren has talked with him this morning, we have talked with his mother and sister who are here, and it has been our decision not to present any witnesses as testimony during the sentencing.
> >
> > “[Prosecutor]: Does he agree to that?
> >
> > “The Court: Is that correct, Mr. James?

"Defendant: (Nods.)

"[Vinson]: Mr. James agrees with that."

(Supplemental trial record, p. 9.)

James v. State, 61 So.3d at 376-377. It is well established that "when a competent[2] defendant clearly instructs counsel not to investigate or present mitigation evidence, the scope of counsel's duty to investigate is significantly more limited than in the ordinary case." *Cummings v. Sec'y for Dep't of Corr.*, 588 F.3d 1331, 1358–59 (11th Cir. 2009); *citing Knight v. Dugger*, 863 F.2d 705, 750 (11th Cir. 1988). The ACCA recognized this principle and applied the applicable precedent in reviewing the scope of trial counsel's investigation. The ACCA concluded that James had not shown deficient performance, holding:

> Vinson, in contradiction to her client's wishes, talked to members of James's family and asked them to testify on James's behalf. Vinson testified that James became angry when he discovered that she had talked to his mother and sister. Counsel also had the competency report completed by Dr. Rebert, the presentence report from the first trial, the attorney case file from James's first trial, and other evidence that had been admitted at James's first trial. This is not a case where the attorneys conducted no investigation. Given the unique circumstances presented

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[2] In evaluating James' instructions, trial counsel had the benefit of a mental health evaluation performed by performed by Dr. Wendy Rebert in 1995 which found James competent to stand trial and assist counsel. *James*, 61 So.3d at 368. Moreover, trial counsel also testified that her personal interactions with James revealed no indication that he had any mental problems. (Vol. 23, R32 R. 237-238.)

> in this case we cannot say that counsel's actions were unreasonable. See *Schriro v. Landrigan,* supra.

Id. at 377. Applying the correct deference required by AEDPA, the District Court concluded that the ACCA's decision "was neither contrary to, nor an unreasonable application of, clearly established federal law." *James v. Culliver*, 2014 WL 4926178 at *100, 135-136.

James makes a cursory reference to this Court's decisions in *Williams v. Taylor*, 529 U.S. 362 (2000), *Wiggins v. Smith*, 539 U.S. 510 (2003) and *Rompilla v. Beard*, 545 U.S. 374 (2004), apparently arguing that the ACCA's decision was unreasonable because trial counsel was required to find "all reasonably available mitigating evidence." (James' Petition, p. 9.) James' reliance on these cases is misplaced. The first, and most important, distinction between the present case and the facts in *Williams*, *Wiggins*, and *Rompilla* is that none of the defendants in those cases instructed his counsel not to involve his family. Nor did any instruct their counsel to call "no witnesses" in the penalty phase. Nor did any express a clear preference to be confined on death row rather than in the prison general population. James, however, did all of these things. Consequently, the scope of counsel's duty to investigate was "**significantly** more limited than in the ordinary case." *Cummings v. Sec'y*, 588 F.3d at 1358–59 (emphasis added); *citing Knight v. Dugger*, 863 F.2d 705, 750 (11th Cir. 1988). Nor did counsel have an inflexible "duty" to "discover all

reasonably available mitigating evidence" in defiance of their client's instructions. (James' Petition, p. 9.)

In *Cullen v. Pinholster*, 563 U.S.170 (2011), this Court corrected the Ninth Circuit when it drew the exact same proposition out of the Supreme Court's decisions in *Williams*, *Wiggins*, and *Rompilla*. *Pinholster*, 563 U.S. at 195. The Ninth Circuit concluded that there existed a "constitutional duty to investigate" and that it was "prima facie ineffective" for counsel to only acquire minimal information about a defendant's background. *Id*. In reversing the Ninth Circuit, this Court held that "[t]he Court of Appeals misapplied *Strickland* and overlooked "the constitutionally protected independence of counsel and ... the wide latitude counsel must have in making tactical decisions." *Id*. (quoting *Strickland*, 466 U.S. at 689). As this Court further observed, "*Strickland* itself rejected the notion that the same investigation will be required in every case." *Id.* Moreover, as courts have recognized: "[a]s the Supreme Court explained in *Strickland,* the issue of what investigation decisions are reasonable "depends critically" on the defendant's instructions." *Cummings*, 588 F.3d at 1357. In short, this Court has not created any rule that counsel is *per se* ineffective if he does not investigate every possible avenue of mitigation. Rather, this Court recognizes that cases must be considered on their own facts.

The critical fact here was that James was an uncooperative client who did not want to end up with a life-without-parole sentence. James told trial counsel on multiple occasions that he did want to present mitigation evidence through his family. (Vol. 22, R32 R. 181.) Mr. Warren testified that James adamantly instructed him not to involve his family in the trial. *Id.* at 163. James went further, instructing counsel to call no witnesses at all in the penalty phase. (Vol. 23, R32 R. 263.) Further, as the ACCA found, James had a reason for his decision to forbid the investigation and presentation of mitigating evidence. Gordon Warren, James' other trial counsel, explained that:

> I talked to [James] for a long time and the thing he kept coming back to was that he had it pretty good where he was on death row. He said he had his own television set that he could control and watch what he wanted. He didn't have to deal with twenty other guys voting on whether to watch football or baseball. He had plenty of reading material. He didn't have to watch his back and worry about someone sneaking up behind him and clubbing him or stabbing him because he was handled one on one exclusively on death row. ... He did not want to move in with the general population.

Id. at 374-375 (quoting (C. 1192-93)). Based on this conversation, Warren believed that James "was trying to sabotage his case." *Id.* Indeed, James' disinclination to move to general population was the major factor in his refusal of a plea agreement that would have led to a life sentence. (Vol. 1, R. 15; Vol. 22, R32 R. 184-187.) James notably fails to address either his reasons for wanting to avoid a life sentence or his flat rejection of the State's plea offer in his petition. Nonetheless, they are

clearly a part of the "unique circumstances" that establish the reasonableness of trial counsel's investigation. *James*, 61 So.3d at 377.

Also, unlike in *Williams*, the present case doesn't involve counsel's failure to locate easily available and "extensive records graphically describing [James]' nightmarish childhood" or prison records showing a model prisoner who helped break a drug ring. *Williams*, 529 U.S. at 395. In the present case, trial counsel did not fail to review records of a prior conviction that would have revealed "a range of mitigation leads that no other source had opened up." *Rompilla*, 545 U.S. at 390. To the contrary, trial counsel reviewed the transcript of James' previous trial and the files of James' prior counsel. (Vol. #22, R32 Tr. 126-127; Vol. #23, R32 R. 208-209.) Nor did counsel unreasonably fail to follow up red flags in the records that they did review as happened in *Wiggins*. *Wiggins*, 539 U.S. at 525. In short, even if trial counsel had not been specifically, adamantly, and repeatedly instructed not to pursue mitigation, the present case would still be plainly distinguishable from *Williams, Wiggins,* and *Rompilla*.

Reviewing the record, the ACCA also found that trial counsel made repeated efforts to speak with James' family members, including his "grandmother, his mother, and one of his sisters." *James*, 61 So.3d at 374. When he learned of the investigation, James became angry with counsel for not abiding by his instructions. *Id.* But, the record also shows that James' family members did not offer promising

leads for mitigation purposes. James mother refused to assist trial counsel because "she did not want to get involved." *Id.* As for James' sister, she did give information about abuse allegedly suffered by James, but James denied that any abuse occurred. *Id.*, (Vol. 23, R32 R. 258-259.) "An attorney does not render ineffective assistance by failing to discover and develop childhood abuse that his client does not mention to him." *Puiatti v. Sec'y, Fla. Dep't of Corr.*, 732 F.3d 1255, 1281 (11th Cir. 2013). Judge Vinson also learned from James' sister that he had a history of violence, including beating up another man in Job Corps, threatening someone with a gun, and breaking a former girlfriend's arm. (Vol. 23, R32 R. 261-262.) Trial counsel decided not to call James' sister to avoid the possibility of exposing this damaging information to the jury. *Id.*

Trial counsel also had other sources of information: a mental health evaluation performed by Dr. Wendy Rebert, James' presentence investigation from his first trial, and previous counsel's case file. *James*, 61 So.3d at 376. None offered valuable mitigation. For instance, the Rebert evaluation showed that James had an IQ of 102 and was not suffering from any mental defect when he murdered Ms. Hall. *James*, 61 So.3d at 368. The record in this case shows that trial counsel's conduct "does not fit within the category of trial counsel 'blindly following' a client's instructions." *Newland v. Hall*, 527 F.3d 1162, 1209 (11th Cir. 2008). Considering James' reasoned, persistent, and "adamant" desire to avoid the possibility of a life sentence,

the ACCA reasonably concluded that trial counsel's efforts to investigate his background satisfied the constitutional requirements identified in *Strickland*.

B. The ACCA Reasonably Determined that James Failed to Establish Prejudice.

As the Eleventh Circuit concluded, James also entirely failed to offer *any* evidence that he would have allowed trial counsel to present anything they learned, despite having the opportunity to do so in a state court evidentiary hearing. By contrast, the evidence is clear that James repeatedly gave "adamant" instructions not to present any witnesses at the penalty phase.[3] *See, e.g.* (Vol. 22, 181, 187-188, Vol. 23, R32 R. 263.) "If [James] issued such an instruction, counsel's failure to investigate further could not have been prejudicial under *Strickland*." *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007). James also assured the trial court that he did not wish to present mitigating evidence. (Vol. 4, R.Supp. 9.) Tellingly, James does not even mention this Court's decision in *Schriro*, which held that it was "not objectively unreasonable for [the state] court to conclude that a defendant who refused to allow the presentation of any mitigating evidence could not establish *Strickland* prejudice based on his counsel's failure to investigate further possible

[3] In his petition, James sometimes refers to his instructions to trial counsel as if the evidence was not clear, e.g. "[i]f James did knowingly tell his counsel ... that he wanted to be sentenced to death." (James' Petition, p. 9.) However, James fails to cite to any evidence in the record that contradicts the clear and unequivocal testimony that trial counsel gave regarding his expressed intent not to present evidence so that he could remain on death row.

mitigating evidence." *Schriro*, 550 U.S. at 478. Under the facts in this case, it is clear that *Schriro* controls.

This Court made clear in *Schriro* that a "[b]ecause the Arizona postconviction court reasonably determined that Landrigan 'instructed his attorney not to bring any mitigation to the attention of the [sentencing] court ...' it was not an abuse of discretion for the District Court to conclude that Landrigan could not overcome § 2254(d)(2)'s bar to granting federal habeas relief." *Schriro*, 550 U.S. at 477. As in *Schriro*, James "not only refused to assist counsel in obtaining mitigating evidence, but actually interfered with counsel's efforts to do so." *James v. Culliver*, 2014 WL 4926178, at *98 (*citing Schriro,* 550 U.S. at 478). Also as in *Schriro*, the Alabama postconviction court considered James' trial colloquy, his expressed wishes to remain on death row, and his repeated statements to counsel before reasonably determining that "[c]learly, James wished that no mitigating evidence be presented on his behalf." *James v. Culliver*, 2014 WL 4926178, at *92. The District Court gave the correct AEDPA deference to the state court findings and, as in *Schriro*, correctly determined that "the State courts reasonably concluded that, in light of the evidence against James, the types of mitigating evidence he claims counsel should have presented had no reasonable probability of producing a different result." *Id*. at 102.

The prejudice standard that the Eleventh Circuit applied comports with this Court's holding in *Schriro*. Indeed, James has acknowledged that:

> In the circumstances of this case [] to establish prejudice-Petitioner actually must make two showings. First, Petitioner must show a reasonable probability that-if Petitioner had been advised more fully about character evidence or if trial counsel had requested a continuance-Petitioner would have authorized trial counsel to permit such evidence at sentencing.

Gilreath v. Head, 234 F.3d 547, 551 (11th Cir. 2000); (James' Petition, p. 9.) Despite the opportunity to counter trial counsel's testimony about his uncooperative nature, James entirely failed to make this showing. As the District Court correctly noted:

> Because James did not testify at his Rule 32 hearing, this court has nothing to support a finding that he would have "authorized trial counsel to permit such evidence at sentencing."

James v. Culliver, 2014 WL 4926178, at *99. The Eleventh Circuit agreed. *James*, 957 F.3d at 1192–93 ("James has not shown that he would have changed his mind if his attorneys had had more mitigation evidence to offer.") Consequently, the ACCA, the District Court, and the Eleventh Circuit all concluded that James had failed to establish prejudice. *Schriro*, 550 U.S. at 475; *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d at 1266. Nothing in James' petition calls those decisions into question, much less establishes any of the grounds for certiorari review.

II. The Eleventh Circuit did not Ignore "Significant Questions" About Whether James Knowingly Waived Mitigation, Because James did not Raise any such Claim to the Eleventh Circuit.

James, relying on this Court's decision in *Godinez v. Moran*, 509 U.S. 389 (1993), also faults the Eleventh Circuit for supposedly "ignore[ing]" the question of

whether he was competent to waive the presentation of mitigation evidence. (James' Petition, p. 11.) However, James fails to acknowledge that he *did not raise any substantive claim of incompetence* in his motion for a certificate of appealability or in his briefing to the Eleventh Circuit. *See* James' Motion for Certificate of Appealability, attached hereto as Appendix "A" and James' Eleventh Circuit Brief, attached hereto as Appendix "B". Thus, contrary to James' petition, there was no "question presented" about his competence in the Eleventh Circuit. It is axiomatic that a court cannot "ignore" a claim that is not raised. Moreover, this Court "ordinarily do[es] not decide in the first instance issues not decided below." *Cooper Indus., Inc. v. Aviall Servs., Inc.*, 543 U.S. 157, 168–69 (2004) (quoting *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001)). Thus, the fact that James failed to raise this claim in the Eleventh Circuit renders this petition an extraordinarily poor vehicle for addressing the issue.

Moreover, James does not even cite to evidence that supposedly establishes his incompetence. James' vague assertions about "schizoid characteristics" and "possibly having a though disorder" do not make up for his failure to offer any actual evidence of incompetence. As the District Court explained:

> In contrast to *Ake* and *Blake,* however, James was evaluated by a psychologist in 1996, prior to his first trial, and found not to be suffering from a mental disease or defect at the time he shot and killed Faith Hall. *See James v. State,* 61 So.3d 357, 368 (Ala. Crim. App. 2010). Moreover, James presented evidence at his Rule 32 hearing of a psychological evaluation conducted by Richard Holbrook, who

> concluded that James did *not* suffer from any significant mental health problems. Similarly, while James introduced copies of two MMPI–2 tests that had been administered to him, he failed to present any evidence or testimony concerning the validity of those tests. Further, the conclusion that could be drawn from the test administrations was that James, at worst "*may* exhibit a thought disorder."

James v. Culliver, 2014 WL 4926178, at *121 (footnote omitted). In the District Court, James' "claims of incompetence f[e]ll short of clear and convincing evidence," and they fare no better here. *Id*. at *122.

Finally, to the extent that James claims that the Eleventh Circuit erred by not remanding for an evidentiary hearing, this claim is refuted by this Court's holding in *Pinholster* that "evidence introduced in federal court has no bearing on § 2254(d)(1) review." *Pinholster*, 563 U.S. at 185. The record that was before the state court is clear: James made a reasoned and informed decision that he did not want mitigation evidence presented. James has never shown, whether in the court below or in this petition, that the state court's determination based on that record was "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law." 28 U.S.C.A. § 2254(d)(1). Consequently no relief was warranted, no evidentiary hearing could be granted, and this petition should be denied.

CONCLUSION

For the foregoing reasons, this Court should deny the petition.

Respectfully submitted,

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