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

APPENDIX

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January 22, 2021

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APPENDIX A

James' Motion for Certificate of Appealability

No. 17-11855

In the United States Court of Appeals for the Eleventh Circuit

JOE NATHAN JAMES,
PETITIONER-APPELLEE
v.
WARDEN, HOLMAN CORRECTIONAL FACILITY,

JEFFERSON DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA, NO. 2:10-CV-02929-CLS-HGD
HON. C. LINWOOD SMITH, PRESIDING

PETITIONER'S APPLICATION FOR CERTIFICATE OF APPEALABILITY

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JOE NATHAN JAMES

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

Undersigned counsel certifies that the following persons may have an interest in these proceedings:

Alper, Ty – State Co-Counsel for Petitioner-Appellant

Anderson, Richard D. – Deputy Attorney General, Counsel for Respondent-Appellee (federal proceedings)

Brower, William – State Trial Counsel (pre-trial proceedings)

Dunn, Jefferson – Commissioner of Alabama Department of Corrections, Respondent-Appellee

James, Joe Nathan – Petitioner-Appellant

McCormick, Hon. Michael – Trial Judge (State Criminal Trial and Rule 32)

McIntire, Jeremy– Deputy Attorney General (State Proceedings)

Smith, Hon. C. Lynwood – Judge, District Court for the Northern District of Alabama

Smith, Faith Hall – Victim

Van Winkle, Wesley A. – Counsel for Petitioner-Appellant

Vinson, Hon. Virginia – State Trial Counsel (lead)

Warren, Gordon – State Trial Counsel (associate)

Wood, John – State Co-Counsel for Petitioner-Appellant

I certify that the foregoing persons appear to me to fall within the scope of 11th Circuit Rule 26.1-2(a) and may have an interest in these proceedings.

Dated: August 9, 2017

/s/ Wesley A. Van Winkle

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INTRODUCTION

Petitioner Joe Nathan James respectfully requests a certificate of appealability from the district court's Memorandum Opinion and Orders of September 30, 2014, denying and dismissing all claims in his Petition for Writ of Habeas Corpus, denying Petitioner's motion for an evidentiary hearing, and denying a certificate of appealability. District Court Doc. 27.

Habeas corpus relief is compelled under 28 U.S.C. § 2254(d)(1) and (2) because the state court ignored or unreasonably applied clearly established federal law and unreasonably determined the facts in denying Petitioner's claims of ineffective assistance of counsel. Petitioner showed that in this capital case trial counsel performed no investigation and presented no witnesses in either the guilt or penalty phases. Petitioner also showed that but for these errors it was at least reasonably probable that a more favorable result would have been obtained in his case. Petitioner also showed that the state evidentiary hearing was little more than a kangaroo court in which the Attorney General effectively made all the rulings, which the evidentiary hearing judge routinely signed without reading. The district court erred in dismissing the petition and denying Petitioner an evidentiary hearing.

STATEMENT OF ISSUES ON WHICH A CERTIFICATE IS REQUESTED

Petitioner respectfully requests that this court issue a certificate of appealability pursuant to Fed. R. App. P. 22(b), 11th Circuit Rule 22-1, and 28 U.S.C. § 2253, on the following issues:

1. Whether James's counsel were ineffective in the guilt phase of his trial for failing to conduct any substantial investigation or present to the jury readily available evidence, including, *inter alia*, evidence that James was not stalking the victim, as the prosecution contended, but that the victim actually had been stalking James and his fiancee, had attacked them with a tire iron while they waited in line at a fast-food drive-through window, and had instigated a high-speed automobile chase of James's fiancee and her infant child.

2. Whether James's counsel were ineffective in the penalty phase of his trial by not investigating and presenting to the jury readily available evidence regarding James chaotic upbringing and family background; his genetic predisposition for mental illnesses and other mental deficits; his medical, psychiatric and neurological impairments, including but not limited to, schizophrenic spectrum disorder, mood disorder, depression, and debilitating head and brain trauma; his childhood history of profound neglect, abandonment, abuse and instability, isolation and imprisonment; and his childhood exposure to

neurotoxins, substance abuse and severe racial and ethnic discrimination, all of which have direct bearing on Petitioner's character, mental functioning and disabilities and numerous other factors in mitigation.

3. Whether the state court deprived James of a procedurally fair and reliable evidentiary hearing and whether the district court erred in denying an evidentiary hearing altogether.

STATEMENT OF THE CASE

Petitioner was convicted and sentenced to death by the Tenth Judicial Circuit Court in Jefferson County, Birmingham, Alabama, the Honorable Michael W. McCormick, presiding. Petitioner was convicted of capital murder on June 17, 1999 and was sentenced to death on July 19, 1999. Petitioner timely appealed and the Court of Criminal Appeals affirmed the judgment in all respects on April 28, 2000, *sub nom. James v. State*, 532 U.S. 1040 (2001) (USSC Docket No. 00-9007). Upon a writ of certiorari to the Alabama Supreme Court, that court also affirmed the judgment in all respects on April 28, 2000, *sub nom. James v. State*, 788 So.2d 185 (2000).

On May 7, 2002, Petitioner filed a state petition for post-conviction relief under Rule 32, thereby tolling the running of the one-year federal statute of limitations with 14 days remaining, pursuant to 28 U.S.C. §2244(d)(1)(A). CR

159, 233. On December 5, 2003, the court granted an evidentiary hearing with respect to some of Petitioner's claims, primarily claims of ineffective assistance of counsel. CR Supp. 10. On June 6, 2004, an evidentiary hearing was held. In essence, the evidence showed that counsel conducted virtually no investigation into either the guilt or sentencing phases of the case and that had counsel done so, substantial evidence could have been discovered and presented.

On October 28, 2004, the Circuit Court dismissed all Petitioner's claims by signing without alteration a 103-page proposed final order prepared by the Respondent. CR Supp. 2; CR Supp. 270-372. Petitioner's state appeals were all ultimately denied on October 15, 2010, when the Alabama Supreme Court denied certiorari.

On October 29, 2010, Petitioner filed a timely habeas corpus petition in the District Court for the Northern District of Alabama, seeking relief pursuant to 28 U.S.C. §2254. The district court denied relief in a final judgment entered on December 30, 2014. Order, 2:10-cv-02929-CLS-HGD, Doc. 27. The district court also denied a certificate of appealability. *Id.,* Doc. 27. On March 30, 2017, the district court denied James's motion to alter or amend the judgment. *Id.*, Doc. 40.

James timely filed his notice of appeal to this Court on April 28, 2017. This

Court has jurisdiction to determine whether to grant James a certificate of appealability under 28 U.S.C. § 2253(c), Fed. R. App. P. 22(b), and 11th Cir. Rule 22-1.

FACTUAL SUMMARY

At Petitioner's trial, the prosecution sought to show that Petitioner had stalked his former girlfriend, Faith Hall Smith (hereinafter, "Hall"), and ultimately killed her out of jealousy because he could not have her himself. The prosecution's evidence showed that Petitioner and Hall dated for a time in the early 1990s, but broke up some time in late 1993 or early 1994. Trial RT1 147-148. Hall's mother and daughter testified that during their relationship Petitioner was violent with Hall. *Id.*, Trial RT2 18. Hall's mother testified that Hall lived with her, and that after they broke up Petitioner continued to stalk and harass Ms. Hall so that Hall's mother frequently had to "run him off." Trial RT2 76. Hall's ex-husband testified that Petitioner was jealous of his relationship with Hall and once threatened to kill them both. Trial RT2 25-26.

In August, 1994, Ms. Hall's friend, Tammy Sneed, lived in the first-floor apartment of a three-story building at 2208-A 6th Court, near the intersection of 23rd Street in downtown Birmingham. *Id.* 188, 212, 222. A woman named Bridget Gregory lived in the second floor apartment immediately above Sneed's

apartment, and a woman named Trenicha Holyfield lived on the third floor above Gregory. *Id.* 188. Gregory testified that on the evening of August 14, 1994, she saw Petitioner sitting on the steps of Holyfield's apartment with a nine-millimeter pistol between his legs. He told her he was waiting for a friend to come out of one of the apartments. Trial RT2 39-40.

At about 6 p.m. on the following evening, August 15, 1994, Hall and Sneed returned to Sneed's apartment from a shopping trip with Sneed's three young children. Trial RT2 122. Seeing Petitioner's car, a red El Camino, parked in front of the apartment, they quickly got out of Sneed's car and ran into the apartment. Trial RT2 43-44, 122-123. Gregory, who saw them running, came downstairs to see what was wrong. Hall told Gregory she was afraid Petitioner would kill her and asked Gregory to call the police because Sneed did not have a telephone. Trial RT2 43-35.

As Gregory was leaving the apartment, Petitioner came running up to the door holding a gun in one hand, shoved her out of the way, and pushed his way into the apartment past Sneed and Hall, who were trying to shut the door on him. Trial RT2 47-48, 125. Sneed and Hall asked him to put the gun away, and he did so, placing it in his belt. Trial RT 2 48, 127-128. Hall then ran to the bathroom, and Petitioner pulled his gun out and followed her. Sneed and Gregory heard

several gunshots coming from the back of the apartment. Trial RT2 48, 128. Gregory re-entered the apartment, meeting Sneed at the front door, while Petitioner ran out the back. Trial RT2 48-49, 129. Petitioner got into his car, which was still running, and drove off. Trial RT2 50-51. Gregory yelled to a group of people who had gathered nearby to call the police. *Id.*

When police arrived, Hall was dead on the bathroom floor in Sneed's apartment. A subsequent autopsy revealed that Hall had died as a result of multiple gunshot wounds: one bullet passed through the biceps and chest, another struck the abdomen, and the third entered the top of the head. Trial RT2 153, 161-162, 195. Three spent lead bullets were found at the scene. *Id.* 242. A ballistics witness testified that the bullets were either .38 caliber or .357 magnum bullets, and were not nine millimeter bullets. Trial RT2 95. It could not be determined whether they had been fired from the same gun, though they could have been. Trial RT2 97.

No witnesses were presented by the defense at either the guilt/innocence phase or the sentencing phase. Petitioner was convicted and sentenced to death.

At the Rule 32 evidentiary hearing in postconviction, Petitioner established that trial counsel had performed virtually no investigation to prepare for either the guilt or the sentencing phase of the trial. However, Petitioner presented six

witnesses who testified that they would have appeared and testified on Petitioner's behalf if they had been asked and could have presented extensive evidence regarding Petitioner's impoverished, abusive childhood, family history of schizophrenia, Petitioner's own mental illness– demonstrated through testing administered by the Alabama Department of Corrections– and other evidence in mitigation. Because funding for investigation and experts had been denied by the court, Petitioner also proffered, in the form of affidavits, the statements of a psychiatrist, neuropsychologist, and mitigation specialist regarding Petitioner's mental illness and background. Petitioner had repeatedly requested funding for these experts and an investigator, but these requests were all denied.

Petitioner also sought to present the testimony of a witness named Mara Ruffin, Petitioner's former fiancee and the mother of his two children, who would have testified that she and Petitioner had been stalked by the victim, Faith Hall Smith, for a period prior to the homicide; that Hall had assaulted them by smashing the window of their pickup truck with a tire iron while they were parked in line at a McDonald's restaurant, spraying Ruffin with broken glass; and that Hall had chased Ruffin across town in her car while her infant daughter was in the car with her. This testimony would have contradicted the prosecution's theory at trial and shown that Hall was not the innocent victim of a stalker but was herself a

violent stalker involved in a romantic triangle, and also would have helped to prove that Petitioner went to see Hall on the day of the incident not to kill her but to warn her to stay away from his fiancee.

However, when Ms. Ruffin failed to appear at the evidentiary hearing in response to a subpoena, the court denied Petitioner's request for a bench warrant to compel her to testify. Petitioner did present court records showing that trial counsel could have discovered the facts of Hall's tire iron attack on Petitioner and Ms. Hall simply by typing in Hall's name on the public computer on the counter of the Circuit Court clerk's office. Petitioner also showed that trial counsel's contention that Petitioner would not provide any helpful information to counsel was not true, and that counsel's own handwritten notes contained the story of Hall's assault on Petitioner and Ruffin which counsel had obtained from Petitioner during their first meeting. Petitioner also showed that he had given trial counsel the names and location information of several potential witnesses, including Ruffin and their two daughters, and that trial counsel had made no effort to contact them.

In spite of the evidence at the evidentiary hearing, the Circuit Court dismissed all of Petitioner's claims by signing, without alteration, a 103-page order written entirely by the deputy attorney general assigned to the case. A letter

of instructions from the deputy attorney general to the Circuit Court judge, obtained by Petitioner, plus numerous obvious typographical errors in the order, strongly suggest that the judge did not even read the order before signing it.

ARGUMENT

I. A Certificate Of Appealability Must Issue When A Petitioner Surpasses The Absence Of Frivolity Standard Under 28 U.S.C. § 2253(c)(1)

The standard for issuance of a Certificate of Appealability ("COA") is deliberately low. *Melton v. Fla. Dept. Of Corr.*, 778 F.3d 1234, 1238 (11th Cir. 2015). A court should issue a COA so long as "reasonable jurists would find the district court's assessment of the constitutional claims debatable." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The Supreme Court has held that a petitioner is not required "to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus." *Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003). "The question is the debatability of the underlying constitutional claim, not the resolution of that debate." *Id*. at 342. The Supreme Court has observed that "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Id*. at 338. "Because this case involves the death penalty, any doubts as to whether a COA should issue must be resolved in [Mr. James's] favor." *Hughes v. Dretke*, 412

F.3d 582, 588 (5th Cir. 2005); *see also Barefoot v. Estelle*, 463 U.S. 880, 893 (1983).

II. The Traditional Deference Afforded to State Courts Is Not Merited and Relief Is Warranted Under 28 U.S.C. § 2254(d)(2) Because The Circuit Court Adopted The State's Proposed Findings Without Independently Evaluating Those Findings

As noted above, the Attorney General drafted and the state court signed the Circuit Court order without change, inclusive of typos and other obvious errors. The Supreme Court, in *Jefferson v. Upton*, 560 U.S. 292 (2010), discussed arguments raised by a defendant before this court that a state court's judgment should not be afforded deference under the pre-AEDPA version of section 2254. The Court observed that "[t]hese are arguments that the state court's *process* was deficient. In other words, they are arguments that Jefferson 'did not receive a full and fair evidentiary hearing in . . . state court.'" *Jefferson*, 560 U.S. at 292 (emphasis added).

While *Jefferson* was decided on the basis of the pre-AEDPA version of section 2254(d), that case, read in conjunction with *Taylor v. Maddox*, 366 F.3d at 999-1000 (claim may be resolved on the basis of § 2254(d)(2) if, *inter alia,* "the process employed by the state court is defective"), compels the conclusion that the state court's adoption of findings virtually verbatim from the prevailing party's proposed order—absent any indicia that the court actually reviewed and evaluated them—renders the state court's process defective and its findings suspect.

The deference traditionally afforded to the state court findings under section 2254(d) is predicated on the presumption of regularity. That presumption is called into question whenever a court adopts the State Attorney General's (or any litigant's) proposed findings verbatim. But the presumption of regularity should not only be called into question but rejected altogether, when the verbatim findings include obvious typographical and analytical errors *that all but guarantee that the court did not even review (much less analyze) the State's proposed findings before issuing its order*. Because the court's findings here were nothing more than the State's advocacy, the state court's fact-finding was inherently deficient and unreasonable, and habeas relief is appropriate under section 2254(d)(2).

The state court hearing was also outrageously biased and one-sided for many other reasons set forth in Section V, *infra*. While Petitioner cannot fully develop all these errors here due to length limitations, he has more than adequately demonstrated entitlement to relief under §2254(d)(2) and, at a minimum, should have been granted a federal evidentiary hearing on his claims.

III. Jurists of Reason Could Conclude that Petitioner was Deprived of Effective Assistance of Counsel at the Guilt Phase.

A. Standards of Review

In order to demonstrate the merits of a claim of ineffective assistance of counsel, a petitioner must show both that counsel's performance was deficient (the performance prong) and that the deficiency prejudiced the defense (the prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In assessing the performance prong, the reviewing court must find that the deficiency of counsel fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Wiggins v. Smith*, 529 U.S. at 521. "Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable . . ." *Strickland*, 466 U.S. at 688. In capital cases, the ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases (2003) set forth the "well-defined norms" by which the reasonableness of counsel's performance should be judged. *Wiggins v. Smith*, 539 U.S. at 524. Such professional standards are useful as guides to what is reasonable "to the extent

they describe the professional norms prevailing when the representation took place." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009).

In assessing the prejudice prong, the reviewing court must find "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonably probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466 U.S. at 694. However, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693-694. The standard is thus *less* than a preponderance of the evidence. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

B. Petitioner was Deprived of Effective Assistance at the Guilt Phase

Claim I of petitioner's second amended Rule 32 petition alleged that petitioner was denied the right to effective assistance of counsel during the guilt phase of his trial. CR 1212-1281. In a self-serving final order prepared by the Attorney General– petitioner's opponent in this litigation– and signed by a judge who did not trouble to actually read it, the court dismissed all these subclaims as unproven. CR SUPP 330-355.

The state decision was abusive, erroneous, and objectively unreasonable. However, the Court of Criminal Appeals, which issued the last reasoned decision by the state courts, relied entirely upon the factual findings in the order in denying petitioner the relief to which he was entitled, and the Alabama Supreme Court affirmed the judgment. The result– a decision that was effectively made by the Attorney General and then uncritically adopted by the appellate court– was contrary to and involved an unreasonable application of United Supreme Court precedents and also constituted an unreasonable determination of the facts. The district court's decision defering to the state decision was therefore error.

1. Counsel's Performance Fell Below the Standard of Care.

The final order signed by the state Circuit Court selectively set forth the legal analysis for ineffective assistance cases in language taken primarily from *Chandler v. United States*, 218 F.3d 1305 (11th Cir. 2000), a 17-year-old case which at the time of the hearing had been superseded by several major U.S. Supreme Court cases the order did not cite or discuss. CR 326-330.

With regard to Claim I, the most obvious and serious error committed by the state court concerned counsel's failure to investigate and present a coherent guilt-phase defense. The order found counsel's performance during the guilt phase was "reasonable." CR 226. In view of the evidence adduced at the hearing, which

showed that counsel completely failed to investigate or present evidence regarding the circumstances of the homicide or the victim's violent background, this finding was grossly unreasonable.

Foremost among the duties of trial counsel is the duty to investigate. *Strickland v. Washington,* supra, 466 U.S. at pp. 690-691; *Wiggins v. Smith, supra*, 539 U.S. at p. 527; *Goodwin v. Balkcom*, 684 F.2d 794, 805 (11th Cir. 1982). Indeed, in order to prepare for a capital trial, counsel must investigate every possible avenue of defense, investigate and challenge assertions by the state, and subject the state's case to a rigorous examination and testing. *Strickland v. Washington, supra,* 466 U.S. 668; *Code v. Montgomery*, 799 F.2d 1481, 1483 (11th Cir. 1986).

The final order completely failed to discuss the law pertaining to counsel's duty to investigate and failed to evaluate the adequacy of counsel's guilt-phase investigation according to prevailing standards. With respect to the performance prong of the *Strickland* test, the order simply concluded that trial counsel's performance was reasonable because "counsel's strategy was to negate the burglary element of the capital murder charge." CR 336. However, counsel did nothing whatsoever to attempt to negate the burglary element of the charge, presented no witnesses, and provided the most perfunctory of arguments.

Moreover, counsel's failure to investigate cannot be shielded behind a talismanic invocation of supposed "strategy." Courts may defer to counsel's supposedly "strategic" judgments or tactical decisions only if those judgments or decisions are themselves based upon reasonable investigation. *Wiggins v. Smith, supra*, 539 U.S. at 521. In addition, "[i]n assessing the reasonableness of an attorney's investigation, however, a Court must consider not only the quantum of evidence already known to counsel, *but also whether the known evidence would lead a reasonable attorney to investigate further*." *Wiggins v. Smith, supra*, 539 U.S. at p. 527, emphasis added. A state court judgment which merely concludes that counsel's investigation was adequate without assessing whether the decision to cease investigating at a certain point demonstrated reasonable professional judgment will itself be held to be "objectively unreasonable" and "an unreasonable application of *Strickland*" and will be overturned by a federal court. *Id.,* at pp. 527-528. The state court decision in Petitioner's case is thus objectively unreasonable on this basis alone.

The evidence adduced at the evidentiary hearing clearly showed that trial counsel performed no real investigation. Lead counsel's time sheets in this case reflect a total of only 66.25 hours, including the trial itself, and only 42.25 hours out of court, while associate counsel could not produce any time sheets at all. CR

1520, 2751-2755; RT 128; 203-204. Counsel did no document gathering and failed to assemble a defense team. *See*, ABA Guideline 4.1(A). Lead counsel admitted that she gathered no documents, did not hire an investigator, did not hire a mitigation specialist, and did not retain a psychologist, a psychiatrist, or a neuropsychologist. RT 251. Counsel did not even claim a tactical or strategic reason for this unprofessional failure; indeed, it "never occurred to" associate counsel that it might be a good idea to do hire an investigator, and there was no tactical or strategic reason for counsel's failure to do so. RT 160-162.

Counsel also conducted no meaningful investigation of their own. None of lead counsel's activities in her time sheets were described as investigation. The one hour she spent checking witness's records and the one-half hour she spent talking to petitioner's grandmother on the phone appear to constitute the entire investigation lead counsel conducted prior to trial. CR 2751-2755. Associate counsel primarily assisted lead counsel and reviewed the files of petitioner's previous trial. RT 126. Though he initially stated it was partly his responsibility to conduct a background investigation, that investigation consisted only of interviewing petitioner, a task he claimed was unproductive. RT 126, 143.

Lean counsel's pre-hearing affidavit, prepared by the Attorney General and sworn by counsel under penalty of perjury, attempted to blame petitioner for

counsel's failure to investigate, stating that petitioner had refused to provide her any information regarding the circumstances of the offense itself. CR 1519, 1521. Lead counsel claimed she never heard that petitioner had a girlfriend and that petitioner never mentioned the names of any friends when she asked about potential witnesses. CR 1526. She initially repeated these assertions on the stand. RT 211, 254. She also testified that she did not recall petitioner ever telling her that the victim had made threats against him and his girlfriend and had attacked them previously. RT 211.

However, directed to examine her own notes of her first conversation with petitioner on December 31, 1998, in the Jefferson County Jail, counsel agreed that these notes clearly showed petitioner told her all his movements prior to and during the homicide incident and even told her that at the time of the killing the "victim charge[d] him from kitchen" before he pulled out the gun and shot. CR 2749; RT 214. In the left hand margin of those notes, counsel wrote the words, "in a trance," suggesting that petitioner reported having had a dissociative reaction of some kind. CR 2749; RT 214. The notes further showed petitioner told counsel that the "victim had previously made death threats on defendant's children and mother of . . . [illegible]." CR 2749; RT 214. He also told her that the victim had "busted out a window with a jack" while petitioner and his girlfriend were "in

a truck" and "in front of a police station." CR 2749; RT 214. Asked whether this paragraph of her notes showed that petitioner in fact gave her his entire summary of the facts of the case, she admitted "it appears to, yes."[1] RT 215.

As the foregoing demonstrates, petitioner in fact provided lead counsel with his version of the events surrounding the homicide and the name of an important witness regarding his past relationship with her, but counsel did absolutely nothing to investigate this information. In light of the information petitioner disclosed to his counsel, her failure to conduct even a cursory investigation was inexplicable and unreasonable. Though she later claimed on the stand that she was "sure" she had done something to investigate the victim, she could not say what that was. RT 215. Indeed, at the evidentiary hearing she could not even recall the victim's *name,* RT 216, and her time-sheets and handwritten notes both show that the only guilt-phase investigation she performed was one hour spent

[1]On this point, the Alabama Court of Criminal Appeals completely ignored the facts and testimony set forth in the text and stated only that "Vinson testified that she did not recall James telling her about Ruffin's assault charge against Hall but that James was 'very uncommunicative.'" *James v. State,* 61 So.3d 357, 366 (2010). The court simply ignored the fact that counsel herself subsequently admitted on the stand that petitioner actually told her about this assault and her own hand-written notes showed that he had done so in their very first meeting, yet another example of the unreasonable nature of the state court's decision.

researching the criminal backgrounds of three prosecution witnesses. CR 2750, 2755; RT 216.

Thus, counsel's repeated self-serving contentions that petitioner would not cooperate with her or provide her with any information about the crime, as well as her specific claims that she had never heard about the Brighton incident and the victim's assault against petitioner and his girlfriend, and that she had never even heard that petitioner had a girlfriend, were all false and perjurious. This strongly suggests that the rest of counsel's self-protective testimony also cannot be trusted, and it also does not reflect well on the reliability of the Office of the Attorney General, which prepared both the false pre-hearing affidavit counsel signed and the final order signed by the Circuit Court.

However, even if petitioner had failed to be as fully cooperative with his attorney as her notes clearly show he was, this would still not have justified her complete failure to conduct an investigation. Capital trial counsel must conduct a thorough and independent investigation even if the client does not cooperate. See, e.g., *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir. 1991). Furthermore, counsel must *always* attempt to discover information in the possession of the prosecution and law enforcement, *Rompilla v. Beard*, *supra*, 545 U.S. 374, 387, and in this

case counsel made no effort even to obtain the Brighton police reports demonstrating the victim's prior assault against petitioner and Ms. Ruffin.

In view of the information Petitioner provided her, counsel's failure to investigate the victim's background or interview Ms. Ruffin were patently unreasonable. Contrary to the state court decision, it is simply unarguable that counsel failed to meet the standard of even minimal competence at the guilt phase.

2. Counsels' Incompetent Performance Prejudiced Petitioner's Case.

It is equally unarguable that counsels' failure to conduct an investigation prejudiced petitioner. The prosecution claimed that James had stalked Faith Hall for days and wanted to kill her because he was jealous of her relationships with other men. Trial TX 178-179, 181-183, 187; TX (6/17/99) 20-23. However, even a cursory investigation would have shown that the *reverse* was the case, and that it was Hall who had been stalking petitioner and his girlfriend, Mara Ruffin, and the couple's two children.

If counsel had gone to the trouble of checking the victim's criminal record at the public computer on the counter of the clerk's office, she would have discovered that the victim had a history of assault. CR 2732. Furthermore, as noted above, petitioner himself had told Lead counsel in their first meeting that Hall had assaulted him and his girlfriend, Mara Ruffin, by smashing the window

of their pickup truck with a tire iron. CR 2749. Even a cursory investigation would have completely confirmed the accuracy of petitioner's story, revealing a police report on the incident in Brighton Police Department files showing that Hall had indeed assaulted Ms. Ruffin and Petitioner in Brighton mere weeks before the homicide. CR 2734-2745.

Had the jury been informed of the evidence of Ms. Hall's history of assault against petitioner, it may well have accepted a self-defense or imperfect self-defense theory, or at least rejected the prosecution theory that petitioner intended to assault Ms. Hall when he entered the apartment, thereby reducing the crime from capital murder to a lesser form of homicide. Since the prosecution's only theory of capital murder was based on this assault/burglary-murder theory, it is at least reasonably likely that a more favorable result would have been obtained in the guilt phase had counsel performed with even minimal competence. Petitioner was entitled to inform the jury that he had an honest belief that he was in danger from Ms. Hall, who had assaulted him previously with a tire iron, and therefore acted reasonably in arming himself before he entered her apartment. See *Brooks v. State*, 630 So.2d 160 (Ala.Crim.App.1993).

The state court correctly found that trial counsel did not obtain any of these records regarding the assaultive history of the victim. CR 332. However, the

order found all this documentary evidence of the victim's assaultive history "irrelevant" on the grounds that the victim's violent nature cannot be proved by evidence of specific acts. CR 332-33. This was clearly erroneous.

First of all, the legal question before the court was not whether or not the Brighton documents were admissible. Rather, the question in this ineffective assistance of counsel claim was whether it was reasonably probable that a more positive result would have been obtained had counsel conducted the required investigation. *Strickland, supra*, 466 U.S. at p. 695. Petitioner proved at the hearing that he had informed counsel that the victim had a history of assaulting petitioner and the mother of his children. A document available on the public computer on the Court Clerk's counter would have confirmed this, and a Brighton Police Department report available through discovery would have provided precise confirmation of all the details petitioner gave his attorney. Moreover, as counsel herself confirmed, petitioner had informed her that he had put the gun away and turned to leave, firing at the victim only when she "charged at him." RT 214, 219-220. Any reasonable attorney would have continued investigating by interviewing Ms. Ruffin, the arresting officer, and other potential witnesses to the Brighton incident to determine whether there was a self-defense defense available, to present such a defense if possible, and in any event to undermine the

prosecution's theory that petitioner was the aggressor. The evidence would also have helped to support a defense of imperfect self-defense. See, e.g., *Depetris v. Kuykendall*, 239 F.3d 1057 (9th Cir. 2001).

Because this evidence completely contradicted and undermined the prosecution's theory of the case and showed that it was Hall who was stalking petitioner, and not the other way around, there is at least a reasonable probability that this evidence would have resulted in a more favorable verdict for petitioner. Moreover, even if counsel had concluded that a self-defense defense was not persuasive, Ms. Ruffin and others would have testified that the victim had a reputation for violence, a matter which is clearly admissible under Rule 405(a) of the Alabama Rules of Evidence. *Peraita v. State*, 897 So.2d 1161, 1186 (Ala. 2003).

Furthermore, contrary to the order, the documentary evidence was itself admissible to show self-defense. Under Alabama law, evidence of specific acts of violence is in fact admissible to show the accused's knowledge of such acts and his reasonable apprehension of peril. *Wright v. State*, 641 So.2d 1274, 1280 (Ala.Crim.App. 1994). "The general rule is that such evidence is admissible if the person toward whom the violence was directed had a very close connection with

the accused such that there would be a reasonable apprehension of peril on the part of the accused." *Ibid.*

In addition, apart from self-defense, evidence of prior difficulties between petitioner and Ms. Hall was admissible to negate other elements of the charged offense, such as the prosecution's claim that petitioner entered the apartment with the intent to assault the victim. *Dickerson v. State*, 360 So.2d 1053, 1054-1055 (1978); *Sashington v. State*, 325 So.2d 205, 209 (1975). Here the jury would have been more than justified in concluding from the Brighton Police Report or testimony about it from the arresting officer or Ms. Ruffin that petitioner had acted in reasonable apprehension of peril in arming himself and had not entered the apartment with the intent to commit an assault. Since that was supposedly the defense theory, it is *at least* reasonably probable that a more favorable outcome would have been obtained had the defense investigated and presented actual *evidence* in support of this theory, instead of simply asking the jury to accept the theory on the basis of counsel's unsupported assertion.

The decision of the Court of Criminal Appeals with respect to this claim was also unreasonable. The appellate court's decision uncritically adopted the factual determinations made by the Attorney General and adopted by a judge who did not bother to read them. As noted previously, the court simply ignored the fact

that lead counsel's story that petitioner would not give him his version of events was both proved and admitted to be false, and instead assumed that every word lead counsel had said was true even when she was shown to have been, and admitted to being, wrong both in her testimony and her signed affidavit. The court then focused on the facts that the prosecution's two witnesses did not testify petitioner acted in self-defense and that petitioner did not present evidence of self-defense at the Rule 32 hearing. See, e.g., *James v. State*, 61 So.2d 357, 366-367. However, rather obviously, there was no such evidence at trial because trial counsel did not investigate and therefore did not ask the witnesses about facts indicating self-defense or substantiating petitioner's statement to counsel that Hall had lunged at him prior to the shooting, and there was no such evidence at the hearing because the court repeatedly refused to provide petitioner with the funding for investigators and experts petitioner needed to make his case.

Moreover, the court never even addressed the possibility that the evidence, even if insufficient to establish complete self-defense, nevertheless established imperfect self-defense, nor did the court consider the impact the investigation into Hall's background would have had on the penalty phase, nor did the court analyze prejudice by comparing the totality of the evidence against the evidence presented at trial, as *Strickland* requires. Examining the evidence in that light would have

compelled reversal, for here there was no defense at all, a fact any reasonable juror would have taken to be a virtual admission by the defense that petitioner was guilty as charged. The defense did not present any witnesses or question the state's witnesses on the facts petitioner had provided to Lead counsel in their first meeting. It is at least reasonably likely that had the jury seen that the defense disputed the state's version of events might have found petitioner either not guilty or guilty of a lesser included crime. Petitioner submits that relief is required on the state record alone, but if this court finds the quantum of evidence developed at the state hearing inadequate, an evidentiary hearing must be granted in the district court so that petitioner can fully develop the claims he was prevented from developing at the state level.

3. The Order's Other Findings and Conclusions on Claim I Were Unreasonable and Clearly Erroneous.

The length limit on this application prevents Petitioner from setting forth in detail the many other unreasonable findings and conclusions made by the state court, but the order made a number of other unreasonable and erroneous findings regarding counsel's failure to investigate and present guilt-phase evidence, all of which were uncritically accepted by the higher Alabama courts. Petitioner will very briefly note these objectionable findings here.

A. The Atlanta Evidence. The Rule 32 court found that petitioner failed to present evidence to support his claim that counsel failed to investigate and discover that petitioner was in Atlanta the weekend prior to the murders and therefore could not have been the person allegedly seen outside Ms. Hall's apartment with a nine-millimeter weapon the night prior to the homicide. CR 334-335. The fault for this lack of evidence, however, lies not with petitioner but with the Circuit Court, which refused petitioner's request for a bench warrant to compel the testimony of Mara Ruffin, who would have testified petitioner was with her in Atlanta, as the petition alleged. CR 1233-1234. The findings were thus grossly unreasonable.

B. The Mental Health Evidence. The final order found that petitioner did not prove his claim that counsel failed to investigate and present evidence of petitioner's dissociative reaction at the time of the homicide. CR SUPP 335-336. However, the order completely failed to address the questions of whether trial counsel had a duty to investigate their client's mental state and whether they performed competently in this respect. Counsel's own notes show petitioner told Lead counsel that he had been "in a trance" at the time of the homicide, and that petitioner's sister had told Lead counsel her mother told her Petitioner acted like he was on drugs the morning of the homicide. CR 2749; RT 268. Such suggestive

information would have triggered further investigation into this matter had reasonably competent counsel been appointed. Instead, counsel not only failed to investigate but failed to retain a psychologist or include on the defense team any person qualified to recognize or diagnose mental illness; and by their own admission neither attorney had such qualifications. RT 173, 239. In failing to retain such an expert or conduct any investigation into this matter, counsel plainly failed to meet the standard of reasonable competence.

The record also shows that the failure to investigate or retain an expert was prejudicial. Had counsel fulfilled their basic duty to gather records from such sources as the Alabama Department of Corrections and Holman Prison, where petitioner had been housed for years prior to this trial, and from petitioner's middle school, they would have learned that petitioner had numerous mental problems, such as schizoid characteristics and a possible thought disorder. RT 226-228; CR 2649-2652. Lay social history testimony revealed that petitioner's father and aunt suffered from a mental illness which appears to have been schizophrenia, RT 22-23, 27, 54-57, and that others on his father's side of the family also suffered from mental illness. RT 55-57. Lay social history testimony also showed that petitioner almost certainly suffered from fetal alcohol syndrome. His mother drank to excess on the weekends throughout her pregnancy with

petitioner, and petitioner was born with the characteristic facial features of fetal alcohol syndrome, including widely spaced eyes and ears, lack of a philtrum, and deformed eyelids.

The appellate court decision also did not mention the fact that when the Circuit Court denied petitioner's repeated requests for funding for mental health experts, petitioner's counsel submitted to the court a proffer in the form of three declarations signed under penalty of perjury by a psychiatrist, a neuropsychologist, and a mitigation specialist. These declarations showed that based on the evidence petitioner had presented to them, the mental health experts believed there was a high probability that Mr. James suffered from schizophrenia or a disease on the schizophrenia spectrum, such as schizotypal disorder, and had organic brain impairments, a history of physical abuse, and likely posttraumatic stress disorder. *See* Motion to Expand the Record, Declaration of Pablo Stewart, M.D., at pp. 7-8; Declaration of Karen Bronk Froming, Ph.D., at p. 8. Neither the order nor the appellate court's decision discuss any of this evidence.

The Court of Criminal Appeals found that counsel acted reasonably in relying upon an opinion of Dr. Wendy Rebert because she was an "expert." *James v. State*, *supra*, 61 So.3d 357, 368. The finding is absurd for a number of reasons. First, Rebert's evaluation was for *competence to stand trial*; its purpose was not to

diagnose mental illness, and the opinion that he was competent to stand trial therefore did nothing to rule out the presence of mental illness.[2] Rebert administered a basic competency instrument and an IQ test, but never administered any instrument such as the MMPI that might have disclosed psychoses, personality disorders, or other mental illnesses, not an instrument such as the Halstead-Reitan Neuropsychological Battery that might have disclosed organic brain damage. No competent expert would have been able to diagnose mental illness on the basis of the tests Rebert administered.

Second, Rebert was not a defense expert, but a competence expert appointed to advise the court. Competent counsel specifically on notice of information suggesting a potential mental defense, as Lead counsel was, cannot rely solely upon a competence evaluation prepared by a court-appointed expert, but instead *must* retain mental health professionals *for the defense* and conduct an investigation into the matter. *Evans v. Whitley*, 855 F.2d 631 (9th Cir, 1988); *Roberts v. Dretke*, 381 F.3d 491, 498 (5th Cir. 2004) Third, her competence evaluation was *four years* out of date, having been done in 1995, and was hardly conclusive on petitioner's mental condition at the time of trial in 1999. Fourth,

[2]A person can be profoundly mentally ill and still be competent to stand trial. *Lackey v. State*, 615 So.2d 145, 154 (Ala. Crim. App. 2002).

Rebert lacked any social history documents, the *sine qua non* of mental health diagnosis. *See, e.g.,* Kaplan & Sadock, *Comprehensive Textbook of Psychiatry*, ch. 7.1, Part IX, "Developmental and Social History," p. 895. In their declarations, petitioner's experts explain the significance of the social history documents petitioner's habeas counsel was able to obtain and properly base their conclusions on that material.

The appellate court's conclusion that there is "nothing in the record" which might have prompted counsel to investigate petitioner's mental health is factually wrong, objectively unreasonable, and demonstrates that the appellate court relied solely on the Attorney General's findings and did not actually review the record of the hearing itself. The Court of Criminal Appeals did not examine the relevant evidence or comment on it because the Attorney General conveniently left it out of his final order, never once mentioning the testing data, and alluding to the other evidence only in connection with mitigation.

Accordingly, contrary to the state appellate court's decision, petitioner in fact *did* make the requisite showing of evidence of mental illness that would have compelled any reasonably competent counsel to investigate petitioner's mental health. Any shortcomings in the showing of actual mental illness are attributable not to petitioner but to the state Circuit Court, which denied petitioner the funding

needed for mental health experts and erred in the other respects set forth in Petitioner's district court motion for evidentiary hearing. Relief is compelled.

IV. Trial Counsel was Plainly Ineffective in the Sentencing Phase of Petitioner's Trial, and the State and District Courts' Conclusions to the Contrary Were Erroneous and Unreasonable.

Petitioner's Claim II alleged ineffective assistance of counsel in the sentencing phase of petitioner's trial based on several errors. However, due to length limitations, Petitioner will focus here solely on counsel's failures to investigate or present mitigation or social history evidence. Habeas corpus relief on this claim was clearly compelled.

The Sixth, Eighth, and Fourteenth Amendments to the United States Constitution guarantee a capital defendant competent counsel at the penalty phase of his trial. *Williams v. Taylor,* 529 U.S. 362, 394-395 (2000); *Brownlee v. Haley,* 306 F.3d 1043 (11th Cir. 2002). At a minimum, competent penalty-phase performance requires that counsel must conduct an investigation into the history and background of the defendant "to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387, n. 7; see also, ABA Guidelines 10.4, 10.7. Counsel must conduct this investigation well in advance of trial and cannot wait until as

late as a week before the trial to begin preparing for the penalty phase of the trial. ABA Guideline 10.7, Comment; *Brownlee v. Haley, supra*, 306 F.3d at 395.

In recent years, the United States Supreme Court has repeatedly emphasized that capital counsel perform ineffectively if they fail to conduct a thorough mitigation investigation. The Supreme Court has also repeatedly reversed other capital cases in which the quality of the penalty phase representation far exceeded the quality of the indolent representation petitioner received in this case. See, *Williams v. Taylor*, 529 U.S. 362. 395-396 (2000) (death sentence reversed even though sentencing phase defense was presented because counsel had not "fulfilled their obligation to conduct a thorough investigation of the defendant's background," waited until a week before trial to begin conducting a mitigation investigation, and then failed to uncover extensive social history records graphically describing the defendant's "nightmarish childhood"); *Wiggins v. Smith*, 539 U.S. 510 (even though counsel obtained and reviewed a presentence report containing social history information, gathered records from the Maryland Department of Social Services recording incidents of the defendant's physical and sexual abuse, alcoholic mother, placements in foster care, and borderline retardation, and also retained a psychologist to administer a number of tests on the defendant, counsel performed incompetently because they failed to seek out "all

reasonably available mitigating evidence" and specifically failed to hire a social worker to prepare a social history. *Id.*, at 524; *Rompilla v. Beard*, 545 U.S. 374, 381, 387 (2005) (death sentence reversed in spite of the fact that trial counsel had conducted an extensive investigation, including conducting detailed interviews with the client and five of his family members and retaining three mental health experts, and in spite of the fact that the client was not only uncooperative but actually obstructed their efforts, because trial counsel had failed to examine the court file on the defendant's prior conviction).

It should be noted that in all three of the foregoing cases, the United States Supreme Court reversed decisions of the lower courts which had upheld the defendants' death sentences, holding that the state courts' determinations that counsel had acted competently or that counsel's incompetence had not prejudiced the defendant were not merely incorrect but were also *objectively unreasonable*. See, e.g., *Williams v. Taylor, supra*, 529 U.S. at p. 397-398; *Wiggins v. Smith., supra*, 539 U.S. at pp. 528-529; *Rompilla v. Beard, supra,* 545 U.S. at 389-390.

As was true in the guilt phase, neither attorney conducted any meaningful mitigation investigation. Second-chair counsel testified that he conducted no mitigation investigation at all. He testified, "I don't think I thought beyond the trial itself, trying to get to the mitigation phase." RT 166. He agreed that "it

would be fair to say" that he was not thinking about mitigation. RT 166. "It wasn't on my radar screen." RT 167. This was a clear admission of incompetent performance.

Lead counsel did no better. She testified that she had done no record-gathering at all. RT 240, 251. She did not retain an investigator, a mitigation specialist, a psychologist, a psychiatrist, or a neuropsychologist. RT 251. Thus, there was no defense team even to begin conducting an investigation. Counsel also did no meaningful investigation of her own. Prior to trial, she made exactly one telephone call to petitioner's step-grandmother and returned one phone call that had been placed to her by petitioner's mother. RT 241. Apart from these two phone conversations, only one of which she originated, she spoke to no members of petitioner's family before trial began. RT 241. She admitted that, apart from her conversations with petitioner himself, this was the entire extent of the mitigation investigation. RT 251. Thus, under the prevailing standard of care and binding United States Supreme Court precedent, counsel was grossly incompetent in failing to investigate. RT 240.

Incredibly, however, the state court found this pathetic non-investigation to be sufficient to satisfy the competence prong of *Strickland*. CR SUPP 359. The Circuit Court order found it "obvious" from the record and the hearing that

counsel conducted a "limited" investigation and did not present mitigating evidence. CR SUPP 359. However, the order found this did not constitute deficient performance because, according to the order, petitioner's *family* was "unwilling to help" and petitioner himself "refused to provide counsel with any information." CR SUPP 359. The order concluded that "[t]he absence of non-statutory mitigation is attributable not to trial counsel, but to Mr. James and his family." CR SUPP 360. The order could not be more wrong.

First of all, the order grossly distorted the facts which emerged at the hearing. The record clearly does *not* show that petitioner's family was "unwilling to help." To the contrary, it shows that counsel made no meaningful effort to contact, interview, or even locate petitioner's family. Lead counsel's entire effort to contact petitioner's family consisted of placing one phone call to petitioner's elderly step-grandmother, and returning one other phone call from petitioner's mother. RT 241-242. Counsel made no other attempt to contact any of petitioner's family, even though all his siblings' names were listed in the 1996 presentence report in her file. RT 244-246; Exh, 37. Counsel made no attempt to contact petitioner's aunts, and no attempt to track down petitioner's father or other family members. Counsel made no attempt to contact Mara Ruffin, the mother of petitioner's two children, even though petitioner gave counsel her name and

number on December 31, 1998, and in spite of the fact that the names of petitioner's two daughters were also listed in the 1996 presentence report. RT 247-248; Exh. 37. Each of the social history witnesses who testified at the hearing, including three of petitioner's family members, stated that they would have come to court and testified if they had been contacted by the defense and asked to do testify, and petitioner's sister testified she would have given counsel the names of many other witnesses to interview for mitigation purposes if counsel had only asked her. All this testimony went uncontradicted and unchallenged. RT 29, 72, 88, 112-113. At most, the evidence shows that petitioner's *mother* was reticent to testify in court, but it also shows that many other family and social history witnesses were available and willing to help. Thus, the order's conclusion that petitioner's family was unwilling to help contradicts the record.

Secondly, the order's conclusion that petitioner himself refused to cooperate with counsel in the sentencing phase or permit counsel to put on mitigating evidence is also clearly false. Although lead counsel repeatedly sought to blame her failure to investigate on petitioner's supposed lack of cooperation, the record clearly and repeatedly demonstrated that she was lying about this very matter. For example, while counsel contended in both her testimony and her sworn pre-hearing affidavit that petitioner refused to cooperate or give her information about

the homicide, CR 1519; RT 211, it was demonstrated at the hearing that petitioner had in fact given her a complete explanation of his version of the events of the killing the very first time they met. This fact was established by handwritten notes made by lead counsel herself at her first meeting with petitioner on December 31, 1998, notes which completely summarized petitioner's version of events. When confronted with these notes, lead counsel *admitted* that her affidavit was false in stating that petitioner would not talk about the incident or give her any information. RT 215; Exh. 37.

Similarly, although lead counsel contended in her affidavit that she had never heard that petitioner had a girlfriend, CR 1526, she admitted that her own notes from her first meeting with petitioner also showed he had given her his girlfriend's name, telephone number, and even social security number, and that her affidavit was therefore also false in this respect. RT 246-248; Exh. 37. Although she initially testified that petitioner had never told her that the victim had attacked him and his girlfriend with a tire iron, she admitted that her notes showed he had given her the full story of this incident– a story later confirmed by a police report on file at the Brighton Police Department, which of course counsel never bothered to obtain. RT 211, 215; Exh, 37. Although counsel stated in her affidavit and testimony that petitioner would not give her any names of family members or

others from whom she could obtain mitigating evidence, she admitted on the stand that petitioner had given her the name and phone number of his step-grandmother, and as shown previously her own notes also show he had given her the name and contact information of his girlfriend, Mara Ruffin. CR 1525; RT 221, 243, 246-247, 258; Exh. 37. Accordingly, counsel's self-serving statements attempting to place the blame on petitioner for her own lack of investigation were *proven* and *admitted* to be false, and the order's conclusions to the contrary are clearly erroneous and objectively unreasonable.

Third, even if the final order had been correct in concluding that petitioner and his family had refused to cooperate, the law does not excuse counsel from failing to investigate or present mitigating evidence on this basis. In a capital case, counsel *must* conduct an independent investigation of the circumstances of the case and *must* seek to obtain *all* reasonably available evidence in mitigation even if the defendant does not provide assistance or cooperation, objects to the presentation of mitigation evidence, and/or refuses to testify. ABA Guideline 10.7(a)(2); see e.g. *Rompilla v. Beard, supra*, 545 U.S. at p. 377 [counsel found ineffective "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available" and despite consulting mental health experts]; *Porter v. McCollum, supra*, 558 U.S. ___, 130

S.Ct. 447, 453 [counsel found ineffective despite a "fatalistic and uncooperative" client who instructed counsel "not to speak with Porter's ex-wife or son," because "that does not obviate the need for defense counsel" to conduct a mitigation investigation]; *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir.1991) [trial counsel ineffective for failing to adequately investigate and present mitigating evidence even though the defendant, Blanco, instructed his attorneys not to call any family members or acquaintances to testify at the penalty phase]; *Thompson v. Wainwright,* 787 F.2d 1447, 1451 (11th Cir. 1986) [attorney required to investigate mitigation evidence even if defendant instructs him not to and refuses to testify]; *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001) [defendant's alleged "waiver" of right to present mitigating evidence invalid because counsel had not adequately explained what mitigation evidence was; also, the state court's holding that counsel's duty to investigate mitigation was absolved by defendants lack of cooperation was an unreasonable application of *Strickland*]; *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2001) [fact that family was uncooperative and defendant was strongly opposed to presenting mitigation evidence does not relieve counsel of duty to investigate]; *Johnson v. Baldwin*, 114 F.3d 835 (9th Cir. 1997) [even where defendant *lies* to counsel, counsel must still conduct investigation to determine whether defendant's story is credible].

The state court's conclusion that petitioner somehow "waived" or is "estopped" from asserting ineffective assistance in failing to investigate due to petitioner's alleged failure to cooperate, even if that allegation were true, is not merely unreasonable but simply absurd. (CR SUPP 360.) Under the Eighth and Fourteenth Amendments, until counsel has conducted a thorough and constitutionally adequate investigation, explained to the defendant what evidence is available, explained to the defendant what the purpose of mitigating evidence is and why it is significant, and then obtained an express waiver, and until the trial court has placed all these facts on the record and conducted its own inquiry into the defendant's understanding of the significance of his decision, no knowing and intelligent waiver of the right to present mitigating evidence can be made. *Battenfield v. Gibson, supra*, 236 F.3d 1215, 1231-1233, also 1231, n. 8, and cases there cited. Any state court finding to the contrary will be held "patently unreasonable." *Id.*, at p. 1233.

This case bears striking resemblances to this court's decision in *Blanco, supra*. As in *Blanco*, counsel's self-serving contentions in this case that petitioner would not cooperate were revealed at the hearing to be false. It is clear from counsel's own notes that petitioner actually *did* cooperate and provided counsel with names and contact information for *at least* his step-grandmother and his

fiancee, who was also the mother of his two daughters, and that counsel's contentions to the contrary were lies. However, even if petitioner had refused to cooperate or provide the names of any individuals for counsel to interview, counsel must still conduct an investigation, and the evidence at the hearing showed that counsel failed to do so even though they had ample leads with which to begin such an investigation that did not require petitioner's cooperation.

For example, the presentence report from the first trial, which was in counsel's own files the moment she took over the case in December, 1998– six months prior to trial– contained the names of all of petitioner's five siblings and his two daughters, a list of his prior employers, a list of schools he had attended, and other leads for investigation that counsel never pursued. CR 2729-2731. Had counsel bothered to do any record gathering at all, or even collect documents in the possession of the Department of Corrections and Holman Prison, they would have discovered additional social history information as well as substantial credible information indicating serious mental problems, including the results of psychological testing reporting petitioner's schizoid characteristics and possible thought disorder. CR 2661-2667. The foregoing are only two of a host of obvious methods counsel could have used to begin a mitigation investigation without any information or assistance from petitioner. Under the circumstances, counsel's

attempt to blame petitioner for their own lack of investigation smacks of desperation.

The state court's conclusion that counsel's failure to investigate was not prejudicial is similarly absurd. Although petitioner was severely hampered at the hearing by the Court's refusal to provide funds for investigators or mental health experts, petitioner nevertheless managed to make a very substantial showing of prejudice from counsel's failure to investigate or present any mitigating evidence, a showing much greater than the minimal level required to compel reversal.

The standards of prejudice for an ineffective assistance claim were set forth in the guilt phase argument above. See Argument III. It bears repeating, however, that a capital defendant need *not* show that it is more likely than not that he would have received a life sentence had his attorneys performed competently. A reasonable probability is *less* than a preponderance of the evidence. *Strickland, supra*, at p. 698. Even if the new evidence is not entirely favorable to the defendant or would leave some aggravating evidence (e.g., future dangerousness) unrebutted, evidence of a defendant's difficult childhood, poverty, mental problems, and similar background and character evidence will be sufficient to establish prejudice from counsel's failure to perform effectively if that evidence

"might well have influenced the jury's appraisal of his moral culpability." *Williams v. Taylor, supra*, at p. 398.

Under the foregoing standards, petitioner's showing of mitigating evidence was far more than was required to compel reversal. It must be remembered that counsel in this case presented *no mitigating evidence at all* at trial. By comparison, the mitigating evidence presented at trial in *Wiggins*, *Rompilla,* and *Sears v. Upton,* 561 U.S. 945*,* was extensive, yet the United States Supreme Court reversed those decisions because counsel had not discovered and presented "*all reasonably available* mitigating evidence." See, e.g., *Wiggins v. Smith, supra*, 539 U.S. at p. 524, emphasis in original. Indeed, in *Rompilla* counsel consulted three mental health experts, presented five witnesses, and gathered a number of social history records, yet the Supreme Court reversed because counsel had failed to examine the prosecution's file regarding one of the defendant's prior convictions which the prosecution intended to use in aggravation. In *Sears*, the Court found trial counsel ineffective in a 1993 trial even though they had presented seven witnesses in the penalty proceedings. *Sears v. Upton*, *supra*, 130 S. Ct., at p. 3266. Clearly, if trial counsel's much more extensive investigation and presentation in these cases required reversal, *a fortiori* trial counsel's

complete failure to investigate or present a mitigation case *at all* compels relief here.

Indeed, one eloquent demonstration of the strength of petitioner's mitigation case lies in the fact that even the grossly unreasonable order crafted by the Attorney General contains sufficient persuasive mitigating evidence to demonstrate prejudice and compel relief under then existing Supreme Court case law.

For example, the order found that petitioner had a "difficult childhood, marked by the instability of constant moves, poverty, a frequently absent mother, and a completely absent father." CR SUPP 367. The order noted that petitioner showed that his father was mentally ill. CR SUPP 363. The order agreed that petitioner showed that his mother drank heavily, often to excess, while she was pregnant with petitioner, and that petitioner was born with facial abnormalities, i.e., a large head, small ears, and drooping upper eyelids which required petitioner to tip his head backwards in order to see and which required surgery when he was four or five years of age. CR SUPP 363.[3]

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[3]Though the order did not so find– primarily because petitioner was prevented from presenting mental health experts or even the proffered declarations of mental health experts– the evidence on this point strongly suggests petitioner suffered fetal alcohol syndrome, a lifelong pattern of mental and physical defects affecting the central nervous system, which typically results in mental retardation,

The order found that petitioner's mother was so sexually promiscuous that petitioner and his five siblings were born to five different fathers. CR SUPP 363, 366. The order found that petitioner's biological father beat his mother, sometimes in front of him, when he was an infant, and abandoned the family when petitioner was two years old. CR SUPP 363. From that time on, the order found, petitioner's life was filled with "constant moves and instability." CR SUPP. 366. The order stated that petitioner's mother moved the family from apartment to apartment, so that the family lived in 18 different places when he was a child. CR SUPP. 364. The order found that when petitioner's mother was gone, petitioner took care of his five younger siblings, and was very protective of his sister. CR SUPP. 364, 366. Finally, the order found that petitioner had a fiancee at the time of the homicide, and had two daughters by her. CR SUPP 363, 364.

Although petitioner submits that there was much more evidence presented at the evidentiary hearing which a jury might have found persuasive and which the order simply omitted, a review of the United States Supreme Court case law compels the conclusion that even the evidence found to be true in the self-serving

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learning disabilities, short attention span, hyperactivity in childhood, and other mental health issues. Denying petitioner funds for mental health experts placed petitioner in a Catch 22, unable to show the prejudice from counsel's failure to retain mental health experts.

final order itself, when compared with the *total absence* of mitigation evidence presented at trial, was more than adequate to establish the prejudice from counsel's ineffectiveness and compel reversal. Any of the foregoing facts "might well have influenced the jury's appraisal of his moral culpability." *Williams v. Taylor, supra*, at p. 524. It cannot seriously be contended that there is not a reasonable probability– a standard *less* than a preponderance of the evidence– that a more favorable result might have been obtained had this evidence been presented.

Because trial counsel presented no evidence on his behalf, the jury in petitioner's case was given no sense of petitioner as a human being. Instead, they were asked to determine whether he should live or die based solely on evidence of the worst thing he had ever done in his life. Without any mitigating evidence to humanize petitioner, the jury was likely to view petitioner with fear and hostility, overlook their common humanity with him, and seek solely to avenge the victim's death. This likelihood became even greater when the prosecutor falsely portrayed petitioner as a monster who killed in cold blood, an evil generic killer who was "mean. Plain old mean." Trial RT (6/17/99) 23. Indeed, the full impact of counsel's ineffective performance is neatly summed up in the following passage of the prosecutor's closing penalty phase argument:

> All of us want to sit back and we all want to think, There has to be something good about this guy. There has to be something good. But I submit to you there is not.

Ibid.

The prosecutor was able to make this argument, of course, only because trial counsel never investigated or presented any evidence in petitioner's favor; and since the defense had presented absolutely no evidence to contradict the prosecutor's contention, the jury had no reason to spare petitioner's life.

Yet in light of the evidence presented at the hearing, even the Attorney General's absurdly self-serving final order agrees that petitioner proved he had a family, including two infant daughters. A reasonable jury might have decided to spare petitioner's life simply so petitioner's two little girls would have a father when they grew up, even if the jurors were not willing to spare petitioner for his own sake. Similarly, even under the Attorney General's self-serving view of the evidence, the jury would have heard that petitioner was born to an alcoholic, sexually promiscuous mother and a mentally ill, schizophrenic father who beat petitioner's mother. The jury would have heard that in addition to his family history of schizophrenia, petitioner suffered from birth defects– facial abnormalities that set him apart from other children– and might have put two-and-two together, even without a mental health expert, and figured out that petitioner

suffered from fetal alcohol syndrome and, possibly, schizophrenia itself. The jury would have heard that in spite of his deficits, petitioner cared for his younger siblings when his mother was out carousing with her many boyfriends, and was also protective of his sister Yosandra. Any of these facts might have persuaded a reasonable juror to look at petitioner in a more positive or sympathetic light, or at least to understand that petitioner was not one of the "worst of the worst" and therefore did not deserve to die. Like the evidence presented in post-conviction in *Williams v. Taylor*, *supra*, the foregoing evidence "might well have influenced the jury's appraisal of his moral culpability," *Williams v. Taylor, supra*, at p. 524, and reversal of the judgment was accordingly compelled on the Attorney General's facts alone.

It must be emphasized that the foregoing findings constitute only the selective, one-sided view of petitioner's *opponent* in the litigation and do not reflect what a reasonably impartial, unbiased finder of fact would have found. Indeed, the order's blatant bias was made immediately apparent by the fact that the order included no findings with respect to the mitigating impact of any of the documentary evidence petitioner presented, such as the Department of Corrections' own psychological examinations of petitioner, including two MMPI examinations of petitioner, which showed, *inter alia*, that petitioner had "schizoid

characteristics" and a possible "thought disorder" and believed he was possessed by evil spirits. RT 226-228; Exhs. 12A, 12B. In view of the fact that these two respected, empirical psychological tests were administered *by the state itself*, the state court's failure to mention them as mitigating evidence or evaluate their credibility was grossly unreasonable. Plainly, even without the assistance of an explanation from a mental health expert, a reasonable juror could have concluded from the combined effect of this documentary evidence, petitioner's family history of mental illness, and the argument of competent counsel that petitioner was mentally ill and therefore less culpable than would be a person with all his faculties intact.

Similarly, documentary evidence clearly proved that only months prior to the killing, petitioner and his girlfriend, Mara Ruffin, were attacked with a tire iron by the victim, Faith Hall, who broke the window of the truck in which they were sitting, cutting Ms. Ruffin with flying broken shards of glass. In view of the fact that this information came from a report prepared by a law enforcement officer, an agent of the state, the order's complete failure to mention this credible mitigating evidence is also inexplicable and further demonstrates the biased nature of the order.

Plainly, had evidence of the Brighton assault been presented, a reasonable juror could have concluded that petitioner was not acting maliciously or even unreasonably in arming himself prior to entering the victim's apartment, but instead went prepared to defend himself against someone who had previously assaulted him and his girlfriend with a deadly weapon. This evidence would have demonstrated that there was bad blood between the victim and petitioner, and that the victim was hardly the blameless, saintly, innocent young girl the prosecutor falsely portrayed her to be. Trial RT (6/17/99) 36.[4] At the very least, this evidence would have effectively countered the prosecutor's theory that petitioner had been stalking the victim; in fact, it was the victim who had been stalking petitioner and his girlfriend. The state court's failure to mention these facts is objectively unreasonable.

The state court's decision also fails to mention other matters which would have aided the defense. For example, petitioner's aunt, Consuela James, testified that petitioner's father was not the only person in the family who suffered from mental illness; at least three other paternal relatives were clearly mentally ill, a powerfully mitigating fact in view of the genetic component in schizophrenic

[4]The prosecutor outrageously suggested to the jury, without any evidentiary basis, that the victim had been praying when she was killed. Trial RT (6/17/99) 36.

spectrum disorders. RT 57. Ms. James also testified that petitioner's mother abandoned the family for long periods of time, and permanently gave up her son, Hakim, to petitioner's step-grandmother. RT 66. The order is silent on all these matters, matters which would have underscored the fact that petitioner suffers from mental illness and was raised in a bizarre environment, surrounded by parents and others who were themselves severely mentally ill.

The state court decision was also unreasonable in many other respects. For example, it supposedly discounted *all* of the testimony of Petitioner's sister, Yosandra Craig, simply because she recalled speaking to a male lawyer rather than a female lawyer at petitioner's trial several years earlier. CR SUPP 340, n. 7 (finding Ms. Craig's "entire testimony . . . incredible"). The order does not explain how this failure of recollection undermines the credibility of her testimony regarding her own upbringing with petitioner, nor does the order explain why, having supposedly discounted her "entire testimony," the order then selectively *relies* upon her testimony for negative findings about petitioner's background and for the fact that Ms. Craig succeeded academically even though raised in the same deprived background as petitioner. CR SUPP 340, n. 7, 367; RT 117. It is also noteworthy that the order does not find any credibility problems with the testimony of lead counsel, even though she admitted on the stand that statements

in her sworn affidavit and even aspects of her live testimony were false. In any event, petitioner submits that Craig's testimony regarding petitioner's childhood was perfectly credible and that it was manifestly unreasonable of the final order to selectively discount aspects of that testimony helpful to the defense while relying upon others perceived helpful to the prosecution.

Finally, petitioner notes that the state court decision reflected not only unreasonable and demonstrably false factual findings, a lack of legal scholarship, and an absence of analysis, but also a basic misunderstanding of the purpose and importance of mitigating evidence. The order concluded that although petitioner proved he had "a difficult childhood, marked by the instability of constant moves, poverty, a frequently absent mother, and a completely absent father," this evidence must be "afforded little weight" because "many people who experience similar or even worse childhoods do not grow up and commit capital murder." CR SUPP 367. This statement not only fails to logically support the conclusion, but also is legally irrelevant.

The purpose of mitigating evidence is not to excuse or justify the defendant's conduct in committing the offense of which he was convicted, or to show that the offense was itself attributable to the defendant's background and character. Instead, the purposes of mitigating evidence are "extremely broad and

encompass any evidence that tends to lessen the defendant's moral culpability for the offense or otherwise support[] a sentence less than death. In particular, a mitigation presentation may be offered not to justify or excuse the crime 'but to help explain it.'" ABA Guideline 10.11, Comment. Thus, evidence about, e.g., petitioner's past relationship with Hall and her previous attacks on petitioner and his girlfriend– facts proved by official documentary evidence on which the order makes no findings– were powerfully mitigating.

Mitigating evidence may also be presented to show the jury that the defendant is a sympathetic human being and to counter arguments, such as those made by the prosecutor in this case, that the defendant is a cold-blooded killer, is "plain old mean," and that there is nothing good about him. RT (6/17/99) 23, 36. Indeed, one important reason why social history witnesses must be sought and presented by competent counsel is that such witnesses "humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive way, such as attempting to protect other family members from domestic violence or trying to be a good parent and provider." ABA Guideline 10.11, Comment.

Thus, the facts that petitioner was caring and protective toward his sister, took care of his younger siblings when his mother was away, and had two young

daughters of his own– all of which the order found petitioner proved at the hearing– served to humanize petitioner and constituted powerfully mitigating evidence. Particularly in light of the fact that defense counsel presented no evidence *at all* to assist petitioner's cause in the sentencing phase, the order's conclusion that the evidence at the evidentiary hearing was inadequate to establish prejudice is profoundly erroneous and unreasonable.

Petitioner overwhelmingly proved ineffective assistance of counsel at both the guilt and penalty phases, and reversal of the entire judgment is therefore mandated.

V. Petitioner Should Have Been Granted an Evidentiary Hearing.

Subject only to modifications enacted by the AEDPA, a federal Court's determination of whether to grant an evidentiary hearing is still governed primarily by *Townsend v. Sain*, 372 U.S. 293 (1963). *See, Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Petitioner was entitled to a hearing because the state factual determination was not fairly supported by the record as a whole, the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing, the material facts were not adequately developed at the state court hearing, and the state trier of fact did not afford petitioner a full and fair fact hearing. *Townsend v. Sain*, 372 U.S., at p. 313. Indeed, the state hearing was little

more than a kangaroo court in which Petitioner was obliged to try his case to the Attorney General, his opponent in the litigation, who effectively ruled on all issues before the court. The district court therefore erred in denying Petitioner an evidentiary hearing.

The Circuit Court judge reflexively signed virtually every proposed order placed before him by respondent without any alteration or further explanation, failing to sign only those orders which the state itself superseded with duplicative orders, leading any reasonable and impartial observer to conclude that throughout this litigation the judge simply followed the instructions given him by respondent.[1] The Attorney General effectively ruled even on such matters as Petitioner's requests for funds for investigators and experts– requests that impartial courts routinely treat as *ex parte* matters because they necessarily disclose matters of defense strategy and tactics but which Petitioner was compelled to serve on Respondent.

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[1]/ Indeed, the Circuit Court and the Attorney General practically announced that the Attorney General would be authoring the final decision in this matter even before the evidentiary hearing was completed. At one point during the hearing, when a dispute arose as to whether the declarant of a statement was a psychologist or a licensed professional counselor, the Attorney General suggested that the court defer resolving the question at that point "as long as we can tie it up in the order . . ." (RT 227.) The judge obediently nodded and said, "All right." (RT 227.)

So routine were these rulings that in some cases, such as when the Circuit Court granted the state's motion to prospectively prohibit petitioner from amending the petition, the court signed respondent's order without even providing petitioner with an opportunity to respond to the state's motion. In other cases, such as when the Circuit Court purportedly "dismissed" all of petitioner's claims and then the petition itself in January, 2003, it was apparent that the court was not even familiar with the contents of its own file or the current status of the case, had not even read the current version of the petition, and had not carefully read the orders it was signing— approving some orders the Attorney General had directed to the original petition and other orders directed to the first amended petition, all while petitioner's *second* amended petition had been on file with the court for at least two months. It is also apparent that the court did not bother to read the Attorney General's outrageous, overreaching, and clearly erroneous final order before signing it.

The United States Supreme Court has condemned the mechanical adoption of verbatim orders drafted by the prevailing party. *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 72-73 (1985) (noting Court's prior criticism of verbatim adoption of findings of fact prepared by prevailing party but holding remand was unnecessary because court's findings varied considerably in organization and

content from those submitted by petitioner's counsel); *United States v. El Paso Natural Gas,* 376 U.S. 651, 56 (1964) (condemning trial court's verbatim adoption of findings of fact and conclusions of law written by prevailing party where they were mechanically adopted.)

Most recently, the United States Supreme Court condemned the practice of the verbatim adoption of findings of fact prepared by prevailing parties in *Jefferson v. Upton*, 563 U.S. 284 (2010). In *Jefferson*, the federal district court failed to address the petitioner's arguments that the state court's procedure of adopting findings written entirely by the state attorney general deprived its findings of the presumption of correctness or the need for deference under section 2254. The high court criticized this failure and referred the case back to the federal district court to determine whether the findings actually warranted a presumption of correctness. *Id.*, 563 U.S. at 293-295. The court appeared to be particularly concerned that the state court may have adopted "findings that contain internal evidence suggesting that the judge may not have read them." *Id.,* at 294. Here it is plain from the document itself and from the circumstances surrounding its adoption by the Circuit Court that the final order was simply signed by a state court judge who never read it.

By denying Petitioner's repeated requests for funding for a mitigation specialist and mental health experts, the court effectively created a perfect Catch-22– preventing the indigent Petitioner from developing the facts necessary to prove the prejudice prong of his claim that trial counsel had been ineffective in failing to consult or retain such experts. When Petitioner finally submitted the declarations of three such experts, consulted at counsel's own expense, explaining that correctional records and other evidence strongly suggested petitioner was mentally ill and suffered from frontal lobe brain damage, the Attorney General first requested a week to review the declarations and finally instructed the judge to sign a final order dismissing them on an absurd basis, never raised in the evidentiary hearing, to which Petitioner had never been given an opportunity to respond.

The court granted discovery only days before the hearing and then refused to grant Petitioner a continuance even though many state agencies had not yet provided documents in compliance with the order and discovery actually obtained, including two MMPI tests disclosed by the Alabama Department of Corrections which confirmed that petitioner was mentally ill, required more time for expert assistance and other witnesses to explain their results.

Perhaps most unfair of all, however, was the court's refusal to issue a bench warrant to compel attendance of Mara Ruffin, a critical defense witness who would have testified regarding the prior assaults on her by the victim, Faith Hall, as well as the fact that Petitioner was in Atlanta with her the night before the crime and was not the man with the gun Gregory said she saw on the porch– testimony which would have seriously undermined the prosecution's theory that Petitioner was stalking Hall and that he entered her apartment with the intent to commit assault. Furthermore, as the mother of Petitioner's two children, Ms. Ruffin was also a critically important mitigation witness who could have testified, *inter alia*, that Petitioner was a positive influence in his daughters' lives. The court's wholly unreasonable ruling deprived Petitioner of his right to compulsory process.

The foregoing paragraphs describe only the tip of the iceberg of unfairness Petitioner encountered during state proceedings. Space limitations prevent Petitioner from fully discussing these issues here, but at a minimum he was entitled to an evidentiary hearing in federal district court to fully develop and present the evidence he was prevented from presenting in state court.

CONCLUSION

For the reasons set forth herein, this Court should issue a Certificate of Appealability to permit Mr. James to appeal his claims of ineffective assistance of counsel and should remand for a federal evidentiary hearing on those claims.

Dated: August 9, 2017

Respectfully submitted,

/s/ Wesley A. Van Winkle
Wesley A. Van Winkle
Attorney for Petitioner Joe Nathan James

CERTIFICATE OF COMPLIANCE

In compliance with Fed. R. App. P. 32(a)(7)(C), I verify that this Application for Certificate of Appealability, including footnotes and excluding the items set forth in 11th Cir. R. 32-4, contains no more than 14,000 words.

/s/ Wesley A. Van Winkle
Wesley A. Van Winkle

CERTIFICATE OF SERVICE

I certify that the foregoing Application for Certificate of Appealability was served on the following by United States mail, postage prepaid, on August 9, 2017:

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Alabama State House
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Montgomery, AL 36130-0152

Jefferson S. Dunn
Commissioner
Alabama Department of Corrections
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P.O. Box 301501
Montgomery, AL 36130-1501

Joe Nathan James
Z-610, H1-23A
Holman 3700
Atmore, AL 36503

/s/ Carol Friedman
Carol Friedman

APPENDIX B

James' Eleventh Circuit Brief

No. 17-11855

In the United States Court of Appeals for the Eleventh Circuit

JOE NATHAN JAMES,
PETITIONER-APPELLEE
v.
WARDEN, HOLMAN CORRECTIONAL FACILITY,

JEFFERSON DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS, ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA, NO. 2:10-CV-02929-CLS-HGD
HON. C. LINWOOD SMITH, PRESIDING

APPELLANT'S OPENING BRIEF

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JOE NATHAN JAMES

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT (CIP)

Undersigned counsel certifies that the following persons may have an interest in these proceedings:

Alper, Ty – State Co-Counsel for Petitioner-Appellant

Anderson, Richard D. – Deputy Attorney General, Counsel for Respondent-Appellee (federal proceedings)

Brower, William – State Trial Counsel (pre-trial proceedings)

Dunn, Jefferson – Commissioner of Alabama Department of Corrections, Respondent-Appellee

James, Joe Nathan – Petitioner-Appellant

McCormick, Hon. Michael – Trial Judge (State Criminal Trial and Rule 32)

McIntire, Jeremy– Deputy Attorney General (State Proceedings)

Smith, Hon. C. Lynwood – Judge, District Court for the Northern District of Alabama

Smith, Faith Hall – Victim

Van Winkle, Wesley A. – Counsel for Petitioner-Appellant

Vinson, Hon. Virginia – State Trial Counsel (lead)

Warren, Gordon – State Trial Counsel (associate)

Wood, John – State Co-Counsel for Petitioner-Appellant

I certify that the foregoing persons appear to me to fall within the scope of 11th Circuit Rule 26.1-2(a) and may have an interest in these proceedings.

Dated: October 24, 2018

/s/ Wesley A. Van Winkle

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No. 17-11855

In the United States Court of Appeals for the Eleventh Circuit

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APPELLANT'S OPENING BRIEF

INTRODUCTION

Appellant and Petitioner Joe Nathan James respectfully appeals the district court's Memorandum Opinion and Orders of September 30, 2014, denying and dismissing all claims in his Petition for Writ of Habeas Corpus and denying Appellant's motion for an evidentiary hearing. District Court Doc. 27.

Habeas corpus relief is compelled under 28 U.S.C. § 2254(d)(1) and (2)

because the state court ignored or unreasonably applied clearly established federal law and unreasonably determined the facts in denying Appellant's claim of ineffective assistance of counsel at the penalty phase of his trial. Appellant showed that in this capital case trial counsel fell far below the minimum standard of care required of capital defense lawyers, performing no investigation and presenting no witnesses in the penalty phase even though many social history witnesses could have testified and expert mental health professionals could have given a persuasive and sympathetic explanation of appellant's conduct. Appellant also showed that but for these errors it was at least reasonably probable that a more favorable result would have been obtained in his case and thus established his entitlement to relief for ineffective assistance of counsel.

Appellant also showed that the state court unreasonably determined the facts. The state evidentiary hearing was little more than a kangaroo court in which the Attorney General effectively made all the rulings, which the evidentiary hearing judge routinely signed without reading. Appellant argued federal constitutional error in connection with the wholesale adoption of the Attorney General's profoundly biased 103-page opinion, but the Alabama Court of Criminal Appeals rejected the contention and all of Appellant's substantive claims. The district court affirmed the state court's judgment, effectively validating the state's

unconstitutional procedure and analytical errors. The district court plainly erred in dismissing the petition and denying Appellant an evidentiary hearing, and appellate relief is therefore required.

Although Appellant recognizes that the Court of Criminal Appeals' decision is the last reasoned decision of the state court and therefore the decision reviewed by the district court and this court, that decision uncritically adopted the profoundly biased and legally and factually incorrect 103-page order drafted by the Attorney General, an order signed by a Rule 32 judge who obviously failed even to read it. This procedure was not only a federal constitutional violation but also rendered the state's fact-finding process relevant to Appellant's claim of penalty phase ineffective assistance invalid and unreasonable under 28 U.S.C. §2254(d). Accordingly, appellant will respectfully continue to direct this Court's attention to the unfairness of the state's process.

STATEMENT OF THE CASE

Appellant was convicted and sentenced to death by the Tenth Judicial Circuit Court in Jefferson County, Birmingham, Alabama, the Honorable Michael W. McCormick, presiding. Appellant was convicted of capital murder on June 17, 1999 and was sentenced to death on July 19, 1999. Appellant timely appealed and the Court of Criminal Appeals affirmed the judgment in all respects on April 28,

2000, *sub nom. James v. State*, 532 U.S. 1040 (2001) (USSC Docket No. 00-9007). Upon a writ of certiorari to the Alabama Supreme Court, that court also affirmed the judgment in all respects on April 28, 2000, *sub nom. James v. State*, 788 So.2d 185 (2000).

On May 7, 2002, Appellant filed a state petition for post-conviction relief under Rule 32, thereby tolling the running of the one-year federal statute of limitations with 14 days remaining, pursuant to 28 U.S.C. §2244(d)(1)(A). CR 159, 233. On December 5, 2003, the court granted an evidentiary hearing with respect to some of Appellant's claims, primarily claims of ineffective assistance of counsel. CR Supp. 10. On June 6, 2004, an evidentiary hearing was held. In essence, the evidence showed that counsel conducted virtually no investigation into either the guilt or sentencing phases of the case and that had counsel done so, substantial evidence could have been discovered and presented. Appellant also sought funding from the court to retain three experts to assist in the evidentiary hearing and presented declarations signed under penalty of perjury from three potential expert witnesses. Dr. Pablo Stewart, a psychiatrist, and Dr. Karen Froming, a neuropsychologist, both explained in their declarations, *inter alia*, that Appellant had been born to parents who were mentally ill, in particular a father who suffered from schizophrenia, and that testing needed to be conducted to

determine whether Appellant suffered from mental illness himself. A third expert, Russell Stetler, a mitigation specialist, explained how a mitigation investigation is conducted, how the investigation conducted by the defense had fallen woefully short of the standard of care applicable to capital defense counsel, and what steps would have been taken by competent counsel to investigation appellant's background. The Circuit Court denied appellant's request for expert assistance.

On October 28, 2004, the Circuit Court dismissed all Appellant's claims by signing without alteration a 103-page proposed final order prepared by the Respondent. CR Supp. 2; CR Supp. 270-372. Appellant's state appeals were all ultimately denied on October 15, 2010, when the Alabama Supreme Court denied certiorari.

On October 29, 2010, Appellant filed a timely habeas corpus petition in the District Court for the Northern District of Alabama, seeking relief pursuant to 28 U.S.C. §2254. The district court denied relief in a final judgment entered on December 30, 2014. Order, 2:10-cv-02929-CLS-HGD, Doc. 27. The district court also denied a certificate of appealability (COA). *Id.,* Doc. 27. On March 30, 2017, the district court denied James's motion to alter or amend the judgment. *Id.*, Doc. 40.

James timely filed his notice of appeal to this Court on April 28, 2017,

seeking a certificate of appealability with respect to his claims of ineffective assistance of counsel in both the guilt and penalty phases. On June 8, 2018, this Court denied a COA regarding the claim of ineffective assistance in the guilt phase but granted a COA as to Appellant's penalty phase ineffective assistance claim. 11th Cir. Order (6/8/18).

FACTUAL SUMMARY

At Appellant's trial, the prosecution sought to show that Appellant had stalked his former girlfriend, Faith Hall Smith (hereinafter, "Hall"), and ultimately killed her out of jealousy because he could not have her himself. The prosecution's evidence showed that Appellant and Hall dated for a time in the early 1990s, but broke up some time in late 1993 or early 1994. Trial RT1 147-148. Hall's mother and daughter testified that during their relationship Appellant was violent with Hall. *Id.*, Trial RT2 18. Hall's mother testified that Hall lived with her, and that after they broke up Appellant continued to stalk and harass Ms. Hall so that Hall's mother frequently had to "run him off." Trial RT2 76. Hall's ex-husband testified that Appellant was jealous of his relationship with Hall and once threatened to kill them both. Trial RT2 25-26.

In August, 1994, Ms. Hall's friend, Tammy Sneed, lived in the first-floor apartment of a three-story building at 2208-A 6th Court, near the intersection of

23rd Street in downtown Birmingham. *Id.* 188, 212, 222. A woman named Bridget Gregory lived in the second floor apartment immediately above Sneed's apartment, and a woman named Trenicha Holyfield lived on the third floor above Gregory. *Id.* 188.

Gregory testified that on the evening of August 14, 1994, she saw Appellant sitting on the steps of Holyfield's apartment with a nine-millimeter pistol between his legs. He told her he was waiting for a friend to come out of one of the apartments. Trial RT2 39-40.

At about 6 p.m. on the following evening, August 15, 1994, Hall and Sneed returned to Sneed's apartment from a shopping trip with Sneed's three young children. Trial RT2 122. Seeing Appellant's car, a red El Camino, parked in front of the apartment, they quickly got out of Sneed's car and ran into the apartment. Trial RT2 43-44, 122-123. Gregory, who saw them running, came downstairs to see what was wrong. Hall told Gregory she was afraid Appellant would kill her and asked Gregory to call the police because Sneed did not have a telephone. Trial RT2 43-35.

As Gregory was leaving the apartment, Appellant came running up to the door holding a gun in one hand, shoved her out of the way, and pushed his way into the apartment past Sneed and Hall, who were trying to shut the door on him.

Trial RT2 47-48, 125. Sneed and Hall asked him to put the gun away, and he did so, placing it in his belt. Trial RT 2 48, 127-128. Hall then ran to the bathroom, and Appellant pulled his gun out and followed her. Sneed and Gregory heard several gunshots coming from the back of the apartment. Trial RT2 48, 128. Gregory re-entered the apartment, meeting Sneed at the front door, while Appellant ran out the back. Trial RT2 48-49, 129. Appellant got into his car, which was still running, and drove off. Trial RT2 50-51. Gregory yelled to a group of people who had gathered nearby to call the police. *Id.*

When police arrived, Hall was dead on the bathroom floor in Sneed's apartment. A subsequent autopsy revealed that Hall had died as a result of multiple gunshot wounds. One bullet passed through the biceps and chest, another struck the abdomen, and the third entered the top of the head. Trial RT2 153, 161-162, 195. Three spent lead bullets were found at the scene. *Id.* 242. A ballistics witness testified that the bullets were either .38 caliber or .357 magnum bullets, and were not nine millimeter bullets. Trial RT2 95. It could not be determined whether they had been fired from the same gun, though it was possible that they could have been. Trial RT2 97.

No witnesses were presented by the defense at either the guilt/innocence phase or the sentencing phase. Appellant was convicted and sentenced to death.

At the Rule 32 evidentiary hearing in postconviction, Appellant established that trial counsel had performed virtually no investigation to prepare for either the guilt or the sentencing phase of the trial. However, Appellant presented six witnesses who testified that they would have appeared and testified on Appellant's behalf if they had been asked and could have presented extensive evidence regarding Appellant's impoverished, abusive childhood, family history of schizophrenia, Appellant's own mental illness– demonstrated through testing administered by the Alabama Department of Corrections– and other evidence in mitigation. Because funding for investigation and experts had been denied by the court, Appellant also proffered, in the form of affidavits, the statements of a psychiatrist, neuropsychologist, and mitigation specialist regarding Appellant's mental illness and background. Appellant had repeatedly requested funding for these experts and an investigator, but these requests were all denied.[1]

Appellant also sought to present the testimony of a witness named Mara Ruffin, Appellant's former fiancee and the mother of his two children, who would have testified that she and Appellant had been stalked by the victim, Faith Hall

[1]/ The state provided no funding for post-conviction counsel or expenses. Appellant's post-conviction counsel, a California solo practitioner, personally provided all funds for travel and investigation expenses and performed most of the investigation himself.

Smith, for a period prior to the homicide; that Hall had assaulted them by smashing the window of their pickup truck with a tire iron while they were parked in line at a McDonald's restaurant, spraying Ruffin with broken glass; and that Hall had chased Ruffin across town in her car while her infant daughter was in the car with her. This testimony would have contradicted the prosecution's theory at trial and shown that Hall was not the innocent victim of a stalker but was herself a violent stalker involved in a romantic triangle, and also would have helped to prove that Appellant went to see Hall on the day of the incident not to kill her but to warn her to stay away from his fiancee.

However, when Ms. Ruffin failed to appear at the evidentiary hearing in response to a subpoena, the court denied Appellant's request for a bench warrant to compel her to testify. Appellant did present court records showing that trial counsel could have discovered the facts of Hall's tire iron attack on Appellant and Ms. Hall simply by typing in Hall's name on the public computer on the counter of the Circuit Court clerk's office. Appellant also showed that trial counsel's contention that Appellant would not provide any helpful information to counsel was not true, and that counsel's own handwritten notes contained the story of Hall's assault on Appellant and Ruffin which trial counsel had obtained from Appellant during their first meeting. Appellant also showed that he had given trial

counsel the names and location information of several potential witnesses, including Ruffin and their two daughters, and that trial counsel had made no effort to contact them.

In spite of the evidence at the evidentiary hearing, the Circuit Court dismissed all of Appellant's claims by signing, without alteration, a 103-page order written entirely by the deputy attorney general assigned to the case. A letter of instructions from the deputy attorney general to the Circuit Court judge, obtained by Appellant, plus numerous obvious typographical errors in the order, strongly suggest that the judge did not even read the order before signing it.

STATEMENT REGARDING ORAL ARGUMENT

If it would assist the court, Appellant respectfully requests oral argument at the Court's convenience. Appellant notes that his counsel would be traveling from the west coast.

ARGUMENT

I. Appellant Was Deprived of the Effective Assistance of Counsel in the Penalty Phase, and Reversal is Required.[2]

A. Standards of Review

In order to demonstrate the merits of a claim of ineffective assistance of counsel, a defendant must show both that counsel's performance was deficient (the performance prong) and that the deficiency prejudiced the defense (the prejudice prong). *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

In assessing the performance prong, the reviewing court must find that the deficiency of counsel fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688; *Wiggins v. Smith*, 529 U.S. at 521. "Prevailing norms of practice as reflected in American Bar Association standards and the like, e.g., ABA Standards for Criminal Justice 4-1.1 to 4-8.6 (2d ed. 1980) ("The Defense Function"), are guides to determining what is reasonable . . ." *Strickland*, 466 U.S. at 688. In capital cases, the ABA Guidelines on the Appointment and Performance of Counsel in Death Penalty Cases (2003)

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[2]/ Appellant's Claim II alleged ineffective assistance of counsel in the sentencing phase of Appellant's trial and was based on several errors. However, due to length limitations, Appellant will focus here solely on counsel's failures to investigate or present mitigation or social history evidence. Habeas corpus relief on this claim was clearly compelled.

set forth the "well-defined norms" by which the reasonableness of counsel's performance should be judged.[3] *Wiggins v. Smith*, 539 U.S. at 524. Such professional standards are useful as guides to what is reasonable "to the extent they describe the professional norms prevailing when the representation took place." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009).

In assessing the prejudice prong, the reviewing court must find "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland,* 466

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[3]/ The 2003 Guidelines were formally adopted by the ABA four years after the trial in this case. However, the 2003 Guidelines are merely a more detailed amplification of principles set out in the 1989 Guidelines and, at least as relevant to this case, are not materially different. *Compare,* 1989 ABA Guidelines 11.8.3 and 11.8.6 with 2003 Guideline 10.7 and Comment thereto. "[T]he standards merely represent a codification of longstanding, common-sense principles of representation understood by diligent, competent counsel in death penalty cases. The ABA standards are not aspirational in the sense that they represent norms newly discovered after Strickland. They are the same type of longstanding norms referred to in Strickland in 1984 as 'prevailing professional norms' as 'guided' by 'American Bar Association standards and the like.'" *Hamblin v. Mitchell*, 354 F.3d 482, 487 (6th Cir. 2003). It is noteworthy that in ineffective assistance cases, the United States Supreme Court has implicitly recognized this principle by frequently applying professional standards and guidelines that were not formally adopted until after the underlying trial in the case at hand. *See, e.g., Wiggins v. Smith, supra,* 510 U.S. at p. 524 (applying 1989 Guidelines to 1986 trial; *Strickland v. Washington, supra*, 466 U.S. at 688 (applying 1980 ABA Standards for Criminal Justice to 1976 trial).

U.S. at 694. However, "a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case." *Id.* at 693-694. The standard is thus *less* than a preponderance of the evidence. "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." *Id.* at 694.

B. Standard of Care for Penalty Phase Counsel

The Sixth, Eighth, and Fourteenth Amendments to the United States Constitution guarantee a capital defendant competent counsel at the penalty phase of his trial. *Williams v. Taylor,* 529 U.S. 362, 394-395 (2000); *Brownlee v. Haley,* 306 F.3d 1043 (11th Cir. 2002). At a minimum, competent penalty-phase performance requires that counsel must conduct an investigation into the history and background of the defendant "to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Rompilla v. Beard*, 545 U.S. 374, 387, n. 7; see also, ABA Guidelines 10.4, 10.7. Counsel must conduct this investigation well in advance of trial and cannot wait until as late as a week before the trial to begin preparing for the penalty phase of the trial. ABA Guideline 10.7, Comment; *Brownlee v. Haley, supra*, 306 F.3d at 395.

Counsel's investigation must be conducted "regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented." ABA Guideline 10.7. Counsel must "seek out and interview" all "witnesses familiar with aspects of the client's life history," such as "members of the client's immediate and extended family," and "neighbors friends and acquaintances who knew the client or his family." ABA Guideline 10.7; 1989 Guideline 11.8.3.

Immediately upon entry into the case, counsel must explore "the existence of other potential sources of information relating to . . . , the client's mental state, . . . and any mitigating factors." ABA Guideline 10.7, Comment. Counsel must "obtain necessary releases for securing confidential records" relating to the client's history. ABA Guideline 10.7, Comment. Counsel must gather medical records, social service records, juvenile and criminal records, and similar documentary evidence which may shed light on the defendant's background and upbringing and provide leads for further investigation. ABA Guideline 10.7, Comment; *Brownlee v. Haley, supra,* 306 F.3d at 395. "Records should be requested concerning not only the client, but also his parents, grandparents, siblings, and children." ABA Guideline 10.7, Comment. Counsel must "assemble the documentary record of the defendant's life, collecting school, work, and prison records which might serve as sources of relevant facts." ABA Guideline 10.7,

Comment, n. 213. Counsel must conduct this investigation well in advance of trial and cannot wait until as late as a week before the trial to begin preparing for the penalty phase of the trial. ABA Guideline 10.7, Comment; *Brownlee v. Haley, supra*, 306 F.3d at 395.

In recent years, the United States Supreme Court has repeatedly emphasized that capital counsel perform ineffectively if they fail to conduct a thorough mitigation investigation. The Supreme Court has also repeatedly reversed other capital cases in which the quality of the penalty phase representation far exceeded the quality of the indolent representation Appellant received in this case. See, *Williams v. Taylor*, 529 U.S. 362. 395-396 (2000) (death sentence reversed even though sentencing phase defense was presented because counsel had not "fulfilled their obligation to conduct a thorough investigation of the defendant's background," waited until a week before trial to begin conducting a mitigation investigation, and then failed to uncover extensive social history records graphically describing the defendant's "nightmarish childhood"); *Wiggins v. Smith*, 539 U.S. 510, 524 (even though counsel obtained and reviewed a presentence report containing social history information, gathered records from the Maryland Department of Social Services recording incidents of the defendant's physical and sexual abuse, alcoholic mother, placements in foster care, and

borderline retardation, and also retained a psychologist to administer a number of tests on the defendant, counsel performed incompetently because they failed to seek out "all reasonably available mitigating evidence" and specifically failed to hire a social worker to prepare a social history); *Rompilla v. Beard*, 545 U.S. 374, 381, 387 (2005) (death sentence reversed in spite of the fact that trial counsel had conducted an extensive investigation, including conducting detailed interviews with the client and five of his family members and retaining three mental health experts, and in spite of the fact that the client was not only uncooperative but actually obstructed their efforts, because trial counsel had failed to examine the court file on the defendant's prior conviction).

For counsel to compile a comprehensive, reliable and well-documented social history, investigation must therefore begin immediately upon counsel's entry into the case. (*See* ABA Guidelines, 11.4.1.) As the United States Supreme Court noted in *Williams*, it was unreasonable for counsel to wait until one week before trial to prepare for the penalty phase, thus resulting in a failure to adequately investigate and put on mitigating evidence. (*Williams v. Taylor*, *supra,* 529 U.S. at p. 395.)

It should be noted that in all three of the foregoing cases, the United States Supreme Court reversed decisions of the lower courts which had upheld the

defendants' death sentences, holding that the state courts' determinations that counsel had acted competently or that counsel's incompetence had not prejudiced the defendant were not merely incorrect but were also *objectively unreasonable*. See, e.g., *Williams v. Taylor, supra*, 529 U.S. at p. 397-398; *Wiggins v. Smith., supra*, 539 U.S. at pp. 528-529; *Rompilla v. Beard, supra,* 545 U.S. at 389-390. It is also important to note that the standard of care on which Appellant relies was well established long before trial in this case. Indeed, in all the foregoing cases plus the case of *Porter v. McCollum*, 558 U.S. 30, 40 (2009), on which Appellant also relies, the United States Supreme Court found counsel fell below the standard of care at the time of trials that were held at least ten years *before* the trial in Appellant's case. The trials in these cases respectively date to 1986 (*Williams*), 1988 (*Rompilla* and *Porter*), and 1989 (*Wiggins*); Appellant's trial was held in 1999.

C. Trial Counsel Performed Incompetently Under the Standard of Care Clearly Established by the United States Supreme Court

Although the requirement that counsel investigate to find "all reasonably available mitigation evidence" applied to all capital trials tried at least as early as 1986, *see Wiggins, supra*, neither of Appellant's attorneys conducted any meaningful mitigation investigation. Second-chair counsel testified that he

conducted no mitigation investigation at all. He testified, "I don't think I thought beyond the trial itself, trying to get to the mitigation phase." RT 166. He agreed that "it would be fair to say" that he was not thinking about mitigation. RT 166. "It wasn't on my radar screen." RT 167. This was a clear admission of incompetent performance.

Lead counsel did no better. She testified that she had done no record-gathering at all. RT 240, 251. She did not retain an investigator, a mitigation specialist, a psychologist, a psychiatrist, or a neuropsychologist. RT 251. Thus, there was no defense team even to begin conducting an investigation. Counsel also did no meaningful investigation of her own. Prior to trial, she made exactly one telephone call to Appellant's step-grandmother and returned one phone call that had been placed to her by Appellant's mother. RT 241. Apart from these two phone conversations, only one of which she originated, she spoke to no members of Appellant's family before trial began.[4] RT 241. She admitted that, apart from

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[4]/ Counsel also spoke briefly with petitioner's mother, stepfather, and sister at the trial itself, but only because these three people came to the trial on their own and "surprised" counsel, who apparently had not even told them when trial was to occur. CR 1525. Based upon counsel's time sheets, it is clear that the conversations with petitioner's mother and step-father occurred after the guilt verdict was returned, and the conversation with petitioner's sister appears to have occurred after presentation of the prosecution's guilt phase case was completed. CR 2752. Obviously, conversations conducted after the guilt phase is over with individuals who have contacted counsel on their own do not qualify as

her conversations with Appellant himself, this was the entire extent of the mitigation investigation. RT 251. Thus, under the prevailing standard of care and binding United States Supreme Court precedent, counsel was grossly incompetent in failing to investigate. RT 240.

Incredibly, however, the state court found this pathetic non-investigation to be sufficient to satisfy the competence prong of *Strickland*. CR SUPP 359. The Circuit Court order found it "obvious" from the record and the hearing that counsel conducted a "limited" investigation and did not present mitigating evidence. CR SUPP 359. However, the order found this did not constitute deficient performance because, according to the order, Appellant's *family* was "unwilling to help" and Appellant himself "refused to provide counsel with any information." CR SUPP 359. The order concluded that "[t]he absence of non-statutory mitigation is attributable not to trial counsel, but to Mr. James and his family." CR SUPP 360.

However, the order's conclusions are flatly contradicted by the facts that emerged at the hearing. The record clearly does *not* show that Appellant's family was "unwilling to help." To the contrary, it shows that counsel made no

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investigation by counsel. ABA Guidelines 107; *Blanco v. Singletary*, 943 F.2d 1477, 1501-1502 (11th Cir. 1991).

meaningful effort to contact, interview, or even locate Appellant's family. Lead counsel's entire effort to contact Appellant's family consisted of placing one phone call to Appellant's elderly step-grandmother, and returning one other phone call from Appellant's mother. RT 241-242. Counsel made no other attempt to contact any of Appellant's family members, even though all his siblings' names were listed in the 1996 presentence report in counsel's own file. RT 244-246; Exh, 37. Counsel made no attempt to contact Appellant's aunts, and no attempt to track down Appellant's father or other family members. Counsel made no attempt to contact Mara Ruffin, the mother of Appellant's two children, even though Appellant gave counsel her name and number on December 31, 1998 (see below) and in spite of the fact that the names of Appellant's two daughters were also listed in the 1996 presentence report. RT 247-248; Exh. 37. Each of the social history witnesses who testified at the hearing, including three of Appellant's family members, stated that they would have come to court and testified if they had been contacted by the defense and asked to testify, and Appellant's sister testified she would have given counsel the names of many other witnesses to interview for mitigation purposes if counsel had only asked her. All this testimony went uncontradicted and unchallenged. RT 29, 72, 88, 112-113. At most, the evidence shows that Appellant's *mother* was reticent to testify in court, but it also

shows that many other family and social history witnesses were available and willing to help. Thus, the order's conclusion that Appellant's "family" was unwilling to help contradicts the record.

Secondly, the order's conclusion that Appellant himself refused to cooperate with counsel in the sentencing phase or permit counsel to put on mitigating evidence is also clearly false. Although lead counsel repeatedly sought to blame her failure to investigate on Appellant's supposed lack of cooperation, the record clearly and repeatedly demonstrated that she was lying about this very matter. For example, while counsel contended in both her testimony and her sworn pre-hearing affidavit that Appellant refused to cooperate or give her information about the homicide, CR 1519; RT 211, it was demonstrated at the hearing that Appellant had in fact given her a complete explanation of his version of the events of the killing the very first time they met. This fact was established by handwritten notes made by lead counsel herself at her first meeting with Appellant on December 31, 1998, notes which completely summarized Appellant's version of events. When confronted with these notes, lead counsel *admitted* that her own sworn affidavit was false in stating that Appellant would not talk about the incident or give her any information. RT 215; Exh. 37.

Nor was this lead counsel's only lie. Although counsel contended in her

affidavit that she had never heard that Appellant had a girlfriend, CR 1526, counsel admitted that her own notes from her first meeting with Appellant also showed he had given counsel his girlfriend's name, telephone number, and even social security number, and that her affidavit was therefore also false in this respect. RT 246-248; Exh. 37. Although counsel initially testified that Appellant had never told her that the victim had attacked him and his girlfriend with a tire iron, she admitted that her notes showed he had given her the full story of this incident– a story later confirmed by a police report on file at the Brighton Police Department, which of course counsel never bothered to obtain. RT 211, 215; Exh, 37. Although counsel stated in her affidavit and testimony that Appellant would not give her any names of family members or others from whom she could obtain mitigating evidence, she admitted on the stand that Appellant had given her the name and phone number of his step-grandmother, and as shown previously her own notes also show he had given her the name and contact information of his girlfriend, Mara Ruffin. CR 1525; RT 221, 243, 246-247, 258; Exh. 37. Accordingly, counsel's self-serving statements attempting to place the blame on Appellant for her own lack of investigation were admitted to be false *by counsel herself,* and the order's conclusions to the contrary are clearly erroneous and objectively unreasonable.

Moreover, even if the final order had been correct in concluding that Appellant and his family had been uncooperative, the law does not excuse counsel from failing to investigate or present mitigating evidence on this basis. In a capital case, counsel *must* conduct an independent investigation of the circumstances of the case and *must* seek to obtain *all* reasonably available evidence in mitigation even if the defendant does not provide assistance or cooperation, objects to the presentation of mitigation evidence, and/or refuses to testify. See e.g. *Rompilla v. Beard, supra*, 545 U.S. at p. 377 [counsel found ineffective "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available" and despite consulting mental health experts]; *Porter v. McCollum, supra*, 558 U.S. 30, 40, [counsel found ineffective despite a "fatalistic and uncooperative" client who instructed counsel "not to speak with Porter's ex-wife or son," because "that does not obviate the need for defense counsel" to conduct a mitigation investigation]; *Blanco v. Singletary*, 943 F.2d 1477 (11th Cir.1991) [trial counsel ineffective for failing to adequately investigate and present mitigating evidence even though the defendant, Blanco, instructed his attorneys not to call any family members or acquaintances to testify at the penalty phase]; *Thompson v. Wainwright,* 787 F.2d 1447, 1451 (11th Cir. 1986) [attorney required to investigate mitigation evidence even if defendant instructs him not to

and refuses to testify]; *Battenfield v. Gibson*, 236 F.3d 1215 (10th Cir. 2001) [defendant's alleged "waiver" of right to present mitigating evidence invalid because counsel had not adequately explained what mitigation evidence was; also, the state court's holding that counsel's duty to investigate mitigation was absolved by defendants lack of cooperation was an unreasonable application of *Strickland*]; *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2001) [fact that family was uncooperative and defendant was strongly opposed to presenting mitigation evidence does not relieve counsel of duty to investigate]; *Johnson v. Baldwin*, 114 F.3d 835 (9th Cir. 1997) [even where defendant *lies* to counsel, counsel must still conduct investigation to determine whether defendant's story is credible]. See also, 1989 ABA Guidelines 11.4.1(B-C); 2003 ABA Guideline 10.7(a)(2);

The state court's conclusion that Appellant somehow "waived" or is "estopped" from asserting ineffective assistance in failing to investigate due to Appellant's alleged failure to cooperate, even if that allegation were true, is objectively unreasonable under United States Supreme Court authority and this Court's own caselaw. (CR SUPP 360.) Under the Eighth and Fourteenth Amendments, until counsel has conducted a thorough and constitutionally adequate investigation, explained to the defendant what evidence is available,

explained to the defendant what the purpose of mitigating evidence is and why it is significant, and then obtained an express waiver, and until the trial court has placed all these facts on the record and conducted its own inquiry into the defendant's understanding of the significance of his decision, no knowing and intelligent waiver of the right to present mitigating evidence can be made. *Battenfield v. Gibson, supra*, 236 F.3d 1215, 1231-1233, also 1231, n. 8, and cases there cited. Any state court finding to the contrary will be held "patently unreasonable." *Id.*, at p. 1233.

This case also bears striking resemblances to this Court's decision in *Blanco, supra*. In *Blanco*, as in this case, the defendant gave counsel the names of some potential mitigation witnesses but counsel did not interview them prior to trial, ask those witnesses for more leads, or conduct any other mitigation investigation. This Court found this constituted deficient performance.

> Blanco's counsel needed to talk to the witnesses suggested by Blanco, determine whether they could provide helpful testimony, and seek leads on other possible witnesses. From what we can determine, this was not done prior to trial. Once trial started, counsel were too hurried to do an adequate job. To save the difficult and time-consuming task of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available. No adequate investigation was conducted in this case.

Id., at pp. 1501-1502.

As the attorneys did in this case, the attorneys in Blanco also attempted to place the blame for their own incompetence on the defendant. In an evidentiary hearing held after they had been accused of ineffective assistance, the attorneys contended that when they discussed with the defendant what witnesses to call,

> Blanco "started acting irrationally"; "his whole demeanor really changed at that point." "He didn't respond. . . . He was not responding to his attorneys in terms of you would explain something and you would say, this is the reason for it, and, you know, it would just be like talking to a wall." [Attorney] Rodriguez also stated that Blanco was uncommunicative and easily angered. According to Rodriguez, after the jury returned its guilty verdict, Blanco became further depressed and unresponsive. This testimony is confirmed by the statements Blanco made during his discussions with the trial judge to the effect that he believed his attorneys were "lying to my face." During the precise period when Blanco's lawyers finally got around to preparing his penalty phase case, Blanco was noticeably morose and irrational.

Id., at p. 1502.

Accordingly, as the state is attempting to do here, the government in *Blanco* argued that Blanco was at fault for the fact that no mitigation was presented because he had "instructed his attorneys not to call any family members or acquaintances to testify." *Id.*, atp. 1502. However, this Court reiterated its earlier holding that

> "a defendant's desires not to present mitigating evidence do not terminate counsels' responsibilities during the sentencing phase of a death penalty trial: "The reason lawyers may not 'blindly follow' such

> commands is that although the decision whether to use such evidence is for the client, the lawyer first must evaluate potential avenues and advise the client of those offering potential merit."

Id., at p. 1502.

This Court also found that "this case points up an additional danger of waiting until after a guilty verdict to prepare a case in mitigation of the death penalty: Attorneys risk that both they and their client will mentally throw in the towel and lose the willpower to prepare a convincing case in favor of a life sentence." *Id*., at p. 1503. This court concluded that "the ultimate decision that was reached not to call witnesses was not a result of investigation and evaluation, but was instead primarily a result of counsels' eagerness to latch onto Blanco's statements that he did not want any witnesses called." *Ibid.* With respect to the attorneys' contentions that Blanco had acted irrationally, been argumentative, and been uncooperative with them, this Court found that for these very reasons, contrary to the state's argument, "counsel therefore had a *greater* obligation to investigate and analyze available mitigation evidence." *Ibid.*, emphasis added.

As in *Blanco*, counsel's self-serving contentions in this case that Appellant would not cooperate were revealed at the hearing to be false. It is clear from counsel's own notes that Appellant actually *did* cooperate and provided counsel with names and contact information for *at least* his step-grandmother and his

fiancee, who was also the mother of his two daughters, and that counsel's contentions to the contrary were lies. However, even if Appellant had refused to cooperate or provide the names of any individuals for counsel to interview, counsel must still conduct an investigation, and the evidence at the hearing showed that counsel failed to do so even though they had ample leads with which to begin such an investigation that did not require Appellant's cooperation.

For example, while counsel admitted on the stand that she conducted no record gathering at all, the presentence report from Appellant's first trial was in counsel's own files the moment she took over the case in December, 1998– six months prior to trial. This report contained the names of all of Appellant's five siblings and his two daughters, a list of his prior employers, a list of schools he had attended, and other leads for investigation that counsel never pursued. CR 2729-2731. Alternatively, had counsel obtained a discovery order from the court, they could have collected Appellant's custodial and medical documents in the possession of the Department of Corrections and Holman Prison, as post-conviction counsel was able to do. Counsel then would have discovered not only additional social history information but substantial credible information indicating that Appellant suffered from serious mental problems, including the results of psychological testing reporting Appellant's schizoid characteristics and

possible thought disorder. CR 2661-2667. As this Court noted in *Cummings v. Sec'y for the Dep't of Corrections*, 588 F.3d 1331, 1358 (11th Cir. 2009), the principle that "an attorney not not 'blindly follow' a client's instructions not to investigate or use mitigating evidence . . . especially holds true where a possible impairment prevents the client from exercising proper judgment." *Id*., citing *Dobbs v. Turpin*, 142 F.3d 1383, 1387-1388 (11th Cir. 1998).

The foregoing are only two of a host of obvious methods counsel could have used to begin a mitigation investigation without any information or assistance from Appellant. Under the circumstances, counsel's attempt to blame Appellant for their own lack of investigation smacks of desperation, and the state court's acceptance of counsel's contention was objectively unreasonable.

D. Counsel's Failure to Investigate Was Prejudicial

The state court's conclusion that counsel's failure to investigate was not prejudicial is also objectively unreasonable. Although Appellant was severely hampered at the hearing by the Court's refusal to provide funds for investigators or mental health experts, Appellant nevertheless managed to make a very substantial showing of prejudice from counsel's failure to investigate or present any mitigating evidence, a showing much greater than the minimal level required to compel reversal.

The standards of prejudice for an ineffective assistance claim were set forth above. See Section A, *supra*. It bears repeating, however, that a capital defendant need *not* show that it is more likely than not that he would have received a life sentence had his attorneys performed competently. A reasonable probability is *less* than a preponderance of the evidence. *Strickland, supra*, at p. 698. Even if the new evidence is not entirely favorable to the defendant or would leave some aggravating evidence (e.g., future dangerousness) unrebutted, evidence of a defendant's difficult childhood, poverty, mental problems, and similar background and character evidence will be sufficient to establish prejudice from counsel's failure to perform effectively if that evidence "might well have influenced the jury's appraisal of his moral culpability." *Williams v. Taylor, supra*, at p. 398.[5]

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[5]/ As this Court correctly noted in its order granting a COA, "the district court's conclusion that Petitioner would have had to change the mind of at least seven jurors to change the outcome of the sentencing was incorrect." Order (6/8/18) at 21, n. 6. Under Alabama Code §13A 5-46(f), "[t]he decision of the jury to recommend a sentence of death must be based on a vote of at least 10 jurors." Thus, if only three jurors had been persuaded to vote for life, the outcome would have been more favorable to Appellant.

Moreover, Appellant respectfully submits that the district court's reasoning was based upon a faulty premise. No United States Supreme Court decision Appellant has found suggests that a reviewing court conducting *Strickland* prejudice analysis may properly consider the number of jurors that would have needed to change their verdict for the defendant to prevail on his claim. To the contrary, under *Strickland* if there is a reasonable probability, i.e., a probability *less* than a preponderance of the evidence, of a more favorable outcome, prejudice is established and reversal is required. If a reasonable probability exists that one

Under the foregoing standards, Appellant's showing of mitigating evidence was far more than was required to compel reversal. It must be remembered that counsel in this case presented *no mitigating evidence at all* at trial. By comparison, the mitigating evidence presented at trial in *Wiggins*, *Rompilla,* and *Sears v. Upton,* 561 U.S. 945*,* was extensive, yet the United States Supreme Court reversed those decisions because counsel had not discovered and presented "*all reasonably available* mitigating evidence." See, e.g., *Wiggins v. Smith, supra*, 539 U.S. at p. 524, emphasis in original. Indeed, in *Rompilla* counsel consulted three mental health experts, presented five witnesses, and gathered a number of social history records, yet the Supreme Court reversed because counsel had failed to examine the prosecution's file regarding one of the defendant's prior convictions which the prosecution intended to use in aggravation. In *Sears*, the Court found trial counsel ineffective in a 1993 trial even though they had presented seven witnesses in the penalty proceedings. *Sears v. Upton*, *supra*, 130 S. Ct., at p. 3266. Clearly, if trial counsel's much more extensive investigation

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juror would have changed his or her mind, there is also a reasonable probability that three, or four, or even twelve would have done so. Certainly, without conducting a prohibited inquiry into the mental processes of the jurors, Federal Rule of Evidence 606(b), there is no principled basis on which a district court could conclude that mitigating evidence might have persuaded one or two jurors to change their votes, but would not have persuaded three jurors to do so.

and presentation in those cases required reversal, *a fortiori* trial counsel's complete failure to investigate or present a mitigation case *at all* compels relief here.

Indeed, one eloquent demonstration of the strength of Appellant's mitigation case lies in the fact that even the grossly unreasonable and biased order crafted by the Attorney General itself includes sufficient persuasive mitigating evidence to demonstrate prejudice and compel relief under then existing Supreme Court case law.

For example, the order found that Appellant had a "difficult childhood, marked by the instability of constant moves, poverty, a frequently absent mother, and a completely absent father." CR SUPP 367. The order noted that Appellant showed that his father was mentally ill. CR SUPP 363. The order agreed that Appellant showed that his mother drank heavily, often to excess, while she was pregnant with Appellant, and that Appellant was born with facial abnormalities, i.e., a large head, small ears, and drooping upper eyelids which required Appellant to tip his head backwards in order to see and which required surgery when he was four or five years of age. CR SUPP 363.[6]

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[6]Though the order did not so find– primarily because Appellant was prevented from presenting mental health experts or even the proffered declarations of mental health experts– the evidence on this point strongly suggests Appellant

The order found that Appellant's mother was so sexually promiscuous that Appellant and his five siblings were born to five different fathers. CR SUPP 363, 366. The order found that Appellant's biological father beat his mother, sometimes in front of him, when he was an infant, and abandoned the family when Appellant was two years old. CR SUPP 363. From that time on, the order found, Appellant's life was filled with "constant moves and instability." CR SUPP. 366. The order stated that Appellant's mother moved the family from apartment to apartment, so that the family lived in 18 different places when he was a child. CR SUPP. 364. The order found that when Appellant's mother was gone, Appellant took care of his five younger siblings, and was very protective of his sister. CR SUPP. 364, 366. Finally, the order found that Appellant had a fiancee at the time of the homicide, and had two daughters by her. CR SUPP 363, 364.

Although Appellant submits that there was much more evidence presented at the evidentiary hearing which a jury might have found persuasive and which the order simply omitted, a review of the United States Supreme Court case law

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was born with fetal alcohol syndrome, a lifelong pattern of mental and physical defects affecting the central nervous system, which typically results in mental retardation, learning disabilities, short attention span, hyperactivity in childhood, and other mental health issues. Denying Appellant funds for mental health experts placed Appellant in a Catch 22 in which he was unable to show the prejudice from counsel's failure to retain mental health experts because he was denied funds for mental health experts in his Rule 32 proceedings.

compels the conclusion that even the evidence found to be true in the self-serving final order itself, when compared with the *total absence* of mitigation evidence presented at trial, was more than adequate to establish the prejudice from counsel's ineffectiveness and compel reversal. Any of the foregoing facts "might well have influenced the jury's appraisal of his moral culpability." *Williams v. Taylor, supra*, at p. 524. It cannot seriously be contended that there is not a reasonable probability– a standard *less* than a preponderance of the evidence– that a more favorable result might have been obtained had this evidence been presented.

Because trial counsel presented no evidence on his behalf, the jury in Appellant's case was given no sense of Appellant as a human being. Instead, they were asked to determine whether he should live or die based solely on evidence of the worst thing he had ever done in his life. Without any mitigating evidence to humanize Appellant, the jury was likely to view Appellant with fear and hostility, overlook their common humanity with him, and seek solely to avenge the victim's death. This likelihood became even greater when the prosecutor falsely portrayed Appellant as a monster who killed in cold blood, an evil generic killer who was "mean. Plain old mean." Trial RT (6/17/99) 23. Indeed, the full impact of counsel's ineffective performance is neatly summed up in the following passage of

the prosecutor's closing penalty phase argument:

> All of us want to sit back and we all want to think, There has to be something good about this guy. There has to be something good. But I submit to you there is not.

Ibid.

The prosecutor was able to make this argument, of course, only because trial counsel never investigated or presented any evidence in Appellant's favor; and since the defense had presented absolutely no evidence to contradict the prosecutor's contention, the jury had no reason to spare Appellant's life.

Yet in light of the evidence presented at the hearing, even the Attorney General's absurdly self-serving final order agrees that Appellant proved he had a family, including two infant daughters. A reasonable jury might have decided to spare Appellant's life simply so Appellant's two little girls would have a father when they grew up, even if the jurors were not willing to spare Appellant for his own sake. Similarly, even under the Attorney General's self-serving view of the evidence, the jury would have heard that Appellant was born to an alcoholic, sexually promiscuous mother and a mentally ill, schizophrenic father who beat Appellant's mother. The jury would have heard that in addition to his family history of schizophrenia, Appellant suffered from birth defects– facial abnormalities that set him apart from other children– and might have put two-and-

two together, even without a mental health expert, and figured out that Appellant suffered from fetal alcohol syndrome and, possibly, schizophrenia itself. The jury would have heard that in spite of his deficits, Appellant cared for his younger siblings when his mother was out carousing with her many boyfriends, and was also protective of his sister Yosandra. Any of these facts might have persuaded a reasonable juror to look at Appellant in a more positive or sympathetic light, or at least to understand that Appellant was not one of the "worst of the worst" and therefore did not deserve to die. Like the evidence presented in post-conviction in *Williams v. Taylor*, *supra*, the foregoing evidence "might well have influenced the jury's appraisal of his moral culpability," *Williams v. Taylor, supra*, at p. 524, and reversal of the judgment was accordingly compelled on the Attorney General's facts alone.

It must be emphasized that the foregoing findings constitute only the selective, one-sided view of Appellant's *opponent* in the litigation and do *not* reflect what a reasonably impartial, unbiased finder of fact would have found. Indeed, the order's blatant bias was made immediately apparent by the fact that the order included no findings with respect to the mitigating impact of any of the documentary evidence Appellant presented, such as the Department of Corrections' own psychological examinations of Appellant, including two MMPI

examinations of Appellant, which showed, *inter alia*, that Appellant had "schizoid characteristics" and a possible "thought disorder" and believed he was possessed by evil spirits. RT 226-228; Exhs. 12A, 12B. The fact that Appellant suffered from a possible thought disorder cannot be overemphasized. Thought disorder is essentially psychosis; it is present even when hallucinations and delusions are not. If Appellant has thought disorder with schizoid characteristics, he is likely schizophrenic, particularly since his father was. Moreover, in view of the fact that these two respected, empirical psychological tests were administered *by the state itself*, the test results must be seen as highly credible. The state court's failure to mention them as mitigating evidence or evaluate their credibility was grossly unreasonable. Plainly, even without the assistance of an explanation from a mental health expert, a reasonable juror could have concluded from the combined effect of this documentary evidence, Appellant's family history of mental illness, and the argument of competent counsel that Appellant was mentally ill and therefore less culpable than would be a person with all his faculties intact.

Similarly, documentary evidence clearly proved that only months prior to the killing, Appellant and his girlfriend, Mara Ruffin, were attacked with a tire iron by the victim, Faith Hall, who broke the window of the truck in which they were sitting, cutting Ms. Ruffin with flying broken shards of glass. In view of the

fact that this information came from a report prepared by a law enforcement officer, an agent of the state, the order's complete failure to mention this credible mitigating evidence is also inexplicable and further demonstrates the biased nature of the order.

Plainly, had evidence of the Brighton assault been presented, a reasonable juror could have concluded that Appellant was not acting maliciously or even unreasonably in arming himself prior to entering the victim's apartment, but instead went prepared to defend himself against someone who had previously assaulted him and his girlfriend with a deadly weapon. This evidence would have demonstrated that there was bad blood between the victim and Appellant, and that the victim was hardly the blameless, saintly, innocent young girl the prosecutor falsely portrayed her to be. Trial RT (6/17/99) 36.[7] At the very least, this evidence would have effectively countered the prosecutor's theory that Appellant had been stalking the victim; in fact, it was the victim who had been stalking Appellant and his girlfriend. The state court's failure to mention these facts is objectively unreasonable.

The state court's decision also fails to mention other matters which would

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[7]/ The prosecutor outrageously suggested to the jury, without any evidentiary basis, that the victim had been praying when she was killed. Trial RT (6/17/99) 36.

have aided the defense. For example, Appellant's aunt, Consuela James, testified that Appellant's father was not the only person in the family who suffered from mental illness; at least three other paternal relatives were clearly mentally ill, a powerfully mitigating fact in view of the genetic component in schizophrenic spectrum disorders. RT 57. Ms. James also testified that Appellant's mother abandoned the family for long periods of time, and permanently gave up her son, Hakim, to be raised by Appellant's step-grandmother. RT 66. The order is silent on all these matters, matters which would have underscored the fact that Appellant suffers from mental illness and was raised in a bizarre and unstable environment, surrounded by parents and others who were themselves severely mentally ill.

The state court decision was also unreasonable in many other respects. For example, it supposedly discounted *all* of the testimony of Appellant's sister, Yosandra Craig, simply because she recalled speaking to a male lawyer rather than a female lawyer at Appellant's trial several years earlier. CR SUPP 340, n. 7 (finding Ms. Craig's "entire testimony . . . incredible"). The order does not explain how this failure of recollection undermines the credibility of her testimony regarding her own upbringing with Appellant, nor does the order explain why, having supposedly discounted her "entire testimony," the order then selectively *relies* upon her testimony for negative findings about Appellant's background and

for the fact that Ms. Craig succeeded academically even though raised in the same deprived background as Appellant. CR SUPP 340, n. 7, 367; RT 117. It is also noteworthy that the order does not find any credibility problems with the testimony of lead counsel, even though she admitted on the stand that statements in her sworn affidavit and even aspects of her live testimony were false. In any event, Appellant submits that Craig's testimony regarding Appellant's childhood was perfectly credible and that it was manifestly unreasonable of the final order to selectively discount aspects of that testimony helpful to the defense while relying upon others perceived helpful to the prosecution.

Finally, Appellant notes that the state court decision reflected not only unreasonable and demonstrably false factual findings, a lack of legal scholarship, and an absence of analysis, but also a basic misunderstanding of the purpose and importance of mitigating evidence. The order concluded that although Appellant proved he had "a difficult childhood, marked by the instability of constant moves, poverty, a frequently absent mother, and a completely absent father," this evidence must be "afforded little weight" because "many people who experience similar or even worse childhoods do not grow up and commit capital murder." CR SUPP 367. This statement not only fails to logically support the conclusion, but also is legally irrelevant.

The purpose of mitigating evidence is not to excuse or justify the defendant's conduct in committing the offense of which he was convicted, or to show that the offense was itself attributable to the defendant's background and character. Instead, the purposes of mitigating evidence are "extremely broad and encompass any evidence that tends to lessen the defendant's moral culpability for the offense or otherwise support[] a sentence less than death. In particular, a mitigation presentation may be offered not to justify or excuse the crime 'but to help explain it.'" ABA Guideline 10.11, Comment. Thus, evidence about, e.g., Appellant's past relationship with Hall and her previous attacks on Appellant and his girlfriend– facts proved by official documentary evidence on which the order makes no findings– were powerfully mitigating.

Mitigating evidence may also be presented to show the jury that the defendant is a sympathetic human being and to counter arguments, such as those made by the prosecutor in this case, that the defendant is a cold-blooded killer, is "plain old mean," and that there is nothing good about him. RT (6/17/99) 23, 36. Indeed, one important reason why social history witnesses must be sought and presented by competent counsel is that such witnesses "humanize the client by allowing the jury to see him in the context of his family, showing that they care about him, and providing examples of his capacity to behave in a caring, positive

way, such as attempting to protect other family members from domestic violence or trying to be a good parent and provider." ABA Guideline 10.11, Comment.

Thus, the facts that Appellant was caring and protective toward his sister, took care of his younger siblings when his mother was away, and had two young daughters of his own– all of which the order found Appellant proved at the hearing– served to humanize Appellant and constituted powerfully mitigating evidence. Particularly in light of the fact that defense counsel presented no evidence *at all* to assist Appellant's cause in the sentencing phase, the order's conclusion that the evidence at the evidentiary hearing was inadequate to establish prejudice is profoundly erroneous and unreasonable.

Appellant overwhelmingly proved ineffective assistance of counsel at both the guilt and penalty phases, and reversal of the entire judgment is therefore mandated.

E. The Traditional Deference Afforded to State Courts Is Not Merited and Relief Is Warranted Under 28 U.S.C. § 2254(d)(2) Because The Circuit Court Adopted The State's Proposed Findings Without Independently Evaluating Those Findings

As noted above, the Attorney General drafted and the state court signed the Circuit Court order without change, inclusive of typographical and other obvious errors. The Supreme Court, in *Jefferson v. Upton*, 560 U.S. 292 (2010), discussed

arguments raised by a defendant before this court that a state court's judgment should not be afforded deference under the pre-AEDPA version of section 2254. The Court observed that "[t]hese are arguments that the state court's *process* was deficient. In other words, they are arguments that Jefferson 'did not receive a full and fair evidentiary hearing in . . . state court.'" *Jefferson*, 560 U.S. at 292 (emphasis added).

While *Jefferson* was decided on the basis of the pre-AEDPA version of section 2254(d), that case, read in conjunction with *Taylor v. Maddox*, 366 F.3d at 999-1000 (claim may be resolved on the basis of § 2254(d)(2) if, *inter alia,* "the process employed by the state court is defective"), compels the conclusion that the state court's adoption of findings virtually verbatim from the prevailing party's proposed order—absent any indicia that the court actually reviewed and evaluated them—renders the state court's process defective and its findings suspect.

The deference traditionally afforded to the state court findings under section 2254(d) is predicated on the presumption of regularity. That presumption is called into question whenever a court adopts the State Attorney General's (or any litigant's) proposed findings verbatim. But the presumption of regularity should not only be called into question but rejected altogether, when the verbatim findings include obvious typographical and analytical errors that all but guarantee that the court did not even review (much less analyze) the State's proposed

findings before issuing its order. Because the court's findings here were nothing more than the State's advocacy, the state court's fact-finding was inherently deficient and unreasonable, deference to the state court's decision is unwarranted, and habeas relief is appropriate under section 2254(d)(2).

F. At a Minimum, Appellant Should Have Been Granted an Evidentiary Hearing on This Claim.

Subject only to modifications enacted by the AEDPA, a federal Court's determination of whether to grant an evidentiary hearing is still governed primarily by *Townsend v. Sain*, 372 U.S. 293 (1963). *See, Schriro v. Landrigan*, 550 U.S. 465, 473 (2007). Appellant was entitled to a hearing because the state factual determination was not fairly supported by the record as a whole, the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing, the material facts were not adequately developed at the state court hearing, and the state trier of fact did not afford Appellant a full and fair fact hearing. *Townsend v. Sain*, 372 U.S., at p. 313. Indeed, the state hearing was little more than a kangaroo court in which Appellant was obliged to try his case to the Attorney General, his opponent in the litigation, who effectively ruled on all issues before the court. The district court therefore erred in denying Appellant an evidentiary hearing.

The Circuit Court judge reflexively signed virtually every proposed order placed before him by respondent without any alteration or further explanation, failing to sign only those orders which the state itself superseded with duplicative orders, leading any reasonable and impartial observer to conclude that throughout this litigation the judge simply followed the instructions given him by respondent.[1] The Attorney General effectively ruled even on such matters as Appellant's requests for funds for investigators and experts– requests that impartial courts routinely treat as *ex parte* matters because they necessarily disclose matters of defense strategy and tactics but which Appellant was compelled to serve on Respondent.

So routine were these rulings that in some cases, such as when the Circuit Court granted the state's motion to prospectively prohibit Appellant from amending the petition, the court signed respondent's order without even providing Appellant with an opportunity to respond to the state's motion. In other cases, such as when the Circuit Court purportedly "dismissed" all of Appellant's claims

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[1]/ Indeed, the Circuit Court and the Attorney General practically announced that the Attorney General would be authoring the final decision in this matter even before the evidentiary hearing was completed. At one point during the hearing, when a dispute arose as to whether the declarant of a statement was a psychologist or a licensed professional counselor, the Attorney General suggested that the court defer resolving the question at that point "as long as we can tie it up in the order . . ." (RT 227.) The judge obediently nodded and said, "All right." (RT 227.)

and then the petition itself in January, 2003, it was apparent that the court was not even familiar with the contents of its own file or the current status of the case, had not even read the current version of the petition, and had not carefully read the orders it was signing— approving some orders the Attorney General had directed to the original petition and other orders directed to the first amended petition, all while Appellant's *second* amended petition had been on file with the court for at least two months. It is also apparent that the court did not bother to read the Attorney General's outrageous, overreaching, and clearly erroneous final order before signing it.

The United States Supreme Court has condemned the mechanical adoption of verbatim orders drafted by the prevailing party. *See, e.g., Anderson v. Bessemer City*, 470 U.S. 564, 72-73 (1985) (noting Court's prior criticism of verbatim adoption of findings of fact prepared by prevailing party but holding remand was unnecessary because court's findings varied considerably in organization and content from those submitted by Appellant's counsel); *United States v. El Paso Natural Gas,* 376 U.S. 651, 56 (1964) (condemning trial court's verbatim adoption of findings of fact and conclusions of law written by prevailing party where they were mechanically adopted.)

Most recently, the United States Supreme Court condemned the practice of the verbatim adoption of findings of fact prepared by prevailing parties in *Jefferson v. Upton*, *supra*, 563 U.S. 284. In *Jefferson*, the federal district court failed to address the Appellant's arguments that the state court's procedure of adopting findings written entirely by the state attorney general deprived its findings of the presumption of correctness or the need for deference under section 2254. The high court criticized this failure and referred the case back to the federal district court to determine whether the findings actually warranted a presumption of correctness. *Id.*, 563 U.S. at 293-295. The court appeared to be particularly concerned that the state court may have adopted "findings that contain internal evidence suggesting that the judge may not have read them." *Id.,* at 294. Here it is plain from the document itself and from the circumstances surrounding its adoption by the Circuit Court that the final order was simply signed by a state court judge who never read it.

By denying Appellant's repeated requests for funding for a mitigation specialist and mental health experts, the court effectively created a perfect Catch-22– preventing the indigent Appellant from developing the facts necessary to prove the prejudice prong of his claim that trial counsel had been ineffective in failing to consult or retain such experts. When Appellant finally submitted the

declarations of three such experts, consulted at counsel's own expense, explaining that correctional records and other evidence strongly suggested Appellant was mentally ill and suffered from frontal lobe brain damage, the Attorney General first requested a week to review the declarations and finally instructed the judge to sign a final order dismissing them on an absurd basis, never raised in the evidentiary hearing, to which Appellant had never been given an opportunity to respond.

The court granted discovery only days before the hearing and then refused to grant Appellant a continuance even though many state agencies had not yet provided documents in compliance with the order and discovery actually obtained, including two MMPI tests disclosed by the Alabama Department of Corrections which confirmed that Appellant was mentally ill, required more time for expert assistance and other witnesses to explain their results.

Perhaps most unfair of all, however, was the court's refusal to issue a bench warrant to compel attendance of Mara Ruffin, a critical defense witness who would have testified regarding the prior assaults on her by the victim, Faith Hall, as well as the fact that Appellant was in Atlanta with her the night before the crime and was not the man with the gun Gregory said she saw on the porch– testimony which would have seriously undermined the prosecution's theory that Appellant

was stalking Hall and that he entered her apartment with the intent to commit assault. Furthermore, as the mother of Appellant's two children, Ms. Ruffin was also a critically important mitigation witness who could have testified, *inter alia*, that Appellant was a positive influence in his daughters' lives. The court's wholly unreasonable ruling deprived Appellant of his right to compulsory process.

The foregoing paragraphs describe only the tip of the iceberg of unfairness Appellant encountered during state proceedings. Space limitations prevent Appellant from fully discussing these issues here, but at a minimum he was entitled to an evidentiary hearing in federal district court to fully develop and present the evidence he was prevented from presenting in state court.

CONCLUSION

For the reasons set forth herein, this Court should reverse the judgment of the district court and grant appropriate habeas corpus relief on Appellant's claim of ineffective assistance of counsel in the penalty phase.

Dated: October 24, 2018

Respectfully submitted,

/s/ Wesley A. Van Winkle
Wesley A. Van Winkle
Attorney for Appellant Joe Nathan James

CERTIFICATE OF COMPLIANCE

In compliance with Fed. R. App. P. 32(a)(7)(C), I verify that this Appellant's Opening Brief, including footnotes and excluding the items set forth in 11th Cir. R. 32-4, contains no more than 13,000 words.

/s/ Wesley A. Van Winkle
Wesley A. Van Winkle

CERTIFICATE OF SERVICE

I certify that on October 24, 2018 I filed the foregoing Appellant's Opening Brief electronically through the CM/ECF system and mailed 7 bound paper copies to the court, and that a paper copy of the brief was also mailed on this date to:

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/s/ Wesley A. Van Winkle
Wesley A. Van Winkle