APPENDIX B

Opinion dated July 14, 2017

Donald Dallas v. Jefferson S. Dunn, Commissioner, et. al.,
United States District Court, Middle District of Alabama
Case No.: 2:02-cv-00777-WKW-SRW

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DONALD DALLAS,	)	
	)	
Petitioner,	)	
	)	
v.	)	CASE NO. 2:02-CV-777-WKW
	)	
JEFFERSON S. DUNN,	)	
Commissioner, Alabama Department	)	
of Corrections,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION AND ORDER

Petitioner Donald Dallas filed this federal habeas corpus action pursuant to 28 U.S.C. §2254 challenging his October 1995 Montgomery County conviction for capital murder and sentence of death. For the reasons set forth below, Petitioner is entitled to neither habeas corpus relief nor a Certificate of Appealability.

I. BACKGROUND

A. The Offense

There is no genuine dispute as to the facts of Petitioner's offense. The day of his arrest for the murder of 73-year-old Hazel Liveoak, Petitioner gave police a videotaped statement in which he admitted he and an accomplice (1) kidnapped the elderly Mrs. Liveoak from a grocery store parking lot in Prattville, Alabama, on the afternoon of July 12, 1994, (2) drove her in her own vehicle to a location south of

Montgomery where, despite her protests that she had a heart condition, he convinced her to get into the trunk of her car with a promise to release her once they reached her bank, (3) drove Mrs. Liveoak to a parking lot in south Montgomery where Petitioner and his accomplice convinced her to furnish the access code for her bank card and withdrew money from her bank account using her bank access card after promising to notify police of her location, (4) abandoned Mrs. Liveoak's vehicle (with her still in the trunk) in an isolated area of a K-Mart parking lot where it was discovered the following day containing Mrs. Liveoak's lifeless body, and (5) despite Petitioner's repeated assurances and promises, made no effort to contact or notify anyone of Mrs. Liveoak's location or perilous predicament.[1] Petitioner

[1] Petitioner's videotaped statement to police was admitted into evidence without objection during his capital murder trial as State Exhibit 40 and played in open court for the jury. State Court Record (henceforth "SCR"), Volume 7, at pp. 647-48 (*i.e.,* 7 SCR 647-48). A verbatim transcription of the audio portion of the same videotape recording was admitted into evidence as State Exhibit 41 and appears among the State Court Record at 3 SCR 457-69. Petitioner's statement was actually a series of questions and answers during a *Mirandized* custodial interview in which Petitioner stated that (1) he told Mrs. Liveoak he would check on her and call police to tell them where she was, 3 SCR 458-49, 463, (2) Mrs. Liveoak informed him she had a heart condition, 3 SCR 458, (3) as he drove Mrs. Liveoak to Greenville immediately after her abduction, Petitioner informed her that he had a crack problem and she prayed for him, 3 SCR 463, (4) he promised his accomplice he would let Mrs. Liveoak out of the trunk, 3 SCR 461, (5) once he and his accomplice obtained money from Mrs. Liveoak's bank account, they left the scene in a cab, 3 SCR 459, (6) after abandoning Mrs. Livepoak in her trunk, he and his accomplice went to a location in Montgomery where they purchased and used crack cocaine, 3 SCR 461, (7) the morning after he abandoned Mrs. Liveoak in the trunk of her car, Petitioner awoke and assumed it was too late to call police to help her so he began shoplifting to get more money, 3 SCR 461, 463, and (8) when he learned from a television report that Mrs. Liveoak had been found dead, he cut his hair and planned to commit suicide-by-police during an armed robbery of a bank, 3 SCR 461. In his statement, Petitioner specifically denied any intent to harm anyone. 3 SCR 464.

testified at the guilt-innocence phase of his trial in a manner consistent with his post-arrest statement to police.[2]

[2] More specifically, Petitioner testified on direct examination at the guilt-innocence phase of his capital murder trial that (1) he pushed Mrs. Liveoak into her vehicle and drove off from the WalMart parking lot, (2) she was scared and volunteered to get money from her credit card, (3) he told her he had a crack problem, (4) she prayed for him, (5) he told her he would not hurt her, (6) he drove them on the Interstate south and exited on a dirt road, (7) he directed her to get out and walk into the woods but she said she was scared so he suggested she get into the trunk, (8) he told her she would get out as soon as he got to the bank and got the money, (9) he drove to the AmSouth Bank on South Boulevard in Montgomery, (10) his accomplice Carolyn "Polly" Yaw was initially unable to get the bank's teller machine to work, (11) he got out of Mrs. Liveoak's car and sat on the trunk so he could hear her better, (12) Mrs. Liveoak told him the phone number of her son but he did not write it down and, instead, told her he would call police to rescue her, (13) after he and Yaw obtained money from Mrs. Liveoak's bank account, they called a cab and left the scene, (14) they went to Chester Foley's house to get crack cocaine, (15) they next went to a motel where they smoked crack until the crack of daylight, (16) they left the motel at checkout time and returned to Chester Foley's house, (17) they went with Dennis "Tony" Bowen to get money for more drugs, (18) he and Dale Blake went to steal more items to trade or sell to get more drugs, (19) he assumed Mrs. Liveoak had gotten out of her vehicle and he was going to be arrested for kidnaping and robbery, (20) he made an attempt the day after he left Mrs. Liveoak in her trunk to return to the bank parking lot but the car in which he was riding broke down, and (21) he never intended to kill Mrs. Liveoak. 7 SCR 794-803.

Significantly, Petitioner also testified on direct examination that he made an attempt to return to the place where he left Mrs. Liveoak because he "wanted to make sure she was gone":

> Once I went to the motel, I never left the motel. I tried one time, but the guy that came over that Chester knew, I had asked Chester if he knew anybody with a car that could take me somewhere and bring me back. This is when Chester first came back with the drugs, *because at the time I wanted to make sure she was gone*. But I didn't want to call a cab, because I didn't want to get caught, because I took a cab away from there. I knew if I called the Yellow Cab Company or any cab company, that they would be looking out for me. 8 SCR 801-02 (emphasis added).

On cross-examination, Petitioner testified (1) he had previously been convicted on charges of possession of a forged instrument, first degree burglary, first degree kidnaping, and second degree robbery, 8 SCR 803, (2) on the drive from Prattville after he abducted Mrs. Liveoak, she informed him she had a heart problem, 8 SCR 816, (3) "Like I say. I wasn't thinking too many things but one thing. I am robbing somebody, and I am going to be in big trouble. I am going to spend a lot of time in jail if I get caught doing this.", *Id.*, (4) he was not thinking and only wanted to get dope and get into his own world, 8 SCR 817, (5) he never thought about killing anyone, 8 SCR 818, (6) he passed a number of pay phones on the way to the crack house and the motel on the evening he abandoned Mrs. Liveoak in her trunk but he made no effort to stop and place a call to anyone to alert them to Mrs. Liveoak's location, 8 SCR 822, (7) he did not use the motel phone

B. Indictment

In October 1994, a Montgomery County grand jury returned a seventeen-count indictment charging Petitioner with (1) two counts of capital murder, *i.e.,* intentionally causing the death of Hazel Liveoak (a) by inducing a heart attack by confining her in an automobile trunk during a kidnaping, to wit, abducting her with the intent to accomplish or aid the commission of felony robbery and (b) intentionally causing the death of Hazel Liveoak by confining her in an automobile trunk and causing death during a robbery, *i.e.,* the theft of a VISA card by force with the intent to overcome her physical resistance causing serious physical injury, (2) three counts of fraudulent use of a credit card, (3) one count of theft of property by deception, and (4) eleven counts of unauthorized use of a communications device.[3]

C. Guilt-Innocence Phase of Trial

The guilt-innocence phase of Petitioner's capital murder trial commenced on October 17, 1995.

1. The Prosecution's Evidence

The prosecution presented Mrs. Liveoak's son who testified regarding the circumstances surrounding her disappearance and his delivery of a spare key to her

to call for help for Mrs. Liveoak, 8 SCR 823, and (8) he was worried about getting caught and cut his hair after he learned of Mrs. Liveoak's death, 8 SCR 825.

[3] 1 SCR 7-23.

vehicle to a law enforcement officer in Millbrook.[4] A university maintenance worker testified that (1) he heard a radio broadcast regarding a missing person driving a maroon Chrysler with an Elmore County license plate, (2) he observed a red vehicle with an Elmore tag parked in a very isolated location within a K-Mart parking lot in South Montgomery, and (3) he called police when he got home.[5] The former police chief of Millbrook testified he (1) delivered the key to Mrs. Liveoak's vehicle to Montgomery police officers at the K-Mart parking lot and (2) was present when other law enforcement officers opened her automobile trunk and discovered her lifeless body.[6] A Montgomery police patrol officer testified regarding the isolated location of Mrs. Liveoak's vehicle within the K-Mart parking lot and the conditions inside her passenger compartment when the vehicle was discovered, including the fact no keys were found inside the vehicle.[7]

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[4] 6 SCR 548-54 (testimony of Larry Liveoak). More specifically, Mr. Liveoak testified that (1) he last saw his widowed mother on the afternoon of July 12, 1994, (2) when he went by her home later that same day, she was not there, (3) he contacted the police dispatcher in Millbrook to report her missing, (4) after an unsuccessful all-night search for her and her vehicle, he went to a television station to seek assistance in locating her, (5) the following day, he was notified her vehicle had been found, and (6) a Millbrook police officer picked up his mother's keys from him. *Id.* Mr. Liveoak also identified photographs of his mother and her vehicle. *Id.*, at 553.

[5] 6 SCR 554-60 (testimony of Richard Walker). Mr. Walker also identified photographs of Mrs. Liveoak's car in the location where it was parked in the K-Mart parking lot. 6 SCR 560.

[6] 6 SCR 561-68 (testimony of Danny Pollard). Mr. Pollard also testified that, upon the discovery of Mrs. Liveoak's body, the Violent Crimes Task Force was notified of the crime. 6 SCR 567.

[7] 6 SCR 568-75 (testimony of R.C. Cleghorn). Officer Cleghorn also testified (1) the vehicle did not contain a trunk release in the passenger compartment or glove box, (2) the vehicle was parked a "good distance" from the store and bank and all other vehicles in the parking lot, (3)

A Montgomery police evidence technician testified that (1) he photographed Mrs. Liveoak's lifeless body after it was discovered inside the trunk of her car, (2) her vehicle was located 350 feet from the K-Mart store, 202 feet from the AmSouth Bank, and 166 feet from East South Boulevard, (3) after her body was removed, her vehicle was taken to a police facility and processed for fingerprints, (4) the entire crime scene was photographed and videotaped, (5) an earring matching one found inside the trunk was found outside the lip of the trunk, (6) no fingerprints were found inside the interior of the vehicle, but (7) a palm print was found on the outside of the vehicle's trunk.[8] A latent fingerprint examiner testified that Petitioner's palm print matched that lifted from the driver's side of the trunk lid of Mrs. Liveoak's vehicle.[9]

The state medical examiner testified that (1) he performed an autopsy on the 73-year-old Mrs. Liveoak on July 14, 1994, (2) Mrs. Liveoak had bruising on the right side of her head, the backs of both hands and wrists, and her right biceps, (3)

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the driver's and passenger side front windows were partially down and a strong foul odor emanated from inside the vehicle, (4) a drop of blood was observed underneath the rear trunk lid, and (5) spoiled food in a plastic bag was found on the floor inside the passenger compartment. *Id.* He also identified photographs of the interior of the passenger compartment. *Id.*, at 573-74.

[8] 6 SCR 575-600, 7 SCR 601-02 (testimony of S.Z. Smith). Detective Smith also testified (1) a useless fingerprint was lifted on a window, (2) a brownie wrapper was found on the rear seat of the car's interior, (3) no other vehicles were located around Mrs. Liveoak's vehicle, (4) no sounds came from inside the vehicle or its trunk before the arrival of the vehicle key, (5) Mrs. Liveoak's left hand showed visible bruising, (6) a cloth purse was found inside the vehicle containing an address book and pocket planner but no money or credit cards, and (7) Mrs. Liveoak's tennis shoes were found inside the trunk of the car after her body was removed. *Id.*

[9] 6 SCR 603-07 (testimony of Danny Smith).

she also had non-life-threatening minor cuts to both her palms, (4) the bruising and lacerations to her hands were consistent with efforts to bang on a trunk lid to get out, (5) the bruising to her right arm was consistent with someone grabbing her in an effort to control or manipulate her, (6) her heart displayed extreme arthrosclerosis, *i.e.,* blockage, in the descending coronary artery, (7) he found evidence she had suffered a prior heart attack but had recovered from same, (8) he did not find evidence of a recent heart attack, (9) her general cardiac health was "very questionable," (10) there was evidence the blood supply to the heart was markedly diminished, (11) he found severe pulmonary edema, *i.e.,* fluid backed up into the lungs, (12) her heart was failing, (13) her cause of death was cardiac failure, (13) the manner of her death was homicide, (14) while Mrs. Liveoak apparently was able to do her daily chores and take care of her personal affairs, she lacked the cardiac reserve to be able to handle the extremely stressful confines in which she was placed, *i.e.,* being confined in a hot, dark, space for hours, and (15) her heart could not take the stress, which is why he concluded her death was the result of "homicide by heart attack."[10]

A Montgomery Police Detective testified that (1) there were no signs of life but there was a strong odor of spoiled milk and a body when he arrived at the K-

[10] 7 SCR 609-24 (testimony of Allan Stillwell). On cross-examination, Dr. Stillwell admitted he could not testify as to the intent of the actor who placed Mrs. Liveoak inside her automobile trunk. *Id.,* at 623.

Mart parking lot around 2010 hours on July 13, 1994, (2) no other cars were parked near Mrs. Liveoak's vehicle, (3) when the trunk lid was opened, there was condensation on the inside lid of the trunk, (4) Mrs. Liveoak's pants were stained and there were visible bruises and scratches on her hands, (5) paramedics present when the trunk was opened found no signs of life in Mrs. Liveoak's body, (6) her body was taken away for autopsy, (7) no car keys were found inside Mrs. Liveoak's vehicle, (8) her purse was found but not her billfold, (9) after speaking with Tony Bowen, he and other law enforcement officers developed Petitioner and Carolyn "Polly" Yaw as suspects, (10) he discovered Petitioner and Yaw had registered at a motel on July 13, 1994, (11) a search for a white vehicle driven by "Blake" led to the arrests of Petitioner and Yaw after a brief chase, (12) he gave Petitioner his *Miranda* warnings, (13) Petitioner indicated that he understood his rights, read his rights form, and signed same, (14) he advised Petitioner he was charged with capital murder and faced the death penalty or life in prison, (15) Petitioner did not appear to be intoxicated or under the influence of alcohol or narcotics, (16) Petitioner was cooperative, (17) during his initial interview, Petitioner stated that (a) he found Mrs. Liveoak's vehicle with the keys inside it in the Wal-Mart parking lot in Prattville, (b) he drove the vehicle to the K-Mart in Montgomery, (c) he opened the trunk of her vehicle, (d) he found her body, and (e) he closed the trunk lid and left the scene, (18) after further questioning, Petitioner admitted that (a) he grabbed the lady in the

WalMart parking lot, (b) she screamed and hollered as he drove her vehicle to Greenville, (c) he put the lady in the trunk of her car despite the fact the victim said she had a bad heart, (d) he told her he would send someone to get her out once he left her, (e) he passed out after doing crack the evening of the kidnaping and did not wake until the following morning, and (f) when he awoke he figured it was too late to get help for the lady, (19) a knife was recovered from the rear passenger side floorboard of the white vehicle in which Petitioner was riding at the time of his arrest, and (20) Petitioner gave a voluntary videotaped statement that was not induced by any promises, threats, or other forms of coercion.[11]

Dennis Anthony Bowen testified that (1) he met Petitioner in July 1994 when he went to Chester Foley's house to smoke crack cocaine, (2) at the time of Petitioner's capital murder trial, he had been in an outpatient drug treatment program for about a year, (3) in July 1994 he drove Petitioner and Carolyn "Polly" Yaw to WalMart to shoplift cigarettes to get money to buy drugs, (4) Petitioner ran out of the store carrying a television in a box, (5) Petitioner threw the box into the bed of Bowen's truck, wrestled with a store employee, and then jumped into the truck, (6) Bowen drove away, (7) Bowen and Petitioner were both later arrested in connection

[11] 7 SCR 624-64 (testimony of Steve Saint). Detective Saint also testified without contradiction that the transcription of Petitioner's videotaped statement admitted without objection at trial as State Exhibit 41 was an accurate transcription of the videotaped recording admitted without objection at trial as State exhibit 40. *Id.*,at 648.

with the incident at WalMart, (8) through conversations with Chester Foley, Petitioner, and Yaw, Bowen became aware that Petitioner and Yaw claimed they robbed and placed an old lady in a trunk and got money with the lady's bank card, (9) when Bowen asked Petitioner and Yaw about their claims, Petitioner sarcastically responded that he wished or hoped the old lady died, and (10) Bowen saw an article in the next morning's newspaper about the missing woman, went to visit his attorney, and met with police to reveal what he knew.[12]

An elderly man testified that (1) he went to the WalMart in Prattville on July 9, 1994 to return a microwave oven, (2) as he was returning to his car, a robber with a knife got into his car and struck his fingers, (3) the robber drove his car to Millbrook and stopped in a wooded area, (4) after he gave the robber about $170 in cash, the robber forced him to get out of the car and lie down in the woods, (5) the robber threatened to lock him in the trunk of the car but he protested that he would "smother to death in there," (6) the robber drove off in the victim's car, (7) he got

[12] 7 SCR 664-701 (testimony of Dennis Anthony Bowen). Bowen acknowledged on direct examination that he was high on crack cocaine at the time of his conversations with Petitioner and Yaw. *Id.,* at 672. On cross-examination, Bowen admitted (1) crack cocaine has a very intense high which wears off very fast and leaves you with a craving for more, (2) he began using crack cocaine in 1992, (3) when he met with police, Bowen did not inform them he had heard Petitioner say he hoped Mrs. Liveoak would die, (4) he was charged with robbery and later pleaded guilty to theft in connection with the incident at WalMart in July 1994, (5) an arrest warrant was then outstanding for him due to his failure to comply with the conditions of his probation, and (6) that day at Petitioner's trial was the first time he had ever told anyone that Petitioner said he hoped or wished Mrs. Liveoak died. *Id.,*at 675-08. On redirect, Bowen testified he had not been promised anything to induce his testimony at Petitioner's trial. *Id.,* at 699.

up and walked about a mile down the road where he found his car but not the keys, (8) he later saw a newscast regarding a missing lady and recognized Petitioner as his robber, and (9) Petitioner pleaded guilty to robbing him.[13]

2. The Defense's Evidence

Called by the defense, an acquaintance of Petitioner testified that (1) Petitioner was crying and appeared to be worried after Petitioner saw television coverage of the discovery of Mrs. Liveoak's body and (2) Petitioner said that he had tried to get "that boy" to take him back over there.[14]

A clinical psychologist who had examined Petitioner for competency to stand trial testified that (1) Petitioner had a long history of substance abuse beginning with alcohol abuse around age 7-8, regular marijuana use around age 12-13, and intravenous drugs – including crystal meth and dilaudid – around age 13-14, (2) people with an early history of IV drug abuse have a more difficult time quitting because it retards social and psychological development, (3) those who smoke or inhale crack cocaine have a harder time stopping its use and staying off it, (4) while

[13] 7 SCR 703-12 (testimony of Wesley Orville Portwood). Petitioner's videotaped statement to police admitted into evidence as State Exhibit 40 included admissions by Petitioner that he was the individual who kidnaped and robbed Portwood. 3 SCR 459, 465-68.

[14] 7 SCR 727-30 (testimony of Rhonda Sue Chavers). On cross-examination, Ms. Chavers testified the Petitioner cut his hair after seeing reports of Mrs. Liveoak's death and never mentioned Mrs. Liveoak on the night he stayed at Chavers' residence, *i.e.,*,July 13, 1994. *Id.,* at 730-31.

crack is not physically addictive, *i.e.,* there is no treatment regimen for addiction, it results in a very intense psychological addiction causing a craving for the drug and a dependence that requires users to need more of the drug to get the same effect, (5) the psychological craving resulting from crack cocaine abuse causes intense discomfort and irritability, (6) Petitioner has been diagnosed as dependent upon cocaine, (7) at the time of his capital offense, Petitioner was binging on crack, *i.e.*, he wanted more and more of the drug and used large quantities of crack within shorter time periods, (8) Petitioner had been binging on crack for twelve days prior to his encounter with Mrs. Liveoak and was oblivious to time at that time, (9) Petitioner was functioning at below the average intelligence level at the time of his capital offense, (10) despite his abuse of crack, Petitioner knew the difference between right and wrong, (11) Petitioner became tearful when he related the circumstances of Mrs. Liveoak's death, and (12) Petitioner was remorseful – denying he ever intended for Mrs. Liveoak to die.[15]

[15] 7 SCR 743-61 (testimony of Dr. Guy Renfro). On cross-examination, Dr. Renfro testified that (1) Petitioner knew it was wrong to abduct and rob Mrs. Liveoak and leave her in the trunk of her car, (2) not every drug addict commits violent crimes, and (3) crack use increases the propensity for violence because it makes users more confrontational. *Id.,* at 761-64. On re-direct examination, Dr. Renfro testified (1) the craving effects of crack affect a user's choices and (2) crack is a "drug of concern." *Id.,* at 764-66.

An attorney (and Petitioner's court-appointed mitigation specialist) testified the federal Sentencing Guidelines treated crack cocaine as more dangerous and addictive than powder cocaine.[16]

Petitioner testified on direct examination that (1) he was born and raised in New York until age 6 or 7 when his parents divorced and he moved with his mother and two of his siblings to Florida, where he began abusing alcohol, (2) he skipped school regularly, (3) he played in a band in bars with his step-father beginning around age 10 and continued drinking alcohol, (4) he began using marijuana around age nine and often stole from his mother to pay for pot when he was in middle school, (5) he had no parental supervision growing up and did not attend church, (6) he began using cocaine intravenously around age 13, (7) crystal meth, used intravenously, became his drug of choice around the same time, (8) he also abused Quaaludes, Placidyls, Desoxyns, Mepergan, Deerol, and LSD, (9) he "discovered" crack cocaine in 1992 which he smoked, (10) he had been doing crack for about two weeks immediately prior to his encounter with Mrs. Libeoak, (11) he pawned everything he owned to buy crack, (12) he stole cigarettes and meat from grocery stores to pay for drugs, which he bought from Chester Foley, (13) he and Carolyn Yaw have five children, (14) he and Mike Kelly robbed Mr. Portwood at knife point,

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[16] 7 SCR 767-77 (testimony of Susan James).

(15) he never touched Portwood but did threaten him, (16) the night before he encountered Mrs. Liveoak, he traded a stolen bicycle for crack, (17) he pushed Mrs. Liveoak into her car and drove away from the WalMart in Prattville, (18) Mrs. Liveoak was scared and offered to get money for him from her credit cards, (19) as he drove Mrs. Liveoak's car south on the Interstate, he told her he had a crack problem and she prayed for him, (20) he drove to a road in the woods, stopped the car, and directed Mrs. Liveoak to get out and walk into the woods, (21) when she said she was scared, he suggested she get into the trunk and promised she would get out as soon as he got to the bank and got the money, (22) when they reached the AmSouth Bank on South Boulevard in Montgomery, initially Carolyn Yaw could not get the teller machine to work, (23) he had been speaking with Mrs. Liveoak from inside the car but he got out and sat on the trunk to hear her better, (24) when Mrs. Liveoak gave him the phone number for her son, he did not write it down, (25) he promised Mrs. Liveoak he would call the police to let her out of the trunk, (26) after he and Carolyn Yaw got money from Mrs. Liveoak's bank account, they called a cab and left for Chester Foley's house, (27) they later went to a motel where they smoked crack until dawn, (28) at check-out time, they went back to Chester Foley's house, (29) he, Yaw, and Dennis Bowen went to the WalMart in Prattville to steal things to trade for more crack, (30) he and Dale Blake went to Wetumpka and Millbrook and stole items to trade for crack, and (31) when he awoke the morning

after his encounter with Mrs. Liveoak, he assumed she had gotten out of her trunk and he was likely wanted for kidnaping and robbery.[17]

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[17] 7 SCR 778-800, 8 SCR 801-03 (testimony of Donald Dallas). Petitioner's direct examination ended with the following exchanges:

> Q: Mr. Dallas, this jury and this Court and this family want to know why you didn't make the phone call?
>
> A: Once I went to the motel, I never left the motel. I tried one time, but the guy that came over that Chester knew, I had asked Chester if he knew anybody with a car that could take me somewhere and bring me back. This is when Chester first came back with the drugs, *because at the time I wanted to make sure she was gone*. But I didn't want to call a cab, because I didn't want to get caught, because I had took a cab away from there. I knew if I called the Yellow Cab Company or any cab company, that they would be looking out for me. So Chester brung [sic] the guy that lives across the street from him to the motel. Of course, he knows that I am a crack addict. I told him I would give him twenty-five dollars to carry me over to the Southern Bypass to let me look at something, and if everything was okay, then I would give him some more money to fill his car up with gas and buy his beer, because he was young. So we started over there, and his car overheated, so we didn't make it no further than the first store we stopped to get gas at. So me being in the public when I am hitting crack, I can't do, so I suggested to go back to the motel, and I asked Chester to find us another ride. Chester knew, I guess, what I was trying to do, because he was the only one I had told. I never left again. I smoked crack to daylight. I never used the phone. And by the next day, I never heard anything about it, so I started hustling trying to get money to get more crack.
>
> Q: Mr. Dallas, did you intend to kill Hazel Liveoak?
>
> A: No, I did not. I didn't intend to kill nobody.
>
> Q: Was your purpose just to get money?
>
> A: (No verbal response.)

8 SCR 801-03 (Emphasis added).

During his cross-examination, Petitioner testified as follows:

> Q: But you were more comfortable just to leave her in the trunk of the car? Were you more comfortable leaving her in the trunk of the car, putting her in the trunk of the car?
>
> A: For me to get away?
>
> Q: Period. When you put her in the trunk of that car. Were you more comfortable putting her inside -- a seventy-three-year-old woman, inside the trunk of a car?
>
> A: I wasn't even thinking about nothing like that. I was thinking about getting the money.
>
> Q: When did you start thinking about the heart condition that she told you about, Mr. Dallas?
>
> A: When we was going down the interstate, like I said, we was talking. And she said she had a heart problem. I asked her was she okay. She said, yes, I

Petitioner's cross-examination concluded as follows:

> Q: There you are driving around, riding around in that parking lot, and there was Mrs. Liveoak still in the trunk of that car?
> A: Yes.
> Q: And did you park the car back in the K-Mart parking lot?
> A: Yes.
> Q: Mr. Dallas, why didn't you leave the keys with the car?
> A: I thought I did.
> Q: But you didn't, did you?

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am okay. I guess in my mind, you know, my daddy died of a heart attack. He was a real physically active man. He died in his sleep of a heart attack. I just never really thought about the heart attack. I don't guess I thought it would ever happen.

> Q: Wait a second. You said your daddy died of a heart attack?
> A: Yes, he did.
> Q: And she tells you she has a heart condition, and you thought it was okay to put a seventy-three-year-old woman with a heart condition on a summer afternoon in the trunk of a car?
> A: Like I say, I wasn't thinking about too many things but one thing. I am robbing somebody, and I am going to be in big trouble. I am going to spend a lot of time in jail if I get caught doing this. And wasn't really -- if I had been thinking, it would have never happened.
> Q: Spent a lot of time in jail if you get caught. Kind of cut down the chances of getting caught, Mr. Dallas, if the witness who you abducted is dead, isn't it?
> A: No.
> Q: You don't think that would cut down your chances of getting caught?
> A: No. I knew I was going to get caught for robbing her. I didn't wipe off no fingerprints or try to do nothing. I wasn't even thinking. I just wanted to get the money and get the dope and get in my own world.
> Q: You were just talking about getting caught, Mr. Dallas. You just abducted someone just a few days beforehand, correct?
> A: Correct.
> Q: You left that person alive, correct? That was the person that could identify you possibly; isn't that right?
> A: That's why I knew I would get caught. Sooner or later, everybody knows they are doing a crime they are going to get caught. With the drugs, you don't comprehend it.
> Q: But you also knew, Mr. Dallas, that if Mrs. Liveoak was dead, she could not really identify you very well, could she?
> A: That ain't so. That ain't so. Never in my mind have I ever thought about killing anybody.

8 SCR 815-18.

A: If you didn't find them, then, obviously not.

Q: Mr. Dallas, why didn't you at least move that car in a closer position where someone might happen upon it?

A: I wasn't thinking about that.

Q: You weren't thinking about Mrs. Liveoak at all, were you?

A: I just wanted to get out.

Q: You didn't care about Mrs. Liveoak, did you?

A:` That's not so.

Q: Mr. Dallas, this is a woman that was praying for your crack addiction. I think that's what you testified to. Is that right?

A: Yeah.

Q: And you were paying her by leaving her in the trunk of a car and parked that car in an area where it was not likely to be found and she was not likely to be found. Is that how you repaid her, Mr. Dallas?

A: No.

Q: Let me ask you this, Mr. Dallas. When you went over to that crack house and got in that cab, it is a long way from K-Mart parking lot to Chisholm, isn't it?

A: It is.

Q: Do you have any idea how many pay phones you passed along the way?

A: I guess I figured she got found, because --

Q: That wasn't my question.

A: Redo your question, please.

Q: Do you have any idea how many pay phones you passed along the way?

A: Five hundred.

Q: A bunch?

A: A bunch.

Q: And you had eight hundred dollars on you, right? That's what you testified to?

A: Right.

Q: Out of that eight hundred dollars, do you think you may could have gotten a quarter to use one of those pay phones?

A: We never stopped.

Q: Did you ever ask the cab driver to stop?

A: No.

Q: When you went to the Coliseum Motel that night, you didn't have a way there, did you?

A: Yes.

Q: You did?

A: Yes, sir.

Q: I take it back. I am sorry. You had to get a ride to go there, right?

A: Yes, I did.

Q: From the crack house, Chester Foley's house or whatever it was in Chisholm to the Coliseum Motel, did you pass a number of pay phones at that time?

A: Yes.

Q: Still had money on you, too, didn't you?

A: Yeah.

Q: Obviously you had money on you, because you had enough money to get a hotel room?

A: Correct.

Q: Didn't use a quarter at that time to call for help, did you?

A: I never used the phone.

Q: Never stopped, did you?

A: No.

Q: How about the Coliseum Motel itself, there were phones in that motel, weren't there?

A: I expect so.

Q: You expect so. Only you didn't even try, did you?

A: I never used the phone. I never used it.

Q: I think you said you didn't call a cab to go back over to the K-Mart parking lot to check on her, because you felt it may draw too much attention to yourself?

A: (No verbal response.)

Q: Is that a yes?

A: Yes.

Q: Mr. Dallas, you don't dispute at all that you intended to abduct and kidnap Hazel Liveoak, correct?

A: Correct.

Q: And you don't dispute that you did intend to rob Hazel Liveoak?

A: No.

Q: You don't dispute the fact that you intended to place Mrs. Liveoak in the trunk of the car there on that dirt road?

A: No.

Q: And you don't dispute the fact that you intended to leave and drive around with Mrs. Liveoak in the trunk of that car; is that right?

A: Yes.

Q: You don't dispute the fact that you intended to leave, when you left the K-Mart parking lot, to keep Mrs. Liveoak in the trunk of that car when you left?

A: I never thought too much about it. When the money came out of the machine, I guess that was it. I never thought about anything but getting out of there.

Q: And you were worried about getting caught?

A: Yes.

Q: As a matter of fact, you were so worried about getting caught the next day when you found out about Mrs. Liveoak's death, you cut your hair to try and change your appearance?

A: I started to run, yeah.

Q; Mr. Dallas, isn't it true the first time you have shown any remorse or any worry about what you did on that day is when you found out that Mrs. Liveoak was dead.

A: It wasn't supposed to happen.

Q: You didn't show any remorse when you were hitting on a crack pot that night, were you?

A: (No verbal response.)

Q: Were you?

A: (Witness shakes head negatively.)

Q: You didn't show any remorse when you went up to Wal-Mart to steal more for crack, did you?

A: No.

Q: You didn't give her a thought?

A: That's crack addiction.

Q: You didn't give her a thought, did you?

A: Excuse me?

Q: You didn't give her a thought, did you?

A: I was wanted for robbery now.[18]

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[18] 8 SCR 820-26 testimony of Donald Dallas).

Because Petitioner's substantive claims and ineffective assistance claims are highly fact-sensitive and overlap substantially, analysis of those claims set forth below will repeat relevant portions of the evidence described in detail above, particularly the relevant portions of Petitioner's critically important trial testimony.

3. The Guilt-Innocence Phase Jury Charge and Verdict

The trial judge instructed the jury at the conclusion of the guilt-innocence phase of Petitioner's capital murder trial that (1) capital murder as defined by state law "is basically intentional murder with something additional," (2) count one of the indictment against Petitioner charged intentional murder during a kidnaping, (3) count two charged intentional murder during a robbery, (4) in addition to the capital murder counts, the jury also had before it lesser-included offenses consisting of felony murder and manslaughter, (5) the jury could convict Petitioner of capital murder only if the jury concluded beyond a reasonable doubt that the Petitioner caused the death of Mrs. Liveoak and intended to kill her, (6) a person acts intentionally with respect to a result or conduct when it is his or her purpose to cause that result or to engage in that conduct, (7) the jury could convict Petitioner of capital murder only if it concluded beyond a reasonable doubt that the Petitioner abducted or robbed Mrs. Liveoak or intended to accomplish or aid in the commission of the kidnaping or robbery of Mrs. Liveoak or the flight therefrom, (8) evidence of intoxication is relevant to negate an element of the offense charged, (9) to convict when the defense of intoxication is raised, the prosecution must also prove beyond a reasonable doubt that at the time of the alleged offense, the defendant did not, as a

result of being intoxicated, lack the capacity to either appreciate the criminality of his alleged conduct or to conform his alleged conduct to the requirements of law, (10) a person acts intentionally when his purpose is to cause a specific result, (11) the jury could infer that a person intends the natural consequences of what he does if the act is done intentionally, (12) the jury could consider the Petitioner's conduct and demeanor immediately after the crime in his statements to aid in characterizing his intent, and (13) the jury's verdict must be unanimous.[19]

The jury retired to deliberate at the guilt-innocence phase of trial at 1:30 PM on October 19, 1995.[20] At 1:50 PM the same date, the jury returned its verdict on all seventeen counts of the indictment, finding Petitioner guilty beyond a reasonable doubt on all counts.[21] The trial judge instructed the jury to return to the jury room and to designate on the verdict form under which (or both) of the two theories of capital murder the jury had convicted Petitioner of that offense.[22] The jury returned to the courtroom shortly thereafter, and the trial court asked the jury foreman in open court whether the jury's action in circling both kidnaping and robbery on the verdict

[19] 8 SCR 884-87, 899-908, 913-15, 917-18, 922. The state trial court's guilt-innocence phase jury instruction also clearly distinguished between the intentional murder required for a conviction for capital murder and the reduced culpable mental state necessary to convict a defendant of felony murder or manslaughter under applicable state law. *Id.,* at 908-12.

[20] 8 SCR 931.

[21] 8 SCR 931-34.

[22] 8 SCR 934.

form indicated the jury had concluded Petitioner was guilty of capital murder under both theories submitted in the jury charge; the jury foreman stated that was correct.[23]

D. Punishment Phase of Trial

The punishment or sentencing phase of Petitioner's capital murder trial commenced at 2:45 PM the same date.

1. Prosecution's Punishment Phase Evidence

The prosecution presented only one witness at the punishment phase of Petitioner's trial – the victim's son Larry Liveoak. Mr. Liveoak testified briefly about (1) the stress and emotional duress he and his family suffered during the search for his mother after she went missing, (2) the important role his mother played in their family, (3) the good works his mother performed while alive, and (4) the impact his mother's death had on him and his family.[24]

2. Defense's Punishment Phase Evidence

Petitioner's older sister testified that (1) their family split up and there was a lot of violence involving guns and knives between their parents, (2) Petitioner was without parental guidance, supervision, or direction growing up, (3) their parents beat them, (4) Petitioner witnessed her being beaten, (5) their father was an alcoholic, (6) after their parents separated, she, their brother Paul, and Petitioner

[23] 8 SCR 935.

[24] 8 SCR 947-52 (testimony of Larry Liveoak).

went to live with their mother in a home she could best describe as "hell," (7) their mother and step-father ignored Petitioner, allowing him to do as he pleased, (8) Petitioner was aware that she was molested, (9) their mother was taken to an insane asylum on two occasions, (10) she and Petitioner were raised in bars and were lucky to have food in their home, sometimes going as long as a week without eating, (11) she ran away from home at age eighteen and got married, (12) Petitioner had two children with a woman named Pam with whom Petitioner lived for three years, (13) Pam was a good influence on Petitioner, (14) Petitioner began going out with Carolyn "Polly" Yaw about fourteen years before the date of trial, (15) Yaw got Petitioner into drugs, at which point Petitioner became "a different person," (16) Yaw dominated Petitioner, who took the blame for Yaw's criminal behavior, and (17) Petitioner's behavior vis-à-vis Mrs. Liveoak did not accurately reflect Petitioner's character.[25]

One of Petitioner's older brothers testified that (1) he has convictions for DUI and possession of marijuana, (2) their oldest brother went to live with another family at some point and grew up to become a counselor for children in New York, (3) Petitioner was gainfully employed at some point as an electrician, (4) Yaw was a bad influence on Petitioner, (5) Yaw and an accomplice once stabbed a man and

[25] 8 SCR 955-66 (testimony of Cindy Knight).

stole the man's money and clothes, (6) Petitioner never got into trouble at school and made it to the sixth grade, (7) Petitioner was doing crack for two weeks prior to his capital offense, and (8) Petitioner was different when on crack.[26]

Petitioner's former common law wife testified that (1) she and Petitioner had two teenage daughters, (2) Petitioner was a kind person who worked with her older brother, (3) Polly Yaw caused their breakup at a time when Petitioner was working in Tuscaloosa, (4) their breakup happened after she and Petitioner argued and the next thing she knew, Petitioner was dating Yaw and doing drugs, (5) Yaw once struck her, (6) it was out of character for Petitioner to kill someone, (7) she had never known Petitioner to be violent, and (8) she did not believe Petitioner would be violent in prison.[27]

Polly Yaw's step-sister testified that (1) she had known Petitioner since she was sixteen, (2) Petitioner is not a violent person, (3) Polly Yaw's reputation in the community was "mean," (4) Yaw always nagged Petitioner, (5) Yaw got Petitioner on crack, and (6) Petitioner is sincerely remorseful for Mrs. Liveoak's death.[28]

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[26] 8 SCR 966-73 (testimony of Paul Dallas).

[27] 8 SCR 973-77 (testimony of Pam Cripple).

[28] 8 SCR 977-80 (testimony of Rhonda Chavers).

3. Punishment Phase Jury Charge & Verdict

The state trial court instructed the jury (1) it was to consider all of the evidence, including the evidence offered during both the guilt-innocence and punishment phases of trial, when making its sentencing recommendation, (2) it could consider only those aggravating factors which it determined had been established beyond a reasonable doubt, (3) more specifically, it could only consider the following aggravating factors (but only if the jury determined it had been established beyond a reasonable doubt): (a) the Petitioner had previously been convicted of another felony involving the use or threatened use of violence to another person, (b) the Petitioner committed capital murder while engaged in the commission or attempted commission or flight from either robbery in the first degree or kidnaping in the first degree, and (c) Petitioner's capital murder was especially heinous, atrocious, or cruel compared to other capital offenses, (4) "heinous" means "extremely wicked or shockingly evil," (5) "atrocious" means "outrageously wicked and violent," (6) "cruel" means "designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others," (7) for a capital offense to be "especially heinous and atrocious" any brutality involved "must exceed that which is normally present in any capital offense," (8) for a capital offense to be "especially cruel," it must be "a conscienceless or pitiless crime which is unnecessarily torturous to the victim," (9) "all capital offenses are heinous,

atrocious, and cruel to some extent," (10) the jury instruction was intended to cover "only those cases in which the degree of heinousness, atrociousness or cruelty exceeds that [which] will always exist when a capital offense is committed," (11) before making a recommendation in favor of a death sentence, the jury must unanimously agree that the prosecution had presented evidence establishing beyond a reasonable doubt the existence of at least one of the foregoing aggravating factors, (12) the jury must weigh against any aggravating factors all mitigating circumstances presented, (13) a "mitigating circumstance" means any evidence which "indicates or tends to indicate the defendant should be sentenced to life imprisonment without parole instead of death," and includes, but is not limited to, such factors as (a) whether the Petitioner had no significant history of prior criminal activity, (b) whether the Petitioner was under the influence of extreme mental or emotional disturbance when he committed capital murder, (c) whether the victim was a participant in the petitioner's criminal conduct or consented to the act, (d) whether the Petitioner was an accomplice in the capital offense committed by another person and his participation was relatively minor, (e) whether the Petitioner acted under extreme duress or under substantial domination of another person, (f) whether the capacity of the Petitioner to appreciate the criminality of his conduct and to conform his conduct to the requirements of law was substantially impaired, and (g) any aspect of the Petitioner's character or record and any of the

circumstances of the offense the Petitioner offered as a basis for a sentence of life imprisonment without parole instead of death, including the Petitioner's prior kindness and good works toward others which indicate a possibility of redemption and rehabilitation, the love and caring shown towards Petitioner by his family and friends, and that Petitioner appears to function well in various kinds of penal institutions, indicating a probability that Petitioner can be integrated into long-term prison life without significant difficulty, (14) since his arrest, Petitioner has shown no tendency towards violence against others, (15) the burden is on the prosecution to disprove the existence of a mitigating circumstance offered by the Petitioner by a preponderance of the evidence, (16) only an aggravating circumstance must be proven beyond a reasonable doubt, (17) the jury's deliberations should be based upon the evidence and must avoid the influence of passion, prejudice, or any other arbitrary factor, (18) weighing aggravating and mitigating factors is not a mechanistic process – different circumstances may be given different weights or values in determining the sentence in a case, (19) in order to recommend a punishment of death, at least ten jurors must vote for death – any number less than ten cannot recommend death, (20) in order to recommend a sentence of life without parole, at least seven jurors must vote for that sentence, (21) the jurors should hear and consider the views of their fellow jurors and carefully weigh, sift, and consider

the evidence, realizing that a human life is at stake, and bring to bear their best judgment on the sole issue before the jury.[29]

The jury subsequently sent out a note requesting additional instructions on the definition of mitigating circumstances.[30] From 5:30 to 5:36 p.m. the same date, the jury returned to the courtroom; the trial judge repeated his earlier instructions regarding the definition of mitigating circumstances and added, at the request of Petitioner's counsel, additional examples of mitigating circumstances offered by the defense, including Petitioner's good work record, poor family up-bringing, cooperation with police officers, emotional state at the time of the offense, and being under the influence of alcohol or drugs.[31] At 5:55 p.m. the same date, the jury returned its sentencing recommendation, recommending by a vote of eleven to one that the punishment be fixed at death.[32]

4. Sentencing Hearing and Trial Court Findings

On November 16, 1995, the trial judge held the sentencing hearing. Petitioner's trial counsel made objections to the pre-sentence report.[33] Petitioner's

[29] 8 SCR 990-1000, 9 SCR 1001-11.

[30] 9 SCR 1015-17.

[31] 9 SCR 1017-23.

[32] 9 SCR 1023-24.

[33] 9 SCR 1026-28.

court-appointed mitigation expert argued in favor of a sentence of life without parole, calling the court's attention to the trial testimony of Petitioner and Dr. Renfro and emphasized that (1) Petitioner had displayed poor judgment but had not intended to kill Mrs. Liveoak, (2) Petitioner was suffering from the pernicious effects of crack cocaine addiction at the time of his offense, (3) scientific evidence and media accounts suggested the "euphoric feeling is so intense that crack cocaine users quickly develop a habit on the drug that is almost impossible to overcome," (4) Petitioner was so dominated by Carolyn "Polly" Yaw that he took the blame for her, (5) Petitioner was contrite and cooperative with law enforcement after his arrest, (6) Petitioner was remorseful, (7) killing Petitioner will not bring back Mrs. Liveoak, and (8) a sentence of life without parole is worse than death.[34]

Petitioner's trial counsel argued that (1) Petitioner had great remorse for what he had done and had accepted responsibility for it, (2) some good could come out of Petitioner's life if he were permitted to live, (3) Petitioner experienced an extremely difficult childhood, (4) something about Petitioner's childhood "prevented him from developing the sense of responsibility that we are supposed to have, that sense of responsibility that tells us to follow the rules, to obey the law, to respect the dignity of others, and to avoid injuring others by our own selfish desires," (5) Petitioner's

[34] 9 SCR 1028-44.

desire for crack overwhelmed his judgment, (6) Petitioner's actions were not those of a rational human being, and (7) life without parole was the appropriate sentence.[35] Petitioner then addressed the court and stated that (1) he was deeply sorry for his offense and had never meant for it to happen, (2) since the time he and Mrs. Liveoak prayed for his crack habit, he had not done it, (3) he wanted to apologize to her family, and (4) with the court's permission, he would like the opportunity to tell others about the harmful effects of crack cocaine, specifically what this "destroying drug" had done to him and his family.[36]

The trial court imposed sentences of ten years on counts three through seventeen of the indictment.[37] On the capital murder counts, the trial court imposed a sentence of death by electrocution.[38] In its sentencing order, the trial court found that (1) Petitioner "never did a thing to rescue Mrs. Liveoak" despite having multiple opportunities to do so, (2) Mrs. Liveoak apparently did not die immediately but had a number of bruises and cuts on her hands consistent with attempts by her to free herself, (3) Petitioner let Mrs. Liveoak die in the trunk of her car while he and Yaw went to a crack house to purchase crack with money they obtained through the use

[35] 9 SCR 1044-50.

[36] 9 SCR 1050-51.

[37] 9 SCR 1052-53.

[38] 9 SCR 1053.

of Mrs. Liveoak's credit card, (4) the following day, Petitioner sarcastically told Dennis Bowen that he "hoped the old lady would die," (5) Petitioner knew from the earlier abduction of Mr. Portwood that he could cause the death of someone by leaving her in the trunk of a car, (6) "the inference can clearly be drawn that he left Mrs. Liveoak in the trunk of the car to prevent subsequent identification," (7) Petitioner's intent to kill was also shown through his testimony at trial, specifically when, in response to questions about why he placed Mrs. Liveoak in the trunk of her car, Petitioner emphasized he was concerned about getting caught, (8) *the jury concluded beyond a reasonable doubt that Petitioner committed his capital offense while engaged in the commission or attempted commission, or as an accomplice in the commission or attempted commission, or while in flight after the commission or attempted commission, of kidnaping and robbery*, (9) the prosecution proved beyond a reasonable doubt that Petitioner was previously convicted of another felony involving the use or threatened use of violence against another person, (10) the prosecution proved beyond a reasonable doubt that Petitioner's capital offense was especially heinous, atrocious, or cruel, specifically by proving Mrs. Liveoak suffered pre-mortem injuries suffering both physically and psychologically after being left in the trunk of an automobile on a summer afternoon, *i.e.*, "entombed in the trunk of her car," after Petitioner cruelly gave her false hope she would be rescued, (11) Petitioner failed to present sufficient evidence to establish either (a) he had no

significant history of prior criminal activity, (b) he committed his capital offense while under the influence of extreme mental or emotional disturbance (*i.e.,* while Petitioner presented evidence showing he was craving crack cocaine, he failed to present evidence showing he was under the influence of crack at the time he committed his capital offense), (c) he committed his offense as a mere accomplice, (d) he acted under extreme duress or under the substantial domination of another person, (e) his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, or (f) his age at the time of the offense (*i.e.,* thirty) was a mitigating circumstance, (12) Petitioner did present evidence supporting a number of non-statutory mitigating circumstances but the trial court did not give great weight to any of these factors, specifically evidence showing (a) Petitioner was remorseful for his conduct, (b) Petitioner's post-arrest confession and cooperation with investigating officers, (c) Petitioner came from a poor family and did not have adequate adult role models or morals instilled in him (the court found there was no evidence Petitioner turned to a life of crime because of his upbringing in light of the absence of a criminal record for his sister who grew up in the same household), (d) Petitioner's good work record, (e) Petitioner was a good husband to his first wife, (f) Petitioner's prior kindness and good work toward others, (g) the love and caring shown Petitioner by his family and friends, (h) Petitioner's record of functioning well in penal institutions, and (i)

Petitioner's record of nonviolence since his arrest, and finally, (13) after considering the jury's recommendation and weighing the aggravating and mitigating circumstances, Petitioner's sentence should be fixed at death.[39]

E. Direct Appeal

Petitioner appealed his conviction and sentence, presenting nine claims in his appellant's brief.[40] The Alabama Court of Criminal Appeals affirmed Petitioner's conviction and sentence in an opinion issued March 21, 1997, rejecting on the merits all of Petitioner's grounds for appellate review. *Dallas v. State,* 711 So. 2d 1101 (Ala. Crim. App. 1997). Petitioner next filed a petition for certiorari with the

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[39] 2 SCR 357-69.

[40] Petitioner's appellant's brief, filed April 11, 1996, appears among the state court records submitted to this Court at 10 SCR Tab 2. As grounds for review, Petitioner's appellate counsel argued (1) the prosecution violated the equal protection principle announced in *Batson v. Kentucky* by using twelve of its sixteen peremptory strikes to remove black members of the jury venire, (2) the trial court erred in granting the prosecution's challenge for cause to juror 129 and in denying the defense's challenge for cause to juror 64, (3) the trial court erred in denying the defense's requests for guilt-innocence phase jury instructions on the lesser-included offenses of reckless murder and criminally negligent homicide, (4) the trial court erred in denying the defense's objections to the guilt-innocence phase jury charge commenting on (a) the defendant's credibility, (b) the impeachment of the defendant, and (c) the defendant's flight from the crime scene as evidence of consciousness of guilt, (5) the trial court erred in allowing the jury to consider as an aggravating circumstance whether the crime was especially heinous, atrocious, and cruel, (6) the trial court erred in considering improper victim impact testimony in the form of (a) testimony by the victim's son concerning the impact of his mother's death upon him and his family and (b) a letter from the victim's daughter, (7) Petitioner's lead trial counsel rendered ineffective assistance as a result of a conflict of interest, (8) the trial court erred in denying Petitioner's trial counsels' motions for continuance, which caused said counsel to constructively render ineffective assistance, and (9) there was insufficient evidence to support the jury's verdict at the guilt-innocence phase of trial, *i.e.,* insufficient evidence to show Petitioner possessed the specific intent to kill the victim.

Alabama Supreme Court.[41] The Alabama Supreme Court affirmed Petitioner's conviction and sentence in an opinion issued March 13, 1998, finding no reversible error. *Ex parte Dallas*, 711 So. 2d 1114 (Ala. 1998). The United States Supreme Court denied Petitioner's petition for writ of certiorari on October 5, 1998. *Dallas v. Alabama*, 525 U.S. 860 (1998).[42]

F. State Habeas Corpus Proceeding

Petitioner filed a sworn, *pro se* state habeas corpus petition, *i.e.,* a petition pursuant to Rule 32 of the Alabama Rules of Criminal Procedure.[43] The state trial

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[41] Petitioner's certiorari petition with the Alabama Supreme Court appears at 11 SCR Tab 6. Petitioner's certiorari petition re-urged the same nine grounds for relief Petitioner had urged before the Alabama Court of Criminal Appeals.

[42] Petitioner's petition for writ of certiorari filed with the United States Supreme Court appears at 11 SCR Tab 10.

[43] Petitioner's *pro se* Rule 32 petition (signed September 23, 1999) appears at both 12 SCR (Revised) Tab 13-A & 15 SCR Tab 30. As grounds for relief in his sworn *pro se* Rule 32 petition, Petitioner presented (1) a rambling 75-page series of conclusory ineffective assistance claims attacking the performance of his state trial counsel, (2) a series of conclusory complaints about the performance of the prosecution during his trial, including arguments the prosecution (a) used extraneous information to assist during jury selection, (b) presented unspecified prejudicial evidence, (c) improperly commented on unidentified irrelevant evidence, (d) elicited unidentified inadmissible hearsay evidence, (e) improperly commented on the credibility of witnesses, (f) improperly commented on the defense's failure to call certain witnesses, (3) the prosecution violated the rule in *Brady v. Maryland* by failing to disclose to the defense (a) notes, recordings, and other documents memorializing conversations between prosecution witness Bowen and law enforcement officers after July 14, 1994, (b) information regarding Bowen's probation status and prior convictions, and (c) the fact that during his post-arrest interview, Petitioner initially denied any involvement in Mrs. Liveoak's murder, (4) the trial court erred in admitting evidence of Petitioner's kidnaping and robbery of Mr. Portwood just days before Petitioner's kidnaping, robbery, and murder of Mrs. Liveoak, (5) the trial court erred in admitting photographs and videotaped images of Mrs. Liveoak's body in the trunk of her car, (6) the trial court erred in granting the prosecution's challenge for cause to juror 129 and in denying the defense's challenge for cause to juror 64, (7) the trial court erred in denying the defense's requested guilt-innocence phase jury instructions on the lesser-included offenses of reckless murder and criminally negligent

court summarily dismissed several of Petitioner's claims in an Order issued October 28, 1999.[44] On June 21, 2001, the state trial court held an evidentiary hearing (during

homicide, (8) the trial court erred in the guilt-innocence phase jury instructions in commenting on Petitioner's credibility as a witness, (9) the trial court erred in permitting the jury to consider as an aggravating circumstance at the punishment phase of trial whether Petitioner's capital offense was especially heinous, atrocious, or cruel, (10) two jurors failed to truthfully answer voir dire questions, thereby depriving Petitioner of his right to intelligently exercise his peremptory challenges, (11) the trial court's denial of Petitioner's motions for continuance constructively caused Petitioner's trial counsel to render ineffective assistance because Petitioner's counsel were unable to adequately investigate the case against Petitioner and Petitioner's background for potentially mitigating evidence, (12) Petitioner's state appellate counsel rendered ineffective assistance on direct appeal by failing to present all of the foregoing claims for relief urged by Petitioner in his Rule 32 petition as grounds for relief in Petitioner's appellant's brief, and (13) the death penalty as administered in Alabama violates the Eighth Amendment's prohibition against cruel and unusual punishment. Petitioner executed a separate verification of his pro se Rule 32 petition on March 22, 2000 (15 SCR Tab 38).

[44] The state trial court's Order of October 28, 1999, appears at 15 SCR Tab 35. The state trial court found that (1) Petitioner's constructive ineffective assistance claims based upon the Alabama fee schedule for defense counsel, the trial court's denial of Petitioner's lead trial counsel's pretrial motion to withdraw, and the trial court's denial of Petitioner's motions for continuance (a) could and should have been raised at trial and on direct appeal and (b) were unsupported by factual allegations showing how Petitioner was prejudiced thereby, (2) Petitioner alleged no facts showing how he was prejudiced by the performance of his counsel at a pretrial detention hearing, (3) Petitioner's complaints about the pretrial performance of his trial counsel were conclusory, (4) Petitioner's admissions during his videotaped confession and trial testimony, together with the trial testimony of Dennis Bowen, collectively foreclosed a finding of prejudice in connection with Petitioner's complaints of ineffective assistance during the guilt-innocence phase of trial, (5) Petitioner's complaint about the admission of his signed confession was procedurally defaulted because that claim could and should have been raised on direct appeal, (6) Petitioner's complaints of prosecutorial misconduct, *i.e.,* Petitioner's complaints about prosecutorial jury argument, were procedurally defaulted because they could and should have been raised on direct appeal, (7) Petitioner's *Brady* claim relating to the trial testimony of Detective Saint was procedurally defaulted because this claim could and should have been raised on direct appeal, (8) Petitioner's claims relating to the admission of evidence of Petitioner's prior criminal behavior and the admission of photographic and videotape evidence were procedurally defaulted because they could and should have been raised on direct appeal, (9) Petitioner's claims relating to trial court rulings on challenges for cause and the trial court's jury instructions had been raised and addressed by the Alabama Court of Criminal Appeals on direct appeal and could not be re-litigated in Petitioner's Rule 32 proceeding, (10) Petitioner's juror misconduct claim was not based on any identified newly discovered evidence and was subject to dismissal absent amendment [Petitioner did not subsequently amend his Rule 32 petition to address this issue], (11) Petitioner's complaint that his lead trial counsel suffered from an actual conflict of interest had been fully

which Petitioner was represented by counsel and Petitioner participated telephonically) and later received deposition testimony from additional witnesses.[45] The same trial court judge who presided over Petitioner's capital murder trial issued an Order on September 25, 2001, denying Petitioner's Rule 32 petition.[46]

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addressed and denied during Petitioner's direct appeal and could not be re-litigated in his Rule 32 proceeding, (12) Petitioner's claim of ineffective assistance by his state appellate counsel was insufficiently specific to comply with Rule 32.6(b) of the Alabama Rules of Criminal Procedure and was subject to dismissal absent amendment by Petitioner [Petitioner did not subsequently amend his Rule 32 petition to address this issue], and (13) Petitioner's challenge to the constitutionality of Alabama's then-current method of execution (electrocution) was procedurally defaulted because it could and should have been raised on direct appeal and lacked arguable merit.

[45] On June 21, 2001, the state trial court heard testimony in connection with Petitioner's Rule 32 petition from (1) attorney Jeffery C. Duffey, Petitioner's former trial co-counsel, (2) Susan James, Petitioner's former mitigation specialist and co-counsel at the sentencing hearing, (3) John Mann, a Montgomery Police Sergeant, and (4) Danny Billingsley, an investigator with the Alabama Attorney General's Office. The foregoing testimony appears at 12 SCR Tab 13 and 12 SCR (Revised) Tab 13. The state habeas trial court also had before it the deposition testimony of (1) Petitioner's former lead trial counsel, attorney Algert Agricola (which appears at 13 SCR Tab 14 and 13 SCR (Revised) Tab 14) and (2) Petitioner's acquaintance Chester Foley (which appears at Doc # 187-1).

[46] The state trial court's Order of September 25, 2001, appears at both 13 SCR Tab 14-A & 16 SCR Tab 65. The trial court found that (1) Petitioner's complaints about the performance of his former counsel prior to trial (who withdrew or were dismissed from representation prior to trial) and many of Petitioner's complaints about the performance of his counsel at the guilt-innocence phase of trial were subject to summary dismissal (because they actually challenged pretrial rulings made by the trial court which could and should have been raised via direct appeal), (2) Petitioner's complaints about the performance of his trial counsel during the pretrial hearing on Petitioner's motion to suppress were refuted by Petitioner's videotaped confession, (3) Petitioner's complaints about the failure of his trial counsel to call Chester Foley to testify at the hearing on Petitioner's motion to suppress and at trial were refuted by Foley's deposition testimony (in which Foley denied any personal knowledge of the circumstances surrounding Petitioner's offense and was never asked whether he had any personal knowledge of the circumstances surrounding Petitioner's arrest), (4) there was more than sufficient evidence to support the jury's guilty verdict and proof of the specific intent to kill (specifically, viewed in the light most favorable to the jury's verdict, the evidence showed Petitioner (a) placed Mrs. Liveoak in the trunk of her car on a July afternoon in Alabama, (b) removed the keys from her vehicle, (c) parked the vehicle in a remote location of the K-Mart parking lot, and (d) made no attempt to summon help for Mrs. Liveoak despite having made numerous assurances to her that he would do so and in spite of his

knowledge of her age and heart problems), (5) Petitioner failed to show there was any evidence available at the time of trial showing Mrs. Liveoak was alive at the time her vehicle was discovered by police or that her fatal cardiac episode would have occurred even if she had not been left to die inside the trunk of her car in the middle of the summer in the middle of Alabama, (6) there was no showing law enforcement personnel were negligent in the manner they reacted after the discovery of Mrs. Liveoak's vehicle the day after Petitioner abandoned same the day before, (7) there was no evidence presented showing any deal or promises of leniency ever existed between the prosecution and witness Dennis Bowen, (8) there is no rule in Alabama which prevents either party from investigating the background of potential jurors for use during jury selection, (9) the prosecution's opening statement describing the evidence it believed would be presented at the guilt-innocence phase of trial was neither inflammatory nor unduly prejudicial, (10) the failure of Petitioner's trial counsel to object to the prosecution's closing jury argument was neither objectively unreasonable nor prejudicial to Petitioner (because there was no legitimate basis for objection to the prosecution's jury arguments), (11) Petitioner testified at the guilt-innocence phase of trial in his case-in-chief to the same facts he alleged the prosecution had introduced through hearsay testimony, (12) Petitioner presented no new or additional evidence (other than that presented at trial by Petitioner's trial counsel through the defense's mental health expert) showing Petitioner suffered from a mitigating mental state at the time of his capital offense, (13) Petitioner's trial counsel presented extensive mitigating evidence showing Petitioner (a) came from a broken home, (b) began drinking alcohol and using intravenous drugs at any early age, (c) only completed sixth grade, (d) had no direction in his life, (e) was nevertheless a good father, husband, and provider, (f) became hooked on cocaine after taking up with Polly Yaw, (g) took responsibility for Yaw's criminal actions, and (h) was dominated by Yaw, (14) Petitioner failed to present any new or additional mitigating evidence was available at the time of trial from his oldest brother, his mother, or others, (15) Petitioner's allegations that additional evidence was available at the time of trial to show specific instances of abuse, neglect or drug abuse during Petitioner's childhood and adult life would have been, at best, cumulative of the evidence Petitioner's trial counsel actually presented during Petitioner's capital murder trial, (16) there was no impropriety in the prosecution's punishment phase jury arguments (a) appealing to the jury for justice or (b) pointing out the jury had already found beyond a reasonable doubt that one aggravating circumstance existed, *i.e.,* Petitioner committed intentional murder during the course of committing or attempting to commit robbery and kidnaping, (17) the short duration of the jury's punishment phase deliberation did not establish that Petitioner was prejudiced by his trial counsel's performance at the punishment phase of trial, (18) Petitioner failed to present any evidence showing the outcome of his pre-sentence interview would have been any different had his trial counsel accompanied Petitioner to the interview or that the failure of his trial counsel to attend the pre-sentence interview was objectively unreasonable, (19) Petitioner failed to present any evidence showing it was objectively unreasonable for his state appellate counsel to have failed to raise all of the claims presented in Petitioner's *pro se* Rule 32 petition as part of Petitioner's appellant's brief on direct appeal, and (20) there was overwhelming evidence to support the jury's verdict at the guilt-innocence phase of trial and the jury's sentencing recommendation.

Petitioner filed a motion to alter or vacate the judgment on October 25, 2001.[47] The state trial court denied Petitioner's motion. Petitioner appealed on November 28, 2001,[48] but the Alabama Court of Criminal Appeals dismissed his appeal on December 7, 2001, as untimely.[49]

Petitioner filed motions seeking leave to file an out-of-time appeal[50] and requesting a finding that the filing of his motion to alter, vacate, and amend judgment tolled the applicable time for filing a notice of appeal.[51] The state trial court granted the latter of these motions in an Order issued February 12, 2002.[52] Petitioner filed a second Notice of Appeal on February 15, 2002.[53] In an Order issued March 1, 2002, the Alabama Court of Criminal Appeals struck Petitioner's second appeal as untimely.[54] Petitioner filed a petition for writ of certiorari with the Alabama

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[47] Petitioner's motion to alter, vacate or amend appears at both 13 SCR Tab 15 and 13 SCR (Revised) Tab 15.

[48] 13 SCR (Revised) Tab 15-A.

[49] 14 SCR Tab 19.

[50] 13 SCR (Revised) Tabs 17 & 17-A.

[51] 13 SCR (Revised) Tab 17-B.

[52] 13 SCR (Revised) Tab 17-D.

[53] 13 SCR (Revised) Tab 17-E.

[54] 14 SCR Tab 22 & 16 SCR Tab 75.

Supreme Court,[55] which that court dismissed without opinion on June 28, 2002, for failure to comply with Rule 39(c)(1) of the Alabama Rules of Appellate Procedure.[56]

G. Proceedings in Federal Court

Petitioner filed his original federal habeas corpus petition on July 9, 2002, asserting seventeen categories of claims for relief (Doc. # 1).[57] Petitioner filed a

[55] 14 SCR Tab 23 (Petition) & Tab 24 (Brief).

[56] 14 SCR Tab 27.

[57] As grounds for relief, Petitioner's federal habeas counsel argued (1) the prosecution improperly used peremptory challenges in a racially discriminatory manner in violation of the holding in *Batson v. Kentucky*, (2) the state trial court erred in denying the defense's requests for guilt-innocence phase jury instructions on the lesser-included offenses of reckless murder and criminally negligent homicide, (3) the trial court's denial of Petitioner's trial counsels' motions for continuance violated Petitioner's constitutional rights to due process and the effective assistance of counsel, (4) Petitioner's lead trial counsel suffered from an actual conflict of interest which denied Petitioner the effective assistance of counsel, (5) the state trial court erred in granting the prosecution's challenge for cause to juror 129 and in denying the defense's challenge for cause to juror 64, (6) the state trial court erred in overruling the defense's objections to guilt-innocence phase jury instructions (a) stating the jury "may infer that a person intends the natural consequences of what he does if the act is done intentionally" and (b) commenting on the credibility and impeachment of the Petitioner, (7) Petitioner's trial counsel rendered ineffective assistance before, during, and after trial (due to (a) limitations in the fee schedule for Alabama defense counsel, (b) the withdrawal or removal of several attorneys prior to Petitioner's trial, (c) the denial of Petitioner's motions for continuance, and (d) the failures of Petitioner's trial counsel to (i) adequately investigate the case against Petitioner [including the actual medical cause of Mrs. Liveoak's death] and Petitioner's background for mitigating evidence, (ii) challenge the prosecution's case and introduce exculpatory evidence, (iii) object to the medical examiner's testimony that Mrs. Liveoak's death was a homicide, (iv) adequately cross-examine prosecution witness Dennis Bowen regarding Bowen's prior statement to the police and the possibility of a deal between prosecutors and Bowen, (v) present expert medical testimony and evidence showing the actual cause of Mrs. Liveoak's death, (vi) object to the prosecution's use of undisclosed extraneous information during jury selection, (vii) object to the prosecution's derogation of Petitioner's character during opening and closing jury arguments at the guilt-innocence phase of trial, (viii) object to the prosecution's assertion during closing jury argument at the guilt-innocence phase of trial that the case against Petitioner was simple and uncomplicated, (ix) object to the prosecution's closing jury argument at the guilt-innocence phase of trial suggesting that portions of Petitioner's trial testimony were incredible, (x) object to the prosecution's closing jury argument at the guilt-innocence phase of trial suggesting that Dennis Bowen's credibility was superior to

that of Petitioner, (xi) object to the prosecution's closing jury argument at the guilt-innocence phase of trial suggesting that Petitioner's testimony that he attempted to return to the K-Mart parking lot but was unable to do so because the vehicle in which he was a passenger broke down was not credible because the driver of the vehicle had not appeared at trial and testified under oath, (xii) object to the prosecution's closing jury argument at the guilt-innocence phase of trial suggesting that Dennis Bowen's testimony was sufficient to establish that Petitioner intentionally murdered Mrs. Liveoak, (xiii) object to the prosecution's closing jury argument at the guilt-innocence phase of trial suggesting that Petitioner's admissions regarding his voluntary abuse of crack cocaine did not excuse his criminal actions or preclude a finding that Petitioner intentionally murdered Mrs. Liveoak, (xiv) object to the prosecution eliciting unspecified hearsay testimony, (xv) call the defense's court-appointed mitigation expert to testify at the punishment phase of trial, (xvi) adequately investigate Petitioner's medical history, correctional history, educational history, employment and training history, family and social history, and any religious or cultural influences in an effort to identify and develop potentially mitigating evidence, (xvii) adequately meet with Petitioner prior to trial, (xviii) adequately meet with potential defense witnesses prior to their testimony at the punishment phase of trial, (xix) elicit further potentially mitigating evidence from the witnesses actually called to testify by the defense at the punishment phase of trial about instances of neglect, physical and emotional abuse, marital infidelities, mental instability, alcoholism, and misbehavior by Petitioner's parents and Petitioner's difficult, neglected, and undisciplined childhood, (xx) present available mitigating evidence showing Petitioner's early exposure to and abuse of alcohol and narcotics, (xxi) present mitigating evidence showing Petitioner's strong moral character, (xxii) interview and present testimony from Petitioner's older brother Jimmy in New York, regarding Petitioner's difficult childhood [including evidence showing Jimmy once physically assaulted his mother, knocking her over a couch and had limited contact with Petitioner after their parents divorced and Petitioner's mother left New York with the three younger Dallas children], (xxiii) present additional testimony from Rhonda Chavers regarding Petitioner's good character and difficult childhood, (xxiv) present evidence showing the Dallas children were subjected to sexual abuse by babysitters, (xxv) interview and present the testimony of Petitioner's mother Elaine regarding her physical and emotional abuse of Petitioner, her infidelities and those of Petitioner's biological father and step-father, Petitioner's truancy, the Dallas family's extremely poor economic standing, and the negative influences of Petitioner's biological father and step-father upon Petitioner's development, (xxvi) present testimony showing that, on crack, Petitioner was a "different man," (xxvii) present expert testimony showing the likely causes of Petitioner's emotional and physical problems ["serious psychopathology including confused thinking, distorted perceptions, and other psychotic processes"], including the psychological assessment done on Petitioner at the Kilby Correctional Facility, (xxviii) present evidence showing Petitioner successfully completed a drug rehabilitation program in Texas, and (xxix) to attend Petitioner's pre-sentence interview, (8) the state trial court erred in admitting Petitioner's signed confession, which was obtained in violation of Petitioner's right to counsel, (9) the prosecution engaged in misconduct, including (a) using extraneous information about a juror as a basis for not striking the juror during jury selection, (b) presenting prejudicial evidence lacking in probative value, (c) commenting on irrelevant evidence, (d) eliciting hearsay testimony, and (e) improperly commenting on the credibility of witnesses and on the defense's failure to present certain witnesses, (10) the trial court erred in considering improper victim impact evidence in the form of a letter to the trial judge from Mrs. Liveoak's daughter urging the imposition of a sentence

brief on the merits in support of his claims for relief on June 7, 2007, arguing that he was entitled to *de novo* review on all of his claims for relief (Doc. # 88). The same date, Petitioner also filed an appendix to his merits brief accompanied by more than two dozen new exhibits (mostly addressing his claim that his trial counsel failed to adequately investigate and present then-available mitigating evidence) and a motion to supplement the record (Doc. # 86-87). The court granted Petitioner's motion to supplement the record in an Order issued June 8, 2007 (Doc. # 89).

Respondent filed a brief on August 14, 2007, responding to the merits of some, but not all, of Petitioner's claims for relief (Doc. # 92). Petitioner filed a response to Respondent's brief on September 28, 2007, arguing the ineffective assistance of Petitioner's state habeas counsel excused the Petitioner's procedural defaults on some of his claims for federal habeas corpus relief (Doc. # 95).

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of death, (11) the prosecution failed to disclose beneficial information to the defense in violation of the rule in *Brady v. Maryland* in the form of notes, recordings, and other information regarding conversations between prosecution witness Dennis Bowen and law enforcement personnel after Bowen gave his statement on July 14, 1994, (12) the state trial court erred in admitting the testimony of Mr. Portwood regarding Petitioner's robbery and kidnaping of him days before Mrs. Liveoak's murder, (13) the state trial court erred in admitting videotape and photographic evidence of the victim's body, (14) the state trial court erred in permitting the jury to consider as an aggravating circumstance whether Petitioner's capital offense was especially heinous, atrocious, and cruel, (15) Petitioner was denied his right to exercise his peremptory challenges due to venire members who furnished untruthful information during voir dire [specifically one juror failed to disclose his brother was a crack addict and another juror failed to reveal he had testified as a witness in a civil trial], (16) the prosecution failed to present sufficient evidence showing Petitioner intentionally murdered Mrs. Liveoak, and (17) the Alabama capital sentencing scheme fails to conform to the constitutional requirements announced in *Ring v. Arizona* and *Apprendi v. New Jersey*.

On April 1 and May 5, 2009 (Doc. # 108-09), Petitioner filed a pair of motions to supplement the record along with numerous new affidavits and other documents in support of his claims. The court will grant those motions.

In an Order issued January 12, 2012, the Court addressed the merits of several of Petitioner's claims on which the parties agreed there was no procedural default (Doc. # 120). More specifically, the Order of January 12, 2012, applied the deferential standard of review mandated by the AEDPA and rejected on the merits Petitioner's claims that (1) the state trial court erred in overruling the defense's objections to the guilt-innocence phase jury instructions (a) permitting the jury to draw the inference that a person intends the natural consequences of an intentional act and (b) commenting on the impeachment and credibility of the Petitioner's trial testimony, (2) the state trial court erred in denying the defense's requested jury instructions on the lesser-included offenses of reckless murder and criminal negligent homicide, (3) the state trial court erred in denying the defense's motions for continuance, (4) his lead trial counsel suffered from an actual conflict of interest, (5) the state trial court erroneously permitted the jury to consider as an aggravating factor at the punishment phase of trial whether Petitioner's capital offense was especially heinous, atrocious, or cruel, (6) there was insufficient evidence to show the Petitioner intended to kill Mrs. Liveoak, (7) the state trial court erred in failing to grant the defense's challenge for cause to a prospective juror, (8) the state trial

court improperly considered victim-impact evidence, and (9) the prosecution used its peremptory strikes in a racially discriminatory manner.[58]

Petitioner filed a motion for reconsideration on May 25, 2012 (Doc. # 121), arguing for the first time in a coherent manner that (1) the prosecution's stated reasons for striking jurors 29 and 31 were pre-textual and (2) his lead trial counsel's simultaneous representation of Petitioner in his capital murder case and the Alabama Department of Mental Health and Mental Retardation in an unrelated civil lawsuit constituted a conflict of interest. The same date, Petitioner filed another motion to supplement the record to include a copy of the motion to withdraw filed in the state trial court by Petitioner's lead trial counsel in February, 1995 (Doc. #122). The court granted this motion to supplement in an Order issued September 30, 2016 (Doc. # 135). Respondent filed a brief in opposition to reconsideration on June 6, 2012 (Doc. # 124). Petitioner filed a reply to Respondent's brief in opposition to reconsideration on June 6, 2012 (Doc. # 125).

The Clerk reassigned this case to the undersigned judge's docket on July 19, 2016 (Doc. # 129). In an Order issued August 9, 2016, the court directed the parties to file supplemental briefing (Doc. #130).

[58] The Order of January 12, 2012 disposed of the first four claims for federal habeas corpus relief contained in Petitioner's original federal habeas corpus petition, as well as a portion of the fifth claim, and claims six, fourteen, and sixteen in the order listed in *note* 57, *supra*.

On October 3, 2016, Petitioner filed (1) a supplemental brief addressing respondent's assertions that some of Petitioner's claims were untimely filed and procedurally defaulted (Doc. # 136) and (2) additional pleadings accompanied by twenty-three new exhibits (Doc. # 137-39).

On November 17, 2016, Respondent filed a supplemental brief (1) re-urging the court to dismiss Petitioner's federal habeas corpus petition as untimely filed and to deny relief on fifty-three of Petitioner's claims as procedurally defaulted and (2) argued Petitioner's procedurally defaulted claims were not subject to review on the merits under the holding in *Martinez v. Ryan* (Doc. # 144).

Petitioner filed a supplemental brief on timeliness and procedural default on December 1, 2016 (Doc. # 145).

Petitioner filed a motion on January 11, 2017, requesting leave to amend his original federal habeas corpus petition to include a claim that Petitioner's death sentence is inconsistent with the Supreme Court's holding in *Hurst v. Florida*, 135 S. Ct. 616 (2016) (Doc. # 146).

The briefing in this cause on the subjects of procedural default and timeliness has been extensive.[59] Despite rejection of Respondent's motion to dismiss and the passage of considerable time, Respondent has yet to address the merits of many of

[59] *See, e.g.,* Doc. nos. 4, 5, 11, 12, 15, 17, 18, 20, 27, 29, 36, 40, 42, 43, 67, 70, 88, 92, 95, 113, 118, 121, 122, 124, 125, 136, 141, 144, 145. This cause was reassigned to the undersigned on July 19, 2016, after all but four of the foregoing pleadings and briefs had been filed.

Petitioner's substantive claims.[60] The record currently before the court is not bereft of briefing and analysis from Respondent's perspective on the Petitioner's multi-

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[60] *See* Doc. # 49 & Doc. # 92. The pleadings filed in this cause are far from concise or clear. Petitioner filed his original petition almost fifteen years ago (Doc. # 1). As explained in *note* 57, supra, Petitioner identified seventeen claims for relief in his original petition. In subsequent pleadings and briefs, however, Petitioner has referenced numerous factual and legal arguments made in support of his other numbered claims as if those arguments represented separate and independent claims for relief. *See, e.g.,* Doc. # 136, p. 132, n. 517, where Petitioner argues a number of factual assertions made in support of Petitioner's complaints about the denial of his motion for continuance and other substantive claims are, in fact, separate and distinct ineffective assistance claims. In the same footnote, Petitioner states cryptically that the list of claims contained in the parties' Joint Report "do not match the substance of the claims in the petition." The confusion engendered by Petitioner's chaotic pleading practice has not been limited to the court. In his brief on the merits, (Doc. # 92), Respondent identified more than fifty claims for relief which Respondent believes to be procedurally defaulted by virtue of the dismissal of Petitioner's allegedly untimely appeal from the denial of his state habeas corpus petition. The parties' pleadings are replete with arguments about allegedly incorrectly designated or misidentified claims. The two constants throughout this litigation have been the parties' inability to identify all of the ineffective assistance claims properly presented and Respondent's failure to address the merits of most of Petitioner's multi-faceted ineffective assistance claims.

The fundamental problem with Petitioner's multi-faceted ineffective assistance claims in his original petition is that Petitioner failed to identify with reasonable specificity each discrete act or omission (*i.e.,* exactly what it is he alleges his trial counsel either did or failed to do) which Petitioner argues satisfies both prongs of the *Strickland* standard. Instead, the fourth and seventh major sections of Petitioner's original petition consist of a stream of consciousness list of assertions about the poor performance of Petitioner's trial counsel, investigators, expert witness, and others at various stages of Petitioner's trial court proceedings.

Petitioner has invoked the Supreme Court's holdings in *Martinez v. Ryan*, 566 U.S. 1 (2012), and *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), as justification for overruling the Respondent's assertions that Petitioner procedurally defaulted on the vast majority of Petitioner's claims of ineffective assistance by Petitioner's trial counsel because Petitioner's state post-conviction counsel failed to file a timely notice of appeal following denial of relief in Petitioner's state habeas corpus proceeding. As the Eleventh Circuit has made clear, review of assertions of the equitable principle recognized in *Martinez v. Ryan* necessarily requires a federal court to examine the merits of the underlying claim of ineffective assistance by trial counsel. *See Sullivan v. Secretary, Florida Dept. of Corrections,* 837 F.3d 1195, 1201 (11th Cir. 2016) ("Under *Martinez*, post-conviction counsel's failure to raise a claim in a state collateral proceeding can provide cause and prejudice to excuse a procedural default if: the procedural default is caused by post-conviction counsel's unconstitutionally ineffective assistance; the collateral proceeding in which post-conviction counsel erred was the first opportunity the defendant had to raise the procedurally defaulted claim; and the procedurally defaulted claim has at least 'some merit.'"). Thus, in order to resolve Petitioner's assertions of the equitable principle announced in *Martinez v. Ryan,* it is necessary to delve into the merits of Petitioner's underlying complaints about the

faceted ineffective assistance claim. Respondent filed a pair of pleadings in response to Petitioner's expansive ineffective assistance claims presented in Petitioner's state habeas corpus proceeding.[61] The state habeas trial court addressed the merits (or lack thereof) of Petitioner's ineffective assistance complaints in a thorough Order containing numerous findings of fact and conclusions of law fully supported by the record before that court.[62] Having considered the parties' extensive briefing on the issue of procedural default, the court will address the merits of Petitioner's ineffective assistance claims *de novo* regardless of whether those claims are procedurally defaulted.

II. PETITIONER'S MOTION FOR RECONSIDERATION

In his motion filed May 25, 2012 (Doc. # 121), Petitioner urges reconsideration of the court's denial of federal habeas corpus relief on (1) Petitioner's conflict of interest claim and (2) Petitioner's complaint that two identified members of Petitioner's jury venire (numbers 29 & 31) were improperly stricken by the prosecution during jury selection in violation of the equal protection

performance of his state trial counsel. Rather than wading through the quagmire that is the analytical approach mandated by the holding in *Martinez v. Ryan*, the court will apply Ockham's Razor and address the merits of all of Petitioner's ineffective assistance claims *de novo*, as requested by Petitioner.

[61] 15 SCR Tabs 33 & 34.

[62] 13 SCR (Revised) Tab 14-A.

principle announced in *Batson v. Kentucky*, 476 U. S. 79 (1986). Having considered Petitioner's motion for reconsideration and briefs in support and opposition to same, the court will deny Petitioner's motion for reconsideration.

In *Batson v. Kentucky*, the United States Supreme Court extended the equal protection principle barring the purposeful exclusion of Blacks from criminal jury service to the prosecution's use of peremptory challenges during petit jury selection. *See Batson v. Kentucky*, 476 U. S. at 89 ("the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."). Dallas is white. *Batson* provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race. First, the defendant must make out a prima facie case of discriminatory jury selection by the totality of the relevant facts concerning a prosecutor's conduct during the defendant's own trial. Second, once the defendant makes the prima facie showing, the burden shifts to the State to come forward with a race-neutral explanation for challenging jurors within the arguably targeted class. Finally, the trial court must determine if the defendant established purposeful discrimination by the prosecution. *Snyder v. Louisiana*, 552 U. S. 472, 476-77 (2008); *Miller-El v. Dretke*, 545 U. S. 231, 239 (2005); *Batson v. Kentucky*, 476 U. S. at 94-98.

With regard to the first step, *i.e.,* establishing a prima facie case, the Supreme Court has described that process as follows:

> [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate."

Batson v. Kentucky, 476 U. S. at 96 (*citations omitted*).

With regard to the second step, *i.e.,* the prosecution's burden of presenting a neutral reason for the peremptory challenge, the Supreme Court has noted that, while there are any number of bases on which a prosecutor reasonably might believe it is desirable to strike a venire member who is not excused for cause, the prosecutor must give a clear and reasonably specific explanation of his legitimate reasons for exercising the peremptory challenge. *Miller-El v. Dretke*, 545 U. S. at 239; *Batson v. Kentucky*, 476 U. S. at 98 n.20.

> It is true that peremptories are often the subjects of instinct, and it can sometimes be hard to say what the reason is. But when illegitimate grounds like race are in issue, a prosecutor simply has got to state his reasons as best he can and stand or fall on the plausibility of the reasons he gives. A *Batson* challenge does not call for a mere exercise in thinking up any rational basis. If the stated reason does not hold up, its pretextual significance does not fade because a trial judge, or an appeals court, can imagine a reason that might not have been shown up as false.

Miller-El v. Dretke, 545 U. S. at 252.

In the third and final step in the *Batson* process, the Supreme Court has emphasized the critical role of the trial court in evaluating the prosecutor's credibility. *Snyder v. Louisiana*, 552 U. S. at 477.

> [T]he critical question in determining whether a prisoner has proved purposeful discrimination at step three is the persuasiveness of the prosecutor's justification for his peremptory strike. At this stage, "implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination." In that instance the issue comes down to whether the trial court finds the prosecutor's race-neutral explanations to be credible. Credibility can be measured by, among other factors, the prosecutor's demeanor; by how reasonable, or how improbable, the explanations are; and by whether the proffered rationale has some basis in accepted trial strategy.

Miller-El v. Cockrell, 537 U. S. 322, 338-339 (2003).

Consideration of a *Batson* objection, or the review of a ruling claimed to be *Batson* error, requires that all of the circumstances that bear upon the issue of racial animosity be consulted and considered. *Snyder v. Louisiana*, 552 U. S. at 478. In several recent opinions, the Supreme Court has examined a wide array of factors in resolving *Batson* claims. *See, e.g.*, *Snyder v. Louisiana*, 552 U. S. at 480-85 (holding a prosecutor's proffer of a pretextual explanation regarding the stricken venire member's scheduling conflicts, which were significantly less imposing than those of a white venire member whom the prosecutor accepted, permitted an inference of discriminatory intent); *Miller-El v. Dretke*, 545 U. S. at 240-66 (citing the prosecutor's differential questioning of black and white venire members throughout

the entire voir dire, the prosecution's "remarkable" use of ten of its fourteen peremptories to strike ten of the eleven black venire members who were not removed for cause or by agreement, the prosecutor's failure to strike white venire members who offered voir dire testimony similar to black venire members whom the prosecutor did strike, and the prosecution's selective requests for a jury shuffle only when black venire members were near the front of the list as evidence warranting a finding of purposeful discrimination).

As correctly noted by Petitioner, the state trial court implicitly determined Petitioner satisfied the initial prong of *Batson* analysis. The state trial court directed the prosecution to furnish reasons for each of its peremptory strikes exercised during jury selection. As explained above, such a directive is necessary only if a criminal defendant first makes a prima facie case of discriminatory jury selection by the totality of the relevant facts. The prosecution then furnished the state trial court with its reasons for each of its peremptory strikes. The state trial court considered these reasons and the argument furnished by Petitioner's trial counsel and ultimately denied all of Petitioner's challenges to the prosecution's peremptory strikes. This ruling constituted an implicit factual determination that the prosecution's proffered race-neutral reasons for all of its peremptory strikes were credible. *Hightower v. Terry*, 459 F.3d 1067, 1072 n.9 (11th Cir. 2006), *cert. denied*, 550 U.S. 952 (2007).

The fundamental analytical problem with Petitioner's *Batson* claims is Petitioner failed to furnish the state appellate courts and has failed to furnish this court with copies of the juror questionnaires filled out by all the members of Petitioner's jury venire. *See* Doc. # 120, at p. 51 n.3 (noting the juror questionnaires were not included in the state appellate record or the state post-conviction record and are not before this court for consideration).[63] This failure renders it virtually impossible for this court to second-guess the implicit credibility findings made by the state trial court when it rejected Petitioner's *Batson* claims. The juror questionnaires furnish the context within which the credibility of a prosecutor's proffered race-neutral reasons for exercising a peremptory challenge are evaluated. *See Jasper v. Thaler*, 765 F. Supp. 2d 783, 816 n.62 (W.D. Tex. 2011) (discussing the analytical hurdles to evaluating a *Batson* claim without access to the juror questionnaires completed by the venire members whom the petitioner claimed had been improperly stricken by the prosecution), *aff'd*, 466 F. App'x 429 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 788 (2012). Absent review of the juror questionnaires executed by all members of the jury venire prior to Petitioner's trial, this court, like

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[63] In an affidavit submitted to this court by Petitioner, the former Court Administrator of the 15th Judicial Circuit states that state retention rules permit destruction of juror questionnaire forms after four years unless they have been made a part of the case record. *Affidavit of Robert Merrill*, Doc. # 87-1, Exhibit 3. Unfortunately, Mr. Merrill does not claim to possess personal knowledge regarding the actual disposition of the juror questionnaires completed by Petitioner's venire members.

the state appellate courts, is not in a proper position to re-examine the implicit credibility findings made by the state trial court on Petitioner's *Batson* claims.

The complete absence of any of the juror questionnaires from the state court record in Petitioner's direct appeal is especially problematic given the extensive reliance on the juror questionnaire answers made on the record by counsel for both parties during individual voir dire examination of Petitioner's potential jurors. Counsel for both the prosecution and defense spent considerable time and effort during individual voir dire asking jury venire members about their answers to the juror questionnaires, which included at least 45 questions.[64] The following discussion is hampered by the absence of the questionnaires from the record. The prosecution accurately described a number of the jury venire members against whom it used peremptory strikes as having demonstrated great reluctance to vote in favor of the death penalty (or to sit in judgment of another human being). The prosecution also accurately identified another group of the jury venire members against whom it utilized peremptory strikes as having serious criminal records or close relatives with serious criminal records. There was nothing objectively unreasonable with the state trial court's acceptance of those proffered race-neutral reasons for the prosecution's peremptory strikes of jury venire members 20, 58, 73, 91, 95, 113, each of whom expressed serious reservations about his or her ability to vote in favor of the death

[64] *See, e.g.,* 4 SCR 152, 184, 197-98; 5 SCR 208, 232, 234, 244-45, 315-16.

penalty.[65] *See Garcia v. Stephens*, 793 F.3d 513, 527 (5th Cir. 2015) (prospective juror's opposition to the death penalty a legitimate and racially neutral reason for prosecution's peremptory strike), *cert. denied*, 136 S. Ct. 897 (2016). Likewise, the state trial court reasonably accepted as race-neutral the prosecution's explanations that jury venire members 26, 29, 45, and 67 had close relatives with serious criminal convictions.[66]

Furthermore, Petitioner's arguments in support of his motion for reconsideration of the denial of his *Batson* claims regarding jury venire members 29 and 31 are unpersuasive. The prosecution stated on the record that its strike of juror 31 was based upon that venire member's disinterested demeanor throughout voir dire, including his arms crossed across his chest and the fact he rolled his eyes at

[65] 4 SCR 157-61 (voir dire examination of venire member 20); 5 SCR 249-55 (voir dire examination of venire member 58); 5 SCR 298-305 (voir dire examination of venire member 73); 5 SCR 332-39 (voir dire examination of venire member 91); 5 SCR 353-62 (voir dire examination of 95); 6 SCR 404-16 (voir dire examination of 113). Each of these venire members expressed reluctance to vote in favor of imposing the death penalty ranging from a general disagreement with the death penalty to grave reservations about their ability to sit in judgment another human being. While the reservations about imposing the death penalty expressed by these venire members may not have risen to a level sufficient to sustain a challenge for cause, the prosecution's exercise of peremptory challenges against these venire members was consistent with the prosecution's professional duty to seek the ultimate punishment for the ultimate crime. Venire member 67 also expressed reservations about her ability to vote to impose a death sentence. 5 SCR 286-87.

[66] 4 SCR 180-88 (venire member 26 – brother convicted of murder); 4 SCR 193-99 (venire member 29 – cousin convicted of dealing drugs); 5 SCR 227-35 (venire member 45 – brother plea bargained a charge of murder down to a lesser offense); 5 SCR 283-89 (venire member 67 – two uncles killed a person and one uncle went to prison). The state trial court's implicit factual finding that the prosecution's use of peremptory strikes against each of these individuals was race-neutral was itself eminently reasonable.

several points.[67] Petitioner criticizes the state trial court's failure to make express factual findings regarding the demeanor of juror 31. Significantly, however, Petitioner's trial counsel did not challenge the factual accuracy of those descriptions of the venire member's demeanor given by the prosecutor.[68] Instead, Petitioner's trial counsel merely pointed out juror 31 was a teacher and the prosecution had failed to strike other teachers on the jury venire.[69] The prosecution responded that it struck venire member 31 based upon his disinterested demeanor and not because of his occupation.[70] Thus, resolving the *Batson* claim surrounding the striking of juror 31 did not require the state trial court to evaluate conflicting descriptions of that venire member's demeanor.

The prosecution stated on the record that its strike of juror 29 was based upon the fact he had a reading disorder that prevented him from completing his juror questionnaire and he had a cousin who had been convicted of selling drugs.[71] Petitioner's trial counsel did not challenge the prosecution's assertion that juror 29

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[67] 6 SCR 484-85.

[68] 6 SCR 492.

[69] *Id.*

[70] 6 SCR 497.

[71] 6 SCR 487-88.

had a reading problem.[72] In fact, during individual voir dire, Petitioner's trial counsel pointed out this venire member had failed to complete a few answers on his questionnaire and this venire member candidly admitted he had a reading problem.[73] Instead, Petitioner's trial counsel pointed out that another member of the jury venire had a relative who had a drug-related criminal conviction.[74] The prosecution responded that (1) the other venire member identified by Petitioner's counsel had a wife who had been convicted of an offense while on diet pills and (2) he considered that offense different from the drug-trafficking offense committed by juror 29's cousin.[75] Thus, once more, there did not appear to be any genuine issue of material fact regarding juror 29's reading disability or the fact this venire member had a relative with a conviction for a drug-related offense.

The state trial court had access to the juror questionnaires and the opportunity to examine first-hand the demeanor of the jury venire members during their individual voir dire examination. When viewed under the AEDPA's deferential standard, the state trial court's implied credibility findings regarding the race-neutral reasons proffered by the prosecution for striking venire members 29 and 31 were

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[72] 6 SCR 490.

[73] 4 SCR 197-98.

[74] 6 SCR 490.

[75] 6 SCR 498-99.

objectively reasonable. "A trial court is best situated to evaluate both the words and the demeanor of jurors who are peremptorily challenged, as well as the credibility of the prosecutor who exercises those strikes." *Davis v. Ayala*, 135 S. Ct. 2187, 2201 (2015). Given Petitioner's failure to present the juror questionnaires to the state appellate courts, which reviewed and rejected Petitioner's *Batson* claims on the merits in the course of his direct appeal, the state appellate courts' rejection on the merits of Petitioner's *Batson* claims were objectively reasonable under clearly established federal law and the evidence presented to those appellate courts. This court is not in a position to evaluate the propriety of the trial court's implicit credibility findings on Petitioner's *Batson* claims under the AEDPA's deferential standard without access to the same information that was before the state trial court when it made its implicit credibility findings. *See Davis v. Ayala*, 135 S. Ct. at 2201 (appellate judges cannot on the basis of a cold record easily second-guess a trial judge's decisions about the likely motivation of a prosecutor). Even if reasonable minds might disagree about the prosecutor's credibility, on habeas review that does not suffice to supersede the trial court's credibility determination. *Id.* For the foregoing reasons, Petitioner's motion for reconsideration of the denial of his *Batson* claim is denied.

Petitioner originally presented his conflict of interest/constructive ineffective assistance claim to the state appellate courts in his direct appeal as his seventh claim

in his appellant's brief.[76] The Alabama Court of Criminal Appeals denied that claim on the merits. *Dallas v. State*, 711 So. 2d at 1111. This Court applied the AEDPA's deferential standard of review in denying Petitioner's analogous claim in this federal habeas corpus proceeding (Doc. #120, at pp. 31-32). In his motion for reconsideration, Petitioner relies upon new factual allegations, new affidavits,[77] and other new documentation purportedly supporting his conflict of interest claim which were not presented to the Alabama state appellate courts during Petitioner's direct appeal. Under the Supreme Court's holding in *Cullen v. Pinholster*, 563 U.S. 170, 181-82 (2011) ("We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits."), this Court may not consider Petitioner's new evidence in the course of reviewing Petitioner's conflict of interest claim under the AEDPA. For the reasons discussed in the Order

[76] 10 SCR Tab 2, at pp. 51-52.

[77] *See, e.g.,* Affidavit of Dr. Ken Benedict executed June 7, 2007 (Doc. # 87-2, Exhibit 15) and the undated, unsworn "Affidavit" of Dr. Joseph Schumacher (Doc. # 87-2, Exhibit 16). Dr. Schumacher's unsworn statement specifically references a 2007 affidavit he reviewed in the course of preparing his own statement. Petitioner's direct appeal concluded at the state appellate level on March 13, 1998, when the Alabama Supreme Court denied Petitioner's petition for writ of certiorari. *Ex parte Dallas*, 711 So. 2d 1114 (Ala.), *cert. denied*, 525 U.S. 860 (1998). Obviously, Petitioner never submitted either of these documents to the Alabama state appellate courts in support of Petitioner's conflict of interest claim. They are not properly before this Court for the purposes of federal habeas corpus review of Petitioner's conflict of interest claim. Because Dr. Schumacher's "affidavit" is undated and unsworn, it may not be considered as evidence in this proceeding.

issued January 12, 2012 (Doc. # 120), Petitioner's motion for reconsideration of the denial of his conflict of interest claim is denied.

III. MOTION FOR LEAVE TO AMEND/SUPPLEMENT PETITION

Petitioner has filed a motion for leave to amend his operative pleading but furnished as an attachment not a proposed *amended* federal habeas corpus petition but, rather, what amounts to a *supplemental* federal habeas corpus petition adding a single new claim to those already before this court.[78] The Supreme Court's decision in *Hurst v. Florida*, 136 S. Ct. 616 (2016), was handed down January 12, 2016. Petitioner's motion for leave to amend his petition to include a new claim based on the holding in *Hurst*, which overruled several prior Supreme Court decisions, is timely. Petitioner's motion for leave to amend requests permission to present an issue of significant constitutional gravity bearing upon the fundamental fairness of Petitioner's state court trial. Moreover, Petitioner's proposed "amendment" of his petition to include a claim premised upon the Supreme Court's holding in *Hurst* does little more than expand and update the same arguments Petitioner raised as his final claim for relief in his original petition. The Court will permit Petitioner to amend

[78] Petitioner's proposed amended petition does not comply with the requirements of Rule 15.1, Local Rules for the United States District Court for the Middle District of Alabama, in that it does not "reproduce the entire pleading, document or other papers as amended . . . ." Instead, Petitioner's proposed amended petition accompanying his recent motion for leave to amend merely supplements his original petition by adding Petitioner's new *Hurst* claim.

his final claim in his original petition to include his legal arguments based upon *Hurst* and will address those arguments in the context of his final claim for relief.

IV. ***HURST, RING, & APPRENDI* CLAIM**

A. The Claim

In his seventeenth and final claim in his original petition (Doc. # 1, at pp. 77-81) and his "amended petition" submitted January 11, 2017 (Doc. # 146-1), Petitioner argues his sentence violates the Eighth Amendment because under the holdings in *Hurst v. Florida*, 136 S. Ct. 616 (2016), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), only a jury may make the factual findings necessary to impose a sentence of death.

B. The Constitutional Standard

Until recently, the Supreme Court's opinions addressing capital punishment offered a wide array of ambiguous analytical approaches to resolving Eighth Amendment claims. For instance, in *Trop v. Dulles*, 356 U.S. 86 (1958), the Supreme Court addressed the issue of a former soldier sanctioned for desertion with loss of his citizenship. In the course of an opinion that reflected his own views on the subject, Chief Justice Earl Warren wrote as follows:

> The exact scope of the constitutional phrase 'cruel and unusual' has not been detailed by this Court. But the basic policy reflected in these words is firmly established in the Anglo-American tradition of criminal justice. The phrase in our Constitution was taken directly from the English Declaration of Rights of 1688, and the principle it represents can be traced back to the Magna Carta. The basic concept

> underlying the Eighth Amendment is nothing less than the dignity of man. While the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards. Fines, imprisonment and even execution may be imposed depending upon the enormity of the crime, but any technique outside the bounds of these traditional penalties is constitutionally suspect. This Court has had little occasion to give precise content to the Eighth Amendment, and, in an enlightened democracy such as ours, this is not surprising. But when the Court was confronted with a punishment of 12 years in irons at hard and painful labor imposed for the crime of falsifying public records, it did not hesitate to declare that the penalty was cruel in its excessiveness and unusual in its character. *Weems v. United States*, 217 U.S. 349, 30 S.Ct. 544, 54 L.Ed. 793 [1910]. The Court recognized in that case that the words of the Amendment are not precise, and that their scope is not static. The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society.

Trop v. Dulles, 356 U.S. at 99-101, 78 S. Ct. at 597-98 *(Footnotes omitted)*.

Though often cited in subsequent Supreme Court opinions, Chief Judge Warren's "evolving standards of decency" standard proved to be difficult to apply consistently. For example, in *Furman v. Georgia*, 408 U.S. 238 (1972), a bare majority of the Supreme Court struck down capital sentencing schemes in thirty-nine States but failed to reach any degree of consensus in terms of an analytical approach to the Eighth Amendment. The result was nine separate opinions issued from the Supreme Court in *Furman*, each reflecting a different analytical approach to the Eighth Amendment claims presented therein.

The situation changed little when, four years later, a series of plurality opinions from the Supreme Court upheld the new capital sentencing schemes

adopted by Georgia, Texas, and Florida in response to *Furman*. *See Gregg v. Georgia*, 428 U.S. 153, 183 (1976) (plurality opinion issued by Justice Stewart for himself and Justices Powell and Stevens with Chief Justice Burger and Justices White and Rehnquist concurring separately) (the death penalty is said to serve two principal social purposes: retribution and deterrence of capital crimes by prospective offenders); *Gregg v. Georgia,* 428 U.S. at 195 ("Where the sentencing authority is required to specify the factors it relied upon in reaching its decision, the further safeguard of meaningful appellate review is available to ensure that death sentences are not imposed capriciously or in a freakish manner."); *Jurek v. Texas*, 428 U.S. 262, 268 (1976) (same plurality and concurrences) (holding imposition of the death penalty does not *per se* violate the Eighth Amendment's proscription of "cruel and unusual punishment"); *Proffitt v. Florida*, 428 U.S. 242, 252 (1976) (same plurality and concurrences) (holding the Supreme Court "has never suggested that jury sentencing is constitutionally required"). The same date, the Supreme Court struck down North Carolina's adoption of a mandatory death penalty scheme for all persons convicted of first-degree murder and Louisiana's adoption of mandatory death sentences for persons convicted of five categories of capital murder. *See Woodson v. North Carolina*, 428 U.S. 280, 301-03 (1976) (plurality opinion by Justice Stewart for himself and Justices Powell and Stevens with Justices Brennan and Marshall concurring separately) (holding North Carolina's mandatory death sentence for first-

degree murder violated the Eighth and Fourteenth Amendments because mandatory death sentences are inconsistent with "the evolving standards of decency that mark the progress of a maturing society" and fail to "allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before imposition of a sentence of death"); *Roberts v. Louisiana*, 428 U.S. 325, 334 (1976) (same plurality and concurrences as in *Woodson*) ("The constitutional vice of mandatory death statutes lack of focus on the circumstances of the particular offense and the character and propensities of the offender is not resolved by Louisiana's limitation of first-degree murder to various categories of killings.").

A year later, in *Coker v. Georgia*, 433 U.S. 584, 592 (1977), a Supreme Court plurality (Justice White joined by Justices Stewart, Blackmun, and Stevens, joined separately by Justices Brennan and Marshall with Justice Powell concurring in part and dissenting in part) held "a sentence of death is grossly disproportionate and excessive punishment for the crime of rape and is therefore forbidden by the Eighth Amendment as cruel and unusual punishment."

In *Godfrey v. Georgia*, 446 U.S. 420 (1980), Justice Stewart wrote for himself and three other Justices with Justices Brennan and Marshall concurring separately (*i.e.*, the same plurality and concurrences as in *Coker v. Georgia*) to strike down as unconstitutionally vague Georgia's aggravating factor that a capital offense was "outrageously or wantonly vile, horrible and inhuman." Relying upon Justice

White's concurring opinion in *Furman*, the Supreme Court held (1) a capital sentencing scheme must provide a meaningful basis for distinguishing the few cases in which the death penalty is imposed from the many cases in which it is not and (2) the Georgia Supreme Court's construction of the aggravating factor in question failed to adequately channel the jury's discretion because a person of ordinary sensibility could fairly characterize almost every murder in such terms. *Godfrey v. Georgia*, 446 U.S. at 427-29. The Supreme Court concluded the state courts had not limited the meaning of the aggravating factor in question in a manner which avoided the "standardless and unchanneled imposition of death sentences." *Id.*, 446 U.S. at 430-32.

Of great significance to Petitioner's case is the Supreme Court's opinion in *Enmund v. Florida*, 458 U.S. 782 (1982), which arose from the same jurisdiction as *Hurst*. In *Enmund*, the Supreme Court (Justice White writing for himself and three other Justices with Justice Brennan joining but concurring separately) struck down a sentence of death for a criminal defendant who was convicted as an accomplice to a felony murder. The Florida trial court instructed Enmund's jury that "the killing of a human being while engaged in the perpetuation of or in the attempt to perpetuate the offense of robbery is murder in the first degree even though there is no premeditated design or intent to kill." *Enmund v. Florida*, 458 U.S. at 784-85. The Florida Supreme Court later determined there was no evidence Enmund (1) was

present at the time and place of the murders, (2) killed anyone, (3) intended to kill anyone, or (4) anticipated that lethal force would or might be used during the robbery. *Id.*, 458 U.S. at 788. After carefully reviewing the nation's capital murder statutes and the practices of juries with regard to the imposition of a death sentence for felony murder absent a showing of intent to kill or reckless indifference to human life, the Supreme Court concluded the Eighth Amendment forbids the imposition of the death penalty on one such as Enmund "who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed." *Id.*, 458 U.S. at 789-97. The Supreme Court emphasized that the two principal social purposes for the death penalty, *i.e.,* retribution and deterrence, are not furthered by the imposition of a death penalty on a robber who did not take a human life, attempt to kill, or intend to kill. *Id.*, 458 U.S. at 797-801.

In *Tison v. Arizona*, 481 U.S. 137, 152-58 (1987), a majority of the Supreme Court clarified its holding in *Enmund*, holding that the sons of a convicted murderer who smuggled an arsenal of firearms into a state prison and actively assisted their father in an armed prison break and the subsequent kidnaping, robbery, and murder of a family (including a two-year-old child) could be sentenced to death because their participation in the capital offense was major and their mental state was one of

reckless indifference to the value of human life.[79] The Supreme Court took great pains to distinguish its holding in *Enmund*, pointing out Enmund had been a minor actor in the armed robbery, was not physically present at the time of the murders, and did not intend to kill, attempt to kill, or kill. *Tison v. Arizona*, 481 U.S. at 149-50. The Supreme Court held the evidence showed (1) the Tison brothers' participation in their capital offense was "anything but minor" and (2) the brothers

[79] The facts in *Tison* set forth in the Supreme Court's opinion [481 U.S. at 139-43] are so extreme they deserve elaboration. Unlike *Enmund*, in which the petitioner had been spotted sitting in a getaway vehicle along a highway while his accomplices robbed a residence and shot the occupants several hundred yards away, the Tison brothers were physically present and actively involved in both the prison break and the ensuing kidnaping and robbery of a family one of the brothers had flagged down along a highway after the Tisons' vehicle had a flat tire. More specifically, the Tison brothers and their mother plotted to break their father and his cellmate, also a convicted murderer, out of an Arizona prison where he was serving a term for having killed a guard during a prior escape attempt. The three Tison brothers obtained "a small arsenal" of weapons and smuggled them into their father's prison inside a large ice chest. The Tison sons armed their father and his cellmate. The five men brandished their weapons, locked the prison guards and visitors present in a storage closet, and fled the prison grounds in the Tisons' (Ford) vehicle. After abandoning their initial getaway vehicle for a second (Lincoln) getaway vehicle the Tison sons had acquired and placed in close proximity to the prison, the five men spent two nights at an isolated house where they changed a flat tire on the Lincoln using the lone spare tire. As the group drove back roads and secondary highways through the desert, another tire blew out. The group flagged down a vehicle driven by a couple traveling with their two-year-old son and teenage niece. After the group robbed and drove their captives into the desert, the elder Tison and his cellmate fatally shot all four of their captives with repeated blasts from shotguns. The Tison sons later claimed they were surprised by the shooting. Several days later, the group ran into a police roadblock resulting in a shootout. The elder Tison managed to escape into the desert where he died of exposure. One of the three Tison brothers was killed in the shootout. The elder Tison's cellmate and the remaining two Tison brothers were apprehended. The surviving Tison brothers were charged with car theft, robbery, kidnaping, and capital murder under Arizona's felony murder statute, which provided at that time that a killing occurring during the perpetuation of robbery or kidnaping was capital murder. Each Tison brother was convicted of capital murder. An Arizona judge, acting without a jury, found (1) each Tison brother's participation in the capital offense was "very substantial," (2) each could reasonably have foreseen that his conduct would cause a grave risk of death, and (3) there were no statutory mitigating factors applicable. The trial judge sentenced both Tison brothers to death.

both subjectively appreciated their actions were likely to result in the taking of innocent life. *Id.*, 481 U.S. at 152. The Supreme Court ultimately held "the reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death represents a highly culpable mental state, a mental state that may be taken into account in making a capital sentencing judgment when that conduct causes the natural, though also not inevitable, lethal result." *Id.*, 481 U.S. at 157-58. The Supreme Court reversed the Arizona Supreme Court's opinion declaring that *Enmund* required a showing of intent to kill. *See Tison v. Arizona*, 481 U.S. at 158 ("major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement.").

In *Maynard v. Cartwright*, 486 U.S. 356 (1988), the Supreme Court unanimously struck down an Oklahoma death sentence based upon a factual determination that the capital offense was "especially heinous, atrocious, or cruel." The Court relied upon Justice Stewart's and Justice White's concurring opinions in *Furman* and reasoned that "[s]ince *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action," *Maynard v. Cartwright*, 486 U.S. at 362 (*citing Gregg v. Georgia*, 428 U.S. at 189, 206-07, 220-22). The Supreme Court

noted that, at the time of the petitioner's trial, Oklahoma courts had not yet restricted the aggravating factor in question to those murders in which torture or serious physical abuse were present. *Id.*, 486 U.S. at 365. The Supreme Court concluded that its holding in *Godfrey* controlled the outcome in *Maynard* because Oklahoma's courts had not limited the "especially heinous, atrocious, or cruel" aggravating factor any more effectively than had the Georgia court limited the term "outrageously or wantonly vile, horrible or inhuman." *Id.*, 486 U.S. at 363-64.

The lack of Supreme Court consensus on an analytical approach to the Eighth Amendment continued in a case rejecting an "as applied" challenge to the Texas capital sentencing scheme. *See Franklin v. Lynaugh*, 487 U.S. 164, 172-73 (1988) (holding there is no constitutional right to have a capital sentencing jury consider "residual doubts" as to the defendant's guilt in an opinion by Justice White for himself, Chief Justice Burger, and Justices Scalia and Kennedy, with Justices O'Connor and Blackmun concurring separately).

A degree of consensus did begin to appear within the Supreme Court early the following decade when five Justices finally agreed on a single standard for reviewing the adequacy of jury instructions in a capital sentencing proceeding:

> We think the proper inquiry in such a case is whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence. Although a defendant need not establish that the jury was more likely than not to have been impermissibly inhibited by the instruction, a capital sentencing proceeding is not inconsistent with the

> Eighth Amendment if there is only a possibility of such an inhibition. This "reasonable likelihood" standard, we think, better accommodates the concerns of finality and accuracy than does a standard which makes the inquiry dependent on how a single hypothetical "reasonable" juror could or might have interpreted the instruction. There is, of course, a strong policy in favor of accurate determination of the appropriate sentence in a capital case, but there is an equally strong policy against retrials years after the first trial where the claimed error amounts to no more than speculation. Jurors do not sit in solitary isolation booths parsing instructions for subtle shades of meaning in the same way that lawyers might. Differences among them in interpretation of instructions may be thrashed out in the deliberative process, with commonsense understanding of the instructions in the light of all that has taken place at the trial likely to prevail over technical hairsplitting.

Boyde v. California, 494 U.S. 370, 380-381 (1990) (footnotes omitted).

This baby-step forward toward analytical consensus quickly dissipated, however, in a series of opinions addressing the constitutionality of various state aggravating factors. For example in *Shell v. Mississippi*, 498 U.S. 1 (1990), in a terse *per curiam* opinion, the Supreme Court struck down as unconstitutionally vague a Mississippi trial court's jury instruction attempting to restrict the definition of the term "especially heinous, atrocious, or cruel" as used as an aggravating factor in that state's capital sentencing scheme. *See Shell v. Mississippi*, 498 U.S. at 1 (*citing Maynard v. Cartwright*, 486 U.S. 356 (1988)).

In *Arave v. Creech*, 507 U.S. 463 (1993), the Supreme Court upheld as constitutional against a vagueness challenge Idaho's aggravating circumstance that the defendant "exhibited utter disregard for human life" based upon the Idaho Supreme Court's limiting construction of that term as referring to "acts or

circumstances surrounding the crime which exhibit the highest, the utmost, callous disregard for human life, *i.e.*, the cold-blooded, pitiless slayer." *Arave v. Creech*, 507 U.S. at 467-68. "The terms 'cold-blooded' and 'pitiless' describe the defendant's state of mind: not his *mens rea*, but his attitude toward his conduct and his victim." *Id.*, 507 U.S. at 473. "The 'utter disregard' factor refers not to the outrageousness of the acts constituting the murder, but to the defendant's lack of conscientious scruples against killing another human being." *Id.*, 507 U.S. at 478 (*quoting State v. Fain*, 116 Idaho 82, 99, 774 P.2d 252, 269, *cert. denied*, 493 U.S. 917 (1989)).

True consensus on an overarching analytical approach to Eighth Amendment claims did not fully appear, however, until eight Supreme Court Justices agreed in *Tuilaepa v. California*, 512 U.S. 967 (1994), on the principle that the Eighth Amendment addresses two different, but related, aspects of capital sentencing: the eligibility decision and the selection decision. *Tuilaepa*, 512 U.S. at 971 (Justice Kennedy writing for himself, Chief Justice Rehnquist, and Justices O'Connor, Scalia, Souter, and Thomas, with Justices Stevens and Ginsburg concurring separately but not rejecting the analytical approach offered by Justice Kennedy). The Supreme Court's analysis of those two aspects of capital sentencing provided the first comprehensive system for analyzing Eighth Amendment claims that a clear majority of the Supreme Court had ever offered:

> To be eligible for the death penalty, the defendant must be convicted of a crime for which the death penalty is a proportionate punishment. To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one "aggravating circumstance" (or its equivalent) at either the guilt or penalty phase. The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or both). As we have explained, the aggravating circumstance must meet two requirements. First, the circumstance may not apply to every defendant convicted of a murder; it must apply only to a subclass of defendants convicted of murder. Second, the aggravating circumstance may not be unconstitutionally vague. * * *
>
> We have imposed a separate requirement for the selection decision, where the sentencer determines whether a defendant eligible for the death penalty should in fact receive that sentence. "What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime." That requirement is met when the jury can consider relevant mitigating evidence of the character and record of the defendant and the circumstances of the crime.

Tuilaepa, 512 U.S. at 971-73 (citations omitted).

In *Tuilaepa*, the Supreme Court clearly declared its view that States may adopt capital sentencing procedures which rely upon the jury, in its sound judgment, to exercise wide discretion. *Tuilaepa*, 512 U.S. at 974. The Supreme Court also concluded, at the *selection* stage, States are not confined to submitting to the jury specific propositional questions but, rather, may direct the jury to consider a wide range of broadly-defined factors, such as "the circumstances of the crime," "the defendant's prior criminal record" and "all facts and circumstances presented in extenuation, mitigation, and aggravation of punishment." *Tuilaepa*, 512 U.S. at 978.

In *Loving v. United States*, 517 U.S. 748 (1996), the Supreme Court described the first part of the *Tuilaepa* analysis, *i.e.,* the eligibility decision, as follows:

> The Eighth Amendment requires, among other things, that "a capital sentencing scheme must 'genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.'" Some schemes accomplish that narrowing by requiring that the sentencer find at least one aggravating circumstance. The narrowing may also be achieved, however, in the definition of the capital offense, in which circumstance the requirement that the sentencer "find the existence of the aggravating circumstance in addition is no part of the constitutionally required narrowing process."

Loving, 517 U.S. at 755 (citations omitted).

The Supreme Court subsequently elaborated on the distinction between the narrowing function or "eligibility decision" and the "selection phase" of a capital sentencing proceeding in *Buchanan v. Angelone*, 522 U.S. 269 (1998):

> Petitioner initially recognizes, as he must, that our cases have distinguished between two different aspects of the capital sentencing process, the eligibility phase and the selection phase. *Tuilaepa v. California,* 512 U.S. 967, 971, 114 S.Ct. 2630, 2634, 129 L.Ed.2d 750 (1994). In the eligibility phase, the jury narrows the class of defendants eligible for the death penalty, often through consideration of aggravating circumstances. *Ibid.* In the selection phase, the jury determines whether to impose a death sentence on an eligible defendant. *Id.,* at 972, 114 S.Ct., at 2634-2635. Petitioner concedes that it is only the selection phase that is at stake in his case. He argues, however, that our decisions indicate that the jury at the selection phase must both have discretion to make an individualized determination and have that discretion limited and channeled. *See, e.g., Gregg v. Georgia,* 428 U.S. 153, 206-207, 96 S.Ct. 2909, 2940-2941, 49 L.Ed.2d 859 (1976). He further argues that the Eighth Amendment therefore requires the court to instruct the jury on its obligation and authority to

consider mitigating evidence, and on particular mitigating factors deemed relevant by the State.

No such rule has ever been adopted by this Court. While petitioner appropriately recognizes the distinction between the eligibility and selection phases, he fails to distinguish the differing constitutional treatment we have accorded those two aspects of capital sentencing. It is in regard to the eligibility phase that we have stressed the need for channeling and limiting the jury's discretion to ensure that the death penalty is a proportionate punishment and therefore not arbitrary or capricious in its imposition. In contrast, in the selection phase, we have emphasized the need for a broad inquiry into all relevant mitigating evidence to allow an individualized determination. *Tuilaepa, supra,* at 971-973, 114 S.Ct., at 2634-2636; *Romano v. Oklahoma,* 512 U.S. 1, 6-7, 114 S.Ct. 2004, 2008-2009, 129 L.Ed.2d 1 (1994); *McCleskey v. Kemp,* 481 U.S. 279, 304-306, 107 S.Ct. 1756, 1773-1775, 95 L.Ed.2d 262 (1987); *Stephens, supra,* at 878-879, 103 S.Ct., at 2743-2744.

In the selection phase, our cases have established that the sentencer may not be precluded from considering, and may not refuse to consider, any constitutionally relevant mitigating evidence. *Penry v. Lynaugh,* 492 U.S. 302, 317-318, 109 S.Ct. 2934, 2946-2947, 106 L.Ed.2d 256 (1989); *Eddings v. Oklahoma,* 455 U.S. 104, 113-114, 102 S.Ct. 869, 876-877, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio,* 438 U.S. 586, 604, 98 S.Ct. 2954, 2964-2965, 57 L.Ed.2d 973 (1978). However, the state may shape and structure the jury's consideration of mitigation so long as it does not preclude the jury from giving effect to any relevant mitigating evidence. *Johnson v. Texas,* 509 U.S. 350, 362, 113 S.Ct. 2658, 2666, 125 L.Ed.2d 290 (1993); *Penry, supra,* at 326, 109 S.Ct., at 2951; *Franklin v. Lynaugh,* 487 U.S. 164, 181, 108 S.Ct. 2320, 2331, 101 L.Ed.2d 155 (1988). Our consistent concern has been that restrictions on the jury's sentencing determination not preclude the jury from being able to give effect to mitigating evidence. Thus, in *Boyde v. California,* 494 U.S. 370, 110 S.Ct. 1190, 108 L.Ed.2d 316 (1990), we held that the standard for determining whether jury instructions satisfy these principles was "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Id.,* at 380, 110 S.Ct., at 1198; see also *Johnson, supra,* at 367-368, 113 S.Ct., at 2669.

> But we have never gone further and held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence. And indeed, our decisions suggest that complete jury discretion is constitutionally permissible. *See Tuilaepa, supra,* at 978-979, 114 S.Ct., at 2638-2639 (noting that at the selection phase, the state is not confined to submitting specific propositional questions to the jury and may indeed allow the jury unbridled discretion); *Stephens, supra*, at 875, 103 S.Ct., at 2741-2742 (rejecting the argument that a scheme permitting the jury to exercise "unbridled discretion" in determining whether to impose the death penalty after it has found the defendant eligible is unconstitutional, and noting that accepting that argument would require the Court to overrule *Gregg, supra*).

Buchanan v. Angelone, 522 U.S. at 275-277.

C. *De Novo* Review

Petitioner relies upon the Supreme Court's opinions in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), *Ring v. Arizona*, 536 U.S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016). Petitioner misconstrues the holding in *Hurst*, as well as those in *Ring* and *Apprendi* as they apply to Alabama's capital sentencing scheme generally and his own trial in particular.

In *Apprendi v. New Jersey*, the Supreme Court struck down on due process grounds a state scheme that permitted a trial judge to make a factual finding based on a preponderance of the evidence regarding the defendant's motive or intent underlying a criminal offense and, based on such a finding, increase the maximum end of the applicable sentencing range for the offense by a factor of one hundred percent. *Apprendi*, 530 U.S. at 497. The Supreme Court's opinion in *Apprendi*

emphasized it was merely extending to the state courts the same principles discussed in Justice Stevens' and Justice Scalia's concurring opinions in *Jones v. United States*, 526 U.S. 227, 252-53 (1999): other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Put more simply, the Supreme Court held in *Apprendi* (1) it was unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal is exposed and (2) all such findings must be established beyond a reasonable doubt. *Id.*, 530 U.S. at 490.

Two years later, in *Ring v. Arizona*, the Supreme Court applied the holding and its reasoning in *Apprendi* to strike down a death sentence in a case in which the jury had declined to find the defendant guilty of pre-meditated murder during the guilt-innocence phase of a capital trial (instead finding the defendant guilty only of felony murder) but a trial judge subsequently concluded the defendant should be sentenced to death based upon *factual* determinations that (1) the offense was committed in expectation of receiving something of pecuniary value (*i.e.*, the fatal shooting of an armored van guard during a robbery) and (2) the foregoing aggravating factor out-weighed the lone mitigating factor favoring a life sentence

(*i.e.*, the defendant's minimal criminal record).[80] *Ring v. Arizona*, 536 U.S. at 609. The Supreme Court emphasized, as it had in *Apprendi*, the dispositive question "is not one of form, but of effect": [i]f a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." *Id.*, 536 U.S. at 602. "A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.*, 536 U.S. at 602 (*quoting Apprendi*, 530 U.S. at 483). Because Ring would not have been subject to the death penalty under Arizona law based solely

[80] The Arizona trial judge instructed Ring's jury on alternative theories of premeditated murder and felony murder. *Ring v. Arizona*, 536 U.S. at 591. The jury deadlocked on premeditated murder but convicted Ring of felony murder occurring in the course of armed robbery. *Id.* The trial court also instructed Ring's jury in accordance with Arizona law that (1) a person commits first-degree murder if, acting either alone or with one or more other persons, the person commits or attempts to commit one of several enumerated felonies including robbery and, in the course of and furtherance of the offense or immediate flight from the offense, the person or another person causes the death of any person and (2) a conviction for felony murder did not require a specific mental state other than what is required for the commission of the enumerated felonies. *Id.* (*citing* Ariz.Rev.Stat.Ann. § 13-1105(A) and (B) (West 2001)). At the guilt-innocence phase of Ring's trial, there was no evidence presented showing Ring participated in the planning of the robbery or expected the killing of the armored car guard. *Id.*, 536 U.S. at 592-93. Between the guilt-innocence phase of trial and Ring's sentencing hearing, however, one of his accomplices entered into a plea agreement and agreed to testify at Ring's sentencing hearing. *Id.*, 536 U.S. at 593. At the sentencing hearing, the accomplice identified Ring as the primary planner of the robbery and the person who actually shot the guard. *Id.*

The Arizona trial judge found a second aggravating factor applied in Ring's case, *i.e.*, Ring's comments after the fatal shooting in which he chastised his co-conspirators for their failure to praise Ring's marksmanship rendered his offense "especially heinous, cruel, or depraved." The Arizona Supreme Court later held there was insufficient evidence to support the trial judge's finding of depravity but nonetheless re-weighed the remaining aggravating factor against the lone mitigating factor and affirmed Ring's death sentence. *Ring v. Arizona*, 536 U.S. at 595-96.

upon the jury's verdict (and but for the trial judge's factual determination as to the existence of an aggravating factor), the Supreme Court declared Ring's death sentence violated the right to trial by jury protected by the Sixth Amendment. *Id.*, 536 U.S. at 609.

In *Blakely v. Washington*, 542 U.S. 296, (2004), the Supreme Court struck down as a violation of the Sixth Amendment's right to jury trial a judge-imposed sentence of imprisonment that exceeded by more than three years the state statutory maximum of 53 months. *Blakely v. Washington*, 542 U.S. at 303-04. In so ruling, the Supreme Court relied upon its prior holding in *Apprendi,* 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). In *Blakely*, the Supreme Court also relied upon its prior opinion in *Ring v. Arizona, supra*, for the principle "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely v. Washington*, 542 U.S. at 303.

In *Hurst v. Florida*, the Supreme Court struck down as a violation of the principles announced in *Apprendi* and *Ring* a death sentence imposed by a Florida judge after the jury at the guilt-innocence phase of Hurst's trial convicted him of first-degree murder but failed to specify which of the two theories of murder

submitted (*i.e.,* premeditated murder or felony murder for an unlawful killing during a robbery) it believed. *Hurst*, 136 S. Ct. at 619-20. The Florida felony murder statute at the time of Hurst's trial, as was true for Arizona's felony murder statute at the time of Ring's trial, did not require a jury finding of the specific intent to kill.[81] Consistent with Florida's hybrid capital sentencing scheme, the sentencing court held an evidentiary hearing before the jury, and the jury recommended a sentence of death. After the Florida Supreme Court vacated Hurst's first sentence, the sentencing judge conducted a new evidentiary hearing, instructing the jury it could recommend a death sentence if it found at least one aggravating circumstance beyond a reasonable doubt, *i.e.,* either the murder was especially heinous, atrocious, or cruel, or the murder was committed while Hurst was committing a robbery. At the conclusion of the second sentencing hearing the jury recommended death by a vote of 7 to 5. In her sentencing order, the trial judge relied upon her independent determination that the evidence established statutory aggravating factors of (1) the capital felony was especially heinous, atrocious, or cruel and (2) the capital felony was committed while the defendant was engaged, or was an accomplice, in the

[81] Florida law provided at the time of Hurst's murder trial that first degree murder consisted of the unlawful killing of a human being (1) when perpetuated from a premeditated design to effect the death of the person killed or any human being, (2) when committed by a person engaged in the perpetuation of, or in the attempt to perpetuate any of nineteen listed felonies (including robbery and kidnaping), or (3) which resulted from the unlawful distribution of any controlled substance identified in the statute, when such drug is proven to be the proximate cause of the death of the user. Fla. Stat. § 782.04(1) (2010).

commission or an attempt to commit, or flight after committing or attempting to commit any robbery, *i.e.,* Fla. Stat. § 921.141(6)(d) & (h) (2010). The Supreme Court held the Sixth Amendment and Due Process Clause jointly require that each element of a crime be proved to a jury beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 621. The Supreme Court described its prior holding in *Apprendi* as follows: "any fact that 'exposes the defendant to a greater punishment *than that authorized by the jury's guilty verdict*' is an 'element' that must be submitted to a jury." *Id.* (*emphasis added*). The Supreme Court concluded Hurst's death sentence was invalid because the sentencing judge, not a jury, found the aggravating circumstance necessary for the imposition of the death penalty under Florida law. *Id.*, at 624.

Alabama's capital sentencing scheme is very similar to the hybrid system that produced Hurst's death penalty. As explained in detail in Section I.D.3. above, Petitioner's capital sentencing proceeding followed the same pattern as Hurst's: first, the trial judge instructed an advisory jury it could only consider specific aggravating circumstances it determined beyond a reasonable doubt existed in Petitioner's case; second, the jury recommended a sentence of death; and finally, the trial judge issued a written sentencing order containing factual findings, weighing aggravating factors he concluded had been established beyond a reasonable doubt against mitigating circumstances, and imposing a sentence of death. There the similarities between Petitioner's trial and those in *Hurst, Ring*, and *Enmund* end, however.

What distinguishes Petitioner's trial from the constitutionally defective capital murder trials in *Hurst, Ring,* and *Enmund* discussed above, and what distinguishes the holding in *Apprendi* from the circumstances of Petitioner's case, is the fact Petitioner's capital sentencing *jury* made all the factual determinations at the guilt-innocence phase of Petitioner's trial (*unanimously* and *beyond a reasonable doubt*) necessary to render Petitioner eligible for the death penalty under Alabama law (*i.e.*, finding Petitioner (1) intentionally murdered Mrs. Liveoak and (2) did so in the course of committing her robbery and kidnaping). As the Supreme Court explained in *Hurst*, its holding in *Apprendi* was that "any fact that 'exposes the defendant to a greater punishment than that authorized by the jury's guilty verdict' is an 'element' of the offense that must be submitted to a jury." *Hurst*, 136 S. Ct. at 621. The jury's factual findings at the guilt-innocence phase of Petitioner's capital murder trial rendered Petitioner *eligible* for the death penalty within the meaning of the Supreme Court's Eighth Amendment jurisprudence. *See Tuilaepa v. California*, 512 U.S. at 971-72 ("To render a defendant eligible for the death penalty in a homicide case, we have indicated that the trier of fact must convict the defendant of murder and find one 'aggravating circumstance' (or its equivalent) at either the guilt or penalty phase."). Petitioner's jury made guilt-innocence phase factual findings, unanimously and beyond a reasonable doubt, that he (1) intentionally killed Mrs. Liveoak and (2) committed her murder in the course of her robbing and kidnaping.

These factual findings were all that were necessary under applicable Alabama law and the Eighth Amendment to render Petitioner *eligible* to receive a sentence of death.

As explained at length above, the Supreme Court's Sixth and Eighth Amendment jurisprudence requires that all factual determinations necessary to render a defendant *eligible* for a sentence of death must be made unanimously and beyond a reasonable doubt by a jury. The juries in *Enmund, Ring*, and *Hurst* all rendered ambiguous guilty verdicts on charges of first-degree murder. Those charges were premised or potentially premised upon felony murder theories that did not require the prosecution to establish beyond a reasonable doubt that the defendant acted with the specific intent to kill, as required by the holding in *Enmund.* Likewise, the ambiguous guilty verdicts in *Enmund*, *Ring*, and *Hurst* did not establish that the juries in those cases had concluded unanimously and beyond a reasonable doubt the existence of an aggravating circumstance that both (1) did not apply to every defendant convicted of a murder and (2) was not unconstitutionally vague.[82] *See*

[82] Enmund's jury was instructed it could convict him of first-degree murder for the killing of a human being while engaged in the perpetuation of or in the attempt to perpetuate the offense of robbery even though there was no premeditated design or intent to kill. *Enmund*, 458 U.S. at 784-85. Ring's jury was instructed on the dual theories of premeditated murder and felony murder; it deadlocked on premeditated murder but convicted on felony murder after receiving instructions permitting it to convict on that charge without making a finding of a specific mental state beyond that necessary to convict for robbery. *Ring*, 536 U.S. at 591-92. Hurst's jury convicted him of first-degree murder without specifying which of the two alternative theories (*i.e.*, premeditated murder or felony murder for an unlawful killing during a robbery) it had concluded the evidence

Tuilaepa, 512 U.S. at 972 (the aggravating circumstance must apply only to a subclass of defendants convicted of murder and may not be unconstitutionally vague). In stark contrast, Petitioner's guilty verdict on the capital murder counts against him necessarily included factual findings (unanimously and beyond a reasonable doubt) that Petitioner intentionally killed Mrs. Liveoak in the course of both her kidnaping and robbery. Petitioner's guilty verdict did not suffer from any of the ambiguities present in *Enmund*, *Ring*, or *Hurst*. For this reason, Petitioner's death penalty does not suffer from the same constitutional defect that took place during the trials of *Enmund*, *Ring*, and *Hurst*. Likewise, the Petitioner's death sentence does not violate the constitutional rule announced in *Apprendi*. Petitioner's trial conformed in all respects to the Sixth and Eighth Amendment requirements applicable to the *eligibility* determination of the capital sentencing process.

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established beyond a reasonable doubt. *Hurst*, 136 S. Ct. at 619-20. Thus, all of these guilty verdicts were highly ambiguous.

Another problematic element in both *Ring* and *Hurst* that is absent from Petitioner's case is the presence of the aggravating factor of premeditation. It is far from clear whether a jury's finding that a murder was premeditated, standing alone, is sufficient to satisfy the Eighth Amendment requirement discussed in *Tuilaepa* that an aggravating circumstance must apply to only a subclass of defendants convicted of murder. *See Tuilaepa*, 512 U.S. at 972 (*quoting Arave v. Creech*, 507 U.S. at 474 ("If the sentencer fairly could conclude that an aggravating circumstance applies to every defendant eligible for the death penalty, the circumstance is constitutionally infirm.")). Given the Supreme Court's holdings in *Enmund* and *Tison*, which compel a jury finding of an intentional killing (or at least reckless indifference to human life joined with major participation in the underlying crime) as a prerequisite to the imposition of the death penalty, it is uncertain whether a jury finding of premeditation can survive constitutional scrutiny if proffered as the sole basis for elevating a murder conviction to one which will support the imposition of a death sentence. Petitioner's jury unanimously found beyond a reasonable doubt that Petitioner intentionally murdered Mrs. Liveoak during the course of robbing and kidnaping her. There was no ambiguity in that finding.

The Supreme Court has distinguished the constitutional requirements of the *eligibility* decision, *i.e.*, the narrowing function, and the *selection* decision, *i.e.*, the individualized assessment of mitigating circumstances, holding the latter requires only that the sentencing jury be given broad range to consider all relevant mitigating evidence but leaving to the States wide discretion on how to channel the sentencing jury's balancing of mitigating and aggravating factors. *See Kansas v. Marsh*, 549 U.S. 158, 174-75 (2007) (holding, in connection with the *selection* phase of a capital sentencing proceeding, the Constitution mandates only that (1) the defendant has a right to present the sentencing authority with information relevant to the sentencing decision and (2) the sentencing authority is obligated to consider that information in determining the appropriate sentence); *Tuilaepa*, 512 U.S. at 978 (holding, at the *selection* stage, States are not confined to submitting to the jury specific propositional questions but, rather, may direct the jury to consider a wide range of broadly defined factors, such as "the circumstances of the crime," "the defendant's prior criminal record" and "all facts and circumstances presented in extenuation, mitigation, and aggravation of punishment").

At the *selection* phase of a capital trial, the Supreme Court has left to the States the decision whether to channel a sentencing jury's weighing of mitigating evidence or grant the jury unfettered discretion to consider all relevant mitigating evidence and weigh that evidence in any manner the jury deems reasonable. *See Kansas v.*

Marsh, 549 U.S. at 174 ("So long as a state system satisfies these requirements, our precedents establish that a State enjoys a range of discretion in imposing the death penalty, including the manner in which aggravating and mitigating circumstances are to be weighed."). Likewise, the Supreme Court has not yet imposed a particular burden of proof requirement with regard to a capital sentencing jury's consideration of mitigating evidence when such consideration occurs exclusively within the selection process:

> In sum, "discretion to evaluate and weigh the circumstances relevant to the particular defendant and the crime he committed" is not impermissible in the capital sentencing process. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." Indeed, the sentencer may be given "unbridled discretion in determining whether the death penalty should be imposed after it has been found that the defendant is a member of the class made eligible for that penalty."

Tuilaepa v. California, 512 U.S. at 979-80 (citations omitted).

"[T]here is no constitutional requirement of unfettered sentencing discretion in the jury, and States are free to structure and shape consideration of mitigating evidence 'in an effort to achieve a more rational and equitable administration of the death penalty.'" *Johnson v. Texas*, 509 U.S. 350, 362 (1993) (*quoting Boyde v. California*, 494 U.S. at 377). "We have never held that a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is

constitutionally required." *Kansas v. Marsh*, 549 U.S. at 175 (*quoting Franklin v. Lynaugh*, 487 U.S. at 179).

The Supreme Court has never categorically mandated *jury* resolution of all factors at the *selection* phase of a capital sentencing process. On the contrary, the Supreme Court's jurisprudence addressing the *selection* aspect of capital sentencing has focused on requiring consideration of all mitigating evidence, as well as the circumstances of the capital offense. *See Tuilaepa v. California*, 512 U.S. at 972 ("What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime." (quoting *Zant v. Stephens*, 462 U.S. 862, 879 (1983)). "The selection decision, on the other hand, requires individualized sentencing and must be expansive enough to accommodate relevant mitigating evidence so as to assure an assessment of the defendant's culpability." *Tuilaepa v. California*, 512 U.S. at 973.

Petitioner received exactly the type of individualized assessment of his culpability in the context of all the mitigating evidence presented during trial when (1) the jury considered all relevant mitigating evidence presented during either phase of trial, (2) the jury made its sentencing recommendation (after weighing only those aggravating circumstances it determined had been established beyond a reasonable doubt against all the mitigating circumstances), and (3) the trial judge issued his findings and conclusions in his sentencing order (which findings were dictated, in

part, by the jury's unanimous finding beyond a reasonable doubt that the Petitioner's capital offense took place in the course of a kidnaping and robbery).[83]

The jury made the determination at the guilt-innocence phase of trial that Petitioner's intentional capital offense took place in the course of the kidnaping and robbery of Mrs. Liveoak. The jury made these determinations unanimously and beyond a reasonable doubt. Petitioner admitted during his testimony at the guilt-innocence phase of his trial that he committed the kidnaping and robbery of Mr.

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[83] At the time of Petitioner's capital murder trial, Alabama law provided, and still provides, as follows:

> At the sentencing hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances. Provided, however, any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing.
>
> Ala. Code § 13A-5-45(e).

The state trial court's sentencing order, containing findings of fact and conclusions of law, appears at 2 SCR 357-69. Judge Reese found the state had proven beyond a reasonable doubt three aggravating circumstances, *i.e.,* that (1) *as found by the jury*, the Petitioner's capital offense was committed while Petitioner was engaged in or was an accomplice in the commission or attempted commission, or during flight after committing or attempting to commit kidnaping and robbery, (2) Petitioner was previously convicted of a felony involving the use or threat of violence to a person, *i.e.,* the Portwood kidnaping and robbery, and (3) Petitioner's capital offense was especially heinous, atrocious, or cruel compared to other capital offenses. 2 SCR 361-64. Judge Reese found an absence of any statutory mitigating circumstances but did find a number of non-statutory mitigating circumstances, including (1) Petitioner's remorsefulness, (2) the fact Petitioner came from a poor family and lacked adequate role models who instill morals into him, (3) Petitioner's previous good work record, (4) the fact Petitioner was a good husband to his first wife and a good father to their children, (5) Petitioner's prior kindnesses and good works toward others, (6) the love and care shown Petitioner by his family and friends, (7) the fact Petitioner appears to function well in penal institutions, and (8) the lack of violence shown by Petitioner since his capital offense. 2 SCR 367-68. The trial court did not give much weight to any of the Petitioner's mitigating circumstances when weighed against the aggravating circumstances and concluded the jury's advisory verdict together with the aggravating circumstances outweighed the mitigating circumstances and warranted imposition of a sentence of death. 2 SCR 368-69.

Portwood just days before the kidnaping, robbery, and murder of Mrs. Liveoak. The state trial court was constitutionally obligated to consider the circumstances of Petitioner's offense when it made the selection determination at the punishment phase of Petitioner's capital murder trial. This necessarily included consideration of the particularly tortured final hours Mrs. Liveoak spent without food, water, or ventilation inside the steel trunk of her car, which Petitioner parked in an isolated location bereft of shade on an asphalt parking lot in the middle of July in central Alabama. After the jury unanimously made the determinations beyond a reasonable doubt at the guilt-innocence phase of trial that Petitioner intentionally murdered Mrs. Liveoak during the course of her kidnaping and robbery, Petitioner received from both the advisory jury and the trial court the individualized consideration of the circumstances of his offense and the mitigating aspects of his character and background at the punishment phase of his capital murder trial. This is all the Eighth and Sixth Amendments required in connection with the selection decision. Petitioner's final claim for relief contained in his original petition, as supplemented by Petitioner's *Hurst* claim contained in his amended petition, does not warrant federal habeas corpus relief under a *de novo* standard of review.

V. TRIAL COURT RULINGS ON CHALLENGES FOR CAUSE

A. The Claim

In his fifth claim for relief in his original petition, Petitioner complained about both the state trial court's granting of the prosecution's challenge for cause to venire member 129 and the trial court's refusal to grant the defense's challenge for cause to venire member 64 (Doc. #1, at pp. 14-15). The court rejected Petitioner's latter argument on the merits under the AEDPA's standard of review in the Order issued January 12, 2012 (Doc. #120, at pp. 23-24, 31-32). This leaves only Petitioner's complaint about the state trial court's granting of the prosecution's challenge for cause to venire member 129 for *de novo* review.

The individual voir dire examination of venire member 129 included the following exchanges:

> THE COURT: This is a capital murder case, meaning you may or may not be called upon to make a decision about capital punishment. Do you understand that?
> PROSPECTIVE JUROR: Yes, sir.
> THE COURT: You may not be called upon because there are other lesser included offenses for you to consider. However, if you are called upon to make that decision, I need to ask you these questions, because it would be too late at the end of the case to ask you these questions. Capital punishment means life without parole or the death penalty. Do you have an opinion one way or the other about capital punishment?
> PROSPECTIVE JUROR: Yes, sir.
> THE COURT: What is that, please, ma'am?
> PROSPECTIVE JUROR: I don't believe in capital punishment.
> THE COURT: When you say you don't believe in capital punishment, I am assuming you are talking about the death penalty; is that right?
> PROSPECTIVE JUROR: Yes, sir.

THE COURT: You don't believe it serves an appropriate function in our society?
PROSPECTIVE JUROR: No, sir.
THE COURT: Let me ask you this. Let me tell you this first. In Alabama here the State of Alabama recognizes certain criminal offenses whereby the punishment may be the death penalty. Now, I recognize that you may personally disagree with that. But let me ask you this. If you are selected as a juror in this case, and you are called upon to make that decision, do you think you could entertain the possibility of the death penalty as a sentence in this case?
PROSPECTIVE JUROR: No, sir.
THE COURT: You don't think if I give you instructions that would tell you you need to consider and weigh these factors, that you could do that in deciding whether or not the death penalty could be imposed?
PROSPECTIVE JUROR: No, sir.
THE COURT: What you are telling me then is your personal opinion is just so great and you just disagree with it so much you just couldn't rule and you couldn't consider that at all?
PROSPECTIVE JUROR: Yes, sir.
THE COURT: State?
MR. MCNEIL: No questions.
THE COURT: Defense?
EXAMINATION BY MR. AGRICOLA:
Q: Ms. Foy, do you understand that the Alabama Legislature passes the laws that we are governed by here in Alabama?
A: Yes, sir.
Q: And do you understand that the Alabama Legislature has passed a law that authorizes the death penalty in some cases where the circumstances are so bad that a judgment has been made by the Legislature that the death penalty ought to be authorized in those cases? Do you understand that's the law?
A: Yes, sir.
Q: Now, you have expressed, I think, a pretty clear personal belief against the death penalty?
A: Yes, sir.
Q: Do you understand, Ms. Foy, when you enjoy the benefits of citizenship in this country and in this state, that it carries with it certain obligations?
A: Yes, sir.
Q: And one of those obligations is jury service?

A: Yes, sir.

Q: Now do you understand that in a civilized society we have to follow the law?

A: Yes, sir.

Q: And that if we don't follow the law, all of us will be in serious danger of our life and limb?

A: Yes, sir.

Q: Ms. Foy. What happens in cases like this is that the judge will explain to you what the law is. And as a juror, you will be required to take an oath. Do you understand that?

A: Yes, sir.

Q: And if you take that oath, you must abide by that oath to follow the law?

A: Yes, sir.

Q: If the Judge instructs you that if you make a finding as a juror that the defendant is guilty of capital murder, do you understand that you must follow his instructions and consider two punishments; one being life without parole, and one being the death penalty.

A: Yes, sir.

Q: And he would explain to you what the law is that you must apply to the evidence?

A: Yes, sir.

Q: Now, regardless of your personal feelings can you follow the law?

A: Yes, sir.

Q: Can you swear under oath that you will listen to the Judge and apply the law to the facts and the evidence that comes in from the witness stand?

A: Yes, sir.

Q: You are not saying here today, are you, that you would automatically vote against the death penalty if the facts are and if the jury finds that the facts satisfy the law about the death penalty? You wouldn't automatically dismiss the death penalty as an option, would you?

A: Yes, sir.

MR. AGRICOLA: That's all.

EXAMINATION BY MR MCNEIL:

Q: Ms. Foy, I am a little confused now. On the Judge's questions you said that you would not consider the death penalty as a punishment, that you would not consider it?

A: No.
Q: Let me ask you these questions then. Maybe I misunderstood you. Are you against the death penalty?
A: Yes, sir.
Q: You said a strong belief?
A: Yes, sir.
Q: Is that belief so strong that you feel like it would really get in the way with your ability to follow the Judge's instructions?
A: Yes, sir.
Q: The Judge is not going to tell you how to vote, Ms. Foy. I want to make sure you understand that. When it comes to the death penalty, that's something you have got to do on your own. Do you ever foresee yourself being able to vote for the death penalty in any case?
A: No, sir.
MR. MCNEIL: That's all.
THE COURT: Thank you, ma'am. You can return to the jury assembly room on the third floor. State?
MR. MCNEIL: Challenge Juror 129.[84]

B. The Constitutional Standard

The standard for determining the constitutional fitness of a capital sentencing juror is set forth in a series of Supreme Court opinions dating back several decades. In *Witherspoon v. Illinois*, 391 U.S. 510, 521-23 (1968), the Supreme Court held that prospective jurors may not be excused from sitting on a capital jury simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction. Rather, the Supreme Court held as follows:

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

[84] 6 SCR 453-61 (voir dire examination of venire member 129).

> against the penalty regardless of the facts and circumstances that might emerge in the course of the proceedings.

Witherspoon v. Illinois, 391 U.S. at 522 n.21.

In *Adams v. Texas*, 448 U.S. 38 (1980), the Supreme Court emphasized the limitations *Witherspoon* imposed on the ability of the State to exclude members of a jury venire from service on a petit capital jury:

> a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams v. Texas, 448 U.S. at 45.

In *Adams*, the Supreme Court further discussed the many practical consequences of its *Witherspoon* holding:

> If the juror is to obey his oath and follow the law of Texas, he must be willing not only to accept that in certain circumstances death is an acceptable penalty but also to answer the statutory questions without conscious distortion or bias. The State does not violate the *Witherspoon* doctrine when it excludes prospective jurors who are unable or unwilling to address the penalty questions with this degree of impartiality. * * *
>
> [A] Texas juror's views about the death penalty might influence the manner in which he performs his role but without exceeding the "guided jury discretion" permitted him under Texas law. In such circumstances, he could not be excluded consistently with *Witherspoon*.
>
> The State could, consistently with *Witherspoon*, use § 12.31(b) to exclude prospective jurors whose views on capital punishment are such as to make them unable to follow the law or obey their oaths. But

> the use of § 12.31(b) to exclude jurors on broader grounds based on their opinions concerning the death penalty is impermissible. * * *
>
> [N]either nervousness, emotional involvement, nor inability to deny or confirm any effect whatsoever is equivalent to an unwillingness or an inability on the part of the jurors to follow the court's instructions and obey their oaths, regardless of their feelings about the death penalty. * * * Nor in our view would the Constitution permit the exclusion of jurors from the penalty phase of a Texas murder trial if they aver that they will honestly find the facts and answer the questions in the affirmative if they are convinced beyond a reasonable doubt, but not otherwise, yet who frankly concede that the prospects of the death penalty may affect what their honest judgment of the facts will be or what they may deem to be a reasonable doubt. * * * [T]he State may bar from jury service those whose beliefs about capital punishment would lead them to ignore the law or violate their oaths.

Adams v. Texas, 448 U.S. at 46-50 (citations omitted).

In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court further clarified its holdings in *Witherspoon* and *Adams*, holding that the proper inquiry when faced with a venire member who expresses personal, conscientious, or religious views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. at 424. In *Wainwright v. Witt*, the Supreme Court also emphasized that considerable deference is to be given the trial court's first-hand evaluation of the potential juror's demeanor and that no particular magical incantation or word choice need necessarily be followed in interrogating the potential juror in this regard. *Id.*, 469 U.S. at 430-35.

More recently, in *Uttecht v. Brown*, 551 U.S. 1 (2007), the Supreme Court reviewed its *Witherspoon-Witt* line of opinions and identified the following "principles of relevance":

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

Uttecht v. Brown, 551 U.S. at 9 (citations omitted).

The Supreme Court has emphasized the critical inquiry for *Witherspoon-Witt* purposes is not whether a state appellate court properly reviewed the propriety of the exclusion but, rather, whether the trial court correctly applied the appropriate federal constitutional standard. *Uttecht v. Brown*, 551 U.S. at 16-17. Finally, the Supreme Court has admonished reviewing courts to defer to the trial court's resolution of questions of bias arising from a potential juror's conflicting voir dire answers because the trial court had the opportunity to observe the demeanor of the potential juror. *Uttecht v. Brown*, 551 U.S. at 20 ("where, as here there is a lengthy questioning of a prospective juror and the trial court has supervised a diligent and

thoughtful *voir dire*, the trial court has broad discretion."). "Courts reviewing claims of *Witherspoon-Witt* error, however, especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." *Uttecht v. Brown*, 551 U.S. at 22.

C. De Novo Review

Having independently reviewed the entirety of the voir dire examination of venire member 129, the state trial court's implicit factual finding of disqualifying bias is not merely objectively reasonable. It is entirely compelling. Venire member 129 was the quintessential vacillating venire member who responded in widely divergent ways to questions about her ability to consider and vote in favor of a sentence of death, depending upon the manner in which those questions were phrased. This venire member did, however, make clear that her personal views on the propriety of the death penalty would impede her ability to follow the trial judge's instructions. *Cf. Stewart v. Dugger*, 877 F.2d 851, 855 (11th Cir. 1989) (affirming a federal habeas court's deference to a state trial court's implicit factual findings in granting a challenge for cause to a venire member who insisted it would be extremely difficult for him to vote in favor of a death sentence), *cert. denied*, 495 U.S. 962 (1990). In such circumstances, it is particularly critical that a federal habeas court defer to the implicit credibility findings made by the state trial judge who had the

opportunity to examine firsthand the vacillating venire member's demeanor during voir dire examination. *Uttecht v. Brown,* 551 U.S. at 22; *Sumner v. Mata,* 455 U.S. 591, 597 (1982). Petitioner's complaint about the state trial court granting the prosecution's challenge for cause to venire member 129 does not warrant federal habeas relief under a *de novo* standard of review.

VI. ERRONEOUS ADMISSION OF PETITIONER'S CONFESSION

A. The Claim

In his eighth claim in his original petition, Petitioner argues the state trial court erred in admitting into evidence *the signed copy* of Petitioner's statement to police given shortly after his arrest (Doc. #1, at pp. 63-65).

During a pretrial hearing held October 11, 1995, the state trial court heard evidence on Petitioner's motion to suppress his videotaped post-arrest statement to police.[85] The only two witnesses who testified at the hearing were a Montgomery

[85] The verbatim transcription from the pretrial hearing on Petitioner's motion to suppress appears at 4 SCR Tab 1, at pp. 1-70.

Police homicide detective and the Petitioner.[86] In an Order issued October 11, 1995, the state trial court denied Petitioner's motion to suppress.[87]

As explained above, the state trial court admitted without objection Petitioner's post-arrest videotaped statement to police (in question and answer format); the jury saw and heard the videotaped recording played in open court during the guilt-innocence phase of Petitioner's capital murder trial.[88] The trial court also

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[86] More specifically, at the pretrial hearing, detective David R. Hill testified that (1) Hazel Liveoak's body was found at 21:13 hours on July 13, 1994, (2) Dennis Bowen furnished information which allowed police to identify Petitioner and Carolyn Yaw as suspects in Mrs. Liveoak's murder, (3) Petitioner was arrested and brought to police headquarters, where Petitioner was given his *Miranda* warnings, (4) Petitioner signed the form waiving his rights, (5) no promises or threats or coercion were used to induce Petitioner to make his statement, (6) a videotaped statement was taken from Petitioner, (7) several weeks later, Petitioner contacted Detective Hill and requested an opportunity to examine his statement, (8) Detective Hill arranged for Petitioner to be transported to the Montgomery Police Department on September 1, 1994, where Petitioner reviewed a written transcription of his statement and signed same, (9) at that time, Detective Hill was unaware counsel had been appointed for Petitioner and Petitioner informed him that he had not yet been appointed counsel [both men were apparently in error on that point], (10) Petitioner appeared entirely sober throughout his post-arrest interrogation, (11) initially, Petitioner denied committing the offense, (12) Petitioner appeared lucid and did not appear intoxicated during his post-arrest interrogation, and (13) Petitioner never requested an attorney during his post-arrest interrogation. 4 SCR at R-3-R-42, R-66-R-67 (testimony of David R. Hill).

Petitioner testified during the same hearing and stated (1) he was smoking crack the day of his arrest, (2) he was addicted to crack cocaine, (3) he was high at the time of his arrest, (4) he was high at the time of his post-arrest interrogation, (5) he did not recall signing the waiver of rights form admitted into evidence during the hearing, (6) he did not read any of the papers he signed that day, (7) he was never told he had been charged with capital murder, (8) he was never told he was facing the death penalty, (9) he was not given his *Miranda* warnings on either July 14 or September 1, 1994, (10) he was in his "own world" during his post-arrest interrogation, and (11) he was promised a four-year sentence in exchange for giving police his post-arrest statement. 4 SCR 42-66 (testimony of Donald Dallas).

[87] 2 SCR 356.

[88] 7 SCR 647-48.

admitted into evidence without objection a transcription of the audio portion of the videotaped recording.[89] The copy of the verbatim transcription of the audio portion of the videotape recording admitted into evidence at trial as State Exhibit 41 included Petitioner's undated and unwitnessed signature at the bottom of each page.[90]

B. The Constitutional Standard

A federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling violates a specific federal constitutional right or is so egregious it renders the petitioner's trial fundamentally unfair. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *Darden v. Wainwright*, 477 U.S. 168, 179-83 (1986). The test for determining whether the admission of evidence warrants federal habeas corpus relief is whether the allegedly erroneous admission of evidence either (1) violated a specific federal constitutional right or (2) rendered the defendant's trial so fundamentally unfair that the conviction was obtained in violation of the Due Process Clause of the Fourteenth Amendment. *Herring v. Secretary, Dept. of Corr.*, 397 F.3d 1338, 1335 n.8 (11th Cir.), *cert. denied*, 546 U.S. 928 (2005); *Thigpen v. Thigpen*, 926 F.2d at 1012.

[89] 7 SCR 648.

[90] 3 SCR 457-69.

Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (holding complaints regarding the admission of evidence under California law did not present grounds for federal habeas relief absent a showing that admission of the evidence in question violated due process); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (recognizing that federal habeas relief will not issue for errors of state law); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) (holding a federal court may not issue the writ on the basis of a perceived error of state law). In the course of reviewing state criminal convictions in federal habeas corpus proceedings, a federal court does *not* sit as a super-state appellate court. *Estelle v. McGuire*, 502 U.S. at 67-68; *Lewis v. Jeffers*, 497 U.S. at 780; *Pulley v. Harris*, 465 U.S. at 41; *Thigpen v. Thigpen*, 926 F.2d 1003, 1012 (11th Cir. 1991).

> When a federal district court reviews a state prisoner's habeas petition pursuant to 28 U.S.C. § 2254 it must decide whether the petitioner is "in custody in violation of the Constitution or laws or treaties of the United States." The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*.

Coleman v. Thompson, 501 U.S. 722, 730 (1991).

C. *De Novo* Review

Petitioner argues the admission of his signed confession violated his Sixth Amendment right to counsel because he signed the verbatim transcription of his

videotaped confession after the state trial court appointed counsel to represent him. This argument is meritless. The document admitted without objection into evidence during Petitioner's trial as State Exhibit 41 was a transcription of Petitioner's post-arrest interrogation conducted after *Miranda* warnings had been administered and Petitioner signed a waiver of his rights. The state trial court's Order overruling Petitioner's motion to suppress implicitly rejected as incredible Petitioner's testimony at the pretrial hearing that he was so intoxicated at the time of his post-arrest interrogation that he was incapable of understanding his constitutional rights and effectively waiving those rights. Petitioner does not allege any facts or identify any legal authority challenging the admission at trial of the videotaped recording of Petitioner's post-arrest interrogation. Nor does Petitioner allege any facts or identify any legal authority showing the state trial court erred in overruling Petitioner's motion to suppress his videotaped post-arrest statement to police. Under such circumstances, the fact the state trial court chose to admit a copy of the transcription of the audio portion of the videotaped recording that was played without objection for Petitioner's jury and which bore Petitioner's signature did not violate Petitioner's Sixth Amendment right to counsel.

An accused is denied the basic protections of the Sixth Amendment when there is used against him at his trial evidence of his own incriminating words which government agents deliberately elicited from him after he had been indicted and in

the absence of his counsel. *Fellers v. United* States, 540 U.S. 519, 523 (2004); *Massiah v. United* States, 377 U.S. 201, 206 (1964); *United States v. US Infrastructure, Inc.*, 576 F.3d 1195, 1216 (11th Cir. 2009), *cert. denied*, 559 U.S. 1009 (2010). At Petitioner's request, several weeks after Petitioner gave his actual statement to police, the State permitted Petitioner to review the verbatim transcription of his videotaped interrogation and sign the transcription of his earlier statement. The state trial court did not admit into evidence any statement made by Petitioner on September 1, 1994, which law enforcement authorities "deliberately elicited' from Petitioner on that date and which differed in content from the videotaped statement Petitioner gave shortly after his July 14, 1994 arrest. Petitioner's Sixth Amendment rights were not violated by the admission, without objection, of his signed version of the transcription of his prior videotaped statement.

Likewise, the admission of State Exhibit 41 did not render Petitioner's trial fundamentally unfair. The jury saw and heard Petitioner's videotaped statement made just hours after his arrest. There is no argument currently before this court showing there was any error in connection with the admission of Petitioner's videotaped statement. The presence of Petitioner's unwitnessed, undated signature on the bottom of the transcribed pages of the exhibit admitted without objection at trial as State Exhibit 41 did not render Petitioner's trial fundamentally unfair. If Petitioner had made timely objection to the admission of the signed version of the

transcript, the state trial court could easily have substituted a redacted version of the same transcription, *i.e.*, one not bearing Petitioner's signature. The erroneous admission of evidence renders a trial fundamentally unfair only when the erroneously admitted evidence was material, *i.e.*, the evidence was a critical, crucial, highly significant factor to the outcome of the trial. *Baxter v. Thomas*, 45 F.3d 1501, 1509 (11th Cir.), *cert. denied*, 516 U.S. 956 (1995); *Thigpen v. Thigpen*, 926 F.2d at 1012; *Dobbs v. Kemp*, 790 F.2d 1499, 1504 (11th Cir. 1986), *modified on reh.*, 809 F.2d 750 (11th Cir.), *cert. denied*, 481 U.S. 1059 (1987). Given the admission without objection at trial of Petitioner's videotaped statement to police, the admission of the verbatim transcription of the videotaped recording (with or without Petitioner's signature on the transcription) was not a crucial, critical, or highly significant factor in the outcome of either phase of Petitioner's capital murder trial.

Finally, any error regarding the admission of State Exhibit 41 was harmless under the Supreme Court's standard for harmless error in federal habeas corpus proceedings. *See Brecht v. Abrahamson*, 507 U.S. 619, 637 (1993) (holding the test for harmless error in a federal habeas corpus action brought by a state prisoner is "whether the error had substantial and injurious effect or influence in determining the jury's verdict"). Admission of the undated, unwitnessed, but signed verbatim transcription of the audio portion of Petitioner's videotaped statement did not have a substantial or injurious effect or influence on the jury's verdict at either phase of

Petitioner's capital murder trial. Petitioner's eighth claim does not warrant federal habeas relief under a *de novo* standard of review.

VII. ERRONEOUS ADMISSION OF EXTRANEOUS OFFENSES

A. The Claim

In his twelfth claim in his original petition, Petitioner argues the state trial court erred in admitting the testimony of Wesley Orville Portwood concerning Petitioner's kidnaping and robbery of him just days before Petitioner's kidnaping, robbery, and murder of Mrs. Liveoak (Doc. # 1, at pp. 68-70). Petitioner contends it was error for the state trial court to admit Mr. Portwood's testimony after the court admitted Petitioner's videotaped statement - because in that recording, Petitioner admitted the essential facts concerning his robbery and kidnapping of Mr. Portwood.[91]

At trial, Mr. Portwod testified that (1) after striking him with a knife, Petitioner forced his way into Mr. Portwood's car and drove him to an isolated location near Millbrook where Petitioner directed him to get out of the car and threatened to place Mr. Portwood in the trunk of his vehicle, (2) Mr. Portwood protested that he would "smother to death in there," (3) Petitioner then directed him

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[91] In his videotaped post-arrest statement to police, Petitioner stated that he abducted an "old man" from a parking lot in Prattville, drove him to a wooded location near Lake Jackson in Millbrook, "laid him face down, and drove his car probably a quarter of a mile from him and got out and left." 3 SCR 465-67.

to lay down in the woods, (4) Petitioner then drove off, and (5) Mr. Portwood rose and walked about a mile down the road where he found his abandoned car but not the keys.[92]

B. The Constitutional Standard

The same legal principles discussed above in Section VI.B. in connection with Petitioner's complaint about the admission of his signed statement apply to this claim. The Eleventh Circuit has held that evidence of an extraneous offense is admissible under Alabama law if it shows something more than the defendant's bad character and the likelihood he acted in conformity therewith by committing the charged crime. *Thigpen v. Thigpen*, 926 F.2d at 1014. The Eleventh Circuit has also declared Alabama law permits the admission of extraneous offense evidence when such evidence is relevant to (1) show either (a) the defendant's physical capacity, skill, or means to commit the charged crime, (b) the res gestae of the crime, (c) identity of person or crime, (d) scienter or guilty knowledge, (e) intent, (f) plan, design, scheme, or system, (g) motive, (h) malice, or (i) aspects of various particular crimes, (2) rebut special defenses, or (3) an aspect of the charged crime which is a "real and open issue" in the case. *Id.*. 926 F.2d at 1014-15.

[92] 7 SCR 703-14 (testimony of Wesley Orville Portwood).

C. *De Novo* Review

The admission of Mr. Portwood's trial testimony did not render Petitioner's capital murder trial fundamentally unfair. Admission of Mr. Portwood's testimony did not show merely Petitioner's bad character. Mr. Portwood's testimony supported the inference that Petitioner's actions in placing the elderly Mrs. Liveoak inside her car trunk only days later on the afternoon of July 12, 1994, and keeping her there were intended to result in her death. Only days before Petitioner's abduction and robbery of Mrs. Liveoak, the elderly Mr. Portwood informed Petitioner that he would likely "smother to death" if forced to get inside his own vehicle's trunk.[93] Petitioner's intent to kill Mrs. Liveoak was the only genuinely "real and open issue" before the jury at the guilt-innocence phase of Petitioner's capital murder trial.[94] *Cf. Thigpen v. Thigpen*, 926 F.2d at 1015-19 (holding

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[93] 7 SCR at 708 (testimony of Wesley Orville Portwood).

[94] During Petitioner's state habeas corpus proceeding, all three of Petitioner's trial counsel testified that the defense's strategy at the guilt-innocence phase of trial was to attempt to convince the jury that Petitioner was so mentally and emotionally disturbed and intoxicated by his addiction to crack cocaine and his binging on that drug during the time frame that included Mrs. Liveoak's abduction and robbery that Petitioner could not and did not form the intent to kill her. 12 SCR Tab 13, at p. 37 (testimony of Jeffery C. Duffey); 12 SCR Tab 13, at pp. 75-76, 86-87, 98, 113 (testimony of Susan James); 13 SCR Tab 14, at pp. 159, 165, 169, 171, 181-82, 189, 228-29 (deposition testimony of Algert Agricola). Attorney Agricola, in particular, emphasized that, in light of Petitioner's confession to police to all elements of the offense of capital murder except intent and Petitioner's admissions during their pretrial conferences, the defense was left with little to argue at the guilt-innocence phase of trial other than that Petitioner was so intoxicated on crack that he could not form the intent to commit murder. 13 SCR Tab 14, at pp. 159, 165, 169, 171, 181-82, 228-29 (deposition testimony of Algert Agricola). Attorney Agricola testified the defense's punishment phase strategy was similar, *i.e.,*, to show Petitioner was intoxicated at the time of his capital offense and operating under the domination of Carolyn Yaw. *Id.*, at p. 189.

extraneous offense evidence admissible where relevant to show the defendant's and a co-defendant's relative motives). Furthermore, in light of the admission without objection of Petitioner's videotaped statement, in which he admitted to the essential elements of his abduction and robbery of Mr. Portwood, admission of Mr. Portwood's trial testimony was harmless error, at worst. *See Brecht v. Abrahamson*, 507 U.S. at 637 (holding the test for harmless error in a federal habeas corpus action brought by a state prisoner is "whether the error had substantial and injurious effect or influence in determining the jury's verdict"). Petitioner's twelfth claim does not warrant federal habeas corpus relief under a *de novo* standard of review.

VIII. ERRONEOUS ADMISSION OF PHOTOGRAPHS AND VIDEO

A. The Claim

In his thirteenth claim in his original petition, Petitioner argues the state trial court erred in admitting the videotape showing Mrs. Liveoak's body inside the trunk of her car, as well as photographs showing the same (Doc. # 1, at pp. 71-73). Petitioner also complains about the admission of photographs showing Mrs. Liveoak's personal items, *i.e.*, an earring, a day planner, and groceries found inside the passenger compartment and the trunk of her vehicle.

The state trial court admitted without objection numerous photographs of the interior of Mrs. Liveoak's vehicle, the interior of her trunk, and Mrs. Liveoak's body

as it appeared upon its discovery in the trunk of her car.[95] The trial court also admitted without objection a videotape recording of the same scenes.[96] Finally, the state trial court admitted without objection several photographs taken during the course of Mrs. Liveoak's autopsy which showed bruises and scratches on her hands, right knee, and upper right arm.[97]

B. The Constitutional Standard

The same legal principles discussed in Section VI.B. apply to this claim.

C. *De Novo* Review

Petitioner argues the photographs and video in question are inherently prejudicial:

> Both the pictures and the video also depicted close up shots of items completely irrelevant to the issue of guilt, engineered solely to bring the victim to life for the jury, to make the jurors imagine the life she would have led had she lived. The pictures showed her eyeglasses, emphasizing for the jury her age and evoking an image of frailty; her

[95] 6 SCR at pp. R-590-91. The photographs of Mrs. Liveoak's body, marked as State Exhibits 9-15, showed Mrs. Liveoak's body lying on her back with her legs bent at the knees and a portion of her stomach exposed. Her shoes had been removed but, otherwise, her body was fully clothed. These photographs show bruising on the back of her right hand and right knee and scratches on both her hands but do not contain any graphic images of open wounds or viscera.

The photographs of Mrs. Liveoak's vehicle and its contents, *i.e.*, State Exhibits 1-8, appear at 2 SCR at pp. 389-400 & 3 SCR at pp. 401-04. There are no graphic images in any of these photographs. There was nothing even remotely inflammatory about any of the photographs admitted during Petitioner's trial.

[96] 6 SCR at pp. R-590-91.

[97] 7 SCR at pp. R-619-23. The autopsy photographs, admitted as State Exhibits 29-33, appear at 3 SCR at pp. 438-47. The autopsy photographs likewise do not contain any graphic images or depictions of wounds or viscera.

> earring, which had come out or was taken out of her ear, implying some sort of struggle despite the testimony to the contrary; her daily planner, emphasizing for the jury that she had a life, she had plans on which she would now not be able to follow through, a package of brownie mix, meant to evoke her son's testimony that she was going to bake for a sick friend that day; and finally, some yarn, creating the image of Mrs. Liveoak as a kindly grandmother.

(Doc. # 1, at pp. 71-72).

Contrary to Petitioner's assertions, however, there was nothing the least bit graphic, gruesome, lurid, or inflammatory about any of the photographic evidence admitted during Petitioner's trial. The only injuries apparent on Mrs. Liveoak's body in the photographs showing her lying in her automobile trunk or at autopsy showed bruising and scratches to her hands. None of the photographs admitted showed Mrs. Liveoak's body nude, any exposed viscera, or the interior of any portion of her body. The photographs were necessary to demonstrate to the jury the extent of the victim's injuries and admissible under state evidentiary standards. *See, e.g., Smith v. State*, ___ So. 3d ___, ___, 2017 WL 1033665, *20 (Ala. Crim. App. 2017) (holding photographs which were not unduly gruesome or unfairly prejudicial admissible to distinguish between victim's injuries and postmortem animal and insect activity); *Gobble v. State*, 104 So. 3d 920, 963-64 (Ala. Crim. App. 2010) ("Autopsy photographs depicting the character and location of the wounds on the victim's body are admissible even if they are gruesome, cumulative, or relate to an undisputed matter."), *cert. denied* (Ala. Sept. 14, 2012), *cert. denied*, 133 S. Ct. 1808 (2013). The state trial court's admission without objection of all the photographic

evidence and videotape recordings showing the location and physical appearance of Mrs. Liveoak's body, her injuries, her vehicle, and her other possessions did not render Petitioner's capital murder trial fundamentally unfair.

Petitioner did not object to the admission of any of the photographic or videotaped evidence in question. The photographs were admissible and relevant to show (1) the isolated location in which her vehicle was abandoned by Petitioner, (2) the condition of her lifeless body when discovered (which contradicted some of the more self-serving aspects of Petitioner's post-arrest statement to police, *i.e.*, the medical examiner testified the bruising to her upper right arm was consistent with someone having grabbed her right arm with considerable force, refuting Petitioner's assertion that he never employed any force against Mrs. Liveoak), and (3) that Mrs. Liveoak had been the victim of a robbery and kidnaping in a manner consistent with Petitioner's statement that he abducted her after she exited a grocery store and took her credit cards, bank card, and wallet (*i.e.*, the items found inside her vehicle and trunk did not include her wallet, bank card, or credit cards but did include a grocery receipt and perishable groceries).

Contrary to the arguments underlying Petitioner's thirteenth claim, Petitioner was not entitled to have the trial court *sua sponte* exclude any and all visual evidence which either tended to show Mrs. Liveoak had once been alive or portrayed her in a sympathetic light. Even the admission of graphic photographic evidence rarely

renders a proceeding fundamentally unfair. *Baxter v. Thomas*, 45 F.3d at 1509; *Jacobs v. Singletary*, 952 F.2d 1282, 1296 (11th Cir. 1992). Petitioner confessed to abducting and robbing Mrs. Liveoak and locking her in the trunk of her car, which he admitted he abandoned in an isolated unshaded location on an asphalt parking lot in the middle of July in central Alabama. The admission of photographs and video showing the condition in which her lifeless body was discovered the day after Petitioner abandoned Mrs. Liveoak did not render Petitioner's trial fundamentally unfair. The photographic and videotaped evidence in question was not a crucial, critical, or highly significant factor to the jury's verdict at either phase of Petitioner's capital murder trial. Petitioner's thirteenth claim does not warrant federal habeas corpus relief under a *de novo* standard of review.

IX. VICTIM IMPACT EVIDENCE

A. The Claim(s)

In his tenth claim in his original petition, Petitioner argues the state trial judge improperly considered a letter from Mrs. Liveoak's daughter in which she pleaded with the court to impose a sentence of death (Doc. #1, at p. 66). Petitioner's brief on the merits furnished no argument or legal authorities in support of this claim (Doc. # 88). Despite that fact, the parties state in their Joint Report that there are two claims before the court addressing victim impact issues, *i.e.*, Petitioner's complaint about the alleged consideration of Mrs. Liveoak's daughter's letter and a complaint

about the admission at the punishment phase of trial of the testimony of Mrs. Liveoak's son, Larry Liveoak (Doc. # 56, at pp. 47-50).

B. State Court Disposition

In his appellant's brief, Petitioner argued the state trial court (1) erred in admitting victim impact testimony from Mrs. Liveoak's son and (2) improperly considered a letter written by Mrs. Liveoak's daughter asking the trial court to impose a sentence of death.[98] On direct appeal, the Alabama Court of Criminal Appeals held (1) Larry Liveoak's victim impact testimony at the punishment phase of Petitioner's capital murder trial was relevant to the jury's decision whether to recommend that the death penalty be imposed, and (2) there was no indication the trial court considered the letter written by Mrs. Liveoak's daughter, which was received by the trial court approximately two weeks *after* the court entered its sentencing order. *Dallas v. State*, 711 So. 2d at 1110. Petitioner failed to present any claims regarding victim impact evidence in his pro se state habeas corpus petition (*i.e.*, his Rule 32 petition).

C. AEDPA Standard of Review

Because petitioner filed his federal habeas corpus action after the effective date of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"),

[98] 10 SCR Tab 2, at pp. 48-51.

this Court's review of those petitioner's claims for federal habeas corpus relief which were disposed of on the merits by the state courts is governed by the AEDPA. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). Under the AEDPA standard of review, this Court cannot grant petitioner federal habeas corpus relief in this cause in connection with any claim that was adjudicated on the merits in state court proceedings, unless the adjudication of that claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000); 28 U.S.C. § 2254(d).

The Supreme Court has concluded the "contrary to" and "unreasonable application" clauses of 28 U.S.C. § 2254(d) (1) have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Under the "contrary to" clause, a federal habeas court may grant relief if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Brown v. Payton*, 544 U.S. at 141; *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) ("A state court's decision is 'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or it 'confronts a set of

facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'"). A state court's failure to cite governing Supreme Court authority does not, *per se*, establish the state court's decision is "contrary to" clearly established federal law: "the state court need not even be aware of our precedents, 'so long as neither the reasoning nor the result of the state-court decisions contradicts them.'" *Mitchell v. Esparza*, 540 U.S. at 16.

Under the "unreasonable application" clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. *Brown v. Payton*, 544 U.S. at 141; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). A federal court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *McDaniel v. Brown*, 558 U.S. 120, 132-33 (2010) ("A federal habeas court can only set aside a state-court decision as 'an unreasonable application of . . . clearly established Federal law,' § 2254(d) (1), if the state court's application of that law is 'objectively unreasonable.'"); *Wiggins v. Smith*, 539 U.S. at 520-21. The focus of this inquiry is on whether the state court's application of clearly established federal law was objectively unreasonable; an "unreasonable" application is different from a merely "incorrect" one. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under the AEDPA is not whether a federal court

believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold."); *Wiggins v. Smith*, 539 U.S. at 520; *Price v. Vincent*, 538 U.S. 634, 641 (2003) ("it is the habeas applicant's burden to show that the state court applied that case to the facts of his case in an objectively unreasonable manner").

As the Supreme Court has explained:

> Under the Antiterrorism and Effective Death Penalty Act, a state prisoner seeking a writ of habeas corpus from a federal court "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement."

Bobby v. Dixon, 132 S. Ct. 26, 27 (2011) (quoting *Harrington v. Richter,* 562 U.S. 86, 103 (2011)).

Legal principles are "clearly established" for purposes of AEDPA review when the holdings, as opposed to the dicta, of Supreme Court decisions as of the time of the relevant state-court decision establish those principles. *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) ("We look for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'"); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003). Under the AEDPA, what constitutes "clearly established federal law" is determined through review of the decisions of the United States Supreme Court, not the precedent of the federal Circuit Courts. *See Lopez v. Smith*, 135 S. Ct. 1, 2 (2014) (holding the AEDPA

prohibits the federal courts of appeals from relying on their own precedent to conclude a particular constitutional principle is "clearly established").

The AEDPA also significantly restricts the scope of federal habeas review of state court fact findings. 28 U.S.C. § 2254(d)(2) provides federal habeas relief may not be granted on any claim that was adjudicated on the merits in the state courts unless the state court's adjudication of the claim resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Wood v. Allen*, 558 U.S. 290, 301 (2010) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."); *Williams v. Taylor*, 529 U.S. at 410 ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law."). Even if reasonable minds reviewing the record might disagree about the factual finding in question (or the implicit credibility determination underlying the factual finding), on habeas review, this does not suffice to supersede the trial court's factual determination. *Wood v. Allen*, 558 U.S. at 301; *Rice v. Collins*, 546 U.S. 333, 341-42 (2006).

In addition, § 2254(e)(1) provides a petitioner challenging state court factual findings must establish by clear and convincing evidence that the state court's findings were erroneous. *Schriro v. Landrigan*, 550 U.S. at 473-74 ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual

findings unless applicants rebut this presumption with 'clear and convincing evidence.'"); *Rice v. Collins*, 546 U.S. at 338-39 ("State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'"); *Miller-El v. Dretke,* 545 U.S. 231, 240 (2005) ("[W]e presume the Texas court's factual findings to be sound unless Miller-El rebuts the 'presumption of correctness by clear and convincing evidence.'"); 28 U.S.C. §2254(e)(1). It remains unclear at this juncture whether § 2254(e)(1) applies in every case presenting a challenge to a state court's factual findings under § 2254(d)(2). *See Wood v. Allen*, 558 U.S. at 300 (choosing not to resolve the issue of § 2254(e)(1)'s possible application to all challenges to a state court's factual findings); *Rice v. Collins*, 546 U.S. at 339 (likewise refusing to resolve the Circuit split regarding the application of § 2254(e)(1)).

However, the deference to which state-court factual findings are entitled under the AEDPA does not imply an abandonment or abdication of federal judicial review. *See Miller-El v. Dretke*, 545 U.S. at 240 (the standard is "demanding but not insatiable"); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.").

D. Clearly Established Federal Law

In *Payne v. Tennessee*, 501 U.S. 808, 825-26 (1991), the Supreme Court held that (1) the admission of evidence of *the impact of a capital murder on the victim and his or her survivors* and (2) prosecutorial jury argument regarding same, are both constitutionally permissible at the punishment phase of a capital murder trial.

E. AEDPA Review

The Alabama Court of Criminal Appeals' rejections on the merits during Petitioner's direct appeal of Petitioner's complaints about (1) the admission of Larry Liveoak's victim impact testimony at the punishment phase of petitioner's capital murder trial and (2) the state trial court's alleged consideration of the letter written by Mrs. Liveoak's daughter were neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor based upon an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

Larry Liveoak's testimony at the punishment phase of Petitioner's capital murder trial consisted of statements focused on the impact of Mrs. Liveoak's death upon himself and his family. As such, the state appellate court reasonably concluded Larry Liveoak's punishment phase trial testimony was constitutionally permissible under the Supreme Court's holding in *Payne v. Tennessee*.

The state appellate court found, as a matter of fact, that the state trial court did not receive the objectionable letter from Mrs. Liveoak's daughter until approximately two weeks after it issued its sentencing order. Petitioner has alleged no specific facts, much less furnished clear and convincing evidence, showing the state trial court received the letter from Mrs. Liveoak's daughter prior to the date it issued its sentencing order. Under such circumstances, this court must defer to the state appellate court's factual finding. *Schriro v. Landrigan*, 550 U.S. at 473-74; *Rice v. Collins*, 546 U.S. at 338-39. Petitioner has failed to rebut the correctness of the state appellate court's factual finding. Petitioner's tenth claim does not warrant federal habeas corpus relief when viewed under the deferential standard of the AEDPA.

F. *De Novo* Review

Additionally, this court has conducted an independent review of Petitioner's complaints about the admission of Larry Liveoak's punishment phase trial testimony and the state trial court's alleged consideration of the letter written by Mrs. Liveoak's daughter. It concludes that neither complaint warrants federal habeas corpus relief relief under a *de novo* standard of review. Mr. Liveoak's punishment phase trial testimony was admissible under the standard announced in *Payne*. The admission of his punishment phase testimony did not render Petitioner's trial fundamentally unfair. There is no fact-specific allegation before the court, much less any clear and

convincing evidence, showing the state trial court ever received the letter from Mrs. Liveoak's daughter prior to the date it issued its sentencing order.

X. ALLEGEDLY FALSE TESTIMONY BY VENIRE MEMBERS

A. The Claim

In his fifteenth claim in his original petition, Petitioner argues he was denied his right to exercise his peremptory challenges in an intelligent manner when "several jurors failed to disclose crucial evidence despite direct and unambiguous questioning by the court" (Doc. # 1, at pp. 74-76).[99]

Petitioner included a similar set of complaints in his *pro se* state habeas corpus petition (*i.e.*, his Rule 32 petition).[100] The state habeas trial court summarily dismissed this claim.[101] Petitioner's brief in support of his federal habeas corpus

[99] More specifically, Petitioner alleges that (1) a venire member identified only as "A.B." "failed to reveal during voir dire examination that his brother had a severe crack addiction" and (2) another venire member identified only as "J.C." "failed to reveal that he had testified as a witness in more than one civil trial prior to being called for jury service" (Doc. # 1, at p. 75).

[100] 12 SCR (Revised) Tab 13-A, at pp. 99-102. Petitioner cited to only state law authorities in support of his analogous claim in his state habeas corpus proceeding.

[101] The state trial court's Order issued September 25, 2001, states that the trial court dismissed Petitioner's claim identified in Petitioner's *pro se* state habeas corpus petition as claims "II.B. through II.K." because those claims were procedurally defaulted from review under Rule 32. 13 SCR (Revised) Tab 14-A, at p. 45. Petitioner's complaint about allegedly false testimony by jury venire members was labeled claim "K" in his *pro se* state habeas corpus petition. 12 SCR (Revised) Tab 13-A, at pp. 99-102. The state trial court's Order issued October 25, 1999, summarily dismissed several of Petitioner's pro se claims without prejudice based on inadequate pleading and explained that Petitioner's assertions of jury misconduct failed to allege any newly discovered evidence sufficient to satisfy Rule 32. 15 SCR Tab 35, at p. 13. There is no evidence before this court establishing that Petitioner ever amended his *pro se* Rule 32 petition or otherwise

petition repeats the same conclusory assertions about the two unidentified venire members included in Petitioner's *pro se* state habeas corpus petition and Petitioner's original federal habeas corpus petition (Doc. # 88, at pp. 205-08).[102]

B. The Constitutional Standard

The only legal authorities presented by Petitioner in support of his analogous claim for state habeas corpus relief were state court authorities interpreting state law.[103] Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented. *Estelle v. McGuire*, 502 U.S. at 67-68; *Lewis v. Jeffers*, 497 U.S. at 780; *Pulley v. Harris*, 465 U.S. at 41.

The only federal authorities germane to Petitioner's fifteenth claim cited in Petitioner's original petition or brief on the merits are the Supreme Court's holdings

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furnished the state habeas court with any specific facts or evidence indicating any member of Petitioner's jury venire testified falsely during voir dire examination.

[102] Only one member of the jury venire who reached the group and individual voir dire stage had the initials "A.B.", *i.e.*, venire member 25. Two members of the jury venire had the initials "J.C.", *i.e.*, venire members 84 and 88. Petitioner does not offer any information from which this court can identify which of these two venire members Petitioner claims failed to raise his or her hand when the state trial judge asked the assembled jury venire members the following question: "Have any of you ever testified in a criminal trial or a civil trial or before the Grand Jury? Have you ever testified as any kind of witness before a jury in a criminal civil trial or to the Grand Jury?" 4 SCR at p. R-102. In response to the trial judge's questions about service as a trial witness or Grand Jury witness, venire members 16, 129, 10, 55, 13, 58, 120, and 35 all indicated on the record they had testified in various judicial proceedings. 4 SCR at pp. R-102-04. None of those venire members had the initial "J.C."

[103] 12 SCR (Revised) Tab 13-A. at pp. 99-02.

in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984), and *Williams v. Taylor*, 529 U.S. 420 (2000). The holdings in both cases will be examined in detail.

In *McDonough*, the federal trial court asked potential jurors in a products liability lawsuit whether any of them or their family had sustained any severe injury in an accident that resulted in any disability or prolonged pain and suffering.[104] One venire member who eventually became a juror did not respond to this question, which was addressed to the panel as a whole. After the trial concluded and the jury returned a verdict in favor of the plaintiffs, the defendant manufacturer filed a motion for permission to approach members of the jury, alleging "upon information and belief" that this juror's son may have been injured at one time, a fact which was not revealed during voir dire. After the District Court denied its initial motion, the defendant manufacturer filed a second motion and attached an affidavit from the father of the primary plaintiff who stated that, in the course of his duties as a Navy

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[104] More specifically, the federal District Court asked the jury venire the following question:

> "Now, how many of you have yourself or any members of your immediate family sustained any severe injury, not necessarily as severe as Billy, but sustained any injuries whether it was an accident at home, or on the farm or at work that resulted in any disability or prolonged pain and suffering, that is you or any members of your immediate family?"

McDonough, 464 U.S. at 550.

The Supreme Court assumed the venire member in question had not considered his son's broken leg to have been sufficiently serious to require an affirmative answer to this question. *McDonough*, 464 U.S. at 555.

recruiter, he had reviewed the enlistment application of the juror's son and that the applicant stated he had been injured in the explosion of a truck tire. The District Court granted the motion for permission to approach the juror to inquire about the injuries allegedly sustained by his son. The defendant moved for a new trial, citing, among other reasons, the District Court's initial denial of its motion to approach the juror. The District Court denied the motion for new trial. On appeal, the Tenth Circuit held the issue of the juror's good faith was irrelevant and reversed. It ordered a new trial. The Supreme Court noted that "jurors are not necessarily experts in English usage" and held "[t]o invalidate the result of a three-week trial because of a juror's mistaken though honest response to a question, is to insist on something closer to perfection than our judicial system can be expected to give." *McDonough*, 464 U.S. at 555. The Supreme Court concluded it was error for the Tenth Circuit to reverse without first permitting an inquiry by the District Court into harmless error and set forth the following standard for obtaining a new trial premised upon a venire member's failure to reveal information: "We hold that to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and *then further show that a correct response would have provided a valid basis for a challenge for cause*." *McDonough*, 464 U.S. at 556 (Emphasis added)

In *Williams v. Taylor*, a state prisoner convicted of capital murder and sentenced to death challenged his conviction based, in part, on allegations of jury bias and prosecutorial misconduct, arising from a venire member's failure to respond to questions asking whether the venire members were related to people likely to be called to testify at trial or had ever been represented by any of the attorneys involved in the case. More specifically, the petitioner alleged, and *presented the federal District Court with affidavits* establishing the venire member who eventually served as the jury foreperson was the ex-spouse of the prosecution's lead-off witness and a former client of one of the prosecutors.[105] The Supreme Court held the petitioner

[105] The Supreme Court's opinion describes the operative facts as follows:

Petitioner's claims are based on two of the questions posed to jurors by the trial judge at *voir dire*. First, the judge asked prospective jurors, "Are any of you related to the following people who may be called as witnesses? Then he read the jurors a list of names, one of which was "Deputy Sheriff Claude Meinhard." Bonnie Stinnett, who would later become the jury foreperson, had divorced Meinhard in 1979, after a 17-year marriage with four children. Stinnett remained silent, indicating the answer was "no." Meinhard, as the officer who investigated the crime scene and interrogated Cruse, would later become the prosecution's lead-off witness at trial.

After reading the names of the attorneys involved in the case, including one of the prosecutors, Robert Woodson, Jr., the judge asked, "Have you or any member of your immediate family ever been represented by any of the aforementioned attorneys?" Stinnett again said nothing despite the fact Woodson had represented her during her divorce from Meinhard. App. 483, 485.

In an affidavit she provided in the federal habeas proceedings, Stinnett claimed '[she] did not respond to the judge's [first] question because [she] did not consider [herself] 'related' to Claude Meinhard in 1994 [at *voir dire*] . . . . Once our marriage ended in 1979, I was no longer related to him." *Id.*, at 627. As for Woodson's earlier representation of her, Stinnett explained as follows:

> "When Claude and I divorced in 1979, the divorce was uncontested and Mr. Woodson drew up the papers so that the divorce could be completed. Since neither Claude nor I was

had presented sufficient evidence to warrant an evidentiary hearing in the District Court on the issues of whether the juror in question was biased and whether the prosecution's silence "so infected the trial as to deny due process." *Williams v. Taylor*, 529 U.S. at 441-42. The Supreme Court emphasized the remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias. *Id.*, 529 U.S. at 444.

C. *De Novo* Review

Unlike the party seeking a new trial in *McDonough* and the federal habeas petition in *Williams v. Taylor*, Petitioner did not support his conclusory assertions before the state habeas court with any fact-specific allegations, affidavits, or other evidence showing any of the members of his jury venire actually testified falsely during individual voir dire examination. Petitioner likewise fails to allege any specific facts before this court, much less furnish any affidavits based upon personal knowledge or other evidence, showing any of the jury venire members whom he

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> contesting anything, I didn't think Mr. Woodson 'represented' either one of us." *Id.*, at 628.
>
> Woodson provided an affidavit in which he admitted "[he] was aware that Juror Bonnie Stinnett was the ex-wife of then Deputy Sheriff Meinhard and [he] was aware that they had been divorced for some time." *Id.*, at 629. Woodson stated, however, "[t]o [his] mind, people who are related only by marriage are no longer 'related' once marriage ends in divorce." *Ibid.* Woodson also 'had no recollection of having been involved as a private attorney in the divorce proceedings between Claude Meinhard and Bonnie Stinnett." *Id.*, at 629-630. He explained that "[w]hatever [his] involvement was in the 1979 divorce, by the time of trial in 1994 [he] had completely forgotten about it." *Id.*, at 630.

Williams v. Taylor, 529 U.S. at 440-41.

alleges failed to accurately respond to the trial judge's questions directed to the assembled venire members actually failed to raise their hand when asked pertinent questions. Instead, with regard to the first of these venire members, Petitioner points to a series of questions the state trial court directed to the jury venire as a group and alleges, without any explanation, that venire member "A.B." failed to disclose he had a brother with a crack addiction. Petitioner offers no explanation for how he or his federal habeas counsel acquired personal knowledge of the fact that venire member A.B.'s brother was addicted to crack cocaine as of the date of Petitioner's 1995 capital murder trial. Nor does Petitioner or his federal habeas counsel allege any specific facts showing either of them has ever possessed personal knowledge of any facts showing either (1) venire member "A.B." was personally aware at the time of Petitioner's 1995 trial that venire "A.B." had a brother with a crack addiction, (2) venire member "A.B." understood the judge's series of ambiguous questions during group voir dire as asking whether he had a relative who had experienced a drug problem, or (3) the factual or evidentiary basis for Petitioner's assertion that venire member "A.B." had a brother who was addicted to crack cocaine in 1995.

The parties in *McDonough* and *Williams v. Taylor,* who sought new trials based upon allegations that venire members failed to respond truthfully to questions during voir dire, furnished the responsible reviewing courts with affidavits from the venire members in question. Petitioner did not present the state habeas court, and

does not present this court, with any affidavits from individuals possessing personal knowledge of relevant facts showing that either (1) venire member "A.B." actually had a brother who was addicted to crack cocaine at the time of Petitioner's 1995 capital murder trial or (2) venire member "J.C." testified as a witness in multiple civil trials prior to being called to serve on Petitioner's jury. Moreover, Petitioner's conclusory assertions of concealed information by these poorly identified venire members fail to satisfy the standard set forth in *McDonough* for obtaining a new trial, *i.e.*, a showing not only that a juror failed to answer a material question on voir dire but that a correct response would have provided a valid basis for a challenge for cause. *McDonough*, 464 U.S. at 556. Neither the fact that a venire member had a relative with a crack addiction nor the fact that a venire member had previously testified in multiple civil proceedings would, standing alone, have justified a valid challenge for cause. Because Petitioner has failed to furnish any fact-specific allegations or any affidavits supporting his conclusory assertions of juror bias, he is not entitled to an evidentiary hearing under the standard set forth in *Williams v. Taylor*.[106]

[106] Moreover, Petitioner's conclusory assertion that, if his trial counsel had known that venire member "J.C." had previously testified multiple times in judicial proceedings, Petitioner's defense team would have questioned "J.C." about same is not supported by this court's independent review of the record from the voir dire examination of Petitioner's venire members. As explained above in note 102, *supra*, eight members of Petitioner's jury venire responded affirmatively when asked by the trial judge whether they had ever testified in a judicial proceeding. 4 SCR at pp. R-102-04. Petitioner did not ask seven of those eight venire members any questions about their prior service as witnesses in judicial proceedings. See 4 SCR at pp. R-128-36 (voir