PETITION
APPENDIX

APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12133

D.C. Docket No. 5:16-cv-00473-RDP

JAMES EDWARD BARBER,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

(June 25, 2021)

Before JILL PRYOR, GRANT and BRANCH, Circuit Judges.

PER CURIAM:

In this capital case, James Edward Barber appeals the district court's denial of his federal habeas petition. Barber was sentenced to death in Alabama for the murder of his erstwhile girlfriend's elderly mother. Following an unsuccessful direct appeal and collateral proceedings in the Alabama state courts, Barber filed a federal habeas petition in the United States District Court for the Northern District of Alabama; the district court denied the petition. Barber appeals the rejection of his petition, contending that his trial counsel were constitutionally ineffective in investigating and presenting to the jury a case in mitigation of the death penalty. After a thorough review of the briefing and the record, and with the benefit of oral argument, we affirm the denial of Barber's petition.

I.

Barber was convicted in Alabama of murder that was made capital because it was committed during a robbery. *See Barber v. State*, 952 So. 2d 393, 400 (Ala. Crim. App. 2005). A jury voted 11 to 1 to recommend a death sentence, and the trial court accepted the recommendation. *Id.* For purposes of this appeal, we assume trial counsel performed deficiently and that our review of prejudice to Barber is *de novo*. Because we make these "simplifying assumptions in favor of" Barber, *Castillo v. Fla., Sec'y Dep't of Corr.*, 722 F.3d 1281, 1283 (11th Cir. 2013), we recount only those facts from Barber's trial, sentencing, and postconviction proceedings that are necessary to decide this appeal.

A. Facts Elicited at Trial

The trial court's summary of facts, which the Alabama Court of Criminal Appeals (CCA) adopted on direct appeal, was as follows:

> Dorothy Epps was seventy-five years old at the time of her death, weighed approximately 100 pounds, and was 5 feet 5 inches tall. She was murdered on or about May 20th or May 21st, 2001, at her home in Harvest, Alabama.
>
> The Defendant knew Mrs. Epps during her lifetime, had done repair work at the Epps home, and had had a social relationship with one of Mrs. Epps' daughters. There was no evidence of a forced entry by the Defendant into the Epps home, and it is more likely than not that the Defendant gained access to the home easily because of his acquaintance with Mrs. Epps.
>
> Based upon the physical evidence presented including photographs of Mrs. Epps, before and during the autopsy, photographs of the area of the home where Mrs. Epps' body was found, and based upon the videotaped confession of the Defendant, the Defendant first struck Mrs. Epps in the face with his fist, and at some point thereafter, obtained a claw hammer that he used to cause multiple blunt force injuries to Mrs. Epps which caused her death.
>
> Dr. Joseph Embry, a medical examiner with the Alabama Department of Forensic Sciences, testified as to his findings from the autopsy he performed on May 23rd, 2001.
>
> Dr. Embry's examination of the body of Dorothy Epps showed injuries that he classified in several different categories: bruises, cuts and fractures, bleeding over the brain, multiple injuries in hand and arms, rib fractures and bruising in the front of her body, and bruising and rib fractures in the back of the body.
>
> Dr. Embry found evidence of nineteen different lacerations in the head and seven fractures in the head or skull, injuries to the neck and mouth and left eye caused by blows to Mrs. Epps by the Defendant's

> fists, and her tongue was bruised and injured from a blow or blows to the head.
>
> Numerous defensive wounds were found by Dr. Embry, which were obviously inflicted upon Mrs. Epps in her effort to try to ward off the blows. She had bruising in her left palm and forearm, and bruising and injuries to the backs of her hands.
>
> Mrs. Epps also suffered abdominal and lower chest bruising and she had fractures of her ribs in those areas. The wounds and injuries suffered by Mrs. Epps were consistent with those that would have been inflicted with a claw hammer, according to Dr. Embry.
>
> Based upon his examination and his experience and training, Dr. Embry testified that the cause of death of Mrs. Epps was multiple blunt force injuries as depicted and described in his testimony, including the photographs that were admitted into evidence.
>
> It is obvious from the testimony and the photographs that the injuries to Mrs. Epps, inflicted by the Defendant with a claw hammer, occurred over several areas of the part of the house where she was found. It is also clear from the evidence presented and from the photographs that Mrs. Epps was at times facing her attacker, that she was aware of what was happening at the hands of the Defendant. It is also clear that she made efforts to protect herself and get away from the blows being inflicted by the Defendant, and that she suffered great pain and mental anguish at the hands of the Defendant as he was attempting to inflict the blows with the claw hammer that ultimately resulted in her death.
>
> Dr. Embry also testified unequivocally that Mrs. Epps would have been conscious when she received the defensive wounds and injuries as depicted in the photographic evidence.

Barber, 952 So. 2d at 401–02. The jury also heard "that there were blood spatters from Mrs. Epps' wounds all around the area where she was found, that there was a good deal of blood on the floor, walls, furniture, and ceiling in the area where she was found." *Id.* at 402. And the jury heard that there were bloody footprints on

Epps' back. *Id.* at 403. Investigators discovered a bloody palm print at the scene, and a latent print examiner from the Huntsville Police Department who examined the print testified that the print belonged to Barber. *See id.* at 402.

Upon his arrest, Barber confessed, "admitting that he struck Mrs. Epps with a claw hammer, grabbed her purse, and ran out of the house." *Id.* He told investigators he had been using cocaine all day on the day of the murder, did not plan to kill Epps, and was remorseful for having done so. *Id.* at 404–05. The jury saw a videotape of the confession.

The jury found Barber guilty. *See id.* at 400.

B. Sentencing Proceedings

At the sentencing phase, the State called two witnesses to testify. Epps' husband of 52 years, George Epps, testified that his wife's murder was "absolutely devastating" to his family. Doc. 15-12 at 10–12.[1] Investigator Dwight Edger, who took Barber's confession and investigated the crime, testified that Epps' death was especially heinous, atrocious, and cruel as compared to the approximately two dozen other capital cases he had been involved in. He told the jury he believed Barber "took up close and personal a hammer and slaughtered this victim repeatedly with blows to her body for no other reason than to take what small amount of money he could get to purchase drugs with." *Id.* at 17.

[1] "Doc." numbers refer to the district court's docket entries.

Defense counsel presented four witnesses in mitigation. Barber's brother and mother testified that Barber was a loving family member who began using drugs and alcohol at an early age, around 12 or 13. A minister who worked at the jail testified that Barber had become a Christian and was an active participant in worship service. He testified that others incarcerated in the jail looked up to Barber.

Dr. Marianne Rosenzweig, a clinical and forensic psychologist, testified as an expert witness. Rosenzweig reviewed investigative and forensic materials from the case, interviewed Barber for about 3.5 hours, and interviewed five other people: Barber's mother, two brothers, former employer, and an official at the jail where Barber was housed. Rosenzweig testified about Barber's childhood, adolescence, and adulthood; his relationship with cocaine, his substance abuse diagnoses, and the behavioral effects of his cocaine use; the effect his cocaine use had, in her opinion, on the murder; and his adjustment to a carceral environment.

Of Barber's childhood, Rosenzweig testified that he was the fifth of seven children whose parents remained married. She testified that the family lived in an upper working class neighborhood and that Barber's parents "were good parents," although "with seven children . . . the children often don't get as much individual attention." Doc. 15-12 at 36. Rosenzweig reported that Barber "had basically a happy childhood with one exception, that he was overweight when he was a child

and he was teased a lot by other kids," resulting in low self-esteem. *Id.* Barber made "above average grades" in school and only got in "minor kinds" of trouble at home. *Id.* at 37.

Of Barber's adolescence, Rosenzweig testified that he began to experiment with marijuana around age 13, started using "any kind of pills that he could get his hands on" by age 15 or 16, and was smoking marijuana daily by age 16 or 17. *Id.* In her opinion, Barber was biologically predisposed to substance abuse. She cited a "strong family history of substance abuse problems" and noted that of the seven Barber children, five had problems with substance usage at some point or another. *Id.* at 60. Rosenzweig reported that Barber "started to hang out with the kids who could be described as a partying-type crowd, who used alcohol, drugs," and that he quit school in 12th grade to move to Florida to work construction with one of his brothers. *Id.* at 37–38.

Of his adulthood leading up to the crime, Rosenzweig testified that Barber first used cocaine around age 20 and started using it "quite heavily" when he began making good money at his job. *Id.* at 41. Around this time, he stopped using marijuana and primarily used alcohol and cocaine. Although he was known for his good demeanor "when he was not high on substances," *id.* at 39, when he was high, his personality changed—"obnoxious was the word [she] heard over and over again," *id.* at 42. He had romantic relationships, but they fell apart because of his

substance abuse. He had become somewhat violent with family members, once punching his younger brother and once punching his 13-year-old nephew in the back when his nephew commented that he was staggering. He was arrested for slapping Liz Epps, the victim's daughter. Nonetheless, Rosenzweig reported, Barber maintained a loving relationship with his parents and cared for them when his father was ill with cancer.

Rosenzweig reported that Barber would sometimes "stay high for about three, four days" with little sleep. *Id.* at 41. Most of the money he made went to drugs, and he often stole or borrowed money from friends to buy drugs. He used cocaine heavily for about 10 years, was sober for about a year, and then relapsed after an injury that led him from pain pills back to cocaine. At the time of Epps' death, Rosenzweig reported, Barber was using "about three to four hundred dollars' worth of crack cocaine a week and had also resumed his use of alcohol" a few weeks earlier. *Id.* at 46.

Rosenzweig opined that Barber qualified for the diagnoses of cocaine abuse and alcohol abuse and that he probably met the diagnoses for cocaine and alcohol dependency. She discussed the effects of large amounts of cocaine, including anxiety, agitation, irritability, confusion, and paranoia (possibly accompanied by hallucinations). She also discussed the effects of cocaine withdrawal, which she said produced similar symptoms. And she discussed the behavioral effects of

chronic crack cocaine use, including paranoia, impaired thinking, and "[m]oral degradation," which includes stealing and culminates in a "total declining from the person they were," essentially, "rock bottom." *Id.* at 55–56. This "rock bottom," Rosenzweig testified, is characterized by suicidal ideation, loss of relationships, "intense paranoia," and "[b]izarre behavior." *Id.* at 56. Rosenzweig opined that Barber was at rock bottom when he killed Epps.

Rosenzweig testified further that she had knowledge of similar crimes coinciding with withdrawal from crack cocaine in which the person "is only responding to those centers in what we call the primitive brain," "reacting wildly" and, in the case of homicides, "overkill[ing] the victim." *Id.* at 59. In her opinion, Barber's addiction played a role in Epps' death. She believed that Barber "probably was just so out of control and reacting so wildly that he did not realize what he was doing, much less . . . realize the ultimate impact of his actions, that he would in fact kill her or hurt her." *Id.* at 68–69.

Lastly, Rosenzweig testified that Barber had adjusted well while incarcerated. "[I]n a prison environment, presuming he would not have access to substances," Rosenzweig had "every expectation that [Barber] would continue to be a model prisoner and would pose no risk to other inmates or to the correctional staff." *Id.* at 63.

The jury recommended a death sentence by a vote of 11 to 1. The trial court adopted the jury's recommendation and imposed a death sentence, finding two aggravating circumstances: the murder was committed during a robbery and was especially heinous, atrocious, or cruel.

C. Direct Appeal and Postconviction Proceedings

The CCA upheld Barber's conviction and sentence on direct appeal. *See Barber*, 952 So. 2d at 393, 464, *cert. denied*, 549 U.S. 1306 (2007). Barber timely filed a state postconviction motion under Alabama Rule of Criminal Procedure 32, which challenged his conviction and sentence. As relevant to this appeal, Barber claimed that his trial counsel rendered ineffective assistance in failing to investigate and present an adequate case in mitigation of the death penalty. The Rule 32 court granted him an evidentiary hearing, and he presented testimony from 10 witnesses, including Barber's lead trial counsel and investigator, Rosenzweig, family members, a friend, an expert in psychopharmacology and addiction, an expert in clinical psychology and forensic psychology and assessment, and Barber himself.[2]

[2] Co-counsel in Barber's case died about a year after trial, before the evidentiary hearing.

Because we assume for purposes of analyzing Barber's claim under *Strickland v. Washington*, 466 U.S. 668 (1984), that trial counsel performed deficiently, we do not recount testimony that went only to deficient performance, including that of trial counsel, the defense investigator, and Rosenzweig.

Family members and a friend testified that Barber grew up in a house with little oversight or structure. They testified that Barber was surrounded by "bad influences," including an older brother and brother-in-law who had problems with addiction. Doc. 15–64 at 146. They testified that several members of the family had mental health issues, including depression, severe anxiety, and substance abuse disorders. Barber's sister testified that Barber had once attempted suicide. Barber testified to his drug and alcohol use, which started around age 12 and intensified (except for a brief period of relative sobriety) until the murder.

Postconviction counsel's experts testified about the effects of cocaine use, withdrawal, and addiction, as well as risk factors for cocaine addiction. Psychopharmacology and addiction expert William Alexander Morton, Jr., testified that addiction is a "brain disease," Doc. 15-65 at 107, and that people who use crack cocaine "are mildly violent to extremely violent," *id.* at 115. Morton testified that Barber's videotaped confession was "an incredible . . . video of addiction" in that it showed memory impairment and impulsivity. *Id.* at 122.

Clinical psychology and forensic psychology and assessment expert Dr. Karen Lee Salekin testified that Barber's background, which she reviewed extensively, contained "a lot of risk factors [for addiction] throughout the early child development teen years into adulthood and very few protective factors." *Id.* at 164. Community and school risk factors included the high availability of drugs

and alcohol in his community, community norms that supported substance use, community economic deprivation, a family history of substance abuse, a family history of criminality and mental illness, lack of family cohesion, detached parenting, and lack of academic success. Barber's individual risk factors included "unchecked defiance at [an] early age," "influence of peer group," "favorable attitude to problem behaviors," and "early initiation of problem behavior," including first use of alcohol at only eight years of age. Doc. 15-66 at 11–15. Salekin testified that Barber had symptoms of depression, including one suicidal "gesture" and one attempt. *Id.* at 17. Of protective factors in Barber's history, Salekin testified that "there aren't many and they weren't strong." *Id.* at 21. The risk factors, Salekin testified, "were far more powerful" than the "few protective factors." *Id.* at 22–23.

After the evidentiary hearing, the Rule 32 court denied relief. Barber appealed to the CCA, which affirmed. As to his ineffective assistance of counsel claim, the CCA concluded that Barber failed to show his trial counsel performed deficiently or that any deficiency prejudiced him. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (explaining that, to establish ineffective assistance of counsel, the defendant "must show that counsel's performance was deficient" and "that the deficient performance prejudiced the defense"). The Alabama Supreme Court denied Barber's petition for a writ of certiorari.

D. Federal Habeas Proceeding

After he exhausted his state appeals, Barber filed a petition for a writ of habeas corpus in federal district court, raising several claims including his ineffective assistance of counsel claim. The district court denied Barber relief and declined to issue a certificate of appealability ("COA"). This Court granted Barber a COA on his ineffective assistance of counsel claim only.

II.

"When reviewing a district court's grant or denial of habeas relief, we review questions of law and mixed questions of law and fact *de novo*, and findings of fact for clear error." *Reaves v. Sec'y, Fla. Dep't of Corr.*, 717 F.3d 886, 899 (11th Cir. 2013) (internal quotation marks omitted). An ineffective assistance of counsel claim "presents a mixed question of law and fact that we review *de novo*." *Pope v. Sec'y, Fla. Dep't of Corr.*, 752 F.3d 1254, 1261 (11th Cir. 2014).

Because the CCA decided Barber's ineffective assistance of counsel claim on the merits, we must review that court's decision under the highly deferential standards set by Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Wilson v. Sellers*, 138 S. Ct. 1188, 1191–92 (2018). AEDPA bars federal courts from granting habeas relief to a petitioner on a claim that was adjudicated on the merits in state court unless the relevant state court's adjudication:

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

28 U.S.C. § 2254(d). If we decide that the state court's decision was contrary to or involved an unreasonable application of clearly established precedent or was based on an unreasonable determination of the facts in light of the record, we are "unconstrained by § 2254's deference and must undertake a *de novo* review of the record." *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1260 (11th Cir. 2016) (internal quotation marks omitted).

III.

Barber claims that his trial counsel were ineffective in failing to investigate and present any evidence regarding Barber's mental health problems, negative role models, and parental neglect, and in failing to adequately investigate and present evidence about the extent and severity of Barber's substance abuse problems. Under *Strickland*, 466 U.S. at 686, a defendant has a Sixth Amendment right to effective assistance of trial counsel. Counsel renders ineffective assistance, warranting vacatur of a conviction or sentence, when his performance falls "below an objective standard of reasonableness," taking into account prevailing professional norms, and when "there is a reasonable probability that, but for

counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 688, 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

We assume for present purposes that trial counsel's performance was deficient. *See Knight v. Fla. Dep't of Corr.*, 958 F.3d 1035, 1046 (11th Cir. 2020) ("We think it simplest and most straightforward to start, in this case, from the other end of the *Strickland* standard. For purposes of our analysis, we will simply assume (without deciding) that [counsel's] representation fell below an objective standard of reasonableness sufficient to establish deficient performance, and focus our assessment on the prejudice prong." (internal quotation marks and citation omitted)). We also assume that the CCA's prejudice determination was based on an unreasonable application of clearly established law, and thus AEDPA deference is not owed.[3] *See Castillo*, 722 F.3d at 1283. We do so because even under *de*

[3] Although we make this assumption, we note that the proposition is likely true: the CCA appears to have applied standards contrary to *Strickland* in assessing both prongs of Barber's ineffective assistance of counsel claim.

As to deficient performance, the CCA contrasted "counsel's complete failure to conduct a mitigation [investigation]," where a deficient performance finding would be "likely," and "counsel's failure to conduct an adequate investigation where the presumption of reasonable performance is more difficult to overcome." Doc. 15-68 at 23. The court explained, "[t]he cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been *limited to* those situations in which defense counsel have *totally failed* to conduct such an investigation." *Id.* (emphasis added). Although *Strickland* establishes a presumption of reasonable performance, that presumption does not preclude relief when there was some investigation. *See Strickland*, 466 U.S. at 689–91.

On prejudice, the CCA said "the focus is on whether the sentencer *would have concluded* that the balance of aggravating and mitigating circumstances did not warrant death," Doc. 15-68

novo review Barber cannot demonstrate that counsel's failure to investigate and present mitigating evidence prejudiced his defense.

"In evaluating prejudice, our task is to review the new evidence presented by [Barber] and then 'reweigh the evidence in aggravation against the totality of available mitigating evidence.'" *Knight*, 958 F.3d at 1046 (quoting *Cullen v. Pinholster*, 563 U.S. 170, 198 (2011)). After review of the evidence Barber presented at his Rule 32 hearing as well as the mitigating evidence the jury heard and a reweighing of the totality of that evidence against the aggravating evidence, we conclude that Barber has not shown prejudice.

Much of the evidence introduced at Barber's Rule 32 hearing "fill[ed] in some of the details of [Barber's] drug use," but it did not "add anything truly new" given Rosenzweig's testimony at the penalty phase of Barber's trial about the effects of addiction on his life and commission of this crime. *Id.* at 1047. Although the details and perspectives about Barber's drug use—particularly from Morton and Salekin—undoubtedly have mitigating value, they do not add substantial heft to Barber's case in mitigation because the jury learned much of it from Rosenzweig. *Id.*; *see also Dallas v. Warden*, 964 F.3d 1285, 1308–11 (11th Cir. 2020) (explaining that such cumulative evidence, though it "substantiates,

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at 24 (internal quotation marks omitted), which is a higher standard than *Strickland*'s "reasonable probability" of a different result, *see Strickland*, 466 U.S. at 694.

supports, or explains" testimony provided at trial, has limited value (alterations adopted) (internal quotation marks omitted)).

Some of the evidence introduced at Barber's Rule 32 hearing was new evidence that the jury never heard: Barber had a family history of mental health issues (including his own battles with depression and suicidal gestures or attempts), was exposed early to negative role models, and was subject to a detached parenting style.[4] Although this new evidence "paints a darker picture" of Barber's background, *Dallas*, 964 F.3d at 1311, it does not, when combined with the other mitigating evidence, raise a reasonable probability that the jury would not have recommended a sentence of death. The aggravating circumstances in this case are simply too great to permit us to find a probability of a different outcome had the jury heard what Barber presented at his Rule 32 hearing. The jury heard that Barber took advantage of his friendly relationship with a frail, elderly woman to gain access to her home and then brutally beat her to death, first with his fists and then with a hammer. The jury heard that Epps moved about the house during the attack and tried to defend herself from Barber's onslaught with nothing but her bare hands. Jurors heard that Epps had wounds all over her body and Barber's

[4] Arguably the jury heard some about Barber's parents' child-rearing: Dr. Rosenzweig testified that because of the number of children in the house, each child did not get a lot of individual attention. We assume for purposes of this opinion that evidence at postconviction about the complete lack of household discipline and oversight was new.

footprint on her back, and they saw gruesome photographs of her injuries. They heard that Barber stole Epps' purse in the hopes it would contain money he could use to buy drugs. Put plainly, "[t]his is not a case where the weight of the aggravating circumstances or the evidence supporting them was weak." *Sochor v. Sec'y, Dep't of Corr.*, 685 F.3d 1016, 1030 (11th Cir. 2012) (internal quotation marks omitted). It is a case where "the disparity between what was presented at trial and what was offered collaterally" was insufficiently great to shift "the balance between the aggravating and mitigating evidence." *Dallas*, 964 F.3d at 1312.

In sum, "[i]n the face of the horrific nature of [Barber's] crime and the brutality of [Epps'] death, and because the jury already knew much about [Barber's] life, there is no reasonable probability that, had the jury known the limited additional details presented in postconviction, they would have spared his life." *Id.* at 1312–13. We affirm the denial of relief on Barber's ineffective assistance of counsel claim.

AFFIRMED.

APPENDIX B

FILED
2019 Mar-08 PM 04:14
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

JAMES EDWARD BARBER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 5:16-cv-00473-RDP**
	)	
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

In capital litigation, the stakes are high. Fortunately, counsel who represent capital defendants are generally (and admirably) committed to their chosen work. It is hard work; lawyers who represent capital defendants feel the full weight of the world (or, at least, their client's life and future) on their shoulders. They must pour heart, soul, and health (not to mention resources) into their trade. And, when they are unsuccessful (as they often are), they realize that every move they make will be second guessed. That is the way it is and must be, because Congress and the courts have established a rigorous framework to review counsel's conduct to ensure counsel provided constitutionally adequate representation. Additionally, the federal habeas statute requires federal courts to review state courts' handling of a prisoner's conviction, sentence, and postconviction claims. Before the state can "wield the sword," as a general rule, that type of review must occur. This case is no different. Petitioner James Edward Barber has presented a number of claims which call upon this court to review both his trial counsel's and the state courts' handling of his trial, appeal, and postconviction proceedings.

One of Barber's claims presents a particularly interesting question: What happens when counsel's performance is limited not by the lawyer's unreasonable deficiency but, rather, by a

client's own choices? The Supreme Court has spoken directly to that scenario. And, that is the circumstance presented by the first of Barber's claims in this case. During his pretrial proceedings and at his trial, Barber insisted he did not kill Dorothy Epps. In fact, he did. There is no question about that. After his trial and direct appeal, he admitted it. But earlier, in the trial court, Barber insisted he was innocent and refused to permit his lawyers to present any defense that would have involved admitting he killed Epps.

Not until after his conviction and death sentence became final did Barber change his tune. He now says he killed Epps, but there were mitigating circumstances involved. He was intoxicated when he killed her and did not kill her during a robbery. Both these defenses had the potential, if believed by the jury, to spare Barber's life. But, they were never asserted. Barber says they should have been. He claims that, even though he insisted at the time that his lawyers not present those defenses, their failure to present them violated his constitutional right to effective assistance of counsel.

Barber makes a number of other claims, too. He raises a *Strickland* claim based on his counsel's penalty-phase performance, challenges certain rulings of the state trial and appellate courts, and makes claims based on the prosecution's conduct and other circumstances of his trial. Accordingly, he has petitioned for a writ of habeas corpus under 28 U.S.C. § 2254 challenging his 2003 capital murder conviction and death sentence in Alabama state court. (Doc. # 1). The parties have fully briefed Barber's claims. (Docs. # 1, 20, 23). After careful consideration of each of his claims in light of the record, the pleadings, and the applicable provisions of 28 U.S.C. § 2254, the court concludes that Barber has not shown he is entitled to habeas relief. Accordingly, and for the reasons stated below, his petition for a writ of habeas corpus is due to be denied.

Table of Contents

I. Background and Procedural History

To discuss the issues raised by Barber's federal habeas petition, the court need only briefly recount the crime at issue. Barber was convicted and sentenced to death in Madison County, Alabama, for the murder of Dorothy Epps during the course of a first-degree robbery. *See* Ala. Code § 13A-5-40(a)(2); *Barber v. State*, 952 So. 2d 393, 400 (Ala. Crim. App. 2005). Barber knew Epps before killing her. *Barber*, 952 So. 2d at 401. He previously had a romantic relationship with Epps' daughter, and he had performed repair work at the Epps home in the past. *Id.* at 401, 405. One weekend in May 2001, Barber entered Epps' home while she was alone and beat her to death. *Id.* at 401-05. There was no evidence of forced entry at the Epps home, making it more likely than not that Barber gained access to the home easily because of his acquaintance with Epps. *Id.* at 401. The evidence at trial showed that Barber first struck Epps in the face with his fist and then inflicted multiple blunt-force injuries using a claw hammer. *Id.* The medical examiner who performed Epps' autopsy found evidence of nineteen different lacerations and seven fractures in the head or skull caused by the blows. *Id.*

Crime scene investigators discovered a large amount of Epps' blood all around the area she was found, including the floor, walls, furniture, and ceiling. *Id.* at 402. They also found a bloody palm print on a counter in the area where Epps was found. A latent print examiner with the Huntsville Police Department later compared the bloody print to the known palm print of Barber and testified unequivocally that the palm print found on the countertop was Barber's. *Id.* at 402.

State authorities took Barber into custody on May 24, 2001, less than one week after the murder. *Id.* at 403. Investigator Dwight Edger interviewed Barber three times between May 23 and May 25, 2001, and each time Barber waived his *Miranda* rights and agreed to speak with

Edger. *Id.* at 404. In the first two interviews Barber denied any knowledge of the crime, but in the third interview he confessed to the crime after Edgar informed him that officers had recovered his bloody palm print from the crime scene. *Id.* at 404-05.

During the third interview, Barber became very emotional and stated that "he had been using cocaine all day" on the day of the murder and that "he was really 'f—ed up' and did not plan to kill the victim." *Id.* at 404. He went on to describe Epps' killing in some detail:

> And I was going over to see [Epps] . . . I stopped over there and was going to talk to her about the shutters and all of a sudden I just figured, well, you know, she's probably got a few bucks, you know, I should ask her for some money, and I just turned around and hit her. Something came over me, I just BOOM—turned around and hit her.

(Vol. 23 at 1238). Barber further explained in the third interview that he:

> hit the victim with his hands and then with a hammer; that he threw the hammer in the trash and took the trash bag; that he took the victim's purse because it looked good and not to rob her; and that he threw the bag, purse, and his shoes in a dumpster at a carwash.

Barber, 952 So. 2d at 405. During the third interview, Barber estimated that he killed Epps around 7:00 pm on Saturday, May 19, 2001. *Id.*

Barber was tried for capital murder in Madison County Circuit Court. His trial began on December 9, 2003. (State Court Record, Vol. 8, Tab R-10 at 407).[1] On December 15, 2003, the jury found Barber guilty of murdering Epps during the course of a robbery. (Vol. 11 at 1189). On December 16, 2003, the jury recommended by a vote of eleven to one that Barber be sentenced to death. (Vol. 12, Tab R-32 at 1330). On January 9, 2004, the trial court accepted the recommendation of the jury and sentenced Barber to death. (Vol. 12, Tab R-34 at 1361; Vol. 12, Tab R-35 at 270).

[1] References to the state court record are designated "(Vol. _ at _)." The court will list any page number associated with the record by reference to the number in the upper right hand corner of the page, if available. Otherwise, the page number will correspond with the number at the bottom of the page. Additionally, citations to the record will generally include an easily identifiable tab number close to the cited material where available.

Barber appealed to the Alabama Court of Criminal Appeals, challenging his conviction and sentence on a variety of constitutional grounds. *See generally Barber*, 952 So. 2d 393. The Court of Criminal Appeals affirmed Barber's conviction and sentence. *Id.* at 464. The Court of Criminal Appeals denied Barber's petition for rehearing on July 8, 2005, and the Alabama Supreme Court denied his petition for writ of certiorari on September 22, 2006. *Id.* at 393. The Supreme Court of the United States denied Barber's petition for writ of certiorari on March 26, 2007. *Barber v. Alabama*, 549 U.S. 1306 (2007).

Barber filed a petition for state postconviction relief under Alabama Rule of Criminal Procedure 32. (Vol. 17, Tab R-47 at 14). After conducting a hearing, the Madison County Circuit Court denied his petition. (Vol. 22, Tab R-59 at 1115). The Alabama Court of Criminal Appeals affirmed. (Vol. 29, Tab R-65 at 26). Barber then filed an application for rehearing in the Court of Criminal Appeals, which was denied. (Vol. 29 at Tab R-66). Finally, Barber filed a petition for writ of certiorari in the Alabama Supreme Court on August 17, 2015. (Vol. 29 at Tab R-67). The Alabama Supreme Court denied the petition on September 25, 2015. (Vol. 29 at Tab R-68).

In March 2016, Barber filed his federal habeas petition in this court. (Doc. # 1). Respondent Jefferson Dunn, Commissioner of the Alabama Department of Corrections, asserts that each of Barber's claims for relief lacks merit and that the petition is therefore due to be denied. (Doc. # 20). Barber has filed a reply brief in support of his petition. (Doc. # 23). Before addressing the merits of Barber's petition, the court explains the standard of review that applies to his claims.

II. Standard of Review

Each of the claims raised in Barber's federal habeas petition was previously raised on direct appeal from his conviction or in state postconviction proceedings. Because Barber

petitioned the Alabama Supreme Court for a writ of certiorari both on direct appeal and following postconviction proceedings, he has "invok[ed] one complete round of [Alabama's] established appellate review process" and thereby exhausted his state court remedies as required by 28 U.S.C. § 2254(b)(1). *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999); *see also Smith v. Jones*, 256 F.3d 1135, 1141 (11th Cir. 2001); *Pruitt v. Jones*, 348 F.3d 1355, 1359 (11th Cir. 2003). Thus, there are no exhaustion or procedural default issues raised by Barber's federal habeas petition.

The claims in Barber's petition are governed by the deferential standard of review mandated by Congress in 28 U.S.C. § 2254(d). Under that standard, a federal court may grant habeas corpus relief to a state prisoner for claims adjudicated on the merits by a state court only if the petitioner shows that the state court proceedings resulted in a decision that was:

(1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or

(2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding."

28 U.S.C. § 2254(d)(1), (2); *see also Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (stating that § 2254(d) requires a "highly deferential standard for evaluating state-court rulings, which demands that state-court decisions be given the benefit of the doubt" (internal citation and quotation marks omitted)). This court's review of Barber's claims under § 2254(d)(1) is limited to the record that was before the state courts that adjudicated those claims on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011). Similarly, the state courts' decisions must be "measured against [the Supreme] Court's precedents as of the time" the state courts rendered their decisions. *Id.* at 182 (internal quotation marks omitted).

Section 2254(d)(1)'s "contrary to" clause applies when the state court reaches a conclusion "opposite to that reached by the Supreme Court on a question of law or if the state court decides a case differently than the Supreme Court has on a set of materially indistinguishable facts." *Jones v. GDCP Warden*, 753 F.3d 1171, 1182 (11th Cir. 2014) (quoting *Williams v. Taylor*, 529 U.S. 362, 413 (2000)) (brackets omitted). An "unreasonable application" of Supreme Court precedent under § 2254(d)(1) occurs when 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 prisoner's case." *Id.* (quoting *Williams*, 529 U.S. at 413) (brackets omitted). The Supreme Court has explained that an "unreasonable application of" its prior holdings must be "objectively unreasonable," not merely wrong; so, even "clear error" will not suffice to allow relief under this clause of § 2254(d)(1). *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003). Rather, "[u]nder § 2254(d), a habeas court must determine what arguments or theories supported . . . the state court's decision; and then it must ask whether it is possible fairminded jurists could disagree that those arguments or theories are inconsistent with" a prior holding of the Supreme Court. *Harrington v. Richter*, 562 U.S. 86, 102 (2011). This question, the Supreme Court has observed, is "the only [one] that matters under § 2254(d)(1)." *Lockyer*, 538 U.S. at 71. To the extent that Barber disputes a factual determination by the state courts, this court may only overturn a state court's factual findings if Barber "produces 'clear and convincing evidence' that those findings are erroneous." *Jones*, 753 F.3d at 1182 (quoting 28 U.S.C. § 2254(e)(1)).

To determine whether Barber is entitled to habeas relief based on a claim that was adjudicated on the merits in state court, a federal habeas court looks to the decision of "the last state court to decide [the] claim . . . ." *Wilson v. Sellers*, 138 S. Ct. 1188, 1192 (2018); *see also Newland v. Hall*, 527 F.3d 1162, 1199 (11th Cir. 2008) ("[T]he highest state court decision

reaching the merits of a habeas petitioner's claim is the relevant state court decision."). In Barber's case, the relevant decisions are the opinions of the Alabama Court of Criminal Appeals affirming his conviction and sentence on direct appeal, *Barber v. State*, 952 So. 2d 393 (Ala. Crim. App. 2005), and affirming the denial of his Rule 32 petition in postconviction proceedings, (Vol. 29, Tab R-65 at 1-26). Where, as here, the last state court to decide a prisoner's federal claim "explains its decision on the merits in a reasoned opinion," a federal court "simply reviews the specific reasons given by the state court and defers to those reasons if they are reasonable." *Wilson*, 138 S. Ct. at 1192.[2]

The court's review of Barber's § 2254 petition is highly deferential to the state courts' resolution of his claims. *See Ferguson v. Culliver*, 527 F.3d 1144, 1146 (11th Cir. 2008). If "fairminded jurists could disagree" on the correctness of the state court's decision, federal habeas relief is precluded. *Harrington*, 562 U.S. at 101.

III. Barber's Claims for Relief

Barber, through counsel, has asserted a number of claims in his § 2254 petition. The court addresses each, in turn.

A. Barber's Guilt-Phase *Strickland* Claim

Barber first claims he received ineffective assistance of counsel at the guilt phase of his trial, in violation of the Sixth Amendment as interpreted in *Strickland v. Washington*, 466 U.S. 668 (1984). (Doc. # 1 at 29-78)

[2] When the last state court to decide a prisoner's federal claim on the merits does so without a reasoned opinion, the Supreme Court has instructed federal habeas courts to "'look through' the unexplained decision to the last related state-court decision that does provide a relevant rationale" and to then "presume that the unexplained decision adopted the same reasoning." *Wilson*, 138 S. Ct. at 1192. Here, the Alabama Supreme Court declined to engage in discretionary review of Barber's conviction and sentence either on direct appeal or during his Rule 32 proceedings. Thus, the last state court to consider Barber's claims on the merits was the Alabama Court of Criminal Appeals, which provided reasoned opinions both on direct appeal and on appeal from the denial of Barber's Rule 32 petition. *Wilson*'s "look through" rule is therefore inapplicable in this case.

An ineffective assistance of counsel claim under the Sixth Amendment has two elements. First, a defendant "must show that counsel's performance was deficient." *Strickland*, 466 U.S. 668, 687 (1984). Second, he must show that counsel's deficient performance prejudiced his defense. *Id.*

To establish deficient performance, a defendant "must show that counsel's representation fell below an objective standard of reasonableness." *Harrington*, 562 U.S. at 104 (internal quotation marks omitted). Reasonableness must be determined by reference to "prevailing professional norms." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc) (quoting *Strickland*, 466 U.S. at 688). Reviewing courts "must apply a 'strong presumption' that counsel's representation was within the 'wide range' of reasonable professional assistance." *Harrington*, 562 U.S. at 104. The burden is on the defendant to show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* (quoting *Strickland*, 466 U.S. at 687).

To establish prejudice, a defendant "must demonstrate 'a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Strickland*, 466 U.S. at 694). To show prejudice, "[i]t is not enough 'to show that the errors had some conceivable effect on the outcome of the proceeding.'" *Id.* (quoting *Strickland*, 466 U.S. at 693). Rather, "[c]ounsel's errors must be 'so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.'" *Id.* (quoting *Strickland*, 466 U.S. at 687). In other words, "[t]he likelihood of a different result" absent counsel's deficient performance "must be *substantial*, not just conceivable." *Id.* at 112 (emphasis added).

The Supreme Court has described *Strickland*'s standard as "highly deferential." *Id.* at 105 (internal quotation marks omitted). It has explained that "[s]urmounting *Strickland*'s high bar is never an easy task." *Id.* (internal quotation marks omitted). Thus, when reviewing a state court's adjudication of a *Strickland* claim under § 2254(d)'s highly deferential standard, a federal court must be "doubly deferential." *Burt v. Titlow*, 571 U.S. 12, 15 (2013) (internal quotation marks omitted). That means giving "both the state court and the defense attorney the benefit of the doubt." *Id.* Because "[t]he *Strickland* standard is a general one," "the range of reasonable applications" under § 2254(d) "is substantial." *Harrington*, 562 U.S. at 105. Thus, "[w]hen § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Barber raised his guilt-phase ineffective assistance claim before the Alabama Court of Criminal Appeals when he appealed the denial of his Rule 32 petition. He contends the Court of Criminal Appeals unreasonably rejected his guilt-phase ineffective assistance of counsel claim. The court divides its discussion of this claim into three parts. First, it recounts Barber's arguments that he received ineffective assistance of counsel at the guilt phase of his trial. Second, it reviews the state court's reasoning in rejecting Barber's claim. Third, it explains why the state court neither acted contrary to nor unreasonably applied clearly established Supreme Court precedent in rejecting Barber's claim.

1. Barber's Arguments

Barber argues his trial counsel were deficient during the guilt phase of his trial for two principal reasons: (1) they failed to adequately investigate and discuss with Barber two alternative lines of defense and (2) they pursued an "impossible" innocence defense at trial to the

exclusion of other more viable defenses they could have presented. He claims trial counsel's performance prejudiced him because evidence he presented in state postconviction proceedings actually proved the alternative defenses that trial counsel failed to investigate and present at trial, and those alternative defenses could have reduced his conviction from a capital offense to a noncapital offense.

a. Failure to Investigate Alternative Defenses

First, Barber faults his trial counsel for failing to thoroughly investigate and present a manslaughter defense based on evidence that he was intoxicated at the time of the crime. Barber claims it was objectively unreasonable for his counsel not to investigate and inform him of the possibility of arguing that he was so intoxicated at the time of the killing that he was incapable of forming the specific intent to kill required for a murder conviction under Alabama law. (Doc. # 1 at ¶¶ 59-75). Barber's argument is based on several sources of evidence tending to show his intoxication at the time of the crime and his general propensity for substance abuse.

In Barber's videotaped confession to police, he stated that on the day he killed Epps:

> [I] had been doing coke all day long at my house. The stuff just makes you fucked up. And I was going over to see [Epps] . . . I stopped over there and was going to talk to her about the shutters and all of a sudden I just figured, well, you know, she's probably got a few bucks, you know, I should ask her for some money, and I just turned around and hit her. Something came over me, I just BOOM—turned around and hit her.
>
> . . .
>
> I just turned around and hit her. I don't know why, I just . . . I guess I was just all fuckin' drugged up and . . . I don't know. I was, I was fucking insane almost, you know.

(Vol. 23 at 1238, 1241). Barber's videotaped confession was admitted in evidence at trial and played for the jury. (Vol. 10 at 981-82). There is no dispute Barber's counsel were aware of the confession.

Trial counsel were also aware that Barber had a history of substance abuse and addiction. Barber explained his experience with cocaine addiction in his videotaped confession:

> And once you start doing, you just can't stop. I mean, once you start doing that stuff, you can't stop doing it. It takes a hold of you and you just—you spend every fucking penny you got on it. It makes you all fucked up. But yet you can't stop doing it.

(Vol. 23 at 1242).

Dr. Marianne Rosenzweig, a forensic and clinical psychologist hired to assess Barber's competency to confess, also reported Barber's history of cocaine and alcohol abuse to Barber's counsel: "[Barber] was using a few hundred dollars' worth [of cocaine] at a time twice a week at the time that he was arrested [for Epps' murder]. . . . Mr. Barber also reports that he has had a problem with alcohol since his early 20's . . . ." (Vol. 23 at 1210-11). In light of this evidence, Barber claims his trial counsel's failure to investigate and discuss a manslaughter defense with him was objectively unreasonable.

Second, Barber also faults his trial counsel for failing to thoroughly investigate and discuss with him a defense based on the theory that Barber committed robbery as a mere afterthought to the murder. In Alabama, murder is a capital offense if committed during a first-degree robbery. Ala. Code § 13A-5-40(a)(2). The state charged Barber with capital murder based on the allegation that he killed Epps during the commission of a robbery—specifically, that he stole her purse after beating her to death. (Vol. 1, Tab R-1 at 9). Under Alabama law, "a robbery committed as a 'mere afterthought' and unrelated to the murder will not sustain a conviction under § 13A-5-40(a)(2) for the capital offense of murder-robbery." *Connolly v. State*, 500 So. 2d 57, 63 (Ala. Crim. App. 1985). Barber argues that statements in his confession showed he lacked the intent to rob Epps before killing her. He claims his trial counsel unreasonably failed to

investigate and inform him of the mere afterthought defense, which, if implemented, could have reduced his conviction from capital to noncapital murder.

Barber claims several statements in his taped confession show that his theft of Epps' purse was a "mere afterthought," unrelated to his decision to kill her. He points to his description of the killing as unplanned, illogical, and purposeless:

> I mean I just don't even know how it happened like. I just kinda snapped. I mean, we weren't arguing or nothing . . . I just thought I needed some money, you know. . . I just figured, well, you know, she's probably got a few bucks, you know, I should ask her for some money, and I just and I just turned around and hit her. Something came over me. I just BOOM—turned around and hit her. I don't know why.

(Vol. 23 at 1236, 1238). He also points to his response when asked what he did with Epps' purse: "I didn't take the purse to rob her. I just figured it looked good, I was like, freaking out." (Vol. 23 at 1237). In light of this evidence, Barber claims his trial counsel's failure to investigate and discuss a mere afterthought defense with him was objectively unreasonable.

Barber admitted to killing Epps at his Rule 32 evidentiary hearing, but at the time of his trial "he insisted . . . that he was innocent and had nothing to do with Epps's murder." (Vol. 29, Tab R-65 at 14). Indeed, the state courts found that Barber "would not consider any defense that required him to admit that he killed Epps" and that he "refused" to consider "trying the case on the basis that [he] was intoxicated when he killed Epps." (*Id.* at 13). Barber nevertheless maintains that "just because a defendant insists he is innocent and demands that counsel pursue[ ] an innocence defense does not make it reasonable for counsel to follow his wishes." (Doc. # 1 at 46, ¶ 88). In short, Barber argues his counsel were deficient for failing to "make an informed evaluation of all possible defenses" and "have meaningful discussions with [him] about these defenses and the realities of the case." (*Id.*). The import of his argument is that, had counsel investigated and discussed the manslaughter and mere afterthought defenses with him, Barber

likely would have instructed counsel to pursue those defenses instead of complete innocence, thereby potentially avoiding a capital conviction.

b. Pursuit of an "Impossible" Innocence Defense

Finally, in addition to failing to investigate and inform him of alternative defenses, Barber faults his trial counsel for in fact pursuing an innocence defense at trial -- a defense he now characterizes as "impossible" -- instead of the more viable manslaughter and mere afterthought defenses discussed above. Barber claims evidence that could have been used to support both the intoxication and mere afterthought defenses was presented at trial, despite counsel's failure to investigate. Specifically, Barber points to statements in his videotaped confession regarding his cocaine usage on the day of the crime and his statement, "I didn't take the purse to rob her. I just figured it looked good . . . ." (Vol. 23 at 1237). Because the confession was played for the jury, Barber claims it was objectively unreasonable for his trial counsel not to argue the intoxication and mere afterthought defenses to the jury. Though Barber recognizes that his counsel obtained jury instructions on the lesser-included offenses of manslaughter, felony murder, and intentional murder (Vol. 11, Tab R-21 at 1147-55), and specific instructions regarding the intoxication and mere afterthought defenses (*Id.* at 1152-53, 1166), he claims the manslaughter instruction "was rendered meaningless because Trial Counsel failed to make any argument to the jury that Mr. Barber's intoxication at the time of the offense could have deprived him of the requisite intent." (Doc. # 1 at 50-51). He also criticizes his trial counsel for making "only a half-hearted attempt" to argue that the state failed to prove the killing occurred during the commission of a robbery. (*Id.* at 53). In short, Barber claims it was objectively unreasonable for his counsel to primarily pursue an innocence defense at trial and to give short shrift to what he contends were the more viable intoxication and mere afterthought defenses.

c. Prejudice

Barber claims he was prejudiced by his trial counsel's failure to investigate and discuss the manslaughter and mere afterthought defenses with him and their decision to instead pursue an innocence defense at trial. He argues that evidence presented at his Rule 32 hearing proved the manslaughter and mere afterthought defenses. And though he does not expressly argue it, Barber implies that had his trial counsel adequately investigated and discussed the manslaughter and mere afterthought defenses with him, he would have instructed his counsel to pursue those defenses at trial instead of the innocence defense he insisted on at the time.

At his Rule 32 hearing, Barber testified about his drug and alcohol use on the day he killed Epps and the day prior to the killing. (Vol. 26 at 403-14). He prefaced his testimony by stating, "Like I said, my memory is what it is and I can't tell you every time I stopped and got crack during this period. But I'm going to do my best." (*Id.* at 403). He also gave the following caveat about his estimates of the amount of drugs and alcohol he consumed prior to killing Epps: "I mean, you know, none of these numbers that I'm giving you are gospel because it's a long time ago and I was pretty messed up." (*Id.* at 407). He proceeded to testify that on the day before he killed Epps he smoked several hundred dollars' worth of crack cocaine, likely took four to seven prescription pain pills, and drank a case of beer and a large bottle of wine. (*Id.* at 404-07). He fell asleep that night and woke up at approximately 6:00 or 6:30 am the next morning. (*Id.* at 407). On the day of the crime, Barber testified that he continued to use crack cocaine, prescription pain pills, and alcohol prior to killing Epps. (*Id.* at 408). When asked how much alcohol he drank that day, Barber responded: "I couldn't tell you with any -- really with any kind of truth to it. It was quite a bit." (*Id.* at 408). He nevertheless proceeded to testify that he smoked several hundred dollars' worth of crack cocaine, took at least four to five prescription pain pills,

and drank at least a case of beer before killing Epps that evening. (*Id.* at 409-14). Barber described the extent of his intoxication at this point, shortly before he killed Epps, as "very, very intense," and stated he was "very wasted." (*Id.* at 414).

Barber also offered the expert testimony of Dr. Alexander Morton at his Rule 32 hearing to explain how his alleged intoxication could have affected his ability to form the intent required for a murder conviction. (*Id.* at 452-521). Dr. Morton testified that crack cocaine users can be "mildly violent to extremely violent" and can experience cognitive impairment. (*Id.* at 483, 486-87). Dr. Morton also testified that using the combination of substances Barber used on the day he killed Epps could lead the user to be unable to control his actions. (*Id.* at 510).

Barber also testified regarding the mere afterthought defense at his Rule 32 hearing. He stated that he went to Epps' home to pick up a shutter he had been repairing for her. (*Id.* at 412). He described his attack on Epps as unprovoked and unplanned. (*Id.* at 414-15) ("[I] just seemed to snap . . . and I don't know why. . . . I do know that I [killed her]. And I don't know why."). And he explained that his intent to steal Epps' purse did not arise until sometime after the killing, when he returned to the crime scene to make it look like Epps had been killed by a random intruder during a robbery. (*Id.* at 417) ("I thought, 'Maybe I can make it look like a crime,' you know, 'somebody broke in here.' So I moved a few things around, pulled out the phone jacks. And I threw her pocketbook in that garbage bag with the hammer. . . . And I left and I went home.").

Finally, Barber also testified at his Rule 32 hearing that his trial counsel failed to discuss with him the possibility of pursuing the manslaughter or mere afterthought defenses to obtain a noncapital conviction. (*Id.* at 426-27).

Based on the evidence presented at his Rule 32 hearing, Barber contends there is a "reasonable probability that, but for [his] counsel's unprofessional errors," the result of his guilt-phase trial would have been different. *Strickland*, 466 U.S. at 694. He suggests that had his counsel adequately investigated the manslaughter and mere afterthought defenses, and discussed those defenses with him, he likely would have instructed his trial counsel to pursue those alternative defenses in hopes of obtaining a noncapital conviction. And, he claims that had counsel pursued those alternative defenses at trial instead of an "impossible" innocence defense, there is a reasonable probability that he would have been convicted of manslaughter or noncapital murder.

2. The State Court's Decision

Barber presented his *Strickland* claims to the state courts in a Rule 32 postconviction proceeding. The Alabama Court of Criminal Appeals affirmed the Rule 32 court's denial of Barber's guilt-phase ineffective assistance claim. (Vol. 29, Tab R-65 at 10-19). The Court of Criminal Appeals held that Barber's counsel were not deficient for failing to pursue the manslaughter and mere afterthought defenses because both defenses "would have required Barber to admit that he killed Epps," and "[t]estimony at the evidentiary hearing revealed that Barber denied killing Epps" at the time of his trial and instead "insisted that trial counsel pursue an innocence defense." (*Id.* at 12). In light of Barber's insistence that trial counsel pursue an innocence defense, the state court concluded that "Barber failed to prove that counsel were ineffective in their investigation and presentation of alternative defenses." (*Id.* at 14). The court also found that "Barber failed to prove that he was prejudiced by counsels' decision not to present alternative defenses" at trial. (*Id.*). The relevant portions of the state court's opinion are worth quoting in full:

[B]oth [the manslaughter and mere afterthought] lines of defense would have required Barber to admit that he killed Epps. Testimony at the evidentiary hearing revealed that Barber denied killing Epps and insisted that trial counsel pursue an innocence defense. Barber's trial counsel testified that he "made sure Mr. Barber knew all about the evidence and all about the discovery material that we had, the evidence that the State would have -- was intending to present at trial to convict him, and also the law that applied to all of that." (R. 61.) Trial counsel also testified that he and co-counsel discussed with Barber the option of pursuing lesser-included offenses as well as presenting evidence that Barber was intoxicated at the time of the crime. The following exchange occurred during the evidentiary hearing:

> "[Barber's Rule 32 Counsel]: Were you aware in December 2003 that in a capital case, where specific intent is an element of the offense, that you could have put on a case involving voluntary intoxication to mitigate the guilt?
>
> "[Barber's Trial Counsel]: Yes.
>
> "[Barber's Rule 32 Counsel]: Did you consider that in December 2003?
>
> "[Barber's Trial Counsel]: Yes.
>
> "[Barber's Rule 32 Counsel]: Did you discuss that with Mr. Barber?
>
> "[Barber's Trial Counsel]: Yes.
>
> "[Barber's Rule 32 Counsel]: So you were aware that was an option but you chose not to litigate the case on that basis; correct?
>
> "[Barber's Trial Counsel]: No. That's not correct. Mr. Barber was aware of it and refused to even discuss that option with us at all. And said, I will not consider anything but a trial on the facts; that I am not guilty."

(R. 67.)

Barber's trial counsel repeatedly testified that Barber would not consider any defense that required him to admit that he killed Epps. When asked again whether he talked to Barber about trying the case on the basis that Barber was intoxicated when he killed Epps, trial counsel stated that Barber "refused to go down that road and stated that he was not guilty." (R. 74.) The following exchange also occurred:

> "[Barber's Rule 32 Counsel]: So, with respect to the lesser included offense charge, did you try the case on the basis of a theory that he was intoxicated at the time he committed the offense?

> "[Barber's Trial Counsel]: That he could have been intoxicated at the time of the offense? I have no evidence that he was. And I couldn't suggest that he was because to suggest that he was intoxicated and should be found guilty of a lesser offense went against his desires to pursue an absolute not guilty innocence defense. So to answer --
>
> "[Barber's Rule 32 Counsel]: But you didn't talk to him about -- I'm sorry.
>
> "[Barber's Trial Counsel]: To answer your question. Did I pursue that in the courtroom? No.
>
> "[Barber's Rule 32 Counsel]: Yeah.
>
> "[Barber's Trial Counsel]: Now did we pursue it outside the courtroom prior to trial? Yes. And Mr. Barber was absolutely uncooperative with us on that regard and we could not make any progress with that."

(R. 74-75.) See also (R. 80) (Trial counsel testified that "[Barber] would not allow us to do anything other than tell the jury that he was absolutely not guilty.")

At the evidentiary hearing, Barber admitted that he killed Epps. (R. 430.) However, on cross-examination, the following exchange occurred:

> "[Counsel for the State]: And throughout your entire representation with Mr. Tuten you always maintained, 'I didn't do it. I'm innocent.' Isn't that right, Mr. Barber?
>
> "[Barber]: That's right."

(R. 450.) Thus, Barber's testimony at the evidentiary hearing reveals that he was dishonest with trial counsel and insisted that they investigate and pursue a defense theory that Barber knew was false.

In its order denying Barber's petition, the circuit court found that Barber failed to prove that counsel were ineffective in their investigation and presentation of alternative defenses. . . . Those findings are supported by the record.

. . . A review of the testimony and evidence presented at the evidentiary hearing reveals that Barber failed to prove that he was prejudiced by counsels' decision not to present alternative defenses. In order to present a viable manslaughter defense at trial, counsel would have been required to tell the jury that Barber killed Epps, albeit unintentionally. Similarly, in order to pursue a mere-afterthought defense, trial counsel would have to admit that Barber

committed the murder. However, both trial counsel and Barber made clear at the evidentiary hearing that Barber refused to admit that he killed anyone.

. . . .

Thus, trial counsel could not be ineffective for adhering to Barber's wishes. Barber's refusal to discuss other options left trial counsel with no alternatives. The record contains ample evidence that trial counsel informed Barber of the law as it related to his case but that Barber refused to consider anything other than an innocence defense. The record reveals that Barber voluntarily chose the course of action that trial counsel ultimately undertook. . . . *Barber cannot now claim that he was prejudiced by the course of action that he insisted counsel undertake. This rationale applies to Barber's claim regarding a manslaughter defense as well as his claim regarding a mere-afterthought defense as each defense would have required Barber to admit that he killed Epps*. . . .

Although it is not readily apparent from the face of his petition, the evidence that Barber presented at the evidentiary hearing as well as his arguments on appeal suggest that Barber's actual claim was not that trial counsel were ineffective simply for inadequately investigating alternate defenses and failing to present those defenses. Rather, it appears that Barber is arguing that trial counsel were ineffective for failing to convince him to change his mind and agree to admit that he killed Mrs. Epps. In his brief on appeal, Barber argues that his "insistence that trial counsel pursue an innocence defense does not absolve their failure to investigate the manslaughter defense." (Barber's brief at 34). Thus, it appears that Barber is arguing that, had trial counsel conducted the investigation that his Rule 32 counsel conducted, they would have been able to convince him to admit to the killing and could have then pursued alternative defenses.

However, the evidence presented at Barber's evidentiary hearing indicated that trial counsel did conduct an investigation into a manslaughter defense. According to trial counsel, he had an "untold" number of conversations with Barber about lesser-included offenses. (R. 62.) Although trial counsel did testify that he could not specifically remember a conversation with Barber about a manslaughter defense, the record contains a letter from trial counsel to Barber in which trial counsel told Barber: "Alcohol and/or drug abuse may give rise to defenses, mitigation evidence and grounds to suppress statements." (C. 1225.) Thus, the record contained evidence suggesting that trial counsel did investigate and discuss this matter with Barber. Barber failed to offer any evidence, other than his own self-serving testimony, that a more thorough investigation would have enabled trial counsel to convince him to admit that he killed Epps.

Rule 32.3, Ala. R. Crim. P., provides that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Furthermore, "'[w]hen there is conflicting testimony as to a factual matter . . . , the question of the credibility of

the witnesses is within the sound discretion of the trier of fact.'" Calhoun v. State, 460 So. 2d 268, 269-70 (Ala. Crim. App. 1984), quoting State v. Klar, 400 So. 2d 610, 613 (La. 1981)). Because the record contained evidence suggesting that counsel conducted an investigation into alternative lines of defense and discussed those defenses with Barber, the circuit court was correct in finding that Barber failed to prove that counsel were ineffective during the guilt phase of his trial.

We also note that, in trial counsel's above-mentioned letter to Barber, counsel discussed evidence that he was investigating at Barber's request. For example, counsel told Barber that he was, at Barber's request, attempting to locate Barber's cellular telephone records and inquired as to why those records were important. Counsel also informed Barber that he had filed a motion to compel the State to allow him to view the physical evidence and was seeking a court order to view the crime scene. Thus, counsel's pretrial investigation appears to have been driven, at least in part, by Barber's false assertion that he was innocent. This supports trial counsel's testimony that Barber "refused to even discuss" the possibility that trial counsel put on a case involving voluntary intoxication. (R. 67.)

In fact, the record reveals that trial counsel spent a great deal of time investigating an innocence defense based on Barber's misrepresentations. For example, trial counsel testified that he spent time investigating two alibis that Barber put forth, i.e., that Barber could not have committed the crime because he was at home cooking spaghetti when Epps was killed and that Barber was with a prostitute during the time frame in which Epps was killed. (r. 139-41.) According to trial counsel, neither alibi proved to be plausible. At the evidentiary hearing, Barber even testified that trial counsel met with him "at least 11 times" regarding the bloody palm print that was found at the scene. (R. 435-36.)

Had Barber been [as] honest with trial counsel about his involvement in Epps's murder as he eventually was with Rule 32 counsel, trial counsel would not have wasted time and resources pursuing fruitless leads to support Barber's claim of innocence. This further supports the trial court's determination that Barber did not receive ineffective assistance of counsel during the guilt phase of his trial. Barber failed to prove that, had trial counsel conducted a more extensive investigation into a manslaughter defense, they would have been able to convince him to admit that he killed Epps.

(Vol. 29, Tab R-65 at 12-18).

3. The State Court's Decision Was Reasonable

The Alabama Court of Criminal Appeals did not act contrary to or unreasonably apply *Strickland* when it rejected Barber's guilt-phase ineffective assistance claim. The state court

concluded Barber failed to establish either element of a *Strickland* claim—*i.e.*, that his trial counsel's performance was deficient or that he suffered prejudice from their performance. Neither determination was contrary to or involved an unreasonable application of clearly established Supreme Court precedent.

a. Deficient Performance

Barber claims the state court unreasonably concluded that his trial counsel were not deficient either for failing to adequately investigate and apprise him of the manslaughter and mere afterthought defenses or for pursuing an innocence defense at trial instead of those arguably more viable defenses. The court disagrees—neither determination by the Court of Criminal Appeals was unreasonable.

i. Investigation of Alternative Defenses

The state court did not act contrary to clearly established Supreme Court precedent[3] or unreasonably apply *Strickland* in concluding Barber's trial counsel acted reasonably in their investigation of alternative defenses. As *Strickland* itself explained, "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions." 466 U.S. at 691. A defense lawyer's investigative decisions are frequently and "quite properly" based on "information supplied by the defendant." *Id.* "[W]hat investigation decisions are reasonable depends critically on such information." *Id.* Thus, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." *Id.*

[3] Barber has identified no Supreme Court case involving "materially indistinguishable facts" that has reached a decision opposite the state court's, so the state court's decision does not run afoul of § 2254(d)'s "contrary to" clause. *Jones*, 753 F.3d at 1182 (internal quotation marks omitted).

The Alabama Court of Criminal Appeals reasonably applied these principles to conclude that any failure by trial counsel to more extensively investigate the manslaughter and mere afterthought defenses and to present those defenses at trial was reasonable in light of Barber's repeated assertions of innocence and his insistence that trial counsel pursue an innocence defense at trial. (Vol. 29, Tab R-65 at 14-16). The state court found ample record evidence "that trial counsel informed Barber of the law as it related to his case but that Barber refused to consider anything other than an innocence defense." (*Id.* at 16); *see also* (Vol. 24, Tab R-60 at 100-01 (trial counsel explaining that he was aware of the mere afterthought defense before trial but that "Mr. Barber would not allow" him to defend the case on that basis). Testimony from Barber's Rule 32 hearing showed that trial counsel repeatedly tried to persuade Barber to consider other lines of defense besides complete innocence but that Barber steadfastly and unequivocally refused to do so. (Vol. 29, Tab R-65 at 14) (quoting trial counsel's testimony that Barber "would not allow us to do anything other than tell the jury that he was absolutely not guilty"); (Vol. 24, Tab R-60 at 84) (testimony by trial counsel: "I told [Barber], Let's do something other than say you're not guilty. And he flatly refused to even discuss that with us. . . . Every time I met with him I begged him to let us do something to save his life and he flatly refused."); (*id.* at 102-03) (trial counsel explaining that he "remember[s] numerous conversations about all defenses in this case with Mr. Barber and several conversations [specifically] about [the mere afterthought defense]" and that he encouraged Barber to pursue that defense). Based on this testimony, the state court concluded that "trial counsel could not be ineffective for adhering to Barber's" desire to pursue an innocence defense. (Vol. 29, Tab R-65 at 16). In its view, "Barber's refusal to discuss other options left trial counsel with no alternatives." (*Id.*).

There is certainly a "reasonable argument" that Barber's trial counsel "satisfied *Strickland*'s deferential standard" by declining to put scarce resources toward investigating defenses that Barber categorically refused to consider at the time of his trial. *Harrington*, 562 U.S. at 105. Given the time and resource constraints inherent in every trial, it was not unreasonable for the state court to conclude that Barber's counsel acted reasonably by choosing to spend "a great deal of time investigating an innocence defense" based on Barber's steadfast insistence that counsel put on a complete innocence defense at trial instead of wasting precious time and resources pursuing alternative defenses their client refused to consider. (Vol. 29, Tab R-65 at 18). As *Strickland* itself explained, "when a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable." 466 U.S. at 691. The Alabama Court of Criminal Appeals reasonably applied this principle to reject Barber's guilt-phase ineffective assistance claim.

Additionally, the Court of Criminal Appeals credited Barber's trial counsel with investigating various alternative defenses (including specifically the manslaughter defense) and discussing those defenses with Barber. (Vol. 29, Tab R-65 at 12-13, 17). Barber now challenges various factual findings made by the Court of Criminal Appeals in support of its conclusion that trial counsel performed a reasonable investigation of alternative defenses. Because "a determination of a factual issue made by a State court shall be presumed to be correct," Barber has "the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); *see also Thompson v. Haley*, 255 F.3d 1292, 1297 (11th Cir. 2001) ("State court findings of historical facts made in the course of evaluating an ineffectiveness claim

are subject to a presumption of correctness under 28 U.S.C. § 2254(d).”). For the reasons explained below, Barber has not carried that burden.

In crediting Barber’s trial counsel with investigating alternative defenses and discussing them with Barber, the state court referenced trial counsel’s testimony that “Mr. Barber was aware” that evidence of intoxication could mitigate guilt in a capital murder case but that Barber “refused to even discuss that option with us at all.” (Vol. 29, Tab R-65 at 12-13). The court likewise referenced trial counsel’s testimony that he “pursue[d] [a lesser-included offense strategy] outside the courtroom prior to trial” and had “an ‘untold’ number of conversations with Barber about lesser-included offenses.” (*Id.* at 13, 17). The court also relied upon a letter from trial counsel to Barber explaining that “[a]lcohol and/or drug abuse may give rise to defenses . . . .” (*Id.* at 17). Based on this evidence, the Court of Criminal Appeals found that that trial counsel did in fact conduct an investigation into a manslaughter defense, but that Barber was simply unwilling to consider pursuing that defense further. (*Id.* at 17). And though the state court did not expressly reference it, the record reveals that trial counsel discussed the mere afterthought defense with Barber and encouraged him to pursue it, but that Barber simply refused “to admit he committed the homicide.” (Vol. 24, Tab R-60 at 102-03).

Barber claims the state court’s factual findings were unreasonable in light of the evidence presented at his Rule 32 hearing, which he claims showed that trial counsel in fact failed to adequately investigate the manslaughter and mere afterthought defenses and discuss those defenses with Barber. But Barber’s argument fails for at least two reasons. First, Barber has not met his burden under § 2254(e)(1) of providing “clear and convincing evidence that [the state court’s factual] findings are erroneous.” *Jones*, 753 F.3d at 1182 (internal quotation marks omitted). Barber points to trial counsel’s statement at the Rule 32 hearing, “I’m not sure I

specifically talked to [Barber] about manslaughter," as evidence that trial counsel did not investigate or discuss a manslaughter defense with him before trial. (Vol. 24, Tab R-60 at 80). But Barber's current counsel are cherry picking the record. For example, they fail to note that, when trial counsel was asked whether he spoke with Barber "about trying the case on the basis . . . that he was intoxicated when he killed the victim," trial counsel answered, "Yes. But [Barber] refused to go down that road and stated he was not guilty." (Vol. 24, Tab R-60 at 74). Indeed, trial counsel repeatedly stressed at the Rule 32 hearing that he attempted to pursue alternatives to an absolute innocence defense before trial but that Barber would not consider anything besides a complete innocence defense. (Vol. 24, Tab R-60 at 74-84). It was not unreasonable for the state court to conclude that trial counsel looked into an intoxication/manslaughter defense based on this testimony.

Barber also points to the following Rule 32 hearing testimony by Dr. Rosenzweig, whom trial counsel hired to conduct a psychological evaluation of Barber:

> [Rule 32 Counsel:] Were you ever specifically asked by Mr. Barber's lawyers to evaluate Mr. Barber's mental state at the time of the offense?
>
> [Dr. Rosenzweig:] I don't recall that I was asked specifically to do that.

(Vol. 25 at 193). Barber claims trial counsel's failure to ask Dr. Rosenzweig to investigate Barber's mental state at the time of the crime is further evidence the state court's finding that trial counsel investigated a manslaughter defense was unreasonable. But Barber fails to note that Dr. Rosenzweig's Rule 32 hearing testimony and penalty-phase trial testimony reveals she evidently *did* investigate Barber's mental state at the time of the crime—indeed, she was able to give an opinion on that issue during the penalty phase of Barber's trial. (Vol. 25 at 196) ("I said I did not think that [Barber] had the intent to kill [Epps]."); (Vol. 12, Tab R-27 at 1265-66) (Dr. Rosenzweig explaining that she did not believe Barber intended to kill Epps). Barber's Rule 32

counsel faulted trial counsel for failing to have Dr. Rosenzweig testify regarding Barber's intent at the time of the crime during the guilt phase of Barber's trial. (*Id.* at 197; Vol. 24, Tab R-60 at 89-91). But calling Dr. Rosenzweig to testify for that purpose would have required trial counsel to admit Barber's guilt, in violation of his resolute insistence that counsel maintain his innocence. (Vol. 24, Tab R-60 at 90) (Barber's trial counsel explaining that though they considered calling Dr. Rosenzweig to testify about Barber's mental state when he killed Epps, they chose not to "[b]ecause Mr. Barber would have none of it and would not allow us to do it. To do so would have required him to admit that he was involved in perpetrating this crime and he would not do it."). And in any event, whether or not trial counsel asked Dr. Rosenzweig to investigate Barber's mental state at the time of the crime casts no doubt at all on the state court's *other* factual findings (discussed above) supporting its conclusion that trial counsel adequately investigated alternative defenses. Barber has failed to prove by clear and convincing evidence that the state court's factual determinations were erroneous.

Barber's attack on the state court's factual findings supporting its denial of Barber's *Strickland* claim also fails for a second, more fundamental reason. Even if the court were inclined to agree with Barber that the Court of Criminal Appeals unreasonably credited trial counsel with performing a more thorough investigation of alternative defenses than they in fact did (and, to be clear, the court is not so inclined), it still would not conclude that the state court unreasonably applied *Strickland* in denying Barber's claim. As explained above, *Strickland* teaches that "what investigation decisions are reasonable depends critically" "on information supplied by the defendant." 466 U.S. at 691. So, even if trial counsel in fact performed a less thorough investigation than the state court credited them with performing, that does not mean their investigation was so deficient as to fall below *Strickland*'s deferential standard. As

explained above, there is without question a "reasonable argument" that Barber's trial counsel "satisfied *Strickland*'s deferential standard" by deciding to focus their investigative energies on issues other than alternative defenses to innocence that Barber categorically refused to consider at the time of his trial. *Harrington*, 562 U.S. at 105.

In short, Barber has not shown by clear and convincing evidence that the state court's factual determinations regarding trial counsel's investigation of alternative defenses were erroneous. That conclusion is based upon the record, and is further buttressed by Barber's categorical refusal to consider any defense besides complete innocence. Indeed, his refusal to consider alternative defenses would have rendered a decision by counsel to focus their scarce investigative resources on other issues entirely reasonable. Taken both independently and in combination with one another, these two realities create a "reasonable argument" that Barber's trial counsel "satisfied *Strickland*'s deferential standard." *Id.* Habeas relief is therefore precluded.

ii. Pursuit of Innocence Defense at Trial

The state court also did not unreasonably apply *Strickland* in concluding that Barber's trial counsel acted reasonably by pursuing an innocence defense at trial, rather than the manslaughter and mere afterthought defenses. Indeed, far from being constitutionally *required* to contradict Barber's wishes and present the manslaughter or mere afterthought defenses at trial, trial counsel may well have been constitutionally *forbidden* from doing so. *See McCoy v. Louisiana*, 138 S. Ct. 1500, 1507-10 (2018).

McCoy involved a defendant charged with capital triple murder whose defense counsel, faced with overwhelming evidence of his client's guilt, believed the best chance of avoiding a death sentence lay in admitting his client's guilt at trial and then pleading for mercy from the jury at the penalty phase. *Id.* at 1505-07. Counsel also planned to argue that McCoy "should be

convicted only of second-degree murder, because his mental incapacity prevented him from forming the requisite specific intent to commit first degree murder." *Id.* at 1506 n.1 (internal quotation marks omitted). McCoy, however, much like Barber in this case, "adamantly objected" to his counsel admitting his guilt at trial. *Id.* at 1505. Rather than concede guilt and seek only to avoid the death penalty, McCoy demanded his counsel pursue acquittal and argue he was innocent. *Id.* at 1506.

McCoy's counsel was convinced that was a losing strategy. So, instead of following his client's wishes, counsel chose to follow his "experienced-based view" and, in hopes of saving his client's life, admit to the jury that McCoy had killed the victims. *Id.* at 1505, 1506-07. Though at the penalty phase counsel "urged mercy in view of McCoy's 'serious mental and emotional issues,'" the jury was unpersuaded. *Id.* at 1507. It returned three death verdicts. *Id.*

The Supreme Court reversed McCoy's conviction and granted him a new trial, holding that the Sixth Amendment affords a defendant "the right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty." *Id.* at 1505. Though litigation strategy remains the province of defense counsel, the Court explained that certain decisions in a criminal case concerning the *objective* of the representation are reserved for the client alone. *Id.* at 1508. Those decisions include, for example, "whether to plead guilty, waive the right to a jury trial, testify in one's own behalf, and forgo an appeal." *Id.* at 1508. Because the decision whether to maintain innocence at the guilt phase of a capital trial strikes at the heart of a client's autonomy to decide the objectives of his defense, the Court concluded the decision could only be made by McCoy. *Id.* Counsel's decision to override McCoy on this issue therefore violated his right to the "Assistance of Counsel" guaranteed by the Sixth Amendment. *Id.* at 1507.

Barber's case is strikingly similar to *McCoy*. In both cases, experience suggested that admitting to a killing provided the best chance for a client to avoid the death penalty, but both McCoy and Barber adamantly and repeatedly objected to that strategy. (*See* Vol. 24, Tab R-60 at 84) (testimony by Barber's trial counsel: "I told [Barber], Let's do something other than say you're not guilty. And he flatly refused to even discuss that with us. . . . Every time I met with him I begged him to let us do something to save his life and he flatly refused.").[4] Unlike McCoy's lawyer, however, Barber's trial counsel *honored* his desire to maintain his innocence at trial. Yet, Barber now contends his trial counsel violated the Sixth Amendment by, rather presciently, adhering to the Sixth Amendment rule announced in *McCoy* years later.[5] Though *McCoy* had not been decided at the time of Barber's trial, it is at the very least strong evidence that the state court was not unreasonable to conclude that Barber's counsel satisfied *Strickland*'s deferential standard. If, as *McCoy* holds, the Sixth Amendment *forbids* a lawyer from confessing to a killing over the client's objection, then there is a reasonable argument that -- even pre-

[4] As noted above, Barber's trial counsel testified repeatedly and unequivocally at the Rule 32 hearing that Barber "would not allow us to do anything other than tell the jury that he was absolutely not guilty." (Vol. 24, Tab R-60 at 80); *see also* (*id.* at 74) ("I couldn't suggest that [Barber] was [intoxicated] because to suggest that he was intoxicated and should be found guilty of a lesser offense went against his desires to pursue an absolute not guilty innocence defense."); (*id.* at 83) (explaining he did not call a particular witness "because to do so [he] would have had to admit Mr. Barber committed the crime and [Barber] was not willing to do that nor let us do it"). Barber himself corroborated trial counsel's testimony with his own statements. When the state asked Barber whether, throughout his entire representation with trial counsel, he "always maintained, 'I didn't do it. I'm innocent,'" Barber responded "That's right." (Vol. 26 at 450).

[5] The prescience of Barber's trial counsel is rather remarkable. Indeed, he appears to have complied with *McCoy* (before it was decided) almost to the letter. *McCoy* made clear that though counsel "could not interfere with McCoy's telling the jury 'I was not the murderer,'" counsel "could, if consistent with providing effective assistance, focus his own collaboration on urging that McCoy's mental state weighed against conviction." 138 S. Ct. at 1509. To be sure, that is exactly what Barber's trial counsel did in this case. When asked by Rule 32 counsel whether he argued an intoxication defense at trial, trial counsel responded, "As best we could without going against what Mr. Barber had told us to do in his defense." (Vol. 24, Tab R-60 at 79); *see also* (Vol. 11, Tab R-19 at 1111) (trial counsel's closing argument explaining that the jury must assess "was the Defendant intoxicated to negate the intent of what he was doing . . . those are the things that you have to recognize). Trial counsel also argued the mere afterthought defense to the jury at closing argument and suggested the state had not proved Epps was killed during the course of a robbery. (Vol. 11, Tab R-19 at 1109-10). Thus, trial counsel did an admirable job of respecting Barber's desires concerning the objective of his defense while simultaneously "focus[ing their] own collaboration" on highlighting lesser-included offenses the jury might find to be supported by the evidence. *McCoy*, 138 S. Ct. at 1509.

McCoy -- the Sixth Amendment did not *require* Barber's counsel to do what *McCoy* now forbids (namely, ignore Barber's sustained insistence that counsel pursue an innocence defense at trial and instead admit that Barber killed Epps). It would be odd indeed to hold that Barber's trial counsel was constitutionally ineffective for anticipating and adhering to the Sixth Amendment rule announced in *McCoy*. The court declines to do so.

b. Prejudice

Alternatively, even if the Alabama Court of Criminal Appeals' conclusion that Barber's trial counsel acted reasonably was unreasonable, its conclusion that Barber failed to show prejudice was not. To establish prejudice, a defendant "must demonstrate a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Harrington*, 562 U.S. at 104 (internal quotation marks omitted). In Barber's case, that standard requires him to make two showings. *See Gilreath v. Head*, 234 F.3d 547, 551 (11th Cir. 2000). First, he must show a reasonable probability that, had counsel adequately investigated and apprised him of alternative defenses to innocence, he would have permitted counsel to pursue those alternative defenses instead of insisting on maintaining absolute innocence. *See id.* Second, he must show that had counsel more aggressively pursued the alternative defenses at trial, there is a reasonable probability the jury would have found him guilty of a lesser-included offense. *See id.* Without making both showings, Barber cannot show a reasonable probability of a different result (*i.e.*, a *non*capital conviction). However, Barber can make neither showing and thus has failed to establish prejudice.

The evidence reviewed above thoroughly refutes the idea that Barber would have been more open to other defenses besides innocence if only his counsel had more thoroughly investigated those defenses and more assertively discussed those defenses with him. As to

investigation, it was not for lack of information that Barber was unwilling to consider an intoxication or mere afterthought defense. Barber knew better than anyone his state of mind when he killed Epps. His counsel also reviewed the relevant evidence with him. (Vol. 24, Tab R-60 at 61). If, based on his own memory of the event, refreshed by his counsel's review of the evidence, Barber was unwilling to consider an intoxication or mere afterthought defense at the time of trial, no additional investigation by trial counsel would have been remotely likely to change his mind. As to informing Barber of the alternative defenses to innocence available to him, the record shows that trial counsel repeatedly discussed alternative defenses with Barber and urged him to let them present those defenses at trial, to no avail. (*Id.* at 74-84); *see especially* (*id.* at 84) (testimony by trial counsel: "I told [Barber], Let's do something other than say you're not guilty. And he flatly refused to even discuss that with us. . . . Every time I met with him I begged him to let us do something to save his life and he flatly refused."). The state court was not unreasonable to conclude based on this evidence that Barber "failed [to show] that a more thorough investigation would have enabled trial counsel to convince him to admit that he killed Epps." (Vol. 29, Tab R-65 at 17).

Even if trial counsel had convinced Barber to let them try his case on a manslaughter or mere afterthought theory, Barber has failed to show the jury likely would have convicted him of a noncapital offense. Though Barber claims he was severely intoxicated when he killed Epps, he was able to describe the crime in considerable detail in his videotaped confession, as the state noted in its closing argument. (Vol. 11, Tab R-20 at 1126-30). Moreover, the jury heard the evidence of Barber's intoxication contained in his confession and received intoxication and manslaughter instructions from the trial judge, but still convicted Barber of capital murder.[6]

[6] This is perhaps unsurprising since Alabama law imposes a high standard to establish an intoxication defense: "to negate the specific intent required for a murder conviction, the degree of the accused's intoxication

(Vol. 11, Tab R-21 at 1152-55). Barber has not shown the jury likely would have reached a different conclusion if he had presented a manslaughter defense as his primary trial strategy. And though Barber now claims he formed the intent to steal Epps' purse only after he killed her, statements in his videotaped confession suggested money motivated the killing. (Vol. 23 at 1238) ("I stopped over there and was going to talk to [Epps] about the shutters and all of a sudden I just figured, well, you know, she's probably got a few bucks, you know, I should ask her for some money, and I just turned around and hit her."). Moreover, trial counsel argued the mere afterthought defense in closing argument (Vol. 11, Tab R-19 at 1109-10), but the jury rejected it and instead convicted Barber of capital murder. Barber has not shown the jury would likely have reached a different result had he made the mere afterthought defense the centerpiece of his trial strategy.

Barber has failed to show that, but for his counsel's unprofessional errors, he likely would have been willing to pursue a different strategy: admit at trial that he killed Epps, but offer mitigation evidence. He also has failed to show that, had he admitted to killing Epps and offered such mitigation evidence, the jury likely would have convicted him of a lesser, noncapital offense. As he has not made both showings, the state court's conclusion that Barber failed to show prejudice was reasonable and may not be disturbed on habeas review.

Because the state court's adjudication of Barber's guilt-phase ineffective assistance claim was reasonable, Barber is not entitled to federal habeas relief on that claim.

B. Barber's Penalty-Phase *Strickland* Claim

Barber also claims the Alabama Court of Criminal Appeals unreasonably rejected his penalty-phase ineffective assistance of counsel claim. (Doc. # 1 at 78-119). The court divides its

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must amount to insanity." *Whitehead v. State*, 777 So. 2d 781, 832 (Ala. Crim. App. 1999) (internal quotation marks omitted); (Vol. 11, Tab R-21 at 1153).

discussion of this claim into three parts. First, it recounts Barber's arguments that he received ineffective assistance of counsel at the penalty phase of his trial. Second, it reviews the state court's reasoning in rejecting Barber's claim. Third, it explains why the state court neither acted contrary to nor unreasonably applied clearly established Supreme Court precedent in rejecting Barber's claim.

1. Barber's Arguments

Barber argues his trial counsel performed deficiently in the penalty phase of his trial because they failed to conduct a reasonable mitigation investigation. He argues he suffered prejudice because trial counsel failed to uncover substantial, noncumulative mitigation evidence that a reasonable investigation would have uncovered and that, if presented at the penalty phase, would have created a reasonable probability of the jury concluding "that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695.

a. Failure to Conduct a Reasonable Mitigation Investigation

The mitigation investigation Barber's trial counsel conducted consisted primarily of interviews conducted by Robert Tuten, one of Barber's lawyers, and Dr. Rosenzweig, a forensic psychologist hired to investigate potential mitigation evidence and prepare a mitigation report. Tuten's investigation involved speaking with Barber to gather information about his background that could aid trial counsel in uncovering mitigation evidence. (Vol. 24, Tab R-60 at 116). As part of his investigation, Tuten wrote down the names of six "friends and relatives of James Barber" who he believed "were potential sources for mitigation evidence." (Vol. 24, Tab R-60 at 117).[7] When asked what steps he took "to cause [those] people to be interviewed," Tuten replied that he "let Marianne Rosenzweig know about their existence." (Vol. 24, Tab R-60 at 118-19).

[7] The names Tuten wrote down were: "Elizabeth B.," "Mark B.," "Beverly Risedorf," "Darren B.," "Margaret Kitteridge," and "Ronald [Kitteridge]." (Vol. 24 at 1428).

Tuten also testified that he personally spoke with Barber's mother, Elizabeth, and brother, Mark, several times before they testified at the penalty phase of Barber's trial. (Vol. 24, Tab R-60 at 119). But he could not recall contacting any other friends, family members, or former employers of Barber, including Barber's ex-wife Teresa Starke and his ex-fiancé Rita Impalusso. (Vol. 24, Tab R-60 at 119-24).

Trial counsel relied primarily on their mitigation expert, Dr. Rosenzweig, to investigate potential sources of mitigation evidence. Barber argues Dr. Rosenzweig's investigation was woefully deficient and that it was objectively unreasonable for trial counsel to rely almost entirely on her mitigation investigation in preparing for the penalty phase of Barber's trial. Barber identifies three alleged shortcomings of Dr. Rosenzweig's investigation that he claims rendered the investigation objectively unreasonable.

First, Barber claims Dr. Rosenzweig spent too little time interviewing him. Dr. Rosenzweig met with Barber for three and a half hours on March 26, 2003—some eight months before Barber's trial began in December 2003. (Vol. 25 at 182-83, 198-99). She spent one and a half hours assessing whether Barber had been competent to confess and two hours interviewing Barber about mitigation evidence. (Vol. 25 at 182-83, 198-99). Barber claims two hours "was an unreasonably short amount of time" for Dr. Rosenzweig to spend "gathering information purporting to cover his entire 42-year life." (Doc. # 23 at 51). Barber also faults Dr. Rosenzweig for only conducting a single interview with him. He argues that a single interview is insufficient to cover the breadth of information a reasonable mitigation investigation requires and that multiple interviews are need to build rapport with a defendant and conduct follow-up. (Doc. # 23 at 52).

Second, Barber claims Dr. Rosenzweig's investigation into collateral sources was insufficient. Dr. Rosenzweig spent just over four hours conducting four phone interviews with collateral sources between April 6 and April 10, 2003. (Vol. 25 at 182-83, 198-99, 207). The four phone interviews were with Elizabeth Barber (Barber's mother), Mark and Glen Barber (Barber's brothers), and Keith Collins (a former employer or contractor Barber had worked for). (Vol. 25 at 207). Dr. Rosenzweig spoke with Mark Barber for two hours; Glen Barber for about an hour; Elizabeth Barber for about 45 minutes; and Keith Collins for about 20 minutes. (Vol. 25 at 238). She also spoke briefly with Sergeant Dunn at the Madison County jail, but forgot to list him as a collateral source in her mitigation report. (Vol. 25 at 238-39). Barber argues Dr. Rosenzweig's investigation of collateral sources was unreasonable for the following reasons: she interviewed too few sources; she did not spend enough time with the sources she did interview and failed to conduct follow-up or discuss her findings with Barber; she did not interview a diverse enough range of collateral sources and neglected to include Barber's extended family members, friends, ex-girlfriends, ex-fiancé, and ex-wife; and she did not properly interview the collateral sources but instead used the interviews "just simply to confirm what Mr. Barber had told [her] about himself," rather than pursuing other potential mitigation evidence beyond what Barber relayed himself. (Vol. 12, Tab R-27 at 1231).

Third, Barber claims Dr. Rosenzweig did not adequately review available records relating to his past. The records trial counsel provided to Dr. Rosenzweig consisted only of police and forensic records relating to Epps' death; they did not include any materials concerning Barber's background. (Vol. 25 at 189; Vols. 23-24 at 1383-1426). Dr. Rosenzweig testified she did not receive or review any of Barber's school records or records regarding Barber's medical history, health, family history, or employment history. (Vol. 25 at 203-05). Dr. Rosenzweig testified that

she may have asked Tuten to obtain Barber's medical records from a Huntsville hospital and police records from Barber's DUI arrest, but she never received them. (Vol. 25 at 202-03). Barber argues his defense's failure to obtain any records relating to his background during their mitigation investigation was objectively unreasonable. Taken together, Barber argues these shortcomings show his trial counsel performed deficiently at the penalty phase of his trial and that the contrary conclusion of the state court was unreasonable.

b. Prejudice

Barber next argues he suffered prejudice from trial counsel's deficient mitigation investigation because trial counsel failed to uncover substantial, noncumulative mitigation evidence that a reasonable investigation would have uncovered. Had that evidence been presented at the penalty phase, Barber argues, it would have created a reasonable probability of the jury concluding "that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. The mitigation evidence Barber identifies falls into three categories.

First, Barber claims trial counsel failed to uncover evidence that he and his family have a history of mental illness. Testimony at Barber's Rule 32 hearing revealed that Barber's mother and grandmother experienced multiple nervous breakdowns in their lifetimes and that Barber's older sister was hospitalized for mental health issues relating to prolonged depression. (Vol. 25 at 291, 303-05, 336-38, 342-45). Testimony also revealed that Barber himself contemplated suicide on at least one occasion—he was found at home "with a gun in his mouth." (Vol. 25 at 350).

Second, Barber claims trial counsel failed to uncover that he had destructive role models during his childhood. Testimony at the Rule 32 hearing suggested that Barber's older brother and

older brother-in-law had been bad influences on Barber and used drugs or alcohol in his presence while Barber was growing up. (Vol. 25 at 314-15, 338-342).

Third, Barber claims trial counsel failed to uncover that he experienced a lack of parental discipline in his childhood. Testimony at the Rule 32 hearing suggested that Barber sometimes fought with his siblings as a child, regularly used drugs and alcohol during his teenage years, and possibly stole money from his father's gas station without receiving any meaningful disciplinary action from his parents. (Vol. 25 at 281, 283-84, 295). Barber's brother described the Barber household as "very lenient" and explained that it was difficult for his parents to adequately discipline all seven children. (Vol. 25 at 311-12).

Barber argues that the mitigation evidence presented at his Rule 32 hearing was not cumulative of the evidence presented at his trial. (Doc. # 23 at 73). He contends that had the evidence of Barber's personal and family history of mental illness, poor role models, and lack of parental discipline been presented at his trial, it would have created a reasonable probability of the jury not returning a death verdict.

2. The State Court's Decision

The Alabama Court of Criminal Appeals rejected Barber's penalty-phase ineffective assistance claim for two reasons. First, the court found the claim barred by the doctrine of invited error because Barber was uncooperative with trial counsel and their mitigation expert in preparing for the penalty phase of his trial. (Vol. 29, Tab R-65 at 19-21). Second, the court found Barber failed to prove both the deficient performance and prejudice prongs of *Strickland*. (*Id.* at 21-26). Because this court concludes that the state court reasonably applied *Strickland* to deny Barber's claim, it need not address the state court's alternative holding that Barber's *Strickland*

claim was barred by the doctrine of invited error. The court therefore recounts only the deficiency and prejudice portions of the state court's analysis.

The Court of Criminal Appeals first held that Barber failed to prove deficient performance by trial counsel under *Strickland*. The court relied on the following evidence to conclude that trial counsel were not deficient:

> Trial counsel presented testimony from Barber's brother, Mark Barber, who testified that Barber had problems with drugs and started using marijuana and alcohol at the age of 12. Mark Barber also testified that, in his opinion, Barber was a good person who is supportive of his family. Barber's mother, Elizabeth Barber, also testified that Barber was a good son who helped her after her husband died. Additionally, Alex Dryer, a minister who knew Barber through a prison ministry, testified that Barber became a Christian while he was incarcerated and that Barber shared his religion with other inmates.
>
> Trial counsel also called Dr. Rosensweig as a mitigation expert to testify during the penalty phase. Dr. Rosensweig testified that she interviewed Barber as well as other collateral sources in order to confirm things that Barber told her. Rosensweig testified that she spoke with family members, a former employer, and an officer from the Madison County jail. Dr. Rosensweig was able to give detailed testimony regarding what she learned about Barber's childhood, his adolescent years, and his adult life. That testimony included information regarding Barber's drug use, including his use of crack cocaine, and how that drug use negatively affected his life. Dr. Rosensweig also testified regarding the differences in powdered cocaine and crack cocaine as well as the effects of crack cocaine use. Dr. Rosensweig even introduced a chart that graphically depicted the behavior effects of the progression of cocaine depend[e]ncy.

(*Id.* at 21-22).

Based on this evidence, the state court concluded:

> Notwithstanding Barber's lack of cooperation, trial counsel was able to put forth a mitigation case that cast Barber as a person with a good heart who, for various reasons, began using drugs and alcohol. Trial counsel further put evidence before the jury that, because of this extensive drug use, Barber's brain did not function normally.

(*Id.* at 22).

The state court recognized that testimony presented at Barber's Rule 32 hearing suggested "that trial counsel could have done a more extensive mitigation investigation; that Dr. Rosensweig could have spent more time on her investigation and her evaluation of Barber and other collateral sources; and that additional expert testimony could have been presented regarding the effects of crack cocaine." (*Id.* at 22-23). But, the state court reasoned that it must distinguish "between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation where the presumption of reasonable performance is more difficult to overcome." (*Id.* at 23) (internal quotation marks omitted).[8] The court explained that "if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by Strickland will be hard to overcome." (*Id.*) (internal quotation marks omitted). The court classified Barber's claim as the latter type, concluding that trial counsel's investigation was reasonable and that "[t]he fact that Rule 32 counsel would have conducted a more extensive investigation and presented additional witnesses during the penalty phase does not render trial counsel's performance deficient." (*Id.* at 26).

Regarding prejudice, the state court concluded that Barber failed to show "what additional information or witnesses could have been provided that would have been so compelling it would have caused a different result at the penalty phase." (*Id.* at 26). Indeed, the

[8] The court recognizes that this language likely misstates the appropriate standard for evaluating *Strickland* claims based on counsel's failure to conduct a reasonable mitigation investigation. Counsel may conduct an unreasonable mitigation investigation that runs afoul of *Strickland* even if counsel conducts some investigation, but the investigation conducted is not adequate. But the state court's language on this point is immaterial to the court's analysis on habeas review. As explained below, the court need not decide whether the state court reasonably concluded that Barber failed to show deficient performance on his guilt-phase *Strickland* claim because, in any event, the state court reasonably concluded that Barber failed to show prejudice. *See Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (en banc) ("[I]f we conclude that the [state court] reasonably applied clearly established federal law when it decided that [petitioner] had failed to establish prejudice, we may affirm the denial of [the habeas] petition without addressing whether the performance of his counsel was deficient.").

court concluded that "much of [the testimony presented at the Rule 32 hearing] would have been cumulative to testimony that was offered during the penalty phase." (*Id.* at 23). Because Barber failed to show "that he was prejudiced by any of counsels' alleged failures," the court affirmed the Rule 32 court's denial of Barber's guilt-phase *Strickland* claim. (*Id.* at 26).

3. The State Court's Decision Was Reasonable

Barber argues the state court's rejection of his penalty-phase *Strickland* claim was contrary to and an unreasonable application of *Williams v. Taylor*, 529 U.S. 362 (2000); *Wiggins v. Smith*, 539 U.S. 510 (2003); *Rompilla v. Beard*, 545 U.S. 374 (2005); *Porter v. McCollum*, 558 U.S. 30 (2009); and *Sears v. Upton*, 561 U.S. 945 (2010). Whether the state court unreasonably concluded that trial counsel's performance was not deficient is a close question. But even assuming the state court's conclusion on that point was unreasonable, its holding that Barber failed to establish prejudice was not. Thus, Barber is not entitled to habeas relief on this claim.

a. Deficient Performance

At the penalty phase of a capital trial, *Strickland*'s first prong requires counsel "to conduct a thorough investigation of the defendant's background" for the purpose of gathering potential mitigation evidence. *Porter*, 558 U.S. at 39 (internal quotation marks omitted). Barber's trial counsel relied almost entirely on Dr. Rosenzweig to conduct their mitigation investigation. Dr. Rosenzweig's investigation consisted of a two-hour interview with Barber and just over four hours conducting phone interviews with four collateral sources—Barber's mother, two of his brothers, and a former employer. (Vol. 25 at 182-83, 198-99, 207). Neither she nor trial counsel interviewed any additional sources concerning Barber's past, including Barber's extended family members, childhood friends, ex-girlfriends, ex-fiancé, or ex-wife. They also did not obtain or review any of Barber's school records, DUI arrest records, or records regarding his medical history, family history, or employment history. (Vol. 25 at 202-05).

The Supreme Court has found deficient performance under *Strickland* where counsel "abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources." *Wiggins*, 539 U.S. at 524. In *Wiggins*, counsel's mitigation investigation consisted of psychological testing and reviewing a presentence investigation report and social services records from the City of Baltimore. *Id.* at 523. The presentence investigation report contained only "a one-page account of Wiggins' 'personal history' noting his 'misery as a youth,' quoting his description of his own background as 'disgusting,' and observing that he spent most of his life in foster care." *Id.* (some internal quotation marks omitted). The social services records merely documented Wiggins' "various placements in the State's foster care system." *Id.*

The Court also found deficient performance in *Williams*. 529 U.S. at 395-96. There, counsel did not begin preparing a mitigation case until a week before trial and failed to obtain juvenile records that "graphically describ[ed] Williams' nightmarish childhood." *Id.* at 395 & n.19. Counsel also failed to (1) "introduce available evidence that Williams was 'borderline mentally retarded' and did not advance beyond sixth grade in school," (2) seek prison records describing positive behavior by Williams in prison, and (3) return the phone call of a witness who offered to testify about positive interactions he had with Williams as part of a prison ministry program. *Id.* at 396.

The Court found deficient performance again in *Porter* where counsel had only one short meeting with the defendant and "did not obtain any of Porter's school, medical, or military service records or interview any members of Porter's family." 558 U.S. at 39. Finally, the Court in *Sears* affirmed a state court's finding of deficient performance where counsel's investigation

consisted of one day or less spent interviewing roughly a dozen witnesses selected by the defendant's mother. 561 U.S. at 952; *id.* at 958 (Scalia, J., dissenting).

Given Barber's insistence that trial counsel pursue an absolute innocence defense at the guilt stage, counsel believed obtaining anything less than a capital murder conviction at the guilt phase was not "realistically achievable." (Vol. 24, Tab R-60 at 59). Counsel's objective heading into trial was therefore "[t]o put on a mitigation case and try to avoid the death penalty." (*Id.*). In light of that trial strategy and counsel's "obligation to conduct a thorough investigation of the defendant's background," *Porter*, 558 U.S. at 39 (internal quotation marks omitted), it is at least a close question whether trial counsel met that obligation with an investigation consisting of a two-hour interview with Barber; four hours interviewing Barber's mother, two brothers, and a former employer; and at best limited (and unsuccessful) attempts to review records concerning Barber's personal history. *See Johnson v. Sec'y, DOC*, 643 F.3d 907, 932 (11th Cir. 2011) (finding deficient performance where trial counsel recognized "that the sentence stage was the only part of the trial in which [the defendant] had any reasonable chance of success" but nevertheless "failed to adequately" prepare for the sentence stage). Whether the state court's contrary decision was unreasonable under the deferential standard of review imposed by § 2254(d) is an even closer question. But the court need not decide that issue because, in any event, the state court reasonably concluded that Barber failed to show prejudice. *Evans v. Sec'y, Dep't of Corr.*, 703 F.3d 1316, 1326 (11th Cir. 2013) (en banc) ("[I]f we conclude that the [state court] reasonably applied clearly established federal law when it decided that [petitioner] had failed to establish prejudice, we may affirm the denial of [the habeas] petition without addressing whether the performance of his counsel was deficient.").

b. Prejudice

The Court of Criminal Appeals concluded Barber was not prejudiced by his counsel's performance because he failed to show "what additional information or witnesses could have been provided that would have been so compelling it would have caused a different result at the penalty phase." (Vol. 29, Tab R-65 at 26). Based on the evidence presented at Barber's original penalty-phase trial and his Rule 32 hearing, that conclusion was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent.

To establish prejudice, Barber must show there was "a reasonable probability that, absent [counsel's deficient performance], the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland*, 466 U.S. at 695. "[R]easonable probability" means "a probability sufficient to undermine confidence in the outcome." *Id.* at 694. That standard "does not require a showing that counsel's actions 'more likely than not altered the outcome,' but the difference between *Strickland*'s prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest case.'" *Harrington*, 562 U.S. at 111-12. To determine whether Barber has shown a "reasonable probability" of a different outcome, the court must "consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter*, 558 U.S. at 41 (internal quotation marks and brackets omitted). The court begins by considering the mitigation evidence presented at the penalty phase of Barber's trial.

i. Mitigation Evidence at Barber's Penalty-Phase Trial

Three witnesses testified at the penalty phase of Barber's trial. The court reviews the testimony of each, in turn.

Barber's older brother, Mark Barber, testified first. He described his and Barber's childhood as "a normal childhood" and stated that he had left home when Barber was about fifteen years old. (Vol. 12, Tab R-27 at 1216). Mark testified that Barber "always had a big heart" and did "whatever he could for anybody he could." (*Id.* at 1217). He explained that Barber began using marijuana and alcohol around age twelve or thirteen, "[p]ossibly younger than that," and continued to abuse these substances over his entire life. (*Id.*). Mark testified that on several occasions he tried to assist Barber with checking into a clinic to get help for his drug addiction and alcoholism, but was unsuccessful because Barber lacked insurance and could not pay for rehab. (*Id.* at 1217-18). He also testified that Barber was a painter who did good work, was well-liked by others, and had the ability to express love and good feelings to other people. (*Id.* at 1219-20).

Alex Dryer, a minister who came to know Barber through a prison ministry, testified next. (*Id.* at 1222). Dryer testified that Barber had become a Christian through the prison ministry and was an active participant in weekly praise and worship. (*Id.* at 1223). He also testified that Barber shared his faith with other inmates, leading others to become Christians as well. (*Id.* at 1223-24). Finally, Dryer testified that he believed Barber has the capacity to love and care for other people, and that he had seen major changes in Barber during the last two years of ministering to him. (*Id.* at 1224-25).

Dr. Rosenzweig testified last. After explaining her qualifications and investigative methods, Dr. Rosenzweig began by telling the jury what she had learned about Barber's childhood. (*Id.* at 1227-33). She testified that Barber was the fifth of seven children and grew up in a small Connecticut town with his parents, who had only been married to each other. (*Id.* at 1233). She stated that Barber had "a pleasant home life," and that "his parents were good

parents" even though seven children didn't "get as much individual attention." (*Id.*). With the exception of being teased by other kids for being overweight, Barber had "basically a happy childhood." (*Id.*). He made above-average grades in school and only got into minor trouble at home. (*Id.* at 1234). According to Dr. Rosenzweig, Barber's mother "described him as being a little bit mischievous, not a bad boy and he was not really much trouble." (*Id.*).

Dr. Rosenzweig next told the jury about Barber's adolescent years. She testified that Barber began using marijuana at age thirteen, which was "not atypical" in the small town he grew up in. (*Id.*). By age fifteen or sixteen, he had started using "any kind of pills that he could get his hands on," and by sixteen to seventeen, he was "smoking marijuana on a daily basis," both before and after school. (*Id.*). During his teenage years, Dr. Rosenzweig testified, Barber spent time with "a partying-type crowd" who used alcohol and drugs, but he only got into minor trouble for things like skipping school. (*Id.* at 1234-35). In the twelfth grade, against his parents' advice, Barber quit school and moved to Florida to work in the construction business with one of his older brothers. (*Id.* at 1235).

Dr. Rosenzweig then told the jury about Barber's adult life. Dr. Rosenzweig described Barber's employment history, including his time working construction in Florida, at a manufacturing plant in Connecticut, as a vacuum cleaner salesman and then branch manager, and as a painter. (*Id.* at 1235-36). She also described his romantic relationships, including a seven-year relationship with a live-in girlfriend, a two-year marriage, and his relationship with Liz Epps, the victim's daughter. (*Id.* at 1237-38, 1242). The first two relationships ended in part because of Barber's substance abuse, and Barber was arrested in 1998 for slapping Liz Epps in the face during an argument. (*Id.* at 1237-38).

Last, Dr. Rosenzweig told the jury about the significant impact Barber's substance abuse had on his life. Barber began using cocaine on a casual basis in his early twenties, which then escalated to heavy use. (*Id.* at 1238). At times he "went on binges where he might . . . stay high for about three, four days and not sleep much during that time." (*Id.*). From about 1985 to 1998, Dr. Rosenzweig testified, Barber had five different arrests for driving while intoxicated. (*Id.*). His drug use strained his relationships with family and friends, especially when he would borrow money to support his substance abuse and fail to repay it. (*Id.* at 1239). Barber's brother, Glenn, told Dr. Rosenzweig that Barber had stolen coins from him as well as a microwave and golf clubs to pawn for drug money. (*Id.* at 1240-41).

Barber enrolled in Alcoholics Anonymous and was able to stop using cocaine and alcohol for a brief period of time, from about 1999 to 2000. (*Id.* at 1242-43). But in October 2000, he injured his back and was prescribed pain pills for the injury. (*Id.* at 1243). He began abusing pain pills shortly after that and was using cocaine again by December 2000. (*Id.*). Barber's cocaine usage escalated from about fifty dollars' worth of cocaine per week in 2000 to three to four hundred dollars' worth per week at the time of Epps' death. (*Id.*). He also continued to heavily abuse alcohol during this time, consuming anywhere from a half to a full case of beer three to four times per week. (*Id.* at 1246).

Based on Barber's heavy substance abuse, Dr. Rosenzweig testified that he could be diagnosed with cocaine abuse, cocaine dependency, alcohol abuse, and possibly alcohol dependency, all of which are psychiatric diagnoses recognized by the fourth edition of the Diagnostic and Statistical Manual. (*Id.* at 1247-48). She explained the effects of cocaine use on human behavior, including its effect on the brain and its tendency to cause users to become

irritable, agitated, violent, and judgment-impaired. (*Id.* at 1248-56). And she testified specifically that she observed these types of cocaine-induced behaviors in Barber's case. (*Id.* at 1256).

Dr. Rosenzweig also testified that there was scientific evidence showing a hereditary or biological basis for alcohol and drug addiction in certain people and that Barber's family history suggested he may have been predisposed to substance abuse. (*Id.* at 1257). She pointed to Barber's strong family history of substance abuse, including an alcoholic maternal grandfather and multiple siblings who abused alcohol or marijuana during their lives. (*Id.*). Finally, Dr. Rosenzweig testified that she believed Barber would likely be a model prisoner who would pose no risk to other inmates or prison staff if he received a life sentence instead of the death penalty. (*Id.* at 1258-60).

ii. Mitigation Evidence at Barber's Rule 32 Hearing

As explained above, Barber points to three categories of mitigation evidence presented at his Rule 32 hearing that he claims were not presented at his original trial and would have created a reasonable probability of a different sentence had the jury heard them. Those three categories are (1) evidence regarding Barber's personal and family history of mental illness, (2) evidence that Barber had destructive role models during his childhood, and (3) evidence of a lack of parental discipline in the Barber home. The court reviews the Rule 32 hearing testimony regarding each of these categories in detail.

Evidence of Mental Illness. At his Rule 32 hearing, Barber's sister Beverly Risedorf testified that Barber's mother experienced two nervous breakdowns, one of which resulted in a prolonged catatonic state that caused her to be hospitalized and lose about 60 pounds. (Vol. 25 at 342-45). She also testified that Barber's grandmother experienced several nervous breakdowns that confined her to bed and required shock treatments. (Vol. 25 at 336-38). Barber's niece

Denise Kisiel testified that her mother Penny Kittredge (Barber's older sister) was hospitalized for mental health issues relating to prolonged depression. (Vol. 25 at 291, 303-05). Risedorf further testified that Barber himself contemplated suicide on at least one occasion—Barber's mother had come home from work and "found [Barber] in the room with a gun in his mouth." (Vol. 25 at 350). Both Risedorf and Kisiel stated they would have been willing to testify at Barber's trial in 2003. (Vol. 25 at 306, 364-65). Dr. William Alexander Morton, Jr., a psychopharmacologist who testified at the Rule 32 hearing, stated that mental illnesses have a hereditary basis and often run in families. (Vol. 26 at 452, 568).

Evidence of Poor Role Models. Risedorf testified that Ron Kittredge, her and Barber's older brother-in-law, lived in the Barber household for some time after he was released from prison. (Vol. 25 at 338-340). She recounted one occasion on which Ron Kittredge smashed the mirror over her sister's bedroom dresser, cutting himself. (Vol. 25 at 340-41). She also testified that Ron Kittredge was sometimes intoxicated in front of Barber. (Vol. 25 at 342). Mark Barber described Ron Kittredge as "a bad influence, in trouble all the time and, you know, I'm sure on drugs and alcohol and whatever." (Vol. 25 at 314). Mark similarly testified that his and Barber's older brother, Joel, was an alcoholic who was "a bad influence" on Barber. (Vol. 25 at 314). He testified further that numerous members of Barber's immediate family used drugs growing up—"[p]retty much everybody at some point or another" "except for my two younger brothers." (Vol. 25 at 315).

Evidence of a Lack of Parental Discipline. Denise Kisiel testified that she could recall "some fights that [Barber] may have had with his siblings" when she visited the Barber home as a child and that she could not remember Barber ever specifically being punished for those incidents. (Vol. 25 at 295). Francis King, a high school friend of Barber's, testified that Barber

used drugs and alcohol on a daily basis during parts of his teenage years. (Vol. 25 at 281). He also testified that Barber was suspected of stealing money from his father's gas station where he worked part-time but that Barber's father would only give him "a scolding" instead of meaningful "disciplinary action." (Vol. 25 at 282-83). King, who described himself as a "pretty regular visitor" to the Barber residence, stated that he observed "no disciplinary action there as compared to what I grew up with." (Vol. 25 at 284). Mark Barber testified that there was little discipline in the Barber household when he and Barber were growing up, describing the environment as "very lenient." (Vol. 25 at 311-12). He explained that "[i]t was difficult . . . for my parents to discipline seven children. My Dad was . . . ususally working somewhere around the clock . . . ." (Vol. 25 at 311). "[B]y the time you were a 12-year-old child in our family," he testified, "you were pretty much on your own. You could do pretty much anything in those days." (Vol. 25 at 312). Barber contends the lack of discipline by his parents led him "to develop his own perverse view of moral norms and consequences" and "resulted in [him] engaging in more frequent poor and sometimes violent behaviors." (Doc. # 23 at 72).

iii. Reweighing the Mitigation Evidence

Barber has not shown that the additional mitigation evidence presented at his Rule 32 hearing would have created a reasonable probability of a different outcome at his penalty-phase trial, and he certainly has not shown that the state court was unreasonable for failing to conclude otherwise. The state court's conclusion that Barber failed to establish prejudice was reasonable for at least three different reasons.

First, some of the allegedly "new" mitigation evidence presented at Barber's Rule 32 hearing was in fact cumulative of the mitigation evidence offered at his penalty-phase trial. The jury at Barber's trial heard testimony from Dr. Rosenzweig that Barber had grown up around

poor role models in an environment where drug and alcohol use was common. She explained that Barber had begun using marijuana at age thirteen, which was "not atypical" in the town where he grew up. (Vol. 12, Tab R-27 at 1234). She also testified that Barber spent time with "a partying-type crowd" who used alcohol and drugs, and that he regularly abused alcohol and drugs himself during his teenage years. (*Id.* at 1234-35). Thus, the Rule 32 hearing testimony indicating that Barber's older brother Joel and brother-in-law Ron Kittredge were bad influences who used drugs or alcohol around Barber would have added little to what the jury already knew from Dr. Rosenzweig about Barber's younger years. And, as the Eleventh Circuit has explained, a finding of no prejudice is entirely appropriate where "the petitioner's postconviction mitigation evidence is cumulative of the mitigating evidence the jury already knew about." *Evans*, 703 F.3d at 1342; *see also id.* n.4 (collecting cases applying this principle).

Second, the postconviction mitigation evidence Barber presented was nowhere near as compelling as the new mitigation evidence offered in cases in which the Supreme Court has found prejudice. On de novo review, the Supreme Court has found prejudice where new mitigation evidence showed that a petitioner with diminished mental capacities had "experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother"; "suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care"; and been homeless for a time. *Wiggins*, 539 U.S. at 535. The Court also found prejudice on de novo review in *Rompilla* based on the following mitigation evidence presented at Rompilla's postconviction hearing:

> Rompilla's parents were both severe alcoholics who drank constantly. His mother drank during her pregnancy with Rompilla, and he and his brothers eventually developed serious drinking problems. His father, who had a vicious temper, frequently beat Rompilla's mother, leaving her bruised and black-eyed, and bragged about his cheating on her. His parents fought violently, and on at least one occasion his mother stabbed his father. He was abused by his father who beat

> him when he was young with his hands, fists, leather straps, belts and sticks. All of the children lived in terror. There were no expressions of parental love, affection or approval. Instead, he was subjected to yelling and verbal abuse. His father locked Rompilla and his brother Richard in a small wire mesh dog pen that was filthy and excrement filled. He had an isolated background, and was not allowed to visit other children or to speak to anyone on the phone. They had no indoor plumbing in the house, he slept in the attic with no heat, and the children were not given clothes and attended school in rags.

545 U.S. at 391-92 (internal quotation marks omitted).

On § 2254(d) review, the Supreme Court has found prejudice where new mitigation evidence "graphically describe[ed]" the petitioner's "nightmarish childhood" -- including being severely and repeatedly beaten by his father, living in a home with standing feces and urine, and being placed in an abusive foster home while his parents were incarcerated -- and showed that the petitioner was "borderline mentally retarded and did not advance beyond sixth grade in school." *Williams*, 529 U.S. at 395-96 & n.19 (internal quotation marks omitted). It also found prejudice under § 2254(d) in *Porter*, where postconviction mitigation evidence revealed "(1) Porter's heroic military service in two of the most critical—and horrific—battles of the Korean War, (2) his struggles to regain normality upon his return from war, (3) his childhood history of physical abuse, and (4) his brain abnormality, difficulty reading and writing, and limited schooling." 558 U.S. at 41.[9]

The new mitigation evidence offered at Barber's Rule 32 hearing -- testimony that Barber's mother and grandmother experienced nervous breakdowns, his sister suffered from depression, Barber had poor role models growing up, and the Barber household was undisciplined -- is simply not comparable to the graphic, gripping postconviction mitigation

[9] The specific mitigation evidence introduced at Porter's postconviction hearing included testimony that "Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child"; that "[o]n one occasion, Porter's father shot at him for coming home late, but missed and just beat Porter instead"; that "Porter attended classes for slow learners and left school when he was 12 or 13"; and that Porter suffered from posttraumatic stress disorder as a result of serving his country in the Korean War, where he fought and was wounded in some of the worst battles of the war. *Porter*, 558 U.S. at 33-35 & n.4.

evidence offered in *Wiggins*, *Rompilla*, *Williams*, and *Porter*. Far from experiencing violent and abusive parents, physical and sexual abuse, extreme neglect, and frequent changes in custody or homelessness, Barber's Rule 32 hearing expert explained that Barber came from an intact family, did not experience sexual or physical abuse, and always had adequate food, shelter, and clothing. (Vol. 27 at 587-88). And unlike the petitioners in *Wiggins* and *Williams*, who had diminished mental capacities or were borderline mentally retarded, Barber's Rule 32 hearing expert testified that Barber did not have deficient intellectual abilities. (*Id.* at 588). In light of the stark differences between the postconviction mitigation evidence presented in Barber's case and in cases in which the Supreme Court has found prejudice, the court cannot say that the state court acted contrary to or unreasonably applied clearly established Supreme Court precedent in finding that Barber failed to establish prejudice.

Third, the state court's decision that Barber failed to show prejudice was reasonable in light of *Cullen v. Pinholster*, 563 U.S. 170, 201-02 (2011). There, the petitioner offered additional mitigation evidence quite similar to the evidence presently offered by Barber in an attempt to show prejudice under *Strickland*. In particular, Pinholster presented evidence of his family's "serious substance abuse, mental illness, and criminal problems." *Pinholster*, 563 U.S. at 201. But the Court concluded that evidence was "by no means clearly mitigating, as the jury might have concluded that Pinholster was simply beyond rehabilitation." *Id.* The same could be said of Barber's postconviction mitigation evidence concerning his family members' substance abuse, mental illness, and criminal histories.

In *Pinholster* the petitioner also offered evidence that (1) his brother "died of suicide by drug overdose," (2) he "was mostly unsupervised and 'didn't get much love,' because his mother and stepfather were always working and 'were more concerned with their own lives than the

welfare of their kids,'" and (3) "[n]either parent seemed concerned about Pinholster's schooling." *Id.* at 201-02. The Court nevertheless concluded that this additional evidence was insufficient to render the state court's conclusion that Pinholster failed to show prejudice unreasonable. *Id.* at 202. Likewise, this court cannot say the Alabama Court of Criminal Appeals was unreasonable to conclude that the additional evidence of Barber's family history of mental illness, poor childhood role models, and lack of parental discipline and supervision would not have created a reasonable probability of a different result if presented at Barber's penalty-phase trial.

For all these reasons, Barber is not entitled to habeas relief on his penalty-phase ineffective assistance claim.

C. Barber's Claims That the Trial Court Improperly Precluded the Jury from Considering Certain Mitigation Evidence and Failed to Instruct the Jury Regarding Mercy

At the penalty phase of Barber's trial, the jury heard testimony from Barber's family and friends about their love for him and desire to see him live. In addition to offering mitigation evidence, Barber's mother, Elizabeth Barber, and his spiritual advisor, Alex Dryer, both expressed how much they cared about Barber and that they wanted him to live. (Vol. 12, Tab R-27 at 1224-25, 1275). Barber's mother pleaded with the jury to spare Barber's life because of her love for him. (*Id.* at 1275). At the close of the penalty-phase testimony, the trial court told the jury that "the defendant's family's wishes as to what the sentence should be or what the sentence should not be are not factors that you can consider in arriving at your verdict." (*Id.* at 1278). The trial court also gave the following penalty-phase instruction before the jury retired to deliberate:

> You also heard statements from family of the Defendant asking that you not determine that death would be an appropriate penalty. And while they have the right to make that request, that in and of itself, requests of that type are not offered as mitigation in this case but can be taken as far as the life of the Defendant in that

> regard and what he has done in the past prior to the crime being committed and since his incarceration.

(*Id.*, Tab R-31 at 1317-18).

Barber claims two constitutional violations based on the trial court's jury instructions. (Doc. # 1 at 119-26). First, he argues the trial court's instructions limiting the consideration the jury could give the testimony of his family and friends violated his Eighth and Fourteenth Amendment rights. (Doc. # 23 at 96-98). Second, Barber argues the trial court's failure to expressly instruct the jury that it could consider mercy in determining his sentence violated his Eighth and Fourteenth Amendment rights. (*Id.* at 99-101). The Alabama Court of Criminal Appeals addressed and rejected both claims on Barber's direct appeal. *Barber*, 952 So. 2d at 447-53. As explained below, neither determination by the state court was unreasonable, and Barber is therefore not entitled to habeas relief on these claims.

1. The Trial Court's Instructions Regarding the Testimony of Barber's Family and Friends

Barber argues that under the Eighth and Fourteenth Amendments, he "was entitled to full recognition and consideration of all relevant factors mitigating in favor of life without parole instead of death, including his family's and friends' desire to see him live." (Doc. # 23 at 96). He claims the trial court's instruction that the jury disregard "the defendant's family's wishes as to what the sentence should be or what the sentence should not be" violated that guarantee. (Vol. 12, Tab R-27 at 1278). The Alabama Court of Criminal Appeals rejected Barber's claim on direct appeal. It concluded that that "the opinions of [Alex] Dryer and [Elizabeth] Barber about punishment were not relevant mitigating circumstances for the jury to consider during the penalty phase of [Barber's] capital trial" and that the trial court therefore "did not improperly restrict the jury's consideration of those opinions by giving" the above-quoted instructions. *Barber*, 952 So. 2d at 450.

Barber claims the state court's decision was unreasonable in light of *Penry v. Lynaugh*, 492 U.S. 302 (1989); *Hitchcock v. Dugger*, 481 U.S. 393 (1987); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978); and *Woodson v. North Carolina*, 428 U.S. 280 (1976). (Docs. # 1 at 122-23; 23 at 97).[10] Those decisions do espouse the principle that sentencing juries may not "be precluded from considering any relevant mitigating evidence" in deciding whether to impose the death penalty on a particular individual. *Hitchcock*, 481 U.S. at 394 (internal quotation marks omitted). But they *do not* hold that the desire of a defendant's friends and family to see him live qualifies as "relevant mitigating evidence" that the Constitution requires sentencing juries be permitted to consider. *Id.* Instead, the decisions Barber cites merely require that sentencers in capital cases be allowed to consider such traditional mitigating evidence as a defendant's life experiences, family history, character traits, mental and emotional profile, prior record, and role in the crime at issue.[11]

It is no surprise that the decisions Barber cites do not require sentencers to treat the views of a defendant's family and friends concerning the appropriate sentence as "relevant mitigating evidence." "Mitigating evidence," as its name suggests, refers to evidence that the American

[10] Barber also cites *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 246 (2007), (Doc. # 23 at 97), but that case was decided after Barber's direct appeal. It therefore does not represent clearly established law at the time of the relevant state-court decision. *See Pinholster*, 563 U.S. at 182.

[11] *Penry* held that it was unconstitutional to execute a defendant where the sentencing jury "was never instructed that it could consider [evidence of the defendant's mental retardation and history of abuse] as *mitigating* evidence and that it could give mitigating effect to that evidence in imposing sentence." 492 U.S. at 320; *see also id.* at 328. *Hitchcock* reached the same conclusion where the trial judge instructed the sentencing jury not to consider nonstatutory mitigating evidence concerning the defendant's difficult childhood, tumultuous upbringing, and positive character traits. 481 U.S. at 397-99. *Eddings* also set aside a defendant's death sentence because the sentencing judge refused to consider as mitigating evidence the sixteen-year-old defendant's troubled family history, difficult upbringing, and emotional disturbance. 455 U.S. at 107-09, 112-17. In *Lockett*, a plurality of the Court likewise concluded that the defendant's death sentence was unconstitutionally obtained where the state's death penalty statute did not permit the sentencing judge to consider such mitigating factors as the defendant's character, prior record, age, lack of specific intent to cause death, and relatively minor role in the crime. 438 U.S. at 597. Finally, *Woodson* invalidated North Carolina's mandatory death-penalty statute in part because it failed "to allow the particularized consideration of relevant aspects of the character and record of each convicted defendant before the imposition" of the death penalty. 428 U.S. at 303.

legal tradition has long held to be relevant to an offender's moral culpability. *See Penry*, 492 U.S. at 319 (explaining that "evidence about the defendant's background and character is relevant" to determining the appropriateness of the death penalty "because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse") (internal quotation marks omitted). It is difficult to see how the desires of a defendant's family and friends concerning whether he lives or dies, standing alone, bear on his moral culpability for the crime at issue. This may explain why the Supreme Court has never recognized a constitutional requirement for capital sentencers to consider the desires of a defendant's family and friends when imposing sentence.

Given the factual distinctions between the traditional mitigating *evidence* at issue in the Supreme Court decisions Barber cites and the testimony about his family's and friends' *desires* in this case, it is plain that the state court's decision was not "contrary to" clearly established Supreme Court precedent. *See Jones*, 753 F.3d at 1182. And, given the questionable relevance of the desires of a defendant's family and friends concerning his sentence to determining his moral culpability, *see Penry*, 492 U.S. at 319, this court cannot say the state court unreasonably applied Supreme Court precedent by declining to extend it to a new context where it arguably should not apply. Accordingly, Barber is not entitled to habeas relief on this claim.

2. The Trial Court's Failure to Give an Instruction Regarding Mercy

Barber also challenges the state trial court's failure to give several penalty-phase jury instructions he requested relating to mercy. Barber requested multiple penalty-phase jury instructions that referenced the concept of mercy. (Vol. 2 at 223-34, ¶¶ 10, 29-30, 32, 37, 39-43). The most explicit proposed jury instructions read as follows:

> 39. This court's prior instruction, during the trial phase, that you were not to be swayed by mercy in deciding whether the defendant was guilty, does not apply in this sentencing hearing. You may decide to sentence the defendant to life imprisonment without the possibility of parole simply because, based on the evidence introduced at either the guilt-innocence or sentencing phase at this trial, you find it appropriate to exercise mercy.
>
> 40. A decision to grant the defendant mercy based on the evidence introduced at either the guilt-innocence or sentencing phase at this trial does not violate the law. The law does not forbid you from being influenced by pity for the defendant and you may be governed by mercy, sentiment, or sympathy for the defendant in arriving at a proper penalty in this case as long as that pity, mercy, sentiment or sympathy is derived from the evidence.
>
> 41. If a mitigating circumstance or an aspect of the defendant's background or character, based upon the evidence you have heard or seen at either the guilt-innocence or sentencing phase of this trial, arouses mercy, sympathy, empathy, or compassion that persuades you that death is not the appropriate penalty, you must act in response and impose a sentence of life imprisonment.
>
> . . . .
>
> 43. An appeal to the sympathy or passions of a jury is inappropriate at the guilt phase of a trial. However, at the penalty phase, you may consider sympathy, pity, compassion, or mercy for the defendant that has been raised by any evidence that you have heard or seen. . . . You may decide that the sentence of life imprisonment without the possibility of parole is appropriate for the defendant based on the sympathy, pity, compassion, and mercy you feel as a result of the evidence introduced at either the guilt-innocence or the penalty phase.

(*Id.* at 231, ¶¶ 39-43).

The trial court denied Barber's request for the above-quoted instructions, and did not explicitly instruct the jury that it could consider mercy in determining Barber's sentence. (Vol. 12, Tab R-31 at 1306-26). Instead, the trial court gave the following general instruction to the jury: "mitigating circumstances shall include any aspect of a defendant's character or record and any of the circumstances of the offense that the Defendant offers as a basis for a sentence of life imprisonment without parole as opposed to death and *any other relevant mitigating circumstance* which the Defendant offers as a basis for a sentence of life imprisonment without parole instead

of death." (*Id.* at 1316-17). In other words, though the trial court did not explicitly instruct the jury that it could consider mercy in determining Barber's sentence, it did not forbid them from considering mercy either. Additionally, the trial court also did not forbid defense counsel or defense mitigation witnesses from asking for mercy on behalf of Barber, and both defense counsel and mitigation witnesses did in fact plead for mercy before the sentencing jury. (*Id.*, Tab R-27 at 1224-25, 1275; Tab R-29 at 1298).

On direct appeal, the Alabama Court of Criminal Appeals rejected Barber's constitutional challenge to the trial court's decision not to give his requested jury instructions regarding mercy. The court concluded "that the trial court properly refused to give [Barber's] requested instructions or any other instructions relating to mercy." *Barber*, 952 So. 2d at 453. For the reasons explained below, the state court's decision was not unreasonable.

Barber argues the trial court had a "constitutional obligation to instruct the jury clearly and specifically that sympathy or mercy can form the basis for a life sentence" and that the trial court's failure to do so violated clearly established Supreme Court precedent. (Doc. # 1 at 127, ¶ 259; *see also* Doc. # 23 at 99-101). But none of the cases Barber cites in support of this argument[12] hold that a death sentence must be set aside as unconstitutional if the trial judge does not explicitly instruct the sentencing jury that it may consider mercy in determining the appropriate sentence. At most, some of those cases stand for the general proposition that a trial judge is required by the Eighth and Fourteenth Amendments to "clearly and explicitly instruct the jury about mitigating circumstances and the option to recommend against death." *Moore*, 809 F.2d at 731 (internal quotation marks omitted) (collecting cases). The trial judge in Barber's case

[12] *Simmons v. South Carolina*, 512 U.S. 154 (1994); *Mills v. Maryland*, 486 U.S. 367 (1988); *Caldwell v. Mississippi*, 472 U.S. 320 (1985); *Nelson v. Nagle*, 995 F.2d 1549 (11th Cir. 1993); *Moore v. Kemp*, 809 F.2d 702, 730 (11th Cir. 1987); *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986); *Miller v. Estelle*, 677 F.2d 1080 (5th Cir. 1982); and *Spivey v. Zant*, 661 F.2d 464 (5th Cir. 1981). *See* (Docs. # 1 at 127-28; 23 at 99-101).

doubtless complied with that requirement by spending six full trial-transcript pages explaining various types of mitigation evidence to the jury (Vol. 12, Tab R-31 at 1313-18) and expressly instructing the jury, "If you determine . . . that one or more aggravating circumstances exists but that they do not outweigh the mitigating circumstances you find exist[ ], then . . . your determination would be life without parole." (*Id.* at 1320). No decision Barber cites, of the Supreme Court or otherwise, clearly establishes a constitutional rule requiring trial judges in capital cases to explicitly instruct the sentencing jury that it may consider mercy in determining the appropriate sentence. Therefore, the state court's decision rejecting this claim was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent, and Barber is not entitled to habeas relief on this claim.

D. Barber's *Ring v. Arizona* Claim

In *Ring v. Arizona*, 536 U.S. 584, 609 (2002) the Supreme Court held that the Sixth Amendment's jury-trial guarantee requires a jury, not a judge, to find beyond a reasonable doubt every fact that makes a defendant death-eligible. Barber claims his death sentence was obtained in violation of *Ring* and that the Alabama Court of Criminal Appeals unreasonably rejected his *Ring* claim on direct appeal. (Doc. # 1 at 130-37). The court disagrees. The state court's decision affirming Barber's death sentence was neither contrary to nor an unreasonable application of *Ring*, and he is therefore not entitled to habeas relief on this claim.

1. Relevant Supreme Court Precedent

The Sixth Amendment, made applicable to the states through the Fourteenth Amendment, guarantees criminal defendants the right to a trial "by an impartial jury." That right, "in conjunction with the Due Process Clause, requires that each element of a crime be proved to the jury beyond a reasonable doubt." *Alleyne v. United States*, 570 U.S. 99, 104 (2013). In *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Supreme Court held that any fact (other than the

fact of a prior conviction[13]) that increases the maximum penalty that may be imposed upon a defendant constitutes an element of the crime and must therefore be proved to a jury beyond a reasonable doubt.

Two years later in *Ring*, the Court extended *Apprendi* to the context of capital sentencing. *Ring* considered the constitutionality of Arizona's capital sentencing scheme. Under Arizona law, a defendant convicted of first-degree murder could not receive a death sentence absent a factual determination that a statutory aggravating factor existed. *Ring*, 536 U.S. at 596. Put differently, without a factual determination that an aggravating factor existed, the maximum penalty a defendant convicted of first-degree murder could receive was life in prison. *Id.* at 596-97. The constitutional problem with Arizona's capital sentencing scheme, the Court held, was that Arizona law required the sentencing judge, and not a jury, to make the critical finding whether an aggravating factor existed. *Id.* at 597, 609. Thus, under *Ring*, the Sixth Amendment requires every fact that makes a defendant eligible for the death penalty -- that makes the maximum imposable sentence death -- to be found by a jury beyond a reasonable doubt.

The Supreme Court recently applied *Ring* to hold Florida's capital sentencing scheme unconstitutional in *Hurst v. Florida*, 136 S. Ct. 616 (2016).[14] Under Florida law, the maximum sentence a defendant convicted of first-degree murder could receive on the basis of his conviction alone was life imprisonment. *Id.* at 620. A person convicted of first-degree murder could be sentenced to death "only if an additional sentencing proceeding result[ed] in findings by the court that such person shall be punished by death." *Id.* (internal quotation marks omitted). The additional sentencing proceeding called for under Florida law required the sentencing judge

[13] *See Almendarez-Torres v. United States*, 523 U.S. 224, 239-47 (1998).

[14] Because *Hurst* had not been decided at the time of Barber's direct appeal, the court discusses *Hurst* "only to the extent it reflects an application and explication of the Supreme Court's holding in *Ring*." *Waldrop v. Comm'r, Alabama Dep't of Corr.*, 711 F. App'x 900, 923 n.6 (11th Cir. 2017).

to conduct an evidentiary hearing before a jury. *Id.* The jury would then return "an 'advisory sentence' of life or death without specifying the factual basis of its recommendation." *Id.* Finally, the sentencing judge, "[n]otwithstanding the recommendation" of the jury, was to independently weigh the aggravating and mitigating circumstances and enter a sentence of life imprisonment or death. *Id.* (internal quotation marks omitted). Though Florida law required the sentencing judge to "give the jury recommendation great weight," the sentence was required to "reflect the trial judge's independent judgment about the existence of aggravating and mitigating factors." *Id.* (internal quotation marks omitted).

The jury at Hurst's guilt-phase trial convicted him of first-degree murder, but it did not specify which of two theories charged by the trial judge it believed: premeditated murder or felony murder for an unlawful killing during a robbery. *Id.* at 619-20. At Hurst's sentencing hearing, the jury recommended the death penalty by a vote of seven to five, but it did not specify which of two aggravating factors charged by the sentencing judge it had found beyond a reasonable doubt: "that the murder was especially 'heinous, atrocious, or cruel' or that it occurred while Hurst was committing a robbery." *Id.* at 620.

The Supreme Court held that Hurst's sentence violated the Sixth Amendment rule announced in *Ring* because "the maximum punishment Timothy Hurst could have received without any judge-made findings was life in prison without parole." *Id.* at 622. It therefore reversed the Florida Supreme Court's judgment affirming Hurst's death sentence. *Id.* at 624.

2. Alabama's Capital Sentencing Scheme and Barber's Death Sentence

Like Florida, Alabama also bifurcates the guilt and penalty phases of a capital defendant's trial. *See* Ala. Code § 13A-5-45. After a defendant is convicted of a capital offense, the trial court is required to "conduct a separate sentence hearing to determine whether the defendant shall be sentenced to life imprisonment without parole or to death." Ala. Code § 13A-

5-45(a). A capital defendant may not be sentenced to death "[u]nless at least one aggravating circumstance as defined in Section 13A-5-49 exists." *Id.* § 13A-5-45(f). Certain capital offenses, like the murder during a robbery Barber was convicted of, have as one of their elements a fact that corresponds to one of the aggravating circumstances listed in § 13A-5-49. *Compare* Ala. Code § 13A-5-40(a)(2) (defining the capital offense of murder committed during a robbery), *with* Ala. Code § 13A-5-49(4) (listing as an aggravating circumstance that "[t]he capital offense was committed while the defendant was engaged . . . in the commission of . . . robbery"). Where such overlap between the elements of a capital offense and the aggravating circumstance necessary to impose a death sentence exists, Alabama law provides that "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 sentence hearing." Ala. Code § 13A-5-45(e).

At the time of Barber's conviction and sentencing, Alabama law required the penalty-phase jury to "hear the evidence and arguments of both parties, deliberate, and return an advisory verdict recommending either life imprisonment without parole (if it determined that no aggravating circumstances existed, or that the aggravating circumstances did not outweigh the mitigating circumstances) or death (if it determined that one or more aggravating circumstances existed, and that they outweighed the mitigating circumstances)." *Waldrop v. Comm'r, Alabama Dep't of Corr.*, 711 F. App'x 900, 922 (11th Cir. 2017) (citing the pre-2017 version of Ala. Code § 13A-5-46(e)). After receiving the jury's advisory verdict, the trial judge would then "independently determine the appropriate sentence." *Id.* (citing the pre-2017 version of Ala. Code § 13A-5-47(a)). "If the court found that at least one aggravating circumstance existed, and that they outweighed any mitigating circumstances, it could impose a death sentence,

notwithstanding a contrary jury recommendation." *Id.*; *see also* Ala. Code § 13A-5-47(e) (pre-2017 version).[15]

In Barber's case, the jury returned a unanimous guilt-phase verdict convicting Barber of murder during a first-degree robbery under Ala. Code § 13A-5-40(a)(2). (Vol. 11 at 1189; Vol. 1, Tab R-1 at 8-9). At the penalty phase, the trial judge instructed the jury that its guilt-phase verdict established the aggravating circumstance that Barber had killed Epps during a robbery beyond a reasonable doubt, and that it should consider the circumstance proven for purposes of sentencing. (Vol. 12, Tab R-31 at 1309-10). The state also argued it had established the existence of another aggravating circumstance—that the murder was especially heinous, atrocious, or cruel compared to other capital offenses. (*Id.* at 1310). The jury returned an advisory verdict recommending by a vote of eleven to one that Barber be sentenced to death. (*Id.*, Tab R-32 at 1330). The trial judge independently found the existence of both aggravating circumstances—that the murder occurred during a robbery and that the murder was especially heinous, atrocious, or cruel. (*Id.*, Tab R-33 at 1357; Tab R-35 at 273). The court then weighed the aggravating circumstances against the mitigating factors and sentenced Barber to death. (*Id.*, Tab R-33 at 1360-61; Tab R-34 at 1361; Tab R-35 at 276).

3. The State Court's Rejection of Barber's Claim Was Reasonable

Barber argued on direct appeal that his death sentence violated the Sixth Amendment rule announced in *Ring v. Arizona*. The Alabama Court of Criminal Appeals rejected his argument. "Because the [guilt-phase] jury convicted [Barber] of the capital offense of robbery-murder," the court reasoned, the aggravating circumstance of robbery *was* found by a jury "beyond a

[15] In 2017, Alabama amended its capital sentencing scheme. *See* S.B. 16, 2017 Leg., Reg. Sess. (Ala. 2017). Under the new scheme, the jury's sentence recommendation is binding on the court. *See* § 13-A-5-47(a) (2017) ("Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole.").

reasonable doubt." *Barber*, 952 So. 2d at 459. Thus, the court concluded, "the jury, and not the judge, determined the existence of the 'aggravating circumstance necessary for imposition of the death penalty.'" *Id.* (quoting *Ring*, 536 U.S. at 609).

The state court's decision was neither contrary to nor an unreasonable application of *Ring*. Barber became death-eligible under Alabama law when the guilt-phase jury convicted him of murder during a robbery in the first degree. That is so because Alabama law makes the death penalty available in a capital case whenever "at least one aggravating circumstance" exists. Ala. Code § 13A-5-45(f). That a murder occurred during a robbery is an aggravating circumstance, *id.*, § 13A-5-49(4), and that aggravating circumstance was found beyond a reasonable doubt when the jury convicted Barber of murder during a first-degree robbery at the guilt phase of his trial, *see id.*, § 13A-5-40(a)(2). Thus, every fact that made Barber eligible for the death penalty -- that made his maximum imposable sentence death -- was found by a jury beyond a reasonable doubt at the guilt phase of his trial. That is precisely what *Ring* requires.

Barber contends that *Ring* requires more. In addition to a guilt-phase jury finding of a statutory aggravating circumstance, Barber argues *Ring* requires the jury (and not the judge) to find that the aggravating circumstance(s) outweigh any mitigating circumstances. In other words, Barber claims he was not death-eligible for purposes of *Ring* absent a determination that the aggravating factors outweighed the mitigating factors, and that *Ring* therefore requires a jury to make that determination.

The Alabama Court of Criminal Appeals rejected Barber's argument on this point, and this court cannot say that its application of *Ring* "was so unreasonable that no 'fairminded jurist' could agree with the conclusion." *Waldrop*, 711 F. App'x at 923 (citing *Richter*, 562 U.S. at 101). *Ring* can be fairly read to require a jury finding on any fact that makes a defendant's

maximum imposable sentence death while still permitting a judge to make the ultimate decision, based on its weighing of aggravating and mitigating circumstances, whether to impose the maximum penalty of death or a lesser penalty. Indeed, that was Justice Scalia's explanation of *Ring*'s holding in his concurring opinion:

> What today's decision says is that the jury must find the existence of the *fact* that an aggravating factor existed. Those [s]tates that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor determination (where it logically belongs anyway) in the guilt phase.

Ring, 536 U.S. at 612-13 (Scalia, J., concurring). And as the Eleventh Circuit has explained, that reading of *Ring* is also consistent with *Hurst*, which held that "the Sixth Amendment does not allow the trial court 'to find an aggravating circumstance, *independent of a jury's factfinding*, that is necessary for imposition of the death penalty.'" *Waldrop*, 711 F. App'x at 924 (quoting *Hurst*, 136 S.Ct. at 624) (emphasis in Eleventh Circuit's opinion).

Barber's argument that *Ring* requires a jury to determine whether aggravating factors outweigh mitigating factors before the death penalty may be imposed is also foreclosed by binding Eleventh Circuit precedent. *See Lee v. Comm'r, Alabama Dep't of Corr.*, 726 F.3d 1172, 1197-98 (11th Cir. 2013). In *Lee*, as here, an Alabama jury found the existence of an aggravating circumstance when it convicted the defendant of murder during a first-degree robbery. The Eleventh Circuit held that "[n]othing in *Ring*—or any other Supreme Court decision—forbids the use of an aggravating circumstance implicit in a jury's verdict" to impose a death sentence. *Id.* at 1198. The court also held that "*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances." *Id.* And, as the Eleventh Circuit recently explained in an unpublished opinion, the fact that the trial judge (as in Barber's case) also independently found an additional aggravating circumstance not implicit in the guilt-

phase jury verdict (that the crime was especially heinous, atrocious, or cruel) is immaterial because "[t]he trial court's finding of an additional aggravating circumstance did not increase the maximum penalty to which [the defendant] was exposed, and therefore falls outside the clearly established holding in *Ring*." *Waldrop*, 711 F. App'x at 924. For all these reasons, Barber is not entitled to habeas relief on his *Ring v. Arizona* claim.

E. Barber's Claim That His Indictment Was Defective

Barber argues that under *Apprendi* and *Ring*, aggravating circumstances which expose a defendant to the death penalty "are necessarily elements of the offense which must be specified in the indictment." (Doc. # 1 at 137, ¶ 279). He claims his indictment failed to identify the aggravating circumstances on which his death sentence was based and that he is therefore entitled to habeas relief. The Alabama Court of Criminal Appeals rejected this claim on direct appeal. It concluded that "although *Apprendi* required that the facts that increased a sentence above the statutory maximum must be submitted to a jury, those facts [do] not have to be alleged in the indictment." *Barber*, 952 So. 2d at 460 (internal quotation marks omitted).

The state court's conclusion was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent. The only Supreme Court case Barber cites in support of this claim is *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999). (Doc. # 1 at 137, ¶ 279). But *Jones* did not hold that the Constitution requires every fact that increases the maximum penalty for a crime to be charged in the indictment. Indeed, footnote six of the opinion, which Barber cites, explains that the Supreme Court's prior decisions merely "suggest rather than establish" that principle. *Jones*, 526 U.S. at 243 n.6. In fact, the *Jones* Court invoked the principle only to establish constitutional *doubt* concerning the Government's reading of the statute at issue in that case. *Id.* Because the phrase "clearly established Federal law, as determined by the Supreme Court of the United States" in § 2254(d) "refers to the holdings, as

opposed to the dicta" of Supreme Court decisions, *Jones* does not provide Barber a basis for federal habeas relief. *Williams*, 529 U.S. at 412.

Moreover, the Supreme Court in *Apprendi* expressly reserved the question of whether the federal Constitution requires states to allege all facts that increase a defendant's sentencing exposure in an indictment. *See* 530 U.S. at 477 n.3. The Court noted that "Apprendi has not here asserted a constitutional claim based on the omission of any reference to sentence enhancement or racial bias in the indictment." *Id.* It therefore declined to "address the indictment question separately today," noting that "the Fifth Amendment right to 'presentment or indictment of a Grand Jury'" had never been incorporated through the Fourteenth Amendment and applied to the states. *Id.* In the years since *Apprendi*, the Supreme Court has never held that the federal Constitution requires states to charge every element of a crime in the indictment. It has only held that facts which increase a defendant's sentencing exposure must be proved to a jury beyond a reasonable doubt. As explained above, the State of Alabama satisfied that requirement in this case.

Finally, the court also notes, as a factual matter, that Barber's indictment *did* charge the aggravating circumstance that he intentionally killed Epps while committing a robbery. (Vol. 1, Tab R-1 at 9) ("[S]aid defendant caused said death during the time that the said defendant was in the course of committing or attempting to commit a theft of the following property, to-wit: One (1) purse containing lawful currency of the United States . . . and credit cards . . . by the use of force against the person of Dorothy Epps . . . ."). As noted above, Alabama law makes the death penalty available in a capital case whenever "at least one aggravating circumstance" exists. Ala. Code § 13A-5-45(f). Thus, even if *Jones* or another Supreme Court case had held that the Constitution requires every fact that increases the maximum penalty for a crime to be charged in

a state indictment (and, to be clear, the Supreme Court has never so held), Alabama would have complied with such a rule in this case.

F. Barber's Claims Based on the State Court's Reliance on *Ex Parte Waldrop*, 859 So. 2d 1181 (Ala. 2002) in Affirming His Death Sentence

Barber argues that the Alabama Court of Criminal Appeals' reliance on *Ex Parte Waldrop*, 859 So. 2d 1181 (Ala. 2002) in affirming Barber's death sentence violated his rights under the Fourteenth Amendment's Due Process Clause and the Eighth Amendment. (Doc. # 1 at 137-39). In *Waldrop*, the Alabama Supreme Court held that the death penalty could be constitutionally imposed by a judge based on a guilt-phase jury finding that a statutory aggravating circumstance existed. 859 So. 2d at 1187-90. In that case, an Alabama jury convicted Waldrop of two counts of murder made capital because the murder was committed during a first-degree robbery and one count of murder made capital because two or more persons were murdered during a single course of conduct. *Id.* at 1185. At the conclusion of Waldrop's sentencing proceeding, the jury recommended by a vote of ten to two that Waldrop be sentenced to life imprisonment without parole. *Id.* The trial judge, however, overrode the jury's recommendation and sentenced Waldrop to death. *Id.* The Alabama Supreme Court held that Waldrop's death sentence did not violate *Ring* or *Apprendi* because Waldrop became death eligible upon the jury's guilt-phase finding that he committed murder during a first-degree robbery. *Id.* at 1187-88. The court explained that "the findings reflected in the jury's [guilt-phase] verdict alone exposed Waldrop to a range of punishment that had as its maximum the death penalty." *Id.* at 1188. Once that event occurred, the court concluded, there was no constitutional problem with a judge choosing to impose the maximum penalty authorized by the jury's guilt-phase verdict -- death -- notwithstanding the jury's penalty-phase recommendation to the contrary. *Id.*

Barber contends the Alabama Court of Criminal Appeals' reliance on *Waldrop* in affirming his death sentence unconstitutionally changed the legal effect the jury's guilt-phase verdict. Barber argues that *Waldrop* "arbitrarily renders defendants convicted of some capital offenses automatically subject to the death penalty at the end of the guilt phase, while defendants convicted of other capital offenses cannot be sentenced to death without further jury findings at the penalty phase." (Doc. # 23 at 93). In Barber's view, "[t]his violates the requirements of due process and the Sixth, Eighth, and Fourteenth Amendments, as well as the integrity of the jury's judgment." (*Id.*). In particular, he claims the state court's reliance on *Waldrop* resulted in a decision that was contrary to and an unreasonable application of two Supreme Court precedents: *Simmons v. South Carolina*, 512 U.S. 154 (1994) and *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The court is unpersuaded. The Alabama Court of Criminal Appeals' reliance on *Waldrop* in affirming Barber's sentence did not result in a decision that was either contrary to or an unreasonable application of *Simmons*, *Caldwell*, or any other Supreme Court precedent.

First, Barber claims that under *Simmons*, due process entitled him to inform the guilt-phase jury about the nature and consequences of finding him guilty of murder during a robbery, a finding that exposed him to the death penalty under Alabama law. (Docs. # 1 at 138-39; 23 at 94). Barber appears to be arguing that under *Simmons* he was entitled to inform the guilt-phase jury that a conviction for murder during a robbery would result in his maximum imposable sentence being death. (*Id.*). But *Simmons* requires nothing of the sort.

Simmons held that, where a defendant's future dangerousness is at issue in the penalty phase of a capital trial and the defendant is ineligible for parole under state law, "due process requires that the sentencing jury be informed that the defendant is parole ineligible." 512 U.S. at 156 (plurality opinions). A plurality of the Court reached that conclusion based on the principle

that due process "does not allow the execution of a person on the basis of information which he had no opportunity to deny or explain." *Id.* at 161 (internal quotation marks omitted). At the penalty phase of Simmons' capital trial, the state argued for the death penalty in part on the basis that Simmons "would pose a future danger to society if he were not executed." *Id.* at 162. Simmons sought three times to inform the jury that he was in fact ineligible for parole under state law and thus would spend the rest of his life in prison if not executed, but the trial court denied each request. *Id.* A plurality of the Supreme Court[16] concluded that Simmons was denied due process because the state "succeeded in securing a death sentence on the ground, at least in part, of [Simmons'] future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole." *Id.*

Simmons simply did not address the argument Barber makes in this case: that due process entitled him to inform the jury at the *guilt* phase of his trial that a conviction for murder during a robbery would expose him to a maximum sentence of death. Instead, *Simmons* spoke to what a defendant must be permitted to inform the jury of at the *penalty* phase of his trial where the state relies on the concealment of critical information (whether the defendant has the chance of ever leaving prison) to argue that death is the only appropriate sentence. As both the plurality and Justice O'Connor's concurring opinion recognized, the Court's decision in *Simmons* represented a narrow exception to the "broad proposition" espoused in other Supreme Court decisions "that [federal courts] generally will defer to a State's determination as to what a jury should and should not be told about sentencing." *Id.* at 168 (plurality opinion); *see also id.* at 177 (O'Connor, J., concurring in the judgment). There is nothing in Barber's case approaching the

[16] Justices O'Connor and Kennedy and Chief Justice Rehnquist concurred only in the judgment. *Simmons*, 512 U.S. at 175-78.

stark facts presented in *Simmons* that would justify departing from the normal rule. Unlike the prosecution in *Simmons*, the state in Barber's case in no way concealed critical facts about the effect of the jury's guilt-phase verdict. And, most fundamentally, Barber has identified no clearly established Supreme Court precedent holding that a defendant has a constitutional right to inform a guilt-phase jury that a conviction for a particular offense will result in the defendant being eligible for the death penalty.[17] The state court's decision was neither contrary to nor an unreasonable application of *Simmons*.

Second, Barber claims the state court's affirmance of Barber's death penalty was contrary to and an unreasonable application of *Caldwell*. (Doc. # 1 at 136, ¶ 276). He appears to argue that the imposition of a death sentence following an advisory jury verdict violates "the Eighth Amendment as interpreted by *Caldwell*, because the jury was led to believe that it played only an advisory role in Mr. Barber's fate." (Doc. # 23 at 94).[18] *Caldwell* held that a prosecutor's statements urging a penalty-phase jury "not to view itself as determining whether the defendant would die, because a death sentence would be reviewed for correctness by the State Supreme Court" rendered the defendant's death sentence unconstitutional. 472 U.S. at 323. But Barber has identified no statements at his penalty-phase proceeding that could have led the jury "to believe

[17] Moreover, the court notes that at his trial Barber did not ask the court to inform the jury that a conviction for murder during a robbery could result in a death sentence. In fact, Barber's counsel asked the court to expressly tell the jury members that they were not to consider punishment at the guilt phase of the trial. (Vol. 11, Tab R-21 at 1165). The court complied with Barber's request and instructed the jury members that "[p]unishment is not to be discussed or considered by you in arriving at a true and just verdict as to whether or not the Defendant is guilty of any offense charged or if he's not guilty of anything. You are not to discuss or be concerned with at all any punishment that might result from a verdict of guilty of any offense." (*Id.* at 1166). This further factually distinguishes this case from *Simmons*, where the petitioner sought three times to inform the jury of the effect a life-imprisonment verdict would have. 512 U.S. at 162.

[18] Barber also cites *Adams v. Texas*, 448 U.S. 38 (1980) in this portion of his habeas petition and reply brief (Docs. # 1 at 139, ¶ 283; 23 at 94), but he does not attempt to explain how the Alabama Court of Criminal Appeals' decision is either contrary to or an unreasonable application of *Adams*. In any event, the state court's decision did not contravene *Adams*, which held that Texas violated the Constitution "when it excluded members of the venire from jury service because they were unable to take an oath that the mandatory penalty of death or imprisonment for life would not affect their deliberations on any issue of fact." 448 U.S. at 40. No jury-service oath is at issue in this case.

that responsibility for determining the appropriateness of a death sentence rests not with" it, but with some other decisionmaker. *Id.* And a review of the record confirms that no such statements were made. (Vol. 12, Tabs R-28 through R-31 at 1282-1325). Indeed, every phase of Barber's sentencing proceeding impressed upon the jury the importance of coming to its own conclusion about the appropriate sentence based on the law and the evidence before it.

In closing arguments, the prosecution told the jury, "Ultimately you will weigh those [aggravating and mitigating] factors and reach a determination as to the appropriate sentence. . . . That weighing process and that determination will be yours to make." (*Id.*, Tab R-28 at 1285-86). The defense emphasized in its closing argument that the jury's decision was "a life or death decision," and thus that it should consider all the relevant information it possibly could. (*Id.*, Tab R-29 at 1290). The defense even described the jury's verdict form as "a piece of paper giving [the state] permission to kill [Barber]." (*Id.* at 1298). The defense concluded its closing argument by telling the jury, "[Barber] does not deserve to die. Please don't kill him." (*Id.*). Finally, the prosecution in its rebuttal argument reiterated to the jury:

> [Y]ou have a function in this trial as Judge Little has explained to you. And your function is to make a determination on the evidence that has come to you and you're going to weigh it. . . . [Y]ou keep in mind we all have our functions and your function here right now is to make that call, and you make that call in a methodical way, not in an emotional way, not because of them seated over there or not because of him seated here. Just on what you heard and what you think the just result is in this case.

(*Id.*, Tab R-30 at 1305-06). Thus, unlike in *Caldwell*, nothing in the record suggests Barber's jury was encouraged to view its decision whether to return a death verdict as belonging to anyone besides itself. To the contrary, the jury was repeatedly reminded of the weight of its responsibility and encouraged to apply the law to the evidence before it to reach a just result. Therefore, Barber has not shown that the state court's decision affirming his death sentence was

contrary to or an unreasonable application of *Caldwell* or any other Supreme Court precedent. Accordingly, Barber is not entitled to habeas relief on this claim.

G. Barber's Claim Based on the Trial Court's Admission of Testimony About the Partial Palm Print

At Barber's trial, the trial court admitted testimony by a state witness that a partial palm print in Epps' blood found at the crime scene belonged to Barber. Barber claims the admission of this testimony violated the Fourteenth Amendment's Due Process Clause because the state failed to adequately preserve the partial palm print so Barber's defense team could independently examine it. (Doc. # 1 at 139-44). The Alabama Court of Criminal Appeals rejected this claim on direct appeal, finding no due process violation because "it does not appear that the State acted in bad faith in not preserving the bloody palm print" and because an independent examination of the bloody palm print was "not particularly material or critical to [Barber's] defense strategy at trial." *Barber*, 952 So. 2d at 425-26. As explained below, the state court's rejection of this claim was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent; therefore, Barber is not entitled to habeas relief.

Investigators recovered a bloody palm print on the surface of a countertop in Epps' home following her murder. (Vol. 9, Tab R-16 at 699-700). The portion of the countertop containing the bloody palm print was admitted at trial as State's Exhibit 30. (*Id.* at 749). Dan Lamont, a latent print examiner at the Huntsville Police Department, testified at trial concerning his analysis of the bloody palm print. (*Id.* at 770-73). He explained that that the bloody palm print as it appeared at trial did not look the same as when he first examined it because "[i]t's degraded. There's very little left of the original print." (*Id.* at 770). Still, Lamont proceeded to tell the jury the process by which he had compared the fresh bloody palm print on the countertop to known ink prints of Barber's palms. (*Id.* at 770-73). He concluded his direct-examination testimony by

stating his opinion that the bloody palm print found on the countertop "was identical with the right inked palm print on the palm print card of James Edward Barber." (*Id.* at 773).

Barber claims the admission of Lamont's testimony violated the Fourteenth Amendment's Due Process Clause because the state failed to adequately preserve the bloody palm print and thereby deprived Barber's defense team the chance to independently examine it and potentially rebut Lamont's conclusion that the print was Barber's. He argues the state court's decision rejecting his claim was unreasonable because "a defendant need not show bad-faith on the part of the State" to establish a due process violation based on the state's failure to preserve potentially useful evidence. (Doc. # 1 at 141). But his argument is unavailing under clearly established Supreme Court precedent, which holds that "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Arizona v. Youngblood*, 488 U.S. 51, 58 (1988).

At the time of Barber's direct appeal, *Youngblood* and *Illinois v. Fisher*, 540 U.S. 544 (2004) were the only Supreme Court precedents addressing due process claims based on the state's failure to preserve potentially useful evidence. *Youngblood* involved a defendant accused of kidnapping and sodomizing a ten-year-old boy. 488 U.S. at 52-53. Though following the attack police collected a sexual assault kit, the boy's underwear, and his t-shirt, they failed to timely test the kit samples and failed to properly refrigerate the boy's clothing for future testing. *Id.* at 52-53. A police criminologist examined the boy's clothing for the first time more than a year after the attack and found two semen stains on the clothing. *Id.* at 54. When tested, however, the stains proved "inconclusive as to the assailant's identity." *Id.* Earlier tests on the sexual assault kit had also failed to identify the boy's assailant, so the state relied at trial on the boy's visual identification of Youngblood as the perpetrator of the crime. *Id.* at 53-54.

Both the state and Youngblood presented expert testimony at trial regarding "what might have been shown by tests performed on the samples shortly after they were gathered, or by later tests performed on the samples from the boy's clothing had the clothing been properly refrigerated." *Id.* at 54. At least some of that testimony tended to show that "timely performance of tests with properly preserved semen samples could have produced results that might have completely exonerated [Youngblood]." *Id.* at 55. However, the jury ultimately convicted Youngblood. *Id.* at 124.

The state appellate court reversed Youngblood's conviction, holding that "when identity is an issue at trial and the police permit the destruction of evidence that could eliminate the defendant as the perpetrator, such loss is material to the defense and is a denial of due process." *Id.* at 54. The Supreme Court, in turn, reversed the state appellate court and held that the state's failure to preserve the evidence had not violated Youngblood's federal due process rights. *Id.* at 58-59. The Court explained that under *Brady v. Maryland*, 373 U.S. 83 (1963) and its progeny, the Due Process Clause is violated whenever the prosecution "fails to disclose to the defendant material exculpatory evidence," regardless of whether the state acted in good faith or bad faith. *Id.* at 57. But "the Due Process Clause requires a different result," the Court held, when dealing with "the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant." *Id.* In such cases, "unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law." *Id.* at 58. Because the Court concluded that the state's failure to refrigerate the boy's clothing and perform timely tests on the semen samples was not the result of bad faith but could "at worst be described as negligent," it found no due process violation. *Id.*

On a different set of facts, the Supreme Court applied *Youngblood* in *Fisher* to hold, again, that a defendant's federal due process rights had not been violated. 540 U.S. at 549. The defendant, Fisher, was arrested in 1988 during a traffic stop when police "observed him furtively attempting to conceal a plastic bag containing a white powdery substance." *Id.* at 545. Four tests conducted by police crime labs confirmed that the bag contained cocaine, and Fisher was charged with possession of cocaine. *Id.* He filed a discovery motion eight days later seeking all physical evidence the state planned to use at trial. *Id.* The state responded that it would provide the evidence "at a reasonable time and date upon request." *Id.* Fisher was released on bond pending trial and, when he failed to appear for trial, the trial court issued a warrant for his arrest. *Id.* Fisher remained a fugitive for over ten years, but was eventually apprehended on an unrelated matter. *Id.* At that time, the state reinstated the cocaine-possession charge from more than ten years earlier. *Id.*

In September 1999, shortly before Fisher was recaptured, the police, in accordance with established procedures, destroyed the substance seized from him during his arrest ten years earlier. *Id.* at 546. Fisher moved to dismiss the cocaine-possession charge based on the state's destruction of evidence. *Id.* The trial court denied the motion, and at trial the state introduced evidence showing that the substance Fisher possessed in 1988 was indeed cocaine. *Id.* The jury convicted Fisher of cocaine possession, and he was sentenced to one year in prison. *Id.*

The Supreme Court held that Fisher's conviction for cocaine possession did not violate the Due Process Clause, notwithstanding the police's destruction of the substance seized during his 1988 arrest. *Id.* at 548-49. The court explained that the substance seized from Fisher "was plainly the sort of 'potentially useful evidence' referred to in *Youngblood*, not the material exculpatory evidence addressed in *Brady*" and its progeny. *Id.* at 548. Because it was undisputed

that the police "acted in good faith and in accord with their normal practice" in destroying the evidence, the court held that Fisher had failed to establish a due process violation under *Youngblood*.

Like the semen stains in *Youngblood* and the white powdery substance in *Fisher*, the bloody palm print the state failed to adequately preserve in Barber's case was, at best, merely "potentially useful evidence," not material exculpatory evidence required to be disclosed to the defense under *Brady*. Put differently, the bloody palm print was at best "evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated" Barber. *Youngblood*, 488 U.S. at 57. And in reality, given Barber's admission at his Rule 32 hearing that he did in fact kill Epps (Vol. 26 at 414-16), it can hardly be argued that the bloody palm print would have been even "potentially" useful to Barber—it would have been strictly inculpatory. There is also a substantial question about whether the state in fact "fail[ed] to preserve" the bloody palm print within the meaning of *Youngblood*, 488 U.S. at 58 and *Fisher*, 540 U.S. at 547.[19]

But even assuming that the bloody palm print was "potentially useful evidence" and that the state failed to adequately preserve it, Barber has neither argued nor shown that the state acted in bad faith by failing to photograph or otherwise preserve the bloody palm print from Epps' countertop. He certainly has not produced "clear and convincing evidence" that the state court erred in its finding that the prosecution did not act in bad faith in failing to preserve the bloody palm print, as required by § 2254(e)(1). *See Jones*, 753 F.3d at 1182. Because the state court

[19] The Alabama Court of Criminal Appeals made the following findings of fact about the bloody palm print: "Although Lamont did not photograph the bloody palm print, one of the investigators did photograph it at the crime scene. Further, the State introduced that photograph of the bloody palm print into evidence during the trial." *Barber*, 952 So. 2d at 425. The court also stated: "We have reviewed the portion of the countertop that was introduced into evidence, and we note that, even today, some portions of the bloody palm print are clearly visible." *Id.* at 425 n.3. Barber does not challenge these findings of fact before this court. Nonetheless, out of an abundance of caution, and for purposes of this petition, the court assumes that the state "fail[ed] to preserve" the bloody palm print within the meaning of *Youngblood*, 488 U.S. at 58 and *Fisher*, 540 U.S. at 547.

reasonably concluded that the state did not act in bad faith, *Barber*, 952 So. 2d at 425, its holding that Barber failed to establish a federal due process violation was neither contrary to nor an unreasonable application of *Youngblood* and *Fisher*. Barber is not entitled to habeas relief on this claim.

H. Barber's Claim That the State Vouched for the Credibility of Its Witnesses

Barber argues that the prosecutor in his case impermissibly vouched for the credibility of two state witnesses during his closing argument, in violation of the Fourteenth Amendment's Due Process Clause. (Doc. # 1 at 155-58). The court disagrees.

1. Barber's Arguments and the State Court's Decision

In closing arguments at Barber's trial, the prosecutor made the following statement about Dan Lamont, the latent print examiner who testified that the bloody palm print found on Epps' countertop was Barber's:

> [The defense] knew they had to attack everything. They attacked Dan Lamont. And I will say this to you all. If we had no confession in this case, we would certainly be before you today with a bloody palm print and our expert witnesses and evidence having to do with that bloody palm print. We would still be here prosecuting it. And I will also be the first to admit, it would not be as strong a case as what we have. *But when you look through this and you look at Dan Lamont, and they were on him, I think we all came away with a feeling that Dan Lamont is an upright, qualified fingerprint examiner*.

(Vol. 11, Tab R-20 at 1121-22) (emphasis added). Barber complains about the emphasized portion of the above statement, claiming it constitutes impermissible vouching in violation of the Due Process Clause.

The prosecutor also made the following statement about Investigator Dwight Edger, who took Barber's confession:

> Let me say something briefly about the investigation of this case. This case lent itself to a really clear, concise picture for you all as to the investigation. And this is an overwhelmingly strong case because of that man seated over there, Investigator Edger. *And I don't have to tell y'all about Investigator Edger*

> *because you know him from being here in court and from watching those video tapes. And, you know, that was a first rate professional investigation. And they know it too the truth be known.* But, you know, the confession itself, like I say, it's a fascinating piece of video. I urge you to go back and watch it. I really do.

(*Id.* at 1128-29) (emphasis added). Barber complains about the emphasized portion of the above statement, claiming that it too constitutes impermissible vouching in violation of the Due Process Clause.

The Alabama Court of Criminal Appeals rejected Barber's due process claims related to each statement. *Barber*, 952 So. 2d at 443. It observed that during closing argument, Barber's counsel had "challenged Lamont's testimony, arguing repeatedly that his findings were subjective and that his conclusion was 'junk.'" *Id.* Barber's counsel also "argued that Edger improperly focused his efforts on [Barber] and did not conduct a thorough investigation." *Id.* Viewed in context, the court concluded the prosecutor's statements were "appropriate comments on the evidence and replies-in-kind to defense counsel's arguments regarding Lamont's testimony and Edger's investigation." *Id.* It therefore held that "[t]he prosecutor's statements did not amount to vouching for the credibility of his witnesses." *Id.*

Barber argues the state court's decision was contrary to and an unreasonable application of *Berger v. United States*, 295 U.S. 78 (1935) and *United States v. Young*, 470 U.S. 1 (1985). As explained below, the state court did not act contrary to or unreasonably apply *Berger*, *Young*, or any other Supreme Court precedent in denying Barber's claim.

2. Relevant Supreme Court Precedents

In *Berger*, the Supreme Court reversed a conviction where the prosecutor, through questioning and argument, had made "improper suggestions, insinuations, and . . . assertions of personal knowledge" about additional evidence not before the jury. 295 U.S. at 88. The Court stated that the prosecutor "was guilty of misstating the facts in his cross-examination of

witnesses; of putting into the mouths of such witnesses things which they had not said; of suggesting by his questions that statements had been made to him personally out of court, in respect of which no proof was offered; of pretending to understand that a witness had said something which he had not said and persistently cross-examining the witness upon that basis; of assuming prejudicial facts not in evidence; of bullying and arguing with witnesses; and, in general, of conducting himself in a thoroughly indecorous and improper manner." *Id.* at 84. Based on the prosecutor's "pronounced and persistent" misconduct that had "a probable cumulative effect upon the jury," the Court concluded that "[a] new trial must be awarded." *Id.* at 89.

The Supreme Court further developed the standards that govern prosecutorial vouching for witness credibility in *Young*. During closing arguments at Young's trial for defrauding an oil refinery called Apco, defense counsel accused the prosecution of unfairly presenting the case, seeking to "poison [the juror's] minds," withholding exculpatory evidence, engaging in "reprehensible" conduct, and not believing that Young was guilty of the crime charged. *Young*, 470 U.S. at 4-5. Defense counsel also stated that Young "had been the only one in this whole affair that has acted with honor and with integrity." *Id.* at 5 (internal quotation marks omitted).

In his rebuttal argument, the prosecutor responded to several of defense counsel's statements. First, the prosecutor rebutted defense counsel's claim that the prosecution did not believe Young was guilty:

> I think [defense counsel] said that not anyone sitting at this table thinks that Mr. Young intended to defraud Apco. Well, I was sitting there and I think he was. I think he got 85 cents a barrel for every one of those 117,250.91 barrels he hauled and every bit of the money they made on that he got one percent of. So, I think he did. If we are allowed to give our personal impressions *since it was asked of me.*

Id. (alteration and emphasis in original) (internal quotation marks omitted). The prosecutor also responded to defense counsel's statement that Young had not defrauded Apco: "I don't know what you call that, I call it fraud. You can look at the evidence and you can remember the testimony, you remember what [the witnesses] said and what [Young] admitted they said. I think it's a fraud." *Id.* (first alteration in original) (internal quotation marks omitted). Finally, the prosecutor responded to defense counsel's claim that Young acted with honor and integrity. *Id*. at 5-6. After recapping some of Young's conduct, the prosecutor stated:

> I don't know whether you call it honor and integrity, I don't call it that, [defense counsel] does. If you feel you should acquit him for that it's your pleasure. I don't think you're doing your job as jurors in finding facts as opposed to the law that this Judge is going to instruct you, you think that's honor and integrity then stand up here in [this] Oklahoma courtroom and say that's honor and integrity; I don't believe it.

Id. (first alteration in original) (internal quotation marks omitted).

The Supreme Court acknowledged that "the prosecutor's response constituted error," but it nevertheless affirmed Young's conviction under the plain-error doctrine because Young did not object to the statements at trial. *Id.* at 14. It found no plain error because, though the prosecutor's statements were improper, they were not so prejudicial as to lead the Court to "conclude that the jury's deliberations were compromised." *Id.* at 18. The Court acknowledged "two dangers" posed by prosecutorial comments that "vouch[ ] for the credibility of witnesses and express[ ] [the prosecutor's] personal opinion concerning the guilt of the accused." *Id.* First, "such comments can convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury." *Id.* at 18. Second, "the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the Government's judgment rather than its own view of the evidence." *Id.*

at 19. But the Court found neither danger implicated by the prosecutor's comments at Young's trial. *Id.* The prosecutor's statement that he believed Young intended to commit fraud "contained no suggestion that he was relying on information outside the evidence presented at trial." *Id.* And the "overwhelming evidence" of Young's guilt "eliminate[d] any lingering doubt that the prosecutor's remarks unfairly prejudiced the jury's deliberations or exploited the Government's prestige in the eyes of the jury." *Id.* Because the prosecutor's remarks did not "undermine the fairness of the trial and contribute to a miscarriage of justice," the Court affirmed Young's conviction. *Id.* at 20.

3. The State Court's Rejection of Barber's Vouching Claim Was Reasonable

The state court did not act contrary to or unreasonably apply *Berger*, *Young*, or any other Supreme Court precedent in rejecting Barber's vouching claim. *Berger* is easily distinguishable from Barber's case. The prosecutor's statements in *Berger* were egregious and pervasive. As the Court put it: "It is impossible . . . , without reading the testimony at some length, and thereby obtaining a knowledge of the setting in which the objectionable matter occurred, to appreciate fully the extent of the [prosecutor's] misconduct." 295 U.S. at 85. The prosecutor's many errors included misrepresenting facts during cross-examination, putting words in witnesses' mouths, and suggesting he was privy to additional evidence not presented to the jury. *Id.* at 84. The Court characterized the situation as "one which called for stern rebuke and repressive measures and, perhaps, if these were not successful, for the granting of a mistrial." *Id.* at 85. Nothing remotely similar can be said of the prosecutor's statements at Barber's trial. Barber complains about a total of four sentences the prosecutor uttered in his closing argument, a far cry from the "pronounced and persistent" misconduct by the prosecutor in *Berger*. *Id.* at 89. Moreover, the four sentences Barber complains of do not even begin to approach the severe prosecutorial misconduct at issue

in *Berger*. The state court did not act contrary to or unreasonably apply *Berger* in rejecting Barber's claim.

Young is also of no help to Barber. Leaving aside the fact that the *Young* Court *affirmed* the defendant's conviction, even the language in that opinion Barber relies on, 470 U.S. at 18-19, does not establish that the state court acted contrary to or unreasonably applied clearly established federal law. Nothing in the prosecutor's remarks "convey[ed] the impression that evidence not presented to the jury, but known to the prosecutor, support[ed] the charges against" Barber. *Id.* at 18. Barber apparently recognizes this and instead argues (Doc. # 23 at 82-83) that the prosecutor's statements may have "induce[d] the jury to trust the Government's judgment rather than its own view of the evidence." *Young*, 470 U.S. at 18-19. But that assertion is wholly unsupported.

Barber specifically complains about the prosecutor's use of the terms "upright" and "qualified" to describe Lamont, and "first rate" and "professional" to describe Investigator Edger's investigation. (Doc. # 23 at 82). In rejecting Barber's claim, the state court explained that "[a] distinction must be made between an argument by the prosecutor personally vouching for a witness . . . and an argument concerning the credibility of a witness based upon the testimony presented at trial." *Barber*, 952 So. 2d at 443 (internal quotation marks omitted). Viewed in context, the state court concluded that the prosecutor's statements were of the latter type—"appropriate comments on the evidence and replies-in-kind to defense counsel's arguments regarding Lamont's testimony and Edger's investigation." *Id.* at 443. This court cannot say that conclusion was unreasonable under the deferential standard of review imposed by § 2254(d). The prosecutor's statement, "I think we all came away with a feeling that Dan Lamont is an upright, qualified fingerprint examiner" (Vol. 11, Tab R-20 at 1122), can

reasonably be construed as commenting upon the considerable testimony the jury heard regarding Lamont's qualifications and methodology (Vol. 9, Tab R-16 at 737-47), rather than an impermissible attempt to personally vouch for Lamont's credibility. The prosecutor's statement that Investigator Edger conducted "a first rate professional investigation" (Vol. 11, Tab R-20 at 1128) can likewise reasonably be construed as a comment on the extensive testimony the jury heard from Edger regarding his qualifications and experience investigating crimes and details about the investigation he conducted in Barber's case. (Vol. 10 at 968-87). Indeed, the prosecutor's preceding comment, "I don't have to tell y'all about Investigator Edger because you know him from being here in court and from watching those video tapes" supports this interpretation. (Vol. 11, Tab R-20 at 1128). Because this court cannot say the state court's rejection of Barber's vouching claim was contrary to or unreasonable application of *Berger*, *Young*, or any other Supreme Court precedent, Barber is not entitled to habeas relief on this claim.

I. Barber's Claim That the Trial Court Permitted Improper Opinion Testimony at the Penalty Phase

Barber claims the trial court erred in permitting Investigator Edger to give his opinion at the penalty phase that Barber's crime was especially heinous, atrocious, and cruel as compared to other capital murder cases he had investigated and to speculate regarding Barber's motive for killing Epps. (Vol. 12, Tab R-26 at 1213-14). Barber argues Investigator Edger's opinion testimony was inadmissible because it concerned an ultimate issue—whether the crime was especially heinous, atrocious, and cruel. (Doc. # 1 at 144-45, ¶ 293). He also argues Investigator Edger's testimony that Barber killed Epps "for no other reason . . . than to take what small amount of money he could get to purchase drugs with" (Vol. 12, Tab R-26 at 1214) violated the Eighth and Fourteenth Amendments. (Doc. # 1 at 147, ¶ 301).

The Alabama Court of Criminal Appeals rejected both arguments on direct appeal. *Barber*, 952 So. 2d at 454-58. It held that neither portion of Investigator Edger's penalty-phase testimony was improper opinion testimony under Alabama law and that, in the alternative, any error in the admission of the testimony was harmless. *Id.* at 456.

Federal habeas relief is precluded on this claim because Barber has not shown that the state court's decision was contrary to or involved an unreasonable application of clearly established Supreme Court precedent. Barber has not identified any Supreme Court case that the state court's decision was arguably contrary to or an unreasonable application of. The only Supreme Court case he cites in support of this claim is *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579 (1993). But *Daubert* interpreted the Federal Rules of Evidence, 509 U.S. at 587, which do not apply in state court. Instead, the admissibility of testimony in an Alabama criminal trial is governed by the Alabama Rules of Evidence and other relevant state law. *See Barber*, 952 So. 2d at 455. Even assuming the state court erred in applying state law, state-law errors provide no basis for federal habeas relief. *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010). And, though Barber alleges that the application of Alabama's evidentiary rules violated his federal constitutional rights (Doc. # 1 at 147, ¶ 301), he has not identified a single case, decided by the U.S. Supreme Court or any other court, to support that contention. Accordingly, Barber is not entitled to habeas relief on this claim.

J. Barber's Claim That Alabama's Death-Qualification Process Produced a Conviction-Prone Jury in Violation of His Right to an Impartial Jury

Barber claims that Alabama's death-qualification process produced a conviction-prone jury in violation of his right to an impartial jury. (Doc. # 1 at 148-49). Barber does not explain what "death qualification" in Alabama entails, but the court understands he refers to the practice the Supreme Court addressed in *Lockhart v. McCree*, 476 U.S. 162, 166 (1986), in which

prospective jurors who state they could not under any circumstances vote for the imposition of the death penalty are removed for cause prior to the guilt-phase of a capital trial. Barber contends this practice "disproportionately excludes minorities and women, provides a basis for the prosecution to use peremptory challenges to remove additional venire members from the jury, and conditions the jury toward guilt," in violation of his constitutional right to an impartial jury. (Doc. # 1 at 148, ¶ 302).

The Alabama Court of Criminal Appeals rejected Barber's death-qualification claim on direct appeal. *Barber*, 952 So. 2d at 446-47. It reasoned that the Supreme Court had upheld the practice of death qualification in *Lockhart* and that it was "not improper for a prosecutor to use peremptory challenges to remove veniremembers because they have expressed strong opposition to the death penalty." *Id.* at 447. The state court thus found Barber's claim meritless.

That decision was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent. To the contrary, it was entirely consistent with the Supreme Court's decision in *Lockhart*, which upheld as constitutional the very practice Barber now challenges. 476 U.S. at 173 ("[T]he Constitution does not prohibit the States from 'death qualifying' juries in capital cases."). Barber is not entitled to habeas relief on this claim.

K. Barber's Claim That the State's Decision to Seek the Death Penalty Was Impermissibly Influenced by the Victim's Family Members

Barber claims that the state's decision to seek the death penalty was impermissibly influenced by the victim's family members and that his death sentence was therefore unconstitutionally obtained. (Doc. # 1 at 149-52). For the reasons explained below, Barber is not entitled to habeas relief on this claim.

1. Factual Background

In an order entered July 30, 2002, the state trial court ordered the prosecution to inform the court and opposing counsel within 30 days whether the state intended to seek the death penalty in Barber's case. (Vol. 1, Tab R-1 at 15). When the state failed to respond to the order within 30 days, Barber's counsel filed a motion to preclude the state from seeking the death penalty. (*Id.* at 25). The trial court provisionally granted Barber's motion. (*Id.* at 34). In its order provisionally granting the motion, the trial court stated:

> [T]he Defendant's Motion To Preclude The State From Seeking The Death Penalty is GRANTED; provided, the State may file with the Court a statement as to their reasons for not responding to the previous Order of this Court, and whether or not the State is seeking the death penalty, and if so the specific factual basis for such penalty.
>
> The State shall be allowed ten (10) days in order to file such response. If no response is filed within that time, then this Order shall become final.

(*Id.*).

The state responded to that order two days later. (*Id.* at 30-31). In its response, the state apologized to the court for inadvertently failing to respond to the court's July 30, 2002 order and explained that the state had communicated to defense counsel its intent to seek the death penalty "from the preliminary hearing on." (*Id.* at 30). The prosecutor explained that Epps' family "was asked to meet with us to discuss their feelings prior to a formal response" to the court's July 30, 2002 order, and that the state's heavy trial schedule in August prevented the meeting with Epps' family from occurring until early September. (*Id.*). The prosecutor further stated, "At that meeting, [Epps' family] made clear their wish to seek the death penalty." (*Id.*). The prosecutor went on to explain that he mistakenly believed the court had already been previously informed of the state's decision to seek the death penalty and that he was not aware that either the court or defense counsel needed clarification on the issue until he received Barber's "Motion to Preclude"

and the court's order provisionally granting the motion. (*Id.*). Finally, the prosecutor clarified that the state was indeed seeking the death penalty and that its factual basis for doing so were the aggravating circumstances that the murder occurred during a robbery and was especially heinous, atrocious, or cruel. (*Id.* at 31).

Four days after the state filed its response, the trial court entered an order setting aside its previous order provisionally granting Barber's motion to preclude. (*Id.* at 29). The new order allowed the state "to pursue the death penalty in this case if the Defendant is convicted by a jury of the charge of capital murder." (*Id.*).

2. Analysis

On direct appeal, after reviewing the sequence of events just recited, the Alabama Court of Criminal Appeals concluded:

> The record does not support the inference that the wishes of the victim's family impermissibly influenced the State's decision to seek the death penalty in this case. Rather, it appears that the State had previously indicated its intent to seek the death penalty, based on the circumstances of the offense, before consulting with the victim's family. It further appears that defense counsel was well aware of that intent because defense counsel indicated that the State was seeking the death penalty in this case in a notice of withdrawal of counsel due to a conflict of interest that was filed on August 23, 2002; in a motion to reconsider and demand for an *in camera* hearing that was filed on August 26, 2002; and in a demand for an *in camera* hearing that was filed on August 26, 2002. The meeting with the victim's family appears to have been more of a formality before responding to the trial court's order than a time to decide whether to seek the death penalty.

Barber, 952 So. 2d at 463. The state appellate court therefore rejected Barber's claim that the victim's family impermissibly influenced the state's decision to seek the death penalty.

Barber is not entitled to habeas relief on this claim for two reasons. First, Barber's federal constitutional claim depends on overturning a factual determination made by the state court, and Barber has failed to make the requisite showing under 28 U.S.C. § 2254(e)(1) for rebutting state-court findings of fact. Second, even if Barber could make the required showing on the factual

issue (and, to be clear, he cannot), he has still failed to show that the state court's adjudication of his claim was contrary to or an unreasonable application of clearly established Supreme Court precedent, as required by 28 U.S.C. § 2254(d)(1).

a. The State Court's Factual Determination Stands

Based on its review of the record, the state court determined that the prosecution decided to seek the death penalty in Barber's case before it ever met with Epps' family. It noted that "the State had previously indicated its intent to seek the death penalty, based on the circumstances of the offense, before consulting with the victim's family." *Barber*, 952 So. 2d at 463. It cited several court documents filed by defense counsel *before* the prosecution met with Epps' family that indicated the state was seeking the death penalty. *Id.* (making reference to documents in the record contained at Vol. 1, Tab R-1 at 16, 18, 20). And it therefore concluded that "[t]he meeting with the victim's family appears to have been more of a formality before responding to the trial court's order than a time to decide whether to seek the death penalty." *Id.* Under 28 U.S.C. § 2254(e)(1), "a determination of a factual issue made by a State court shall be presumed to be correct," and the habeas petitioner "shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." Barber has not offered any evidence to rebut the state court's finding on this factual issue, let alone clear and convincing evidence. Barber's federal constitutional claim that that the victim's family *impermissibly* influenced the state's decision to seek the death penalty cannot succeed unless Barber first shows that the victim's family in fact *influenced* the state's decision to seek the death penalty. Because the state court found that the decision to seek the death penalty was made before the meeting with Epps' family, and because Barber has failed to rebut that finding, habeas relief is precluded.

b. The State Court's Rejection of Barber's Claim Was Reasonable

Even if it could be inferred that the state's decision to seek the death penalty in Barber's case was influenced in part by a meeting with Epps' family, the state court did not act contrary to or unreasonably apply clearly established Supreme Court precedent in rejecting Barber's claim. Barber argues that "[f]ederal law clearly establishes that a prosecutor may not consider the opinions of a victim's family when deciding whether to seek capital punishment." (Doc. # 23 at 103). But the Supreme Court precedents Barber cites do not establish that principle.

Barber's argument proceeds in three parts. First, he claims *Gregg v. Georgia* established the principle that "the standards by which [prosecutors] decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence." 428 U.S. 153, 225 (1976) (White, J., concurring in the judgment). Second, he claims *Booth v. Maryland* established the principle that sentencing juries are constitutionally forbidden from considering victim impact statements at the sentencing phase of a capital trial. 482 U.S. 496, 503-09 (1987). Based on his view that *Booth* forbids capital sentencing juries from considering victim impact statements and that *Gregg* requires prosecutors to base their charging decisions only on those facts that juries may base their sentencing decisions on, Barber claims it was unconstitutional for the state to base its decision to seek the death penalty in part on statements made by Epps' family.

Barber's argument fails at every point. First, *Gregg* did not establish a constitutional rule that the only factors a prosecutor may consider in deciding whether to *seek* the death penalty are those factors a jury is constitutionally permitted to consider at sentencing when deciding whether to *impose* the death penalty. *Gregg* involved a constitutional challenge to a death sentence imposed under Georgia's recently amended capital sentencing law. 428 U.S. at 162-63 (opinion

of Stewart, J.). The Court held by a vote of 7-2 that Georgia's capital sentencing scheme did "not violate the Constitution," and the Court therefore affirmed Gregg's death sentence. *Id.* at 207 (opinion of Stewart, J.). Though seven Justices agreed with that result, no one opinion garnered the assent of more than three Justices. Justice Stewart announced the judgment of the Court and delivered an opinion joined by Justices Powell and Stevens, *id.* at 158-207; Justice White delivered an opinion concurring in the judgment joined by Chief Justice Burger and Justice Rehnquist, *id.* at 207-26; and Justice Blackmun delivered an opinion concurring in the judgment for himself only, *id.* at 227. Importantly, *none* of the relevant opinions endorsed a constitutional rule limiting the criteria prosecutors may permissibly consider in deciding whether to seek the death penalty in a given case.

In his opinion, Justice Stewart addressed the defendant's argument that under Georgia's capital sentencing scheme, "the state prosecutor has unfettered authority to select those persons whom he wishes to prosecute for a capital offense and to plea bargain with them." *Id.* at 199. That discretion posed no constitutional problem, Justice Stewart concluded, because it merely permitted the prosecutor to "make[ ] a decision which may remove a defendant from consideration as a candidate for the death penalty," and "[n]othing in any of [the Court's] cases suggests that the decision to afford an individual defendant mercy violates the Constitution." *Id.* Far from prohibiting prosecutors from exercising broad discretion based on a variety of factors in deciding when to seek the death penalty for a particular capital offense, Justice Stewart's opinion expressly permits the state to exercise such discretion.

Justice White's opinion also rejected the defendant's argument that "prosecutors behave in a standardless fashion in deciding which cases to try as capital felonies" as "unsupported by any facts." *Id.* at 225. Justice White reasoned:

> Absent facts to the contrary it cannot be assumed that prosecutors will be motivated in their charging decision by factors other than the strength of their case and the likelihood that a jury would impose the death penalty if it convicts. Unless prosecutors are incompetent in their judgments *the standards by which they decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence*. Thus defendants will escape the death penalty through prosecutorial charging decisions only because the offense is not sufficiently serious; or because the proof is insufficiently strong.

Id. (emphasis added). As context makes clear, when Justice White made the statement Barber relies on -- "the standards by which [prosecutors] decide whether to charge a capital felony will be the same as those by which the jury will decide the questions of guilt and sentence" -- he was making a *descriptive* observation about the likely practices of prosecutors in the real world. *Id.* He was not laying down a constitutional rule forbidding prosecutors from considering criteria in their charging decisions -- such as victim impact statements -- that juries might not be permitted to consider at the sentencing phase of a capital case. Thus, the first premise of Barber's argument -- that *Gregg* requires prosecutors to base their charging decisions in capital cases only on those criteria that juries may base their sentencing decisions on -- is simply not true.

The second step in Barber's argument, premised on *Booth v. Maryland*, likewise founders. *Booth* did hold unconstitutional a death sentence imposed after a jury heard a victim impact statement at the sentencing phase of a capital trial. 482 U.S. at 502-03. The victim impact statement was compiled from interviews with the victims' family and was read to the jury by the prosecutor. *Id.* at 499-501. The statement "provided the jury with two types of information." *Id.* at 502. "First, it described the personal characteristics of the victims and the emotional impact of the crimes on the family." *Id.* "Second, it set forth the family members' opinions and characterizations of the crimes and the defendant." *Id.* The Court held that "this information is irrelevant to a capital sentencing decision, and that its admission creates a constitutionally

unacceptable risk that the jury may impose the death penalty in an arbitrary and capricious manner," in violation of the Eighth and Fourteenth Amendments. *Id.* at 502-03.

However, as Barber acknowledges, *Booth* was overruled four years later in *Payne v. Tennessee*, which held that the Eighth Amendment "erects no *per se* bar" to the admission of victim impact evidence in capital sentencing proceedings. 501 U.S. 808, 827 (1991). Still, Barber argues that though the *Payne* Court overruled *Booth*'s holding that evidence "relating to the victim and the impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing," it did not disturb *Booth*'s holding regarding the second type of evidence at issue in *Booth*—"a victim's family members' characterizations and opinions about the crime, the defendant, and the appropriate sentence." *Id.* at 830 n.2.

In a footnote, the Supreme Court in *Payne* did characterize the portion of *Booth* it did not overrule as holding "that the admission of a victim's family members' characterizations and opinions about the *crime*, the *defendant*, and the *appropriate sentence* violates the Eighth Amendment." *Id.* (emphasis added). But the court doubts *Booth* ever prohibited evidence about a victim's family's views on the *appropriate sentence* from being admitted in a capital sentencing proceeding. The *Booth* Court was primarily concerned about evidence of the victim's family's "opinions and characterizations of the *crimes* and the *defendant*." *Booth*, 482 U.S. at 502 (emphasis added); *see also id.* at 508-09. The *Booth* Court never expressly addressed what is at issue in this case: evidence of the family's "opinions about . . . the *appropriate sentence*." *Payne*, 501 U.S. at 830 n.2 (emphasis added). Though some language in the victim impact statement at issue in *Booth* could be construed as expressing family members' opinions about the appropriate sentence, 482 U.S. at 510-15, the Court only expressly condemned the presentation of the family's opinions about "the crimes" and "the defendant," not the appropriate sentence. *Id.* at

502, 508. Thus, it is not obvious that *Booth* prohibited evidence about a victim's family's views on the appropriate sentence from being admitted in a capital sentencing proceeding, especially if presented in a manner devoid of "emotionally charged opinions." *Id.* at 508. And, if "fairminded jurists could disagree" about *Booth*'s application to this case, that is enough to preclude federal habeas relief. *Harrington*, 562 U.S. at 102.

But, even assuming that *Booth* forbids the admission of a victim's family's opinions about the appropriate sentence at a capital sentencing proceeding, *Gregg*, as explained above, did not establish a constitutional rule forbidding *prosecutors* from considering the views of a victim's family when deciding whether to seek the death penalty against a defendant who has committed a capital crime. And for good reason. At the time prosecutors met with Epps' family, Barber had already been charged with capital murder, which under Alabama law has a maximum sentence of death. (Vol. 1, Tab R-1 at 8-9, 30). Moreover, the prosecution had already given defense counsel notice of its intent to seek the death penalty. (*Id.* at 16, 18, 20, 30); s*ee also Barber*, 952 So. 2d at 463. Thus, the only possible consequence of meeting with Epps' family was the possibility that the meeting might persuade the prosecutors *not* to seek the death penalty. And as Justice Stewart explained in *Gregg*, "[n]othing in any of [the Supreme Court's] cases suggests that the decision to afford an individual defendant mercy violates the Constitution." 428 U.S. at 199. In short, Barber has not shown that the prosecution's consideration of Epps' family's views about the appropriate sentence for his crime violated clearly established Supreme Court precedent beyond any possibility for fairminded disagreement.

Barber has failed to rebut the state court's factual determination that the prosecution's decision to seek the death penalty was made before it met with Epps' family, and he has failed to show that the state court acted contrary to or unreasonably applied clearly established Supreme

Court precedent in rejecting his claim. Barber is therefore not entitled to habeas relief on this claim.

L. Barber's Claims That the Prosecutor Made Impermissible Comments on His Failure to Testify and Impermissibly Shifted the Burden of Proof to Him

Barber argues that his conviction was obtained in violation of the Constitution because the prosecutor made impermissible comments on his failure to testify and impermissibly shifted the burden of proof to him. (Doc. # 1 at 153-55). For the reasons explained below, Barber is not entitled to habeas relief on these claims.

1. Factual Background

In his initial closing argument at the guilt phase of Barber's trial, the prosecutor made the following statements:

> *And it's the last piece of evidence, I assume they would not*[ ] *want to talk about much, which is that confession. All they have to say was he's intoxicated.*
>
> Now, you had an opportunity to observe that confession and it's in evidence for you to observe again. And you can observe his level of intoxication. And it's interesting that he didn't, when initially picked up from that hotel room and interviewed within an hour at 1:00 in the morning when presumably most of whatever is in his system is in his system, he doesn't confess. Some ten hours later, ten hours that he's been in custody. They don't pass out drugs up in the Madison County jail. Ten hours later that he confesses, but you can see the tape.

(Vol. 11, Tab R-18 at 1083-84) (emphasis added). Barber contends that the emphasized portion of the above statement was an impermissible comment on Barber's failure to testify and impermissibly shifted the burden of proof to him. In his rebuttal closing argument, the prosecutor further stated:

> Dwight Edger got to the bottom of it because he stayed after him. *And Dwight said, you think, why would an innocent man confess. I almost feel ridiculous talk[ing] about it though. Why would he? Can you imagine any circumstance where an innocent man decides to confess to a murder he didn't do and a robbery he didn't do? I'll confess it. Why would he? You can't answer that.* And if you wanted to pretend like you could answer it, then ask yourself how could you do it? How can you confess on tape with detail, a detail in particular that only the

> killer would know. What did you hit her with? There was a hammer there and I grabbed the hammer. And I know we all remember Dr. Joe Embry up here in his graphic testimony of the wounds Ms. Epps suffered. Crescent-shaped wounds, crescent-shaped fractures, crescent-shaped depression[s] commonly seen with a hammer.

(*Id.*, Tab R-20 at 1129-30) (emphasis added). Barber also contends the emphasized portion of the above statement was an impermissible comment on Barber's failure to testify.

2. The Prosecutorial-Commentary Claim

The Fifth Amendment's Self-Incrimination Clause provides, "No person shall . . . be compelled in any criminal case to be a witness against himself." The Supreme Court has long held that the Clause, which applies to the states through the Fourteenth Amendment, "forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965).

On direct appeal, the Alabama Court of Criminal Appeals rejected Barber's claim that the prosecutorial statements described above were unconstitutional comments on his refusal to testify. *Barber*, 952 So. 2d at 437-40. The court concluded that, viewed in proper context, neither statement by the prosecutor was "of such a character that a jury would naturally and necessarily construe it as a comment on the defendant's silence." *Id.* at 439, 440 (internal quotation marks omitted). Instead, the court found the statements were permissible comments on the evidence and responses to *defense counsel's* arguments. *Id.*

The state court's interpretation of the prosecutor's comments was not unreasonable, and Barber has not shown that the state court acted contrary to or unreasonably applied clearly established Supreme Court precedent in denying his claim. In context, the prosecutor's first statement -- "And it's the last piece of evidence, I assume they would not[ ] want to talk about much, which is that confession. All they have to say was he's intoxicated" -- was clearly a

comment on defense counsel's *arguments*, not Barber's *silence*. During cross-examination of Investigator Edger, who took Barber's confession, Barber's trial counsel insinuated that Barber may have been intoxicated when he confessed and thus that the confession should not be believed. (Vol. 10 at 1000-Vol. 11 at 1003). The prosecutor's statement simply noted defense counsel's argument ("All they [defense counsel] have to say was he [Barber] [was] intoxicated") and urged the jury to reject that argument based on the circumstances of the confession (it was taken at least 10 hours after Barber ceased using substances) and the contents of the video ("but you can see the tape"). (Vol. 11, Tab R-18 at 1083-84). Contrary to Barber's contentions, the word "they" in the prosecutor's statement clearly referred to Barber's trial counsel, not Barber himself. It was defense counsel, not Barber, who in the prosecutor's view "would not[ ] want to talk about [the confession] much" and who (again, in the prosecutor's view) unpersuasively claimed, "[Barber's] intoxicated." (*Id.* at 1083). Even if the prosecutor's statements are viewed as somewhat ambiguous on this point, Barber has failed to show the state court's conclusion that they were not directed at his failure to testify was unreasonable, beyond the possibility for any fairminded disagreement. Federal habeas relief is therefore precluded. *See Harrington*, 562 U.S. at 101-02.

The prosecutor's second statement regarding the slim likelihood of an innocent man confessing to a crime he did not commit was likewise a permissible response to defense counsel's argument rather than an impermissible comment on Barber's failure to testify. As the state court explained, prior to the prosecutor's second statement, defense counsel made an extensive argument attempting to show why an innocent person might confess to a crime. *Barber*, 952 So. 2d at 439-40. Taken in context, the prosecutor's statement that it was extremely unlikely Barber falsely confessed was clearly a response to defense counsel's suggestions to the

contrary. The statement simply contains no language, direct or indirect, that could reasonably be construed as a comment on Barber's failure to testify. And again, even if one finds the prosecutor's second statement somewhat ambiguous (to be clear, the court does not), Barber still has not shown that the state court's interpretation of the statement was unreasonable, beyond the possibility for any fairminded disagreement. Again, this fact alone precludes federal habeas relief. *See Harrington*, 562 U.S. at 101-02.

3. The Burden-Shifting Claim

Finally, the state court also reasonably concluded that neither of the prosecutor's statements improperly shifted the burden to Barber to prove his innocence. *Barber*, 952 So. 2d at 440-42. Neither statement "suggest[ed] that [Barber] was obligated to produce evidence or prove his innocence." *Id.* at 441. Instead, the "the prosecutor was commenting on the evidence, urging the jury to review the videotape of the confession for itself, to observe [Barber] on the videotape, and to reject the defense's contention that [Barber] was intoxicated when he made the statement." *Id.* at 441-42. Simply put, nothing in the prosecutor's statements suggested that Barber bore the burden of proof on any issue at trial.

Barber argues the state court's decision was contrary to and unreasonable application *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Mullaney v. Wilbur*, 421 U.S. 684 (1975), but he is wrong. Those cases both involved laws or jury instructions that expressly relieved the state of its burden of proving every element of the offense beyond a reasonable doubt. *See Sandstrom*, 442 U.S. at 512, 521 (jury instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts" unconstitutionally relieved the state of its burden of proving that defendant acted with intent); *Mullaney*, 421 U.S. at 684-85, 703-04 (law that required defendant charged with murder to prove he acted in the heat of passion to reduce the murder charge to manslaughter unconstitutionally relieved state of its burden of proving an element of

murder—namely, that the defendant did *not* act in the heat of passion). No such law or jury instruction was present in Barber's case. Instead, the trial court clearly and correctly instructed the jury regarding the state's burden of proof and Barber's presumption of innocence. (Vol. 11, Tab R-21 at 1139-42); *see also Barber*, 952 So. 2d at 442. Indeed, the trial court expressly told the jury: "The burden never rests upon a defendant to disprove his guilt nor to disprove facts that would tend to establish his guilt." (Vol. 11, Tab R-21 at 1140). Instead, the court explained, the burden is "upon the State of Alabama to prove [Barber's] guilt beyond a reasonable doubt, that is, to prove each and every element of the charged offense beyond a reasonable doubt." (*Id.*). Barber has failed to show that the state court unreasonably rejected his claim of unconstitutional burden-shifting. He is therefore not entitled to habeas relief on that claim.

M. Barber's Claim Based on the Trial Court's Admission of Barber's Confession

Barber claims that the trial court's admission of certain portions of his videotaped confession violated his federal constitutional rights. (Doc. # 1 at 158-60). Specifically, Barber complains about the admission of the following comments near the end of his videotaped confession: "I'm gonna get the death penalty for this. . . . Why do I even want attorneys? You know, just charge me with it and put me to death." (Vol. 23 at 1239, 1242). He claims those statements were inadmissible, irrelevant, and highly prejudicial and that the videotape should have been redacted to exclude those statements. He contends the comments were so prejudicial that their admission violated his constitutional rights.

The Alabama Court of Criminal Appeals rejected Barber's claim on direct appeal. *Barber*, 952 So. 2d at 429-30. The court concluded that Barber's statements, "viewed in the context of [his] entire statement, [appeared] to be genuine expressions of emotion and remorse about his actions." *Id.* at 430. The comments showed Barber "was aware of the seriousness of the

crime about which he was confessing" and therefore were not irrelevant or unfairly prejudicial. *Id.* Accordingly, the court found no error in their admission.

Barber has not shown that the state court acted contrary to or unreasonably applied clearly established Supreme Court precedent in rejecting this claim. Indeed, he does not identify a single Supreme Court precedent the state court allegedly contravened or misapplied. He is therefore not entitled to habeas relief on this claim. *See* 28 U.S.C. § 2254(d)(1).

N. Barber's Claim Based on the Jury Viewing Him in Shackles and Handcuffs

Barber claims his due process rights were violated when jurors briefly saw him in shackles and handcuffs in the hallway and saw him in handcuffs during his videotaped statement. (Doc. # 1 at 160-62). For the reasons explained below, Barber is not entitled to habeas relief on this claim.

During a recess just before deliberations began, three jurors briefly viewed Barber in handcuffs and leg shackles in a courthouse hallway. (Vol. 11, Tab R-21 at 1173). As defense counsel explained in his oral motion for a mistrial:

> [A]s the sheriff's department brought Mr. Barber down there were three jurors standing in the outside of Judge Hamilton's courtroom standing there talking, and I heard the elevator door open up and I heard the noise coming from the chains on Mr. Barber's legs and I got up and walked that way and tried to stop it, tried to get in front of them so I could prevent them from walking in front of the jurors. They stopped, they happened to stop right in front of where the jurors were. The jurors got a good look at Mr. Barber with his hands in cuffs and his legs in cuffs and the noise it was making.

(*Id.*). The court denied the mistrial motion (*Id.* at 1174), but it did call the jury back into the courtroom for the following exchange:

> [The Court:] First of all, to ask each of you individually, and I won't call you by name, but I want to ask you as [a] group and individually, of course, if anything has occurred during your deliberations, during any break or at any other time that has caused you to be prejudiced or biased about this case in any way. In other words, your obligation is to follow the law as I give it to you and you determine what the evidence is from the witness stand. So the simple question is: Has

> anything compromised that for any of you[?] If it has in any way let me know immediately.
>
> (No response.)
>
> [The Court:] No response. All right.

(*Id.* at 1174-75).

Jurors also saw Barber in handcuffs when they watched Barber's third videotaped statement, during which he confessed to killing Epps.[20] As the state court explained, Barber was "clearly wearing handcuffs during the interview." *Barber*, 952 So. 2d at 446. However, the court also noted that "because the videotape is blurring in places, the handcuffs are not plainly visible all of the time." *Id.* "Rather, they are more noticeable when [Barber] is moving his hands." *Id.*

On direct appeal, the Alabama Court of Criminal Appeals rejected Barber's claim based on jurors seeing him shackled and handcuffed in the hallway and handcuffed during his videotaped confession. The court observed that Barber "did not wear handcuffs and shackles throughout the trial," but only "going to and from the courtroom." *Id.* at 445. The court also noted that, immediately after the hallway sighting, the trial judge asked the jurors if anything they had seen during a break or at any other time had caused them to be prejudiced or biased about the case, and none of the jurors indicated any such prejudice or bias. *Id.* Finally, the court emphasized that the defense did not object to the admission of the videotape on the ground that Barber was handcuffed or ask for a cautionary instruction; that the viewing was on television, not in person; and that Barber did not wear handcuffs or shackles during the actual trial. *Id.* at 446. Under these circumstances, the state court found Barber's unconstitutional-shackling claim meritless.

[20] The Alabama Court of Criminal Appeals specifically found that Barber "was wearing handcuffs only during the third videotaped statement." *Barber*, 952 So. 2d at 443. Barber has not challenged that factual determination in this court.

The state court's decision was not contrary to or an unreasonable application of clearly established law, beyond the possibility for fairminded disagreement. Under clearly established Supreme Court precedent, "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination, in the exercise of its discretion, that they are justified by a state interest specific to a particular trial." *Deck v. Missouri*, 544 U.S. 622, 629 (2005). But, critically, the Court in *Deck* considered only the "routine use of visible shackles" during actual trial proceedings—not the brief, happenstance exposure to a shackled defendant being transported outside the courtroom, as occurred in this case. *Id.* at 626-29.[21] The history and case law the Court relied on in *Deck* emphasized the importance of a defendant's right to appear without shackles *at his trial*—not as he was being transported to or from the place he would stand trial. *Id.* at 626 (collecting authorities and observing that this rule "was meant to protect defendants appearing *at trial before a jury*") (emphasis added). And neither *Deck* nor any other Supreme Court case Barber cites addressed the constitutionality of jurors viewing a video recording in which the defendant was handcuffed. Accordingly, the state court did not act contrary to or unreasonably apply *Deck* in rejecting Barber's claim.

The other cases Barber cites in support of this claim also provide no basis for habeas relief. *See Estelle v. Williams*, 425 U.S. 501, 503, 505 (1976); *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986); *Illinois v. Allen*, 397 U.S. 337, 343-44 (1970). *Estelle* held that a state may not constitutionally compel defendants to wear prison garb at trial; it did not address shackling at all. 425 U.S. at 512. *Holbrook* held that the Constitution permitted having uniformed security officers sit in the first row of the courtroom's spectator section because that arrangement was not

[21] The defendant in *Deck* was not in fact visibly shackled at the guilt phase of his trial. 544 U.S. at 624. Deck was instead challenging the use of visible shackles at the penalty phase of his capital trial, but the Court nonetheless ruled on the constitutionality of guilt-phase shackling in the course of ruling on his penalty-phase shackling claim. *Id.* at 625-30.

"the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." 475 U.S. at 568-69. To be sure, *Holbrook*'s condemnation of shackling was dictum, not a holding—there was no claim of shackling in that case. But, because that dictum became a holding in *Deck*, the more important point is that *Holbrook* referred to shackling in the context of evaluating a conspicuous courtroom practice -- placing uniformed security guards in close proximity to the defendant -- that persisted throughout the course of a defendant's entire trial. *Id.* at 562-66. No such conspicuous, persistent, and prejudicial courtroom practice is at issue here, where jurors only viewed Barber in restraints in a videotaped interview and on a single, accidental occasion in which three jurors viewed him while he was being transported outside the courtroom.

Finally, *Allen* involved an extreme situation in which a pro se criminal defendant verbally abused the trial judge and jury members, tore open his court file and threw papers on the floor, and so obstinately refused to cease his disruptive conduct that the trial judge ordered him removed from portions of his trial. 397 U.S. at 339-41. The Supreme Court held that the trial court committed no constitutional error in removing the defendant from the courtroom for parts of his trial, under those extreme circumstances. *Id.* at 347. In response to the lower court's suggestion that the trial court might have ordered Allen bound and gagged but kept him present for his trial, the Court observed, "in some situations . . . binding and gagging might possibly be the fairest and most reasonable way to handle a defendant who acts as Allen did here." *Id.* at 344. But it also wrote, "even to contemplate such a technique, much less see it, arouses a feeling that no person should be tried while shackled and gagged except as a last resort." *Id. Allen* thus recognized that it might sometimes be permissible to bind and gag a defendant *in* the courtroom, as a last resort. It certainly does not establish that brief exposure to a shackled defendant *outside*

the courtroom, or viewing a videotaped interview of a handcuffed defendant, violates the Constitution. Barber is not entitled to habeas relief on this claim.

O. Barber's Cumulative-Effect Claim

Finally, Barber claims that the cumulative effect of the alleged errors in his trial discussed above violated his federal constitutional rights. (Doc. # 1 at 162). The Alabama Court of Criminal Appeals rejected this claim on direct appeal, *Barber*, 952 So. 2d at 463, and Barber has not shown that its decision was contrary to or an unreasonable application of clearly established Supreme Court precedent. In support of this claim, Barber cites *Kyles v. Whitley*, 514 U.S. 419, 421 (1995), which held that *Brady* claims must be evaluated based on "the cumulative effect of all [favorable] evidence suppressed by the government." *Kyles* did not hold that discrete claims of constitutional error must be evaluated cumulatively; it only addressed the scope of the suppressed evidence relevant for assessing a *Brady* claim. Moreover, the state court made clear that it "considered the allegations of error cumulatively" and did "not find that the accumulated errors have probably injuriously affected [Barber's] substantial rights." *Barber*, 952 So. 2d at 463 (internal quotation marks omitted). That conclusion was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent, so Barber is not entitled to habeas relief on this claim.

IV. Conclusion

For all these reasons, and after careful review, the court concludes that Barber's petition (Doc. # 1) is due to be denied. A separate order will be entered.

DONE and **ORDERED** this March 8, 2019.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX C

REL: 04/10/2015
Notice: This unpublished memorandum should not be cited as precedent. See Rule 54, Ala.R.App.P. Rule 54(d), states, in part, that this memorandum "shall have no precedential value and shall not be cited in arguments or briefs and shall not be used by any court within this state, except for the purpose of establishing the application of the doctrine of law of the case, res judicata, collateral estoppel, double jeopardy, or procedural bar."

Court of Criminal Appeals

State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

D. Scott Mitchell
Clerk
Gerri Robinson
Assistant Clerk
(334) 229-0751
Fax (334) 229-0521

MEMORANDUM

CR-13-1167 Madison Circuit Court CC-02-1794.60

James Edward Barber v. State of Alabama

BURKE, Judge.

James Edward Barber was convicted of murder made capital because it was committed during the course of a robbery in the first degree. See § 13A-5-40(2), Ala. Code 1975. The jury recommended, by a vote of 11-1, that Barber be sentenced to death. The trial court accepted the jury's recommendation and sentenced Barber to death. This Court affirmed Barber's conviction and sentence in Barber v. State, 952 So. 2d 393 (Ala. Crim. App. 2005), and a certificate of judgment was issued on September 22, 2006. On September 20, 2007, Barber filed a petition for postconviction relief pursuant to Rule

32, Ala. R. Crim. P. Barber filed an amended petition on June 2, 2011. After an evidentiary hearing, the circuit court denied Barber's petition in its entirety. This appeal follows.

This Court adopted the trial court's summary of the evidence in Barber v. State, 952 So. 2d 393, 401-02 (Ala. Crim. App. 2005), as follows:

> "'Dorothy Epps was seventy-five years old at the time of her death, weighed approximately 100 pounds, and was 5 feet 5 inches tall. She was murdered on or about May 20th or May 21st, 2001, at her home in Harvest, Alabama.
>
> "'The Defendant knew Mrs. Epps during her lifetime, had done repair work at the Epps home, and had had a social relationship with one of Mrs. Epps' daughters. There was no evidence of a forced entry by the Defendant into the Epps home, and it is more likely than not that the Defendant gained access to the home easily because of his acquaintance with Mrs. Epps.
>
> "'Based upon the physical evidence presented including photographs of Mrs. Epps, before and during the autopsy, photographs of the area of the home where Mrs. Epps' body was found, and based upon the videotaped confession of the Defendant, the Defendant first struck Mrs. Epps in the face with his fist, and at some point thereafter, obtained a claw hammer that he used to cause multiple blunt force injuries to Mrs. Epps which caused her death.
>
> "'Dr. Joseph Embry, a medical examiner with the Alabama Department of Forensic Sciences, testified as to his findings from the autopsy he performed on May 23rd, 2001.
>
> "'Dr. Embry's examination of the body of

Dorothy Epps showed injuries that he classified in several different categories: bruises, cuts and fractures, bleeding over the brain, multiple injuries in hand and arms, rib fractures and bruising in the front of her body, and bruising and rib fractures in the back of the body.

"'Dr. Embry found evidence of nineteen different lacerations in the head and seven fractures in the head or skull, injuries to the neck and mouth and left eye caused by blows to Mrs. Epps by the Defendant's fists, and her tongue was bruised and injured from a blow or blows to the head.

"'Numerous defensive wounds were found by Dr. Embry, which were obviously inflicted upon Mrs. Epps in her effort to try to ward off the blows. She had bruising in her left palm and forearm, and bruising and injuries to the backs of her hands.

"'Mrs. Epps also suffered abdominal and lower chest bruising and she had fractures of her ribs in those areas. The wounds and injuries suffered by Mrs. Epps were consistent with those that would have been inflicted with a claw hammer, according to Dr. Embry.

"'Based upon his examination and his experience and training, Dr. Embry testified that the cause of death of Mrs. Epps was multiple blunt force injuries as depicted and described in his testimony, including the photographs that were admitted into evidence.

"'It is obvious from the testimony and the photographs that the injuries to Mrs. Epps, inflicted by the Defendant with a claw hammer, occurred over several areas of the part of the house where she was found. It

is also clear from the evidence presented and from the photographs that Mrs. Epps was at times facing her attacker, that she was aware of what was happening at the hands of the Defendant. It is also clear that she made efforts to protect herself and get away from the blows being inflicted by the Defendant, and that she suffered great pain and mental anguish at the hands of the Defendant as he was attempting to inflict the blows with the claw hammer that ultimately resulted in her death.

"'Dr. Embry also testified unequivocally that Mrs. Epps would have been conscious when she received the defensive wounds and injuries as depicted in the photographic evidence.

"'Roger Morrison, who specializes in serology with DNA analysis for the Alabama Department of Forensic Sciences, testified as to his involvement in investigating the crime scene. He testified that there were blood splatters from Mrs. Epps' wounds all around the area where she was found, that there was a good deal of blood on the floor, walls, furniture, and ceiling in the area where she was found. He also testified that he found a bloody palm print on a counter in the area where Mrs. Epps was found. Using DNA testing procedures, Mr. Morrison testified that the blood samples taken from the scene [were] from the victim, Mrs. Dorothy Epps.

"'The bloody palm print was examined by Mr. Dan Lamont, a latent print examiner with the Huntsville Police Department, and he compared it to the known palm print of the Defendant, James Edward Barber. Mr. Lamont testified unequivocally that the palm print found on the countertop at the Epps residence was the palm print of the

Defendant.'"

This Court also noted that, after a series of interviews with police, Barber confessed to murdering Epps.

> "During the third interview, at approximately 11:15 a.m. on May 25, 2001, the appellant was again advised of his Miranda[1] rights, waived those rights, and agreed to talk to [Detective] Edger. Initially, he adamantly denied that he killed the victim, even after being advised that officers had recovered his bloody palm print from the crime scene. Thereafter, however, he became very emotional and stated that, on the day of the murder, he had been using cocaine all day; that he thought about going to a movie with the victim's daughter Liz, but that Liz was in a meeting until late; that he was really 'f---ed up' and did not plan to kill the victim; that he went to the victim's house in his van; that he was talking to the victim; that he suddenly turned around and hit the victim with his hands and then with a hammer; that he threw the hammer in the trash and took the trash bag; that he took the victim's purse because it looked good and not to rob her; and that he threw the bag, purse, and his shoes in a dumpster at a carwash. The appellant estimated that he killed the victim around 7:00 p.m. on Saturday, May 19, 2001. He also made statements to the effect that he just wanted to die; that he did not want a trial; that he wanted to be executed; that he did not want to put the family through it; that he was so sorry and felt so bad for the victim's family; that the crime was senseless and stupid; that he did not want to face the victim's family; that he did not want attorneys; and that he wanted to be charged and put to death. In addition, he asked if he was going to get the death penalty, and he noted that it would be devastating to his and the victim's family. The appellant sobbed and cried throughout the interview and even after the interview was over, repeatedly showing

[1]Miranda v. Arizona, 384 U.S. 436 (1966).

> remorse for his actions, and stated that he loved the victim and did not know why he had killed her. Finally, he agreed to write a statement at a later time and confirmed that he still consented to a search of his van and his residence."

Id. 404-05.

Despite the evidence against him, Barber pleaded not guilty and maintained his innocence throughout trial. Barber insisted that his confession was false because, he said, he was extremely intoxicated during the interview[2].

In his initial petition, Barber maintained his innocence and claimed that trial counsel were ineffective during the guilt phase of his trial for failing to investigate Barber's whereabouts the weekend of the murder; failing to interview corroborating witnesses; failing to corroborate Barber's "viable alibi defense" (C. 31); failing to retrieve Barber's telephone records; failing to conduct an independent forensic investigation; and for failing to investigate the reasons why Barber would have falsely confessed to Epps's murder. Barber also claimed, among other things, that trial counsel rendered ineffective assistance by failing to present an available alibi defense; failing to challenge the credibility of Barber's confession; and failing to adequately challenge the State's case. Barber also claimed that counsel were ineffective during the penalty phase of his trial and that the State withheld evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

In his amended Rule 32 petition[3], Barber changed course

---

[2]Trial counsel hired an expert to evaluate Barber's mental state during his interviews with police. The expert's report stated that she "did not observe any symptoms of intoxication on the videotapes of the second or third statements given by Mr. Barber." (C. 1211.) The expert also concluded that Barber was competent to waive his Miranda rights at the time of his confession. (C. 1212.)

[3]Unless otherwise indicated, further references to Barber's petition refer to his amended Rule 32 petition.

and admitted that he killed Epps. Barber withdrew many of the above-mentioned claims and described the State's evidence of his guilt as "unassailable." (C. 539.) Despite his assertion of absolute innocence at trial and in his initial petition, Barber admitted in his amended petition that he killed Epps but claimed that he did so while intoxicated. Barber also claimed that he did not plan to rob Epps and took her purse only as an afterthought. Barber then alleged that trial counsel were ineffective during the guilt phase for failing to adequately investigate a manslaughter defense as well as evidence that the robbery was an afterthought. Barber also claimed that counsel were ineffective for failing to present these defenses. Finally, Barber claimed that counsel were ineffective during the penalty phase for failing to adequately investigate and present a mitigation case.

On appeal, Barber claims that the circuit court's order denying relief was an abuse of discretion. The only claims that Barber pursues on appeal are the claims from his amended petition alleging ineffective assistance of counsel during the guilt phase and the penalty phase of his trial. Allegations that are not expressly argued on appeal are deemed to be abandoned and will not be reviewed by this Court. Brownlee v. State, 666 So. 2d 91, 93 (Ala. Crim. App. 1995). We note that "'even though this petition challenges a capital conviction and a death sentence, there is no plain-error review on an appeal from the denial of a Rule 32 petition.'" Boyd v. State, 913 So. 2d 1113, 1122 (Ala. Crim. App. 2003), quoting Dobyne v. State, 805 So. 2d 733, 740 (Ala. Crim. App. 2000).

Standard of Review

"The standard of review on appeal in a post conviction proceeding is whether the trial judge abused his discretion when he denied the petition." Elliott v. State, 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992). "'"'A judge abuses his discretion only when his decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based his decision.'"'" Hodges v. State, 926 So. 2d 1060, 1072 (Ala. Crim. App. 2005), quoting State v. Jude, 686 So. 2d 528, 530 (Ala. Crim. App. 1996), quoting in turn Dowdy v. Gilbert Eng'g Co., 372 So. 2d 11, 12 (Ala. 1979), quoting in turn Premium Serv. Corp. v.

Sperry & Hutchinson, Co., 511 F. 2d 225 (9th Cir. 1975). However, "when the facts are undisputed and an appellate court is presented with pure questions of law, that court's review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). Likewise, when a trial court makes its judgment 'based on the cold trial record,' the appellate court must review the evidence de novo. Ex parte Hinton, [Ms. 1110129, November 9, 2012] ___ So. 3d ___, ___ (Ala. 2012) .In either instance, this Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court. See Reed v. State, 748 So. 2d 231 (Ala. Crim. App. 1999)("If the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition.").

All of the issues Barber raises on appeal involve allegations of ineffective assistance of counsel. This Court has held:

> "When reviewing claims of ineffective assistance of counsel, we apply the standard adopted by the United States Supreme Court in Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). To prevail on a claim of ineffective assistance of counsel a petitioner must show: (1) that counsel's performance was deficient; and (2) that the petitioner was prejudiced by the deficient performance.
>
> > "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133-34 [102 S.Ct. 1558, 71 L.Ed.2d 783] (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances

> of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91] at 101 [76 S.Ct. 158, 100 L.Ed. 83 (1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'
>
> "Strickland v. Washington, 466 U.S. at 689, 104 S.Ct. 2052.
>
> "'"'This court must avoid using "hindsight" to evaluate the performance of counsel. We must evaluate all the circumstances surrounding the case at the time of counsel's actions before determining whether counsel rendered ineffective assistance.'" Lawhorn v. State, 756 So. 2d 971, 979 (Ala. Crim. App. 1999), quoting Hallford v. State, 629 So. 2d 6, 9 (Ala. Crim. App. 1992). "[A] court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Strickland, 466 U.S. at 689, 104 S.Ct. 2052.'
>
> "A.G. v. State, 989 So. 2d 1167, 1171 (Ala. Crim. App. 2007)."

Lee v. State, 44 So. 3d 1145, 1154-55 (Ala. Crim. App. 2009). Additionally, this Court has held:

> "'Although we have discussed the performance component of an ineffectiveness claim prior to the

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

Bryant v. State, [Ms. CR-08-0405, September 5, 2014] ___ So. 3d ___, ___ (Ala. Crim. App. 2014), quoting Strickland v. Washington, 466 U.S. 668, 697 (1984). With these principles in mind, we will address each of Barber's arguments.

I.

In his petition, Barber first claimed that trial counsel[4] rendered deficient performance during the guilt phase of his trial because, he said, they failed to adequately investigate and present two potential lines of defense. Barber also claimed that he was prejudiced by counsel's failure to present these defenses. Specifically, Barber claimed that counsel failed to thoroughly investigate a manslaughter defense as well as a defense based on the theory that Barber committed the robbery as an afterthought to the murder. Barber also claimed that trial counsel were deficient under Strickland for failing to present these defenses at trial and that he suffered prejudice as a result.

[4]Barber was represented at trial by attorneys Robert Tuten and Benjamin Boyanton. Mr. Boyanton died before the evidentiary hearing was held in this case.

Barber claimed that trial counsel failed to adequately investigate his use of crack cocaine in the days and hours leading up to Epps's murder. According to Barber, trial counsel should have investigated the medical research available at that time documenting, among other things, the effects of crack cocaine usage on an individual's mental capacity. Barber also claimed that counsel should have retained an expert "to opine on whether intoxication could have deprived Mr. Barber of the intent necessary to commit murder." (C. 550.) Barber argued that counsels' inadequate investigation into the circumstances and effects of Barber's crack cocaine use resulted in that evidence not being adequately presented during trial.[5] Barber claimed that counsels' failure to adequately investigate and present this evidence constituted deficient performance under Strickland.

Barber also claimed that trial counsel failed to investigate whether the murder actually took place during a robbery or whether the robbery was a mere afterthought. According to Barber, an adequate investigation would have revealed that, after Barber killed Mrs. Epps, he

> "was in shock, overwhelmed with fear and anxiety about what had occurred while he was under the influence of crack. He also recognized that the presence of his van at Dorothy Epps's house could connect him to the crime. Eventually, he decided that he would return to Dorothy Epps's home and make it appear that she had been killed by a random perpetrator during a robbery. Hours after first leaving Dorothy Epps's home, Mr. Barber returned driving Elizabeth Epps's car. He pulled the phone jacks out from the wall and attempted to clean as

[5]A review of the record from Barber v. State, 952 So. 2d 393 (Ala. Crim. App. 2005), reveals that evidence was presented establishing that Barber used large amounts of cocaine, prescription pain medication, and alcohol on the day of the murder. Although Barber maintained his innocence, the jury was instructed on the lesser-included offenses of felony murder, manslaughter, and intentional murder. The jury was also instructed that voluntary intoxication could negate specific intent.

> many of his prints as he could from the scene. Mr. Barber took the hammer and Dorothy Epps's purse, putting them into the garbage bag along with his dirty clothes. Mr. Barber then drove his van home and went to sleep."

(C. 559.)

However, both of the above-mentioned lines of defense would have required Barber to admit that he killed Epps. Testimony at the evidentiary hearing revealed that Barber denied killing Epps and insisted that trial counsel pursue an innocence defense. Barber's trial counsel testified that he "made sure Mr. Barber knew all about the evidence and all about the discovery material that we had, the evidence that the State would have -- was intending to present at trial to convict him, and also the law that applied to all of that." (R. 61.) Trial counsel also testified that he and co-counsel discussed with Barber the option of pursuing lesser-included offenses as well as presenting evidence that Barber was intoxicated at the time of the crime. The following exchange occurred during the evidentiary hearing:

> "[Barber's Rule 32 Counsel]: Were you aware in December 2003 that in a capital case, where specific intent is an element of the offense, that you could have put on a case involving voluntary intoxication to mitigate the guilt?
>
> "[Barber's Trial Counsel]: Yes.
>
> "[Barber's Rule 32 Counsel]: Did you consider that in December 2003?
>
> "[Barber's Trial Counsel]: Yes.
>
> "[Barber's Rule 32 Counsel]: Did you discuss that with Mr. Barber?
>
> "[Barber's Trial Counsel]: Yes.
>
> "[Barber's Rule 32 Counsel]: So you were aware that was an option but you chose not to litigate the case on that basis; correct?

"[Barber's Trial Counsel]: No. That's not correct. Mr. Barber was aware of it and refused to even discuss that option with us at all. And said, I will not consider anything but a trial on the facts; that I am not guilty."

(R. 67.)

Barber's trial counsel repeatedly testified that Barber would not consider any defense that required him to admit that he killed Epps. When asked again whether he talked to Barber about trying the case on the basis that Barber was intoxicated when he killed Epps, trial counsel stated that Barber "refused to go down that road and stated that he was not guilty." (R. 74.) The following exchange also occurred:

"[Barber's Rule 32 Counsel]: So, with respect to the lesser included offense charge, did you try the case on the basis of a theory that he was intoxicated at the time he committed the offense?

"[Barber's Trial Counsel]: That he could have been intoxicated at the time of the offense? I have no evidence that he was. And I couldn't suggest that he was because to suggest that he was intoxicated and should be found guilty of a lesser offense went against his desires to pursue an absolute not guilty innocence defense. So to answer --

"[Barber's Rule 32 Counsel]: But you didn't talk to him about -- I'm sorry.

"[Barber's Trial Counsel]: To answer your question. Did I pursue that in the courtroom? No.

"[Barber's Rule 32 Counsel]: Yeah.

"[Barber's Trial Counsel]: Now did we pursue it outside the courtroom prior to trial? Yes. And Mr. Barber was absolutely uncooperative with us on that regard and we could not make any progress with that."

(R. 74-75.) See also (R. 80)(Trial counsel testified that "[Barber] would not allow us to do anything other than tell the jury that he was absolutely not guilty.")

At the evidentiary hearing, Barber admitted that he killed Epps. (R. 430.) However, on cross-examination, the following exchange occurred:

> "[Counsel for the State]: And throughout your entire representation with Mr. Tuten you always maintained, 'I didn't do it. I'm innocent.' Isn't that right, Mr. Barber?
>
> "[Barber]: That's right."

(R. 450.) Thus, Barber's testimony at the evidentiary hearing reveals that he was dishonest with trial counsel and insisted that they investigate and pursue a defense theory that Barber knew was false.

In its order denying Barber's petition, the circuit court found that Barber failed to prove that counsel were ineffective in their investigation and presentation of alternative defenses. The circuit court noted that, although Barber admitted at the evidentiary hearing that he killed Epps, he insisted at trial that he was innocent and had nothing to do with Epps's murder. Those findings are supported by the record.

Rule 32.3, Ala. R. Crim. P., provides that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." A review of the testimony and evidence presented at the evidentiary hearing reveals that Barber failed to prove that he was prejudiced by counsels' decision not to present alternative defenses. In order to present a viable manslaughter defense at trial, counsel would have been required to tell the jury that Barber killed Epps, albeit unintentionally. Similarly, in order to pursue a mere-afterthought defense, trial counsel would have to admit that Barber committed the murder. However, both trial counsel and Barber made clear at the evidentiary hearing that Barber refused to admit that he killed anyone.

In Ferguson v. State, 13 So. 3d 418 (Ala. Crim. App. 2008), the appellant filed a Rule 32 petition in which he claimed that trial counsel was ineffective for allowing him to make inculpatory statements to police. The circuit court dismissed the claim and found that the appellant made the inculpatory statements despite counsel advising him of his right not to speak with police. This Court affirmed the circuit court's dismissal of that claim and held:

> "'"[u]nder the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby." Phillips v. State, 527 So. 2d 154, 156 (Ala. 1988). "'A party cannot assume inconsistent positions in the trial and appellate courts and, as a general rule, will not be permitted to allege an error in the trial court proceedings which was invited by him or was a natural consequence of his own actions.'" Campbell v. State, 570 So. 2d 1276, 1282 (Ala. Crim. App. 1990)(quoting Leverett v. State, 462 So. 2d 972, 976-77 (Ala. Crim. App. 1984)). See also Slaton v. State, 680 So. 2d 879, 900 (Ala. Crim. App. 1995), aff'd, 680 So. 2d 909 (Ala. 1996). "Invited error has been applied to death penalty cases. 'An invited error is waived, unless it rises to the level of plain error.' Ex parte Bankhead, 585 So. 2d 112, 126 (Ala. 1991)." Adams v. State, [955 So. 2d 1037,](Ala. Crim. App. Aug. 29, 2003). Counsel cannot be held ineffective for the informed and voluntary choices of their client. Moreover, a defendant cannot voluntarily choose a course of action and then blame trial counsel for that course of action. Ferguson may not claim in his Rule 32 petition that his own choices violated his constitutional rights.'"

13 So. 3d at 438-39. See also Whitehead v. State, 955 So 2d 448, 455 (Ala. Crim. App. 2006), quoting Adkins v. State, 930 So. 2d 524, 536 (Ala. Crim. App. 2004)("'When a competent defendant knowingly and voluntarily chooses a lawful course of action or defense strategy, counsel is essentially bound by that decision. If the defendant is prejudiced in some respect by his own decision, he should not later be heard to complain about those consequences by challenging the conduct of his

counsel. See State v. Dunn, 224 Tenn. 255, 453 S.W.2d 777, 779 (Tenn. 1970); Dukes v. State, 578 S.W.2d 659, 665 (Tenn. Crim. App. 1978).'").

Thus, trial counsel could not be ineffective for adhering to Barber's wishes. Barber's refusal to discuss other options left trial counsel with no alternatives. The record contains ample evidence that trial counsel informed Barber of the law as it related to his case but that Barber refused to consider anything other than an innocence defense. The record reveals that Barber voluntarily chose the course of action that trial counsel ultimately undertook. Barber did not allege that he was mentally impaired or otherwise incompetent to make the decision to pursue an innocence defense. Barber cannot now claim that he was prejudiced by the course of action that he insisted counsel undertake. This rationale applies to Barber's claim regarding a manslaughter defense as well as his claim regarding a mere-afterthought defense as each defense would have required Barber to admit that he killed Epps. The circuit court's findings are well-supported by the record and its decision to deny relief on these claims was not an abuse of discretion. Any conflicting testimony was for the trial court to resolve. State v. Cortner, 893 So. 2d 1264, 1267-68 (Ala. Crim. App. 2012)("A trial court's ruling on conflicting evidence will not be disturbed unless it is palpably contrary to the weight of the evidence.").

Although it is not readily apparent from the face of his petition, the evidence that Barber presented at the evidentiary hearing as well as his arguments on appeal suggest that Barber's actual claim was not that trial counsel were ineffective simply for inadequately investigating alternate defenses and failing to present those defenses. Rather, it appears that Barber is arguing that trial counsel were ineffective for failing to convince him to change his mind and agree to admit that he killed Mrs. Epps. In his brief on appeal, Barber argues that his "insistence that trial counsel pursue an innocence defense does not absolve their failure to investigate the manslaughter defense." (Barber's brief at 34.) Thus, it appears that Barber is arguing that, had trial counsel conducted the investigation that his Rule 32 counsel conducted, they would have been able to convince him to admit to the killing and could have then pursued alternative defenses.

However, the evidence presented at Barber's evidentiary hearing indicated that trial counsel did conduct an investigation into a manslaughter defense. According to trial counsel, he had an "untold" number of conversations with Barber about lesser-included offenses. (R. 62.) Although trial counsel did testify that he could not specifically remember a conversation with Barber about a manslaughter defense, the record contains a letter from trial counsel to Barber in which trial counsel told Barber: "Alcohol and/or drug abuse may give rise to defenses, mitigation evidence and grounds to suppress statements." (C. 1225.) Thus, the record contained evidence suggesting that trial counsel did investigate and discuss this matter with Barber. Barber failed to offer any evidence, other than his own self-serving testimony, that a more thorough investigation would have enabled trial counsel to convince him to admit that he killed Epps.

Rule 32.3, Ala. R. Crim. P., provides that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Furthermore, "'[w]hen there is conflicting testimony as to a factual matter ..., the question of the credibility of the witnesses is within the sound discretion of the trier of fact.'" Calhoun v. State, 460 So. 2d 268, 269-70 (Ala. Crim. App. 1984), quoting State v. Klar, 400 So. 2d 610, 613 (La. 1981)). Because the record contained evidence suggesting that counsel conducted an investigation into alternative lines of defense and discussed those defenses with Barber, the circuit court was correct in finding that Barber failed to prove that counsel were ineffective during the guilt phase of his trial.

We also note that, in trial counsel's above-mentioned letter to Barber, counsel discussed evidence that he was investigating at Barber's request. For example, counsel told Barber that he was, at Barber's request, attempting to locate Barber's cellular telephone records and inquired as to why those records were important. Counsel also informed Barber that he had filed a motion to compel the State to allow him to view the physical evidence and was seeking a court order to view the crime scene. Thus, counsel's pretrial investigation appears to have been driven, at least in part, by Barber's false assertion that he was innocent. This supports trial

counsel's testimony that Barber "refused to even discuss" the possibility that trial counsel put on a case involving voluntary intoxication. (R. 67.)

In fact, the record reveals that trial counsel spent a great deal of time investigating an innocence defense based on Barber's misrepresentations. For example, trial counsel testified that he spent time investigating two alibis that Barber put forth, i.e., that Barber could not have committed the crime because he was at home cooking spaghetti when Epps was killed and that Barber was with a prostitute during the time frame in which Epps was killed. (R. 139-41.) According to trial counsel, neither alibi proved to be plausible. At the evidentiary hearing, Barber even testified that trial counsel met with him "at least 11 times" regarding the bloody palm print that was found at the scene. (R. 435-36.)

Had Barber been honest with trial counsel about his involvement in Epps's murder as he eventually was with Rule 32 counsel, trial counsel would not have wasted time and resources pursuing fruitless leads to support Barber's claim of innocence. This further supports the trial court's determination that Barber did not receive ineffective assistance of counsel during the guilt phase of his trial. Barber failed to prove that, had trial counsel conducted a more extensive investigation into a manslaughter defense, they would have been able to convince him to admit that he killed Epps.

Barber also claimed that counsel were ineffective for failing to investigate Barber's family and social history. According to Barber, such an investigation would have revealed that Barber grew up surrounded by mental illness and drug abuse. Barber also claimed that counsel could have discovered that Barber suffered from inadequate parenting and neglect. Additionally, Barber claimed that such an investigation would have demonstrated that Barber himself suffered from depression and addiction. According to Barber, all of these problems had a negative effect on his life. Barber presented a number of witnesses at the evidentiary hearing to support these claims.

However, none of these witnesses could have testified regarding Barber's level of intoxication at the time he committed the crime. Thus, even if counsel had conducted the

same investigation that Barber's Rule 32 counsel conducted, they would not have uncovered any evidence that would have supported a manslaughter or a mere-afterthought defense as none of these witnesses saw Barber in the days and hours leading up to the crime. Additionally, this line of defense, even if it would have been beneficial, would have required Barber to admit to the killing. As discussed above, Barber refused to do that. Accordingly, Barber failed to prove that he was prejudiced by trial counsel's failure to contact these witnesses prior to the guilt phase of his trial. Thus, the circuit court did not abuse its discretion in finding that trial counsel were not ineffective during the guilt phase of Barber's trial.

II.

Next, Barber claimed that he received ineffective assistance of counsel during the penalty phase of his trial. Specifically, Barber claimed that trial counsel failed to investigate Barber's family and social history and that counsel was ineffective in dealing with the defense's independent psychologist. In his petition, Barber alleged that a more thorough investigation would have uncovered a wealth of information including evidence that Barber's family had a history of mental illness and substance abuse; that Barber suffered from inadequate parenting and neglect; and that Barber himself had a history of mental illness and substance abuse. Barber called several witnesses at the evidentiary hearing who testified to these matters. According to Barber, both trial counsel and the defense's mitigation expert should have conducted a more thorough investigation.

However, the record reveals that Barber was uncooperative with counsel and the mitigation expert during the penalty phase of his trial. Dr. Marianne Rosensweig, a psychologist who was hired as a mitigation expert for Barber, testified that Barber's actions hampered her investigation. The following exchange occurred during the evidentiary hearing:

> "[Counsel for the State]: And did the Petitioner -- did [Barber] ever give you the names of any friends, local people, for you to talk to in preparation for your mitigation testimony?

"[Dr. Rosensweig]: He refused to.

"[Counsel for the State]: He refused?

"[Dr. Rosensweig]: Uh-huh. (Affirmative.)

"[Counsel for the State]: Okay. Fair to say. Doctor, it's difficult or your mitigation investigation can be severely hampered if the individual you're trying to help is not cooperative?

"[Dr. Rosensweig]: Exactly.

"[Counsel for the State]: And if he won't give you the names of any individuals, you can't find out who to talk to; right?

"[Dr. Rosensweig]: It was very difficult, yes.

"[Counsel for the State]: Did he refuse any other information that you requested?

"[Dr. Rosensweig]: I would, I think the only thing he refused to give me, if my memory's correct after nine years, was that he wouldn't tell me he wouldn't give me the names of people to contact as collateral sources."

(R. 235-36.) Trial counsel also indicated that Barber refused to cooperate with the mitigation investigation. Trial counsel testified that Barber "forbade me to contact any of his family members and refused to even give us contact information for any of them." (R. 150.)

Barber even testified that he did not want to be sentenced to life without the possibility of parole. The following exchange occurred during the evidentiary hearing:

"[Rule 32 Counsel]: Can you explain to the Court why you did not want life without parole?

"[Barber]: Well, that's exactly -- life without parole at the point I was at is just no hope. I wanted some hope. And I didn't want to -- I mean,

> if I wanted to go to trial and lost I'm going to get life without parole or the death penalty. Why would I take that? That's not a deal. I mean you would have to -- there's no hope in it. There's no future in it. I didn't -- I didn't want it.
>
> "Plus, I knew that if I did -- if things did go wrong and I, you know, was convicted and I got the death penalty that there would be people there to help me appeal my case and get the -- you know, to have some hope."

(R. 428-29.) Thus, it appears that Barber's strategy was to maintain his innocence throughout trial in hopes of being acquitted but, when that proved unsuccessful, to ensure that he got the death penalty so that he would have better representation on appeal.

As in the guilt phase of his trial, Barber's own voluntary actions in the penalty phase substantially contributed to the alleged errors he now complains of. "'Under the doctrine of invited error, a defendant cannot by his own voluntary conduct invite error and then seek to profit thereby.'" Whitehead v. State, 955 So 2d 448, 456 (Ala. Crim. App. 2006), quoting Phillips v. State, 527 So. 2d 154, 156 (Ala. 1988). Barber cannot now claim that he was prejudiced by a situation that he helped to create. Accordingly, Barber failed to prove that counsel were ineffective in the penalty phase of his trial and the circuit court was correct to deny relief. See Rule 32.3, Ala. R. Crim. P.

Moreover, a review of the record from Barber v. State, supra, reveals that trial counsel did not render deficient performance in the penalty phase of Barber's trial. Trial counsel presented testimony from Barber's brother, Mark Barber, who testified that Barber had problems with drugs and started using marijuana and alcohol at the age of 12. Mark Barber also testified that, in his opinion, Barber was a good person who is supportive of his family. Barber's mother, Elizabeth Barber, also testified that Barber was a good son who helped her after her husband died. Additionally, Alex Dryer, a minister who knew Barber through a prison ministry, testified that Barber became a Christian while he was incarcerated and that Barber shared his religion with other

inmates.

Trial counsel also called Dr. Rosensweig as a mitigation expert to testify during the penalty phase. Dr. Rosensweig testified that she interviewed Barber as well as other collateral sources in order to confirm things that Barber told her. Rosensweig testified that she spoke with family members, a former employer, and an officer from the Madison County jail. Dr. Rosensweig was able to give detailed testimony regarding what she learned about Barber's childhood, his adolescent years, and his adult life. That testimony included information regarding Barber's drug use, including his use of crack cocaine, and how that drug use negatively affected his life. Dr. Rosensweig also testified regarding the differences in powdered cocaine and crack cocaine as well as the effects of crack cocaine use. Dr. Rosensweig even introduced a chart that graphically depicted the behavioral effects of the progression of cocaine dependancy.

Notwithstanding Barber's lack of cooperation, trial counsel was able to put forth a mitigation case that cast Barber as a person with a good heart who, for various reasons, began using drugs and alcohol. Trial counsel further put evidence before the jury that, because of this extensive drug use, Barber's brain did not function normally.

In his Rule 32 petition, Barber claimed that trial counsel could have done a more thorough investigation that included talking to more family members, childhood friends, and former employers of Barber's. Barber also claimed that trial counsel could have retained an expert in psychopharmacology who would have been able to give additional testimony about the effects that crack cocaine use would have had on Barber's mental state. Many of those family members, as well as Dr. William Morton, an expert in psychopharmacology, testified at Barber's evidentiary hearing. Additionally, Dr. Karen Salekin, a clinical psychologist, testified regarding Dr. Rosensweig's evaluation of Barber.

Taken together, the testimony presented by the witnesses at Barber's evidentiary hearing suggested that trial counsel could have done a more extensive mitigation investigation; that Dr. Rosensweig could have spent more time on her investigation and her evaluation of Barber and other

collateral sources; and that additional expert testimony could have been presented regarding the effects of crack cocaine. However, much of that testimony would have been cumulative to testimony that was offered during the penalty phase.

This Court has explained:

> "'"'[F]ailure to investigate possible mitigating factors and failure to present mitigating evidence at sentencing can constitute ineffective assistance of counsel under the Sixth Amendment.' Coleman [v. Mitchell], 244 F.3d [533] at 545 [(6th Cir.2001)]; see also Rompilla v. Beard, 545 U.S. 374, 125 S.Ct. 2456, 162 L.Ed.2d 360 (2005); Wiggins v. Smith, 539 U.S. 510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). Our circuit's precedent has distinguished between counsel's complete failure to conduct a mitigation investigation, where we are likely to find deficient performance, and counsel's failure to conduct an adequate investigation where the presumption of reasonable performance is more difficult to overcome:
>
> > "'"'[T]he cases where this court has granted the writ for failure of counsel to investigate potential mitigating evidence have been limited to those situations in which defense counsel have totally failed to conduct such an investigation. In contrast, if a habeas claim does not involve a failure to investigate but, rather, petitioner's dissatisfaction with the degree of his attorney's investigation, the presumption of reasonableness imposed by Strickland will be hard to overcome.'
>
> "'"Campbell v. Coyle, 260 F.3d 531, 552 (6th Cir. 2001)(quotation omitted) ...; see also Moore v. Parker, 425 F.3d 250, 255 (6th Cir. 2005). In the present case, defense counsel did not completely fail to conduct an investigation for mitigating evidence. Counsel spoke with Beuke's parents prior to penalty phase of trial (although there is some question as to how much time counsel spent preparing

> Beuke's parents to testify), and presented his parents' testimony at the sentencing hearing. Defense counsel also asked the probation department to conduct a presentence investigation and a psychiatric evaluation. While these investigatory efforts fall far short of an exhaustive search, they do not qualify as a complete failure to investigate. See Martin v. Mitchell, 280 F. 3d 594, 613 (6th Cir. 2002)(finding that defense counsel did not completely fail to investigate where there was 'limited contact between defense counsel and family members,' 'counsel requested a presentence report,' and counsel 'elicited the testimony of [petitioner's] mother and grandmother'). Because Beuke's attorneys did not entirely abdicate their duty to investigate for mitigating evidence, we must closely evaluate whether they exhibited specific deficiencies that were unreasonable under prevailing professional standards. See Dickerson v. Bagley, 453 F. 3d 690, 701 (6th Cir. 2006)."
>
> "'Beuke v. Houk, 537 F. 3d 618, 643 (6th Cir. 2008).'"

McWhorter v. State 142 So. 3d 1195, 1245 (Ala. Crim. App. 2011), quoting Ray v. State, 80 So. 3d 965, 984 (Ala. Crim. App. 2011).

Additionally,

> """When claims of ineffective assistance of counsel involve the penalty phase of a capital murder trial the focus is on 'whether "the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."' Jones v. State, 753 So. 2d 1174, 1197 (Ala. Crim. App. 1999), quoting Stevens v. Zant, 968 F. 2d 1076, 1081 (11th Cir. 1992). See also Williams v. State, 783 So. 2d 108 (Ala. Crim. App. 2000). An attorney's performance is not per se ineffective for failing to present mitigating evidence at the penalty phase of a capital trial. See

> State v. Rizzo, 266 Conn. 171, 833 A.2d 363 (2003); Howard v. State, 853 So. 2d 781 (Miss. 2003), cert. denied, 540 U.S. 1197 (2004); Battenfield v. State, 953 P.2d 1123 (Okla. Crim. App. 1998); Conner v. Anderson, 259 F.Supp.2d 741 (S.D.Ind.2003); Smith v. Cockrell, 311 F.3d 661 (5th Cir. 2002); Duckett v. Mullin, 306 F.3d 982 (10th Cir. 2002), cert. denied [538 U.S. 1004], 123 S.Ct. 1911 (2003); Hayes v. Woodford, 301 F.3d 1054 (9th Cir. 2002); and Hunt v. Lee, 291 F.3d 284 (4th Cir.), cert. denied, 537 U.S. 1045 (2002)."

"'Adkins v. State, 930 So. 2d 524, 536 (Ala. Crim. App. 2001)(opinion on return to third remand). As we also stated in McWilliams v. State, 897 So. 2d 437, 453-54 (Ala. Crim. App. 2004):

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

McWhorter 142 So. 3d at 1247, quoting Hunt v. State, 940 So. 2d 1041, 1067-68 (Ala. Crim. App. 2005).

As noted, trial counsel hired a mitigation expert who conducted an investigation into Barber's background. That evidence was presented to the jury during the penalty phase of Barber's trial. The fact that Rule 32 counsel would have conducted a more extensive investigation and presented additional witnesses during the penalty phase does not render trial counsel's performance deficient. We agree with the circuit court's finding that Barber "failed to plead and prove what additional information or witnesses could have been provided that would have been so compelling it would have caused a different result at the penalty phase." (C. 1136.) The record supports the circuit court's findings and therefore, there was no abuse of discretion.

Because Barber failed to prove that trial counsel were deficient in their representation during the guilt phase and penalty phase of his trial, or that he was prejudiced by any of counsels' alleged failures, the circuit court did not err when it denied Barber's petition.

For the foregoing reasons, the judgment of the circuit court is affirmed.

AFFIRMED.

Windom, P.J., and Welch, Kellum, and Joiner, JJ., concur.

APPENDIX D

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

STATE OF ALABAMA	)	
	)	
V.	) Case No.:	CC-2002-001794.60
	)	
BARBER JAMES EDWARD	)	
Defendant.	)	

ORDER

Having thoroughly reviewed and considered the allegations in the Amended Rule 32 Petition filed on behalf of James Barber, the responses in the State's Answer and Motion to Deny Barber's Amended Rule 32 Petition, the evidence presented by the Petitioner at the evidentiary hearing conducted on June 5-6, 2012, the trial and sentencing transcripts, and all briefs and post hearing arguments from counsel concerning this Amended Rule 32, this Court makes the following findings of fact and conclusions of law and hereby DENIES all relief sought in Barber's Amended Rule 32 Petition.

FACTS UNDERLYING BARBER'S CAPITAL MURDER CONVICTION AND DEATH SENTENCE

This Court adopts the summary of the facts of the crime stated in the trial court's sentencing order and the additional facts stated in the Alabama Court of Criminal Appeals' opinion on direct appeal. (C.R. 271-273): Barber v. State, 952 So. 2d 393, 402-406 (Ala. Crim. App. 2005). This Court also adopts and considers the official transcript of the trial and sentencing hearing. To summarize, on May 22, 2001, Ms. Dorothy Epps was found beaten to death in her home in Harvest, Alabama in Madison County. At the time of her death Mrs. Epps was 75 years old, five feet five inches tall, and weighed about 100 pounds. (T.R. 271)

Barber knew Mrs. Epps, having dated her daughter, Elizabeth Epps, and had been to her home to do repair work. In the days following Mrs. Epps' murder, Barber was interviewed three times by Investigator Dwight Edger of the Madison County Sheriff's Office. In the first interview, Barber denied any knowledge about her murder, indicating he was "shocked: anyone would harm Mrs. Epps. (State's Exhibit 3) In the second interview, the investigator had narrowed the time frame of the crime, and Barber gave a detailed statement about where he had been and what he was doing during that time. In the third and final interview before Mr. Barber's arrest, he initially denied killing Mrs. Epps. (PX 71-A, pp.1-5) Only after the investigator confronted him that a bloody palm print found at the murder scene in the victim's blood, matched his print, did he confess to killing Ms. Epps. Barber confessed to beating Mrs. Epps with his fists and a claw hammer, needing money and taking her purse. (71-A pp 5-16). The Defendant's confession contained in this third statement, and evidence of the Defendant's bloody palm print were admitted into evidence at trial, after the trial court found them to be admissible.

PROCEDURAL HISTORY

In September 2007, James Barber filed a petition pursuant to Rule 32, Ala. R. Crim. P. attacking his conviction for capital murder and resulting death sentence. Mr. Robert Tuten and Mr. Ben Boyanton represented Barber at his trial. Barber's first trial began in August 2003 and ended in a mistrial. In December 2003, a jury convicted Barber of the capital murder, murder during a robbery. The jury recommended by a vote of 11-1 that Mr. Barber be sentenced

to death. The trial court, the Honorable Lloyd H. Little, Jr., followed the jury's recommendation and sentenced Barber to death. Barber's conviction and death sentence were affirmed on direct appeal. Barber v. State, 952 So. 2d 393 (Ala. Crim. App. 2005) Mr. Barber's original Rule 32 Petition was based on actual innocence claims, alleging that his counsel (hereafter referring to both Mr. Tuten and Mr. Boyanton) were ineffective for failure to investigate Barber's whereabouts the weekend of the murder of Ms. Epps, and not "contacting corroborating witnesses and failing to secure records supporting an alibi defense". (O.P 45) Barber also alleged that counsel were ineffective for not conducting an "independent investigation into the State's forensic evidence" and for failing to "investigate reasons for [Barber's] false confession or investigate details that would have weakened the reliability "of his confession. Id.

This Court was specially appointed to handle the Rule 32 Petition by the Chief Justice Sue Bell Cobb upon the retirement of Judge Little. This Court granted Rule 32 counsel access, in the discovery process, to the bloody palm print recovered at the crime scene and identified at trial as the Defendant's. After Barber's Rule 32 counsel was allowed to investigate this print, the Amended Rule 32 Petition was filed in this case, and the actual innocence defense abandoned.

The Petitioner filed the Amended Rule 32 Petition in this case on March 3, 2011. The State filed an Answer and Motion to Deny Barber's Amended Rule 32 Petition on April 13, 2011. Barber's petition contained allegations that he received ineffective assistance from his pre trial and trial counsel and he pled specific facts for consideration under Strickland v. Washington, 466 U.S. 668

(1984). As this Court was NOT the trial judge in this case, had no personal knowledge of any of the counsel in these matters, AND had not reviewed the trial or sentencing transcripts at the time, an evidentiary hearing was set by the Court to hear testimony concerning the allegations contained in the Petition.

This hearing took place in the Madison County Circuit Court on June 5th and 6th, 2012. This Court heard testimony from the following witnesses: Robert Tuten, Dr. Marianne Rosenzweig, Donald McVay, Francis King, Denise Kisiel, Mark Barber, Beverly Ann Risedorf, James Barber, Dr. William Morton, and Dr. Karen Salekin. The State presented no witnesses. Petitioner and the State were given until February 2013 to submit post hearing arguments to the Court, which have been reviewed and considered.

LEGAL PRINCIPLES CONCERNING RULE 32 PROCEEDINGS IN THIS CASE

The Petitioner, Barber, had the burden at the evidentiary hearing of affirmatively proving, by a preponderance of the evidence, that trial counsels' performance was deficient and caused him to be prejudiced. Strickland v. Washington, 466 U.S. 668, 687 (1994). At an evidentiary hearing pursuant to Rule 32, Ala. R. Crim. P., the petitioner bears the sole burden of proving all of the facts necessary to entitle him to post conviction relief. Rule 32.3, Ala. R. Crim. P. See Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005) ("In a postconviction proceeding under Rule 32, Ala. R. Crim. P., the petitioner bears the sole burden of pleading and proof."); see also Chandler v. United States, 218 F. 3d 1305, 1314 n, 15 (11th Cir. 2000) (en banc) ("Never does the government

acquire the burden of showing competence, even when some evidence to the contrary might be offered by the petitioner.").

In order to prevail on a claim for ineffective assistance of counsel, a petitioner must show two components. First, the petitioner must show that his counsel's performance was deficient, meaning that counsel's acts or omissions were outside the range of professionally competent assistance. Strickland, 466 U.S. at 687, 690; Ex Parte Green, 15 So. 3d, 489, 492 (Ala. 2008). For counsel's performance to be deficient, it must fall below an objective standard of reasonableness under prevailing professional norms. Williams v. Taylor, 529 U.S. 362 (2000) at 390-91. Second, the petitioner must show that counsel's deficient performance prejudiced the outcome of the trial. Strickland, at 687. To show prejudice, a petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id at 694. A reasonable probability is a "probability sufficient to undermine confidence in the outcome" Id.

In its' consideration of an ineffective assistance of counsel claim(s), the circuit court should indulge in "a strong presumption that the counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." Strickland v. Washington, 466 U.S. at 689. The Supreme Court has held that

> "In assessing prejudice under Strickland the question is not whether a court can be certain counsel's performance had no effect on the outcome or whether it is possible a reasonable doubt might have been established if counsel acted differently. Instead, Strickland

> asks whether it is 'reasonably likely' the result would have been different. This does not require a showing that counsel's actions 'more likely that not altered the outcome,' but the difference between Strickland's prejudice standard and a more-probable-than-not standard is slight and matters 'only in the rarest of case'. The likelihood of a different result must be substantial, not just conceivable."

Harrington v. Richter, 2011-WL 148587, *18 (Jan. 19, 2011)

I. BARBER FAILED TO PROVE THAT TRIAL COUNSEL WERE INEFFECTIVE FOR NOT ADEQUATELY INVESTIGATING BARBER'S CASE AND DEFENSES

In Part I, paragraphs 48-169 on pages 10-47 of Barber's petition, he alleges that counsel Tuten and Boyanton were ineffective during the guilt phase of the trial, because they did not investigate and present evidence that Barber was so intoxicated at the time of the killing, he could not have formed the requisite and specific intent to intentionally kill Ms. Epps. Barber also contends that counsel were ineffective because they did not investigate and present evidence at the guilt phase that the murder did not occur during the course of a robbery. (A.P. pp 1-2) Barber contends in this Amended Rule 32 Petition that intoxication and robbery as an afterthought were the "only viable "defenses Mr. Tuten and Mr. Boyanton could have reasonably pursued during the guilt phase of the trial. Mr. Boyanton is now deceased, however Mr. Tuten testified at the evidentiary hearing that Barber maintained an absolute innocence defense from the time of his arrest up until the Amended Rule 32 and was completely uncooperative with counsel in their efforts to investigate or develop other defenses and or strategy in preparation of and at trial and sentencing. (evidentiary hearing record at p. 102 hereafter called H.R.)

At the time of this trial, Mr. Tuten, and Mr. Boyanton had already tried the case to a mistrial, just three months before. At the time of this trial, Mr. Tuten was an experienced criminal defense attorney of 14 years, with a background in investigative police work. (H.R. 126) He had previously tried 12 or more capital cases. (H.R. 11) He was appointed by an experienced trial judge to handle this most challenging case. These are important facts that this court considered in evaluation of this claim of ineffective assistance of counsel. See Chandler v. United States, 218 F.3d 1316 (11th Cir. 1998) ("When courts are examining the performance of an experienced trial counsel, the presumption of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger".) There was no evidence presented to this Court concerning the experience of Mr. Boyanton, other than the presumption by Mr. Tuten that he had five plus years of experience because he had been appointed by Judge Little to a capital case. Barber had no complaint about Mr. Boyanton at the hearing when he testified that they had worked "hand in hand" (H.R. 436) Mr. Tuten testified that they worked as a team in every aspect of the defense in this case. (H.R. 47) There was no evidence presented at the hearing that any other counsel previously appointed in the case, either in the District or Circuit court, was deficient, leading up to the appointment of Mr. Tuten or Mr. Boyanton. In fact, Mr. Tuten testified that when he received the appointment he began to build the case from "scratch" without regard for what others had done on the case before him. (H.R. 41) There was no showing that Mr. Tuten's performance or Mr. Boyanton's performance

was affected in a negative way by any of the previous attorneys' performance involved with this case, therefore there has been no showing that Barber was prejudiced.

Barber's defense to the State's case was that he did not commit the crime, that he was innocent. In light of the evidence against Mr. Barber, including his video confession and his bloody palm print recovered at the crime scene, Mr. Tuten concluded and testified that presenting a successful innocence defense during the guilt phase was "next to impossible." (H.R. 50) Mr. Tuten testified that he had hired Don McVay, a retired FBI agent as his investigator in this case. McVay had the training required to examine the bloody palm print himself and compare it to Barbers' for purposes of determining whether Tuten had grounds for filing a motion with Judge Little to hire an independent examiner. McVay advised Mr. Tuten very clearly, that "you didn't have to be an expert to tell "that it was Barber's print. (H.R. 56) Mr. McVay had advised Mr. Tuten that Barber had a very unusual feature called a high delta, that made the identification in this case clear cut. Id. Mr. Tuten's testimony concerning his professional assessment of an innocence defense in this case only corroborates his testimony concerning his efforts to pursue these alternative defenses at trial. Mr. Tuten testified that trial counsel had "untold" numerous conversations with Barber concerning the two "viable defenses" of intoxication and robbery as an afterthought, and that Barber refused to even consider any defense "but a trial on the facts, that I am not guilty". (H.R. 67) "(See State's Exhibit #1, Fee Declaration Sheet, #86 and #115, Tuten's file, admitted at hearing and considered by the Court). Counsel

cannot be held ineffective for the informed and voluntary choices of their client. Moreover, a defendant cannot voluntarily choose a course of action and then blame trial counsel for that course of action. [A Petitioner] may not claim in his Rule 32 petition that his own choices violated his constitutional rights." Ferguson v. State, 13 So. 3d 418, 439 (Ala. Crim. App. 2008).

Mr. Barber admitted at the hearing that he indeed did commit the offense, however, told his trial counsel at the time that he did not commit the crime and testified "that's the defense we went forward with" (H.R. 435). In addition, Barber made it clear that if he were convicted, he wanted the death penalty, so he would have hope on appeal, and did not cooperate in the mitigation investigation. (H.R. 429) This Court finds that not only were these two "viable defenses" considered by counsel for Barber, they were investigated as part of the facts of the case at the guilt phase and discussed with the Defendant. The Court further finds from the record at trial that these two "viable defenses" were pursued in cross examination of Detective Edgar and to the extent possible given an absolute innocence defense, in the closing statement. (T.R. 1007, 1110, 1111) Mark Barber and Elizabeth Epps were also called by trial counsel and gave testimony concerning Barber's extensive history of drug and alcohol abuse. Their testimony actually corroborated the Defendant's confession in which he talks about his drug and alcohol usage leading up to and during the time of the crime. Jury charges were also requested on the issue of lesser included offenses due to intoxication and lack of specific intent. (T.R. 1064, 1152, 1184) A jury charge on Manslaughter was given. A charge was also requested by Barber's counsel and

given by Judge Little within the requirements for Capital Murder, that the "robbery could not be committed as a mere afterthought. (T.R. 1166, 1178) The Alabama Court of Criminal Appeals has held that "the mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory." Hunt v. State, 940 So.2d. 1041, 1067. (Ala. Crim. App. 2005) The court finds here, however, that despite the client's position of an absolute innocence defense, these alternative theories were presented to some degree throughout the course of the trial, and finally in the Court's charge were available to the jury within the law. The theories were rejected both by the jury and the Court.

Therefore, this Court finds the Petitioner does not meet the requirements of Strickland set forth above as to the investigation of these two "viable defenses" based upon the following specific findings of fact. See Ex parte Grau [791 So. 2d 345 (Ala. 2000)].

A. Barber Failed to Prove Trial Counsel Were Ineffective For Not Adequately Investigating Barber's Use of Crack Cocaine Leading Up to the Victim's Death

In part I.A, paragraphs 51-69 on pages 11-19 of Barber's petition, he contends trial counsel did not investigate available medical research that indicates the violent effects of crack cocaine on an individual and its affect on an individual's mental capacity. Barber contends that his third videotaped statement to police should have made trial counsel aware that he used crack cocaine, before killing the victim, Ms. Epps. Barber asserts in his petition that he had consumed crack cocaine, alcohol, and pain killers leading up to and on the day of

the crime. Barber contends that trial counsel were ineffective for failing to retain a psychopharmacological or a psychological expert to see if his intoxication impaired his ability to appreciate the criminality of his conduct or conform his conduct to the law. (A.P.17)

Counsel spoke to Barber concerning his history of drug and alcohol usage, and explored proving his statements concerning his drug use leading up to the time of the confession. (H.R. 82) Mr. Tuten testified at the hearing that "we talked to him about what kind of drugs he used and how extensive his problem was. And we had Dr. Rosenzweig look into his psychiatric and psychological profile to figure out what, if anything, may have been going on with drugs." (H.R. at 82) Counsel had hired Dr. Marianne Rosenzweig, as the mitigation expert in the case, and as a clinical and forensic psychologist, to advise counsel in the area of the Defendant's intoxication at the time of the crime, and at the time of the confession, for use at the suppression hearing. Her findings generated in a report to counsel were not favorable on the issue of whether his statement should have been suppressed as involuntary due to intoxication. (H.R. 144) When questioned about a manslaughter defense due to lack of specific intent, Mr. Tuten testified that "I told him...let's do something other than say you're not guilty, and he refused to even discuss that with us." (H.R. 84) Id. When asked further about his conversations about exploring Manslaughter as a defense based upon his intoxication, Mr. Tuten confirmed he had such conversations with Barber on numerous occasions and "every time I met with him I begged him to let us do something to save his life and he flatly refused." (H.R. 84) Dr.

Rosenzweig's testimony at the hearing confirms the Defendant's position both during the guilt phase and the trial. Barber would not cooperate with her in her efforts to interview witnesses for mitigation and indicated that he did not want to put his mother through testimony at trial and that if he was convicted of Capital Murder he wanted to receive the death penalty because he'd have better representation on appeal. (H.R. 244) Despite Barber's wishes, trial counsel actually called witnesses Mark Barber and Elizabeth Epps, who corroborated Barber history of drug usage leading up to time of crime which had come into evidence through the confession.

In Scott v. State, 2010 WL 1170216, *10 (Ala. Crim. App. March 26, 2010), reversed on other ground, Ex parte Scott, 2011 WL 925761 (Ala. Mar. 18, 2011), the Alabama Court of Criminal Appeals held that

> "Although [the petitioner] listed several examples of what he contends represented inadequate investigation, his assertions present little more than hypothetical scenarios and conclusory allegations. He does not identify any witnesses who could testify to the facts he claims would have benefited him, nor does he assert that any further investigation would have uncovered the witnesses or evidence he contends was not adequately investigated."

Barber does not identify any witnesses in part IA of his petition that could have testified they saw him taking alcohol or drugs during the time preceding this offense. All witnesses given to them by Barber, that counsel attempted to talk to, such as the drug dealer named Rice, the unnamed prostitute, and Ms. Elizabeth Epps denied having any information concerning his drug use on the day of the crime. (H.R. 141) Counsel for Barber does not plead or prove how any such witnesses' testimony would have been admissible for purposes of proving

Barbers' mental state at that time, or how any expert testimony would have been admissible to show Barber's lack of specific intent due to intoxication. Given an absolute innocence defense, this evidence would have been extremely prejudicial as well. This is true of all of the testimony of family witnesses and expert witnesses William Morton, and Karen Salekin, that were called at the evidentiary hearing to testify about the Defendant's history of drug abuse and the effects of cocaine as relevant to the Defendant's behavior in the guilt phase of this case. See Saunders v. State, 10 So.3d 53, 100 (Ala. Crim. App. 2007) (holding that "whether Saunders was so intoxicated from the crack cocaine he smoked that he could not form the specific intent to commit the crimes for which he was convicted was a question for the jury.") Likewise, expert testimony that Barber's capacity at the time of the offense was impaired due to drug and alcohol consumption would not have been admissible in the guilt phase of the trial. See Hill v. State, 507 So. 2d 554, 556 (Ala. Crim. App. 1986) (holding that "Alabama has expressly rejected the diminished capacity doctrine"). Only through the Defendant's confession containing his assertions of drug use and intoxication, and cross examination of the Detective who took Barber's statement, does the issue of specific intent come into the evidence to justify the Judge giving the lesser included offense charge of Manslaughter. Detective Edger testified on cross examination that based on the photographs taken at the motel where Barber was picked up before making his statement, that the Defendant had "apparently" been using drugs and drinking. (T.R. 995) Elizabeth Epps and Mark Barber also gave testimony in the guilt phase confirming Barber's history of

alcohol and drug abuse leading up to and after the crime. The jury had considerable evidence of intoxication to consider and rejected it at the guilt phase of the trial. This Court finds trial counsel were not ineffective for failing to present inadmissible evidence during the guilt phase of the trial. See Tompkins v. Moore, 193 F.3d 1327, 1334 (11th Cir. 1999) (holding that "we will not hold an attorney ineffective for failing to offer inadmissible evidence.")

B. Barber Failed to prove Trial Counsel Were Ineffective For Not Challenging The State's Theory That The Victim's Murder Occurred During The Course of A Robbery.

In part I.B., paragraphs 70-77 on pages 19-21 of Barber's petition, he alleges trial counsel were ineffective for not discovering evidence to prove that Barber did not murder Ms. Epps in the course of a robbery. (Bf. Pp. 19-22) Barber contends his confession "provided abundant evidence" that he did not intend to rob Ms. Epps prior to killing her. (Bf. P. 21) Barber also asserts testimony from his landlady Esther Braswell, that she saw Barber in Elizabeth Epps car, corroborated the Defendant's version of the facts. Barber also contends that cell phone records indicating he called Ms. Braswell to unlock his apartment because he had left his keys in his vehicle at Ms. Epps' house following the murder would have further corroborated an afterthought defense. Barber's attempt to explain his confession to Detective at the evidentiary hearing, at this point in time, is not persuasive to this Court. Neither did Barber identify any witness in the Petition or call any witness, other that himself to testify to this theory of the case now. He offered no evidence at the hearing other than his self-serving statements, that showed he did not intend to rob Ms. Epps at the

time of the murder. Barber admitted in his confession to needing money and to taking Ms. Epps purse. (PX 71-A, p.7) He stated in the videotaped confession that "I thought I needed money", and thinking "she's probably got some money." (PX 71-A, p.7) Although he also stated "I didn't take purse in a robbery", he did not at the time of his statement, say anything about coming back and taking the purse as an afterthought. Id. Judge Little finds in his sentencing order that the "Defendant confessed to the commission of this crime, admitting that he struck Mr. Epps with a claw hammer, grabbed her purse and ran out of the house." (T.R. 273)

Because Barber was unwilling to consider any defense other than he did not murder Ms. Epps, Mr. Tuten and Mr. Boyanton attempted to persuade the jury Barber's confession was unreliable due to Barber being intoxicated at the time he gave the confession. That trial counsel were unsuccessful does not was demonstrate that their performance was deficient. See Hallford v. State, 629 So. 2d 6, 13-14 (Ala. Crim. App. 1992) (holding that "[a]n effective defense does not necessarily result in acquittal."). The Court further finds that counsel did argue afterthought in closing and interjected the defense through cross examination of the Detective, that the purse and a safe were never recovered and there being no evidence that Mr. Barber spent her money or used her credit cards. (T.R. 1109) There is no evidence that these facts, however, support Barber's claim that he did not intend a robbery at the time of the murder. Barber did not identify in the Petition or offer any testimony at the hearing any admissible information that any witness would have provided at the guilt phase that would have proven

Barber killed Ms. Epps, left her house, and then returned hours later in order to make it look like she was killed during a robbery or burglary. His defense was after all, that he was not guilty. The trial counsel requested the specific afterthought charge for Capital Murder/Robbery, which was given by Judge Little and was rejected by the jury. This argument is without proof or merit. The Alabama Court of Criminal Appeals held on direct appeal that the evidence presented at trial "[was] sufficient to support [Barber's] conviction." Barber v State, 952 So.2d at 400-401. Counsel was not ineffective as this allegation claims.

C. Barber Failed to Prove Trial Counsel Were Ineffective For Not Investigating Barber's Family History and His Social History

In part I.C, paragraphs 78-139 on pages 21-39 of Barber's Petition, he alleges that trial counsel were ineffective during the guilty phase and penalty phase for not investigating and presenting evidence related to his family history and his social history. These allegations (1-6) are based on *ABA Guidelines* 11.4 .1(d)(2)(C). However, in Bobby v. Van Hook, 130 S.Ct. 13, 17 (2009) the United States Supreme Court held that "Strickland stressed ...that 'American Bar Association standards and the like' are 'only guides' to what is reasonableness means, not its definition." This Court will address each allegation as it relates to the penalty phase and address the allegations collectively as related to the investigation in the guilt phase of the trial.

1. Barber failed to prove trial counsel were ineffective for not contacting more family members, friends, co-workers and employers;

2. **Barber failed to prove trial counsel were ineffective for not investigating the history of mental illness in Mr. Barber's family;**

3. **Barber failed to prove trial counsel were ineffective for not investigating the history of alcohol and substance abuse in Mr. Barber's Family;**

4. **Barber failed to prove that Counsel were ineffective for not investigating evidence that Mr. Barber suffered from inadequate parenting and neglect;**

5. **Barber failed to prove that counsel did not investigate Mr. Barber's long history of excessive substance abuse, and link between this history and Mr. Barber's development, or how Mr. Barber's problems with addiction had a negative effect on his life;**

6. **Barber failed to prove that counsel did not investigate Mr. Barber's own history of mental illness**

Guilt phase

As to all of the above allegations (1-6) concerning the investigation into the matters set forth above, this court specifically finds no authority or legal scenario cited in Barber's pleadings to show such specific alleged family and social history would be admissible in the guilt phase of the trial. Neither did family members Mark Barber, Beverly Ann Risedorf, Francis King or Denise Kisiel offer any evidence at the Rule 32 evidentiary hearing in these matters which would have been admissible in the guilt phase of the trial. Neither was the evidence offered by Barber's mother, Elizabeth or brother Mark in the penalty phase of the trial, admissible in the guilt phase of this case, although some evidence of Barber's history of drug and alcohol abuse history was admitted without objection by the State. This Court further finds there was no evidence offered by experts Dr. William Morton or Dr. Karen Salekin in the hearing which

would have been admissible in the guilt phase of this trial. Further, this Court finds there is no evidence offered by the Petitioner's mitigation expert at trial, Marianne Rosenzweig, Ph. D., during the penalty phase which would have been admissible at the guilt phase as to Barber's intoxication either during the confession or at the time of the offense. According to the testimony of Mr. Tuten at the hearing, he retained both an investigator, Paul McVay, who was a former FBI agent, and a licensed and qualified forensic mitigation expert in Dr. Rosenzweig, who he had worked with before. Both experts investigated the facts and circumstances surrounding both the confession and the crime itself by speaking to as many contacts as could be developed. (H.R. 82) Barber was not cooperative according to Mr. Tuten, Mr. McVay and Dr. Rosenzweig. The alibi witnesses (drug dealer Rice, unknown prostitute, and Elizabeth Epps) provided to counsel did not prove fruitful and there were no other witnesses provided by Barber to counsel concerning his drug and alcohol intake on the day of the crime. (Bf. Pp. 38-40) Trial counsel called Barber's brother, Mark Barber, former girlfriend, and victim's daughter, Elizabeth Epps, and friend Scott Millhouse, in the defense during the guilt phase of the case. Evidence of his drug use was admitted through the admission of Barber's confession during the testimony of Investigator Edger.

(T.R. 1007) Mark Barber testified that his brother used marijuana, cocaine and other drugs during his childhood and that he had had problems off and on with them. (T.R. 1044) He gave testimony that he had seen his brother so drunk that he "just didn't know what he was doing" and had had black outs. (T.R. 1048)

He testified that he had knowledge of drug and alcohol abuse both before and after the time of the murder. (T.R. 1047) Elizabeth Epps, his former girlfriend testified at trial that she had knowledge of his drug use and knew he was using pills and cocaine before going back to Connecticut in 2000. (T.R. 1057) She also testified that when he first moved back to Alabama from Connecticut that he told her he was clean and sober and was going to AA. (T.R. 1058)

The Alabama Court of Criminal Appeals has specifically held that "[e]vidence that someone was a habitual drug user is not evidence that that person was intoxicated at the time of the murder." Whitehead v. State, 777 So.2d 781, 833 (Ala. Crim. App. 1999). Barber cites no legal authority holding his testimony, or testimony from anyone else, regarding his history of drug or alcohol or mental illness in the family would have been admissible during the guilt phase of his trial. See Daniel v. State, 2011 WL 1605229, *30 (Ala. Crim. App. April 29, 2011) ("Counsel is not ineffective for failing to present inadmissible evidence.") This Court finds, however, that there was considerable evidence described above concerning Barber's history of drug and alcohol abuse, both before, during, and after the murder in front of the jury in the guilt phase, including the Defendant's confession where he stated he had been doing coke all day before the murder. Detective Edger testified that he understood from photographs that there was drug paraphernalia and evidence of drinking in the motel when Barber was picked up for questioning. (T.R. 1002) This Court finds the above styled allegations 1-6 concerning failure of the trial counsel to investigate the matters set forth for use at the guilt phase to be without merit.

The Petitioner failed to show that either trial counsel was deficient or that Barber was prejudiced for failure to present such evidence at the guilt phase of the trial.

Penalty phase

1. **Barber failed to prove trial counsel were ineffective for not contacting more family members, friends, coworkers and employers**

3. **Barber failed to prove trial counsel were ineffective for not investigating the history of alcohol and substance abuse in Mr. Barber's family**

4. **Barber failed to prove trial counsel were ineffective in not investigating evidence that Mr. Barber suffered from inadequate parenting and neglect**

5. **Barber failed to prove that counsel were ineffective for not investigating Mr. Barber's long history of excessive substance abuse, and link between this history and Mr. Barber's development , or how Mr. Barber's problems with addiction had a negative effect on his life**

As to Allegations 1, 3, 4, and 5 set forth above the Court makes the following findings:

Dr. Rosenzweig testified at the penalty phase as an expert forensic psychologist. She was offered as an expert without objection from the State. She testified she was director of psychological services at the University of Alabama for most of 21 years, and had been involved in many capital and other criminal cases and had testified as an expert. (T.R. 1230) Mr. Tuten testified at the hearing that he had worked with her before retaining her in this matter. Dr. Rosenzweig testified that, in addition to Barber, she interviewed Barber's brothers Mark and Glen, Barber's mother Elizabeth, Barber's former employer Keith Collins, and Sgt. Dunn from the Madison County Jail. (R. 1232) Dr.

Rosenzweig also testified at the hearing that at some point Mr. Barber became uncooperative with the investigation. (H.R. 244) Barber confirmed Dr. Rosenzweig and Mr. Tuten's testimony concerning his being uncooperative when he stated he "insisted he did not want them to 'bother' his mother or his sisters." (H.R. 430) Although at the hearing Dr. Rosenzweig testified she wished in hindsight she could have spoken with more collateral sources in preparation of her forensic report and testimony, she could not say that interviewing additional people would have changed her testimony or the overall results of her forensic examination. (H.R. 234) Although the Petitioner's expert in forensic psychology, Dr. Karen Salekin, called to testify at the hearing, testified about interviewing a number of additional collateral sources, and spending more time on her interviews, she did not testify to any contradictory findings to Dr. Rosenzweig's findings made to the jury and ultimately to the Court in the penalty phase. (H.R. 542) Like Dr. Rosenzweig's testimony, her findings confirmed what she obtained from Barber. Petitioner's expert in pharmacology, Dr. William Morton, testified that Dr. Rosenzweig's had made some "excellent points" in her findings concerning the change in Barber's behavior and his symptoms of acute use of cocaine. (H.R. 513) While both Dr. Salekin and Mr. Morton gave opinions that Dr. Rosenzweig's examination was inadequate, neither offered a contradictory fact or opinion that would have changed the findings made by Dr. Rosenzweig. The Petitioner was unsuccessful in proving that counsel was deficient, even if Dr. Rosenzweig was. Counsel is not to be held ineffective for relying on an expert opinion. Smith v. State, 71 So. 3d. 12, 33. (Ala. Crim. App. 2008). This Court has

reviewed the testimony of Dr. Rosenzweig at the penalty phase as well as the testimony of Barber's mother Elizabeth, and his brother Mark. A very lengthy and detailed history of Barber's family and social history was presented to the trial jury in the penalty phase of this case. Petitioner failed to plead and prove what additional information or witnesses could have been provided that would have been so compelling it would have caused a different result at the penalty phase. In fact, Judge Little made the following findings concerning mitigation in his sentencing order in this case.

> 2. The capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Based upon the evidence presented, the Defendant began using illegal drugs while a teenager. Later in his life he began using cocaine on a regular basis as well as alcohol. There is evidence that the Defendant may have been using crack cocaine and alcohol during the hours leading up to the commission of this crime. However, based upon the jury's verdict, his voluntary intoxication, if it did exist, was not to the extent that it negated his intent to commit the crime for which he has now been convicted. While the use of drugs may have bolstered his willingness to commit the offense, there is no evidence to support the contention that the Defendant was under the influence of extreme mental of emotional disturbance at the time of the offense. According to statements made to Detective Edger, he was quite capable of disposing of evidence that might lead to his conviction. Therefore, the Court does not find that this is a mitigating circumstance.
>
> 4. The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The court adopts the findings stated in paragraph 2 immediately above concerning "the influence of extreme mental or emotional disturbance". Again, the use of alcohol and/or drugs may have given the Defendant the tenacity to commit this crime, but there is no evidence to support his contention that this mitigating circumstance 13A-5-51(6) exists.
>
> 6. The Court has also considered all aspects of the Defendant's character and record, and any of the circumstances of the offense that the Defendant has offered in mitigation.

> Specifically, the Court has considered the family background of the Defendant, the troubles that he has had as the result of his use of alcohol, and illegal drugs, and the possibility that he has had a physiological dependency on alcohol and illegal drugs. The Court has also taken into consideration the fact that the Defendant has been productive in the work force, that he obtained his GED after having failed to complete high school and that he has accomplished those things notwithstanding his alcohol and drug abuse.

(C.R. 274, 275)

This Court finds the evidence provided by witnesses' Mark Barber, Beverly Ann Risedorf, William Morton, Karen Salekin, and Denise Kisiel at the hearing to be cumulative to the evidence provided at the penalty phase by trial counsel. There was no evidence presented that demonstrated that either the jury or Judge Little would have been persuaded from their testimony to render a different sentence.

> **2. Barber failed to prove trial counsel were ineffective for not investigating the history of mental illness in Mr. Barber's family**
>
> **6. Barber failed to prove that counsel were ineffective in not investigating Mr. Barber's own history of mental illness**

As to allegations 2, and 6 the Court makes the following findings:

While there was testimony of acute drug usage by all who testified at the penalty phase, and a history of drug usage and abuse by family members, there was no showing made by Barber how evidence of a family history of mental illness would have been relevant at trial or at the penalty phase. See Beckworth v. State, 2009 WL 1164994, at *34 (Ala. Crim. App. May 1, 2009) ("Beckworth failed to allege any facts indicating why evidence about family members' mental retardation and mental illness was relevant [during the penalty phase] or that it

would have been admissible at trial"). Dr. Rosenzweig testified about Barber's maternal grandmother being an alcoholic and that at least five of the seven children in Barber's family had had problems with substances, which was indicative of heredity aspects of drug and alcohol abuse. (R. 1257) There was no proof presented at the hearing as to how this evidence would have been relevant to mitigation in this case, there being no evidence in the trial that the Defendant suffered from any mental illness other than drug addiction. Barber offers no evidence from the testimony of Dr. Salekin that Barber suffered any effects from his grandmother's mental illness or from any other family members' emotional problems. (H.R. 569) In fact, Barber's brother Mark, testified that Barber experienced a "normal childhood". (R. 1216) Barber agreed at the hearing, stating he had a "nice life" growing up. (H.R. 370) Barber does not give any testimony at the hearing that his life was negatively affected as a result of any family history of mental illness. Dr. Rosenzweig testified that Barber did not receive much individual attention as a child because there were seven children. (R.1234) Dr. Rosenzweig testified that Barber was overweight as a child which caused self-esteem issues. (R.1235) This did not effect him in later years as by his mid twenties Barber was a branch manager for the Electrolux Company and was making a good salary. (R.1236) Barber was 42 years old at the time of the offense. See Tomkins v. Moore, 193 F. 3d, 1327 1337 (11th Cir. 1999) (holding that "where there are significant aggravating circumstances and the petitioner was not young at the time of the capital offense, 'evidence of a deprived and abusive childhood is entitled to little, if any, mitigating weight.'") See again Judge

Little's findings that the Defendant was not suffering from an extreme emotional or mental disturbance which would rise to the level of a mitigating circumstance. (C.R. 274) This Court finds these two allegations above (2 and 6) to be without merit. There was no showing that trial counsel were deficient for failure to investigate this allegation or that there was prejudice which resulted to Barber.

D. Barber Failed to Prove That Trial Counsel Were Ineffective In Their Dealings With Dr. Rosenzweig

In part I.D, paragraphs 140-148 on pages 39-42, of Barber's petition, he alleges trial counsel were ineffective because they did not request that Dr. Rosenzweig evaluate his mental state at the time of the offense and did not provide Dr. Rosenzweig with the "necessary guidance or information" for a mitigation investigation. (A.P. 40) Barber also contends that Dr. Rosenzweig did not spend as much time preparing for her testimony in his case as she had spent in other cases. (A.P. 41) Dr. Rosenzweig is an experienced clinical and forensic psychologist. The State did not even object when trial counsel offered her as an expert. (R.1230) It is not deficient performance for a defense attorney to hire experts to investigate a client's background and family history and to rely on the expert's findings. That Barber's Rule 32 counsel have consulted Dr. Salekin and called her to testify at the hearing that her investigation was more extensive and took longer to complete does not demonstrate that Dr. Rosenzweig's investigation was inadequate, or that trial counsel's conduct was deficient. In fact, this court has found that Dr Salekin's testimony was not contradictory to the findings or testimony of Dr. Rosenzweig's at the trial in the penalty phase. Barber also contends that counsel should have retained an expert such as Dr.

Salekin, to evaluate and testify as to Barber's mental state at the time of the offense. (A.P. 42) Dr. Rosenzweig testified during cross-examination at the penalty phase, that, in her opinion, Barber was suffering from withdrawals at the time of the offense and that he did not intend to kill Ms. Epps. (R. 1266) The jury and Judge Little rejected this opinion. Barber does not show from any evidence offered at the hearing in the testimony of Salekin or from the testimony of Dr. William Morton, that the result would have been any different had either the jury or trial judge heard their testimony, which this Court finds to be cumulative to Dr. Rosenzweig's. See Wayne v. Murray, 884 F. 2d 765,767 (4th Cir. 1989) (holding that "[t]o inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of the fair trial and the constitution require.") Again, however, this Court does not find Dr. Rosenzweig's examination in this case to be inadequate. The opinions offered at the hearing by Dr. Salekin and Dr. Williams do not persuade this Court otherwise.

Barber's contention that Mr. Tuten and Mr. Boyanton were deficient for not calling Dr. Rosenzweig to testify to her opinion of intent during the guilt phase is without merit. Both counsel and Dr. Rosenzweig have testified that Barber was unwilling to consider any defense other than innocence. Moreover, testimony from any expert witness concerning Barber's alleged intoxication or lack of intent to kill at the time of the offense would not have been admissible during the guilt phase of the trial. See McCowan v. State, 412 So. 2d 847,849 (Ala. Crim. App. 1982) (holding the trial court did not err in disallowing the appellant's expert

witness from stating "the legal conclusion that the appellant could not have formed the requisite intent for murder[,]"); see also Wilkerson v. State, 686 So. 2d 1266, 1279 (Ala. Crim. App. 1996) (holding "[w]e are aware of no case holding that a witness can testify as to whether the defendant has the ability to form the requisite intent to commit the charged offense.")

Likewise, expert testimony that Barber's mental capacity at the time of the offense was diminished because he had consumed drugs and alcohol prior to the offense would not have been admissible in the guilt phase of the trial. "Alabama has expressly rejected the diminished capacity doctrine." Hill v. State, 507 So. 2d 554, 556 (Ala. Crim. App. 1986). This Court finds that Barber failed to prove counsel ineffective for failing to offer inadmissible evidence, cumulative evidence or inadequate evidence of an expert.

E. Barber Failed To Prove That Barber's Pre-Trial and Trial Counsel Were Ineffective For Not Adequately Communicating With Him

In part IE, paragraphs 149- 165 on pages 42-165, of Barber's petition, he alleges pretrial and trial counsel did not adequately communicate with him during their representation.

1.and 2. Barber failed to prove that pretrial counsel Jerry Hicks and Robert Payne were ineffective for not communicating with him

Barber alleged in his amended Rule 32 petition that two of his pre-trial counsel were ineffective. In part I.E.1, paragraphs 153-158 on pages 43-45, of Barber's amended Rule 32 petition, he alleges he received ineffective assistance from Mr. Jerry Hicks. In part I.E. 2, paragraphs 159-162 on page 45, of the

amended Rule 32, he alleges he received ineffective assistance from Mr. Robert Payne. These allegations are procedurally barred from post-conviction review because they could have been but were not raised on direct appeal. Rule 32.2(a)(3) and (a)(5), Ala. R. Crim. P. See Moody v. State, 2011 WL 6278299 [15] (Ala. Crim. App. Dec. 16, 2011) (holding that "...Moody's claim of ineffective assistance of pre trial counsel were precluded by Rule 32.2(a)(3) and (a)(5) because they could have been, but were not, raised and addressed at trial and on appeal."). This Court finds however, there was no evidence presented at the hearing to prove any ineffectiveness on pre counsels' part or that trial counsel of Barbers' were prejudiced in any way. Barber did not call either Mr. Hicks or Mr. Payne in the Rule 32 hearing. Mr. Tuten testified that he did not consider pretrial counsel to be ineffective from his perspective and therefore did not include a ground of ineffective pre trial counsel in the Motion for New Trial. (H.R. 154) In fact, Tuten testified that both Mr. Payne and Mr. Hicks had done an "excellent job" up until the time when he took over as lead counsel. (H.R. 153) Neither did Barber pursue these allegations in his post hearing brief. As such this Court finds in effect that Barber abandoned these allegations of ineffective assistance of counsel. See Payne v. State, 791 So. 2d 383, 399 (Ala. Crim. App. 1999) (holding that "[b]ecause it appears that [the petitioner] did not present evidence at the evidentiary hearing with regard to [certain] claims..., we conclude that he has abandoned these claims and we will not review them.")

3. Barber failed to prove that trial counsel were ineffective for not communicating with him

In part I.E. 3, paragraphs 163-165 on page 46 of Barber's petition, he asserts that Mr. Tuten and Mr. Boyanton had "the most cursory communications" with him in the months preceding trial. (A.P. 46) Referring to Mr. Tuten's and Mr. Boyanton's fee declarations, Barber also asserts that they "only worked four hours over the weekend break during the guilt phase presentation. The trial in December followed a trial in October which resulted in a mistrial. Mr. Tuten testified it is his general practice to see his clients charged with capital murder as much as possible and at least once per month. (H.R. 62) The billing statements attached to Mr. Tuten's fee sheets show he met with Barber at least 40 times before Barber's trial in December 2003. (See S.X. 1 &S. X. 2) Barber's reliance on trial counsel's fee sheets as conclusive evidence they were ineffective is misplaced. See Martin v. State, 2010 WL 753301, *16. (Ala. Crim. App. Mar. 5, 2010)(holding that "billing statements alone are not sufficient to establish that counsel was ineffective." In Davis v. State, 44 So. 3d. 1118, 1130 (Ala. Crim. App. 2009), the Alabama Court of Criminal Appeals held that

> "we know of no case establishing a minimum number of meetings between counsel and client prior to trial necessary to prepare an attorney to provide effective assistance of counsel.' United States ex rel. Kleba v. MCGinnis, 796 F.2d 947, 954 (7th Cir. 1986). '[B]revity of consultation time between a defendant and his counsel, alone, cannot support a claim of ineffective assistance of counsel Jones v. Wainwright, 604 F.2d 414, 416 (5th Cir. 1979).' Murray v. Maggio,736 F.2d 279,282 (5th 1984).'"

In regard to Mr. Boyanton, Barber testified at the hearing that "he worked so hard after my first trial—during that period between the first and second trial,

he worked diligently, actually hand –in –hand with me, on that palm print. He got books and everything and he would come to the jail and we would go over it and he'd teach me exactly the stuff" (H.R. 424) Mr. Tuten testified at the hearing that he had an "untold number of discussions" with his client leading up to the trial. (H.R. 62) Mr. Tuten testified that during the discovery process, whenever they obtained new information they would meet with Barber and provide him copies of everything. (H.R. 131) The purpose of meeting with Barber, according to Mr. Tuten, was to make sure that he understood what his case was about, the evidence there against him, and to "keep him informed about our progress and his defense so he can help us with his defense." (H.R. 132) Tuten testified that he knew Barber understood the case against him "because he asked a lot of intelligent questions about the evidence and how it related to his case evidentiary wise..." Id. He further testified that Barber asked information about the rules of evidence and the law and how these things applied to the evidence and documents that we were letting him review." Id. Finally Tuten testified that while Barber was active in his defense in that he was "curious about what was happening, what we were doing, and what the evidence against him was", he "resisted everything we tried to do for him." (H.R. 133.) Tuten saw no evidence of any mental disease or defect, which would have affected his ability to understand the preceedings or the evidence in this case. Id. According to Tuten, it was Barber who would not communicate with counsel, and "forbade" them to communicate with his family in the preparation of this case for trial or mitigation.

(H.R. 150) Barber failed to either plead or prove any facts in I.E. 3 of his petition that showed a lack of communication between himself and trial counsel, or any prejudice that resulted as a lack of communication or that caused their representation to be deficient.

F. Barber Failed to Prove That Robert Tuten was ineffective for giving Barber Prejudicial Legal Advice

In part I.F., paragraphs 166-169 on page 46-47 of Barber's petition he alleged that Mr. Tuten was ineffective for asking him to testify at a suppression hearing in another case. Barber failed to affirmatively prove this allegation of ineffective assistance of counsel. Rule 32.3, Ala. R. Crim. P. Barber did not ask Mr. Tuten, one question concerning this allegation or offer any proof if true as to how it prejudiced Barber. This Court finds, therefore, that Barber abandoned this allegation of ineffective assistance of counsel. See Brooks v. State, 929 So. 2d 491, 497 (Ala. Crim. App. 2005) (holding "[A]petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.").

II. BARBER FAILED TO PROVE TRIAL COUNSEL WERE INEFFECTIVE FOR NOT ADEQUATELY CHALLENGING STATE'S CASE AT GUILT PHASE

In part II, paragraphs 170-189 on pages 47-55 of Barber's petition, he alleges trail counsel were ineffective for not investigating whether he had the requisite mental state to commit murder or whether the killing was actually committed during a robbery. At the time of Barber's trial, Mr. Tuten had been practicing criminal defense law for 14 years and had represented 12 or more capital defendants. (H.R. 11) These are important facts this Court considered in

its evaluation of Barber's allegations of ineffective assistance of counsel. See Chandler v. United States, 218 F.3d 1305, 1316 (11th Cir. 1998) ("When courts are examining the performance of an experienced trial counsel, the presumption that his conduct was reasonable is even stronger.")

Barber's defense to the State's charges was he did not murder or rob Mrs. Epps. In the light of the evidence against Barber, including the fact Barber had given a video taped confession and his palm print in the victim's blood was recovered from the crime scene, Mr. Tuten concluded that presenting a successful innocence defense during the guilt phase would be "next to impossible". (H.R. 49) Despite Mr. Tuten's efforts to persuade him otherwise, Barber insisted Mr. Tuten and Mr. Boyanton present a defense based on Barber being innocent. (H.R. 84) Even so, trial counsel hired experts McVay to aid in defense concerning the palm print and Rosenzweig to assist in the suppression of the confession. McVay, an investigator, and a former FBI agent, qualified in the area of print analysis examined the bloody palm print found at the scene and advised Mr. Tuten, that it didn't "take an expert" to "know that the palm print was Barbers." (H.R. 56) His opinion was based on a special "high delta" characteristic clearly on Barber's palm and visible on the print. (H.R. 56). Based on his findings, there was no basis to seek the funds necessary from the Court, for a second opinion, especially in light of Barber's confession. Barber testified that Mr. Boyanton spent a great amount of time working hand–in-hand with him in the cross examination of the State's expert concerning the identification of this palm print. (H.R. 436)

Dr. Rosenzweig's opinion was also sought by trial counsel in an effort to suppress the very damaging video confession in this case. Her findings were also, not helpful to counsel at the guilt phase of the trial. She testified at the hearing that even though it was her expert opinion that Barber did not intend to kill or to harm Mrs. Epps at the time of the murder, she found "no indications that Mr. Barber was in any kind of vulnerable state that would have led him to make a false confession. She concluded her report prepared for trial counsel before the suppression hearing by stating that "in her opinion, there was no evidence to indicate that Mr. Barber did not knowingly, intelligently, and voluntarily waive his right to remain silent and have an attorney present during interrogation." (H.R. 144) Dr. Rosenzweig also testified that Barber was uncooperative with her efforts in mitigation. She testified that if convicted, Barber told her he "wanted to get the death penalty. And he ... and the reason was that he thought he would have better representation of appeal". (H.R. 244)

There is nothing before this court, either in the trial record or presented at the evidentiary hearing, giving any indication that Barber suffered from any kind of mental disease of defect that would have affected his ability to comprehend alternative defenses that were explained by Mr. Tuten. In fact, Mr Tuten testified as previously set forth, that Barber asked intelligent questions and took an active role in his defense. (H.R. 132) He nonetheless, resisted counsels' efforts and effectively tied counsels' hands by insisting they present an innocence defense.(H.R. 133, 67) Barber admits throughout his testimony at the hearing that he told his attorneys "he didn't do it and that's the defense we went with"

(H.R. 435) "Counsel cannot be held ineffective for the informed and voluntary choices of their client. Moreover, a defendant cannot voluntarily choose a course of action and then blame trial counsel for that course of action. [a petitioner] may not claim in his Rule 32 petition that his own choices violated his constitutional rights." Ferguson v. State, 13 So. 3d 418, 439 (Ala. Crim. App. 2008). Barber failed to prove trial counsels' performance was deficient at the guilt phase of the trial.

A. Barber Failed to Prove Trial Counsel were ineffective For Not Presenting Evidence That Barber Was Intoxicated At The Time Of The Offense

In part II.A, paragraphs 172-175 on pages 48-49 of Barber's petition he alleges trial counsel were ineffective for not retaining a psychological or a pharmacological expert to testify "as to [his] mental state." (A.P. 48) Barber argues that his confession to Investigator Edger "provided abundant evidence" that he was severely intoxicated when he killed the victim. (Bf. P. 13)

To support this argument, Barber points out that trial counsel were aware of Barber's long history of drug and alcohol abuse. (Bf. P.14) Barber also contends that trial counsel did not investigate and present evidence regarding his drug and alcohol usage on the day of the offense, including failing to interview the victim's daughter Elizabeth Epps, Barber's alleged drug dealer, and a local prostitute.(Bf. Pp. 15-16)

Mr. Tuten met with Barber no less that 40 times before his trial in December 2003. (See S.X. 1 & S.X. 2, admitted at hearing) Mr. Tuten testified

that he informed Barber about potential defenses, including a defense base on intoxication. At the evidentiary hearing Mr. Tuten was asked by Rule 32 counsel:

Mr. Gallo: Were you aware in December 2003 that in a capital case, where specific intent is an element of the offense, that you could have put on a case involving voluntary intoxication to mitigate the guilt?

Tuten: Yes.

Mr. Gallo: Did you consider that in December 2003?

Tuten: Yes.

Mr. Gallo: Did you discuss that with Mr. Barber?

Tuten: Yes.

Mr. Gallo: So you were aware that was an option but you choose not to litigate the case on that basis; correct?

Tuten: No. That's not correct. Mr. Barber was aware of it and refused to even discuss that option with us at all. And said, I will not consider anything but a trial on the facts; that I am not guilty.

Mr. Tuten repeatedly explained under cross examination by Rule 32 counsel that this was Barber's position of defense. Barber also confirmed this at the evidentiary hearing testifying as follows:

Mr. Hayden: So Mr. Tuten – you heard his testimony yesterday. He said that throughout you insisted that you did not do it. Is that right or is he lying?

Barber: I didn't. I told him that I didn't do it. And that's the

Mr. Hayden: You told him...

Barber: ... that's the defense we went forward with.

Mr. Hayden: Ok. So the defense that you told him is the defense you went forward with. You told Mr. Tuten "I didn't do it." And that's the defense he presented; correct?

Barber: Correct.

(H.R. 34- 435)

In Mulligan v. Kemp, 771 Fd 2d 1436, 1441-1442 (11th Cir. 1985), the Eleventh Circuit held:

> At the start, we note that a defendant's Sixth Amendment rights are his alone, and that trial counsel, while held to a standard of "reasonable effectiveness," is still only an assistant to the defendant and not the master of the defense. See Faretta v. California, 422 U.S. 806, 820, 95 S. Ct. 2525, 2533, 45 L.Ed.2d 562 (1975). Our criminal system allows a defendant the choice of whether he wants to be represented by counsel at trial. See generally Faretta. Because we recognize that a defendant must have this broad power to dictate the manner in which he is tried, it follows that, in evaluating strategic choices of trial counsel, we must give great deference to choices which are made under the explicit direction of the client.

Id. at 1441-1442 emphasis in original).

The Alabama Court of Criminal Appeals has likewise held that "[c]ounsel cannot be held ineffective for the informed and voluntary choices of their client." Ferguson. State, 13 So.3d 418, 439 (Ala. Crim. App. 2008). In order for defense counsel to present an intoxication defense during a murder or capital murder trial, the defendant must be willing to concede that he caused the victim's death. Barber provided no testimony at the evidentiary hearing indicating that he would have been willing to admit he killed Mrs. Epps at the jury trial in this case.

Barber contends Mr. Tuten did not discuss the possibility of pursuing an intoxication defense. (H.R. 426) This assertion is refuted by Mr. Tuten's testimony and by exhibits admitted at the evidentiary hearing. In a letter dated January 23, 2003, from Mr. Tuten to Barber, Mr. Tuten informed Barber that

"alcohol and/or drug abuse may give rise to defenses, mitigation evidence and grounds to suppress statements." (P.X. 40) Mr. Tuten testified he informed Barber about the possibility of pursuing an intoxication defense. (H.R. 67) Also, the first fee declaration submitted by Mr. Tuten establishes he researched intoxication and discussed trial strategies with Barber. (S.X.1)

Barber also argues trial counsel were ineffective for not interviewing individuals that, Barber contends, had relevant information concerning his drug and alcohol use on the day he killed Mrs. Epps previously indentified here. Mr. Tuten testified that he did not personally speak to Ms. Epps about Barber's drug history because Barber would not consider any defense other that he was innocent.(H.R. 83) Ms. Epps was called at the guilt phase and gave evidence of past drug problems. She said he was clean and sober and going to AA when he came back to Alabama. (T.R. 1057) Detective Edger had interviewed Ms. Epps prior to her testimony at trial. She offered no alibi or evidence of his drug/alcohol use on the day of the murder. Mr. Tuten was present when Mr. Boyanton called the alleged drug dealer, Frederick Rice. According to Mr. Tuten, Mr. Rice denied knowing Barber and denied selling him any drugs on the day of the murder or any other time. (H.R. 138) Mr. Tuten also testified he was present when Mr. Boyanton called a phone number provided by Barber for the unnamed prostitute. That person denied being the individual identified by Barber. (H.R. 141) These witnesses were not called to testify at the evidentiary hearing.

Trial counsel did retain an expert psychologist, Dr. Rosenzweig, to examine Barber's state of mind at the time of the offense and give an opinion as

to the confession in this case before the suppression hearing. Mr. Tuten testified that her written report was "no way" or not favorable. (H.R. 51) She was not called to the hearing. Dr. Rosenzweig's opinion as to Barber's state of mind at the time of the offense would not have been admissible in the guilt phase of the trial or the expert opinions of Dr. Morton and Dr. Salekin, who were also called at the hearing. See McCowan v. State, 412 So.2d 847, 849 (Ala. Crim. App. 1982) (holding the trial court did not err in disallowing the appellant's expert witness from stating "the legal conclusion that the appellant could not have formed the requisite intent for murder[.]"); see also Wilkerson v. State, 1266, 1279 (Ala. Crim. App. 1996) (holding "w[e] are aware of no case holding that a witness can testify as to whether the defendant has the ability to form the requisite intent to commit the charged offense.") The question of whether a defendant was so intoxicated at the time of the offense that he or she could not form the specific intent to kill the victim is solely for the jury to decide. See Crosslin v. State, 446 So. 2d 675, 682 (Ala. Crim. App. 1983) (holding that "the degree of intoxication exhibited by the accused, such as to reduce murder to manslaughter , even where the evidence is in sharp conflict , is for the jury to decide."); see also Hammond v. State, 776 So. 2d. 884, 887 (Ala. Crim. App. 1998) (holding that "[w]hile the degree of intoxication necessary to negate specific intent must rise to the level of insanity, it is clear that where there is evidence of intoxication, the extent to which the accused in intoxicated is a question to be decided by the jury.")

The trial counsels' performance in the presentation of the defense in the trial is not found to be deficient or lacking in any way for failure to present inadmissible evidence concerning Barber's intoxication at the time of the offense. At the evidentiary hearing, Barber's videotaped confession was admitted for the Court to view, which was marked at the trial as State's 43. This Court has reviewed this statement of Barber which was admitted after a suppression hearing by Judge Little at the trial. Evidence was in front of the jury from Barber's confession wherein he made the following statements to the Detective concerning his intoxication at the time of the offense: "I'd been doing coke all day"; "I was really fucked up"; "I can't remember much"; and that "stuff just makes you fucked up". (Barber's video statement Exhibit 43 at trial). Mark Barber was called by trial counsel at the guilt phase and testified on direct that Barber had a history of drug problems. (T.R. 1044) On cross examination, he testified that he knew his brother had suffered from black outs in the past. (T.R. 1050) Elizabeth Epps was called to the witness stand by trial counsel at the guilt phase and was also allowed to testify as to Barber's history of alcohol and drug usage. (T.R. 1057) Based on this considerable amount of non-expert evidence of drug usage during the time both preceding and following the murder, which came before the jury in the guilt phase, Judge Little gave an instruction on intoxication and the degree required to mitigate specific intent. The lesser included offense of Manslaughter was given. (T.R. 1152) The jury rejected this "viable defense", which was clearly in the evidence for their consideration.

Neither does this Court find counsels' performance deficient for failure to argue the lack of specific intent in the closing statement as alleged in part I.A.3 of Barber's brief. Although Mr. Tuten agrees at the hearing that the defense was made by Mr. Boyanton in the closing argument, the record shows that Mr. Boyanton spoke to the jury about the State's burden of proving a specific intent and argued that Barber was intoxicated at the time of his "confession" (C.R. 1108). The Court charged the jury on specific intent to kill at the time of the offense being an element that the State had to prove. The trial court instructed the jury on intoxication and how evidence of intoxication could negate a specific intent. (C.R. 1152) Trial counsel were actually able to insert the defense of intoxication in front of the jury through the court's charge of the lesser included offense of Manslaughter. Barber confessed to beating Mrs. Epps to death with his fists and a claw hammer. During his confession to Investigator Edger, in addition to the statements previously referenced above, Barber stated that, "I just thought I needed some money, you know."(PX 71-A p.7) Barber gave very specific details about how he killed the victim and about the events that took place following the killing. He admitted to stealing Mrs. Epps' purse, but tried to downplay it by asserting he only took it because he "figured it looked good." (PX 71-A, p. 8) Barber also told Edger specifically where he disposed of the purse, the claw hammer, and the clothes he wore at the time of the murder. (PX 71-A, p. 7-8, 10) Barber repeatedly made comments indicating he understood the serious nature of what he had done. The Alabama Court of Criminal Appeals concluded that "[Barber's] comments about punishment and the effect on his and the

victim's family showed his awareness of the severity of the situation." Barber v. State, 952 So. 2d at 435. Judge Little found in his sentencing order that "while the use of alcohol and /or drugs may have given [Barber] the tenacity to commit this crime[,]" Barber's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired. (C.R. 275) This Court therefore, finds on the basis of all the above that Barber failed to prove counsel's performance deficient for failure to argue intoxication as a defense at closing. Barber also failed to prove that the result would have been any different had intoxication been presented by calling additional witnesses to give facts or opinions as to Barber's state of mind during the guilt phase of the trial, or that such testimony would have been admissible.

B. Barber Failed to Prove Trial Counsel Were Ineffective For Not Challenging The State's Theory That The Victim's Murder Occurred During The Course of A Robbery

In part II.B, paragraphs 176-179 on pages 49-50, of Barber's petition, he alleges that trial counsel were ineffective for "permit[ing] the State to put on a weak, inadequate case that lacked any direct proof of robbery-murder." (A.P. 49) Barber contends that the State failed to develop "independent evidence of robbery" and "simply buttressed its robbery claim on the version of events [he] provided in his statement." (A.P. 50) Barber also contends trial counsel were ineffective for "not insist[ing] upon a clearer jury instruction on the issue of "afterthought" and for failing to make it clear in their opening statement and closing argument "that State had not made out a sufficient case for murder made capital by virtue of a robbery." (A.P. 51) In part I.D. 2 of Barber's brief, Barber

argues he showed at the evidentiary hearing his intent to rob Mrs. Epps was formed after he murdered her. (Bf. Pp. 48-49) Barber's argument now in part I.D.2 is supported only by his evidentiary hearing testimony. However, during the guilt phase, in his confession which this court has reviewed and considered, Barber states to the Detective that he "didn't plan on doing that"; "thought I needed money"; "she's probably got some money"; "I didn't take the purse in a robbery"; "I grabbed the bag and threw it in a dumpster" " ... in a garbage at a carwash on Bob Wallace" (State's Exhibit 43 at trial) On cross examination at the hearing, Barber testified that he killed Mrs. Epps, stole her purse, and threw the purse, hammer and his shoes in a garbage can at a car wash the morning after the murder. (H.R. 432, 433) The jury clearly heard evidence of both intent to rob and robbery as an afterthought. The Alabama Supreme Court has held that "circumstantial evidence, in conjunction with other evidence, may be sufficient to prove intent" Ex parte Carroll, 627 So.2d 874, 878 (Ala. 1993) In Ex parte Robert, 735 So. 2d 1270, 1276 (Ala. 1999), the Alabama Supreme Court held that "[a]lthough a taking of property committed after a murder and as a 'mere afterthought' and unrelated to the murder will not sustain a conviction under 13A-5-40-(a)(2) for the capital offense of robbery–murder, ..., the question of a defendant's intent at the time of the commission of the crime is generally an issue for the jury to decide." Id.at 1276 (citation omitted). In his sentencing order, Judge Little found that Barber "confessed to the commission of this crime, admitting that he struck Mrs. Epps with a claw hammer, grabbed her purse, and ran out of the house." (C.R. 272) The Alabama Court of Criminal Appeals held on

direct appeal that "the State presented independent circumstantial evidence that connected [Barber] to the murder" and that "[t]his evidence was sufficient to establish the trustworthiness of [Barber's] confession." Barber v. State, 952 So. 2d at 436, 437.

Barber confessed to beating Mrs. Epps to death with his fists and a claw hammer and to taking her purse. He also provided Investigator Edger with specific details about how he disposed of the purse and other incriminating evidence the day after the murder. Barber fails to plead or prove why evidence at the hearing that he returned to the Epps home to check to see if she was still alive, and to retrieve his vehicle and make it look like a burglary break in at the crime scene would have shown his intent to rob Mrs. Epps was an afterthought. (H.R. 417) His testimony now, that it was only on his second trip to Mrs. Epps house that he took her purse is an afterthought and not supported by any of the evidence other that Barber's testimony at the hearing. It is certainly contradictory to his original confession to Detective Edger. Barber gave the Detective great detail as to actions following the murder, including removing, covering up and destroying evidence, but never says he went back to the scene, and only then took Mrs. Epps purse. Barber's defense was one of innocence, and he chose not to take the witness stand and testify as he did at the evidentiary hearing. Trial counsel conducted a very thorough cross examination of a detective on the issue of both intoxication and the specific intent to kill and whether there had actually been a robbery in this case. (T.R. 987) The Court finds there to no evidence that

counsel were ineffective because they allowed the State to present a weak case of robbery-murder.

The Court further finds that there was in fact an argument made by trial counsel in the closing about the requirement that the State prove a specific intent to rob in connection with the commission of the murder for a capital offense, and requested a specific charge on "mere afterthought" not being sufficient. (T.R. 1115) The trial Court charged a "mere afterthought" not being sufficient. (T.R. 1178) Barber did not suggest in pleading or prove at the hearing what "clearer" jury instruction could have been given, or how such charge would have led to a different result at the guilt phase of the trial.

C. Barber Failed to Prove Trial Counsel's Preparation for Trial was Inadequate

In part II.C, paragraphs 180-185 on pages 51-53, of Barber's amended Rule 32 petition, he contends Mr. Tuten and Mr. Boyanton were unprepared to cross examine the State's witnesses, did not prepare his brother Mark or Elizabeth Epps to testify in the guilt phase, did not allow Barber to testify and violated the attorney client privilege by speaking to him with guards present. Mr. Tuten was called to the witness stand at the evidentiary hearing in this case and was not questioned about these specific allegations of ineffective assistance of counsel in preparation of trial. This Court finds that Barber abandoned these allegations. See Brooks v. State, 929 So. 2d 491, 497 (Ala. Crim. App. 2005) (holding "[A] petitioner is deemed to have abandoned a claim if he fails to present any evidence to support the claim at the evidentiary hearing.")

This Court also finds that Petitioner, failed to affirmatively prove these allegations of ineffective assistance of counsel. Rule 32.3, Ala. R. Crim. P. The Court has reviewed the trial transcript in this case in its entirety and finds no evidence of prejudice from lack of preparation by trial counsel at the guilt phase in the examination of the State's witnesses, the direct testimony of Defendant Barber's witnesses or from attorney client conversations in front of guards. It is the defendant's final and ultimate decision to testify or not and there is no showing that the Defendant would have chosen to testify at trial given his testimony at the hearing. Tuten testified it was Defendant's final decision and he recommended his client not testify. (H.R. 109) The issue was not addressed further. Neither is there a showing that trial counsel would not allow the Defendant to testify. There is no showing or proof of ineffective assistance or any prejudice to the Defendant that resulted from these bald allegations set forth above.

D. Barber Failed to Prove Trial Counsel Were Ineffective for Failing to Object to Prosecutorial Misconduct at Trial

In part II.D, paragraphs 186-189 on pages 53-55, of Barber's amended Rule 32 petition, he alleges Mr. Tuten and Mr. Boyanton were ineffective for failing to object to comments made by the prosecutor during the guilt phase opening statement or closing argument. These comments alleged stemmed from Barber's videotaped confession which was available in evidence for the jury to examine. The taped confession leaves little room for the prosecutors to misrepresent the evidence to the jury in their argument, making reasonable inferences from the evidence. There was not evidence presented at the

evidentiary hearing concerning these allegations, therefore this Court finds the allegations have been abandoned. Neither were the allegations specifically pled under the requirements of Strickland. There have been no allegations or proof that, had there been an objection made, that the objection would have been sustained, or that the jury would have reached a different result. Furthermore, Judge Little instructed the jurors before the prosecutor made his guilt phase opening statement, and closing arguments, that "[w]hat the attorneys say to you in their opening statements is not evidence",.... "and again in closing argument is not given to you as evidence"(R. 612, 1136) "[I]t is always presumed that the jury will follow the instructions given to it by the trial court." Ex parte Stewart, 659 So.2d 122, 127 (Ala. 1993). Barber proffered no evidence either in his petition or at the hearing to indicate that the jury did not follow Judge Little's instructions, or that if they didn't, that any prejudice resulted, or the verdict would have been different.

III. BARBER FAILED TO PROVE TRIAL COUNSEL WERE INEFFECTIVE FOR NOT ADEQUATELY DEVELOPING AND PRESENTING MITIGATION EVIDENCE AT THE PENALTY PHASE

In part III, paragraphs 190-201 on pages 55-59 of Barber's petition, he alleges that he was prejudiced by trial counsel's failures at the penalty phase. Barber contends trial counsel never sought funds to hire a social worker and a mitigation expert; did not explain why facts were mitigating or argue a coherent theory of mitigation; did not adequately prepare and present mitigation witnesses; and did not challenge the victim impact evidence at the penalty phase.

A. Barber Failed to Prove Trial Counsel Were Ineffective For Not Seeking the Assistance of a Social Worker or Mitigation Expert

In 2003, at the time of this trial, Dr. Rosenzweig was one of a few mitigation specialist doing mitigation investigations in capital cases in Alabama. (H.R. 146) Mr. Tuten testified that he hired her for that reason and that he had worked with her before. (H.R. 145) She had conducted numerous mitigation investigations before being retained by trial counsel, and was qualified, without objection, in Judge Little's court as an expert in clinical and forensic psychology. (T.R. 1230) Mr. Tuten also testified at the hearing that he had worked with Barber's Rule 32 expert witness, Dr. Karen Salekin in capital mitigation and found her to be "equally proficient" at what she did when compared with Dr. Rosenzweig. (H.R. 148)

Dr. Rosenzweig initially prepared a report for trial counsel relative to the voluntariness of Barber's confession. She concluded that there was no evidence to "indicate that Mr. Barber did not knowingly, intelligently, and voluntarily waive his right to remain silent and have an attorney present during his interrogation." (H.R. 144) She was therefore, not called to testify at the suppression hearing.

She was also responsible for the mitigation investigation, preparation of the forensic report and presentation at the penalty phase upon a conviction. Dr. Rosenzweig testified at the hearing that although she wished to have spent a longer time interviewing Barber, she didn't because "he was not cooperative with the mitigation portion...if he was convicted of capital murder he wanted to get the death penalty." (H.R. 244) Barber told Dr. Rosenzweig that he thought he would have better representation on appeal if he received the death penalty. (H.R. 244)

Mr. Tuten testified that Barber had "forbade" him from contacting his family members and refused to even give him contact information for any of them. (H.R. 150) He stated he got most of contact information from brother, Mark Barber, who called his office. (H.R. 150) Barber confirmed at the hearing that he did in fact instruct trial counsel to have no contact with his mother or sisters about this case. (H.R. 150)

Despite Barber's lack of cooperation with Dr. Rosenzweig, she was able to confirm the information that Barber gave her concerning his family history and background of drug and alcohol problems through the interviews with the following: Mark Barber (brother), Glen Barber (brother), Elizabeth Barber (mother), and Keith Collins (employer). She prepared a through and informative forensic report for presentation at trial. (H.R. State's Exhibit 4,) Mr. Tuten testified that he reviewed the findings with Dr. Rosenzweig numerous times, including a very lengthy meeting where they planned out her mitigation presentation and the questions and exhibits to be used.(H.R. 151)

Dr. Rosenzweig testified extensively during the penalty phase about Barber's history of drug and alcohol abuse and about the long term effects of cocaine use. She testified in front of the jury that in her expert opinion Barber was predisposed to addiction because of his family's history with alcohol and drug abuse. (T.R. 1257) She also testified that at the time of the crime, he was in a downward spiral "crisis" and his ability to think was affected as a result of cocaine withdrawal. She also testified to the jury that in her expert opinion Barber's addiction to cocaine and alcohol played a role in Mrs. Epp's death. (T.R.

1254, 1258) She had prepared an outline for Mr. Tuten to use while he examined her during the penalty phase to ensure he elicited all potential mitigation evidence. (H.R. 241).

Barber's contention that Dr. Rosenzweig's testimony and forensic report were inadequate is based on the testimony of Dr. Karen Salekin and Dr. William Morton who were called to testify at the hearing as to their findings after the fact. This court has thoroughly reviewed Dr. Rosenzweig's testimony at the penalty phase and compared it with the testimony given by Barber's experts at the hearing. This Court finds no substantive or material differences in the opinions reached by these experts. While Dr. Salekin interviewed a number more collateral sources and traveled to Barber's hometown of Winsted, Connecticut, her findings are essentially the same as Dr. Rosenzweig's, just cumulative. The only material finding made by Dr. Salekin, not made by Dr. Rosenzweig, is the information concerning an incident when Barber was found with a shotgun after a breakup with a long term girlfriend. (H.R. 585) She also testified he had no plan to do harm to himself. Id.

A summary of Dr. Rosenzweig's testimony at the penalty phase in front of the jury and trial judge follows:

Dr. Rosenzweig testified that Barber grew up in a middle class working neighborhood, where his father owned a gas station and his mother worked in a plant. (T.R. 1234) Barber did not get much individual attention from his parents because there were seven children in the house. Id. Dr. Rosenzweig found that Barber basically had a happy childhood except that he was teased about being

overweight by other children. Id. According to Dr. Rosenzweig, this caused Barber to suffer from low self esteem. (T.R. 1235) She found that he made above average grades in school and was not one to get in major trouble. According to Barber's mother, he was mischievous, but not a bad boy. Id.

At about age 13, Barber began experimenting with marijuana and at 15 or 16 he started using pills. Id. In his teenage years Barber began hanging out with the party crowd. Barber liked being the center of attention and was described as a funny guy. Barber eventually quit high school and moved to Florida to work with his brother Joel in construction. Barber stayed in Florida for about a year then moved back to parent's home in Connecticut. He eventually obtained his GED and began to work. Id.

Barber worked at a local plant where his mother worked, then had a number of jobs over the years that followed. He was generally known as a very hard worker, especially as a painter. In his mid 20's, Barber became a salesman for Electrolux vacuum cleaner and was eventually promoted to branch manager. (T.R. 1236) Barber worked for Electrolux for about four years, making a good salary and winning a number of awards. He was described as an adult as a pleasant person, calm, and quite considerate when not on drugs. Id.

Barber also was helpful to his parents and would sometimes cook for entire family and do his parent's laundry. (T.R. 1236) Barber also visited his father frequently when he had cancer and helped care for him.

Barber reported to Dr. Rosenzweig that he had a seven year relationship beginning in his mid-2os and ending in his early 30s. (T.R. 1137) Barber reported

the relationship ended because he was not a good partner when on drugs. Barber married a few years later for about two years. Barber's wife was unable to have children and Barber reported his marriage ended because of his drug use. Id.

Barber reported he sold marijuana out of his dad's gas station. (T.R. 1238) Barber reported being introduced to cocaine in his early 20s. Barber reported to Dr. Rosenzweig that while he made a good salary at Electrolux, he began using cocaine quite heavily. He reported at times he went on binges that could last three or four days. Barber reported to Dr. Rosenzweig he used cocaine heavily for ten years. Dr. Rosenzweig testified that Barber and others reported that drug abuse caused quite a lot of problems in his life. From 1985-1998, Barber was arrested five times for DUI. He was also arrested in 1998 for slapping Elizabeth Epps. (T.R. 1238)

Dr. Rosenzweig found that Barber's drug abuse disrupted his relationship with his long-time girlfriend, his wife, as well as family members and friends. (T.R. 1239) As an example Dr. Rosenzweig testified that Barber was always borrowing money for drugs and often did not pay people back. This caused strains on relationships with various people, who described Barber as "quite obnoxious" when high. Id.

Barber's brother Glenn got out of a lunch wagon business with Barber because he gave away food to friends and took proceeds for drugs. (T.R. 1240) Glenn also reported to Dr. Rosenzweig that Barber stole his vacation money and took Glenn's golf clubs and microwave to pawn for drugs. While Mark managed

the gas station, Barber went on a binge and took the business's proceeds and ran away. (T.R. 1241)

Dr. Rosenzweig testified that in 1996 Barber moved to Alabama where his brother Mark lived, to get away from his drug using friends. (T.R. 1243) In 1998 Barber met Elizabeth Epps. Barber and Ms. Epps began living together but broke up in 2001. Id. Barber moved back to Connecticut and began AA program. Eventually Ms. Epps and Barber reconciled and he moved back to Alabama. Id.

Barber continued going to AA, but in July 2000 he began to slack off and not go. According to Dr. Rosenzweig, Barber reported that in October 2000 he hurt his back and was prescribed pain pills. Dr. Rosenzweig stated that for people with past substance abuse, pain medications can "retrigger" substance abuse. Id. Barber began using a lot pills and about Christmas 2000 began using cocaine again. Until Mrs. Epps death, Barber was using between $300-$400 worth of cocaine a week and drinking alcohol three to four times a week.

Dr. Rosenszweig could not find anyone that saw Barber using cocaine. Mark suspected Barber was using cocaine because in the months before Mrs. Epps death, Barber's painting business was doing well but he wanted to borrow money all the time and had nothing to show for it. His expenses were minimal, so Mark suspected the money was going for drugs. (T.R. 1245)

Dr. Rosenzweig testified that there is evidence that there are hereditary aspects to drug and alcohol addition. Based on her investigation, Dr. Rosenzweig found there to be a "rather strong family history of substance abuse problems". (T.R. 1257) She discovered that Barber's maternal grandmother was

an alcoholic. She also found out that two of Barber's siblings are alcoholics and another abused marijuana. According to Dr. Rosenzweig, Mark reported that of the "seven children, that five of them have had problems with substances at least at some period" in their lives. Id.

The testimony at the hearing of pharmacology expert Mr. Morton is also very similar to the testimony of Dr. Rosenzweig's at the penalty phase. Both gave explanations of the effects of long term drug and alcohol addiction on the brain and the symptoms of withdrawal at the time of "crisis", just lengthier. Dr. Rosenzweig stated that the effect of crack is almost immediate, but the high does not last long. (T.R. 1246) She discovered that Barber mixed crack with alcohol, by "pyramiding", and it intensified the effects of the crack cocaine. Dr. Rosenzweig stated that crack is much more addictive than powder cocaine and is one of the most addictive substances known. Id.

Dr. Rosenzweig testified that Barber began using alcohol again in early 2001 and reported he was drinking a half case to a case of beer three to four times a week. Dr. Rosenzweig diagnosed Barber as an abuser of cocaine and alcohol. (T.R. 1247) She also testified that Barber was cocaine dependent and may have developed a physiological dependency on alcohol. Id. Dr. Rosezweig testified that in small doses, the immediate effects of cocaine are euphoria, increased energy level and sex drive. (T.R. 1248) An individual's appetite is reduced if not absent. Additional effects may include an increased self confidence and an individual may have grandiose feelings about themselves. Id. Dr. Rosenzweig went on to testify that in larger doses cocaine can cause anxiety,

a condition where an individual becomes very nervous. (T.R. 1249) Individuals can also become agitated, irritable, confused, paranoid, and can suffer auditory hallucinations. Id.

Dr. Rosezweig testified that withdrawal from cocaine is a physiological phenomenon and that crack withdrawal can occur within 15 minutes after using it. (T.R. 1250) She explained that during withdrawals individuals are likely to show signs of irritability, agitation, paranoia, and are often likely to hallucinate, and have mood swings. Id.

Dr. Rosenzweig used a chart similar to the one used by Dr. Morton to show the jury and the trial judge the behavioral effects of the progression of dependency on cocaine. (T.R. 1250-1254) Dr. Rosenzweig went over the chart at length which provided the jury and the judge with a very detailed analysis of how cocaine affects individuals. (T.R. 1251-1254) Dr. Rosenzweig testified that based on her investigation, at the time of the Mrs. Epps death, Barber was in crisis with his drug and alcohol addiction. She testified that Barber "was paranoid, his behavior had markedly changed and he was in a spiral at the bottom that we call crisis." (T.R. 1254) Dr. Rosenzweig also testified that when an individual comes down from a cocaine high that areas of the brain that deal with judgment and the ability to think and plan are suppressed. (T.R. 1255-1256) She finally testified that in her expert opinion that Barber's judgment was impaired at the time of the killing and that he did not have the intent to kill or hurt Mrs. Epps. (T.R. 1266)

Therefore, based on all the above, this Court finds that Dr. Rosenzweig, was a qualified and experienced mitigation expert retained by trial counsel in this

case. Barber has not shown trial counsel to be ineffective for relying on a qualified professional to conduct the mitigation investigation in the case. See Hall v.State, 979 So.2d 125,163 (Ala. Crim. App. 2007) (holding it is neither unprofessional nor unreasonable for a lawyer to use surrogates to investigate and interview potential witnesses rather than doing so personally.") "See also Wayne v. Murray, 884 F.2d 765, 767 (4th Cir. 1989) ("To inaugurate a constitutional or procedural rule of an ineffective expert witness in lieu of the constitutional standard of an ineffective attorney, we think, is going further than the federal procedural demands of the fair trial and the constitution require. There must be some finality to litigation, and the final stage ha been reached in this case.") See also Washington v. State, 95 So.3d 26,60 (Ala. Crim. App. 2012) (holding "defense counsel is entitled to rely on the evaluations conducted by qualified mental health experts, even if, in retrospect, those evaluations may not have been a complete as others may desire."). This Court finds that Dr. Rosenzweig's investigation and presentation to the jury was not inadequate, but quite thorough and illustrative, especially in light of the evidence of Barber's lack of cooperation. See Dunaway v. State, 2009 WL 4980320,*7 (Ala. Crim. App. 12-18-2009) (holding that "[t]rial counsel's performance was not deficient simply because he did not present cumulative evidence.'") (citation omitted).

In addition, the fact that Rule 32 counsel retained another mitigation expert who they contend is a better expert than Dr. Rosenzweig does not prove trial counsel ineffective. See Waldrop v. State, 987 So. 2d 1186, 1193 (Ala. Crim. App. 2007)(holding "'[a[post conviction petition does not show ineffective

assistance merely because it presents a new expert opinion that is different from the theory used at trial.'") (Citation omitted) Barber did not prove that additional, cumulative evidence offered by Dr. Salekin, or that an additional expert, such as Dr. Morton to give testimony in the penalty phase would have changed the result. See Daniel v. State 2011 WL 1605229,*29 (Ala Crim. App. April 29, 2011) (holding "' the existence of alternative or additional mitigation theories generally does not establish ineffective assistance of counsel.'") (citation omitted).

Barber was 42 years of age when he murdered Mrs. Epps. In light of the overwhelming evidence of the two aggravating circumstances proved beyond a reasonable doubt, including evidence that Barber's beating Mrs. Epps to death with his fists and a claw hammer was especially heinous, atrocious, or cruel when compared to other capital murders, as found by both a jury and Judge Little, this Court finds that Barber has not proven that a "better expert" or an additional expert would have caused a different sentencing result. There is no reasonable probability that more details about Barber's background and family history or testimony from an expert in pharmacology would have caused a different result in the jury's sentencing recommendation at the penalty phase of the trial. See Thompson v. Wainwright, 787 F. 2d 1447,1456 (11th Cir. 1986) (finding that "there is not a reasonable probability the jury would have changed its sentencing conclusion had [defense counsel] presented and argued the mitigation evidence now offered" because of the overwhelming evidence of [the] aggravating circumstances."). See also Judge Little's findings concerning his findings previously set forth in this order wherein he outlines the mitigation

testimony he heard and why he does not find Barber's history of family or personal drug and alcohol abuse to be a mitigating factor in this case. This Court finds Judge Little's sentencing order and his findings as to, what amounts to essentially the same or cumulative mitigation evidence heard by this Court at the evidentiary hearing, to be most compelling. (T.R. 274,275) The trial court's sentencing order leaves little if no room for the reasonable probability that either the jurys' or his verdict would have different, had each heard the same testimony this Court heard at the evidentiary hearing.

A. Barber Failed to Prove Trial Counsel Were Ineffective For Not Explaining To the Jury Why Certain Facts Were Mitigating

In part III.B, paragraph 193 on page 56, of Barber's petition, he alleges that trial counsel did not attempt to show why Barber's history of alcohol and drug abuse was a mitigating circumstance. Dr. Rosenzweig testified at the penalty phase that drug and alcohol addiction have hereditary aspects. (T.R. 1257) Dr. Rosenzweig testified that Barber's maternal grandmother was an alcoholic. She also found that Barber and four other siblings out of seven children had some abuse problems in the life. Id.

Mr. Tuten argued in his penalty phase closing that Barber became addicted to pain pills prescribed by a doctor and that the pain medication caused him to relapse into crack cocaine abuse. (T.R. 1191) Mr. Tuten stressed that it was crack cocaine that caused Barber to kill Mrs. Epps and reminded the jurors of Dr. Rosenzweig' s explanation how crack cocaine "takes over a person's life . (T.R. 1293) Mr. Tuten reiterated the facts concerning the amount of money that Barber spent on cocaine and that once it gets ahold of you, you just can't stop.

Id. In his sentencing order, Judge Little concluded that the "aggravating circumstances" of this offense clearly outweigh any mitigating circumstances, the Court makes that finding even if all of the mitigation circumstances put forth by [Barber] were in fact proven. (C.R. 276) Barber did not question Mr. Tuten specifically about this allegation at the hearing. Therefore this Court finds this allegation not proven and without merit.

B. Barber Failed To Prove Trial Counsel Were Not Ineffective for Not Adequately Preparing and Presenting Mitigation Witnesses

In III.C, paragraphs 194-198 on pages 56-58 of Barber's petition, he alleges that trial counsel did not adequately prepare witnesses to testify during the penalty phase of the trial. Barber asserts that trial counsel did not spend enough time with his brother of his mother before calling them as witnesses in the penalty phase. At the time brother Mark Barber testified at the penalty phase, he had already testified two other times, and had been cross examined by the district attorney at the suppression hearing in front of Judge Little and during the case in chief in front of the jury. Mr. Tuten testified he had spoken to him before about his testimony and about Barbers background as had Dr. Rosenzweig. (H.R. 149) Mr. Tuten also testified he had spoken to Barber's mother Elizabeth Barber before the trial, despite Mr. Barber's wishes. Mr. Tuten made it clear at the hearing that his client had "forbade" him from contacting any witnesses in mitigation, and it was only through Mark Barber calling his office that he and Dr. Rosenzweig were able to develop the mitigation presented. Id.

Mark Barber gave an extensive history of childhood and adult life with Barber at the penalty phase. He testified that they had had a "normal childhood". (T.R. 1216) He testified concerning Barber's lengthy struggle with drugs and alcohol and his many efforts to rehabilitate himself, seeking professional help. He testified he had never seen him violent during any period of intoxication or drug use. (T.R. 1221) Mark Barber "painted a picture of James Barber as an individual and a human being" as was Mr. Tuten's intent during the mitigation presentation. (H.R. 151)

It appears from the trial record that Mrs. Barber became emotional during direct testimony, and her testimony was cut short. There was no cross examination. Mrs. Barber testified that she had had a son murdered by someone with an axe while he was sleeping, so knew how the Epps felt. (T.R. 1274) She testified that James Barber had been a good son to her, calling on Mother's Day, and spending time with her on the holidays and Christmas. (T.R. 1275) Barber's mother testified that he had been there for her since her husband had died. She testified that he called and wrote her from the jail, and she loved him. It was at this point she apologized for becoming emotional and Mr. Boyanton asked her one last question. Id. She answered "You tell them whether or not you want to see your son killed or not," "Oh, no. I can't lose another son. I really can't. Please don't. Don't." Id. She too, showed her son to be a caring human being, as opposed to the individual who committed the "heinous" murder of Mrs. Epps. Dr. Rosenzweig's testimony and presentation previously summarized certainly covers any area of Barber's life not covered by these two witnesses testimony at

the penalty phase. However, Barber also contends that trial counsel were ineffective for not calling those family and friend called at the evidentiary hearing in the penalty phase of the trial. Again this court finds the testimony offered at the hearing by Francis King (teenage friend), Denise Kisiel (niece), and Beverly Risedorf (sister) to be cumulative to the mitigation evidence presented at the penalty phase.

Mr. King testified he met Barber when they were about 14 years old and attended a vocational technical high school in Connecticut together. (H.R. 272) He also worked at Barber's father's gas station, where he had seen Barber drunk. He testified as to his recollections about Barber's drug abuse. He doesn't remember much discipline from Barber's parents. (H.R. 284) He testified that he had not seen Barber since 1983, almost 20 years ago from the time of the murder. (H.R. 288)

Ms. Kisiel testified she was Barber's niece and ten years younger than Barber. (H.R. 291) She testified that when she was in her teens she lived in the same apartment complex as Barber. (H.R. 293) She gave testimony about her father's abuse of drugs and her mother spending time in the hospital for emotional issues. (H.R. 304) She too gave testimony about Barber's drug and alcohol abuse, and said he was "obnoxious" when drunk. (H.R. 299) Her husband worked with Barber at an amusement park, which was a good business. She lost touch with Barber in about 2000. (H.R. 307)

Beverly Risedorf testified she was Barber's sister and seven years older. (H.R. 331) When Risedorf was living in her parents' home, Barber was very

young. She testified that her grandmother lived with them and suffered several breakdowns. She was treated with shock treatments. (H.R. 337) She also testified that her mother, Ms. Barber, had a breakdown in 1972 or 1974 and was hospitalized in a catatonic state. (H.R. 342) She testified to knowledge of an incident where Barber had put a gun in his mouth, which he did not receive help for. She testified about her efforts to get Barber help while he was in Connecticut, and believed things were good when Barber moved back to Alabama. (H.R. 363) She believed that Barber was clean and sober at that time. (H.R. 366)

Barber testified for the first time at the hearing that he killed Mrs. Epps. He gave his version of the events leading up to the crime, including what drugs he had used, what he cooked, and what he was watching on TV. (H.R. 407-408) Barber testified that after beating Mrs. Epps to death with his fists and a claw hammer that he washed off his hand and left. (H.R. 415) He remembered taking Elizabeth Epps' car and calling his landlady to open his apartment because he left his keys in his van. (H.R. 416) He thought of going home, getting money and running away. Id. Once home he testified that he put his clothes in the washing machine and took a shower to remove Mrs. Epps blood. (H.R. 416-417) Barber testified he returned to Mrs. Epps' home to make it look like a crime. Id. The next day he disposed of the evidence, including Mrs. Epps' purse and the claw hammer in a garbage can at a specific carwash on Drake Avenue in Huntsville. (H.R. 433) Barber testified he never told anyone about what he had done and tried to act normal as possible. (H.R. 418) Barber admitted on cross examination that he had confessed the investigator that he had killed Mrs. Epps and taken her

purse. (H.R. 432) He admitted he told investigator twice that he had nothing to do with her murder and did not confess until he was told his palm print in the victims blood was identified from the crime scene. (H.R. 434) Barber testified that he had "enjoyed "his childhood, which included having many brothers and sisters, animals, a swimming pool and mini bikes. (H.R. 369-370) He chronicled his history of drug and alcohol abuse, which included being introduced to pain pills in 1996 and crack cocaine in 2000. (H.R. 390, 397) He testified as to the effects cocaine had on him and his efforts to beat his addiction problems. (H.R. 398-400).

While Barber's testimony at the hearing would have been contradictory to his actual innocence defense he insisted on at trial, the jury had already found beyond a reasonable doubt, a murder in commission of a Robbery in the First Degree. While his testimony at the hearing supports his contention in the Petition that he took the purse only as an afterthought, his Rule 32 rendition of these events directly contradict his contention that he was so intoxicated and withdrawn from crack that he didn't intend to kill Mrs. Epps. A jury or judge might very likely have believed from his testimony that he knew exactly what was going on both before, during and after the crime. Mr. Barber's testimony at the hearing is very detailed and specific about what he did the day of the murder, that night and the next day and night. According to him, he had a purpose for going to her house, was able to get safely away from the scene without detection, clean up and go back to make it look like a murder, and get rid of any evidence connecting him to the murder. He knew not to tell anyone what happened, and only did when he

knew he was caught with the evidence of the palm print in the victim's blood. Mr. Barber's testimony about his drug use and family history would have been cumulative to the mitigation testimony presented about him in the penalty phase. Mr. Tuten was not questioned about not calling Barber at the penalty phase. The Court finds no merit to the argument that additional mitigation witnesses should have been called, as to Barber.

Except for Barber, all the above witnesses at the evidentiary hearing testified they were available to testify at the trial in 2003, however were not contacted by trial counsel. In Waters v. Thomas, 46 F 3d 1506, 1514 (11th Cir. 1995 (en banc), the Eleventh Circuit held that "[t]he mere fact that other witnesses might have been available or that other testimony might have been elicited from those who testified is not a sufficient ground to prove ineffectiveness of counsel." While a capital defendant may present any evidence that is relevant to mitigation, beneficial witnesses are always subject to being cross examined or rebutted by the State. The witnesses' testimony at the hearing is an example of this point. While Barber developed evidence that there may have been a history of mental heath issues suffered by members of Barber's family, this does not demonstrate that Barber suffered from any such illness. In fact there is nothing in the record to suggest that Barber was suffering from any emotional problem outside his addiction issues. The testimony showed that Barber as an adult knew to seek help for his addiction, had opportunities to and did receive professional help on several occasions, and appeared to be sober for an extended period of time. The testimony also proves that Barber was clean and sober when he

returned to Alabama and chose to start abusing drugs and alcohol again. Thereafter, there is no reasonable probability that the outcome at the penalty phase would have different, had all the testimony at the Rule 32 hearing been heard by the trial jury or Judge Little. The State proved beyond a reasonable doubt the existence of two aggravating circumstances. The manner in which Barber murdered this 75 year old, 100 pound woman, was a brutal senseless beating by a 42 year old man. Using his fists and a claw hammer demonstrated a complete disregard for the dignity of human life. The Alabama Court of Criminal Appeals held that "there was overwhelming evidence from which the jury could conclude that the offense was especially heinous, atrocious, or cruel compared to other capital murders." Barber v. State 952 So. 2d at 455. Judge Little concluded that, in addition to being committed during a robbery, that Mrs. Epps' murder was especially heinous, atrocious, or cruel when compared to other capital murders. (C. R. 273-274) Judge Little wrote in his sentencing order that his finding of this aggravator was based on the following:

a. The victim, Mrs. Epps was alone and defenseless and of no physical threat to the Defendant.

b. The Defendant caused the death of Mrs. Epps while inflicting great fear and extreme pain and mental anguish prior to the infliction of the injury, which ultimately caused her death. There is no logical explanation for the Defendant's behavior except his indifference to this human life, and even his enjoyment of the suffering of this victim.

c. As stated previously in this order, the multiple blows by the Defendant with a claw hammer on the body of the victim shows clearly that the death of Mrs. Epps did not occur quickly and mercifully; rather, the events that lead to her ultimate death leads the Court to conclude, without reservation, that the crime of the defendant was extremely

wicked, shockingly evil, outrageously wicked and vile and cruel, with the actions of the Defendant designed to inflict a high degree of pain and fear in the victim, with utter indifference to or even enjoyment of ,the suffering of Mrs. Epps. Any murder of a defenseless victim is to some extent heinous, atrocious, and cruel, but the degree of heinousness, atrociousness and cruelty, with which this offense was committed exceeds that common to other capital offenses.

d. The description of investigators as to the condition of the area of the home where Mrs. Epps was found, shows clearly that this murder was committed in an extremely violent and cruel manner. Defensive wounds to both sides of Mrs. Epps hands would lead one to conclude she received blows to one side of her hand, and then in an effort to protect the side of her hands previously injured, she turned her hands in the other direction in her continued attempts to ward off the blows to protect herself. One of the blows inflicted by the Defendant to the forearm of Mrs. Epps was of such severity that it fractured her right forearm. (C.R. 273)

The Alabama Court of Criminal Appeals held that the evidence "overwhelmingly" supported Judge Little's findings. Id. at 458.

The point can also be made from the testimony at the Rule 32 hearing, that no other family members, growing up in the same surroundings found themselves in the same position as Barber. See Sochorv. Doc (Fl), 2012 WL 2401862, *16 (11th Cir. June 27, 2012) (holding "[w]hen 'additional mitigation evidence emphasizing physical abuse, neglect, and poverty' has the potential to highlight that a petitioner's sibling 'grew up in the same environment' and 'still emerged as a successfully employed, law abiding citizen,' that evidence can pose as much harm as good." (citation omitted). This Court finds that the evidentiary testimony from Barber's friend, relatives and Barber does not establish that trial counsel were ineffective. This Court finds no evidence, no

reasonable probability, that the result at sentencing either by the jury or judge would have been different had such evidence been presented.

C. Barber Failed to Prove Trial Counsel Were Ineffective For Not Challenging the State's Presentation of Victim Impact Evidence

In part III. D., paragraphs 199-201 on page 58 of Barber's petition, Barber contends that trial counsel should have presented evidence that Mrs. Epp's husband, George Epps, had a long running affair with a secretary to discredit his penalty phase testimony regarding the effects Mrs. Epp's murder had had on him and her family.

Rule 32 counsel did not ask Mr. Tuten any questions concerning this allegation at the hearing. Nor does Barber make any attempt to explain in the Petition why or how such evidence if true would have resulted in a different verdict. This Court finds that Barber abandoned this allegation of ineffective assistance of counsel and finds no merit as pled.

IV. Barber Failed to Prove the Cumulative Effect of Trial Counsel's Deficient Performance Denied Mr. Barber a Right to a Fair Trial at Both the Guilty and Sentencing Phases of the Proceeding

In part IV, paragraphs 202-210 on pages 59-63 of Barber's petition, he reiterates his allegations that trial counsel were ineffective during the guilt phase for not investigating and presenting Barber's "two best defenses" of intoxication defense and that taking Mrs. Epps' purse was an afterthought. (A.P. 59 P.202)

Barber also contends in part IV that trial counsel were ineffective for not retaining experts. Barber states trial counsel should have hired a psycho-pharmacologist, like witness Dr. William Morton who testified at the hearing. The

fact that Barber's rule 32 counsel retained a pharmacologist who testified concerning Barber's inability to form the requisite intent to murder while intoxicated, does not establish trial counsel were ineffective. Daugherty v. Dugger, 839 F.2d 1426, 1432 (11th Cir. 1988) (holding that "[t]he mere fact that an expert who would give favorable testimony for the [the petitioner] was discovered five years after this sentencing proceeding is not sufficient to prove that a reasonable investigation at the time of sentencing would have produced the same expert or another expert willing to give the same testimony." Moreover, as previously discussed, the issue of whether Barber was so intoxicated at the time of the crime so as not to intend his actions was for the jury to determine according to the law, given by Judge Little. Expert testimony on the subject of Barber's intent by a pharmacologist, or any lay or expert witness would not have been admissible in the guilt phase.

Barber also contends again in IV that trial counsel should have presented a mitigation case like their expert Dr. Salekin did at the evidentiary hearing. This Court has previously found the testimony at the hearing from both Drs. Salekin and Morton to be cumulative to the testimony given in front of the jury and judge during the penalty phase by Barber's trial expert Dr. Rosenzweig.

This Court has previously found that Barber failed to prove that trial counsels' performance in the investigation of the case either at the guilt of penalty phase was deficient OR that trial counsels' performance was deficient at either the guilt or penalty phase of the trial. There is therefore, no cumulative effect where there are no deficiencies found as a result of any allegation

contained in Barber's Amended Petition. This Court has weighed all of the allegations contained in this Amended Rule 32 petition and finds there to be no "reasonable probability" that the outcome of Mr. Barber's trial would have been different. Strickland 466 U.S. at 694.

CONCLUSION

For the reasons stated above, this Court finds that Barber failed to prove by a preponderance of the evidence that he is entitled to the post conviction relief sought. The Amended Rule 32 Petition is denied.

DONE this 21st day of April, 2014.

/s/ TERESA T PULLIAM
CIRCUIT JUDGE, 10TH JUDICIAL CIRCUIT

APPENDIX E

IN THE CIRCUIT COURT OF MADISON COUNTY, ALABAMA

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STATE OF ALABAMA,

vs. CASE NUMBER CC02-1794LHL

JAME ESWARD BARBER,

Defendant.

SENTENCING ORDER

The Defendant was charged by indictment with the murder of Dorothy Epps during a robbery in the first degree or an attempt thereof. The trial, including jury selection, occurred December 9th through December 17th, 2003, which included the guilt phase and penalty phase of the trial before the jury. The jury returned a verdict on December 16th, 2003, finding the defendant guilty of the capital offense as charged in the indictment, whereupon the Court adjudged the Defendant guilty of the capital offense charged in the indictment in accordance with the jury's verdict.

On December 16th, 2003 a separate sentencing hearing was conducted before the same jury. After presentation of evidence by the State and the Defendant as to the appropriate sentence, and after argument of counsel and the Court's charge as to the applicable law concerning sentencing, the jury returned a verdict wherein they made a determination that the appropriate sentence of James Edward Barber, Jr. is death. The number of jurors voting in favor of the death penalty was eleven (11) and the number of jurors opposed to the death penalty was one (1).

Thereafter, the jury was discharged and a sentencing hearing was scheduled for 11:30 a.m. on Friday, January 9th, 2004.

The Court has been furnished with a written Pre-sentence Investigation Report, prepared at the direction of the Court. Copies of the pre-sentence investigation have been furnished to the state's counsel and to the defendant's counsel. Counsel were directed to furnish to the Court any additions or corrections that they deemed necessary for a complete and accurate pre-sentence investigation, the same to have been furnished to the Court by January 8, 2004.

Pursuant to Section 13A-5-47(b), Code of Alabama, 1975, said Pre-sentence Investigation Report was made a part of the record in this cause.

At the sentencing hearing before the Court, the State, through its District Attorney, asked the Court to fix the Defendant's punishment at death. The Defendant, through counsel, and personally, stated to the Court what they thought the appropriate punishment should be.

FINDINGS OF FACTS SUMMARIZING THE CRIME AND THE DEFENDANT'S PARTICIPATION IN IT

Dorothy Epps was seventy-five years old at the time of her death, weighed approximately 100 pounds and was 5 feet 5 inches tall. She was murdered on or about May 20th or May 21st, 2001 at her home in Harvest, Alabama.

The Defendant knew Mrs. Epps during her lifetime, had done repair work at the Epps' home, and had had a social relationship with one of Mrs. Epps daughters. There was no evidence of a forced entry by the Defendant into the Epps' home, and it is more likely than not that the Defendant gained access to the home easily because of his acquaintance with Mrs. Epps.

Based upon the physical evidence presented including photographs of Mrs. Epps, before and during the autopsy, photographs of the area of the home where Mrs. Epps body was found, and based upon the video-taped confession of the Defendant, the Defendant first struck Mrs. Epps in the face with his fist, and at some point thereafter, obtained a claw hammer that he used to cause multiple blunt force injuries to Mrs. Epps which caused her death.

Dr. Joseph Embry, a medical examiner with the Alabama Department of Forensic Sciences testified as to his findings from the autopsy he performed on May 23rd, 2001.

Dr. Embry's examination of the body of Dorothy Epps showed injuries that he classified in several different categories: bruises, cuts and fractures, bleeding over the brain, multiple injuries in hand and arms, rib fractures and bruising in the front of her body, and bruising and rib fractures in the back of the body.

Dr. Embry found evidence of nineteen different lacerations in the head and seven fractures in the head or skull, injuries to the neck and mouth and left eye caused by blows to Mrs. Epps by the Defendants fists, and her tongue was bruised and injured from a blow or blows to the head.

Numerous defensive wounds were found by Dr. Embry, which were obviously inflicted upon Mrs. Epps in her effort to try to ward off the blows. She had bruising in her left palm and forearm, and bruising and injuries to the backs of her hands.

Mrs. Epps also suffered abdominal and lower chest bruising and she had fractures of her ribs in those areas. The wounds and injuries suffered by Mrs. Epps were consistent with those that would have been inflicted with a claw hammer, according to Dr. Embry.

Based upon his examination and his experience and training, Dr. Embry testified that the cause of death of Mrs. Epps was multiple blunt force injuries as depicted and described in his testimony, including the photographs that were admitted into evidence.

It is obvious from the testimony and the photographs that the injuries to Mrs. Epps, inflicted by the Defendant with a claw hammer, occurred over several areas of the part of the house where she was found. It is also clear from the evidence presented and from the photographs, that Mrs. Epps was at times facing her attacker, that she was aware of what was happening at the hands of the Defendant. It is also clear that she made efforts to protect herself and get away from the blows being inflicted by the Defendant, and that she suffered great pain and mental anguish at the hands of the Defendant as he was attempting to inflict the blows with the claw hammer that ultimately resulted in her death.

Dr. Embry also testified unequivocally that Mrs. Epps would have been conscious when she received the defensive wounds and injuries as depicted in the photographic evidence.

Roger Morrison, who specializes in serology with DNA analysis for the Alabama Department of Forensic Sciences, testified as to his involvement in investigating the crime scene. He testified that there were blood splatters from Mrs. Epps' wounds all around the area where she was found, that there was a good deal of blood on the floor, walls, furniture, and ceiling in the area where she was found. He also testified that he found a bloody palm print on a counter in the area where Mrs. Epps was found. Using DNA testing procedures, Mr. Morrison testified that the blood samples taken from the scene was from the victim, Mrs. Dorothy Epps.

The bloody palm print was examined by Mr. Dan Lamont, a latent print examiner with the Huntsville Police Department and he compared it to the known palm print of the Defendant, James Edward Barber. Mr. Lamont testified unequivocally that the palm print found on the counter top at the Epps' residence was the palm print of the Defendant.

The Defendant, James Edward Barber was taken into custody on May 25th, 2001. Investigator Dwight Edger, prior to each discussion he had with the Defendant, read to him his Miranda Rights and each time the Defendant acknowledged that he understood his rights and agreed to talk to Investigator Edger. The Defendant confessed to the commission of this crime, admitting that he struck Mrs. Epps with a claw hammer, grabbed her purse and ran out of the house. Mrs. Epps' purse was never recovered nor was the claw hammer recovered.

The Defendant was later charged and indicted for the capital murder during robbery in the first degree of Dorothy Epps.

FINDINGS CONCERNING THE EXISTENCE OR NON-EXISTENCE OF AGGRAVATING CIRCUMSTANCES

Pursuant to Section 13A-5-47(d), Code of Alabama, 1975, which requires the trial court to enter specific findings concerning the existence or non-existence of each aggravating circumstance enumerated by statute, the Court finds that none of the aggravating circumstances enumerated by statute were alleged nor proven beyond a reasonable doubt EXCEPT the following, which the Court does find were proven beyond a reasonable doubt:

(1) The capital offense was committed while the Defendant was engaged in the commission of a robbery in the first degree, or in an attempt thereof. The jury's verdict of finding the Defendant guilty of capital murder, as charged in the indictment, establishes the existence of this aggravating circumstance and the verdict of the jury is supported by the evidence. (Section 13A-5-50, Code of Alabama, 1975)

(2) The capital offense was especially heinous, atrocious or cruel as compared to other capital offenses. The Court reaches this conclusion base upon the following evidence:

(a) The victim, Mrs. Epps, was alone and defenseless and of no physical threat to the Defendant.

(b) The Defendant caused the death of Mrs. Epps while inflicting great fear and extreme pain and mental anguish prior to the infliction of the injury, which ultimately caused her death. There is no logical explanation for the Defendant's behavior except his indifference to this human life, and even his enjoyment of the suffering of this victim.

(c) As stated previously in this order, the multiple blows by the Defendant with a claw hammer on the body of the victim shows clearly that the death of Mrs. Epps did not occur quickly and mercifully; rather, the events that lead to her ultimate death leads the Court to conclude, without reservation, that the crime of this defendant was extremely wicked, shockingly evil, outrageously wicked and vile and cruel, with the actions of the Defendant designed to inflict a high degree of pain and fear in the victim, with utter indifference to or even enjoyment of,

the suffering of Mrs. Epps. Any murder of a defenseless victim is to some extent heinous, atrocious and cruel, but the degree of heinousness, atrociousness and cruelty, with which this offense was committed, exceeds that common to other capital offenses.

(d) The description of investigators as to the condition of the area of the home where Mrs. Epps was found, shows clearly that this murder was committed in an extremely violent and cruel manner. Defensive wounds to both sides of Mrs. Epps hands would lead one to conclude she received blows to one side of her hand, and then in effort to protect the side of her hands previously injured, she turned her hands in the other direction in her continued attempts to ward off the blows to protect herself. One of the blows inflicted by the Defendant to the forearm of Mrs. Epps was of such severity that it fractured her right forearm.

(3) The State of Alabama, through the District Attorney's Office, did not contend, nor did it offer any evidence that any other statutorily provided aggravating circumstances existed in this case.

FINDINGS CONCERNING THE EXISTENCE OR NON-EXISTENCE OF MITIGATING CIRCUMSTANCES

In compliance with the statutory requirement that the trial court enter specific findings concerning the existence or non-existence of each mitigating circumstance enumerated by statute (Sections 13A-5-51 and 13A-5-52, Code of Alabama, 1975), the Court finds as follows:

(1) The Defendant has no significant history of prior criminal activity. The pre-sentence investigation report, which has not been challenged by the Defendant or the State shows that this Defendant has no significant history of prior criminal history. Therefore, the Court cannot conclude that the defendant has a significant history of prior criminal activity and considers this to be a mitigating circumstance in this case.

(2) The capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Based upon the evidence presented, the Defendant began using illegal drugs while a teenager. Later in his life he began using cocaine on a regular basis as well as alcohol. There is evidence that the Defendant may have been using crack cocaine and alcohol during the hours leading up to the commission of this crime. However, based upon the jury's verdict, his voluntary intoxication, if it did exist, was not to the extent that it negated his intent to commit the crime for which he has now been convicted. While the use of drugs may have bolstered

his willingness to commit the offense, there is no evidence to support the contention that the Defendant was under the influence of extreme mental or emotional disturbance at the time of the offense. According to statements he made to Investigator Edger, he was quite capable of disposing of evidence that might lead to his conviction. Therefore, the Court does not find that this is a mitigating circumstance.

(3) With respect to mitigating circumstances numbered (3), (4), and (5) in Section 13A-5-51, there is no evidence nor contention by the Defendant that these mitigating circumstances exist in this case.

(4) The capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. The Court adopts the findings stated in Paragraph (2) immediately above concerning " the influence of extreme mental or emotional disturbance". Again, the use of alcohol and/or drugs may have given the Defendant the tenacity to commit this crime, but there is no evidence to support his contention that this mitigating circumstance, Section 13A-5-51(6), exists.

(5) The age of the Defendant at the time of the crime. The Defendant was forty-two (42) years old at the time he committed this crime. The defense does not contend that this would be a mitigating circumstance, and the Court specifically determines that this is not a mitigating circumstance.

(6) The Court has also considered all aspects of the Defendant's character and record, and any of the circumstances of the offense that the Defendant has offered in mitigation. Specifically, the Court has considered the family background of the Defendant, the troubles that he has had as the result of his use of alcohol and illegal drugs, the possibility that he has a physiological dependency on alcohol, and illegal drugs. The Court has also taken into consideration the fact that the Defendant has been productive in the work force, that he obtained his GED after having failed to complete high school, and that he has accomplished those things notwithstanding his alcohol and drug abuse.

CONCLUSION

As required by statute, this Court has carefully weighed the aggravating and mitigating circumstances, which it finds to exist in this case, and has diligently searched the record for other mitigating circumstances, taking into consideration all evidence presented by the Defendant, including biographical sketch of defendant, together with argument of his counsel as to why certain mitigating circumstances exist.

The Court has also taken into consideration the fact that eleven (11) members of the jury found that the appropriate sentence in this case would be death. It is the judgment of this Court that the aggravating circumstances of this offense clearly outweigh any mitigating circumstances, and the Court makes that finding even if all of the mitigating circumstances put forth by the Defendant were in fact proven.

Prior to sentencing, the Defendant was given an opportunity to say anything individually, or through his attorneys, as to why sentence should not be pronounced.

Accordingly, and after consideration of all the above, it is ORDERED by the Court that the Defendant, James Edward Barber, be punished by death.

Rule 8(d)(1), Alabama Rules of Appellate Procedure, provide that the Supreme Court shall at the appropriate time enter an order fixing the date of execution.

The Defendant, James Edward Barber, shall be committed to the custody of the Warden of the William C. Holman Unit of the Alabama State Prison System at Atmore, Alabama, to await appropriate orders from the Supreme Court of the State of Alabama upon disposition of the appeal or other review of Defendant's conviction and of this sentence. The Order of the Alabama Supreme Court fixing the execution date shall constitute the execution warrant.

Pursuant to the provisions of Section 12-22-150, Code of Alabama, 1975, the Court hereby enters on the record that the Defendant appeals from said judgment of conviction and the sentence imposed. Execution of this sentence shall be stayed pending said appeal.

The Defendant, at the time sentence was pronounced, was advised of his right to an appointed attorney in the event that he was unable to afford and attorney for purposes of appeal. He was further advised of his right to a free transcript for appeal purposes, if he was unable to pay for the same. The Defendant and his attorneys were further advised that in the event that the Defendant desired the services of an appointed attorney for appeal purposes or a free transcript, that he was to notify this Court and the same would be ordered.

Done this 9 day of January, 2004.

Loyd H. Little, Jr.
Circuit Judge

APPENDIX F

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 19-12133-P

JAMES EDWARD BARBER,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

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

BEFORE: JILL PRYOR, GRANT and BRANCH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

ORD-42

APPENDIX G

FILED
2019 May-03 AM 10:12
U.S. DISTRICT COURT
N.D. OF ALABAMA

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

JAMES EDWARD BARBER,	)	
	)	
Petitioner,	)	
	)	
v.	)	**Case No. 5:16-cv-00473-RDP**
	)	
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	)	
	)	
Respondent.	)	

MEMORANDUM OPINION

This matter is before the court on Petitioner James Edward Barber's Motion to Alter or Amend Judgment. (Doc. # 26). The motion has been fully briefed. (Docs. # 26-1, 28, 31). For the reasons explained below, the motion is due to be denied.

I. Background

Some fifteen years ago, Barber was convicted and sentenced to death for the murder of Dorothy Epps during a first-degree robbery. (Doc. # 24 at 6-7). The evidence at trial, including Barber's own videotaped confession, showed that he beat his 75-year-old victim to death with his fist and a claw hammer. (*Id.*); *Barber v. State*, 952 So. 2d 393, 400-06 (Ala. Crim. App. 2005). After unsuccessfully challenging his conviction and sentence on direct appeal and in state postconviction proceedings, Barber filed a federal habeas petition pursuant to 28 U.S.C. § 2254. (Doc. # 1). This court determined that Barber was not entitled to relief under § 2254 and therefore denied his petition. (Docs. # 24, 25). It also ruled that Barber was not entitled to a certificate of appealability on any of his claims. (Doc. # 25). Pursuant to Federal Rule of Civil Procedure 59(e), Barber has now moved the court to alter or amend its judgment. (Doc. # 26).

II. Legal Standard

A Rule 59(e) motion to alter or amend a judgment is an extraordinary measure. Such a motion "may not be used to relitigate old matters, or to raise arguments or present evidence that could have been raised prior to the entry of judgment." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 485 n.5 (2008) (internal quotation marks omitted). Instead, "the *only* grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact." *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) (emphasis added) (brackets and internal quotation marks omitted). Because Barber's motion is not based on newly-discovered evidence, the only basis for granting it would be a manifest error of law or fact. A "manifest error" is not just any error but one "that is plain and indisputable, and that amounts to a complete disregard of the controlling law or the credible evidence in the record." *Error*, Black's Law Dictionary (10th ed. 2014).

Because Barber must show that the court made manifest errors of law or fact in denying his § 2254 habeas petition, his burden is especially high. That is so because, under § 2254(d)(1), federal habeas relief is precluded if "fairminded jurists could disagree" about the correctness of the state court's decision to deny Barber relief. *Harrington v. Richter*, 562 U.S. 86, 101-02 (2011). As the Supreme Court has repeatedly explained, to obtain federal habeas relief, a habeas petitioner must show that the state court's adjudication of his claims was not merely "incorrect or erroneous" but "objectively unreasonable"—such that no fairminded jurist could agree with the state court's disposition of his claims under clearly established Supreme Court precedent. *Lockyer v. Andrade*, 538 U.S. 63, 75-76 (2003); *see also Harrington*, 562 U.S. at 101-02. Thus, to succeed on his Rule 59(e) motion, Barber must show that this court completely disregarded controlling law or credible record evidence in concluding that the state court's adjudication of

Barber's claims did not transgress § 2254's highly deferential standard of review. That is a high burden indeed, and one that Barber has not come close to carrying.

III. Analysis

Barber's Rule 59(e) motion claims the court committed manifest errors of law and fact when it (1) denied Barber's penalty-phase *Strickland* claim; (2) denied Barber's guilt-phase *Strickland* claim; and (3) declined to issue a certificate of appealability for three of his claims. Much of Barber's Rule 59(e) motion merely attempts to relitigate already-decided issues or to raise arguments that he already made prior to the entry of judgment. The court first identifies those arguments and issues, as it will not address them further beyond what it has already said in its 108-page memorandum opinion denying habeas relief. As to the remaining issues that Barber arguably has not previously raised, the court briefly explains why Barber has failed to identify any error of law or fact by the court, much less a "manifest" error.

A. Arguments Improperly Raised in a Rule 59(e) Motion

Many of Barber's arguments cannot properly be raised in a Rule 59(e) motion because they are merely attempts to relitigate old matters or to raise arguments Barber could have made (and in fact did make) before the entry of judgment. The court here identifies those arguments and refers Barber to the portions of its memorandum opinion addressing those arguments.

As to his guilt-phase *Strickland* claim, Barber first argues that the state court unreasonably concluded that his trial counsel's performance was not constitutionally deficient. (Doc. # 26-1 at 18-24). He argues specifically that (1) trial counsel failed to adequately investigate and discuss with Barber alternative defenses to innocence, including the manslaughter and mere afterthought defenses; (2) trial counsel's failure to investigate and discuss those defenses with Barber was objectively unreasonable; (3) trial counsel's decision (at

his insistence) to pursue an innocence defense at trial was objectively unreasonable; and (4) the state court's rejection of his claim was an objectively unreasonable application of clearly established Supreme Court precedent. (*Id.*). But Barber previously made each of these same arguments in his habeas petition and reply brief. (Docs. # 1 at 29-53; 23 at 20-35). And the court considered and rejected these arguments in its memorandum opinion. (Doc. # 24 at 13-17, 24-34). The court will not consider them further here.

Barber also argues that he was prejudiced by his trial counsel's allegedly deficient performance at the guilt phase of his trial. (Doc. # 26-1 at 25-27). He argues specifically that (1) had trial counsel adequately investigated alternative defenses to innocence and discussed those defenses with him, he would have allowed his trial counsel to pursue those alternative defenses at trial rather than the innocence defense; and (2) the evidence presented at his Rule 32 hearing established the mere afterthought and manslaughter defenses, which, if presented at trial, would have created a reasonable probability of a noncapital conviction. (*Id.*). But Barber previously made these same arguments in his habeas petition and reply brief. (Docs. # 1 at 53-78; 23 at 36-45). And the court considered and rejected these arguments in its memorandum opinion. (Doc. # 24 at 18-20, 34-36). The court will not consider them further here.

B. Barber Has Failed to Identify Any Manifest Errors of Law or Fact

Barber makes three arguments in his Rule 59(e) motion that he has not already presented to the court: (1) this court manifestly erred in evaluating Barber's penalty-phase *Strickland* claim; (2) this court manifestly erred by relying on *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018) in denying Barber's guilt-phase *Strickland* claim; and (3) this court manifestly erred by declining to issue a certificate of appealability for three of Barber's claims. Though the court is not obligated on a Rule 59(e) motion to consider arguments that could have been raised prior to the

entry of judgment but were not, it will nonetheless do so here out of an abundance of caution.

1. The Court's Denial of Barber's Penalty-Phase *Strickland* Claim

The state court that adjudicated Barber's penalty-phase *Strickland* claim concluded that Barber failed to show he was prejudiced by his counsel's performance. (Doc. # 24 at 47). In denying habeas relief, this court held that the state court's conclusion was neither contrary to nor an unreasonable application of clearly established Supreme Court precedent. (*Id.*). But Barber now argues the court committed a manifest error of law in holding that the state court's ruling was not unreasonable under § 2254 by failing to adequately consider *all* of the mitigation evidence presented at his Rule 32 hearing. (Doc. # 26-1 at 9-16). In particular, Barber faults the court for failing to adequately consider all of the testimony offered by Barber's Rule 32 hearing experts, Dr. Alexander Morton and Dr. Karen Salekin. (Docs. # 26-1 at 10-12; 31 at 7-9).[1] Barber's arguments are meritless.

First, Barber did not even rely upon Dr. Morton's Rule 32 hearing testimony in either his habeas petition or reply brief for the purpose of establishing the prejudice component of his penalty-phase *Strickland* claim. (Docs. # 1 at 99-119; 23 at 69-75). Indeed, Dr. Morton's name appears just two times (both in footnotes) in the portions of Barber's habeas petition and reply brief that address the prejudice component of his penalty-phase *Strickland* claim. (Docs. # 1 at 119 n.9; 23 at 73 n.10). And in neither instance did Barber's counsel actually cite portions of the record containing testimony *by* Dr. Morton. (*Id.*). Barber cannot now claim that it was "manifest error" for the court to decline to address in its memorandum opinion testimony that he did not even rely

[1] Barber's counsel initially made the following assertion: "The Court makes no reference to ***any*** of Dr. Salekin's or Dr. Morton's testimony in its 108-page opinion." (Doc. # 26-1 at 12) (emphasis in original). As the state later pointed out (Doc. # 28 at 4-6), that statement by Barber's counsel is patently false. The court considered both Dr. Salekin's and Dr. Morton's testimony at various points in its memorandum opinion. (Doc. # 24 at 19, 52, 56).

upon to support the prejudice component of his penalty-phase *Strickland* claim.

As to Dr. Salekin, the primary import of her testimony was that she uncovered three categories of mitigation evidence that trial counsel's allegedly unreasonable mitigation investigation failed to uncover: (1) evidence of Barber's personal and family history of mental illness; (2) evidence that Barber had destructive role models during his childhood; and (3) evidence that Barber lacked parental discipline during his childhood. Indeed, these three categories of mitigation evidence stemming from Dr. Salekin's investigation were the primary sources of prejudice Barber identified in his habeas petition (Doc. # 1 at 110-19) and reply brief (Doc. # 23 at 70-74), and they are the primary aspects of Dr. Salekin's testimony that Barber relies on his Rule 59(e) motion (Doc. # 26-1 at 11-14).[2]

Because Barber's prejudice argument was (and is) framed primarily in terms of those three categories of new mitigation evidence, the court thoroughly considered each of those categories of mitigation evidence in its memorandum opinion denying habeas relief. (Doc. # 24 at 40-41, 51-53). Barber seems to complain that the court did not explicitly reference the fact that, in addition to the original source witnesses that Dr. Salekin's investigation uncovered, Dr. Salekin herself also testified regarding these three categories of mitigation evidence. But the fact that the court did not explicitly reference Dr. Salekin's testimony when weighing the three

[2] Indeed, Barber's Rule 59(e) motion references these three categories of mitigation evidence no less than three times. *See* (Doc. # 26-1 at 11) ("Dr. Salekin's investigation uncovered numerous mitigating circumstances that were available (and either not investigated or not presented) at the time of Mr. Barber's trial, including Mr. Barber's personal and familial history of depression and mental illness, the effects of negative role models on Mr. Barber's development, and the absence of adequate parenting during Mr. Barber's childhood."); (*Id.* at 12) (referencing (1) Barber's "personal and family history of substance abuse and mental illness"; (2) the "negative impact that Mr. Barber's family and community played in his life . . . at a very young age"; and (3) the fact that "Mr. Barber's parents lacked involvement and nurturance in his life; provided inconsistent or nonexistent discipline; failed to provide appropriate supervision; and neglected to discuss moral norms or consequences"); (*Id.* at 14) (referencing Barber's trial mitigation expert's failure to uncover "evidence of Mr. Barber's (1) personal or family history of mental illness, (2) poor role models, or (3) poor parenting").

categories of mitigation evidence she and other witnesses testified to, instead choosing to rely primarily on the original source witnesses upon which Dr. Salekin's own testimony was based, was not legal error, let alone "manifest error." And, in any event, even considering the portions of Dr. Salekin's testimony that are not cumulative of the testimony given by other fact witnesses, that testimony is not sufficient to render the state court's conclusion that Barber failed to show prejudice contrary to or an unreasonable application of clearly established Supreme Court precedent.

Barber also takes issue with the court's reliance on the Supreme Court's precedents concerning penalty-phase prejudice. (Doc. # 26-1 at 15). According to Barber, the fact that the Supreme Court has only ever found penalty-phase prejudice in cases where the habeas petitioner introduced far more graphic and compelling mitigation evidence than Barber has introduced in this case is "simply not a relevant factor in the prejudice analysis." (*Id.*). Instead, Barber claims this court was simply required to determine "whether there is a reasonable probability that if the jury had heard the totality of the mitigation evidence presented during the Rule 32 hearing, Mr. Barber would not have been sentenced to death." (*Id.*).

The arguments made by Barber's counsel suggest that they badly misunderstand the relevant legal standard Barber must satisfy to obtain habeas relief. (And, to be clear, that is the most charitable inference the court can draw in light of their arguments.) It is not enough for this court to conclude that, were it deciding the issue de novo, Barber's postconviction mitigation evidence (if presented at trial) would have created a reasonable probability of a different outcome. Instead, to grant § 2254 relief, this court must conclude that the state court so misapplied existing Supreme Court precedent regarding penalty-phase prejudice that no fairminded jurist could agree with the state court's conclusion that Barber failed to establish

prejudice. For the reasons explained in its memorandum opinion (Doc. # 24 at 53-57), the court cannot so hold, and habeas relief is therefore precluded.

2. The Court's Reliance on *McCoy v. Louisiana*, 138 S. Ct. 1500 (2018)

Barber has two objections to the court's reliance on *McCoy v. Louisiana* in rejecting his guilt-phase *Strickland* claim. (Doc. # 24 at 31-34). One is factual, and one is legal, but both are wrong.

Barber first attempts to factually distinguish his case from *McCoy*. In *McCoy*, Barber contends, the defendant "insisted on pursuing an innocence defense even after trial counsel informed him that his only viable strategy was to admit the killings and to concentrate on attempting to avoid a sentence of death." (Doc. # 31 at 12). But in his case, Barber asserts, trial counsel had no such discussion with him. (*Id.*).

This supposed factual distinction is specious. Indeed, it is belied by the record evidence the court referenced in its memorandum opinion (and which Barber's counsel does not contest or even mention in their briefing on Barber's Rule 59(e) motion). That record evidence shows that Barber's trial counsel repeatedly asked Barber to consider alternative defenses besides telling the jury "you're not guilty," but that Barber "flatly refused to even discuss that with [trial counsel]." (Doc. # 24 at 33); *see also* (*id.* at 26-30, 33 & n.4) (referencing extensive testimony showing that Barber's trial counsel repeatedly discussed alternative defenses to innocence with Barber, but that Barber steadfastly refused to permit counsel to present anything besides an absolute innocence defense at trial).

Barber next argues it was improper for the court to consider *McCoy* in denying habeas relief because *McCoy* had not been decided at the time the Alabama Court of Criminal Appeals rendered its decision rejecting Barber's claim. (Doc. # 31 at 13). Barber's argument appears to

rest on two premises. First, because *McCoy* had not been decided at the time of Barber's trial, the Sixth Amendment did not at that time require Barber's counsel to honor his request not to admit to killing Epps. And second, more than simply *permitting* counsel to disregard Barber's express instructions not to admit guilt, the Sixth Amendment (as interpreted in *Strickland*) actually *required* Barber's counsel to ignore his sustained insistence that counsel pursue an innocence defense at trial and instead admit that Barber killed Epps in an attempt to save his life. Both premises of Barber's argument are flawed.

First, as one of our Circuit Judges has recently explained, it is not strictly speaking true that the Sixth Amendment did not require Barber's counsel to refrain from admitting his guilt at his 2003 trial. *See Lester v. United States*, No. 18-10523, 2019 WL 1896580, at *6-8 (11th Cir. Apr. 29, 2019) (statement of William Pryor, J., respecting the denial of rehearing en banc). It is of course true that *McCoy*, the judicial decision which held that the Sixth Amendment requires capital defense lawyers to refrain from admitting their client's guilt if the client so insists, had not been decided in 2003. But, as Judge William Pryor recently reminded us, there is a critical difference "between a change in judicial *doctrine* and a change in *law*." *Id.* at *6 (emphasis added). Without distinguishing "between judges' understanding of the law and the law itself," the Supreme Court could not "meaningfully describe a past decision of its own as 'wrong the day it was decided.'" *Id.* (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 863 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.)). And because the Supreme Court lacks the power to amend the Constitution (a written instrument which "means now" "that which it meant when adopted"), *McCoy* (which interpreted the Sixth Amendment) can only mean that the Sixth Amendment has *always* forbidden capital defense counsel to admit their client's guilt over the client's express objection. *Id.* (internal quotation marks omitted).

The Sixth Amendment's meaning has not changed between the time of Barber's trial in 2003 and the time *McCoy* was handed down in 2018. Thus, if it is true that the Sixth Amendment requires capital defense lawyers to refrain from admitting their client's guilt if the client so insists (and *McCoy* held that to be true), then it would have violated the Sixth Amendment in 2003 for Barber's counsel to admit (over his express objection) that Barber killed Epps, no less than it would today. And if it would have violated the Sixth Amendment for trial counsel to admit Barber's guilt in 2003, then it cannot also be the case (as Barber now argues) that the Sixth Amendment *required* Barber's counsel to admit his guilt in 2003 over Barber's express objection. Simply put, Barber's counsel cannot have been constitutionally ineffective for adhering to the Constitution.

Second, even if one does not accept the sensible distinction between judicial interpretations of the law and the law itself, it does not follow that *McCoy* is of no value in assessing both the reasonableness of counsel's conduct at Barber's trial in 2003 and the reasonableness of the state court's decision holding that counsel's conduct was reasonable—which are the decisive questions in a *Strickland* inquiry governed by § 2254(d). *See Harrington*, 562 U.S. at 105. Assume for a moment a legal world where it were somehow true that, pre-*McCoy*, the Sixth Amendment permitted capital defense lawyers to admit their client's guilt over the client's objection. Even if the pre-*McCoy* Sixth Amendment *permitted* this conduct by defense lawyers, it still seems unlikely the Amendment would have *required* the very conduct it now forbids. At the very least, there is a reasonable argument that the pre-*McCoy* Sixth Amendment (as interpreted in *Strickland*) "did not require Barber's counsel to do [in 2003] what *McCoy* now forbids." (Doc. # 24 at 34). And that is all that is required under § 2254 to sustain the state court's ruling that Barber failed to establish his counsel's deficient performance at the

guilt-phase of his trial. *See Harrington*, 562 U.S. at 105 ("When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.").

3. The Court's Failure to Issue a Certificate of Appealability

Finally, Barber contends the court completely disregarded controlling law by failing to issue a certificate of appealability for three of his claims: (1) his penalty-phase *Strickland* claim, (2) his guilt-phase *Strickland* claim, and (3) his *Ring v. Arizona* claim. (Doc. # 26-1 at 27-32). But far from completely disregarding controlling law, the court rested its decision to deny Barber a certificate of appealability on the very legal same legal principles that Barber identifies in his Rule 59(e) motion. (*Compare* Doc. # 25 at 1, *with* Doc. # 26-1 at 27-28). As the court previously explained (Doc. # 25 at 1), a certificate of appealability may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003). Neither of those standards is satisfied here. Therefore, the court correctly declined to issue a certificate of appealability.

IV. Conclusion

The Supreme Court has recently reiterated that "[b]oth the State and the victims of crime have an important interest in the timely enforcement of a sentence." *Bucklew v. Precythe*, 139 S. Ct. 1112, 1133 (2019) (internal quotation marks omitted). Barber has successfully avoided execution of his lawfully imposed sentence for some fifteen years. Rule 59(e) motions that largely attempt to relitigate issues already resolved in a thorough judicial opinion, or that make

specious claims of "manifest error" where none exists, merely "interpose unjustified delay" and frustrate courts' attempts to resolve collateral attacks on lawfully issued sentences "fairly and expeditiously." *Id.* at 1134. Barber's Rule 59(e) motion is meritless and is due to be denied. An order consistent with this memorandum opinion will be entered.

DONE and **ORDERED** this May 3, 2019.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE