Exhibit 1

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11534

D.C. Docket No. 6:17-cv-00789-LSC

JAMIE MILLS,

Petitioner-Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellee.

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

ORDER:

Jamie Mills, an Alabama inmate sentenced to death, applies for a certificate of appealability to appeal the denial of his petition for a writ of habeas corpus. 28 U.S.C. §§ 2253, 2254. Because he has failed to make a substantial showing of the denial of a constitutional right, Mills's application for a certificate of appealability is **DENIED**.

I. BACKGROUND

Quoting the trial court, the Alabama Court of Criminal Appeals described the facts leading to the trial of Jamie Mills. *See Mills v. State*, 62 So. 3d 553, 557–61 (Ala. Crim. App. 2008). On June 24, 2004, Mills and his common-law wife, JoAnn, went to the home of Floyd and Vera Hill in Marion County, Alabama. *Id.* at 557. Mills intended to rob the Hills. *Id.* He attacked them with a machete, a tire tool, and a ball-peen hammer while JoAnn stood nearby. *Id.* at 557, 560. Mills and JoAnn absconded with several items that belonged to the Hills, including a padlocked tackle box, Floyd's wallet, and Vera's purse. *Id.* at 559–61.

Later that night, a police officer stopped by the Hills' home at the request of their granddaughter. *Id.* at 557. The officer found Floyd dead and Vera lying in a pool of blood, with several long gashes along her head. *Id.* at 557–58. A neighbor told investigators that, earlier that day, she had seen a white sedan circling the area and parking in the Hills' driveway. *Id.* at 558. Because Mills drove a car that matched the neighbor's description, police went to his home. *Id.*

The police were unable to find Mills that night. *Id.* He and JoAnn had returned home after the attack against the Hills, but they left later to play dominos. *Id.* at 560–61. During their brief return home after the attack, they went through the items they took from the Hills. *Id.* at 560. These items included about $140 in cash.

Id. Mills also called Benji Howe, a drug addict, who then came to the Mills' home to purchase pain pills. *Id.*

The next morning, Mills and JoAnn placed the weapons, several of the items they had taken from the Hills, and the blood-stained clothes they had worn that day in a duffel bag, along with a cement block. *Id.* at 561. They put the bag and the tackle box in the trunk of their car. *Id.* at 561. As they attempted to drive away, the police stopped them. *Id.*

After the police detained Mills for questioning, JoAnn gave an investigator permission to search their home and car. *Id.* at 559. The police found the tackle box, which contained Vera's prescription medications, and the duffle bag, stained with blood, in the trunk of the car. *Id.* DNA testing later confirmed that the blood on the weapons and the clothes in the bag belonged to Floyd and Vera Hill. *Id.*

An autopsy later determined that Floyd died due to "blunt and sharp force injury to the head and neck." *Id.* at 558 (internal quotation marks omitted). Although Vera initially survived Mills's attack, she suffered brain injuries and fractures to her skull, neck, and hands. *Id.* She died a few months later due to complications arising from blunt head trauma. *Id.*

A grand jury indicted Mills on three capital charges: two counts of robbery-murder, Ala. Code § 13A-5-40(a)(2), and one count of murder wherein multiple people are murdered by one act or during one scheme or course of conduct, *id.*

§ 13A-5-40(a)(10). Mills pleaded not guilty. At trial, the jury convicted him on all counts and recommended that he be sentenced to death. *Mills*, 62 So. 3d at 556. The trial court adopted that recommendation. *Id.*

Mills appealed. The Alabama Court of Criminal Appeals rejected his arguments, but it remanded for the trial court to correct an error in its sentencing order. *Id.* at 571–72. After the trial court did so, Mills again appealed. The Alabama Court of Criminal Appeals again rejected his arguments. *Id.* at 573–74. Mills petitioned the Supreme Court of Alabama for a writ of certiorari. The Supreme Court of Alabama granted the writ as to four issues that it reviewed for plain error. *Ex parte Mills*, 62 So. 3d 574, 581 (Ala. 2010). It concluded that no plain error occurred, so it affirmed Mills's convictions and sentence. *Id.* at 590, 594, 599, 601. Mills then petitioned the Supreme Court of the United States, which denied him a writ of certiorari. *Mills v. Alabama*, 567 U.S. 951, 951 (2012).

Mills later filed a petition for post-conviction relief in state court. *See* Ala. R. Crim. P. 32. The trial court dismissed his petition, and the Alabama Court of Criminal Appeals affirmed its judgment. The Supreme Court of Alabama denied Mills's petition for a writ of certiorari.

Mills then filed his federal petition for a writ of habeas corpus. *See* 28 U.S.C. § 2254. The district court denied his petition and denied him a certificate of appealability. Mills now moves this Court for a certificate of appealability.

II. STANDARD FOR GRANTING A CERTIFICATE OF APPEALABILITY

This Court may issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). "A petitioner satisfies this standard by demonstrating that reasonable jurists could debate whether (or, for that matter, agree that) the petition should have been resolved in a different manner or that the issues presented were adequate to deserve encouragement to proceed further." *Lott v. Att'y Gen., State of Fla.*, 594 F.3d 1296, 1301 (11th Cir. 2010) (internal quotation marks omitted). "Where, as here, the Antiterrorism and Effective Death Penalty Act . . . applies, we look to the [d]istrict [c]ourt's application of [the Act] to petitioner's constitutional claims and ask whether that resolution was debatable among jurists of reason." *Id.* (alteration adopted) (internal quotation marks omitted).

III. DISCUSSION

Mills seeks a certificate of appealability on three grounds. First, he argues that the prosecution violated the Confrontation Clause at trial and that his counsel was constitutionally ineffective for failing to object to this violation. Second, he argues that the trial judge violated the Constitution, *see Beck v. Alabama*, 447 U.S. 625 (1980), by deferring to Mills's own decision and declining to instruct the jury on lesser-included offenses, that the trial judge violated his Sixth Amendment right to counsel by directing Mills to decide for himself whether he wanted an

instruction on lesser-included offenses, and that his counsel was constitutionally ineffective for failing to adequately litigate the issue of lesser-included instructions. Third, he argues that his counsel was constitutionally ineffective at the penalty phase of his trial. I consider and reject each ground in turn.

A. Mills's Confrontation Clause Claims Do Not Merit a Certificate of Appealability.

Mills presents two claims based on the Confrontation Clause. U.S. Const. amend. VI. First, he argues that the prosecution violated his rights under *Crawford v. Washington*, 541 U.S. 36 (2004), by introducing testimony about a DNA sample in a database without giving Mills the opportunity to cross-examine the analyst who collected and analyzed the sample. Second, he argues that his counsel was constitutionally ineffective by failing to make that objection to this testimony. Neither claim presents a debatable issue.

1. Substantive Confrontation Clause Claim

Mills argues that the prosecution violated the Confrontation Clause by questioning a witness about Benji Howe. Mills's DNA did not match any of the DNA evidence in the case, and his theory at trial was that Howe was the real culprit. In response, the prosecution elicited testimony about how the DNA evidence did not match Howe's DNA either. A State forensic analyst testified that Howe's DNA was in a database that tracked Alabama felons, and there were no matches when the State cross-checked the DNA evidence against the database.

Mills argues that, because the State's forensic witnesses did not personally collect or analyze Howe's DNA, and the State did not establish that the analyst who did do so was unavailable, the testimony violated his Confrontation Clause rights in the light of *Crawford.*

Reasonable jurists would not debate the conclusion of the district court that this issue was procedurally defaulted. A claim is procedurally barred if the prisoner failed to exhaust his remedies in state court, *see* 28 U.S.C. § 2254(b)–(c), and those remedies are now unavailable. *McNair v. Campbell*, 416 F.3d 1291, 1305 (11th Cir. 2005). A prisoner fails to exhaust his remedies if he submits his claim only to the State's highest court on discretionary review—that is, review where the "[c]ourt's decision to grant certiorari is discretionary"—and that court denied review. *Mauk v. Lanier*, 484 F.3d 1352, 1357–58 (11th Cir. 2007). Mills raised a substantive Confrontation Clause claim only in his petition for a writ of certiorari to the Supreme Court of Alabama, which denied him a writ as to that claim. Because Mills failed to exhaust his remedies and those remedies are no longer available, *see* Ala. R. Crim. P. 32.2(a), it is not debatable that this claim is now procedurally barred.

2. Ineffective Assistance of Counsel Claim

Mills also argues that his trial counsel provided ineffective assistance of counsel by failing to raise the Confrontation Clause issue. An ineffective-

assistance claim involves two elements: counsel's performance must have been deficient, and that deficiency must have prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The Alabama Court of Criminal Appeals rejected Mills's claim on direct appeal because it concluded that he could not satisfy the deficiency element, and the district court rejected his claim on habeas review based on the prejudice element.

Federal review of a state prisoner's ineffective-assistance claim is extremely deferential. If a claim has been adjudicated by a state court on the merits, as Mills's claim was, we may not grant habeas relief unless the state adjudication "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 "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). Because *Strickland* establishes a "highly deferential" approach to ineffective-assistance claims, our review is "doubly" deferential when section 2254(d) and *Strickland* "apply in tandem." *Harrington v. Richter*, 562 U.S. 86, 105 (2011) (internal quotation marks omitted). In that circumstance, "[t]he question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.*

Although Mills contends that the Alabama Court of Criminal Appeals made two unreasonable determinations of fact, a determination of fact can be unreasonable only if "no fairminded jurist could agree" with it. *Holsey v. Warden, Ga. Diagnostic Prison*, 694 F.3d 1230, 1257 (11th Cir. 2012) (internal quotation marks omitted). And fairminded jurists could agree with the findings by the Court of Criminal Appeals.

Mills argues that it was unreasonable for the Court of Criminal Appeals to suggest that Robert Bass, a state forensic analyst and investigator who testified on behalf of the State, was involved in the collection or analysis of Benji Howe's DNA. But the Court of Criminal Appeals made no such suggestion; in context, it stated only that Bass "conducted the testing of the DNA samples" collected from items found in Mills's car.

Mills also argues that it was unreasonable for the Court of Criminal Appeals to find that Bass entered the DNA profiles created from the evidence found in Mills's car into the State's DNA database, but fairminded jurists could read the trial transcript to support the finding. For example, Mills's counsel repeatedly used the word "you" when questioning Bass about searching the database, and Bass did not challenge that premise.

The Court of Criminal Appeals also did not rule contrary to clearly established law because "the Supreme Court has never held that the Confrontation

Clause requires an opportunity to cross examine each lab analyst involved in the process of generating a DNA profile and comparing it with another." *Washington v. Griffin*, 876 F.3d 395, 407 (2d Cir. 2017). And a decision is unreasonable "if, and only if, it is so obvious [how] a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question." *Nance v. Warden*, *Ga. Diagnostic Prison*, 922 F.3d 1298, 1304 (11th Cir. 2019) (internal quotation marks omitted). The application of the Confrontation Clause to DNA evidence is contested. *Compare Williams v. Illinois*, 567 U.S. 50, 58 (2012) (plurality opinion) (concluding that the Confrontation Clause does not require "calling the technicians who participated in the preparation of [a DNA] profile"), *with id.* at 110–11 (Thomas, J., concurring in the judgment) (concluding that the Confrontation Clause applies if the DNA evidence in question bears "indicia of solemnity" (internal quotation marks omitted)); *see also id.* at 141 (Kagan, J., dissenting) (noting that *Williams* creates "significant confusion" about the scope of the Confrontation Clause). In the light of this uncertainty, not to mention the absence of information in the record about the nature of the DNA database, there can be no unreasonable application of clearly established law.

Mills's contention that the Alabama Court of Criminal Appeals unreasonably applied *Crawford* by concluding that "counsel was not ineffective for failing to object . . . because there was no reason to question the reliability of the

[DNA] testing" fails because that conclusion was unrelated to his Confrontation Clause claim. Mills raised, and the Court of Criminal Appeals rejected, two ineffective-assistance issues relating to the DNA evidence: the Confrontation Clause issue and a separate assertion that trial counsel was deficient for "fail[ing] to object to the State's failure to make any showing that its DNA evidence was based on a reliable theory and techniques." The Court of Criminal Appeals discussed the absence of evidence suggesting reliability in response to the latter argument only, so its discussion has no bearing on the Confrontation Clause issue.

Reasonable jurists also would not dispute that Mills cannot establish prejudice. There is not "a reasonable probability [that] there would have been a different verdict but for his counsel's unprofessional errors." *Smith v. Sec'y, Dep't of Corr.*, 572 F.3d 1327, 1349 (11th Cir. 2009). As the district court explained, the evidence against Mills was "overwhelming." And the testimony about Howe's DNA did not "eliminate" Howe as a suspect. Mills's DNA did not match the DNA evidence either, and Bass testified that "it is not uncommon for some people's DNA not to transfer" when they touch objects. So even if the testimony were improper, fairminded jurists could conclude that it is not important enough "to undermine our confidence in the verdict." *Id.*

B. Mills's Claims About Instructing the Jury on Lesser-Included Offenses Do Not Merit a Certificate of Appealability.

During a recess, the trial judge, prosecutor, and Mills's counsel discussed whether the trial judge should instruct the jury as to any lesser-included offenses of capital murder. Mills's counsel proposed an instruction on felony murder but admitted to being unsure if the trial judge should give it. The prosecutor proposed an instruction on robbery and assault—on the theory that Vera, who died a few months after Mills attacked her, did not die because of the attack—and Mills's counsel agreed that they "probably should ask [the trial judge] to give that one." The trial judge stated that the proposed felony-murder instruction, which was based on a theory of voluntary intoxication, would contradict Mills's testimony that he did not use drugs. So the trial judge decided that Mills should decide for himself whether he wanted that instruction. After consulting with his lawyers, and against their advice, Mills stated that he did not want the trial judge to give any instructions on lesser-included offenses. The trial judge complied.

Mills presents three claims based on this series of events. First, he argues that the trial judge violated the Constitution, *see Beck v. Alabama*, 447 U.S. 625, by failing to instruct the jury about lesser-included offenses. Second, he argues that the trial judge deprived him of his right to counsel by having him decide whether he wanted instructions on lesser-included offenses. Third, he argues that his trial

counsel was constitutionally ineffective for failing to adequately assert his right to instructions on lesser-included offenses.

1. *Beck* Claim

Mills first raises a claim based on *Beck v. Alabama*. The Supreme Court of Alabama rejected this claim on plain-error review, *see Ex parte Mills*, 62 So. 3d at 581–90, and the district court concluded that that rejection was not unreasonable under section 2254(d).

In *Beck*, the Supreme Court held unconstitutional an Alabama law that "specifically prohibited [trial judges] from giving the jury the option of convicting the defendant of a lesser included offense" in a capital-murder case. 447 U.S. at 627–28 & n.3. The Court explained that the all-or-nothing choice for Alabama juries—convict the defendant and impose the death penalty or find him not guilty and set him free—unconstitutionally "enhance[d] the risk of an unwarranted conviction" and death sentence. *Id.* at 628–29, 637–38.

Mills's argument depends on his theory that *Beck* stands for a much broader principle than its facts suggest. In his view, *Beck* stands for the proposition that "where the evidence supports the applicability of an instruction on a lesser-included charge, the trial court may not refuse to give that instruction based on the interjection of irrelevant considerations." But if fairminded jurists could conclude

that he is wrong, and that a defendant may waive his right to instructions on lesser-included offenses, then his claim fails.

Reasonable jurists would not dispute that Mills's reading is not compelled by clearly established law. The Supreme Court has made clear that a defendant can waive instructions on lesser-included offenses. *See Spaziano v. Florida*, 468 U.S. 447 (1984), *overruled in part on other grounds by Hurst v. Florida*, 577 U.S. 92, 102 (2016). In *Spaziano*, the Supreme Court concluded that a trial court did not violate *Beck* when it conditioned the availability of lesser-included offense instructions on the defendant's waiver of the statute of limitations on those lesser-included offenses. *Id.* at 455. In approving of this practice, the Supreme Court explained that a defendant could waive instructions on lesser-included offenses:

> Although the *Beck* rule rests on the premise that a lesser included offense instruction in a capital case is of benefit to the defendant, there may well be cases in which the defendant will be confident enough that the State has not proved capital murder that he will want to take his chances with the jury. If so, we see little reason to require him . . . to give the State what he perceives as an advantage—an opportunity to convict him of a lesser offense if it fails to persuade the jury that he is guilty of capital murder. In this case, petitioner was given a choice whether to waive the statute of limitations on the lesser offenses included in capital murder [to receive a lesser-offense jury instruction]. He knowingly chose not to do so. Under those circumstances, it was not error for the trial judge to refuse to instruct the jury on lesser included offenses.

Id. at 456–57 (footnote omitted). In the light of *Spaziano*, it is not debatable that the decision of the trial judge to have Mills decide whether he wanted an

instruction on lesser-included offenses was neither contrary to nor an unreasonable application of *Beck*.

2. Right to Counsel Claim

Mills next argues that the trial court violated his right to counsel by having him decide whether he wanted an instruction on lesser-included offenses instead of having his counsel make the decision. He contends that "the constitutional right to counsel . . . requires that . . . the lawyer ha[ve] . . . full authority to manage the conduct of the trial," even at the exclusion of the defendant's wishes. The Supreme Court of Alabama rejected this claim on plain-error review, *Ex parte Mills*, 62 So. 3d at 585–90, and the district court agreed that its decision was not unreasonable under section 2254(d).

Reasonable jurists would not dispute that the Supreme Court of Alabama reasonably applied clearly established law. Indeed, the Supreme Court in *Spaziano* approvingly reviewed a colloquy in which the trial judge asked the defendant himself whether he was willing to waive the statute of limitations on lesser-included offenses in exchange for receiving an instruction on those offenses. *See* 468 U.S. at 456–57 & n.6. To be sure, as Mills points out, a trial court may not "prevent[] [counsel] from assisting the accused during a critical stage of the proceeding," *United States v. Cronic*, 466 U.S. 648, 659 n.25 (1984), and, to the extent a defendant may waive a right, that waiver must be intelligently made,

Johnson v. Zerbst, 304 U.S. 458, 464 (1938). But the trial judge provided Mills's counsel time to confer with him about the benefits and disadvantages of an instruction. And Mills confirmed to the trial judge that he had consulted with counsel "at length . . . about waiving . . . any charge of any lesser-included offense" and that he was "satisfied" with the advice his lawyers had given him about "the advantages, disadvantages[,] and the ramifications associated with the Court not charging the jury as to any lesser-included offenses." No clearly established law suggests that a defendant is deprived of his right to counsel if, after consulting with counsel, he decides to disregard counsel's advice.

3. Ineffective Assistance of Counsel Claim

Mills also contends that his "[t]rial counsel's failure to adequately investigate and litigate the question of lesser-included-offense instructions" was constitutionally ineffective. Mills's counsel appears to have been ambivalent about the prudence of requesting these instructions. During a conference with the trial judge and prosecutor, counsel said that felony murder was the only lesser-included offense that "could . . . possibly fit," but "I don't know" whether it would be prudent to seek. When the prosecutor mentioned robbery and assault as another possibility, counsel agreed "I probably should ask you to give that one." And after the trial judge sought Mills's view, counsel urged him not to waive the instructions. But counsel agreed with Mills that the trial judge should not charge

the jury about the defense of voluntary intoxication, and averred that it had no objections after the trial judge gave his jury charge. The Alabama Court of Criminal Appeals rejected Mills's ineffective-assistance claim about this course of events, and the district court approved of that decision under section 2254(d). Mills now argues that the decision of the Court of Criminal Appeals was based on both an unreasonable determination of the facts and unreasonable applications of clearly established law.

As to the facts, no reasonable jurists would debate that it was reasonable to have found that Mills received "extensive counsel" before his decision to waive any instructions on lesser-included offenses. Mills confirmed to the trial judge during the waiver colloquy that he and his counsel had conferred "at length" about the "advantages, disadvantages[,] and the ramifications" of his choice. Reasonable jurists would not dispute that fairminded jurists could credit his contemporaneous statements and conclude that a "length[y]" discussion was "extensive."

As to the law, Mills cannot establish that the decision about deficient performance was contrary to or an unreasonable application of clearly established law. When we evaluate a *Strickland* claim in the light of section 2254(d), we ask whether any "competent counsel would have taken the action[s] that [the defendant's] counsel did take." *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008) (internal quotation marks omitted). We will deny a certificate of

appealability in that context so long as reasonable jurists would not debate that courts "can conceive of a reasonable motivation for counsel's actions." *Id.* at 1302. Reasonable jurists would not debate that competent counsel could have acted as Mills's counsel did with respect to the issue of lesser-included offenses.

Competent counsel could have expressed doubt about the prudence of instructing on lesser-included offenses or opted not to propose any instructions. For the jury to convict Mills on either lesser-included offense, it would have had to disbelieve Mills's testimony—both his assertion that he did not do drugs and his assertion that he had an alibi for the time of the murders. Counsel is not deficient for questioning or failing to raise instructions that would be inconsistent with the defense's theory of the case. *Hunt v. Comm'r, Ala. Dep't of Corr.*, 666 F.3d 708, 727 (11th Cir. 2012). Moreover, counsel's failure to press for instructions on lesser-included offenses is well-justified when the lesser offenses are implausible in the light of the record, as they are here. *See id.*; *Ex parte Mills*, 62 So. 3d at 577. To be sure, the transcript suggests that Mills's counsel might have overlooked the possibility of an instruction on robbery and assault. But "it matters not whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight." *Gordon*, 518 F.3d at 1301. It is enough that competent counsel could have had a strategic motivation for the same choices. *Id.* at 1302.

Competent counsel also could have chosen not to object to the involvement of Mills in this discussion. As mentioned, it is not clearly established that lesser-included offenses are an issue for lawyers alone. Counsel is not deficient for failing to raise a novel argument. *See United States v. Levy*, 391 F.3d 1327, 1334 n.3 (11th Cir. 2004) (Hull, J., concurring in the denial of rehearing en banc); *see also Engle v. Isaac*, 456 U.S. 107, 134 (1982) (noting that competent counsel need not "recognize and raise every conceivable constitutional claim").

And competent counsel could have acted as Mills's counsel did in advising him and then declining to object to the jury charge. Mills has not rebutted the finding of the Court of Criminal Appeals—and, indeed, his own admission at trial—that counsel advised him "at length." *See* 28 U.S.C. § 2254(e)(1). Moreover, competent counsel could forgo objecting to the omission of instructions on lesser-included offenses from the jury charge for the same reasons of inconsistency and implausibility that justify not proposing those instructions in the first place. *See Hunt*, 666 F.3d at 727.

C. Mills's Claims About Ineffective Assistance of Counsel at the Penalty Phase Do Not Merit a Certificate of Appealability.

Mills last argues that his counsel was constitutionally ineffective at the penalty phase of his trial. During that phase, counsel called two witnesses, Mills's sister and his father's girlfriend. Mills's sister testified about how Mills was a good brother and uncle. She also discussed how their parents had health problems

around the time of the murders, that their father was incarcerated on a drug charge, and that Mills had at one time been incarcerated for failure to pay child support. Mills's father's girlfriend offered background about Mills's father, including the clarification that he was incarcerated for possession of methamphetamine. Mills now contends that his counsel was ineffective for failing to conduct a proper mitigation investigation, which he argues would have produced more compelling evidence. He also contends that his counsel was ineffective for failing to object to errors in the jury charge and in the sentencing order.

1. Mitigation Evidence Claims

Mills raises a few claims based on his counsel's inadequacy at developing the evidence in mitigation. He alleges that "trial counsel did essentially nothing to either investigate or prepare for" the penalty phase of his trial. He argues that, with an adequate investigation, counsel would have uncovered and presented evidence about the effect of his parents' addiction to methamphetamine; his own abuse of and addiction to methamphetamine; his status as a good brother, son, co-worker, and friend; that he was a good worker with a strong work ethic; the presence of several extreme stressors at the time of his crimes; and that he functioned well while in pre-trial detention. He also contends that counsel should have prepared the witnesses who did testify, called experts to testify about Mills's problems with

substance abuse and mental health, and presented additional evidence to the sentencing judge.

Mills raised these claims during his state-habeas proceeding, and the Alabama Court of Criminal Appeals rejected them based on a failure to allege facts that could establish prejudice. We review these claims under section 2254(d) and ask whether reasonable jurists would debate "whether the state court's determination that [Mills] failed to plead sufficient facts . . . to support a claim of ineffective assistance of counsel was contrary to or an unreasonable application of Supreme Court precedent." *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010). "[W]e look only to the allegations in [Mills's state-habeas] petition and [ask] whether those allegations sufficiently state a claim for ineffective assistance." *Id.* In this posture, we must take Mills's factual allegations as true. *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1274 (11th Cir. 2016).

Reasonable jurists would not dispute that Mills's claims cannot satisfy the double deference of *Strickland* and section 2254(d). We will not grant a certificate of appealability so long as reasonable jurists would not dispute that there are "fairminded jurists [who] could agree with the state court's decision." *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1349 (11th Cir. 2019) (internal quotation marks omitted). And it is not debatable that there are at least "reasonable

argument[s]" that the absence of additional mitigation evidence was not prejudicial. *Harrington*, 562 U.S. at 105.

For one thing, the aggravating evidence is too strong. To evaluate the prejudice element of *Strickland*, we must compare "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—with "the evidence in aggravation." *Daniel*, 822 F.3d at 1274 (internal quotation marks omitted). At sentencing, the government presented evidence of several aggravating circumstances: "(1) the murders occurred during the course of a robbery, (2) the murders were committed by a person under sentence of imprisonment, (3) the murders were especially heinous, atrocious or cruel compared to other capital offenses, and (4) Mills intentionally caused the death of two or more persons." In a similar robbery-turned-double-homicide, we described these kinds of aggravating factors as "overwhelming" and "especially powerful." *Boyd v. Allen*, 592 F.3d 1274, 1295–96 (11th Cir. 2010) (internal quotation marks omitted).

Fairminded jurists could also discount the mitigation evidence that Mills argues a better investigation would have uncovered. Much of that evidence would have been cumulative of evidence already in the record. Mills's father's girlfriend testified about how his father was in prison for methamphetamine possession, and the jury heard extensive testimony at the guilt phase about Mills's abuse of

methamphetamine. His sister testified that Mills was a "very good" brother, a "good uncle to [her] children," and a father of "good kids." The trial judge stated in his sentencing order that Mills's former employer had described him as "no trouble" and a "hard worker." And his sister also testified about the stressors affecting Mills around the time of the murders. Even if additional preparation would have yielded "more details" or "different examples," the sentencing jury and the trial judge were already aware of most of the mitigating circumstances that Mills argues should have been introduced. *Robinson v. Moore*, 300 F.3d 1320, 1347 (11th Cir. 2002).

Moreover, fairminded jurists could conclude that at least two of the "mitigating" circumstances cut against Mills. Evidence of drug use "is often a two-edged sword that provides an independent basis for moral judgement by the jury," so additional evidence of Mills's drug use "could have hurt [him] as easily as it could have helped him." *Brooks v. Comm'r, Ala. Dep't of Corr.*, 719 F.3d 1292, 1304 (11th Cir. 2013) (internal quotation marks omitted). And more evidence about his family life could have called attention to its less savory aspects. Mills had been jailed during the year before the murders for failing to pay child support. By the time of the murders, he remained over $10,000 in arrears on those payments.

Finally, Mills fails to address another reason the Court of Criminal Appeals gave for rejecting his arguments about his counsel's failure to call expert witnesses

or introduce evidence about his good behavior in prison: he did not identify by name any witnesses who should have been called. In the light of this omission, Mills did not satisfy Alabama's pleading requirement that habeas petitions "contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." Ala. R. Crim. P. 32.6(b); *see Mashburn v. State*, 148 So. 3d 1094, 1153 (Ala. Crim. App. 2013). Reasonable jurists would not dispute that this ruling was not contrary to or unreasonable under clearly established federal law.

2. Jury Charge Claim

Mills next contends that his counsel was constitutionally ineffective for failing to object to a few aspects of the jury charge, but he has arguably abandoned this claim. Mills does not discuss the claim beyond a bare statement in his section about "deficient performance at the penalty phase." Mills says only that his trial counsel "failed to object to errors in the trial court's penalty-phase jury charge"—without even specifying what those errors were—with a citation to his discussion of the claim in his state-habeas petition. Our evaluation of motions for certificates of appealability is subject to ordinary rules of issue preservation. *Jones v. Sec'y, Dep't of Corr.*, 607 F.3d 1346, 1353–54 (11th Cir. 2010). And a litigant abandons a claim both when he "raises it in a perfunctory manner without supporting arguments and authority" and when he makes only "passing references . . . [that]

are ‘buried’ within [other] arguments.” *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681–82 (11th Cir. 2014).

In any event, it is not debatable that the Alabama Court of Criminal Appeals did not act contrary to or unreasonably apply clearly established law by rejecting this claim. None of the arguments that Mills made in his state-habeas petition is persuasive. Contrary to his assertion, the Supreme Court has never said that the trial judge must instruct the jury that it need not be unanimous in its determination of mitigating circumstances. *Lucas v. Warden, Ga. Diagnostic & Classification Prison*, 771 F.3d 785, 807 (11th Cir. 2014). The Supreme Court has held only that a jury charge is erroneous if there is a “substantial probability” that it would lead reasonable jurors to perceive a unanimity requirement, *Mills v. Maryland*, 486 U.S. 367, 384 (1988), and no clearly established law suggests that a “substantial possibility” exists here, *cf. Smith v. Spisak*, 558 U.S. 139, 147–49 (2010). Mills’s assertion that the trial court should have instructed the jury that it must find all aggravating circumstances unanimously misreads *Ex parte McNabb*, 887 So. 2d 998 (Ala. 2004), which requires no such thing, *see id.* at 1004–06. So counsel had no basis to object to these aspects of the jury charge. And it was reasonable for the Court of Criminal Appeals to conclude that the trial judge’s omission of an instruction on what the jury should do if it found the aggravating and mitigating circumstances to be equal in weight was not prejudicial. In the light of the

"overwhelming" evidence in aggravation, *Boyd*, 592 F.3d at 1295–96 (internal quotation marks omitted), it is highly doubtful that a clarifying instruction would have allowed Mills to avoid the death penalty.

3. Sentencing Order Claim

Mills last argues that his counsel should have objected to the sentencing order. Like the previous claim, this claim is arguably abandoned. Mills's discussion of the defects in the sentencing order is perfunctory and buried within his discussion of other defects in the penalty phase: he states that counsel "failed to object to errors in the trial court's written sentencing order," lists the three aspects of the order that he takes issue with, and cites to a fuller discussion in his state-habeas petition. But he again fails to include "supporting arguments and authority" in his motion itself. *Sapuppo*, 739 F.3d at 681.

In any event, reasonable jurists would not find this claim debatable. The Alabama Court of Criminal Appeals rejected Mills's arguments because he had pleaded the prejudice element of *Strickland* inadequately and because the arguments "distort[ed] and misrepresent[ed] the sentencing order." As to the prejudice issue, Mills did not plead prejudice in his state-habeas petition save for a conclusory assertion that "[h]ad trial counsel objected, there is a reasonable probability that Mr. Mills would not have been sentenced to death." And even if he had, fairminded jurists could undoubtedly conclude that the "overwhelming"

statutory aggravating circumstances outweigh any potential for prejudice. *Boyd*, 592 F.3d at 1295–96 (internal quotation marks omitted). As for the distortion issue, the Court of Criminal Appeals was correct that Mills's arguments stem from misunderstandings of the sentencing order. The district court ably explained how Mills misreads the order. For example, Mills attempts to reconstrue "passing comments" in the sentencing order into "non-statutory aggravating circumstances."

IV. CONCLUSION

Mills's application for a certificate of appealability is **DENIED**.

/s/ William H. Pryor Jr.
CHIEF JUDGE

Exhibit 2

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 21-11534-P

JAMIE MILLS,

Petitioner - Appellant,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent - Appellee.

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

Before: WILLIAM PRYOR, Chief Judge and LUCK, Circuit Judge.

BY THE COURT:

Appellant's motion for reconsideration of the August 12, 2021, order denying motion for certificate of appealability is **DENIED**.