[PUBLISH]

In the
United States Court of Appeals
for the Eleventh Circuit

No. 21-14519

JOSEPH CLIFTON SMITH,

Petitioner-Appellee,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1:05-cv-00474-CG-M

(Filed May 19, 2023)

Before WILSON, JORDAN, and ROSENBAUM, Circuit Judges.

PER CURIAM.

This appeal concerns whether the district court clearly erred in finding that Joseph Clifton Smith is intellectually disabled and, as a result, that his death sentence violates the Eighth Amendment. We hold that the district court did not clearly err. We therefore affirm the district court's judgment vacating Smith's sentence.

I.

A. *A jury found petitioner Joseph Clifton Smith guilty of capital murder.*

Durk Van Dam was brutally murdered on November 23, 1997. *Smith v. Campbell ("Smith III")*, 620 F. App'x 734, 736 (11th Cir. 2015). Police found Van Dam's body in an isolated area near his pick-up truck in Mobile County. *Id.* On the same day that police discovered Van Dam's body, they interviewed Petitioner Joseph Clifton Smith. *Id.*

Although Smith confessed to Van Dam's murder, he offered two conflicting versions of the crime. *Id.* At first, he said that he watched Van Dam's murder. *Id.* Then, he said that he participated, but that he didn't intend to kill Van Dam. *Id.*

A grand jury in Mobile County eventually indicted Smith for capital murder. *Id.* The case went to trial, and the jury found Smith guilty. *Id.* at 736–37.

B. *During the sentencing phase of Smith's trial, the parties presented evidence of Smith's intellectual abilities.*

During the sentencing phase, the parties presented evidence concerning aggravating and mitigating factors. One mitigating factor was whether Smith committed the crime while he "was under the influence of extreme mental or emotional disturbance." Ala. Code § 13A-5-51(2). Both sides presented evidence of Smith's childhood, family background, and intellectual

abilities to contest whether that mitigating factor applied to Smith.

Smith's mother and sister testified that his father was an abusive alcoholic. *Smith III*, 620 F. App'x at 738–39. Smith's father beat the children with belts and water hoses. *Id.* Smith's mother and father divorced when Smith was nine or ten years old. *Id.* at 738.

Soon after his parents divorced, Smith's mother remarried to a man named Hollis Luker. Like Smith's father, Luker beat the children and was drunk "just about every day." *Id.* at 739. Smith's neighbor testified that his mother would bring Smith and his siblings to the neighbor's home to escape Luker's beatings. *Id.*

In the meantime, Smith struggled in school. He had been described as a "slow learner" since he was in the first grade. Smith was eight years old when he reached third grade. At that point, he still needed help to function at a first-grade level, prompting his teacher to label him an underachiever and refer him for an "intellectual evaluation."

During that evaluation, Smith obtained a full-scale IQ score of 75. That score meant that Smith was "functioning in the Borderline range of measured intelligence." Smith's school then asked his mother for permission to do more testing.

At the beginning of Smith's fourth-grade year, which coincided with his parents' divorce, his mother

agreed to have the school perform additional testing. After undergoing more testing, Smith was placed in a learning-disability class.

After that placement, Smith developed an unpredictable temper and often fought with classmates. His behavior became so troublesome that his school placed him in an "emotionally conflicted classroom." These types of classrooms hosted special-education classes for students who could not adjust to a regular classroom, according to Dr. James Chudy, a clinical psychologist. Dr. Chudy met with Smith three times after Van Dam's murder, administered several tests, analyzed records from Smith's past, authored a report about his findings, and testified during Smith's sentencing phase. *Id.* at 738–39.

Smith's academic deficits persisted through junior high school. When he entered sixth grade, his school reevaluated his intellectual abilities. This time, he obtained a full-scale IQ score of 74, again placing him "in the Borderline range of measured intelligence." By grade seven, the school determined that Smith was eligible for the "Educable [Intellectually Disabled]" program. He went on to fail the seventh and eighth grades before dropping out of school for good. *Id.* at 740.

Smith spent much of the next fifteen years in prison. When he was nineteen, Smith went to prison for burglary and receiving stolen property. He was released from prison after six years. But he returned a year later when he violated the conditions of his parole.

There he remained until his release in November 1997, just two days before Van Dam's murder.

Dr. Chudy reevaluated Smith just after Van Dam's murder. When Dr. Chudy tested Smith's IQ, Smith obtained a full-scale score of 72. During the sentencing phase, Dr. Chudy testified that Smith's true IQ score could be as high as 75 or as low as 69 after accounting for the standard error of measurement inherent in IQ tests. "69 is considered clearly [intellectually disabled]," [1] he explained. Either way, Smith's raw score of 72 suggests that he functions at a lower level than 97% of the general population. Dr. Chudy also described Smith as "barely literate in reading."

The sentencing phase eventually came to an end, and the Alabama trial court found that the aggravating circumstances out-weighed the mitigating ones. The court thus sentenced Smith to death.

C. Smith petitioned for habeas relief and argued, among other things, that his sentence violates the Eighth and Fourteenth Amendments because he is intellectually disabled.

After exhausting his direct appeals, Smith sought habeas relief in state court. He argued, among other things, that his sentence violated the Eighth and

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[1] We alter quotations that use outdated language to describe intellectual disabilities. *E.g.*, *Brumfield v. Cain*, 576 U.S. 305, 308 n.1 (2015); *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1303 n.1 (11th Cir. 2015).

Fourteenth Amendments because he is intellectually disabled. *See Atkins v. Virginia*, 536 U.S. 304 (2002).

Consistent with the medical community's general consensus, Alabama law defines intellectual disability as including three criteria: (1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the onset of those qualities during the developmental period (i.e., before the age of 18). *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002).

Applying that definition, the Alabama Court of Criminal Appeals ultimately rejected Smith's *Atkins* claim, finding that he could not meet the intellectual-disability criteria based on the evidence adduced during his trial and sentencing phase. *See Smith v. State ("Smith I")*, 71 So. 3d 12, 19–21 (Ala. Crim. App. 2008) ("[T]he record in Smith's direct appeal supports the circuit court's conclusion that Smith does not meet the broadest definition of [intellectually disabled] adopted by the Alabama Supreme Court in *Ex parte Perkins*, 851 So. 2d 453 (Ala. 2002)."), *cert denied*, No. 1080589 (Ala. 2010) (mem.).

Smith then invoked 28 U.S.C. § 2254 and pressed his *Atkins* claim in federal court. The district court rejected Smith's *Atkins* claim without holding an evidentiary hearing, concluding that the Alabama Court of Criminal Appeals did not unreasonably apply federal law. *Smith v. Thomas ("Smith II")*, No. 05-0474-CG-M, 2013 WL 5446032, at *29 (S.D. Ala. 2013). In doing so, the district court relied on Smith's failure "to

prove that his intellectual functioning was or is significantly subaverage," *id.* at *29 n.1, which is the first prong for Alabama's intellectual-disability definition and requires an IQ of 70 or below. *Ex parte Perkins*, 851 So. 2d at 456. The district court therefore treated "an IQ of 70 as the ceiling for significantly subaverage intellectual functioning" and held that Smith's full-scale IQ scores of 75, 74, and 72 were "fatal to Smith's *Atkins* claim." *Smith II*, 2013 WL 5446032, at *28–29.

Smith then appealed, and we reversed. *Smith III*, 620 F. App'x at 749–52. We first explained that Alabama law does not employ "a strict IQ cut-off of 70" to define significantly subaverage intellectual functioning. *Id.* at 749. And that was key because Dr. Chudy's testimony during the sentencing phase "showed that Smith's IQ could be as low as 69 given a standard error of measurement of plus-or-minus three points." *Id.* at 749–50 (citation omitted). We also noted that "other trial evidence" suggested that Smith had "deficits in intellectual functioning," *id.* at 750. Based on that evidence and "the fact that Alabama does not employ a strict IQ cut-off score of 70," we held that the Alabama Court of Criminal Appeals "determination that Smith conclusively did not possess significantly subaverage intellectual functioning was an unreasonable determination of the facts." *Id.* (citation omitted).

We then turned to the Alabama Court of Criminal Appeals's finding "that Smith did not suffer from significant or substantial deficits in adaptive behavior."

Id. This, too, was an unreasonable determination of the facts, we said, because the record contained evidence "that would support a fact finding that Smith had significant limitations in at least" two areas of adaptive functioning: "(1) social/interpersonal skills and self-direction." *Id.* We therefore said that "the record affirmatively contradicts" the Alabama Criminal court of Appeals's finding that Smith did not suffer from significant defects in adaptive behavior. *Id.* at 750–51.

For those reasons, we remanded Smith's *Atkins* claim to the district court. *Id.* at 751. We instructed the district court "to allow Smith . . . to present an expert witness on his behalf." *Id.* at 750–51. And we also instructed the district court to consider "Smith's requests for discovery and an evidentiary hearing." *Id.* at 752.

D. The district court held an evidentiary hearing to determine whether Smith is intellectually disabled.

On remand, the district court held an evidentiary hearing to assess whether Smith is intellectually disabled. The district court heard lay and expert testimony and received reports from experts who evaluated Smith and analyzed his records.

i. Evidence of Smith's Intellectual Functioning

Smith's first witness was Dr. Daniel Reschly, a certified school psychologist with fifty years of experience

in assessing intellectual disability. Since 1998, Dr. Reschly has taught at (and sometimes chaired) the top-ranked Department of Special Education at Peabody College of Education and Human Development. His teaching and research focus on identifying and treating "persons with mild intellectual disability."

Dr. Reschly testified that people with mild intellectual disability exhibit "borderline and overall low intellectual performance." "It's important" to treat a person's IQ score as indicating a range of scores, he said, because the medical community can only approximate a person's true IQ. This concept reflects the standard error of measurement inherent in IQ tests. So "a range of about 65 to 75" is the "level for someone's performance on an IQ test consistent with mild intellectual disability," Dr. Reschly explained.

Smith also called Dr. John Fabian, who holds a doctorate in clinical psychology and works as a forensic psychologist. When Dr. Fabian assessed Smith's IQ, Smith obtained a full-scale IQ score of 78. Although Dr. Fabian conceded that "a 78 is definitively above" the "70 to 75 IQ range," he testified that Smith's 78 does not eliminate the possibility that Smith is intellectually disabled. To support that answer, he cited Smith's other IQ scores, all of which were lower than 75. Those scores, he said, "trump an overall score on one administration."

For its part, the state called Dr. Glen King, a clinical and forensic psychologist who also practices law. When Dr. King assessed Smith's IQ, Smith

obtained a full-scale IQ score of 74. As a result, Smith has taken five IQ tests during his lifetime. And he has obtained full-scale IQ scores of 75, 74, 72, 78, and 74. Dr. King therefore testified that Smith displayed "a very consistent pattern of intellectual quotient scores" on all five tests. In other words, he testified that the standard error of measurement deserves less weight here because Smith's scores all "fall in the borderline range of intellectual functioning." "I think that the scores speak for themselves," and "they are what they are," he said.

ii. Evidence of Smith's Adaptive Behavior

While intellectual functioning aims "to assess the individual's best level of functioning," Dr. Reschly testified that adaptive behavior looks at the person's "typical performance" and asks, "[W]hat do they do on a day-to-day basis?" A person has significant adaptive behavior limitations if he has "significant deficits in one of [three] areas: conceptual, social, and practical." The conceptual domain includes literacy skills, language, and financial literacy. "The social domain of adaptive behavior refers to various social competencies" that a person "use[s] on an everyday basis." "The practical domain includes a wide diverse set of behaviors that" involve "simple self-care" including "eating, toileting, [and] dressing oneself." A person who shows "significant deficits in one of those areas" meets the medical community's standard for having significant deficits in adaptive behavior.

Dr. King testified that the ABAS-3 test is the "only" test that is "appropriate" for assessing a person's adaptive functioning. The test requires the subject to read a series of statements describing a behavior and rate, on a scale of one to three, how often they perform that behavior without a reminder and without help.

Dr. King administered the ABAS-3 test when he met with Smith before the evidentiary hearing. At the evidentiary hearing, Dr. King testified that in his "experience with capital litigation cases," Smith "generated the highest scores" on the ABAS-3 that Dr. King has seen.

For his part, Dr. Fabian used a different test—called the Independent Living Scales test—to assess Smith's adaptive behavior. The results suggested to Dr. Fabian that Smith had "deficits in every area."

Dr. King sought to undermine those results by testifying that the Independent Living Scales test "is not a recommended device for assessing adaptive behavior." But in other cases where he provided expert testimony, Dr. King testified that the Independent Living Scales test "measures adaptive functioning in a number of different domains," *Tarver v. State*, 940 So. 2d 312, 324 (Ala. Ct. Crim. App. 2004) (Cobb, J., concurring in part and dissenting in part).

Dr. Reschly discussed Smith's "failure to acquire literacy skills at an age-appropriate level, which relates to the conceptual demand of adaptive behavior." Dr. Fabian agreed. Smith's school records show signs

"consistent with significant limitations in at least [the] conceptual domain," he said.

Dr. Reschly and Dr. Fabian also testified that Smith exhibited deficits in the social domain of adaptive behavior. Relying on Smith's school records, Dr. Reschly testified that Smith was poor at following rules, obeying instructions, and forming relations with his peers. Dr. Fabian agreed.

Dr. Fabian assessed Smith's communication skills using the Expressive One-Word Picture Vocabulary and the Receptive One-Word Picture Vocabulary tests. The Expressive test assessed Smith's ability to express through language; the Receptive test assessed his receptiveness to language. Both tests relate "to functional academics or conceptual areas of adaptive functioning and even academic achievement," said Dr. Fabian. Smith scored in the first percentile on the expressive test and in the third percentile on the receptive test. The age equivalents for those scores are thirteen and fifteen, respectively. Those scores, according to Dr. Fabian, "are consistent with someone who is intellectually disabled."

iii. Evidence of Smith's Developmental Period

As Dr. Reschly explained, the medical community defines intellectual disability to include not only deficits in intellectual and adaptive functioning, but also the onset of those qualities during the developmental period. Dr. Reschly said that Smith satisfies this prong of the intellectual-disability definition because Smith

was placed in an "Educable [Intellectually Disabled]" program while he was in school, the criteria for which is "largely parallel to the criteria used to identify mild intellectual disability today." Dr. Reschly also testified that Smith's school records reflect that Smith exhibited symptoms "consistent" with someone who has "adaptive behavioral deficits and the intellectual functioning deficits."

Dr. Fabian also concluded that Smith exhibited behavior "consistent with mild intellectual disability" during the developmental period. Dr. Fabian reached that conclusion after reviewing Smith's school records and Dr. Chudy's report.

E. After the evidentiary hearing, the district court found that Smith is intellectually disabled and therefore granted his habeas petition.

After the evidentiary hearing, the district court issued an order and found that Smith is intellectually disabled. *Smith v. Dunn ("Smith IV")*, No. 05-00474-CG, 2021 WL 3666808, at *1 (S.D. Ala. Aug. 17, 2021). Under Alabama law, the court explained, Smith had the burden of establishing (1) that he has significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) that he has significant or substantial deficits in adaptive behavior; and (3) that those qualities manifested during the developmental period (i.e., before he turned 18). *Id.* at *2 (citation omitted).

Starting with the first prong, the district court explained that when an offender's IQ score is close to, but higher than, 70, he "must be allowed to present additional evidence of intellectual disability, including testimony of adaptive deficits." *Id.* (quoting *Smith v. Comm'r, Ala. Dep't of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019)). The court then noted that Smith had "scores as low as 72, which according to testimony could mean his IQ is actually as low as 69 if you take into account the standard error of measurement." *Id.* At the same time, the court recognized that "all of Smith's IQ scores" are higher than 70. *Id.* at *3. The court then acknowledged Dr. King's testimony that the consistency with which Smith scored above 70 makes it more likely that his true IQ is higher than 70. *Id.* But the court did not find Dr. King's testimony "strong enough" to throw out the lowest score "as an outlier" or to disregard the standard error of measurement. *Id.* The court therefore determined that it needed to consider additional evidence, including testimony about Smith's adaptive deficits. *Id.*

Then the court turned to Smith's adaptive behavior. *Id.* at *4. Invoking our decision in *Smith III*, the court explained that evidence from Smith's sentencing phase "support[ed] a fact finding that Smith had significant limitations in at least two" areas of adaptive behavior: "(1) social/interpersonal skills and (2) self-direction." *Id.* at *5 (quoting *Smith III*, 620 F. App'x at 750). Besides evidence, the court noted that evidence from the evidentiary hearing, like the results from Dr. Fabian's Independent Living Scales Test, "indicated

that Smith had deficits in most areas" of adaptive functioning. *Id.* at *10.

The court acknowledged Dr. King's criticism of the Independent Living Scales test. *Id.* But the court "question[ed] the veracity of Dr. King's criticism" because he used the Independent Living Scales test in another case and testified that the test "measures adaptive functioning in a number of different domains." *Id.* (quoting *Tarver*, 940 So. 2d at 324.)

In the end, the court explained that "whether Smith has significant or substantial deficits in adaptive behavior largely comes down to which expert is believed." *Id.* at *11. The court then found that "Smith has significant deficits in social/interpersonal skills, self-direction, independent home living, and functional academics." *Id.* at *11. For that reason, the court found that "Smith has shown by a preponderance of the evidence that he has significantly subaverage intellectual functioning and significant deficits in adaptive behavior." *Id.*

The question thus became whether Smith's deficits in intellectual and adaptive functioning manifested during the developmental period. The court noted that Smith "enrolled in [Educable Intellectually Disabled] classes in the 7th and 8th grades" and that, according to Dr. Reschly, the criteria for such classes "was largely parallel to the criteria used to identify mild intellectual disability today." *Id.* at *11–12 (internal quotations omitted). The court also cited testimony from Dr. Fabian, who similarly concluded that Smith

exhibited behavior "consistent with intellectual disability" during the developmental period. *Id.* at *12. The court therefore found "that Smith's intellectual and adaptive functioning issues clearly arose before he was 18 years of age." *Id.*

For those reasons, the court granted Smith's habeas petition and vacated his death sentence, explaining that "Smith is intellectually disabled and cannot constitutionally be executed." *Id.* at *13.

II.

Whether a capital offender suffers from an intellectual disability is a question of fact. *Ledford v. Warden, Ga. Diagnostic & Classification Prison*, 818 F.3d 600, 632 (11th Cir. 2016) (quoting *Fults v. GDCP Warden*, 764 F.3d 1311, 1319 (11th Cir. 2014)). We thus review for clear error a district court's finding that an individual is intellectually disabled. *Id.* (citing *Conner v. GDCP Warden*, 784 F.3d 752, 761 (11th Cir. 2015)). "Clear error is a highly deferential standard of review." *Holladay v. Allen*, 555 F.3d 1346, 1354 (11th Cir. 2009) (citation omitted). "Under that standard, we may not reverse just because we 'would have decided the [matter] differently.' A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Cooper v. Harris*, 581 U.S. 285, 293 (2017) (citations omitted).

III.

The question presented is whether the district court clearly erred by finding that Smith is intellectually disabled and, as a result, that his sentence violates the Eighth and Fourteenth Amendments. The Eighth and Fourteenth Amendments prohibit states from executing intellectually disabled offenders. *Atkins*, 536 U.S. at 321. That prohibition stems from "a national consensus" against the practice of executing such offenders. *Id.* at 316. "To the extent there is serious disagreement about the execution of [intellectually disabled] offenders, it is in determining which offenders are in fact [disabled]." *Id.* at 317.

To resolve that disagreement, the Supreme Court has granted the states some discretion to develop standards for assessing whether an offender is intellectually disabled. *Id.* (quoting *Ford v. Wainwright*, 477 U.S. 399, 416–17 (1986)). But states do not wield "unfettered discretion" to determine "how intellectual disability should be measured and assessed." *Hall v. Florida*, 572 U.S. 701, 719 (2014).

Instead, a state's assessment of whether an offender is intellectually disabled "must be 'informed by the medical community's diagnostic framework.'" *Moore v. Texas*, 581 U.S. 1, 13 (2017) (quoting *Hall*, 581 U.S. at 721). Courts identify that framework using "the most recent (and still current) versions of the leading diagnostic manuals—the DSM-5 and the AAIDD-11." *Id.* (citing *Hall*, 572 U.S. at 704–05, 713); *see also* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual*

of Mental Disorders (5th ed. 2013) (hereinafter DSM-5); Am. Ass'n on Intell. & Dev. Disabilities, *Intellectual Disability: Definition, Classification, and Systems of Support* (12th ed. 2021) (hereinafter AAIDD-12).

We start, then, with Alabama's standard for determining intellectual disability. Under Alabama law, Smith "has the burden of proving by a preponderance of the evidence that he . . . is [intellectually disabled] and thus ineligible for the death penalty." *Smith v. State*, 213 So. 3d 239, 252 (Ala. 2007). Carrying that burden requires Smith "to show significant subaverage intellectual functioning at the time the crime was committed, to show significant deficits in adaptive behavior at the time the crime was committed, and to show that these problems manifested themselves before the defendant reached the age of 18." *Id.* at 249.

IV.

Whether Smith has significantly subaverage intellectual functioning turns on whether he has an IQ equal to or less than 70. *Ex parte Perkins*, 851 So. 2d at 456. But the medical community recognizes "that the IQ test is imprecise." *Hall*, 572 U.S. at 723. "Each IQ test score has a 'standard error of measurement.'" *Id.* at 713 (citation omitted). "The standard error of measurement accounts for a margin of error both below and above the IQ test-taker's score." *Ledford*, 818 F.3d at 640. The standard error of measurement thus "allows clinicians to calculate a range within which one may

say an individual's true IQ score lies." *Hall*, 572 U.S. at 713.

For that reason, the intellectual functioning inquiry must recognize "that an IQ test score represents a range rather than a fixed number." *Id.* at 723. So when the lower end of that range is equal to or less than 70, an offender "must be able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723; *see also Moore*, 581 U.S. at 14 ("Because the lower end of Moore's score range falls at or below 70, the [Texas Court of Criminal Appeals] had to move on to consider Moore's adaptive functioning.").

A. The district court did not err by turning to evidence of Smith's adaptive functioning after finding that his IQ score could be as low as 69.

While he was in school, Smith took two IQ tests. He obtained a full-scale IQ score of 75 on the first test. On the second test, he obtained a full-scale score of 74. Dr. Reschly testified that those scores are consistent with mild intellectual disability, "particularly if you consider the standard error of measurement."

Dr. Chudy assessed Smith's IQ for a third time after Van Dam's murder. Smith obtained a full-scale score of 72 on that test. Based on that test, Dr. Chudy testified that Smith's true IQ score could be as high as 75 or as low as 69 after accounting for the test's standard error of measurement. He added that "69 is

considered clearly [intellectually disabled]." And when he was asked whether that finding was consistent with the results on Smith's prior IQ tests, Dr. Chudy said, "Yes, all the scores are very much the same."

Then, before the evidentiary hearing, Smith obtained a full-scale IQ score of 74 on the test that Dr. King administered. Because that score falls within the 70 to 75 range, Dr. Fabian testified that the results of Dr. King's IQ test are consistent with mild intellectual disability.

Dr. Fabian also tested Smith's IQ ahead of the evidentiary hearing. Smith obtained a full-scale score of 78 on that test. Although Dr. Fabian conceded that "a 78 is definitively above" the "70 to 75 IQ range," he testified that Smith's 78 does not eliminate the possibility that Smith is intellectually disabled. Instead, he cited Smith's other scores, all of which were lower than 75, and said that those scores "trump an overall score on one administration."

Dr. King contradicted Dr. Fabian. According to Dr. King, Smith displayed "a very consistent pattern of intellectual quotient scores" on all five tests. Dr. King therefore testified that the standard error of measurement deserves less weight because Smith's scores all "fall in the borderline range of intellectual functioning." "I think that the scores speak for themselves," he said, "they are what they are."

In the end, the district court said that Dr. King's testimony was not "strong enough" for the court to find "that the lowest score can be thrown out as an outlier

or that the standard error for the tests can be disregarded." *Smith IV*, 2021 WL 3666808, at *3. As the district court twice noted, Smith had an IQ score of 72, meaning that his IQ could be "as low as 69 if you take into account the standard error of measurement." *Id.* at *2; *id.* at *3. The court therefore "conclude[d] that additional evidence must be considered, including testimony on [Smith's] adaptive deficits." *Id.* at *3.

In reaching that conclusion, the district court merely applied the Supreme Court's decisions in *Hall* and *Moore*, which hold that a district court must move on to consider an offender's adaptive functioning when the lower end of his lowest IQ score is equal to or less than 70.

We start with *Hall*, which arose after the Florida Supreme Court denied Freddie Lee Hall's *Atkins* claim that he could not be put to death because he was intellectually disabled. Hall "had received nine IQ evaluations in 40 years, with scores ranging from 60 to 80," *Hall*, 572 U.S. at 707. Because "the sentencing court excluded the two scores below 70 for evidentiary reasons," that left only seven "scores between 71 and 80." *Id.* And because none of those scores were equal to or lower than 70, the Florida Supreme Court rejected Hall's *Atkins* claim and affirmed his death sentence. *Id.* (citation omitted).

The Supreme Court reversed. It said that when an offender's "IQ test score falls within the test's acknowledged and inherent margin of error, the [offender] must be able to present additional evidence

of intellectual disability, including testimony regarding adaptive deficits." *Id.* at 723. Because Hall had obtained an IQ score as low as 71, the Court held that "the law require[d] that he have an opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime." *Id.* at 724

Now for *Moore*, which arose after the Texas Court of Criminal Appeals denied Bobby Moore's *Atkins* claim. *Moore*, 581 U.S. at 5. Although Moore had obtained IQ scores of 74 and 78,[2] the Texas Court of Criminal Appeals "discounted the lower end of the standard-error range associated with those scores" and concluded that Moore functioned above the intellectually disabled range. *Id.* at 10 (citation omitted).

Again, the Supreme Court reversed, this time explaining that "Moore's score of 74, adjusted for the standard error of measurement, yields a range of 69 to 79," *id.* at 14. "Because the lower end of Moore's score range falls at or below 70," the Supreme Court said that the Texas Court of Criminal Appeals "had to move on to consider Moore's adaptive functioning." *Id.*

In sum, then, both *Hall* and *Moore* hold that when an offender's lowest IQ score, adjusted for the test's standard error of measurement, is equal to or less than 70, a court must move on and consider evidence of the

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[2] Although the habeas court credited seven of Moore's IQ scores, the Texas Court of Criminal Appeals rejected five of those scores as unreliable and "limited its appraisal to Moore's scores" of 78 and 74. *Id.* at 8, 10.

offender's adaptive deficits. *See Hall*, 572 U.S. at 707, 724 (holding that "the law require[d]" that Hall have an "opportunity to present evidence" concerning his "adaptive functioning" when his lowest score was a 71, even though he also obtained six other IQ scores, including an 80); *Moore*, 581 U.S. at 14 (holding that the Texas courts "had to move on to consider Moore's adaptive functioning" when his lowest score, "adjusted for the standard error of measurement, yield[ed] a range of 69 to 79"); *see also Jackson v. Payne*, 9 F.4th 646, 654 (8th Cir. 2021) (disregarding a habeas petitioner's IQ score of 81 and holding that "the district court 'had to move on to consider [the petitioner's] adaptive functioning' " when his lowest score's score range was less than 70 (quoting *Moore*, 581 U.S. at 14)).

And that is exactly what the district court did here. It first noted that Smith "had IQ test scores as low as 72," suggesting that "his IQ is actually as low as 69 if you take into account the standard error of measurement." *Smith IV*, 2021 WL 3666808, at *2. The court then court declined to treat that score as an outlier. *Id.* at *3. And as a result, the court "conclude[d] that additional evidence must be considered, including testimony" concerning Smith's "adaptive deficits." *Id.*

B. Alabama's arguments to the contrary are unpersuasive.

Alabama argues that the district court erred in three ways. We'll start with Alabama's argument that the district court clearly erred when it found that

Smith suffers from significantly subaverage intellectual functioning. That finding was clear error, Alabama says, because all Smith's IQ scores "place him in the borderline range of intelligence." Given that consistency, Alabama contends that the standard error of measurement warrants less weight.

This argument ignores *Hall* and *Moore*. Just as Smith scored between 72 and 78 on five IQ tests, Freddie Lee Hall scored between 71 and 80 on seven IQ tests. *Hall*, 572 U.S. at 707.[3] Relying on the lowest of those scores, the Supreme Court mandated that Hall "have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his life-time." *Id.* at 724. The Supreme Court reached this conclusion, even though Hall's highest score was an 80—two points more than Smith's highest score here. Heeding *Hall*'s command, the district court relied on Smith's lowest score and turned to "additional evidence" including testimony concerning Smith's adaptive deficits. *Smith IV*, 2021 WL 3666808, at *3.

Alabama contends that we have read *Hall* in a way that permits the district court to ignore the lower end of an offender's standard-error range. Alabama is not wrong. In *Ledford*,[4] we suggested that *Hall*'s

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[3] In fact, Hall had nine IQ scores between 60 and 80, "but the sentencing court excluded the two scores below 70 for evidentiary reasons," *id.*

[4] Although Alabama also relies on our decision in *Jenkins v. Commissioner, Alabama Department of Corrections*, 963 F.3d 1248 (11th Cir. 2020), we declined to apply *Hall* retroactively in

"consideration of the standard error of measurement 'is not a one-way ratchet.'" *Ledford*, 818 F.3d at 641 (quoting *Mays v. Stephens*, 757 F.3d 211, 218 n.17 (5th Cir. 2014)). Instead, we said that "the standard error of measurement is merely a factor to consider when assessing an individual's intellectual functioning—one that may benefit or hurt that individual's *Atkins* claim, depending on the content and quality of expert testimony presented." *Id.* at 640–41; *but see United States v. Wilson*, 170 F. Supp. 3d 347, 366 (E.D.N.Y. 2016) ("[T]he facts in *Hall* require lower courts to consider evidence of adaptive functioning if even one valid IQ test score generates a range that falls to 70 or below.").

Our decision in *Ledford* predates *Moore*, though. And *Moore* rejects *Ledford*'s assertion that a district court can consider anything other than the lower end of an offender's standard-error range. *See Moore*, 581 U.S. at 10, 14; *see also Jackson*, 9 F.4th at 655 n.8.[5]

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that case. *See id.* at 1275 (declining to apply *Hall* because "our Circuit has specifically held that *Hall* is not retroactive to cases on collateral review"). We need not address *Hall*'s (or *Moore*'s) non-retroactivity here (1) because we already set aside the Alabama court's denial of Smith's *Atkins* claim, *see Smith III*, 620 F. App'x at 746-52; and (2) because this is Smith's first § 2254 petition.

[5] *Moore* arose after the Texas Court of Criminal Appeals "discounted the lower end of the standard-error range associated" with Moore's lowest admissible score (a 74). 581 U.S. at 10 (citation omitted). Instead of focusing on the standard-error range associated with Moore's 74, the Texas court cited Moore's academic history and his depression and suggested that those factors "might have hindered his performance" on the IQ test that generated the 74. *Id.* (citation omitted). But the Supreme Court reversed, explaining that "the presence of other sources of

Indeed, *Moore* requires courts to move on and consider adaptive deficits when the lower end of an offender's standard-error range is equal to or less than 70. And to the extent that *Ledford* holds otherwise, *see Ledford*, 818 F.3d at 641 (suggesting that "the standard error of measurement is a bi-directional concept that does not carry with it a presumption that an individual's IQ falls at the bottom of his IQ range"), *Ledford* is no longer good law.

In sum, the district court did not clearly err by considering Smith's adaptive deficits. To the contrary, *Hall* and *Moore* required the district court to turn to evidence of Smith's adaptive deficits because the lower end of his standard-error range was 69. *See Smith IV*, 2021 WL 3666808, at *3.

Alabama also argues that the district court erred by failing "to require Smith to prove by a preponderance of the evidence that he has significantly subaverage intellectual functioning." On this view, the district court's order "focused only on the testimony of" Dr. King and Dr. Chudy,[6] "both of whom found that Smith functions in the borderline range of intelligence."

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imprecision in administering the test to a particular individual cannot *narrow* the test-specific standard-error range." *Id.* at 14 (cleaned up). Because the lower end of Moore's score range fell at or below 70, the Texas court "had to move on to consider Moore's adaptive functioning." *Id.*

[6] The district court's order never says that Dr. King's and Dr. Chudy's testimony was the only evidence it considered when assessing Smith's intellectual functioning. So Alabama's argument builds from an incorrect premise, for "we assume all courts base

We disagree, though, because Smith carried his burden under the intellectual prong through Dr. Chudy's testimony. To satisfy the intellectual-functioning prong, as we have observed, Smith needed to prove only that the lower end of his standard-error range is equal to or less than 70. And while Dr. Chudy found that Smith functions in the borderline range of intelligence, Dr. Chudy explained that functioning in the borderline range "means that [Smith] operates between the Low Average and [intellectually disabled] range." *Smith III*, 620 F. App'x at 740.

In other words, Dr. Chudy treated Smith's IQ score "not as a single fixed number but as a range." *Hall*, 572 U.S. at 712. And Dr. Chudy found that the lower end of that range was 69. *Smith III*, 620 F. App'x at 738. "69 is considered clearly [intellectually disabled]." *Id.* at 738.

Alabama's final argument is that the district court committed legal error by failing to make a finding concerning Smith's intellectual functioning. But of course, the district court did make a finding concerning Smith's intellectual functioning—it found that Smith "had IQ test scores as low as 72" and that a score of 72

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rulings upon a review of the entire record." *Haynes v. McCalla Raymer, LLC*, 793 F.3d 1246, 1249 (11th Cir. 2015) (quoting *Funchess v. Wainwright*, 722 F.2d 683, 694 (11th Cir. 1985)). So regardless of what evidence the district court's order did or did not cite, we will not find clear error when "the district court's account of the evidence is plausible in light of the record *viewed in its entirety*," *Anderson v. Bessemer City*, 470 U.S. 564, 674 (1985) (emphasis added).

"is actually as low as 69 if you take into account the standard error of measurement." *Smith IV*, 2021 WL 3666808, at *2. As a result, the district court had to move on to assess Smith's adaptive deficits. *See Moore*, 581 U.S. at 14 (requiring the Texas courts "to move on" and "consider Moore's adaptive functioning" when his lowest score, "adjusted for the standard error of measurement, yield[ed] a range of 69 to 79"); *Hall*, 572 U.S. at 724 (requiring that Hall have an "opportunity to present evidence" concerning his "adaptive functioning" when his lowest score was a 71).

V.

We turn now to the adaptive-functioning prong. To satisfy this prong, Smith needed to demonstrate "significant or substantial deficits in adaptive behavior." *Ex parte Perkins*, 851 So. 2d at 456; *see also Carroll v. State*, 300 So. 3d 59, 65 (Ala. 2019) (noting that "assessments of adaptive functioning must adhere to the 'medical community's current standards' " (quoting *Moore*, 581 U.S. at 20)). This criterion refers "to how well a person meets community standards of personal independence and social responsibility, in comparison to others of similar age and social background." DSM-5, at 37; AAIDD-12, at 29 ("Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives.").

"Adaptive functioning involves adaptive reasoning in three domains: conceptual, social, and practical."

DSM-5, at 37. Deficits in any one of those domains satisfies the adaptive-functioning prong. *See Moore*, 581 U.S. at 15–16 (citation omitted); DSM-5 at 38 (explaining that the adaptive-functioning criterion "is met when at least one domain of adaptive functioning—conceptual, social, or practical—is sufficiently impaired" such that "ongoing support" is necessary "for the person to perform adequately in one or more life settings at school at work, at home, or in the community"); AAIDD-12, at 31 (explaining that "the 'significant limitations in adaptive behavior' criterion" requires "an adaptive behavior score that is approximately 2 standard deviations or more below the mean in at least one of the three adaptive behavior domains, conceptual, social, or practical").

After the evidentiary hearing, the district court found that "Smith has significant deficits in social/interpersonal skills, self-direction, independent home living, and functional academics." *Smith IV*, 2021 WL 3666808, at *11. That conclusion aligns with the one we reached before the evidentiary hearing, when we said that the record contained evidence "that would support a finding of fact that Smith had significant limitations in at least two" areas: "(1) social/interpersonal skills and self-direction." *Smith III*, 620 F. App'x at 750.[7] And the evidentiary hearing only reinforced that conclusion.

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[7] According to Dr. Reschly and Dr. Fabian, self-direction is a subcategory that falls within the conceptual domain.

Dr. Fabian used the Independent Living Scales test to assess Smith's adaptive behavior. "The ILS is probably the most readily used adaptive functioning one-on-one test used nationally in forensic psychology," said Dr. Fabian. The test required Smith to answer questions like "what the purpose of a will is, what would he do if he had a pain in his chest," how would he fix things in his home, and how would he use a map "to drive from point A to point B." Based on that assessment, Dr. Fabian concluded that Smith had "deficits in every area" of adaptive functioning.

To be sure, Dr. King testified that the ILS test "is not a recommended device for assessing adaptive behavior." But Dr. King uses the ILS test to evaluate whether someone "can manage themselves personally." "That really is what the device was designed to do." Of course, whether a person "can manage themselves" is at the very core of adaptive functioning. *See* DSM-5, at 37; AAIDD-12, at 29. So Dr. King's own testimony contradicts his criticism of the ILS test. In fact, the district court "question[ed] the veracity of Dr. King's criticism" of the ILS test—not because his testimony in this case contradicted his criticism of the ILS test, but because his testimony in another case also contradicted his criticism of the ILS test. *See Smith IV*, 2021 WL 3666808, at *10 (observing that Dr. King has previously testified that ILS test "measures adaptive functioning in a number of different domains" (quoting *Tarver*, 940 So. 2d at 324 (Cobb, J., concurring in part and dissenting in part))).

Because we cannot disturb the district court's finding that Dr. King's criticism of the ILS test lacked credibility, *see*, *e.g.*, *Berenguela-Alvarado v. Castanos*, 950 F.3d 1352, 1357 (11th Cir. 2020), it follows that the conclusion that Dr. Fabian drew from the ILS test—that Smith had "deficits in every area" of adaptive functioning—supports the district court's conclusion about Smith's adaptive deficits.[8]

The record also reveals that Smith struggled to communicate effectively, which supports the district court's finding that Smith has deficits in the "functional academics" realm. *Smith IV*, 2021 WL 3666808, at *11. Functional academics is a subcategory within the conceptual domain, which also includes communication skills. *See* DSM-5, at 37 (explaining that the conceptual domain involves "language, reading, writing, math reasoning," and other academic skills); AAIDD-12, at 30 (listing difficulty communicating effectively as an example of significant deficits in the conceptual domain).

Dr. Reschly, Dr. Chudy, and Dr. Fabian all testified that Smith's illiteracy suggests that he suffers significant deficits in the conceptual domain. For his part, Dr.

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[8] Alabama also criticizes the district court for failing to make "findings concerning Dr. Fabian's reliance" on the ILS. But as we've explained, *see supra* n.6, our task is to determine whether the district court's conclusion—that "Smith has significant deficits in social/interpersonal skills, self-direction, independent home living, and functional academics," *Smith IV*, 2021 WL 3666808, at *11—"is plausible in light of the record *viewed in its entirety,*" *Anderson*, 470 U.S. at 573–74 (emphasis added).

Reschly discussed Smith's "failure to acquire literacy skills at an age-appropriate level, which relates to the conceptual demand of adaptive behavior." Indeed, Dr. Chudy's administered a WRAT-3, an achievement test used to gauge scholastic abilities, which revealed that "Smith is barely literate in reading." That test is "consistent with significant limitations in at least [the] conceptual domain," according to Dr. Fabian.

Dr. Fabian also evaluated Smith's communication skills using the Expressive One-Word Picture Vocabulary and the Receptive One-Word Picture Vocabulary tests. These tests relate "to functional academics or conceptual areas of adaptive functioning and even academic achievement," said Dr. Fabian. Smith scored in the first percentile on the expressive test and in the third percentile on the receptive test. The age equivalents for those scores are thirteen and fifteen, respectively. Those scores, according to Dr. Fabian, "are consistent with someone who is intellectually disabled."

Contending that Smith does not struggle with communication skills, Alabama repeatedly describes Smith as "savvy" and says that he "had no problem understanding or appropriately responding to questions" during the evidentiary hearing. But the record contradicts that description of Smith's testimony. Take, for instance, an exchange between Smith and his attorney. During this exchange, Smith read a prompt that described a behavior. Smith was then asked to rate, on a scale from zero to three, whether he was able to perform that behavior and, if so, how often he performed

that behavior without reminders and without help. A zero would convey that he was unable to perform that behavior while a three would convey that he always or almost always performed that behavior without reminders and without help:

A: "Name 20 or more familiar objects."

Q: Would you give yourself a rating of zero, one, two or three?

A: Yeah, I would.

Q: Would you?

A: Yeah, yeah, I would.

Q: What would that rating be?

A: Huh?

Q: What rating would you give yourself for that?

A: I don't—I don't know. I don't understand the question. Why would I name 20 or more—oh, it says familiar. I thought it said—"name 20 or more familiar objects." One.

Q: But you can name familiar objects to yourself; correct?

A: Huh?

Q: You can name familiar objects to yourself; correct?

A: I can.

Q: Okay. Do you think you could name 20 things?

A: Yeah.

Q: So would the more correct response to that be a three?

A: Yeah, if you ask—if I can, yeah.

As that excerpt demonstrates, the record refutes Alabama's claim that Smith "had no problem understanding or appropriately responding to questions" during the evidentiary hearing.

Indeed, that example adds to the mountain of evidence that suggests Smith struggles to communicate effectively and therefore suffers deficits in the conceptual domain of adaptive functioning. And because deficits in any one domain satisfy the adaptive-functioning criteria, *see Moore*, 581 U.S. at 15–16 (citation omitted); DSM-5 at 38; AAIDD-12, at 31, we cannot say that the district court did clearly erred by finding that Smith satisfied the adaptive-functioning prong.

Resisting that conclusion, Alabama advances three additional arguments as to why the district court clearly erred by finding that Smith satisfied the adaptive-functioning prong. First, Alabama argues that the district court clearly erred by failing to make any findings concerning the ABAS-3,[9] a test that Dr. King

[9] We just described the ABAS-3 test; it requires the subject to read a description of a behavior and rate, on a scale of zero to three, whether the subject can perform that behavior and, if so, how often the subject performs that behavior without reminders

administered to assess Smith's adaptive functioning. Based on the results from that test and his interview with Smith, Dr. King concluded that Smith lacked "any serious problems with adaptive functioning."

But contrary to Alabama's claim, the district court addressed and discredited Dr. King's adaptive-functioning findings because they relied "solely" on "Smith's self-reports." *See Smith IV*, 2021 WL 3666808, at *7–8. Unlike the other tests we've described,[10] the ABAS-3 relies on "an individual giving a report on himself." And as the district court explained, Dr. King's reliance on Smith's self-reports made his findings unreliable for two reasons.

First, the district court explained that the AAIDD "cautions against reliance on self-reporting." *Id.* at *7. The AAIDD warns against "using self-report[ing] for the assessment of adaptive behavior" because self-reporting "may be susceptible to biased responding." AAIDD-12, at 40–41. To that end, Dr. Fabian testified that Smith "has not wanted to be found intellectually disabled." In Dr. Fabian's opinion, Smith is "embarrassed/offended by this."

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and without help. Dr. King administered the ABAS-3 to Smith before the evidentiary hearing.

[10] The ILS test, for example, requires Smith to show (rather than tell) his adaptive abilities by requiring him to answer questions like what is the purpose of a will, what would you do if you had chest pains, how do you fix things in your home, and how do you use a map to get from point A to point B. The administering professional then assesses the test taker's answers to evaluate his adaptive abilities.

Second, and relatedly, the district court explained that much of the information Smith reported to Dr. King was demonstrably untrue:

> For instance, Smith's mother was 63 (not 69) when she died, and Smith's father was 64 (not 70) when he died. Dr. King also acknowledged that Smith told him that he had not attended school beyond the sixth grade, but records show he did not leave school until he was in the eighth grade. Smith also reported to Dr. King that he was drinking on a daily basis from the age of 20 until age 27 when he was arrested. But Smith was actually incarcerated from age 19 to 26 and then again at 27.

Smith IV, 2021 WL 3666808, at *7.

We also note a third reason to doubt Dr. King's reliance on the ABAS-3 test: Smith took that test twice and reported different answers each time, and as we've mentioned (*see supra* at 32–33), a review of Smith's responses the second time he took the test (during the evidentiary hearing) reveal that it's not clear he understood what was being asked.

As we've explained, the ABAS-3 test required Smith to rate, on a scale from zero to three, whether he was able to perform a particular behavior and, if so, how often he performed that behavior without reminders and without help. Smith first took the ABAS-3 test when he met with Dr. King before the evidentiary hearing. Then, Smith's counsel administered the ABAS-3 test during the evidentiary hearing. During the second administration of the test, Smith reported different

ratings than the ones he reported when Dr. King administered the test before the evidentiary hearing. When Dr. King administered the ABAS-3, for example, Smith gave himself a three for the following prompt: "Answers the telephone by saying 'Hello.'" In other words, Smith reported that he always performs that behavior. But when he read that same prompt during the evidentiary hearing, Smith said, "I don't answer no telephone." Similarly, Smith gave himself a one at the evidentiary hearing in response to the prompt that reads: "Nods or smiles to encourage others when they are talking." But Smith gave himself a three in response to the same prompt when Dr. King administered the test before the evidentiary hearing.

The court ultimately discredited Dr. King's testimony concerning Smith's adaptive deficits. *See id.* at *11 (explaining that "whether Smith has significant or substantial deficits in adaptive behavior largely comes down to which expert is believed"). We cannot say that the district court clearly erred in doing so given the problems with Dr. King's testimony.

For the same reason, we must reject Alabama's second argument as to why the district court clearly erred when finding that Smith satisfied the adaptive deficits prong. To support this argument, Alabama contends that Dr. King "found that Smith had strengths in his home living and functional academics." This argument fails because, as we have observed, the district court discredited Dr. King's testimony concerning Smith's adaptive deficits. But even if the district court had credited Dr. King's testimony, this piece of

testimony does not help Alabama to show clear error, for "'the medical community focuses the adaptive-functioning inquiry on adaptive deficits,' not strengths." *Carroll*, 300 So. 3d at 63 (quoting *Moore*, 581 U.S. at 16).

Finally, Alabama claims that the district court improperly "discounted" Dr. King's reliance on records from the Alabama Department of Corrections about Smith's behavior in prison. Those records were "significant," Alabama claims, "because there was no indication that Smith has a mental disability or psychiatric problems, and because the records indicated that he functioned normally."

But the Supreme Court has explained that "[c]linicians . . . caution against reliance on adaptive strengths 'in a controlled setting,' as a prison surely is." *Moore*, 581 U.S. at 16; *see also* DSM-5, at 38 ("Adaptive functioning may be difficult to assess in a controlled setting (e.g., prisons, detention centers)[.]"). So the prison records do not allow Alabama to show clear error.

In sum, we cannot say that the district court clearly erred by finding that Smith satisfied the adaptive-functioning prong. We have already explained that the record contains evidence "that would support a finding of fact that Smith had significant limitations in at least two" domains. *Smith III*, 620 F. App'x at 750. Dr. King's testimony is the only new evidence that has undermined that conclusion. But the district court discredited Dr. King's testimony. As a result, the district court did not clearly err.

VI.

Finally, we turn to the district court's finding that "Smith's intellectual and adaptive functioning issues clearly arose before he was 18 years of age." *Smith IV*, 2021 WL 3666808, at *12. While in school, Smith took two IQ tests and obtained scores of 74 and 75. As a result, the school recommended placing Smith in the "EMR program." EMR at that time referred to "educable [intellectually disabled]," according to Dr. Reschly,[11] who added that "the criteria for identifying someone with educable [intellectual disability] at that time was largely parallel to the criteria used to identify mild intellectual disability today." Those criteria were an IQ score "below 75" and "documented deficits in adaptive behavior." Dr. Fabian shares Dr. Reschly's "understanding" that EMR is "pretty consistent with modern day intellectual disability mild."

In sum, then, the record supports the district court's conclusion that Smith's deficits in intellectual and adaptive functioning "were present at an early age." *Id.* As a result, we cannot say that the district court clearly erred by finding that Smith satisfied the final prong of his *Atkins* claim.

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[11] Alabama asks us to hold that the district court clearly erred by refusing to discredit Dr. Reschly's testimony. On this view, "Dr. Reschly made his diagnosis that Smith was intellectually disabled as a child . . . without personally evaluating him." But because we cannot go back in time, it was impossible for Dr. Reschly (or anyone else, for that matter) to "personally evaluat[e]" whether Smith exhibited deficits in intellectual and adaptive functioning before turning 18.

VII.

We hold that the district court did not clearly err in finding that Smith is intellectually disabled and, as a result, that his sentence violates the Eighth Amendment. Accordingly, we affirm the district court's judgment vacating Smith's death sentence.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JOSEPH CLIFTON SMITH,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION NO. 05-00474-CG**
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	)	
Respondent.	)	

ORDER

(Filed Aug. 17, 2021)

This case is before the Court on remand from the Eleventh Circuit. (Docs. 72, 73). For reasons which will be explained below, the Court finds that the Petitioner is intellectually disabled. Accordingly, Petitioner's Writ of Habeas Corpus will be granted, and his death sentence will be vacated.

BACKGROUND

The Eleventh Circuit found that the factual determination by the Alabama Court of Criminal Appeals that "Smith conclusively did not possess significantly subaverage intellectual functioning was an unreasonable determination of the facts." (Doc. 72, PageID.958). The Eleventh Circuit noted that the Alabama Court of Criminal Appeals came to that conclusion without

conducting an evidentiary hearing and despite there being "trial evidence pointing to significant deficits in Smith's intellectual functioning." (Doc. 72, PageID.957).[1] The Eleventh Circuit found the determination unreasonable given the record evidence and "the fact that Alabama does not employ a strict IQ cut-off score of 70." (Doc. 72, PageID.957-958). The Court also found that "the Alabama Court of Criminal Appeals' finding that there was 'no indication that Smith had significant defects in adaptive behavior' is unsupported (and, in fact, contradicted) by the record and therefore unreasonable."[2] (Doc. 72, PageID.960 (internal citations omitted)). The Eleventh Circuit reversed and remanded the case indicating that Smith should be allowed "to present an expert witness on his behalf" and directing the district court to determine whether to order discovery or an evidentiary hearing. (Doc. 72, PageID.961-962). The Eleventh Circuit stated that "[i]n doing so, we

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[1] The Eleventh Circuit found that the Alabama appellate court was unreasonable in finding that Smith had pled only conclusory allegations that he met each of the three requirements for intellectual disability under *Perkins* and was also unreasonable in its determination of the merits – that Smith was not mentally retarded and could never meet the *Perkins* requirements. (Doc. 72, PageID.955, 957-958). There was trial evidence that Smith's IQ could be as low as 69, given a standard error of measurement of plus-or-minus three points, and that Smith had deficits in intellectual functioning. (Doc. 72, PageID.957).

[2] As this Court will discuss herein, there was evidence "that would support a fact finding that Smith had significant limitations in at least two of the adaptive skills identified by both clinical definitions: (1) social/interpersonal skills and (2) self-direction." (Doc. 72, PageID.959).

express no opinion as to whether Smith is intellectually disabled." (Doc. 72, PageID.962).

Upon remand, this Court ordered discovery (Doc. 78), and held an evidentiary hearing. The parties filed post hearing briefs. (Docs. 126, 129, 130).

DISCUSSION

A. Standard of Review

Since the Eleventh Circuit has found the Alabama Court of Criminal Appeals unreasonably determined the facts, this Court must conduct an independent review of the merits of the petitioner's claim – without deferring to the state court's factual findings. *Panetti v. Quarterman*, 551 U.S. 930, 954 (2007). "Petitioner has the burden of proof by a preponderance of the evidence not only with regard to IQ (intellectual functioning) and onset age, but also as to related limitations in the adaptive skill areas." *Holladay v. Campbell*, 463 F. Supp. 2d 1324, 1341 n.21 (N.D. Ala. 2006), aff'd sub nom. *Holladay v. Allen*, 555 F.3d 1346 (11th Cir. 2009).

B. Intellectual Disability

As the Eleventh Circuit explained, "the United States Supreme Court held in *Atkins* that the execution of 'mentally retarded' individuals violates the Eighth Amendment of the Constitution." (Doc. 72, PageID.951, citing *Atkins v. Virginia*, 536 U.S. 304, 321 (2002)). "The *Atkins* Court, however, left 'to the States the task of developing appropriate ways to enforce the

constitutional restriction upon their execution of sentences.'" (Doc. 72, PageID.951). In Alabama, there are three requirements to establish intellectual disability: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)," (2) "significant or substantial deficits in adaptive behavior," and (3) manifestation of "these problems . . . during the developmental period (i.e., before the defendant reached age 18)." (Doc. 72, PageID.951-952, quoting *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002)). Though there has been some overlap in the evidence and arguments regarding these three requirements the Court will attempt to separate and discuss each below.

1. Significantly Subaverage Intellectual Functioning

Petitioner contends that the Court should take into account the Flynn Effect[3] and the standard margin of error when considering Petitioner's IQ exam scores. Petitioner points to two Supreme Court cases to support his Atkins claim – *Hall v. Florida*, 572 U.S. 701 (2014) and *Moore v. Texas*, 137 S.Ct. 1039 (2017). Respondent denies that these cases entitle Petitioner to relief in this case.

In *Hall*, the Supreme Court ruled that Florida could not maintain a strict adherence to a cutoff IQ score of 70. *Id.* at 1994. The Court concluded "that a

[3] The "Flynn Effect" is a theory that IQ scores have been increasing over time and should be recalibrated in order to reflect this increase.

State cannot execute a person whose IQ test score falls within the test's margin of error unless he has been able to present additional evidence of intellectual disability, including testimony regarding adaptive deficits." *In re Henry*, 757 F.3d 1151, 1154 (11th Cir. 2014) (citing *Hall*, 572 U.S. at 723). Respondent argues that *Hall* does not apply because Alabama courts have not interpreted Alabama's intellectual disability law to preclude consideration of other evidence of intellectual disability, including testimony regarding adaptive deficits when a person has an IQ over 70. However, *Hall* also made clear that courts should be "informed by the medical community's diagnostic framework" which means "courts must consider the standard error inherent in IQ tests when a defendant's test scores put him 'within the clinically established range for intellectual-functioning deficits.'" *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019) (quoting *Hall* and *Moore*).

In *Moore*, the Supreme Court reiterated that "where an IQ score is close to, but above, 70, courts must account for the test's 'standard error of measurement.'" *Moore*, 137 S.Ct. at 1049 (citing *Hall*). The Supreme Court in *Moore* vacated the determination by the Texas Court of Criminal Appeals, which utilized court-created factors (set forth in *Ex parte Briseno*, 135 S.W.3d 1 (Tex. Crim. App. 2004)) in lieu of considering clinical definitions of adaptive functioning. 137 S.Ct. at 1044. The Supreme Court found that by rejecting the medical guidance and clinging to the *Briseno* factors the Texas court had "failed adequately to inform itself

of the 'medical community's diagnostic framework'." *Id.* at 1053.

It remains clear that the Court should consider the standard error inherent in IQ tests and in cases where a defendant's test scores fall "within the clinically established range for intellectual-functioning deficits", "defendants must be allowed to present additional evidence of intellectual disability, including testimony on adaptive deficits." *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019).[4] In the instant case, the Defendant had IQ test scores as low as 72, which according to testimony could mean his IQ is actually as low as 69 if you take into account the standard error of measurement.

There is expert testimony that Smith's intelligence is higher than his previous scores indicated. Dr. Glen King, testified at the May 2017 hearing before this Court. Dr. King had reviewed some of Smith's history and met with Smith to evaluate him. Dr. King met with Smith for approximately three hours and spent about 20 minutes interviewing and giving Smith a

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[4] The Court notes that in *Smith*, the Eleventh Circuit refused to apply *Moore* because *Moore* was decided after the state court made its determination. However, in the case at hand the state court's decision has been found to be unreasonable. As such, this Court is no longer constrained to consider only the reasonableness of the state court's determination given the record before the state court but is instead tasked with conducting an independent determination of Petitioner's intellectual functioning. Additionally, neither party has argued that *Moore, Hall*, or other cases decided after Petitioner's state court proceedings should not apply for that reason.

mental status examination. (Doc. 125-1, PageID.2029-31). King administered the WAIS-IV IQ test to Smith and testified that Smith's full-scale score on the test was 74. (Doc. 125-1, PageID.1983-84). The composite of Smith's verbal comprehension and perceptual reasoning indexes (or GAI) on the WAIS-IV was 77. (Doc. 125-1, PageID.1984). Dr. King said Smith's scores "can be an indication of a learning disability" rather than an intellectual disability. (Doc. 125-1, PageID.1985). Dr. King found Smith did not have significantly subaverage intellectual functioning and diagnosed Smith "as having likely a learning disability." (Doc. 125-1, PageID.1988). Smith's perceptual reasoning score was 86 but his verbal score was lower. (Doc. 125-1, PageID.1985). "[W]here a person has some average abilities and then is not functioning up to academic achievement expectations, that can indicate that that's the reason for that." "They will typically have lower verbal scores." (Doc. 125-1, PageID.1985-86). Dr. King's testimony only indicates that a learning disability *might* be the cause of Smith's poor performance. Dr. King said his disability is "not otherwise specified," because "I think there would have to have been additional assessment to determine the presence of that or to rule out the possibility that he really is functioning in the borderline range of ability." (Doc. 125-1, PageID.1988). Petitioner points out that Smith's school records do not indicate that there was ever a finding that Smith had a learning disability. (Doc. 130 PageID.4449, Doc. 126, PageID.2087-90). Even if Smith's scores do not result from a learning disability, Smith's overall score of 74 on the test administered by King

was still above what is considered significant subaverage intellectual functioning. Dr. King testified that the WAIS-IV test indicated a 95 percent confidence level that Smith's IQ was between 70-79. (Doc. 125-1, PageID.1985).

Dr. King also testified that if there are multiple sources of IQ over a long period of time it contributes to the construct of validity indicating what a true IQ score is for an individual. (Doc. 125-1, PageID.1987). In Smith's case, multiple IQ scores (in fact, all of Smith's scores if you do not consider the standard error) taken over a long period of time place him in the borderline range, functioning just above intellectual disability. (Doc. 125-1, PageID.1987-1988). Dr. King testified that there "are five IQ scores that were obtained over a lengthy period of time by different examiners under different conditions and they are all in the borderline range of intellectual functioning." (Doc. 125-1, PageID.2020). While this leans in favor of finding that Smith does not have significant subaverage intellectual functioning, the Court does not find it strong enough to conclude that Smith is not intellectually disabled without considering evidence of his adaptive deficits. Smith did not consistently score so high that the Court is confident that the lowest score can be thrown out as an outlier or that the standard error for the tests can be disregarded. Although some tests indicate Smith does not have significant subaverage intellectual functioning, this Court concludes that additional evidence must be considered, including testimony on the Defendant's adaptive deficits.

The Court declines to apply the Flynn Effect. "While [the Eleventh Circuit has] previously said that the Flynn Effect may be considered in determining a defendant's IQ, *see Thomas v. Allen*, 607 F.3d 749, 753 (11th Cir. 2010), neither [the Eleventh Circuit] nor the Supreme Court has required courts to do so." *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1342 (11th Cir. 2019). There was expert testimony at the hearing before this Court that there are conflicts within the research about whether to apply the Flynn effect. (Doc. 125-1, PageID.1991). The Flynn effect is a "theory" and there are problems with the research supporting it. (Doc. 125-1, PageID.1990-1991). According to testimony before this Court, neither the American Psychological Association nor the Division of Developmental Disabilities of the Alabama Department of Mental Health and Mental Retardation apply the Flynn effect. (Doc. 125-1, PageID.1964-1965, 1968-1969). The Flynn effect is reportedly not applied in social security cases, in vocational rehabilitation cases or in school admission testing. (Doc. 125-1, PageID.1992). Moreover, the utility of applying it here is questionable since there is already expert evidence to demonstrate that Defendant's IQ, after considering the standard error of measurement, may be as low as 69. The Court merely notes that if the Flynn Effect were taken into consideration, Smith's scores would likely be adjusted lower.

At the time of his criminal trial, Smith was examined by Dr. James F. Chudy who produced a Psychological Evaluation report dated Sept. 6, 1998. (TR

Transcript VOL. 6, pp. 912-21). The Court notes that prior to *Atkins*, evidence of intellectual disability (then termed "mental retardation") was considered "a two-edged sword: it may diminish his blameworthiness for his crime even as it indicates that there is a probability that he will be dangerous in the future." *Burgess v. Comm'r, Alabama Dep't of Corr.*, 723 F.3d 1308, 1318 (11th Cir. 2013) (citation omitted). "Because evidence of mental retardation was a 'two-edged sword' a defendant could reasonably decide not to highlight his mental retardation." *Id.* (citations omitted). Thus, at the time of his trial, Smith had no real incentive to present testimony to support a finding that he was intellectually disabled. At trial, Dr. Chudy found that Smith "was mentally competent and capable in assisting his attorney in his defense and that Smith knew right from wrong. (TR Transcript VOL. 6, p. 916). Dr. Chudy also found that:

> Mr. Smith's thinking was coherent and for the most part logical but that at times it was necessary to re-state questions in more elementary forms so that he could understand them. His comprehension is limited and it is clear that he lacks much insight or awareness into his behavior. During the course of the interview and test administrations there were no signs of psychotic behavior or deviations from reality. When he did not understand a question, he was not reluctant in asking for clarification. He even went so far as to ask for clarification several times so that he could answer questions to the best of his ability.

> During the administration of the tests, Mr. Smith maintained a fairly good attitude and seemed to put forth his best effort, showing fairly good persistence. However, he struggled at times in understanding some of the tasks which required repeating the instructions on several occasions.

(*Id.* at p. 917). Dr. Chudy reported that Smith was administered the WAIS-R and that he scored a Verbal IQ of 73, a Performance IQ of 72 and a Full-Scale IQ of 72 which places him at the 3rd percentile in comparison to the general population. (*Id.*). Dr. Chudy further found the following:

> These scores place him in the Borderline range of intelligence which means that he operates between the Low Average and Mentally Retarded range. Actually these scores place him at a level closer to those individuals who would be considered mentally retarded.
>
> Analysis of the specific subtests of the WAIS-R showed that Mr. Smith displayed major deficiencies in areas related to academic skills. He functioned well below average in his recall of learned and acquired information. (Information). He was also quite weak in word knowledge and usage (Vocabulary) and mental mathematical computation (Arithmetic). Other areas of noted weakness had to do with his social skills. He scored well below average in skills having to do with social reasoning and learning how to respond effectively in social situations (Comprehension). He also showed a major deficiency in his ability to

> predict social sequences of action (Picture Arrangement).

(*Id.*). Dr. Chudy found that Smith did not seem to learn from his experiences because he "does not think through things" and "his mind-set provides little basis for acting in a consistently sensible manner or learning from experience." According to Dr. Chudy, Smith's thinking was "vague, easily confused and he is often overwhelmed with incomprehensible feelings or impulses that he does not understand." (*Id.* at p 919).

After considering the above, the Court finds it is not clear whether Smith qualifies as having significantly subaverage intellectual function. The only thing clear is that Smith strives to answer questions to the best of his ability and is not malingering. As stated above, additional evidence must be considered, including testimony on the Defendant's adaptive deficits to determine whether Smith is intellectually disabled. This is a close case, and the Court concludes that at best Smith intelligence falls at the low end of the Borderline range of intelligence and at worst at the high end of the required significantly subaverage intellectual functioning. As such, the Court finds that whether Smith is intellectually disabled will fall largely on whether Smith suffers from significant or substantial deficits in adaptive behavior, as well as whether his problems occurred during Smith's developmental years.

2. Deficits in Adaptive Behavior

Because IQ test scores are approximations of conceptual functioning, IQ scores alone "may be insufficient to assess reasoning in real life situations and mastery of practical tasks." *See Freeman v. Dunn*, 2018 WL 3235794, at *70 (M.D. Ala. July 2, 2018) (quoting AMERICAN PSYCHIATRIC ASSOCIATION, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 37-38 (5th ed.) ("DSM-V")).

> For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower IQ score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

Id. (quoting DSM-V at p. 37). "[T]he Diagnostic Statistical Manual of Mental Disorders states that adaptive functioning refers 'to how well a person meets standards of personal independence and social responsibility, in comparison to others of similar age and sociocultural background." *Schrader v. Acting Com'r of the Soc. Sec. Admin.*, 632 F. App'x 572, 576 n.3 (11th Cir. 2015) (quoting DSM-V at p. 37).

The Eleventh Circuit explained the general standard for determining whether Smith has significant or substantial deficits in adaptive behavior as follows:

> Neither the Alabama legislature nor the Alabama Supreme Court has defined what

constitutes "significant or substantial deficits in adaptive behavior." *See id.* But the Alabama Supreme Court has applied generally the "most common" or "broadest" definition of mental retardation, which reflects "the clinical definitions considered in *Atkins.*" *In re Jerry Jerome Smith v. State*, No. 1060427, 2007 WL 1519869, at *7 (Ala. May 25, 2007). And "significant or substantial deficits in adaptive behavior" means, under the clinical definitions considered in *Atkins*, a petitioner must show limitations in two or more of the following applicable adaptive-skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health and safety, functional academics, leisure, and work." *Atkins*, 536 U.S. at 308 n.3, 122 S. Ct. at 2245 n.3 (citing the American Association on Mental Retardation and American Psychiatric Association's definitions of mental retardation). Thus, we use that common clinical definition in considering this case. *Cf. Lane v. State*, ___ So.3d ___, ___ No. CR-10-1343, 2013 WL 5966905, at *5 (Ala. Crim. App. Nov. 8, 2013) ("In order for an individual to have significant or substantial deficits in adaptive behavior, he must have concurrent deficits or impairments in . . . at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety." (quotation marks omitted)).

(Doc. 72, PageID.952-953, footnote omitted). The Eleventh Circuit found there was evidence "that would support a fact finding that Smith had significant limitations in at least two of the adaptive skills identified by both clinical definitions: (1) social/interpersonal skills and (2) self-direction." (Doc. 72. PageID.959).

According to Dr. King, Smith's prison records indicate Smith functioned normally in prison. (Doc. 125-1, PageID.2016). At the May 2017 hearing in this case, Sergeant Christopher Earl, a correctional sergeant over the segregation and death row units at Holman prison, testified that Smith functions as a "tier runner" on his tier which has 20-24 inmates. (Doc. 125, PageID.1818-19). As a tier runner, Smith passes out juice and trays, microwaves things for inmates, "get lists up when we're putting out walks or church lists, things like that." (Doc. 125, PageID.1819). Earl testified that the way tier runners are chosen is as follows:

> We talk to the other inmates on the tiers and make sure that they all get along with them. Typically you want somebody that's clean, takes care of theirself. You know, somebody that can get along with everybody on a tier.

(Doc. 125, PageID.1819). According to Earl, Smith does a good job as a tier runner and does not need much supervision. (Doc. 125, PageID.1819). Earl also testified that he has conversations with Smith about things going on inside the prison, things going on in the news and current events. (Doc. 125, PageID.1819-20). Earl testified that Smith seems to understand what they talk about and Smith responds appropriately when

Earl asks him questions. (Doc. 125, PageID.1820). Earl also said Smith seems to have no problem making the "walk list" which consists of going down the tier and writing down the cell numbers of prisoners that want to go on a walk each day. (Doc. 125, PageID.1820-21).

Earl's testimony indicates Smith possesses or has developed some functional skills that have enabled him to perform certain tasks well in prison. However, the Eleventh Circuit has made clear that "the focus of the adaptive functioning inquiry should be an individual's adaptive deficits – not adaptive strengths. *Smith v. Comm'r, Alabama Dep't of Corr.*, 924 F.3d 1330, 1337 (11th Cir. 2019) (citing *Moore*). "After *Moore*, states cannot 'weigh' an individual's adaptive strengths against his adaptive deficits." *Id.* Additionally, there can be little reliance on Smith's behavior in prison because "[c]linicians . . . caution against reliance on adaptive strengths developed 'in a controlled setting,' as a prison surely is." *Moore v. Texas*, 139 S. Ct. 666, 669 (2019)("Moore II"). As Dr. Fabian noted, Smith's prison records do not mean a lot because it is such a controlled and structured setting there and a lot is provided for him. (Doc. 125, PageID.1903-04). Smith "doesn't need to go get health insurance, buy a car, pay for a cell-phone bill, pay for rent, get a job, fill out applications, see a doctor, pay for medical insurance" or perform many other normal independent living requirements. (Doc. 125, PageID.1903). The Court also notes that while Earl believed Smith understood their conversations, it has not been suggested that Earl has

any expertise in assessing a person's intellectual functioning.

Dr King believes the only standardized instrument available to assess Smith's adaptive functioning is the ABAS-3, on which Smith has no score of three or below. Based on those scores as well as Dr. King's interview with Smith, the history Smith gave and other records, Dr King opined that Smith has no significant deficiencies in adaptive functioning. (Doc. 125-1, PageID.2023). Dr. King testified that Smith had a pretty good memory of his life events and family history and that he recalled educational placements from early childhood which were quite cogent and coherent and more detailed that Dr. King expected. (Doc. 125-1, PageID.1980). Dr. King testified that Smith provided the following information:

> He was able to tell me that his mother was deceased recently at age 69 and he was able to tell me that she had apparently had a fall or an accident and that she had high blood pressure, back problems, indicated that – spontaneously with me – that she loved him and all of the brothers and sisters. He was able to report that his parents divorced when he was approximately age nine, that his father deceased at approximately age 70, when he had complications from hip surgery, with a resultant cerebral vascular accident, which he referred to, I think, as a stroke.
>
> It was also reported that his father may have lingered to some extent in terms of his stroke

> and that he also added spontaneously that he and his father never got along very well.
>
> He reported that when he was approximately age nine his parents divorced and he was back and forth between the two parents, but his mother remarried when he was approximately age 11 to Hollis Luker and that his mother eventually divorced Mr. Luker after Mr. Smith was incarcerated.
>
> He reported his father had remarried when he was approximately age 11 or 12 and that he was able to identify his stepmother as Connie Dickinson; reported that they eventually divorced as well.

(Doc. 125-1, PageID.1980-81). Petitioner argues that these supposed strengths should not be relied upon because they come solely from Smith's self-reports. Dr. King stated that he had no records to check that these facts were correct but that he interviewed one of Smith's sisters who supported some of the information. The sister indicated that Smith "did in fact get moved back and forth between the two families on a fairly consistent basis" but she "was somewhat young by the time that he first left the family." (Doc. 125-1, PageID.1981).

There was expert testimony at the hearing before this Court that the American Association of Intellectual and Developmental Disabilities (AAIDD) cautions against reliance on self-reporting. Self-reports are often inaccurate "because persons with mild ID tend to try to mask or hide their intellectual disability" and

"often claim capabilities they don't have." (Doc. 125, PageID.1720). Dr. John Fabian testified that he concluded from his interviews with Smith that Smith "has not wanted to be found intellectually disabled" and "is embarrassed/offended by this." (Doc. 125-1, PageID1914). Dr. Fabian opined that Smith is at risk for exaggerating his skills and abilities because he does not have insight and he does not want to look deficient. (Doc. 125-1, PageID.1914). Self-reports are used as "the last resort when there are, you know, no other collateral informants or the individual cannot be assessed one-on-one with other means." (Doc. 125, PageID.1913). Petitioner points out that some of the details reported by Smith to Dr. King were wrong. For instance, Smith's mother was 63 (not 69) when she died, and Smith's father was 64 (not 70) when he died. Dr. King also acknowledged that Smith told him he had not attended school beyond the sixth grade, but records show he did not leave school until he was in the eighth grade. (Doc. 125-1, PageID.2026). Smith also reported to Dr. King that he was drinking on a daily basis from the age of 20 until age 27 when he was arrested. But Smith was actually incarcerated from age 19 to 26 and then again at 27. (Doc. 125-1, PageID.2027-28).

Dr. King also relied on Smith's self-report that Smith never had a driver's license or permit but that he drove anyway, and he indicated that he had possession of his own vehicles and that he had quite a few of them. Smith reported that the last vehicle he had was an 84 Ford pickup that he bought himself. (Doc. 116-6, PageID.4160). However, Smith's mother had

previously reported to Dr. Fabian that Smith had never owned a vehicle and Melissa Espinal reported that she never saw Smith drive a vehicle. (Doc. 116-1, PageID.2317).

Smith reported to Dr. King that he had a significant work history. Smith reported that he first started mowing grass and doing light lawn maintenance between the ages of 13 and 14 and that he made $400 or $500 per week and that was more than his father was making. Smith reported that he did roofing, painting, and he worked offshore on rigs and supply boats and would also install swimming pools and do landscaping. Smith's last job was landscaping which he reports he did for two years. According to Smith, he always had money in his pocket and he always worked full time and got along well with fellow employees and his employers. (Doc. 116-6, PageID.4160).

Smith's social security records do not show regular or consistent employment or income. (Doc. 116-1, PageID.2111-15). However, at the hearing before this Court Smith reported that he did whatever he could do "as long as I didn't have to pay no taxes." (Doc. 125, PageID.1847). Thus, Smith could have had income that did not show up in his social security records. But other facts indicate Smith had little income. Smith's mother and Melissa Espinal both reported to Dr. Fabian that Smith never consistently held a job. Smith's mother reported that Smith did not work full time and did not have a bank account. (Doc.125-1, PageID.1913). Dr. King testified that he did not believe Smith had much money, he never saved any money and would spend

any money he got. (Doc.125-1, PageID.1912). And Smith was incarcerated from the age of 19 until present, except for approximately one year from the age of 26 until the age of 27 when he went back in prison. (Doc. 125, PageID.1846-47). Smith was released from prison at the age of 27 and was out for three days before the incident for which he is now incarcerated.

Smith was able to tell Dr. King about some current events (specifically that the President of the United States had fired the Attorney General) and that he knew who the current and past president was. Smith could reportedly identify his Social Security number, his AIS number, his address at Holman Prison, and was oriented as to person, place, and time. (Doc. 125-1, PageID.1989). Dr. King testified that although an intellectually disabled person might know some of these facts it is not likely that an intellectually disabled person would know all of these facts. (Doc. 125-1, PageID.1990).

However, Dr. Reschly disagreed with Dr. King. Dr. Reschly testified that he had "evaluated a number of persons who clearly meet the criteria for intellectual disability who have known those things generally because they are used over and over and they are memorized over time." Dr. Reschly also noted that Smith was not able to give his full Social Security number – he was not able to give the first five digits and could only remember and give the last four digits of his social security number. (Doc. 125-1, PageID.2074).

Dr. King administered "the assessment for adaptive functioning, the ABAS-3," and Smith "generated scores that were well above the cutoff that we use typically for consideration of intellectual disability in terms of adaptive functioning." (Doc. 125-1, PageID.2017). Dr. King testified that he read the questions to Smith because he was concerned about Smith's reading capability – the ABAS allows the reports to be read when somebody does not have the ability to read or there is a question about vision. (Doc. 125-1, PageID.2032-34). The ABAS-3 measures eight different areas and usually, a score of three or below in any area would be considered a significantly deficient score. (Doc. 125-1, PageID.2017). Smith's lowest score was a six and ranged from six to ten, ten being average. (Doc. 125-1, PageID.2017-18).

As to records from Smith's youth, Dr. King testified that Smith "may have had some problems with adaptive functioning when he was in school, but I don't think that that was the result of intellectual deficiency." Dr. King explained that he thought "it was just as easily or more easily explained by what was going on at home" that Smith had "[s]ome lower, perhaps, intellectual ability" and also that he started to use alcohol at a fairly young age. (Doc. 125-1, PageID.2018). Dr. Reschly admitted that if Smith continued to consume alcohol at a high level around the ages of 11, 12 and 13 as reported it would have affected both his intellectual performance, his academic skill acquisition and possibly his social relations. (Doc. 125, PageID.1812). Dr Reschly also admitted that the fact that Smith was

physically abused and that his parents divorced and shifted him back and forth between them and between schools might have also affect his development of adaptive functioning and his acquisition of social skills. (Doc. 125, PageID.1812-13). Dr. King noted that Smith was placed in EC classes, which are for emotionally conflicted students – "children who are determined to be having a lot of behavioral problems, psychological adjustment problems." (Doc. 125-1, PageID.2005). Dr. King testified that emotional handicaps do not mean a person has limitations in adaptive functioning. (Doc. 125-1, PageID.2005). Dr. King stated that there was only one or two pages out of Smith's entire school record that designated Smith as EMR. (Doc. 125-1, PageID.2005-06). According to Dr. King, Smith's poor behavior at school is an indication "of what was happening with this child at that time overall in his life." (Doc 125-1, PageID.2007). However, the Supreme Court has found that a detrimental home life – such as one that involves traumatic experiences like childhood abuse and suffering – is considered a risk factor for intellectual disability. *Moore v. Texas*, 139 S. Ct. 666, 669 (2019)("*Moore II*") (citing *Moore*). "Clinicians rely on such factors as cause to explore the prospect of intellectual disability further, not to counter the case for a disability determination." *Moore*, 137 S. Ct. at 1051 (citation omitted). Additionally, evidence of a personality disorder or of mental-health issues is "not evidence that a person does not also have intellectual disability." *Moore II*, 139 S. Ct. at 671 (quoting *Moore*). Mental-health professionals recognize that "many intellectually disabled people also have other mental or physical

impairments, for example, attention-deficit/hyperactivity disorder, depressive and bipolar disorders, and autism." *Moore*, 137 S. Ct. at 1051 (citation omitted).

Dr. Fabian points to Dr. Chudy's findings at the time of trial which indicated Smith had emotional problems. Dr. Fabian found that Smith has difficulties coping with his emotional problems. Dr. Fabian pointed to Dr. Chudy's opinion and stated that he agreed completely with the following points made by Dr. Chudy:

> [Smith] takes little notice of things around him unless it's intended to protect him from potential harm. Does not think through things. This mindset provides little basis for acting in a consistently sensible manner or learning from experience. He did not seem to learn from experience even when it involves bringing pain to himself or those closest to him. In essence, his thinking is vague, he's easily confused . . . , he's often overwhelmed with incomprehensible feelings or impulses that he does not understand.

(Doc. 125, PageID.1899). Dr. Fabian went on to say that Dr. Chudy talks about Smith's emotional personality functioning as being equally dysfunctional. Dr. Fabian testified that "these points" "can be related to other disorders potentially, but also would be consistent with intellectual disability." (Doc. 125, PageID.1899).

Dr. Fabian found that looking at Smith's employment history, the jobs were not complicated and were consistent with his intellectual disability and adaptive deficits. (Doc 125, PageID.1893-94).

According to Dr. Fabian his interviews with Smith's mother and Melissa Espinal and her sister Melanie Espinal indicated that Smith had deficits in communication, reading, writing, functional academics, self-direction, and social skills. (Doc. 125, PageID.1989-1901). Melanie and Melissa were mid-teenagers when they knew Smith, who was about 10 years older. They reported that Smith, though much older, was easily led and wanted to fit in. They indicated that Smith did not think about what he wanted to do in the future and was more impulsive, living day by day in a hotel without a lot of goals. He was really "gullible, naïve, wasn't really self sufficient or independent in living. Didn't seem to cook food, buy groceries, was often hanging around them." Smith "was a grown man trying to impress me, as a kid" and had difficulties understanding things. (Doc. 124, PageID.1900-01).

Smith's mother also indicated he was a follower, he did not work consistently, had difficulties in school, was in special education classes, did not have insurance or a bank account and had problems with frustration tolerance and attention. (Doc. 125, PageID.1901).

Dr. Fabian also pointed out that Smith had difficulties with following laws and with reckless behaviors that were impulsive and not thought out well. (Doc. 125, PageID.1902). Smith was not in the community very long to demonstrate, but he was not able to maintain independent living skills from a practical or adaptive domain perspective. Dr. Fabian opined that Smith falls in the "mild intellectually disabled range." (Doc. 125, PageID.1902).

Dr. Fabian administered the Independent Living Scales test or ILS on Smith. The ILS assesses "one-on-one functional adaptive function":

> So basically I bring in a phone book, I'm bringing in a watch, or I'm asking him what the purpose of a will is, what would he do if he had a pain in his chest, things like that. How he feels about himself relative to his self-esteem, how many friends he has. So it gets at a number of areas of adaptive functioning – memory, managing money, health/safety needs – where I assessed him one on one.

(Doc. 125, Page ID.1879). According to Dr. Fabian the ILS test indicated Smith had deficits in most areas.

> [H]e had difficulties with memory orientation, giving him some different information that he had to recall over time. His ability to use money, to understand how money works was impaired. I mean, he had, I mean deficits in every area. So we look at the areas of memory orientation, money management, managing home transportation, those questions, you know, how he gets things fixed in his home versus using a map, you know, to drive from point A to point B.
>
> Health and Safety really gets into taking care of his hygiene and communicating with doctors, for example. Now he scored well on that. And I think, by my experience interviewing him, he's been knocking out his hygiene pretty well in prison.

> He also had significant difficulties or deficits with social adjustment. This is more how he feels about himself, his emotional perception of himself. Granted he's on death row and his relationships and interpersonal functioning is, you know altered. But some of these questions had to do with values of self/others, for example.

(Doc. 125, PageID.1889-90). Smith scored a standard score of 59 on the ILS, which Dr. Fabian testified was consistent with those in the mild intellectually disabled group which ranges from 57.4 to 78.4. (Doc. 125, PageID.1890).

Dr. King criticized Dr. Fabian's use of the ILS to assess Smith's adaptive functioning. According to King, the ILS is not recommended for assessing adaptive behavior. Dr. King testified that he uses the ILS "quite frequently," for other situations, typically when he is asked to "evaluate individuals who are in need of a conservatorship or guardianship, as an older adult, to determine whether they can manage their financial affairs and to determine whether they can manage themselves personally." (Doc. 125-1, PageID.2013).

Dr. Fabian on the other hand testified that "the ILS is probably the most readily used adaptive functioning one-on-one test used nationally in forensic psychology, [and] forensic neuropsychology." (Doc. 125-1, PageID.1959). Additionally, the Court questions the veracity of Dr. King's criticism since Dr. King utilized the ILS test in a prior Atkins case and testified that "the ILS measures a person's 'ability to live independently,

and it measures adaptive functioning in a number of different domains,' including health and safety, money management, social adjustment, and problem solving." *Tarver v. State*, 940 So. 2d 312, 324 (Ala. Crim. App. 2004).

Dr. Fabian administered other tests that were not specifically geared toward adaptive functioning deficits but that he found indicated such deficits. According to Dr. Fabian, Smith's results on the Neuropsychological Assessment Battery showed that Smith's verbal abstract reasoning skills "were mildly to moderately impaired which . . . showed me that he had a difficulty with abstract reasoning when given information about different people and he had put them together in different groups." (Doc. 125, PageID.1876-77).

Also, the Green Emotional Perception Test is correlated with intelligence, but there is also "an emotional, intellectual, and a perception and an adaptive component to it essentially assessing his ability to not really focus on what is said but how it's said for emotional tones: angry, sad, happy, what tone is the person saying." According to Dr. Fabian, Smith had some significant impairments on that test regarding "emotional perception, which is very adaptive as well." (Doc. 125, PageID.1878).

The Expressive One-Word Picture Vocabulary Test is a test of language. Smith showed significant impairments on that test, as well as on the Receptive One-Word Picture Vocabulary test. These tests correlate to intelligence, but also relate to functional academics or

conceptual areas of adaptive functioning and academic achievement. Smith's scores on these tests indicate his ability to express and receive language is significantly impaired on the first percentile for expressive and the third percentile for receptive. Dr. Fabian testified that those scores are consistent with someone who is intellectually disabled. (Doc. 125, PageID.1880-81).

Additionally, Dr. Fabian administered the Social Cognition Test, which focuses on social perception and being able to process "not only affect and emotion to pictures and faces, but it gets more difficult, where they have to select a photograph, then interacting pairs of people, they listen to a statement made by a person and they have to decide which person or which couple, group of people, that statement went to." Dr Fabian found that Smith's results were similar to his results on the Emotional Perception Test and indicated significant impairments to the social functioning prong of intellectual disability. (Doc. 125, PageID.1882-83).

According to Dr. Fabian, Smith meets the adaptive functioning prong and the intellectual functioning prong of intellectual disability. (Doc. 125, PageID.1903). Dr. King clearly disagrees. As mentioned above, the Court finds this to be a close case and whether Smith has significant or substantial deficits in adaptive behavior largely comes down to which expert is believed. After reviewing the testimony of the experts and Smith's own testimony, the Court concludes that Smith has significant deficits in adaptive behavior. The Court finds Smith has significant deficits in social/interpersonal skills, self-direction, independent home living,

and functional academics[5]. Although Smith has been able to function sufficiently in a controlled prison setting, he appears incapable of behaving as a socially responsible adult or of living independently outside of prison. The Court finds Smith has shown by a preponderance of the evidence that he has significantly subaverage intellectual functioning and significant deficits in adaptive behavior.

3. Manifestation During the Developmental Period

The "sub-average intellectual functioning and the deficits in adaptive behavior must be present at the time the crime was committed as well as having manifested themselves before age 18." *Smith v. State*, 213 So. 3d 239, 248 (Ala. 2007). Smith's earliest records indicate that he seemed to do okay in first grade but made no progress in reading in second or third grade, and that prompted his referral by the school district to special services for evaluation. (Doc. 125, PageID.1759). The ultimate recommendation placed Smith in EC

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[5] Functional academics has been defined as: "cognitive abilities and skills related to learning at school that also have direct application in one's life (e.g., writing; reading; using basic practical math concepts . . .)." *Tharpe v. Humphrey*, 2014 WL 897412, at *23 (M.D. Ga. Mar. 6, 2014), aff'd sub nom. *Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016). "It is important to note that the focus of this skill area is not on grade-level academic achievement, but, rather, on the acquisition of academic skills that are functional in terms of independent living." *Id.*

Resource classes,[6] requiring 10-20 hours in classes for emotional conflict issues and special education. (Doc. 125 PageID.1765). When Smith was in third grade his reading level was at the first grade, third month level, his math was at the second grade, first month level, and his language was at the zero (or kindergarten) grade, first month level. (Doc. 125, PageID.1760). At the age of 12 when Smith was repeating the sixth grade, he was tested again on the WISC-R and received a full-scale score of 74 and was found to be reading at the fourth-grade level, fifth month, he was spelling at the third grade, sixth month level and he performed in math at the third grade, ninth month level. (Doc. 125, PageID.1767-1771). There are records that indicate Smith was enrolled in EC resource classes during his 6th grade year and records that indicate Smith was enrolled in EMR classes in the 7th and 8th grades. (Doc. 116-1, PageID.2116-2208). "EMR" referred to "educable mentally retarded," which was a term used in Alabama in the late 70s and early 80s for a person with an IQ score below 75 who also had deficits in adaptive behavior and was "largely parallel to the criteria used to identify mild intellectual disability today." (Doc. 125, PageID.1754-55).

Dr. Reschly[7] testified that Smith's school records show the kinds of behaviors that are associated with

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[6] "EC" stood for "emotionally conflicted" which was the term Alabama used at that time for what was called elsewhere "emotional behavior." (Doc. 125 PageID.1765).

[7] The Court notes that Respondent contends that the undersigned should refuse to credit Dr. Reschly's testimony because he

and denote mild intellectual disability or what was called EMR. (Doc. 125, PageID.1781). A Walker Problem Behavior Checklist was administered on Smith in the fourth grade that indicated Smith had problems acting out, he was withdrawn, he had issues with distractibility and problems with peer relations. (Doc. 125, PageID.1766-67). In 1982 Smith was reevaluated because regulations required that a child's disability status be reevaluated every three years. (Doc. 125, PageID.1767). Smith scored a full-scale IQ of 74 or 75 which would be adjusted to 72 and which fell within the State of Alabama's requirements for diagnosis as EMR. (Doc. 125, PageID.1768-69). Much of the Walker Problem Behavior Checklist relates to social functioning or the social domain of adaptive behavior. (Doc. 125, PageID1779-80). Reschly testified that Smith's peer

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did not personally evaluate Smith. Most of Dr. Reschly's testimony consisted of an overview of intellectual disability and a review of Smith's school records. Dr. Reschly opined that Smith met the requirements for intellectual disability before the age of eighteen. Obviously, Reschly could not go back and interview Smith at an early age. The school records and family accounts of Smith's childhood are the best information available now on Smith's intellect prior to the age of eighteen. The Court agrees that the reliability and validity of opinions based merely on past records is limited but also recognizes that Dr. Reschly has specialized knowledge on special education and the assessment of intellectual disability in school age children. Respondent also points to cases where Dr. Reschly's testimony has been discredited. However, as Smith argues, disagreements and different opinions are the very heart of litigation and the fact that a court disagreed with one expert in favor of another does not mean the expert's testimony should henceforth be disbelieved. The expert's testimony was simply not enough to overcome the opposing testimony in these prior cases.

relations were rated as being very low or poor and some of the descriptions of Smith's behavior, such as not complying and making an inappropriate comment about a teacher, "reflect social domain deficits in adaptive behavior." (Doc. 125, PageID.1780).

Dr. Fabian also found Smith's school records indicated social domain problems. Dr. Fabian noted that during the developmental years, Smith had not been given a formal adaptive functioning test such as the ABAS or Vineland, but Fabian testified that Smith's records indicate adaptive functioning problems:

> . . . we're starting to see global impairment, where he's academically behind two years, he's acting out, low frustration tolerance, aggression, behavioral problems, and that's often consistent when someone has those adaptive behavioral deficits and the intellectual functioning deficits so that would be consistent with intellectual disability.

(Doc. 125, PageID.1894-95). According to Dr. Fabian, Smith's adaptive functioning fell in the mild intellectually disabled range before the age of 18. (Doc. 1225, PageID.1902).

Dr. King, on the other hand, found that there was no evidence of intellectual disability before the age of 18. (Doc. 125-1, PageID.2021). According to Dr. King, there was only one page in Smiths records that said EMR – indicating he was educably mentally retarded, but the "overwhelming evidence" indicated "he was not functioning highly, but he was not functioning

as an intellectually disabled individual." (Doc. 125-1, PageID.2021-22). Dr. King testified that Smith's IQ scores "were all in the borderline range of ability from childhood to adulthood." (Doc. 125-1, PageID.2022). It is Dr. King's opinion that Smith has never been intellectually disabled. (Doc. 125-1, PageID.2022). Smith "has no testing that indicates that he functions with an IQ of 70 or below in consistent fashion." (Doc. 125-1, PageID.2022).

After reviewing the testimony concerning Smith's early years, the Court finds that Smith's intellectual and adaptive functioning issues clearly arose before he was 18 years of age. As the Court stated previously, this is a close case, but the evidence indicates that Smith's intelligence and adaptive functioning has been deficient throughout his life. The Court found above that Smith falls in the upper end of the required significantly subaverage intellectual functioning and that he has significant deficits in adaptive behavior. The evidence indicates these deficits did not begin during Smith's adult years but were present at an early age. The Court finds Smith's intellectual and adaptive functioning issues manifested during his developmental period.

CONCLUSION

For the reasons explained above, the Court finds that Petitioner Joseph Clifton Smith is intellectually disabled. Accordingly, Smith's petition for writ of habeas corpus is **GRANTED** with respect to his *Atkins*

claim, and his death sentence is **VACATED**. Smith is intellectually disabled and cannot constitutionally be executed.

DONE and **ORDERED** this 17th day of August, 2021.

/s/ Callie V. S. Granade
SENIOR UNITED STATES
DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JOSEPH CLIFTON SMITH,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION NO. 05-00474-CG**
JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections,	)	
Respondent.	)	

ORDER

(Filed Nov. 30, 2021)

This case is before the Court on Respondent's motion to alter or amend the judgment Pursuant to Rule 59(e). (Doc. 136). Respondent moves this Court to withdraw the order granting Joseph Clifton Smith's habeas petition as to his claim that he is intellectually disabled, and thus ineligible for the death penalty, and replace it with an order denying Smith's claim. Respondent claims that Smith failed to satisfy his burden of proving by a preponderance of the evidence that he has significantly subaverage intellectual functioning. Alternatively, Respondent argues that this Court should Reconsider its Order because it did not make clear and specific factual findings in ruling that Smith has significantly subaverage intellectual functioning.

A Rule 59(e) motion "gives a district court the chance 'to rectify its own mistakes in the period immediately

following' its decision". *Banister v. Davis*, 140 S. Ct. 1698 (2020) (quoting *White v. New Hampshire Dept. of Employment Security*, 455 U.S. 445, 450 (1982)). To succeed, a Rule 59(e) motion must be based on "newly-discovered evidence or manifest errors of law or fact." *Friedson v. Shoar*, 2021 WL 5175656, at *5 (11th Cir. Nov. 8, 2021) (quoting *Arthur v. King*, 500 F.3d 1343, 1343 (11th Cir. 2007) (quotation omitted)). Respondent has not offered newly discovered evidence. Thus, the only grounds for granting the motion would be to correct manifest errors 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." *Marshall v. Dunn*, 2021 WL 3603452, at *1 (N.D. Ala. Aug. 13, 2021) (citation and internal quotations omitted). "Manifest error does not mean that one does not like the outcome of a case, or that one believes the court did not properly weigh the evidence." *Id.* (citation omitted).

In the instant case, Respondent attempts to make the same arguments about the same evidence that was raised prior to entry of judgment. A Rule 59(e) motion should be denied if it simply relitigates old matters and argues about evidence that was raised prior to the entry of judgment. *St. Louis Condo. Ass'n, Inc. v. Rockhill Ins. Co.*, 5 F.4th 1235, 1246 (11th Cir. 2021) (citing *Arthur*, 500 F.3d at 1343). Rule 59(e) motions do not afford an unsuccessful litigant "two bites at the apple." *American Home Assur. Co. v. Glenn Estess & Associates, Inc.*, 763 F.2d 1237, 1239 (11th Cir.1985).

Respondent asserts that Petitioner has not met his burden of proving by a preponderance of the evidence that he has significantly subaverage intellectual functioning, significant or substantial deficits in adaptive behavior, and that both conditions were present at the time the crime was committed and manifested before age 18. Respondent's arguments focus primarily on the scores Petitioner received on the various tests Petitioner has taken throughout his life. Respondent appears to contend that the Court should change its ruling because the evidence shows Petitioner's IQ is above 70. However, as the Eleventh Circuit previously stated in this case,[1] Alabama does not employ a strict IQ cut-off score of 70. This Court reviewed the evidence regarding Petitioner's scores and after considering the standard error inherent in IQ tests, this Court found that it must consider additional evidence, including testimony on Petitioner's adaptive deficits, to determine whether Petitioner falls at the low end of the Borderline range of intelligence or at the high end of the required significantly subaverage intellectual functioning. This Court could not determine solely by Petitioner's scores whether he had significantly subaverage intellectual functioning. As this Court explained:

> a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the

[1] See Doc. 72, PageID.957-958.

> person's actual functioning is comparable to that of individuals with a lower IQ score.

(Doc. 135, PageID.4477) (quoting *Freeman v. Dunn*, 2018 WL 3235794 at *70 (M.D. Ala. July 2, 2018). For an individual to have significant or substantial deficits in adaptive behavior, he must have concurrent deficits or impairments in at least two skill areas. This Court found Petitioner had significant deficits in at least four areas: social/interpersonal skills, self-direction, independent home living, and functional academics. (Doc. 135, PageID.4491). To the extent it was not clear in this Court's prior order, this Court clarifies that the evidence regarding Petitioner's adaptive deficits persuaded this Court that Petitioner's actual functioning is comparable to that of an individual with significantly subaverage intellectual functioning. Although Petitioner has scored above 70 on many of his IQ tests, his adaptive behavior problems are severe enough that his actual functioning is lower.

The Court finds that Respondent has not shown that the Court committed a manifest error of law or fact. Accordingly, Respondent's motion to alter or amend the judgment Pursuant to Rule 59(e) (Doc. 136) is **DENIED**. Respondent's alternative motion for reconsideration, which seeks a clarification of this Court's findings is **GRANTED only to the extent that the above discussion clarifies this Court's basis and/or reasoning**.

DONE and **ORDERED** this 30th day of November, 2021.

/s/ Callie V. S. Granade
SENIOR UNITED STATES
DISTRICT JUDGE

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 14-10721

D.C. Docket No. 1:05-cv-00474-CG-M

JOSEPH CLIFTON SMITH,

Petitioner-Appellant,

versus

DONAL CAMPBELL,
COMMISSIONER KIM TOBIAS THOMAS,

Respondents-Appellees.

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

(August 3, 2015)

Before TJOFLAT, HULL and WILSON, Circuit Judges.

HULL, Circuit Judge:

Petitioner Joseph Clifton Smith, a death-row inmate, appeals the district court's denial of his 28 U.S.C. § 2254 habeas corpus petition. This appeal involves only Smith's Atkins claim—that he is intellectually

disabled and cannot be executed under the Eighth and Fourteenth Amendments to the United States Constitution.[1] See Atkins v. Virginia, 536 U.S. 304, 122 S. Ct. 2242 (2002). The Alabama state courts denied Smith's Atkins claim without an evidentiary hearing, as did the district court. We review the history of Smith's case and then the narrow issue in this appeal.

I. FACTUAL BACKGROUND

A. Murder of Durk Van Dam

On Friday, November 21, 1997, Smith was released from a state prison and transferred to a community-custody program to complete the remainder of his 10-year sentence for his burglary and theft convictions. Smith v. State ("Smith I"), 795 So. 2d 788, 796, 797 n.1 (Ala. Crim. App. 2000). Two days after his release from prison, Smith murdered the victim Durk Van Dam on November 23, 1997.

Police discovered Van Dam's body near his pick-up truck in an isolated area in southern Mobile County. Van Dam suffered approximately 35 separate, distinct exterior injuries. His head, face, and torso were beaten; his corpse revealed a number of blunt force injuries; and his body was mutilated by a saw or a saw-like

[1] Although courts formerly employed the term "mental retardation," we now use the term "intellectual disability" to describe the same condition. Accord Brumfield v. Cain, 576 U.S. ___, ___ n.1, 135 S. Ct. 2269, 2274 n.1 (2015). However, we sometimes use the terms "mental retardation" and "mentally retarded" when quoting or discussing earlier judicial opinions, court orders, trial testimony, or other items that used those terms at the time.

device. Van Dam was robbed of $150 in cash and the boots off his feet. His tools were stolen from his pickup truck, which was mired in mud.

B. Smith's Statements to Police

On the day Van Dam's body was discovered, two police officers interviewed Smith, who confessed. In his first statement to the police, Smith admitted that he was at the scene when Van Dam was beaten and robbed but claimed that he was merely a bystander as Larry Reid beat Van Dam. See id. at 796.

When police questioned Reid, Smith repeatedly knocked on the interrogation-room door and requested to speak with the officer who took his first statement. Id. Smith gave a second statement, admitting he participated in the homicide but denying an intent to kill Van Dam. See id.

In his second statement, Smith said that he, Reid, and Van Dam left a motel in Van Dam's red pick-up truck on the evening of November 23, 1997. Id. Van Dam was drinking and driving the truck, and Reid directed Van Dam to an isolated location. Id. Smith asserted that, once they arrived at the location, Reid began hitting Van Dam. Reid kicked Van Dam in the face, at which point Smith thought Van Dam was dead. Id. However, Van Dam got up, and Smith hit him on the head with his fist, kicked him in the ribs several times, threw a handsaw at him, and might have hit him with a hammer. Id. Smith wasn't entirely sure if

he hit Van Dam with a hammer because he suffers from blackouts. Id.

Smith stated that Reid got a power saw from Van Dam's truck and ran the saw against Van Dam's neck. Id. Smith said he held down Van Dam while Reid took money from Van Dam's pockets. Id. Reid kept $100, and Smith kept $40. Id. Toward the end, Smith kicked Van Dam in the ribs several times. Van Dam was alive at that point, Smith said, but Reid subsequently hit the victim in the head several times with boards and sticks and dragged a mattress on top of him. Smith and Reid left, and Smith thought Van Dam was alive as they walked away.

Smith and Reid attempted to steal Van Dam's truck, but it was stuck in the mud. Id. Smith admitted to taking Van Dam's boots and tools. Id. Smith and Reid discussed what to do with Van Dam's body. Id. Smith suggested taking it to a nearby lake, but they left the body under a mattress near Van Dam's truck. Id.

II. SMITH'S TRIAL AND VERDICT

On May 22, 1998, a Mobile County grand jury indicted Smith for capital murder, charging that Smith intentionally killed Van Dam during a first-degree robbery. The case went to trial.

At trial, Dr. Julia Goodin, a forensic pathologist, testified that Van Dam died as a result of 35 different blunt-force injuries to his body. Id. Dr. Goodin found

marks on Van Dam's neck, shoulder, and back that were consistent with Van Dam being cut by a saw. Id. Van Dam had a large hemorrhage beneath his scalp, brain swelling, multiple rib fractures, a collapsed lung, abrasions to his head and knees, and defensive wounds on his hands. Id. The most immediate cause of death was probably Van Dam's multiple rib fractures, which caused one lung to collapse. Id.

The prosecution introduced Smith's two statements to police and called Russell Harmon, who saw Smith on the day of the murder at a motel in Mobile County. See id. at 796–97. Harmon testified that Smith told him that Smith and Reid were going to rob Van Dam, and Smith asked if Harmon wanted to join them. See id. at 797. Harmon declined. Id. When Smith returned to the motel later that night, Smith admitted to Harmon that he participated in the beating of Van Dam and cut Van Dam with a saw before fleeing the crime scene—and leaving Van Dam for dead. Id. Smith told Harmon that he hid Van Dam's tools on the side of a road, and Smith asked Harmon to retrieve them. Harmon did. Smith sold the tools for $200. Id.

Joey Warner, an employee of a pawnshop, testified that (1) on November 23, 1997, Smith pawned several tools, including saws, drills, and a router; (2) Smith was given $200 for the tools; and (3) Smith showed his Alabama Department of Corrections identification card to complete the transaction. Id.

Another witness, Melissa Arthurs, testified that she saw Smith on the night Van Dam disappeared and

noticed blood on Smith's shirt. Id. Smith told Arthurs that he hit, cut, and stabbed Van Dam in the back; he and Reid robbed Van Dam; and Smith would have taken Van Dam's truck had it not been stuck in the mud.[2] See id.

On September 16, 1998, the jury found Smith guilty of capital murder. The penalty phase began the next day.

III. PENALTY PHASE BEFORE THE JURY

A. The State's Evidence

In the penalty phase, the State presented evidence that established three statutory aggravating factors: (1) Smith committed the capital offense while under a sentence of imprisonment, see Ala. Code § 13A-5-49(1); (2) Smith committed the capital offense while engaged in the commission of a robbery, see id. § 13A-5-49(4); and (3) the murder of Van Dam was especially heinous, atrocious, or cruel, see id. § 13A-5-49(8).

As to the first aggravating factor, the State called Betty Teague, the director of the Alabama Department of Corrections' central records office. Teague testified that Smith was in the custody of the Alabama Department of Corrections and placed on "prediscretionary leave" on November 21, 1997—two days before Van Dam's murder. Smith was still under a sentence of

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[2] Smith chose not to testify, and the defense rested without calling any witnesses.

imprisonment during that leave, including the date of Van Dam's murder.

As to the second aggravating factor, the trial judge noted the jury's verdict established that the capital offense was committed during the course of a robbery.

As to the third aggravating factor of a heinous murder, the State recounted the trial evidence, including (1) Smith's own statements to the police; (2) Smith's actions kicking and beating the victim; and (3) Dr. Goodin's testimony about the victim's injuries, including eight broken ribs and many internal and external injuries caused by 35 to 45 blows. The State then rested.

B. Defense Evidence

As part of his penalty-phase defense, Smith called a number of witnesses to establish mitigating circumstances, including that the "offense was committed while the defendant was under the influence of extreme mental or emotional disturbance." See id. § 13A-5-51(2).

Smith first called his mother, Glenda Kay Smith ("Glenda Kay"). Glenda Kay testified that Smith's father, Leo Charles Smith ("Leo Charles") got drunk almost every day and verbally and physically abused Smith. Leo Charles would "try to whoop" Smith and his brothers "with fan belts or water hoses."

When Smith was about 10 years old, Glenda Kay divorced Leo Charles, and she subsequently married

Hollis Luker ("Luker"). Luker got drunk three or four times a week and drank with Smith when Smith was about 16 years old. Smith and Luker would fight, and Luker once injured Smith's ear by hitting him in the head with a bat-like object.

According to Glenda Kay, Smith had educational problems, including dyslexia. Smith was in special education classes and classes for students with "emotional conflicts."[3]

Smith next called Dr. James F. Chudy ("Dr. Chudy"), a clinical psychologist who met with Smith three times, reviewed his school and jail records, and evaluated Smith. Dr. Chudy described Smith's childhood as "at the least, . . . very abusive, probably tormenting at times, [and] extremely unstable."

After administering a Wechsler Adult Intelligence Scale-Revised (WAIS-R) test,[4] Dr. Chudy found Smith had a "full scale IQ of 72, which placed him at the third percentile in comparison to the general population." Dr. Chudy testified that "there actually is what we call a standard error of measurement of about three or four points. So, you know, taking that into account you could—on the one hand he could be as high as maybe

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[3] The State did not cross-examine Glenda Kay.

[4] Dr. Chudy also assessed Smith using these diagnostic tools: (1) the Wide Range Achievement Test-Revised 3; (2) the Bender Gestalt Visual-Motor Integration Test; (3) a Rorschach test; (4) the Mooney Problem Checklist; (5) the Minnesota Multiphasic Personality Inventory-2; (6) the Millon Clinical MultiAxial Inventory-III; (7) the Subtle Alcohol Screening Survey Inventory-2; and (8) the Jesness Inventory.

a 75. On the other hand[, Smith] could be as low as a 69. [Sixty-nine] is considered clearly mentally retarded." Dr. Chudy testified that his findings about Smith's intellect were consistent with the school records Dr. Chudy examined and that "all the scores are very much the same." The defense introduced school records, which indicated Smith at age 12 obtained IQ scores of 74 and 75.

Dr. Chudy also testified that "almost all the time people at this level of IQ, and with [Smith] in particular, what I saw in this testing, he does not look like much of a planner. He's more of a reactor. And I would see him more as a follower than a leader."

As to his learning disorder diagnosis, Dr. Chudy testified that, "in spite of his IQ of 72," Smith "did arithmetic at the kindergarten level, which is a standard score of 45. And in the State of Alabama what meets the criteria for a learning disability is a fifteen point difference between your IQ and your standard score." Accordingly, Smith was "even more limited in math than you would expect," given his IQ score of 72.

Based on Smith's full-scale IQ score of 72, Dr. Chudy diagnosed Smith as having "borderline intellectual functioning." Dr. Chudy stated that an individual functioning in this borderline range has the ability to appreciate the consequences of his actions, though the

functioning limitation would "minimize" the appreciation "considerably."[5]

Dr. Chudy testified that the "emotionally conflicted" classes in which Smith enrolled were special education classes "for kids that are not adjusting to regular classroom[s]."

Based on his evaluation, Dr. Chudy made these six diagnoses of Smith: (1) major depression, severe without psychotic features; (2) post-traumatic stress disorder; (3) alcohol dependence; (4) learning disorder; (5) schizotypal or anti-social personality disorder; and (6) borderline intellectual function.

On cross-examination, Dr. Chudy testified that Smith did not "think things through" and was "impulsive." When the State's prosecutor asked whether "there are a lot of folks who have higher IQ's [sic] and don't have all this so-called baggage who are impulsive," Dr. Chudy said there were. Dr. Chudy testified that his evaluation "did not find a pattern that would show that he had major neurological problems that would be inconsistent with a 72 IQ." When asked whether "[t]here are people with low IQ's [sic] who are what we call 'streetwise,' " Dr. Chudy assented.

Smith called three more witnesses: two sisters and a neighbor. His sister, Rebecca Charlene Smith

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[5] Dr. Chudy testified that Smith was not "insane" and that his level of intellectual functioning did not prevent Smith from knowing "right from wrong." Rather, Smith's level of functioning resulted in Smith not "learn[ing] very well or profit[ing] much from experience."

("Rebecca Charlene"), testified that their step-father Luker drank "all the time" and getting drunk "was an everyday routine for him." Luker treated the members of her family "[l]ike dirt." Luker hit Smith on the side of the head with a baseball bat, beat Smith's brother Jason with a 2-by-4 piece of wood, and physically abused their mother Glenda Kay.

Shirley Stacey ("Stacey") was a former neighbor of the Smith family during Glenda Kay's marriage to Luker. Stacey testified that Luker was drunk "just about every day." Stacey saw Luker beat the Smith children "with water hoses or whatever he could grab." On multiple occasions, Glenda Kay brought the Smith children to Stacey's house to escape or avoid Luker. On one occasion, Glenda Kay ran to Stacey's house with the Smith children because Luker "had beat [Glenda Kay] and ripped her clothes and she . . . had to get away from him."

Another sister, Lynn Harrison, testified that their father Leo Charles got drunk "a lot" and was physically abusive toward her brothers. Leo Charles once chased Smith with a garden hose and, on another occasion, tried to hit Smith with a fan belt. Harrison saw Luker abuse Smith in ways similar to those that Leo Charles abused Smith. The Smith children had to "run several times just to get away" from Luker's beatings of Glenda Kay.[6]

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[6] Smith's two sisters and neighbor Stacey did not testify about Smith's intellectual functioning, adaptive abilities, or performance in school. The State did not cross-examine them.

C. The Jury's Advisory Sentence of Death

The jury returned an advisory verdict recommending that Smith be sentenced to death by electrocution. Eleven jurors voted for a death sentence; one voted for life imprisonment without the possibility of parole.

IV. PENALTY HEARING BEFORE THE TRIAL COURT

A. Evidence in Penalty Hearing

On October 16, 1998, the trial court held a penalty hearing. The trial court admitted evidence of: (1) Smith's 1990 convictions for burglary and theft, (2) a pre-sentence report from the Alabama Board of Pardons and Paroles (the "Alabama Report"), and (3) Dr. Chudy's 1998 report, labeled a "psychological evaluation" of Smith.

For his 1990 convictions, Smith was sentenced to 10 years in prison, released on parole in 1996, and sent back to prison in 1997 when he violated his parole terms. According to the Alabama Report, Smith was arrested nine times between 1986 and 1997 for suspicion of minor crimes, including harassment (three times), menacing (twice), and disorderly conduct (once).

As to Smith's personal and social history, the Alabama Report stated that Smith "dropped out of school in the eighth grade" when Glenda Kay "withdrew him from school on the recommendation of his teachers who described [Smith] as being disrespectful and disruptive in class." According to the Alabama Report,

Smith "was a slow learner and was placed in special education classes." Smith "failed both the seventh and eighth grades[,] and all of his grades, with the exception of physical education, were below average." Smith "has had no further education or training since that time."[7]

Dr. Chudy's 1998 report included the following conclusions about Smith's mental health.

Evidence of Competency.[8] The report stated that, during Dr. Chudy's interviews, Smith "was alert and oriented," was "able to recount the charges against him and ultimately what could happen to him if he were found guilty," and "accurately define[d] the role and purposes of all the parties involved in the trial proceedings." Dr. Chudy concluded Smith was mentally competent and capable of assisting his defense attorney.

Evidence of Subaverage Intellectual Functioning. The report stated that Smith took the WAIS-R IQ test, and that he earned a verbal IQ score of 73, a performance IQ score of 72, and a full-scale IQ score of 72. According to Dr. Chudy's report, those full-scale scores "place[d Smith] at the 3rd percentile in comparison to the general population." These scores placed him "in

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[7] In a section titled "Evaluation of Offender," the Alabama Report stated that several people at the motel, where Smith stayed prior to Van Dam's murder, "stated they believe [Smith] has a mental problem." According to the Alabama Report, in early 1997, Smith got into a fight with an elderly man and bit off the tip of one of the elderly man's fingers.

[8] These subheadings are not included in Dr. Chudy's report itself but are created to organize the information in his report.

the Borderline range of intelligence[,] which means that he operates between the Low Average and Mentally Retarded range." According to Dr. Chudy, "[a]ctually[,] these scores place him at a level closer to those individuals who would be considered mentally retarded."

Evidence of Communication Limitations. Dr. Chudy's report indicated that Smith had some communication problems, but was generally coherent. The report stated that (1) at times, it "was necessary to re-state questions in more elementary forms so that [Smith] could understand them," (2) Smith's "comprehension is limited," and (3) Smith "lacks much insight or awareness into his behavior."

Evidence of Limitations in Daily Functioning. Dr. Chudy's report noted that Smith had "emotional problems, which seem to be largely due to an extremely dysfunctional life . . . [and] compounded by his mental dullness." The report stated that Smith's emotional problems limit his "ability to deal with everyday stresses and demands." Dr. Chudy characterized Smith's state of mind as "indifferent and ineffectual," and concluded that Smith's "thinking [was] not real clear" and that Smith "lacks any direction or goal in life." Dr. Chudy concluded that Smith generally "takes little notice of things around him" and "does not think through things."

Evidence of Deficits in Learning from Experience. Dr. Chudy concluded that Smith's "indifferent and ineffectual" mindset "provides little basis for [Smith] [to act] in a consistently sensible manner or learn[] from experience . . . even when it involves bringing on pain

to himself or those closest to him." Smith's "thinking is vague" and "easily confused," and he "is often overwhelmed with incomprehensible feelings or impulses that he does not understand." Smith "possesses extremely limited insight and judgment."

Evidence of Social Deficits. Dr. Chudy's report indicated that Smith's "personality functioning is equally dysfunctional." As a result of his emotional problems, Dr. Chudy found, Smith often "withdraws from others" and only "[o]casionally . . . will become desperate enough that he will set out to find people to be with." But "poor judgment causes [Smith] to end up with the wrong people." Dr. Chudy found that Smith had "anger about being rejected and 'getting a raw deal in life.'" "Fortunately, [Smith] has been successful at repressing his anger[,] but there is a down side to that. Sooner or later when his anger builds up, it will come out and it will probably come out explosively." Dr. Chudy concluded that Smith "fails to use good judgment because he never learned how to incorporate successfully into societies [sic] norms."

Evidence of Varied Deficits. Dr. Chudy's report examined the particulars of Smith's WAIS-R test results. The report stated that (1) "Smith displayed major deficiencies in areas related to academic skills"; (2) he "functioned well below average in his recall of learned and acquired information (Information)"; and (3) he "was also quite weak in word knowledge and usage (Vocabulary) and mental mathematical computation (Arithmetic)."

Other areas of weakness noted by Dr. Chudy had to do with Smith's social skills. Smith "scored well below average in skills having to do with social reasoning and learning how to respond effectively in social situations (Comprehension)." Smith "also showed a major deficiency in his ability to predict social sequences of action (Picture Arrangement)." Dr. Chudy stated that Smith is "ineffective in problem-solving."

B. Imposition of a Death Sentence

After considering the evidence and arguments, the state trial judge found that the aggravating circumstances outweighed the mitigating circumstances in this case, accepted the jury's advisory death sentence, and ordered that Smith be put to death by electrocution.[9]

The state trial court found these three aggravating circumstances: (1) Smith committed the capital offense while under a sentence of imprisonment at the time of the offense, Ala. Code § 13A-5-49(1); (2) Smith committed the murder while engaged in the commission of a robbery, id. § 13A-5-49(4); and (3) the capital

[9] In 2002, the Alabama Legislature changed the State's standard method of execution from electrocution to lethal injection. See Ala. Code § 15-18-82.1 (2006 Cumulative Supp.). Those inmates who were sentenced to death and whose certificates of judgment were issued after July 1, 2002, had a time-limited option to elect electrocution instead of death by lethal injection. Id. § 15-18-82.1(b). At oral argument, it was confirmed that Smith did not so choose.

offense was especially heinous, atrocious, or cruel compared to other capital offenses, id. § 13A-5-49(8).

The state trial court found that no statutory or non-statutory mitigating circumstances existed. Specifically, the trial court found (1) the capital offense was not committed while Smith was under the influence of extreme mental or emotional disturbance and (2) Smith "was not mentally or emotionally disturbed" to an "extreme extent" or "to the extent that this mitigating circumstance exists." See id. § 13A-5-51(2). The trial court reached this conclusion after "carefully review[ing] and weigh[ing] both the report and testimony of Doctor James Chudy, a clinical psychologist, in the context of the facts underlying the offense charged and proven."

C. Smith's Direct Appeal

The Alabama Court of Criminal Appeals affirmed Smith's conviction and death sentence. Smith I, 795 So. 2d at 842. The Alabama Supreme Court denied Smith's petition for a writ of certiorari. Ex parte Joseph Clifton Smith, 795 So. 2d 842 (Ala. 2001) (mem.). The United States Supreme Court denied Smith's petition for a writ of certiorari. Smith v. Alabama, 534 U.S. 872, 122 S. Ct. 166 (2001).

V. POST-CONVICTION PROCEEDINGS IN STATE COURT

A. 2002 Rule 32 Petition

In 2002, Smith filed a pro se petition in the state trial court, seeking post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. After the State objected on timeliness grounds, the state trial court dismissed Smith's Rule 32 petition as untimely. The Alabama Court of Criminal Appeals affirmed, Smith v. State, 897 So. 2d 1246 (Ala. Crim. App. 2003) (table), and denied rehearing, Smith v. State, 910 So. 2d 831 (Ala. Crim. App. 2004) (table).

In 2004, the Alabama Supreme Court reversed and remanded, holding that Smith's Rule 32 petition was timely. Ex Parte Joseph Clifton Smith, 891 So. 2d 286 (Ala. 2004). The Alabama Court of Criminal Appeals remanded the case to the state trial court for further proceedings. Smith v. State, 891 So. 2d 287 (Ala. Crim. App. 2004).

B. 2004 Second Amended Rule 32 Petition

In 2004, Smith filed an amended Rule 32 petition for post-conviction relief. After the State moved to dismiss, Smith filed a second amended Rule 32 petition. Both petitions alleged that Smith was intellectually disabled and his death sentence violated the Eighth and Fourteenth Amendments. Smith requested "a full evidentiary hearing" and funds to present witnesses, experts, and other evidence.

C. 2005 Dismissal of Second Amended Rule 32 Petition

The State moved to dismiss again. In 2005, the state trial court dismissed Smith's second amended Rule 32 petition. The court rejected Smith's Atkins claim without an evidentiary hearing. The court reviewed the Alabama Supreme Court's decision in Ex parte Perkins, 851 So. 2d 453 (Ala. 2002), which identified three requirements to establish mental retardation "under the broadest definition" of that term: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)," (2) "significant or substantial deficits in adaptive behavior," and (3) manifestation of the first two elements "during the developmental period (i.e., before the defendant reached age 18)." Id. at 456.

As to Smith's intellectual functioning, the state trial court concluded that (1) "[t]he evidence admitted at Smith's trial refutes any assertion that Smith's intellectual functioning is significantly subaverage," and (2) "Smith proffer[ed] no facts in his second amended Rule 32 petition that would in any way dispute the facts contained in the record." As to Smith's adaptive behavior, the state trial court concluded that the record "indicates [few], if any, deficits in Smith's adaptive functioning."

The state trial court found that Smith was not mentally retarded, rejected his Atkins and other claims, and denied his second amended Rule 32 petition in full.

D. Appeal of Dismissal of Second Amended Rule 32 Petition

In 2008, the Alabama Court of Criminal Appeals affirmed the dismissal of Smith's second amended Rule 32 petition, including his Atkins claim. Smith v. State ("Smith II"), 71 So. 3d 12 (Ala. Crim. App. 2008). As to mental retardation, the Alabama appellate court discussed Atkins; how Atkins left it to the states to define "mental retardation"; and Alabama's three requirements for "mental retardation," identified in Perkins. Id. at 17.

Turning to Smith's Atkins claim, the Alabama Court of Criminal Appeals concluded that Smith failed to meet his burden of pleading the facts relied upon in seeking relief, as required by Rule 32.6(b) of the Alabama Rules of Criminal Procedure. See id. at 18–19. The Alabama appellate court found that "[t]he only grounds offered in support" of Smith's claim were his conclusory allegations that he met the three requirements of mental retardation under Atkins and Perkins. Id. at 19.

Alternatively, the Alabama appellate court turned to the merits of Smith's Atkins claim based on the trial evidence. The Alabama appellate court concluded that Smith's mental retardation claim failed on the merits because the trial record shows "Smith does not meet the broadest definition of mentally retarded adopted by the Alabama Supreme Court." Id. The Alabama appellate court reviewed the evidence of Smith's full-scale IQ scores of 74 at age 12 and 72 before trial. Id.

at 19–20. The Alabama appellate court noted that Dr. Chudy testified "that[,] because of the margin of error in IQ testing[,] Smith's IQ score could be as high as 75 or as low as 69."[10] Id. at 19. The Alabama appellate court did not apply a "margin of error" to Smith's above-70 IQ scores. Id. at 20.

As to Smith's adaptive behavior, the Alabama appellate court concluded that there was "no indication that Smith had significant defects in adaptive behavior." Id. at 20. The Alabama appellate court recounted evidence of Smith's participation in the murder and other evidence relevant to Smith's adaptive behavior, including his ability to communicate with police and his having a girlfriend.[11] Id.

The Alabama Supreme Court denied Smith's petition for a writ of certiorari.[12]

VI. SECTION 2254 PETITION IN FEDERAL COURT

A. 2005 Petition

In 2005, Smith filed this petition for a writ of habeas corpus in the United States District Court for the

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[10] The Alabama Court of Criminal Appeals referred to the standard error of measurement as a "margin of error."

[11] In 2009, the Alabama appellate court also denied Smith's application for rehearing.

[12] The Alabama Supreme Court initially granted the writ as to Smith's ineffective-counsel claims, but it denied the writ as to all other claims. Following more briefing, the Alabama Supreme Court quashed the writ.

Southern District of Alabama, pursuant to 28 U.S.C. § 2254. In 2006, the district court stayed the § 2254 proceedings pending the Alabama state courts' resolution of Smith's Rule 32 petitions. In 2011, the district court lifted the stay and granted Smith's motion to amend his § 2254 petition. Smith filed an amended petition on July 25, 2011.

B. 2011 Amended Petition

Smith's amended § 2254 petition alleged, inter alia, that he is intellectually disabled and his execution would violate the Eighth and Fourteenth Amendments. Smith requested discovery and an evidentiary hearing.

In the district court, Smith argued that the Alabama Court of Criminal Appeals' decision—rejecting his Atkins claim—was both an unreasonable application of clearly established federal law, see 28 U.S.C. § 2254(d)(1), and an unreasonable determination of the facts, see id. § 2254(d)(2).

C. 2013 Order Denying Amended § 2254 Petition

On September 30, 2013, the district court denied Smith's amended § 2254 petition without discovery or an evidentiary hearing. Smith v. Thomas ("Smith III"), No. CIV.A.05-0474-CG-M, 2013 WL 5446032, at *38 (S.D. Ala. Sept. 30, 2013). The district court concluded that Smith's Atkins claim was not procedurally defaulted

and was properly before the federal habeas court because Smith raised it in his second amended Rule 32 petition. Id. at *27. The district court examined the reasonableness of the Alabama appellate court's rejection of Smith's Atkins claim based upon Smith's allegations in his first and second amended Rule 32 petitions and the trial record considered by the state courts. Id. at *27–29.

The district court concluded that the only evidence of Smith's IQ presented to the state trial court was Dr. Chudy's testimony that Smith's full-scale IQ score was 72 in 1998, and the school records indicating that Smith's IQ scores were 74 and 75 in grade school. Id. at *28. The district court agreed with the State's position that Dr. Chudy's finding—that Smith is "in the Borderline range of intelligence[,] which means that he operates between the Low Average and Mentally Retarded range"—establishes that Smith is not mentally retarded and not exempt from the death penalty. Id.

The district court acknowledged (1) that Dr. Chudy's testified "that, in Smith's case, 'a standard error of measurement of about three or four points' could result in an IQ 'as high as maybe a 75 [or] . . . as low as a 69,'" and (2) the "Flynn effect," which artificially inflates IQ scores.[13] Id. The district court, however,

[13] The "Flynn effect" is the phenomenon by which "IQ test scores have been increasing over time" because, "as an intelligence test ages, or moves farther from the date on which it was standardized, or normed, the mean score of the population as a whole on that assessment instrument increases." Thomas v. Allen, 607 F.3d 749, 753 (11th Cir. 2010).

observed that the Alabama appellate court had refused to downwardly modify Smith's most recent IQ score of 72 to produce an adjusted score within the mental retardation range of 70 or below. Id. at *28–29. The district court concluded that the Alabama appellate court did not unreasonably refuse to apply a "margin of error" to Smith's IQ score of 72 such that his score would be reduced and fall within the "mental retardation range." Id. at *29.

Because the district court concluded Smith "failed to prove that his intellectual functioning was or is significantly subaverage," it did "not explore whether Smith suffers from deficits in adaptive behavior and whether any such deficits manifested themselves before Smith reached the age of 18." Id. at *29 n.26. The district court denied Smith's § 2254 petition as to all claims, id. at *6–26, *29–38, denied Smith a certificate of appealability, id. at *38, and later denied Smith's motion to reconsider, Smith v. Thomas ("Smith IV"), No. CIV.A.05-0474-CG-M, 2014 WL 217771, at *5 (S.D. Ala. Jan. 21, 2014).

D. Smith's Certificate of Appealability

In 2014, this Court granted Smith a certificate of appealability as to these three issues:

> 1. Whether the Alabama state courts' procedural ruling—that in his Rule 32 post-conviction pleadings as to his mental retardation claim, Smith failed to comply with the specificity pleading requirements in Rule

32.6(b) of the Alabama Rules of Criminal Procedure—was contrary to or an unreasonable application of Atkins v. Virginia, 536 U.S. 304 (2002)?

2. Whether the Alabama state courts' merits determination—that Smith did not show significant deficits in adaptive behavior manifested before age 18—is an unreasonable determination of the facts or an unreasonable application of Atkins?

3. Whether the Alabama state courts' merits determination—that Smith did not show subaverage intellectual functioning—is an unreasonable determination of the facts or an unreasonable application of Atkins?[14]

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[14] With the benefit of the parties' briefs, oral argument, and our examination of the record, it has become clear that the first issue is also properly a question of whether the Alabama Court of Criminal Appeals' procedural ruling is an unreasonable determination of the facts or an unreasonable application of Atkins. Accordingly, we sua sponte expand the certificate of appealability ("COA") to address whether the Alabama appellate court's decision, including its Rule 32.6(b) ruling, was based on an unreasonable determination of the facts under 28 U.S.C. § 2254(d)(2). See Dell v. United States, 710 F.3d 1267, 1272 (11th Cir. 2013), cert. denied, 134 S. Ct. 1508 (2014) (noting this Court has "expanded a COA sua sponte on exceptional occasions, even after oral argument"); see also 11th Cir. R. 27-1(g) ("A ruling on a motion or other interlocutory matter, whether entered by a single judge or a panel, is not binding upon the panel to which the appeal is assigned on the merits, and the merits panel may alter, amend, or vacate it.").

VII. STANDARD OF REVIEW

We review de novo a district court's ultimate decision to deny a habeas corpus petition brought by a state prisoner. McNair v. Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005). As part of that task, we review the district court's factual findings for clear error, and we review mixed questions of fact and law de novo. Id.

VIII. AEDPA

A. AEDPA Deference

A state prisoner's habeas petition is governed by 28 U.S.C. § 2254, as amended by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). "AEDPA recognizes a foundational principle of our federal system: State courts are adequate forums for the vindication of federal rights." Burt v. Titlow, 571 U.S. ___, ___, 134 S. Ct. 10, 15 (2013). AEDPA thus "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." Id. at ___, 134 S. Ct. at 16. Indeed, the purpose of AEDPA's amendments to § 2254 "is to ensure that federal habeas relief functions as a guard against extreme malfunctions in the state criminal justice systems, and not as a means of error correction." Greene v. Fisher, 565 U.S. ___, ___, 132 S. Ct. 38, 43 (2011) (quotation marks omitted).

Accordingly, federal review of final state court decisions under § 2254 is "greatly circumscribed" and "highly deferential." Hill v. Humphrey, 662 F.3d 1335, 1343 (11th Cir. 2011) (en banc) (quotation marks

omitted). Where a state court denied a petitioner relief on alternative grounds, AEDPA precludes the petitioner from obtaining federal habeas relief unless he establishes that each and every ground upon which the state courts relied is not entitled to AEDPA deference. See Wetzel v. Lambert, 565 U.S. ___, ___, 132 S. Ct. 1195, 1199 (2012) (stating § 2254 petition at issue should not be granted "unless each ground supporting the state court decision is examined and found to be unreasonable under AEDPA").

B. Section 2254(d)(1) & (2)

As a general rule, a § 2254 state petitioner may not obtain federal habeas relief "with respect to any claim that was adjudicated on the merits" by a state court. 28 U.S.C. § 2254(d). However, a petitioner may avoid that general rule if one of two conditions exist: either (1) that the state court's 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," id. § 2254(d)(1); or (2) that the state court's adjudication "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," id. § 2254(d)(2). The petitioner carries the burden of proof under § 2254(d)(1) & (2), and our review is limited to the record before the state court. Cullen v. Pinholster, 563 U.S. ___, ___, 131 S. Ct. 1388, 1398 (2011).

Pursuant to § 2254(d)(1), the phrase "clearly established Federal law" means "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision." Lockyer v. Andrade, 538 U.S. 63, 71, 123 S. Ct. 1166, 1172 (2003) (quotation marks omitted). A state court's application of federal law is not unreasonable under § 2254(d)(1) "so long as fairminded jurists could disagree on the correctness of the state court's decision." Harrington v. Richter, 562 U.S. 86, 101, 131 S. Ct. 770, 786 (2011) (quotation marks omitted).

As to § 2254(d)(2), "a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 340, 123 S. Ct. 1029, 1041 (2003). "We may not characterize . . . state-court factual determinations as unreasonable merely because we would have reached a different conclusion in the first instance." Brumfield v. Cain, 576 U.S. ___, ___, 135 S. Ct. 2269, 2277 (2015) (quotation marks omitted). The Supreme Court has found a state court's factual finding to be unreasonable where the record before the state court did not support the factual finding. See Wiggins v. Smith, 539 U.S. 510, 528–29, 123 S. Ct. 2527, 2539 (2003).

IX. ALABAMA'S APPLICATION OF ATKINS

In 2002, the United States Supreme Court held in Atkins that the execution of "mentally retarded"

individuals violates the Eighth Amendment of the Constitution. 536 U.S. at 321, 122 S. Ct. at 2252.[15] The Supreme Court pointed out that, "[t]o the extent there is serious disagreement about the execution of mentally retarded offenders, it is in determining which offenders are in fact retarded." Id. at 317, 122 S. Ct. at 2250. The Atkins Court, however, left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." Id. (quotation marks omitted and alterations adopted).

As recounted above, the Alabama Supreme Court in Perkins identified three requirements to establish intellectual disability "under the broadest definition" of mental retardation: (1) "significantly subaverage intellectual functioning (an IQ of 70 or below)," (2) "significant or substantial deficits in adaptive behavior," and (3) manifestation of "these problems . . . during the developmental period (i.e., before the defendant reached age 18)." Perkins, 851 So. 2d at 456.[16]

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[15] Prior to Atkins, Alabama, along with most other states, had not outlawed the execution of intellectually disabled individuals. See Atkins, 536 U.S. at 314–15 & n.20, 122 S. Ct. at 2248–49 & n.20; id. at 342, 122 S. Ct. at 2261–62 (Scalia, J., dissenting).

[16] In Perkins, decided shortly after Atkins, the Alabama Supreme Court noted that Alabama lacked statutorily-prescribed procedures for identifying intellectually disabled individuals and "urge[d] the Legislature to expeditiously develop procedures for determining whether a capital defendant is mentally retarded and thus ineligible for execution." Perkins, 851 So. 2d at 457 n.1. In the absence of a legislative definition, the Alabama Supreme Court continued to apply "the 'most common' or 'broadest' definition of mental retardation, as represented by the clinical definitions

Neither the Alabama legislature nor the Alabama Supreme Court has defined what constitutes "significant or substantial deficits in adaptive behavior." See id. But the Alabama Supreme Court has applied generally the "most common" or "broadest" definition of mental retardation, which reflects "the clinical definitions considered in Atkins." In re Jerry Jerome Smith v. State, No. 1060427, 2007 WL 1519869, at *7 (Ala. May 25, 2007). And "significant or substantial deficits in adaptive behavior" means, under the clinical definitions considered in Atkins, a petitioner must show limitations in two or more of the following applicable adaptive-skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, health and safety, functional academics, leisure, and work." Atkins, 536 U.S. at 308 n.3, 122 S. Ct. at 2245 n.3 (citing the American Association on Mental Retardation and American Psychiatric Association's definitions of mental retardation).[17] Thus, we use that common clinical definition in considering this case. Cf. Lane v. State, ___ So.3d ___, ___ No. CR-10-1343, 2013 WL 5966905, at *5 (Ala. Crim. App. Nov. 8, 2013) ("In order for an individual to have significant or substantial deficits in adaptive behavior, he must

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considered in Atkins and the definitions set forth in the statutes of other states that prohibit the imposition of the death sentence when the defendant is mentally retarded." In re Jerry Jerome Smith v. State, No. 1060427, 2007 WL 1519869, at *7 (Ala. May 25, 2007).

[17] The American Association on Mental Retardation is now known as the American Association on Intellectual and Developmental Disabilities.

have concurrent deficits or impairments in . . . at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety." (quotation marks omitted)).

X. ANALYSIS OF SMITH'S CLAIMS

A. Rule 32.6(b) Determination

Our first task is to review the Alabama Court of Criminal Appeals' procedural ruling—that Smith failed to meet the pleading requirements of Rule 32.6(b).[18] The Alabama Court of Criminal Appeals' Rule 32.6(b) ruling was based on its underlying factual determination that "[t]he only grounds offered in support" of Smith's claim were his conclusory allegations that he met the three requirements of intellectual disability under Atkins and Perkins. See Smith II, 71 So. 3d at 19.

Here, we do not examine whether the petition was sufficient to meet Alabama's pleading requirement.[19] Rather, our narrow review is only the underlying

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[18] The parties agree that we should review the decision of the Alabama Court of Criminal Appeals on Smith's Atkins claim.

[19] Under Rule 32.6(b), each claim in a petition for post-conviction relief "must 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). "A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings." Id.

factual determination about whether Smith's second amended petition recounted any facts at all or only conclusory allegations.

Smith's second amended Rule 32 petition included at least seven factual grounds that support his Atkins claim: (1) there "was testimony at trial that Mr. Smith functioned intellectually at the bottom 3rd percentile of all adults"; (2) "[s]chool records indicate that Mr. Smith never progressed beyond the 5th grade"; (3) when Smith enrolled in a junior high school in Monroe County, "the county board of education classified Mr. Smith as 'Educable Mentally Retarded' (EMR), based on his 'psychological and educational evaluations, academic history, and other pertinent information' "; (4) "even though he was in EMR classes while in the Monroe County school system, [Smith] either failed or performed at the 'D' level in all subjects"; and "testimony at sentencing . . . showed [Smith's] inability to adapt because" (5) "he often acts out impulsively," (6) he "lacks the ability to formulate a pre-meditated plan," and (7) he "acts as a follower in groups" (alterations adopted). These factual allegations relate to the three requirements of intellectual disability under Perkins: significantly subaverage intellectual functioning, significant or substantial deficits in adaptive behavior, and manifestation before age 18.

In short, the Alabama appellate court's factual determination—that the "only grounds" Smith pled were conclusory allegations that he met each of the three requirements—is unsupported by the record and

therefore unreasonable.[20] See Wiggins, 539 U.S. at 528–29, 123 S. Ct. at 2539; cf. Brumfield, 576 U.S. at ___, 135 S. Ct. at 2276–77 (reviewing under § 2254(d)(2) a state court's factual determination that the record included "no evidence" of adaptive impairment).[21] Thus, the

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[20] We reach this conclusion based on our review of the state court's factual determination about what was alleged in Smith's second amended Rule 32 petition; by contrast, where a state court accurately identifies what allegations were included in a petition and concludes that those allegations failed to meet a pleading requirement, that is a legal conclusion, which is subject to review under § 2254(d)(1). See Brumfield, 576 U.S. at ___ n.3, 135 S. Ct. at 2277 n.3 ("[W]e subject these determinations to review under § 2254(d)(2) instead of § 2254(d)(1) because we are concerned here not with the adequacy of the procedures and standards the state court applied in rejecting [the petitioner's] Atkins claim, but with the underlying factual conclusions. . . .").

[21] Although not squarely on point, Brumfield is instructive. Following Atkins, the death-sentenced Brumfield amended his state post-conviction petition to raise a mental-retardation claim. 576 U.S. at ___, 135 S. Ct. at 2274. Brumfield alleged that he read at a fourth-grade level and obtained an IQ score of 75. Id. at ___, 135 S. Ct. at 2274–75. The state court dismissed his petition. Id. at ___, 135 S. Ct. at 2275.

Later, the district court granted Brumfield's § 2254 petition, holding, inter alia, the state court's dismissal was based on an unreasonable determination of the facts. Id. Reversing, the Fifth Circuit held that the state court's dismissal decision did not rest on an unreasonable determination of the facts. Id. at ___, 135 S. Ct. at 2276.

The United States Supreme Court vacated the Fifth Circuit's opinion and concluded that the state court's dismissal decision was based on two separate factual determinations that were unreasonable. Id. at ___, 135 S. Ct. at 2276–77. First, the state court unreasonably determined that Brumfield's evidence of intellectual functioning precluded him from obtaining an Atkins hearing under Louisiana law. Id. at ___, 135 S. Ct. at 2277–79. Contrary to the state court's decision, Brumfield's proffered IQ score of 75

Alabama Court of Criminal Appeals' conclusion that Smith failed to meet Rule 32.6(b) was based on an unreasonable determination of the facts. See 28 U.S.C. § 2254(d)(2).

B. Merits Determination

We must also consider the alternative basis the Alabama appellate court used for its affirmance of the dismissal of Smith's Rule 32 petition: its merits determination that the trial evidence conclusively showed that Smith is not "mentally retarded" and thus his Atkins claim fails.[22] See Crawford, 311 F.3d at 1326. That merits determination was a finding of fact. See Fults v. GDCP Warden, 764 F.3d 1311, 1319 (11th Cir. 2014) ("A determination as to whether a person is mentally retarded is a finding of fact."). We review the Alabama appellate court's merits ruling first on

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"was squarely in the range of potential intellectual disability" after accounting for the standard error of measurement. Id. at ___, 135 S. Ct. at 2278.

Second, the state court unreasonably concluded that Brumfield "presented no evidence of adaptive impairment." Id. at ___, 135 S. Ct. at 2277, 2279. The Supreme Court concluded that the state court's factual determination—that the record failed to raise any question as to Brumfield's impairment in adaptive skills—was unreasonable because "the evidence in the state-court record provided substantial grounds to question Brumfield's adaptive functioning." Id. at ___, 135 S. Ct. at 2280.

[22] In reviewing Smith's intellectual functioning and adaptive behavior, the Alabama Court of Criminal Appeals considered both Smith's first and second amended Rule 32 petitions and the evidentiary record from Smith's trial. Accordingly, we do the same. See Pinholster, 563 U.S. at ___, 131 S. Ct. at 1398.

Smith's intellectual functioning and then on Smith's adaptive behavior.

As to Smith's intellectual functioning, we agree with the State that Alabama law generally does not contain a strict IQ cut-off of 70 to establish intellectual disability. See Thomas v. Allen, 607 F.3d 749, 757 (11th Cir. 2010) ("There is no Alabama case law stating that a single IQ raw score, or even multiple IQ raw scores, above 70 automatically defeats an Atkins claim when the totality of the evidence (scores) indicates that a capital offender suffers subaverage intellectual functioning.").

But the problem for the State here is that the trial evidence showed that Smith's IQ score could be as low as 69 given a standard error of measurement of plus-or-minus three points. There was also other trial evidence of deficits in intellectual functioning, including that Smith (1) did arithmetic at a kindergarten level, which was consistent with an IQ of 45; (2) suffered from dyslexia; (3) failed seventh grade and dropped out of school in the eighth grade;[23] (4) struggled to recall learned and acquired information; and (5) was "quite weak in word knowledge and usage."

Despite this trial evidence pointing to significant deficits in Smith's intellectual functioning, and even though the state trial court had not conducted an evidentiary hearing, the Alabama Court of Criminal

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[23] In Smith's second amended Rule 32 petition, he also alleged that school records show he never successfully completed any grade beyond the fifth grade.

Appeals held that the record conclusively established Smith was not mentally retarded and could never meet Perkins's intellectual-functioning requirement. Considering the record evidence before the Alabama Court of Criminal Appeals and the fact that Alabama does not employ a strict IQ cut-off score of 70, the factual determination that Smith conclusively did not possess significantly subaverage intellectual functioning was an unreasonable determination of the facts. See Burgess v. Comm'r, Alabama Dep't of Corr., 723 F.3d 1308, 1319 (11th Cir. 2013) ("We hold that the state court's determination that [the petitioner] is not mentally retarded is an unreasonable determination of fact because it was based upon a combination of erroneous factual findings directly contradicted by the record and a record that was insufficient to support its conclusions."); cf. Brumfield, 576 U.S. at ___, 135 S. Ct. at 2278 ("To conclude, as the state trial court did, that [the petitioner's] reported IQ score of 75 somehow demonstrated that he could not possess subaverage intelligence . . . reflected an unreasonable determination of the facts.").

The Alabama Court of Criminal Appeals also determined conclusively that Smith did not suffer from significant or substantial deficits in adaptive behavior. See Smith II, 71 So. 3d at 20. This conclusion was similarly based wholly on the Alabama appellate court's factual determination that there was "no indication" from the trial record "that Smith had significant defects in adaptive behavior." See id.; cf. Brumfield, 576 U.S. at ___, 135 S. Ct. at 2276–77 (reviewing under

§ 2254(d)(2) a state court's factual determination that the record included "no evidence" of adaptive impairment). In other words, there was no record evidence at all of adaptive-behavior impairment.

Even assuming that a petitioner must show deficits areas that are identified in both of the clinical definitions in Atkins, the Alabama Court of Criminal Appeals' conclusion that the record provided "no indication" that Smith had significant deficits in adaptive behavior was an objectively unreasonable determination of the facts. See Miller-El, 537 U.S. at 340, 123 S. Ct. at 1041. Indeed, the record affirmatively contradicts this conclusion that there was "no indication" of significant deficits in Smith's adaptive behavior. There was evidence in the record before the Alabama Court of Criminal Appeals that would support a fact finding that Smith had significant limitations in at least two of the adaptive skills identified by both clinical definitions: (1) social/interpersonal skills and (2) self-direction.

First, as to social/interpersonal skills, Dr. Chudy concluded that Smith "never learned how to incorporate successfully into [society's] norms." Dr. Chudy classified Smith's "personality functioning" as "dysfunctional," noted that Smith "scored well below average in skills having to do with social reasoning and learning how to respond effectively in social situations," and stated that Smith "showed a major deficiency in his ability to predict social sequences of action." Also relevant to this social-skills inquiry, Dr. Chudy found that Smith's emotional problems limited

his "ability to deal with everyday stresses and demands" and caused him to "withdraw[] from others." Furthermore, Dr. Chudy concluded that Smith "takes little notice of things around him" and "does not think through things."

Second, as to self-direction, Dr. Chudy concluded that Smith "lacks any direction or goal in life." Dr. Chudy found that Smith's "indifferent and ineffectual" mindset provided "little basis for [Smith] acting in a consistently sensible manner or learning from experience . . . even when it involves bringing on pain to himself or those closest to him." Dr. Chudy also concluded that Smith "is often overwhelmed with incomprehensible feelings or impulses that he does not understand" and "possesses extremely limited insight and judgment." In addition, Smith's Rule 32 petition alleged that Smith (1) is prone to impulsive behaviors, (2) lacks the ability to formulate premeditated plans, and (3) acts as a follower in groups.

Considering all the foregoing, the Alabama Court of Criminal Appeals' finding that there was "no indication that Smith had significant defects in adaptive behavior," Smith II, 71 So. 3d at 20, is unsupported (and, in fact, contradicted) by the record and therefore unreasonable, see Wiggins, 539 U.S. at 528–29, 123 S. Ct. at 2539; cf. Brumfield, 576 U.S. at ___, 135 S. Ct. at 2279–82 (holding a state court's "conclusion that the [trial] record failed to raise any question" as to the petitioner's adaptive behavior was an unreasonable determination of the facts). Accordingly, its merits determination (at the early dismissal stage) as to Smith's

adaptive behavior functioning was based on an unreasonable determination of the facts.

C. Evidentiary Hearing

Smith requests that we reverse and remand this case to allow Smith on his own to present an expert witness on his behalf. Smith should be allowed to do that.

Smith also included in his prayer for relief a request for discovery and an evidentiary hearing. Neither he nor the State has fully briefed the propriety or usefulness of discovery or of an evidentiary hearing at this stage of the litigation. Accordingly, we do not decide whether the district court should order discovery or an evidentiary hearing, and we leave that issue for the district court to decide in the first instance.

However, in considering whether to grant Smith discovery or an evidentiary hearing, the district court should note that Dr. Chudy's diagnosis of "borderline intellectual functioning" does not ipso facto preclude Smith from attempting to establish that he is intellectually disabled, especially given Dr. Chudy's testimony about the standard error of measurement applicable to Smith's IQ score of 72. See Burgess, 723 F.3d at 1313, 1322 (ordering the district court to conduct an evidentiary hearing to determine whether the petitioner, who had been diagnosed as "borderline mentally retarded," was intellectually disabled under Alabama law).

XI. CONCLUSION

In conclusion, we reverse and remand for further proceedings consistent with this opinion. In doing so, we express no opinion as to whether Smith is intellectually disabled. Upon remand, the district court should consider in the first instance Smith's requests for discovery and an evidentiary hearing.

REVERSED AND REMANDED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JOSEPH CLIFTON SMITH,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION NO. 05-0474-CG-M**
KIM T. THOMAS, Commissioner, Alabama Department of Corrections,	)	
Respondent.	)	

ORDER ON PETITION FOR WRIT OF HABEAS CORPUS

(Filed Sep. 30, 2013)

Petitioner Joseph Clifton Smith ("Petitioner" or "Smith") initiated this action on August 15, 2005 by filing a Petition for Writ of Habeas Corpus (Doc. 1) pursuant to 28 U.S.C. § 2254. Smith challenges a 1998 Alabama state court judgment of conviction and death sentence for capital murder. This matter is before the Court on Petitioner's Amended Petition for Writ of Habeas Corpus (Doc. 52), Respondent Kim T. Thomas'[1] Answer to same (Doc. 56), and Respondent's filing of the indexed record, which consists of 23 volumes.

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[1] Pursuant to Rule 25(d) of the Federal Rules of Civil Procedure, the Court has substituted Kim T. Thomas, the current Commissioner of the Alabama Department of Corrections, for Donal Campbell, who formerly served in that capacity.

For the reasons set forth below, Smith's claims are **DENIED** and his requests for discovery and for an evidentiary hearing[2] are **DENIED**.

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[2] The Antiterrorism and Effective Death Penalty Act (AEDPA) governs the disposition of habeas petitions filed after April 24, 1996. "AEDPA expressly limits the extent to which hearings are permissible, not merely the extent to which they are required." Kelley v. Sec'y for Dep't of Corr., 377 F.3d 1317, 1337 (11th Cir. 2004). 28 U.S.C. § 2254(e)(2) provides the legal standard for determining when an evidentiary hearing in a habeas corpus case is allowed:

> If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—
>
> (A) the claim relies on—
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

Id.

Whereas Smith's claims do not rely on new law or new evidence, and whereas, as set forth herein, Smith cannot establish any constitutional error, none of the statutory conditions has been met, and Smith has therefore failed to establish that an evidentiary hearing is warranted in this case.

I. FACTUAL AND PROCEDURAL BACKGROUND

A. TRIAL

Upon extensive review of the record, the Court finds that the Alabama Court of Criminal Appeals succinctly stated the relevant facts in Smith v. State (Smith I), 795 So. 2d 788, 796-97 (Ala. Crim. App. 2000):

> The appellant, Joseph ("Jody") Clifton Smith, was convicted of murdering Durk Van Dam during the course of a robbery, an offense defined as capital by § 13A–5–40(a)(2), Ala. Code 1975. The jury, by a vote of 11 to 1, recommended that Smith be sentenced to death. The trial court accepted the jury's recommendation and sentenced Smith to die in Alabama's electric chair at a date to be set by the Alabama Supreme Court.
>
> The State's evidence tended to show the following. On November 25, 1997, police discovered the badly beaten body of Durk Van Dam in his mud-bound Ford Ranger truck in a wooded area near Shipyard Road in Mobile County. Dr. Julia Goodin, a forensic pathologist for the Alabama Department of Forensic Sciences, testified that Van Dam died as a result of 35 different blunt-force injuries to his body. Van Dam had marks consistent with marks made by a saw on his neck, shoulder, and back; he also had a large hemorrhage beneath his scalp, brain swelling, multiple rib fractures, a collapsed lung, multiple abrasions

to his head and knees, and defensive wounds on his hands. Dr. Goodin testified that the multiple rib fractures that caused one lung to collapse were probably the most immediate cause of death.

Smith gave two statements to the police. In the first statement he denied any involvement in the robbery-murder but said that he was with Larry Reid when Reid beat and robbed Van Dam. Smith denied taking anything from the victim. When police were questioning Reid, Smith repeatedly knocked on the interrogation room door and requested to talk to the officer who had taken his first statement. In his second statement Smith admitted that he and Reid had planned to rob Van Dam because they had been told that Van Dam was carrying $1,500 in cash. Smith said that he, Reid, and Van Dam left the Highway Host motel in Van Dam's red truck on November 23, 1997. Van Dam was driving. Reid directed Van Dam, who had been drinking, to an isolated location. Once there, Reid began hitting Van Dam. He said that when Reid kicked Van Dam in the face he thought Van Dam was dead. Smith said that Van Dam then got up and Smith hit him on the head with his fist, kicked him in the ribs several times, threw a handsaw at him, and may have hit him with a hammer but he wasn't entirely sure because he suffers from blackouts. Reid then got a power saw from the back of Van Dam's truck, Smith said, and ran the saw against Van Dam's neck. Smith held Van Dam down while Reid took the money from his pockets. Smith and Reid

then attempted to move the truck, because they had planned to steal it, but it got stuck in the mud. Smith also admitted that he took the victim's boots, because his shoes were wet, and that he took the victim's tools. The two discussed where to take Van Dam's body and Smith suggested that they take it to a nearby lake. However, they left the body, Smith said, under a mattress near Van Dam's truck. Smith said that when they divided the money he got only $40 and Reid kept the rest, approximately $100. Smith also told police that he had just been released from custody on Friday—two days before the robbery-murder on Sunday.

Russell Harmon testified that on November 23, 1997, he went to the Highway Host motel and saw Reid and Smith. He said that Smith told him that they were going to rob Van Dam and asked if he wanted to join them. Harmon declined and left the motel. Later that day he went back to the motel to see if the two had been successful with their plans. He said that Smith told him that he had beaten the victim on the head and that he had cut him with a saw. On cross-examination he admitted that he could not swear that Smith was the one who said he had cut Van Dam in the back but that it could have been Reid who made this statement. However, on cross-examination Harmon reiterated that Smith told him that he "hit the man, beat the man—hit the man in the head and cut him." Harmon testified that Smith asked him to go with him to get the tools from where he had left them in the

woods. He said that he went with Smith and that they got the tools and took them to a pawnshop—Smith received $200 for the tools. Harmon testified that he was currently in the county jail because his probation had been revoked.

M.A. testified that she was living at Highway Host motel with her mother and sister at the time of Van Dam's murder. She said that her sister, M., was dating Smith. M.A. testified that on November 23, 1997, she saw Smith, Reid, and Van Dam drive away from the motel in a red truck. She said that when Smith and Reid returned sometime later they were in a black car, Van Dam was not with them, and Smith had blood on his clothes. M.A. testified that Smith told her that he had hit, cut, and stabbed Van Dam in the back.

Patty Milbeck testified that she saw Smith, Reid, and Van Dam on the day of the robbery-murder. When they returned, she said, Van Dam was not with them and Smith appeared nervous. Smith told her that Van Dam had become angry and left. Milbeck stated that at the time of her trial testimony she was in jail because she failed to report to her probation officer.

Joey Warner, an employee of 24-Hour Pawn pawnshop, testified that on November 23, 1997, Smith pawned several tools including saws, drills, and a router. He was given $200 and he showed his Alabama Department of

Corrections identification card as identification to pawn the tools.

B. Direct Appeal

Petitioner pursued a direct appeal to the Alabama Court of Criminal Appeals, which affirmed Petitioner's conviction and death sentence in an opinion issued on May 26, 2000. Smith I, 795 So. 2d 788. Without opinion, the Alabama Supreme Court denied Petitioner's application for a writ of certiorari on March 16, 2001. Ex parte Smith, 795 So. 2d 842, 842 (Ala. 2001).[3] The United States Supreme Court denied review on October 1, 2001. Smith v. Alabama, 534 U.S. 872 (2001).

C. Rule 32 Petition/Collateral Attack

Pursuant to Alabama Criminal Procedure Rule 32, Petitioner filed a *pro se* petition for post-conviction relief with the Circuit Court of Mobile County, Alabama on September 27, 2002. On October 9, 2002, the circuit court ruled that the petition was barred by the statute of limitations. #R-78.[4] The Alabama Court of Criminal Appeals affirmed on December 19, 2003. #R-79. The Alabama Supreme Court reversed and remanded,

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[3] Three justices dissented from the denial of certiorari. Ex parte Smith, 795 So. 2d at 842-46.

[4] The abbreviation "#R." and "Vol." refer to the tab number and volume number assigned by Respondent to various parts of the indexed record as set forth in Respondent's Habeas Corpus Checklist (Doc. 58). Citations to "T.R." refer to the trial transcript. Citations to "Supp. C.R." refer to the supplemental clerk's record from the Rule 32 proceedings.

holding that the petition was timely, on March 5, 2004. Ex parte Smith, 891 So. 2d 286 (Ala. 2004). Petitioner filed a First Amended Rule 32 Petition on June 4, 2004 and filed a Second Amended Rule 32 Petition on January 12, 2005. The State filed a Motion to Dismiss, and on February 11, 2005, after a hearing, the circuit court held that the motion would be granted. The circuit court dismissed Smith's petition on March 18, 2005. The Alabama Court of Criminal Appeals denied rehearing without opinion on June 29, 2005. Smith v. State, 926 So. 2d 1095 (Ala. Crim. App. 2005) (table). The Alabama Supreme Court denied certiorari without opinion on August 12, 2005. Ex parte Smith, 946 So. 2d 545 (Ala. 2005) (table).

Petitioner filed an Alabama Criminal Procedure Rule 32.1(f) petition in circuit court on September 15, 2005.[5] The circuit court granted the petition on November 21, 2005. On December 22, 2005, Petitioner timely filed a notice of appeal. On September 26, 2008, the Alabama Court of Criminal Appeals denied the appeal. Smith v. State (Smith II), 71 So. 3d 12 (Ala. Crim. App. 2008). On January 20, 2010, the Alabama Supreme Court granted certiorari as to one claim for ineffective assistance of counsel, #R-90, but then quashed the writ without written opinion on April 15, 2011, #R-91.

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[5] Meanwhile, Petitioner filed his original petition for writ of habeas corpus with this Court on August 15, 2005. This Court stayed proceedings during the pendency of state proceedings on January 2, 2006.

D. Federal Habeas Petition

Once Smith had exhausted his state appeals, this Court lifted the stay on his § 2254 habeas petition on May 18, 2011. Petitioner filed an Amended Petition for Writ of Habeas Corpus on July 25, 2011. Doc. 52. On October 13, 2011, Respondent filed an Answer to the Amended Petition and the 23-volume indexed record. Docs. 56-57.

II. Statement of the Law

A. THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("AEDPA")

Section 2254(a) of Title 28 of the United States Code provides that "a district court shall entertain an application for a writ of habeas corpus [o]n behalf of a person in custody pursuant to the judgment of a State court" upon a showing that his custody is in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254(a) (2006). Because Smith's habeas petition was filed after April 24, 1996, it is subject to the more deferential standard for review of state court decisions under § 2254 as brought about by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"). See Pub. L. 104-132, § 104, 110 Stat. 1214, 1218-19. "Under AEDPA the role of the federal court . . . is strictly limited." Jones v. Walker, 496 F.3d 1216, 1226 (11th Cir. 2007). This Court no longer has "plenary authority to grant habeas relief" but rather, this Court's "authority to grant relief is now conditioned on

giving deference to the states." Id. Specifically, § 2254(d) provides:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –
>
> > (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 facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

The United States Supreme Court has held that only after determining whether AEDPA is satisfied may this Court review a petitioner's constitutional claims "without the deference the AEDPA otherwise requires." Panetti v. Quarterman, 551 U.S. 930, 932 (2007); see also Jones, 496 F.3d at 1228.

1) Section 2254(d)(1)

The United States Supreme Court explained the framework for § 2254 review in Williams v. Taylor, 529 U.S. 362 (2000). Writing for the Court, Justice O'Connor maintained that "§ 2254(d)(1) places a new

constraint on the power of a federal habeas court to grant a state prisoner's application for a writ of habeas corpus with respect to claims adjudicated on the merits in state court." Id. at 412 In other words, "[u]nder § 2254(d)(1), the writ may issue only if one of the following two conditions is satisfied – the state-court adjudication resulted in a decision that (1) 'was contrary to . . . clearly established Federal law, as determined by the Supreme Court of the United States,' or '(2) involved an unreasonable application of . . . clearly established Federal law, as determined by the Supreme Court of the United States.'" Id. "Under the 'contrary to' clause, a federal habeas court may grant the writ if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." Id. at 412-13. "Under the 'unreasonable application' clause, a federal habeas court may grant the writ if the state court identifies the correct governing principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Id. at 413; see also Ramdass v. Angelone, 530 U.S. 156, 166 (2000) ("A state determination may be set aside under this standard if, under clearly established federal law, a state court has been unreasonable in refusing the governing legal principle to a context in which the principle should have controlled.").

In applying this test, the Supreme Court has instructed that, on any issue raised in a federal habeas petition upon which there has been an adjudication on the merits in a formal state court proceeding, the federal court should first ascertain the "clearly

established Federal law," namely, "the governing legal principle or principles set forth by the Supreme Court at the time the state court render[ed] its decision." Lockyer v. Andrade, 538 U.S. 63, 71-72 (2003). The law is "clearly established" if Supreme Court precedent at the time "would have compelled a particular result in the case." Neelley v. Nagle, 138 F.3d 917, 923 (11th Cir. 1998), abrogated in part on other grounds as recognized by Parker v. Head, 244 F.3d 831, 835 (11th Cir. 2001). Even a summary adjudication of a claim on the merits is entitled to § 2254(d) deference. Harrington v. Richter, 131 S. Ct. 770, 784-85 (2011).

In the second step, the court must determine whether the state court adjudication is contrary to the clearly established Supreme Court case law, either because "'the state court applies a rule that contradicts the governing law set forth in [the Supreme Court's] cases' or if 'the state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result different from [Supreme Court] precedent.'" Lockyer, 538 U.S. at 73 (quoting Williams, 529 U.S. at 405-06). The Supreme Court clarified that "[a]voiding these pitfalls does not require citation of our cases – indeed, it does not even require awareness of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them." Early v. Packer, 537 U.S. 3, 8 (2002). "If the State court decision is found in either respect to be contrary, the district court must independently consider the merits of the petitioner's

claim." Williams v. McNeil, 2010 WL 144986, at *5 (N.D. Fla. Jan. 7, 2010).

If, on the other hand, this Court concludes that the state courts applied Supreme Court precedent correctly and finds that the facts of the Supreme Court cases and Petitioner's case are materially distinguishable, this Court must go to the third step and determine whether the state court "unreasonably applied" the governing legal principles set forth in the Supreme Court's cases. See 28 U.S.C. § 2254(d)(1). The standard for an unreasonable application inquiry is "whether the state court's application of clearly established federal law was objectively unreasonable." Williams, 529 U.S. at 409. Whether a state court's decision was an unreasonable application of legal principle "must be assessed in light of the record the court had before it." Holland v. Jackson, 542 U.S. 649, 652 (2004) (per curiam) (citations omitted); cf. Bell v. Cone, 535 U.S. 685, 697 n.4 (2002) (declining to consider evidence not presented to state court in determining whether its decision was contrary to federal law).

An objectively unreasonable application of federal law occurs when the state court "identifies the correct legal rule from the Supreme Court case law but unreasonably applies that rule to the facts of the petitioner's case" or "unreasonably extends, or unreasonably declines to extend, a legal principle from Supreme Court case law to a new context." Putman v. Head, 268 F.3d 1223, 1241 (11th Cir. 2001). It is important to note that "[t]he question under AEDPA is not whether a federal court believes the state court's determination was

incorrect but whether that determination was unreasonable – a substantially higher threshold." Schriro v. Landrigan, 550 U.S. 465, 473 (2007); see also Williams, 529 U.S. at 412 ("an *unreasonable* application of federal law is different from an *incorrect* or *erroneous* application of federal law" (emphasis in original)).

2) Section 2254(d)(2)

Besides obtaining relief under § 2254(d)(1), a petitioner may also obtain federal habeas relief if the state court's adjudication of the claim on the merits "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)(2); see also Harrington, 131 S. Ct. at 785. In regards to this subsection, the Supreme Court has held that "a decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state court proceeding." Miller-El v. Cockrell, 537 U.S. 322, 348 (2003).

When performing a review under § 2254(d)(2), a federal court presumes the state court's factual findings to be sound unless the petitioner rebuts the "presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1); see Miller-El, 537 U.S. at 340 (explaining that a federal court can disagree with a state court's factual finding, and when guided by AEDPA, "conclude the decision was unreasonable or

that the factual premise was incorrect by clear and convincing evidence."); Jones, 496 F.3d at 1226-27 (holding that § 2254(d)(2)'s "unreasonable determination" standard "must be met by clear and convincing evidence," and concluding that the standard was satisfied where prisoner showed "clearly and convincingly" that the state court's decision "contain[ed] an 'unreasonable determination' of fact").

As stated above, only if this Court finds that Smith satisfied AEDPA and § 2254(d), can this court take the final step of conducting an independent review of the merits of Petitioner's claims. See Panetti, 551 U.S. at 953-54; Jones, 496 F.3d at 1228. In this independent review, the writ will not issue unless the petitioner shows that he is in custody "in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254(a).

Also of critical importance to the § 2254 analysis are notions of procedural default and exhaustion. "A state court's rejection of a petitioner's [federal] constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." Borden v. Allen, 646 F.3d 785, 808 (11th Cir. 2011) (citation omitted); Conner v. Hall, 645 F.3d 1277, 1287 (11th Cir. 2011) (as a general rule, "a federal habeas court will not review a claim rejected by a state court if the decision of the state court rests on a state law ground that that is independent of the federal question and adequate to support the judgment" (internal quotation marks and brackets omitted)). "[A] habeas petitioner may overcome a procedural default

if he can show adequate cause and actual prejudice, or, alternatively, if the failure to consider the merits of his claim would result in a fundamental miscarriage of justice." Borden, 646 F.3d at 808 n.26; see also Conner, 645 F.3d at 1287 (to overcome procedural default, petitioner must "show cause for the failure to properly present the claim and actual prejudice, or that the failure to consider the claim would result in a fundamental miscarriage of justice").

Section 2254 also generally requires petitioners to exhaust all available state-law remedies. In that regard, "[a] petitioner must alert state courts to any federal claims to allow the state courts an opportunity to review and correct the claimed violations of his federal rights. . . . Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues." Lamarca v. Sec'y, Dep't of Corr., 568 F.3d 929, 936 (11th Cir. 2009) (citations omitted). For exhaustion purposes, it is not sufficient "that a somewhat similar state-law claim was made." Kelley, 377 F.3d at 1344-45. What is necessary is that "the petitioner must fairly present every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." Powell v. Allen, 602 F.3d 1263, 1269 (11th Cir. 2010) (citation and internal marks omitted).

III. DISCUSSION

Smith's petition for a writ of habeas corpus alleges 49 errors in support of his prayer for relief. For clarity,

the Court has numbered Petitioner's habeas claims 1-49, in the order in which they have been asserted in Smith's amended petition, as follows:

Claims 1-14, 38: Smith's trial counsel was ineffective (Am. Pet. ¶¶ 28-162; 285-89);

Claim 15: Smith's status as mentally retarded precludes imposing the death penalty (Am. Pet. ¶¶ 163-201);

Claim 16: The prosecution eliminated jurors in violation of Batson v. Kentucky, 476 U.S. 79 (1986) (Am. Pet. ¶¶ 202-03);

Claim 17: The evidence was insufficient to support Smith's conviction and death sentence as matter of law (Am. Pet. ¶¶ 204-08);

Claim 18: The State failed to comply with its discovery obligations under Brady v. Maryland, 373 U.S. 83 (1963) (Am. Pet. ¶¶ 209-12);

Claims 19, 22-28: The trial court improperly instructed the jurors (Am. Pet. ¶¶ 213-16, 227-46);

Claim 20: Trial judge's refusal to allow defense counsel to cross-examine prosecution witness regarding her probationary status violated the Confrontation Clause (Am. Pet. ¶¶ 217-20);

Claim 21: The trial court improperly denied Smith's motion for mistrial (Am. Pet. ¶¶ 221-25);

Claim 29: The trial court erred when it improperly questioned a witness *sua sponte* (Am. Pet. ¶¶ 247-50);

Claim 30: Admission of out-of-court statements by Smith's co-defendant and mother was improper (Am. Pet. ¶¶ 251-56);

Claim 31: State improperly introduced victim impact evidence during closing arguments (Am. Pet. ¶¶ 257-59);

Claim 32: Court failed to find mitigating circumstance that Smith was under influence of extreme mental or emotional disturbance (Am. Pet. ¶¶ 262-63);

Claim 33: Court failed to find mitigating circumstance that Smith acted under extreme duress or the substantial domination of another (Am. Pet. ¶¶ 264-67);

Claim 34: Court failed to consider non-statutory mitigating circumstances, such as abusive family life and mental retardation (Am. Pet. ¶¶ 268-75);

Claim 35: Court improperly applied the heinous, atrocious or cruel aggravating circumstance without sufficient basis for its finding (Am. Pet. ¶¶ 276-78);

Claim 36: Trial court relied on a non-statutory aggravator in deciding to impose a sentence of death (Am. Pet. ¶¶ 279-82);

Claim 37: Trial court improperly relied on sentence recommendation of victim's family (Am. Pet. ¶¶ 283-84);

Claim 39: State made irrelevant and inflammatory remarks during guilt phase closing arguments (Am. Pet. ¶¶ 291-94);

Claim 40: State misstated the law during closing arguments (Am. Pet. ¶¶ 295-97);

Claim 41: State impermissibly argued that Smith was more worthy of the death penalty because he was mentally retarded (Am. Pet. ¶¶ 299-300);

Claim 42: State impermissibly argued that a sentence other than death would insult victim's family (Am. Pet. ¶¶ 301-02);

Claim 43: The Court should consider the cumulative effect of prosecutorial misconduct (Am. Pet. ¶ 303);

Claim 44: Smith's statements were improperly introduced into evidence (Am. Pet. ¶¶ 304-15);

Claim 45: Trial judge should have recused himself *sua sponte* (Am. Pet. ¶¶ 316-18);

Claim 46: Court improperly granted State's challenge for cause and excused a prospective juror with death penalty reservations (Am. Pet. ¶¶ 319-22);

Claim 47: Alabama's method of execution results in inflictions of cruel and unusual punishment (Am. Pet. ¶¶ 323-24);

Claim 48: Alabama statute that limits attorney reimbursement to $1,000 violates federal constitutional law (Am. Pet. ¶¶ 325-26);

Claim 49: Cumulative effect of all above claims of error violated Petitioner's constitutional rights (Am. Pet. ¶ 327).

Respondent has alleged that Claims 7-8, 11-13, 15, 17-18, 38, 47 are partially or entirely procedurally defaulted. Doc. 56 passim. Respondent further alleges Claims 21, 29, 32-34, and 36-37 fail to state a claim for relief under AEDPA because they present only questions of state law. Id. Lastly, Respondent alleges that that the court is barred from considering Claim 44, in part, under the principles enunciated in Stone v. Powell, 428 U.S. 465 (1976).[6] Doc. 56 at 194. As explained in greater detail below, the Court concludes Claims 2, 4, 6, 8, 11, 17-18, 29, 32-33, 36, 38, 43, and 47 are not subject to federal review. The remaining 36 claims will be considered under the purview of AEDPA.

A. Procedurally Defaulted Claims

The Court will first consider those claims alleged by Respondent to be procedurally defaulted.

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[6] Federal courts are not permitted to conduct a post-conviction review of Fourth Amendment claims where state courts have provided an opportunity for full and fair litigation of those claims. Stone, 428 U.S. at 494; Bradley v. Nagle, 212 F.3d 559, 564 (11th Cir. 2000). Under Stone, "where the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, the Constitution does not require that a state prisoner be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." Stone, 428 U.S. at 482.

1) Claims Not Raised in State Court—Claims 17-18, 38, 47

Having reviewed Respondent's allegations of procedural default, the Court finds that Claims 17-18, 38, and 47 were not presented to the state courts on direct appeal. In Claim 17, Petitioner argues that the State "did not present sufficient evidence at Mr. Smith's trial to show that he substantially participated in this robbery or murder or that he had the intent to carry out either the robbery or the murder." Am. Pet. ¶ 206. In Claim 18, Petitioner argues that the State was not forthcoming with favorable evidence as required by Brady v. Maryland, 373 U.S. 83 (1963). Id. ¶¶ 209-12. In Claim 38, Petitioner argues that his counsel was ineffective for failing to object to the inclusion in the presentence investigation report of a letter from the victim's family. Id. ¶¶ 285-89. Petitioner failed to raise Claims 17,[7] 18 and 38 on direct appeal.

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[7] With respect to Claim 17, Smith originally argued in his direct appeal brief that that the evidence was insufficient to charge him with committing a robbery while armed with a "power tool." Doc. 31 at 98. However, in his Rule 32 Petition (and Second Amended Rule 32 Petition), Smith changed his theory of argument and argued that the State did not present sufficient evidence of his intent or that he substantially participated in the robbery. By changing his theory of argument, Smith has failed to preserve this claim for federal review. Kelly, 377 F.3d, at 1344-45 (recognizing that "habeas petitioners are permitted to clarify the arguments presented to the state courts on federal collateral review provided that those arguments remain unchanged in substance" but explaining that "petitioners [should] present their claims to the state courts such that the reasonable reader would understand each claim's particular legal basis and specific factual

With respect to Claim 47, Petitioner argues that Alabama's method of execution results in an infliction of cruel and unusual punishment. Am. Pet. ¶¶ 323-24. On direct appeal, Petitioner challenged electrocution, specifically, as failing to meet constitutional standards. #R-31 at 100-01. However, on July 1, 2002, the Alabama legislature made lethal injection the standard method of execution in Alabama. See Ala. Code § 15-18-82(a) ("Where the sentence of death is pronounced against a convict, the sentence shall be executed at any hour on the day set for the execution, not less than 30 nor more than 100 days from the date of sentence, as the court may adjudge, by lethal injection unless the convict elects execution by electrocution as provided by law. If electrocution is held unconstitutional, the method of execution shall be lethal injection."). At the time of the amendment, Petitioner had not yet sought post-conviction collateral relief in circuit court, yet Petitioner did not challenge the constitutionality of lethal injection in his initial, First Amended, or Second Amended Rule 32 petitions. Accordingly, whereas Petitioner has not exhausted a challenge to lethal injection in state court and the time to do so has lapsed, the claim is procedurally defaulted.[8]

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foundation."). By amending the factual basis for his claim, Smith has failed to preserve it for review.

[8] Because lethal injection is now the standard method of execution in Alabama and electrocution is only an alternative, the Court declines to address the constitutionality of electrocution. See McGahee v. Campbell, 2007 WL 3025192, at *15 (S.D. Ala. Feb. 14, 2007); Coleman v. Mitchell, 268 F.3d 417, 443-44 (6th Cir. 2001) (declining to address the constitutionality of

Smith's failure to present these claims to the state courts in accordance with the state's procedural rules constitutes a procedural default. Teague v. Lane, 489 U.S. 288 (1989); Collier v. Jones, 910 F.2d 770, 773 (11th Cir. 1990). Because Smith has not pled cause or actual prejudice or averred that a fundamental miscarriage of justice would result upon not reviewing the merits of these claims, Claims 17, 18, 38, and 47 are procedurally barred from federal review. See Coleman v. Thompson, 501 U.S. 772, 751 (1991) ("In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.").

2) Claims That Present Only a Question of State Law – Claims 29, 32-33 and 36

Respondent contends that Claims 21, 29, 32-34, and 36-37 present only questions of state law and, therefore, fail to state a claim for relief under AEDPA. As discussed in greater detail below, the Court finds that four of these seven claims (29, 32-33, and 36) are not subject to federal review because they raise questions solely of state law.

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electrocution where, after petitioner's conviction and sentence, Ohio had adopted lethal injection as an option).

In Claim 29, Smith argues that the trial judge committed error by posing his own questions to and eliciting testimony from a prosecution witness during the trial. Am. Pet. ¶¶ 247-50. Though not quite presented as such, this claim raises an issue of state evidence law inasmuch as Smith's challenge goes to the nature of evidence that was put before the jury. See id. ¶ 247 (arguing that "highly improper and inflammatory evidence was admitted over Mr. Smith's objection"); id. ¶ 250 (challenging forensic pathologist's testimony as irrelevant and prejudicial). The Court of Criminal Appeals properly resolved this matter on state law grounds, holding that the trial judge was permitted by Rule 614(b) of the Alabama Rules of Evidence and the Alabama Supreme Court's decision in Kmart Corp. v. Kyles, 723 So. 2d 572 (Ala. 1998), to interrogate witnesses. Smith I, 795 So. 2d at 811-12. Petitioner has failed to present this Court with a cognizable habeas claim because his allegation of error presents only a question of state law.

Similarly, Claims 32, 33, and 36 each raise issues of purely state law. In Claim 32, Petitioner argues that the "trial court refused to find that the offense 'was committed while the defendant was under the influence of extreme mental or emotional disturbance.'" Am. Pet. ¶¶ 262-63. In Claim 33, Petitioner argues that the trial court improperly concluded that there was no evidence that Petitioner acted under extreme duress or the substantial domination of another. Am. Pet. ¶¶ 264-67. In Claim 36, Petitioner argues that the trial court impermissibly relied upon Petitioner's "future

dangerousness to society" as an aggravating factor in sentencing Petitioner. Am. Pet. ¶¶ 279-82. These three claims challenge the trial court's interpretation of three Alabama statutes, specifically Ala. Code §§ 13A-5-51(2) (Claim 32), 13A-5-51(5) (Claim 33), and 13A-5-49 (Claim 36). This Court review of these claims is foreclosed because "[a] state's interpretation of its own laws or rules provides no basis for federal habeas corpus relief." See, e.g., Carrizales v. Wainwright, 699 F.2d 1053, 1055 (11th Cir. 1983).

3) Claims That the State Court Found Procedurally Barred Based on an Independent and Adequate State Procedural Rule – Claims 2, 4, 6, 8, and 11

As to the claims presented to the Alabama state courts and found to be procedurally barred, the Court must determine whether the state court denied Smith's claims based on an independent and adequate state procedural rule. Bailey v. Nagle, 172 F.3d 1299, 1303 (11th Cir. 1999). For this, the Eleventh Circuit has established a three-part test:

> First, the last state court rendering a judgment in the case must clearly and expressly state that it is relying on state procedural rules to resolve the federal claim without reaching the merits of that claim. Secondly, the state court's decision must rest solidly on state law grounds, and may not be intertwined with an interpretation of federal law. Finally, the state procedural rule must be

> adequate; i.e., it must not be applied in an arbitrary or unprecedented fashion. The state court's procedural rule cannot be manifestly unfair in its treatment of the petitioner's federal constitutional claim to be considered adequate for the purposes of the procedural default doctrine.

Judd v. Haley, 250 F.3d 1308, 1313 (11th Cir. 2001) (internal citation and quotations omitted). For the reasons stated below, the Court finds that Claims 2, 4, 6, 8, and 11 were defaulted in state court on an independent and adequate state procedural rule and are therefore procedurally barred and will not be considered.

Claims 2, 4, 6, 8, and 11 each allege ways in which Smith's trial counsel was ineffective. These claims were raised by Smith in his Second Amended Rule 32 petition. The Alabama Court of Criminal Appeals held that they were procedurally barred. See Smith II, 71 So. 3d at 22-23, 25-30. Based on the Court's review of the state court rules applied and the record of Smith's trial, direct appeal, and Rule 32 proceedings, the Court is satisfied that the Court of Criminal Appeals clearly and expressly stated that it relied on state procedural rules to resolve these claims without reaching their merits, that the state court's decision rested solidly on state law grounds and was not intertwined with an interpretation of federal law, that the relevant state procedural law was firmly established and regularly followed, and that the procedural bar was fairly and non-arbitrarily applied. Therefore, Claims 2, 4, 6, 8, and 11 were defaulted in state court pursuant to

independent and adequate state procedural grounds and are procedurally barred in this Court from federal review.

4) Remaining Claims That Respondent Alleges Were Procedurally Defaulted

As discussed in detail above, the Court concludes that Claims 2, 4, 6, 8, 11, 17-18, 29, 32-33, 36, 38, and 47 are procedurally defaulted. Respondent has further argued that Claims 7, 12-13, 15, 21, 34, 37, and 44, or certain facts in support thereof, are procedurally defaulted. Doc. 56 passim. At this initial level of review, the Court must conclude that these claims proceed through to the next level of analysis. With respect to certain of these claims, Respondent may well be correct in pointing out that certain facts in support of the claims may not be considered by the federal court due to Petitioner's having not pled those facts sufficiently at the state level, see Cullen v. Pinholster, 131 S. Ct. 1388, 1398 (2011) ("review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits"), but complete denial of the claims themselves is not proper at this time. The Court has thoroughly reviewed the Court of Criminal Appeals' opinions and concludes that that court's dismissal of these remaining claims was either on the merits or intertwined with an interpretation of federal law. Therefore, in denying these claims, the Court of Criminal Appeals did not rely solely on a state procedural bar. Because these remaining claims were not dismissed based on an "independent and adequate"

procedural ground, these claims proceed to the next step of review. See Harris v. Reed, 489 U.S. 255, 263 (1989) ("[A] procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case 'clearly and expressly' states that its judgment rests on a state procedural bar." (quoting Caldwell v. Mississippi, 472 U.S. 320, 327 (1985))); Michigan v. Long, 463 U.S. 1032, 1040-41 (1983) (presumption that there is no independent and adequate state ground for a state court decision when the "state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion").

B. Claims 1-14 and 38: Counsel Provided Ineffective Assistance

1) Legal Standard

"To prevail on a claim of ineffective assistance, a habeas petitioner must show: (1) that 'counsel's performance was deficient' because it 'fell below an objective standard of reasonableness,' and (2) that 'the deficient performance prejudiced the defense.'" Fugate v. Head, 261 F.3d 1206, 1216 (11th Cir. 2001) (quoting Strickland v. Washington, 466 U.S. 668, 687-88 (1984)) (internal citations omitted).

Deficient performance requires a showing that counsel's performance was "objectively unreasonable and falls below the wide range of competence

demanded of attorneys in criminal cases." Cross v. United States, 893 F.2d 1287, 1290 (11th Cir. 1990); see also Gallo-Chamorro v. United States, 233 F.3d 1298, 1303 (11th Cir. 2000) (petitioner "must prove deficient performance by a preponderance of competent evidence, and the standard is reasonableness under prevailing professional norms"). In this Circuit, courts will presume that counsel's performance was reasonable and adequate, and habeas petitioners bear the "heavy—but not insurmountable—burden of persuading the court that no competent counsel would have taken the action that his counsel did take." Haliburton v. Sec'y for Dep't of Corr., 342 F.3d 1233, 1243 (11th Cir. 2003) (internal quotation marks and citation omitted). The test for reasonableness of performance "is not whether counsel could have done something more or different"; instead, courts consider whether counsel's performance "fell within the broad range of reasonable assistance at trial." Stewart v. Sec'y, Dep't of Corr., 476 F.3d 1193, 1209 (11th Cir. 2007). Failure to raise nonmeritorious issues does not constitute ineffective assistance of counsel. Bolender v. Singletary, 16 F.3d 1547, 1573 (11th Cir. 1994).

With respect to the prejudice prong, "a petitioner must establish that a reasonable probability exists that the outcome of the case would have been different if his lawyer had given adequate assistance." Van Poyck v. Fla. Dep't of Corr., 290 F.3d 1318, 1323 (11th Cir. 2002). A petitioner must show that his attorney's errors "worked to his actual and substantial

disadvantage." Cross, 893 F.2d at 1292 (quoting United States v. Frady, 456 U.S. 152, 170 (1982)).

Because the petitioner bears the burden of satisfying both prongs of the Strickland test, the Court need not "address both components of the inquiry if the [petitioner] makes an insufficient showing on one." Strickland, 466 U.S. at 697. Courts are free to dispose of ineffectiveness claims on either of Strickland's two grounds. Oats v. Singletary, 141 F.3d 1018, 1023 (11th Cir. 1998).

2) Discussion of Petitioner's Claims

a) Claim 1: Counsel Was Ineffective Due to Grossly Inadequate Compensation and Claim 48: Alabama Statute that Limits Attorney Reimbursement to $1,000 Violates Federal Constitutional Law

Petitioner argues that counsel was ineffective "in part" due to "grossly insufficient funding available for defense counsel in capital cases." Am. Pet. ¶¶ 28-30. Smith pleads no facts in support of this claim. Instead, his argument is based on the assumption that counsel was ipso facto inadequate because, in Smith's opinion, Alabama inadequately compensated his attorneys. But Smith's conclusion does not follow. Other capital defendants in this state have made similar claims based on Alabama's statutory scheme. See, e.g., Hallford v. Culliver, 379 F. Supp. 2d 1232, 1279 (M.D. Ala. 2004) ("The essence of [Petitioner]'s argument becomes

simply that the court ought to presume counsel could not provide constitutionally adequate representation because of the inadequate compensation."), aff'd, 459 F.3d 1193 (11th Cir. 2006). However, even if the Court were to agree that the compensation provided to defense counsel in death cases in Alabama is woefully inadequate,[9] "that fact is insufficient as a matter of law to overcome the presumption of effectiveness which attends the performance of counsel." Id. Whereas "attorneys are expected to competently represent indigent clients" regardless of how much or little they are paid, see id. (citing Waters v. Kemp, 845 F.2d 260, 263 (11th Cir. 1988)), and whereas Petitioner has pled no facts to rebut that presumption, the Court does not find that counsel's performance was deficient and concludes that no habeas relief is due Petitioner on his inadequate compensation-based claim.

Petitioner also challenges Alabama's compensation scheme directly, arguing that the statutory limit on reimbursement for out-of-court preparation that was in place in 1998 violated separation-of-powers doctrine, constituted a taking without just compensation,

[9] The U.S. Supreme Court recently criticized Alabama's statutory scheme for compensating counsel appointed in capital cases. See Maples v. Thomas, 132 S. Ct. 912, 917 (2012) ("Appointed counsel in death penalty cases are also undercompensated. . . . Even today, court-appointed attorneys receive only $70 per hour."); see also McFarland v. Scott, 512 U.S. 1256, 1256 (1994) (Blackmun, J., dissenting from denial of certiorari) (citing Ala. Code § 15-12-21(a) and opining that "compensation for attorneys representing indigent capital defendants often is perversely low"). Nonetheless, the Supreme Court has not found Alabama's compensation statute to be unconstitutional.

and violated the Due Process Clause.[10] Am. Pet. ¶¶ 30, 325-26. Smith's unsupported and wholly conclusory arguments fail to indicate how, in rejecting these claims, the state court's determination was contrary to or unreasonably applied federal law. Indeed, Smith has directed the Court to no case in which a court held Alabama's compensation scheme to be unconstitutional. This Court finds no error in the state court's opinion, which is supported by a long line of state precedents. See, e.g., Samra v. State, 771 So. 2d 1108, 1112 (Ala. Crim. App. 1999) (citing cases), aff'd sub nom. Ex parte Samra, 771 So. 2d 1122 (Ala. 2000).

b) Claim 3: Counsel Failed To Interview Family Members

In Claim 3, Petitioner argues that counsel was ineffective for failing to interview family members. Am. Pet. ¶¶ 33-37. Claim 3 is contradicted by the record. Smith's counsel interviewed three of Smith's family members and a family friend, each of whom testified extensively at the sentencing hearing as to Smith's abusive past. T.R. 761-70, 798-814. Thus, Smith has not demonstrated that his counsel's performance was deficient under Strickland, and Claim 3 must fail.

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[10] In 1999, the Alabama legislature eliminated the limit on attorneys' fees in cases where the original charge is a capital offense. See Ala. Code § 15-12-21(d)(1).

c) Claim 5: Counsel Failed To Show Bias of the State's Witness, Melissa Arthers

In paragraphs 46-51 of his Amended Petition, Petitioner argues his attorney was ineffective for failing to articulate the proper basis for introducing the fact that a prosecution witness, Melissa Arthers, was in state custody at the time that she testified. Trial counsel argued that Arthers' incarceration could be offered solely for impeachment purposes. T.R. 369. However, the trial court did not allow counsel to impeach Arthers in that way. Id. Petitioner now argues that trial counsel should have instead offered the fact of Arthers' incarceration to show bias. But this Court agrees with the Alabama Court of Criminal Appeals that this "was not error, much less plain error." Smith II, 71 So. 3d at 26. In any event, Smith has failed to satisfy the prejudice prong of Strickland inasmuch as he has not shown that a reasonable probability exists that the outcome of the case would have been different had the fact of Arthers' imprisonment been admitted. See Van Poyck, 290 F.3d at 1323. As such, Claim 5 is **DENIED**.

d) Claim 7: Counsel Failed To Challenge the Voluntariness of Custodial Statements

In paragraphs 61-64 of his Amended Petition, Petitioner argues that counsel was ineffective for failing to object to the admission of Smith's allegedly involuntary, custodial statements even though "trial counsel knew about Mr. Smith's mental limitations." Am. Pet.

¶ 62. The circuit court determined that Smith's mental deficiency is refuted by the record and found Smith's claim to be without merit. #R.84 at 21. As described more fully *infra* in the discussion of Claim 15, the Court agrees that Smith's cognitive abilities were not so deficient as to affect the voluntariness of his custodial statements. Whereas an objection as to voluntariness premised on Smith's mental capacity would have been meritless, Smith's counsel was not ineffective for not having made it. See Bolender, 16 F.3d at 1573. Therefore, Claim 7 is due to be **DENIED**.

e) Claim 9: Counsel Was Ineffective for Failing To Move for the Trial Judge's Recusal & Claim 45: Trial Judge Should Have Recused Himself Sua Sponte

Two of Smith's claims stem from the fact that, in 1990, Smith pled guilty to three felony charges that were prosecuted under the supervision of then-Mobile County District Attorney Christopher N. Galanos. Eight years later, Galanos was the circuit court judge assigned to preside over Smith's capital trial. In Claim 9, Smith argues that, because Galanos was the District Attorney when Smith was prosecuted in 1990, defense counsel should have moved for his recusal, and that counsel's failure to make such a motion rendered his assistance ineffective. Am. Pet. ¶¶ 72-98. In Claim 45, Smith argues that Judge Galanos should have recused himself sua sponte even in the absence of such a motion. Id. at 174-75. This Court agrees with the repeated

determination of the Court of Criminal Appeals that neither claim has any merit, see Smith II, 71 So. 3d at 29; Smith I, 795 So. 2d at 803-04, and finds that Judge Galanos' failure to recuse himself sua sponte does not offend the Constitution.

Smith argues that defense counsel should have moved for Judge Galanos' recusal because "Judge Galanos[ ] [played a] substantial prior role as prosecutor of the offense alleged to be a qualifying aggravating circumstance." Am. Pet. ¶ 76. Putting aside Smith's wholly conclusory characterization of Judge Galanos' role as "substantial," a careful examination of the record reveals that Smith's argument rests on a patently false premise, inasmuch as none of the convictions secured during Judge Galanos' tenure as District Attorney was offered as an aggravating circumstance. The only aggravating circumstances that were argued to the jury during the penalty phase of Smith's capital trial and to Judge Galanos at sentencing were that 1) Smith committed a capital offense while under sentence of imprisonment, see Ala. Code. § 13A-5-49(1); 2) Smith committed the capital offense while engaged in or was an accomplice in the commission of a robbery, see id. § 13A-5-49(4); and 3) the capital offense was especially heinous, atrocious, or cruel, see id. § 13A-5-49(8). T.R. 836-37. The fact that Smith was under sentence of imprisonment[11] at the time of Durk Van Dam's

[11] "Under sentence of imprisonment" is statutorily defined as meaning "while serving a term of imprisonment, while under a suspended sentence, while on probation or parole, or while on work release, furlough, escape, or any other type of release or

murder was proven by the testimony of a records custodian from the Alabama Department of Corrections and the admission of a document that indicated Smith was released to a community custody program on November 21, 1997. T.R. 751-57. The state did not elicit any testimony regarding the facts or circumstances of the convictions that resulted in the sentence Smith was under at the time of Van Dam's murder. In short, the convictions obtained while Judge Galanos was District Attorney did not directly affect Smith's sentence.

Nonetheless, in support of his claim, Smith relies heavily on three cases in which the Court of Criminal Appeals held that Judge Galanos should have recused himself as a consequence of his prior service as District Attorney. Am. Pet. ¶¶ 81-83 (citing Crawford v. State, 686 So. 2d 199 (Ala. Crim. App. 1996), Crumpton v. State, 677 So. 2d 814 (Ala. Crim. App. 1995), and Ex parte Sanders, 659 So. 2d 1036 (Ala. Crim. App. 1995)). However, each case is easily distinguished. Unlike Smith, the defendants in the cases cited by Petitioner were arrested while Galanos was Mobile County District Attorney. See Crawford, 686 So. 2d at 200 (defendant arrested July 21, 1994); Crumpton, 677 So. 2d at 815 (defendant arrested July 17, 1994); Ex parte Sanders, 659 So. 2d at 1037 (defendant arrested July 8 & 12, 1994). In holding that Judge Galanos should have

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freedom while or after serving a term of imprisonment, other than unconditional release and freedom after expiration of the term of sentence." Ala. Code § 13A-5-39(7). Smith has never disputed the fact that he was under sentence of imprisonment at the time of Van Dam's murder.

recused himself in those cases, the Court of Criminal Appeals cited the portion of the Alabama Code that prohibits judges from sitting in any case "in which he has been of counsel," Ala. Code. § 12-1-12, and an ethical canon that states that a judge should disqualify himself if "[h]e served as a lawyer in the matter in controversy," Ala. Canons of Jud. Ethics 3(C)(1)(b).[12] With respect to the capital prosecution of Smith, however, Judge Galanos was never "of counsel" or "a lawyer in the matter in controversy"; Smith was arrested for Van Dam's murder on November 25, 1997, more than three years after Judge Galanos left the District Attorney's Office and assumed the bench.

Murphy v. Beto, 416. F.2d 98 (5th Cir. 1969), a case decided by the old Fifth Circuit more than four decades ago, more closely addresses the issue presented by Smith's claims. In Murphy, a state prisoner convicted of felony theft as a recidivist and sentenced to life imprisonment as a consequence of his criminal history sought a writ of habeas corpus from a federal district court arguing, inter alia, that he had been deprived of due process of law because the trial judge had been the

[12] Underlying these principles is the basic tenet that the "Due Process Clause entitles a person to an impartial and disinterested tribunal." Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). It bears noting that Petitioner has cited several prejudicial rulings by Judge Galanos during the trial, that Petitioner contends, demonstrate that Judge Galanos was not impartial towards Petitioner. Am. Pet. ¶¶ 89-98, 316-18. However, these allegations were not raised in Petitioner's Rule 32 petition and therefore were not properly presented to the state courts, and therefore, are not properly before the Court for consideration. See Borden, 646 F.3d at 817.

district attorney at the time of one of his convictions alleged for the sentencing enhancement. Id. at 99-100. The court of appeals expressly held that "petitioner's . . . contention, that the trial judge was district attorney at the time of one of his convictions alleged for enhancement, is not a sufficient ground for disqualification and does not present a question cognizable in habeas corpus." Id. at 100. Murphy remains good law in this Circuit and is controlling.[13] See Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc) ("[D]ecisions of the United States Court of Appeals for the Fifth Circuit (the "former Fifth" or the "old Fifth"), as that court existed on September 30, 1981, handed down by that court prior to the close of business on that date, shall be binding as precedent in the Eleventh Circuit, for this court, the district courts, and the bankruptcy courts in the circuit.").

As described above, Petitioner's underlying claim lacks merit, and therefore, counsel was not ineffective

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[13] Murphy is merely analogous but not identical to the instant case because Smith's offense was aggravated by the fact that it was committed while Smith was under sentence of imprisonment—a *consequence* of a prior conviction—whereas Murphy's sentence was enhanced as a *direct result* of having been previously convicted of other crimes. However, the fact that Judge Galanos' relationship to the aggravating factor in Smith's case is more attenuated than the relationship that the judge in Murphy had to the enhancement employed in that case only serves to further weaken Smith's argument that recusal was warranted under the circumstances presented here. Cf. Jarrell v. Balkcom, 735 F.2d 1242, 1259 (11th Cir. 1984) (where the jury, rather than the judge, was the "trier of fact," judge did not err in failing to recuse himself).

for failing to raise the issue at trial. See Bolender, 16 F.3d at 1573 ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance."). Claims 9 and 45 are, therefore, **DENIED**.

f) Claim 10: Counsel Failed To Object to Prosecutorial Misconduct and Claim 39: State Made Irrelevant and Inflammatory Remarks During Guilt Phase Closing Arguments

In Claim 10, Petitioner argues that his counsel was ineffective for failing to object to two specific instances of alleged prosecutorial misconduct during closing arguments. Am. Pet. ¶ 99-104. In Claim 39, Petitioner asserts that this misconduct denied him of due process and a fair trial. Id. ¶¶ 291-94.

Smith first contends that his trial counsel was ineffective for failing to object when the prosecutor made a reference to "Larry's story," which Smith suggests was an improper reference to a statement by Smith's co-defendant, Larry Reid, which had not been admitted into evidence. T.R. 657. Upon review of the context in which the reference was made, the Court of Criminal Appeals determined that the prosecutor meant to refer to Petitioner, not to Reid, and his failure to do so was merely "an inadvertent slip of the tongue." Smith I, 795 So. 2d at 825. The Court agrees and finds that Smith was not prejudiced by this misstatement. Therefore,

this claim fails under the prejudice prong of Strickland.

Smith next claims that his trial counsel was ineffective for failing to object to the prosecutor calling Smith a "thief," T.R. 648, and a "liar," id. at 656. The Court agrees with the Court of Criminal Appeals that these characterizations of Petitioner were supported by facts in evidence, and therefore, did not constitute reversible error. Additionally, Petitioner has again failed to prove that he was prejudiced by either remark. Therefore, Claim 10 is **DENIED**, and Claim 39 fails because it is without merit.

g) Claim 12: Counsel Failed To Adequately Investigate Independent Mitigation Evidence

In paragraphs 125-52 of his Amended Petition, Petitioner argues that his counsel failed to investigate, elicit sufficient mitigation evidence from testifying witnesses, and present evidence from available non-testifying witnesses. Specifically, Petitioner claims that counsel "failed to obtain important and available information regarding Mr. Smith's family and social history, employment history, educational history, medical history, mental health history, correctional history, and community and cultural influences." Am. Pet. ¶ 127. "When assessing a decision not to investigate, we must make 'every effort . . . 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." Waters v. Thomas, 46 F.3d 1506, 1514 (11th Cir. 1995) (quoting Foster v. Dugger, 823 F.2d 402, 406 (11th Cir. 1987)). The Court agrees with the Court of Criminal Appeals' assessment of counsel's performance. Smith II, 71 So. 3d at 32. Smith's trial counsel presented a highly detailed mitigation case during the penalty phase. T.R. 761-815. Based on the record, it appears that Smith's trial counsel examined and presented to jurors much evidence of Smith's family troubles, difficulties in school, medical conditions, and educational shortcomings. Id. Counsel presented this information in an effort to present a sympathetic portrait of Smith. Smith has not demonstrated that his counsel's performance was deficient or that Smith was prejudiced by the alleged shortcomings of counsel's investigation and presentation of mitigating circumstances.

h) Claim 13: Counsel Failed To Obtain Expert Assistance

In paragraphs 153-59 of his Amended Petition, Petitioner argues that his counsel was ineffective for failing to obtain the assistance of a neuropsychologist. Respondent claims that certain facts presented in Petitioner's amended habeas petition are procedurally defaulted because they were not presented to the state courts during the Rule 32 proceedings or on appeal from the denial of the Rule 32 petition. Doc. 56 at 61. Upon a thorough examination of all properly presented facts, the court agrees with the Alabama circuit court's findings of fact. Dr. Chudy testified that there was no

evidence indicating Smith's mental deficiencies were neurologically-based. T.R. 796. "Nothing in Dr. James Chudy's written report or in his trial testimony raises any inference that Smith would have been entitled to additional expert assistance or that his trial counsel were ineffective for failing to secure additional, expert assistance." Supp. C.R. 423-24. Smith's counsel was not ineffective for failing to secure an expert that was not necessary.

i) Claim 14: Counsel Failed To Properly Object to Improper Jury Instructions

In paragraphs 160-62 of his Amended Petition, Petitioner argues that his counsel was ineffective for failing to object to an allegedly improper penalty phase jury instruction. The Court's review of the record – which is bolstered by the decision of the Rule 32 trial court – confirms that trial counsel did, in fact, object to the allegedly improper instruction, T.R. 852, and that, as a result of the objection, the trial court recharged the jury concerning the burden of proof. T.R. 854-56. Petitioner's statement that "[t]he judge never corrected the misstatement of the law" is patently incorrect. Because Petitioner's claim lacks merit, Claim 14 is **DENIED**.

j) Claim 16: The Prosecution Eliminated Jurors in Violation of Batson

In Claim 16 (Am. Pet. ¶¶ 202-03),[14] Petitioner argues that the State violated U.S. Supreme Court's decision in Batson v. Kentucky, 476 U.S. 79 (1986) by exercising its peremptory strikes against black jurors in a racially discriminatory manner. In Batson, the Supreme Court held that the Equal Protection Clause forbids the exercise of peremptory jury strikes on the basis of race. The Supreme Court has provided a familiar three-part framework for evaluating claims of racial discrimination in jury selection. First, for a defendant[15] to establish a prima facie case, he or she must produce evidence sufficient to support an inference that the

[14] The majority of Petitioner's Batson-related argument is contained in Paragraphs 105-22 of his Amended Petition. Respondent has alleged that "[t]he only facts that are properly before this Court are contained in paragraphs 105, 107, and 110-113 of the amended habeas petition because they were presented during the Rule 32 proceedings" and that "the facts in paragraph 106, the second sentence of paragraph 108, the last sentence of paragraph 109, the third and fourth sentences of paragraph 114, and the facts set forth in paragraphs 115-122 of the amended habeas petition" are not before this Court "because they were not presented to the state courts in the Rule 32 proceedings or on appeal from the denial of the Rule 32 petition." Doc. 56 at 47. Upon careful review of the record before the direct appeal and Rule 32 state courts, the Court agrees that certain facts presented in paragraphs 114, 116-17, 119-22 were not presented to the state court, and therefore, the Court does not rely on those facts and allegations contained therein.

[15] The Supreme Court in Powers v. Ohio, 499 U.S. 400 (1991) eliminated the requirement that a criminal defendant raising a Batson challenge must show commonality of race with excluded jurors. Thus, Smith, who is white, has standing to challenge the State's use of peremptory strikes against black jurors.

prosecutor exercised its peremptory challenges on the basis of race. Johnson v. California, 545 U.S. 162, 170 (2005). "[E]stablishment of a *prima facie* case is an absolute precondition to further inquiry into the motivation behind the challenged strike." Cent. Ala. Fair Hous. Ctr., Inc. v. Lowder Realty Co., 236 F.3d 629, 636 (11th Cir. 2000). If a prima facie showing is made, then, at the second step, the burden shifts to the State to offer non-discriminatory reasons for its challenges. Id. The State's proffered explanation at this stage need not be persuasive or even plausible, so long as it is not discriminatory. Purkett v. Elem, 514 U.S. 765, 768 (1995). At the third step, if both sides have carried their burdens, the trial court must determine whether the defendant has proven purposeful discrimination. Id. at 767. "At this point, the decisive question will be whether counsel's race-neutral explanation should be believed." McNair v. Campbell, 416 F.3d 1291, 1310 (11th Cir. 2005).

Because Smith's attorneys did not raise a Batson challenge at trial, the trial judge did not have occasion to assess whether Smith could make out a prima facie case of racial discrimination or to press the State to offer race-neutral explanations for its strikes. When presented with the issue on direct appeal, the Court of Criminal Appeals concluded that Petitioner failed to make out a prima facie case of discrimination:

> Smith contends that the record reflects that of the 13 blacks on the venire the State removed 8 by its peremptory strikes. He contends that the record supports his entitlement to a Batson hearing because, he says, the record

establishes a prima facie case of racial discrimination. We do not agree.

There was no Batson objection to the State's use of its peremptory strikes. Smith contends that the strike list supports his motion to remand for a Batson hearing because it shows that 8 of the State's 13 strikes were used to remove prospective black jurors. We note that the strike list also reflects that defense counsel used every one of it[s] 13 strikes to remove white prospective jurors. The strike list is confusing. It fails to indicate what jurors were struck for cause, and it does not reflect the final composition of Smith's jury.

As this Court stated in Boyd v. State, 715 So. 2d 825, 836 (Ala. Crim. App. 1997):

> "In his appellate brief, the appellant argues that a prima facie case of gender discrimination exists because the prosecutor used 10 of his 14 peremptory strikes to remove 10 of 26 female jurors. However, a review of the strike list included in the record, as well as the voir dire examination, indicates that the appellant used 10 of his 13 strikes to remove female jurors. There were no supporting circumstances to indicate gender discrimination or to render a failure by the trial court to find the existence of a prima facie case of gender discrimination plain error, i.e., error that would adversely affect the substantial rights of the appellant. Similarly, in George v. State, 717 So. 2d 827 (Ala. Crim.

> App. 1996), this Court found that the record did not supply an inference of gender discrimination. 'Before the plain error analysis can come into play in a Batson issue, the record must supply an inference that the prosecution engaged in purposeful discrimination.' Pace v. State, 714 So. 2d 316 (Ala. Crim. App. 1995)."
>
> The record fails to raise an inference of racial discrimination. We refuse to find error based on this inadequate record.

Smith I, 795 So. 2d at 802-03 (footnote and citations omitted). Accordingly, the premises on which the Court of Criminal Appeals rested its analysis can be expressed as four propositions: 1) There was no Batson objection lodged by defense counsel at trial; 2) Smith's argument is based on a strike list that shows eight of the State's thirteen peremptory strikes were used to remove eight of the thirteen black veniremen; 3) the strike list shows that all of defense counsel's thirteen strikes were used to strike white veniremen;[16] and 4)

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[16] The Court of Criminal Appeals' opinion does not make clear whether this fact entered into the court's calculation. Respondent has argued in its Answer to Smith's Amended Petition that Smith's claim lacks merit due to Smith's "unclean hands." Doc. 56 at 51-52. However, Batson and its progeny make clear that this fact can have no bearing on the issue. Bui v. Haley, 321 F.3d 1304, 1317 n. 19 (11th Cir. 2003) ("As Batson instructs us to be equally protective of the equal protection rights of the potential jurors as we are of those of the defendant, the fact that [Petitioner] himself may have unclean hands can have no bearing on our determination of whether the State's use of its strikes to remove blacks from the jury passes constitutional muster.").

the strike list is "confusing." However, the evidence and argument presented in Petitioner's direct appeal brief was more comprehensive than the court's analysis suggested:

> After the initial winnowing of the venire for cause or excuse or by random selection, the venire was left 38 members, of whom 13 were black and 25 were white. However, according to the court's strike sheets, the State then proceeded to use eight of its thirteen strikes (62% of its strikes) to eliminate blacks from the jury. This emphasis on striking blacks is all the more damning given that blacks only consisted of 34% of the remaining venire.

#R-31 at 69 (internal citations omitted). Petitioner also presented evidence of discriminatory intent, tracking the factors set forth by the Alabama Supreme Court in Ex parte Branch, 526 So 2d. 609, 622-23 (Ala. 1987):

- Lack of common characteristics other than race: The blacks eliminated from the venire were retired from the air force, not employed, an electrician, retired from corporate employment, a mechanic, a maintenance worker at Wal-Mart, a musician at a church, and a laborer at the Kimberly-Clark company. The only thing which these people shared was the color of their skin.
- Pattern of Strikes: Not only did the State use eight out of thirteen strikes to eliminate black veniremembers, it used six of its first eight strikes to eliminate blacks.

- Past conduct: Courts recognize that the Mobile County District Attorney's office has frequently used racially discriminatory peremptory strikes.
- Type and Manner of Questions Made During Voir Dire: The only questions posed by the State during voir dire dealt with whether or not the juror knew any of the witnesses, whether or not they sat on a jury before, and whether or not they could consider inferential or circumstantial proof. No one answered that such proof would be a problem.
- Type and Manner of Questions Directed to Specific Juror: The only individualized voir dire was for jurors who indicated potential problems with the death penalty. The State only examined one of the eight jurors in question, John Turk, who unequivocally stated that he could impose the death penalty.
- Disparate Treatment: The State struck both potential jurors John Turk, a retiree from Kelly Air Force Base, and Matilda Pond, a retiree who had worked at the Gordon Corporation, but kept on the panel, Dorothy Mann, a white female, who was retired after working for the United States Department of Defense.
- Most or All of Peremptory Strikes Used to Dismiss Blacks: The state used 8 of its 13 strikes, or 62%, to strike blacks from the jury.

- Most or all of the Black Jurors Dismissed: The State removed eight of thirteen remaining black jurors from the panel, or 62%.

#R-31 at 70-71 (internal citations omitted).

While, in the Court's opinion, the state court's consideration of Smith's substantive Batson claim was perhaps given short shrift, the undersigned cannot conclude based on the record before the state court that its decision is unentitled to AEDPA deference.[17] In making the requisite determination, Batson requires that the court consider "all relevant circumstances," Batson, 476 U.S. at 96, including, but not limited to, whether there is "a 'pattern' of strikes against black jurors included in the particular venire [that] might give rise to an inference of discrimination," id. at 97. Statistical evidence may support an inference of discrimination, but only when placed in context. United

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[17] The Court is reminded that its duty under AEDPA is to

> ask whether the state court's application of clearly established federal law was objectively unreasonable. Although difficult to define, "unreasonable" is a common legal term familiar to federal judges. For present purposes, the most important point is that an unreasonable application of federal law is different from an incorrect application of federal law. Because Congress specifically used the word "unreasonable," and not a term like "erroneous" or "incorrect," a federal habeas court may not grant relief simply because it concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable.

Williams, 529 U.S. at 365.

States v. Ochoa-Vasquez, 428 F.3d 1015, 1044 (11th Cir. 2005). The Eleventh Circuit has explained that "[t]he number of persons struck takes on meaning *only* when coupled with other information such as the racial composition of the venire, the race of others struck, or the voir dire answers of those who were struck compared to the answers of those who were not struck." Lowder, 236 F.3d at 636-37) (internal citations omitted). However, the burden of placing statistical facts in proper context rests on Petitioner and Smith has failed to carry his burden.[18] See Chavez v. Sec'y Fla. Dep't of

[18] The Court can glean several additional details from the record by comparing the strike list with the voir dire transcript. The venire initially consisted of 48 people, 16 (33%) were identified as black and 32 (67%) were identified as white. Vol. 7 at 57-58. Juror number 13 (white male) and Juror number 31 (white female), were struck by agreement of both sides. T.R. 85-89, 110. Four jurors – Juror 8 (white female), Juror 16 (black male), Juror 38 (black female), and Juror 48 (black male), were struck by the State for cause because they indicated that they would not impose the death penalty under any circumstance. Id. at 89-101, 105-09. The State also struck a fifth juror for cause, Juror 25 (white male), who indicated his experience of being arrested on a felony charge would affect his ability to give the State a fair trial. Id. at 48-49, 109. Defense counsel struck Juror 6 (white male) and Juror 41 (white male) for cause. Id. at 43-44, 110. After strikes for cause and the two strikes by mutual agreement, the venire consisted of 39 members. Id. at 111. The trial judge asked his court reporter for a number between 1 and 48, and struck Juror 35 (white female) at random, leaving 38 venire persons in the venire. Id. Out of the 38 members remaining, 13 were identified as black (34%) and 25 were identified as white (66%). See Vol. 7 at 57-58. Counsel were given 13 strikes each, and the jury was empanelled. T.R. at 113. The State does not appear to dispute the racial makeup of the jurors as listed on the strike sheet, see Doc. 56 at 50-51, and upon a review of the strike sheet and voir dire testimony, the Court finds no reason to presume that it is not accurate.

Corr., 647 F.3d 1057, 1061 (11th Cir. 2011) (habeas pleading requirements "would mean nothing if district courts were required to mine the record, prospecting for facts that the habeas petitioner overlooked and could have, but did not, bring to the surface in his petition. . . . [D]istrict court judges are not required to ferret out delectable facts buried in a massive record. . . .").

The only context Petitioner provided the state court was that the "remaining venire" consisted of 34% black venirepersons, the State struck 62% of the 13 blacks who were part of that "remaining venire," and the State used its first 6 out of 8 strikes on black veniremembers. While the Court recognizes that the Eleventh Circuit has cited approvingly a Second Circuit decision that held that "a challenge rate nearly twice the likely minority percentage of the venire strongly supports a prima facie case under Batson," see Lowder, 236 F.3d at 637 (quoting United States v. Alvarado, 923 F.2d 253, 256 (2d Cir. 1991)), these statistics may not be viewed in a vacuum, and there are other factors present in this case that weigh against a finding that a prima facie case was established.

First, the strike sheet reflects that, armed with 13 peremptory strikes, the state could, but did not, strike all the black veniremen. See Lowder, 236 F.3d at 638 ("[T]he unchallenged presence of jurors of a particular race on a jury substantially weakens the basis for a prima facie case of discrimination in the peremptory striking of jurors of that race."). Because the State had thirteen strikes available, but struck only eight out of

a possible thirteen African-American jurors, there is no inference of discrimination. United States v. Puentes, 50 F.3d 1567, 1578 (11th Cir. 1995) ("Although the presence of African-American jurors does not dispose of an allegation of race-based peremptory challenges, it is a significant factor tending to prove the paucity of the claim."); see Lowder, 236 F.3d at 637 ("the number of jurors of one race struck by the challenged party may be sufficient by itself to establish a prima facie case where a party strikes all or nearly all of the members of one race on a venire"). With five black jurors, the jury seated was 41.6% black (or 42.8% black when considering the alternate).[19] While this fact is not necessarily dispositive, it certainly undermines Petitioner's argument. On this point, the Eleventh Circuit's analysis in United States v. Hill, 643 F.3d 807, 838-39 (11th Cir. 2011) is instructive. There, the court concluded that no prima facie case existed where the strike percentage against blacks was 64%, the State could have, but did not exclude, 5 black jurors, and 9 black jurors (or 50%) remained in the venire at the conclusion of voir dire. Id. Similarly, a prima facie case does not exist in Petitioner's case where the strike percentage is 62%, the State could have, but did not exclude, 5 black jurors, and 5 black jurors (or 41.6%) remained on the jury after voir dire. See also United States v. Campa, 529 F.3d 980, 998 (11th Cir. 2008) (no

[19] See United States v. Hill, 643 F.3d 807, 838 (11th Cir. 2011) ("in determining whether a prima facie case has been established[,] the peremptory strikes used to select alternates are to be considered together with those used to select the initial 12 jurors").

prima facie case where strike percentage was 78%, 2 black jurors remained who could have been removed, and 4 black jurors (or 16%) made up the jury after voir dire).

Second, there was not "a substantial disparity" between the percentage of black jurors of struck (62%) and the percentage of their representation on the venire (41.6%). See United States v. Novaton, 271 F.3d 968, 1002 (11th Cir. 2001) ("The existence of a 'substantial disparity between the percentage of jurors of one race struck and the percentage of their representation on the jury' may create such an inference of discrimination") (quoting Lowder, 236 F.3d at 637-38).

Third, there was no suggestion that the subject matter of the case suggested a motive for discriminatory use of peremptory strikes. See Ochoa-Vasquez, 428 F.3d at 1045 n. 39 ("In some Batson claims, the subject matter of the case may be relevant if it is racially or ethnically sensitive."); see also Johnson, 545 U.S. at 173 (fact that black defendant was charged with killing his white girlfriend's child was a "highly relevant" circumstance proving prima facie case of discrimination against prosecution striking black venirepersons); United States v. Stewart, 65 F.3d 918 (11th Cir. 1995) (defendants' use of peremptory strikes against white venirepersons relevant where defendants were Ku Klux Klan members being prosecuted for a racially motivated hate crime against blacks). Here, there was no evidence that the crime was motivated by race. Also weighing against a finding of a prima facie case is the fact that defense counsel was given the

opportunity to raise a Batson motion, but declined to do so. Based on the foregoing and guided by AEDPA, the Court concludes that Court of Criminal Appeals was not objectively unreasonable in light of the record before the court. See Miller-El, 537 U.S. at 348. Petitioner's Claim 16 is, therefore, **DENIED**, as Petitioner did not meet his burden of proving a prima facie case of discrimination.

C. Claims 19, 22-28: The Trial Court Improperly Instructed the Jurors

1) Claim 19: Trial Court Improperly Instructed Jurors That the Burden of Proof for Proving a Mitigating Circumstance Was 'Beyond a Reasonable Doubt' and That the Defense Was Required to Prove Beyond a Reasonable Doubt that Mitigating Factors Outweighed Aggravating Factors in Order To Return a Life Verdict

During the penalty phase of Smith's trial, the trial judge erroneously instructed the jury. In paragraphs 213-18, Petitioner argues that the trial court's improper jury instructions resulted in two errors, both of which violated Smith's constitutional rights. The Court of Criminal Appeals found that, upon defense counsel's objection, the trial court corrected its error. Smith I, 795 So. 2d at 835. The original instruction to which Petitioner objected was delivered as follows:

> "[I]f after a full and fair consideration of all of the evidence in this case you are convinced beyond a reasonable doubt that the mitigating circumstances outweigh the aggravating circumstances, or you are convinced beyond a reasonable doubt that the State has failed to prove at least one or more aggravating circumstances, your verdict would be to recommend the punishment of life imprisonment without parole. . . . In order to return an advisory verdict of death by electrocution at least 10 of your number must be satisfied beyond a reasonable doubt that aggravating circumstances have been proven and outweigh mitigating circumstances. In order to return an advisory verdict recommending life without parole at least 7 of your number must be satisfied beyond a reasonable doubt of the existence of mitigating circumstances and that those mitigating circumstances outweigh the aggravating circumstances."

T.R. 847-49 (emphasis added).

Counsel objected to the aforementioned instruction as follows:

> Mr. Byrd: We would also take exception to the two statements towards the end of your charge concerning the jury had to be convinced beyond a reasonable doubt that the mitigating circumstances outweigh the aggravating circumstances in order to recommend life without parole and also stating that they had to believe that a mitigating circumstance existed beyond a reasonable doubt.

> We respectfully submit that the jury should have been instructed that unless they are convinced by a preponderance of the evidence that a mitigating circumstances does not exist, then they should consider that; and if they were not so convinced, then they would weigh the mitigating circumstance against whatever aggravating circumstance they may believe was proved beyond a reasonable doubt. It has placed too high a burden on the Defendant to establish mitigation beyond a reasonable doubt.

T.R. 851-52. Counsel clearly voiced two objections here: (1) the instruction improperly stated that the jury had to be convinced beyond a reasonable doubt that the mitigating circumstances outweigh the aggravating circumstances in order to recommend life without parole, and (2) the instruction improperly stated that the burden of proof for proving a mitigating circumstance was beyond a reasonable doubt.

The trial judge agreed to reinstruct the jury from the pattern instructions. T.R. 854. The trial judge recharged the jury as follows:

> Ladies and gentlemen, I wish to make clear the distinction between the burden of proof as it relates to proof of an aggravating circumstance and proof of a mitigating circumstance.
>
> Proof of a mitigating circumstance only requires proof by a preponderance of the evidence, which I will define again for you. Proof of an aggravating circumstance requires proof beyond a reasonable doubt.

> And I repeat, a mitigating circumstance considered by you should be based on the evidence you have heard. When the factual existence of an offered mitigating circumstance is in dispute, the State shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. The burden of disproving it by a preponderance of the evidence means that you are to consider that the mitigating circumstance does exist unless taking the evidence as whole it is more likely than not that the mitigating circumstances does not exist. Therefore, if there is a factual dispute over the existence of a mitigating circumstance, then you should find and consider that mitigating circumstance unless you find the evidence is such that it is more likely than not that the mitigating circumstance does not exist.
>
> Only an aggravating circumstance must be proven beyond a reasonable doubt and the burden is always on the State of Alabama to convince you from the evidence beyond a reasonable doubt that such an aggravating circumstance exists and the burden is also on the State to prove to you beyond a reasonable doubt that the aggravating circumstance or circumstances, should you find that they exist, outweigh any mitigating circumstances which need only be proven by a preponderance of the evidence.

T.R. 854-56.

The trial court's recital of the pattern instruction clearly corrected the misstatement as to the burden of proof for proving a mitigating circumstance. Additionally, the judge stated several times not only that the state has the burden of proving aggravating circumstances beyond a reasonable doubt, but also that the state has the burden of disproving the existence of a mitigating circumstance by a preponderance of the evidence. As stated in Peek v. Kemp, 784 F.2d 1479, 1489 (11th Cir. 1986), it is well established that "a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge." As to this error, the Court agrees with the Court of Criminal Appeals that the trial judge promptly and properly corrected the stated error.

With regard to the first error (i.e., instructing that the jury had to be convinced beyond a reasonable doubt that the mitigating circumstances outweighed the aggravating circumstances in order to recommend life without parole), the Court of Criminal Appeals only stated that "the trial court thoroughly instructed the jury that the aggravating circumstances must outweigh the mitigating ones and that the weighing is not merely a numerical one." Smith I, 795 So. 2d at 835. That court went on to say, "[t]he trial court's instructions on these principles of law were both thorough and accurate. No error occurred here." Id. On appeal to the Alabama Supreme Court, three justices dissented from the court's denial of a writ of certiorari, focusing primarily on the issue of whether the trial court's second statement of the law was sufficient to correct its

erroneous instruction as to how the jury was to balance the aggravating and mitigating circumstances. As the dissenters noted correctly, "[m]isinforming the jury about the quantum of proof necessary to recommend a sentence of life without parole in a capital case is a significant error. . . ." Ex parte Smith, 795 So. 2d at 844.

At this stage of review, it is the Court's duty to determine whether the error rose to the level of constitutional error such that habeas relief is warranted. The question is "'whether the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process,' not merely whether 'the instruction is undesirable, erroneous, or even 'universally condemned.''" Henderson v. Kibbe, 431 U.S. 145, 154 (1977) (quoting Cupp v. Naughten, 414 U.S. 141, 147 (1973)). To state it differently, "[t]he ultimate question is whether there is a reasonable possibility that the jury understood the instructions in an unconstitutional manner." Peek, 784 F.2d at 1489.

The Court finds that the trial court's error was not so damaging as to deprive Petitioner of due process. The Court is cognizant that "[a]n omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." Henderson, 431 U.S. at 155. While, in isolation, the trial judge appears to state that the jury must be convinced beyond a reasonable doubt that the mitigating circumstances outweigh the aggravating circumstances, the instruction must be read in context. See Cupp, 414 U.S. at 146-47 ("[A] single instruction to a jury may not be judged in

artificial isolation, but must be viewed in the context of the overall charge.").

Moreover, even assuming the instruction unconstitutionally raised the burden of proof necessary for recommending a life sentence without parole, the Court concludes that the error was harmless because the evidence of Petitioner's guilt was "so overwhelming that the error could not have been a contributing factor in the jury's decision to convict." Jarrell, 735 F.2d at 1257 (citing Mason v. Balkcom, 669 F.2d 222, 227 (5th Cir. Unit B 1982)); see also Chapman v. California, 386 U.S. 18, 24 (1967) ("before a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt"). Therefore, Claim 19 is due to be **DENIED**.

2) Claim 22: Jury Instructions Reduced the Jury's Sense of Responsibility

In paragraphs 227-29 of his Amended Petition, Smith argues that the trial judge's penalty phase instructions improperly reduced the jury's sense of responsibility by repeatedly reminding the jurors that their verdict was merely a recommendation. Petitioner cites Caldwell v. Mississippi for the proposition that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for the defendant's death rests elsewhere." Caldwell, 472 U.S. at 328-29. However, Petitioner's claim of Caldwell error fails because the trial judge did not mischaracterize

the jury's advisory function under Alabama law. See Dugger v. Adams, 489 U.S. 401, 407 (1989) ("To establish a Caldwell violation, a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law."); Ala. Code § 13A-5-46 (describing jury's sentencing determinations as "advisory" ten separate times); see also Davis v. Singletary, 119 F.3d 1471 (11th Cir. 1997) ("The infirmity identified in Caldwell is simply absent in a case where the jury was not affirmatively misled regarding its role in the sentencing process." (internal quotation marks and citations omitted)). Claim 22 is **DENIED**.

3) Claim 23: Trial Judge Erred in Not Repeating Definition of "Reasonable Doubt" to the Jury

In paragraph 230 of his Amended Petition, Smith argues that the trial judge erred in failing to repeat the definition of "reasonable doubt." As further described *infra* in Part III.C.7., the reasonable doubt instruction did not violate the Supreme Court's decision in Cage v. Louisiana. The Court of Criminal Appeals properly concluded that the given instruction contained no plain error and it was not error for the court to refer to the instruction, rather than repeat it. Smith I, 795 So. 2d at 836-37 (citing Griffin v. State, 790 So. 2d 267 (Ala. Crim. App. 1999), rev'd on other grounds sub nom. Ex parte Griffin, 790 So. 2d 351 (Ala. 2000)). Because Smith has failed to show that the trial court's decision "(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 based on an unreasonable determination of the facts in light of the evidence presented in the State court proceedings." 28 U.S.C. § 2254(d), Claim 23 is **DENIED**.

4) Claim 24: Instruction on Aggravating Circumstance That the Crime was Heinous, Atrocious or Cruel was Erroneous

In paragraphs 231-33 of his Amended Petition, Smith argues that the trial judge's instruction on the aggravating circumstance of "especially heinous, atrocious or cruel" was improper because it "required the jurors to engage in a comparison of the events before them with other crimes without any guidance as to how to do so." Am. Pet. ¶ 233. The Court of Criminal Appeals reviewed the claim for plain error[20] and found that the instruction was identical to the pattern jury instructions and "tracks the case law definition of the especially heinous, atrocious, or cruel aggravating circumstance." Smith I, 795 So. 2d at 837. Citing Godfrey v. Georgia, 446 U.S. 420 (1980), the court concluded that there was no error. Id. This court agrees that the judge's instruction did not constitute error, and that the court properly applied Godfrey. Therefore, plaintiff

[20] Trial counsel actually did in fact object to the trial judge's instruction. See R. 851, 853-54.

has failed to meet his burden and Claim 24 is hereby **DENIED**.

5) Claim 25: Failure To Instruct Jurors That They Had to Find Unanimously That the State Had Proved the Existence of Each Aggravating Circumstance Beyond a Reasonable Doubt was Erroneous

In paragraphs 234-35 of his amended petition, Smith argues that the trial court failed to properly instruct the jury that before the jury could consider an aggravating circumstance, they must unanimously find that it existed beyond a reasonable doubt. Petitioner's claim is without merit. The trial court instructed the jury that "the burden of proof is on the State to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstance. . . . This means that before you can even consider recommending that the Defendant's punishment be death, each and every one of you must be convinced beyond a reasonable doubt . . . that at least one or more of the aggravating circumstances exist." R.839 (emphasis added). The trial judge is not required to use the word 'unanimous' when instructing the jury. The trial judge's use of the phrases "each and every one of you" and "'each of you' implies that any findings of aggravating circumstances had to be unanimous." Taylor, 808 So. 2d at 1211. The trial judge's instruction was not error, and the Court of Criminal Appeals properly

applied Lockett v. Ohio, 438 U.S. 586, 605 (1978). Habeas relief on this ground is therefore not warranted.

6) Claim 26: Trial Judge Failed To Instruct Jurors That They Must Individually Consider the Existence of Mitigating Circumstances

In paragraphs 236-37 of his Amended Petition, Smith argues that the trial judge erroneously instructed the jury that they needed to collectively and unanimously consider and determine the existence of a mitigation circumstance before considering it. The Court agrees with the Court of Criminal Appeals' finding that this claim lacks merit. The trial judge clearly instructed that the burden of proof was on the state to disprove the factual existence of a mitigating circumstance by a preponderance of the evidence. T.R. 843. The trial judge clearly instructed the jury first to assume that the mitigating circumstance existed, explaining, "you are to consider that the mitigating circumstance does exist unless taking the evidence as a whole it is more likely than not that the mitigating circumstance does not exist." Id. Because Claim 26 is without merit, this claim is **DENIED**.

7) Claim 27: Instructions on Reasonable Doubt During the Guilt Phase Were Erroneous

In paragraphs 239-42 of his Amended Petition, Smith argues that the trial court's instruction on

reasonable doubt ran afoul of Cage v. Louisiana, 498 U.S. 39 (1990), overruled in part on other grounds by Estelle v. McGuire, 502 U.S. 62 (1991). In Cage, the Supreme Court held that the trial court's instruction that equated reasonable doubt with "grave uncertainty" and "actual substantial doubt" was unconstitutional because it could have been interpreted by a reasonable juror as allowing a finding of guilt based on a degree of proof below that required by the Due Process Clause. Id. at 41. Smith contends the instruction that reasonable doubt "does not mean a vague and arbitrary notion, but it is an actual doubt based on all the evidence, the lack of evidence, a conflict in the evidence or a combination thereof" is "equivalent to the instruction found unconstitutional in Cage" because it uses the phrase "actual doubt." Am. Pet. ¶ 241. The Court of Criminal Appeals concluded that the trial court's instruction was distinguishable from the instruction in Cage, and this decision was not contrary to and did not involve an unreasonable application of Cage v. Louisiana, nor did it result in a decision based on an unreasonable determination of the facts presented. See Smith v. State, 756 So. 2d 892, 922 (Ala. Crim. App. 1997) ("Although the trial court did refer to a reasonable doubt as an "actual doubt," it did not state that the doubt must be "grave" or "substantial," as the faulty charge in Cage instructed.") see also Cage, 498 U.S. at 41 ("It is plain to us that the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable-doubt standard."). Claim 27 is, therefore, **DENIED**.

8) Claim 28: Accomplice Liability Instructions During the Guilt Phase Were Erroneous

In Claim 28, Smith argues that the trial court's instructions did not require any direct proof of either Smith's involvement in the crime or his mental state, thereby allowing the jury to convict Smith of capital murder without finding that Smith had a particularized intent to kill. Am. Pet. ¶¶ 243-46. The Court of Criminal Appeals thoroughly reviewed the trial court's instructions and concluded that there was no error, noting that the trial court had instructed the jury that, to find Smith guilty as an accomplice, "it must be shown beyond a reasonable doubt that he was present with the intent to aid and abet the principal actor *and it must also be shown that he possessed the same intent to kill.*" Smith I, 795 So. 2d at 831 (emphasis added) (citing T.R. 682). Smith has failed to demonstrate that the state court's decision resulted in a decision that was contrary to, or involved an unreasonable application of, Supreme Court precedent or resulted in a decision based on an unreasonable determination of the facts.

The Supreme Court case that Smith cites in support of his claim, Enmund v. Florida, 458 U.S. 782 (1982), is distinguishable. In Enmund, the Supreme Court held that death is not a valid penalty where the defendant "neither took life, attempted to take life, nor intended to take life." Id. at 787. The Supreme Court compared the 36 federal and state jurisdictions that authorized capital punishment at that time and placed

at one end of the spectrum those states (*e.g.*, Florida) that allowed the death penalty to be imposed solely for participation in a robbery in which another robber takes life and placed at the other end those states (*e.g.*, Alabama) that make knowing, intentional, purposeful, or premeditated killing an element of capital murder. Id. at 789-91. Whereas Enmund blessed rather than repudiated Alabama's insistence on proof of intent to kill, and whereas the trial court's instructions in this case accurately stated the law with respect to the need to find that intent, Claim 28 is **DENIED**.

D. Remaining Claims

1) Claim 15: Petitioner's Status as Mentally Retarded Precludes Imposing the Death Penalty

In paragraphs 163-201 of his Amended Petition, Petitioner argues that he is mentally retarded and, therefore, that his execution is prohibited by the Supreme Court's decision in Atkins v. Virginia, 536 U.S. 304 (2002). In Atkins, the Supreme Court held that "death is not a suitable punishment for a mentally retarded criminal" and that "the Constitution 'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." Id. at 321 (quoting Ford v. Wainwright, 477 U.S. 399, 405 (1986)); see also id. at 318 (holding that mentally retarded criminals' "deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability"). Atkins did not, however, dictate a national standard for determining whether a criminal

defendant is mentally retarded. Rather, the Supreme Court offered two clinical definitions[21] and expressly left "to the States the task of developing appropriate ways to enforce the constitutional restriction upon their execution of sentences." Id. at 317 (internal

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[21] Specifically, the Supreme Court observed that:

> The American Association on Mental Retardation (AAMR) defines mental retardation as follows: "Mental retardation refers to substantial limitations in present functioning. It is characterized by significantly subaverage intellectual functioning, existing concurrently with related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18." Mental Retardation: Definition, Classification, and Systems of Supports 5 (9th ed. 1992).
>
> The American Psychiatric Association's definition is similar: "The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A) that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety (Criterion B). The onset must occur before age 18 years (Criterion C). Mental Retardation has many different etiologies and may be seen as a final common pathway of various pathological processes that affect the functioning of the central nervous system." Diagnostic and Statistical Manual of Mental Disorders 41 (4th ed. 2000). "Mild" mental retardation is typically used to describe people with an IQ level of 50-55 to approximately 70. Id., at 42-43.

Atkins, 536 U.S. at 308 n.3.

quotation marks and brackets omitted). Accordingly, to evaluate Smith's Atkins claim, this Court must examine Alabama law.

Four years ago, the Eleventh Circuit described the test that the Alabama Supreme Court set forth in Ex parte Perkins, 851 So. 2d 453 (Ala. 2002):

> [T]he Alabama Supreme Court has defined the test for mental retardation that rises to the level of prohibiting execution as having three components: (1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age eighteen).

Holladay v. Allen, 555 F.3d 1346, 1353 (11th Cir. 2009). Relatedly, Alabama's criminal procedure law defines an "intellectually disabled person" as "[a] person with significant subaverage general intellectual functioning resulting in or associated with concurrent impairments in adaptive behavior and manifested during the developmental period, as measured by appropriate standardized testing instruments." Ala. Code § 15-24-2(3).[22]

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[22] Formerly, Section 15-24-2(3) referred to mentally retarded persons. However, in 2009, the Alabama legislature mandated that "[a]ll references to 'mentally retarded' shall be changed to 'people with an intellectual disability' and all references to 'mental retardation' shall be changed to 'intellectual disability.'" Ala. Code § 22-50-2.1(d). The legislature emphasized that the

The Alabama Supreme Court has further discussed the three criteria that must all be met in order for a defendant to be considered mentally retarded under Alabama law:

> All three factors must be met in order for a person to be classified as mentally retarded for purposes of an Atkins claim. Implicit in the definition is that the subaverage intellectual functioning and the deficits in adaptive behavior must be present at the time the crime was committed as well as having manifested themselves before age 18. This conclusion finds support in examining the facts we found relevant in Ex parte Perkins and Ex parte Smith, and finds further support in the Atkins decision itself, in which the United States Supreme Court noted: 'The American Association on Mental Retardation (AAMR) defines mental retardation as follows: 'Mental retardation refers to substantial limitations in present functioning." Therefore, in order for an offender to be considered mentally retarded in the Atkins context, the offender must currently exhibit subaverage intellectual functioning, currently exhibit deficits in adaptive behavior, and these problems must have manifested themselves before the age of 18.

"change in terminology" was intended to be merely "a name change only" without any substantive effect. Id. For the sake of internal consistency within this Order, the Court will use the term "mentally retarded," which appears throughout the relevant federal and state case law.

Smith v. State (Jerry Smith), 2007 WL 1519869, at *8 (Ala. May 25, 2007) (not yet released for publication) (internal citation and emphasis omitted).

Though Smith's Atkins claim is properly before the Court because Smith raised it in his First and Second Amended Rule 32 petitions, many of the facts now alleged in support of that claim were not contained in Smith's state court submissions. Whereas this Court cannot "review . . . a state court adjudication on the merits in light of allegations not presented to the state court" without doing violence to both the AEDPA and "the 'historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts,'" see Borden, 646 F.3d at 816-17 (quoting Williams, 529 U.S. at 436), this Court will examine the reasonableness of the Court of Criminal Appeals' rejection of Smith's Atkins claim based only upon the limited allegations contained in his First and Second Amended Rule 32 petitions and the record presented to the state courts.[23]

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[23] But for the addition of a single paragraph that outlines the differences between the manner in which the ninth and tenth editions of the American Association on Mental Retardation's manual categorize adaptive behavior skills, the sections of Smith's amended Rule 32 petitions that set forth his Atkins claim are identical. Compare #R-52 ¶¶ 112-16 (First Amended Rule 32 Petition) with #R-46 ¶¶ 114-19. (Second Amended Rule 32 Petition). The only additional allegation contained in that paragraph is the wholly conclusory assertion that "Mr. Smith has deficiencies in all three of these adaptive areas and clearly meets the mental retardation requirements set forth in Atkins." #R-46 ¶ 118.

In support of his Atkins claim, Smith argued only the following facts to the state courts:

- "When Mr. Smith was transferred to the Monroe County Excel junior high school, the county board of education classified Mr[.] Smith as 'Educable Mentally Retarded' (EMR), based on his 'psychological and educational evaluations, academic history, and other pertine[nt] information.'" #R-46 ¶ 115.
- "There was testimony at trial that Mr. Smith functioned intellectually at the bottom 3rd percentile of all adults." Id. (citing T.R. 781).
- "There was testimony at sentencing which showed his inability to adapt because he often acts out impulsively, lacks the ability to formulate a pre-meditated plan and acts as a follower in groups." Id. ¶ 116 (without any citation to the record).
- "School records indicate that Mr. Smith never progressed beyond the 5th grade. Id. ¶ 117.
- [T]hough he was in EMR classes while in the Monroe County school system, he either failed or performed at the 'D' level in all subjects." Id. ¶ 117.

A few additional facts were brought out during Smith's penalty phase examination of Dr. James F. Chudy, a clinical psychologist who testified that he psychologically evaluated Smith by reviewing Smith's school and jail records, conducting a clinical interview with Smith, and subjecting Smith to a "large battery" of tests that covered intelligence, organic problems,

achievement, and personality. T.R. 771-74. Most significantly, Dr. Chudy testified that Smith's full scale IQ in 1998 (several months after the murder of Durk Van Dam) was 72. T.R. 781, 790. The school records reviewed by Dr. Chudy indicated that Smith's IQ was 75 at age 8 and 74 at age 12. Vol. 8 at 393. No other evidence of Smith's IQ was presented to the state courts.

Respondent argues that, because the Alabama Supreme Court set an IQ of 70 as the ceiling for significantly subaverage intellectual functioning—the first of the three Perkins prongs—the fact that Smith's IQ exceeds (and, apparently, has always exceeded) that threshold is fatal to Smith's Atkins claim. Doc. 56 at 78-79. Respondent also notes that Dr. Chudy found that, based on Smith's most recent IQ score, Smith is "in the Borderline range of intelligence[,] which means that he operates between the Low Average and Mentally Retarded range." Id. at 79 (quoting T.R. 917). Dr. Chudy's finding and a diagnosis of mental retardation are mutually exclusive, inasmuch as something cannot be both between two things and the same as one of them. (The fact that Alabama is *between* Mississippi and Georgia precludes the possibility that Alabama *is* Mississippi.) Similarly, Dr. Chudy's finding that Smith's scores on the Wechsler Adult Intelligence Scale test "place him at a level *closer to those individuals who would be considered mentally retarded*," R. 917 (emphasis added), is incompatible with a determination that Smith is mentally retarded himself. (To make another geographical analogy: Mobile is closer to

Pascagoula than it is to Pensacola, but Mobile is not Pascagoula.)

Smith attempts to overcome this seemingly dispositive evidentiary shortcoming by urging this Court to do something that the Alabama Court of Criminal Appeals refused to do, namely to downwardly modify his most recent IQ score to produce an adjusted score within the mental retardation range. Am. Pet. ¶ 184. In addition to directing the Court to Dr. Chudy's testimony that, in Smith's case, "a standard error of measurement of about three or four points" could result in an IQ "as high as maybe a 75 [or] . . . as low as a 69," T.R. 781, Smith argues that "consideration should also be given to what is termed the 'Flynn effect.' " Am. Pet. ¶ 181. As recently described by the Eleventh Circuit, the Flynn effect is "a method that recognizes the fact that IQ test scores have been increasing over time" and "acknowledges that as an intelligence test ages, or moves farther from the date on which it was standardized, or normed, the mean score of the population as a whole on that assessment instrument increases, thereby artificially inflating the IQ scores of individual test subjects." Thomas v. Allen, 607 F.3d 749, 753 (11th Cir. 2010).

Though the Eleventh Circuit has held that a federal habeas court has discretion to consider the standard error of measurement ("SEM") and the Flynn effect, id. at 758,[24] it by no means stated or implied that

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[24] This case is distinguishable from Thomas in several significant respects. First, in Thomas, the habeas court was not

required to give any deference to the state court's conclusion that the defendant was not mentally retarded because defendant's Rule 32 proceedings predated the Supreme Court's decision in Atkins. See Thomas v. Allen, 614 F. Supp. 2d 1257, 1259 n.1 (N.D. Ala. 2009) (noting that post-conviction state remedies were exhausted in 2000). By contrast, Smith's claim was rejected on the merits six years after Atkins was decided, and the Court of Criminal Appeals' decision relied primarily on Atkins and its progeny, specifically Perkins. See Smith II, 71 So. 3d at 17-21. Accordingly, the state court's determination that Smith is not mentally retarded is entitled to AEDPA deference. Second, the parties in Thomas stipulated that "a SEM of approximately plus or minus five points" was appropriate, see Thomas, 607 F.3d at 753, whereas the Respondent here has not made a similar concession or even acknowledged the propriety of considering any adjustment whatsoever. Third, the defendant in Thomas presented evidence of four intelligence assessments conducted during his developmental period that yielded three unadjusted scores below 70—56 at age 9, 68 at age 13, and 64 at age 14—and one borderline score of 74 at age 16. See id. at 753-54. In this case, however, every IQ test administered to Smith during his developmental period yielded an unadjusted score above the cutoff for mental retardation. See Vol. 8 at 393 (indicating IQ of 75 at age 8 and of 74 at age 12).

In holding that the district court did not clearly err in finding that the defendant in Thomas was mentally retarded notwithstanding that one of his four unadjusted, developmental period IQ scores was above the cutoff established in Perkins, the Eleventh Circuit observed that "[t]here is no Alabama case law stating that a single IQ raw score, or even multiple IQ raw scores, above 70 automatically defeats an Atkins claim when the totality of the evidence (scores) indicates that a capital offender suffers subaverage intellectual functioning." Thomas, 607 F.3d at 757. However, the totality of scores in this case does not warrant the same conclusion. The mean of Thomas' four developmental period scores was 65.5 (well within the mental retardation range), but the mean of Smith's scores is 74.5 (unquestionably above the Perkins threshold). Cf. Holladay, 555 F.3d at 1357-58 (affirming district court's determination that defendant demonstrated

such consideration was required or even appropriate where, as here, the state court explicitly rejected application of one modifier and never heard any argument with respect to application of the other. Constrained by AEDPA, the question presented to this Court is simply whether the Court of Criminal Appeals unreasonably refused to apply a "margin of error"[25] to Smith's IQ score of 72 such that his score would be reduced and fall within the mental retardation range. See Schriro, 550 U.S. 465 at 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold."). The Court answers in the negative and finds that Smith's Atkins claim fails because the state court did not unreasonably apply federal law in holding that Smith was not exempt from execution on the basis of mental retardation.[26]

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significantly subaverage intellectual functioning where mean of defendant's IQ scores was below 70).

[25] The Court of Criminal Appeals used the term "margin of error" to refer to the SEM. Smith II, 71 So. 3d at 20 ("Smith urges this Court to adopt a 'margin of error' when examining a defendant's IQ score and then to apply that margin of error to conclude that because Smith's IQ was 72 he is mentally retarded. The Alabama Supreme Court in Perkins did not adopt any 'margin of error' when examining a defendant's IQ score. If this Court were to adopt a 'margin of error' it would, in essence, be expanding the definition of mentally retarded adopted by the Alabama Supreme Court in Perkins.").

[26] Because Smith has failed to prove that his intellectual functioning was or is significantly subaverage, the Court need not and does not explore whether Smith suffers from deficits in adaptive behavior and whether any such deficits manifested

2) Claim 20: Trial Judge's Refusal To Allow Defense Counsel To Cross-Examine Prosecution Witness Regarding Her Probationary Status Violated the Confrontation Clause

In Claim 20, Smith argues that he was denied his Sixth Amendment right to confront the witnesses against him when the trial judge sustained the State's objection to a question concerning the residence of prosecution witness Melissa Arthers, who, at the time she testified against Smith, was in state custody because her juvenile probation had been revoked. Am. Pet. ¶¶ 217-20. Smith's argument relies primarily on Davis v. Alaska, 415 U.S. 308 (1974), in which the Supreme Court held that exclusion of a prosecution witness' juvenile record violated the Confrontation Clause where the witness' "vulnerable status as a [juvenile] probationer" could arguably support an inference that the witness was biased in favor of the state and had an incentive to lie. Id. at 316-18. On direct appeal, Court of Criminal Appeals rejected Smith's Davis claim in a lengthy section of its opinion by distinguishing Davis on the facts[27] and further holding that any Davis error was harmless. Smith I, 795 So. 2d at 817-21.

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themselves before Smith reached the age of 18. Jerry Smith, 2007 WL 1519869, at *8.

[27] Specifically, the Court of Criminal Appeals noted that Smith's counsel sought to offer evidence of Arthers' incarceration strictly for impeachment purposes, whereas the defendant in Davis made it clear that he sought not to introduce the witness' juvenile adjudication for purposes of general impeachment but, rather, to show the witness' bias and prejudice. Smith I, 795 So.

Smith apparently desires for this Court to review his claim de novo, because, in lieu of alleging that the Court of Criminal Appeals misapplied federal law, he merely makes the conclusory assertion that "[t]he trial court's failure to allow Mr. Smith to cross-examine Ms. Arthurs [sic] about the revocation of her probation violated Mr. Smith's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments." Am. Pet. ¶ 220. Limited by AEDPA, this the Court cannot do. Whereas Smith has failed to demonstrate that the state court's adjudication of his Davis claim was contrary to or involved an unreasonable application of clearly established federal law, Claim 20 is **DENIED**.

3) Claim 21: The Trial Court Improperly Denied Smith's Motion for Mistrial

In paragraphs 221-25 of his Amended Petition, Smith argues that the trial court should have granted his motion for a mistrial when, in response to a question by one of the prosecutors, a witness revealed that

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2d at 817. The Court of Criminal Appeals also found significance in the fact that, unlike the juvenile in Davis, Arthers' probation had already been revoked, had no state action pending against her, and was not in the "vulnerable status [of] a probationer." Id. at 818 (quoting Davis, 415 U.S. at 318-19). Finally, the Court of Criminal Appeals found that "one major distinction not present in this case . . . is that the juvenile in Davis was a[ ] 'crucial' eyewitness to the accused's presence near the scene of the crime when it occurred and possibly a suspect in the crime," whereas Arthers' was not suspected to be an accomplice of Smith's and her testimony was corroborated by either other witnesses or Smith's own confession. Id.

Smith had previously been in prison.[28] Smith contends, without support, that this error was "so severe that it rose to 'the level of a denial of fundamental fairness' warranting habeas relief." Am. Pet. ¶ 224 (quoting Snowden v. Singletary, 135 F.3d 732, 737 (11th Cir. 1998)). Relying solely on state precedents, the Court of Criminal Appeals denied Smith's claim on the merits. Smith I, 795 So. 2d at 822-23. This Court does not have occasion to revisit that determination. Agan v. Vaughn, 119 F.3d 1538, 1549 (11th Cir. 1997) (acknowledging the "fundamental principle that state courts are the final arbiters of state law, and federal habeas courts should not second-guess them on such matters"). It suffices to observe as the Eleventh Circuit did in United States v. Veteto, 701 F.2d 136 (11th Cir. 1983), that "[w]hile use of such words as 'jail,' 'prison,' 'arrest' are, generally to be avoided, where irrelevant, the mere utterance of the word does not, without regard to context or circumstances, constitute reversible error per se." Id. at 139-40 (quoting United States v. Barcenas,

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[28] The record reveals that the witness volunteered the fact of Smith's previous incarceration even though that fact was not responsive to the prosecutor's question:

> Q [prosecutor]: Did you speak to anybody there?
>
> A [witness]: Yes, sir
>
> Q: Who did you speak to?
>
> A: His son, Jody.
>
> Q: Now, at that time did you know Jody?
>
> A: Yes, sir, by writing him when he was in prison.
>
> MR. HUGHES [defense counsel]: Your Honor, I object to that.

T.R. 271.

498 F.2d 1110, 1113 (5th Cir. 1974). Whereas the witness' reference to prison in this case was volunteered, was not responsive to the prosecutor's question, and added nothing to the state's case, Smith bears the burden of proving that the witness' answer clearly prejudiced him. Id. at 140. This Smith has not even attempted to do, and, therefore, Claim 21 is **DENIED**.

4) Claim 30: Admission of Out-of-Court Statements by Smith's Co-Defendant and Mother Was Improper

In Claim 30, Petitioner argues that the admission of out-of-court statements made by Smith's separately tried accomplice, Larry Reid, and by Smith's mother violated his Sixth Amendment right to confront the witnesses against him. Am. Pet. ¶¶ 251-56. Additionally, Smith argues—for the first time—that the admission of these statements violated his Fifth Amendment right to silence. Am. Pet. ¶ 255 (citing Doyle v. Ohio, 426 U.S. 610 (1976)). However, because Smith did not make that second argument on either direct appeal or collateral review, Smith's Doyle claim is procedurally defaulted, and this Court will assess only whether the admission of the statements was constitutionally offensive under the Confrontation Clause.

a) Statements by Smith's Co-Defendant Introduced Through Russell Harmon

Smith complains that, at trial, Russell Harmon, who was an acquaintance of both Smith and Reid, was asked the following questions and gave the following answers:

> Q [prosecutor]: Russell, was there any conversation about any money from the dead man?
>
> A [Harmon]: They had said that they had got – that they had –
>
> > MR. HUGHES [defense counsel]: Your Honor, if it please the Court, I would object to "they," that he state specifically who said what.
> >
> > THE COURT: That's fair. Can you tell us who said what about the money, if anything was said about the money?
>
> A: Yes, sir. Larry [Reid] and then Jody was mainly agreeing with Larry. Jody did not come out right and say anything about the money, no.
>
> * * *
>
> Q: And who told you something about a mattress, do you recall who that was?
>
> A: I think – I'm not sure, but I think Larry did.
>
> > MR. HUGHES: Well, that answers the question. If he's not for sure he's just

> speculating and guessing and we would object to it.
>
> THE COURT: It's sustained. You could lay a predicate, though, I mean.
>
> Q: Do you recall who said anything about a mattress.
>
> A: I believe it was Larry.

T.R. 343-46.

According to Smith, Reid's statements were inadmissible hearsay and their admission violated the principles set forth in Bruton v. United States, 391 U.S. 123 (1968). In Bruton, the United States Supreme Court held that admission of a non-testifying defendant's confession that implicated his co-defendant in the crime violated that co-defendant's Sixth Amendment right to confrontation. The Court of Criminal Appeals denied Smith's Bruton claim on the merits, noting that any error was 1) invited by defense counsel's objection, see Smith I, 795 So. 2d at 813, and 2) harmless because Reid's out-of-court statements were cumulative of Smith's own admissions to the police, see id. at 813-14. Though the Court of Criminal Appeals' decision rested entirely on state precedents, see id. (citing, *inter alia*, McCorvey v. State, 642 So. 2d 1351, 1354 (Ala. Crim. App. 1992)), those precedents are in line with a proposition that was clearly established by the United States Supreme Court nearly three decades prior, namely that Bruton error can be rendered harmless where the erroneously admitted testimony was "merely cumulative of other overwhelming and largely

uncontroverted evidence properly before the jury." Brown v. United States, 411 U.S. 223, 231 (1973). Whereas the state court's adjudication of this issue did not result in a decision contrary to clearly established federal law, Smith is not entitled to habeas relief on Bruton grounds.

b) Statements by Smith's Mother Introduced Through Sergeant Pyle

Smith also claims his right to confrontation was violated when Sergeant Patrick Pyle testified that Smith's mother told him that Smith was using her washing machine to wash his clothes. Am. Pet. ¶ 255. Specifically, Sergeant Pike testified as follows:

> Q [prosecutor]: And what did you search the house – what areas of the house did you look in?
>
> A [Sgt. Pyle]: We searched the area that Ms. Smith indicated was the Defendant's bedroom area and we looked in the washing machine.
>
> Q: And where was the washing machine located?
>
> A: It was – if you walk in you're in a living room with a kitchen to the left and a small hallway. The washer and dryer were in that small hallway.
>
> Q: And were the washer – was the washer running?
>
> A: Yes, ma'am, it was in a – like a spin cycle.

> Q: And what made you search the washing machine?
>
> A: Well, we were looking, from what we had learned form the people we had talked to earlier, for some clothes and when we got to the house, [Detective] Lunceford and myself, we were talking to Ms. Smith about where Jody had been, what he had been doing. I could hear the washer running and I asked her was she washing any amount of clothes in there and she said no, Jody was.

T.R. 408-09.

The Court of Criminal Appeals did not conduct a Confrontation Clause analysis because it found that Ms. Smith's statement was not hearsay because it was offered to explain why the police officers searched Ms. Smith's trailer the way that they did, not for the truth of the matter asserted. See Smith I, 795 So. 2d at 814.[29] This Court finds no error in the state court's determination, whereas United States Supreme Court precedent had clearly established that the admission of nonhearsay "raises no Confrontation Clause concerns." Tennessee v. Street, 471 U.S. 409, 414 (1985). Claim 30 is **DENIED**.

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[29] The Court of Criminal Appeals also found that any error was harmless, inasmuch as Smith told police that he had washed the clothes he had worn during the robbery-murder, thereby rendering Sergeant Pyle's testimony on this point merely cumulative. Smith I, 795 So. 2d at 814.

5) Claim 31: State Improperly Introduced Victim Impact Evidence During Closing Arguments

In paragraphs 257-59 of his amended petition, Petitioner argues that the prosecutor improperly argued victim-impact evidence during the guilt phase, which prejudiced Smith. Petitioner specifically objects to the prosecutor having argued that the victim "had two little boys that he knew he would never see again. I ask that you let that be the picture in your mind as you decide what intent is. . . ." T.R. 675. Defense counsel timely moved for a mistrial on the same grounds, which the judge denied, stating, "[h]e argued the facts in evidence. There is testimony in the record the credibility of which the jury must assess that the man begged for his life." T.R. at 676. The Court of Criminal Appeals did not improperly apply Payne v. Tennessee, 501 U.S. 808, 825 (1991). ("In the majority of cases, . . . victim impact evidence serves entirely legitimate purposes"). The prosecutor was responding to defense counsel's argument that there was absolutely no evidence of intent, R. 660-69, and argued facts in evidence, see T.R. 470. The prosecutor's statements did not "so infect[ ]the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 169 (1986). Therefore, Petitioner has failed to meet his burden under AEDPA, and Claim 31 must be **DENIED**.

6) Claim 34: Court Failed To Consider Non-Statutory Mitigating Circumstances, Such as Abusive Family Life and Mental Retardation

In paragraphs 268-75 of his amended petition, Petitioner argues that the trial court did not properly consider non-statutory mitigating circumstances, such as Smith's abusive family life and his mental retardation. The record wholly contradicts this allegation. See Smith I, 795 So. 2d at 839 (citing R. 190) ("Therefore, these nonstatutory circumstances, though thoughtfully considered and applied, do not merit significant consideration." (emphasis added)). Claim 34 is without merit and is **DENIED**.

7) Claim 35: Court Improperly Applied the Heinous, Atrocious or Cruel Aggravating Circumstance Without Sufficient Basis for Its Finding

In paragraphs 276-78 of his Amended Petition, Petitioner argues that the trial court improperly found that the murder was especially heinous, atrocious or cruel. Petitioner contends that "the evidence at trial did not reliably establish that the length of time for the victim to die reflects any information about whether or not this death was indeed more heinous, atrocious or cruel than other murders." Am. Pet. ¶¶ 278. But this is not the standard articulated by the Supreme Court or applied by Alabama courts. In line with federal constitutional requirements, "Alabama courts have limited 'especially heinous, atrocious, or cruel' crimes to those

'conscienceless or pitiless homicides which are unnecessarily torturous to the victim.'" Hallford, 459 F.3d at 1205-06 (quoting Ex parte Kyzer, 399 So. 2d 330, 334 (Ala. 1981)). Evidence that a victim's death was prolonged or protracted is not required in order to sustain a finding that a murder was especially heinous, atrocious or cruel. See id. at 1206 (upholding finding that murder was especially heinous, atrocious or cruel where five minutes elapsed between initial shooting and final two shots). In this case, the forensic pathologist testified that Durk Van Dam's death was caused by "approximately thirty-five (35) separate, distinct exterior injuries to the victim's head, torso, and appendages and eleven (11) separate, distinct injuries which caused internal trauma," all of which were sustained over a period of approximately 45 minutes. Smith I, 795 So. 2d at 840-41. Thus, the record was more than sufficient to support a finding that Van Dam's murder was especially heinous, atrocious or cruel. Claim 35 is **DENIED**.

8) Claim 37: Trial Court Improperly Relied on Sentence Recommendation of Victim's Family

In paragraphs 283-84 of his Amended Petition, Petitioner argues that, in sentencing Smith to death by electrocution, the trial judge relied impermissibly upon written statements made by victim Durk Van Dam's family members that were included in the

presentence investigation report.[30] Though the trial judge expressed that he was "quite familiar" with the pre-sentence investigation report that included the victim-impact evidence to which Smith objects, Petitioner has not shown that the trial judge ever considered the family's statements. To the contrary, the trial judge implicitly acknowledged that the victim-impact evidence was not to be considered when he stated at Petitioner's sentencing hearing that "[t]he law requires that the Court weigh the statutorily enumerated aggravating circumstances against both the statutory enumerated mitigating circumstances, as well as any other factor which might reasonably be considered in mitigation." #R.30 at R-19. The Court therefore agrees with the Court of Criminal Appeals that "the record reflects that the trial court did not consider any sentencing recommendations of the victim's family when imposing sentence," Smith I, 795 So. 2d at 838, and finds Petitioner's claim to be without merit.

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[30] Specifically, those statements were:

> HE CANNOT BE ALLOWED TO EVER HURT ANOTHER INNOCENT PERSON. THAT IS WHY, WE THE FAMILY OF DURK VAN DAM UPHOLD THE VERDICT MADE BY THE JURY. GUILTY OF CAPITAL MURDER, DEATH BY ELECTROCUTION.
>
> MY PARENTS FELL [sic] VINDICATED KNOWING THAT YOU ARE TO BE ELETRICUTED [sic] BUT FOR ME, THE ONLY REAL JUSTICE WOULD BE FOR YOU TO HAVE INFLICTED UPON YOU THE SAME TORTUROUS METHOD OF DEATH AS BESTOWED UPON MY BROTHER.

T.R. 910-11.

9) Claim 40: State Misstated the Law During Closing Arguments

In paragraphs 295-97 of his Amended Petition, Petitioner argues that the prosecutor misstated the law to the jury when she said, "I told you if the Judge let you hear it you could consider it. If the Judge let you see it, then it was evidence and you could consider it." Am. Pet. ¶ 297 (quoting T.R. 658). The Court agrees with the Court of Criminal Appeals' analysis that "the trial court repeatedly told the jurors that comments of counsel were not evidence and that it was the court's duty to instruct them on the law." Smith I, 795 So. 2d at 826; T.R. 122-23, 647. As the Eleventh Circuit recently explained, improper argument by counsel is not grounds for a mistrial unless that argument did "so prejudicially affect the [Petitioner's] rights that a different outcome might have been achieved in its absence." United States v. McGarity, 669 F.3d 1218, 1246 (11th Cir. 2012). Therefore, the Court finds and adopts the Court of Criminal Appeals' conclusion that the prosecutor's closing argument statements did not "infect[] the trial with unfairness" such that Smith was denied due process under Darden v. Wainwright, 478 U.S. 1036 (1986). Petitioner's Claim 40 is therefore, **DENIED**.

10) Claim 41: State Impermissibly Argued That Smith Was More Worthy of the Death Penalty Because He Was Mentally Retarded

In paragraphs 299-300 of his Amended Petition, Petitioner argues that during closing arguments, the prosecutor impermissibly argued that Smith was more worthy of receiving the death penalty because he was mentally retarded. Smith's grievance relies on a gross distortion of the record. In support of his claim, Smith quotes the prosecutor's following remarks:

> [F]rom your own common sense, from your own experience you know it to be true, there are folks out there with marginal IQs who are streetwise. They get along they get by, they survive sometimes better than the rest of us in certain situations. This man's been in prison, this man's been around, this man is streetwise. He knew what he was doing.

T.R. 831.

The Court agrees with the Court of Criminal Appeals that "[t]he above comment did not imply that Smith should be sentenced to death because he is mentally retarded," Smith I, 795 So. 2d at 832, and that the prosecutor's remarks were based on Dr. Chudy's testimony that there are people with low IQs who are streetwise. See T.R. 797.[31]

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[31] Q [prosecutor]: There are people with low IQ's [sic] who are what we would call "streetwise," aren't there?

A [Dr. Chudy]: Yes.

This Court finds no error in the Court of Criminal Appeals' adjudication of this claim. Claim 41 is hereby **DENIED**.

11) Claim 42: State Impermissibly Argued That a Sentence Other Than Death Would Insult Victim's Family

In paragraphs 301-02 of his Amended Petition, Petitioner argues that, in violation of the Supreme Court's ruling in Payne v. Tennessee, 501 U.S. 808, 830 (1990) the prosecutor improperly argued to the jury that a sentence other than death would insult the victim's family. The prosecutor argued in closing arguments:

> "Life without parole means just that. That he would serve the rest of his natural life in prison. But what does that say to Durk Van Dam's family? What does that say to them about their brother, about their father, about their son, about their uncle? It says Durk's life was valueless. There was no value in his life and there was no meaning in his death. You see, life without parole means that Jody would live."

Smith I, 795 So. 2d at 834-35. Petitioner contends that the prosecutor's argument violates Payne because "evidence and argument relating to the victim and the

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Q: And folks who can survive in places where you and I couldn't even survive?

A: Yes.

impact of the victim's death on the victim's family are inadmissible at a capital sentencing hearing." Payne, 501 U.S. at 830 n.2. Petitioner fails to present a compelling case that his issue falls within the purview of Payne. Payne stands for the proposition that "evidence of family members' opinions and characterizations of the crime, the defendant, and the appropriate sentence" are improper. United States v. Brown, 441 F.3d 1330, 1351 (11th Cir. 2006). However, here, the prosecutor did not express any opinions or characterizations of the *victims.* Rather, the prosecutor's statement was a reminder "that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and, in particular, his family." Smith I, 795 So. 2d at 834 (quoting Payne, 501 U.S. at 824). Whereas Payne clearly allows for the admission of evidence showing the victim's "uniqueness as an individual human being," Payne, 501 U.S. at 823-24 (quotation marks omitted), Claim 42 was properly denied by the state court and is hereby **DENIED** by this Court.

12) Claim 43: The Court Should Consider the Cumulative Effect of Prosecutorial Misconduct

In Claim 43, Petitioner argues that the cumulative effect of the prosecutorial misconduct alleged in Claims 39-42 violated Petitioner's constitutional rights to a fair trial and due process. Am. Pet. ¶ 303. The only case cited in support, Kyles v. Whitley, 514. U.S. 419 (1995), is inapposite. In Kyles, the United States

Supreme Court held that, in determining the materiality of evidence that was not disclosed to the defense as required by Brady v. Maryland, courts must evaluate the suppressed evidence collectively rather than considering each item individually. Id. at 436. Not only are the facts of Kyles distinguishable from the facts of the instant case, but the legal proposition for which Kyles stands has no significance here. In any event, Petitioner's claim is meritless, insofar as this Court has failed to find any prosecutorial misconduct.[32] See United States v. Hardy, 389 F. App'x 924, 926-27 (11th Cir. 2010) ("[W]here there is no error or only a single error, there can be no cumulative error."). Petitioner's cumulative effect claim is therefore **DENIED**.

13) Claim 44: Smith's Statements Were Improperly Introduced into Evidence

In paragraphs 304-15 of his Amended Petition, Petitioner argues that his custodial statements to the police were inadmissible because they were made

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[32] On direct appeal, Petitioner cited Ex parte Tomlin, 540 So. 2d 668 (Ala. 1988), in support of his cumulative effect argument. #R-31 at 60. In Ex parte Tomlin, the Alabama Supreme Court declined to determine whether, standing alone, any of the prosecutor's improper comments during closing argument constituted reversible error. Id. at 672 ("We must conclude . . . that errors did occur. . . . We need not decide whether either of the two errors, standing alone, would require a reversal; we hold that the cumulative effect of the errors probably adversely affected the substantial rights of the defendant and seriously affected the fairness and integrity of the judicial proceedings."). Here, however, this Court and the state courts have failed to find any error whatsoever, rendering moot the question of sufficiency.

subsequent to an illegal arrest and were compelled by police coercion. Petitioner's first argument is foreclosed by Stone v. Powell, 428 U.S. 465 (1976). In Stone, the United States Supreme Court held that federal courts are precluded from conducting post-conviction review of Fourth Amendment claims where state courts have provided "an opportunity for full and fair litigation" thereof. Stone, 428 U.S. at 494. In the context of the Fourth Amendment, "full and fair consideration" includes at least one evidentiary hearing in a trial court and the availability of meaningful appellate review. Bradley, 212 F.3d at 565. In this case, the record shows that Petitioner was afforded the opportunity in the state courts to fully, fairly, and adequately litigate the admissibility of the evidence in question. See Smith I, 795 So. 2d at 806-07 (describing suppression hearing held to determine whether Smith's statements were voluntary).[33]

However, even if this fruit-of-the-poisonous-tree claim were not foreclosed by Stone, Petitioner still

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[33] Smith argues, citing Tukes v. Dugger, 911 F.2d 508, 514 (11th Cir. 1990), that Stone does not apply because he did not receive meaningful appellate review of his Fourth Amendment claim. Am. Pet. at 168 n.32. However, Smith's case is distinguishable from Tukes. In Tukes, the Eleventh Circuit stated that Stone v. Powell does not apply when the state trial court does not make explicit factual findings relating to the Fourth Amendment issue and the state appellate court summarily affirms. See Tukes, 911 F.2d at 514. Here, the trial court made specific factual findings that the Miranda warnings were satisfied, Smith's statements were voluntarily given, and probable cause existed. See generally #R.8 (hearing on motion to suppress). Therefore, Stone applies, and Petitioner's claim is barred from federal review.

would not be entitled to habeas relief. Having reviewed the record in this matter, the Court concludes that the state court's factual findings were reasonable, that Petitioner has not met his burden of rebutting the presumption of correctness of the state court's factual findings by clear and convincing evidence, and that the state court's legal analysis was neither contrary to, nor an unreasonable application of, federal law.

With respect to Petitioner's Fifth Amendment claim that his statements were involuntary because they were coerced and Smith was not properly Mirandized, Petitioner's arguments fail. On direct appeal and in his Amended Petition, Petitioner asserted that his post-arrest statements to police should not have been admitted because: 1) they were involuntary because his IQ is low, 2) Miranda warnings were not repeated prior to making his first custodial statement, and 3) the police coerced his second statement by telling him that his co-defendant had implicated him in the robbery-murder. Doc. 31 at 78-82; Am Pet. ¶¶ 310-15.

As to the first issue, Smith's mental deficiency was not before the trial court when it held that Smith's statements were given voluntarily. However, Smith did assert this claim on direct appeal, and the Court of Criminal Appeals concluded that "even considering evidence of the defendant's mental subnormality . . . the defense testimony does not show that the defendant was so mentally deficient that he was incapable of being able to make a knowing and intelligent waiver." Smith I, 795 So. 2d at 810 (punctuation omitted). The

Court of Criminal Appeals found that Smith was lucid, coherent, aware of his circumstances, not clearly under the influence of drugs or alcohol, and indicated that he could read, write, and understand English. Id. at 809. The Court of Criminal Appeals also found significant the fact that Smith had prior involvement with the police and the criminal justice system. Id. at 809-10. Pursuant to AEDPA, this Court treats these factual findings as correct. See 28 U.S.C. § 2254(e)(1). Given the aforementioned factual context, the Court cannot conclude that Smith's borderline IQ rendered his statements involuntary. Compare United States v. Calles, 271 F. App'x. 931, 939 (11th Cir. 2008) ("A district court may find a knowing and intelligent waiver . . . where the defendant with a low IQ voluntarily and knowingly waived his Miranda rights where he 'interacted normally and intelligently with the arresting agents and . . . was familiar with the criminal justice system.'" (quoting United States v. Glover, 431 F.3d 744, 748 (11th Cir. 2005)) with Cooper v. Griffin, 455 F.2d 1142, 1144-45 (5th Cir. 1972) (waiver not knowing or voluntary where evidence was "undisputed" that defendants were mentally retarded with IQs of 61 and 67).[34] The evidence presented does not reflect that Smith's statement was involuntarily provided.

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[34] Smith also claims that, in examining the totality of the circumstances as required by Edwards v. Arizona, 451 U.S. 477, 482 (1981), the Court should consider that Smith "is mentally retarded, dyslexic and suffers from several other mental illnesses." Am. Pet. ¶ 311. However, as noted above, the record does not support Smith's claim of mental retardation, and Smith does not indicate how his alleged dyslexia or unspecified "mental illnesses"

Petitioner next argues that his statement was involuntary because the police Mirandized him five hours prior to his first custodial statement by which time the initial warning was stale. All Petitioner says in support of this argument is that he "did not make 'an independent and informed choice of his own free will,' when he gave inculpatory statements" and that his "impairments and the length of time he was in custody are factors to be considered in determining the voluntariness of his statement" under Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Am. Pet. ¶ 312. "[A]n accused does not have to be continually reminded of his Miranda rights once he has knowingly waived them." Shriner v. Wainwright, 715 F.2d 1452, 1456 (11th Cir. 1983); see also Jarrell, 735 F.2d at 1253-54 (where Miranda warnings given were complete and defendant understood them, confession given four hours later was not inadmissible because of failure to refresh). Based on the totality of the circumstances surrounding the statement, the evidence presented confirms that Smith voluntarily waived his right to remain silent and there was no evidence that the police improperly coerced him.

Lastly, Petitioner has argued that the police improperly coerced his second statement, citing, in support, Spano v. New York, 360 U.S. 315 (1959). In Spano, the evidence was overwhelming that the police had violated the defendant's constitutional rights. There, the defendant was questioned for nearly eight hours

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could have affected his ability to knowingly and voluntarily waive his right to remain silent.

during the late evening and early morning hours, by fifteen separate individuals, who denied his requests to speak to his attorney. Id. at 321-22. The police also played on the defendant's vulnerability by misrepresenting that his friend would lose his job as a police officer if he failed to cooperate. Id. at 322. Spano is completely inapposite to the facts presented here. Whereas Smith has failed to demonstrate that the state court's adjudication of his Miranda claims was contrary to or involved an unreasonable application of clearly established federal law, Claim 44 is **DENIED**.

14) Claim 46: Court Improperly Granted State's Challenge for Cause and Excused a Prospective Juror with Death Penalty Reservations

In paragraphs 319-22 of his Amended Petition, Petitioner argues that the trial court improperly dismissed a potential juror because that potential juror expressed reservations about the death penalty. As the Court of Criminal Appeals recognized when it adjudicated this claim on direct appeal, the controlling United States Supreme Court precedent is Wainwright v. Witt, 469 U.S. 412 (1985). In Wainwright, the Supreme Court held that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Id. at 424. The Court of Criminal Appeals found

that the dismissed juror "never wavered in his conviction that he would be unable to consider a death sentence under any circumstances," Smith I, 795 So. 2d at 802, and supported that finding by noting that the potential juror stated in response to questioning by defense counsel that he would not recommend a death sentence even if, hypothetically, his own brother were killed in the course of a robbery. Id.; T.R. 91-96. Whereas the potential juror's response to counsel's questions did not reveal any equivocation as to his inability to recommend a sentence of death, the court properly granted the state's challenge for cause. See Morgan v. Illinois, 504 U.S. 719, 728 (1992) "[A] juror who in no case would vote for capital punishment, regardless of his or her instructions, is not an impartial juror and must be removed for cause."). Claim 46 is, therefore, **DENIED**.

15) Claim 49: Cumulative Effect of All Above Claims of Error Violated Petitioner's Constitutional Rights

Lastly, Petitioner argues that the cumulative effect of all his alleged claims of error violated his rights under the Constitution. Am. Pet. ¶ 327. Petitioner raised this claim on direct appeal, but the Court of Criminal Appeals did not address it explicitly. However, this Court, when called upon to adjudicate a claim pursuant to the cumulative error doctrine, "must consider the cumulative effect of these incidents and determine whether, viewing the trial as a whole, appellants received a fair trial as is their due under

our Constitution." United States v. Baker, 432 F.3d 1189, 1203 (11th Cir. 2005); see also Hardy, 389 F. App'x at 926 ("We address a claim of cumulative error by first considering the validity of each claim individually, and then examining any errors in the aggregate and the trial as a whole to determine whether the appellant was afforded a fundamentally fair trial."). After careful consideration, the Court finds that Petitioner's trial was not so replete with errors that he was denied a fair trial. Claim 49 is, therefore, **DENIED**.

IV. CONCLUSION

For the reasons set forth herein, it is **ORDERED** that the claims for habeas corpus relief asserted in Smith's § 2254 amended petition (Doc. 52) are **DENIED**. Specifically, Claims 2, 4, 6, 8, 17-18, 29, 32-33, 36, 38, and 47 are **DENIED** because they are procedurally defaulted in their entirety, and those portions of the claims that are not procedurally defaulted or barred are **DENIED** because the undersigned finds that Smith's constitutional rights were not violated.

After reviewing the issues raised in Smith's § 2254 petition, it is **FURTHER ORDERED** that a Certificate of Appealability (COA) not be issued to Petitioner Smith. The Court finds that Smith has failed to make a substantial showing of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its rulings as to each and all of the remaining issues in his habeas petition. See 28 U.S.C. § 2243(c)(2); Slack v. McDaniel,

529 U.S. 473, 483-84 (2000) ("To obtain a COA under § 2253(c), a habeas prisoner must make a substantial showing of the denial of a constitutional right, a demonstration that . . . includes showing 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." (internal quotation marks omitted)). Therefore, a COA is hereby **DENIED** as to all issues.

DONE and **ORDERED** this 30th day of September, 2013.

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

REL: 09/26/2008

ALABAMA COURT OF CRIMINAL APPEALS

OCTOBER TERM, 2007-2008

CR-05-0561

Joseph Clifton Smith

v.

State of Alabama

Appeal from Mobile Circuit Court
(CC-98-2064.60)

(Filed Sep. 26, 2008)

WISE, Judge.

The appellant, Joseph Clifton Smith, appeals the summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala.R.Crim.P. In 1998,

Smith was convicted of murdering Durk Van Dam during the course of a robbery, an offense defined as capital by § 13A-5-40(a)(2), Ala. Code 1975. The jury, by a vote of 11 to 1, recommended that Smith be sentenced to death, and the circuit court sentenced Smith to death. Smith's conviction and his sentence of death were affirmed on direct appeal. Smith v. State, 795 So. 2d 788 (Ala.Crim.App. 2000), cert. denied, 795 So. 2d 842 (Ala.), cert. denied, 534 U.S. 872 (2001). We issued the certificate of judgment on March 16, 2001.

In September 2002, Smith filed a Rule 32 petition. The circuit court summarily dismissed the petition after finding that it was untimely filed.[1] We affirmed the circuit court's dismissal without an opinion. Smith v. State, 897 So. 2d 1246 (Ala. Crim. App. 2003) (table). On certiorari review the Alabama Supreme Court reversed this Court's judgment and held that Smith's postconviction petition was timely filed. See Ex parte Smith, 891 So. 2d 286 (Ala. 2004). The case was remanded to the circuit court and Smith was allowed to amend his petition.

On remand, Smith filed amended petitions in June 2004 and again in January 2005. In March 2005, the circuit court granted the State's motion to dismiss. Smith filed a notice of appeal. We dismissed the appeal after finding that the notice of appeal was not timely filed. Smith v. State, 926 So. 2d 1095 (Ala. Crim. App.

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[1] Rule 32.2(c), Ala.R.Crim.P., was amended effective March 22, 2002, to change the limitations period within which to file a Rule 32 petition from two years to one year.

2005) (table). Smith then filed a second Rule 32 petition seeking an out-of-time appeal from the denial of his first Rule 32 petition. That Rule 32 petition was granted, and this appeal is an out-of-time appeal from the denial of Smith's first Rule 32 petition.

We stated the following facts surrounding the murder in our opinion on direct appeal:

> "The State's evidence tended to show the following. On November 25, 1997, police discovered the badly beaten body of Durk Van Dam in his mud-bound Ford Ranger truck in a wooded area near Shipyard Road in Mobile County. Dr. Julia Goodin, a forensic pathologist for the Alabama Department of Forensic Sciences, testified that Van Dam died as a result of 35 different blunt-force injuries to his body. Van Dam had marks consistent with marks made by a saw on his neck, shoulder, and back; he also had a large hemorrhage beneath his scalp, brain swelling, multiple rib fractures, a collapsed lung, multiple abrasions to his head and knees, and defensive wounds on his hands. Dr. Goodin testified that the multiple rib fractures that caused one lung to collapse were probably the most immediate cause of death.
>
> "Smith gave two statements to the police. In the first statement he denied any involvement in the robbery-murder but said that he was with Larry Reid when Reid beat and robbed Van Dam. Smith denied taking anything from the victim. When police were questioning Reid, Smith repeatedly knocked on

the interrogation room door and requested to talk to the officer who had taken his first statement. In his second statement Smith admitted that he and Reid had planned to rob Van Dam because they had been told that Van Dam was carrying $1,500 in cash. Smith said that he, Reid, and Van Dam left the Highway Host motel in Van Dam's red truck on November 23, 1997. Van Dam was driving. Reid directed Van Dam, who had been drinking, to an isolated location. Once there, Reid began hitting Van Dam. He said that when Reid kicked Van Dam in the face he thought Van Dam was dead. Smith said that Van Dam then got up and Smith hit him on the head with his fist, kicked him in the ribs several times, threw a handsaw at him, and may have hit him with a hammer but he wasn't entirely sure because he suffers from blackouts. Reid then got a power saw from the back of Van Dam's truck, Smith said, and ran the saw against Van Dam's neck. Smith held Van Dam down while Reid took the money from his pockets. Smith and Reid then attempted to move the truck, because they had planned to steal it, but it got stuck in the mud. Smith also admitted that he took the victim's boots, because his shoes were wet, and that he took the victim's tools. The two discussed where to take Van Dam's body and Smith suggested that they take it to a nearby lake. However, they left the body, Smith said, under a mattress near Van Dam's truck. Smith said that when they divided the money he got only $40 and Reid kept the rest, approximately $100. Smith also told police

that he had just been released from custody on Friday – two days before the robbery-murder on Sunday.

"Russell Harmon testified that on November 23, 1997, he went to the Highway Host motel and saw Reid and Smith. He said that Smith told him that they were going to rob Van Dam and asked if he wanted to join them. Harmon declined and left the motel. Later that day he went back to the motel to see if the two had been successful with their plans. He said that Smith told him that he had beaten the victim on the head and that he had cut him with a saw. On cross-examination he admitted that he could not swear that Smith was the one who said he had cut Van Dam in the back but that it could have been Reid who made this statement. However, on cross-examination Harmon reiterated that Smith told him that he "hit the man, beat the man-hit the man in the head and cut him." (R. 340.) Harmon testified that Smith asked him to go with him to get the tools from where he had left them in the woods. He said that he went with Smith and that they got the tools and took them to a pawnshop-Smith received $200 for the tools. Harmon testified that he was currently in the county jail because his probation had been revoked.

"M.A. testified that she was living at Highway Host motel with her mother and sister at the time of Van Dam's murder. She said that her sister, M., was dating Smith. M.A. testified that on November 23, 1997, she saw

> Smith, Reid, and Van Dam drive away from the motel in a red truck. She said that when Smith and Reid returned sometime later they were in a black car, Van Dam was not with them, and Smith had blood on his clothes. M.A. testified that Smith told her that he had hit, cut, and stabbed Van Dam in the back."

Smith, 795 So. 2d at 796-97.

Standard of Review

This is an appeal from the denial of a postconviction petition – a proceeding initiated by Smith. Rule 32.3, Ala.R.Crim.P., states, in part: "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitled the petitioner to relief."

In the direct-appeal proceedings we reviewed Smith's capital-murder trial and sentencing proceedings for plain error. See Rule 45A, Ala.R.App.P. However, the plain-error standard of review does not apply to the review of postconviction proceedings challenging a death sentence. See Ex parte Dobyne, 805 So. 2d 763 (Ala. 2001). We review the denial of a postconviction petition under an abuse-of-discretion standard. See Elliott v. State, 601 So. 2d 1118 (Ala.Crim.App. 1992). "Abuse of discretion" has been defined as: "An appellate court's standard for reviewing a decision that is asserted to be grossly unsound, unreasonable, illegal, or unsupported by the evidence." Black's Law Dictionary 11 (8th ed. 2004).

Also, the procedural bars contained in Rule 32 apply to all cases, even those challenging a capital-murder conviction and death sentence. See Hunt v. State, 940 So. 2d 1041 (Ala.Crim.App. 2005); Hooks v. State, 822 So. 2d 476 (Ala.Crim.App. 2000); State v. Tarver, 629 So. 2d 14 (Ala.Crim.App. 1993).

I.

Smith first argues that the circuit court erred in summarily dismissing his claim that he is mentally retarded. He asserts that he is mentally retarded and that his sentence of death violates the United States Supreme Court's holding in Atkins v. Virginia, 536 U.S. 304 (2002). Smith further contends that he is entitled to an evidentiary hearing on this issue because, he says, the circuit court erroneously relied on evidence presented at his trial concerning his IQ score. Smith asserts that a clinical psychologist testified at his sentencing hearing that Smith's IQ placed him in the bottom 2% of all adults and that the "margin of error" in IQ testing would place his IQ below 70.

The State argues that Smith failed to plead sufficient facts showing that his mental functioning was consistent with the definition of mental retardation adopted by the Alabama Supreme Court in Ex parte Perkins, 851 So. 2d 453, 456 (Ala. 2002). Specifically, it asserts that Smith failed to plead any facts to show that he suffered from "subaverage intellectual functioning" or "deficit adaptive functioning." Neither, it asserts, did Smith "plead any facts showing his IQ was

70 or less." Indeed, it contends that Smith did not even plead his IQ score in his second amended petition.

In Atkins v. Virginia, the United States Supreme Court held that it was cruel and unusual punishment in violation of the Eighth Amendment to execute a mentally retarded individual.[2] However, the Supreme Court left it to the individual states to define mental retardation. Though Alabama has yet to enact legislation addressing this issue, the Alabama Supreme Court in Perkins held that a defendant is mentally retarded if he or she: (1) has significantly subaverage intellectual functioning (an IQ of 70 or below); (2) has significant defects in adaptive behavior; and (3) these two deficiences manifested themselves before the defendant attained the age of 18.

In addressing this claim, the circuit court made the following findings:

> "Smith contends that he is mentally retarded and, thus, his execution would violate the Eighth Amendment as interpreted by Atkins v. Virginia, [536 U.S. 304] (2002). . . . In his first and second amended Rule 32 petitions, Smith attempts to support this contention by pointing out that in junior high school he was classified as 'Educable Mentally Retarded.' Smith also contends, without any citations to the trial record, that '[t]here was testimony at

[2] Atkins applies retroactively to all cases, even those on collateral review. See Schriro v. Summerlin, 542 U.S. 348 (2004); Clemons v. State, [Ms. CR-01-1355, August 29, 2003] So. 2d (Ala.Crim.App. 2003).

sentencing showing his inability to adapt.' The only difference in the Atkins claim in Smith's first amended petition and the Atkins claim in his second amended petition is the addition of one paragraph. . . . Smith argues that he is mentally retarded as it is defined by 'the AAMR publication Mental Retardation: Definition, Classification, and Systems of Support ([10]th Ed. [2002]).' The Court finds, however, that the Atkins claim . . . is no more factually specific than that Atkins claim in Part III of his first amended Rule 32 petition.

" . . . .

"Smith's school records indicate he had a full scale IQ of 74 at age 12. (S.R. 383) Before trial Dr. [James] Chudy administered the WAIS-R on Smith to assess his intellectual abilities. Chudy indicated in his report that '[o]n the WAIS-R [Smith] earned a Verbal IQ of 73, a Performance IQ of 72, and a Full Scale IQ of 72.' (C.R. 400) Chudy also testified during the penalty phase of Smith's trial that he 'did not find a pattern that would show that [Smith] had major neurological problems that would be inconsistent with a 72 IQ.' (R. 796) The evidence admitted at Smith's trial refutes any assertion that Smith's intellectual functioning is significantly subaverage. Smith proffers no facts in his second amended Rule 32 petition that would in any way dispute the facts contained in the record.

"Likewise, the record indicates little, if any, deficits in Smith's adaptive functioning.

While reviewing the evidence of flight on direct appeal, the Alabama Court of Criminal Appeals found that:

> "[T]he evidence indicated that Smith and Reid attempted to hide the body under a mattress, and tried to steal [the victim's] truck but it got stuck in the mud and they left it behind, and that Smith went back to the Highway Host motel to shower and to change clothes. [Smith] admitted to police that he tried to wipe his fingerprints off the truck and also told police that he had washed the clothes he was wearing at the time of the robbery-murder. Also, when [Smith) was first questioned about the murder he denied any involvement and placed the blame for the robbery-murder on Reid. . . . All of the conduct evidences a 'consciousness of guilt' on the part of Smith.'

"Smith v. State, 795 So. 2d at 829 (emphasis added). Smith's actions after the murder 'indicate that [Smith] does not suffer from deficits in his adaptive behavior.' Ex parte Smith, [[Ms. 1010267, March 14, 2003] ___ So. 2d ___ (Ala. 2003)]. Based on Smith's complete failure to proffer any new facts in his second amended Rule 32 petition to dispute the facts presented at his trial, the Court finds 'that [Smith], even under the broadest definition of mental retardation, is not mentally retarded.' Ex part Perkins, 851 So. 2d at 456. The Court

> finds that the allegation in Part II of Smith's second amended Rule 32 petition is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P."

(C.R. 427-30.)

First, we agree with the circuit court that Smith failed to meet his burden of pleading in regard to this claim. In Boyd v. State, 913 So. 2d 1113 (Ala.Crim.App. 2003), we stated the following concerning a Rule 32 petitioner's burden of pleading:

> "'Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief.' Boyd v. State, 746 So. 2d 364, 406 (Ala.Crim.App. 1999). In other words, it is not the pleading of a conclusion 'which, if true, entitle[s] the petitioner to relief.' Lancaster v. State, 638 So. 2d 1370, 1373 (Ala.Crim.App. 1993). It is the allegation of facts in pleading which, if true, entitles a petitioner to relief. After facts are pleaded, which, if true, entitle the petitioner to relief, the petitioner is then entitled to an opportunity, as provided in Rule 32.9, Ala.R.Crim.P., to present evidence proving those alleged facts."

913 So. 2d at 1125. "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis must be included in the petition itself." Hyde v. State, 950 So. 2d 344, 356 (Ala.Crim.App. 2006). Rule 32.6(b), Ala.R.Crim.P., states:

> "The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."

Smith pleads only conclusions concerning his mental health and does not even indicate his IQ score in his pleading. The only grounds offered in support of this claim were the following:

> "Mr. Smith has deficiencies in all three of these adaptive areas and clearly meets the mental retardation set forth in Atkins.
>
> "As evidenced by his school records and the testimony at trial, both his subaverage intellectual functioning and inability to adapt manifested themselves before Mr. Smith turned 18. Therefore, Mr. Smith meets the three requirements under the Atkins test for mental retardation and imposition of the death penalty on him violates the Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama law."

(C.R. 75.) Clearly Smith failed to satisfy the pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

Moreover, the record in Smith's direct appeal supports the circuit court's conclusion that Smith does not meet the broadest definition of mentally retarded

adopted by the Alabama Supreme Court in Ex parte Perkins, 851 So. 2d 453 (Ala. 2002).[3]

Intellectual functioning. The record shows that before Smith's trial he was evaluated by Dr. James Chudy, a clinical psychologist. Dr. Chudy performed IQ tests on Smith and determined that Smith's verbal IQ was 73, his performance IQ was 72, and his full-scale IQ was 72. Dr. Chudy diagnosed Smith as suffering from the following disorders: major depression, post-traumatic stress disorder, alcohol dependence, learning disorder, personality disorder, and borderline intellectual functioning. Dr. Chudy also testified that because of the margin of error in IQ testing Smith's IQ score could be as high as 75 or as low as 69. Smith's mother, Glenda Smith, also testified that Smith has dyslexia.[4]

Smith's school records were also introduced at his sentencing hearing. These records show that Smith was administered an IQ test when he was 12 years of age. At that time Smith's verbal IQ was 80, his performance IQ was 72, and his full-scale IQ was 74. The school recommended that Smith participate in regular classes. However, the records show that the next year another school recommended that Smith be placed in special-education classes after he was classified as

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[3] We may take judicial notice of our previous records involving Smith's direct appeal. See Hull v. State, 607 So. 2d 369 (Ala.Crim.App. 1992).

[4] Dyslexia is defined as "the inability to read, spell, and write words, despite the ability to recognize letters." Dorland's Illustrated Medical Dictionary 516 (W.B. Saunders Co. 28th ed. 1994).

"educable mentally retarded." Smith had also been administered an IQ test in 1979 when he was eight years of age. At that time, Smith scored a verbal IQ of 80, a performance IQ of 73, and a full-scale IQ of 75. (Trial record, supp. C.R. 393.)

Adaptive behavior. "Adaptive skills are those skills that one applies to the everyday demands of independent living, such as taking care of oneself and interacting with others." State v. White, 118 Ohio St. 3d 12, 885 N.E.2d 905, 908 (2008). The American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, 39 (4th ed. 2000), defines adaptive functioning as "how effectively individuals cope with common life demands and how well they meet the standards of personal independence expected of someone in their particular age group, sociocultural background, and community setting."

Smith and Larry Reid committed the robbery/murder on November 25, 1997. Just days before the murder Smith had been released from prison on prediscretionary leave – a program that allowed him to live at home and to work in the community. Smith had been living with his mother in a trailer park. The manager of the trailer park told the probation officer who conducted the presentence investigation that Smith did odd jobs for her around the trailer park, that he was a hard worker, and that she had never had any complaints about him. In Smith's statement to police he referenced his girlfriend. Also, M.A., a State's witness at Smith's trial, testified that at the time of the robbery/murder Smith was dating her sister. Smith

also told police that both he and his codefendant, Larry Reid, planned to rob the victim, and that, after the victim was killed, he suggested that they dispose of the body in a nearby lake and that he pawn the tools that he had taken from the victim. Smith's prison records showed that he frequently went to the infirmary to obtain medical attention for different ailments. Also, a review of Smith's statement to police does not indicate that Smith lacked the ability to communicate or to interact with others. There is no indication that Smith had significant defects in adaptive behavior. The record does not show that Smith meets the broadest definition of mentally retarded adopted by the Alabama Supreme Court in Perkins, and Smith pleaded no new evidence in support of this claim.

In summary, Smith urges this Court to adopt a "margin of error" when examining a defendant's IQ score and then to apply that margin of error to conclude that because Smith's IQ was 72 he is mentally retarded. The Alabama Supreme Court in Perkins did not adopt any "margin of error" when examining a defendant's IQ score. If this Court were to adopt a "margin of error" it would, in essence, be expanding the definition of mental retarded adopted by the Alabama Supreme Court in Perkins. This Court is bound by the decisions of the Alabama Supreme Court. See § 12-3-16, Ala. Code 1975. As one court noted concerning the margin of error in IQ tests as it related to a federal regulation:

> "We find the reasoning in Bendt [v. Chater, 940 F.Supp. 1427 (S.D.Iowa 1996)], and its

> reliance on Cockerham v. Sullivan, 895 F.2d 492, 495 (8th Cir. 1990), to be most persuasive. Ellison v. Sullivan, 929 F.2d 534 (10th Cir. 1990). In Bendt, the district court noted that 'incorporating a 5 point measurement error into a claimant's IQ test results would effectively expand the requisite IQ under listing 12.05(C) from test scores of 60 to 70 to test scores of 60 to 75.' Bendt, 940 F.Supp. at 1431. The Court concluded that this would alter the range of IQ's which satisfy the Listing of Impairments for Mental Retardation and Autism in contradiction of the federal regulations interpreting the Act."

Colavito v. Apfel, 75 F.Supp. 2d 385, 403 (E.D.Pa. 1999). The circuit court did not abuse its discretion in dismissing this claim.

II.

Smith next argues that he was denied the effective assistance of counsel at both phases of his capital-murder trial. He asserts that the circuit court erroneously confused the burden of pleading with the burden of proof and that he is entitled to an evidentiary hearing on his claims because, he argues, he met his burden of pleading "a clear and specific statement of the grounds upon which relief is sought."[5]

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[5] It appears that Smith's brief on these claims is identical to the pleadings in his second amended petition concerning ineffective assistance of counsel.

To prevail on a claim of ineffective assistance of counsel the petitioner must show: (1) that counsel's performance was deficient and (2) that the petitioner was prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 668 (1984).

> "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. 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.' 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, 466 U.S. at 689.

> "'"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, [Ms. CR-05-2241, November 2, 2007] ___ So. 2d ___, ___ (Ala.Crim.App. 2007).

In Hyde v. State, 950 So. 2d 344 (Ala.Crim.App. 2006), we stated the following concerning a petitioner's burden of pleading claims of ineffective assistance of counsel:

> "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala.Crim.App. 2003). To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not

> only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S.Ct. 2052. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

950 So. 2d at 355-56.

First, we note that when addressing several of Smith's claims of ineffective assistance the circuit court stated in its order that a finding of no plain error on direct appeal foreclosed a finding of prejudice under Strickland v. Washington. However, the cases relied on by the circuit court – Woods v. State, 957 So. 2d 492 (Ala.Crim.App. 2004), and Taylor v. State, [Ms. CR-02-0706, August 27, 2004] ___ So. 2d ___ (Ala.Crim.App. 2004) – were subsequently overruled and reversed, respectively, by the Alabama Supreme Court in Ex parte Taylor, [Ms. 1040186, September 30, 2005] ___ So. 2d ___ (Ala. 2005). In Taylor, the Supreme Court held:

> "[a]lthough it may be the rare case in which the application of the plain-error test and the prejudice prong of the Strickland [v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d

> 674 (1984)] test will result in different outcomes, a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under Strickland to sustain a claim of ineffective assistance of counsel."

Taylor, ___ So.2d at ___. The circuit court issued its order before the Alabama Supreme Court released its opinion in Taylor. Also, the circuit court gave alternative reasons for denying relief on the majority of the claims. Moreover, we may affirm the circuit court's ruling denying a Rule 32 petition if it is correct for any reason. McNabb v. State, [Ms.CR-05-0509, August 31, 2007] ___ So.2d ___ (Ala.Crim.App. 2007); Hall v. State, 979 So. 2d 125 (Ala.Crim.App. 2007).

A.

Smith first argues that his trial counsel was ineffective, in part, because of the "grossly inadequate compensation" paid to appointed attorneys who represent indigent capital-murder defendants in Alabama. See § 15-1221, Ala. Code 1975.[6]

Smith made only a general claim in his second amended petition that counsel was ineffective because of the inadequate compensation paid to court-appointed attorneys in capital cases. Smith cited no specific

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[6] In 1999, § 15-12-21 was amended to remove the cap on fees an attorney appointed to represent an indigent defendant in a capital-murder case could receive.

instance where counsel's performance was ineffective based on the statutory cap. "The burden of pleading under Rule 32.3 and Rule 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b).The full factual basis must be included in the petition itself." Hyde v. State, 950 So. 2d 344, 356 (Ala.Crim.App. 2006). Thus, Smith failed to meet his burden of pleading in regard to this claim. See Rule 32.6(b), Ala.R.Crim.P. As we stated in McNabb v. State, [Ms. CR-05-0509, August 31, 2007] ___ So. 2d ___, ___. (Ala.Crim.App. 2007):

> "[S]ummary denial of this claim was proper because, as the circuit court found, McNabb failed to meet his burden of pleading sufficiently or with specificity facts to support his claim. See, e.g., Duncan v. State, 925 So. 2d 245 (Ala.Crim.App. 2005) (summary denial of claim that counsel was ineffective as a result of inadequate compensation was proper where petitioner failed to allege how counsel's performance would have been different had the statutory compensation scheme been different)."

Also, on direct appeal this Court specifically addressed the substantive issue underlying this claim and found no error. We addressed the issue under the preserved-error standard of review. Counsel cannot be held ineffective for failing to raise an issue that has no merit. See Davis v. State, [Ms. CR-03-2086, April 4, 2008] ___ So. 2d ___ (Ala.Crim.App. 2008) (opinion on remand from the Alabama Supreme Court).

B.

Smith next argues that his trial counsel's investigation was deficient because the cap the circuit court placed on funds for the investigator counsel retained was too low.

The circuit court made the following findings:

> "This is not a case where a defense attorney's request for funds to hire an investigator was denied. The trial court granted Smith's. trial counsel up to $1000 to hire an investigator. Nothing in the record on appeal indicates the trial court limited trial counsel from requesting additional funds if they thought they were necessary. In addition to receiving funds for a private investigator, Smith's trial counsel also requested and received $1500 for a mental health expert who testified during the penalty phase of trial. Further, the Court finds that Smith's trial counsel did, in fact, present the testimony and evidence proffered in Part I.K(1) of Smith's second amended petition during the penalty phase of his trial. Smith fails to proffer in Part I.B of his second amended Rule 32 petition any specific beneficial mitigating evidence his trial counsel could have discovered and presented if they had requested and received more funds for a private investigator. See Thomas v. State, 766 So. 2d 860, 892 (Ala.Crim.App. 1998) (holding that 'claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible,

> its admission would have produced a different result') (emphasis added). The Court finds that the allegation in Part I.B of Smith's second amended Rule 32 petition is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P."

(Supp. C.R. 388-90.)

First, Smith failed to meet his burden of pleading in regard to this claim. Smith merely states in his petition that "[i]f trial counsel had been given the funds necessary to hire someone to conduct a complete mitigation investigation, they would have uncovered a wealth of mitigating evidence, which the jury never heard." (C.R. 23.) Smith does not plead what mitigating evidence was not discovered because of the alleged cap on fees. Smith failed to comply with the pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

Second, the record of Smith's trial supports the circuit court's findings. The record shows that Smith filed a pretrial motion for funds to hire an investigator and a psychologist. That motion was granted. The circuit court allowed $1,000 for an investigator and $1,500 for a psychologist. There is no indication that Smith was foreclosed from filing a request for additional funds for the investigator he retained. This claim is not supported by the record.

C.

Smith next argues that counsel's assistance was ineffective because counsel failed to adequately investigate the capital-murder charges against him. Smith lists many grounds in support of this claim.

> "A review of a claim of ineffective counsel is not triggered until the petitioner has identified specific acts or omissions. Strickland. See, e.g., Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result)."

Thomas v. State, 766 So. 2d 860, 892 (Ala.Crim.App. 1998), overruled on other grounds, Ex parte Taylor, [Ms. 1040186, September 30, 2005] ___ So. 2d ___ (Ala. 2005). "'"[A] defendant who alleges a failure to investigate on the part of his counsel must allege with specificity what the investigation would have revealed and how it would have altered the outcome of the trial."' State v. Flynn, 190 Wis.2d 31, 48, 527 N.W.2d 343 (Ct.App. 1994)." State v. Hickles, 296 Wis.2d 417, 722 N.W.2d 399 (2006).

1.

Smith first argues that counsel was ineffective for not interviewing his family members and presenting their testimony at the penalty phase of his trial.

When denying relief on this claim, the circuit court made the following findings:

> "In Thomas v. State, 766 So. 2d 860, 892 (Ala.Crim.App. 1998), the Alabama Court of Criminal Appeals held that 'claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result.' In Woods v. State, [957 So. 2d 492 (Ala.Crim.App. 2004)], the Alabama Court of Criminal Appeals reviewed the circuit court's summary dismissal of Woods's postconviction claim that his defense counsel were ineffective for failing to interview member of his family. The Alabama Court of Criminal Appeals held that the circuit court's holding that Woods's allegation did not meet the specificity and full factual pleading requirements of Rule 32.6(b) was correct and adopted the circuit court's findings that 'Woods fail[ed] to identify any family member by name, proffer what their testimony would have been at trial, or argue why such testimony would have caused a different result at the penalty phase or at sentencing.' Id.
>
> "If the specificity and factual pleading requirements of Rule 32.6(b) mean anything, certainly they would require a postconviction petitioner, or his counsel, to identify for a court reviewing a Rule 32 petition (sic) to name the witnesses a defense attorney should have interviewed and proffer what beneficial

> information the specific witnesses could have provided at trial. Smith fails to identify in Part I.C(1) of his second amended petition a single member of his family by name or proffer to the Court with any specificity what they would have testified about at trial. The Court finds that the allegation in Part I.C(1) fails to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P. See Coral v. State, [900 So. 2d 1274 (Ala.Crim.App. 2004)] (holding that '[e]ach subcategory [of ineffective assistance of counsel] is an independent claim that must be sufficiently pleaded'). Therefore, this allegation is summarily dismissed."

(Supp. C.R. 391-93.) We agree with the circuit court. Smith failed to meet his burden of pleading in regard to this claim. Smith does not plead the name of any specific family member who failed to testify or plead what their specific omitted testimony would have consisted of. Rule 32.6(b), Ala.R.Crim.P.

Furthermore, the record of Smith's trial shows that three of Smith's family members testified at the sentencing hearing – Smith's mother and his two sisters. They all testified that Smith's father was an alcoholic and that he was very abusive to Smith. It is clear that counsel did talk to Smith's family members. This claim is not supported by the record.

Moreover,

> "'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)."

McWilliams v. State, 897 So. 2d 437, 453 (Ala.Crim.App. 2004), rev'd on other grounds in Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005). "We cannot say that trial counsel's performance was deficient simply because he did not call every witness who conceivably may have been willing to testify at the sentencing phase of the trial." Bui v. State, 717 So. 2d 6, 22 (Ala.Crim.App. 1997).

2.

Smith next argues that counsel was ineffective for failing to locate two critical eyewitnesses. Specifically, he asserts that counsel failed to locate a unknown male who drove Smith and his codefendant to their hotel after the murder and failed to locate a clerk of a convenience store who allegedly sold Smith cigarettes immediately after the robbery/murder.

When denying relief on this claim, the circuit court stated:

> "In Thomas v. State, 766 So. 2d [860] at 893 [(Ala.Crim.App. 1998)], the Alabama Court of Criminal Appeals held that '[a] claim of failure to call witnesses is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome.' Smith's use of the term 'eyewitness' in his second amended petition is misleading. There is nothing in the trial record, and Smith proffers no facts in his second amended Rule 32 petition, that would raise any inference anyone other than Smith and his codefendant were eyewitnesses to the victim being beaten to death. Further, Smith fails to identify in his second amended Rule 32 petition either of these individuals by name or proffer to the Court with any specificity what these unnamed witnesses would have testified about[;] instead Smith makes the completely conclusory argument that these witnesses 'could have substantiated his statements to the police.' Id. Because Smith fails to proffer any specific facts to support these allegations, the Court finds that Part I.C(2) of Smith's second amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b). Therefore, these allegations are summarily dismissed."

(Supp. C.R. 393-94.)

We agree with the circuit court. Smith failed to plead any facts in support of this claim. Smith did not plead the identity of the alleged omitted witnesses,

what their testimony would have consisted of, or how he was prejudiced by their failure to testify. Thus, Smith failed to meet the pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

3.

Smith next argues that counsel was ineffective for failing to introduce evidence that one of the State's witnesses, M.A.,[7] was incarcerated at the time of his trial. He asserts that this was proof of the witness's bias in favor of the State and that his counsel was ineffective for failing to introduce this evidence during M.A.'s testimony.

Initially, we note that the record shows that counsel did attempt to question M.A. about where she was residing at the time of trial, but the circuit court granted the State's motion to exclude this evidence. Smith's claim is not supported by the record.

Also, on direct appeal we devoted a great portion of our opinion to addressing the issue of whether the circuit court erred in not allowing Smith's attorney to cross-examine M.A. about where she was living at the time of Smith's trial.[8] When addressing the merits of this claim we stated: "[W]e emphasize that our affirmance of this issue is not dependent on application of

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[7] M.A. was a juvenile when she testified at Smith's trial; thus, we are using initials to protect her anonymity.

[8] M.A. was in a juvenile detention facility at the time of Smith's trial.

the plain-error doctrine. The trial court's ruling was not error, much less, plain error." 795 So. 2d at 817. Specifically we held that "the failure to allow M.A. to be questioned about the fact that her juvenile probation had been revoked was harmless." 795 So. 2d at 821. Because we found that the substantive issue underlying this claim was at best harmless, Smith cannot meet the prejudice prong of the Strickland test. As this Court stated in Gaddy v. State, 952 So. 2d 1149 (Ala.Crim.App. 2006):

> "Harmless error does not rise to the level of the prejudice required to satisfy the Strickland test. As a Florida Court of Appeals aptly explained in Johnson v. State, 855 So. 2d 1157 (Fla.Dist.Ct.App. 2003):
>
> > "'If the harmless error test . . . has been satisfied, then it follows that there can be no prejudice under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This is because of the fundamental difference between the harmless error test that is applied on direct appeal and the prejudice prong of Strickland. As the first district has explained:
> >
> > > "'"Significantly, the test for prejudicial error in conjunction with a direct appeal is very different from the test for prejudice in conjunction with a collateral claim of

> ineffective assistance. There are different tests because, once a conviction becomes final, a presumption of finality attaches to the conviction. Thus, as Goodwin [v. State, 751 So. 2d 537, 546 (Fla. 1999)] explains, the test for prejudice on direct appeal is the harmless error test of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967), under which trial court error will result in reversal unless the prosecution can prove 'beyond a reasonable doubt' that the error did not contribute to the verdict obtained. Conversely, however, as explained in Strickland, prejudice may be found in a collateral proceeding in which ineffective assistance of counsel is claimed only upon a showing by the defendant that there is a 'reasonable probability' that counsel's deficient performance affected the outcome of the proceeding."'

"855 So. 2d at 1159, quoting in part Sanders v. State, 847 So. 2d 504, 506 (Fla.Dist.Ct.App. 2003). See also Commonwealth v. Howard, 538 Pa. 86, 645 A.2d 1300(1994). Because the

> Supreme Court specifically held that the erroneous jury instruction was harmless error, Gaddy cannot show prejudice under Strickland. Relief was correctly denied on this claim."

952 So. 2d at 1160. Accordingly, Smith failed to allege any facts that would entitle him to relief. See Rule 32.7(d), Ala.R.Crim.P.

4.

Smith next argues that counsel was ineffective during jury selection in failing to ensure that the jurors who were chosen for his trial were impartial. Specifically, he asserts that counsel failed to question the venire about possible mitigation, mental retardation, or child abuse.

The circuit court found that this claim was insufficiently pleaded. We agree. Smith failed to plead any specific questions that could have been asked of the venire-members or how he was prejudiced by the failure to ask those questions. Smith failed to comply with the pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

5.

Smith next argues that counsel was ineffective for failing to object to the admission of his confession. Specifically, he asserts that his confession should have been suppressed because his low IQ rendered him

unable to make such a statement knowingly and intelligently.

The circuit court found that the underlying claim had no merit because we addressed the issue on direct appeal and found no error. On direct appeal we stated:

> "Mental subnormality is but one factor to consider when reviewing the totality of the circumstances surrounding a confession.
>
> "Here, '[e]ven considering evidence of the defendant's mental subnormality[,] which was not before the trial judge when he ruled on the admissibility of the statements, the defense testimony "does not show that [the defendant] was so mentally deficient that he was incapable of being able to make a knowing and intelligent waiver."' Whittle v. State, 518 So. 2d [793] at 797 [(Ala. Crim. App. 1987)], quoting Sasser [v. State], 497 So. 2d [1131] at 1134 [(Ala. Crim. App. 1986)])."

Smith v. State, 795 So. 2d at 810. Because the substantive issue has no merit, Smith's counsel was not ineffective for failing to raise the issue at trial. See Davis, supra.[9]

6.

Smith argues that counsel was ineffective for failing to formulate and argue any theories of defense. Specifically, he asserts that counsel failed to argue that

[9] The trial record also shows that counsel vigorously argued many grounds in support of suppressing Smith's confession.

Smith lacked the "intent and ability to formulate the plan which led to Mr. Van Dam's death" and failed to argue any viable theory of defense in his opening and closing statements.

The circuit court made the following findings on this claim:

> "Smith fails to cite in paragraph 48 of his second amended petition to any specific portion of Dr. Chudy's report in which Chudy opined Smith lacked the ability to formulate a plan to rob and murder the victim. Further, on direct appeal, the Alabama Court of Criminal Appeals held that:
>
> > "'[T]he evidence indicated that Smith and Reid attempted to hide the body under a mattress, and tried to steal [the victim's] truck but it got stuck in the mud and they left it behind, and that Smith went back to the Highway Host motel to shower and to change clothes. [Smith] admitted to police that he tried to wipe his fingerprints off the truck and also told police that he had washed the clothes he was wearing at the time of the robbery-murder. Also, when [Smith] was first questioned about the murder he denied any involvement and placed the blame for the robbery-murder on Reid. . . . All of the conduct evidences a "consciousness of guilt" on the part of Smith.'

"Smith v. State, 795 So. 2d at 829 (emphasis added). When reviewing the trial court's finding that Smith did not act under the domination of his codefendant, the Alabama Court of Criminal Appeals held that:

> " 'The trial court stated that the "record is devoid that [Smith] on November 23, 1997, acted under the domination of Larry Reid or anyone else." This finding is also supported by Smith's admissions to police. Smith said that both he and Reid planned to rob [the victim], that [Smith] suggested that they dispose of the body in a nearby lake, and that [Smith] took the tools to the pawnshop. Smith did not state in his statements that Reid threatened him if he told anyone about the robbery-murder. The court's failure to find this as a mitigating circumstance is supported by the record.'

"Id. at 839 (emphasis added). Based on the findings of the trial court and the Alabama Court of Criminal Appeals, this Court finds that the allegation in paragraph 48 of Smith's second amended Rule 32 petition is without merit. Rule 32.7(d), Ala.R.Crim.P.

" . . . .

"Smith's entire argument in Part I.G(1) of his second amended Rule 32 petition consists of the allegation his trial counsel did not set forth or argue a 'viable theory of defense' in his opening statement or closing argument.

> Smith fails, however, to state in his second amended petition with any specificity what viable theory his defense trial counsel could have presented during his guilt phase opening statement or in his guilt phase closing arguments that would have been so compelling it might have change the outcome of the guilt phase. Smith proffers no facts in Part I.G(1) of his second amended petition that, if true, would establish 'if trial counsel had presented a different opening statement [or closing argument], the result of the trial would have been different.' Callahan v. State, 767 So. 2d 380, 397 (Ala.Crim.App. 1999) Smith does not even point to one example of inconsistent testimony by State witnesses that would support Part I.G(1). The Court finds that the allegations in Part I.G(1) of Smith's second amended petition fail to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, they are summarily dismissed."

(Supp. C.R. 402-04.) The circuit court's findings as to this issue are supported by the record, and we adopt them as part of this opinion.

Moreover, counsel argued at Smith's trial that Smith had no specific intent to commit capital murder and that, at most, Smith intended to commit only a robbery. This theory was consistent with Smith's statement to police. "[T]he mere existence of a potential alternative defense theory is not enough to establish ineffective assistance based on counsel's failure to present that theory.' Rosario-Dominquez v. United States,

353 F.Supp.2d [500] at 513 [(S.D.N.Y. 2005)]." Hunt v. State, 940 So. 2d 1041, 1067 (Ala.Crim.App. 2005).

7.

Smith argues that counsel was ineffective for failing to move that Judge Chris Galanos recuse himself from presiding over his trial. Specifically, he asserts that Judge Galanos was the district attorney when Smith pleaded guilty to a separate burglary offense in 1990 and that he therefore should not have presided over his 1998 capital-murder trial.

The circuit court found that the underlying issue had been addressed on direct appeal and determined adversely to Smith. This Court stated: "'It was held in Ray v. State, 398 So. 2d [774 at] 766–777 [(Ala.Crim.App. 1981)], that the fact that the trial judge, before he was a judge and while he was district attorney of the particular circuit, had prosecuted the defendant in another case presented no valid ground for a motion that he recuse himself.'" Smith, 795 So. 2d at 804, quoting James v. State, 423 So. 2d 339, 341 (Ala.Crim.App. 1982). Thus, Smith failed to state a claim upon relief could be granted. See Rule 32.7(d), Ala.R.Crim.P.

8.

Smith next argues that counsel failed to object to numerous instances of prosecutorial misconduct. Specifically, he asserts that counsel failed to object when

the prosecutor commented on a statement made by his codefendant, Larry Reid, and that counsel failed to object when the prosecutor called Smith a liar and a thief.

On direct appeal we addressed the underlying issues supporting this claim. We held that the prosecutor's reference to Smith's codefendant was an inadvertent slip of the tongue:

> "A review of the remark, together with the evidence presented at trial, shows that the prosecutor inadvertently misstated the name. The prosecutor said Larry instead of Jody. The contents of the remark reflect that the prosecutor was referring to Smith's statement – not to any statement that his codefendant may have made to police. Clearly, this was an inadvertent slip of the tongue. We find no error, much less plain error, here."

Smith, 795 So. 2d at 825. Also, we found no error in the prosecutor calling Smith a thief and a liar because the references were supported by the record: "Smith told police that he stole Van Dam's tools and pawned them. By his own admission, he was a thief in November 1997 as the prosecutor said in his argument." Smith, 795 So. 2d at 826. As for the reference that Smith was a liar, we stated that Smith denied any involvement in the murder in his first statement to police and then in his second statement admitted his participation in the robbery/murder. The references to Smith as a thief and a liar were in accord with the evidence admitted at trial and did not constitute improper arguments.

Because the underlying issues have no merit, counsel was not ineffective for failing to object. See Davis, supra.

Moreover,

> "[e]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made. Effectiveness of counsel is not measured by whether counsel objected to every question and moved to strike every answer."

Brooks v. State, 456 So. 2d 1142, 1145 (Ala.Crim.App. 1984).

9.

Smith argues that counsel was ineffective for failing to make a Batson v. Kentucky, 476 U.S. 79 (1986), objection after the prospective jurors were struck.

In Batson, the United States Supreme Court held that it was a violation of the Equal Protection Clause to exclude black veniremembers from a black defendant's trial based solely on race. In 1991, this holding was extended to white defendants in Powers v. Ohio, 499 U.S. 400 (1991). Smith is white and was tried in 1998.

We note that when denying relief on this claim the circuit court stated:

> "Smith raised the underlying substantive issue on direct appeal. On direct appeal Smith

> contended that 'the strike list supports his motion to remand for a Batson hearing because it shows that 8 of the State's 13 strikes were used to remove prospective black jurors.' Smith v. State, 795 So. 2d at 803. In rejecting Smith's Batson claim, the Alabama Court of Criminal Appeals held that '[t]he record fails to raise an inference of racial discrimination.' Id. Smith proffers no additional facts in his second amended Rule 32 petition that were not before the trial court and considered by the Alabama Court of Criminal Appeals when it addressed this issue on direct appeal."

(Supp. C.R. 413.)

The only ground that Smith pleaded in his petition was that the number of strikes the State used to remove black prospective jurors showed racial discrimination. In Hinton v. State, [Ms. CR-04-0940, April 28, 2006] ___ So. 2d ___ (Ala.Crim.App. 2006), we quoted with approval a circuit court's order denying relief:

> "'[Also], this claim is dismissed for lack of specificity in accordance with Alabama Rule of Criminal Procedure 32.6(b) because Hinton fails to allege facts necessary to show that counsel could have proved a prima facie case in support of a Batson motion. The only specific allegation offered in support of what counsel could have stated in a Batson motion is that the State removed nine of the fourteen African-American veniremembers; however, Hinton presents no evidence in support of this allegation. Even so, a Batson motion based solely on the number of African-Americans

> removed from the venire will not prove a prima facie case of discrimination. See Ex parte Pressley, 770 So. 2d 143, 147 (Ala. 2000).'"

___ So. 2d at ___. Thus, this claim was properly dismissed pursuant to Rule 32.6(b), Ala.R.Crim.P.

10.

Smith next argues that counsel was ineffective in inadequately investigating for the penalty phase of his capital trial. He raises several grounds in support of this claim.

As we stated above:

> "A review of a claim of ineffective counsel is not triggered until the petitioner has identified specific acts or omissions. Strickland. See, e.g., Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993) (claims of failure to investigate must show with specificity what information would have been obtained with investigation, and whether, assuming the evidence is admissible, its admission would have produced a different result)."

Thomas v. State, 766 So. 2d 860, 892 (Ala.Crim.App. 1998), overruled on other grounds, Ex parte Taylor, [Ms. 1040186, September 30, 2005] ___ So. 2d ___ (Ala. 2005).

a.

First, Smith argues that his trial counsel failed to adequately investigate the mitigation evidence that was critical to his penalty-phase defense. Smith provides a laundry list of individuals whom he claims counsel should have interviewed. However, Smith did not plead the substance of each of the named individual's alleged omitted testimony. Smith merely makes generalized assertions that counsel should have presented Smith's "family and social history, employment history, educational history, and community and cultural influences." (C.R. 56.)

The circuit court made the following findings of fact on this claim:

> "Smith contends that 'numerous [] family members, neighbors, and acquaintances were available to provide the mitigating information which was not included in the testimony presented.' Smith then proffers to the Court a laundry list of individuals that, he contends, his trial counsel should have interviewed. In paragraph 87 of his first amended Rule 32 petition, Smith listed 10 individuals that, he contends, his trial counsel should have interviewed and presented during the penalty phase. In paragraph 87 of his second amended Rule 32 petition, Smith lists 26 individuals. Despite listing 16 more individuals, Smith proffers the identical 'facts' in paragraphs 88-103 of his second amended petition as he proffered in paragraph 88-103 of his first amended petition.

"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.' Further, in Thomas v. State, 766 So. 2d 860, 893 (Ala.Crim.App. 1998), the Alabama Court of Criminal Appeals held that '[a] claim of failure to call witnesses, is deficient if it does not show what the witnesses would have testified to and how that testimony might have changed the outcome' (emphasis added). Smith fails to proffer in his first amended Rule 32 petition or in his second amended Rule 32 petition what a particular witness would have testified about or argue how such testimony might have changed the outcome of the penalty phase of trial. Smith's contention that his trial counsel were ineffective for failing to interview and present certain individuals without informing the Court what those individuals would have said or arguing how their testimony might have changed the outcome of trial is the epitome of a bare allegation. See Bold v. State, 746 So. 2d 364, 406 (Ala.Crim.App. 1999) (holding that 'Rule 32.6(b) requires that the petition itself disclose the facts relied upon in seeking relief') (emphasis in original); see also Coral v. State, [900 So. 2d 1274 (Ala.Crim.App. 2004)] (holding that '[e]ach subcategory [of an ineffective assistance of counsel claim] is an independent claim that must be sufficiently pleaded.'"

(Supp. C.R. 414-16.) The circuit court's findings are supported by the record.

We have thoroughly reviewed the record of Smith's trial. At the penalty phase, counsel presented the testimony of Smith's mother, his two sisters, a longtime family friend, and a clinical psychologist who had evaluated Smith before trial. Smith's mother, Glenda Smith, testified that Smith's natural father, Leo Smith, drank heavily, that he was abusive to the whole family, and that he frequently beat Smith with any item he had near him. She said that after she divorced Smith's father she married Hollis Luker. She testified that Luker was more abusive than Smith's father and that at one time he hit Smith with a baseball bat and severely damaged one of Smith's ears. Glenda Smith testified that she left Luker after he beat her with an axe handle. She said that Smith attended many schools, that he had a learning disability and was in special-education classes, and that he is dyslexic.

Dr. James Chudy, a clinical psyhologist, testified that he evaluated Smith before trial. He said that Smith's verbal IQ was 73, his performance IQ was 72, and his full-scale IQ was 72. He said that it was his opinion that Smith suffered from depression, post-traumatic stress disorder, alcohol dependency, a learning disorder, and a personality disorder and that he had borderline intellectual functioning. He said that Smith was a follower and not a leader. It was his opinion that there was no evidence indicating that Smith's mental health was related to any major neurological problems.

Smith's sister, Rebecca Smith, testified to the abuse the family suffered at the hands of Leo Smith and Hollis Luker and Smith's frequent beatings. Lynn Harrison, Smith's sister, also testified to the abuse the family suffered and that Luker was more abusive to her brothers.

Shirley Stacey testified that she had known Smith and his family for 18 years. She said that she lived next to them when Glenda Smith was married to Hollis Luker. She testified that Luker frequently beat the children and that she witnessed some of the beatings. She also said that Smith was a "respectful child."

At the end of trial, the circuit judge stated for the record: "I would like to say that I applaud Mr. [Greg] Hughes and Mr. [Jim] Byrd for their diligence, professionalism and skill in defending Mr. Smith. What I asked you two gentlemen to do was not easy, but you have performed to the very best of your ability and I am grateful to you both." (Trial record, R-21.)

The record of the penalty phase shows that the alleged omitted evidence concerning Smith's family history and education was presented in the penalty phase. Thus, the circuit court did not abuse its discretion in denying relief on this claim.

b.

Smith asserts that his trial counsel was ineffective for not obtaining the assistance of an neuropsychologist to conduct neurological testing on Smith.

The circuit court made the following findings on this claim:

> "Nothing in [Dr. James] Chudy's written report or in his trial testimony raises any inference that Smith would have been entitled to additional expert assistance or that his trial counsel were ineffective for failing to secure additional, expert assistance. See Ex parte Dubose, 662 So. 2d 1189, 1192 (Ala. 1995) (holding that to be entitled to funds for expert assistance '[a] defendant must show a reasonable probability that an expert would aid in his defense and that at trial would result in a fundamentally unfair trial'); see also Chandler v. United States, 218 F. 3d [1305] at 1315 [(11th Cir. 2000)] (holding that 'for a petitioner to show that the conduct was unreasonable, a petitioner must establish that no competent counsel would have taken the action that his counsel did take'). The Court finds that the allegations in Part I.K(2) of Smith's amended Rule 32 petition are based entirely on speculation and conjecture and fail to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, they are summarily dismissed."

(Supp. C.R. 423-24.)

Dr. Chudy testified that there was no evidence indicating that Smith's mental health was related to any major neurological problems. Counsel is not ineffective for relying on an expert's opinion. "'Counsel is not ineffective for failing to shop around for additional

experts.' Smulls v. State, 71 S.W.3d 138, 156 (Mo. 2002). 'Counsel is not required to "continue looking for experts just because the one he has consulted gave an unfavorable opinion." Sidebottom v. Delo, 46 F.3d 744, 753 (8th Cir. 1995).' Walls v. Bowersox, 151 F.3d 827, 835 (8th Cir. 1998)." Waldrop v. State, [Ms. CR-05-1370, August 31, 2007] ___ So. 2d ___, ___ (Ala.Crim.App. 2007). Thus, Smith is due no relief on this claim.

c.

Smith next argues that counsel was ineffective for failing to obtain the assistance of other experts. Smith argues that counsel should have obtained the services of a "substance-toxicologist, a psychopharmacologist, an expert in environmental exposure, and an expert in post-traumatic stress disorder."

The circuit court, in denying relief on this claim, stated:

> "Smith fails to identify for the Court in his second amended Rule 32 petition any individuals in the fields of expertise listed in Part I.K(3) or proffers to the Court what beneficial testimony these unnamed individuals would have provided at the penalty phase of Smith's trial. The Court finds that the allegation in Part I.K(3) of Smith's second amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P. See Boyd v. State, 746 So. 2d 364, 406 (Ala.Crim.App. 1999) (holding that Rule 32.6(b)requires that the petition

> itself disclose the facts relief upon in seeking relief')."

(Supp. C.R. 424-25.)

We have held that a petitioner fails to meet the specificity requirements of Rule 32.6(b), Ala.R.Crim.P., when the petitioner fails to identify an expert by name or plead the contents of that expert's expected testimony. See McNabb v. State, [Ms. CR-05-0509, August 31, 2007] ___ So. 2d ___ (Ala.Crim.App. 2007); Duncan v. State, 925 So. 2d 245 (Ala.Crim.App. 2005). Smith failed to plead sufficient facts to satisfy the requirements of Rule 32.6(b), Ala.R.Crim.P.

d.

Smith argues that counsel was ineffective for failing to object to an improper jury instruction in the penalty phase concerning the weighing of the aggravating circumstances and the mitigating circumstances.

The circuit court stated the following, when denying relief on this claim:

> "The record on appeal, however, establishes that trial counsel did, in fact, object to the above quoted instruction. . . . As a result of trial counsel's objection, the trial court recharged the jury concerning the burden of proof. After the trial court recharged the jury, trial counsel again logged an objection. The Court finds that the allegation . . . is without merit because it is directly refuted by the record; therefore, it is denied."

(Supp. C.R. 425-26.) Smith's claim is disputed by the record; thus, Smith is due no relief.

III.

Smith next argues that the circuit court erred in dismissing several of his claims after finding that those claims were procedurally barred by Rule 32.2, Ala.R.Crim.P.

A.

Smith asserts that the circuit court erred in dismissing his Batson v. Kentucky, 479 U.S. 79 (1986), claim and his sufficiency claim because they could have been, but were not, raised at trial or on direct appeal.

The circuit court correctly found that Smith's Batson claim was procedurally barred in this postconviction proceeding. See Boyd v. State, 746 So. 2d 364 (Ala.Crim.App. 1999). Moreover, Smith's sufficiency claim is procedurally barred in this postconviction proceeding. See Bass v. State, 810 So. 2d 802 (Ala.Crim.App. 2001).

B.

Smith next argues that the circuit court erred in dismissing his Ring v. Arizona, 536 U.S. 584 (2002), claim.

The United States Supreme Court in Apprendi v. New Jersey, 530 U.S. 466 (2000), held that any fact

which increases a punishment above the statutory maximum must be presented to a jury and proven beyond a reasonable doubt. This holding was extended to death-penalty cases in Ring.

The circuit court stated the following concerning this claim:

> "Smith acknowledges in his second Smith acknowledges in his second amended Rule 32 petition that in the Alabama Supreme Court's holding in Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002), the Court 'interpreted Ring as not affecting Alabama's capital sentencing statute.' Further, on June 24, 2004, the United States Supreme Court specifically held that 'Ring announced a new procedural rule that does not apply retroactively to case already final on direct review.' Schriro v. Summerlin, [542 U.S. 348 (2004)]. Thus, in addition to being procedurally barred from postconviction review, the Court finds that the allegation in Part V. (i) of Smith's second amended Rule 32 petition is without merit."

(Supp. C.R. 433-34.) Smith's Ring claim was procedurally barred in this postconviction proceeding. See Hodges v. State, [Ms. CR-04-1226, March 23, 2007] ___ So. 2d ___ (Ala.Crim.App. 2007).

Moreover, Smith was convicted of murdering the victim during the course of a robbery. The fact that increased Smith's possible punishment to death, the robbery, was found by a jury to exist beyond a reasonable

doubt. There was no Ring violation. See Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002).

C.

Smith also argues that the circuit court erred in finding that his Brady v. Maryland, 373 U.S. 83 (1963), claim was procedurally barred because Smith failed to assert in his Rule 32 petition that the claim was based on newly discovered evidence. Specifically, he asserts only one ground in support of this claim. He contends that the State failed to disclose that one of its main witnesses, M.A., received favorable treatment for her testimony at Smith's trial.

In Williams v. State, 782 So. 2d 811, 818 (Ala.Crim.App. 2000), we stated:

> "The appellant's first argument is that the State withheld exculpatory information in violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). . . . The appellant did not assert that this claim was based on newly discovered evidence. Therefore, it is procedurally barred because he could have raised it at trial and on direct appeal, but did not. See Rule 32.2(a) (3) and (a) (5), Ala.R.Crim.P.; Boyd v. State, 746 So. 2d 364 (Ala.Cr.App. 1999); Matthews v. State, 654 So. 2d 66 (Ala.Cr.App. 1994); Lundy v. State, 568 So. 2d 399 (Ala.Cr.App. 1990)."

Likewise, Smith did not assert in his petition that this claim was based on newly discovered evidence; thus, it

is procedurally barred in this postconviction proceeding.

Moreover, the record shows that M.A. testified that she had no agreement with the State in exchange for her testimony at Smith's trial. The prosecutor also stated for the record that M.A. had no agreement with the State. This contention is not supported by the record.

D.

Smith next asserts that the circuit court erroneously dismissed his juror-misconduct claims. Smith alleged that jurors failed to truthfully answer questions during voir dire and that the jury considered extraneous information during deliberations.

The circuit court found that Smith failed to name a single juror by name, failed to identify a single question a juror did not truthfully answer, failed to plead what juror or jurors failed to answer what question, and failed to identify any allegedly extraneous evidence that the jurors considered during deliberations. It further held that Smith failed to allege any facts as to why this claim could have not have been raised at trial or on direct appeal.

In Ex parte Pierce, 851 So. 2d 606 (Ala. 2000), the Alabama Supreme Court stated the following in regard to juror-misconduct claims:

> "Pierce was not required to prove that this information meets the elements of 'newly

> discovered material facts' under Rule 32.1(e). While the information about Sheriff Whittle's contacts with the jury may be 'newly discovered,' Pierce does not seek relief under Rule 32.1(e). Pierce does not contend that '[n]ewly discovered material facts exist which require that the conviction or sentence be vacated by the court.' Rule 32.1(e). Instead, Pierce's claim fits under Rule 32.1(a): 'The constitution of the United States or of the State of Alabama requires a new trial. . . .' Rule 32.1(a) states a ground for relief distinct from that stated in Rule 32.1(e). . . .
>
> "Although Rule 32.1(e) does not preclude Pierce's claim, Rule 32.2(a)(3) and (5) would preclude Pierce's claim if it could have been raised at trial or on appeal."

851 So. 2d at 613-14. Under Pierce, this claim was procedurally barred because Smith failed to allege in his petition that the claim could have been raised at trial or on direct appeal.

For the foregoing reasons, we hold that the circuit court did not abuse its discretion in summarily dismissing Smith's Rule 32 petition and we affirm the circuit court's ruling.

AFFIRMED.

McMillan and Welch, JJ., concur. Baschab, P.J., and Shaw, J., concur in the result.

Court of Criminal Appeals of Alabama.
Joseph Clifton SMITH
v.
STATE.

CR–98–0206.
May 26, 2000.
Rehearing Denied Aug. 25, 2000.

Glenn L. Davidson, Mobile, for appellant.

Bill Pryor, atty. gen.; and J. Clayton Crenshaw and Thomas F. Parker IV, asst. attys. gen., for appellee.

PER CURIAM.

The appellant, Joseph ("Jody") Clifton Smith, was convicted of murdering Durk Van Dam during the course of a robbery, an offense defined as capital by § 13A–5–40(a)(2), Ala.Code 1975. The jury, by a vote of 11 to 1, recommended that Smith be sentenced to death. The trial court accepted the jury's recommendation and sentenced Smith to die in Alabama's electric chair at a date to be set by the Alabama Supreme Court.

The State's evidence tended to show the following. On November 25, 1997, police discovered the badly beaten body of Durk Van Dam in his mud-bound Ford Ranger truck in a wooded area near Shipyard Road in Mobile County. Dr. Julia Goodin, a forensic pathologist for the Alabama Department of Forensic Sciences, testified that Van Dam died as a result of 35 different blunt-force injuries to his body. Van Dam had marks consistent with marks made by a saw on his neck,

shoulder, and back; he also had a large hemorrhage beneath his scalp, brain swelling, multiple rib fractures, a collapsed lung, multiple abrasions to his head and knees, and defensive wounds on his hands. Dr. Goodin testified that the multiple rib fractures that caused one lung to collapse were probably the most immediate cause of death.

Smith gave two statements to the police. In the first statement he denied any involvement in the robbery-murder but said that he was with Larry Reid when Reid beat and robbed Van Dam. Smith denied taking anything from the victim. When police were questioning Reid, Smith repeatedly knocked on the interrogation room door and requested to talk to the officer who had taken his first statement. In his second statement Smith admitted that he and Reid had planned to rob Van Dam because they had been told that Van Dam was carrying $1,500 in cash. Smith said that he, Reid, and Van Dam left the Highway Host motel in Van Dam's red truck on November 23, 1997. Van Dam was driving. Reid directed Van Dam, who had been drinking, to an isolated location. Once there, Reid began hitting Van Dam. He said that when Reid kicked Van Dam in the face he thought Van Dam was dead. Smith said that Van Dam then got up and Smith hit him on the head with his fist, kicked him in the ribs several times, threw a handsaw at him, and may have hit him with a hammer but he wasn't entirely sure because he suffers from blackouts. Reid then got a power saw from the back of Van Dam's truck, Smith said, and ran the saw against Van Dam's neck. Smith held Van

Dam down while Reid took the money from his pockets. Smith and Reid then attempted to move the truck, because they had planned to steal it, but it got stuck in the mud. Smith also admitted that he took the victim's boots, because his shoes were wet, and that he took the victim's tools. The two discussed where to take Van Dam's body and Smith suggested that they take it to a nearby lake. However, they left the body, Smith said, under a mattress near Van Dam's truck. Smith said that when they divided the money he got only $40 and Reid kept the rest, approximately $100. Smith also told police that he had just been released from custody on Friday—two days before the robbery-murder on Sunday.[1]

Russell Harmon testified that on November 23, 1997, he went to the Highway Host motel and saw Reid and Smith. He said that Smith told him that they were going to rob Van Dam and asked if he wanted to join them. Harmon declined and left the motel. Later that day he went back to the motel to see if the two had been successful with their plans. He said that Smith told him that he had beaten the victim on the head and that he had cut him with a saw. On cross-examination he

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[1] At the time of the robbery-murder Smith had not completed the remainder of his sentence on convictions for two counts of burglary and one count of receiving stolen property. On November 21, 1997, Smith was placed on Prediscretionary Leave, which is a community-custody program where the inmate can live at home and work in the community. Betty Teague, director of the central records office for the Alabama Department of Corrections, testified that an inmate who is nearing the end of his sentence may be placed in this program.

admitted that he could not swear that Smith was the one who said he had cut Van Dam in the back but that it could have been Reid who made this statement. However, on cross-examination Harmon reiterated that Smith told him that he "hit the man, beat the man—hit the man in the head and cut him." (R. 340.) Harmon testified that Smith asked him to go with him to get the tools from where he had left them in the woods. He said that he went with Smith and that they got the tools and took them to a pawnshop—Smith received $200 for the tools. Harmon testified that he was currently in the county jail because his probation had been revoked.

M.A.[2] testified that she was living at Highway Host motel with her mother and sister at the time of Van Dam's murder. She said that her sister, M., was dating Smith. M.A. testified that on November 23, 1997, she saw Smith, Reid, and Van Dam drive away from the motel in a red truck. She said that when Smith and Reid returned sometime later they were in a black car, Van Dam was not with them, and Smith had blood on his clothes. M.A. testified that Smith told her that he had hit, cut, and stabbed Van Dam in the back.

Patty Milbeck testified that she saw Smith, Reid, and Van Dam on the day of the robbery-murder. When they returned, she said, Van Dam was not with them

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[2] M.A. is a juvenile with a juvenile record. In keeping with the laws designed to protect the anonymity of juvenile offenders we are using this witness's initials. § 12–15–72, Ala.Code 1975, and Rule 52, Ala.R.App.P.

and Smith appeared nervous. Smith told her that Van Dam had become angry and left. Milbeck stated that at the time of her trial testimony she was in jail because she failed to report to her probation officer.

Joey Warner, an employee of 24-Hour Pawn pawnshop, testified that on November 23, 1997, Smith pawned several tools including saws, drills, and a router. He was given $200 and he showed his Alabama Department of Corrections identification card as identification to pawn the tools. (Supp. R. 92.)

Standard of Review

Because Smith has been sentenced to death, this Court must review each issue raised in Smith's brief, even if the issue was not first presented to the trial court. This Court must also review the record to determine if there is any "plain error" i.e., error that has adversely affected the substantial rights of the appellant, see Rule 45A, Ala.R.App.P., even though the issue was not raised in Smith's appellate brief to this Court.

> "The standard of review in reviewing a claim under the plain-error doctrine is stricter than the standard used in reviewing an issue that was properly raised in the trial court or on appeal. As the United States Supreme Court stated in *United States v. Young*, 470 U.S. 1, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985), the plain-error doctrine applies only if the error is 'particularly egregious' and if it 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings.' See *Ex parte Price*, 725

> So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999); *Burgess v. State*, 723 So.2d 742 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998), cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999); *Johnson v. State*, 620 So.2d 679, 701 (Ala.Cr.App.1992), rev'd on other grounds, 620 So.2d 709 (Ala.1993), on remand, 620 So.2d 714 (Ala.Cr.App.), cert. denied, 510 U.S. 905, 114 S.Ct. 285, 126 L.Ed.2d 235 (1993)."

Hall v. State, [Ms. CR-94-0661, October 18, 1999] ___ So.2d ___, ___ (Ala.Cr.App.1999).

Guilt–Phase Issues

I.

Smith argues that "the trial court violated Mr. Smith's rights to a capital trial free from arbitrariness when it randomly removed a juror from the venire." (Appellant's brief to this Court, p. 89.) The following occurred after the trial court granted strikes for cause:

> "The Court: Okay. So that means we have lost one, two, three, four, five, six, seven, eight, nine. That means we've got 39. All right. Lesley [court reporter], give me any number between 1 and 48."
>
> "The Court Reporter: Thirty-five.
>
> "The Court: Ma'am?
>
> "The Court Reporter: Thirty-five.

> "The Court: All right. Thirty-five. Gentlemen, strike 35. All right. All right. That leaves 38."

(R. 111.)

Initially, we observe that no objection was made to the court's using the court reporter to strike one juror so that the State and the defense would have an even number of strikes. Our review, therefore, is limited to determining whether plain error occurred. Rule 45A, Ala.R.App.P.

Section 12–16–100(a), Ala.Code 1975, addresses the drawing, selection, and empaneling of juries in criminal cases and states in part:

> "In every criminal case the jury shall be drawn, selected and empaneled as follows: Upon the trial by jury in the circuit courts of any person charged with a felony, including a capital felony, a misdemeanor, or violation, the court shall require a strike list or lists to be compiled from the names appearing on the master strike list as established in Section 12–16–74. *In compiling the list or lists, names of qualified jurors may be omitted on a nonselective basis. . . .*"

(Emphasis added.) This same provision is also contained in Rule 18.4(a), Ala.R.Crim.P.

Clearly, the trial court was authorized by law to remove this prospective juror. There is no argument that this prospective juror was not removed on a "nonselective basis," indeed, Smith's argument states that

this prospective juror was "randomly struck." No error, much less plain error, occurred here.

II.

Smith argues that he was denied an impartial and unbiased jury because the trial court denied his request for individual sequestered voir dire examination.

The following occurred at a pretrial hearing regarding Smith's motion for individual voir dire:

> "Mr. Hughes [defense counsel]: Judge, I don't have anything other than what was stated in the motion, as far as that goes.
>
> *"The Court: It's my understanding, based on my review of the Alabama law, that there's no requirement to individual voir dire in a capital case.*
>
> *"Mr. Hughes: I think you're correct, Judge.*
>
> "The Court: And so the lawyers will know exactly what I intend to do, we will qualify our panel generally, meaning the panel in its entirety. Those who express particular reservations about the death penalty or those who indicate that they would automatically impose it will then be reduced to smaller groups, in the past, usually done in groups of three or five.
>
> "I don't know that pretrial publicity is an issue in this case, but if you all think that, too, is something that needs to be gone into with

> those who express some knowledge, we'll sure do that.
>
> "But my plan is to qualify them generally and then separate those folks whose responses create a death-penalty issue or pretrial publicity issues.
>
> "I would also ask that I get from each lawyer a list of proposed voir dire questions by 5:00 p.m. on Friday, September 11, the Friday before we go to trial on Monday. . . ."

(R. 7–8) (emphasis added). Defense counsel's own words indicate that he was aware that there is no right to individual voir dire in a capital case.

The Court gave the venire the following instruction prior to voir dire examination:

> "The Court: . . . If the answer to a question is something that you find to be of a particularly sensitive or personal nature that you don't want to share with 48 strangers, I understand that. And if you find yourself in that situation where the answer to a question applies to you, but you don't want to share it with the rest of your fellow jurors, you are free to come up here to the bench and outside the hearing of the rest of your fellow jurors tell us whatever your response is."

(R. 15–16.)

The record reflects that the trial court did grant individual voir dire to the extent that any juror who thought his or her answer was sensitive could be

questioned outside the presence of the remaining veniremembers.

> "'"In Alabama, there is no requirement that a defendant be allowed to question each prospective juror individually during voir dire examination. This rule applies to capital cases, and the granting of a request for individual voir dire is discretionary with the trial court." *Coral v. State*, 628 So.2d 954, 968 (Ala.Cr.App.1992). "The fact that the appellant's case involved capital murder is not alone reason to require individual voir dire. . . . A trial court's decision in denying individual voir dire examination of a jury panel will not be disturbed on appeal absent an abuse of that discretion." *Smith v. State*, 588 So.2d 561, 579 (Ala.Cr.App.1991). See also *Henderson v. State*, 583 So.2d 276, 283 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992).'
>
> "*Taylor v. State*, 666 So.2d 36, 66 (Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala. 1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996). See also *Smith v. State*, 727 So.2d 147 (Ala.Cr.App.1998); and *George v. State*, 717 So.2d 827 (Ala.Cr.App.), aff'd in pertinent part, 717 So.2d 844 (Ala. 1996), aff'd. on return to remand, 717 So.2d 849 (Ala.Cr.App.1997), aff'd, 717 So.2d 858 (Ala.), cert. denied, 525 U.S. 1024, 119 S.Ct. 556, 142 L.Ed.2d 462 (1998). Perkins offered no evidence in the trial court to show how he was prejudiced as a result of prospective

> jurors being questioned in panels, as opposed to individually, regarding their views on capital punishment. On appeal, he offers only general arguments concerning the *possibility* of prejudice and fails to show that any comments by a prospective juror improperly influenced other members of a panel.
>
> "'A trial court is vested with great discretion in determining how voir dire examination will be conducted, and that court's decision on how extensive a voir dire examination is required will not be overturned except for an abuse of that discretion.' *Ex parte Land*, 678 So.2d 224, 242 (Ala.), cert. denied, 519 U.S. 933, 117 S.Ct. 308, 136 L.Ed.2d 224 (1996). A careful review of the record reveals that the method of voir dire employed by the trial court was sufficient to 'provide[ ] reasonable assurance that prejudice would have been discovered if present.' *Haney [v. State*], 603 So.2d [368] at 402 [(Ala.Crim.App.1992)]. Accordingly, we find that the trial court did not abuse its discretion by denying Perkins's motion for individual, sequestered voir dire examination regarding the veniremembers' views on capital punishment."

Perkins v. State, [Ms. CR-93-1931, November 19, 1999] ___ So.2d ___, ___ (Ala.Cr.App.1999). See also *Ingram v. State*, 779 So.2d 1225 (Ala.Cr.App.1999) and *Whitehead v. State*, 777 So.2d 781 (Ala.Cr.App.1999).

This case is similar to *Perkins.* Smith has offered no specific allegations that any prospective juror was prejudiced by the answers of another prospective juror.

The trial court's method of voir dire examination was sufficient.

III.

Smith argues that the trial court committed reversible error, and violated the United States Supreme Court's holding in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968), by removing a prospective juror for cause for the sole reason, he argues, that the juror had expressed mere reservations about the death penalty.

The following occurred during defense counsel's voir dire examination of prospective juror M.C.:

> "The Court: Hi, Mr. [C.] When we were asking questions earlier this morning about the death penalty you indicated that neither your conscience nor your convictions, if I heard you correctly, would allow you to impose a penalty of death by electrocution in any circumstance. Is that right, sir?
>
> "[M.C.]: Correct.
>
> "The Court: All right. The law requires that I give the lawyers for both sides the opportunity to ask you any follow-up questions, if in fact they have any, outside the presence of the rest of the jury, which is why we are here at this stage.
>
> "So, Mr. Hughes [defense counsel], do you have any questions of Mr. [C.]?

"Mr. Hughes: Mr. [C.], you have not heard any of the facts in this case at this point. If you heard the facts, all the details in this whole business, and the Judge tells you how you must consider the facts, and if you were satisfied from the facts that Mr. Smith had done all of the things they have alleged in this case and you at that point say—voted and the jury voted to convict Mr. Smith of capital murder and then you were presented with evidence, some that might be what are called aggravating factors that would make it seem—or the State's position that it ought to carry the death penalty and mitigate the factors from the defense that would say you ought not to put him in the electric chair, that really the correct decision would be life without parole, and the Judge would tell you to consider these factors and weigh one against the other, would you be able to follow the Judge's instructions and do that?

"[M.C.]: I would probably lean toward life without parole if the—I probably wouldn't—I wouldn't consider the death penalty. That's it. That's just –

"Mr. Hughes: Are you saying—Well, let me ask you this. I believe you told us earlier that your brother had been robbed and hit on the head.

"[M.C.]: He had an incident. Yeah, there was an incident.

"Mr. Hughes: All right. And thank God it didn't come to pass, but just to give us a

> talking point here, had your brother been killed would you feel that that would then—might be something that would justify the electric chair for somebody that might have done that?
>
> "[M.C.]: I wouldn't have voted—I mean, if they had killed him I wouldn't. I wouldn't—I wouldn't have gave—I couldn't have gave them the electric chair. Maybe somebody else would, but I wouldn't."

(R. 91–93.)

The standard we use in determining whether a prospective juror was properly struck for cause based on opposition to the death penalty was discussed by this Court in *Pressley v. State*, 770 So.2d 115, 127 (Ala.Cr.App.1999), aff'd, 770 So.2d 143 (Ala.2000). In *Pressley* we stated:

> "The 'original constitutional yardstick' on this issue was described in *Witherspoon v. Illinois*, 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Under *Witherspoon*, before a juror could be removed for cause based on the juror's views on the death penalty, the juror had to make it unmistakably clear that he or she would automatically vote against the death penalty and that his or her feelings on that issue would therefore prevent the juror from making an impartial decision on guilt. However, this is no longer the test. In *Wainwright v. Witt*, 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court held that the proper standard for determining

> whether a veniremember should be excluded for cause because of opposition to the death penalty is whether the veniremember's views would '"prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."' The Supreme Court has expressly stated that juror bias does not have to be proven with 'unmistakable clarity.' *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986)."

It is clear from the quoted discussion with this prospective juror that this juror never wavered in his conviction that he would be unable to consider a death sentence under any circumstances. This juror even indicated that if his brother had been killed he could not vote to execute the killer. This juror had views towards the death penalty that would have impaired his duties as a juror in this capital case. The trial court properly struck this prospective juror for cause.

In a footnote to Smith's brief to this Court Smith states that he was never given the opportunity to individually question veniremembers as to whether they had fixed opinions in *favor* of the death penalty. Smith's argument is not supported by the record and is raised for the first time on direct appeal. See Rule 45A, Ala.R.App.P. The record reveals that the trial court asked the prospective jurors the following questions:

> "The Court: . . . Please forgive me for being somewhat repetitive, but the law requires

> that we identify each prospective juror by name and get that individual's precise response on the record. So that's why you're hearing some of these questions asked over and over again.
>
> "Now, there's a flip side to that question, which is this. If the State were to meet its burden of proof and satisfy you that the Defendant was guilty beyond a reasonable doubt of an intentional killing in the course of a robbery, is there any one of you who would automatically vote to impose a penalty of death by electrocution?
>
> "(No response.)"

(R. 58–59.)

Later, during defense counsel's voir dire examination the following occurred:

> "Mr. Hughes [defense counsel]: Do any of you feel, just as a matter of conscience, that if a person participates in any activity that results in another person dying that the person who is the actor in the activity forfeits his right to live, just because someone dies as a result, directly or indirectly, of their actions?
>
> "(No response.)
>
> "Mr. Hughes: Do any of you feel that imprisonment is too easy of a punishment for someone who has killed another?
>
> "(No response.)

> "Mr. Hughes: Would all of you be willing to consider in the event there is a conviction—Let me rephrase that. Are there any of you who would not be willing to consider a punishment of life imprisonment without parole in the event there should be a conviction for capital murder? Is there anybody that would automatically say that's not an option?
>
> "(No response.)"

(R. 82–83.)

After the general voir dire questioning, the court excused all of the jurors except the ones who had responded to the question about their opposition to the death penalty. These prospective jurors were individually questioned. At no time did defense counsel object to the lack of any further questioning concerning the prospective jurors' views *in favor of* the death penalty. In fact, each time a question was asked concerning this issue no prospective juror responded. Smith's allegation is not supported by the record.

Moreover, "this court has held that the failure of the trial court to question potential jurors concerning their views in favor of the death penalty does not constitute plain error. *Henderson v. State*, 583 So.2d 276 (Ala.Cr.App.1990), affirmed, 583 So.2d 305 (Ala.1991), cert. denied, 503 U.S. 908, 112 S.Ct. 1268, 117 L.Ed.2d 496 (1992)." *Harris v. State*, 632 So.2d 503 (Ala.Cr.App.1992), aff'd, 632 So.2d 543 (Ala.1993), aff'd, 513 U.S. 504, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995).

IV.

Smith next argues that the State violated *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), by using its peremptory strikes to remove black prospective jurors based on their race. Smith contends that the record reflects that of the 13 blacks on the venire the State removed 8 by its peremptory strikes. He contends that the record supports his entitlement to a *Batson* hearing because, he says, the record establishes a prima facie case of racial discrimination. We do not agree.

There was no *Batson* objection to the State's use of its peremptory strikes. Smith contends that the strike list supports his motion to remand for a *Batson* hearing because it shows that 8 of the State's 13 strikes were used to remove prospective black jurors. We note that the strike list also reflects that defense counsel used every one of it 13 strikes to remove white prospective jurors.[3] The strike list is confusing. It fails to indicate what jurors were struck for cause, and it does not reflect the final composition of Smith's jury.

As this Court stated in *Boyd v. State*, 715 So.2d 825, 836 (Ala.Cr.App.1997), aff'd, 715 So.2d 852 (Ala.), cert. denied, 525 U.S. 968, 119 S.Ct. 416, 142 L.Ed.2d 338 (1998):

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[3] *Batson* applies to white prospective jurors, see *White Consolidated Industries, Inc. v. American Liberty Insurance Co.*, 617 So.2d 657 (Ala. 1993), and to defense counsel, see *Georgia v. McCollum*, 505 U.S. 42, 112 S.Ct. 2348, 120 L.Ed.2d 33 (1992).

> "In his appellate brief, the appellant argues that a prima facie case of gender discrimination exists because the prosecutor used 10 of his 14 peremptory strikes to remove 10 of 26 female jurors. However, a review of the strike list included in the record, as well as the voir dire examination, indicates that the appellant used 10 of his 13 strikes to remove female jurors. There were no supporting circumstances to indicate gender discrimination or to render a failure by the trial court to find the existence of a prima facie case of gender discrimination plain error, i.e., error that would adversely affect the substantial rights of the appellant. Similarly, in *George v. State*, 717 So.2d 827 (Ala.Cr.App.1996), rev'd on other grounds, 717 So.2d 844 (Ala. 1996) this Court found that the record did not supply an inference of gender discrimination. 'Before the plain error analysis can come into play in a *Batson* issue, the record must supply an inference that the prosecution engaged in purposeful discrimination. *Ex parte Watkins*, 509 So.2d 1074 (Ala.), cert. denied, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987); *Rieber [v. State*, 663 So.2d 985 (Ala.Cr.App.1994), affirmed, 663 So.2d 999 (Ala.1995)].' *Pace v. State*, 714 So.2d 316 (Ala.Cr.App.1995)."

The record fails to raise an inference of racial discrimination. We refuse to find error based on this inadequate record.

V.

Smith argues that the trial judge erred in failing to sua sponte recuse himself from hearing Smith's case. Specifically, he contends that there was an appearance of impropriety because the trial judge, Judge Chris Galanos, had prosecuted Smith for two counts of receiving stolen property and for third-degree burglary when Judge Galanos was district attorney for Mobile County.

Initially, we observe that there was no motion to recuse filed in the trial court. Therefore, our review of this issue is limited to determining whether plain error was present. Rule 45A, Ala.R.App.P.

Our review of the record reflects that in 1990, eight years before Smith's trial for capital murder, Smith pleaded guilty to receiving stolen property and to burglary in the third degree while Judge Galanos was the district attorney for Mobile County.

Smith contends that Judge Galanos should have recused himself from hearing this present case against Smith because, he argues, there was an appearance of impropriety sufficient to require Judge Galanos to recuse himself under Canon 3(C)(1), Alabama Canons of Judicial Ethics.

We have previously addressed this issue in *James v. State*, 423 So.2d 339 (Ala.Cr.App.1982), and stated: "It was held in *Ray v. State*, 398 So.2d [774 at] 776–777 [(Ala.Cr.App.1981)], that the fact that the trial judge, before he was a judge and while he was district

attorney of the particular circuit, had prosecuted the defendant in another case presented no valid ground for a motion that he recuse himself." See also *Payne v. State*, 48 Ala.App. 401, 265 So.2d 185 (1972), cert. denied, 288 Ala. 748, 265 So.2d 192 (1972), cert. denied, 409 U.S. 1079, 93 S.Ct. 703, 34 L.Ed.2d 669 (1972).

Other courts have reached this same conclusion. See *Jarrell v. Balkcom*, 735 F.2d 1242 (11th Cir.1984), cert. denied, 471 U.S. 1103, 105 S.Ct. 2331, 85 L.Ed.2d 848 (1985) ("The mere fact that a judge acted as prosecutor in an unrelated case is insufficient to constitute reversible error."); *Goodspeed v. Beto*, 341 F.2d 908 (5th Cir.1965), cert. denied, 386 U.S. 926, 87 S.Ct. 867, 17 L.Ed.2d 798 (1967) ("[T]he judge who presided was a former district attorney who had prosecuted the petitioner for different crimes. That was not sufficient ground for the disqualification of the judge."); *Hathorne v. State*, 459 S.W.2d 826, 829 (Tex.Crim.App.1970), cert. denied, 402 U.S. 914, 91 S.Ct. 1398, 28 L.Ed.2d 657 (1971) ("It is of course well settled that the mere fact that the trial judge personally prosecuted the (defendant) in past crimes does not disqualify him from presiding over a trial where a new offense is charged.' "); *Thomas v. Workmen's Compensation Appeal Board*, 680 A.2d 24 (Pa.Commw.Ct.1996) (Because judge previously prosecuted defendant does not preclude judge in future unrelated cases from presiding over trial.).

VI.

Smith argues that he was denied a fair trial because the trial court failed to admonish the jurors, every time that they left the courtroom, not to discuss the case with anyone and to avoid exposure to any outside contact concerning the case. He cites Rule 19.3(d), Ala.R.Crim.P., in support of this contention.

Initially, we note that there was no objection to the court's failure to admonish the jury every time that the jurors left the courtroom. Thus, our review is limited to determining whether plain error occurred. Rule 45A, Ala.R.App.P.

Rule 19.3(d), Ala.R.Crim.P., states:

> "(d) *Admonitions to Jurors.* In all cases, the court shall admonish the jurors that they are not:
>
> "(1) To discuss among themselves any subject connected with the trial until the case is submitted to them for deliberation;
>
> "(2) To converse with anyone else on any subject connected with the trial, until they are discharged as jurors in the case;
>
> "(3) To knowingly expose themselves to outside comments or to news accounts of the proceedings, until they are discharged as jurors in the case; or
>
> "(4) To form or express any opinion on the case until it is submitted to them for deliberation.

> "If the jurors are permitted to separate, they may also be admonished not to view the place where the offense allegedly was committed."

Smith argues that at each break on the first day of trial, the trial court failed to so admonish the jury.

The jury in this case was sequestered. At the first break on the first day of jury selection the trial court instructed the venire that the members were not to discuss the case with anyone. (R. 61.) After Smith's jury was sworn, the trial court gave the jurors detailed instructions on their obligations. The court's instructions, in part, stated:

> "The Court: . . . And the reason for that is pretty simple. That is, that your verdict, whatever it is, must be based exclusively on what is seen and heard in this courtroom and cannot even appear to be influenced by any outside source, which was why earlier today I twice said, please, don't talk about this case nor allow anyone to talk about it with you.
>
> "All right. So, obviously, rule one from this point forward is no exposure in any way, shape or form to any local media for fear that you might hear or see something about this case. Rule number two is that you shall not talk about this case with anyone, nor allow anyone to talk about it with you until 12 of you retire to that room right behind you and actually start to deliberate a verdict. And the reason for that is also simple. You're going to hear this case in bits and pieces. And both as a

> matter of law and as a matter of conscience you shouldn't even begin to make up your mind or share your opinions until you've got all the pieces put together."

(R. 119–20.)

The trial court did not give similar detailed instructions at each break in the court proceedings. To require a court to do so would be unduly burdensome, disruptive, and contrary to the clear wording of Rule 19.3(d). Indeed, Rule 19.3(d) does not require that a trial court give the admonitions at each court break. Indeed, Rule 19.3(d) does not state that these instructions must be given more than once in the trial. The record clearly reflects that the jurors were aware of their duties and obligations. There was no violation of Rule 19.3(d).

VII.

Smith argues that his statements to police should have been suppressed because, he says, they were illegally obtained. He cites several different grounds in support of this contention.

A.

Smith argues that the police did not have probable cause to arrest him without a warrant; therefore, he says, the statements he made to the police should have been suppressed because they were "fruits of the

poisonous tree." *Wong v. United States*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

This Court has stated the following about arresting an accused without a warrant:

> "Section 15–10–3(3), Ala.Code 1975, provides that an officer may arrest someone *without a warrant* when he has reasonable cause to believe that the person arrested committed a felony. ' "Reasonable cause is equated with probable cause." ' *Sockwell v. State*, 675 So.2d 4 (Ala.Cr.App.1993), aff'd, 675 So.2d 38 (Ala.1995). 'Probable cause is knowledge of circumstances that would lead a reasonable person of ordinary caution, acting impartially, to believe that the person arrested is guilty.' *Sockwell*, 675 So.2d at 13.
>
> > " 'Probable cause to arrest exists when, at the time the magistrate issues the warrant or the officer makes the arrest, there are reasonably trustworthy facts and circumstances sufficient, given the totality of the circumstances, to lead a reasonable person to believe there is a fair probability that the suspect is committing or has committed an offense.'
>
> "*Swain v. State*, 504 So.2d 347 (Ala.Cr.App.1986), citing *Fifteenth Annual Review of Criminal Procedure; United States Supreme Court and Courts of Appeal 1984–1985*, 74 Geo. L.J. 499, 518 (1986). As concerns probable cause, we

note that the Alabama Supreme Court has held:

> "'Probable cause exists if facts and circumstances known to the arresting officer are sufficient to warrant a person of reasonable caution to believe that the suspect has committed a crime. "In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act. . . ." "'The substance of all the definitions of probable cause is a reasonable ground for belief of guilt.'" "Probable cause to arrest is measured against an objective standard and, if the standard is met, it is unnecessary that the officer subjectively believe that he has a basis for the arrest." The officer need not have enough evidence or information to support a conviction in order to have probable cause for arrest. Only a probability, not a prima facie showing, of criminal activity is the standard of probable cause.'
>
> "*Dixon v. State*, 588 So.2d 903, 906 (Ala.1991) (citations omitted)."

Smith v. State, 727 So.2d 147, 156–57 (Ala.Cr.App.1998), aff'd, 727 So.2d 173 (Ala.), cert. denied, 528 U.S. 833,

120 S.Ct. 91, 145 L.Ed.2d 77 (1999). See also *Melson v. State*, 775 So.2d 857 (Ala.Cr.App.1999).

Here, a suppression hearing was held to determine whether Smith's statements were voluntary.[4] After the officers discussed the circumstances surrounding Smith's statements, defense counsel argued that the statements were illegal because there was no probable cause to arrest Smith. Another hearing was held on this issue. Detective Sgt. Mike Reynolds of the Mobile County Sheriff's Office testified that as a result of information that he received that a juvenile, M.A., was telling people that Smith and Reid had been involved in a robbery-murder, he went to the Highway Host motel to talk with M.A. M.A. told police that she had seen Smith, Reid, and an unknown white male in a red truck on the day of the robbery-murder. When Smith and Reid returned to the motel, M.A. told police, Smith had blood on his jeans, and he told her that he and Reid had robbed, and had beaten Van Dam, and had left his body in the woods. Reynolds testified that M.A. told him:

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[4] The record contains no formal written motion to suppress the statements. The record concerning defense counsel's objections to the statements is very confusing. At one point the trial court stated: "Well, you know, one thing that would have been nice would have been to get a written motion so we would know exactly what it is you're objecting to." (R. 180.) It does appear that counsel objected on the basis that the statements were involuntary, that police failed to satisfy the *Miranda* requirements, that the time between the statements was too long and that *Miranda* warnings should have been given again, and that Smith had been coerced into making a statement.

"[Smith] told her how he had taken the gentleman to a wooded area near the 'party hole,' is what she called it, off Shipyard Road, how they had robbed him, how they had beat him, also how they had gotten the truck stuck and that when they left him they left him beneath a mattress. Also, that they had at some point placed an 'x' on his back."

(R. 187.) M.A. also told Reynolds that Smith showed her a Tennessee driver's license that he said was the victim's. Reynolds stated that police then talked with Reid, who was staying at the Highway Host motel at the time of the murder. Reid told police that he had been with Smith and Van Dam but that he had gotten them to drop him off. Reid also went with police to where M.A. said the body was located. Reid told police that the body was in the opposite direction from where it was eventually found. Police did not discover the body when they were with Reid. They took Reid back to the motel and went back to the area, where they discovered Van Dam's body in his truck. A bloody mattress was located near the truck. Reynolds also stated that much of the information M.A. had given them was corroborated by the murder scene. After talking with Reid and M.A., police proceeded to Smith's house to take him into custody. Certainly, there was more than sufficient probable cause to believe that Smith was involved in the robbery-murder.

B.

Smith further argues that he was illegally arrested at his home without a warrant in violation of *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980).

We note that the circumstances surrounding Smith's arrest were not totally developed in the record because Smith did not attack his arrest on this ground at trial. We are thus confined to a plain-error analysis. Rule 45A, Ala.R.App.P. We have stated about reviewing the validity of an arrest that "'[t]he defendant cannot successfully argue that error is plain in the record when there is no indication in the record that the act upon which the error is predicated ever occurred.'" *Smith v. State*, 588 So.2d 561 (Ala.Cr.App.1991), on remand, 620 So.2d 727 (Ala.Cr.App.1992), quoting *Ex parte Watkins*, 509 So.2d 1074 (Ala.), cert. denied, 484 U.S. 918, 108 S.Ct. 269, 98 L.Ed.2d 226 (1987).

Here, Sgt. Patrick Pyle of the Mobile County Sheriff's Office testified that Smith was arrested at his mother's trailer, which was located in a trailer park off Old Pascagoula Road in Mobile. There is no evidence in the record concerning who was present at the time of Smith's arrest. However, Pyle testified that he went to Smith's mother's trailer several different times that day. He said that she gave them permission to search the trailer and that she signed two permission to search forms. These forms are contained in the record. (Supp. R. 446–47.) There is absolutely no evidence in

the record that the police forced their way into Smith's mother's house to arrest him.

As this Court stated in *Smith*:

> "[T]here is no merit to Smith's argument that the entry into his home to make the arrest violated *Payton v. New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). *Payton* concerned a warrantless and a *nonconsensual* entry into a suspect's home to make a routine felony arrest. There is no evidence here that the officers' entry into Smith's mother's trailer (where Smith was staying) was without consent. (R. 1127.) As the state pointed out in its brief to this court, '"the consent necessary in the *Payton* context is consent to enter, not consent to arrest.'" quoting *Fortenberry v. State*, 545 So.2d 129, 137 (Ala.Cr.App.1988), aff'd, 545 So.2d 145 (Ala. 1989), quoting in turn *United States v. Briley*, 726 F.2d 1301 (8th Cir.1984)."

727 So.2d at 157–58.

Moreover, officers could have legally entered Smith's mother's trailer and arrested Smith without a warrant if there was probable cause to arrest and exigent circumstances. We have already determined that there was probable cause to arrest Smith. Thus, we are left to determine whether exigent circumstances existed for his immediate arrest without first obtaining a warrant. As this Court stated in *Borden v. State*, 769 So.2d 935 (Ala.Cr.App.1997):

"In *Bush* [*v. State*], 523 So.2d 538 [(Ala.Cr.App.1988)], this court set forth the following as factors that may indicate the existence of exigent circumstances:

> "'(1) the gravity or violent nature of the offense with which the suspect is to be charged; (2) a reasonable belief that the suspect is armed; (3) probable cause to believe that the suspect committed the crime; (4) strong reason to believe that the suspect is in the premises being entered; (5) a likelihood that delay could cause the escape of the suspect or the destruction of essential evidence, or jeopardize the safety of officers or the public; and (6) the peaceful circumstances of the entry.'

"523 So.2d at 546, citing *United States v. Standridge*, 810 F.2d 1034, 1037 (11th Cir.), cert. denied, 481 U.S. 1072, 107 S.Ct. 2468, 95 L.Ed.2d 877 (1987). See *Dorman v. United States*, 140 U.S.App. D.C. 313, 435 F.2d 385, 392–93 (D.C.Cir.1970); 3 W.LaFave, *Search and Seizure* § 6.1(f) (3d ed.1996). Virtually all of the factors described in *Bush* were present in the instant case. '[T]he gravity of the underlying offense was of the highest nature. The defendant had committed an offense for which the death penalty was authorized.' *Musgrove [v. State*], 519 So.2d [565] at 573 [(Ala.Cr.App.), aff'd, 519 So.2d 586 (Ala.1986), cert. denied, 486 U.S. 1036, 108 S.Ct. 2024, 100 L.Ed.2d 611 (1988)]. Law enforcement officers had reason to believe that the appellant would be armed, in view of the fact that they had information that he had stabbed Ledbetter to death approximately 13 hours earlier. There was probable cause to believe that the appellant had committed the

crime, including the statements of eyewitnesses. The officers had reason to believe that the appellant was inside the apartment where his automobile was parked outside and that his probable state of mind made it likely that further delay could allow the appellant to flee or could jeopardize the safety of the woman known to reside in the apartment. Additionally, there is evidence that the arrest was made without the use of force: the officers first attempted to effect entry by knocking and announcing themselves, and after their entry, the appellant was cooperative, even signing a consent-to-search form. Accordingly, even if the appellant's arrest was unauthorized under the warrant (and we emphatically do not so hold), it was justified on the ground of probable cause and exigent circumstances."

We believe that there were exigent circumstances present here to uphold the entry into Smith's mother's trailer to arrest him without a warrant.

Based on the record before us, we hold that Smith's arrest was not illegal.

C.

Smith also argues that the statements he made to the police should have been suppressed because, he says, they were involuntary, i.e., given as a result of police coercion and involuntary because, he says, the *Miranda*[5] warnings were not given.

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[5] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).

A confession is presumed involuntary and it is the State's burden to prove by a preponderance of the evidence that *Miranda* warnings were given and that the accused voluntarily waived his *Miranda* rights. *Coral v. State*, 628 So.2d 954 (Ala.Cr.App.1992), aff'd, 628 So.2d 1004 (Ala.1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994); *Lewis v. State*, 535 So.2d 228 (Ala.Cr.App.1988). In determining whether a statement is voluntary, a reviewing court must look at the "totality of the circumstances" surrounding the confession. *McLeod v. State*, 718 So.2d 727, 729 (Ala.), on remand, 718 So.2d 731 (Ala.Cr.App.), cert. denied, 524 U.S. 929, 118 S.Ct. 2327, 141 L.Ed.2d 701 (1998). "When determining the admissibility of a confession, this Court must look at the entire circumstances, not only the behavior of the interrogators in creating pressure, but also the defendant's experience with the criminal justice system and personal characteristics." *Craig v. State*, 719 So.2d 274, 278 (Ala.Cr.App.1998).

Here, Smith gave two statements to police. Detective Donald Lunceford of the Mobile County Sheriff's Office testified that he and another officer went to Smith's mother's trailer on November 27, 1997, at around noon to arrest Smith. Lunceford said that Smith was read his *Miranda* rights at the moment he was taken into custody and again after he was transported to the criminal investigation division office in Theodore. Detective Reynolds stated that he talked with the appellant at around 5:00 p.m. that same day and that he did not give him *Miranda* warnings again because when he entered the interview room he saw a

Miranda form. He said that Detective Lunceford told him that Smith had already been informed of his *Miranda* rights. Also, Smith was in police custody from the time that he was arrested, around 12:00 p.m., until he made his first statement, at approximately 5:00 p.m. the same day. There was a lapse of approximately five hours from his arrest to the first statement. Reynolds and Lunceford both testified that Smith was made no promises or offered any inducements to testify. Both also testified that Smith was not coerced in order to get a statement from him. Reynolds said that he told Smith that he had been implicated in the robbery-murder of Van Dam. Reynolds testified that Smith was in Detective Lunceford's and Detective Pyle's presence until he was turned over to him. (R. 440.)[6] Reynolds also stated that no one had access to Smith after Lunceford and Pyle relinquished him to Reynolds. (R. 445.) Smith gave a second statement at 8:00 p.m. on the same day. He was read his *Miranda* before making this statement and he signed a waiver of rights form.

1.

Smith initially argues that his statements were involuntary because his IQ is low.

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[6] Though this information is not contained in the record of the suppression hearing, Detective Reynolds testified as to this before the jury. "In reviewing a trial court's ruling on a motion to suppress, this Court may consider the evidence adduced both at the suppression hearing and at the trial." *Henry v. State*, 468 So.2d 896, 899 (Ala.Cr.App.1984), cert. denied, 468 So.2d 902 (Ala. 1985).

Initially, we note that this was not a reason given for suppressing Smith's statement. (R. 179.) Thus, our review is limited to a plain-error analysis. Rule 45A, Ala.R.App.P.

We observe that when the suppression motion was made, the trial court had no knowledge of Smith's IQ. The only evidence of Smith's IQ is contained in the penalty phase of the proceedings. At the time of the motion to suppress nothing in the record reflected Smith's IQ.

In this case, Detective Lunceford testified that, when he made his statements, Smith did not appear to be under the influence of drugs or alcohol, and that he was lucid, coherent, and aware of his circumstances. He asked Smith if he could read and write and whether he understood the English language; he indicated that he could and he did. Smith then signed the acknowledgement-of-rights form and he appeared to understand his rights. Also, Smith had had prior involvement with the police and the criminal justice system. Detective Reynolds verified what Lunceford had testified to.

Mental subnormality is but one factor to consider when reviewing the totality of the circumstances surrounding a confession, *Harkey v. State*, 549 So.2d 631 (Ala.Cr.App.1989); *Lewis v. State*, 535 So.2d 228 (Ala.Cr.App.1988); *Whittle v. State*, 518 So.2d 793 (Ala.Cr.App.1987); *Sasser v. State*, 497 So.2d 1131 (Ala.Cr.App.1986), and will not alone render a

confession involuntary. *Flynn v. State*, 745 So.2d 295 (Ala.Cr.App.1999).

Here, "[e]ven considering evidence of the defendant's mental subnormality[,] which was not before the trial judge when he ruled on the admissibility of the statements, the defense testimony 'does not show that [the defendant] was so mentally deficient that he was incapable of being able to make a knowing and intelligent waiver.'" *Whittle v. State*, 518 So.2d at 797, quoting *Sasser*, 497 So.2d at 1134.

2.

Smith argues that his statement was involuntary because before his first statement he was not again read his *Miranda* rights. We do not agree.

The record shows that Smith was given his *Miranda* rights on two separate occasions within five hours of making his first statement to Reynolds. This Court has frequently stated:

> "'It should be made clear that once *Miranda's* mandate was complied with . . . it was not necessary to repeat the warnings at the beginning of each successive interview. To adopt an automatic second warning system would be to add a perfunctory ritual to police procedures rather than providing the meaningful set of procedural safeguards envisioned by *Miranda*.'"

Jones v. State, 47 Ala.App. 568, 258 So.2d 910 (Ala.Cr.App.1972). See also *McBee v. State*, 50 Ala.App.

622, 282 So.2d 62 (1973); *Allen v. State*, 53 Ala.App. 66, 297 So.2d 391 (1974), cert. denied, 292 Ala. 707, 297 So.2d 399 (Ala.1974). See also *Anderson v. State*, 339 So.2d 166 (Ala.Cr.App.1976) (*Miranda* warnings given the night before when defendant was arrested; it was not necessary to give *Miranda* warnings again).

We have also stated:

> "In *Hollander v. State*, 418 So.2d 970, 972 (Ala.Cr.App.1982), this court stated:
>
> > "'It is well settled that once *Miranda* warnings have been given and a waiver made, a failure to repeat the warnings before subsequent interrogation will not automatically preclude the admission of an inculpatory response. *Fagan v. State*, 412 So.2d 1282 (Ala.Crim.App.1982); *Smoot v. State*, 383 So.2d 605 (Ala.Crim.App.1980). Whether the *Miranda* warnings must be repeated depends on the facts of each individual case, with the lapse of time and the events which occur between interrogation being relevant factors to consider. *Fagan v. State*, supra; *Jones v. State*, 47 Ala.App. 568, 258 So.2d 910 (1972).'"

Cleckler v. State, 570 So.2d 796, 803 (Ala.Cr.App.1990).

Here, when Smith gave the first statement at approximately 5:00 p.m. he told police that he had nothing to do with the robbery-murder and that Reid had

beaten and robbed Van Dam. This first statement was an exculpatory statement that did not implicate Smith in the robbery-murder. Only five hours had passed since he was taken into custody and Smith had been in Pyle's and Lunceford's custody during this time. The second statement was taken at approximately 8:00 p.m. the same day. Reynolds testified that before Smith made this second statement—in which he admitted that he had hit, and had kicked Van Dam, and had thrown a handsaw at Van Dam, and had held Van Dam down while Reid took his money—he read Smith his *Miranda* rights and Smith signed a waiver of rights form. This wavier is in the record. (Supp. R. 449.) It is undisputed that Smith was given his *Miranda* rights before he made his second inculpatory statement.[7] No violation of *Miranda* occurred here.

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[7] Even if were to conclude that Smith should have been advised of his *Miranda* rights before the first statement, which we do not, we would still hold that the second statement was accompanied by the appropriate *Miranda* warnings and would not be inadmissible on that basis. As this Court stated in *Hogan v. State*, 663 So.2d 1017, 1020 (Ala.Cr.App.1994):

> "We reject the appellant's first argument on the authority of *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), *Cleveland v. State*, 555 So.2d 302, 304 (Ala.Cr.App.1989), and *Scott v. State*, 555 So.2d 763 (Ala.Cr.App.1988).
>
> "In *Scott*, this court approved the following analysis by the trial court:
>
> " 'The Court finds that even if the statement by the defendant to Officer Sharp was inadmissible because of a failure to give the complete warning under Rule 11(A), [Ala.R.Juv.P.,] the second statement to Nesmith and Lee would not necessarily be rendered inadmissible as

3.

Smith argues that his statement was involuntary because, he says, police coerced him into making the statement by telling him that Reid had implicated him in the robbery-murder.

Initially, we observe that there was no objection on this basis at the suppression hearing. Our review is limited to plain error. Rule 45A, Ala.R.App.P.

We have stated that telling a suspect that he has been implicated in a crime is not coercive. *C.C. v. State*, 586 So.2d 1018 (Ala.Cr.App.), on remand, 591 So.2d 156 (Ala.Cr.App.1991). "Confronting a defendant with evidence of guilt is not coercion on the part of police and does not render a subsequent confession involuntary." *Jackson v. State*, 562 So.2d 1373, 1382 (Ala.Cr.App.1990).

VIII.

Smith argues that the trial court committed reversible error when it asked the coroner about the number of distinct wounds that she had counted on Van Dam's body. He contends that this information was relevant only to the penalty phase issue—to the question whether the crime was especially heinous,

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a result. In *Oregon v. Elstad*, 470 U.S. 298, 105 S.Ct. 1285, 84 L.Ed.2d 222 (1985), the United States Supreme Court held that a statement given after proper *Miranda* warnings is not tainted by an earlier unwarned statement where both statement are voluntary. . . .'"

atrocious, or cruel—and was highly inflammatory at the guilt phase of the proceedings.

At the end of Dr. Goodin's testimony the following occurred:

> "The Court: Doctor, if I may, in the course of your autopsy, how many separate and distinct injuries were you able to document?
>
> "Mr. Byrd [defense counsel]: Your, Honor, I would respectfully object to that as being a little bit too vague. I would ask it be limited to certain and distinct injuries caused by some force inflicted by a human being, not say indefinite as to all the different injuries.
>
> "The Court: I will rephrase the question at your request.
>
> "Mr. Byrd: Thank you, sir.
>
> "The Court: If there has been testimony in this case that Mr. Van Dam was beaten, was assaulted with a saw and struck with certain tools, can you tell us how many separate and distinct injuries your external examination documented?
>
> "Mr. Byrd: Before we receive an answer, Your Honor, may we approach?
>
> "The Court: Yes.
>
> "(At the sidebar:)
>
> "The Court: Okay. What's on your mind?

> "Mr. Byrd: Judge, with regards to the Court's question we would submit that by asking questions of fact from this particular witness and that particular question would be helping the State with [its] case and the question is vague, Your Honor.
>
> "The Court: First of all, let me bring to your attention Rule 614 of the Alabama Rules of Evidence which gives the Court permission not only to question but to interrogate. All right. Secondly, there has been some caselaw most recently *K–Mart Corporation & Ray Jones v. Joyce Kyles*, [723 So.2d 572 (Ala. 1998)] where this issue was raised. And the Court of—excuse me. The Alabama Supreme Court affirmed the right of the judge to ask questions."

(R. 626–27.)

The above quote from the record clearly shows that Smith did not object to this question at trial on the basis he now raises on appeal. Thus, we are limited to a plain-error analysis. Rule 45A, Ala.R.App.P.

As the trial court stated above, a trial judge has the right to ask questions of a witness. That right is provided in Rule 614(b), Ala.R.Evid. and has been recognized in the case cited by the judge, *K–Mart Corp. v. Kyles*, 723 So.2d 572 (Ala.1998). The trial court had the right to ask the coroner this question. However, Smith argues on appeal that the answer to the question was relevant only to a penalty-phase issue—whether the

crime was especially heinous, atrocious, or cruel, as compared to other capital cases.

Dr. Goodin testified that there were 35 different injuries on Van Dam's body. We fail to see how the coroner's testimony could possibly have risen to the level of plain error based on the record before us. Dr. Goodin, before this question had been asked, testified in depth concerning the different and distinct injuries suffered by the victim and the fact that the victim did not die a slow death. Also, the jury was shown photographs of the victim's body and had firsthand knowledge of the different injuries. Furthermore, in both of Smith's statements he told police that Van Dam was beaten repeatedly. There is absolutely no question that Van Dam suffered numerous and severe injuries. We are confident that the trial court's conduct here did not amount to error, much less plain error.

IX.

Smith argues that the admission of what he alleges is hearsay evidence amounts to reversible error. He cites several different places in the record in support of this contention.

A.

Smith argues, citing *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968),[8] that it

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[8] "In *Bruton v. United States*, 391 U.S. 123, 88 S.Ct. 1620, 20 L.Ed.2d 476 (1968), the United States Supreme Court held that

was reversible error to allow hearsay testimony during Russell Harmon's testimony concerning what Reid had told him about the robbery-murder. During Harmon's testimony the following occurred:

> "Q [by prosecutor]: Russell, was there any conversation about any money from the dead man?
>
> "A: They had said that they had got—that they had
>
> "Mr. Hughes [defense counsel]: Your Honor, it if please the Court, I would object to 'they,' that he state specifically who said what.
>
> "The Court: That's fair. Can you tell us who said what about the money, if anything was said about the money?
>
> "A: Yes, sir. Larry and then Jody was mainly agreeing with Larry. Jody did not come right out and say anything about the money, no."

(R. 343–44.)

Initially, we observe that in the above exchange defense counsel not only did not object to the elicited testimony but asked that the witness identify who had made the statement. Counsel acquiesced to the admission of this testimony and cannot now complain on appeal that any error occurred. "A party may not

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admission of the confession of a nontestifying defendant, implicating his codefendant in the crime, violated the codefendant's rights under the Confrontation Clause of the Sixth Amendment, notwithstanding any cautionary instructions to the jury." *Sneed v. State*, 783 So.2d 841, 847 (Ala.Cr.App.1999).

predicate an argument for reversal on 'invited error,' that is, 'error into which he has led or lulled the trial court.'" *Atkins v. Lee*, 603 So.2d 937 (Ala.1992). We have applied the invited-error rule to capital cases. *Ex parte Bankhead*, 585 So.2d 112, 126 (Ala.), on remand, 585 So.2d 133 (Ala.Cr.App.1991), after remand, 625 So.2d 1141 (Ala.Cr.App.1992), rev'd on other grounds, 625 So.2d 1146 (Ala.), on remand, 625 So.2d 1149 (Ala.Cr.App.1993). "'An invited error is waived, unless it rises to the level of plain error.'" *Perkins v. State*, [Ms. CR-93-1931, November 19, 1999] ___ So.2d ___, ___ (Ala.Cr.App.1999), quoting *Bankhead*, 585 So.2d at 126.

Here, there is no question that the above-quoted exchange did not rise to the level of plain error. The information elicited from this witness had been volunteered by Smith in his statement to police. Smith said that he held Van Dam down while Reid took the money out of his pockets.

Smith also objects to the following testimony:

"Q [defense counsel]: Can you recall exactly what Jody said and can you recall exactly what Larry said?

"A [Harmon]: No, ma'am. No, ma'am.

"Q: Any [reason] why can't you separate them?

"A: Well, because it was a year ago and I don't sit and dwell on—I mean, I don't sit and think about it.

> "Q: Other than that the guy was left for dead, were you told anything else about his condition?
>
> "A: No ma'am, just beat bad. He was just beat bad.
>
> "Q: And who told you something about a mattress, do you recall who that was?
>
> "A: I think—I'm not for sure, but I think Larry did.
>
> > "Mr. Hughes: Well, that answers the question. If he's not for sure he's just speculating and guessing and we would object to it.
> >
> > "The Court: It's sustained. You could lay a predicate, though, I mean.
>
> "Q: Do you recall who said anything about a mattress?
>
> "A: I believe it was Larry."

(R.345–46.)

Initially, we note that counsel did not raise the same objection to the testimony at trial that he now raises on direct appeal. We are therefore limited to a plain-error analysis. Rule 45A, Ala.R.App.P.

Smith argues that the above exchange resulted in the admission into evidence of hearsay about Reid's out-of-court statements implicating Smith. Our reading of the exchange does not reveal that the testimony suggests that Reid implicated anyone but himself.

Also, this same information was contained in Smith's statements to police. "'Testimony which may be apparently illegal upon admission may be rendered prejudicially innocuous by subsequent or prior lawful testimony to the same effect or from which the same facts can be inferred.'" *McCorvey v. State*, 642 So.2d 1351, 1354 (Ala.Cr.App.1992), quoting *Thompson v. State*, 527 So.2d 777, 780 (Ala.Cr.App.1988). See also *Ex parte Bush*, 474 So.2d 168 (Ala.1985); *Parker v. State*, 587 So.2d 1072 (Ala.Cr.App. 199 1), on remand, 610 So.2d 1171 (Ala.Cr.App.), aff'd, 610 So.2d 1181 (Ala. 1992), cert. denied, 509 U.S. 929, 113 S.Ct. 3053, 125 L.Ed.2d 737 (1993); *Gulledge v. State*, 526 So.2d 654 (Ala.Cr.App.1988).

B.

Smith argues that the trial court erred in allowing Sgt. Pyle to testify about what Smith's mother told him. The following occurred during Pyle's testimony:

> "Q [prosecutor]: And what did you search the house—what areas of the house did you look in?
>
> "A: We searched the area that Ms. Smith indicated was the Defendant's bedroom area and we looked in the washing machine.
>
> "Q: And where was the washing machine located?
>
> "A: It was—if you walk in you're in a living room with a kitchen to the left and a small

> hallway. The washer and dryer were in that small hallway.
>
> "Q: And were the washer—was the washer running?
>
> "A: Yes, ma'am, it was in a—like a spin cycle.
>
> "Q: And what made you search the washing machine?
>
> "A: Well, we were looking, from what we had learned form the people we had talked to earlier, for some clothes and when we got to the house, Lunceford and myself, we were talking to Ms. Smith about where Jody [Smith] had been, what he had been doing. I could hear the washer running and I asked her was she washing any amount of clothes in there and she said no, Jody was.
>
> "Q: And because of that did you make any immediate request of Ms. Smith?
>
> "A: I asked her if she would mind stopping that washer right away.
>
> "Q: And did she stop the washing machine?
>
> "A: Yes, ma'am."

(R. 408–09.) Smith contends that Pyle's testimony that Smith's mother told him that Smith was washing clothes was hearsay, was highly prejudicial, and resulted in his being denied his right to confrontation.

There was no objection to the admission of this testimony; thus, we apply a plain-error review. Rule 45A, Ala.R.App.P.

A review of the above-quoted portion of the record shows that this statement was elicited to establish the reasons for the officer's action and the reasons the officers searched certain areas of the trailer. It was not offered for the truth of the matter asserted and was not hearsay. "The fact of the conversations in this case was offered to explain the officer's actions and presence at the scene—not for the truth of the matter asserted. Accordingly, it was not hearsay. *Clark v. City of Montgomery*, 497 So.2d 1140, 1142 (Ala.Cr.App.1986)." *Thomas v. State*, 520 So.2d 223 (Ala.Cr.App.1987).

Moreover, Smith told police in his statements that he had washed the clothes he had worn during the robbery-murder. Thus, even if this evidence was hearsay, it was cumulative of other evidence that was presented though Smith's own admissions to police.

> "Testimony that may be apparently inadmissible may be rendered innocuous by subsequent or prior lawful testimony to the same effect or from which the same facts can be inferred. *McFarley v. State*, 608 So.2d 430, 433 (Ala.Crim.App.1992); *Thompson v. State*, 527 So.2d 777, 780 (Ala.Crim.App.1988). Mary Evans's testimony that Mary Enfinger yelled for her to get her gun from under the bed is merely cumulative of evidence that had already been elicited by the appellant's counsel. Even if Mary Evans's testimony were inadmissible hearsay, the statement was cumulative of prior evidence and any error that may have resulted was harmless."

Yeomans v. State, 641 So.2d 1269, 1272–73 (Ala.Cr.App.1993). See also *Flynn v. State*, 745 So.2d 295 (Ala.Cr.App.1999).

X.

Smith next argues that the trial court erred in not allowing him to cross-examine State's witness M.A. about where she was residing at the time of trial to show her bias in favor of the State. See *Davis v. State*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974). It is apparent from the record that Smith sought to elicit that M.A. had been adjudicated a juvenile offender and that at the time of trial she was in the custody of juvenile correctional authorities because her probation had been revoked. The following occurred during her testimony:

> "Q [defense counsel]: [M.A.], where do you live today?
>
> "Ms. Davis [prosecutor]: Judge, we're going to object. Can we approach?
>
> "The Court: Sure.
>
> "(At the sidebar:)
>
> "Mr. Byrd [defense counsel]: Judge, she's been revoked on a drug violation.
>
> "The Court: You can ask her if she was using drugs at the time that this occurred. That's pertinent. But as to where she's living now, I sustain the objection.
>
> "Mr. Byrd: Well, Judge, that goes to her credibility. *It is offered strictly for*

> *impeachment and would go directly to her credibility.*
>
> "The Court: Well, it might—it might affect her credibility, but the question is consistent with the Rules of Evidence, is that a proper mode of impeachment, and I don't think it is."

(R. 369) (emphasis added).

Smith argues that this evidence was admissible to establish any possible bias M.A. might have in favor of the State. This specific argument was not raised during trial and Smith made no attempt to argue that M.A. had made any deal with the State that would result in her being biased. Smith made no offer of proof that the juvenile probation revocation would be proof of bias. We have held that an offer of proof is necessary before we can review a trial court's ruling on the limitation of cross-examination. See *M.T. v. State*, 677 So.2d 1223 (Ala.Cr.App.1995); *Myers v. State*, 601 So.2d 1150 (Ala.Cr.App.1992).

Other jurisdictions have held that because of the restrictive holding of *Davis*, and the fact that juvenile records may not be used for impeachment of general credibility, an offer of proof is essential to preserve this issue for an appellate court. In *Smith v. United States*, 392 A.2d 990 (D.C.Ct.App.1978), the issue before the court was whether the lower court erred in not allowing a State's witness, who had identified the accused as the robber and had picked him out of a lineup, to be cross-examined about the fact that the witness, at the

time of trial, was incarcerated in a juvenile facility. The *Smith* Court stated:

> "In the case at bar, counsel for appellant did not proffer, nor does the record indicate any reason why Mr. Thames' juvenile record or place of residence would make his testimony partial or biased. Hence, the proffered cross-examination here was intended simply as a general impeachment of the witness' credibility.
>
> "There is an inherent difference between cross-examination intended as a general attack on the credibility of a witness and cross-examination directed toward revealing possible bias, prejudices, or ulterior motives of a witness. See *Davis v. Alaska*, [415 U.S. 308,] 316, 94 S.Ct. 1105[, 39 L.Ed.2d 347 (1974)]; *Springer v. United States*, [388 A.2d 846] at 855 [(D.C.1978)]; *Gillespie v. United States*, D.C.App., 368 A.2d 1136, 1137 (1977).
>
> "'[B]ias is always a proper subject of cross-examination.' *Hyman v. United States*, D.C.App., 342 A.2d 43, 44 (1975). And, the curtailment of such cross-examination by a trial court must be reviewed in terms of whether it is constitutional error. See *Davis v. Alaska*, supra 415 U.S. at 318, 94 S.Ct. 1105; *Brookhart v. Janis*, supra 384 U.S. at 3, 86 S.Ct. 1245; *Springer v. United States*, supra at 856; *Gillespie v. United States*, supra at 1138. However, the Constitution does not confer a right in every case to impeach the general credibility of a witness through cross-examination

> about his past delinquency adjudications or criminal convictions. *Davis v. Alaska*, supra 415 U.S. at 321, 94 S.Ct. 1105 (Stewart, J., concurring). In fact, in the context of impeachment of general credibility, evidence of a prior conviction usually is inadmissible if the conviction resulted from a juvenile adjudication. See *Brown v. United States*, supra[, 119 U.S.App.D.C. 203, 338 F.2d 543 (1964)]. See also Fed.R.Evid. 609(d); *United States v. Decker*, 543 F.2d 1102, 1104–05 (5th Cir.1976), cert. denied sub nom. *Vice v. United States*, 431 U.S. 906, 97 S.Ct. 1700, 52 L.Ed.2d 390 (1977); *United States v. Lind*, 542 F.2d 598, 599 (2d Cir.1976), cert. denied, 430 U.S. 947, 97 S.Ct. 1585, 51 L.Ed.2d 796 (1977). Hence, we conclude that the trial court's restriction of the impeachment of Mr. Thames' general credibility by cross-examination regarding his juvenile record was not inconsistent with the Sixth Amendment's confrontation clause.
>
> ". . . .
>
> "We are not convinced on the record of this case, that trial court abused its discretion. We cannot perceive that such impeachment might have affected the outcome."

392 A.2d at 992–93. See also *State v. Wilson*, 16 Wash.App. 434, 557 P.2d 18, 21 (1976), review denied, 88 Wash.2d 1015 (1977) ("If it was the purpose of defense counsel to impeach the testimony of Thomas by demonstrating his bias within the rule of *Davis*, it was incumbent upon him to make this purpose known to the trial court in his offer of proof."); *Bellinder v. State*,

69 Wis.2d 499, 230 N.W.2d 770 (1975) ("The problem created by an inadequate record is particularly apparent in this case because of the limited factual applicability of *Davis v. Alaska*, supra.").

The above-quoted portion of the record reflects that defense counsel sought to elicit this testimony for the purpose of attacking M.A.'s credibility—not to show any bias that M.A. had in favor of the State. This conclusion is supported by the record. Before trial Smith filed a motion styled as a "Motion to Compel Disclosure of Existence and Substance of Promises of Immunity, Leniency, or Preferential Treatment." (R. 143.) This motion requested the State to disclose any deals that it had made with any State witnesses. This motion was granted, and at a pretrial hearing the following occurred:

> "The Court: . . . Mr. Brandyburg [prosecutor], do you know if anyone would be testifying in this case pursuant to any sort of a bargain with the district attorney?
>
> "Mr. Brandyburg: Judge, based on the information and belief, to this point there are no agreements. The State is aware of its obligations to reveal any agreements, as such, as they arise, and I'm sure Ms. Davis [prosecutor] will do that. At this point, no, sir, there are none.
>
> ". . . .
>
> "Ms. Davis: Your Honor, for the record, there have been no agreements with any parties in this case."

(R. 4–10.) The record clearly shows that M.A. was not offered any reward from the State in exchange for her testimony at Smith's trial.

Based on the application of the above principles of law, our review of this issue is limited to a plain-error analysis. Rule 45A, Ala.R.App.P. However, we emphasize that our affirmance of this issue is not dependent on application of the plain-error doctrine. The trial court's ruling was not error, much less, plain error.

Smith argues, citing the United States Supreme Court's opinion in *Davis v. Alaska*, 415 U.S. 308, 94 S.Ct. 1105, 39 L.Ed.2d 347 (1974), that he was denied his Sixth Amendment rights of confrontation on cross-examination when the trial court sustained the State's objection to the question concerning M.A.'s residence. In *Davis*, the state's key witness, a juvenile, identified the defendant as the man he had seen on a road near his family's house at the point where a stolen safe was later discovered. At the time of the defendant's trial and at the time of the events the witness testified to, the witness was on probation, having been adjudicated a delinquent for two burglaries. The defendant argued that he should have been allowed to reveal to jurors the witness's status as a juvenile probationer to show that the witness had made a faulty identification of the defendant in an effort to shift attention away from himself as a suspect in the crime and because he "might have been subject to undue pressure from the police and made his identifications under fear of possible probation revocation." 415 U.S. at 311, 94 S.Ct. 1105. The trial court granted the state's motion to keep

the witness's juvenile records secret. The Supreme Court, reversing the trial court's judgment, held that the defendant was entitled to introduce the witness's juvenile record to support an inference that the witness was biased because of his "vulnerable status as a probationer," *Davis*, 415 U.S. at 318–19, 94 S.Ct. 1105, and that the exclusion of this evidence violated the defendants right of confrontation and cross-examination.

Davis, however, does not stand for the proposition that a juvenile witness can be cross-examined as to prior juvenile adjudications for impeachment purposes; it stands for the proposition that such rights of cross-examination are for the purpose of showing bias or prejudices under the guidelines therein set forth. The defendant in *Davis* made it clear that he would not introduce the witness's juvenile adjudication for purposes of general impeachment of his character as a truthful person but, rather, to show the bias and prejudice of the witness. Here, however, Smith's counsel argued only that M.A.'s probation revocation "goes to her credibility. It is offered strictly for impeachment and would go directly to her credibility." On appeal, in an effort to bring himself within *Davis*, Smith suggests that his trial counsel was attempting to bring out matters that would have shown that M.A., because she was presumably under the control of juvenile authorities, was induced by bias to give testimony for the State. However, counsel for Smith did not proffer, nor does the record indicate any reason why, M.A.'s juvenile record or place of residence would make her testimony partial or biased in favor of the State. In fact the record

supports the conclusion that the State had no agreement with M.A. in exchange for her testimony.

This case is distinguishable from the holding in *Davis* for several very significant and distinct reasons, and we believe that the facts of this case do not fall under the restrictive holding of *Davis.* Unlike the juvenile in *Davis*, M.A.'s probation had already been revoked. Any conceivable help she could have expected from the State would be speculative at best and not supported by the record in this case. M.A. had no state action pending against her and was not in the "vulnerable status [of] a probationer." *Davis*, 415 U.S. at 318–19, 94 S.Ct. 1105. Also, one major distinction not present in this case, that was noted in *Davis*, is that the juvenile in *Davis* was an "crucial" eyewitness to the accused's presence near the scene of the crime when it occurred and possibly a suspect in the crime. The *Davis* court noted, "serious damage to the strength of the State's case would have been a real possibility had petitioner been allowed to pursue this line of inquiry." *Davis*, 415 U.S. at 319, 94 S.Ct. 1105. Here, every material aspect of M.A.'s testimony was either corroborated by other witnesses or corroborated by Smith's confession. Most significant is the fact that M.A. was not a suspect in the case and was not Smith's accomplice in the robbery-murder.

We find support for this holding in Alabama law. Recognizing the competing interests of protecting the anonymity of juvenile offenders versus the right of an accused to confront the witnesses against him, Alabama has limited the Supreme Court's holding in

Davis, by holding that, although juvenile records may properly be used to show a witness's bias, the use of juvenile records for purposes of general impeachment is disallowed. Rule 609, Ala.R.Evid., addresses the admissibility of prior convictions to impeach a witness. Rule 609(d), states: "Evidence of juvenile or youthful offender adjudications is not admissible under this rule." Also, § 12–15–72(a)(b), Ala.Code 1975, provides that a juvenile adjudication is not a conviction and is not admissible against a juvenile in any court. Further, Alabama caselaw has consistently distinguished the restrictive holding in *Davis.* See *Ex parte Lynn*, 477 So.2d 1385 (Ala.1985), on remand, 477 So.2d 1388 (Ala.Cr.App.1985), after remand, 543 So.2d 704 (Ala.Cr.App.1987), aff'd, 543 So.2d 709 (Ala.1988), cert. denied, 493 U.S. 945, 110 S.Ct. 351, 107 L.Ed.2d 338 (1989) (case reversed because the defendant was not allowed to cross-examine accomplice about his plea bargain with the state in exchange for his testimony against his accomplice; the Court noted that there is a difference between general impeachment of a juvenile witness and attacking the witness's credibility because of bias); *Ex parte McCorvey*, 686 So.2d 425 (Ala.), on remand, 686 So.2d 426 (Ala.Cr.App.1996) (Supreme Court held that there was no error in limiting the cross-examination of defendant about his probationary status as youthful offender); *Rowell v. State*, 647 So.2d 67 (Ala.Cr.App.1994); *Kirby v. State*, 581 So.2d 1136 (Ala.Cr.App.1990), (*Davis* is "'carefully limited and [was] not intended to mandate a sweeping constitutional intrusion into state evidence law'"); *Hunt v. State*, 453 So.2d 1083 (Ala.Cr.App.1984), overruled

on other grounds, *Ex parte Marek*, 556 So.2d 375 (Ala. 1989) (the court declined to apply the holding in *Davis* because juvenile witness was no longer on probation, his probation had been terminated five years before trial); and *Alderson v. State*, 370 So.2d 1119 (Ala.Cr.App.1979) ("holding in *Davis* was limited, and was not meant to be a general license to impeach a witness by past juvenile delinquency adjudication in all situations"). Cf. *May v. State*, 710 So.2d 1362 (Ala.Cr.App.1997) (court did not improperly deny defendant access to juvenile records because juvenile witness had no pending actions against him at the time of trial).

Even if we were to hold that *Davis* mandated the introduction of evidence of M.A.'s juvenile probation revocation, we believe that any possible error in its exclusion was harmless beyond a reasonable doubt based on the Supreme Court's decision in *Delaware v. Van Arsdall*, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986).

Before the Supreme Court released *Davis*, that Court, on two occasions, examined the right of an accused to cross-examine the witnesses who testify against him. See *Smith v. Illinois*, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed.2d 956 (1968), and *Alford v. United States*, 282 U.S. 687, 51 S.Ct. 218, 75 L.Ed. 624 (1931). The Court in *Alford*, citing prior case-law, noted that "'a denial of cross-examination without waiver . . . would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" 390 U.S.

at 131, 88 S.Ct. 748, quoting *Brookhart v. Janis*, 384 U.S. 1, 3, 86 S.Ct. 1245, 16 L.Ed.2d 314 (1966).

However, in the years since *Smith, Alford*, and *Davis*, the Supreme Court has clearly eschewed a per se Confrontation Clause analysis in favor of a harmless-error analysis. In *Delaware v. Van Arsdall*, the Supreme Court specifically limited its holdings in those cases and held that the denial of "the opportunity to cross-examine an adverse witness does not fit within the limited category of constitutional errors that are deemed prejudicial in every case." The *Van Arsdall* Court stated:

> "We hold that the constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to a *Chapman* [*v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967),] harmless-error analysis. The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination

> otherwise permitted, and, of course, the overall strength of the prosecution's case."

475 U.S. at 684, 106 S.Ct. 1431.

Other states have, since the release of *Van Arsdall*, applied the harmless-error analysis to a trial court's curtailment of cross-examination to show bias. See *People v. Nutall*, 312 Ill.App.3d 620, 245 Ill.Dec. 515, 728 N.E.2d 597 (2000); *State v. Roberts*, 97 Wash.App. 1069 (1999); *People v. Kliner*, 185 Ill.2d 81, 235 Ill.Dec. 667, 705 N.E.2d 850 (1998), cert. denied, 528 U.S. 830, 120 S.Ct. 86, 145 L.Ed.2d 73 (1999); *People v. Jones*, 209 Mich.App. 212, 530 N.W.2d 128 (1995), appeal denied, 450 Mich. 955, 549 N.W.2d 560 (1995); *State v. Davis*, 256 Kan. 1, 883 P.2d 735 (1994); *State v. Bowen*, 254 Kan. 618, 867 P.2d 1024 (1994); *State v. Howell*, 868 S.W.2d 238 (Tenn.1993), cert. denied, 510 U.S. 1215, 114 S.Ct. 1339, 127 L.Ed.2d 687 (1994).

An application of the principles set out in *Van Arsdall* more than supports a finding of harmless error. The most damaging evidence that M.A. testified to was the following:

> "[Smith] said they went off drinking and that they had hit the man in the head with a 2 x 4 and struck him in the face a couple of times. They ended up pulling off in the woods, they drug him about a mile away from his vehicle and Larry had walked away when Jody struck him. Jody—Jody told me that he had stabbed the man in the back, cut an 'x' in his back, hit him in the knees with a hammer so he

> couldn't' walk and sliced his throat with a handsaw."

(R. 361.) Smith himself told police in his confession that he kicked Van Dam in the ribs several times,[9] hit him on the head with his fist, probably hit him with a hammer but he could not actually remember because he suffered from blackouts, threw a handsaw at him, and held him down while Reid took the money from his pockets. He said that the two then left Van Dam's body under a mattress after Smith suggested that they put Van Dam's body in a nearby lake. Smith's own words reflect that he aided and abetted Reid in the robbery-murder and most likely, based on the coroner's testimony and on Smith's statements, struck the fatal blows when he kicked Van Dam in the ribs.

Smith's own words and actions indicate his intent to rob and to kill Van Dam. Smith tried initially to put the blame on Reid; he then admitted that he and Reid intended to rob Van Dam. Smith suggested that the two put the body in a nearby lake, and Smith said that he was mad at Van Dam and that he kicked him. Smith indicated that he knew he had messed up because he had just been released from prison two days before the murder, and Smith said that he held Van Dam down

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[9] The coroner testified that the rib fractures that caused the collapsed lung were probably the most immediate cause of death. "[W]hen you fracture multiple ribs and you no longer have the integrity of the space that holds your lung the lung will collapse and that's probably what happened here. He has probably a pneumothorax and a collapsed lung and his rib fractures are probably his most life-threatening injury." (R. 623.)

while Reid went through his pockets and got his money. Even if Smith did not actually strike the fatal blow, he is not excused from liability for the robbery-murder under Alabama law. We have held: "As long as the appellant intentionally promoted or aided in the commission of the killing itself, whether he actually committed the murder does not affect his liability or guilt." *Price v. State*, 725 So.2d 1003 (Ala.Cr.App.1997), aff'd, 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999).

Also, Russell Harmon corroborated M.A.'s testimony and testified that Smith and Reid approached him on the day of the robbery-murder and asked if he wanted to participate in robbing Van Dam. He said that when he spoke to the two later that day they both said that they had beaten and robbed Van Dam. Harmon said that Smith told him that he had cut Van Dam with a saw. On cross-examination Harmon did say he was not absolutely sure whether Smith or Reid made this statement. However, Harmon reiterated on cross-examination that Smith told him that he had "hit the man, beat the man—hit the man in the head and cut him." (R. 340.)

Other aspects of M.A.'s testimony were corroborated by police testimony concerning the crime scene and testimony that Smith had pawned the tools he had taken from Van Dam.

The record also reflects that the trial court allowed M.A. to be questioned concerning her use of drugs in 1997 and the fact that she had smoked marijuana on

the day of the robbery-murder. Defense also questioned M.A. about the specifics of her direct examination. Here, there was not a total denial of cross-examination.

Moreover, the most incriminating evidence offered against Smith was not M.A.'s testimony but Smith's own confession of his participation in the robbery-murder. Certainly, a confession is the most damaging and compelling evidence the State may present against an accused.[10] This is abundantly clear when reviewing the history of the *Miranda* decision. M.A.'s testimony was not the most "crucial" piece of evidence the State presented against Smith.

We hold that the failure to allow M.A. to be questioned about the fact that her juvenile probation had been revoked was harmless.

XI.

Smith argues, in one paragraph in his brief to this Court, that the trial court erred in allowing what he argues were cumulative and gory photographs of the victim's body to be introduced at trial because, he says, they were so prejudicial that their admission denied him a fair trial.

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[10] The Alabama Supreme Court in *Ex parte Cothren*, 705 So.2d 861 (Ala.1997), cert. denied, 523 U.S. 1029, 118 S.Ct. 1319, 140 L.Ed.2d 482 (1998), characterized a confession as the "centerpiece" of the State's case against an accused.

"'Photographic evidence is admissible in a criminal prosecution if it tends to prove or disprove some disputed or material issue, to illustrate some relevant fact or evidence, or to corroborate or dispute other evidence in the case. Photographs that tend to shed light on, to strengthen, or to illustrate other testimony presented may be admitted into evidence. *Chunn v. State*, 339 So.2d 1100, 1102 (Ala.Cr.App.1976). To be admissible, the photographic material must be a true and accurate representation of the subject that it purports to represent. *Mitchell v. State*, 450 So.2d 181, 184 (Ala.Cr.App.1984). The admission of such evidence lies within the sound discretion of the trial court. *Fletcher v. State*, 291 Ala. 67, 277 So.2d 882, 883 (1973); *Donahoo v. State*, 505 So.2d 1067, 1071 (Ala.Cr.App.1986) (videotape evidence). Photographs illustrating crime scenes have been admitted into evidence, as have photographs of victims and their wounds. E.g., *Hill v. State*, 516 So.2d 876 (Ala.Cr.App.1987). Furthermore, photographs that show the external wounds of a deceased victim are admissible even though the evidence is gruesome and cumulative and relates to undisputed matters. E.g., *Burton v. State*, 521 So.2d 91 (Ala.Cr.App.1987). Finally, photographic

> evidence, if relevant, is admissible even if it has a tendency to inflame the minds of the jurors. *Hutto v. State*, 465 So.2d 1211, 1212 (Ala.Cr.App.1984).'
>
> "*Ex parte Siebert*, 555 So.2d 780, 783–84 (Ala.1989), cert. denied, 497 U.S. 1032, 110 S.Ct. 3297, 111 L.Ed.2d 806 (1990). See also *Kuenzel v. State*[, 577 So.2d 474 (1990)]; *Ivery v. State*[, 686 So.2d 495 (1996)]; C. Gamble, *McElroy's Alabama Evidence*, § 207.01(2) (5th ed.1996). We have examined the photographs introduced into evidence in this case, and applying the legal principles set out above to the facts of this case, we conclude that the trial court did not abuse its discretion in admitting the photographs into evidence at either the guilt phase or the sentencing phase of the trial."

Ingram v. State, 779 So.2d 1225, 1273 (Ala.Cr.App.1999).

XII.

Smith argues that the trial court erred in denying his motion for a new trial after a State's witness testified that Smith had previously been in prison. The following occurred during the direct examination of Patricia Milbeck:

> "Q: [prosecutor]: Now, at that time did you know Jody?
>
> "A: Yes, sir, by writing him when he was in prison.

> "Mr. Hughes [defense counsel]: Your Honor, I object to that."

(R. 271.)

After this occurred the trial court held a hearing outside the presence of the jury. Smith then moved for a mistrial because, he argued, the error could not be corrected with curative instructions. The trial court took the motion under advisement until later in the day and then gave the jury the following curative instruction:

> "Members of the jury, the last response given by the witness to a question from Mr. Cherry was not only inappropriate and improper, but it was not a legal response. This Defendant is on trial because he is alleged to have committed a particular offense and as we talked about both yesterday and today, your sole focus is on the question of whether he is guilty or not guilty of that offense. At this stage of these proceedings his past, whatever it might be, is of no legal significance whatsoever."

(R. 278.) The trial court then polled the jury to determine if the members could follow the instructions. Each juror indicated that he or she could.

The Court then held a hearing on the issue whether the comment made by the witness warranted a mistrial. After considering arguments from both sides, the court held that there was no manifest necessity for a mistrial. (R. 310.) We agree.

Smith, citing *Ex parte Sparks*, 730 So.2d 113 (Ala.1998), on remand, 730 So.2d 117 (Ala.Cr.App.1999), argues that the presentation of evidence of a prior offense could not be eradicated by a curative instruction and automatically warrants reversal. However, we believe that Smith's reliance on *Sparks* is misplaced. See *Sullivan v. State*, 742 So.2d 202 (Ala.Cr.App.1999).

In *Sparks*, the accused was on trial for driving under the influence of alcohol and running a stop sign. Sparks testified in his own defense and denied that he had been drinking and attributed his failing his field sobriety test to problems with his knees. The city prosecutor, on cross-examination, asked Sparks if he had previously been convicted of driving under the influence. There was an objection and a motion for a mistrial. The trial court denied the motion and gave the jury a curative instruction. The Supreme Court reversed the driving-under-the-influence conviction, stating that it could not condone "a prosecutor's attempt to elicit testimony about a defendant's prior convictions in violation of the general exclusionary rule against such evidence." 730 So.2d at 115. The Court also noted that the prejudice could not be eradicated because the prior conviction was for the same offense the defendant was presently on trial for.

Here, the question asked by the prosecutor did not call for evidence that Smith had a prior record. The question called for a yes or no answer—the witness, on her own volition, elaborated on that answer; thus, her answer was nonresponsive to the prosecutor's question.

> "We find that Claiborne's references to the appellant's having been in prison, which were clearly unresponsive to the questions posed are comparable to remarks that we have held can be eradicated by curative instructions." See, e.g., *Bowers v. State*, 629 So.2d 793, 794 (Ala.Cr.App.1993) (where 'trial court, of its own volition, instructed the jurors to disregard [police detective's unresponsive answer that he "understood the defendant was facing charged in Milwaukee"] and questioned jurors to ensure that they could disregard the statement,' the trial court's actions 'cured any possible error'); *Garnett v. State*, 555 So.2d at 1155 ('any prejudice arising from [prosecutor's] question [indicating that murder defendant had been arrested for beating his wife] . . . was both capable of eradication and was eradicated by the trail court's prompt action' in instructing the jurors to disregard the question and in polling the jurors to ascertain that they could disregard the question); *Floyd v. State*, 412 So.2d 826, 830 (Ala.Cr.App.1981) ('the trial court's action in immediately instructing the jury to disregard the prosecution's vague reference to another unspecified crime cured any potential error prejudicing the appellant's case')."

Stanton v. State, 648 So.2d 638, 643 (Ala.Cr.App.1994).

Moreover, we note that there was other evidence presented showing that Smith had been in prison. The pawnshop employee testified that when Smith pawned the power tools he showed his Alabama Department of

Corrections identification card. Also, Smith said in his first statement that he had just gotten out of prison on the Friday before the robbery-murder on Sunday.

XIII.

Smith argues that there was insufficient evidence to convict him of capital murder as charged in the indictment because, he says, there was no evidence that he was armed with a power saw at the time of the robbery-murder.

The indictment against Smith read as follows:

> "The Grand Jury of said County charge, that, before the finding of this indictment Joseph Clifton Smith whose name is to the Grand Jury otherwise unknown than as stated, did in the course of committing the theft of lawful United States Currency, the amount and denomination not known to the Grand Jury, used force against the person of Durk Van Dam, with intent to overcome Durk Van Dam's physical power of resistance which Joseph Clifton Smith was armed with a deadly weapon or dangerous instrument, to-wit: a power tool, in violation of § 13A–8–41 of the Code of Alabama. Smith did with intent to cause the death of Durk Van Dam cause the death of Durk Van Dam by hitting him about the head and body with an object or objects unknown to the Grand Jury, in violation of § 13A–5–40(2) of the Code of Alabama, against the peace and dignity of the State of Alabama."

(R. 6.)

What Smith fails to consider is that an indictment encompasses the conduct of an accomplice as well as a principal. As we stated in *Price v. State*, 725 So.2d 1003, 1055 (Ala.Cr.App.1997), aff'd, 725 So.2d 1063 (Ala.1998):

> "[I]n Alabama, an individual who is present with the intent to aid and abet in the commission of an offense is as guilty as the principle wrongdoer. § 13A–2–20, –23, Code of Alabama 1975. See *Stokley v. State*, 254 Ala. 534, 49 So.2d 284 (1950); *Robinson v. State*, 335 So.2d 420 (Ala.Cr.App.1976), cert. denied, 335 So.2d 426 (Ala.1976); *Heard v. State*, 351 So.2d 686 (Ala.Cr.App.1977); *Hill v. State*, 348 So.2d 848 (Ala.Cr.App.1977), cert. denied, 348 So.2d 857 (Ala. 1977). 'A conviction of one charged in the indictment with having been the actual perpetrator of a crime is authorized on proof of a conspiracy or that the accused aided and abetted in the commission of the crime. *Stokley v. State*, 254 Ala. 534, 49 So.2d 284 (1950). . . . As long as the appellant intentionally promoted or aided in the commission of the killing itself, whether he actually committed the murder does not affect his liability or his guilt. *Lewis v. State*, 456 So.2d 413 (Ala.Cr.App.1984). The trial court instructed the jury as to the laws of complicity and accomplice liability in the present case."

"Under Alabama law, the distinction between principals and accessories has long been abolished; one charged as a principal may be convicted as an accomplice, and the State is not required to notify the

defendant in the indictment or otherwise that it is proceeding under a complicity theory." *Johnson v. State*, 612 So.2d 1288 (Ala.Cr.App.1992). We note that the trial court gave a thorough and extensive charge on accomplice liability.

In Smith's first statement to police he said that Reid dragged a skill saw blade across Van Dam's neck and yelled, "Where's the money at, give me the goddamn money or I'm fixing to kill you." In the second statement, Smith said that Reid took a "skill saw blade" to Van Dam.

There was more than sufficient evidence to show that Smith was, at a minimum, an accomplice to the murder as charged in the indictment.

XIV.

Smith argues that several comments by the prosecutor in his closing argument in the guilt phase denied him a fair trial.

When reviewing a prosecutor's comment made in argument to the jury we must look at the record as a whole and view the remark in the context of the entire trial. *Duren v. State*, 590 So.2d 360, 364 (Ala.Cr.App.1990), aff'd, 590 So.2d 369 (Ala.1991), cert. denied, 503 U.S. 974, 112 S.Ct. 1594, 118 L.Ed.2d 310 (1992). We have stated that the failure to object to an allegedly improper argument in a death-penalty case will weigh against a claim of prejudice. *Freeman v. State*, 776 So.2d 160 (Ala.Cr.App.1999).

Also, "[i]mproper comments by the district attorney will result in reversal only if they 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 106 S.Ct. 2464, 91 L.Ed.2d 144 (1986), quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 94 S.Ct. 1868, 40 L.Ed.2d 431 (1974).

> "'In reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact in the context of the particular trial, and not to view the allegedly improper acts in the abstract. *Whitlow v. State*, 509 So.2d 252, 256 (Ala.Cr.App.1987); *Wysinger v. State*, 448 So.2d 435, 438 (Ala.Cr.App.1983); *Carpenter v. State*, 404 So.2d 89, 97 (Ala.Cr.App.1980), cert. denied, 404 So.2d 100 (Ala.1981). Moreover, this Court has also held that statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.'"

Wilson v. State, 777 So.2d 856, 893 (Ala.Cr.App.1999), quoting *Bankhead*, 585 So.2d at 106–07.

A.

Smith argues that the prosecutor improperly commented on a statement to police made by Smith's

codefendant, which was never admitted into evidence. Smith challenges the following:

> "Well, Jody started thinking, 'Better get my story straight,' so he's banging on the door, 'Hey, tell that detective I want to talk to him, I need to talk to him again,' and that's when Detective Reynolds comes back. Now, *Larry's* story is closer to the mark. He's still lying about where the pawnshop was, but he admits more of what he did. And they got his clothes out of his Mama's washing machine, they got the tools back from the pawnshop."

(R. 657) (emphasis added). Smith argues that this comment was a reference to a statement by Smith's codefendant. There was no objection to this argument. See Rule 45A, Ala.R.App.P.

A review of the remark, together with the evidence presented at trial, shows that the prosecutor inadvertently misstated the name. The prosecutor said Larry instead of Jody. The contents of the remark reflect that the prosecutor was referring to Smith's statement—not to any statement that his codefendant may have made to police. Clearly, this was an inadvertent slip of the tongue. We find no error, much less plain error, here. *Baxter v. State*, 723 So.2d 810 (Ala.Cr.App.1998).

B.

Smith also argues that the prosecutor denied him a fair trial by calling him a thief. The following occurred:

> "Jody, Joseph C. Smith, is a thief. He was [a] thief back in November of 1997. He stole Durk Van Dam's money, he took his wallet, he took his checkbook. For a while he had control of his truck. He took his identity, his I.D. cards, his driver's license, he took his tools, he took his shoes, his boots. And lastly, but definitely not leastly, he stole his life. He took everything from Durk Van Dam."

(R. 648.) There was no objection to the above remark; thus, we apply a plain-error review. Rule 45A, Ala.R.App.P. The failure to object to an alleged improper argument does weigh against a claim of prejudice. *Freeman v. State*, 776 So.2d 160 (Ala.Cr.App.1999).

This Court in *Barbee v. State*, 395 So.2d 1128, 1134 (Ala.Cr.App.1981), noted:

> "The digest abounds with instances where the prosecutor has commented on the defendant's character or appearance. *Hall v. United States*, 419 F.2d 582 (5th Cir.1969) ('hoodlum'); *Wright v. State*, 279 Ala. 543, 188 So.2d 272 (1966) ('Judas'); *Rogers v. State*, 275 Ala. 588, 157 So.2d 13 (1963) ('a slick and slimy crow'); *Watson v. State*, 266 Ala. 41, 93 So.2d 750 (1957) ('a maniac'); *Weaver v. State*, 142 Ala. 33, 39 So. 341 (1905) ('beast'); *Liner v. State*, 350 So.2d 760 (Ala.Cr.App.1977) ('a rattlesnake' and 'a viper'); *Jones v. State*, 348 So.2d 1116 (Ala.Cr.App.), cert. denied, *Ex parte Jones*, 348 So.2d 1120 (Ala. 1977) ('a purveyor of drugs'); *Kirkland v. State*, 340 So.2d 1139 (Ala.Cr.App.), cert. denied, *Ex parte Kirkland*, 340 So.2d 1140 (Ala. 1977)

> ('slippery'); *Jeter v. State*, 339 So.2d 91 (Ala.Cr.App.), cert. denied, 339 So.2d 95 (Ala.1976), cert. denied, 430 U.S. 973, 97 S.Ct. 1661, 52 L.Ed.2d 366 (1977)('a flim flam artist'); *Cassady v. State*, 51 Ala.App. 544, 287 So.2d 254 (1973) ('a demon'); *Reed v. State*, 32 Ala.App. 338, 27 So.2d 22, cert. denied, 248 Ala. 196, 27 So.2d 25 (1946) ('lied like a dog running on hot sand'); *Williams v. State*, 22 Ala.App. 489, 117 So. 281 (1928) ('a chicken thief'); *Ferguson v. State*, 21 Ala.App. 519, 109 So. 764 (1926) ('a smart aleck'); *Quinn v. State*, 21 Ala.App. 459, 109 So. 368 (1926) ('a wild catter'); *Thomas v. State*, 19 Ala.App. 187, 96 So. 182, cert. denied, *Ex parte Thomas*, 209 Ala. 289, 96 So. 184 (1923) ('a moral pervert'); *Beard v. State*, 19 Ala.App. 102, 95 So. 333 (1923) ('seducer')."

References in closing argument to a defendant's character will not constitute reversible error if they are supported by the record. *Nicks v. State*, 521 So.2d 1018, 1023 (Ala.Cr.App.1987), aff'd, 521 So.2d 1035 (Ala.), cert. denied, 487 U.S. 1241, 108 S.Ct. 2916, 101 L.Ed.2d 948 (1988). See *Schartau v. State*, 534 So.2d 378 (Ala.Cr.App.1988) (reference to appellant as thief did not amount to reversible error); *Jackson v. State*, 249 Ala. 348, 31 So.2d 519 (1947) (reference to appellant as "damned thief" did not amount to reversible error).

Here, the comment was supported by the record. Smith told police that he stole Van Dam's tools and pawned them. By his own admission, he was a thief in November 1997 as the prosecutor said in his argument.

C.

Smith argues that the prosecutor prejudiced him by referring to him as a liar. The following occurred:

> "And Jody gave them two statements. The first statement he's lying through his teeth. He said, 'I don't—I—I didn't—I didn't do anything to that man, I didn't touch that man, my fingerprints won't be on nothing, I didn't go anything.' Now, that was a lie."

(R. 656.) There was no objection to this comment; thus, our review is for plain error. Rule 45A, Ala.R.App.P.

Clearly, this characterization of the appellant is supported by the record. Smith, in his first statement, totally denied any involvement in the robbery-murder. In the second statement he admitted his participation in the robber-murder. "[T]he prosecutor, in the appropriate case, may use opprobrious terms to characterize the accused or his conduct, provided that the remarks are in accord with the evidence." *Bankhead*, supra.

D.

Smith argues that the prosecutor misstated the law when he argued, "If the Judge let you see it, then it was evidence and you could consider it." (R. 657–58.)

There was no objection to this comment; thus, our review is limited to determining whether there was plain error. Rule 45A, Ala.R.App.P.

Here, the trial court repeatedly told the jurors that comments of counsel were not evidence and that it was the court's duty to instruct them on the law. We do not believe that this isolated statement by the prosecutor so "infected the trial with unfairness" that Smith was denied due process. *Darden v. Wainwright.*

E.

Smith argues that the prosecutor illegally argued victim-impact evidence at the guilt phase and that her doing so resulted in prejudice to Smith.

During the closing argument the prosecutor argued:

> "In the final seconds of his life Durk Van Dam pleaded for his life. He had two little boys that he knew he would never see again. I ask that you let that be the picture in your mind as you decide what intent is, as they robbed him and they slowly and mercilessly intentionally and cruelly kicked and beat this man to death."

(R. 675.)

We agree with the State—the above statement was a reply to the defense's argument that there was absolutely no evidence of intent. "A prosecutor has a right based on fundamental fairness to reply in kind to the argument of defense counsel." *DeBruce v. State*, 651 So.2d 599, 609 (Ala.Cr.App.1993), aff'd, 651 So.2d 624 (Ala.1994). Also, the argument was based on the

facts presented at trial through Smith's own statement, in which he told police, "The guy's hollering, 'No, sir, no, sir, please, don't kill me, I got two little boys, please, don't kill me.' " (R. 470.) A prosecutor may argue facts in evidence. *Manigan v. State*, 402 So.2d 1063 (Ala.Cr.App.), cert. denied, 402 So.2d 1072 (Ala.1981). The argument was based on evidence presented at trial.

We have reviewed all of the challenged comments made by the prosecutor and are confident that none of them so infected the trial with unfairness that Smith was denied due process. *Darden v. Wainwright.*

XV.

Smith argues that the trial court's jury instructions were flawed for several reasons.

> " 'A trial court has broad discretion in formulating its jury instructions, providing those instructions accurately reflect the law and the facts of the case. *Raper v. State*, 584 So.2d 544 (Ala.Cr.App.1991). We do not review a jury instruction in isolation, but must consider the instruction as a whole, *Stewart v. State*, 601 So.2d 491 (Ala.Cr.App.1992), aff'd in relevant part, 659 So.2d 122 (Ala.1993), and we must evaluate instructions like a reasonable juror may have interpreted them. *Francis v. Franklin*, 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Stewart v. State.*' "

Griffin v. State, 790 So.2d 267, 332 (Ala.Cr.App.1999), quoting *Ingram v. State*, 779 So.2d 1225 (Ala.Cr.App.1999).

A.

Smith first argues that the trial court erred in giving an instruction on flight because, he argues, there was no evidence of flight. He also argues that even if an instruction was warranted the one given was erroneous.

Smith argues in his brief to this Court that there was no evidence of flight because, "Indeed, the State offered no evidence that Mr. Smith ever left the small corner of Mobile County where he lived and all the events in this case occurred." (Smith's brief to this Court at page 20.)

McElroy's Alabama Evidence states the following concerning evidence of flight:

> "The prosecution is generally given wide latitude in proving things that occurred during the accused's flight. Indeed, the term 'flight' includes any conduct of the accused that is relevant to show a consciousness of guilt. *Such conduct may include the use of aliases, concealment of identity, attempting to avoid arrest and the use of false exculpatory statements.*"

McElroy's § 190.01(1) (5th ed.1996) (emphasis added).

In *Ex parte Jones*, 541 So.2d 1052, 1053–57 (Ala.1989), Justice Maddox, writing for the Court, detailed what constitutes evidence of flight in Alabama. Justice Maddox stated:

> "Evidence of flight has long been allowed in the courts of Alabama, and the State is generally given wide latitude in proving things that occurred during the accused's flight. C. Gamble, *McElroy's Alabama Evidence*, § 190.01(1) at 381 (3d ed.1977). However, as Dean Gamble has noted:
>
> > "'Logic would dictate that at some point the flight of the accused will be so far removed from the time of the charged crime that such flight will be too remote to be relevant as having probative value upon the accused's consciousness of guilt. However, such a case has not yet made its way before the appellate courts of Alabama."

"*Id.*, § 190.01(4) at 383.

"One of this Court's first detailed examinations of evidence of flight came in *Levison v. State*, 54 Ala. 520 (1875); there, this Court stated:

> "'Flight, the demeanor when arrested, stolidity or trepidation, under accusation, prevarication in answer to inquiries relating to the offense, or to his conduct, the fabrication or suppression of evidence, or previous threats, or antecedent grudges, are all evidentiary

> facts against the person to whom they are imputable, dependent for their value on a connection with other criminating circumstances. They are evidence against the party to whom they are imputable, and not constituting the guilty act, only pointing to him as the guilty agent, are not evidence for or against another with whom he has no connection. *The most inconclusive of the criminating circumstances, that which, not combined with other factors, is of the least probative force is flight.* [citation omitted.] It may be attributable to fear, or to impatience and restlessness, under the duress of imprisonment, or to a consciousness of guilt. Much depends on the character of the mind, temperament and education. One will, with fortitude, endure imprisonment without murmuring, and without an effort to fly, though tortured with the consciousness of crime; while another of a different mental, or moral, or physical organization, conscious of innocence, fretting under unaccustomed restraints, or fearful of the issue of the events leading to his imprisonment, will fly on the first opportunity. Flight is of consequence, in itself, delusive and inconclusive as a criminating fact.'

"54 Ala. at 527. (Emphasis added.)

"In an even earlier case, this Court did hold, however, that care must be taken in introducing evidence like evidence of flight. In *Liles v. State*, 30 Ala. 24, 24–25 (1857), this Court stated:

"'In determining how far the conduct of a prisoner may be evidence against him, we feel that we are treading on dangerous and doubtful ground. One of acute sensibilities might be overwhelmed by a simple accusation of crime; while a hardened offender would stand unabashed, and undisturbed in muscle, though conscious of the deepest guilt. A respectable modern writer, speaking of the effect produced by imputation of crime, uses the language, that 'it is an impulse of nature, consequent upon extreme surprise, to which the innocent may yield as well as the guilty. It may happen that the more innocent the party, the greater the shock occasioned by such a proceeding.' *Burrill on Cir. Ev.*, 476–7; *Smith v. The State*, 9 Ala. 990–5.'

". . . .

"One of the most recent cases summarizing the Alabama rule on this subject is *Beaver v. State*, 455 So.2d 253, 257 (Ala.Crim.App.1984):

> "'"In a criminal prosecution the state may prove that the accused engaged in flight to avoid prosecution . . . as tending to show the accused's consciousness of guilt. . . . The state is generally given wide latitude or freedom in proving things that occurred during the accused's flight." C. Gamble, *McElroy's Alabama Evidence* § 190.01(1) (3rd ed.1977). "Evidence of flight is admissible even though it

> is weak or inconclusive or if several days have passed since the commission of the crime." *Tate v. State*, 346 So.2d 515, 520 (Ala.Cr.App.1977). Evidence of flight is admissible even though that evidence involves the commission of other crimes by the accused. See *Tate*, supra; *Neal v. State*, 372 So.2d 1331, 1344–45 (Ala.Cr.App.1979). For the same reason, evidence that the accused resisted or attempted to avoid arrest is admissible. *Crenshaw v. State*, 225 Ala. 346, 348, 142 So. 669 (1932). Additionally, the evidence that the accused was observed at the police station throwing keys in a trash can was admissible. Any act proving or tending to prove the accused's effort or desire to obliterate, destroy, or suppress evidence of a crime is relevant and admissible even if it involves evidence of a separate offense. *Watwood v. State*, 389 So.2d 549, 551 (Ala.Cr.App.), cert. denied, *Ex parte Watwood*, 389 So.2d 552 (Ala.1980).'"

See also *Ex parte Weaver*, 678 So.2d 284 (Ala.), on remand, 678 So.2d 292 (Ala.Cr.App.1996) (quoting *Jones* in depth).

Here, the evidence indicated that Smith and Reid attempted to hide the body under a mattress, and tried to steal Van Dam's truck but it got stuck in the mud and they left it behind, and that Smith went back to

the Highway Host motel to shower and to change clothes. He admitted to police that he tried to wipe his fingerprints off the truck and also told police that he had washed the clothes he was wearing at the time of the robbery-murder. Also, when he was first questioned about the murder he denied any involvement and placed the blame for the robbery-murder on Reid. Clearly, these facts are sufficient to fit within the definition of "flight," as they evidence a consciousness of guilt, as that term is defined in Alabama. *McElroy's Alabama Evidence*, § 190.1(1). All of the conduct evidences a "consciousness of guilt" on the part of Smith.

Also, this Court has never held that in order to establish flight the State must prove that the accused left the city or community where the crime occurred. *Muse v. State*, 29 Ala.App. 271, 196 So. 148 (1940), cert. denied, 239 Ala. 557, 196 So. 151 (Ala.1940) ("[T]here can be no set or specific time necessary to constitute flight, and the distance the accused ran before he was apprehended is also immaterial.") Other states have reached this same conclusion. *State v. Hatten*, 297 Mont. 127, 991 P.2d 939 (1999) ("flight includes fleeing, even a short distance, to wherever a defendant thinks is safe to dispose of evidence."); *State v. Hill*, 875 S.W.2d 278, 284 (Tenn.Crim.App.1993) (flight occurred when accused ran between two houses—"Flight from the crime scene may be taken in any manner."); *Baier v. State*, 891 P.2d 754 (Wyo.1995) (evidence sufficient to show flight where accused left the hotel where assault occurred and was apprehended a short distance away by police); *State v. Moseley*, 338 N.C. 1, 449 S.E.2d 412

(1994), cert. denied, 514 U.S. 1091, 115 S.Ct. 1815, 131 L.Ed.2d 738 (1995) (evidence of flight sufficient because accused left the victim in a secluded area, took the victim's identification, and left the scene).

Smith argues that the court's instruction on flight was erroneous because the instruction told the jury that the State had presented evidence of flight. The trial court gave the following instruction on flight:

> "In this case you have heard testimony concerning flight. That is, that the Defendant allegedly left from the scene of the purported crime. With reference to evidence that was presented in this case bearing on the alleged flight by the Defendant from the scene of the alleged crime, the jury is instructed that evidence may be offered tending to show flight of the Defendant, and when such evidence is offered by the State it may be considered by you, the jury in connection with all of the other evidence in the case of circumstances tending to prove guilt, and in connection with such evidence consideration should be given to any evidence of the motive which may have prompted such flight. That is, whether a consciousness of guilt, an impending or likely apprehension of being brought to justice caused the flight or whether it was caused from some other or more insistent motive.
>
> "In the first place, where evidence is offered to show the Defendant's flight, that is, he went away from the scene of the alleged offense, it would be for you, the jury, to say whether it is flight as a matter of fact. The

> jury would have to determine from the evidence the question whether this was flight or not and then you would further consider such evidence in light of all the other evidence you have heard in this case, including any evidence to negate or explain any such evidence of flight and whether such evidence was a reasonable explanation or not, all of which you would consider in connection with all the other evidence giving each part of the evidence such weight as you, the jury, feel it is entitled to receive in this particular case."

(R. 700–01.)

Defense counsel objected to the court's instruction on flight and the court recharged the jury as follows:

> "Finally, and consistent with the notion that I do not want you to think that I have commented on the evidence in any way, shape or form, in charging you on the issue of flight I remind you that what was said was that it is for you to determine whether or not there was flight in this case. And if and only if you determine as a matter of fact that there was flight in this case would you then be permitted by law to perceive and consider what, you know, may have prompted such flight.
>
> "But again, can each of you accept the proposition that the Court is not in any way, shape or form trying to suggest to you that there was flight in this case? If you cannot, please, raise your hand."

(R. 720.)

The trial court cured the defect now asserted on appeal. Also, the instruction given in this case was similar to an instruction in *Minor v. State*, 780 So.2d 707 (Ala.Cr.App.1999), that this Court upheld. The instruction correctly explained Alabama's law on flight.

B.

Smith argues that the trial court's instruction on reasonable doubt was flawed because it contained the term "actual doubt" in violation of the United States Supreme Court's holding in *Cage v. Louisiana*, 498 U.S. 39, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990).

Smith did not object to the trial court's instruction on reasonable doubt; thus, our review is limited to plain error. Rule 45A, Ala.R.App.P.

The Court gave the following instruction:

> "A reasonable doubt is not a mere possible doubt because everything related to human affairs is open to some possible or imaginary doubt. A reasonable doubt is a doubt of a fair-minded juror honestly seeking the truth after careful and impartial consideration of all the evidence in the case. It is a doubt based upon reason and common sense. It does not mean a vague or arbitrary notion, but it is an actual doubt based upon the evidence, the lack of evidence, a conflict in the evidence or a combination thereof. It is a doubt that remains after going over in your minds the entire case and giving consideration to all the testimony. It is distinguished from a doubt

> arising from mere possibility, from bare imagination or from fanciful conjecture."

(R. 680.)

"'In *Cage*, the United States Supreme Court found that if the trial court defines "reasonable doubt" by using the terms "grave uncertainty," "actual substantial doubt" and "moral certainty," a reasonable juror could interpret the instructions to mean that a lesser degree of proof is needed to convict than is required by the due process clause.'" *McWhorter v. State*, 781 So.2d 257, 303 (Ala.Cr.App.1999), quoting *Lawhorn v. State*, 756 So.2d 971 (Ala.Cr.App.1999).

The reasonable doubt instruction given here was virtually identical to the pattern jury instruction on the burden of proof. The instruction did not contain the term "actual substantial doubt." "'A trial court's following of an accepted pattern jury instruction weighs heavily against any finding of plain error.'" *Wilson v. State*, 777 So.2d 856 (Ala.Cr.App.1999), quoting *Price v. State*, 725 So.2d 1003, 1058 (Ala.Cr.App.1997), aff'd, 725 So.2d 1063 (Ala.1998), cert. denied, 526 U.S. 1133, 119 S.Ct. 1809, 143 L.Ed.2d 1012 (1999). Cf. *Ex parte Wood*, 715 So.2d 819 (Ala.), cert. denied, 525 U.S. 1042, 119 S.Ct. 594, 142 L.Ed.2d 536 (1998) (court noted that it had never held that following the pattern jury instruction may never amount to plain error).

We have upheld a similar reasonable doubt instruction against a claim of plain error. *Smith v. State*, 756 So.2d 892 (Ala.Cr.App.1998).

C.

Smith argues that the trial court's jury instruction on accomplice liability was erroneous because, he says, it lowered the State's burden of proof by allowing for the jury to find Smith guilty by transferring Reid's intent.

The trial court gave a detailed instruction on accomplice liability. At several points in the charge it instructed the jurors that an accomplice must intend for the conduct to occur. The court instructed in part:

> "The accomplice is criminally responsible for acts which are the direct, proximate, natural result of the conspiracy formed. He is not responsible for any special act not within the scope of a common purpose, but which grow out of the individual malice of another perpetrator when intent is one of the required constituent elements of an offense. And in each of the offenses that I am going to define for you intent is a requirement."

(R. 681–82.) The court further stated, "it must be shown beyond a reasonable doubt that he was present with the intent to aid and abet the principal actor and it must also be shown that he possessed the same intent to kill." (R. 682.)

The court did state, "Without this individual intent or personal knowledge it cannot be affirmed that he aided or abetted in the crime charged. This need not, however, be positively proved." (R. 682.) However, the court further charged the jury:

> "A person acts intentionally when it is his purpose to cause the death of another person. The intent to kill must be real and specific. Intent is a state of mind. There is generally no way to prove intent by positive evidence. It usually has to be proven by circumstantial evidence."

(R. 684.)

The court's instructions were thorough and accurate statements of the law. There was no error in the court's instruction on accomplice liability.

D.

Smith further argues that the trial court erred in not instructing the jury on drawing "no adverse inference" from Smith's failure to testify at trial.

Smith never requested a no-adverse-inference instruction and never objected when the judge failed to sua sponte give such an instruction. The United States Supreme Court in *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), held that the Fifth Amendment requires the giving of a "no-adverse-inference" instruction when requested to do so by trial counsel. The duty to give such an instruction arises only when a request has been made to give the instruction to the jury. *Carter*.

We have followed the prevailing view and held that a trial court commits no error in failing to sua

sponte give a "no-adverse-inference" instruction. *Phillips v. State*, 726 So.2d 292 (Ala.Cr.App.1998).

> "Appellant cites *Carter v. Kentucky*, 450 U.S. 288, 101 S.Ct. 1112, 67 L.Ed.2d 241 (1981), for the proposition that a trial judge in a criminal case must instruct the jury that the defendant has a right not to testify and no adverse inference shall be drawn from his failure to do so. In this case there was no request for such an instruction. We disagree that the trial judge should have instructed the jury sua sponte. It is a matter of judgment for defense counsel to decide whether such an instruction is more harmful than beneficial. Counsel may decide it merely calls attention to the problem. We adhere to the requirement that such an instruction shall be given when requested."

Ice v. Commonwealth, 667 S.W.2d 671, 677 (Ky.), cert. denied, 469 U.S. 860, 105 S.Ct. 192, 83 L.Ed.2d 125 (1984). See also *Dutton v. State*, 674 P.2d 1134, 1140 (Okla.Cr.App.), cert. denied, 467 U.S. 1256, 104 S.Ct. 3548, 82 L.Ed.2d 850 (1984) ("We reject appellant's assertion that a trial judge is obligated to give a cautionary instruction on its own initiative."); *Davis v. State*, 161 Ga.App. 358, 359, 288 S.E.2d 631, 632 (1982) ("we cannot agree that the failure to give the charge sua sponte was error"); *People v. Castaneda*, 81 Mich.App. 453, 265 N.W.2d 367 (1978) ("Inasmuch as defendant did not request the instruction, the issue has been waived. . . ."). See also *Mills v. Commonwealth*, 996 S.W.2d 473 (Ky.1999), cert. denied, 528 U.S. 1164, 120

S.Ct. 1182, 145 L.Ed.2d 1088 (2000); *People v. Sully*, 283 Cal.Rptr. 144, 53 Cal.3d 1195, 812 P.2d 163 (1991), cert. denied, 503 U.S. 944, 112 S.Ct. 1494, 117 L.Ed.2d 634 (1992); *State v. Baxter*, 51 Haw. 157, 454 P.2d 366 (1969), cert. denied, 397 U.S. 955, 90 S.Ct. 984, 25 L.Ed.2d 138 (1970).

Penalty–Phase Issues

XVI.

Smith argues that Alabama's method of execution—the electric chair—results in cruel and unusual punishment in violation of the Eight Amendment to the United States Constitution. The use of the electric chair, as a means of satisfying a capital punishment, has repeatedly withstood constitutional challenge. See *Woods v. State*, 789 So.2d 896 (Ala.Cr.App.1999); *Jackson v. State*, [Ms. CR-97-2050, May 28, 1999] ___ So.2d ___ (Ala.Cr.App.1999); *Scott v. State*, 728 So.2d 164 (Ala.Cr.App.1997), aff'd, 728 So.2d 172 (Ala.), cert. denied, 528 U.S. 831, 120 S.Ct. 87, 145 L.Ed.2d 74 (1999); *Williams v. State*, 556 So.2d 737 (Ala.Cr.App.1986), aff'd in part, rev'd in part on other grounds, 556 So.2d 744 (Ala.1987), on remand, 556 So.2d 746 (Ala.Cr.App.1988), after remand, 571 So.2d 336 (Ala.Cr.App.1989), aff'd, 571 So.2d 338 (Ala.1990), cert. denied, 500 U.S. 938, 111 S.Ct. 2067, 114 L.Ed.2d 471 (1991).

XVII.

Smith argues that Alabama's system of limiting the compensation for attorneys appointed on capital cases to $1,000 for out-of-court work violates the separation-of-powers doctrine, constitutes a taking without just compensation, violates the Due Process Clause, deprives indigent capital defendants of the effective assistance of counsel, and violates the Equal Protection Clause. These claims have repeatedly been rejected. See *Ex parte Smith*, 698 So.2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997); *May v. State*, 672 So.2d 1310 (Ala.1995); *Ex parte Grayson*, 479 So.2d 76 (Ala.), cert. denied, 474 U.S. 865, 106 S.Ct. 189, 88 L.Ed.2d 157 (1985); *Smith v. State*, 581 So.2d 497 (Ala.Cr.App.1990), rev'd on other grounds, 581 So.2d 531 (Ala.1991), on remand, 581 So.2d 536 (Ala.Cr.App.1991), after remand, 698 So.2d 189 (Ala.Cr.App.1996), aff'd, 698 So.2d 219 (Ala.), cert. denied, 522 U.S. 957, 118 S.Ct. 385, 139 L.Ed.2d 300 (1997).

> "It should be noted that the Alabama Legislature recently passed the 'Investment in Justice Act of 1999,' and, in pertinent part, that Act amended § 15–12–21. Under the new Act, the rate of compensation for attorneys representing indigent criminal defendants is increased to $50 per hour for in-court time and $30 per hour for out-of-court time, with no limit on compensation for an attorney in a case involving a capital offense. Moreover, effective October 1, 2000, the hourly rate

> increases to $40 per hour for out-of-court time and $60 per hour for in-court time."

McWhorter v. State, 781 So.2d 257, 306 (Ala.Cr.App.1999).

XVIII.

Smith argues that he was denied his right to a just sentencing determination by remarks made by the prosecutor in the sentencing phase.

We review the allegations of prosecutorial misconduct using the standards of review discussed by this Court in Part XIV of this opinion.

A.

Smith argues that the following comment implied that Smith should be sentenced to death because he was mentally retarded:

> "The Doctor said that this Defendant has a low IQ and I asked him this question because from your own common sense, from your own experience you know it to be true, there are folks out there with marginal IQs who are streetwise. They get along they get by, they survive sometimes better than the rest of us in certain situations. This man's been in prison, this man's been around, this man is streetwise. He knew what he was doing."

(R. 831.)

There was no objection to the above comment; thus, we apply a plain-error analysis. Rule 45A, Ala.R.App.P.

The above comment did not imply that Smith should be sentenced to death because he is mentally retarded. The comments were based on the evidence presented through Dr. James F. Chudy's testimony. Dr. Chudy, a clinical psychologist, testified that people with low IQs can be streetwise and can function as well as, or better than, the average person. There comments were based on facts in evidence and were the proper subject of comment in closing. See *Manigan v. State*, 402 So.2d 1063 (Ala.Cr.App.), cert. denied, 402 So.2d 1072 (Ala. 1981).

B.

Smith argues that the prosecutor committed reversible error by, he argues, commenting that any sentence but death would be an insult to the victim's family. The following occurred:

> "Life without parole means just that. That he would serve the rest of his natural life in prison. But what does that say to Durk Van Dam's family? What does that say to them about their brother, about their father, about their son, about their uncle? It says Durk's life was valueless. There was no value in his life and there was no meaning in his death. You see, life without parole means that Jody would live."

(R. 820–21.)

As the State asserts in brief, this type of argument is permissible at the sentencing phase of a capital trial. As this Court stated in *Burgess v. State*, [Ms. CR-93-2054, November 20, 1998] ___ So.2d ___ (Ala.Cr.App.1998):

> "'[T]he State has a legitimate interest in counteracting the mitigating evidence which the defendant is entitled to put in, by reminding the sentencer that just as the murderer should be considered as an individual, so too the victim is an individual whose death represents a unique loss to society and, in particular, [his] family.' *Payne v. Tennessee*, 501 U.S. at [808,] 824, 111 S.Ct. 2597[, 115 L.Ed.2d 720 (1991)], citing *Booth v. Maryland*, 482 U.S. 496, 517, 107 S.Ct. 2529, 96 L.Ed.2d 440 (White, J., dissenting).
>
> > "'It is presumed that jurors do not leave their common sense at the courthouse door. It would elevate form over substance for us to hold, based on the record before us, that [Smith] did not receive a fair trial simply because the jurors were told what they probably had already suspected—that [Van Dam] was not a "human island," but a unique individual whose murder had inevitably had a profound impact on [his] children, spouse, parents, friends or dependents (paraphrasing a portion of Justice Souter's opinion concurring

> in the judgment in *Payne v. Tennessee*, 501 U.S. at 838, 111 S.Ct. 2597.)'

"*Ex parte Rieber*, 663 So.2d 999, 1006 (Ala. 1995), cert. denied, 516 U.S. 995, 116 S.Ct. 531, 133 L.Ed.2d 437 (1995)."

There was no improper argument here.

C.

Smith argues that the following comment made by the prosecutor "impermissibly criticiz[ed] his exercise of [his right to a trial by jury] in violation of Alabama law". (Smith's brief to this Court at p. 82):

> "Now, my Mama always told me as I was sitting at her knee growing up as a young girl that there are consequences to your conduct. Now, my Mama didn't use those words. What she told me was, 'Baby, you're going to reap what you sow.' If you sow seeds of brutality, if you kill people, you're going to reap that back. And today for Joseph Smith it is harvest time. It is because of Jody that you all are being placed with this enormous and awesome responsibility. It is because Jody stood out on Shipyard Road and was making decisions about the life of Durk Van Dam that you are placed here today. It is Jody's fault, but it's because of the decisions that Jody made that you are called upon today to make a decision about his life."

(R. 820.) There was no objection to this comment; thus, our review is limited to plain error. Rule 45A, Ala.R.App.P.

By no stretch of the imagination can the above comment be interpreted as criticizing Smith's right to a trial by jury. Clearly, the prosecutor was arguing that Smith was responsible for his own actions and that he intended to rob and kill Van Dam, and, thus, that his sentence should be death.

XIX.

Smith argues that there were numerous errors in the trial court's instructions to the jury and that those errors resulted in his being denied a fair and accurate sentence determination.

We use the same standards of review we discussed in Part XV of this opinion.

A.

Smith first argues that the trial court incorrectly instructed the jury on what it had to find before it could return a verdict of life imprisonment without parole.

The trial court gave the following instruction:

> "All right. And to repeat, in order to return an advisory verdict of death by electrocution at least 10 of your number must be satisfied beyond a reasonable doubt that aggravating circumstances have been proven

> and outweigh mitigating circumstances. In order to return an advisory verdict recommending life without parole at least 7 of your number must be satisfied beyond a reasonable doubt of the existence of mitigating circumstances and that those mitigating circumstances outweigh the aggravating circumstances."

(R. 848.)

Smith objected to the above instruction and the trial court clarified its instruction on the burden of proof necessary to find mitigating circumstances. The trial court reinstructed the jury as follows:

> "Ladies and gentlemen, I wish to make clear the distinction between the burden of proof as it relates to proof of an aggravating circumstances and proof of a mitigating circumstance.
>
> "Proof of a mitigating circumstance only requires proof by a preponderance of the evidence, which I will define again for you. Proof of an aggravating circumstance requires proof beyond a reasonable doubt.
>
> "And I repeat, a mitigating circumstance considered by you should be based on the evidence you have heard. When the factual existence of an offered mitigating circumstance is in dispute, the State shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. The burden of disproving it by a preponderance of the evidence means that

> you are to consider that the mitigating circumstance does exist unless taking the evidence as whole it is more likely than not that the mitigating circumstances does not exist. Therefore, if there is a factual dispute over the existence of a mitigating circumstance, then you should find and consider that mitigating circumstance unless you find the evidence is such that it is more likely than not that the mitigating circumstance does not exist.
>
> "Only an aggravating circumstance must be proven beyond a reasonable doubt and the burden is always on the State of Alabama to convince you from the evidence beyond a reasonable doubt that such an aggravating circumstance exists and the burden is also on the State to prove to you beyond a reasonable doubt that the aggravating circumstance or circumstances, should you find that they exist, outweigh any mitigating circumstances which need only be proven by a preponderance of the evidence."

(R.854–56.)

Clearly, the trial court's restatement of the burden of proof was a correct statement of the law and corrected the court's earlier misstatement concerning the burden of proof necessary to find mitigating circumstances. Also, the trial court thoroughly instructed the jury that the aggravating circumstances must outweigh the mitigating ones and that this weighing is not merely a numerical one. (R. 844.)

The trial court's instructions on these principles of law were both thorough and accurate. No error occurred here.

B.

Smith also argues that the trial court's failure to instruct the jury that its finding as to mitigating circumstances did not have to be unanimous, implied that its findings as to the mitigating circumstances had to be unanimous. There was no objection raised at trial concerning the court's failure to instruct that the jury's finding did not have to be unanimous. We review this issue for plain error. Rule 45A, Ala.R.App.P.

A review of the jury's instruction on mitigating circumstances does not reflect that the trial court instructed the jury that its decision that evidence was mitigating had to be unanimous. The trial court instructed that jury in accordance with the *Alabama Proposed Pattern Jury Instructions for Use in the Guilt Stage of Capital Cases Tried Under Act No. 81-178.*

As we recently stated in *Hall v. State*, [Ms. CR-94-0661, October 1, 1999] ___ So.2d ___ (Ala.Cr.App.1999):

> "This Court addressed a similar issue in *Freeman v. State*, 776 So.2d 160 (Ala.Cr.App.1999):
>
> > "'Freeman also contends that the trial court erred by failing to instruct the jury that its findings as to mitigating circumstances did not

> have to be unanimous. In failing to so instruct the jury, he says, the trial court implied that the jurors had to unanimously agree before they could find the existence of a mitigating circumstance. Freeman did not object at trial to the trial court's instructions to the jury concerning mitigating circumstances; therefore, we will review this claim under the plain error rule. Rule Ala.R.App.P.'
>
> "We have reviewed the trial court's instructions to the jury; we find nothing in the instructions that would have suggested to the jurors, or given them the impression, that their findings concerning the existence of mitigating circumstances had to be unanimous. See *Coral v. State*, 628 So.2d 954, 985 (Ala.Cr.App.1992), aff'd, 628 So.2d 1004 (Ala.1993), cert. denied, 511 U.S. 1012, 114 S.Ct. 1387, 128 L.Ed.2d 61 (1994); *Windsor v. State*, 683 So.2d 1027 (Ala.Cr.App.1994), aff'd, 683 So.2d 1042 (Ala.1996), cert. denied, 520 U.S. 1171, 117 S.Ct. 1438, 137 L.Ed.2d 545 (1997)."

C.

Smith argues that the trial court erred in referring to the allegedly erroneous instruction it had given on reasonable doubt in the guilt phase of the proceedings.

In Part XV.B. of this opinion we held that the court's reasonable doubt instruction was not erroneous. Thus, our focus is on whether the trial court erred in not reinstructing the jury on reasonable doubt but rather in relying on an instruction he had given in the guilt phase.

We observe that Smith did not object to the court's relying on its previous given instruction. Our review is limited to plain error. Rule 45A, Ala.R.App.P.

Here, the trial court at the beginning of its charge stated:

> "It is again my duty to instruct you on those rules of law that you shall apply in your determination of the appropriate punishment in this case. In charging you I want to remind you of the instructions that you received yesterday during the guilt phase, particularly concerning the basic law in defining the term 'reasonable doubt,' as well as your duties and functions as jurors. If any one of you feels that it is necessary, I will recharge you as to each and every one of those principles of law."

(R. 834.) Also, the reasonable doubt charge was given within 24 hours of the court's instructions in the penalty phase. As we stated in *Griffin v. State*, 790 So.2d 267 (Ala.Cr.App.1999):

> "The trial court gave a detailed definition of reasonable doubt during the guilt phase at approximately 5:00 p.m. and then referenced his instruction the following morning at approximately 11:00 a.m. Only a short time—

> less than 24 hours—lapsed between the instructions Additionally, the trial court asked the jury if it needed to reinstruct on reasonable doubt and no one indicated that he did not remember the previous instruction. '"It is assumed that the jury will consider the previously given instructions along with those given in the supplemental charge."' *Collins v. State*, 611 So.2d 498, 503 (Ala.Cr.App.1992), quoting *Brannon v. State*, 549 So.2d 532, 542 (Ala.Cr.App.1989), quoting *Davis v. State*, 440 So.2d 1191, 1195 (Ala.Cr.App.1983), cert. denied, 465 U.S. 1083, 104 S.Ct. 1452, 79 L.Ed.2d 770 (1984)."

As we did in *Griffin*, we find no plain error here.

D.

Smith argues that the trial court's instruction on the aggravating circumstance that the offense was especially heinous, atrocious, or cruel, as compared to other capital cases was erroneous because, he says, it implied that the jury was to compare this case to others and the instruction expanded on the definition.

There was no objection to the court's charge on this aggravating circumstance; thus, we apply the plain-error doctrine. Rule 45A, Ala.R.App.P.

The trial court gave the following instruction:

> "The term 'heinous' means extremely wicked or shockingly evil.

> "The term 'atrocious' means outrageously wicked and violent.
>
> "The term 'cruel' means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others.
>
> "What is intended to be included in this aggravating circumstance [are] those cases where the actual commission of the capital offense is accompanied by such additional acts as to set the crime apart from the norm of capital offenses. For a capital offense to be especially cruel, it must be a conscienceless or pitiless crime which is unnecessarily torturous to the victim. All capital offenses are heinous, atrocious, and cruel to some extent."

(R. 838.)

The trial court's jury instruction is identical to the *Proposed Pattern Jury Instructions for Use in the Sentence Stage of Capital Cases Tried Under Act No. 81-178* and tracks the caselaw definition of the especially heinous, atrocious, or cruel aggravating circumstance. *Godfrey v. Georgia*, 446 U.S. 420, 100 S.Ct. 1759, 64 L.Ed.2d 398 (1980), and *Kyzer v. State*, 399 So.2d 330 (Ala.1981). The jury instruction was not erroneous; it was a correct definition of this aggravating circumstance.

E.

Smith argues that the trial court diminished the jury's role at sentencing by reminding it that its verdict would only be a recommendation.

We have repeatedly stated that a trial court does not diminish the jury's role by stating that its verdict in the penalty phase is a recommendation or an advisory verdict. *Taylor v. State*, 666 So.2d 36 (Ala.Cr.App.1994), on remand, 666 So.2d 71 (Ala.Cr.App.1994), aff'd, 666 So.2d 73 (Ala.1995), cert. denied, 516 U.S. 1120, 116 S.Ct. 928, 133 L.Ed.2d 856 (1996); *Burton v. State*, 651 So.2d 641 (Ala.Cr.App.1993), aff'd, 651 So.2d 659 (Ala.1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995); *White v. State*, 587 So.2d 1218 (Ala.Cr.App.1990), aff'd, 587 So.2d 1236 (Ala.1991), cert. denied, 502 U.S. 1076, 112 S.Ct. 979, 117 L.Ed.2d 142 (1992).

XX.

Smith argues that trial court's sentencing order is erroneous for several reasons.

Smith did not object to any of the alleged errors he now argues occurred in the trial court's sentencing order. We are confined to reviewing these allegations for plain error. Rule 45A, Ala.R.App.P.

A.

Smith contends that the trial court erroneously relied upon the sentencing recommendation of the victim's family. The record reflects that included in the presentence report is a victim-impact statement from the victim's family—his parents, sisters, and sons. The statement relates that the victim's family "upholds the verdict made by the jury" and that Smith should never be allowed to enter society.

The trial court stated that it had read and was familiar with the presentence report—the court also stated the following before imposing sentence:

> "The law requires that the Court weigh the statutorily enumerated aggravating circumstances against both the statutory enumerated mitigating circumstances, as well as any other factor which might reasonably be considered in mitigation."

(R. 19, sentencing hearing before the judge.) Also, the sentencing order reflects that the trial court considered only what the law allows in determining whether to impose the death penalty.

The record reflects that the trial court did not consider any sentencing recommendations of the victim's family when imposing sentence. No plain error occurred here. *Ex parte Land*, 678 So.2d 224 (Ala.), cert. denied, 519 U.S. 933, 117 S.Ct. 308, 136 L.Ed.2d 224 (1996); *Burgess v. State*, 723 So.2d 742 (Ala.Cr.App.1997), aff'd, 723 So.2d 770 (Ala.1998),

cert. denied, 526 U.S. 1052, 119 S.Ct. 1360, 143 L.Ed.2d 521 (1999).

B.

Smith argues that the trial court erred in failing to find several mitigating circumstances.

First, Smith argues that the trial court should have found as a mitigating circumstance that Smith committed the act while he was "under the influence of extreme mental or emotional disturbance." § 13A–5–51(2), Code of Alabama 1975. Specifically, he states that the psychologist testified that Smith had an array of mental problems and that he was borderline retarded.

The trial court, when evaluating this statutory mitigating circumstance, stated the following in its order:

> "The capital offense was committed while the Defendant was under the influence of extreme mental or emotional disturbance. The Court has carefully reviewed and weighed both the report and testimony of Doctor James Chudy, a clinical psychologist, in the context of the facts underlying the offense charged and proven.
>
> "The value of human life mandates that the Defendant's troubled history and array of psychological disorders—not psychosis—be balanced against Dr. Chudy's conclusions that the Defendant could appreciate the

> wrongfulness of his acts and was competent and in control at the time of the crime.
>
> "The conclusion is fortified by the Defendant's conduct on November 23, 1997, and thereafter. The robbery and murder of Durk Van Dam were calculated, intentional acts. The Defendant possessed the presence of mind to hide the victim's tools which he directed Russell Harmon to retrieve. He had the guile to attempt to minimize his participation in the crime in his initial statement of investigators on November 25, 1997, and in his subsequent confession he demonstrated the presence of mind to admit he 'F___ Up." The Court concludes that the Defendant was not mentally or emotionally disturbed neither to an extreme extent, nor to the extent this mitigating circumstance exists."

(R. 188.)

We have stated, "'merely because an accused proffers evidence of a mitigating circumstance does not require the judge or the jury to find the existence of that fact. *Mikenas [v. State*, 407 So.2d 892, 893 (Fla.1981)]; *Smith [v. State*, 407 So.2d 894 (Fla.1981)].'" *Loggins v. State*, 771 So.2d 1070, 1088 (Ala.Cr.App.1999), quoting *Harrell v. State*, 470 So.2d 1303, 1308 (Ala.Cr.App.1984), aff'd, 470 So.2d 1309 (Ala.), cert. denied, 474 U.S. 935, 106 S.Ct. 269, 88 L.Ed.2d 276 (1985).

Here, the trial court's findings were supported by Smith's statements to police. There was no evidence

that Smith was under extreme mental and emotional disturbance at the time of the robbery-murder.

Smith also argues that the trial court erred in not finding, as mitigation, that he acted under the domination of another, § 13A–5–51(5). The trial court stated that the "record is devoid that the Defendant on November 23, 1997, acted under the domination of Larry Reid or anyone else." This finding is also supported by Smith's admissions to police. Smith said that both he and Reid planned to rob Van Dam, that he suggested that they dispose of the body in a nearby lake, and that he took the tools to the pawnshop. Smith did not state in his statement to police that he was threatened to participate in the robbery-murder. He told police in both statements that Reid threatened him if he told anyone about the robbery-murder. The court's failure to find this as a mitigating circumstance is supported by the record.

Smith argues that the trial court erred in failing to find as nonstatutory mitigating evidence his abusive childhood home and the fact that he was mentally retarded. The trial court, when considering the nonstatutory mitigating evidence, stated the following:

> "The testimony of Dr. Chudy and the Defendant's mother give rise to a duty to consider the non-statutory mitigating circumstances.
>
> "The potential existence of nonstatutory mitigating circumstances come from further consideration of Doctor Chudy's testimony and that of his mother. It is irrefutable that

> this Defendant is the product of an abusive environment woefully lacking in nurturance and emotional support. These factors, though regrettable, are not a license for violence, nor do they justify any act of senseless rage directed at an innocent human being. Were this the case every person from a deprived background could explode at will without fear of consequence.
>
> "Likewise, the Defendant's lack of intelligence is not an excuse for murder, especially in the context of this case. The Defendant knew he had 'F Up' and while in control as he savagely attacked Durk Van Dam.
>
> "Therefore, these nonstatutory circumstances, though thoughtfully considered and applied, do not merit significant consideration."

(R. 190.) "'Although the trial court is required to consider all mitigating circumstances, the decision whether a particular mitigating circumstance is proven and the weight to be given it rests with the sentencer.'" *Boyd v. State*, 715 So.2d 825, 840 (Ala.Cr.App.1997), aff'd, 715 So.2d 852 (Ala.1998), quoting *Williams v. State*, 710 So.2d 1276, 1347 (Ala.Cr.App.1996), aff'd, 710 So.2d 1350 (Ala.1997), cert. denied, 524 U.S. 929, 118 S.Ct. 2325, 141 L.Ed.2d 699 (1998). The trial court's findings are more than supported by the evidence presented at trial and contained in the record.

C.

Smith argues that the trial court erred in finding that the murder was especially heinous, atrocious, or cruel as compared to other capital murders. The trial court in its sentencing order stated the following:

> "Doctor Julia Goodin, a board certified forensic pathologist, testified to a constellation of injuries which mandate consideration of the applicability of this aggravating circumstance within the narrow context of *Kyzerv. State*, 399 So.2d 330 (Ala.1981).
>
> "The cause of the victim's death was multiple blunt force injuries, totalling approximately thirty-five (35) separate, distinct exterior injuries to the victim's head, torso, and appendages and eleven (11) separate, distinct injuries which caused internal trauma. Doctor Goodin testified that the victim was repeatedly beaten, cut, and kicked, and additional testimony established that a variety of tools were used as weapons.
>
> "The victim, furthermore, did not die quickly. According to Doctor Goodin, she opined that the likely mechanism of death was rib fractures which probably resulted in a pneumothorax and a collapsed lung, probably leaving the victim gasping for breath, for an unspecified period of time. Therefore, this Section 13A–5–49(8) aggravating circumstance is proven beyond a reasonable doubt and is considered."

(R. 186.)

The Alabama Supreme Court in *Ex parte Clark*, 728 So.2d 1126 (Ala.), on remand, 728 So.2d 1141 (Ala.Cr.App.1998), characterized this aggravating circumstance as follows:

> "In *Lindsey v. Thigpen*, 875 F.2d 1509 (11th Cir.1989), the United States Court of Appeals for the Eleventh Circuit upheld this Court's application of the 'especially heinous, atrocious or cruel' aggravating circumstance because this Court's application of it provided a 'principled way to distinguish' cases in which the death penalty is appropriately imposed from cases in which it is not. *Id.* at 1513 (upholding our application of Ala.Code 1975, § 13A–5–49(8) and quoting *Godfrey [v. Georgia*], 446 U.S. [420] 431, 100 S.Ct. 1759, 64 L.Ed.2d 398 [(1980)]). The Eleventh Circuit emphasized that the Alabama appellate courts' interpretation of § 13A–5–49(8) passed muster under the Eighth Amendment because this Court and the Court of Criminal Appeals had consistently defined 'especially heinous, atrocious or cruel' to include only 'those conscienceless or pitiless homicides which are *unnecessarily torturous* to the victim.' *Lindsey v. Thigpen*, at 1514 (quoting *Ex parte Kyzer*, 399 So.2d 330, 334 (Ala. 1981))(emphasis added)."

We have upheld a finding that the murder was especially heinous, atrocious, or cruel, where the victim was severely beaten. See *Ex parte Hutcherson*, 727 So.2d 861 (Ala.1998), cert. denied, 527 U.S. 1024, 119 S.Ct. 2371, 144 L.Ed.2d 775 (1999); *Ashley v. State*, 651 So.2d 1096 (Ala.Cr.App.1994); *McGahee v. State*, 632

So.2d 976 (Ala.Cr.App.1993), aff'd, 632 So.2d 981 (Ala.1993), cert. denied, 513 U.S. 1189, 115 S.Ct. 1251, 131 L.Ed.2d 132 (1995).

Clearly, the testimony established that Van Dam was severely beaten for approximately 45 minutes and that he was left to die under a mattress. Smith said that one point he begged for his life because of his two young sons. Also, Van Dam tried to defend himself against the attack as evidenced by the many defensive wounds he sustained to his hands. The coroner also testified that Van Dam died a slow death because of the collapse of one of his lungs. One can also infer from the evidence that Van Dam lived long enough to crawl into his truck, after his severe and prolonged beating, where he died. There was more than sufficient evidence presented for the trial court to find that the murder was "especially heinous, atrocious, or cruel" as compared to other capital murders.

D.

Smith argues that the trial court erred in relying on a nonstatutory aggravating factor when the court stated in its sentencing order that Smith "is a demonstrable danger to civilized society." (R. 190.)

The record reflects that this statement was made at the end of the trial court's application of the aggravating and the mitigating circumstances and at the beginning of the court's final sentence pronouncement. It is clear from the order that the court did not rely on this finding as an nonstatutory aggravating

circumstance. See *Burgess v. State*, 744 So.2d 958 (Ala.Cr.App.1998).

XXI.

Last, as required by § 13A–5–53, Ala.Code 1975, we will address the propriety of Smith's conviction for capital murder and the sentence to death by electrocution. Smith was indicted and convicted of murdering Durk Van Dam during the course of a robbery, an offense defined as capital in § 13A–5–40(a)(2).

The record reflects that Smith's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Section 13A–5–53(b)(1).

The trial court correctly found that the aggravating circumstances outweighed the mitigating circumstances and mandated that Smith be sentenced to death. The trial court found no statutory mitigating circumstances. The trial court made the following findings about the nonstatutory mitigating circumstances:

> "The testimony of Doctor Chudy and the Defendant's mother give rise to a duty to consider the non-statutory mitigating circumstances.
>
> "The potential existence of nonstatutory mitigating circumstances come from further consideration of Doctor Chudy's testimony and that of his mother. It is irrefutable that this Defendant is the product of an abusive environment woefully lacking in nurturance and emotional support. These factors, though

> regrettable, are not a license for violence, nor do they justify any act of senseless rage directed at an innocent human being. Were this the case every person from a deprived background could explode at will without fear of consequence.
>
> "Likewise, the Defendant's lack of intelligence is not an excuse for murder, especially in the context of this case. The Defendant knew he had 'F Up' and while in control as he savagely attacked Durk Van Dam.
>
> "Therefore, these nonstatutory circumstances though thoughtfully considered and applied, do not merit significant consideration."

(R. 190). The trial court found the existence of three aggravating circumstances, §§ 13A–5–49(1), 13A–5–49(4) and 13A–5–49(8): that Smith was under a term of imprisonment for two burglary convictions and one receiving-stolen-property conviction at the time of the robbery-murder; that the murder of Van Dam occurred during the course of a robbery; and that the murder was especially heinous, atrocious, or cruel as compared to other capital offenses. We agree with the trial court's findings.

Section 13A–5–53(b)(2) provides that we must independently weigh the aggravating circumstances and the mitigating circumstances to determine the propriety of Smith's sentence of death. After an independent weighing, we are convinced, as was the trial court, that death is the appropriate sentence for Smith's conduct.

Section 13A–5–53(b)(3) provides that we must address whether Smith's sentence is disproportionate or excessive to other penalties imposed in similar capital cases. Smith's conviction is neither. "In fact, two-thirds of the death sentences imposed in Alabama involve cases of robbery/murder." *McWhorter v. State*, 781 So.2d 257 (Ala.Cr.App.1998).

Last, we have searched the entire record for any error that may have adversely affected Smith's substantial rights and have found none. Rule 45A, Ala.R.App.P.

Smith's conviction and sentence to death by electrocution are due to be, and are hereby, affirmed.

AFFIRMED.

LONG, P.J., and McMILLAN, COBB, BASCHAB, and FRY, JJ., concur.

In the
United States Court of Appeals
For the Eleventh Circuit

No. 21-14519

JOSEPH CLIFTON SMITH,

Petitioner-Appellee,

versus

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent-Appellant.

Appeal from the United States District Court
for the Southern District of Alabama
D.C. Docket No. 1: 05-cv-00474-CG-M

(Filed Jun. 9, 2023)

Before WILSON, JORDAN, and ROSENBAUM, Circuit Judges.

ORDER:

The State's motion to stay the issuance of the mandate pending a petition for writ of certiorari fails to show "that there is good cause for a stay." Fed. R. App. P. 41(d)(1); *see also, e.g.*, *Nara v. Frank*, 494 F.3d 1132, 1133 (3d Cir. 2007) (observing that courts award such

relief in "exceptional cases"). We therefore deny the motion.

To establish good cause for a stay, "there must be a likelihood of irreparable harm if the judgment is not stayed." *Phillip Morris USA Inc. v. Scott*, 561 U.S. 1301, 1302 (2010) (Scalia, J., in chambers). The State invokes two reasons in service of its argument that it will suffer irreparable harm absent a stay. Neither is persuasive.

First, the State asserts that it "would likely need to resentence" Smith unless we stay our judgment affirming the district court's order vacating his death sentence. Ala.'s Mot. at 18. "Absent a stay," the State complains that it will "be forced to expend resources to conduct a new sentencing hearing for a murder that took place in the last century." *Id.* at 20. But even the State's own motion concedes that resentencing Smith will require minimal resources. As the State explained, "Because Smith's conviction of a capital crime is not disputed, the only sentence he could receive would be life without parole." *Id.* at 20.

Second, the State also claims that its certiorari petition risks becoming moot "if Smith's sentence is vacated and he is resentenced by the state circuit court to comply with this Court's ruling." *Id.* at 18. But even if Smith's death sentence is vacated and he is sentenced to life without parole before the Supreme Court resolves the State's petition for writ of certiorari, "neither the losing party's failure to obtain a stay preventing the mandate of the Court of Appeals from issuing

nor the trial court's action in light of that mandate makes the case moot." *Kernan v. Cuero*, 138 S. Ct. 4, 7 (2017). Rather, the Supreme Court could still "undo what the *habeas corpus* court did" if it so desires. *Id.* (quoting *Eagles v. United States ex rel. Samuels*, 329 U.S. 304, 308 (1946)).

* * * *

"A stay is not a matter of right," but "is instead 'an exercise of judicial discretion.'" *Nken v. Holder, 556* U.S. 418, 433 (2009) (quoting *Virginian Ry. Co. v. U.S.*, 272 U.S. 658, 672-73 (1926)). The party requesting a stay bears the burden of showing that the circumstances justify an exercise of that discretion." *Id.* at 433–34. That is a "heavy burden," *Scott*, 561 U.S. at 1302. And it is one the State has failed to carry here.

The State's motion not only fails to establish good cause for a stay, but it also mischaracterizes the panel opinion. According to the State's motion, the panel opinion applied "a presumption that an individual's IQ falls at the bottom of his IQ range." Ala.'s Mot. at 15 (quoting, allegedly, *Smith v. Comm'r, Ala. Dep't of Corr. ("Smith II")*, 67 F.4th 1335, 1348 (11th Cir. 2023)).

But the panel opinion did not apply a presumption that an individual's IQ score falls at the bottom of his IQ range; the panel opinion presumed that an individual's "IQ score *could*" fall at the bottom of his range of admissible IQ scores. *Smith II*, 67 F.4th at 1345; *see also id.* at 1346 (noting that the district court did not find the State's expert's testimony "strong enough" to throw out Smith's lowest IQ score, leading the district

court to find that Smith's "IQ *could be* 'as low as 69'" (citations omitted)). So if the bottom of a person's range of admissible IQ scores is equal to or less than 70, that individual *could* have significantly subaverage intellectual functioning. *E.g.*, *Ex parte Perkins*, 851 So. 2d 453, 456 (Ala. 2002) (defining significantly subaverage intellectual functioning as an IQ of 70 or below). When a district court finds that an individual *could* have significantly subaverage intellectual functioning, binding Supreme Court precedent requires the district court to move on and consider other evidence of the individual's intellectual disability (or lack thereof). *See Smith II*, 67 F.4th at 1347 (first citing *Hall v. Florida*, 572 U.S. 701, 707, 724 (2014); then citing *Moore v. Texas*, 581 U.S. 1, 14 (2017)). And we review "a district court's finding that an individual is intellectually disabled" "for clear error" only. *Id.* at 1344.

The State's distortion of the panel opinion further undermines its claim "that there is good cause for a stay." Fed. R. App. P. 41(d)(1).

For these reasons, the State's motion to stay the issuance of the mandate pending a petition for writ of certiorari is DENIED.

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF ALABAMA SOUTHERN DIVISION

JOSEPH CLIFTON SMITH,	)	
Petitioner,	)	
vs.	)	**CIVIL ACTION**
KIM T. THOMAS, Commissioner, Alabama Department of Corrections,	)	**NO. 05-0474-CG-M**
Respondent.	)	

ORDER

(Filed Jan. 21, 2014)

This matter is before the court on the motion of Petitioner Joseph Clifton Smith ("Petitioner" or "Smith") to stay (Doc. 61), Petitioner's motion for reconsideration pursuant to Rule 59(e) (Doc. 60), Respondent's response (Doc. 63) and Petitioner's reply (Doc. 64). For the reasons explained below, the court finds that both motions should be denied.

I. Background

Smith initiated this action on August 15, 2005 by filing a Petition for Writ of Habeas Corpus (Doc. 1) pursuant to 28 U.S.C. § 2254. Smith filed an Amended Petition on July 25, 2011. (Doc. 52). Smith' petition challenges a 1998 Alabama state court judgment of

conviction and death sentence for capital murder. This court denied Smith's petition on September 30, 2013. (Doc. 59). On October 28, 2013, Smith moved for reconsideration pursuant to Rule 59(e) asserting that the court's order dismissing his petition contains substantial factual errors and manifest errors of law with regard to his claim that he is mentally retarded and entitled to Atkins relief. Smith further asserts that this court should stay the proceedings in this case pending the decision of the Supreme Court of the United States in Hall v. Florida, No 12-10882 (2012).

II. Motion to Stay

Smith contends that the Supreme Court's decision in Hall v. Florida will have a direct impact on the determination in this case. The issue before the court in Hall is whether the Florida scheme for identifying mentally retarded defendants in capital cases violates Atkins v. Virginia. In Hall, the petitioner claims that Florida Courts have conflicted with Atkins "by inventing a new definition of mental retardation which requires a non-existent 'bright line' standardized IQ score of 70 or below which is contrary to the recommendations of the inventors and developers of the very IQ tests the Florida Retardation Statute relies upon by ignoring the scientifically accepted and essential standard error of measurement and use of confidence intervals." Hall, 12-10882, petition for writ of certiorari pp. 5-6.

However, Smith did not properly support his Atkins claim in state court.[1] Smith attempted to assert that he was mentally retarded and that his execution would violate the Eighth Amendment as interpreted by Atkins, but failed to plead sufficient facts to show that he suffered from subaverage intellectual functioning or deficit adaptive functioning and did not even plead his IQ score. The Court of Criminal Appeals of Alabama agreed with the Circuit Court that "Smith failed to meet his burden of pleading in regard to this claim." Smith v. State, 71 So.3d 12, 18 (Ala.Crim.App. 2008). As stated by the Criminal Appeals Court:

> Smith pleads only conclusions concerning his mental health and does not even indicate his IQ score in his pleading. The only grounds

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[1] The court notes that Smith raised other issues in state court relating to his IQ. For instance Smith argued that comments made in closing argument about his low IQ implied that he should be sentenced to death because he is mentally retarded. In closing, the prosecution had included the following statement:

> "The Doctor said that this Defendant has a low IQ and I asked him this question because from your own common sense, from your own experience you know it to be true, there are folks out there with marginal IQs who are streetwise. They get along they get by, they survive sometimes better than the rest of us in certain situations. This man's been in prison, this man's been around, this man is streetwise. He knew what he was doing." (R. 831).

Smith also argued on appeal that because there was testimony that he was borderline retarded, the trial court should have found that his commission of the act while under the influence of extreme mental or emotional disturbance was a mitigating circumstance. None of the IQ related issues raised by Smith provide any additional support for his Atkins claim.

> offered in support of this claim were the following:
>
> > "Mr. Smith has deficiencies in all three of these adaptive areas and clearly meets the mental retardation set forth in Atkins.
> >
> > "As evidenced by his school records and the testimony at trial, both his subaverage intellectual functioning and inability to adapt manifested themselves before Mr. Smith turned 18. Therefore, Mr. Smith meets the three requirements under the Atkins test for mental retardation and imposition of the death penalty on him violates the Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama law."
>
> (C.R. 75.) Clearly Smith failed to satisfy the pleading requirements of Rule 32.6(b), ALA.R.CRIM.P.

Id. at 19. The Criminal Appeals Court further found that even if the claim had been properly plead, the record supports the Circuit Court's conclusion that Smith does not meet the broadest definition of mentally retarded. Id. The Court discussed Smith's argument that it should adopt a margin of error when examining a defendant's IQ. Id. at 19-21. However, the Court reasoned that such a conclusion would in essence expand the definition of mentally retarded adopted by the Alabama Supreme Court in Ex parte Perkins, 851

So.2d 453 (Ala. 2002) and conflict with federal regulations. Id. at 20-21.

As this court stated in the order denying Smith's petition (Doc. 59, pp. 57-58), the Atkins claim is properly before this court because it was raised in Smith's First and Second Amended Rule 32 petitions, but many of the facts now alleged in support of that claim were not contained in Smith's state court submissions. This court can only look to the allegations stated in Smith's Rule 32 petitions. Borden v. Allen, 646 F.3d 785, 816 (11th Cir. 2011). As the Borden Court explained:

> Logically, that court could only undertake an "adjudication of the claim" that was presented to it; we believe that a review of a state court adjudication on the merits in light of allegations not presented to the state court—for example, by examining additional facts or claims presented for the first time in a petitioner's federal habeas petition—would insufficiently respect the "historic and still vital relation of mutual respect and common purpose existing between the States and the federal courts."

Id. (quoting Michael Williams v. Taylor, 529 U.S. 420, 436, 120 S.Ct. 1479, 1490, 146 L.Ed.2d 435 (2000)). Although this court and the state court discussed the merits of Smith's claim and whether it would be appropriate to apply a margin of error to his IQ, this court finds that even if a margin of error should have been applied to such determinations, the state court's

finding that Smith's Atkins claim fails because he did not support such a claim, was not unreasonable or contrary to clearly established federal law.

In Smith's Rule 32 petitions, he raised an Atkins claim, arguing that he was mentally retarded and that application of the death penalty to a mentally retarded person violates the Eighth and Fourteenth Amendments. However, in support of this claim, Smith only submitted the following argument:

> 112. Application of the death penalty to, and execution of, a mentally retarded person violates the Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama law. Atkins v. Virginia, 536 U.S. 304 (2002). In Atkins, the Supreme Court set out a three prong test to identify mental retardation sufficient to prohibit application of the death penalty. That test requires (1) subaverage intellectual functioning, (2) "significant limitations in adaptive skills," and (3) the manifestation of the first two requirements occurred before the age of 19 Atkins, 536 U.S. at 318. Smith meets all of these requirements.
>
> 113. Smith suffers from sub-average intellectual function. When Smith was transferred to the Monroe County Excel Junior high school, the county board of education classified Smith as "Educably Mentally Retarded" (EMR), based on his "psychological and educations evaluations, academic history, and other pertine[sic] information." In addition,

there was testimony at trial that Smith functioned intellectually at the bottom 3rd percentile of all adults. (R. 781).

114. Smith also suffers from significant limitations in adaptive skills. Atkins defines adaptive skills as 'communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work. Mental retardation manifests before age 18.' Mental retardation" Definition, Classification, and Systems of Supports 5 (9th ed.1992)." Atkins, at 308 n. 3. Smith has deficiencies in all of these areas. There was testimony at sentencing which showed his inability to adapt because he often acts out impulsively, lacks the ability to formulate a pre-meditated plan and acts as a follower in groups. See Atkins, 536 U.S. at 318 (" . . . there is abundant evidence that they often act on impulses rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders.")

115. In addition, those with mild mental retardation, generally do not academically progress beyond the 6th grade. Diagnostic and Statistical Manual of Mental Disorders (4th Ed., 2000, Text Revision). School records indicate that Smith never progressed beyond the 5th grade. Additionally, even though he was in EMR classes while in the Monroe County school system, he either filed or performed at the "D" level in all subjects.

> 116. As evidenced by his school records and the testimony at trial, both his sub-average intellectual functioning and inability to adapt manifested themselves before Smith turned 18. Therefore, Smith meets the three requirements under the Atkins test for mental retardation and imposition of the death penalty on him violates the Eighth and Fourteenth Amendments to the United States Constitution, the Alabama Constitution and Alabama law.

R-52, ¶¶ 113-116. Most of the Smith's state court Atkins claim consisted of factual conclusions and statements of law. Smith's only citation to the record was to page 781 of the trial record which includes the following testimony by Dr. Chudy:

> Q. And after reviewing these tests did you come to form any opinion about Jody's IQ level?
>
> A. Yes, I did.
>
> Q. And what was that, please, sir?
>
> A. He was found to a full scale IQ of 72, which placed him at the third percentile in comparison to the general population.
>
> Q. Out of a hundred people where would that put him?
>
> A. Third. If you had normally distributed a hundred people in this room, ninety-seven would function higher than he would.

> Q. And did you make any findings about a borderline intelligence situation with him?
>
> A. Well, there – there actually is what we call a standard error of measurement of about three or four points. So, you know, taking that into account you could – on the one hand he could be as low as a 69. 69 is considered clearly mentally retarded.

TR 781. The above testimony was cited to support petitioner's statement that "there was testimony at trial that Smith functioned intellectually at the bottom 3rd percentile of all adults." The above evidence does not support a finding that Smith had both significantly subaverage intellectual functioning and significant deficits in adaptive functioning. As this court stated in the order denying Smith's petition, all three of the following must be shown for mental retardation to rise to the level of prohibiting execution:

> (1) significantly subaverage intellectual functioning (i.e., an IQ of 70 or below); (2) significant or substantial deficits in adaptive behavior; and (3) the manifestation of these problems during the defendant's developmental period (i.e., before the defendant reached age eighteen).

Holladay v. Allen, 555 F.3d 1346, 1353 (11th Cir. 2009); see also Smith v. State (Jerry Smith), 2007 WL 1519869, at *8 (Ala. May 25, 2007) (stating that "All three factors must be met in order for a person to be classified as mentally retarded for purposes of an Atkins claim.").

Additionally, it is not clear that Alabama courts have required a bright line standardized IQ score of 70 or below as the Hall case alleges exists in Florida. As this court stated in the order denying Smith's petition, the Eleventh Circuit has held that a federal habeas court has discretion to consider the standard error of measurement and the Flynn effect. (Doc. 59, p. 61, citing Thomas v. Allen, 607 F.3d 749, 753 (11th Cir. 2010)). Thus, when there is evidence to suggest a petitioner's IQ should be adjusted downward, a court may consider applying a standard error of measurement and the Flynn effect. However, Smith failed to provide sufficient evidence to persuade the court that Smith's IQ should be adjusted downward. There was testimony that if a standard error of measurement was applied Smith's IQ could be as low as 69. But considering that same standard error of measurement would also suggest that Smith's IQ could be as high as 75. Where, as here, there was little or no evidence to point towards a downward adjustment, the state Court was not wrong to refuse to apply a standard error of measurement and adjust Smith's IQ downward.[2]

For the reasons discussed above, the court does not find that the Supreme Court's decision in Hall v.

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[2] As this court previously explained the instant case can be distinguished from the Thomas case. (Doc. 59, p. 61, n. 24). Unlike the Court in Thomas, this court must give deference to the state court's conclusion. Additionally, unlike the circumstances in Thomas, the parties here did not stipulate that a standard error of measurement was appropriate and there was no evidence that any intelligence assessment ever yielded an IQ score for Smith that was below 70. (Doc. 59, p. 61, n. 24).

Florida will have a direct impact on the determination in this case.

III. Motion to Reconsider

Smith has moved for reconsideration pursuant to Rule 59(e). For the reasons discussed above with regard to Smith's motion to stay, the court also finds that reconsideration should be denied.

> The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact. A Rule 59(e) motion cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment.

Jacobs v. Tempur–Pedic Int'l, Inc., 626 F.3d 1327, 1344 (11th Cir. 2010). Smith has failed to identify any newly discovered evidence or any manifest errors of law or fact.

CONCLUSION

For the reasons set forth above, the motions of Petitioner Joseph Clifton Smith to stay (Doc. 61) and for reconsideration pursuant to Rule 59(e) (Doc. 60), are **DENIED**.

DONE and **ORDERED** this 21st day of January, 2014

/s/ Callie V. S. Granade
UNITED STATES DISTRICT JUDGE

IN THE SUPREME COURT OF ALABAMA

[SEAL]

April 15, 2011

1080589 Ex parte Joseph Clifton Smith. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Joseph Clifton Smith v. State of Alabama) (Mobile Circuit Court: CC98-2064.60; Criminal Appeals : CR-05-0561).

CERTIFICATE OF JUDGMENT

WHEREAS, the appeal in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on April 15, 2011:

Writ Quashed. No Opinion. Main, J. - Woodall, Stuart, Bolin, and Murdock, JJ., concur. Cobb, C.J., and Parker, Shaw, and Wise, JJ., recuse themselves.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s)

herewith set out as same appear(s) of record in said Court.

Witness my hand this 15th day of April, 2011.

/s/ Robert G. Esdale
Clerk, Supreme Court of Alabama

IN THE SUPREME COURT OF ALABAMA

[SEAL]

January 20, 2010

1080589

Ex parte Joseph Clifton Smith. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Joseph Clifton Smith v. State of Alabama) (Mobile Circuit Court: CC98-2064.60; Criminal Appeals : CR-05-0561).

ORDER

IT IS ORDERED that the petition for writ of certiorari to the Court of Criminal Appeals is granted as to petitioner's claim of ineffective assistance of counsel regarding his trial counsel's failure to file a motion to recuse the trial judge; writ is denied as to all other claims.

See Rule 39(g)(1) - (3), Alabama Rules of Appellate Procedure, as amended effective June 1, 2005, for instructions regarding the filing of briefs. The petitioner may file a brief within 14 days from the date of this order unless the petition involves a pretrial appeal by the State in a criminal case, in which case the brief may be filed within 7 days from the date of this order. Thereafter, the respondent may file a brief in accordance with subsection (g)(2) of Rule 39. If the petitioner or the respondent chooses not to file a brief, that party must file a waiver of the right to file the brief within

the time the brief is due under the appellate rules. See Rule 39(g)(1) and (2).

See Rule 39(h) with regard to oral argument.

PER CURIAM - Cobb, C.J., and Lyons, Woodall, Stuart, Smith, Bolin, and Murdock, JJ., concur. Parker and Shaw, JJ., recuse themselves.

I Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.
Witness my hand this 20th **day of** January 2010

/s/ Robert G. Esdale, Sr.
Clerk, Supreme Court of Alabama

cc:
Hon, Lane W. Mann
Hon. James C. Wood
Chad W Bryan, Esq.
Hon. Troy Robin King
Corey Landon Maze, Esq.
Pamela Lynn Casey, Esq.

/ag

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

Lane W. Mann
Clerk
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[SEAL]

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February 13, 2009

CR-05-0561 Death Penalty

Joseph Clifton Smith v. State of Alabama (Appeal from Mobile Circuit Court: CC98-2064.60)

NOTICE

You are hereby notified that on February 13, 2009 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/ Lane W. Mann
Lane W. Mann, Clerk
Court of Criminal Appeals

cc: Hon. JoJo Schwarzauer, Circuit Clerk
Chad W. Bryan, Attorney
Pamela Lynn Casey, Asst. Attorney General
Corey Landon Maze, Asst. Attorney General

Supreme Court of Alabama.

Ex parte Joseph Clifton Smith

NO. 1041432

|

August 12, 2005

Opinion

Disposition: Certiorari denied.

Court of Criminal Appeals of Alabama.

Joseph Clifton Smith
v.
State

CR-04-1491
June 29, 2005

Reh. denied.

Ala.Cr.App. 2005.
Smith v. State
926 So.2d 1095 (Table)

Court of Criminal Appeals of Alabama.

Joseph Clifton Smith
v.
State

CR-02-0319
January 16, 2004

Reh. denied.

Ala.Cr.App. 2004.
Smith v. State
910 So.2d 831 (Table)

795 So.2d 842 (Mem)
Supreme Court of Alabama.

Ex parte Joseph Clifton SMITH.
(In re Joseph Clifton Smith
v.
State).

1992220.
|
March 16, 2001.

Attorneys and Law Firms

Glenn L. Davidson, Mobile, for petitioner.

Bill Pryor, atty. gen., and Thomas F. Parker IV, asst. atty. gen., for respondent.

Prior report: Ala.Cr.App., 795 So.2d 788.

Opinion

MOORE, Chief Justice.

WRIT DENIED. NO OPINION.

HOUSTON, SEE, BROWN, JOHNSTONE, and STUART JJ., concur.

LYONS, HARWOOD, and WOODALL, JJ., dissent.

HARWOOD, Justice (dissenting).

Joseph Smith was convicted on September 16, 1998, of capital murder. The Court of Criminal Appeals affirmed his conviction and the sentence of death on May 26, 2000. *Smith v. State*, 795 So.2d 788 (Ala.Crim.App.2000). He petitioned this Court for certiorari review. This Court today denies that review. I respectfully dissent from that denial.

The first issue Smith presents in his certiorari petition concerns the trial court's instructing the jurors that they could recommend a sentence of life imprisonment without parole only if they were convinced "beyond a reasonable doubt that the mitigating circumstances outweigh the aggravating circumstances." I conclude that Smith properly presented this issue to this Court under Rule 39, Ala.R.App.P. Smith quotes language from *Stewart v. State*, 730 So.2d 1203 (Ala.Crim.App.1996), and from various other cases from the Court of Criminal Appeals (noted on pages 7 through 9 of his petition) that show a conflict between that court's caselaw concerning the proper weighing of aggravating and mitigating circumstances and the law as the trial judge presented it to the jury in the instruction Smith challenges. The petition also alerts this Court to the fact that the instruction in question conflicts with the rationale of the holdings in *Mills v. Maryland*, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988), and *Ex parte Martin*, 548 So.2d 496 (Ala.1989), and with certain provisions of the death-penalty statute, particularly § 13A–5–48, Ala.Code 1975. The trial court's instruction that the jurors could

recommend life without parole only if they were convinced "beyond a reasonable doubt that the mitigating circumstances outweigh the aggravating circumstances" is plainly contrary to the requirements of the authorities Smith cited in his petition.

On page 8 of his petition, Smith (citing R.T. 847–48) quotes the following language from the trial court's instruction:

> "[I]f after a full and fair consideration of all of the evidence in this case you are convinced *beyond a reasonable doubt that the mitigating circumstances outweigh the aggravating circumstances* . . . your verdict would be to recommend the punishment of life imprisonment without parole."

(Emphasis added by Smith.) The Court of Criminal Appeals quoted that statement in its opinion, and it also quoted this further language from the instruction (referencing R.T. 848):

> "All right. *And to repeat*, in order to return an advisory verdict of death by electrocution at least 10 of your number must be satisfied beyond a reasonable doubt that aggravating circumstances have been proven and outweigh mitigating circumstances. In order to return an advisory verdict recommending life without parole at least 7 of your number must be *satisfied beyond a reasonable doubt of the existence of mitigating circumstances and* that those mitigating circumstances *outweigh* the aggravating circumstances."

Smith v. State, 795 So.2d at 835 (emphasis added). I note that in this second statement, the judge committed the additional error of misstating the burden of proof for a mitigating circumstance. Moreover, that second statement not only fails to correct the earlier error—the statement that, in order to recommend a sentence of life without parole, the jury had to find beyond a reasonable doubt that the mitigating circumstances outweighed the aggravating circumstances—but that second statement could reasonably be understood to restate that earlier error.

The petition also notes that the trial court attempted to give a curative instruction, quoted by the Court of Criminal Appeals, 795 So.2d at 835, which included this passage:

> "Only an aggravating circumstance must be proven beyond a reasonable doubt and the burden is always on the State of Alabama to convince you from the evidence beyond a reasonable doubt that such an aggravating circumstance exists and the burden is *also* on the State to prove to you beyond a reasonable doubt that the aggravating circumstance or circumstances, should you find that they exist, outweigh any mitigating circumstances which need only be proven by a preponderance of the evidence."

(Emphasis supplied.) The Court of Criminal Appeals concluded that this instruction corrected the earlier error concerning the burden of proof relating to mitigating circumstances; it then held that the trial court had

not committed reversible error. I believe the petition correctly notes that the trial court's attempted cure of its error concerning the burden of proof relating to mitigating circumstances does not address the separate error in the instruction that stated that the jury could recommend a sentence of life imprisonment without parole only if the jury found beyond a reasonable doubt that the mitigating circumstances outweighed the aggravating circumstances. Based upon the instructions quoted in the opinion of the Court of Criminal Appeals and pointed out by Smith in his petition, a reasonable jury might conclude that in order to recommend the death penalty it must determine that the aggravating circumstances outweigh the mitigating circumstances, whereas in order to recommend a sentence of life without parole, it must determine, beyond a reasonable doubt, that the mitigating circumstances outweigh the aggravating circumstances. I believe that, especially in a capital case, the trial judge should phrase any attempted curative charge in such a way as to alert the jury to the fact that the court had made a misstatement earlier and that the court is now giving an instruction intended to supplant and correct the earlier misstatement.

Misinforming the jury about the quantum of proof necessary to recommend a sentence of life without parole in a capital case is a significant error, and the critical issue raised by this petition is whether the trial court's later statement of the law was sufficient to cure that error. My research does not reveal a hard-and-fast

rule concerning what is required to cure an erroneous instruction in this context.[1]

It appears that Alabama courts have reviewed, on a case-by-case basis, the question whether attempted cures were sufficient to correct erroneous instructions, giving a practical consideration to the question whether the error "has or probably has adversely affected [a] substantial right of the appellant." Rule 45A, Ala.R.App.P. For example, in *Starks v. State*, 594 So.2d 187 (Ala.Crim.App.1991), the Court of Criminal Appeals considered an error in the trial court's jury charge concerning the distinction between the capital offense of intentional murder and the lesser included offense of felony murder. It described the trial court's error and contrasted that error with the correct procedures:

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[1] For example, if this were the admittedly different situation in which the trial court had attempted to cure a prosecutor's improper comment on the defendant's refusal to testify, this Court would require that the trial court "sustain the [defendant's] objection and immediately instruct the jury as to the impropriety of the remark made by the district attorney," and it has stated that "[i]n giving a curative instruction on the defendant's right not to testify, the trial judge should read the statute and explain thoroughly and immediately to the jury that the defendant's failure to testify in his own behalf shall not create any presumption against him." *Ex parte Wilson*, 571 So.2d 1251, 1265 (Ala.1990). *See also Whitt v. State*, 370 So.2d 736 (Ala.1979); *Bailey v. State*, 717 So.2d 3 (Ala.Crim.App.1997); and *Lockett v. State*, 505 So.2d 1281 (Ala.Crim.App.1986). Of course, the trial court's actions in this case would fall far short of meeting any comparable requirements that might be imposed in a case like the present one.

"At the beginning of his charge, the trial judge read the indictment, which charged the appellant with *intentional* murder. Shortly thereafter, however, he discussed the elements of the charged capital offense using only the term 'murder.' He clearly did *not* include intent when enumerating the elements of the capital offense and stated that the term 'murder' would be defined later. Subsequently, when he did define the term 'murder,' he used *both* the intentional form found in [Ala.Code 1975,] § 13A–6–2(a)(1) and the felony murder form found in § 13A–6–2(a)(3). Immediately after providing this dual definition of 'murder,' the trial judge referred to the charged offense of '*murder* occurring in the commission or attempted commission of a dangerous felony' and then the 'lesser included offense of *murder*.' (Emphasis added.) The trial judge never instructed the jury that, in order to convict the appellant of the capital offense, it must find that he *intentionally* killed Benton. Furthermore, the trial judge failed to clearly distinguish the elements of the charged capital offense from those of the lesser included offense of felony murder. Compare *Freeman v. State*, 555 So.2d 196, 208 (Ala.Cr.App.1988) ('the trial judge extensively instructed the jury on the difference between capital murder, felony murder, and intentional murder'), affirmed, 555 So.2d 215 (Ala.1989), cert. denied, 496 U.S. 912, 110 S.Ct. 2604, 110 L.Ed.2d 284 (1990); *Davis v. State*, 440 So.2d 1191, 1194 (Ala.Cr.App.1983) (trial court instructed jury on 'the intent required for a capital felony, on

> the felony murder doctrine, and on the distinction between the intent required for a capital felony and the intent required for the lesser included offense of noncapital murder'), cert. denied, 465 U.S. 1083, 104 S.Ct. 1452, 79 L.Ed.2d 770(1984); *Womack v. State*, 435 So.2d 754, 763 (Ala.Cr.App.) ('[t]he jury was given proper instructions on the "intent to kill requirement" where trial court 'made it clear to the jury that the felony murder doctrine was relevant only to the lesser included offense of noncapital murder, and that there could be no conviction for the capital offense absent a finding beyond a reasonable doubt that the appellant possessed the intent to kill'),' affirmed, 435 So.2d 766 (Ala.), cert. denied, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983). We note that a similar deficiency required the reversal of codefendant Russaw's capital murder conviction. *Russaw v. State*, 572 So.2d 1288, 1292–93 (Ala.Cr.App.1990)."

594 So.2d at 193–94.

The court in *Starks* then addressed the State's argument, made in reliance on *Bui v. State* 551 So.2d 1094 (Ala.Crim.App.1988), that the trial court's error was cured by a later instruction concerning the definition of "intentional murder." The court concluded that the charge defining "intentional murder" did not cure the earlier error because it did not adequately address the element of intent required to prove capital murder. Similarly, the trial court's later instruction in this present case—that to recommend the death penalty the jury must find that the aggravating circumstances

outweigh the mitigating circumstances—did not adequately address the earlier error concerning when a jury could recommend a sentence of life without parole. The trial court's curative instruction in this case did not specifically note and address the earlier error, and it did not explicitly correct that error. In addition to *Starks*, I would note *Ex parte Hamilton*, 396 So.2d 123 (Ala.1981) (holding that a single curative charge was not sufficient to cure the error resulting from three separate misstatements of the quantum of evidence that the jury was to consider in reaching its verdict), and *Reed v. State*, 47 Ala.App. 617, 259 So.2d 304 (1972) (holding that a charge telling the jury that the defendant had the burden of explaining his lawful possession of allegedly stolen property was not cured by a general instruction telling the jury that the State had the burden of proving guilt beyond a reasonable doubt).

As an example of a proper cure of an erroneous instruction, I note *King v. State*, 355 So.2d 1148 (Ala.Crim.App.1978), where the trial court cured an erroneous reference to a "confession" by explicitly instructing the jury to disregard that reference, stating the correct instruction, and polling the jury. The trial court in the instant case took no action comparable to the trial court's action in *King*. I consider the situation in this case more analogous to the situation in *Starks, supra*, where the trial court gave a plainly erroneous instruction concerning a critical aspect of the jury's duty, and a subsequent curative instruction was at best confusing and failed to correct the error. Accordingly, I

believe this Court should issue the writ of certiorari to consider more fully Smith's argument regarding the erroneous jury instructions.

LYONS and WOODALL, JJ., concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA
JUDICIAL BUILDING, 300 DEXTER AVENUE
P.O. BOX 301555

Hon. Susan F. Wilson, Circuit Clerk

RE: CR-98-0206 (DEATH PENALTY)
Joseph Clifton Smith v.
State of Alabama
(Appeal from Mobile Circuit Court: CC98-2064).

Hon. Glenn L. Davidson, Attorney

Dear Sir or Madam:

You are hereby notified that on August 25th, 2000 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for rehearing overruled. 39(k) Motion Denied.

/s/ Lane M. Mann
Clerk
Court of Criminal Appeals

LWM/jz