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In the

United States Court of Appeals

For the Eleventh Circuit

No. 21-13734

MARCUS BERNARD WILLIAMS,

Petitioner-Appellee,

versus

STATE OF ALABAMA,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 1:07-cv-01276-KOB

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC

(Filed Sep. 22, 2023)

Before WILSON, GRANT, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en

banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

[PUBLISH]

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No. 21-13734

MARCUS BERNARD WILLIAMS,

Petitioner-Appellee,

versus

STATE OF ALABAMA,

Respondent-Appellant.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 1:07-cv-01276-KOB

(Filed Jul. 11, 2023)

Before WILSON, GRANT, and LAGOA, Circuit Judges.

WILSON, Circuit Judge:

In 1996, Marcus Bernard Williams was convicted of capital murder by an Alabama jury. The jury recommended death by execution, and the trial judge imposed the death penalty. Williams filed a petition for habeas corpus relief in the Northern District of

Alabama, alleging—as relevant to this appeal—that trial counsel was ineffective during the penalty phase of his trial for failing to investigate and present mitigating evidence.

The district court initially denied habeas relief on all claims, and Williams appealed. We vacated the district court's order and remanded to the district court to determine whether Williams was entitled to an evidentiary hearing and to reconsider his failure-to-investigate claims de novo. *Williams v. Alabama*, 791 F.3d 1267, 1277 (11th Cir. 2015). After conducting an evidentiary hearing, the district court granted habeas relief. The State of Alabama (State) now appeals. After careful review of the record and with the benefit of oral argument, we affirm.

I. BACKGROUND

The only question presented in this appeal is whether Williams' trial attorneys were constitutionally ineffective during the penalty phase of his trial. Neither the facts of Williams' case nor his guilt is in dispute. The relevant facts are as follows:

> On November 6th, 1996, the defendant had been out with friends, drinking and smoking marijuana. Upon returning home that evening, the defendant's thoughts turned to a young female neighbor of his, Melanie Dawn Rowell, and his desire to have sexual relations with her.

> At approximately 1:00 a.m. that night, Williams attempted to enter Rowell's back door, but the door was locked. He then noticed a kitchen window beside the door. He removed the screen from the window and found that the window was not locked.

Williams v. State, 795 So. 2d 753, 761 (Ala. Crim. App. 1999) (*Williams I*). Williams entered through the kitchen window, took a knife from the counter, and proceeded upstairs, removing his pants part way up the stairs. *Id.* Williams entered Rowell's bedroom. *Id.*

> He climbed in bed on top of her. When he began removing Rowell's clothes, a struggle ensued. . . . As Rowell continued to struggle, Williams placed his hands around her neck. Eventually Rowell ceased to struggle as Williams continued to strangle her. When she was motionless, Williams proceeded to have sexual intercourse with her for 15 to 20 minutes.

Id. at 761–62. Williams was subsequently arrested. *Id.* at 762. He provided written statements to the police implicating himself in Rowell's death. Williams was indicted for murder during a rape or attempted rape. *See* Ala. Code § 13A-5-40(a)(3) (1975).

Trial

Williams was represented at trial by Tommie Wilson (now deceased) and Erskine Funderburg. Wilson was primarily responsible for the guilt phase, while Funderburg mainly handled the penalty phase. After his first trial ended in a mistrial, Williams' retrial

began on February 22, 1999. Williams' sole defense was that he intended only to rape, not kill, Rowell. The defense offered no evidence or witnesses at the guilt phase. The jury found Williams guilty of capital murder during a rape. *Williams I*, 795 So. 2d at 761.

At the penalty phase, trial counsel called two witnesses: Williams' mother, Charlene Williams, and his great-aunt, Eloise Williams. Charlene[1] told the jury that she was young and unmarried when she had Williams; that Williams faced hardships as a child, such as living with different relatives and having no father or adult male figure in his life; and that Williams stopped playing school sports after a knee injury. Charlene also gave testimony that portrayed Williams in a negative light. She testified that Williams dropped out of high school, hung out "with a rough crowd," was kicked out of the Job Corps for fighting, stopped going to church, and "wanted to sleep all day and stay up all night."

Eloise told the jury about Williams' unstable home life and testified that he did not see his mother often and became sad and withdrawn at times, that he was a good student with no significant criminal history, that he struggled following the deaths of his grandfather and uncle, and that since going to jail, he stayed out of trouble and was remorseful for his crime. Eloise also testified that Williams had a quick temper, had a prior arrest for fighting as a teenager, was irregularly

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[1] Williams' relatives are referred to throughout this opinion by their first names to avoid confusion.

employed after high school, and started drinking and using drugs not long before the crime. After 30 minutes of deliberation, the jury recommended a death sentence by an 11-to-1 vote. *Id.*

At the sentencing hearing, Williams took the stand to testify, and he expressed his remorse. The trial court found one aggravating circumstance—the murder was committed during a rape—and one statutory mitigating circumstance—Williams had no significant history of prior criminal activity. *Id.* at 784. The trial court also found four non-statutory mitigating circumstances: (1) Williams' unstable upbringing, (2) his problem resulting from the end of a promising athletic career, (3) the attainment of his GED after not graduating from high school, and (4) his remorse. *Id.* at 784–85. The trial court found the aggravating factor outweighed the mitigating factors and sentenced Williams to death. *Id.* at 761.

Direct Appeal

Williams appealed to the Alabama Court of Criminal Appeals (ACCA). He raised several issues, including ineffective assistance of counsel during trial. *Id.* at 782. The ACCA reviewed Williams' claims for plain error because he "did not first present [them] to the trial court in a motion for a new trial." *Id.* The ACCA concluded that Williams had not shown that his trial counsel's performance was deficient and that their allegedly deficient performance prejudiced him. *Id.* at 784. The Alabama Supreme Court affirmed the ACCA's

judgment and Williams' conviction and sentence. *Ex parte Williams*, 795 So. 2d. 785, 787–88 (Ala. 2001). The United States Supreme Court denied certiorari. *Williams v. Alabama*, 534 U.S. 900 (2001).

State Postconviction Proceedings

Williams next sought state postconviction relief based on his claim that trial counsel failed to conduct an adequate investigation into his background, thus failing to uncover a history of neglect and childhood sexual abuse by an older boy. Williams requested discovery and an evidentiary hearing. The postconviction court denied relief. The ACCA affirmed, *see Williams v. State*, 2 So. 3d 934 (Ala. Crim. App. 2006) (table), and the Alabama Supreme Court denied certiorari, *see Ex parte Williams*, 13 So. 3d 52 (Ala. 2007) (table).

Federal Habeas Proceedings

In July 2007, Williams petitioned for federal habeas corpus relief under 28 U.S.C. § 2254 from the Northern District of Alabama. The district court, applying deference under the Antiterrorism and Effective Death Penalty Act (AEDPA) to the state postconviction court's ruling, concluded that the ruling was not contrary to, or an unreasonable application of *Strickland v. Washington*, 466 U.S. 668 (1984), and denied his petition. *See Williams v. Alabama*, No. 1:07-cv-1276, 2012 WL 1339905 (N.D. Ala. Apr. 12, 2012). After the district court denied Williams' request for a certificate of

appealability (COA), Williams filed a motion in our court seeking a COA.

We granted a limited COA on Williams' claim of ineffective assistance of counsel for failure to investigate and present mitigating evidence during the penalty phase of his trial. After considering Williams' appeal, we concluded that "Williams' failure-to-investigate claims were fairly presented in state court, [but] they were not decided 'on the merits' within the meaning of 28 U.S.C. § 2254(d)." *Williams v. Alabama*, 791 F.3d 1267, 1269 (11th Cir. 2015) (*Williams II*). We held that the district court erred in granting deference under AEDPA to the postconviction court's decision because the ACCA had applied a procedural bar and therefore had not adjudicated Williams' claims on the merits. *Id.* at 1273–74. Thus, we vacated the district court's order denying the failure-to-investigate claims and Williams' request for an evidentiary hearing. *Id.* at 1277. We remanded Williams' case back to the district court to determine whether Williams was entitled to an evidentiary hearing and to reconsider his failure-to-investigate claims de novo. *Id.*

Evidentiary Hearing

On remand, the district court conducted a three-day evidentiary hearing on Williams' failure-to-investigate claims.[2] Williams testified at the hearing and called

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[2] Williams asserted eight failure-to-investigate claims in his amended habeas petition: (1) failure to collect documentary evidence and hire a mitigation specialist; (2) failure to thoroughly

several witnesses who testified to facts that Williams claims trial counsel should have presented during the penalty phase of his trial. The following lay witnesses testified: attorney Funderburg; Tina Watson (attorney Wilson's former legal secretary); Billy Stephens (a mitigation investigator whom Wilson purportedly sought to hire); Sharenda and LaCharo Williams (Williams' sisters); Marlon Bothwell (Williams' childhood friend); Eloise; and Charlene. Williams also presented testimony from clinical psychologist Dr. Matthew Mendel and neuropsychologist Dr. Kenneth Benedict to explain the effects that child sexual abuse, alcoholism, abandonment, and familial dysfunction had on Williams. Wilson did not testify because she passed away in 2015. However, Wilson's case file was presented as documentary evidence. The State presented expert testimony from Dr. Glen King to counter Williams' experts. Both sides presented evidentiary materials.

Williams argued that, had counsel performed an adequate penalty phase mitigation investigation, they would have discovered and been able to present evidence regarding: childhood sexual abuse by an older boy; an extensive family history of childhood sexual abuse and incest; a family history of alcoholism which

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investigate Williams' history, including his childhood sexual abuse; (3) failure to interview Williams' friend, Alister Cook; (4) failure to adequately interview and prepare the penalty phase witnesses; (5) failure to compile Williams' history of abuse and neglect; (6) failure to investigate Williams' family history of mental illness; (7) failure to show that Williams' background contributed to his committing capital murder; and (8) failure to present his redeeming characteristics.

contributed to Williams' early and excessive use of alcohol; a childhood defined by chaos, abandonment, and abuse; an extensive family history of fracture and dysfunction; and psychologically damaging experiences during childhood.

On September 23, 2021, the district court entered a 141-page order granting Williams' habeas petition on all his failure-to-investigate claims except for three of them.[3] *Williams v. Alabama*, No. 1:07-cv-1276, 2021 WL 4325693, at *1 (N.D. Ala. Sept. 23, 2021) (*Williams III*).

The State timely appealed.

II. STANDARD OF REVIEW

We review de novo the district court's grant of a federal habeas petition under 28 U.S.C. § 2254. *Peterka v. McNeil*, 532 F.3d 1199, 1200 (11th Cir. 2008). The district court's factual findings in a habeas proceeding are reviewed for clear error—a highly deferential standard of review. *Sims v. Singletary*, 155 F.3d 1297, 1304 (11th Cir. 1998); *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left

[3] The claims that the district court did not grant habeas relief on were "counsels' failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and the failure to present his redeeming characteristics because Mr. Williams . . . failed to show prejudice on these three claims." *Williams III*, 2021 WL 4325693, at *1.

with the definite and firm conviction that a mistake has been committed." *Anderson v. City of Bessemer City*, 470 U.S. 564, 573 (1985) (alteration adopted) (quoting *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948)). "An ineffective assistance of counsel claim is a mixed question of law and fact which we review *de novo*." *Sims*, 155 F.3d at 1304.

III. DISCUSSION

The State argues on appeal that the district court erred in two ways. First, by failing to uphold the presumption of effective assistance of counsel, and second, by incorrectly reweighing the additional aggravating and mitigating evidence produced at the evidentiary hearing. None of the State's arguments has merit.

To succeed on an ineffective assistance of counsel claim, a defendant must demonstrate two things: (1) that counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687.

A. Deficient Performance

To establish deficient performance, a defendant must show "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id.* "[T]he proper standard for attorney performance is that of reasonably effective assistance." *Id.* Thus, to prevail on an ineffectiveness claim, "the defendant

must show that counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. A petitioner bears the burden of proving counsel's performance was unreasonable by "a preponderance of competent evidence." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). Regarding the duty to investigate, "counsel has a duty to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary. . . . [A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Strickland*, 466 U.S. at 691.

The district court found "that counsels' performance was deficient for failing to reasonably investigate Mr. Williams' background for mitigation." *Williams III*, 2021 WL 4325693, at *17. In making this determination, the district court considered "what Mr. Williams' counsel knew about him, his criminal charges, and his background and 'what counsel then failed to do and learn about [Mr. Williams] and his childhood background.'" *Id.* (citing *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 552 (11th Cir. 2015)). Because the State has not shown any of the district court's factual findings are clearly erroneous, we agree with the district court.

After reviewing the totality of the evidence in the record and produced at the evidentiary hearing, we find that Funderburg's and Wilson's representation of Williams at the penalty phase "fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at

687–88. Specifically, counsel failed to conduct an adequate investigation into Williams' background for possible mitigating evidence. Counsel knew how important the penalty phase of the trial was, given the overwhelming evidence of Williams' guilt. Funderburg testified that he knew Williams' confession would likely be admitted at trial, so mitigation would be important to possibly get life without parole. Wilson also knew the importance of mitigation. Handwritten notes from her case file show that she identified the "best issue" to be whether the sentence would be life without parole or death. Counsel also knew the sexual nature of the crime and that alcohol and marijuana played a significant role, so reasonable counsel with this knowledge would have thoroughly investigated Williams' sexual history and how he began abusing alcohol and marijuana.

Despite counsel's knowledge that the penalty phase would be crucial, counsel failed to use available resources for a mitigation investigation. The trial court had granted a motion from Wilson and awarded $1,500 to hire a mitigation investigator for the penalty phase, but counsel never used the court-awarded funds to retain a mitigation investigator.

The evidence also shows that counsel unreasonably delayed starting their mitigation investigation, and when counsel did start at the eleventh hour, their efforts were minimal and deficient. The trial court appointed Wilson in November 1996 and Funderburg in May 1997, and Williams' trial was ultimately set for November 1998. Yet, at the time Wilson filed the June

1997 motion seeking funds for a mitigation investigator—seven months after her appointment—she stated in the motion that there had "not been adequate investigation into critical matters relevant to . . . [the] level of culpability and appropriate punishment." By August 1997, Funderburg had not spoken to any of Williams' friends or family regarding his background. And by February 1999—only days prior to Williams' trial—the only documentary records that Funderburg had received and reviewed were Williams' Job Corps records.

Funderburg testified at the evidentiary hearing that he did not contact any family or friends prior to August 1997 because he did not think there was much cooperation at the time from Williams' friends who were also suspects. But counsel did not even reach out to those friends or relatives who were *not* suspects, such as Williams' childhood friend, Marlon Bothwell, or his sisters, LaCharo and Sharenda. Prior to trial, the only relatives Funderburg met with were Williams' mother, Charlene, and his great-grandmother, Beulah Williams. Counsel called only two witnesses at the penalty phase—Charlene and Eloise. Funderburg failed to properly prepare Eloise to testify, as he only met with her for the first time on the day of her testimony for about fifteen minutes. Eloise testified at the evidentiary hearing that counsel did not seem to understand Williams' life story.

The evidence shows that counsel met infrequently with Williams and failed to ask more than general questions about Williams' background. Williams testified at the evidentiary hearing that he met with

counsel only about "a half dozen times," and the meetings lasted 15 to 30 minutes. Counsel's fee declarations support Williams' testimony. Wilson's fee declaration reflects that she met with Williams only twice for a total of 3 hours over the course of two years. Funderburg's fee declaration shows he met with Williams five times for a total of 8 hours (although 4.5 of the 8 hours were conferences with Williams *and* the District Attorney, so presumably Funderburg and Williams were not alone). Williams testified that Funderburg asked him only general questions about his childhood, such as about family and school. Williams was never asked about his family background; whether he had been neglected; or whether he had been sexually, physically, or emotionally abused.

These deficiencies were patently unreasonable. *See Johnson v. Sec'y, DOC*, 643 F.3d 907, 932 (11th Cir. 2011) ("Given the overwhelming evidence of guilt, any reasonable attorney would have known . . . that the sentence stage was the only part of the trial in which [the defendant] had any reasonable chance of success.")

Had counsel conducted a more thorough investigation into Williams' sexual history, they would have learned that Williams had been sexually abused on three or four occasions between the ages of four and six when he and his mother lived with the Mostella family. At the evidentiary hearing, Williams testified that

Mario Mostella, who was older[4] and used to babysit him, used to pretend they were playing a game in which they would touch each other's genitals, and Mostella would anally penetrate Williams. Williams never told his mother about the sexual abuse, and the abuse led Williams to have thoughts of self-harm and suicide and feelings of shame and depression. Williams stated that he never told his trial attorneys about the sexual abuse because "[t]hey didn't ask," but he later told his postconviction attorney. Williams testified that he did not tell his postconviction attorney about the sexual abuse when first asked, but after growing comfortable with him over time, Williams shared that he had been sexually abused when counsel later asked him again.

Williams was also exposed to sexual relations at an inappropriately young age. There were poor boundaries in Williams' family with regard to sexuality. For example, Charlene used to have her boyfriends in the same bed that she shared with Williams (although Williams never witnessed his mother having sexual relations). Williams testified that when he was ten years old, his 18- or 19-year-old cousin Brian Williams allowed him "to watch [Brian] have sex as a way of showing [Williams] how to do it with a woman." Williams' sexual abuse and his exposure to other people's sexual relations at such a young age had a significant

[4] Williams testified that he believed Mostella was ten or twelve years older than him, whereas Eloise testified that Mostella was "maybe ten" years old. While Mostella's exact age is unclear, it is apparent that he was older than Williams and, since he used to babysit Williams, presumably would have been in control when they were unsupervised.

detrimental impact on his own sexual development. Dr. Mendel testified that male victims of sexual abuse will often display "compulsive sexuality or hyper sexuality, [become] very driven to be sexually active and have numerous partners." Williams became sexually active at the age of ten, had about 75 sexual partners by the time he graduated high school, and about 150 sexual partners by the time of his arrest. Williams had no serious or committed relationships, just a "pattern of repeated hookups and sexual encounters." Dr. Mendel testified that Williams' promiscuity was "very reassuring to him" and "made him feel like a man."

Had counsel conducted an adequate investigation into Williams' family background, they also would have learned about the domestic violence Williams witnessed between his mother and her abusive boyfriend, Jeff Deavers. Williams saw his mother "with a black eye and busted lip," and on another occasion he saw Deavers strike his mother with his hand. Williams, who was then 12 or 13 years old, grabbed a knife and tried to stab Deavers.

Counsel would have also learned about the pervasive history of childhood sexual abuse and incest within Williams' family, which spans multiple generations. Dr. Mendel stated in his expert report that Williams' great-grandmother Beulah was raped by her uncle, who fathered her child; his grandmother Laura's first child was fathered by Laura's cousin; his aunt Veronica was molested by her aunt Helen's boyfriend; and his cousin Brian molested Williams' sister LaCharo and his cousin Zakia. Within Williams'

family, the sexual abuse and molestations were simply "swept under the rug." According to Dr. Mendel, within Williams' family, "disclosure would have been worthless, resulting in neither protection from further abuse or treatment for the impact of the abuse."

Further, counsel would have learned about the alcoholism that was rampant in Williams' family, and how Williams' mother Charlene often drank to the point of intoxication and neglected Williams as a child. Williams began drinking alcohol between the ages of 12 and 14 years old, and his consumption steadily increased through his teenage years to the point where he was getting drunk weekly.

Finally, counsel would have learned that Williams' childhood was defined by chaos and abandonment. As a child, Williams and his teenage mother lacked a stable home life, instead bouncing around to live with different relatives or family friends. Eloise testified at the evidentiary hearing that Charlene would often go out partying or drinking; she would leave the children to fend for themselves; and at times the children were not clean or well cared for. When Williams was six or seven years old, he moved back and forth between Eloise and his great-grandmother because Charlene could not properly care for him. Charlene and Williams' father were not in a committed relationship, and Williams' father was not involved in his life until he was 13 or 14 years old. Williams did not grow up with any of his six half-siblings, all of whom were raised in different households. Williams felt that all of his half-siblings had a place they could call home, whereas Williams

lacked a consistent home and felt that he was never wanted or belonged anywhere.

Had trial counsel conducted an adequate investigation into Williams' background, they would have learned about all the circumstances discussed above and been able to present them to the jury as mitigating evidence. But the jury never heard any of this compelling mitigating evidence.

Because the Supreme Court has endorsed the use of the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 1989 (ABA Death Penalty Guidelines), the district court properly used it to determine whether Williams' counsel was deficient. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Looking to the prevailing norms at the time of Williams' trial, a capital defendant who does not have a "credible argument for innocence . . . has the right to present his or her sentencer with any mitigating evidence that might save his or her life." ABA Death Penalty Guidelines 1.1, commentary. The ABA Death Penalty Guidelines further instruct that counsel should investigate both the guilt and penalty phases "immediately upon counsel's entry into the case and [the investigation] should be pursued expeditiously." *Id.* 11.4.1(A). Moreover, as soon as appropriate counsel should "collect information relevant to the sentencing phase of trial including, but not limited to . . . family and social history (including physical, sexual or emotional abuse)." *Id.* 11.4.1(2)(C).

It is clear to us from the totality of the evidence that counsel spent minimal time and effort conducting a background investigation for potential mitigating evidence that would help the jury understand why Williams committed the crime that he did. Counsel's minimal efforts were also unreasonably delayed and untimely. As a result, counsel's failure to conduct an adequate background investigation for mitigating evidence deprived Williams of reasonably effective assistance. *Strickland*, 466 U.S. at 687.

The State argues that the district court failed to uphold the presumption of effective assistance when it found that attorney Wilson unreasonably failed to keep better records. Citing *Callahan v. Campbell*, 427 F.3d 897, 933 (11th Cir. 2005), the State asserts that when assessing a deceased attorney's performance, courts presume the attorney "did what [s]he should have done" and exercised reasonable professional judgment. We are not persuaded by the State's argument. While it is true that "[j]udicial scrutiny of counsel's performance must be highly deferential" and we must endeavor "to eliminate the distorting effects of hindsight," *Strickland*, 466 U.S. at 680, the deferential standard is not insurmountable. Although Wilson could not testify herself, we have a thorough understanding from the other witnesses and documentary evidence of what Wilson did—and, more importantly, did not do—as far as Williams' mitigation defense during the penalty phase. Funderburg, Wilson's co-counsel, and Tina Watson, her legal assistant of almost two decades, both testified at the evidentiary hearing, and Wilson's case

file was also produced. Here, there is abundant evidence that trial counsel's performance at the penalty phase was untimely, deficient, and unreasonable.

Nor were counsel's omissions the result of strategy. Trial counsel had "a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. Here, counsel did not conduct a reasonable background investigation, and the decision not to investigate was not the result of any strategic choice. In order to make a strategic choice about which evidence to present and which evidence to omit, counsel needed to first investigate and discover the evidence and then make an informed, strategic decision. Here, counsel simply failed to conduct an adequate investigation in the first place.

In sum, the district court made thorough factual findings after the evidentiary hearing, which help us assess the merit of Williams' failure-to-investigate claims—and the State has not specifically identified any of those factual findings as clearly erroneous. Considering the district court's factual findings and the totality of the evidence in the record, on de novo review we find that "in light of all the circumstances," trial counsel's failure to investigate Williams' background for mitigating evidence was "outside the wide range of professionally competent assistance." *Id.* at 690.

B. Prejudice

In addition to deficient performance, a petitioner must also establish prejudice to succeed on an ineffective-assistance-of-counsel claim. *Id.* at 687. To establish prejudice, a defendant must show "that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* When a defendant challenges a death sentence, the test for prejudice "is whether there is a reasonable probability that, absent [counsel's] errors, the sentencer—including an appellate court, to the extent it independently reweighs the evidence—would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694.

After carefully reweighing the evidence, we find there is a reasonable probability that, absent counsel's deficiencies, the balance of aggravating and mitigating factors in Williams' case did not warrant a sentence of death.

At the penalty phase of Williams' trial, the jury only heard testimony from Eloise and Charlene. However, their testimony revealed very little about the true extent of Williams' troubled upbringing and family history. The jury never heard about Williams' sexual abuse, his early exposure to sexual relations, his exposure to domestic violence, the abandonment by both his father and mother, or the sexual abuse and alcoholism that was pervasive in his family. The Supreme Court

has found that counsel's failure to present evidence of abuse in mitigation constitutes prejudice. *See*, *e.g.*, *Wiggins*, 539 U.S. at 534–35 (finding prejudice where counsel failed to discover and present mitigating evidence of the defendant's physical and sexual abuse during childhood); *Rompilla v. Beard*, 545 U.S. 374, 391–93 (2005) (finding petitioner was prejudiced by counsel's failure to present evidence of parents' alcoholism, domestic violence, physical and verbal abuse, and dire living conditions). In Williams' case, "the nature, quality, and volume of the mitigation never known to the jury is significant enough to conclude that it 'bears no relation' to the cursory evidence that trial counsel presented." *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (quoting *Rompilla*, 545 U.S. at 393). Had the jury been presented with all of the mitigating evidence, there is a reasonable probability that the outcome of Williams' trial could have been different. *Strickland*, 466 U.S. at 695.

The State argues that the district court incorrectly reweighed the additional aggravating and mitigating evidence produced at the evidentiary hearing by giving significance to the number of aggravators and mitigators rather than their nature. This argument is meritless and, in all events, on de novo review, this Court has independently reweighed all the available evidence. *See Strickland*, 466 U.S. at 695. We have reviewed the record and the evidence produced at the evidentiary hearing, and we find that not only the sheer volume of but also the powerful nature of the

mitigators overwhelmingly outweighs the aggravator in Williams' case. We do not minimize the weight or significance of the aggravating circumstance—that the murder was committed during a rape—but, when balancing it against all of the mitigating circumstances that we now know, our confidence in the outcome of the penalty phase of Williams' trial is undermined. *Id.* at 694.

The State also asserts that the district court erroneously found Williams was prejudiced by counsel's failure to present evidence of childhood sexual abuse by Mostella because Williams never described the experience as traumatic, and the mitigation value of the evidence is weakened by the passage of time between the abuse and Williams' crime. We disagree. Dr. Mendel testified at the evidentiary hearing that he strongly believed that "if the sexual abuse hadn't happened, there would not have been the sexual violence." The abuse clearly had a damaging impact on Williams because he felt shameful and had thoughts of hurting or killing himself. The abuse also contributed to the early age at which Williams became sexually active, and the hypersexuality he developed as an adolescent and a young man. The district court credited both Williams' and Dr. Mendel's testimony regarding the sexual abuse by Mostella, and the State has not adequately challenged this credibility finding. Thus, we reject the State's argument that Williams was not prejudiced by the failure to present evidence regarding Williams' sexual abuse by Mostella. *See Williams II*, 791 F.3d at 1277 (noting that sexual molestation and repeated

rape "during childhood can be powerful mitigating evidence, and is precisely the type of evidence that is 'relevant to assessing a defendant's moral culpability' ").

The dissent disagrees that Williams has established prejudice and places much emphasis on the facts of the underlying murder. Dissenting Op. at 2–3. While we do not minimize the brutality of Williams' crime, those facts must be weighed against all the mitigating evidence. Here, the district court conducted an evidentiary hearing on the failure-to-investigate claims, made extensive factual findings based on evidence that had not been presented during Williams' penalty phase, and concluded that Williams was entitled to habeas relief. On appeal, we must review the district court's factual findings for clear error and its legal conclusions de novo. The clear error standard is highly deferential. *Holton*, 425 F.3d at 1350. The dissent has not suggested that any of the district court's factual findings were clearly erroneous. We find no clear error in the court's factual findings. Considering the record before us—and given the highly deferential standard of review for factual findings—we conclude that Williams has established *Strickland* prejudice.

Thus, Williams "has met the burden of showing that the decision reached [at the penalty phase] would reasonably likely have been different absent the errors." *Strickland*, 466 U.S. at 696.

IV. CONCLUSION

Williams has established both that his trial counsel rendered deficient performance during the penalty phase of his trial, and that their deficient performance prejudiced him. As a result, Williams' trial was fundamentally unfair. Accordingly, we affirm the district court's grant of habeas corpus relief.

AFFIRMED.

GRANT, Circuit Judge, dissenting:

Trial counsel's efforts to investigate Williams's background and prepare for the sentencing phase were unacceptable. Despite being fully aware that the strength of the evidence of their client's guilt meant a thorough mitigation investigation was imperative, the two attorneys billed a combined total of less than 15 hours for sentencing-phase preparation. But even though I join the majority in concluding that counsel's performance was deficient, I do not agree that Williams can meet his burden of showing a reasonable probability that, if not for counsel's substandard performance, the sentencing authority "would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Strickland v. Washington*, 466 U.S. 668, 695 (1984). I therefore respectfully dissent.

The only way to conclude that Williams met that burden is to dismiss the statutory aggravator—that

the murder was committed during a burglary and rape, Alabama Code § 13A-5-49(4)—without adequate consideration. We have previously explained that when a murder is "carefully planned, or accompanied by torture, rape or kidnapping," the aggravating circumstances of the crime itself may "outweigh any prejudice caused when a lawyer fails to present mitigating evidence." *Callahan v. Campbell*, 427 F.3d 897, 938 (11th Cir. 2005) (quoting *Dobbs v. Turpin*, 142 F.3d 1383, 1390 (11th Cir. 1998)). This is especially true where the murder is a brutal one—"or, even, a less brutal murder for which there is strong evidence of guilt in fact." *Clisby v. Alabama*, 26 F.3d 1054, 1057 (11th Cir. 1994).

Here, the murder of Rowell was brutal. And it was proven by overwhelming evidence of Williams's guilt, including blood and semen evidence and several statements by Williams describing his crimes. *See Williams v. Alabama*, 791 F.3d 1267, 1269 (11th Cir. 2015).

The circumstances of the burglary, rape, and murder that Williams committed bear repeating. Melanie Rowell, a young mother with two small children, was fast asleep when Williams invaded her home in the middle of the night, intent on raping her. He took a knife from her kitchen and went quietly up the stairs, taking his pants off along the way. At the top of the stairs, he climbed over a baby gate and stopped to "peek[ ] in" at the children, who were asleep in the bedroom across the hall from Rowell's. Rowell awoke with Williams on top of her, holding a knife to her throat and pulling off her shorts. She screamed and struggled and bit his hand, but he held her down and strangled

her until she stopped moving, and then raped her—apparently not caring whether she was alive or dead at that point. Afterward, Williams left Rowell's brutalized and half-naked body on the floor, where it was discovered first by Rowell's 15-month-old daughter and then by her mother. Any evaluation of the aggravating circumstance must acknowledge the shock and terror of the home invasion, the added fear the victim must have felt for her children, the cold brutality shown by Williams in strangling a neighbor to death so that he could rape her, and the cruel aftermath of the murder for Rowell's family, especially her young children. *See Miller v. State*, 913 So. 2d 1148, 1164 (Ala. Crim. App. 2004) (explaining that victim impact evidence is admissible during the penalty phase and relevant to whether the death penalty should be imposed).

Here, the majority concludes that the "sheer volume" and "powerful nature" of the mitigating evidence "overwhelmingly outweighs the aggravator in Williams' case." Maj. op. at 22. I cannot agree. To start, the volume of mitigating evidence has little bearing on its weight, especially when much of the evidence is cumulative of the testimony given at trial. *See Wong v. Belmontes*, 558 U.S. 15, 22–23 (2009) (finding no prejudice where some of the new evidence was cumulative of evidence presented at trial and thus of little use); *Holsey v. Warden, Georgia Diagnostic Prison*, 694 F.3d 1230, 1270–71 (11th Cir. 2012) (same). Williams's mother and aunt testified during the original penalty phase about Williams's difficult childhood, including his abandonment by his father, his lack of a stable home,

and his sadness and sense of abandonment when his mother left him to be cared for by relatives. Their testimony about Williams was much the same during the federal habeas proceedings. That this narrative was already presented makes it no less tragic. But it does minimize the potential effect of the new evidence Williams offers.

Williams's new evidence of childhood abuse also fails to match the standard set by the Supreme Court in *Wiggins v. Smith* and *Rompilla v. Beard*.[1] His testimony that he was sexually abused by an older boy on three or four occasions over a two-year period, though horrifying, bears little resemblance to the "severe privation and abuse," "physical torment, sexual molestation, and repeated rape" demonstrated in *Wiggins*, or the long history of severe neglect and physical and emotional abuse described in *Rompilla*. *See Wiggins v. Smith*, 539 U.S. 510, 516–17, 535 (2003); *Rompilla v. Beard*, 545 U.S. 374, 390–93 (2005). Indeed, the State's expert testified that Williams did not experience trauma from the encounters, and Williams's own expert testified that the lack of stability in Williams's

[1] The majority accepts as a given that Williams would have disclosed the abuse to trial counsel if they had asked, but I am not convinced. Williams never told anyone about the abuse until decades after it occurred and after he had already been sentenced to death. He denied childhood abuse during his pretrial psychological evaluation and when he was first asked about it by his postconviction counsel. Williams's psychological expert opined that Williams would also have initially denied sexual abuse if his trial counsel had asked him about it and would only say that it was "possible" that the abuse "could have come out" with "time and development of trust."

home life had a more negative and traumatizing impact on Williams than the sexual abuse.

Other new evidence has even less mitigating value. Testimony that members of Williams's extended family also suffered childhood sexual abuse has little relevance—and thus should be accorded little weight—given the lack of evidence that Williams witnessed or even knew about the abuse. Evidence of widespread alcoholism among the adults in Williams's life would have served only to partially explain Williams's own alcoholism; the witnesses gave no indication that his family members were violent or abusive when drunk. And more detailed evidence of Williams's own drug and alcohol use likely would not have helped him at all. Such evidence "often has little mitigating value and can do as much or more harm than good in the eyes of the jury." *Crawford v. Head*, 311 F.3d 1288, 1321 (11th Cir. 2002); *see*, *e.g.*, *Grayson v. Thompson*, 257 F.3d 1194, 1227 (11th Cir. 2001).

One more thing to consider is that Williams's evidence related to childhood sexual abuse is not entirely mitigating, and would also invite unfavorable evidence in rebuttal. We "must consider all the evidence—the good and the bad—when evaluating prejudice." *Belmontes*, 558 U.S. at 26. In explaining the link between the childhood sexual abuse and Williams's capital crime, Williams's expert testified that he compensated for feelings of shame and self-doubt by becoming hypersexual and hyperaggressive. He became sexually promiscuous without developing any stable romantic relationships. He was suspended from school twice and

kicked out of Job Corps for fighting, and he was arrested for assault during his teens. Further, the new evidence shows that although Williams was open about his hypersexuality, he refused to acknowledge his "anger and the tendencies toward violence" arising from the abuse.

This testimony would have had the potential to harm Williams in the eyes of the jury. It would have also invited argument by the State that Williams's tendencies toward violence and aggression would make him a danger to other inmates if he were released into the general population to serve a life sentence. *See Simmons v. South Carolina*, 512 U.S. 154, 165 n.5 (1994) (plurality opinion) ("the fact that a defendant is parole ineligible does not prevent the State from arguing that the defendant poses a future danger"); *see also id.* at 177 (O'Connor, J., concurring in judgment) (when the defendant raises his parole ineligibility, "the prosecution is free to argue that the defendant would be dangerous in prison").

To prove this propensity, the State undoubtedly would have introduced evidence that before his arrest, Williams committed a second burglary and sexual assault on another neighbor—this time a woman he had known since childhood. The evidence would have shown that only a few weeks after murdering Rowell, Williams again invaded a neighbor's home in the middle of the night with the intention of raping her. The record reflects graphic evidence of yet another violent attack in which Williams took off his pants, climbed through a window, and attacked the woman in her bed,

holding her down while he rubbed his penis on her and "put his hand up in her vagina" as she struggled and begged for her life. When Williams discovered that the woman was menstruating, he ordered her to perform oral sex on him. She continued to struggle with Williams until daybreak, when he finally left.

This evidence is relevant in several ways. To start, it is admissible in Alabama to show future dangerousness, which is "a subject of inestimable concern at the penalty phase." *Floyd v. State*, 289 So. 3d 337, 431 (Ala. Crim. App. 2017) (citation omitted). And while future dangerousness is not an aggravating circumstance in itself, it is relevant to determining the weight that should be afforded to the aggravating circumstance proven by the State. *See id.*

The evidence of Williams's second burglary and attempted rape would have also reduced or eliminated the mitigating value of his lack of significant prior criminal history. Just as significantly, the later crime would have demonstrated Williams's lack of regret in the weeks following Rowell's murder, undermining his (already unconvincing) claim for the mitigating circumstance of remorse.

In addition to the previously unexplored evidence depicting Williams as an unrepentant murderer and serial home invader, the State likely would have responded to Williams's claims of childhood suffering by further developing evidence of the lasting trauma Williams inflicted on Rowell's children by killing their mother. At the initial sentencing hearing, the State

introduced only one witness to testify about the children's anger, fear, grief, and confusion; the evidence Williams now proffers would have opened the door to much more. *See*, *e.g.*, *Woodward v. State*, 123 So. 3d 989, 1041–43 (Ala. Crim. App. 2011), *as modified on denial of reh'g* (Aug. 24, 2012).

Given all of these facts, I do not agree that it is reasonably likely that the assistance of competent counsel at trial would have resulted in a different sentence. *Strickland*, 466 U.S. at 696. To be sure, I do not excuse the failure of the defense team to properly investigate and present a mitigation case. But viewed in its entirety and weighed properly, the evidence developed in habeas creates only the slightest possibility of a different outcome. This conclusion does not in any way conflict with the factual findings made by the district court. *Contra* Maj. op. at 23. And the district court's final determination on the prejudice prong is a mixed question of law and fact that we review de novo. *Strickland*, 466 U.S. at 698; *Jefferson v. GDCP Warden*, 941 F.3d 452, 473 (11th Cir. 2019). To show prejudice under *Strickland*, the "likelihood of a different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011). Because Williams has not met that standard, I would reverse the district court's grant of federal habeas relief and reinstate Williams's death sentence.

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

MARCUS BERNARD WILLIAMS,	)	
Petitioner,	)	**CIVIL ACTION NO. 1:07-cv-1276-KOB**
v.	)	
STATE OF ALABAMA,	)	
Respondent.	)	

FINAL ORDER

(Filed Sep. 23, 2021)

In conformity with the Memorandum Opinion filed contemporaneously with this Order, the court **GRANTS** Mr. Williams Amended Petition for Writ of Habeas Corpus (doc. 5) as to all of his claims of ineffective assistance of counsel during the penalty phase of his trial for failing to investigate and present mitigating evidence EXCEPT those claims involving counsels' failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and failure to present his redeeming characteristics because Mr. Williams has failed to show prejudice on these three claims.

A writ of habeas corpus shall issue directing the State of Alabama to vacate and set aside the death sentence of Marcus Williams unless, within 90 days of this judgment's entry, the State of Alabama initiates proceedings to retry Mr. Williams' sentence. In the

alternative, the State of Alabama shall re-sentence Mr. Williams to life without the possibility of parole.

Because Mr. Williams has failed to make the requisite showing, the court DENIES a certificate of appealability as to the three claims the court denies because Mr. Williams failed to show prejudice on those claims.

DONE and ORDERED this 23rd day of September, 2021.

/s/ Karon Owen Bowdre
KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

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

MARCUS BERNARD WILLIAMS,	)	
Petitioner,	)	**CIVIL ACTION NO. 1:07-cv-1276-KOB**
v.	)	
STATE OF ALABAMA,	)	
Respondent.	)	

MEMORANDUM OPINION

(Filed Sep. 23, 2021)

This death penalty habeas case comes before the court following remand from the Eleventh Circuit Court of Appeals for an evidentiary hearing on Marcus Bernard Williams's failure-to-investigate claims. *See Williams v. Alabama*, 791 F.3d 1267 (11th Cir. 2015). Mr. Williams alleges that trial counsel's failure to investigate his background prevented the defense from presenting a constitutionally adequate mitigation case during the penalty phase of his trial. (Doc. 5 at 40-65). The court held an evidentiary hearing on May 14-16, 2018 at which Mr. Williams presented witnesses and exhibits.

The road from the evidentiary hearing to this point took a mistaken detour. After initially denying Mr. Williams' habeas motion after the evidentiary hearing, the court granted his motion for reconsideration and vacated its initial Memorandum Opinion and

Order denying habeas relief under 28 U.S.C. § 2254. (Docs. 94, 95, & 102). The court vacated its rulings because it made a manifest error of law in assessing Mr. Williams' future dangerousness in weighing the mitigating and aggravating circumstances. (Doc. 102). So, the court set out to carefully re-weigh all of the aggravating and mitigating evidence in light of the relevant and binding case law.

After careful reconsideration of the record and applicable law, the court admits that it initially decided the failure to investigate claims wrongly. As the court will explain below, Mr. Williams' counsel failed to reasonably investigate Mr. Williams' background for mitigation and that failure prejudiced Mr. Williams. So, for the following reasons, the court will GRANT Mr. Williams' habeas motion on all of his failure-to-investigate claims EXCEPT counsels' failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and the failure to present his redeeming characteristics because Mr. Williams has failed to show prejudice on these three claims.

I. INTRODUCTION

On November 6, 1996, Mr. Williams returned home after a night of drinking and smoking marijuana with friends. *Williams v. State*, 795 So. 2d 753, 761 (Ala. Crim. App. 1999). Upon arriving home, he desired to have sexual relations with a young female neighbor, Melanie Dawn Rowell. Mr. Williams entered Ms.

Rowell's apartment through an unlocked window, then proceeded to her bedroom where he climbed on top of her and attempted to remove her clothes. Ms. Rowell struggled to stop him, so he strangled her until she was motionless, then had sexual intercourse with her for fifteen to twenty minutes. *Id.* at 761-62.

Ms. Rowell's cause of death was asphyxia due to strangulation. Mr. Williams stole Ms. Rowell's purse before leaving her apartment. He was later arrested and taken into custody for the burglary and attempted rape of Lottie Turner on November 24, 1996. While in custody for that burglary, Mr. Williams gave incriminating statements admitting his involvement in Ms. Rowell's death. DNA testing confirmed that semen and blood found at the Rowell crime scene were consistent with Mr. Williams's genetic profile. *Id.* at 762, 766-67.

II. PROCEDURAL HISTORY

Court-appointed attorneys Erskine Funderburg and Tommie Wilson[1] represented Mr. Williams at trial. (Vol. 4, Tab 27 at 2). Because of the overwhelming evidence of Mr. Williams's guilt, his attorneys argued only that, although he intended to rape Ms. Rowell, he did not intend to kill her. (Vol. 3, Tab 11 at 494-504). Despite their efforts, on February 24, 1999, the jury found Mr. Williams guilty of capital murder for intentionally causing the death of Ms. Rowell during a rape or

[1] Ms. Wilson died on March 6, 2015. (*See* Doc. 84-84).

attempted rape, in violation of Alabama Code § 13A-5-40(a)(3) (1975). (Vol. 4, Tab 14 at 534-36).

The penalty phase of Mr. Williams's trial was held the next day, before the same jury. (See Vol. 3, Tab 15-Tab 24). Trial counsel called only two witnesses, Mr. Williams's mother, Charlene Williams, and his aunt, Eloise Williams. (Vol. 3, Tab 19). The Eleventh Circuit Court of Appeals summarized their testimony:

> Charlene Williams told the jury that she was sixteen years old and unmarried when Mr. Williams was born, and that Mr. Williams had faced certain difficulties as a child. For example, she testified that Mr. Williams sometimes lived with her grandmother and aunt; had no relationship with his father and lacked adult male figures in his life; and had to stop playing school sports after injuring his knee. Mr. Williams's counsel also elicited testimony that portrayed him in a negative light, such as the fact that he was a high school dropout; he "started hanging with a rough crowd"; he got kicked out of the Job Corp[s] for fighting; and upon returning home, he stopped going to church and "wanted to sleep all day and stay up all night." FN.1.
>
> > FN.1. A capital defendant's history of violent and aggressive behavior is generally considered an aggravating factor. *See Holsey v. Warden*, 694 F.3d 1230, 1269-70 (11th Cir. 2012).
>
> Eloise Williams also testified about Mr. Williams's unstable home life. She told the

jury that he had moved from place to place as a child and lived with different family members; he became sad and withdrawn at times because he did not see his mother often; he had been a good student with no significant criminal history; and he had struggled emotionally after the deaths of his grandfather and uncle. However, as with Charlene, counsel also elicited evidence from Eloise that was likely more harmful than helpful. For example, Eloise told the jury that Mr. Williams had a quick temper; he had been arrested for fighting as a teenager; FN.2, he had not maintained regular employment after leaving high school; and not long before the crime, he started drinking and using drugs. Eloise ended on a positive note, telling the jury that since Mr. Williams had been in jail, he had stayed out of trouble and expressed remorse for his crime.

> FN.2. The fact that Mr. Williams's counsel told the jury about these adolescent brushes with the law is noteworthy because the State could not have offered evidence of Mr. Williams's juvenile arrests to establish any aggravating factors. In Alabama, "juvenile charges, even those that result in an adjudication of guilt, are not convictions and may not be used to enhance punishment." *Thompson v. State*, 503 So.2d 871, 880 (Ala.Crim.App. 1986) aff'd sub nom. *Ex parte Thompson*, 503 So.2d 887 (Ala. 1987).

> Neither Charlene nor Eloise was asked about Mr. Williams's history of sexual abuse.

Williams, 791 F.3d at 1269-70. The jury deliberated only thirty minutes before returning an 11 to 1 verdict, recommending that Mr. Williams be sentenced to death. (Vol. 3, Tab 24 at 596-97).

At the April 6, 1999 sentencing hearing, Mr. Williams testified, expressing his remorse. (Vol. 4 at 607-11). The victim's mother, Donna Rowell, testified about the impact of her daughter's death on the family, especially Ms. Rowell's young children. (*Id.* at 604-06). The trial court found one aggravating circumstance – that Mr. Williams killed the victim while committing or attempting to commit a rape, robbery, burglary, or kidnapping. (*Id.* at 630). The trial court found as mitigating factors Mr. Williams's lack of a criminal history, his unstable home life as a child, his frustration from an injury ending his hopes of an athletic career, his obtaining a GED, and his remorse. (*Id.* at 631-38). The trial court found the aggravating factor outweighed the mitigating factors, and sentenced Mr. Williams to death. (*Id.* at 639).

The Alabama Court of Criminal Appeals affirmed Mr. Williams's conviction and death sentence on December 10, 1999. *See Williams v. State*, 795 So. 2d 753 (Ala. Crim. App. 1999). The Alabama Supreme Court affirmed his conviction and sentence on January 12, 2001. *See Ex parte Williams*, 795 So. 2d 785 (2001). The United States Supreme Court denied certiorari review

on October 1, 2001. *See Williams v. Alabama*, 535 U.S. 900 (2001).

In August, 2004, Mr. Williams filed an amended Rule 32 petition in the trial court. The trial court denied the Rule 32 petition on the merits, without holding an evidentiary hearing. (Vol. 13, Tab 59). The Alabama Court of Criminal Appeals affirmed the denial of Rule 32 relief. (Vol. 13, Tab 60).

In 2007, Mr. Williams filed the present § 2254 petition in this court, arguing inter alia, that trial counsel were ineffective for failing to conduct an adequate mitigation investigation. (Doc. 5 at 40-65). This court denied the petition on April 12, 2012. *See* (Docs. 27, 28). The Eleventh Circuit Court of Appeals remanded the case, instructing this court to "determine whether Mr. Williams is entitled to an evidentiary hearing and to reconsider his failure-to-investigate claims de novo." *Williams*, 791 F.3d at 1277.

Mr. Williams filed a motion for an evidentiary hearing on March 3, 2017. (Doc. 51). On October 4, 2017, the court granted Mr. Williams's motion for an evidentiary hearing on his failure-to-investigate claims. (Doc. 60).

This court held an evidentiary hearing on May 14-16, 2018. Mr. Williams testified at the evidentiary hearing, and presented the testimony of the following witnesses: Tina Watson, the legal secretary for Tommy Wilson, Mr. Williams' trial counsel who was deceased at the time of the evidentiary hearing; Erskine Funderburg, Mr. Williams' trial counsel; Billy Stephens,

the person Ms. Wilson purportedly sought to hire as a mitigation investigator; Sharenda Williams and LaCharo Williams, Mr. Williams' sisters; Eloise Williams, Mr. Williams' aunt; Charlene Williams, Mr. Williams' mother; and Marlon Bothwell, Mr. Williams' childhood friend. Mr. Williams also called two experts, clinical psychologist Dr. Matthew Mendel and neuropsychologist Dr. Kenneth Benedict, as mitigation witnesses. The State of Alabama presented expert testimony from Dr. Glen King. The court paid close attention to the testimony, and carefully reviewed the transcript of the evidentiary hearing, along with the exhibits presented at the hearing. (Docs. 91-93).

The court entered its initial Memorandum Opinion and Order denying habeas relief under 28 U.S.C. § 2254 (docs. 94 & 95), and Mr. Williams filed a motion to reconsider under Fed. R. Civ. P. 59 (doc. 98). The court granted the motion to reconsider because it made a manifest error of law in assessing Mr. Williams' future dangerousness in weighing the mitigating and aggravating circumstances and vacated its initial Memorandum Opinion and Order denying relief. (Doc. 102). Now, after careful and thorough reconsideration, the court will GRANT Mr. Williams' habeas motion for ineffective assistance of counsel on all of the failure-to-investigate claims EXCEPT counsels' failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and failure to present his redeeming characteristics because Mr. Williams has failed to show prejudice on these three claims.

III. LEGAL STANDARD

To determine whether counsel were ineffective, the court begins with the instruction from *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court established a two-pronged analysis for determining whether counsel's performance was ineffective. "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687.

A petitioner must establish both parts of the *Strickland* standard: that is, a habeas petitioner bears the burden of proving, by "a preponderance of competent evidence," that the performance of his trial or appellate attorney was deficient; and, that the deficient performance prejudiced his defense. *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc).

A. The Performance Prong

To satisfy the performance prong, a petitioner must establish by a preponderance of the evidence that counsel's performance was unreasonable. *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) (citing *Chandler*, 218 F.3d at 1313). Deficient performance is "'representation [that] f[alls] below an objective standard of reasonableness.'" *Hardwick v. Sec'y, Fla. Dep't of Corr.*, 803 F.3d 541, 551 (11th Cir. 2015) (citing *Strickland*, 466 U.S. at 688).

The Sixth Amendment does not guarantee a defendant the very best counsel or the most skilled attorney, but only an attorney who performed reasonably well within the broad range of professional norms. *Stewart*, 476 F.3d at 1209. The court does not consider "what the best lawyers would have done"; instead the court must determine "whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992).

Judicial scrutiny of counsel's performance must be highly deferential, because "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. Indeed, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. This strong presumption of competent assistance creates a heavy burden of persuasion: "petitioner must establish that *no competent counsel would have taken the action that his counsel did take.*" *Stewart*, 476 F.3d at 1209 (quoting *Chandler*, 218 F.3d at 1315) (emphasis added). The court can grant relief on ineffectiveness grounds only if a petitioner shows that "no reasonable lawyer, in the circumstances, would have done so." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994).

This court's review of counsel's performance must not be made with the benefit of hindsight. As the Eleventh Circuit has instructed, "[t]he widespread use of the tactic of attacking trial counsel by showing what

'might have been' proves that nothing is clearer than hindsight – except perhaps the rule that we will not judge trial counsel's performance through hindsight." *Waters v. Thomas*, 46 F.3d 1506, 1514 (11th Cir. 1995).

When examining counsel's performance at the penalty phase of trial, the court must decide " 'whether counsel reasonably investigated possible mitigating factors and made a reasonable effort to present mitigating evidence to the sentencing court.' " *Stewart*, 476 F.3d at 1209 (quoting *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir. 2006)). To meet the requirements of *Strickland*, counsel does not need to investigate "every conceivable line of mitigating evidence" regardless of its likelihood of benefitting the defendant at sentencing. *Pittman v. Sec'y, Florida Dep't of Corr.*, 871 F.3d 1231, 1250 (11th Cir. 2017) (quoting *Wiggins v. Smith*, 539 U.S. 510, 533 (2003)).

In fact, the *Strickland* standard does not even "require defense counsel to present mitigating evidence at sentencing in every case." *Id.* Rather, the *Strickland* standard for counsel's performance is "reasonableness under prevailing professional norms." *Strickland*, 466 U.S. at 688. And, of course, reasonableness depends upon the context of the particular case. *Wiggins v. Smith*, 539 U.S. 510, 522-23 (2003). So, the district court must make a case-by-case determination regarding whether a mitigation investigation was reasonable under the facts of that particular case. *Hardwick*, 803 F.3d at 552.

Counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel; "it can, on occasion, be justified as a strategic choice." *Hardwick*, 803 F.3d at 551 (citing *Lightbourne v. Dugger*, 829 F.2d 1012, 1025 (11th Cir. 1987)). "Strategic choices made *after thorough investigation* of law and facts relevant to plausible options are virtually unchallengeable. . . ." *Strickland*, 466 U.S. at 690 (emphasis added). So, counsel's decision not to investigate or present mitigating evidence is "only reasonable, and thus due deference, to the extent that it is based on a professionally reasonable investigation." *Hardwick*, 803 F.3d at 551.

B. The Prejudice Prong

A petitioner also must meet a high burden to establish that his lawyer's deficient performance caused prejudice to his case. *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002). The petitioner does not meet that high burden merely by showing "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* (citing *Strickland*, 466 U.S. at 693). Instead, a petitioner must show " 'a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' " *Stewart*, 476 F.3d at 1209 (quoting *Strickland*, 466 U.S. at 695). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, which is a lesser showing than a preponderance of the evidence." *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1360 (11th Cir. 2020) (internal

quotation marks and citations omitted) (quoting *Strickland*, 466 U.S. at 694).

In evaluating whether the petitioner has shown a reasonable probability that, if counsel had not been deficient the petitioner would not have been sentenced to death, the court must "consider 'the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding' – and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000)); *see also Sears v. Upton*, 561 U.S. 945, 956 (2010) (holding that a proper prejudice analysis under *Strickland* must take into account the newly uncovered mitigation evidence, along with the mitigation evidence introduced during the penalty phase of the trial, to assess whether a reasonable probability arises that the petitioner would have received a different sentence after a constitutionally sufficient mitigation investigation).

IV. THE EVIDENTIARY HEARING

In his amended petition, Mr. Williams alleges that trial counsel were ineffective during the penalty phase of the trial because they failed to adequately investigate and present mitigation evidence to show that he should not have been sentenced to death. (Doc. 5 at 38-65).

Specifically, he claims in his amended petition that trial counsel were ineffective because they failed to

conduct an adequate mitigation investigation into Mr. Williams' background, including their failure to collect documentary evidence and hire a mitigation specialist; failure to thoroughly investigate Mr. Williams's history, including that he was sexually abused as a child; failure to interview Mr. Williams's closest friend Alister Cook[2]; failure to adequately interview and prepare the penalty phase witnesses; failure to compile Mr. Williams's history of abuse and neglect; failure to investigate his family history of mental illness; failure to show that Mr. Williams's background contributed to his committing capital murder; and failure to present his redeeming characteristics. (*Id.*).

Mr. Williams called witnesses at the evidentiary hearing who testified to the facts that he claims trial counsel should have discovered and presented during the penalty phase of Mr. Williams' trial. And, Mr. Williams also called two experts, clinical psychologist Dr. Matthew Mendel who specializes in child sexual abuse, and neuropsychologist Dr. Kenneth Benedict, as mitigation witnesses to explain the effects of the sexual abuse, alcoholism, abandonment and overall family dysfunction on Mr. Williams. The State of Alabama presented expert testimony from Dr. Glen King to counter Mr. Williams' experts' opinions. Both sides also submitted evidentiary materials, including Mr.

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[2] Described as "Marcus' closest friend[] during the period leading up to his arrest," Cook and Mr. Williams had been friends since they were eight or nine years old. (*See* Doc. 5 at 49). Mr. Williams and Cook had been drinking together the night of the murder. (*Id.* at 47).

Williams' trial counsels' files and the experts' written opinions.

Mr. Williams argues that if counsel had performed an adequate penalty phase mitigation investigation, they would have learned and been able to present the following evidence:

A. Sexual Abuse by an Older Boy

Mr. Williams testified at the evidentiary hearing that, between the ages of four and six, he was sexually abused three or four times by an older boy Mario Mostella, while he and his mother Charlene lived with the Mostella family. (Doc. 91 at 118-20). Mr. Williams' amended habeas petition indicates that Mario was "then about age fifteen" when he "repeatedly subjected [Marcus] to anal rape." (Doc. 5). Mr. Williams testified at the evidentiary hearing that "Mario is probably about ten years older." (Doc. 91 at 123). Mr. Williams did not know the exact year that Mario was born but just knew Mario was older than Mr. Williams. (*Id.* at 128). And Dr. Mendel's report indicates that Mr. Williams *estimated* that Mario was about ten years older than Mr. Williams, making Mario about fourteen to sixteen years old at the time of the abuse. (Doc. 87-1 at 117). Mr. Williams' sexual abuse by Mario occurred at times when Mario was at least an age to babysit Mr. Williams. (Doc. 91 at 203).

Eloise Williams testified that she thought Mario was "maybe six or seven" or "maybe ten" when Mr. Williams and Charlene moved in with the Mostella family, but did not know Mario's true age. Charlene testified

at the evidentiary hearing that Mario was "like eight or nine" when she and Mr. Williams moved in with the Mostellas. (Doc. 92 at 162). Eloise described Mario as being on the "rough side" and "in and out of trouble . . . a bully, pushy," and Charlene described Mario as "just being a bad, bad little boy or so." (Doc. 92 at 111-112, 162).

Mr. Williams testified that all but one of the instances of sexual abuse by Mario occurred in Ashville, Alabama in an old shack called Bachelor's Kip behind the Mostella's home when Mario was babysitting him. Mr. Williams testified that one of the instances of sexual abuse occurred in "Ohio." Eloise Williams testified that Charlene and Mr. Williams moved out of state with the Mostellas to Ohio at some point when Marcus was younger. (Docs. 91 at 119-120 & 92 at 114). But Charlene testified that she and Mr. Williams went to visit the Mostellos in Missouri, not Ohio, and ended up staying for about four months. (Doc. 92 at 216-217).

Mr. Williams stated that at the time the abuse was happening, he thought it was a game when Mario Mostella would "touch" and "penetrate" him from behind while Charlene was away. (*Id.*). Mr. Williams testified at the evidentiary hearing and told Dr. Benedict that Mario would "touch my groin area and have me touch him in the same area" but only Mario penetrated Mr. Williams from behind. (Docs. 87-1 at 87 & 91 at 119). But Mr. Williams told Dr. Mendel that "I don't remember [Mario] asking me to touch him." (Doc. 87-1 at 118). And Mr. Williams told the State's expert Dr. King that the sexual abuse by Mario involved "anal penetration

of Mr. Williams and also of Mario" and that the abuse by Mario involved "you do me and I do you." (Doc. 85-2 at 4).

Dr. Mendel described Mario's actions as "pretty classic grooming behavior." (Doc. 93 at 165). Dr. Mendel stated in his report that at the time Mr. Williams was being molested by Mario, Mr. Williams "did not think there was anything wrong with what was going on." (Doc. 84-31 at 5). But Dr. Mendel explained that by the time Mr. Williams became sexually active with a female at the age of ten he began to feel shame about Mario's sexual abuse of him. (Doc. 93 at 52). Mr. Williams testified at the evidentiary hearing that he felt shame, was depressed, and had thoughts of hurting and killing himself as a result of the sexual abuse by Mario. (Doc. 91 at 121).

While he lived with Eloise after his sexual abuse by Mario, Mr. Williams was "sullen, withdrawn, unhappy," and had issues with bed-wetting. (*Id.* at 125-26). Charlene testified that Mr. Williams started wetting the bed "between five and six or something like that." (Doc. 92 at 166). Dr. Benedict stated that bed-wetting was "another factor associated with [Mr. Williams'] shame and lack of control." (Doc. 87-1 at 84). And Mr. Williams reported to Dr. King that he started having nightmares at the age of seven or eight about "either falling off a cliff or drowning" that would occur once or twice a week. (Doc. 85-2 at 6).

Dr. Mendel testified that he assessed Mr. Williams' account of sexual abuse by Mario "with the greatest

level of skepticism," especially where Mr. Williams did not tell anyone until after his criminal charges. (Doc. 93 at 85). But Dr. Mendel found Mr. Williams's account of his childhood sexual abuse "extremely credible" and testified that he has no doubt that it happened even though Mr. Williams did not tell anyone about the sexual abuse until around 2005 because he was ashamed and did not think that his mother would believe him. Dr. Mendel also testified that "if there was not the sexual abuse, particularly by Mario, if there was not the sexual abuse, we would not be sitting here today." And Dr. Mendel opined that "if the sexual abuse hadn't happened, there would not have been sexual violence. I believe that very strongly. . . ." (Docs. 92 at 121 & 93 at 85-86, 120).

Dr. Mendel explained that male victims of sexual abuse are much less likely to disclose their abuse; the length of time between sexual abuse in males and eventual disclosure is much longer; and people are more likely to suspect sexual abuse in female victims. (Doc. 93 at 74). Dr. Mendel stated in his report that "[m]ale victims often do not tell about their sexual abuse until they enter either the justice system or substance abuse treatment." (Doc. 84-31 at 5). He concluded that "the fact that [Mr. Williams] did not tell about his abuse is not at all unusual and should not be considered a counter-indication of the presence of sexual abuse." (Doc. 84-31 at 5).

Mr. Williams points out that consistent with other male victims who finally disclose childhood abuse after entering the justice system, he shared details of his

sexual abuse with the first attorney who asked him about it. (Doc. 88 at 95-96). Mr. Williams testified that trial counsel never asked him if he had been sexually abused, but that if counsel had asked, he would have told them:

> Q. Why did you tell [Rule 32 counsel] about what had happened to you during your childhood when you previously had not talked about it?
>
> A. He asked me about it. And I didn't, at first, I didn't tell him anything. And over time, I got comfortable, more comfortable with him and he asked me about it again and that's when I told him.
>
> Q. Why didn't you tell your trial lawyers about sexual abuse and about some of the things you have told the Court here today about your background?
>
> A. They didn't ask.

(Doc. 91 at 122).

Mr. Williams told Dr. Mendel that he became sexually active at the young age of ten and was promiscuous throughout his adolescence and early adulthood because he wanted to prove to himself that he is not gay. (*Id.* at 6). Dr. Mendel testified that prepubescent sexual intercourse is "the biggest red flag" indicating sexual abuse. (Doc. 93 at 124). Dr. Mendel also opined that Mr. Williams became hypersexual, having from one hundred fifty to two hundred sexual partners by

the time he was arrested, in an effort to prove that he is not gay. (Doc. 93 at 55-56).

Mr. Williams was also exposed to sexuality by his family members. While they lived with the Mostellas, Mr. Williams bathed with Charlene and shared a bed with her. (Doc. 92 at 165). Dr. Benedict, a neuropsychologist specializing in developmental psychopathology, testified that Mr. Williams was "also exposed to adult sexual relations when living with his mother, when she would have . . . her boyfriends in the same bed that she shared with" Mr. Williams, although Mr. Williams said that he did not actually witness his mother having sexual relations. (Doc. 91 at 176). Dr. Benedict reported that Mr. Williams would wake up in his mother's bed "to find other men in the same bed . . . indicating that premature exposure to adult sexuality occurred very early in his life." (Doc. 87-1 at 87).

Mr. Williams testified that when he was about ten years old, his teenage cousin Brian Williams "allowed [Mr. Williams] to watch him have sex as a way of showing [Mr. Williams] how to do it with a woman." (Doc. 91 at 120). Dr. Mendel testified that Mr. Williams told him that Brian was "always talking about sex and telling him about sex." (Doc. 93 at 64). Dr. Mendel explained that premature exposure to sexuality "basically tends to feed hypersexualization. So you get these, basically you get these kids who are thinking about sex and wanting to do and explore sexual things before they are physically, psychological or emotionally ready to do that. They're not adults." (*Id.* at 65).

Mr. Williams also engaged in other sexually inappropriate behavior. In his affidavit, Dr. Benedict stated that Mr. Williams told him that when he was a child he would sneak outside to peep on his mother's friends while they used the outhouse. (Doc. 84-33 at 12). Eloise testified that while Mr. Williams lived with her, she once caught him peeping at her through the bathroom door. (Doc. 92 at 127). Charlene testified that when Mr. Williams was fifteen, Lottie Turner told her that Mr. Williams was "peeping in her window." (*Id.* at 184).

Dr. Mendel testified that Mr. Williams's sexual promiscuity reassured him that he was not gay and made Mr. Williams feel like a man. (Doc. 93 at 58). Dr. Mendel opined that Mr. Williams's lack of a serious girlfriend made it less likely that he would tell anyone about his sexual abuse. (*Id.* at 84). Dr. Mendel explained in his report that because male victims who fear they might be gay after being sexually abused often try to compensate for their fears by becoming stereotypically "macho," Mr. Williams's compensatory hyper-masculinization resulted in aggressive and violent behavior in his pre-teen years. (Doc. 84-31 at 7).

Mr. Williams's compensatory hyper-masculinization continued into his teenage years. Mr. Williams' friend Marlon Bothwell testified that Mr. Williams was bullied in high school and often got into fights after school. (Doc. 93 at 10-20). Marlon recalled that Mr. Williams became more aggressive after a fight in which Mr. Williams was slammed, head-first, into the ground. (*Id.* at 13).

Mr. Williams dropped out of high school in his senior year. (Doc. 91 at 103). He joined the Job Corps, but was kicked out for fighting. (Doc. 93 at 60-61). Dr. Mendel stated in his report that when Mr. Williams returned home to Ashville after being kicked out of Job Corps, he was "drinking constantly, always drunk, with a pervasive sense of hopelessness and despair he had felt only once previously in his life, in the aftermath of his knee surgery during his senior year of high school." (Doc. 84-31 at 9). Dr. Mendel further stated in his report that the "critical factors in Marcus' progression toward his crimes were his chronic states of hypersexuality and of aggression, which fused together in his acts of sexual violence; the acute state of hopelessness secondary to his expulsion from JobCorps;[3] along with alcohol as a disinhibiting agent." (*Id.*).

Mr. Williams maintains that exploring his sexual abuse history was especially important because, as Dr. Mendel testified, a large number of people who commit acts of sexual violence were themselves sexually abused. *See* (Docs. 84-31 at 9 & 93 at 122). Mr. Williams argues that although childhood abuse is particularly mitigating in capital cases, counsel's failure to investigate his background meant the jury never heard "this account of [his] psychological trajectory from an abusive childhood to sexual violence." (Doc. 88 at 87).

At the evidentiary hearing, Mr. Funderburg justified his decision not to present evidence concerning Mr.

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[3] Mr. Williams maintains that he killed Melanie Rowell only ten days after his expulsion from Job Corps. (Doc. 88 at 86).

Williams's "future dangerousness" or propensity for sexual violence, including that eighteen days after Mr. Williams committed the rape and murder of Ms. Rowell, he attempted to rape Lottie Turner:

> Q. Is it also fair to say that you would want to avoid any testimony that might show or tend to show the future dangerousness of your client, like he's going to do it again?
>
> A. In this case?
>
> Q. Yes.
>
> A. Yes. We had another crime that had occurred that we had to keep out. Marcus had been involved in a similar act from when this case occurred until his arrest.
>
> So, at the time he was found guilty of this, we, I think, entered into a plea agreement on the other charge as well, which the State tried to get it in, but we were able to keep it out.
>
> Q. You wouldn't have wanted, certainly, to offer any testimony that might tend to indicate that your client was predisposed to sexual violence?
>
> A. Absolutely not.
>
> Q. And in that judgment that might have made a jury even more likely to give death, fair to say?
>
> A. Yes, that's one of the biggest reasons we did not want to call Marcus in the case,

> even though he had given statements, we couldn't put him up on the stand and run the risk of that other conduct somehow coming in.

(Doc. 91 at 76).

Mr. Williams argues that counsel's failure to present available evidence of sexual abuse was not a strategic choice because counsel failed to ask Mr. Williams or anyone else about sexual abuse and failed to "conduct any reasonable investigation" of Mr. Williams's background. (Doc. 88 at 88). Mr. Williams maintains that if counsel had investigated and presented evidence of Mr. Williams's childhood sexual abuse, the jury would have had "powerfully mitigating context for his behavior." (Doc. 88 at 89). Mr. Williams points out that the Eleventh Circuit Court of Appeals has held that sexual abuse evidence is not a "double-edged sword," *Williams v. Alabama*, 791 F.3d at 1277, and that " 'both the Supreme Court and [the Eleventh Circuit] have recognized the long-lasting effects child sexual abuse has on its victims.' *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (citing *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008); *United States v. Irey*, 612 F.3d 1160, 1207 (11th Cir. 2010) (en banc))." (Doc. 88 at 89).

Mr. Williams adds that his arrest for breaking into Lottie Turner's house and attempting to rape her "is entirely consistent with the portrait of [his] psychological unraveling, stemming from his childhood sexual abuse." (Doc. at 89-90). Mr. Williams points to the

portion of his confession to the murder in which he wrote, "I have a problem and I want help." (*Id.* at 90) (quoting Doc. 84-11 at 39). He concludes that without the context of Mr. Williams's history of childhood sexual abuse, the jury was given no explanation for his "confounding, and harmful, behavior," which allowed the jury to sentence him to death for an "awful, and apparently inexplicable, crime." (Doc. 88 at 90).

B. Extensive Family History of Childhood Sexual Abuse

Mr. Williams points out that under the ABA Guidelines applicable at the time of his trial, "counsel had a duty to collect information pertaining to 'family and social history (including physical, sexual or emotional abuse),' and to 'obtain names of collateral persons or sources to verify, corroborate, explain and expand upon [the] information obtained.'" (Doc. 88 at 90) (quoting *Williams v. Allen*, 542 F.3d at 1339) (citing 1989 ABA Guidelines 11.4.1(D)). He explains that "several interviews are often necessary to bring out all the relevant information, particularly when sensitive matters such as child abuse or sexual abuse are involved." (*Id.*) (quoting *Alabama Capital Defense Trial Manual*, at 588 (3d ed. 1997)). Mr. Williams contends that if trial counsel had investigated his background, they would have learned the following details about childhood sexual abuse and incest in his family.

In his report, Dr. Mendel detailed the pervasive history of sexual abuse of children by older relatives in

Mr. Williams's family. Dr. Mendel stated that Mr. Williams's great-grandmother, Beulah, was reportedly raped by her uncle; his grandmother Laura's first child was fathered by her cousin; his aunt Veronica was molested as a child by her aunt's boyfriend; and his cousin Brian Williams, in addition to allowing Mr. Williams to watch him having sex with girls, molested Mr. Williams's sister LaCharo and his cousin Zakia Fomby. (Doc. 84-31 at 6). Charlene testified that when LaCharo was "about twelve," she told her that Brian Williams "tried to molest her." (Doc. 92 at 190). Despite Brian "den[ying] it all," Charlene tried to talk to the police about it, but "didn't get to talk to the police" because "there wasn't none at the station where [she] went." (*Id.* at 190-91).

Dr. Mendel testified that he was "struck by the level of sexual abuse across multiple generations" of Mr. Williams's family. (Doc. 93 at 40). He stated that in evaluating Mr. Williams, he considered the history of sexual abuse in Mr. Williams's family because it "very much runs in families." (*Id.* at 68). He added that a family history of sexual abuse is a risk factor for future sexual abuse by the victim. (*Id.* at 74). Mr. Williams argues that Brian Williams's abuse of LaCharo and Zakia lends credibility to Mr. Williams's account of Brian's inappropriate behavior, and confirms that Brian's sexual interactions with Marcus were predatory, not playful or minor. (Doc. 88 at 93).

Mr. Williams asserts that his family history of sexual abuse, and the lack of intervention by the adults in his family, provides context for his own abuse, and

explains his reluctance to disclose his own sexual abuse as a child. (*Id.* at 94). Dr. Mendel testified that the family's unresponsiveness to other instances of sexual abuse "affects the degree of disclosure or the likelihood of disclosure." (Doc. 93 at 69). Dr. Mendel opined that Mr. Williams and other victims in his family feared that they would not be believed if they reported their abuse. (*Id.* at 69-70; Doc. 84-31 at 6). Dr. Mendel contends that if Mr. Williams's trial attorneys had conducted in depth interviews with him and his family, as required under the ABA Guidelines, they too would have learned about the sexual abuse in his background and family history. (Doc. 93 at 96).

C. Family History of Alcoholism Contributed to Mr. Williams's Early and Excessive Use of Alcohol

Mr. Williams asserts that he was raised in a family of alcoholics. (Doc. 88 at 72). Eloise testified that when she married into the Williams family, she "learned that they did a lot of drinking and partying." (Doc. 92 at 99). Mr. Williams's great-grandmother, Beulah Williams, with whom he lived from time to time, was unable to properly care for the children left with her. (Doc. 91 at 146, Doc. 92 at 155). Beulah, described as a good person who "did like to drink and party," worked through the week, but got drunk on the weekends, to the point that she became incoherent and would pass out or urinate on herself. (Doc. 92 at 100, 152, Doc. 91 at 146).

Eloise testified at the evidentiary hearing that almost all of Beulah's family, including Eloise's husband Robert, had problems with drinking. (Doc. 92 at 106-07). Sharenda testified that during the times she and Mr. Williams spent with Eloise and Robert, Robert was a heavy drinker who "drank probably almost every day at some point," to the point of intoxication. (Doc. 91 at 147). And Sharenda testified that Robert, who was angry with Mr. Williams for walking away from the stove while grease was heating on the stove, walked Mr. Williams over to Eloise's daycare, argued with and grabbed Mr. Williams, and body slammed Mr. Williams to the ground. (Doc. 91 at 148-149).

Charlene testified that she was a heavy drinker from the age of fifteen until she was "like about thirty-two," having been influenced to drink by Beulah and other relatives who drank excessively. (Doc. 92 at 155-56). Charlene drank mostly on the weekends, sometimes to the point of intoxication. (Doc. 91 at 141; Doc. 92 at 156). She drank while she lived with the Mostellas,[4] and she drank while she was in a relationship with Jeff Deavers who was abusive towards her. (Doc. 92 at 112; Doc. 91 at 140). Dr. Mendel stated in his report that Charlene's "pattern of drinking and going out rather than watching her children left Marcus susceptible to Mario's sexual predation." (Doc. 84-31 at 8).

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[4] Eloise testified that while Charlene and Mr. Williams lived with the Mostellas, Charlene and Olivia Mostella "were still partying and doing different things, drinking, leaving the children." (Doc. 92 at 112).

Mr. Williams's childhood friend, Marlon Bothwell, testified that he and Mr. Williams began drinking probably between the ages of twelve and fourteen, but Mr. Williams's alcohol consumption increased so much when he was about sixteen or seventeen that he often saw Mr. Williams drunk. (Doc. 93 at 15-17). Dr. Mendel testified that Mr. Williams "was drinking heavily by his high school years" and began drinking "much more following a couple of very negative difficult experiences in his life." (*Id.* at 77). Dr. Mendel stated in his report that, because alcoholism runs in families, Mr. Williams's "alcohol abuse and likely dependence are probably 'multiply-determined,' stemming from a familial pattern of alcoholism as well as Marcus' specific traumatic life circumstances." (Doc. 84-31 at 8).

Dr. Mendel explained that alcoholism often runs in families because of the modeling and example shown by family members drinking. (Doc. 93 at 75-76). He added that "people generally accept that there is a genetic basis for a predisposition towards addiction, including alcoholism." (*Id.* at 76). Dr. Glen King, a clinical psychologist who testified on behalf of the State of Alabama, testified that "but for [Mr. Williams's] substance abuse, in terms of this crime, I don't think we would be here." (Doc. 92 at 86). Dr. Mendel agreed with Dr. King's conclusion that "if there wasn't the alcohol, we wouldn't – this wouldn't have happened and we wouldn't be here today." (Doc. 93 at 82).

Mr. Williams argues that by failing to investigate and present expert testimony at the penalty phase on both his and his families excessive use of alcohol,

counsel deprived the jury of this critical explanation for his conduct. (Doc. 88 at 77). He argues that, although Mr. Funderburg testified that the defense theory for the penalty phase of the trial was that Mr. Williams was not in his right mind because of alcohol and marijuana use, he presented "paltry" evidence about Mr. Williams's substance abuse. (*Id.*) (citing Doc. 91 at 90).

Mr. Williams points out that, although counsel asked Charlene two questions "conceivably related to alcohol use" in the penalty phase, those questions were not helpful because they pertained to Mr. Williams's time in Job Corps, not during his childhood or the time of the crime. (*Id.*) (citing Vol. 3, Tab 19 at 557). Mr. Williams also points out that during the penalty phase, Eloise offered, without being asked about alcohol or drugs, that she "began to notice he had changed – drinking, you know and maybe drugs." (*Id.*) (citing Vol. 3, Tab 19 at 565).

Mr. Williams argues that "without any specifics of when Marcus began drinking, and with no explanation for why Marcus was drinking – such as his genetic predisposition to alcoholism, the excessive drinking modeled by close relatives who reared him, and his traumatic childhood experiences – the jury was left to conclude that Marcus's drinking, which was only vaguely mentioned, was merely a personal failing." (*Id.*) He maintains that counsel was unreasonable for failing to investigate and present available evidence of Mr. Williams's family history of substance abuse. (*Id.*)

D. Childhood Defined by Chaos, Abandonment, and Abuse

Charlene testified that Mr. Williams, her second child, was born when she was sixteen years old. (Doc. 92 at 158-59). Before he was born, his older sister Aquea was sent to New York to live with her paternal grandmother, and never returned to live with Charlene. (*Id.* at 159-60). His father, Michael Daniels, was not involved in his life when Mr. Williams was "small," but "became involved later on in life," when he was around thirteen or fourteen. (*Id.* at 161).

During his early years, Charlene and Mr. Williams "bounced from place to place." (Doc. 88 at 53). They lived with Charlene's grandparents, Ralph and Beulah Williams, in "the old house," a dilapidated house without a bathroom, heating, air conditioning, or hot water (Doc. 92 at 116, 206); they lived with family friends, Della and Will Bothwell (Doc. 93 at 7, 23); they lived with Charlene's friend Olivia Mostella and her three children in Ashville, Alabama (Doc. 92 at 161-62); and they moved to Missouri with the Mostellas for about four months. (*Id.* at 166-67).

Eloise Williams testified that when Charlene and Mr. Williams lived with the Mostellas, Charlene and Olivia left the children alone at home with Olivia's elderly mother while they went out partying and drinking. (Doc. 92 at 112). Mr. Williams testified that when they lived with Olivia, her son, Mario Mostella, sexually abused him three or four times, over the course of "a couple of years," beginning at the age of four. (Doc.

91 at 118-19). When they returned to Ashville, Charlene lived with her grandmother for a while; with Mary Mostella, Olivia Mostella's mother, for a while; moved into an apartment in Gadsden; then finally moved back to Ashville. (*Id.* at 167-68).

During this time, Charlene gave birth to three more children. (*Id.*). When Mr. Williams was around nine years old, Charlene began a six-year relationship with Jeff Deavers, who was physically and verbally abusive to her, "sometimes" in front of Mr. Williams. (Doc. 92 at 170-74). Mr. Williams testified that one time when he was twelve or thirteen years old, he saw Mr. Deavers strike Charlene with his bare hands. In response, Mr. Williams "grabbed a knife and tried to stab him." (Doc. 91 at 118). Although Mr. Williams previously told Dr. Benedict that Mr. Deavers was the one with the knife, the state's expert Dr. King testified that discrepancy was not a "significant difference in the dynamics of that event." (Doc. 92 at 59).

Charlene had poor parenting skills: she left the children to fend for themselves; they were not supervised appropriately; and at times, they were not clean or "well taken care of." (*Id.* at 117). During the time period when Mr. Williams was around five to ten years old, family members tried to help Charlene by taking her children in to live with them. (*Id.* at 117-21).

Eventually, when Mr. Williams was about seven or eight years old, Charlene abandoned Mr. Williams and could no longer care for him. So, he moved in with his aunt Eloise Williams. (*Id.* at 119, 169). During this

time, Mr. Williams moved back and forth between the homes of his great grandmother, Beulah Williams, his aunt Elvis, his aunt Veronica Fomby, and his aunt Eloise Williams. (Docs. 91 at 116 & 92 at 169). Eloise took him to Sunday School and church, helped him with his homework, and allowed him to play baseball. (Doc. 92 at 119-20, 124-26).

Mr. Williams lived with Eloise on and off until he was twelve or thirteen years old. (*Id.* at 127). Eloise testified that when Mr. Williams was in middle school, he started getting in trouble at school, "getting in fights, stealing and just different things." (Doc. 92 at 126-27). At one point, Eloise caught him peeping through the bathroom door at her. (*Id.* at 127). When Mr. Williams was twelve or thirteen years old, Eloise took him back to live with Charlene because he wanted to live with his mother. (Doc. 92 at 127). Eloise testified that Charlene was not happy about Mr. Williams living with her and that he stayed with Charlene "not very long." Mr. Williams then went to live with his Aunt Elvis Williams and then "he went floating around to different places after that." (Doc. 92 at 128).

When he was fourteen years old, Mr. Williams finally met his father, Michael Daniels, and moved in with him for about nine months. (Doc. 91 at 116). Dr. Mendel testified at the evidentiary hearing that Mr. Williams had "wondered about, questioned, struggled and worried about" his father his entire life, hoping that the reason his father never came to visit him was because he did not know Mr. Williams existed. (Doc. 93 at 42).

Mr. Williams argues that rather than investigating his family history and presenting "available evidence of Marcus's abandonment by his mother, as well as the itinerant and dysfunctional lifestyle he was subject to while he was with her," trial counsel elicited testimony in the penalty phase from Charlene, minimizing the instability in Mr. Williams's life, and leaving the jury with the impression that he "spent lots of time with his mother." (Doc. 88 at 65).

Specifically, Mr. Williams points to the following portions of Charlene's testimony in the penalty phase:

> Q. Where was [Mr. Williams] when he wasn't with you?
>
> A. He lived with my grandmother and my aunt. They helped me because I was a young girl.
>
> . . . .
>
> Q. Prior to this time, had Marcus been a problem child to you in any way?
>
> A. No, he had never been.
>
> Q. Did you spend a lot of time with him when he was growing up?
>
> A. Yes. Marcus was the baby for five and a half years.

(*Id.*) (quoting Vol. 3, Tab 19 at 554, 558).

He adds that at the sentencing hearing, Eloise testified only generally about Marcus being "left from one place to another" and not "hav[ing] a stable home." (*Id.*)

(quoting Vol. 3, Tab 19 at 561). Mr. Williams argues that the penalty phase of his trial contained no testimony about the "domestic violence and abuse" he experienced in the various places he lived. (*Id.*). Mr. Williams argues that the testimony presented at the evidentiary hearing paints a "vastly different picture of his background" than the limited testimony presented at his trial. (*Id.* at 65-66) (quoting *Williams v. Allen*, 542 F.3d at 1342).

E. Extensive Family History of Dissolution and Dysfunction

Mr. Williams alleges that compounding the failure to thoroughly investigate and present evidence of his "dysfunctional upbringing," trial counsel also failed to present available evidence of his "troubled family history." (Doc. 88 at 66). He claims that the dysfunction of his childhood was part of an "easily discernable pattern." (*Id.*). Charlene testified that she, her sister, and her brother were raised by their grandparents, Ralph and Beulah Williams; she did not meet her father until she was three years old; her mother, Laura Williams, "moved away to New York" and never contacted her after she left; and that her mother died a violent death when Charlene was twelve years old. (Doc. 92 at 148-51, 193).

Charlene became sexually active at age thirteen, became pregnant with Mr. Williams's older sister at the age of fourteen, and started drinking at age fifteen. (*Id.* at 155-57). Charlene eventually gave birth to Mr.

Williams and three more children, LaCharo, and twins, Sharenda, and Sharay, all of whom were raised in different homes. (*Id.* at 167-68). Mr. Williams maintains that the "distance created by Charlene's abandonment and separation of her children made it difficult for them to bond, and develop loving relationships, as a family." (Doc. 88 at 70).

Mr. Williams's sister Sharenda Williams testified at the evidentiary hearing that she and Mr. Williams "did spend time together" during Mr. Williams's teenage years after he left Aunt Eloise's home. (Doc. 91 at 150). She clarified that they spent a minimal amount of time together because after being adopted by her Aunt Eloise, she lived a "much more strict lifestyle" and was "very involved in church." (*Id.*). Mr. Williams's sister LaCharo Williams testified at the evidentiary hearing that because of their age difference her relationship with Mr. Williams did not really develop until after he was arrested. (Doc. 92 at 214).

Mr. Williams contends that the "treatment that Marcus and his siblings received from caregivers reinforced this sense of distance." (Doc. 88 at 71). Sharenda testified at the evidentiary hearing that their uncle Robert Williams was "very strict" with Mr. Williams, while he treated her "like a girl," letting her get away with anything. (Doc. 91 at 148).

Mr. Williams adds that although "the circumstances of all of Charlene's children were precarious, [his] nomadic existence was especially so." (Doc. 88 at

71). Mr. Williams points out Dr. Mendel's testimony from the evidentiary hearing:

> I think that the chaos, the lack of stability and the sense of abandonment, betrayal, the contrast he experienced in his life from seeing why was my younger sister adopted by this aunt, this great aunt, and not me. Why was my other younger sister kept and raised by our mother and not me, why was my younger brother adopted by this family, unrelated family down the road and raised in a stable household, why was my older sister taken in by her father and raised in a – I don't know much about that family, but at least a relatively consistent home, and why was I bounced around.
>
> He experienced a sense of being unwanted, rejected, abandoned, betrayed throughout his life, and I think that's had an enormous impact on him.

(*Id.*) (quoting Doc. 93 at 41-42).

Mr. Williams asserts that defense counsel should have investigated and presented evidence of his dysfunctional family history because conditions within the family can influence a defendant's upbringing and experiences. (Doc. 88 at 71-72) (citing *Kormondy v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1244, 1251 (11th Cir. 2012) (explaining that, during penalty phase proceedings in 1994, "[the defendant's] life story actually began with [his mother's] story about her life prior to [his] birth because, according to Dr. Larson, what she had experienced prior to that event had a profound

effect on the person [the defendant] eventually became"). He points out that courts have held that failing to investigate and present available evidence of a "chaotic, abusive, neglectful family" was deficient. (Doc. 88 at 72) (citing *Johnson v. Bagley*, 544 F.3d 592, 605 (6th Cir. 2008) and *Frierson v. Woodford*, 463 F.3d 982, 989 (9th Cir. 2006) ("[A] failure to investigate and present, at the penalty phase of a capital trial, evidence of . . . a dysfunctional family or social environment may constitute ineffective assistance of counsel.")).

Mr. Williams argues that his life was impacted by the "early sexual activity, excessive alcohol use, neglect and abandonment of children, and frayed familial bonds" that persisted generation after generation in his family. He contends that, with the evidence of his troubled family history, counsel "could have described the cycles of generational abusive and neglectful parenting that repeat the same behaviors and lead to the same outcomes." (Doc. 88 at 72) (quoting Johnson, 544 F.3d at 605). He maintains that counsel were deficient for failing to present the available evidence of his dysfunctional family history to the jury. (Doc. 88 at 72).

F. Psychologically Damaging Childhood Experiences

Dr. Benedict testified that the following risk factors present in Mr. Williams's early life increased the likelihood that Mr. Williams would have a "bad outcome in life": the family history of intergenerational sexual abuse; being born out of wedlock to a teenage

mother who did not have help with parenting; the family's limited resources and conditions that would constitute poverty or would border on poverty; very poor boundaries in the family with respect to sexuality and drinking; exposure to adult sexuality and adult substance abuse at a young age; being sodomized or sexually molested as a child; Mr. Williams's own precocious or early sexual activity; and his early use of alcohol. (Doc. 91 at 167-68, 175-78). Dr. Benedict concluded that Mr. Williams's greatest risk factor was the "lack of consistent caretaking by his mother with whom he tried to establish a relationship and wanted a relationship with, you know, to the present day, but her inconsistency and the various reunions and separations from her." (*Id.* at 175).

Dr. Benedict also testified that Mr. Williams's childhood sexual abuse was traumatic. (*Id.* at 181). Dr. Mendel testified that Mr. Williams was "groomed" into sexual activity at a young age, and taught that it was a secret. (Doc. 93 at 49-51, 100-01). Dr. Benedict testified that being molested at a young age by someone older "comes with the kind of power differential that characterizes abusive situations, sexual or physical aggression or emotional aggression." (Doc. 91 at 181). Dr. Mendel explained that even before Mr. Williams knew that what was happening with Mario was inappropriate, he knew it was something he should hide:

> [T]he time that Marcus says that he came close to telling was when on – after one of the incidents of sexual abuse, he and Mario came out of the – that shack, the Bachelor's Kip and

> Marcus' mother, Mario's mother and I believe Mario's sister were walking toward them and asked, one of them asked, they all asked, what were you guys doing in there.
>
> I think independently Marcus would have blurted out exactly what they were doing, but instead, Mario said something, Mario lied, said, oh, we were, you know, doing whatever in there, Marcus doesn't recall exactly what. So that's why he didn't tell at that point.
>
> As time went on and he got more of a sense that this was sexual, this was shameful, this was something to be embarrassed about, he did, as most male victims do, which is to keep it – keep it hidden.

(Doc. 93 at 51).

Dr. Benedict testified that the instability in Mr. Williams's childhood, and his inability to develop an attachment with a primary caretaker were traumatic for him. (*Id.* at 180). Dr. Mendel testified that Mr. Williams had a "lot of anger toward his mother for not being there," and that the "chaos, the abandonment, the betrayal, the loss, the lack of stability, [and] the lack of predictability" were the "biggest factor[s] in his childhood." (Doc. 93 at 44, 118).

Dr. Benedict testified that it was very difficult for Mr. Williams to reconcile the different expectations his various caretakers had of him:

> It's very difficult for a child and even teenagers to experience such radically different sets of expectation in parenting styles.
>
> So, if there are essentially very few boundaries, very few rules and very limited oversight in the home of his mother, we heard testimony today about the very strict and regimented environment he grew up or he experienced when he was living with [his aunt Eloise Williams].
>
> It's very difficult for kids to reconcile those differences and to know what message to take.

(Doc. 91 at 180-82).

Dr. Benedict explained that Mr. Williams was also exposed to "general disinhibited behavior that would take a number of forms in his life," including exposure to relatives with serious drinking problems, and exposure to domestic violence between his mother and her long time boyfriend, Jeff Deavers. (Doc 91 at 181-82). Dr. Benedict concluded that, as a result of these traumatic experiences, Mr. Williams turned to alcohol, hypersexuality, and hypermasculine aggression as a way to "guard against some psychological problem." (*Id.* at 183-84).

Mr. Williams argues that despite trial counsel's knowledge that he "was not in his right mind" at the time of the crime, counsel "presented no expert testimony to explain his psychological trajectory from a

childhood of abuse to commission of the crime."[5] (Doc. 88 at 101). Instead, counsel "painted an incomplete and unhelpful picture" at the penalty phase, by relying on limited testimony that never mentioned Mr. Williams's family history of domestic violence, alcoholism, and sexual abuse. (*Id.*).

Mr. Williams also faults trial counsel for failing to present expert testimony to give a favorable opinion as to his "capacity for rehabilitation." (*Id.*). Both Dr. Benedict and Dr. Mendel testified that treatment was available, including when Marcus was a child, to ameliorate the damage from his traumatic experiences, and that Marcus would have benefitted from such treatment. (Doc. 91 at 182, 197-98; Doc. 93 at 63-64). Dr. Mendel opined that if Mr. Williams had been able to discuss his traumatic experiences with someone, "we would have seen way less dramatic and self-destructive and destructive to others acts on [Mr. Williams's] part." (Doc. 93 at 62-63).

Dr. Benedict testified that Mr. Williams's psychological condition has improved significantly since his discussions with experts and his attorneys while he has been incarcerated. (Doc. 91 at 194). In addition, Dr. Mendel and even Dr. King, the State's expert, both testified that, but for alcohol, Marcus's crime would not have happened. (Doc. 92 at 86; Doc. 93 at 82).

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[5] Trial counsel Erskine Funderburg testified that in mitigation, counsel were arguing that Mr. Williams was "not in his right mind but not because of a mental disease, it was because of the alcohol and the marijuana." (Doc. 91 at 90).

V. ANALYSIS

Mr. Williams argues that counsel were deficient in failing to investigate and present the potentially mitigating evidence he presented at the evidentiary hearing, and that he was prejudiced by counsel's failures. He maintains that he was "cooperative and willing to assist in his defense"; that he offered to "provide information about his background, but counsel w[ere] unresponsive"; and that his friend and family were "available and willing to provide mitigating information, but they were not contacted or interviewed." (Doc. 90 at 10). Mr. Williams argues that absent counsel's errors, counsel would have been able to present several more non-statutory mitigating circumstances pertaining to his excruciating life history, including sexual abuse, alcoholism, abandonment, and poverty. (*Id.* at 32-34). He argues that in light of this new mitigating evidence, taken as a whole, a reasonable probability exists that the jury would have reached a different result. (*Id.* at 35). For the following reasons, this court agrees.

A. Deficient Performance

Mr. Williams claims that counsel were deficient for failing to investigate and present at the penalty phase non-statutory mitigating evidence about his background, including his prior sexual abuse by an older male, his family history of sexual abuse, his family history of alcoholism, and his family cycle of overall chaos and dysfunction. This court agrees that counsels'

performance was deficient for failing to reasonably investigate Mr. Williams' background for mitigation.

The Supreme Court has held that, based on standards applicable in 1999 when Mr. Williams was tried, attorneys representing capital defendants were obligated "to conduct a thorough investigation of the defendant's background." *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (finding that counsel's mitigation investigation "fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we long have referred to as 'guides to determining what is reasonable'"). Counsel's failure to conduct an adequate background investigation or to pursue all reasonably available mitigating evidence can satisfy *Strickland*'s deficient performance prong. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003); *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1351 (11th Cir. 2011).

To determine whether trial counsel conducted a reasonable background investigation or made a reasonable decision to not conduct a background investigation, the court must "put itself in counsel's shoes, review the information of which he was or should have been aware, and determine what a reasonable attorney would have done under those circumstances." *Hardwick v. Sec., Fla. Dep't of Corrections*, 803 F.3d 541, 552 (11th Cir. 2015) (citing *Strickland*, 466 U.S. at 690). This court must "assess 'all the circumstances' and 'consider whether the known evidence would lead a reasonable attorney to investigate further.'" *See Frazier v. Bouchard*, 661 F.3d 519, 531 (11th Cir. 2011)

(quoting *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010)). So, the court must consider what Mr. Williams' counsel knew about him, his criminal charges, and his background and "what counsel then failed to do and learn about [Mr. Williams] and his childhood background." *See Hardwick*, 803 F.3d at 552.

In Mr. Williams' case, counsels' failure to conduct an adequate and thorough background investigation for possible mitigating circumstances was unreasonable and deficient. The court will first explain what Mr. Williams' counsel knew or should have known about Mr. Williams and his case, including knowledge of potential sources of mitigation. Then the court will set out in what ways counsel failed to conduct a reasonable investigation into Mr. Williams' background and discuss what mitigation evidence a reasonable investigation would have uncovered.

1. What Counsel Knew or Should Have Known

a. Counsel Knew the Penalty Phase was Pivotal

When the trial court first appointed Ms. Wilson and Mr. Funderburg to represent Mr. Williams in his capital murder case, they knew or should have known that the penalty phase would be pivotal to Mr. Williams' defense. As the Eleventh Circuit acknowledged in this case, Mr. Williams' defense counsel faced "overwhelming evidence of [Mr. Williams'] guilt." *Williams v. Alabama*, 791 F.3d 1267, 1269 (11th Cir. 2015). In light of Mr. Williams' three detailed statements to

investigators admitting his guilt and the DNA evidence corroborating Mr. Williams' statements and linking him directly to the crime (doc. 84-25 at 7), no reasonable attorney would have basically disregarded the penalty phase of the trial and conducted virtually no background investigation for mitigating evidence.

Where the evidence clearly supports the guilt of a defendant, reasonable counsel would focus their efforts on the penalty phase of the trial. *See Johnson v. Sec., DOC*, 643 F.3d 907, 932 (11th Cir. 2011) ("Given the overwhelming evidence of guilt, any reasonable attorney would have known, as [counsel] testified he actually did know, that the sentence stage was the only part of the trial in which Johnson had any reasonable chance of success."); *Collier v. Turpin*, 177 F.3d 1184, 1202 (11th Cir. 1999) ("Although counsel . . . recognized that the sentencing phase was the most important part of the trial given the overwhelming evidence of guilt, they presented almost none of the readily available evidence of Collier's background and character that would have led the jury to eschew the death penalty.").

Because the penalty phase of Mr. Williams' trial was pivotal to his case given the overwhelming evidence of Mr. Williams' guilt, no reasonable counsel would have failed to conduct a thorough mitigation investigation into Mr. Williams' background. *See Hardwick v. Sec., Fla. Dep't Corr.*, 803 F.3d 541, 552 (11th Cir. 2015) (finding deficient performance and prejudice where "[c]ounsel knew, or should have known, that Hardwick's defense in the penalty phase – specifically

the presence or absence of mitigating evidence – would be pivotal").

And the prevailing norms at the time of Mr. Williams' trial underscored the importance of the penalty phase of the trial, especially when a defendant has confessed to the crime. According to the 1989 ABA Guidelines 1.1, commentary, in many death penalty cases, "no credible argument for innocense exists, so that the life or death issue of punishment is the *real focus* of the entire case." (Emphasis added).

Trial counsel knew from the beginning that Mr. Williams' "life depended on the penalty-phase presentation." *See Maples v. Comm'r Ala. Dep't Of Corr.*, 729 F. App'x 817, 825 (11th Cir. 2018) (finding deficient performance could be based on counsel's unreasonably cursory preparation for the penalty-phase when counsel "knew from the onset that Maple's life depended on the penalty-phase presentation."). Mr. Funderburg admitted at the evidentiary hearing that he knew at the outset of the case that Mr. Williams' confessions would likely be admitted into evidence, so counsel would "have to prepare for the penalty phase in advance of the trial." And Mr. Funderburg testified that knowing "in all likelihood the confession is going to go in," counsel would then "focus on mitigation because if you can get a mitigating factor and convince a jury, then you can get possibly life without [the possibility of parole]." (Doc. 91 at 52 & 88).

Mr. Funderburg also testified that he ordered the *Alabama Capital Defense Trial Manual* that discusses

the importance of mitigation evidence for the penalty phase of a capital murder trial. *See* (Doc. 91 at 52). That manual explains that, during the penalty phase of a capital murder trial, counsel "will be faced with giving an account of how the defendant came to be on trial for life. *Defense counsel cannot do this without a clear understanding of the circumstances and influences surrounding that life.*" *Ala. Capital Def. Trial Manual*, at 3 (3d ed. 1997) (emphasis added). So, Mr. Funderburg knew that mitigation evidence and the penalty phase were key to Mr. Williams' defense; yet, as the court will discuss in detail *infra*, counsel conducted virtually no mitigation investigation.

And the record shows that Ms. Wilson also knew the importance of the penalty phase and an adequate mitigation investigation in light of Mr. Williams' confessions and overwhelming evidence of guilt. Ms. Wilson's case file contains a note presumably in her handwriting that indicates that the primary focus of Mr. Williams' case and "best issue" would be to argue for life imprisonment without the possibility of parole and to avoid the death penalty. *See* (Doc. 84-26 at 69).

Ms. Wilson also expressed to the trial court in her June 4, 1997 "Ex Parte Application for Investigative Expenses" the importance of the penalty phase and counsel's mitigation efforts. Specifically, she stated that "Defense counsel has an ethical, legal and constitutional duty to conduct a *thorough inquiry into all aspects of this case,*" including any mitigation factors. (Doc. 84-14 at 55) (emphasis added). Her motion contains a section titled "MITIGATING

CIRCUMSTANCES" in which Ms. Wilson states that the jury and judge will be "constitutionally required" to consider as mitigating factors "any aspects of [Mr. Williams'] character or record and any of the circumstances of the offense that [he] proffers on a basis for a sentence less than death," including "any of the diverse frailties of human kind." (Doc. 84-14 at 56) (quotations and citations omitted).

Ms. Wilson, citing the 1989 ABA Guidelines applicable in death penalty cases at that time, acknowledged in the motion that counsel must direct an investigator to "interview people with knowledge of all aspects of Marcus Bernard Williams' background" and that an investigator is "*essential* to obtaining documentary evidence and discovering mitigating information." (Doc. 84-14 at 56) (emphasis added). Ms Wilson also admitted in that motion that counsel at that point – about *seven months after her appointment* to represent Mr. Williams on November 26, 1996 – had not conducted an "adequate investigation into critical matters relevant to guilt, level of culpability and appropriate punishment." (Doc. 84-14 & 84-17). She stated in the motion that a "*constitutionally sufficient investigation* into these aspects of the life and character of [Mr. Williams] will *require* . . . the services of an investigator to assist in the identification of potential witnesses, and a *thorough investigation into [his] past*. . . ." (Doc. 84-14 at 57) (emphasis added). And Ms. Wilson tellingly admitted in the motion that "*counsel would be remiss and constitutionally ineffective if she did not conduct a thorough investigation of all aspects*

of Marcus Bernard Williams' case." (Doc. 84-14 at 54-58) (emphasis added).

And the trial court granted Mr. Wilson's motion and awarded counsel $1,500.00 to hire an investigator to assist with a thorough mitigation investigation for the penalty phase of Mr. Williams' trial. The trial judge's order granting this relief was "conditioned upon the defendant's attorney providing to the Court the name of said investigator to be used and the costs of services to be provided for a determination of reasonableness." (Docs. 84-51 at 42, 73 & 91 at 35). As the court will discuss thoroughly *infra*, counsel failed to use those funds to hire an investigator to assist with mitigation or for any other mitigation efforts.

So, Ms. Wilson and Mr. Funderburg knew and acknowledged that a mitigation investigation into Mr. Williams' background and the penalty phase would play a vital role in their ability to effectively represent him and in fact obtained court-ordered funds to assist counsel in that mitigation investigation. But, as discussed thoroughly *infra*, instead of focusing on the penalty phase of the trial and conducting a thorough and adequate mitigation investigation into Mr. Williams' background, counsel unreasonably conducted virtually no mitigation efforts in this case.

b. Counsel Knew Mr. Williams Wanted Help for His Sexual Crime

Counsel also knew that Mr. Williams' crime for which he was on trial for his life involved a rape and

murder; that eighteen days after the rape and murder of Ms. Rowell, Mr. Williams broke into Ms. Turner's home and attempted to rape her; and that, at the time he confessed to these sexual crimes, Mr. Williams wrote in his statement to law enforcement that "*I have a problem and I want help.*" (Doc. 84-11 at 39).

Mr. Williams' counsel, knowing the importance of a thorough mitigation investigation for the penalty phase, would have to explain to the jury how Mr. Williams came to be on trial for his life for committing the rape and murder. *See Ala. Capital Def. Trial Manual*, at 3 ("counsel will be faced with giving an account of how the defendant came to be on trial for life"). Given the sexual nature of Mr. Williams' crime and his statements to investigators regarding his "problem" in committing sexual crimes, reasonable counsel would have thoroughly explored *why* Mr. Williams stated that he had a "problem" that led him to commit a sexual offense; what was the problem; and why he felt that he needed help. When asked at the evidentiary hearing "Given the sexual nature of the offense, would a full psychological evaluation have been warranted?" Mr. Funderburg stated "That, I don't know." (Doc. 91 at 48). But a reasonable attorney would have at least known that the sexual nature of the crime and Mr. Williams' plea for help for his conduct warranted some investigation into that issue.

That reasonable investigation would involve *at the least* questioning Mr. Williams *thoroughly* about his prior sexual history, including why he felt that he had a problem committing sexual crimes; at what age he

became sexually active; whether he had been exposed to any deviant sexual actions as a child; whether he had been the victim of any improper sexual contact as a child; and whether he had a history of sexual abuse in his family. To understand how Mr. Williams ended up committing such a heinous sexual crime and then explain to the jury any mitigating factors they should consider against the aggravating factor involving a murder in the commission of a sexual crime, reasonable counsel would have thoroughly inquired into Mr. Williams' background for any explanation for his confessed "problem" with sexual crimes.

But, as discussed in detail *infra*, Mr. Williams' counsel failed to thoroughly question Mr. Williams or any of his family members regarding any aspect of his background. Counsel did not ask Mr. Williams, his family, or friends a single specific or even general question about Mr. Williams' prior sexual abuse, sexual history or about any sexual abuse history in the family. That failure was unreasonable given what counsel knew about the sexual nature of Mr. Williams' crime and his statement regarding wanting help for his actions.

c. Counsel Knew Alcohol and Marijuana Contributed Greatly to Mr. Williams' Crime

Counsel also knew that Mr. Williams' crime involved his abuse of alcohol and marijuana. *See* (Doc. 84-11 at 39). Mr. Williams' confessed to law enforcement that "I have let drugs, alchohol [sic], and sex ruin

my life." (Doc. 84-11 at 39). Mr. Williams stated in another written confession that "I have an alchohol [sic] and drug problem"; that "too much alchohol [sic] and drugs controled [sic] my actions"; and that he wanted help for his alcohol and drug issues. (Doc. 84-6 at 25).

And Mr. Funderburg testified at the evidentiary hearing that "I think the peg we held our hat on the most was the fact that he had been drinking quite a bit[;] I believe he had smoked pot most of the day or part of the day." (Doc. 91 at 75). Mr. Funderburg also testified that "the mitigation factors" counsel presented involved Mr. Williams not being "in his right mind" because of "the alcohol and marijuana." (Doc. 91 at 232).

In fact, in her opening statement for the penalty phase, Ms. Wilson told the jury that Mr. Williams had been "drinking and doing drugs that day"; that he "admitted he had been out drugging that day"; and "but for [Mr. Williams'] drinking and drugging, none of us would be here today." (Doc. 84-29 at 13). She specifically asked the jury to take into consideration as a mitigating factor that Mr. Williams had been drinking and doing drugs the day of the rape and murder. (Doc. 84-29 at 15).

So, counsel knew that alcohol and drugs played a significant role in Mr. Williams' crime and actually wanted the jury to consider this fact as a mitigating factor. Reasonable counsel with this knowledge would have thoroughly investigated Mr. Williams' background for any mitigation factors explaining *why* Mr.

Williams was under the influence of alcohol and marijuana on the day of the murder. *See Rompilla v. Beard*, 545 U.S. 374, 382 (2005) (finding deficient performance and prejudice where counsel knew from police reports that Rompilla had been drinking heavily at the time of the offense and a mental health expert reported Rompilla's alcohol issues, but counsel "did not look for evidence of a history of dependence on alcohol that might have extenuating significance").

To explain how Mr. Williams ended up raping and murdering a woman while heavily under the influence of alcohol and drugs, reasonable counsel would have thoroughly questioned Mr. Williams and his family about what age Mr. Williams began abusing alcohol and drugs; his history of abusing alcohol and drugs; and any history of alcoholism or drug abuse in his family. But, as the court will explain in detail *infra*, Mr. Williams' counsel failed to thoroughly investigate Mr. Williams' background regarding his alcohol and drug issues – the very thing that counsel sought to present as a mitigation factor. That failure was unreasonable.

2. What Counsel Failed To Do

Under the prevailing professional norms in 1999, Mr. Williams' counsel had a constitutional duty to conduct a thorough investigation into his background. *See Williams*, 529 U.S. at 396. According to Mr. Funderburg's testimony at the evidentiary hearing, Ms. Wilson assumed the primary responsibility for the penalty phase of Mr. Williams' trial and that his role in the

guilt and penalty phase "would have been more of experts." (Doc. 91 at 17). Mr. Funderburg testified that he subpoenaed some records for and gave the closing statement in the penalty phase, but Ms. Wilson filed the motion for a mitigation investigator and conducted the witness examinations of Charlene and Eloise Williams, the only two witnesses called during the penalty phase. And, Mr. Funderburg testified that "Tommie was primarily responsible for mitigation, talking to fact witnesses, local witnesses, [and] family members. . . ." (Doc. 91 at 17-18, 58).

And in her opening statement at the penalty phase of Mr. Williams' trial, Ms. Wilson told the jury that "any life events that influence a person are factors for your consideration" in mitigation. (Doc. 84-29 at 13). Yet, neither she nor Mr. Funderburg conducted a *thorough* investigation into Mr. Williams' background to discover those specific life events that negatively influenced his life. *See Wiggins*, 539 U.S. at 526 ("Though [counsel] told the jury it would "hear that Kevin Wiggins had a difficult life," counsel never "followed up on that suggestion with details of Wiggins' history.").

In fact, Mr. Funderburg in his closing statement at the penalty phase, after counsel called only two family members to testify very scarcely about Mr. Williams' background, told the jury "I don't know what makes a person do certain things. I don't know what made Marcus Williams do this in this case." (Doc. 84-29 at 41). Mr. Funderburg could not offer powerful mitigating circumstances to explain Mr. Williams' actions because counsel failed to thoroughly investigate Mr. Williams'

background to discover any such mitigation evidence. Counsel failed to discover important mitigating factors that could give the jury some explanation of how Mr. Williams ended up on trial for his life. Counsel's mitigation efforts were minimal and deficient.

a. Counsel failed to timely begin any mitigation efforts or collect documentary evidence on Mr. Williams

Even though counsel knew that the penalty phase of the trial was pivotal to Mr. Williams' defense, counsel did not *timely* begin any mitigation efforts or request documentary evidence regarding Mr. Williams' background. The Supreme Court has endorsed the 1989 ABA Guidelines applicable in death penalty cases as "well-defined norms" for purposes of determining when counsel's performance is objectively unreasonable. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003) (finding that counsel's conduct "fell short of the standards for capital defense work articulated by the American Bar Association (ABA) – standards to which we long have referred to as 'guides to determining what is reasonable'"). Those Guidelines require that counsel begin independent investigations relating to the penalty phase "immediately upon counsel's entry into the case and should be pursued expeditiously." 1989 ABA Guidelines at 11.4.1(A); *see also Raheem v. GDCP Warden*, 995 F.3d 895, 910 (11th Cir. 2021) (finding counsel not deficient where defense counsel "quickly began investigating Raheem's background and mental health" upon their appointment as counsel in 1999).

The record in Mr. Williams' case shows that counsel did not conduct a thorough investigation, much less begin any type of mitigation efforts expeditiously. The trial court appointed Ms. Wilson on November 26, 1996 and Mr. Funderburg on May 28, 1997. (Docs. 84-17 at 3 & 84-1 at 54). The trial court originally set Mr. Williams' trial to begin February 9, 1998, but continued it until November 17, 1998 at counsels' request just about a week before the original trial date. (Docs. 84-10 at 82 & 84-11 at 56). The trial that began November 17, 1998 ended in a mistrial because of an insufficient number of qualified jurors. (Docs. 84-16 at 28 & 91 at 25). Mr. Williams' second trial began on February 22, 1999, with the penalty phase starting on February 25, 1999. (Doc. 84-1 at 67).

Mr. Funderburg testified that when he joined the case in May 1997, Ms. Wilson did not have a "plan for the penalty phase of the trial" and had conducted no mitigation investigation. (Doc. 91 at 16). So, for the six months from November 1996 until May 1997, Ms. Wilson failed to begin any type of penalty phase preparation. As of Ms. Wilson's filing of her motion for funds for a mitigation investigator on June 4, 1997, about *seven months* after her appointment in this case, counsel admitted that she had not conducted an "adequate investigation" regarding mitigation. (Doc. 91 at 34).

Mr. Funderburg also testified that as of August 26, 1997, when he completed the "Defense Attorney Information" form for Mr. Williams' pre-trial competency evaluation at Taylor Hardin, he had not reached out to any of Mr. Williams family or friends "to try to get

information about Marcus' background." (Doc. 91 at 42). So, between May 1997 and August 1997, Mr. Funderburg conducted no mitigation investigation. And in a letter dated February 2, 1998 to Ms. Wilson, which was only a week before the initial February 1998 trial setting and about the time counsel requested a continuance of the trial, Mr. Funderburg wrote that "there is still much work to be done in preparing the defense." (Doc. 91 at 36).

And at the time of Mr. Funderburg's letter to Ms. Wilson on February 2, 1998, counsel had not requested any school, medical, or Job Corp records for Mr. Williams. A thorough mitigation investigation "must include obtaining all medical, mental health, school, employment and other records that relate to the client." *See Ala. Capital Def. Trial Manual*, at 589 (3d ed. 1997); *see also Raheem v. GDCP Warden*, 995 F.3d 895, 910 (11 th Cir. 2021) (finding counsel not deficient where they "tried to get all records [they] could from [Raheem's] educational past, his medical past, and his counseling past," in addition to his prison records; [they] got every kind of record [they] could think of").

In fact, the only documentary records counsel actually requested were Mr. Williams' Job Corp records. Even though Mr. Williams' mother Charlene called Mr. Funderburg's office on November 12, 1998 with information to request the Job Corp records from Earl C. Clements, 2302 Hwy 60 East, Morganfield, Kentucky 42437 (doc. 84-11 at 12), Mr. Funderburg waited *three months* to request those records from the U.S. Department of Labor on February 17, 1999 – only *five days*

prior to the start of Mr. Williams' trial on February 22, 1999. (Doc. 84-1 at 70); *see also Williams v. Taylor*, 529 U.S. 362, 395 (2000) (finding counsel was deficient when he did not begin to prepare for the sentencing phase until a week before trial).

And even Mr. Funderburg characterized the timing of his request for the Job Corp records as "Late, late in relation to – short notice before trial." (Doc. 91 at 39). He gave no explanation as to why he waited until right before the February 1999 trial setting to request those records or why he was the one requesting those records given his testimony at the hearing that Ms. Wilson was the primary counsel on the mitigation efforts. And, Mr. Funderburg admitted that he failed to request the Job Corp records before the November 1998 trial ended in a mistrial. (Doc. 91 at 39). Had the November 1998 trial not ended in a mistrial, Mr. Funderburg would have proceeded through that trial without having sought any documentary records regarding Mr. Williams' background. Mr. Funderburg also failed to explain why he failed to request any other documentary evidence for Mr. Williams' case.

No reasonable attorney who knows that the penalty phase of the trial would be paramount to Mr. Williams' defense would wait until five days before trial to request Job Corp documents, especially when Mr. Williams' crime occurred only ten days after he was terminated from the Job Corp on October 27, 1996. *See* (Doc. 84-17 at 65). But counsel failed to obtain those records in time to utilize any information in them for

mitigation purposes. And counsel failed to even request any other type of documentary evidence on Mr. Williams.

And most telling about the *untimeliness* of counsels' minimal efforts regarding mitigation involved the character letters for Mr. Williams provided to the trial judge for sentencing *after* the penalty phase of the trial before the jury. *See* (Doc. 84-21 at 1-6). Eloise Williams testified at the evidentiary hearing that, *on the day of her testimony at the penalty phase*, counsel asked Eloise to "get[ ] people to write letters" as character references for Mr. Williams. (Doc. 92 at 137). And two of those letters are dated April 4, 1999, which was after the penalty phase of the trial and before the sentencing before the trial court on April 6, 1999. (Doc. 84-21 at 1-6). Eloise testified that she turned those letters over to counsel, and Mr. Funderburg offered those statements at the sentencing as attachments to the pre-sentence investigation report. (Docs. 92 at 138 & 84-29 at 66).

No reasonable attorney would wait until literally the day of the penalty phase of the trial to get a family member with whom counsel has hardly communicated to pull together character letters for Mr. Williams at the last minute. Counsel did not bother to solicit names from Eloise Williams or any other family member and then interview those people themselves; instead they waited until literally the last minute to get someone else to do what they should have done long before the day of the penalty phase of the trial. Seemingly, getting those character letters for Mr. Williams seemed like an afterthought to counsel. And given counsels' minimal

effort regarding mitigation, the entire penalty phase of Mr. Williams' trial seemed to be the least of counsel's concern.

b. Counsel failed to utilize mitigation investigation funds or hire a mitigation investigator

Most telling regarding the *lack* of counsels' mitigation efforts was the fact that they failed to utilize any of the $1,500 awarded by the trial court for a mitigation investigation. Counsel indicated in the motion for mitigation investigation funds that they had a constitutional duty to conduct a thorough mitigation investigation; received $1,500 from the trial court to conduct a mitigation investigation; but failed to utilize those funds to conduct a thorough mitigation investigation or to hire anyone to assist with a mitigation investigation.

Ms. Wilson's case file contained a letter addressed to Billy Stephens dated October 29, 1997, indicating that Ms. Wilson wanted Mr. Stephens to help with a mitigation investigation.[6] (Docs. 84-26 at 68 & 91 at 101). But Mr. Stephens testified at the evidentiary hearing that he did not receive the letter, never met with Ms. Wilson, and did not assist counsel in any way

[6] Ms. Wilson's fee declaration also contains an entry dated "1-29-97" for "Letter to Billy Stephens RE: Investigator," but the court can find no letter with that date addressed to Mr. Stephens in Ms. Wilson's case files. *See* (Doc. 84-17 at 3).

with mitigation efforts in Mr. Williams' case. (Doc. 91 at 100-103).

Mr. Funderburg testified that "I think Tommie hired another investigator that did some interviews for her. . . . It would be in her billing, I don't know." (Doc. 91 at 92). But the court can find no other evidence in the record to support that Ms. Wilson contacted any other investigator to assist with mitigation efforts. In fact, the court can find no filing with the trial court in which counsel provided the name of any investigator used for mitigation efforts or the costs of services provided by an investigator, as required by the trial court's order awarding those funds. *See* (Doc. 84-51 at 42, 73). And the court can find no records in either Ms. Wilson or Mr. Fundeburg's trial counsel files or fee declarations submitted to the trial court to show that either counsel used the court-ordered funds to hire a mitigation investigator or used the funds to conduct any type of meaningful mitigation investigation.

Instead of using the court-awarded money to conduct a thorough mitigation investigation that they knew and acknowledged was paramount to Mr. Williams' case, Mr. Funderburg testified at the evidentiary hearing that he used $400 of the $1,500 to serve subpoenas on potential witnesses that investigators previously identified as suspects in the crime – not to subpoena family members or friends who could testify about Mr. Williams' background. (Docs. 84-6 at 4-6, 84-11 at 43-44 & 91 at 36-38). And Mr. Funderburg admitted at the evidentiary hearing that he did not

interview any of those subpoenaed witnesses for mitigation purposes. (Doc. 91 at 37).

The other $1,100 of those court-ordered mitigation funds were unused and not reported on either counsel's fee declaration. Mr. Funderburg testified at the evidentiary hearing that he did not expend any of the court allocated funds on a mitigation investigation. *See* (Docs. 84-51 at 42, 73 & 91 at 35, 92). And nothing in Ms. Wilson's counsel files or fee declaration indicates that she used any of those funds on a mitigation investigation.

Remarkably, instead of utilizing the court-awarded funds for any mitigation efforts, Mr. Funderburg filed a "Motion for Extraordinary Expenses" on December 9, 1998, *after* Mr. Williams' November 1998 trial ended in a mistrial, requesting additional funds for an independent forensic testing laboratory to re-test Mr. Williams' DNA samples. (Docs. 84-1 at 43 & 91 at 24-25). The trial judge granted the motion and awarded counsel $2,500 for the DNA re-testing. (Doc. 91 at 25). Counsel did not even bother to ask for these additional funds for DNA re-testing *before* his first trial ended in a mistrial. But most shocking is that counsel focused on securing additional funds related to the *guilt* phase although Mr. Williams had confessed to the crime, but counsel failed to utilize existing mitigation funds for the *penalty* phase that the trial court had already awarded to conduct any type of mitigation investigation.

Instead of counsel focusing on the penalty phase of Mr. Williams' trial given his three statements admitting his guilt, Mr. Funderburg spent two months right before the February 22, 1999 trial arranging for Reliagene to conduct independent DNA analysis and awaiting the results of the re-testing. (Doc. 91 at 25-28). In the end, those efforts merely confirmed that the DNA from the crime scene matched that of Mr. Williams. (Docs. 84-1 at 1-23 & 91 at 27). Counsels' focus on the guilt phase so late in the game when they knew Mr. Williams' confessions would be admitted into evidence was unreasonable. No reasonable counsel, knowing the importance of the penalty phase because of their client's confessions and existing DNA evidence linking their client to the crime, would fail to spend court-ordered mitigation funds but instead ask for more funds to re-test DNA samples *after* the first trial ended in a mistrial. In fact, choosing to forgo spending any court-ordered mitigation funds and instead focusing on re-testing DNA at that stage lacked any reasonable basis.

Counsel's failure to utilize the court-ordered mitigation funds to conduct a thorough investigation into Mr. Williams' background was unreasonable in light of their acknowledgment of the importance of the penalty phase in Mr. Williams' case. This case does not involve counsel who thought a thorough mitigation investigation was not necessary and made a strategic decision to not conduct one or end mitigation efforts at a certain point as futile. Counsel in this case asked for funds to hire a mitigation investigator, and the court granted

that request. Nothing in the record suggests that counsel made a strategic decision to not use those court-ordered funds to conduct a mitigation investigation. They just did not follow through.

To the contrary, the record shows that counsel knew a mitigation investigation was paramount to Mr. Williams' case and wanted to conduct a thorough mitigation investigation. The problem is that counsel's minimal efforts to conduct a thorough mitigation investigation fell way short of reasonable. Counsel *attempted* to secure a mitigation investigator but failed to follow through with efforts to hire an investigator to assist with mitigation. No reasonable counsel would secure court funds to hire a mitigation investigator; try to secure a mitigation investigator; drop those efforts for no legitimate, strategic reason; and instead focus on re-testing the DNA for the guilt phase when the defendant confessed to the crime.

As Ms. Wilson stated in the motion for mitigation funds, counsel knew they would be "constitutionally ineffective" if they did not conduct a *thorough* mitigation investigation into Mr. Williams' background and needed the help of an investigator to conduct interviews. Yet, counsel failed to use those mitigation funds to hire an investigator to assist them with mitigation efforts and failed to themselves conduct a thorough mitigation investigation into any area of Mr. Williams' background. Reasonable counsel would not seek mitigation funds knowing the importance of a thorough background investigation and then fail to use any of those funds to conduct any type of mitigation efforts

themselves or hire a mitigation investigator to assist them. Counsels failed efforts regarding using the court-ordered mitigation funds to hire a mitigation investigator were unreasonable and deficient and in their own words "constitutionally ineffective."

c. Failure to adequately interview Mr. Williams about his background for mitigation

A thorough, reasonable mitigation investigation would start with counsel thoroughly interviewing their client and collecting background information from him. *See Ala. Capital Def. Trial Manual*, at 588 (the penalty phase investigation "must start at the first client interview"). Based on the professional standards in both the 1989 ABA Guidelines and the *Alabama Capital Defense Trial Manual*, Mr. Williams' counsel had a "duty to collect information pertaining to 'family and social history (including physical, sexual, or emotional abuse,' and to 'obtain names of persons or sources to verify, corroborate, explain and expand upon [the] information obtained.' " *See Williams v. Allen*, 542 F.3d 1326, 1339 (11th Cir. 2008) (quoting 1989 ABA Guidelines 11.4.1(D)). As the *Alabama Capital Defense Trial Manual* also explains, because the "stakes are so high in a capital case," counsel must spend "a great deal of time with the client" so he will "feel very comfortable and competent during what will be a very difficult experience." *Ala. Capital Def. Trial Manual*, at 3 (3d ed. 1997).

But, Mr. Williams' counsel spent very minimal time themselves interviewing Mr. Williams regarding

any mitigation efforts or in preparing for the penalty phase of Mr. Williams' trial. Mr. Williams testified that counsel met with him "about a half dozen times," each time from "fifteen to thirty minutes." (Doc. 91 at 104-105). Mr. Williams stated that those meetings were generally in the courthouse before or after court settings and that none of those meetings were at the jail. (*Id.* at 105).

Mr. Williams testified that he had "hardly any" relationship with Ms. Wilson because "she didn't really talk to me much." (Doc. 91 at 105). Ms. Wilson's fee declaration corroborates this claim. As the primary counsel responsible for the penalty phase of Mr. Williams' trial, Ms. Wilson's fee declaration submitted to the trial court reflects that she spent very little time with Mr. Williams at all, much less for the penalty phase.[7]

Ms. Wilson's fee declaration contains just a few entries indicating that she spent any time with Mr. Williams. *See* (Doc. 84-17 at 2-10). Ms. Wilson noted in her fee declaration a 30 minute conference with Mr. Williams on May 28, 1997 regarding "charges, defenses, discovery" on the same day as Mr. Williams' arraignment.[8] The only other entry prior to Mr. Williams' trial

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[7] Ms. Wilson submitted her fee declaration to the trial court on June 24, 1999, after Mr. Williams' guilt and penalty phases of his trial on February 22-25, 1999 and sentencing by the trial judge on April 6, 1999. *See* (Doc. 84-17 at 2-10).

[8] Mr. Funderburg indicated in his fee declaration that Mr. Williams' arraignment occurred June 10, 1997, and that he spent .25 hours on May 28, 1997 for "Receipt and review of notice of appointment." *See* (Doc. 84-1 at 67).

on February 22-25, 1999 regarding meeting with Mr. Williams was for August 3, 1997, where Ms. Wilson noted that she had an "*Office Conference* with Co-Counsel & Defendant" for two hours. (Doc. 84-17 at 5) (emphasis added). Curiously, Mr. Funderburg's fee declaration does not contain an entry for August 3, 1997 and does not indicate that he met with Mr. Williams or Ms. Wilson on that day. *See* (Doc. 84-1 at 68). And the court is unsure where Ms. Wilson's August 3, 1997 meeting with Mr. Williams occurred because he was incarcerated at that time and could not meet at Ms. Wilson's "office."

Even though Mr. Williams wrote Ms. Wilson a letter dated February 28, 1997 asking her to meet with him about his background, without interruptions and "without my family being around," Ms. Wilson's records indicate that she possibly met with Mr. Williams only two times as discussed above for at most 2.5 hours prior to his trial that began on February 22, 1999. *See* (Docs. 84-26 at 86 & 91 at 109). So for the two years between his February 1997 letter asking to meet with counsel to discuss his background and his February 1999 trial, Ms. Wilson's records indicate she met with Mr. Williams only twice. And according to Ms. Wilson's fee declaration, she had no meetings or contact with Mr. Williams for almost a year and a six months between the August 3, 1997 meeting and his trial date on February 22, 1999.

Although Ms. Wilson's legal secretary Tina Watson testified that "it is normal practice for [all documents about this case] to be kept in the file," she could not say

for sure that all of Ms. Wilson's notes were in her case file submitted to the court. (Doc. 91 at 11-14). And the State argues that "[b]ecause Tommie Wilson is deceased, it is simply impossible to determine how much time she actually spent 'preparing for the sentencing phase.'" (Doc. 89 at 23). But a reasonable attorney would document and include in her fee declaration submitted to the trial court at least *all* time spent with a defendant in a capital murder trial. The fact that Ms. Wilson included only a few cursory entries in her fee declaration regarding specifically spending time with Mr. Williams supports his statements regarding the minimal amount of time Ms. Wilson devoted to talking with him and investigating Mr. Williams' background for mitigating evidence.

No reasonable counsel in a death penalty case who is primarily responsible for the penalty phase would meet with the defendant only twice in two years when she knows that a thorough mitigation investigation is vital to the case. Mr. Williams was willing to discuss his background with Ms. Wilson, but according to Ms. Wilson's fee declaration she failed to spend any meaningful time with him to discover mitigation evidence in his background.

Ms. Wilson's case file contains no notes regarding her meetings with Mr. Williams or any notes regarding any mitigation investigation efforts with Mr. Williams. Ms. Wilson's minimal contact with Mr. Williams was especially unreasonable given her role as the primary counsel responsible for the penalty phase of his trial

and the paramount importance of Mr. Williams' background as a potential source of mitigation evidence.

Although Mr. Funderburg claimed Ms. Wilson was primarily responsible for the penalty phase of the trial, his fee declaration indicates that he spent more time with Mr. Williams than did Ms. Wilson. *See* (Doc. 84-1 at 67-71). And Mr. Williams testified that he had more contact with Mr. Funderburg than he did with Ms. Wilson. (Doc. 91 at 106). According to Mr. Funderburg's fee declaration, he met with Mr. Williams only five times and spent at most only about eight hours total meeting with him from May 1997 when the court appointed Mr. Funderburg until Mr. Williams' trial in February 1999. *See* (Doc. 84-1 at 67-70).

Mr. Funderburg testified at the hearing that he met with Mr. Williams about "nine or ten times" because he *assumed* that the entries in his fee declaration for "Travel to and from Ashville" would be to meet with Mr. Williams. (Doc. 91 at 50). But, in four of the only five entries in his fee declaration where Mr. Funderburg indicates that he actually met with Mr. Williams, he also included a 1.0 hour entry for "Travel to and from Ashville" on that same date. In most of the "Travel to and from Ashville" entries where he did *not* include a meeting with Mr. Williams, Mr. Funderburg included other things that he did that day, including "Research and Trial Preparation" and "Receipt/review of case action summary." The April 6, 1999 entry where Mr. Funderburg included only "Travel to and from Ashville" corresponded with the date of Mr. Williams' sentencing hearing. (Doc. 84-1 at 67-70). And a reasonable

attorney would include in his fee declaration *all* the time he actually spent with the defendant, especially in a death penalty case. So, Mr. Funderburg's fee declaration shows that he met with Mr. Williams about five times from June 1997 until his trial in February 1999 for a total of about 8 hours.

And Mr. Funderburg noted that 4.5 hours of those 8 hours were for a "Meeting with District Attorney *and* Defendant," so he presumably met with Mr. Williams *alone* for less than 4.5 hours on that date. *See* (Doc. 84-1 at 68) (emphasis added).

And 1.25 of those 8 hours included Mr. Funderburg meeting with Mr. Williams on August 26, 1997 regarding "psychological forms" for the Taylor Hardin evaluation for Mr. Williams' competency to stand trial (*Id.*) But those forms were only two pages and contained no background mitigation information on Mr. Williams because counsel had conducted no mitigation investigation into Mr. Williams' background at that point. (Doc. 84-15 at 22-25). In fact, question 3 of that form asked counsel to indicate "information from Relatives, Friends, etc. that would Substantiate Defendant's Mental Condition" but Mr. Funderburg wrote in response that "Defense Counsel has been unable to consult with relatives and friends concerning this issue." *Id. So*, Mr. Funderburg presumably did not glean any background information from Mr. Williams during that 1.25 hours meeting with him regarding those forms.

And although Mr. Funderburg does not specify about what he met with Mr. Williams during the rest of his meetings, some of those meetings presumably were about the guilt phase of the trial because Mr. Funderburg testified that his primary responsibility was "forensics and DNA and kind of the technical issues." *See* (Doc. 91 at 57).

So, Mr. Funderburg most likely spent less than eight hours actually meeting with Mr. Williams in a meaningful way to investigate his background for mitigation. That minimal amount of time spent with Mr. Williams was inadequate to thoroughly interview and question Mr. Williams about his background for possible mitigation. *See Daniel v. Comm'r, Ala. Dep't Corr.*, 822 F.3d 1248, 1264 (11th Cir. 2016) (finding deficient performance when no competent attorney in 2003 would have failed to conduct timely and thorough background interviews with the defendant and his immediate family members when they were available to counsel).

Not only did Mr. Funderburg spend very minimal time with his client, Mr. Williams testified that counsel posed to him "just general questions" about his background, including about "parents, brothers, sisters, that sort of deal, school," but did not ask anything specific about his family history or whether he had been sexually, physically, or emotionally abused in his childhood. (Doc. 91 at 106). Mr. Funderburg admitted at the hearing that he asked Mr. Williams only general questions about his background. (Doc. 91 at 70). Mr. Funderburg testified that he did not ask Mr. Williams any

specific questions regarding his past sexual history, alcohol use, or family background. Instead, Mr. Funderburg testified that his practice was to ask only "general questions" like "what kind of childhood did you have, where did you grow up, where did you live, how were you treated, were there problems." (Doc. 91 at 70). Mr. Funderburg indicated that he understood the importance of physical and sexual abuse as "potential" mitigation evidence, but that he did not try to get that information by asking Mr. Williams "a litmus test of specific questions." (*Id.* at 69).

Counsel's practice of only asking vague, general questions did not satisfy counsel's duty to thoroughly interview Mr. Williams about his background and was unreasonable in light of the professional norms at the time of Mr. Williams' trial. The 1989 ABA Guidelines specifically required counsel to "[c]ollect information relevant to the sentencing phase of trial," including information about his medical history and any "alcohol and drug use" and "family and social history (including physical, sexual or emotional abuse)." 1989 ABA Guidelines 11.4.1(D).

The *Alabama Capital Defense Trial Manual*, of which Mr. Funderburg had a copy, provides a "list of questions relating to your client's life history[,]" but cautions that the list is "not exhaustive" and that counsel may need to seek "additional background information and data" not specifically listed in the questions. *Ala. Criminal Def. Trial Manual*, at 55. The *Manual*'s list of questions instructs counsel to ask about "the name, age and address (where available) of

every member of the client's family or household"; the "physical conditions in which the family lived" and whether the client had "adequate food" at home; "any moves made by the client's family" and the reasons for those moves; whether the client or his siblings experienced "sexual abuse (whether or not associated with discipline) or harassment, or aberrant sexual modeling"; "any major disruptions of or trauma to any member of the household;" whether the client "demonstrate[d] any behavioral difficulties"; whether the client "has ingested quantities of alcohol or drugs in such a way as to suggest substance abuse"; and whether the client has any "family history of mental illness, criminal conduct, or alcohol or drug use." *Ala. Capital Def. Trial Manual*, at 1, 58-61, 64, 72, 68, 78-80.

Mr. Funderburg knew that Mr. Williams's crime involved a sexual offense; that Mr. Williams admitted to police that he had a problem committing sexual crimes and wanted help; that Mr. Williams admittedly had an alcohol and drug problem and wanted help; and that alcohol and drugs contributed greatly to the Mr. Williams' crime. Yet, counsel failed to ask Mr. Williams any specific questions about his sexual history or alcohol and drug history as required by the 1989 ABA Guidelines and the *Alabama Capital Defense Manual*. A reasonable investigation would involve *at the least* counsel questioning Mr. Williams *thoroughly* about his prior sexual history, including why he felt that he had a problem committing sexual crimes; at what age he became sexually active; whether he had been exposed

to any deviant sexual actions as a child; whether he had been the victim of any improper sexual contact as a child; and whether he had a history of sexual abuse in his family. But counsel did not even broach the subject of Mr. Williams' sexual history or why he thought he had a problem committing sexual crimes. *See Johnson*, 643 F.3d at 907 (finding deficient performance where trial counsel did not specifically ask Johnson if he had been abused by his father, mother, grandparent, or anyone else; counsel "did not broach the subject."). That failure was unreasonable.

Mr. Funderburg's practice of asking only general questions of defendants in death penalty cases was especially unreasonable given what counsel knew about Mr. Williams and the specifics of his sexual crime and his alcohol abuse on the day of the crime. *See Correll v. Ryan*, 539 F.3d 938, 945 (9th Cir. 2008) (The Court found deficient performance for failure to investigate for mitigating evidence where counsel "asked no such specific questions" about the defendant's "drug abuse, head injury, psychiatric history, or family dysfunction. . . . Thus, his failure to gather mitigating information did not result from its unavailability; it resulted from counsel's complete failure to ask any relevant questions."); *McNeill v. Branker*, 601 F. Supp. 2d 694, 717 (E.D.N.C. 2009) (finding trial counsel deficient when he "made only minimal effort to investigate potential mitigating evidence" where his "primary approach to learning about the petitioner's character, background, and upbringing was to ask petitioner and his parents their impression on the subject").

Had counsel simply spent adequate time with Mr. Williams, developed a rapport with him to gain his trust, and specifically asked Mr. Williams about his sexual history, counsel most likely would have discovered the same mitigating evidence uncovered by Mr. Williams' Rule 32 counsel "Karl," who Mr. Williams first told about his sexual abuse by Mario. *See Wiggins*, 529 U.S. at 525 ("Had counsel investigated further, they might well have discovered the sexual abuse later revealed during state post conviction proceedings.").

Mr. Williams testified that he did not tell Karl about the sexual abuse the first time he asked about that issue, but after Karl developed a rapport with Mr. Williams and specifically asked him about his past sexual abuse, he then felt comfortable telling Karl about his past sexual abuse by Mario. (Doc. 91 at 122). Mr. Williams testified at the evidentiary hearing that "Karl was more accessible and more like he wanted to help, interested in what I had to say. Whereas my trial attorneys already had their plan made out so, you know, there was – they had nothing they wanted to talk to me about or wanted to hear from me about, that's the way I felt." (Doc. 91 at 130).

Likewise, had Ms. Wilson and Mr. Funderburg spent adequate time with Mr. Williams, developed a rapport with him as did Karl, and asked Mr. Williams specific questions relevant to mitigation, Mr. Williams would have told trial counsel that Mario, who Mr. Williams believed was "ten or twelve years older" than him, sexually abused him about three or four times between the ages of four and six; that he felt shame and

depression about Mario's sexual abuse of him; that he had thoughts of hurting and killing himself after the sexual abuse; that Mr. Williams began having sexual intercourse at the age of ten; that when he was around ten years old he "was allowed to watch [his eighteen-year-old cousin Brian Williams] have sex as a way of showing me how to do it with a woman"; and that his mother had men in her bed when Mr. Williams was sleeping with her. (Doc. 91 at 118-134); *see Daniel*, 822 F.3d at 1265 (finding deficient performance and prejudice where the jury never heard about Daniel's physical, emotional, or sexual abuse "that trial counsel could have gotten from timely and meaningful interviews with Mr. Daniels.").

And, had counsel asked Mr. Williams specific questions about his family background as called for by the prevailing professional norms in 1999, Mr. Williams also would have told them about the domestic violence he witnessed at the age of twelve between his mother and her boyfriend Jeff Deavers. (Doc. 117-118, 132). Mr. Williams testified at the evidentiary hearing that his mother's relationship with Mr. Deavers was "volatile," meaning they would "get into fights, physical fights"; he saw evidence on his mother that Mr. Deavers had attacked or beaten her, including a black eye and busted lip; and when he was twelve-years-old, he saw Mr. Deavers' strike Mr. Williams' mother with his bare hands, and Mr. Williams responded by "grabb[ing] a knife and tr[ying] to stab him." (Doc. 91 at 117-118).

Mr. Funderburg claimed that he was at the "mercy of what [Mr. Williams was] willing to tell [him]." (Doc.

91 at 70). But Mr. Williams did not give information because counsel failed to even ask. And Mr. Funderburg cannot assign his constitutional duty to thoroughly investigate for mitigation to the client Mr. Williams. *See Rompilla*, 545 U.S. at 381 (Court found deficient performance and prejudice when Rompilla's "own contributions to the case were minimal" and even though he was "even actively obstructive by sending counsel on false leads."). Even if Mr. Williams was not willing to cooperate with counsel, which he was, that fact would not abrogate counsel's duty to thoroughly investigate Mr. Williams' background for mitigation. *See Blanco v. Singletary*, 943 F.2d 1477, 1502 (11th Cir. 1991) (counsel cannot "blindly follow" a client's command to not present mitigating evidence and that command does not end counsel's responsibility to conduct a reasonable mitigation investigation).

Mr. Williams' counsel unreasonably failed to ask Mr. Williams any specific questions about or *thoroughly* investigate any aspect of Mr. Williams' background. That failure constituted deficient performance.

d. Failure to adequately investigate or interview any family members or friends for mitigation

Not only did counsel fail to adequately spend time with and interview Mr. Williams about his background, counsel also failed to adequately investigate or interview any family members or friends for possible mitigation evidence. When asked at the evidentiary

hearing "How would you characterize the amount of work you did in preparation for the sentencing in the Marcus Williams case," Mr. Funderburg testified that "I would say that we tried to contact as many people as we obtained information from from [sic] Marcus' mother and his grandmother." Mr. Funderburg did not know how many people he contacted and said "whatever is in my notes." (Doc. 91 at 28). But both his and Ms. Wilson's case files are silent on the issue of a mitigation investigation and do not contain *any* notes about *any* meetings with or list of *any mitigation* witnesses.

Mr. Williams testified that counsel did not discuss with him prior to his trial any witnesses or information that counsel planned to present at the penalty phase or what aspects of his childhood or background that his counsel might argue to the jury. (Doc. 91 at 112-113). But Mr. Williams indicated that before trial his counsel asked him to give them "a list of relatives and friends that I could call as witnesses." (Doc. 91 at 113). Mr. Williams testified that he wrote about twelve or thirteen names, including Glen Smith, Tim Cater, Marlon Bothwell, Tameka Richardson, Charlene Williams, and Eloise Williams, and others names he could not recall on a piece of paper and gave the list to counsel. (Doc. 91 at 113). But the list provided by Mr. Williams is not in Ms. Wilson or Mr. Funderbug's case files in the record. And Mr. Funderburg testified his practice was to keep all papers and documents related to a case in his file. (Doc. 91 at 96).

Counsels' files do, however, contain a *blank* form provided by the trial court on which counsel was to list all possible mitigation witnesses for the penalty phase. (Doc. 84-50 at 70-73). In fact, on September 18, 1997, the trial court provided that form to counsel and ordered that counsel "shall have the defendant fill out and complete a list of any potential witnesses in this cause who might in any way assist counsel in their defense of this case"; that counsel "retain a copy of this list for their files and investigative use"; and that counsel furnish a completed and signed copy of that list to the trial judge within fourteen days of that September 18, 1997 order. (Doc. 84-11 at 73-74). The trial court's order also indicates that the list provided to the trial judge "shall remain under seal in the office of the undersigned judge. Upon completion of the trial, the sealed list shall be made a part of the record in this cause. . . ." (*Id.*) Ms. Wilson's fee declaration indicates that she mailed a copy of that order to Mr. Williams on September 20, 1997 "to complete and return." (Doc. 84-17 at 6). But the only copy of that form that the court can find in the record is completely blank.

Mr. Funderburg acknowledged that the form provided by the court was blank and testified at the evidentiary hearing that he "would have produced a list independent of that form," or "we would have prepared one on our own, not necessarily using this exact form." (Doc. 91 at 30, 60). But the court can find no list of any mitigation witnesses in either counsel's files. And Mr. Funderburg admitted at the evidentiary hearing that his case file contained no list of possible mitigation

witnesses. (Doc. 91 at 96). He gave no explanation for why some type of mitigation list was *not* in his or Ms. Wilson's files for Mr. Williams' case.

In fact, at sentencing, the trial judge inquired about the fact that it had not received a list of mitigation witnesses from the defendant as he had ordered. The trial judge stated at the sentencing hearing that "I think the record will reflect the Court has previously distributed to the defendant and his attorneys a list for prospective witnesses that the defendant would request be called. Quite frankly, based on that list, I don't know whether any witnesses were listed as to the sentencing phase." (Doc. 84-29 at 92).

Mr. Funderburg responded to the trial judge that "[w]e did that through statements [attached to the presentence report]. [Mr. Williams] read through those and he said he wanted us to offer those and we did." (*Id.* at 93). But the jury did not see those six written statements on behalf of Mr. Williams because counsel asked Eloise Williams *on the day of the penalty phase of the trial* to gather those statements for sentencing before the trial judge. And Mr. Funderburg did not testify that counsel talked to or interviewed any of the people who provided character references before receiving their statements from Eloise Williams. So, although Mr. Williams provided a list of possible mitigation witnesses to counsel, they failed to compile or provide a completed list of possible mitigation witnesses to the trial court as ordered. That failure was unreasonable and reflects counsel's complete lack of effort to conduct any type of mitigation investigation.

The court acknowledges that Mr. Funderburg testified that he did meet with Mr. Williams and talked about potential mitigation witnesses (doc. 91 at 47, 61) and that counsel had "contacted or tried to contact everyone that had been presented" (doc. 91 at 60). But the facts that counsel failed to compile any list of mitigation witnesses, no mitigation list is in either counsels' case files, and the trial judge questioned why counsel failed to provide to the court a list of mitigation witnesses as ordered undermine Mr. Funderburg's testimony. Reasonable counsel would have compiled a list of mitigation witnesses as ordered and provided that list to the trial court. And even if Mr. Funderburg did meet with Mr. Williams and talk about some mitigation witnesses, *talking about* some witnesses would not be enough. Counsel had a duty to *thoroughly interview or investigate* mitigation witnesses, but they failed to fulfill that constitutional duty.

Mr. Funderburg tried to justify this failure by testifying that "[i]f I recall, we actually had an in-camera meeting with [the trial judge] without the State being involved," at which the trial judge questioned Mr. Williams about whether he had any other witnesses he wanted counsel to call as mitigation witnesses, but Mr. Williams answered "no." (Doc. 91 at 60). But the only colloquy from the trial judge that this court can find in the record took place during the actual sentencing hearing on April 6, 1999. (Doc. 84-29 at 92-93). And that colloquy occurred immediately after the trial judge questioned why counsel failed to submit a list of mitigation witnesses. (Doc. 84-29 at 92).

The responsibility to know what evidence is relevant to mitigation, investigate any family members or friends to discover that mitigation evidence, and call them as witnesses during the penalty phase of the trial was on *counsel*, not Mr. Williams. Mr. Williams' indication to the trial judge that he did not want to call any additional witnesses did not erase counsel's duty to conduct a thorough mitigation investigation *prior* to the penalty phase before the jury and the sentencing hearing before the trial judge.

In addition to the counsels' failure to compile a list of possible mitigation witnesses, both Ms. Wilson and Mr. Funderburg's fee declarations show very little time meeting with family members at all, much less regarding mitigation. In her fee declaration, Ms. Wilson indicates that she spent at most only two hours total in conferences with "family," but her declaration does not specify which family members. And her fee declaration indicates that she reviewed on April 4, 1999 the "character witness letters," but Ms. Wilson did not actually collect those letters herself – counsel tasked Eloise Williams with collecting them. Ms. Wilson's fee declaration shows no other time investigating or interviewing Mr. Williams's family members or any other witnesses for the penalty phase of the trial. (Doc. 84-17 at 6). The minimal time that Ms. Wilson spent talking to or interviewing family members regarding Mr. Williams' background was unreasonable, especially in light of Mr. Funderburg's claims that Ms. Wilson was the one primarily responsible for any mitigation efforts for the penalty phase of Mr. Williams' trial.

And, although Mr. Funderburg testified that Ms. Wilson was primarily responsible for the penalty phase of Mr. Williams' trial, Mr. Funderburg's fee declaration submitted to the trial court showed he spent more, albeit minimal, time talking to family members and preparing for the penalty phase of the trial. *See* (Doc. 84-1 at 55-59). But Mr. Funderburg testified at the evidentiary hearing that he could not identify any entry on his fee declaration "referring to interviews of mitigation witnesses." (Doc. 91 at 29). And, at most, Mr. Funderburg spent about twelve hours on the enitre penalty phase of the trial that included two 15 minute phone calls with Charlene on August 27, 1997 and September 5, 1997; a 45 minute "meeting with Eloise" on October 23, 1997; two short phone calls with Charlene regarding "pastoral rights" and a continuation of the trial on November 6, 1997 and January 3, 1998; a 90 minute meeting with "Defendant's family" on November 11, 1998; and two telephone conferences with "witnesses" totaling 2.5 hours on November 16, 1998 and December 14, 1999. And on March 15, 1999, *after* the penalty phase of the trial before the jury in February 1999, Mr. Funderburg researched sentencing preparation and prepared Mr. Williams's sentencing statement for the April 1999 sentencing before the trial judge. His fee declaration states "12.3 Hours at $20.00 per hour = $246 (Sentencing Phase)." (Doc. 84-1 at 55-59).

Generously interpreting Mr. Funderburg's fee declaration, he spent at most about a total of twelve hours preparing for the entire penalty phase of Mr. Williams' trial, including *minimal* contact with Mr. Williams'

family. And his trial counsel file and records do not reflect any additional time spent investigating or interviewing family members or friends for mitigation purposes. Counsel had no list of mitigation witnesses in their files; no documented plan to secure mitigation evidence; and no notes from conversations with Mr. Williams, Charlene, Eloise, or any of his family members regarding his family background.

Counsel had no reasonable excuse for failing to – at the very least – compile a list of *all* of Mr. Williams family members, including all the relatives with whom Mr. Williams had lived and all of his siblings, and reach out to them to find out about Mr. Williams' childhood background.

The 1989 Guidelines do not establish a specific number of persons that counsel should interview, and the Eleventh Circuit has rejected the idea that there is a "magic number" of witnesses an attorney must interview for mitigation. *See Alderman v. Terry*, 468 F.3d 775, 792 (11th Cir. 2006). But the Eleventh Circuit has "found deficient performance in cases where an attorney's efforts to speak with available witnesses were insufficient to formulate an accurate life profile of [the] defendant." *Williams v. Allen*, 542 F.3d 1326, 1339 (11th Cir. 2008) (alteration in original) (internal quotation marks omitted) (quoting *Jackson v. Herring*, 42 F.3d 1350, 1367 (11th Cir. 1995)).

Mr. Williams' sisters Lacharo Williams and Sharenda Williams both testified at the evidentiary hearing that they were present at the penalty phase of

Mr. Williams' trial in February 1999 but that neither Mr. Funderburg nor Ms. Wilson spoke to or interviewed them about their family background either before or on the day of the penalty phase of the trial. (Docs. 91 at 153 & 92 at 211-212). LaCharo also testified at the evidentiary hearing that she was with her mother Charlene "when she was talking to [Ms. Wilson before the trial], but Ms. Wilson "didn't have any interaction with me." (Doc. 92 at 211). Both LaCharo and Sharenda testified they would have cooperated with Mr. Williams' counsel and talked to them about their family background had counsel reached out to them. (Docs. 91 at 153 & 92 at 212). Counsels' failure to interview or investigate Mr. Williams' sisters who were available and present at the penalty phase of the trial was unreasonable. *See Cooper v. Sec'y, Dep't Of Corr.*, 646 F.3d 1328, 1351-52 (11th Cir. 2011) (finding deficient performance based on an inadequate mitigation investigation where counsel only interviewed Cooper, his mother, and a psychologist, but not other available family members).

Mr. Funderburg's case file also contains a note in his handwriting on which he wrote the names Takeisha Fomby, Barbara Powell, LaCharo Williams, and Sharenda Williams and "need excuse that their appearance was necessary in court on 2-25-99." (Doc. 84-11 at 29). Mr. Funderburg testified at the evidentiary hearing that none of the people listed on the note were called as mitigation witnesses. (Doc. 91 at 33). And Sharenda and LaCharo testified that neither of Mr. Williams' trial counsel ever talked with them prior to,

during, or after the trial about mitigation or anything else, even though they were present at the penalty phase of the trial. (Docs. 91 at 153 & 92 at 212); *see Johnson v. Sec'y, DOC*, 643 F.3d 907, 935 (11th Cir. 2011) (finding deficient performance where trial counsel's failure to speak with witnesses was not product of witnesses' unavailability or unwillingness but counsel's lack of effort). Both LaCharo and Sharenda's testimony at the evidentiary hearing was credible and undermine Mr. Funderburg's testimony that he had contacted or tried to contact all possible mitigation witnesses.

And Mr. Williams' childhood friend Marlon Bothwell testified at the evidentiary hearing that he knew Mr. Williams since he was around four-years-old; was living in Ashville in 1999; but no one contacted him about Mr. Williams during the time his case was going to trial. And Marlon Bothwell was one of the names that Mr. Williams testified he wrote on a piece of paper and gave to counsel to contact regarding testifying on Mr. Williams' behalf. (Doc. 91 at 113). But counsel failed to reach out to Mr. Bothwell or ask him any questions regarding Mr. Williams' background. And Mr. Bothwell testified that he would have cooperated with anyone working on Mr. Williams' behalf if they had contacted him and asked what he knew about Marcus' background. (Doc. 93 at 6, 18-19). Counsels' failure to contact one of Mr. Williams' childhood friends whose name Mr. Williams provided to them was unreasonable and deficient.

When asked at the evidentiary hearing why he failed to contact any family members or friends prior to completing the Taylor Hardin evaluation paperwork on August 26, 1997, Mr. Funderbrug testified that "I don't think at that time there was a lot of cooperation with those – with friends that were also suspects." (Doc. 91 at 42). The court agrees that Mr. Williams' childhood friend Alister Cook, who was partying with Mr. Williams the night Mr. Williams broke into Lottie Turner's home and attempted to rape her, could have initially been a suspect and may not have cooperated with talking to counsel about Mr. Williams' background; Mr. Cook gave several statements to the police about being with Mr. Williams the night of the Turner burglary and attempted rape. *See* (Doc. 84-6 at 25 & 84-15 at 25-28).

But the record contains no evidence that Mr. Funderburg or Ms. Wilson even *attempted* to talk to Mr. Cook about Mr. Williams' background for mitigation. In fact, Mr. Funderburg included Mr. Cook on the list of witnesses he subpoenaed to appear for the November 1998 trial, but Mr. Funderburg admitted at the evidentiary hearing that he did not interview any of the subpoenaed witnesses for mitigation purposes. (Doc. 84-11 at 44 & 91 at 37). Counsel's failure to even attempt to talk to Mr. Williams's closest friend Mr. Cook, who was "hanging" with Mr. Williams around the time of the Rowell murder, was deficient.

And Mr. Funderburg admitted that he had not reached out to any of Mr. Williams' family or friends who were *not* suspects in the crime. (Doc. 91 at 42). Mr.

Williams' sisters LaCharo and Sharenda and friend Marlon Bothwell who all testified at the evidentiary hearing were *not* suspects in the case. *See* (Doc. 84-6 at 4-6). They were available witnesses that counsel could have interviewed thoroughly about Mr. Williams and his family background. *See Hardwick*, 803 F.3d at 554 (reasonable counsel would have pursued avenues of mitigation by interviewing available family members). But counsel failed to conduct a thorough mitigation investigation, ignored Mr. Williams' sisters who were actually present at the penalty phase of the trial, and failed to thoroughly interview close family members who were willing and available to testify. Those failures were unreasonable.

e. Failure to Adequately Interview and Prepare the Penalty Phase Witnesses

Counsel also failed to thoroughly interview and prepare prior to Mr. Williams' trial the only two family members they called as witnesses at the penalty phase – Charlene Williams and Eloise Williams. Mr. Funderburg testified that "the mother and the grandmother seems were the primary two we would have met with on several occasions. . . ." (Doc. 91 at 30). But Mr. Funderburg did not have clear understanding of Mr. Williams' family dynamics because he thought Beulah Williams was Mr. Williams' grandmother, when she in fact was his great-grandmother. *See* (Doc. 91 at 43). And counsel did not call Beulah Williams to testify at the penalty phase of the trial; they called his aunt Eloise Williams.

And counsel's decision to call two mitigation witnesses at the penalty phase whom they failed to thoroughly interview prior to their testimony was deficient. *See Andrus v. Texas*, 140 S. Ct. 1875, 1882 (2020) (finding deficient performance where counsel was "barely acquainted" with the mitigation witnesses and "did not prepare the witnesses or go over their testimony before calling them to the stand"). Eloise testified at the evidentiary hearing that counsel did not meet with her about her testimony until the day of her testimony at the penalty phase "in a little room at the courthouse"; that they met "not long at all" about "fifteen minutes"; that counsel asked her "general things" "about his family life"; and that counsel did not seem to have an "understanding at that time of Marcus' life story." (Doc. 92 at 134-135). Eloise also stated that before the trial date, counsel did "not get in touch with me or not told me, ask me things"; did not ask her any questions regarding sexual issues in Marcus' family, behavior issues, or substance abuse history for Mr. Williams or his family; and did not explain mitigation evidence to her or what would be useful or helpful for Mr. Williams' case. (Doc. 92 at 135-136). And Mr. Funderburg's testimony that he primarily met with Mr. Williams' mother and "grandmother" supports Eloise's testimony that counsel did not thoroughly interview her before her testimony at the penalty phase of the trial.

Charlene testified that she met with Mr. Williams' counsel "maybe three times" for "not long," "about thirty minutes." (Doc. 92 at 191-192). She testified that counsel asked to meet with her one time; that she went

herself the other two times to talk to them about the trial; and that she talked to Ms. Wilson first and then to Mr. Funderburg. (*Id.*) Charlene testified that when she went to Pell City to meet with counsel on one occasion, her cousin Gwin Fomby went with her, but counsel did not attempt to interview Ms. Fomby. (*Id.* at 192). Charlene also testified that Mr. Williams' trial counsel did not ask her to put them in contact with any other family members; never came to her home to meet with her; did not explain to her the meaning of mitigation evidence; did not explain what kind of evidence would be helpful to Mr. Williams' case; and did not ask her about alcohol or sexual abuse in the family. She stated that had counsel asked her about these specific things, she would have cooperated with them and answered their questions. (Doc. 92 at 192-193).

And the Eleventh Circuit noted in its decision remanding this case that both Charlene and Eloise's testimony at the penalty phase of the trial was "brief" and that counsel "elicited testimony [from them] that portrayed [Mr. Williams] in a negative light" that was "likely more harmful than helpful." *Williams*, 791 F. 3d at 1270. The fact that counsel elicited testimony from Charlene and Eloise that was harmful to Mr. Williams' case indicates that counsel had no real understanding of Mr. Williams' background and had not thoroughly interviewed either Charlene or Eloise about the details of Mr. Williams' background prior to their testimony.

Most telling about counsel's lack of understanding about Mr. Williams' abandonment by his mother involved counsel's questions of Charlene and her

testimony at the penalty phase that could have given the jury the impression that she spent considerable amount of time with her son when he was growing up.

> Q. Where was [Mr. Williams] when he wasn't with you?
>
> A. He lived with my grandmother and my aunt. They helped me because I was a young girl.
>
> . . . .
>
> Q. Prior to this time, had Marcus been a problem child to you in any way?
>
> A. No, he had never been.
>
> Q. Did you spend a lot of time with him when he was growing up?
>
> A. Yes. Marcus was the baby for five and a half years.

(Doc. 84-29 at 18, 22). From her testimony, the jury could conclude that Mr. Williams at times lived with relatives because Charlene was a "young girl"; that she never had any problems with Mr. Williams when she was raising him; and she spent a lot of time with him when he was growing up. None of her testimony revealed the true dysfunction and troubled history Mr. Williams faced being raised by an alcoholic mother whose abandonment of him impacted his life in a traumatic way. Counsel presented but a "hallow shell" of Mr. Williams' traumatic and troubling childhood. *See Collier v. Turpin*, 177 F.3d 1184, 1201 (11th Cir. 1999) (Court found deficient performance where counsel

called *ten* witnesses but the examinations were "minimal"; "Counsel presented no more than a *hollow shell* of the testimony necessary for a 'particularized consideration of relevant aspects' of the defendant's background.").

Counsel failed to ask Charlene about her own alcohol abuse, her inability to care for her children, her abandonment of her children, the domestic violence she suffered by Jeff Deavers that Mr. Williams' witnessed, the sexual abuse of her daughter by Brian Williams that Charlene failed to do anything about, or the fact that she allowed men to sleep with her while in her bed with Mr. Williams. Counsel failed to ask because they failed to even look for this mitigation evidence. *See Andrus*, 140 S. Ct. At 1877 ("Andrus' defense counsel not only neglected to present [mitigating evidence]; he failed to even look for it.").

Reasonable counsel would have thoroughly interviewed Charlene and Eloise before their testimony, asked specific questions of them as called for by the prevailing norms at that time, and spoke to other family members who could verify the cycle of dysfunction in which Mr. Williams was raised. Instead, Mr. Williams put Charlene and Eloise on the stand without thoroughly interviewing them and without a true understanding of Mr. Williams' family dysfunction and troubled history. *See Wiggins*, 529 U.S. at 534 (Counsel's "partial presentation of a mitigation case suggest[s] that their incomplete investigation was the result of inattention, not reasoned strategic judgment.").

A reasonable attorney would have thoroughly interviewed all family members with whom Mr. Williams lived during his childhood, any family member who could explain how Mr. Williams' grew up, and any friend of his that knew his background. And a reasonable attorney would have asked specific questions called for by the prevailing norms at that time, especially regarding Mr. Williams and his family's past history of sexual abuse and alcoholism. Had counsel conducted an adequate and thorough mitigation investigation with Mr. Williams' family members and friends, they would have uncovered evidence of the history of sexual abuse throughout his family, history of alcoholism in his family, and the depth of the dysfunction and chaos in Mr. Williams' troubled family history. Counsel's failure to conduct a thorough investigation into Mr. Williams' family background constitutes deficient performance.

3. What a Reasonable Investigation Would Have Uncovered

As the court has thoroughly discussed supra, Mr. Williams' counsel failed to thoroughly investigate Mr. Williams' background for mitigation evidence. Had counsel performed a thorough mitigation investigation, they would have uncovered powerful mitigation evidence about Mr. Williams' background that the jury never heard.

a. Preliminary Matters

But before the court sets out the mitigation evidence that the court finds a thorough investigation would have uncovered, it must first address a few preliminary issues.

i. Consideration of Strategic Choices

The court first must address whether counsel's failure to conduct a thorough mitigation investigation and present the mitigation evidence presented at the evidentiary hearing involved a strategic decision by counsel. Counsel's failure to present mitigating evidence is not per se ineffective assistance of counsel and can "on occasion, be justified as a strategic choice." *Hardwick*, 803 F.3d at 551.

At the evidentiary hearing, Mr. Funderburg justified his decision not to present evidence concerning Mr. Williams's "future dangerousness" or propensity for sexual violence because he did not want to indicate to the jury that his client was predisposed to sexual violence. (Doc. 91 at 76). And Mr. Funderburg testified that he successfully kept out of the guilty phase of Mr. Williams' trial any reference to Mr. Williams' attempted rape of Ms. Turner just eighteen days after his rape and murder of Ms. Rowell. (Doc. 91 at 78).

But that strategic decision to keep out the subsequent attempted rape of Ms. Turner did not eradicate counsel's duty to *first* thoroughly investigate Mr. Williams' background for any mitigating evidence that

might shed light on why he committed both sexual crimes. "Strategic choices made *after thorough investigation* of law and facts relevant to plausible options are virtually unchallengeable. . . ." *Strickland*, 466 U.S. at 690 (emphasis added). Counsel's decision not to investigate or present mitigating evidence is "only reasonable, and thus due deference, to the extent that it is based on a professionally reasonable investigation." *Hardwick*, 803 F.3d at 551.

Here, counsel's alleged strategic decision to keep out of evidence Mr. Williams' subsequent sexual crime may have made sense during the *guilt* phase of the trial, but that decision was not made *after* a thorough investigation of Mr. Williams' background and was not based on a professionally reasonable investigation regarding the *penalty* phase of the trial. Counsel unreasonably failed to even ascertain what mitigation evidence existed regarding Mr. Williams childhood sexual abuse or childhood sexual history. Reasonable counsel would have conducted a thorough mitigation investigation into Mr. Williams' past sexual history, asked Mr. Williams specific questions regarding his past sexual abuse and his sexual experiences, processed that information, and then a made a "strategic" decision whether to present that evidence to the jury at the *penalty* stage of the trial. Counsel cannot sidestep the first requirement – the thorough mitigation investigation – and then claim they strategically chose to not present mitigating evidence they did not bother to ask about or discover.

So, counsel's claims to have strategically decided to keep out any evidence of the sexual abuse and deviant sexual circumstances to which Mr. Williams was subjected as a child come too late. Counsel could not strategically decide to keep out evidence of which they were not aware because of their unreasonable mitigation investigation.

Mr. Funderburg also testified that he would not have wanted to introduce evidence that conflicted with Mr. Williams' pretrial competency report, in which Dr. Smith with Taylor Hardin stated that Mr. Williams "denied history of childhood sexual, emotional, or physical abuse." (Doc. 84-10 at 34). But Mr. Williams testified that Dr. Smith did not ask him specifically about whether he had been sexually abused, but instead asked general questions about his background. He admitted at the evidentiary hearing that he did not tell Dr. Smith about the sexual abuse by Mario because she did not specifically ask him about it. (Doc. 91 at 110-111). And if Mr. Williams did not offer that information to Dr. Smith based on her general questions, that circumstance could explain Dr. Smith's notation that Mr. Williams denied any such abuse.

But in any event, as the Eleventh Circuit pointed out in this case, "[a]lthough [the statement regarding Mr. Williams's denial of sexual abuse] may be relevant to [this court's] *Strickland* analysis, it does not by itself foreclose relief." *Williams*, 791 F.3d at 1277. The Eleventh Circuit stated that "[b]ecause this report only evaluated Mr. Williams's 'competency to stand trial and mental state at the time of the alleged offense,' it

is not an adequate substitute for the '*thorough investigation*' required of attorneys representing capital defendants." *Williams*, 791 F.3d at 1277 (quoting *Williams v. Taylor*, 529 U.S. 362, 396 (2000)) (emphasis added); *see also Wiggins*, 539 U.S. at 532 (Counsel's "decision to hire a psychologist sheds no light on the extent of the investigation into petitioner's social background."). And the Eleventh Circuit further stated that the fact that the competency report was not a substitute for a thorough mitigation investigation was "especially true because the competency report itself came with a significant disclaimer: 'this information should be viewed cautiously without verification by a third party." *Id.* And Mr. Funderburg testified that neither he nor Ms. Wilson attempted to verify the information contained in the competency report. (Doc. 91 at 47). So, the notation in Dr. Smith's report that Mr. Williams denied being sexually abused does not justify counsel's failure to conduct a thorough mitigation investigation into Mr. Williams' background.

Mr. Funderburg also testified that the trial judge would not have granted a motion for an independent mental health evaluation of Mr. Williams, apart from the Taylor Hardin evaluation, unless counsel had a basis for asking for one. And Mr. Funderburg testified that the he did not see "any need for a mental health evaluation based on the Taylor Hardin report and [his] dealings with Mr. Williams." (Doc. 91 at 67).

But Dr. Smith's Taylor Hardin evaluation of Mr. Williams only assessed Mr. Williams' competency to stand trial and his mental status *at the time of the*

crime and was not for mitigation. A defendant can be competent to stand trial but have suffered traumatic childhood experiences that deeply affect his psychological development and behavior. *See Hardwick*, 803 F.3d at 553 ("Dr. Barnard was appointed solely to evaluate Hardwick for competency and sanity, not for mitigation," and counsel did not discuss mitigation evidence with the doctor.). But because Mr. Williams' trial counsel failed to conduct a thorough mitigation investigation to discover those childhood experiences, they failed to supply any relevant information to Dr. Smith about Mr. Williams' past sexual history and lacked any background information to properly evaluate Dr. Smith's evaluation in light of Mr. Williams' troubling background. *See Hardwick*, 803 F.3d at 553 (finding deficient performance where counsel, prior to the competency evaluation, failed to give Dr. Barnard any limited background information on Hardwick). Reasonable counsel would have thoroughly interviewing Mr. Williams and his family members before the competency evaluation and providing that information to Dr. Smith.

And a reasonable attorney evaluating Dr. Smith's report would have seen red flags that would have led him to at least ask for an independent mental health evaluation. Dr. Smith's report indicates that Mr. Williams "has had difficulty sustaining interpersonal, dating relationships for longer than three months at any given time"; that he began drinking at the age of fourteen or fifteen and would consume two six-packs of beer to get drunk; that he reported having "vague

suicidal ideation from time to time . . . and 'thoughts of just you know knife . . . jumping off building . . . they come and go pretty often . . . ' "; that on the day of the crime Mr. Williams was "being driven to 'do something stupid' by 'hearing voices telling me to just do it . . . try something stupid . . . it was like my own voice, my inner voice telling me to do something' "; and that Mr. Williams "attributed his behavior on [that day of the crime] to 'I've always been neglected . . . looked down upon.' " Dr. Smith also indicated in her report that Mr. Williams' "pattern of behavior over time[ ] is also *consistent with personality disorder*, most likely antisocial." (Doc. 87-1 at 57-64) (emphasis added). Yet, Mr. Williams' counsel "disregarded, rather than explored, the multiple red flags." *See Andrus*, 140 S. Ct. at 1883.

Given what Mr. Williams' trial counsel knew about the sexual nature of the crime and the role of alcohol and drugs in his conduct, these red flags in Dr. Smith's report would have prompted a reasonable attorney to explore any underlying reasons in Mr. William's history for his difficulty maintaining interpersonal relationships, alcohol abuse as a young teenager, suicidal ideation experienced "pretty often," hearing his inner voice telling him to "do something stupid" in a alcohol and drug induced state on the day of the crime, and feelings of severe neglect. *See Hardwick*, 803 F.3d at 553 (Hardwick's competency assessment included red flags that counsel should have investigated including Hardwick's alcohol and drug abuse at an early age and diagnosis of anti-social personality disorder.).

Had Mr. Williams' trial counsel conducted a thorough mitigation investigation into Mr. Williams' background and discovered his troubling sexual history and alcohol abuse at an early age, coupled with these red flags from Dr. Smith's report, they would have had a basis to at least request from the trial judge an independent mental health evaluation regarding the effects of his past sexual experiences, alcohol abuse, abandonment by his mother, and overall troubled background on his psychological development for mitigation purposes.

And, in his January 16, 1998 "Order on Pre-trial Motions Filed to Date," the trial judge in essence invited a defense motion for independent psychological testing and stated that "Defendant will be filing motion for funds for independent psychologist for independent test. Defendant's counsel to advise the Court in advance the basis for said testing." (Vol. IV, Tab R-27 at 87). But counsel never filed a motion with such request. Had Mr. Williams' trial counsel conducted a thorough mitigation investigation and discovered all of the mitigation evidence that a reasonable investigation would have uncovered, trial counsel would have had a basis to at least ask the trial judge for funds for an independent mental health evaluation for mitigation purposes. Given the trial judge's willingness to grant trial counsel's request for independent DNA retesting even though Mr. Williams had confessed to the crime and the first round of DNA testing linked him to the crime, the trial judge would have likely granted a

request from trial counsel for an independent mental health evaluation.

And Mr. Funderburg gave no testimony at the evidentiary hearing that counsel's trial strategy was to *not* investigate Mr. Williams' background. *See Daniel*, 822 F.3d at 1268 ("It is important to Mr. Daniel's case that this record includes nothing to indicate that trial counsel's limited investigation into Mr. Daniel's troubled family background was the product of reasonable professional judgment.") Mr. Funderburg gave no indication that counsels' trial strategy was to *not* talk to all available family members about Mr. Williams' background. In fact, he claimed to have contacted everyone he knew to contact, yet he had no mitigation list or notes from any mitigation interviews in his case file and did not interview Mr. Williams' sisters who testified at the evidentiary hearing. And Mr. Funderburg gave no testimony at the evidentiary hearing that counsels' trial strategy was to *not* explain to the jury Mr. Williams' and his family's history of alcohol abuse, including by family members with whom Mr. Williams' lived when he was a child. In fact, counsel specifically asked the jury to take into consideration as a mitigating factor that Mr. Williams had been drinking and doing drugs the day of the rape and murder. (Doc. 84-29 at 15).

So, the court finds that counsel's failure to thoroughly investigate Mr. Williams' background for possible mitigation evidence and present that evidence at the penalty phase of the trial was not the result of any reasonable trial strategy.

ii. Consideration of Expert Testimony

The court also must decide whether it can consider as mitigating evidence the testimony and opinions of Dr. Mendel and Dr. Benedict. Mr. Williams must demonstrate that a reasonable investigation for mitigation evidence would have uncovered the mitigating evidence he presented at the evidentiary hearing. *See Blanco v. Singletary*, 942 F.2d 1477, 1500 (11th Cir. 1991). When that mitigation evidence includes expert testimony, a petitioner must show a "reasonable likelihood that an ordinary competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced." *Elledge v. Dugger*, 823 F.2d 1439, 1446 (11th Cir. 1987) (opinion withdrawn in part on a different issue by 833 F.2d 250 (11th Cir. 1987)).

If Mr. Williams cannot show a reasonable likelihood that a "similar expert could have been found at the pertinent time by an ordinary competent attorney using reasonably diligent effort," he "was not prejudiced by counsel's failure to investigate." *Elledge*, 823 F.2d at 1446. "Merely proving that someone – years later – located an expert who will testify favorably is irrelevant" unless Mr. Williams can make this showing. *See id.*

Dr. Mendel

Dr. Mendel testified that he is a clinical psychologist in Raleigh, North Carolina. (Doc. 93 at 34). He completed his degree at Princeton in 1984 and received

his Masters and PhD in clinical psychology from the University of Michigan in 1992. (*Id.* at 35).

Dr. Mendel found that his testing of Mr. Williams would not support a formal diagnosis of PTSD as a result of Mr. Williams' sexual abuse by Mario and other traumatic childhood experiences. But Dr. Mendel testified regarding how Mr. Williams' abandonment by his mother, past sexual abuse, alcoholism, family history of both alcoholism and sexual abuse, and overall family dysfunction contributed to Mr. Williams' overall development and later sexual crime. (Doc. 93 at 34-131).

Dr. Mendel testified that, during the time he worked on his dissertation in the "mid eighties or late eighties," the National Center for Child Abuse and Neglect was and still is located in Huntsville, Alabama. He testified that based on the location of that Center in Huntsville, he "think[s] there actually were and still are a lot of experts in the impact of child abuse here in Alabama," but he did not know if any of them were closer than Huntsville. (Doc. 93 at 64).

The court finds that based on Dr. Mendel's testimony a reasonable likelihood exists that Mr. Williams' counsel could have found an expert similar to Dr. Mendel in 1999 in Alabama to testify about the impact of Mr. Williams' abandonment by his mother, history of sexual abuse, alcohol abuse, and overall dysfunctional upbringing. And, the State did not raise any specific objection to the court's consideration of Dr. Mendel's testimony in its post-hearing brief. *See* (Doc. 89 at 31-34). So, the court will consider Dr. Mendel's testimony

as mitigation evidence that reasonable counsel could have presented at Mr. Williams' trial in 1999.

Dr. Benedict

Dr. Benedict received his Ph.D in Clinical Psychology in 1992 from the University of North Carolina at Chapel Hill and completed his Postdoctoral Fellowship in Child and Adolescent Clinical Psychology and Neuropsychology at Harvard Medical School in 1993.

Dr. Benedict testified at the evidentiary hearing regarding the affects of Mr. Williams' sexual abuse by Mario and overall dysfunctional upbringing on his development. (Doc. 91 at 166-231). He also testified that Mr. Williams suffered from "complex trauma syndrome," a diagnosis that Dr. Benedict concedes was not in a "diagnostic manual to which [an expert] could have turned." (Doc. 91 at 226).

Dr. Benedict testified that a "suitably trained clinician," such as a social worker, psychologist, psychiatrist, or licensed counsel, with knowledge of the "dynamics of child sexual abuse . . . and neglect, who was current with the literature" in 1999 could have reached the same diagnosis of "complex trauma syndrome" or "complex PTSD." (Doc. 91 at 228-229). Dr. Benedict *assumed* that "child and adolescent trained clinicians" were available to testify regarding "complex trauma syndrome" in Alabama in 1999. (*Id.* at 230).

The State objected to the court's consideration of Dr. Benedict's opinion and testimony regarding his

opinion that Mr. Williams suffers from "complex post-traumatic stress syndrome." (Doc. 89 at 31). First, the State argues that Mr. Williams never raised any claim in his habeas petition "regarding trial counsel's failure to present expert testimony from a psychologist" and that he never raised a claim of ineffective assistance of counsel for failure to present psychological testimony in his Rule 32 petition. (*Id.*). But Mr. Williams specifically argued in his amended habeas petition in the context of a failure to investigate claim that "[a]lthough a thorough, defense sponsored, mental health evaluation was essential to Mr. Williams' defense, trial counsel failed to obtain one." (Doc. 5 at 36) (citing *Fortenberry v. Haley*, 297 F.3d 1213, 1126 (11th Cir. 2002) ("The duty to investigate requires that counsel 'conduct a substantial investigation into any of his client's plausible lines of defense.' "). So, the court finds that Mr. Williams has presented Dr. Benedict's testimony and report as part of the failure to investigate claim that is properly before this court.

The State also argues that the court should not consider Dr. Benedict's opinion and testimony regarding his diagnosis of "complex trauma syndrom" because Dr. Benedict conducted no testing for psychological trauma on Mr. Williams; Dr. Benedict admitted that Mr. Williams did not describe his encounters with Mario as "traumatic"; the DSM-4 diagnostic manual did not in 1999 and does not currently recognize "complex trauma syndrome" as a diagnosable mental disorder; and Dr. Benedict testified that Mr. Williams' alleged "complex post traumatic stress

disorder" did not manifest until 2007, nearly a decade after the trial. (Doc. 89 at 33-34).

And Dr. King, the State's expert, testified at the evidentiary hearing that neither the DSM-4 or DSM-5 diagnostic manuals contain a diagnosis of "complex trauma syndrome." (Doc. 92 at 55). Dr. King also indicated that complex trauma syndrome "was actually originally proposed in 1994, didn't gel in terms of possibility until about 2005, 2006, [and] now is under consideration." (Doc. 92 at 56). He explained that this syndrome would be "subsumed under posttraumatic stress disorder," a mental disorder from which both Dr. Mendel and Dr. King found Mr. Williams did not suffer at the time of the crime. (Doc. 92 at 56-57 & Doc. 93 at 93).

Because the DSM-4 diagnostic manual in effect at the time of Mr. Williams' trial did not include "complex trauma syndrome" as a recognized diagnosis, the court finds that Mr. Williams' counsel in 1999 could not have found an expert like Dr. Benedict who would have testified that Mr. Williams suffered from that syndrome. So the court will not consider Dr. Benedict's testimony or opinion regarding his "complex trauma syndrome" diagnosis of Mr. Williams.

But the court finds that Mr. Williams' trial counsel in 1999 could have found an expert like Dr. Benedict who could have testified regarding the impact of Mr. Williams' sexual abuse by Mario and overall dysfunctional upbringing on his psychological development. So, the court will consider Dr. Benedict's testimony and

opinion as it relates to Mr. Williams' childhood experiences on his psychological development for mitigation purposes.

b. Evidence that a Reasonable Investigation Would have Uncovered

In addition to the evidence that trial counsel already presented during the penalty-phase presentation at Mr. Williams' trial, the jury would have heard the evidence as set out in detail *supra* in the evidentiary hearing section of this Memorandum Opinion. Had Mr. Williams' trial counsel conducted a thorough mitigation investigation, the jury and the trial judge would have heard the following mitigation evidence:

- While in the care of his alcoholic mother, Mr. Williams was sexually abused three or four times between the ages of four and six by an older boy Mario Mostello when Mr. Williams and his mother Charlene lived with the Mostellos. Mr. Williams felt shame and depression, had thoughts of hurting or killing himself, began having nightmares about falling off a cliff or drowning, began wetting the bed after his sexual abuse by Mario, and had difficulty maintaining a relationship with a girl for more than three months.
- Mr. Williams was exposed to adult sexual relations early in his life when living with his mother until around the age of six or seven when Charlene would have boyfriends sleep in the same bed that she shared with Mr. Williams. Mr. Williams

would wake up in his mother's bed and find men in the same bed with him.

- Charlene had poor parenting skills; lived with her children in poverty, sometimes in homes without running water, plumbing, or electricity; left the children to fend for themselves; and did not appropriately supervise her children.

- Charlene abandoned Mr. Williams when he was around six or seven years old because of her alcohol use and inability to properly care for him. Mr. Williams' contact with his mother after the abandonment was inconsistent, resulting in various reunions and painful separations from her. Because of Charlene's abandonment of Mr. Williams, he bounced between living with different relatives many times and never had a particular place he called home. Mr. Williams felt unwanted, rejected, abandoned, and betrayed throughout his life because of Charlene's abandonment.

- When Mr. Williams was only ten years old, his teenage cousin Brian arranged for Mr. Williams to watch Brian having sex with girls. Mr. Williams became sexually active with females at the young age of ten. Mr. Williams was hypersexual as a young boy and had one hundred fifty to two hundred sexual partners by the time he was arrested in an effort to prove that he was not gay. Mr. Williams also became

hypermasculine and aggressive in his teenage years because of his childhood sexual abuse.

- Sexual abuse was rampant throughout Mr. Williams' family. Mr. Williams's great-grandmother, Beulah, was reportedly raped by her uncle; his grandmother Laura's first child was fathered by her cousin; his aunt Veronica was molested as a child by her aunt's boyfriend; and his cousin Brian Williams, in addition to allowing Mr. Williams to watch him having sex with his girlfriend, molested Mr. Williams's sister LaCharo and his cousin Zakia Fomby.

- When he was twelve or thirteen years old, Mr. Williams witnessed domestic abuse involving his mother Charlene and her boyfriend Jeff Deavers. Mr. Deavers struck Charlene with his bare hands, and Mr. Williams grabbed a knife and tried to stab Mr. Deavers.

- When Mr. Williams was a teenager and living with Eloise, her husband Robert physically abused Mr. Williams by picking him up in the air and body slamming him to the ground because Mr. Williams walked away from the stove when he was cooking.

- Mr. Williams was raised by and lived with alcoholics during his childhood, including his mother Charlene, his great-grandmother Beulah, and his uncle Robert

Williams. Beulah drank so heavily that she would become incoherent and urinate on herself; Charlene would drink heavily and party instead of watching her children, leaving Mr. Williams' susceptible to the sexual abuse by Mario; Charlene was influenced to drink heavily by Beulah and other relatives she saw abusing alcohol; and Robert was a heavy drinker who drank almost every day to the point of intoxication.

- Mr. Williams began drinking alcohol as a young teenager and was heavily drinking and often drunk by the time he was sixteen or seventeen years old. After his expulsion from the Job Corp about ten days before the murder, Mr. Williams was drinking excessively and smoking marijuana.

Counsels' failure to thoroughly investigate Mr. Williams' background deprived the jury and the trial judge from hearing any of this powerful mitigating evidence.

B. Prejudice

But the ineffective assistance of counsel claim based on an unreasonable mitigation investigation does not end with a finding of deficient performance. Mr. Williams must also show that he was prejudiced by his counsels' deficient performance. In this case, the court finds that, not only was Mr. Williams' counsels' performance deficient because they failed to conduct a

thorough mitigation investigation as set out in detail *supra*, that failure prejudiced Mr. Williams.

To prove prejudice, Mr. Williams must show a "*reasonable probability* that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Jones v. Sec'y, Florida Dep't of Corr.*, 834 F.3d 1299, 1312 (11th Cir. 2016) (quoting *Strickland*, 466 U.S. at 695) (emphasis added). "A reasonable probability is a probability sufficient to undermine confidence in the outcome, which is a *lesser* showing than a preponderance of the evidence." *Sealey v. Warden, Georgia Diagnostic Prison*, 954 F.3d 1338, 1360 (11th Cir. 2020) (internal quotation marks and citations omitted) (quoting *Strickland*, 466 U.S. at 694) (emphasis added).

In evaluating that probability, this court must "consider the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweigh it against the evidence in aggravation." *Id.* (*quoting Porter v. McCollum*, 558 U.S. 30, 41 (2009)). Taking into consideration all of the evidence presented at both the penalty phase of Mr. Williams's trial and the evidence from the evidentiary hearing that a reasonable mitigation investigation would have revealed, this court finds that Mr. Williams has established a reasonable probability that his sentence would have been different but for his trial counsel's deficient performance.

As an initial matter, the court finds that Mr. Williams failed to present any evidence or testimony regarding what Mr. Williams' closest friend Alister Cook would have told the jury about Mr. Williams' background; his family's history of mental illness; or Mr. Williams' "redeeming characteristics." Mr. Williams did not call Mr. Cook as a witness at the evidentiary hearing and did not submit an affidavit from him that the court can find; so the court has no evidence about what Mr. Cook would have testified regarding Mr. Williams' background. Mr. Williams also did not call any of the individuals he listed in his amended petition as witnesses at the evidentiary hearing who could have testified about Mr. Williams' redeeming characteristics. *See* (Doc. 5 at 63). And none of the witnesses that testified at the evidentiary hearing testified about any history of mental illness in Mr. Williams' family.

So, Mr. Williams has failed to show how counsels' failures to interview Mr. Cook, investigate Mr. Williams' background for his family's history of mental illness, or present mitigating evidence about his "redeeming characteristics" prejudiced Mr. Williams. So, the court will deny Mr. Williams' failure to investigate claims on just these three specific grounds. But the court will grant Mr. Williams failure-to-investigate claims on all other grounds because he has shown both deficient performance and prejudice on those claims.

The court finds that the mitigation evidence presented at the evidentiary hearing "'paints a vastly different picture of [Mr. Williams'] background than that created by the actual penalty-phase testimony'" of

Charlene and Eloise. *See Debruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1276 (11th Cir. 2014) (quoting *Williams v. Allen*, 542 F.3d 1326, 1342 (11th Cir. 2008)). Charlene's brief testimony at the penalty phase of the trial that her family had to step in to help her raise Mr. Williams because she was a "young girl," that Mr. Williams had never been a problem child to her in any way, and that she spent a lot of time with him when he was growing up failed to touch the surface of the depth of dysfunction that Mr. Williams experienced being raised solely by his alcoholic mother until the age of six. In fact, the court agrees with Mr. Williams that Charlene's testimony "minimized the instability in Marcus's life" in the eyes of the jury. *See* (Doc. 88 at 65). Likewise, Eloise's brief testimony at the penalty phase of the trial that Mr. Williams had an unstable life and moved between different family members did not give the jury a complete picture of Mr. Williams troubled background as a child. Although counsel nominally presented a mitigation case, "the record leaves no doubt that counsel's investigation to support that case was an empty exercise." *See Andrus*, 140 S. Ct. at 1882.

Contrary to the State's argument, the court finds that all of the powerful mitigating evidence that Mr. Williams' counsel failed to elicit at the penalty phase of the trial was not duplicative because the jury never heard any of the specific details of his troubled background. And in this case, "the nature, quality, and volume of the mitigation evidence is significant enough to conclude that it 'bears no relation' to the *cursory* evidence that trial counsel presented" at the penalty

phase of the trial. *See Daniel v. Comm'r, Alabama Dep't of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (citing *Rompilla v. Beard*, 545 U.S. 374, 393 (2005) (emphasis added). Trial counsel barely and vaguely touched the surface of Mr. Williams' troubled childhood and failed to give the jury powerful mitigation evidence readily available to counsel.

Mr. Williams' trial counsel failed to present any evidence at the penalty phase regarding Charlene's alcohol abuse and the impact it had on her ability to raise Mr. Williams; Charlene's abandonment of Mr. Williams when he was around six or seven years old because she could not adequately take care of or provide for him and the traumatic effect this abandonment had on Mr. Williams; the poverty in which Mr. Williams lived when he lived with Charlene; Mr. Williams' early exposure to adult sexual relations when Charlene allowed boyfriends to sleep in the same bed that she shared with Mr. Williams; Mr. Williams' exposure to domestic violence between Charlene and her boyfriend Jeff Deavers; and Mr. Williams' inconsistent contact with his mother throughout his childhood that led to various reunions and painful separations from her that left him feeling rejected and unwanted.

And Mr. Williams' trial counsel failed to elicit from Eloise at the penalty phase of the trial any testimony regarding Charlene's alcohol abuse and neglect of Mr. Williams when he lived with Charlene until about the age of six or seven; the conditions of poverty in which Mr. Williams was raised; Mr. Williams' family history of alcohol abuse by those with whom he lived at times

in his childhood, including Beulah and Eloise's husband Robert; and the extensive history of sexual abuse that was rampant in Mr. Williams' family, including the sexual abuse of his sister by his cousin Brian.

Trial counsel also failed to present any evidence at the penalty phase that Mr. Williams' teenage cousin Brian arranged for Mr. Williams around the age of ten to watch Brian having sexual intercourse with females; that Mr. Williams began having sexual intercourse with girls at the age of ten; or that Mr. Williams was hypersexual and had about one hundred fifty to two hundred sexual partners by the time he was twenty-one years old. All of this evidence was not duplicative and would constitute powerful mitigating evidence, especially in light of Dr. Mendel's testimony tying these sexual behaviors with Mr. Williams sexual abuse at a young age.

And the evidence of Mr. Williams' sexual abuse by Mario is also powerful mitigation evidence that the jury never heard because of trial counsel's deficient performance. *See Daniel*, 822 F.3d at 1276 ("Both the Supreme Court and this Court have recognized the long-lasting effects child sexual abuse has on its victims."). As the Eleventh Circuit stated in this case, evidence of Mr. Williams' sexual abuse at the hands of an older boy was neither "cumulative" nor a "double-edged sword." *Williams*, 791 F.3d at 1277. In fact, according to the Eleventh Circuit, evidence that Mr. Williams was a victim of sexual abuse during his childhood formative years is "precisely the type of evidence that is 'relevant to assessing a defendant's moral

culpability.'" *See id.* (quoting *Wiggins v. Smith*, 539 U.S. 510, 535 (2003)).

The court acknowledges the testimony at the evidentiary hearing that Mario may not have been "ten or twelve" years older than Mr. Williams; that one of instances of sexual abuse may have occurred in Missouri and not Ohio; and that the abuse may have also involved Mr. Williams' touching and penetration of Mario. But despite these discrepancies, the court agrees with Dr. Mendel that Mr. Williams' account of his sexual abuse by Mario is credible. The court credits Mr. Williams' testimony at the evidentiary hearing regarding the sexual abuse by Mario and Dr. Mendel's testimony at the evidentiary hearing that he assessed Mr. Williams' account of his childhood sexual abuse by Mario with "the greatest level of skepticism" and had no doubt that Mr. Williams had been sexually abused by Mario. *See* (Doc. 93 at 85).

Although the court cannot ascertain from the record the exact age of Mario at the time of his sexual abuse of Mr. Williams, the court finds based on the testimony that Mario was old enough to babysit Mr. Williams and was probably at least six years older than Mr. Williams based on the testimony of Eloise. The fact that Mr. Williams was left in Mario's care while his mother was not present supports Mr. Williams *belief* that Mario was ten to twelve years older than him at the time of the sexual abuse. And the fact that Mr. Williams was mistaken about the age of Mario does not discredit his belief that Mario was much older than him at the time of the sexual abuse.

Also, Mr. Williams' mistaken belief that he and Charlene lived with the Mostellas in Ohio instead of Missouri does not negate that Mario sexually abused him. In fact, given Mr. Williams young age at the time of his four-month stay in Missouri, the court finds that mistake would not undermine the credibility of the mitigating effects of the sexual abuse.

And even though Mr. Williams was inconsistent about whether he reciprocally penetrated or touched Mario, that fact does not eliminate the mitigating effect that Mario's grooming and sexual abuse of a little boy about six years younger than him could have on a jury. Although Dr. Mendel testified that he could not explain that discrepancy, he still had no doubt that Mr. Williams had been groomed and sexually abused by Mario. And the court credits Dr. Mendel's testimony that he believes strongly that, if Mario had not sexually abused Mr. Williams, he would not have committed sexual violence. The court finds Dr. Mendel's testimony persuasive and credible.

And Dr. King did not testify that he did not believe that the sexual abuse by Mario never happened. Instead, Dr. King testified that Mr. Williams' sexual encounter with Mario was just two pre-pubescent children engaging in homosexual experimentation to which Mr. Williams did not react with horror and did not describe as a "traumatic event." (Doc. 92 at 49). Dr. King testified that Mario's behavior was not abnormal because sixty percent of children under teenage years engage in some kind of homosexual activity. (Doc. 92 at 49).

But the court finds that a reasonable probability exists that the jury could credit Dr. Mendel's testimony on this issue as more persuasive. Dr. Mendel explained that even a four year age difference between Mr. Williams and Mario would be a "significant" age difference in terms of the impact of the sexual abuse on Mr. Williams and a six-year age difference would be "very significant." (Doc. 93 at 99). Dr. Mendel acknowledge the study that indicates sixty percent of children under the age of twelve "play doctor" and agreed that sexual touching and exploration between children of similar ages may not "particularly mean anything." (Doc. 93 at 126). But Dr. Mendel testified that actual sexual intercourse, like sodomy, initiated by a boy about *six years older* than the victim is not normal sexual exploration for prepubescent children. (Doc. 93 at 124, 126). The court finds Dr. Mendel's testimony on this issue more persuasive than Dr. King's testimony.

And although the State's expert Dr. King testified that Mr. Williams did not suffer from PTSD as a result of the sexual abuse by Mario, Dr. King also stated the lack of a PTSD diagnosis "doesn't mean that [Mr. Williams] doesn't have maybe some other kinds of symptoms that would go along with discomfort about previous sexual encounters, sexual activity." (Doc. 92 at 81). And Dr. King testified that, even though he believed that Mr. Williams' sexual abuse by Mario was not a "traumatic event" for a PTSD diagnosis, "[t]hat's not to say it wasn't a problematic event in his life." (Doc. 92 at 49). So even Dr. King agreed that Mr.

Williams' sexual abuse by Mario could have affected Mr. Williams negatively.

The Supreme Court and the Eleventh Circuit have repeatedly held that the failure to investigate and present available mitigating evidence of a troubled childhood, including parental abandonment, alcoholism, domestic violence, poverty, and sexual abuse, during the penalty phase of a capital murder trial is both deficient and prejudicial. *See Rompilla v. Beard*, 545 U.S. 374 (2005) (petitioner was prejudiced by trial counsel's failure to investigate and present evidence of parent's alcoholism, domestic violence, physical abuse, poverty, and inadequate living conditions); *Wiggins v. State*, 539 U.S. 510 (2003) (petitioner was prejudiced by trial counsel's failure to investigate and present mitigating evidence of an "alcoholic, absentee mother," abandonment, poverty, neglect, and sexual abuse during childhood); *Johnson v. Sec'y, DOC*, 643 F.3d 907 (11th Cir. 2011) (petitioner was prejudiced by trial counsel's failure to investigate and present mitigating evidence of parents' alcoholism, childhood abandonment, abuse, family history of drug use, poverty, and neglect).

Moreover, even the State's expert Dr. King testified that the facts that Mr. Williams was "sexually active beginning at age ten," had "multiple sexual partners," had difficulty maintaining a relationship with a girl for more than three months, had an older boy "arrange[] for him to observe that older teenager having sex with women or girls," never had a place he felt was his home, lived with alcoholics who drank to the point of being drunk, and lived at times with people

who "had themselves been sexually abused years previously" were all relevant to evaluate Mr. Williams' "conduct or his mental or emotional condition." (Doc. 92 at 87-90). Dr. King explained that all of those facts would be "relevant in terms of understanding his childhood situation, adolescent development," "in terms of he didn't have very good childhood and wasn't given the appropriate kind of stable situation that we like to see children have," and "in terms of the development of what we call personality disorder because that's where those kinds of things start." (Doc. 92 at 89). The court finds that those facts would have been particularly relevant and mitigating given the sexual nature of Mr. Williams' crime and the role that alcohol and drugs played in that crime. But the jury never heard any of those mitigating factors because of trial counsel's deficient performance.

The State argues that the "mitigation factor" of Mr. Williams' "unstable childhood would have been undercut by the fact that he was given a chance at a stable, structured, nurturing home, but rejected it because he didn't like the beneficial rules put in place by his Aunt Eloise." *See* (Doc. 89 at 30). But while Mr. Williams lived with Eloise who provided some stability, he was also living with her husband Robert who was an alcoholic who physically abused him by body slamming him to the ground. And while living with Eloise, Mr. Williams struggled with wanting to be with his mother who he felt rejected and abandoned him. As Dr. Mendel testified, Mr. Williams' feelings of abandonment and

rejection by his mother greatly impacted his psychological development. The jury never heard those facts.

And the court finds that evidence regarding Mr. Williams' alcohol abuse as a young teenager and his family history of alcoholism was not a "doubled-edged sword." Mr. Funderburg and Ms. Wilson actually argued to the jury that Mr. Williams' alcohol and drug abuse on the day of the crime was a mitigating factor for the jury to consider. And as both Dr. Mendel and Dr. King testified, Mr. Williams would not have been on trial for his life but for his alcohol and drug abuse the day of the crime. *See* (Docs. 92 at 86 & 93 at 82). But because trial counsel presented no evidence at the penalty phase regarding when Mr. Williams began drinking, his possible predisposition to alcoholism given his family history, or the excessive drinking modeled by close relatives with whom he lived, counsel failed to give the jury any background mitigating evidence to explain his alcohol abuse on the day of the crime. Instead, the jury was left with the impression that Mr. Williams' alcohol abuse on the day of the crime was a result solely of his moral failure with no explanation as to when or why Mr. Williams began abusing alcohol.

Also, as mitigating circumstances, trial counsel argued at the penalty phase, and the jury considered, that Mr. Williams was only twenty-one years old at the time of the crime; that he was under the influence of alcohol at the time of the crime; that he had no significant prior criminal history; that he cooperated with law enforcement in confessing to the crime; that he had no disciplinary issues while in jail awaiting trial; and

that he expressed remorse for the crime. (Vol. 3, Tab 21 at 573-74). In sentencing Mr. Williams, the trial court found the following mitigating circumstances existed: Mr. Williams's lack of a criminal history; his unstable home life as a child; his frustration from an injury ending his hopes of an athletic career; his obtaining a GED; and his remorse. (Vol. 4 at 631-38). The trial court found the following mitigating factors argued by the defense did not exist: Mr. Williams's age at the time of the offense; his capacity to appreciate the criminality of his conduct due to marijuana and alcohol use at the time of the offense; and his cooperation with law enforcement. (*Id.* at 636-37).

Weighing the mitigating evidence actually presented at the penalty phase and the additional mitigating evidence that counsel could have presented in the penalty phase against the *one* aggravating factor the prosecution argued in the penalty phase, the court finds that the scale tips in favor of a reasonable probability that the jury would have reached a different conclusion.

During the penalty phase of Mr. Williams's trial, the state argued only one aggravating circumstance, "[t]hat the capital offense was committed while the defendant was engaged in commission of or an attempt to commit rape, robbery, burglary or kidnapping." (Vol. 3, Tab 18 at 552; Vol. 3, Tab 23 at 584; Vol. 4 at 601). The court specifically instructed the jury that it could not consider any other aggravating circumstance. (Vol. 3, Tab 23 at 584). If this court granted Mr. Williams' habeas petition in this case, no doubt the state would

again argue the same aggravating circumstance. This one aggravating factor does not outweigh the powerful mitigation evidence present in this case.

The court acknowledges that, if Mr. Williams were granted a new sentencing hearing, the state could also present evidence of Mr. Williams' future dangerousness that just eighteen days after the murder of Ms. Rowell on November 6, 1996, Mr. Williams broke into the home of Lottie Turner during the night of November 24, 1996 and attempted to rape her. (*See* Doc. 84-22 at 59-60).[9] On May 20, 1997, a St. Clair County

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[9] After his arrest, Mr. Williams confessed in a written statement, to breaking into Ms. Turner's house "with sex in mind." (Petitioner's Exhibit 1 at 525). Mr. Williams explained that he had been drinking and "smok[ing] a lot [of] weed" all day, when he and his friend Alister Cook left the party around midnight to go pick up some girls. (Id.). Mr. Williams got "upset" and "snapped" when his plans "didn't work out with those females." (Id.). Mr. Williams described the crime as follows:

> I walk around to the back of [Lottie Turner's] house and I put my gloves on try to open two bedroom windows, no luck so I tried the ____ one and I was in there. I took off my clothes outside and went in through the window. I found her in bed so I stripped on down out of my underwear and enter the bedroom crawling to the foot of her bed. I went to raise up and crawl on top of her. She wakes up. She tries to hit [me] with something so we tussle and finally I got [her] pin down. I started fondling her breast and rubbing my penis on her breast. At this time I [was] holding her down. I told her all I wanted was sex and not to hurt her. I told her this several times. She grabs my shirt when I was about to leave so I could not leave until she realized that I wasn't going to hurt her. It was 6:30 am [when] she finally let go. So I grab[b]ed my glove and my boxers and

grand jury indicted Mr. Williams on a charge of first degree burglary in the Lottie Turner case. *See* https://v2.alacourt.com, *State of Alabama v. Marcus Bernard Williams*, Case No. CC-1997-000083.00.[10] On March 2, 1999, less than a week after the guilt and penalty phases of his capital murder trial, and a month before the sentencing hearing, Mr. Williams entered a plea of guilty to first degree burglary, and was sentenced to twenty-five years' imprisonment. (*Id.*).

Because Mr. Williams had not been convicted in the Turner burglary case at the time of the penalty phase of his trial, the state did not and could not have argued that case as a statutory aggravating circumstance. *See* Alabama Code § 13A-5-49(2) (a prior *conviction* of a felony involving the use or threat of violence to the person can be used as an aggravating circumstance). But the trial court took judicial notice of Mr. Williams's conviction in the Turner burglary case. (*Id.* at 634). The trial court did not "consider this

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> jumped out of the window. I threw my clothes on and ran into the woods. . . .

(Id.). Mr. Williams blamed the crime on "lack of sex and too much alcohol and drugs." (Id.). Mr. Williams also apologized "for the two women [he had] hurt," and asked for help "find[ing] his true self again." (Id.).

[10] The court takes judicial notice of the state court records available on the state's Alacourt website. *See Keith v. DeKalb County, Ga.*, 749 F.3d 1034, 1041 n.18 (11th Cir. 2014) (taking judicial notice of DeKalb County Superior Court Online Judicial System pursuant to Federal Rule of Evidence 201); *see also Grider v. Cook*, 522 Fed. Appx. 544, 545 n.2 (11th Cir. 2013) ("the district court was permitted to take judicial notice of Grider's state court criminal proceedings").

subsequent act by [Mr. Williams] for any purposes of aggravation," but did consider it as evidence of his state of mind in determining that Mr. Williams's capacity to appreciate the criminality of his actions due to his use of marijuana and alcohol, and his cooperation with law enforcement were not mitigating circumstances in his case. (*Id.* at 634-37).

And the State could have presented evidence of this similar crime at the penalty phase of the trial to show Mr. Williams' future dangerousness, but chose not do to so.[11] But, upon re-sentencing, the State could introduce the Turner burglary to show Mr. Williams' future dangerousness. Alabama Courts have held that remarks on future dangerousness are proper in determining "what weight should be afforded the aggravating circumstances that the State had proven." *Floyd v. State*, CR-13-0623, 2017 WL 2889566 at 63 (Ala. Crim. App. July 7, 2017). As the *Floyd* court explained:

> Although future dangerousness is not an aggravating circumstance under § 13A-5-49, Ala. Code 1975, "future dangerousness [is] a subject of inestimable concern at the penalty phase of the trial" and evidence and argument about future dangerousness are permissible. *McGriff v. State*, 908 So.2d 961, 1013 (Ala. Crim. App. 2000), *rev'd on other grounds*, 908 So.2d 1024 (Ala. 2004). *See also Whatley v. State*, 146 So.3d 437, 481-82 (Ala. Crim. App.

[11] Mr. Williams's trial counsel, Erskine Funderburg, testified at the evidentiary hearing that the State tried to get the Turner case into evidence in the *guilt* phase of the trial, "but [defense counsel] were able to keep it out." (Doc. 91 at 76).

> 2010) (holding that evidence of a capital defendant's future dangerousness is admissible during the penalty phase of the trial under § 13A-5-45(d), Ala. Code 1975); and *Arthur v. State*, 575 So.2d 1165, 1185 (Ala. Crim. App. 1990) (holding that prosecutor's remark during penalty phase of capital trial that the defendant would kill again if given the chance was "proper because [it] concerned the valid sentencing factor of [the defendant's] future dangerousness.").

Id.

But the court finds that the fact that Mr. Williams would never be eligible for parole would undercut the State's future dangerousness evidence. The Supreme Court has held that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."[12] *Simmons v. South Carolina*, 512 U.S. 154, 156, 162 (1994). The Court in *Simmons* reasoned that, in assessing future dangerousness during the penalty phase of a capital trial, "the actual duration of the defendant's prison sentence is indisputably

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[12] The Court noted that, although South Carolina death penalty statutes "do not mandate consideration of a defendant's future dangerousness in capital sentencing, the State's evidence in aggravation is not limited to evidence relating to statutory aggravating circumstances." *Simmons*, 512 U.S. at 162-63. Likewise, Alabama law does not mandate consideration of Williams' future dangerousness, but a jury can consider future dangerousness in capital sentencing. *See Floyd v. State*, CR-13-0623, 2017 WL 2889566 at 63 (Ala. Crim. App. July 7, 2017).

relevant" because a jury could "view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future *nondangerousness* to the public than the fact that he never will be released on parole." *Id.* at 163-64 (emphasis added). The Supreme Court stated that "the fact that the alternative sentence to death is life without parole will necessarily *undercut* the State's argument regarding the threat the defendant poses to society." *Id.* at 169 (emphasis added).

The Supreme Court again in 2017 reiterated how a sentence of life in prison without the possibility of parole could minimize a defendant's future dangerousness. In *Buck*, the defendant's sentence of death under Texas law required that the State prove that he posed a threat of future dangerousness. *Buck*, 137 S. Ct. at 767. Buck's counsel presented evidence from an expert that "his client is liable to be a future danger because of his race." *Id.* at 765. In addressing the *Strickland* standard for ineffective assistance of counsel, the Supreme Court in *Buck* found that "no competent defense attorney would introduce such evidence about his own client." *Id.* at 775.

In assessing the prejudice prong of *Strickland*, the Court in *Buck* addressed the issue of "whether Buck had demonstrated a reasonable probability that, without Dr. Quitjano's testimony on race, at least one juror would have harbored a reasonable doubt about

whether Buck was likely to be violent in the future."[13] *Id.* at 776. In finding that Buck was prejudiced by his counsels' deficient performance, the Court addressed whether any mitigating circumstances would minimize Buck's future dangerousness. The Supreme court stated that "Buck's prior violent acts had occurred outside of prison, within the context of romantic relationships with women." But the Court noted that "[i]f the jury did not impose a death sentence, Buck would be sentenced to life in prison, and no such romantic relationship would be likely to arise. ***A jury could conclude that those changes would minimize the prospect of future dangerousness.***" *Buck*, 137 S. Ct. at 776 (emphasis added).

Likewise, in Mr. Williams' case, the trial judge instructed the jury that they had two options for in the penalty phase of the trial under Alabama Law: "to sentence the defendant to a term of life in prison without the possibility of parole . . . or to sentence the defendant to death." (Doc. 84-29 at 6). So, even if the State chose to present the subsequent Turner burglary to the jury at the re-sentencing, Mr. Williams's future dangerousness evidenced by that burglary would be *minimized* by the fact that Mr. Williams would never be eligible for parole and would pose no threat to the public at large. Moreover, Mr. Williams' counsel on re-sentencing could present evidence of his prison record evidencing no violent history while incarcerated,

[13] In Texas, a sentence of death requires an unanimous vote by the jury; if the jury vote is not unanimous, a defendant would receive life without parole.

which would further minimize the significance of the State's future dangerousness argument.

And the court agrees with Mr. Williams that his attempted rape of Ms. Turner just eighteen days after his rape and murder of Ms. Rowell is "entirely consistent with the portrait of Marcus' psychological unraveling, stemming from his childhood sexual abuse" and his plea for help for his sexual crimes. *See* (Doc. 88 at 90). Had counsel investigated and presented evidence of Mr. Williams' background, especially his childhood sexual abuse, the jury would have received powerful mitigating evidence to give context for his adult sexual crimes. *See New York v. Ferber*, 458 U.S. 747, 758 n.9 (1982) (in the context of child pornography, the Court noted that "[i]t has been found that sexually exploited children are unable to develop healthy affectionate relationships in later life, having sexual dysfunctions, and have a tendency to become sexual abusers as adults.") (citations omitted). And Dr. Mendel testified at the hearing that had Mario not sexually abused Mr. Williams, "there would not have been the sexual violence" by Mr. Williams. (Doc. 93 at 85-86). So, evidence of Mr. Williams' childhood sexual abuse by Mario and Mr. Williams' subsequent hypersexualization may have cast his sex-related crimes in a "different light." *See Wharton v. Chappell*, 765 F.3d 953, 977 (9th Cir. 2014).

And the Supreme Court and the Eleventh Circuit have time and again found that petitioners were prejudiced by their counsel's deficient performance where the crimes were more highly aggravated than Mr.

Williams' case involving only one aggravating factor. *See Porter v. McCollum*, 558 U.S. 30, 40-44 (2009) (finding prejudice in a two-victim murder case with *three* aggravating factors); *Rompilla*, 545 U.S. at 383 (finding prejudice despite *three* aggravating factors including that the murder was committed in the course of a felony; that the petitioner had a "significant history of felony convictions," including a rape and assault conviction; and the murder was committed by torture); *Williams v. Taylor*, 529 U.S. 362, 399, 418 (finding prejudice despite the fact that "in the months following the murder of Mr. Stone, Williams savagely beat an elderly woman, stole two cars, set fire to a home, stabbed a man during a robbery, set fire to the city jail, and confessed to having strong urges to choke other inmates and to break a fellow prisoner's jaw") (Rehnquist, C.J., dissenting); *Hardwick*, 822 F.3d at 546 (finding prejudice when Hardwick had *five* aggravating factors, including three prior felony convictions); *Johnson*, 643 F.3d at 911-912, 937-938 (finding prejudice despite Johnson having *five* mitigating factors, including being on parole for burglary at the time of the murders and having prior felony convictions involving the use of violence; Johnson also committed armed robbery and attempted murder in Oregon just one month after he committed the two murders for which a jury sentenced him to death); *Cooper v. Sec'y Dep't of Corr.*, 646 F.3d 1328, 1356 (11th Cir. 2011) (finding prejudice despite a triple homicide and the presence of *six* aggravating factors).

Recently, the Eleventh Circuit in *Dallas v. Warden* affirmed the district court's denial of habeas relief and found that counsel's failure in 1994 to discover and present allegations that Dallas had been sexually assaulted did not prejudice Dallas. 964 F.3d 1285, 1311 (11th Cir. 2020). But that case is distinguishable from Mr. Williams' case for many reasons. In contrast to Mr. Williams' case, counsel in *Dallas* presented a "substantial" mitigation case during the penalty phase of the trial, including calling as witnesses a licensed clinical psychologist, a defense mitigation consultant, two of Dallas' older siblings, the mother of Dallas' children, a long-time friend who was with Dallas around the time of the murder, and Dallas himself. Dallas and his siblings testified at trial and "described at length" Dallas' "deeply abusive childhood and a thoroughly dysfunctional family." His sister testified at trial that Dallas knew that she was molested as a teenager and that she "ran away from home at eighteen to escape." But when Dallas' brother testified at the penalty phase of the trial, he did not mention being sexual abused. *Dallas*, 964 F.3d at 1291-1295.

Years later, Dallas' brother, in a 2007 affidavit for Dallas' federal habeas case, alleged for the first time that he and Dallas were both sexually assaulted. Dallas' brother explained in the affidavit that he "witnessed Donald being anally raped as well as being forced to perform oral sex on this man"; that the sexual assault happened on at least four occasions; but Dallas' brother "did not identify the name of the abuser, the time, or the location." *Id.* at 1300.

The Eleventh Circuit in *Dallas* held that "although [the brother's] new allegations paint a darker picture of Dallas' childhood, it does not *standing alone* raise a reasonable probability that the jury would not have recommended that Dallas be sentenced to death." *Id.* at 1311 (emphasis added). The Court noted that trial counsel had called Dallas' brother as a mitigation witness but he failed to mention the sexual abuse even after his sister testified that she had been sexually molested. And, the Court in Dallas found that "[u]ltimately and most critically, however, the aggravating factors were overwhelming," and that the sexual abuse allegation would not have outweighed the *four* aggravating factors, especially where the "jury [already] heard many details of the abuse and poverty-stricken conditions of Dallas' childhood." *Id.* at 1311 (emphasis added).

In Mr. Williams' case, unlike in *Dallas*, counsel conducted virtually no mitigation investigation; the jury heard none of the details of Mr. Williams' troubled background; counsel failed to utilize funds for a mitigation investigator; and the case involved only *one* aggravating factor. In this case, a reasonable probability exists that the sexual abuse of Mr. Williams, in totality with all the other powerful mitigating evidence the jury never heard, would have undermined the confidence in the outcome of Mr. Williams' sentencing.

The fact that Mr. Williams' case is *not* highly aggravated further supports a finding of prejudice in this case. *See Wiggins v.* Smith, 539 U.S. 510, 537 (2003) (noting that Wiggins did not have a record of violent

conduct to offset the mitigating factors); *Williams v. Allen*, 542 F.3d 1326, 1343 (11 th Cir. 2008) ("Further supporting a finding of prejudice is the fact that this case is not highly aggravated."); *Maples*, 729 F. App'x at 827 ("And the probability that one more juror would have been moved to vote for life over death is further compounded by the limited aggravation in this case – the state trial court found only one statutory aggravating factor applicable here.").

And even though the jury heard none of the powerful mitigating evidence produced at the evidentiary hearing, one juror still voted for life without parole. Had the jury heard all of the powerful mitigating evidence about Mr. Williams' sexual abuse and troubling childhood background, a reasonable probability exists that more jurors would have followed suit.

A failure of counsel to conduct a reasonable mitigation investigation is prejudicial where, as in Mr. Williams' case, such an investigation would have uncovered an "'excruciating life history.'" *See Daniel*, 822 F.3d at 1275 (quoting Wiggins, 539 U.S. at 537). This mitigation evidence "might well have influenced the jury's appraisal of his moral culpability." *See Williams v. Taylor*, 529 U.S. at 398. Mr. Williams' case is not one where the new evidence "would barely have altered the sentencing profile presented to the sentencing judge." *See Porter*, 558 U.S. at 41 (quotations and citations omitted). The jury and judge in Mr. Williams case heard almost nothing that would allow them to "accurately gauge his moral culpability." *See id.*

A reasonable probability exists that the result of the sentencing proceeding would have been different had Mr. Williams' counsel discovered, presented, and explained to the jury the significance of all of the available evidence that Mr. Williams presented at the evidentiary hearing. *See Williams v. Taylor*, 529 U.S. at 398. Had the jury and judge been able to "place [Mr. Williams'] life history 'on the mitigating side of the scale," a reasonable probability exists that the jury and sentencing judge "would have struck a different balance." *See Wiggins*, 539 U.S. at 537.

The court has carefully weighed all of the mitigating evidence presented at the both the penalty phase and the evidentiary hearing against the limited aggravating evidence in this case and finds that Mr. Williams has shown a reasonable probability that but for his counsels' deficient performance the jury would not have recommended the death sentence.

V. CONCLUSION

Under a *de novo* standard of review, and for the reasons stated above, the court finds that Mr. Williams has shown that his trial counsels' performance was deficient for failing to investigate and present mitigation evidence at the penalty phase of the trial. Mr. Williams has also shown that he was prejudiced by his trial counsels' deficient performance. The court therefore will **GRANT** Mr. Williams Amended Petition for Writ of Habeas Corpus (doc. 5) as to all of his claims of ineffective assistance of counsel during the penalty phase

of his trial for failing to investigate and present mitigating evidence EXCEPT counsels' failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and the failure to present his redeeming characteristics because Mr. Williams has failed to show prejudice on these three claims.

A writ of habeas corpus shall issue directing the State of Alabama to vacate and set aside the death sentence of Marcus Williams unless, within 90 days of this judgment's entry, the State of Alabama initiates proceedings to retry Mr. Williams' sentence. In the alternative, the State of Alabama shall resentence Mr. Williams to life without the possibility of parole.

VI. CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. This court may issue a certificate of appealability "only if the applicant has a made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurist would find the district court's assessment of the constitutional claims debatable and wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further," *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted).

This court's denial of Mr. Williams ineffective assistance of counsel claims involving counsels' failure to interview Mr. Williams' closest friend Alister Cook, failure to investigate his family history of mental illness, and the failure to present his redeeming characteristics because Mr. Williams has failed to show prejudice on these three claims constitutes an adverse ruling on those claims. But those three claims do not satisfy either standard for a certificate of appealability. Accordingly, a motion for a certificate of appealability is due to be **DENIED** as to those three claims.

The court will enter a separate Order in accordance with this Memorandum Opinion.

DONE and **ORDERED**.

/s/ Karon Owen Bowdre
KARON OWEN BOWDRE
UNITED STATES DISTRICT JUDGE

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

MARCUS BERNARD WILLIAMS,	)	
Petitioner,	)	**CIVIL ACTION NO. 1:07-cv-1276-KOB**
v.	)	
STATE OF ALABAMA,	)	
Respondent.	)	

FINAL JUDGMENT

(Filed Apr. 17, 2019)

For the reasons stated in the accompanying Memorandum of Opinion, the court **DENIES** Marcus Bernard Williams's Petition for Writ of Habeas Corpus.

DONE and **ORDERED** this 17th day of April, 2019.

/s/ Karon Owen Bowdre
KARON OWEN BOWDRE
CHIEF UNITED STATES
DISTRICT JUDGE

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

MARCUS BERNARD WILLIAMS,	)	
Petitioner,	)	**CIVIL ACTION NO. 1:07-cv-1276-KOB**
v.	)	
STATE OF ALABAMA,	)	
Respondent.	)	

MEMORANDUM OPINION

(Filed Apr. 17, 2019)

This death penalty habeas case comes before the court following remand from the Eleventh Circuit Court of Appeals for an evidentiary hearing on Marcus Bernard Williams's failure-to-investigate claims. *Williams v. Alabama*, 791 F.3d 1267 (11th Cir. 2015). Mr. Williams alleges that trial counsel's failure to investigate his background prevented the defense from presenting a constitutionally adequate mitigation case during the penalty phase of his trial. (Doc. 5 at 40-65). The court held an evidentiary hearing at which Mr. Williams presented witnesses and exhibits. The court finds that Mr. Williams is not entitled to relief under 28 U.S.C. § 2254 because he has not established that he suffered prejudice as a result of counsel's failure to investigate and present evidence of his background as mitigation evidence in the penalty phase of his trial.

I. INTRODUCTION

On November 6, 1996, Mr. Williams returned home after a night of drinking and smoking marijuana with friends. *Williams v. State*, 795 So. 2d 753, 761 (Ala. Crim. App. 1999). Upon arriving home, he desired to have sexual relations with a young female neighbor, Melanie Dawn Rowell. *Id.* Mr. Williams entered Ms. Rowell's apartment through an unlocked window, then proceeded to her bedroom where he climbed on top of her and attempted to remove her clothes. *Id.* Ms. Rowell struggled to stop him, so he strangled her until she was motionless, then had sexual intercourse with her for fifteen to twenty minutes. *Id.* at 761-62. Ms. Rowell's cause of death was asphyxia due to strangulation. *Id.* at 762. Mr. Williams stole Ms. Rowell's purse before leaving her apartment. *Id.* at 762. He was later arrested and taken into custody where he gave an incriminating statement admitting his involvement in Ms. Rowell's death. *Id.* DNA testing confirmed that semen and blood found at the crime scene were consistent with Mr. Williams's genetic profile. *Id.* at 766-67.

II. PROCEDURAL HISTORY

Court-appointed attorneys Erskine Funderburg and Tommie Wilson[1] represented Mr. Williams at trial. (Vol. 4, Tab 27 at 2). Because of the overwhelming evidence of Mr. Williams's guilt, his attorneys argued only

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[1] Ms. Wilson died on March 6, 2015. (*See* Petitioner's Exhibit 12).

that although he intended to rape Ms. Rowell, he did not intend to kill her. (Vol. 3, Tab 11 at 494-504). Despite their efforts, on February 24, 1999, the jury found Mr. Williams guilty of capital murder for intentionally causing the death of Ms. Rowell during a rape or attempted rape, in violation of Alabama Code § 13A-5-40(a)(3) (1975). (Vol. 4, Tab 14 at 534-36).

The penalty phase of Mr. Williams's trial was held the next day, before the same jury. (*See* Vol. 3, Tab 15 - Tab 24). Trial counsel called only two witnesses, Mr. Williams's mother, Charlene Williams, and his aunt, Eloise Williams. (Vol. 3, Tab 19). The Eleventh Circuit Court of Appeals summarized their testimony:

> Charlene Williams told the jury that she was sixteen years old and unmarried when Mr. Williams was born, and that Mr. Williams had faced certain difficulties as a child. For example, she testified that Mr. Williams sometimes lived with her grandmother and aunt; had no relationship with his father and lacked adult male figures in his life; and had to stop playing school sports after injuring his knee. Mr. Williams's counsel also elicited testimony that portrayed him in a negative light, such as the fact that he was a high school dropout; he "started hanging with a rough crowd"; he got kicked out of the Job Corp[s] for fighting; and upon returning home, he stopped going to church and "wanted to sleep all day and stay up all night." FN.1.
>
> > FN.1. A capital defendant's history of violent and aggressive behavior is

> generally considered an aggravating factor. *See Holsey v. Warden*, 694 F.3d 1230, 1269-70 (11th Cir. 2012).

Eloise Williams also testified about Mr. Williams's unstable home life. She told the jury that he had moved from place to place as a child and lived with different family members; he became sad and withdrawn at times because he did not see his mother often; he had been a good student with no significant criminal history; and he had struggled emotionally after the deaths of his grandfather and uncle. However, as with Charlene, counsel also elicited evidence from Eloise that was likely more harmful than helpful. For example, Eloise told the jury that Mr. Williams had a quick temper; he had been arrested for fighting as a teenager; FN.2, he had not maintained regular employment after leaving high school; and not long before the crime, he started drinking and using drugs. Eloise ended on a positive note, telling the jury that since Mr. Williams had been in jail, he had stayed out of trouble and expressed remorse for his crime.

> FN.2. The fact that Mr. Williams's counsel told the jury about these adolescent brushes with the law is noteworthy because the State could not have offered evidence of Mr. Williams's juvenile arrests to establish any aggravating factors. In Alabama, "juvenile charges, even those that result in an adjudication of guilt, are

> not convictions and may not be used to enhance punishment." *Thompson v. State*, 503 So.2d 871, 880 (Ala.Crim.App. 1986) *aff'd sub nom. Ex parte Thompson*, 503 So.2d 887 (Ala. 1987).
>
> Neither Charlene nor Eloise was asked about Mr. Williams's history of sexual abuse.

Williams, 791 F.3d at 1269-70. The jury deliberated only thirty minutes before returning an 11 to 1 verdict, recommending that Mr. Williams be sentenced to death. (Vol. 3, Tab 24 at 596-97).

At the April 6, 1999 sentencing hearing, Mr. Williams testified, expressing his remorse. (Vol. 4 at 607-11). The victim's mother, Donna Rowell, testified about the impact of her daughter's death on the family, especially Ms. Rowell's young children. (*Id.* at 604-06). The trial court found one aggravating circumstance – that Mr. Williams killed the victim while committing or attempting to commit a rape, robbery, burglary, or kidnapping. (*Id.* at 630). The trial court found as mitigating factors Mr. Williams's lack of a criminal history, his unstable home life as a child, his frustration from an injury ending his hopes of an athletic career, his obtaining a GED, and his remorse. (*Id.* at 631-38). The trial court found the aggravating factor outweighed the mitigating factors, and sentenced Mr. Williams to death. (*Id.* at 639).

The Alabama Court of Criminal Appeals affirmed Mr. Williams's conviction and death sentence on

December 10, 1999. *See Williams v. State*, 795 So. 2d 753 (Ala. Crim. App. 1999). The Alabama Supreme Court affirmed his conviction and sentence on January 12, 2001. *See Ex parte Williams*, 795 So. 2d 785 (2001). The United States Supreme Court denied certiorari review on October 1, 2001. *See Williams v. Alabama*, 535 U.S. 900 (2001).

In August, 2004, Mr. Williams filed an amended Rule 32 petition in the trial court. The trial court denied the Rule 32 petition on the merits, without holding an evidentiary hearing. (Vol. 13, Tab 59). The Alabama Court of Criminal Appeals affirmed the denial of Rule 32 relief. (Vol. 13, Tab 60).

In 2007, Mr. Williams filed the present § 2254 petition in this court, arguing *inter alia*, that trial counsel were ineffective for failing to conduct an adequate mitigation investigation. (Doc. 5 at 40-65). This court denied the petition on April 12, 2012. (*See* Docs. 27, 28). The Eleventh Circuit Court of Appeals remanded the case, instructing this court to "determine whether Mr. Williams is entitled to an evidentiary hearing and to reconsider his failure-to-investigate claims *de novo*." *Williams*, 791 F.3d at 1277.

Mr. Williams filed a motion for an evidentiary hearing on March 3, 2017. (Doc. 51). On October 4, 2017, the court granted Mr. Williams's motion for an evidentiary hearing on his failure-to-investigate claim. (Doc. 60).

This court held an evidentiary hearing on May 14-16, 2018. Mr. Williams testified at the evidentiary

hearing, and presented the testimony of Tina Watson, Erskine Funderburg, Billy Stephens, Sharenda Williams, Dr. Kenneth Benedict, Eloise Williams, Charlene Williams, LaCharo Williams, Marlon Bothwell, and Dr. Matthew Mendel. The State of Alabama presented testimony from Dr. Glen King. The court paid close attention to the testimony, and has carefully reviewed the transcript of the evidentiary hearing, along with the exhibits presented at the hearing.

III. LEGAL STANDARD

To determine whether counsel were ineffective, the court begins with the instruction from *Strickland v. Washington*, 466 U.S. 668 (1984). The Supreme Court established a two-pronged analysis for determining whether counsel's performance was ineffective. "First, the defendant must show that counsel's performance was deficient. . . . Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* at 687.

A petitioner must establish both parts of the *Strickland* standard: that is, a habeas petitioner bears the burden of proving, by "a preponderance of competent evidence," that the performance of his trial or appellate attorney was *deficient; and*, that the deficient performance *prejudiced his defense. Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*). "Because a petitioner's failure to show either deficient performance or prejudice is fatal to a *Strickland* claim, a court need not address both *Strickland prongs*

if the petitioner fails to satisfy either of them." *Kokal v. Sec'y, Dep't of Corr.*, 623 F.3d 1331, 1344 (11th Cir. 2010) (citations omitted). As stated in *Strickland*, "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." 466 U.S. at 697.

A. The Performance Prong

To satisfy the performance prong, a petitioner must establish that counsel's performance was unreasonable by the preponderance of the evidence. *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) (citing *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000)).

The Sixth Amendment does not guarantee a defendant the very best counsel or the most skilled attorney, but only an attorney who performed reasonably well within the broad range of professional norms. *Stewart*, 476 F.3d at 1209. The court does not consider "what the best lawyers would have done"; instead the court must determine "whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992).

Judicial scrutiny of counsel's performance must be highly deferential, because "[r]epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another." *Strickland*, 466 U.S. at 693. Indeed, reviewing courts "must

indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. This strong presumption of competent assistance creates a heavy burden of persuasion: "*petitioner must establish that no competent counsel would have taken the action that his counsel did take.*" *Stewart*, 476 F.3d at 1209 (quoting *Chandler*, 218 F.3d at 1315) (emphasis added).

The court can not grant relief on ineffectiveness grounds unless a petitioner shows that "*no reasonable lawyer*, in the circumstances, would have done so." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994) (emphasis added).

When examining counsel's performance at the penalty phase of trial, the court must decide "whether counsel reasonably investigated possible mitigating factors and made a reasonable effort to present mitigating evidence to the sentencing court." *Stewart*, 476 F.3d at 1209 (quoting *Henyard v. McDonough*, 459 F.3d 1217, 1242 (11th Cir. 2006). To meet the requirements of *Strickland*, counsel does not need to investigate "every conceivable line of mitigating evidence" regardless of its likelihood of benefitting the defendant at sentencing. *Pittman v. Sec'y, Florida Dep't of Corr.*, 871 F.3d 1231, 1250 (11th Cir. 2017) (quoting *Wiggins v. Smith*, 539 U.S. 510, 533 (2003)).

In fact, the *Strickland* standard does not even "require defense counsel to present mitigating evidence at sentencing in every case." *Id.* Rather, the *Strickland* standard for counsel's performance is "reasonableness

under prevailing professional norms." *Strickland*, 466 U.S. at 688. And, of course, reasonableness depends upon the context of the particular case. *See Wiggins*, 539 U.S. at 522-23. This objective standard of reasonableness means that "whether the challenged actions of counsel were the product of a deliberate strategy or mere oversight" does not matter; counsel's actual motivation is not relevant but instead "what reasonably could have motivated counsel." *Pittman v. Sec'y, Florida Dep't of Corr.*, 871 F.3d at 1250 (quoting *Gordon v. United States*, 518 F.3d 1291, 1301 (11th Cir. 2008)).

B. The Prejudice Prong

A petitioner also must meet a high burden to establish that his lawyer's deficient performance caused prejudice to his case. *Van Poyck v. Fla. Dep't of Corr.*, 290 F.3d 1318, 1322 (11th Cir. 2002). The petitioner does not meet that high burden merely by showing "that the errors had some conceivable effect on the outcome of the proceeding." *Id.* (quoting *Strickland*, 466 U.S. at 693). Instead, a petitioner must show "'a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Stewart*, 476 F.3d 1193, 1209 (11th Cir. 2007) (quoting *Strickland*, 466 U.S. at 695).

In evaluating whether the petitioner has shown a reasonable probability that, if counsel had not been deficient, he would not have been sentenced to death, the court must "consider 'the totality of the available

mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding' – and 'reweig[h] it against the evidence in aggravation.'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (quoting *Williams v. Taylor*, 529 U.S. 362, 397-398 (2000)); *see also Sears v. Upton*, 561 U.S. 945, 956 (2010) (holding that a proper prejudice analysis under *Strickland* must take into account the newly uncovered mitigation evidence, along with the mitigation evidence introduced during the penalty phase of the trial, to assess whether a reasonable probability arises that the petitioner would have received a different sentence after a constitutionally sufficient mitigation investigation.).

IV. THE EVIDENTIARY HEARING

In his amended petition, Mr. Williams alleges that trial counsel were ineffective during the penalty phase of the trial because they failed to adequately investigate and present mitigation evidence to show that he should not have been sentenced to death. (Doc. 5 at 38-65).

Specifically, he claims that trial counsel were ineffective because they failed to collect documentary evidence and hire a mitigation specialist; failed to thoroughly investigate Mr. Williams's history, including that he was sexually abused as a child; failed to interview Mr. Williams's closest friend Alister Cook[2];

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[2] Cook, described as "Marcus' closest friend[] during the period leading up to his arrest," and Mr. Williams had been friends since they were eight or nine years old. (*See* Doc. 5 at 49). Mr.

failed to adequately interview and prepare the penalty phase witnesses; failed to compile Mr. Williams's history of abuse and neglect; failed to investigate his family history of mental illness; failed to show that Mr. Williams's background contributed to his committing capital murder; and failed to present his redeeming characteristics. (*Id.*). Mr. Williams argued that an evidentiary hearing would allow him to produce witnesses whose testimony could prove his claim that counsel's failure to investigate was constitutionally ineffective. (Doc. 51 at 5-26).

Mr. Williams argues that, had counsel performed an adequate penalty phase investigation, they would have learned, and been able to present evidence that: a) his childhood was defined by chaos, abandonment, and abuse; b) his difficult upbringing was influenced by "an extensive history of dissolution and dysfunction" in his family; c) the family history of alcoholism contributed to his early and excessive use of alcohol; d) he was sexually abused by an older boy when he was a child; e) his family has an extensive history of childhood sexual abuse; and f) his traumatic childhood experiences were psychologically damaging. (Doc. 88 at 50-102).

Mr. Williams called witnesses at the evidentiary hearing who testified to the facts he claims should have been discovered by trial counsel and presented during the penalty phase. He argues that if counsel

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Williams and Cook had been drinking together the night of the murder. (*Id.* at 47).

had performed an adequate penalty phase investigation, they would have learned and been able to present the following evidence.

A. Childhood Defined by Chaos, Abandonment, and Abuse

Charlene Williams testified that Mr. Williams, her second child, was born when she was sixteen years old. (Doc. 92 at 158-59). Before he was born, his older sister Aquea was sent to New York to live with her paternal grandmother, and never returned to live with Charlene. (*Id.* at 159-60). His father, Michael Daniels, was not involved in his life when Mr. Williams was "small," but "became involved later on in life," when he was around thirteen or fourteen. (*Id.* at 161).

During his early years, Charlene and Mr. Williams "bounced from place to place." (Doc. 88 at 53). They lived with Charlene's grandparents, Ralph and Beulah Williams, in "the old house," a dilapidated house without a bathroom, heating, air conditioning, or hot water (Doc. 92 at 116, 206); they lived with family friends, Della and Will Bothwell (Doc. 93 at 7, 23); they lived with Charlene's friend Olivia Mostella and her three children in Ashville, Alabama (Doc. 92 at 161-62); and they moved to Missouri with the Mostellas for about four months. (*Id.* at 166-67). Eloise Williams testified that when they lived with the Mostellas, Charlene and Olivia left the children alone at home with Olivia's elderly mother while they went out partying and drinking. (Doc. 92 at 112). Mr. Williams testified that when

they lived with Olivia, her son, Mario Mostella, sexually assaulted him three or four times, over the course of "a couple of years," beginning at the age of four. (Doc. 91 at 118-19). When they returned to Ashville, Charlene lived with her grandmother for a while; with Mary Mostella, Olivia Mostella's mother, for a while; moved into an apartment in Gadsden; then finally moved back to Ashville. (*Id.* at 167-68).

During this time, Charlene gave birth to three more children. (*Id.*). When Mr. Williams was around nine years old, Charlene began a six-year relationship with Jeff Deavers, who was physically and verbally abusive to her, "sometimes" in front of Mr. Williams. (Doc. 92 at 170-74).

Charlene had poor parenting skills: she left the children to fend for themselves; they were not supervised appropriately; and at times, they were not clean or "well taken care of." (*Id.* at 117). During the time period when Mr. Williams was around five to ten years old, family members tried to help Charlene by taking her children in to live with them. (*Id.* at 117-21).

Eventually, when Mr. Williams was about seven or eight years old, he moved in with his aunt Eloise Williams. (*Id.* at 119, 169). During this time, Mr. Williams moved back and forth between the homes of his great grandmother, Beulah Williams, and his aunt Eloise Williams. (Doc. 92 at 169). Eloise took him to Sunday School and church, helped him with his homework, and allowed him to play baseball. (*Id.* at 119-20, 124-26). While he lived with Eloise, Mr. Williams was

"sullen, withdrawn, unhappy," and had issues with bed-wetting. (*Id.* at 125-26).

Mr. Williams lived with Eloise until he was twelve or thirteen years old. (*Id.* at 127). Eloise testified that when Mr. Williams was in middle school, he started getting in trouble at school, "getting in fights, stealing and just different things." (Doc. 92 at 126-27). At one point, Eloise caught him peeping through the bathroom door at her. (*Id.* at 127). When Mr. Williams was twelve or thirteen years old, Eloise took him back to live with Charlene because he wanted to live with Charlene. (*Id.*).

When he was fourteen years old, Mr. Williams finally met his father, Michael Daniels, and moved in with him for about nine months. (Doc. 91 at 116). Dr. Matthew Mendel, a clinical psychologist, testified at the evidentiary hearing that Mr. Williams had "wondered about, questioned, struggled and worried about" his father his entire life, hoping that the reason his father never came to visit him was because he did not know Mr. Williams existed. (Doc. 93 at 42).

Mr. Williams argues that rather than investigating his family history and presenting "available evidence of Marcus's abandonment by his mother, as well as the itinerant and dysfunctional lifestyle he was subject to while he was with her," trial counsel elicited testimony in the penalty phase from Charlene, minimizing the instability in Mr. Williams's life, and leaving the jury with the impression that he "spent lots of time with his mother." (Doc. 88 at 65).

Specifically, Mr. Williams points to the following portions of Charlene's testimony in the penalty phase:

> Q. Where was [Mr. Williams] when he wasn't with you?
>
> A. He lived with my grandmother and my aunt. They helped me because I was a young girl.
>
> . . . .
>
> Q. Prior to this time, had Marcus been a problem child to you in any way?
>
> A. No, he had never been.
>
> Q. Did you spend a lot of time with him when he was growing up?
>
> A. Yes. Marcus was the baby for five and a half years.

(*Id.*) (quoting Vol. 3, Tab 19 at 554, 558).

He adds that at the sentencing hearing, Eloise testified only generally about Marcus being "left from one place to another" and not "hav[ing] a stable home." (*Id.*) (quoting Vol. 3, Tab 19 at 561). Mr. Williams argues that the penalty phase of his trial contained no testimony about the "domestic violence and abuse" he experienced in the various places he lived. (*Id.*). Mr. Williams argues that the testimony presented at the evidentiary hearing paints a "vastly different picture of his background" than the limited testimony presented at his trial. (*Id.* at 65-66) (quoting *Williams v. Allen*, 542 F.3d at 1342).

B. Extensive Family History of Dissolution and Dysfunction

Mr. Williams alleges that compounding the failure to present evidence of his "dysfunctional upbringing," trial counsel also failed to present available evidence of his "troubled family history." (*Id.* at 66). He claims that the dysfunction of his childhood was part of an "easily discernable pattern." (*Id.*). Charlene testified that she, her sister, and her brother were raised by their grandparents, Ralph and Beulah Williams; she did not meet her father until she was three years old; her mother, Laura Williams, "moved away to New York" and never contacted her after she left; and that her mother died a violent death when Charlene was twelve years old. (Doc. 92 at 148-51, 193).

Charlene became sexually active at age thirteen, became pregnant with Mr. Williams's older sister at the age of fourteen, and started drinking at age fifteen. (*Id.* at 155-57). Charlene eventually gave birth to Mr. Williams and three more children, LaCharo, and twins, Sharenda, and Sharay, all of whom were raised in different homes. (*Id.* at 167-68). Mr. Williams maintains that the "distance created by Charlene's abandonment and separation of her children made it difficult for them to bond, and develop loving relationships, as a family." (Doc. 88 at 70).

Mr. Williams's sister Sharenda Williams testified at the evidentiary hearing that she and Mr. Williams "did spend time together" during Mr. Williams's teenage years after he left Aunt Louise's home. (Doc. 91 at

150). She clarified that they spent a minimal amount of time together because after being adopted by her Aunt Louise, she lived a "much more strict lifestyle" and was "very involved in church." (*Id.*). Mr. Williams's sister LaCharo Williams testified at the evidentiary hearing that due to their age difference, her relationship with Mr. Williams did not really develop until after he was arrested. (Doc. 92 at 214).

Mr. Williams contends that the "treatment that Marcus and his siblings received from caregivers reinforced this sense of distance." (Doc. 88 at 71). Sharenda testified at the evidentiary hearing that their uncle Robert Williams was "very strict" with Mr. Williams, while he treated her "like a girl," letting her get away with anything. (Doc. 91 at 148).

Mr. Williams adds that although "the circumstances of all of Charlene's children were precarious, [his] nomadic existence was especially so." (Doc. 88 at 71). Mr. Williams points out Dr. Mendel's testimony from the evidentiary hearing:

> I think that the chaos, the lack of stability and the sense of abandonment, betrayal, the contrast he experienced in his life from seeing why was my younger sister adopted by this aunt, this great aunt, and not me. Why was my other younger sister kept and raised by our mother and not me, why was my younger brother adopted by this family, unrelated family down the road and raised in a stable household, why was my older sister taken in by her father and raised in a – I don't know much

> about that family, but at least a relatively consistent home, and why was I bounced around.
>
> He experienced a sense of being unwanted, rejected, abandoned, betrayed throughout his life, and I think that's had an enormous impact on him.

(*Id.*) (quoting Doc. 93 at 41-42).

Mr. Williams asserts that defense counsel should have investigated and presented evidence of his dysfunctional family history because conditions within the family can influence a defendant's upbringing and experiences. (Doc. 88 at 71-72) (citing *Kormondy v. Sec'y, Fla. Dep't of Corr.*, 688 F.3d 1244, 1251 (11th Cir. 2012) (explaining that, during penalty phase proceedings in 1994, "[the defendant's] life story actually began with [his mother's] story about her life prior to [his] birth because, according to Dr. Larson, what she had experienced prior to that event had a profound effect on the person [the defendant] eventually became"). He points out that courts have held that failing to investigate and present available evidence of a "chaotic, abusive, neglectful family" was deficient. (*Id.* at 72) (citing *Johnson v. Bagley*, 544 F.3d 592, 605 (6th Cir. 2008) and *Frierson v. Woodford*, 463 F.3d 982, 989 (9th Cir. 2006) ("[A] failure to investigate and present, at the penalty phase of a capital trial, evidence of . . . a dysfunctional family or social environment may constitute ineffective assistance of counsel.")).

Mr. Williams argues that his life was impacted by the "early sexual activity, excessive alcohol use, neglect

and abandonment of children, and frayed familial bonds" that persisted generation after generation in his family. (*Id.* at 72). He contends that, with the evidence of his troubled family history, counsel "could have described the cycles of generational abusive and neglectful parenting that repeat the same behaviors and lead to the same outcomes." (*Id.*) (quoting *Johnson*, 544 F.3d at 605). He maintains that counsel were deficient for failing to present the available evidence of his dysfunctional family history to the jury. (*Id.*).

C. Family History of Alcoholism Contributed to Mr. Williams's Early and Excessive Use of Alcohol

Mr. Williams asserts that he was raised in a family of alcoholics. (Doc. 88 at 72). Eloise testified that when she married into the Williams family, she "learned that they did a lot of drinking and partying." (Doc. 92 at 99). Mr. Williams's great-grandmother, Beulah Williams, with whom he lived from time to time, was unable to properly care for the children left with her. (Doc. 91 at 146, Doc. 92 at 155). Beulah, described as a good person who "did like to drink and party," worked through the week, but got drunk on the weekends, to the point that she became incoherent and would pass out or urinate on herself. (Doc. 92 at 100, 152, Doc. 91 at 146). Eloise testified at the evidentiary hearing that almost all of Beulah's family, including Eloise's husband Robert, had problems with drinking. (Doc. 92 at 106-07). Sharenda testified that during the times she and Mr. Williams spent time with Eloise and Robert, Robert

was a heavy drinker who "drank probably almost every day at some point," to the point of intoxication. (Doc. 91 at 147).

Charlene testified that she was a heavy drinker from the age of fifteen until she was "like about thirty-two," having been influenced to drink by Beulah and other relatives who drank excessively. (Doc. 92 at 155-56). Charlene drank mostly on the weekends, sometimes to the point of intoxication. (Doc. 91 at 141; Doc. 92 at 156). She drank while she lived with the Mostellas,[3] and she drank while she was in a relationship with Jeff Deavers. (Doc. 92 at 112; Doc. 91 at 140). Dr. Mendel stated in his report that Charlene's "pattern of drinking and going out rather than watching her children left Marcus susceptible to Mario's sexual predation." (Petitioner's Exhibit 5 at 8).

Mr. Williams's childhood friend, Marlon Bothwell, testified that he and Mr. Williams began drinking probably between the ages of twelve and fourteen, but Mr. Williams's alcohol consumption increased so much when he was about sixteen or seventeen, that he often saw Mr. Williams drunk. (Doc. 93 at 15-17). Dr. Mendel testified that Mr. Williams "was drinking heavily by his high school years," having begun drinking "much more following a couple of very negative difficult experiences in his life." (*Id.* at 77). Dr. Mendel stated in his report that because alcoholism runs in families, Mr.

[3] Eloise testified that while Charlene and Mr. Williams lived with the Mostellas, Charlene and Olivia "were still partying and doing different things, drinking, leaving the children." (Doc. 92 at 112).

Williams's "alcohol abuse and likely dependence are probably 'multiply-determined,' stemming from a familial pattern of alcoholism as well as Marcus' specific traumatic life circumstances." (Petitioner's Exhibit 5 at 8).

Dr. Mendel explained that alcoholism often runs in families because of the modeling and example shown by family members drinking. (Doc. 93 at 75-76). He added that "people generally accept that there is a genetic basis for a predisposition towards addiction, including alcoholism." (*Id.* at 76). Dr. Glen King, a clinical psychologist, testified that "but for [Mr. Williams's] substance abuse, in terms of this crime, I don't think we would be here." (Doc. 92 at 86). Dr. Mendel agreed with Dr. King's conclusion that "if there wasn't the alcohol, we wouldn't – this wouldn't have happened and we wouldn't be here today." (Doc. 93 at 82).

Mr. Williams argues that by failing to present expert testimony on excessive use of alcohol at the penalty phase, counsel deprived the jury of this critical explanation for his conduct. (Doc. 88 at 77). He argues that although Mr. Funderburg testified that the defense theory for the penalty phase of the trial was that Mr. Williams was not in his right mind, due to alcohol and marijuana use, he presented "paltry" evidence about Mr. Williams's substance abuse. (*Id.*) (citing Doc. 91 at 90).

Mr. Williams points out that although counsel asked Charlene two questions "conceivably related to alcohol use" in the penalty phase, those questions were

not helpful because they pertained to Mr. Williams's time in Job Corps, not during his childhood or the time of the crime. (*Id.*) (citing Vol. 3, Tab 19 at 557). Mr. Williams also points out that during the penalty phase, Eloise offered, without being asked about alcohol or drugs, that she "began to notice he had changed – drinking, you know and maybe drugs." (*Id.*) (citing Vol. 3, Tab 19 at 565).

Mr. Williams argues that "without any specifics of when Marcus began drinking, and with no explanation for why Marcus was drinking – such as his genetic predisposition to alcoholism, the excessive drinking modeled by close relatives who reared him, and his traumatic childhood experiences – the jury was left to conclude that Marcus's drinking, which was only vaguely mentioned, was merely a personal failing." (*Id.*) He maintains that it was unreasonable for counsel not to present available evidence of Mr. Williams's dysfunctional upbringing and family history of substance abuse. (*Id.*)

D. Sexual Abuse by an Older Boy

Mr. Williams testified that between the ages of four and six, he was sexually abused three or four times by Mario Mostella, while he and Charlene lived with the Mostella family. (Doc. 91 at 118-20). Mr. Williams stated that at the time it was happening, he thought it was a game when Mario would "touch" and "penetrate" him from behind while Charlene was away.

(*Id.*). Mr. Williams did not tell anyone about the sexual assaults because he was ashamed. (*Id.* at 121).

Dr. Mendel described this as "pretty classic grooming behavior." (Doc. 93 at 165). He testified that Mr. Williams's account of his childhood sexual abuse is "extremely credible" and that he has no doubt that it happened. (*Id.* at 85-86).

Dr. Mendel stated in his report that at the time Mr. Williams was being molested by Mario, Mr. Williams "did not think there was anything wrong with what was going on." (Petitioner's Exhibit 5 at 5). He noted that male victims of childhood sexual abuse do not often tell anyone about the sexual abuse until they enter the justice system or substance abuse treatment. (*Id.*). Mr. Williams told Dr. Mendel that he became sexually active at a young age and was promiscuous throughout his adolescence and early adulthood because he wanted to prove to himself that he is not gay. (*Id.* at 6). Dr. Mendel opined that Mr. Williams became hypersexual, becoming sexually active at the age of ten,[4] and having from one hundred fifty to two hundred sexual partners by the time he was arrested, in an effort to prove that he is not gay. (Doc. 93 at 55-56).

Mr. Williams was also exposed to sexuality by his family members. While they lived with the Mostellas, Mr. Williams bathed with Charlene and shared a bed with her. (Doc. 92 at 165). Dr. Benedict, a

[4] Dr. Mendel testified that prepubescent sexual intercourse is "the biggest red flag" indicating sexual abuse. (Doc. 93 at 124).

neuropsychologist specializing in developmental psychopathology, testified that Mr. Williams was "also exposed to adult sexual relations when living with his mother, when she would have . . . her boyfriends in the same bed that she shared with" Mr. Williams. (Doc. 91 at 176).

Mr. Williams testified that when he was about ten years old, his teenage cousin Brian Williams "allowed [Mr. Williams] to watch him have sex as a way of showing [Mr. Williams] how to do it with a woman." (Doc. 91 at 120). Dr. Mendel testified that Mr. Williams told him that Brian was "always talking about sex and telling him about sex." (Doc. 93 at 64). Dr. Mendel explained that premature exposure to sexuality "basically tends to feed hypersexualization. So you get these, basically you get these kids who are thinking about sex and wanting to do and explore sexual things before they are physically, psychological or emotionally ready to do that. They're not adults." (*Id.* at 65).

Mr. Williams also engaged in other sexually inappropriate behavior. In his affidavit, Dr. Benedict stated that Mr. Williams told him that when he was a child, he would sneak outside to peep on his mother's friends while they used the outhouse. (Petitioner's Exhibit 7 at 12). Eloise testified that while Mr. Williams lived with her, she once caught him peeping at her through the bathroom door. (Doc. 92 at 127). Charlene testified that when Mr. Williams was fifteen, Lottie Turner told her that Mr. Williams was "peeping in her window." (*Id.* at 184).

Dr. Mendel testified that Mr. Williams's sexual promiscuity reassured him that he was not gay and made Mr. Williams feel like a man. (Doc. 93 at 58). Dr. Mendel opined that Mr. Williams's lack of a serious girlfriend made it less likely that he would tell anyone about his sexual abuse. (*Id.* at 84). Dr. Mendel explained in his report that because male victims who fear they might be gay after being sexually abused often try to compensate for their fears by becoming stereotypically "macho," Mr. Williams's compensatory hyper-masculinization resulted in aggressive and violent behavior in his pre-teen years. (Petitioner's Exhibit 5 at 7).

Mr. Williams's compensatory hyper-masculinization continued into his teenage years. Marlon Bothwell testified that Mr. Williams was bullied in high school and often got into fights after school. (Doc. 93 at 10-20). Marlon recalled that Mr. Williams became more aggressive after a fight in which Mr. Williams was slammed, head-first, into the ground. (*Id.* at 13).

Mr. Williams dropped out of high school in his senior year. (Doc. 91 at 103). He joined the Job Corps, but was kicked out for fighting. (Doc. 93 at 60-61). Dr. Mendel stated in his report that when Mr. Williams returned home to Ashville after being kicked out of Job Corps, he was "drinking constantly, always drunk, with a pervasive sense of hopelessness and despair he had felt only once previously in his life, in the aftermath of his knee surgery during his senior year of high school." (Petitioner's Exhibit 5 at 9). Dr. Mendel further stated in his report that the "critical factors in Marcus'

progression toward his crimes[5] were his chronic states of hypersexuality and of aggression, which fused together in his acts of sexual violence; the acute state of hopelessness secondary to his expulsion from Job-Corps; along with alcohol as a disinhibiting agent." (*Id.*).

Dr. Mendel explained that male victims of sexual abuse are much less likely to disclose their abuse; the length of time between sexual abuse in males and eventual disclosure is much longer; and people are more likely to suspect sexual abuse in female victims. (Doc. 93 at 74). Dr. Mendel stated in his report that "[m]ale victims often do not tell about their sexual abuse until they enter either the justice system or substance abuse treatment." (Petitioner's Exhibit 5 at 5). He concluded that "the fact that [Mr. Williams] did not tell about his abuse is not at all unusual and should not be considered a counter-indication of the presence of sexual abuse." (Petitioner's Exhibit 5 at 5).

Mr. Williams points out that consistent with other male victims who finally disclose childhood abuse after entering the justice system, he shared details of his sexual abuse with the first attorney who asked him about it. (Doc. 88 at 95-96). Mr. Williams testified that trial counsel never asked him if he had been sexually abused, but that if counsel had asked, he would have told them:

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[5] Mr. Williams maintains that he killed Melanie Rowell only ten days after his expulsion from Job Corps. (Doc. 88 at 86).

> Q. Why did you tell [Rule 32 counsel] about what had happened to you during your childhood when you previously had not talked about it?
>
> A. He asked me about it. And I didn't, at first, I didn't tell him anything. And over time, I got comfortable, more comfortable with him and he asked me about it again and that's when I told him.
>
> Q. Why didn't you tell your trial lawyers about sexual abuse and about some of the things you have told the Court here today about your background?
>
> A. They didn't ask.

(Doc. 91 at 122).

Mr. Williams maintains that exploring his sexual abuse history was especially important because, as Dr. Mendel testified, a large number of people who commit acts of sexual violence were themselves sexually abused. (Petitioner's Exhibit 5 at 9) (citing Doc. 93 at 122). Mr. Williams argues that although childhood abuse is particularly mitigating in capital cases, counsel's failure to investigate his background meant the jury never heard "this account of [his] psychological trajectory from an abusive childhood to sexual violence." (Doc. 88 at 87).

At the evidentiary hearing, Mr. Funderburg justified his decision not to present evidence concerning Mr. Williams's sexual history:

Q. Is it also fair to say that you would want to avoid any testimony that might show or tend to show the future dangerousness of your client, like he's going to do it again?

A. In this case?

Q. Yes.

A. Yes. We had another crime that had occurred that we had to keep out. Marcus had been involved in a similar act from when this case occurred until his arrest.

So, at the time he was found guilty of this, we, I think, entered into a plea agreement on the other charge as well, which the State tried to get it in, but we were able to keep it out.

Q. You wouldn't have wanted, certainly, to offer any testimony that might tend to indicate that your client was predisposed to sexual violence?

A. Absolutely not.

Q. And in that judgment that might have made a jury even more likely to give death, fair to say?

A. Yes, that's one of the biggest reasons we did not want to call Marcus in the case, even though he had given statements, we couldn't put him up on the stand and run the risk of that other conduct somehow coming in.

(Doc. 91 at 76).

Mr. Williams argues that counsel's failure to present available evidence of sexual abuse was not a strategic choice, because counsel failed to ask Mr. Williams or anyone else about sexual abuse and failed to "conduct any reasonable investigation" of Mr. Williams's background. (Doc. 88 at 88). Mr. Williams maintains that if counsel had investigated and presented evidence of Mr. Williams's childhood sexual abuse, the jury would have had "powerfully mitigating context for his behavior." (Doc. 88 at 89). Mr. Williams points out that the Eleventh Circuit Court of Appeals has held that sexual abuse evidence is not a "double-edged sword," *Williams v. Alabama*, 791 F.3d at 1277, and that "'both the Supreme Court and [the Eleventh Circuit] have recognized the long-lasting effects child sexual abuse has on its victims.' *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1276 (11th Cir. 2016) (citing *Kennedy v. Louisiana*, 554 U.S. 407, 435 (2008); *United States v. Irey*, 612 F.3d 1160, 1207 (11th Cir. 2010) (en banc))." (Doc. 88 at 89).

Mr. Williams adds that his arrest for breaking into Lottie Turner's house and attempting to rape her is "is entirely consistent with the portrait of [his] psychological unraveling, stemming from his childhood sexual abuse." (*Id.* at 89-90). Mr. Williams points to the portion of his confession to the murder in which he wrote, "I have a problem and I want help." (*Id.* at 90) (quoting Petitioner's Exhibit 1 at 1039). He concludes that without the context of Mr. Williams's history of childhood sexual abuse, the jury was given no explanation for his "confounding, and harmful, behavior," which allowed

the jury to sentence him to death for an "awful, and apparently inexplicable, crime." (*Id.*).

E. Extensive Family History of Childhood Sexual Abuse

Mr. Williams points out that under the ABA Guidelines applicable at the time of his trial, "counsel had a duty to collect information pertaining to 'family and social history (including physical, sexual or emotional abuse),' and to 'obtain names of collateral persons or sources to verify, corroborate, explain and expand upon [the] information obtained.'" (Doc. 88 at 90) (quoting *Williams v. Allen*, 542 F.3d at 1339) (citing 1989 ABA Guidelines 11.4.1(D)). He explains that "several interviews are often necessary to bring out all the relevant information, particularly when sensitive matters such as child abuse or sexual abuse are involved." (*Id.*) (quoting *Alabama Capital Defense Trial Manual*, at 588 (3d ed. 1997)). Mr. Williams contends that if trial counsel had investigated his background, they would have learned the following details about childhood sexual abuse and incest in his family.

In his report, Dr. Mendel detailed the pervasive history of sexual abuse of children by older relatives in Mr. Williams's family. Dr. Mendel stated that Mr. Williams's great-grandmother, Beulah, was reportedly raped by her uncle; his grandmother Laura's first child was fathered by her cousin; his aunt Veronica was molested as a child by her aunt's boyfriend; and his cousin Brian Williams, in addition to allowing Mr. Williams

to watch him having sex with his girlfriend, molested Mr. Williams's sister LaCharo and his cousin Zakia Fomby. (Petitioner's Exhibit 5 at 6). Charlene testified that when LaCharo was "about twelve," she told her that Brian Williams "tried to molest her." (Doc. 92 at 190). Despite Brian "den[ying] it all," Charlene tried to talk to the police about it, but "didn't get to talk to the police" because "there wasn't none at the station where [she] went." (*Id.* at 190-91).

Dr. Mendel testified that he was "struck by the level of sexual abuse across multiple generations" of Mr. Williams's family. (Doc. 93 at 40). He stated that in evaluating Mr. Williams, he considered the history of sexual abuse in Mr. Williams's family because it "very much runs in families." (*Id.* at 68). He added that a family history of sexual abuse is a risk factor for future sexual abuse. (*Id.* at 74). Mr. Williams argues that Brian Williams's abuse of LaCharo and Zakia lends credibility to Mr. Williams's account of Brian's inappropriate behavior, and confirms that Brian's sexual interactions with Marcus were predatory, not playful or minor. (Doc. 88 at 93).

Mr. Williams asserts that his family history of sexual abuse, and the lack of intervention by the adults in his family, provides context for his own abuse, and explains his reluctance to disclose his own sexual abuse as a child. (*Id.* at 94). Dr. Mendel testified that the family's unresponsiveness to other instances of sexual abuse "affects the degree of disclosure or the likelihood of disclosure." (Doc. 93 at 69). Dr. Mendel opined that Mr. Williams and other victims in his family feared

that they would not be believed if they reported their abuse. (*Id.* at 69-70; Petitioner's Exhibit 5 at 6). Dr. Mendel contends that if Mr. Williams's trial attorneys had conducted in depth interviews with him and his family, as required under the ABA Guidelines, they too would have learned about the sexual abuse in his background and family history. (Doc. 93 at 96).

F. Psychologically Damaging Childhood Experiences

Dr. Benedict testified that the following risk factors present in Mr. Williams's early life increased the likelihood that Mr. Williams would have a "bad outcome in life": the family history of intergenerational sexual abuse; being born out of wedlock to a teenage mother who did not have help with parenting; the family's limited resources and conditions that would constitute poverty or would border on poverty; very poor boundaries in the family with respect to sexuality and drinking; exposure to adult sexuality and adult substance abuse at a young age; being sodomized or sexually molested as a child; Mr. Williams's own precocious or early sexual activity; and his early use of alcohol. (Doc. 91 at 167-68, 175-78). Dr. Benedict concluded that Mr. Williams's greatest risk factor was the "lack of consistent caretaking by his mother with whom he tried to establish a relationship and wanted a relationship with, you know, to the present day, but her inconsistency and the various reunions and separations from her." (*Id.* at 175).

Dr. Benedict testified that the instability in Mr. Williams's childhood, and his inability to develop an attachment with a primary caretaker were traumatic for him. (*Id.* at 180). Dr. Mendel testified that Mr. Williams had a "lot of anger toward his mother for not being there," and that the "chaos, the abandonment, the betrayal, the loss, the lack of stability, [and] the lack of predictability" were the "biggest factor[s] in his childhood." (Doc. 93 at 44, 118).

Dr. Benedict testified that it was very difficult for Mr. Williams to reconcile the different expectations his various caretakers had of him:

> It's very difficult for a child and even teenagers to experience such radically different sets of expectation in parenting styles.
>
> So, if there are essentially very few boundaries, very few rules and very limited oversight in the home of his mother, we heard testimony today about the very strict and regimented environment he grew up or he experienced when he was living with [his aunt Eloise Williams].
>
> It's very difficult for kids to reconcile those differences and to know what message to take.

(Doc. 91 at 180-82).

Dr. Benedict also testified that Mr. Williams's childhood sexual abuse was traumatic. (*Id.* at 181). Dr. Mendel testified that Mr. Williams was "groomed" into sexual activity at a young age, and taught that it was

a secret. (Doc. 93 at 49-51, 100-01). Dr. Benedict testified that being molested at a young age by someone older "comes with the kind of power differential that characterizes abusive situations, sexual or physical aggression or emotional aggression." (Doc. 91 at 181). Dr. Mendel explained that even before Mr. Williams knew that what was happening with Mario was inappropriate, he knew it was something he should hide:

> [T]he time that Marcus says that he came close to telling was when on – after one of the incidents of sexual abuse, he and Mario came out of the – that shack, the Bachelor's Kip and Marcus' mother, Mario's mother and I believe Mario's sister were walking toward them and asked, one of them asked, they all asked, what were you guys doing in there.
>
> I think independently Marcus would have blurted out exactly what they were doing, but instead, Mario said something, Mario lied, said, oh, we were, you know, doing whatever in there, Marcus doesn't recall exactly what. So that's why he didn't tell at that point.
>
> As time went on and he got more of a sense that this was sexual, this was shameful, this was something to be embarrassed about, he did, as most male victims do, which is to keep it – keep it hidden.

(Doc. 93 at 51).

Dr. Benedict explained that Mr. Williams was also exposed to "general disinhibited behavior that would take a number of forms in his life," including exposure

to relatives with serious drinking problems, and exposure to domestic violence between his mother and her long time boyfriend, Jeff Deavers. (Doc 91 at 181-82). Dr. Benedict concluded that as a result of these traumatic experiences, Mr. Williams turned to alcohol, hypersexuality, and hypermasculine aggression as a way to "guard against some psychological problem." (*Id.* at 183-84).

Mr. Williams argues that despite trial counsel's knowledge that he "was not in his right mind" at the time of the crime, counsel "presented no expert testimony to explain his psychological trajectory from a childhood of abuse" to commission of the crime."[6] (Doc. 88 at 101). Instead, counsel "painted an incomplete and unhelpful picture" at the penalty phase, by relying on limited testimony that never mentioned Mr. Williams's family history of domestic violence, alcoholism, and sexual abuse. (*Id.*).

Mr. Williams also faults trial counsel for failing to present expert testimony to give a favorable opinion as to his "capacity for rehabilitation." (*Id.*). Both Dr. Benedict and Dr. Mendel testified that treatment was available, including when Marcus was a child, to ameliorate the damage from his traumatic experiences, and that Marcus would have benefitted from such treatment. (Doc. 91 at 182, 197-98; Doc. 93 at 63-64). Dr. Mendel opined that if Mr. Williams had been able

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[6] Trial counsel Erskine Funderburg testified that in mitigation, counsel were arguing that Mr. Williams was "not in his right mind but not because of a mental disease, it was because of the alcohol and the marijuana." (Doc. 91 at 90).

to discuss his traumatic experiences with someone, "we would have seen way less dramatic and self-destructive and destructive to others acts on [Mr. Williams's] part." (Doc. 93 at 62-63).

Dr. Benedict testified that Mr. Williams's psychological condition has improved significantly since his discussions with experts and his attorneys while he has been incarcerated. (Doc. 91 at 194). In addition, Dr. Mendel and Dr. King, the State's expert, both testified that, but for alcohol, Marcus's crime would not have happened. (Doc. 92 at 86; Doc. 93 at 82).

V. ANALYSIS

Mr. Williams argues that counsel were deficient in failing to uncover and present the potentially mitigating evidence he presented at the evidentiary hearing, and that he was prejudiced by counsel's failures. He maintains that he was "cooperative and willing to assist in his defense"; that he offered to "provide information about his background, but counsel w[ere] unresponsive"; and that his friends and family were "available and willing to provide mitigating information, but they were not contacted or interviewed." (Doc. 90 at 10). Mr. Williams argues that absent counsel's errors, counsel would have been able to present several more non-statutory mitigating circumstances pertaining his excruciating life history, including poverty, abandonment, sexual abuse, and alcoholism. (*Id.* at 32-34). He argues that in light of this new mitigating evidence, taken as a whole, "there is a reasonable

probability that at least one juror would have chosen life imprisonment instead of death." (*Id.* at 35).

To prove counsel were deficient, Mr. Williams must show that counsel's performance was "outside the wide range of professionally competent assistance." *Strickland*, 466 U.S. at 690. Professionally competent assistance includes a duty to conduct a reasonable investigation. *Id.* at 690-91. To provide constitutionally adequate representation to a defendant in a capital trial, "counsel must perform a thorough investigation where it appears necessary to do so." *Frazier v. Bouchard*, 661 F.3d 519, 531 (11th Cir. 2011). To determine whether trial counsel's decision not to investigate Mr. Williams's background was reasonable, this court must "assess 'all the circumstances' and 'consider whether the known evidence would lead a reasonable attorney to investigate further.'" *Id.* (quoting *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010)).

However, a court may decline to reach *Strickland*'s performance prong if it is convinced that the prejudice prong cannot be satisfied. *Waters v. Thomas*, 46 F.3d 1506, 1510 (11th Cir. 1995) (citing *Strickland*, 466 U.S. at 697) ("If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."); *see also Wong v. Belmontes*, 558 U.S. 15, 19 (2009) (assuming, for purposes of analysis, that counsel's performance was deficient because prejudice inquiry was dispositive to the claim); and *Frazier*, 661 F.3d at 530 (holding that the court "need not reach an ultimate conclusion on the matter, for we may decline

to reach the performance prong of the ineffective assistance test if convinced that the prejudice prong cannot be satisfied"). Because the court concludes that Mr. Williams cannot make the requisite showing of prejudice under *Strickland*'s second prong, the court assumes without deciding that counsel failed to perform an adequate mitigation investigation, and will address *Strickland*'s prejudice prong.

To prove prejudice, a petitioner must show there is a "reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Jones v. Sec'y, Florida Dep't of Corr.*, 834 F.3d 1299, 1312 (11th Cir. 2016) (quoting *Strickland*, 466 U.S. at 695). In evaluating that probability, this court must "consider the totality of the available mitigation evidence – both that adduced at trial, and the evidence adduced in the habeas proceeding – and reweigh it against the evidence in aggravation." *Id.* (quoting *Porter v. McCollum*, 558 U.S. 30, 41 (2009)). Mr. Williams cannot show a reasonable probability that if counsel had investigated and presented the evidence presented in the evidentiary hearing at the penalty phase of his trial, that he would not have been sentenced to death.

Mr. Williams argues that "clearly a breakdown in the adversarial process" occurred in his case because despite the abundance of available mitigating evidence produced at the evidentiary hearing, counsel presented almost no mitigation at sentencing. (Doc. 88 at 103). He contends that the mitigation evidence omitted by

counsel paints a vastly different picture of Mr. Williams's background than the testimony counsel presented in the penalty phase. (*Id.*). He concludes that he was "denied an individualized sentencing determination by counsel's failure to present 'precisely the type of evidence' that is relevant to assessing his moral culpability. *Williams v. Alabama*, 791 F.3d at 1277." (*Id.* at 106).

Mr. Williams contends that the mitigating evidence counsel could have presented in the penalty phase must be weighed against the sole aggravator the prosecution argued in the penalty phase. (Doc. 90 at 32). However, a "principled re-weighing of aggravating and mitigating circumstances" requires the court to consider "both the additional evidence that defense counsel could have presented on [Mr. Williams's] behalf in mitigation as well as the additional evidence that the prosecution could have presented to the jury in aggravation." *Frazier*, 661 F.3d at 532.

During the penalty phase of Mr. Williams's trial, the state argued only one aggravating circumstance, "[t]hat the capital offense was committed while the defendant was engaged in commission of or an attempt to commit rape, robbery, burglary or kidnapping." (Vol. 3, Tab 18 at 552; Vol. 3, Tab 23 at 584; Vol. 4 at 601). The court specifically instructed the jury that it could not consider any other aggravating circumstance. (Vol. 3, Tab 23 at 584).

As mitigating circumstances, trial counsel argued, and the jury considered, that Mr. Williams was only

twenty-one years old at the time of the crime; that he was under the influence of alcohol at the time of the crime; that he had no significant prior criminal history; that he came from a troubled family background; that he cooperated with law enforcement in confessing to the crime; that he had no disciplinary issues while in jail awaiting trial; and that he expressed remorse for the crime.[7] (Vol. 3, Tab 21 at 573-74).

If Mr. Williams were granted a new sentencing in this case, his counsel would no doubt argue the same statutory and non-statutory mitigating factors, along with the new mitigating evidence presented at the evidentiary hearing. And no doubt, the state would again argue the same aggravating circumstance it argued previously, that Mr. Williams killed the victim while

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[7] In sentencing Mr. Williams, the trial court found the following mitigating circumstances existed: Mr. Williams's lack of a criminal history; his unstable home life as a child; his frustration from an injury ending his hopes of an athletic career; his obtaining a GED; and his remorse. (Vol. 4 at 631-38). The trial court found the following mitigating factors argued by the defense did not exist: Mr. Williams's age at the time of the offense; his capacity to appreciate the criminality of his conduct due to marijuana and alcohol use at the time of the offense; and his cooperation with law enforcement. (*Id.* at 636-37).

The trial court took judicial notice of Mr. Williams's conviction in the Turner burglary case. (*Id.* at 634). The trial court did not "consider this subsequent act by [Mr. Williams] for any purposes of aggravation," but did consider it as evidence of his state of mind in determining that Mr. Williams's capacity to appreciate the criminality of his actions due to his use of marijuana and alcohol, and his cooperation with law enforcement were not mitigating circumstances in his case. (*Id.* at 634-37).

committing or attempting to commit a rape, robbery, burglary, or kidnapping.

However, if Mr. Williams were granted a new sentencing hearing, the state would not be limited to the sole aggravating circumstance it originally argued. *See Frazier*, 661 F.3d at 533. In addition to the aggravating circumstance that the capital offense was committed while Mr. Williams was engaged in the commission of or an attempt to commit rape, robbery, burglary or kidnapping, in a new hearing, the state could present evidence that just eighteen days after the murder of Ms. Rowell, Mr. Williams confessed to, and was charged with first degree burglary, in a crime eerily similar to the rape and murder of Ms. Rowell.

On November 24, 1996, Mr. Williams was arrested after breaking into the home of Lottie Turner during the night and attempting to rape her. (*See* Petitioner's Exhibit 2 at 509-511). In recounting the events of that night, Ms. Turner informed the police that she was asleep in her home, when she awoke to find Mr. Williams on her bed, wearing no pants. (*Id.* at 509). Mr. Williams told her not to look at him; that he had "wanted her for a long time"; and that he had "had all her girls and they gave good blow jobs." (*Id.*). When Mr. Williams began rubbing his penis between her breasts, Ms. Turner began to struggle, begging for her life. (*Id.*). After Mr. Williams "put his hand up in her vagina" and "found that she was on her period by the blood and pad," he told her to "suck his penis." (*Id.*). Ms. Turner continued to resist Mr. Williams until "it got daylight,"

then he exited her home out the window through which he had entered. (*Id.* at 510). Ms. Turner identified Mr. Williams as the perpetrator. (*Id.*).

After being arrested, Mr. Williams confessed in a written statement, to breaking into Ms. Turner's house "with sex in mind." (Petitioner's Exhibit 1 at 525). Mr. Williams explained that he had been drinking and "smok[ing] a lot [of] weed" all day, when he and his friend Alister Cook left the party around midnight to go pick up some girls. (*Id.*). Mr. Williams got "upset" and "snapped" when his plans "didn't work out with those females." (*Id.*). Mr. Williams described the crime as follows:

> I walk around to the back of [Lottie Turner's] house and I put my gloves on try to open two bedroom windows, no luck so I tried the ___ one and I was in there. I took off my clothes outside and went in through the window. I found her in bed so I stripped on down out of my underwear and enter the bedroom crawling to the foot of her bed. I went to raise up and crawl on top of her. She wakes up. She tries to hit [me] with something so we tussle and finally I got [her] pin down. I started fondling her breast and rubbing my penis on her breast. At this time I [was] holding her down. I told her all I wanted was sex and not to hurt her. I told her this several times. She grabs my shirt when I was about to leave so I could not leave until she realized that I wasn't going to hurt her. It was 6:30 am [when] she finally let go. So I grab[b]ed my glove and my boxers and

> jumped out of the window. I threw my clothes on and ran into the woods. . . .

(*Id.*). Mr. Williams blamed the crime on "lack of sex and too much alcohol and drugs." (*Id.*). Mr. Williams also apologized "for the two women [he had] hurt," and asked for help "find[ing] his true self again." (*Id.*).

On May 20, 1997, Mr. Williams was indicted by a St. Clair County grand jury on a charge of first degree burglary in the Lottie Turner case. *See* https://v2.alacourt.com, *State of Alabama v. Marcus Bernard Williams*, Case No. CC-1997-000083.00.[8] On March 2, 1999, less than a week after the guilt and penalty phases of his capital murder trial, and a month before the sentencing hearing, Mr. Williams entered a plea of guilty to first degree burglary, and was sentenced to twenty-five years' imprisonment. (*Id.*). Although the state could have presented evidence of this similar

[8] The court takes judicial notice of the state court records available on the state's Alacourt website. *See Keith v. DeKalb County, Ga.*, 749 F.3d 1034, 1041 n.18 (11th Cir. 2014) (taking judicial notice of DeKalb County Superior Court Online Judicial System pursuant to Federal Rule of Evidence 201); *see also Grider v. Cook*, 522 Fed. Appx. 544, 545 n.2 (11th Cir. 2013) ("the district court was permitted to take judicial notice of Grider's state court criminal proceedings").

crime at the penalty phase of the trial,[9] it did not do so.[10]

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[9] Alabama Code § 13A-5-49(2) provides that a prior conviction of a felony involving the use or threat of violence to the person can be used as an aggravating circumstance. Because Mr. Williams had not been convicted in the Turner burglary case at the time of the penalty phase of his trial, the state could not have argued that case as an aggravating circumstance. However, the state could have argued at the penalty phase, that the Turner case evidenced Mr. Williams's future dangerousness. Alabama Courts have held that remarks on future dangerousness are proper in determining "what weight should be afforded the aggravating circumstances that the State had proven." *Floyd v. State*, CR-13-0623, 2017 WL 2889566 at 63 (Ala. Crim. App. July 7, 2017). As the *Floyd* court explained:

> Although future dangerousness is not an aggravating circumstance under § 13A-5-49, Ala. Code 1975, "future dangerousness [is] a subject of inestimable concern at the penalty phase of the trial" and evidence and argument about future dangerousness are permissible. *McGriff v. State*, 908 So.2d 961, 1013 (Ala. Crim. App. 2000), *rev'd on other grounds*, 908 So.2d 1024 (Ala. 2004). *See also Whatley v. State*, 146 So.3d 437, 481-82 (Ala. Crim. App. 2010) (holding that evidence of a capital defendant's future dangerousness is admissible during the penalty phase of the trial under § 13A-5-45(d), Ala. Code 1975); and *Arthur v. State*, 575 So.2d 1165, 1185 (Ala. Crim. App. 1990) (holding that prosecutor's remark during penalty phase of capital trial that the defendant would kill again if given the chance was "proper because [it] concerned the valid sentencing factor of [the defendant's] future dangerousness.").

Id.

[10] Mr. Williams's trial counsel, Erskine Funderburg, testified at the evidentiary hearing that the state tried to get the Turner case into evidence in the guilt phase of the trial, "but [defense counsel] were able to keep it out." (Doc. 91 at 76).

If Mr. Williams were granted a new sentencing hearing, the state could certainly argue in addition to the aggravating circumstance that the murder was committed while Mr. Williams was committing or attempting to commit a rape, robbery, burglary, or kidnapping, that Mr. Williams's criminal history includes a very similar crime that is highly relevant to Mr. Williams's future dangerousness. Given the availability of this additional, highly prejudicial evidence, this court cannot find that, but for trial counsel's failure to investigate and present at the penalty phase the additional mitigating evidence presented at the evidentiary hearing, a reasonable probability exists that the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant the death penalty.

To be sure, the evidence presented at the evidentiary hearing, pointing out Mr. Williams's chaotic childhood, including sexual abuse by an older boy, his dysfunctional family history, including alcoholism and childhood sexual abuse, and the psychological impact it had on Mr. Williams, would have presented the jury with a more complete picture of Mr. Williams to use in making its sentencing recommendation. But, as counsel feared, such evidence could have just as likely raised concerns about Mr. Williams's propensities to commit similar crimes. And, the jury was also not aware of the highly damaging evidence of Mr. Williams's similar crime, just a couple of weeks after the rape and murder of Ms. Rowell. The totality of evidence likely to have been presented had counsel discovered

and presented the evidence presented at evidentiary the hearing could have just as likely encouraged the jury to vote for the death penalty as to vote against it. *See Stanley v. Zant*, 697 F.2d 955, 969 (11th Cir. 1983) ("[M]itigation may be in the eye of the beholder.")

After re-weighing the original aggravating and mitigating circumstances, the additional evidence trial counsel could have presented in mitigation, and the additional, highly damaging evidence the state could have presented, the court finds that Mr. Williams has not made the requisite showing of prejudice required by *Strickland.*

V. CONCLUSION

Based on the foregoing, the petition for writ of habeas corpus is due to be **DENIED**. The court will enter a separate final judgment contemporaneously with this Memorandum Opinion.

VI. CERTIFICATE OF APPEALABILITY

Rule 11(a) of the Rules Governing Section 2254 Cases requires the district court to issue or deny a certificate of appealability when it enters a final order adverse to the applicant. This court may issue a certificate of appealability "only if the applicant has a made a substantial showing of the denial of a constitutional right." 28 U.S.C. 2253(c)(2). To make such a showing, a "petitioner must demonstrate that reasonable jurist would find the district court's assessment of

the constitutional claims debatable and wrong," *Slack v. McDaniel*, 529 U.S. 473, 484 (2000), or that "the issues presented were adequate to deserve encouragement to proceed further." *Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (internal quotations omitted).

This court finds that Mr. Williams's claim does not satisfy either standard. Accordingly, a motion for a certificate of appealability is due to be **DENIED**.

DONE and **ORDERED** this 17th day of April, 2019.

/s/ Karon Owen Bowdre
KARON OWEN BOWDRE
CHIEF UNITED STATES
DISTRICT JUDGE

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 12-14937

D.C. Docket No. 1:07-cv-01276-KOB-TMP

MARCUS BERNARD WILLIAMS,

Petitioner-Appellant,

versus

STATE OF ALABAMA,

Respondent-Appellee.

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

(June 26, 2015)

Before MARCUS, WILSON and MARTIN, Circuit Judges.

MARTIN, Circuit Judge:

Marcus Bernard Williams, an Alabama death-row prisoner, appeals the District Court's denial of his petition for a writ of habeas corpus. He argues that his lawyers were ineffective during the penalty phase of

his capital murder trial because they failed to investigate, discover, or present as mitigating evidence the fact that he suffered sexual abuse as a child. The only question we answer today concerns the applicable standard of review. Although Mr. Williams's failure-to-investigate claims were fairly presented in state court, they were not decided "on the merits" within the meaning of 28 U.S.C. § 2254(d). For this reason, we vacate the District Court's order denying Mr. Williams's failure-to-investigate claims and remand the case for further proceedings consistent with this opinion.

I. BACKGROUND

Mr. Williams was convicted and sentenced to death for the murder of Melanie Rowell. Williams v. State, 795 So. 2d 753, 761 (Ala. Crim. App. 1999). Neither the facts of this brutal crime nor Mr. Williams's guilt are now in dispute. On the night of November 6, 1996, Mr. Williams snuck into Ms. Rowell's apartment, where Ms. Rowell and her two young children were asleep. Id. He entered Ms. Rowell's bedroom, climbed on top of her, and tried to remove her clothes. Id. She fought back, so he strangled her until she was motionless and then had intercourse with her. Id. at 762. "The cause of death was asphyxia due to strangulation." Id. (quotation omitted).

Mr. Williams gave several incriminating statements to law enforcement, and DNA testing confirmed that semen and blood found at the crime scene were consistent with his genetic profile. Id. at 766–67, 775.

Faced with overwhelming evidence of guilt, Mr. Williams's lawyers argued only that while he intended to rape Ms. Rowell that night, he did not intend to murder her. Disagreeing, the jury found Mr. Williams guilty of capital murder.

The penalty phase was conducted before the same jury the next day. It was short, consisting of only brief testimony by Mr. Williams's mother, Charlene Williams, and his aunt, Eloise Williams. Charlene Williams told the jury that she was sixteen years old and unmarried when Mr. Williams was born, and that Mr. Williams had faced certain difficulties as a child. For example, she testified that Mr. Williams sometimes lived with her grandmother and aunt; had no relationship with his father and lacked adult male figures in his life; and had to stop playing school sports after injuring his knee. Mr. Williams's counsel also elicited testimony that portrayed him in a negative light, such as the fact that he was a high school dropout; he "started hanging with a rough crowd"; he got kicked out of the Job Corp for fighting; and upon returning home, he stopped going to church and "wanted to sleep all day and stay up all night."[1]

Eloise Williams also testified about Mr. Williams's unstable home life. She told the jury that he had moved from place to place as a child and lived with different family members; he became sad and withdrawn at

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[1] A capital defendant's history of violent and aggressive behavior is generally considered an aggravating factor. See Holsey v. Warden, 694 F.3d 1230, 1269–70 (11th Cir. 2012).

times because he did not see his mother often; he had been a good student with no significant criminal history; and he had struggled emotionally after the deaths of his grandfather and uncle. However, as with Charlene, counsel also elicited evidence from Eloise that was likely more harmful than helpful. For example, Eloise told the jury that Mr. Williams had a quick temper; he had been arrested for fighting as a teenager;[2] he had not maintained regular employment after leaving high school; and not long before the crime, he started drinking and using drugs. Eloise ended on a positive note, telling the jury that since Mr. Williams had been in jail, he had stayed out of trouble and expressed remorse for his crime.

Neither Charlene nor Eloise was asked about Mr. Williams's history of sexual abuse. The State did not offer any rebuttal evidence. Following closing arguments and jury instructions, the jury deliberated for thirty minutes before returning its advisory verdict. Eleven jurors voted for death and one juror voted for life without parole.[3]

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[2] The fact that Mr. Williams's counsel told the jury about these adolescent brushes with the law is noteworthy because the State could not have offered evidence of Mr. Williams's juvenile arrests to establish any aggravating factors. In Alabama, "juvenile charges, even those that result in an adjudication of guilt, are not convictions and may not be used to enhance punishment." Thompson v. State, 503 So. 2d 871, 880 (Ala. Crim. App. 1986) aff'd sub nom. Ex parte Thompson, 503 So. 2d 887 (Ala. 1987).

[3] Alabama does not require a unanimous jury verdict. Instead, the jury's decision to recommend the death sentence requires the vote of only ten jurors. Ala. Code § 13A-5-46(f).

At a separate sentencing proceeding before the trial court, Mr. Williams testified and expressed remorse. Donna Rowell, the victim's mother, was the only other witness to testify. She told the trial court about the impact her daughter's death had on her family, including her daughter's young children. The court found that one aggravating circumstance existed: Mr. Williams committed murder while engaged in the commission of, or an attempt to commit, rape, robbery, burglary, or kidnapping. It also found that this aggravating factor outweighed the mitigating factors of Mr. Williams's lack of prior criminal history, his unstable home life as a child, his frustration resulting from the end of a promising athletic career, his attainment of his GED, and his remorse. The court sentenced Mr. Williams to death.

On direct appeal, Mr. Williams raised, among other arguments not relevant here, two ineffective-assistance-of-counsel claims related to the penalty phase of his trial. He argued that trial counsel were ineffective for failing to present (1) a mitigation expert or (2) documentary evidence. See Williams, 795 So. 2d at 782. His arguments at this stage did not mention that Mr. Williams had been sexually abused as a child. Instead, they focused on counsel's failure to present mitigating evidence in an unbiased and compelling manner.

The Alabama Court of Criminal Appeals found that Mr. Williams had not provided factual support for these claims, and affirmed his conviction and sentence. Id. at 784–85. The Alabama Supreme Court granted

Mr. Williams's certiorari petition and also affirmed his conviction and sentence, holding that "[t]he Court of Criminal Appeals thoroughly addressed and properly decided each of the issues raised on appeal. . . ." Ex parte Williams, 795 So. 2d 785, 787 (Ala. 2001).

In August 2004, Mr. Williams filed an amended petition for postconviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure. For the first time, he claimed that counsel had failed to conduct a reasonable investigation. He argued that trial counsel had been ineffective by failing to "compile a constitutionally adequate social history for use in planning penalty-phase strategy," or "discover and present the many material details that would have supported a mitigation theory based on Mr. Williams' history of abuse and neglect," including that Mr. Williams had been "sexually abused by an older male" when he was a child. The petition also identified sixteen family members who could have testified about this history of abuse and neglect.

The St. Clair County Circuit Court (the "Rule 32 court") denied Mr. Williams's request for an evidentiary hearing and ultimately, his motion for post-conviction relief. First, it denied Mr. Williams's claim that trial counsel had failed to compile an adequate social history for failure to state a claim under Alabama Rule of Criminal Procedure Rule 32.7(d). After summarizing the testimony of Charlene and Eloise Williams, it found that counsel had presented "substantially the same evidence" that could have been discovered through a social history, and therefore were "not ineffective for

failing to present cumulative evidence." The Rule 32 court also dismissed Mr. Williams's claim that trial counsel had not discovered his history of abuse and neglect for failure to meet the specificity and full factual pleading requirements of Alabama Rule of Criminal Procedure Rule 32.6(b). The denial of relief under either Rule 32.6(b) or 32.7(d) is a merits determination. See Frazier v. Bouchard, 661 F.3d 519, 525–26 (11th Cir. 2011).

The Alabama Court of Criminal Appeals affirmed the denial of postconviction relief, but on different grounds. Not recognizing that Mr. Williams had presented his failure-to-investigate claims for the first time in his Rule 32 motion, it sua sponte held that all of his ineffective assistance of counsel claims were "procedurally barred from review because Williams raised allegations of ineffective assistance of counsel on direct appeal and those claims were addressed by this Court and by the Alabama Supreme Court on certiorari review. Rule 32.2(a)(4), Ala. R. Crim. P."[4]

In reaching this decision, the court relied on Davis v. State, 9 So. 3d 514 (Ala. Crim. App. 2006), which taught that the procedural bars set out in Alabama Rule of Criminal Procedure 32.2(a) were jurisdictional

[4] Alabama Rule of Criminal Procedure 32.2(a)(4) provides that a habeas petitioner will not be given relief on any ground "[w]hich was raised or addressed on appeal or in any previous collateral proceeding not dismissed pursuant to the last sentence of Rule 32.1 as a petition that challenges multiple judgments, whether or not the previous collateral proceeding was adjudicated on the merits of the grounds raised."

in nature. See Ex parte Clemons, 55 So. 3d 348, 352 (Ala. 2007) ("Although the Court of Criminal Appeals characterized the procedural bars of Rule 32.2(a) as mandatory, its holding in Davis eliminates any meaningful distinction between a mandatory rule of preclusion and one that is jurisdictional."). Although the Alabama Supreme Court has since reversed course and overruled Davis, see Clemons, 55 So. 3d at 353, 356, the fact that the Court of Criminal Appeals found itself (and necessarily, the trial court) without jurisdiction to reach the merits of Mr. Williams's failure-to-investigate claims is important to this appeal, as we will explain later.

In 2007, Mr. Williams filed a federal habeas petition pursuant to 28 U.S.C. § 2254. In his amended petition, he once again argued that trial counsel were ineffective because they failed to conduct an adequate investigation. The petition alleged more detailed facts about Mr. Williams's childhood sexual abuse than had been presented in state court:

> Beginning when Marcus was about four years old until he was six, he was raped repeatedly by Mario Mostella, an older boy whose mother shared a house with Charlene Williams. Mario, then about age fifteen, enticed Marcus into playing a game, which he called "hide and find." Mario would tell Marcus to hide in a shed and wait for him to find him. Upon being found by Mario, Marcus would lie down on his stomach and was repeatedly subjected to anal rape. Initially, Mario made Marcus think it was just a game, but Marcus came

> to realize that it was wrong because it was always done in such secrecy. Eventually, Mario began to encourage Marcus to believe that it was his (Marcus') idea, and threatened to tell on Marcus. These rapes occurred three or four times in Ashville and also in Ohio, in the basement of the house Marcus and Charlene shared with Mario's family.

The District Court found that it owed 28 U.S.C. § 2254(d) deference to the Rule 32 court's decision, and reviewed the Rule 32 court's disposition of Mr. Williams's failure-to-investigate claims "as [he] presented it to the state courts in the . . . Rule 32 petition, not as he more fully fleshed it out in the instant amended habeas petition." It concluded that the Rule 32 court's rejection of these claims was not contrary to, or an unreasonable application of, Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052 (1984). It agreed that because the jury had heard from Eloise and Charlene Williams about Mr. Williams's childhood and background, Mr. Williams had not demonstrated that presenting "additional cumulative facts would have changed the outcome."

Further, the District Court noted that "evidence of childhood abuse, like that of drug and alcohol abuse, often can be a double-edged sword, perhaps doing good or perhaps doing harm." It therefore could not simply assume that such evidence "would have had a mitigating effect." It denied both the petition and Mr. Williams's request for an evidentiary hearing. Mr. Williams now timely appeals.

II. DISCUSSION

As is often the case when considering a state prisoner's habeas petition, the applicable standard of review is of critical importance. The Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA) establishes a highly deferential standard of review for federal claims that have been "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d). Federal courts may not grant relief on the basis of any such claim unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law" or was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Id.

On the other hand, if a state court refused to decide a claim "on the merits" because the claim was barred by state procedural rules, we are generally, though not always, prevented from reviewing the claim at all. See Cone v. Bell, 556 U.S. 449, 465, 129 S. Ct. 1769, 1780 (2009). This is because "[i]t is well established that federal courts will not review questions of federal law presented in a habeas petition when the state court's decision rests upon a state-law ground that is independent of the federal question and adequate to support the judgment." Id. (quotation marks omitted).

However, resting between AEDPA deference and procedural default is a third path. If the state court did not reach the merits of a petitioner's claim based on some ground that is not adequate to bar federal review,

we must review the claim de novo. Id. at 472, 129 S. Ct. at 1784. In these cases, we are not confined to the state-court record. See, e.g., Madison v. Comm'r, Ala. Dep't of Corr., 761 F.3d 1240, 1249–50 & n.9 (11th Cir. 2014); Mosley v. Atchison, 689 F.3d 838, 844 (7th Cir. 2012) ("If § 2254(d) does not bar relief, then an evidentiary hearing may be needed.").

Given this framework, Mr. Williams's appeal presents two important questions: (1) whether the Rule 32 court's decision is entitled to AEDPA deference under § 2254(d); and (2) if we cannot look to the Rule 32 court's decision as an "adjudication on the merits," whether the Alabama Court of Criminal Appeals' application of a procedural bar—specifically, Alabama Rule of Criminal Procedure 32.2(a)(4)—prevents federal review altogether. We hold that the answer to both questions is no.

A.

Under § 2254(d), AEDPA's deferential standard of review is limited to claims that have been "adjudicated on the merits" in state court. A decision that is based on state procedural grounds is not an adjudication on the merits. See Harrington v. Richter, 562 U.S. 86, 99, 131 S. Ct. 770, 784–85 (2011).

In this case, the Rule 32 court decided Mr. Williams's failure-to-investigate claims on the merits, but the Court of Criminal Appeals did not. Instead, it held that these claims were "procedurally barred from review because Williams raised allegations of ineffective

assistance of counsel on direct appeal and those claims were addressed by this Court and by the Alabama Supreme Court on certiorari review. Rule 32.2(a)(4), Ala. R. Crim. P."

Neither decision is entitled to AEDPA deference under § 2254(d). First, we cannot treat the Court of Criminal Appeals' decision as a merits determination because that court clearly told us that it did not consider the merits of Mr. Williams's failure-to-investigate claims. As the Supreme Court explained in *Richter*, we only presume that a state court reached the merits when there is no "reason to think some other explanation for the state court's decision is more likely." 562 U.S. at 99–100, 131 S. Ct. at 785. In this case, our reason is clear—the Court of Criminal Appeals expressly held that Mr. Williams's claims were "procedurally barred."

Second, we cannot accord AEDPA deference to the Rule 32 court's decision because that decision was rejected by a higher state court on the basis of state law. Although the state contends that there is no indication that the Court of Criminal Appeals disagreed with the Rule 32 court's decision, the Court of Criminal Appeals invoked a jurisdictional procedural bar. See Clemons, 55 So. 3d at 352 (explaining that, at the time of Mr. Williams's appeal, the Court of Criminal Appeals treated Rule 32.2(a)'s procedural bars as jurisdictional).

This means that the Court of Criminal Appeals found itself—and necessarily, the Rule 32 court as well—without the authority to even consider the merits of

Mr. Williams's failure-to-investigate claims. See Davis, 9 So. 3d at 522 (applying Rule 32 procedural bar sua sponte and stating that "this Court has no authority to modify or amend the procedural bars contained in Rule 32"); see also Hurth v. Mitchem, 400 F.3d 857, 858 (11th Cir. 2005) ("A rule is jurisdictional if the petitioner's non-compliance with it actually divests the state courts of power and authority to decide the underlying claim, instead of merely offering the respondent an opportunity to assert a procedural defense which may be waived if not raised."). Thus, the Court of Criminal Appeals disagreed that the Rule 32 Court had jurisdiction to make any merits determination at all, including the one that it made.

For this reason, the State's reliance on Loggins v. Thomas, 654 F.3d 1204 (11th Cir. 2011), and Hammond v. Hall, 586 F.3d 1289 (11th Cir. 2009), is misplaced. Those cases simply hold that when state trial and appellate courts make alternative, but consistent, merits determinations, we accord AEDPA deference to both decisions. See Loggins, 654 F.3d at 1217 ("Our case law also makes clear that we accord AEDPA deference not only to the adjudications of state appellate courts but also to those of state trial courts that have not been overturned on appeal."); Hammond, 586 F.3d at 1331 ("In deciding to give deference to both decisions, the critical fact to us is that the Georgia Supreme Court does not appear to have disagreed with the trial court's decision on the deficiency element."). But where, as here, a state trial court issues a decision that the state

appellate court does not agree with, we consider only the state appellate court's decision.

Unlike the state court decisions in Loggins and Hammond, the Court of Criminal Appeals' holding that the Rule 32 court did not have the authority to consider the merits of Mr. Williams's failure-to-investigate claims is not consistent with the Rule 32 court's decision addressing the merits of those claims. Thus, our respect for the state court judgment—and the "fundamental principle that state courts are the final arbiters of state law," Herring v. Sec'y, Dep't of Corr., 397 F.3d 1338, 1355 (11th Cir. 2005) (quotation omitted)—prevents us from deferring to the Rule 32 court's decision.

B.

Having concluded that we cannot accord AEDPA deference to the Rule 32 court's decision, we now turn to the Court of Criminal Appeals' holding that Mr. Williams's failure-to-investigate claims were procedurally barred. Generally, a state court's refusal to reach the merits of a claim for failure to comply with state procedural rules serves as an "independent and adequate state ground for denying federal review." Cone, 556 U.S. at 465, 129 S. Ct. at 1780. But because adequacy is a federal question, federal review is not "barred every time a state court invokes a procedural rule to limit its review of a state prisoner's claims." Id. (quotation omitted). The question, then, is whether the Court of Criminal Appeals' application of Alabama Rule of

Criminal Procedure 32.2(a)(4)—and its incorrect finding that Mr. Williams's claims had been previously raised and addressed on direct appeal—prevents our review. Binding Supreme Court precedent requires us to hold that it does not.

Federal courts have long recognized that a state court's refusal to re-address the merits of a claim, on the grounds that the claim has already been given full consideration in some previous proceeding, imposes no barrier to federal 1275 review. See Ylst v. Nunnemaker, 501 U.S. 797, 804 n.3, 111 S. Ct. 2590, 2595 n.3 (1991). Instead, this type of state-court decision "provides strong evidence that the claim has already been given full consideration by the state courts and thus is ripe for federal adjudication." Cone, 556 U.S. at 467, 129 S. Ct. at 1781; see also Page v. Frank, 343 F.3d 901, 907 (7th Cir. 2003) (state-court decision that it "would not readdress issues that had been litigated previously" did not bar federal review); Brecheen v. Reynolds, 41 F.3d 1343, 1358 (10th Cir. 1994) ("Oklahoma's rule preventing relitigation in state postconviction proceedings of claims raised and decided on direct appeal does not constitute a procedural bar to federal habeas review.").

The Supreme Court's decision in Cone teaches that this principle applies even where, as here, a state court wrongly finds that a claim has already been raised and addressed. In Cone, Gary Cone was convicted and sentenced to death for two murders. 556 U.S. at 453, 456, 129 S. Ct. at 1773, 1775. On direct appeal, he unsuccessfully argued that prosecutors

violated state law by failing to disclose relevant evidence. Id. at 457, 129 S. Ct. at 1775. Several years later, he filed a state habeas petition in which he argued for the first time that prosecutors violated his constitutional rights under Brady v. Maryland, 373 U.S. 83, 83 S. Ct. 1194 (1963). Cone, 556 U.S. at 458, 129 S. Ct. at 1776. The state post-conviction court, conflating the Brady claim with Mr. Cone's earlier state-law claim, found that it could not consider the Brady claim because it had already been decided on direct appeal. See id. at 460, 129 S. Ct. at 1777.

Mr. Cone next raised his Brady claim in a federal habeas petition, but the Sixth Circuit ultimately determined that the state procedural bar also prevented federal review. Id. at 462–63, 467, 129 S. Ct. at 1778–79, 1781. The Supreme Court reversed, explaining that "[w]hen a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." Id. at 466, 129 S. Ct. at 1781. This was so despite the fact that the state postconviction court's decision rested on a "false premise"—Mr. Cone had in fact never brought a Brady claim prior to his habeas petition. Id. at 466, 129 S. Ct. at 1780. The Supreme Court noted that although the state postconviction court could have found that Mr. Cone waived his Brady claim by failing to raise it on direct appeal, it had made no such ruling—and federal courts "have no concomitant duty to apply state procedural bars where state courts have themselves declined to do so." Id. at 467–69, 129 S. Ct. at 1781–82.

Cone controls here. As in Cone, the Court of Criminal Appeals' application of Alabama Rule of Criminal Procedure 32.2(a)(4) rested on a false premise. On direct appeal, Mr. Williams argued that trial counsel were ineffective because of their failure to present expert testimony and documentary evidence during the penalty phase of his trial. Williams, 795 So. 2d at 782. In contrast, Mr. Williams's Rule 32 petition argued that trial counsel were ineffective due to their failure to conduct a reasonable investigation—more specifically, by failing to "compile a constitutionally adequate social history for use in planning penalty-phase strategy," or to "discover and present the many material details that would have supported a mitigating theory based on Mr. Williams' history of abuse and neglect." Cf. Kelley v. Sec'y, Dep't of Corr., 377 F.3d 1317, 1347–49 (11th Cir. 2004) (holding that a petitioner's failure-to-investigate claim was distinct from more specific ineffective assistance claims based on counsel's failure to develop a successful theory of defense). Despite this factual error, the Court of Criminal Appeals clearly held that it could not address Mr. Williams's failure-to-investigate claims under Alabama Rule of Criminal Procedure 32.2(a)(4), which prevents state courts from considering previously determined claims.[5] Under Cone, this does not preclude federal review.

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[5] Although the state court could, perhaps, have found that Mr. Williams waived his failure-to-investigate claims by not raising them on direct appeal, see Ala. R. Crim. P. 32.2(a)(5), it did not. And as the Supreme Court explained in Cone, we "have no concomitant duty to apply state procedural bars where state

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The District Court treated the Rule 32 court's decision as an "adjudication on the merits" under § 2254(d) and found that the court's disposition of Mr. Williams's failure-to-investigate claims was not contrary to, or an unreasonable application of, Strickland. This was error. Section 2254(d)'s deferential standard of review has no application and federal courts must review Mr. Williams's claims de novo.

Still, we are reluctant to do so in the first instance because many of the factual allegations in Mr. Williams's federal petition remain untested. Mr. Williams requested, but was never granted, an evidentiary hearing in state and federal court. Based on our ruling here, the District Court is not limited to the state-court record, see Madison, 761 F.3d at 1249–50 & n.9, so we remand to the District Court to determine whether Mr. Williams is entitled to an evidentiary hearing in light of this opinion.[6]

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courts have themselves declined to do so." 556 U.S. at 468–69, 129 S. Ct. at 1782.

[6] We recognize that Mr. Williams's federal petition contains more factual detail than his Rule 32 petition. However, his Rule 32 petition clearly alleged that trial counsel had not met Strickland's standards because they failed to "compile a constitutionally adequate social history for use in planning penalty-phase strategy," or "discover and present the many material details that would have supported a mitigating theory based on Mr. Williams' history of abuse and neglect," including that Mr. Williams had been "sexually abused by an older male" when he was a child. Thus, his failure-to-investigate claims were "fairly presented" in

To guide the District Court in the exercise of its discretion, we add the following observations. First, "[s]ection 2254(e)(2) continues to have force where § 2254(d)(1) does not bar federal habeas relief," Cullen v. Pinholster, 563 U.S. 170, ___, ___, 131 S. Ct. 1388, 1401 (2011). That provision bars the district court from holding an evidentiary hearing "[i]f the applicant has failed to develop the factual basis of a claim in State court proceedings" unless certain circumstances are shown. 28 U.S.C. § 2254(e)(2). But "[b]y the terms of its opening clause the statute applies only to prisoners who have 'failed to develop the factual basis of a claim in State court proceedings.'" Williams v. Taylor, 529 U.S. 420, 430, 120 S. Ct. 1479, 1487 (2000) (quoting 28 U.S.C. § 2254(e)(2)). In this context, the Supreme Court has explained that "'fail' connotes some omission, fault, or negligence" on the part of the petitioner. Id. at 431, 120 S. Ct. at 1488. Thus, "a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel." Id. at 432, 120 S. Ct. at 1488; see also Breedlove v. Moore, 279 F.3d 952, 960 (11th Cir. 2002) ("[A] petitioner cannot be said to have 'failed to develop' relevant facts if he diligently sought, but was denied, the opportunity to present evidence at each stage of his state proceedings.").

In other words, the District Court on remand must determine whether Mr. Williams "was diligent in his

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state court. Lucas v. Sec'y, Dep't of Corr., 682 F.3d 1342, 1351 (11th Cir. 2012).

efforts" to develop the factual record in state court. Williams, 529 U.S. at 435, 120 S. Ct. at 1490. In Williams, the Supreme Court explained "[d]iligence . . . depends upon whether the prisoner made a reasonable attempt, in light of the information available at the time, to investigate and pursue claims in state court; it does not depend . . . upon whether those efforts could have been successful." Id. And "[d]iligence will require in the usual case that the prisoner, at a minimum, seek an evidentiary hearing in state court in the manner prescribed by state law." Id. at 437, 120 S. Ct. at 1490 (emphasis added). We express no opinion about whether Mr. Williams "failed to develop" his claims within the meaning of § 2254(e)(2).

Second, "[i]n deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief." Schriro v. Landrigan, 550 U.S. 465, 474, 127 S. Ct. 1933, 1940 (2007). As the Supreme Court recognized in Williams, an attorney representing a capital defendant has an "obligation to conduct a thorough investigation of the defendant's background." 529 U.S. at 396, 120 S. Ct. at 1515. With this in mind, the District Court must consider Mr. Williams's allegations that his lawyers spent "less than ten hours" preparing for the sentencing phase of his trial and spoke with only Mr. Williams's mother and aunt.

Third, because the sentencing judge and jury never heard evidence that Mr. Williams was a victim

of sexual abuse, such evidence is not "cumulative." Neither is it a "double-edged sword." Mr. Williams's federal habeas petition alleges that "[b]eginning when Marcus was about four years old until he was six, he was raped repeatedly by Mario Mostella, an older boy whose mother shared a house with Charlene Williams." The fact that a defendant "suffered physical torment, sexual molestation, and repeated rape" during childhood can be powerful mitigating evidence, and is precisely the type of evidence that is "relevant to assessing a defendant's moral culpability." Wiggins v. Smith, 539 U.S. 510, 535, 123 S. Ct. 2527, 2542 (2003).

Finally, we recognize that Mr. Williams's pretrial competency report states that he denied past physical, emotional, or sexual abuse. Although this may be relevant to the District Court's Strickland analysis, it does not by itself foreclose relief. Because this report only evaluated Mr. Williams's "competency to stand trial and mental state at the time of the alleged offense," it is not an adequate substitute for the "thorough investigation" required of attorneys representing capital defendants. Williams, 529 U.S. at 396, 120 S. Ct. at 1515. This is especially true because the competency report itself came with a significant disclaimer: "this information should be viewed cautiously without verification by a third party."

III. CONCLUSION

We vacate the District Court's order denying Mr. Williams's failure-to-investigate claims and its order

denying an evidentiary hearing on those claims. This case is remanded to the District Court to determine whether Mr. Williams is entitled to an evidentiary hearing and to reconsider his failure-to-investigate claims de novo.

VACATED AND REMANDED.

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

MARCUS BERNARD WILLIAMS,	)	
Petitioner,	)	
vs.	)	**1:07-cv-1276-KOB-TMP**
STATE OF ALABAMA,	)	
Respondent.	)	

ORDER

(Filed Apr. 12, 2012)

This matter is before the court on petitioner's Amended Petition for a Writ of Habeas Corpus (doc. 5). The court DENIES petitioner's request for an evidentiary hearing. In accordance with the Memorandum Opinion filed contemporaneously with this Order, the court DENIES the petition for writ of habeas corpus.

DONE and ORDERED this 12th day of April, 2012.

/s/ Karon O. Bowdre
KARON O. BOWDRE
UNITED STATES
DISTRICT JUDGE

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

MARCUS BERNARD WILLIAMS,	)	
Petitioner,	)	**Civil Action No. 1:07-cv-1276-KOB-TMP**
vs.	)	
STATE OF ALABAMA,	)	
Respondent.	)	

MEMORANDUM OPINION

(Filed Apr. 12, 2012)

This action, filed pursuant to 28 U.S.C. § 2254, seeks habeas corpus relief with respect to Petitioner Marcus Williams' state court conviction and death sentence on a charge of capital murder.

Procedural History

On February 24, 1999, following a jury trial, Marcus Williams was convicted of capital murder by intentionally causing the death of Melanie Rowell during a rape or attempted rape that occurred on November 6, 1996, in violation of Alabama Code § 13A-5-40 (1975). The next day, during the penalty phase of the trial, the jury voted 11 to 1 to recommend a sentence of death. The trial court conducted a formal sentencing hearing on April 6, 1999, and, in accordance with the jury's recommendation, sentenced the Petitioner to death.

Petitioner was represented at trial by attorneys Erskine Funderburg and Tommie Wilson.

The Alabama Court of Criminal Appeals affirmed Petitioner's conviction and death sentence on December 10, 1999. *See Williams v. State*, 795 So. 2d 753 (Ala. Crim. App. 1999). Rehearing was denied on January 28, 2000. The Supreme Court of Alabama subsequently granted Petitioner's application for *certiorari* and, on January 12, 2001, affirmed his conviction and sentence. *See Ex parte Williams*, 795 So. 2d 785 (2001). Rehearing was denied on March 30, 2001. The United States Supreme Court denied *certiorari* review on October 1, 2001. *See Williams v. Alabama*, 534 U.S. 900 (2001). Petitioner was represented by Joe Morgan, III, in the Alabama Court of Criminal Appeals. Petitioner was represented by Joe Morgan, III and Dennis Rushing on petition for writ of *certiorari* to the Alabama Supreme Court. Petitioner was represented by LaJuana Davis on petition for writ of *certiorari* review to the United States Supreme Court.

On September 20, 2002, Petitioner filed a Rule 32 petition. (Tab R. 43). On October 17, 2003, Williams filed an amended Rule 32 petition. In response to a motion by the State, the trial court dismissed the petitions as untimely on January 14, 2004, pursuant to *Davis v. State*, 890 So. 2d 193 (Ala. Crim. App. 2003). (Tab R. 37, p. 9). On March 4, 2004, the Alabama Court of Criminal Appeals reversed the dismissal of the petitions based on *Ex parte Davis*, 890 So. 2d 199 (Ala. 2004), which overruled *Davis v. State.* (Tab R. 37, p. 11). On remand, the trial court summarily dismissed the Rule 32

petition and amended petition on March 12, 2004, finding them time-barred by the two-year limitations period that Rule 32.2(c) established. (Tab R. 37; pp. 24-25); *see* Ala. R. Crim. P. 32.2(c).

On August 10, 2004, Petitioner filed his second amended Rule 32 petition. (Tab R. 40). In response to the state's motion to dismiss (Tab. R. 41), the court denied the petition without an evidentiary hearing on December 13, 2004. (Tab R. 59). The Alabama Court of Criminal Appeals affirmed the denial of Rule 32 relief in an unpublished opinion on December 16, 2006. (Tab R. 60). Rehearing was denied on January 12, 2007, and the Alabama Supreme Court denied *certiorari* on June 29, 2007. (Tab R. 61). The present § 2254 petition was filed on July 6, 2007, with the assistance of Leslie Smith.[1]

The Offense

The evidence presented at the 1999 trial was summarized by the Alabama Court of Criminal Appeals as follows:

> On November 6th, 1996, the defendant had been out with friends, drinking and smoking

[1] Leslie Smith filed a motion to withdraw as attorney of record on February 22, 2008, (Doc. 18), which was granted on February 23, 2008. Morad Fakhimi entered an appearance on November 6, 2007, (Doc. 9), and subsequently filed a motion to withdraw as an attorney of record on July 10, 2008, (Doc. 23), which was granted on August 15, 2008. Stephen Ganter, James Lawley and Matt Schulz entered appearances in 2008, and all remain as attorneys of record (Docs. 24, 25, and 26).

marijuana. Upon returning home that evening, the defendant's thoughts turned to a young female neighbor of his, Melanie Dawn Rowell, and his desire to have sexual relations with her.

At approximately 1:00 a.m. that night, Williams attempted to enter Rowell's back door, but the door was locked. He then noticed a kitchen window beside the door. He removed the screen from the window and found that the window was not locked. It was through that window that Williams obtained entrance to the apartment.

Williams proceeded through the kitchen to the stairs leading to the upstairs bedroom. Before exiting the kitchen, Williams removed a knife from a set of knives in a holder on a kitchen countertop. Part way up the stairs, knife in hand, Williams removed his pants. Upon reaching the upstairs area, Williams crossed over a 'baby gate' which protected Rowell's two children, ages 15 months and 2 years, from the stairs. Williams looked into the children's room and found them both asleep.

Williams then entered the room of Melanie Rowell. He climbed in bed on top of her. When he began removing Rowell's clothes, a struggle ensued. Rowell fought Williams and began screaming despite [his] being armed with a knife. Williams placed his hand over her mouth to silence her and once again attempted to remove her clothes. As Rowell

> continued to struggle, Williams placed his hands around her neck. Eventually Rowell ceased to struggle as Williams continued to strangle her. When she was motionless, Williams proceeded to have sexual intercourse with her for 15 to 20 minutes. Prior to ejaculation, Williams pulled out and ejaculated on Rowell's stomach. There was a small cut inflicted upon Rowell's throat that was determined to be post-mortem. The cause of death was asphyxia due to strangulation.
>
> As he left Rowell's apartment, Williams took her purse. According to his statement, he threw the purse and the knife into a dumpster outside the apartment, although a search of the dumpster the next day by law enforcement failed to find either.
>
> The defendant was subsequently arrested after being identified by the elderly female victim in a subsequent break-in in the Ashville area. Upon being taken into custody for that offense, the defendant gave a statement admitting his involvement in the death of Melanie Rowell.

Williams v. State, 795 So. 2d 753, 761-62 (Ala. Crim. App. 1999) (Tab R. 27 at 105).

The Claims

The § 2254 petition alleges multiple grounds for granting habeas corpus relief. Listed below are the claims asserted by Petitioner.[2]

I. The State denied Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by discriminating in the exercise of peremptory strikes. (Doc. 5, p. 4).

II. Trial counsel were ineffective during the guilt phase of Petitioner's trial, thereby depriving Petitioner of his rights under the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Doc. 5, p. 8).

i. Introductory claim—Trial counsel were ineffective due to inadequate compensation. (Doc. 5, p. 10).

A. Trial counsel prejudiced Petitioner before the first witness took the stand by making numerous unreasonable decisions during *voir dire.* (Doc. 5, p. 11).

i. Trial counsel failed to request individual *voir dire.* (Doc. 5, p. 12).

ii. Trial counsel failed to request *voir dire* on racial attitudes. (Doc. 5, p. 13).

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[2] The claim numbers as listed correspond with the claim numbers in Williams's amended habeas petition. However, some sub-claims that were not assigned a number in the amended habeas petition have been given a claim number because they were addressed separately by the state courts.

iii. Trial counsel failed to object to the prosecution's discriminatory use of its peremptory strikes. (Doc. 5, p. 16).

iv. Trial counsel failed to pursue questioning about the death penalty attitudes of a juror who signaled an extraordinary willingness to impose death. (Doc. 5, p. 18).

B. Trial counsel prejudiced Petitioner by failing to put before the jury the fact that a hair not matching Petitioner's was found on Ms. Rowell's shoulder during the crime scene investigation. (Doc. 5, p. 19)

C. Trial counsel rendered ineffective assistance of counsel by not retaining necessary defense experts. (Doc. 5, p. 22).

i. Trial counsel were ineffective for not retaining DNA experts to rebut the prosecution's evidence about the alleged DNA match found on the victim and to test the State's accuracy regarding the unidentified hair found on Rowell. (Doc. 5, p. 23)

ii. Trial counsel failed to retain a forensic medical expert to testify that Rowell's autopsy revealed no signs of rape. (Doc. 5, p. 23).

iii. Trial counsel were ineffective for failing to retain an expert to evaluate combined effects of intoxicating substances used by Williams on the day of the crime. (Doc. 5, p. 23).

D. Trial counsel prejudiced Petitioner by failing to object to improper testimony and physical evidence presented by the State. (Doc. 5, p. 24).

   i. Trial counsel allowed the State to violate Petitioner's right to due process by admitting and commenting on a highly prejudicial knife block set without requiring the State to lay a legally sufficient evidentiary foundation. (Doc. 5, p. 24).

   ii. Trial counsel allowed three State witnesses to indulge in rambling narratives in lieu of testimony. (Doc. 5, p. 26).

   iii. Trial counsel were ineffective for not objecting to the prosecutor's using leading questions during the trial. (Doc. 5, p. 27).

E. Trial counsel prejudiced Petitioner by failing to object to the State's impermissible closing argument, suggesting that Petitioner had a burden to present evidence that someone else committed the crime. (Doc. 5, p. 28).

F. Trial counsel prejudiced Petitioner by presenting the jury with inconsistent and damaging theories of defense during closing argument. (Doc. 5, p. 30).

G. Trial counsel were ineffective to abandon plea and defense of mental defect or disease. (Doc. 5, p. 35).

H. Trial counsel's many errors resulted in a verdict so unreliable as to violate due process and created a reasonable probability that, but for the errors, the result of Petitioner's guilt-phase trial would have been different. (Doc. 5, p. 37).

III. Trial counsel were ineffective during the penalty phase of Petitioner's trial, thereby depriving him of his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution and resulting in the unjust and unconstitutional imposition of the death penalty. (Doc. 5, p. 38).

A. Trial counsel's numerous guilt phase errors prejudiced Petitioner in the penalty phase well before the penalty phase had even started. (Doc. 5, p. 38).

B. Trial counsel's failure to investigate Petitioner's background prevented them from being able to present a constitutionally adequate mitigation case during the penalty phase and violated Petitioner's right to counsel under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Doc. 5, p. 40).

i. Trial counsel were ineffective because they failed to collect documentary evidence and hire a mitigation specialist. (Doc. 5, p. 40).

ii. Trial counsel were ineffective for failing to thoroughly investigate Williams's history. (Doc. 5, pp. 41, 43-51).

iii. Trial counsel were ineffective for failing to interview Allister Cook. (Doc. 5, p. 49).

iv. Trial counsel were ineffective for failing to adequately interview and prepare the penalty phase witnesses. (Doc. 5, pp. 57, 59).

v. Trial counsel failed to compile Williams's history of abuse and neglect. (Doc. 5, pp. 53-57, 60).

vi. Trial counsel failed to investigate Williams's history of mental illness. (Doc. 5, pp. 45, 48, 60, 62).

vii. Trial counsel failed to show that Williams's background contributed to his committing capital murder. (Doc. 5, p. 61).

viii. Trial counsel failed to present Williams's redeeming characteristics (Doc. 5, pp. 62-63).

IV. Appellate counsel rendered ineffective assistance in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, thereby depriving Petitioner of a meaningful appeal. (Doc. 5, p. 65).

V. Prosecutor denied Petitioner a fair trial and sentencing determination by engaging in a consistent pattern of gross misconduct. (Doc. 5, p. 67).

A. Prosecutor made improper comments regarding aggravating circumstances.

B. Prosecutor made improper comments regarding the evidence presented.

VI. The court violated Petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by sentencing him in violation of the United States Constitution by relying on a grossly inadequate pre-sentence report to sentence Petitioner. (Doc. 5, p. 69).

A. Alabama's sentencing scheme is unconstitutional. (Doc. 5, p. 70).

i. Judicial imposition of the death sentence denied Petitioner his Sixth Amendment right to a jury trial. (Doc. 5, p. 71).

ii. The aggravating factors were not charged in Petitioner's indictment. (Doc. 5, p. 74).

iii. Any finding that aggravating factors outweighed mitigating factors is invalid because such findings were not subject to the most stringent 'beyond a reasonable doubt' standard as required for conviction of criminal offenses. (Doc. 5, p. 75).

iv. The jury's recommendation of a death sentence is invalid. (Doc. 5, p. 77).

a. The jury members were told they only made a recommendation. (Doc. 5, p. 77).

b. The verdict is incapable of review as the jury's verdict form failed to specify which aggravating and mitigating factors were found. (Doc. 5, p. 78).

VII. It was a violation of Petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments not to allow the Defendant to conduct independent DNA testing of all suspects. (Doc. 5, p. 78).

VIII. The trial court violated Petitioner's constitutional rights to a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments by allowing DNA evidence. (Doc. 5, p. 79).

IX. The trial court violated Petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by limiting cross examination of an expert witness for the State. (Doc. 5, p. 80).

X. Inadequate evidence exists to support Petitioner's capital murder conviction. (Doc. 5, p. 82).

XI. Petitioner's conviction is in violation of his due process rights under the Fourteenth Amendment to the United States Constitution because no particularized intent exists and thus no capital murder. (Doc. 5, p. 84).

XII. The trial court violated Petitioner's right to a fair trial under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution by denying a motion for verdict of acquittal. (Doc. 5, p. 86).

XIII. The manner of execution used by the State of Alabama constitutes cruel and unusual punishment. (Doc. 5, p. 87).

XIV. The trial court violated Petitioner's rights under the Fifth, Sixth, Eighth, and Fourteenth

Amendments by allowing the State to present argument on an aggravating circumstance not charged. (Doc. 5, p. 88).

XV. The trial court violated Petitioner's constitutional rights to a fair trial and sentencing by permitting overly emotional testimony at the sentencing hearing. (Doc. 5, p. 89).

XVI. The trial court's charge on voluntary intoxication violated Petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Doc. 5, p. 90).

XVII. The trial court violated Petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by refusing to give a manslaughter charge. (Doc. 5, p. 91).

XVIII. The trial court violated Petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by allowing his coerced statement into evidence. (Doc. 5, p. 95).

XIX. The trial court violated Petitioner's constitutional rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments by charging the jury regarding an aggravating circumstance not indicted. (Doc. 5, p. 100).

XX. The trial court violated Petitioner's constitutional rights under the Fifth, Sixth, Eighth and Fourteenth Amendments by giving the jury an improper instruction on the meaning of "reasonable doubt." (Doc. 5, p. 104).

XXI. Petitioner's right to a fair and impartial jury was violated by jurors' failure to truthfully disclose on *voir dire* and the jurors' consideration of extraneous evidence during deliberations. (Doc. 5, p. 106).

XXII. The State failed to comply with its discovery obligations under *Brady v. Maryland.* (Doc. 5, p. 107).

XXIII. The cumulative effect of all the above listed errors entitles Petitioner to habeas relief. (Doc. 5, p. 108).

The Scope of Federal Habeas Review

Pursuant to 28 U.S.C. § 2254(a) (2006), a federal district court is prohibited from entertaining a petition for writ of habeas corpus "on behalf of a person in custody pursuant to the judgment of a State court" unless the petitioner alleges "he is in custody in violation of the Constitution or laws or treaties of the United States." In other words, this court's review of habeas claims is limited to federal constitutional questions. Claims pertaining solely to "an alleged defect in a [state] collateral proceeding" or to a "state's interpretation of its own laws or rules" does not provide a basis for federal habeas corpus relief under § 2254. *Alston v. Dep't of Corr., Fla.*, 610 F.3d 1318, 1325-26 (11th Cir. 2010) (citations omitted). Accordingly, unless otherwise expressly stated, use of the word "claim" in this opinion presupposes a claim of federal constitutional proportion.

A. Exhaustion and Procedural Default

Prior to seeking relief in federal court from a state court conviction and sentence, a habeas petitioner is first required to present his federal claims to the state court by exhausting all of the state's available procedures. *See* 28 U.S.C. § 2254(b)(1) (2006). The purpose of this requirement is to ensure that state courts are afforded the first opportunity to correct federal questions affecting the validity of state court convictions. The Supreme Court recently explained:

> Federal habeas courts reviewing the constitutionality of a state prisoner's conviction and sentence are guided by rules designed to ensure that state-court judgments are accorded the finality and respect necessary to preserve the integrity of legal proceedings within our system of federalism. These rules include the doctrine of procedural default, under which a federal court will not review the merits of claims, including constitutional claims, that a state court declined to hear because the prisoner failed to abide by a state procedural rule.

Martinez v. Ryan, 2012 WL 912950 at *6 (U.S. March 20, 2012).

As explained by the Eleventh Circuit:

> In general, a federal court may not grant habeas corpus relief to a state prisoner who has not exhausted his available state remedies. 28 U.S.C. § 2254(b)(1)(A) ("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 unless it appears that . . . the applicant has exhausted the remedies available in the courts of the State. . . ."). "When the process of direct review . . . comes to an end, a presumption of finality and legality attaches to the conviction. . . . The role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Smith v. Newsome*, 876 F.2d 1461, 1463 (11th Cir. 1989) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 [1983]).

Exhaustion of state remedies requires that the state prisoner "fairly present federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 [1971]) (internal quotation marks omitted). The Supreme Court has written these words:

> [T]hat the federal claim must be fairly presented to the state courts. . . . it is not sufficient merely that the federal habeas applicant has been through the state courts. . . . Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make

> sense to speak of the exhaustion of state remedies.
>
> *Picard*, 404 U.S. at 275. *See also Duncan*, 513 U.S. at 365 ("Respondent did not apprise the state court of his claim that the evidentiary ruling of which he complained was not only a violation of state law, but denied him the due process of law guaranteed by the Fourteenth Amendment.").
>
> Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues. "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 5-6 (1982) (citations omitted).

Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998) (alterations in original) (parallel citations omitted); *see also Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2009).

Moreover, if a petitioner fails to raise his federal claim to the state court at the time and in the manner dictated by the state's procedural rules, the state court can decide the claim is not entitled to a review on the merits, *i.e.*, "the petitioner will have *procedurally defaulted* on that claim." *Mason*, 605 F.3d at 1119 (emphasis added). Usually, if the last state court to examine a claim explicitly finds that the claim is

defaulted because the petitioner failed to follow state procedural rules, then federal review of the claim is also precluded pursuant to federal procedural default principles. *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). As the Eleventh Circuit recently stated:

> "The teeth of the exhaustion requirement comes from its handmaiden, the procedural default doctrine." *Smith v. Jones*, 256 F.3d 1135, 1138 (11th Cir. 2001). The doctrine of procedural default dictates that "[a] state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001). However, a state court's rejection of a federal constitutional claim on procedural grounds may only preclude federal review if the state procedural ruling rests upon "adequate and independent" state grounds. *Marek v. Singletary*, 62 F.3d 1295, 1301 (11th Cir. 1995) (citation omitted).

Ward v. Hall, 592 F.3d 1144, 1156-57 (11th Cir. 2010).[3]

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[3] "When the last state court rendering judgment affirms without explanation, [a federal habeas court will] presume that it rests on the reasons given in the last reasoned decision." *Mason*, 605 F.3d at 1118 n. 2. As the Supreme Court has observed:

> The problem we face arises, of course, because many formulary orders are not meant to convey *anything* as to the reason for the decision. Attributing a reason is therefore both difficult and artificial. We think that the attribution necessary for federal habeas purposes can be facilitated, and sound results more often assured, by applying the following presumption:

The Supreme Court defines an "adequate and independent" state court decision as one which "rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment." *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)); *see also Martinez*, 2012 WL 912950 at *6. Whether a state procedural rule is "adequate and independent" as to have a preclusive effect on federal review of a claim "is itself a federal question." *Lee*, 534 U.S. at 375 (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)).

The Eleventh Circuit has adopted a three-part test to determine if a state court ruling was based on adequate and independent grounds. *See Judd*, 250 F.3d at 1313. 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." *Judd*, 250 F.3d at 1313. Second, "the state court's decision

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> Where there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground. If an earlier opinion "fairly appear[s] to rest primarily upon federal law," we will presume that no procedural default has been invoked by a subsequent unexplained order that leaves the judgment or its consequences in place. Similarly where, as here, the last reasoned opinion on the claim explicitly imposes a procedural default, we will presume that a later decision rejecting the claim did not silently disregard that bar and consider the merits. . . .

Ylst v. Nunnemaker, 501 U.S. 797, 803 (1991) (internal citations omitted).

must rest entirely on state law grounds and not be intertwined with an interpretation of federal law." *Ward*, 592 F.3d at 1156-57 (citing *Judd*, 250 F.3d at 1313). Third, the state procedural rule must be adequate; that is, "firmly established and regularly followed" and not applied "in an arbitrary or unprecedented fashion." *Judd*, 250 F.3d at 1313 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)).

Federal deference to a state court's clear finding of procedural default under its own rules is so strong that

> "[A] state court need not fear reaching the merits of a federal claim in an *alternative* holding. Through its very definition, the adequate and independent state ground doctrine requires the federal court to honor a state holding that is a sufficient basis for the state court's judgment, even when the state court also relies on federal law." *Harris*, 489 U.S. at 264 n. 10, 109 S. Ct. 1038 (emphasis in original). *See also Alderman v. Zant*, 22 F.3d 1541, 1549-51 (11th Cir. 1994) (where a Georgia habeas corpus court found that the petitioner's claims were procedurally barred as successive, but also noted that the claims lack merit based on the evidence, "this ruling in the alternative did not have an effect . . . of blurring the clear determination by the [Georgia habeas corpus] court that the allegations was procedurally barred"), *cert. denied*, 513 U.S. 1061, 115 S. Ct. 673, 130 L. Ed. 2d 606 (1994).

Bailey v. Nagle, 172 F.3d 1299, 1305 (11th Cir. 1999) (alterations in original).

Of course, situations also arise where the doctrines of procedural default and exhaustion intertwine. For instance, if a petitioner's federal claim is unexhausted, a district court will traditionally dismiss it without prejudice or stay the cause of action to allow the petitioner to first avail himself of his state remedies. *See Rose v. Lundy*, 455 U.S. 509, 519-20 (1982). But "if it is clear from state law that any future attempts at exhaustion [in state court] would be futile" under the state's own procedural rules, a court can simply find that the claim is "procedurally defaulted, even absent a state court determination to that effect." *Bailey*, 172 F.3d at 1305 (citation omitted).

B. Exceptions to the Procedural Default Doctrine

In three situations "an otherwise valid state ground will not bar" a federal habeas court from considering a constitutional claim that is procedurally defaulted:

> (1) where failure to consider a prisoner's claims will result in a "fundamental miscarriage of justice"; (2) where the state procedural rule was not "'firmly established and regularly followed'"; and (3) where the prisoner had good "cause" for not following the state procedural rule and was "prejudice[d]" by not having done so.

Edwards v. Carpenter, 529 U.S. 446, 455 (2000) (Breyer, J., concurring) (internal citations omitted); *see also Coleman*, 501 U.S. at 749-50 ("[A]n adequate and

independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice.") (citations and internal quotation marks omitted); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default.").[4]

[4] *See also Herrera v. Collins*, 506 U.S. 390, 417 (1993) (assuming, without deciding, "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of the defendant unconstitutional," but stating that "the threshold showing for such an assumed right would be extraordinarily high"); *Davis v. Terry*, 465 F.3d 1249, 1252 n. 4 (11th Cir. 2006) ("It would be considered a fundamental miscarriage of justice if 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995))).

1. The "Fundamental Miscarriage of Justice" Standard

In a "rare," "extraordinary,"[5] and "narrow class of cases,"[6] a federal court may consider a procedurally defaulted claim in the absence of a showing of "cause" for the procedural default if either: (1) a fundamental miscarriage of justice "has probably resulted in the conviction of one who is actually innocent," *Smith v. Murray*, 477 U.S. 527, 537-38 (1986) (quoting *Carrier*, 477 U.S. at 496);[7] or (2) the petitioner shows "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty." *Schlup*, 513 U.S. at 323-27 & n. 44 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336

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[5] *Schlup*, 513 U.S. at 321 ("To ensure that the fundamental miscarriage of justice exception would remain 'rare' and would only be applied in the '*extraordinary case,*' while at the same time ensuring that the exception would extend relief to those who were truly deserving, th[e Supreme] Court explicitly tied the miscarriage of justice exception to the petitioner's innocence." (emphasis added)).

[6] *McCleskey*, 499 U.S. at 494 ("Federal courts retain the authority to issue the writ of habeas corpus in a further, *narrow class of cases* despite a petitioner's failure to show cause for a procedural default. These are *extraordinary* instances when a constitutional violation probably has caused the conviction of one innocent of the crime. We have described this class of cases as implicating a fundamental miscarriage of justice." (emphasis added) (citing *Carrier*, 477 U.S. at 485)).

[7] Specifically, in *Murray v. Carrier*, the Supreme Court observed that, "in an extraordinary case, where a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." 477 U.S. at 496.

(1992)); *see also*, *e.g.*, *Smith v. Murray*, 477 U.S. at 537-38. But even when exhaustion and procedural default are not at issue, federal review of a claim is fairly restricted if the state court decided the issue on the merits.

2. The "Firmly Established and Regularly Followed" Standard

The Supreme Court has held that a ruling on procedural grounds will be inadequate to bar federal habeas review if the procedural rule relied upon has not been firmly established and regularly followed. *See Edwards*, 529 U.S. at 450 (citing *Ford v. Georgia*, 498 U.S. 411, 423-24 (1991) ("state procedural default is not an 'independent and adequate state ground' barring subsequent federal review unless the state rule was 'firmly established and regularly followed' at the time it was applied"). A federal court must consider whether the procedural rule has been consistently applied in the courts of that state. In *Ford*, the Court held that the petitioner's habeas claims were not barred from federal review because the state court had applied a procedural rule retroactively. *See Ford*, 498 U.S. at 424-25 ("To apply *Sparks* retroactively to bar consideration of a claim not raised between the jurors' selection and oath would therefore apply a rule unannounced at the time of petitioner's trial and consequently inadequate to serve as an independent state ground within the meaning of *James*."). For a procedural ruling to satisfy the firmly established and regularly followed standard, a defendant must "have been apprised of" the

existence of the procedural rule and the manner in which it was applied. *Id.* at 423.

3. The "Cause and Prejudice" Standard

"A federal court may still address the merits of a procedurally defaulted claim if the petitioner can show cause for the default and actual prejudice resulting from the alleged constitutional violation." *Ward*, 592 F.3d at 1157 (citing *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977)). This so-called "cause *and* prejudice" standard is clearly framed in the conjunctive; therefore, a petitioner must affirmatively prove both cause and prejudice. *Cf. id.* (emphasis added).

To show "cause," a petitioner must prove that "some objective factor external to the defense impeded counsel's efforts" to raise the claim previously. *Carrier*, 477 U.S. at 488; *see also Amadeo v. Zant*, 486 U.S. 214, 221-22 (1988).

> Objective factors that constitute cause include "'interference by officials'" that makes compliance with the State's procedural rule impracticable, and "a showing that the factual or legal basis for a claim was not reasonably available to counsel." In addition, constitutionally "[i]neffective assistance of counsel . . . is cause." Attorney error short of ineffective assistance of counsel, however, does not constitute cause and will not excuse a procedural default.

McCleskey v. Zant, 499 U.S. 467, 493-94 (1991) (citations omitted); *see also Martinez*, 2012 WL 912950 at *5 ("Inadequate assistance of counsel at initial-review collateral proceeding may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial."); *Coleman*, 501 U.S. at 754 ("Attorney error that constitutes ineffective assistance of counsel is cause. . . ."). Further, "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel, a defendant has cause for his failure to raise the claim in accordance with applicable state procedures." *Reed v. Ross*, 468 U.S. 1, 16 (1984).

Once cause is proved, a habeas petitioner must also prove prejudice. Such a showing must go beyond proof "that the errors at his trial created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982); *see also McCoy v. Newsome*, 953 F.2d 1252, 1261 (11th Cir. 1992) (per curiam).

C. Rules Governing Habeas Corpus Cases Under § 2254

1. 28 U.S.C. § 2254(d) and (e)

By enacting the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"),[8] Congress significantly

[8] *See* Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended in scattered sections of 28 U.S.C.).

limited the circumstances under which a habeas petitioner may obtain relief. Indeed, under the AEDPA, a petitioner is only entitled to relief on a federal claim if he shows that "the state court decision was (1) 'contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States'; or was (2) 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'" *Boyd v. Allen*, 592 F.3d 1274, 1292 (11th Cir. 2010) (quoting 28 U.S.C. § 2254(d)); *see also Miller-El v. Dretke*, 545 U.S. 231 (2005); *Williams v. Taylor*, 529 U.S. 362, 404 (2000). Moreover, "[a] state court's factual findings are presumed correct unless rebutted by the petitioner with clear and convincing evidence." *Boyd*, 592 F.3d at 1293 (citing § 2254(e)(1)).

A state court's adjudication of a claim will be sustained under § 2254(d)(1) unless it is "contrary to" clearly established Supreme Court precedent or it is an "unreasonable application" of that law. These are two different inquiries, not to be confused or conflated, as the Supreme Court explained in *Williams v. Taylor:*

> Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) "*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."

529 U.S. at 404-05; *see also Alderman v. Terry*, 468 F.3d 775, 790-91 (11th Cir. 2006) ("[T]he 'contrary to' and 'unreasonable application' clauses are interpreted as independent statutory modes of analysis." (citation omitted)). Further, the AEDPA limits the source of "clearly established Federal law . . . to the holdings, as opposed to the dicta, of the [Supreme] Court's decisions as of the time of the relevant state-court decision." *Id.* at 412 (internal quotation marks omitted).[9]

A state-court determination can be "contrary to" clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Williams v. Taylor, 529 U.S. at 405 (citation omitted).

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[9] *See also Bowles v. Sec'y, Dep't of Corr.*, 608 F.3d 1313, 1316 (11th Cir. 2010) ("[F]ederal law is 'clearly established' only when it is 'embodied in a holding' of the Supreme Court. *Dicta* in Supreme Court opinions is not enough. Nor can anything in a federal court of appeals decision, even a holding directly on point, clearly establish federal law for § 2254(d)(1) purposes." (citations omitted)).

Likewise, a state-court determination can be an "unreasonable application"[10] of clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Id. at 407 (citation omitted). Whether a particular application of Supreme Court precedent is "unreasonable" turns not on subjective factors, but on whether the application of Supreme Court precedent at issue was "objectively unreasonable." *See Putman v. Head*, 268 F.3d 1223, 1241-49 (11th Cir. 2001). It is important to note, however, that the Supreme "Court has held on numerous occasions that it is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by [the Supreme]

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[10] "[W]hen the federal court is faced with a 'run-of-the-mill state-court decision applying the correct legal rule,' the companion 'unreasonable application' provision of § 2254(d)(1) is the proper statutory lens." *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006) (citation omitted).

Court." *Knowles v. Mirzayance*, 129 S. Ct. 1411, 1419 (2009) (citations and internal quotation marks omitted). Therefore, the proper inquiry under the AEDPA "is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold." *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (citation omitted).

Finally, "§ 2254(d)(2) regulates federal court review of state court findings of fact; the section limits the availability of relief to 'decisions that were based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.' " *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006) (brackets omitted) (quoting § 2254(d)(2)). Commensurate with the deference accorded to a state court's factual findings, "the petitioner must rebut 'the presumption of correctness [of a state court's factual findings] by clear and convincing evidence.' " *Ward*, 592 F.3d at 1155-56 (alterations in original) (quoting § 2254(e)(1)).[11] "This presumption of correctness applies equally to factual determinations made by state trial and appellate courts." *Bui v. Haley*, 321 F.3d 1304,

[11] *See also Schriro v. Landrigan*, 550 U.S. at 473-74 ("AEDPA also *requires* federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.' " (emphasis added) (quoting § 2254(e)(1))).

1312 (11th Cir. 2003) (citing *Sumner v. Mata*, 449 U.S. 539, 547 (1981)).[12]

Having explained the scope of this court's authority to review state court decisions, it is now appropriate

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[12] And in the unusual instances where the state trial and appellate courts rely on different legal theories in denying a petitioner's claim on the merits, both holdings are entitled to AEDPA deference. *See Allen v. Sec'y, Fla. Dep't of Corr.*, 611 F.3d 740, 752 (11th Cir. 2010). As the Eleventh Circuit explained in the context of an ineffective assistance of counsel claim:

> The state collateral trial court denied this claim based on *Strickland*'s performance element and did not mention the prejudice element. *See Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069 ("[T]here is no reason for a court deciding an ineffective assistance claim to approach the inquiry in the same order or even to address both components of the inquiry if the defendant makes an insufficient showing on one."). The court determined that: "[Allen] did not give counsel any theory of innocence to investigate prior to the sentencing phase. Thereafter, the theory was put forward as a possibility, not as fact. Under those circumstances, Counsel cannot be deemed ineffective for failure to investigate the Defendant's subsequently disclosed theory of innocence." *Florida v. Allen*, No. 92-30056-CF, slip op. at 44. The Florida Supreme Court denied this claim based on *Strickland*'s prejudice element. *See Allen II*, 854 So.2d at 1258 n. 5 (holding that this claim "lacks merit because Allen was not prejudiced by counsel's performance in the guilt phase"). *Under AEDPA we owe deference to both of those decisions. See Hammond*, 586 F.3d at 1331; *see also Cone*, 129 S.Ct. at 1784.

Id. (emphasis added); *see also Hammond v. Hall*, 586 F.3d 1289, 1330-32 (11th Cir. 2009) ("The Georgia courts, considered collectively, gave two consistent reasons for deciding against this claim. Each reason is due deference.").

to examine the federal procedural rules applicable to the controversy presently before the court.

2. Procedural Rules Governing Habeas Corpus Cases Under § 2254

Because "habeas corpus review exists only to review errors of constitutional dimension," a habeas corpus petition must meet the "heightened pleading requirements [of] 28 U.S.C. § 2254 Rule 2(c)." *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (citation omitted). "[T]he petition must 'specify all the grounds for relief available to the petitioner' and 'state the facts supporting each ground.'" *Mayle v. Felix*, 545 U.S. 644, 655 (2005) (quoting Rule 2(c) of the Rules Governing Section 2254 Cases in the U.S. District Courts, 28 U.S.C. foll. § 2254). Accordingly, a "general reference to the transcripts, case records and briefs on appeal patently fails to comply with Rule 2(c)." *Phillips v. Dormire*, 2006 WL 744387 at *1 (E.D. Mo. Mar. 20, 2006) (citing *Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990)); *see also Grant v. Georgia*, 358 F.2d 742 (5th Cir. 1966) (per curiam) ("The application fails to allege any facts upon which the trial court could find a deprivation of a constitutional right, or any other basis for collateral attack. Mere conclusionary allegations will not suffice." (citation omitted)).[13]

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[13] The Eleventh Circuit, in *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), adopted as binding precedent decisions of the former Fifth Circuit rendered prior to October 1, 1981.

The burden of proof is on the habeas petitioner "to establish his right to habeas relief and he must prove all facts necessary to show a constitutional violation." *Blankenship v. Hall*, 542 F.3d 1253, 1270 (11th Cir. 2008).[14] That is, to carry his burden, "a petitioner must state specific, particularized facts which entitle him or her to habeas corpus relief for each ground specified. These facts must consist of sufficient detail to enable the court to determine, from the face of the petition alone, whether the petition merits further habeas corpus review." *Adams*, 897 F.2d at 334; *see also Beard v. Clarke*, 18 Fed. Appx. 530, 531 (9th Cir. 2001) ("Conclusory allegations which are not supported by a statement of specific facts do not warrant habeas relief. . . . Notice pleading is insufficient; the petitioner must state sufficient facts." (citations omitted)).[15] Therefore, the mere assertion of a ground for relief, without more factual detail, does not satisfy a petitioner's burden of proof or the requirements of 28 U.S.C. § 2254(e)(2) and Rule 2(c) of the Rules Governing Section 2254 Cases in

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[14] *See also Stano v. Dugger*, 901 F.2d 898, 899 (11th Cir. 1990) ("If there has been no evidentiary hearing in state court on an issue raised on habeas corpus, one is required if the petitioner alleges facts which, if true, would entitle him to relief."); *Hill v. Linahan*, 697 F.2d 1032, 1036 (11th Cir. 1983) ("The burden of proof in a habeas proceeding is always on the petitioner.").

[15] *See also* Advisory Committee Note to Rule 4 of the Rules Governing § 2254 Cases in the U.S. District Courts, 28 U.S.C. foll. § 2254 ("[N]otice pleading is not sufficient [in habeas proceedings], for the petition is expected to state facts that point to a real possibility of constitutional error." (internal quotation marks omitted) (quoting *Aubut v. Maine*, 431 F.2d 688, 689 (1st Cir. 1970)).

the U.S. District Courts, 28 U.S.C. foll. § 2254. *See Smith v. Wainwright*, 777 F.2d 609, 616 (11th Cir. 1985) (holding that a general allegation of ineffective assistance of counsel is insufficient; a petition must allege specific errors in counsel's performance and facts showing prejudice). The Supreme Court has stated that "[a] prime purpose of Rule 2(c)'s demand that petitioners plead with particularity is to assist the district court in determining whether the State should be ordered to 'show cause why the writ should not be granted,' § 2243, or the petition instead should be summarily dismissed without ordering a responsive pleading." *Mayle*, 545 U.S. at 645 (citing Habeas Corpus Rule 4 pp. 2569-70).

INTRODUCTION TO THE DISCUSSION OF THE CLAIMS

With these elemental precepts in mind, the court now turns to Petitioner's claims. Claim I is a substantive claim of race discrimination in jury selection, followed by Claim II (A-G), which asserts various subclaims of ineffective assistance of counsel during the guilt phase of the trial. Claim III (A and B) asserts ineffective assistance of trial counsel at the penalty phase, and Claim IV alleges ineffective assistance of appellate counsel. In addition to these claims, Petitioner also alleges nineteen other claims (Claims V through XXIII) of substantive violations of his constitutional rights. Each of these claims is addressed, first, with respect to whether it is procedurally defaulted, and then whether any merits resolution of the claim by

the state courts is entitled to deference in accordance with 28 U.S.C. § 2254(d).

Discussion

CLAIM I. THE STATE DENIED MR. WILLIAMS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHT, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY DISCRIMINATING IN THE EXERCISE OF PEREMPTORY STRIKES.

In his amended habeas petition, Williams alleges that the State denied him his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution by discriminating in the exercise of peremptory strikes. (Doc. 5, p. 4). Specifically, Williams asserts that he established a *prima facie* claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), because the State's exercise of peremptory strikes demonstrated a clear pattern of discrimination when two of the three African American venire members were excluded from the jury without being questioned by the prosecution. The third African American was selected to serve on the jury.[16] *Id.* p. 8. Williams did not raise this claim at trial, on direct appeal or in his second amended Rule 32 petition, but instead raised it for the first time in his amended habeas petition.

The State responds by asserting that this claim is procedurally defaulted because Williams did not fairly present it as a federal claim in state court. (Doc. 14, pp.

[16] According to Williams, a fourth African American venire member was validly excused for cause. (Doc. 5, p. 6).

3-4). Further, Respondent contends that dismissal to allow Williams to raise the claim in state court would be futile because (1) a Rule 32 petition would be precluded by the statute of limitations, pursuant to Rule 32.2(c), Ala. R. Crim. P.; (2) a Rule 32 petition would be precluded by the bar on successive petitions, pursuant to Rule 32.2(b), Ala. R. Crim. P.; and, (3) the claim would be procedurally barred because it could have been raised at trial and on appeal, pursuant to Rule 32.2(a)(3) and (5), Ala. R. Crim. P. (Answer p. 4).

A claim is procedurally barred from federal review when it was not raised in state court and cannot now be raised in state court because "any attempt at exhaustion [in state court] would be futile" under the state's own procedural rules. *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (citing *Picard v. Connor*, 404 U.S. 270, 276 (1971)) and *Snowden v. Singletary*, 135 F.3d 732, 737(11th Cir. 1998)).

In *Collier v. Jones*, 910 F.2d 770, 772 (11th Cir. 1990), the Petitioner filed a habeas petition appealing his conviction, and alleged as grounds for relief, *inter alia*, that his rights were violated because of racial discrimination in the jury venire selection process. The Eleventh Circuit explained:

> We find, therefore, that these claims are presented to the federal courts in a posture analogous to claims that have never been presented to a state court, and which have become procedurally barred under state rules. Under such circumstances this circuit has held that *Harris*, 489 U.S. 255, 262 (1989) does

> not preclude a federal court from finding the claims procedurally barred. *See Parker v. Dugger*, 876 F.2d 1470 (11th Cir. 1989) (Holding, post-*Harris*, that where dismissal to allow exhaustion of un-exhausted claims would be futile due to state procedural bar, claims are considered procedurally barred in federal court.). Following this precedent, we hold Collier's two claims based on perjured testimony and racial discrimination in jury venire selection are procedurally defaulted.

Collier, 910 F.2d at 773.

As in *Collier*, Williams's claim that his constitutional rights were violated by the State's discriminatory use of peremptory strikes during *voir dire* is procedurally defaulted from federal review because Williams failed to present this claim in state court, and those claims have become procedurally barred under state procedural rules.

To counter procedural default, Petitioner alleges ineffective assistance of trial counsel (Claim II.A.iii—trial counsel failed to file a *Batson* motion to prosecution's discriminatory peremptory strikes) and appellate counsel (Claim IV) as cause for why this claim was not raised at trial and on appeal. (Doc. 21, p. 32). These arguments are unavailing, however. In *Murray v. Carrier*, 477 U.S. 478 (1986), the petitioner in a habeas action attempted to show cause for a procedural default by establishing that his attorney inadvertently failed to raise the claim on appeal. In rejecting that argument, the Court explained:

> The mere fact that counsel failed to recognize the factual or legal basis for a claim, or failed to raise the claim despite recognizing it, does not constitute cause for a procedural default. *Engle v. Isaac*, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783(1982). The question of cause for a procedural default does not turn on whether counsel erred or on the kind of error counsel may have made. So long as defendant is represented by counsel whose performance is not constitutionally ineffective under the standard established in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984), there is no inequity in requiring him to bear the risk of attorney error that results in procedural default.

Id. 478-479.

The Supreme Court also has noted that to constitute "cause" to excuse a procedural default, counsel's ineffectiveness in failing to raise properly the claim in state court "must have been so ineffective as to violate the Federal Constitution." *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Thus, to serve as "cause," the errors of counsel must not only rise to the level of satisfying the *Strickland* test, but the alleged ineffectiveness must also have been raised and exhausted in state court before it is asserted in the habeas action. Alleged ineffectiveness that is itself procedurally defaulted cannot be used as "cause" to excuse procedural default. *Id.* at 452.

Both Claims II.A.iii and IV as to ineffective counsel are procedurally defaulted as is discussed *infra*,

and therefore, cannot serve as cause to excuse the procedural default of the *Batson* challenge.

Even assuming no procedural bar, the facts presented fall short of the burden required to prove a *prima facie Batson* claim. In *Batson v. Kentucky*, 476 U.S. 79 (1986), the United States Supreme court discussed the relevant factors a defendant could submit in attempting to establish a *prima facie* case of racial discrimination in jury selection. The Court stated:

> [A] defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida, supra*, 430 U.S. at 494, 97 S.Ct. at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits "those to discriminate who are of a mind to discriminate." *Avery v. Georgia*, 345 U.S. at 562, 73 S. Ct. at 89. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empaneling of the petit jury, as in the

> selection of the venire, raises the necessary inference of purposeful discrimination.
>
> In deciding whether the defendant has made the requisite showing, the trial court should consider all relevant circumstances. For example, a "pattern" of strikes against black jurors included in the particular venire might give rise to an inference of discrimination. Similarly, the prosecutor's questions and statements during *voir dire* examination and in exercising his challenges may support or refute an inference of discriminatory purpose. These examples are merely illustrative. We have confidence that trial judges, experienced in supervising *voir dire*, will be able to decide if the circumstances concerning the prosecutor's use of peremptory challenges creates a prima facie case of discrimination against black jurors.

Batson, 476 U.S. 79, 96-97 (1986).

The burden of proof rests on the habeas petitioner to establish a factual basis for the relief he seeks. *Hill v. Linahan*, 697 F.2d 1032, 1034 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549, *reh'g denied*, 714 F.2d 159 (11th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984). The only facts Petitioner offered to establish a factual basis for this claim are that two of the three African Americans that were qualified for jury service were excluded. (Doc. 5, pp. 14, 16). While this "pattern" of strikes against African American jurors might give rise to an inference of discriminatory purpose, Petitioner has identified no other relevant circumstance that would

be material to whether the Petitioner established a *prima facie* case of discrimination against African American jurors. These facts, without more, are simply insufficient to establish a pattern of discrimination under *Batson.* Additionally, after careful examination of *voir dire*, this court finds that the prosecution's questions and statements were fair. This claim is due to be denied both as procedurally defaulted and as without merit.

THE INEFFECTIVE ASSISTANCE CLAIMS

The next category of claims raised by Petitioner asserts forms of ineffective assistance of counsel during the guilt and penalty phase of trial, and one alleging ineffective assistance of appellate counsel. In general terms, these claims allege the following:

Claim II. Williams received ineffective assistance of counsel during the guilt phase of his trial, in violation of his rights guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Claim III. Williams received ineffective assistance of counsel during the penalty phase of trial in violation of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

Claim IV. Williams received ineffective assistance of appellate counsel in violation

> of his rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

These claims are subject to common basic principles applicable to all claims of ineffective assistance of counsel. Before the court begins its discussion of Claims II, III, and IV, a prefatory explanation of the general constitutional standard applicable to ineffective assistance of counsel claims is helpful.

The Standard for Ineffective Assistance of Counsel

In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-pronged standard, under the Sixth Amendment, for judging the effectiveness of attorneys who represent criminal defendants at trial or on direct appeal.[17]

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[17] Ineffective assistance of counsel claims are specifically limited to the performance of attorneys who represented a defendant at trial or on direct appeal from the conviction. *See* 28 U.S.C. § 2254(i) (2006) ("The ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254."). The Supreme Court had previously stated in *Coleman v. Thompson:* "There is no constitutional right to an attorney in state post-conviction proceedings. Consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings." *Coleman*, 501 U.S. 722, 752 (1991) (citations omitted).

However, the Supreme Court's recent decision in *Martinez* creates a narrow exception to the Court's holding in *Coleman*. The *Martinez* Court wrote:

> To protect prisoners with a potentially legitimate claim of ineffective assistance of trial counsel, it is necessary to modify the unqualified statement in *Coleman* that an attorney's ignorance or inadvertence in a postconviction proceeding does not qualify as cause to excuse a procedural default. This opinion qualifies *Coleman* by recognizing a narrow exception: Inadequate assistance of counsel at initial-review collateral proceedings may establish cause for a prisoner's procedural default of a claim of ineffective assistance at trial.

2012 WL 912950 at *5.

The *Martinez* court explained the reason behind announcing this new rule:

> When an attorney errs in initial-review collateral proceedings, it is likely that no state court at any level will hear the prisoner's claim. This Court on direct review of the state proceeding could not consider or adjudicate the claim. See, *e.g.*, *Fox Film Corp. v. Muller*, 296 U.S. 207, 56 S. Ct. 183, 80 L .Ed. 158 (1935); *Murdock v. Memphis*, 20 Wall. 590, 22 L. Ed. 429 (1875); cf. *Coleman, supra*, at 730-731, 111 S. Ct. 2546. And if counsel's errors in an initial-review collateral proceeding do not establish cause to excuse the procedural default in a federal habeas proceeding, no court will review the prisoner's claims.
>
> The same is not true when counsel errs in other kinds of postconviction proceedings. While counsel's errors in these proceedings preclude any further review of the prisoner's claim, the claim will have been addressed by one court, whether it be the trial court, the appellate court on direct review, or the trial court in an initial-review collateral proceeding. *See*, e.g., *Coleman, supra*, at 756, 111 S. Ct. 2546.

Id. at *7.

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. *First*, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second*, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Id. at 687 (emphasis added); *see also Reed v. Sec'y, Fla. Dep't of Corr.*, 593 F.3d 1217, 1239-41 (11th Cir. 2010).

The Court also acknowledged that while § 2254(i) provides the ineffectiveness of counsel during post-conviction proceedings shall not provide a ground for relief, "'[c]ause' . . . is not synonymous with 'a ground for relief.' A finding of cause and prejudice does not entitle the prisoner to habeas relief. It merely allows a federal court to consider the merits of a claim that otherwise would have been procedurally defaulted." *Id.* at *11.

The Supreme Court did not reach the question, however, of whether there was a constitutional right to post-conviction counsel. *Id.* at *5 ("This is not the case, however, to resolve whether that exception exists as a constitutional matter. The precise question here is whether ineffective assistance in an initial-review collateral proceeding on a claim of ineffective assistance at trial may provide cause for a procedural default in a federal habeas proceeding.").

Stated differently, "[a] petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced his defense." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (citation omitted).

Because *Strickland*'s two-part test is clearly framed in the conjunctive, a petitioner bears the burden of proving *both* "deficient performance" *and* "prejudice" by "a preponderance of competent evidence." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc).[18] Thus, a court is not required to address both aspects of the *Strickland* standard if a habeas petitioner is unable to establish one prong. *See*, *e.g.*, *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) ("Because both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa.").

Further, when assessing ineffective assistance of counsel claims

> [I]t is important to keep in mind that "in addition to the deference to counsel's performance mandated by *Strickland*, the AEDPA adds another layer of deference—this one to a

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[18] *See also Kokal v. Sec'y, Dep't of Corr.*, 623 F.3d 1331, 1344 (11th Cir. 2010) ("[A] petitioner's failure to show either deficient performance or prejudice is fatal to a *Strickland* claim. . . ." (citation omitted)); *Williams v. Allen*, 598 F.3d at 789 ("The petitioner bears the burden of proof on the performance prong as well as the prejudice prong of a Strickland claim, and both prongs must be proved to prevail." (citation omitted)).

> State court's decision—when we are considering whether to grant federal habeas relief from a State court's decision." Thus, [a petitioner] not only has to satisfy the elements of the *Strickland* standard, but he must also show that the State "court applied *Strickland* to the facts of his case in an *objectively unreasonable manner.*"

Williams v. Allen, 598 F.3d at 789 (brackets in original omitted) (citations omitted); *see also Porter v. McCollum*, 130 S. Ct. 447, 452 (2009) (per curiam).

A. The Performance Prong

When reviewing whether defense counsel's performance was deficient, "the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices." *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009*)* (per curiam) (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 479 (2000)). As such, a habeas petitioner must show that counsel's representation fell "'below an objective standard of reasonableness' in light of 'prevailing professional norms'" to establish deficient performance. *Id.* at 16 (quoting *Strickland*, 466 U.S. at 687-88); *see also Williams v. Taylor*, 529 U.S. at 390-91; *Johnson v. Upton*, 615 F.3d 1318, 1330 (11th Cir. 2010) ("[T]he governing standard is objectively reasonable attorney conduct under prevailing professional norms. . . .").

Strickland instructs lower federal courts to be "highly deferential" while engaging in such assessments:

> 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 (emphasis added) (citations and quotation marks omitted); *see also Whisenhant v. Allen*, 556 F.3d 1198, 1204 (11th Cir. 2009) (per curiam) ("To counteract the distorting effects of hindsight, the defendant bears the burden of overcoming a strong presumption that the challenged action is sound trial strategy." (citation omitted)). A habeas petitioner "must establish that no competent counsel would have

taken the action that his counsel did take" to overcome the presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Chandler*, 218 F.3d at 1315 (citation omitted); *see also Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007).

In addition, the reasonableness of counsel's performance is judged from the perspective of the attorney, at the time of the alleged error, and in light of all the circumstances. *See*, *e.g.*, *Newland v. Hall*, 527 F.3d 1162, 1184 (11th Cir. 2008) ("We review counsel's performance 'from counsel's perspective at the time,' to avoid 'the distorting effects of hindsight.'" (quoting *Strickland*, 466 U.S. at 689)); *Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001) (giving lawyers "the benefit of the doubt for 'heat of the battle' tactical decisions"). As the Eleventh Circuit has stated:

> Under this standard, there are no "absolute rules" dictating what reasonable performance is or what line of defense must be asserted. [*Chandler*, 218 F.3d] at 1317. Indeed, as we have recognized, "[a]bsolute rules would interfere with counsel's independence—which is also constitutionally protected—and would restrict the wide latitude counsel have in making tactical decisions." *Putman v. Head*, 268 F.3d 1223, 1244 (11th Cir. 2001).

Michael v. Crosby, 430 F.3d 1310, 1320 (11th Cir. 2005). "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless [petitioner shows]

that no reasonable lawyer, in the circumstances, would have done so." *Rogers v. Zant*, 13 F.3d 384, 386 (11th Cir. 1994). Thus, an attorney's performance will be deemed deficient only if it is objectively unreasonable, *i.e.*, it falls below the wide range of competence demanded of attorneys in criminal cases, and petitioner shows "that no competent attorney would have taken the action that [the petitioner's] counsel did take." *Williams v. Allen*, 598 F.3d at 790 (citation and quotation marks omitted); *see also Stone v. Dugger*, 837 F.2d 1477, 1479 (11th Cir. 1988) ("[E]ven in capital felony cases defendants have no legal right to the very best counsel.").

B. The Prejudice Prong

Even when a petitioner proves that counsel performed in a deficient manner, a habeas petitioner must still establish that he or she suffered prejudice as a result of that deficiency. To satisfy this standard, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694; *see also Williams v. Taylor*, 529 U.S. at 391. The Eleventh Circuit has stated: "[t]he prejudice prong does not focus only on the outcome; rather, to establish prejudice, the petitioner must show that counsel's deficient representation rendered the result of the trial fundamentally unfair or unreliable." *Rhode v. Hall*, 582 F.3d 1273, 1280 (11th Cir. 2009)

(citing *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993)). And "[w]hen evaluating this probability, 'a court . . . must consider the totality of the evidence before the judge or jury.'" *Brownlee v. Haley*, 306 F.3d 1043, 1060 (11th Cir. 2002) (citation omitted).

Further, a habeas petitioner "must affirmatively prove prejudice, because '[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.'" *Gilreath v. Head*, 234 F.3d 547, 551 (11th Cir. 2000) (quoting *Strickland*, 466 U.S. at 693). The fact that counsel's "error had some conceivable effect on the outcome of the proceeding" is insufficient to show prejudice. *Strickland*, 466 U.S. at 693; *see also Porter*, 130 S. Ct. at 455-56. Instead, a petitioner must present competent evidence proving "that trial counsel's deficient performance deprived him of 'a trial whose result is reliable.'" *Brown v. Jones*, 255 F.3d 1272, 1278 (11th Cir. 2001) (citation omitted). Therefore, "when a petitioner challenges a death sentence, 'the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Stewart*, 476 F.3d at 1209 (quoting *Strickland*, 466 U.S. at 695).

C. Deference to the State Court's Findings

Section 2254 applies in addition to the underlying substantive law. The Supreme Court recently reminded lower federal courts of the highly deferential

standard applicable to review of a state court's denial of an ineffective assistance of counsel claim: "Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both 'highly deferential,' and when the two apply in tandem, review is 'doubly so.' " *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011) (citations omitted). As a result, this "doubly," "highly deferential" standard transforms the *Strickland* inquiry from "whether counsel's actions were reasonable" into "whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard." *Id.* (citations omitted). In other words, "[t]he pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland*'s standard." *Id.* at 785.

When the deference due under § 2254 combines with the *Strickland* standard for judging the performance of counsel, the result is double deference. *Harrington*, 131 S. Ct. at 788. "Double deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." *Johnson v. Secretary*, 643 F.3d 907, 911 (11th Cir. 2011) (finding such a rare case).

Finally, "[i]neffectiveness of counsel is a mixed question of fact and law." *Thompson v. Haley*, 255 F.3d 1292, 1297 (11th Cir. 2001) (citation omitted). "State

court findings of historical facts made in the course of evaluating an ineffectiveness claim are subject to a presumption of correctness under 28 U.S.C. § 2254(d)." *Thompson*, 255 F.3d at 1297.

CLAIM II. TRIAL COUNSEL WERE INEFFECTIVE DURING THE GUILT PHASE OF MR. WILLIAMS' TRIAL, THEREBY DEPRIVING MR. WILLIAMS OF HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

***i.* Introductory Claim Regarding Inadequate Defense Compensation**

As part of the introduction to his ineffective assistance of counsel claims, Petitioner first contends that Alabama provides inadequate funding and compensation for capital defense attorneys and experts. (Doc. 5, p. 10). This claim is the same claim raised in his Rule 32 petition. (Tab R. 40, p. 199). The Rule 32 court denied this claim because, in *Bui v. State*, 717 So. 2d 6, 15 (Ala. Crim. App. 1997), the Alabama Court of Criminal Appeals rejected the "notion the Alabama statutory scheme of compensating attorneys in capital cases, in and of itself, denies a defendant effective representation." (Tab R. 59, pp. 234-35).

The State asserts that this claim is procedurally defaulted because it was raised in the second amended Rule 32 petition, but then abandoned on appeal. (Doc. 14, p. 6). Indeed, Williams did not present this claim on appeal from the denial of his second amended Rule 32

petition. (*See* Tab. R. 40, p. 200.) A federal habeas petitioner is not entitled to relief unless "the applicant has exhausted the remedies available in the court of the State." 28 U.S.C. § 2254(b)(1)(A). Because he did not present this claim on appeal from the denial of the Rule 32 petition, Petitioner failed to exhaust his claim in state court. The one-year limitation for filing Rule 32 petitions defined by Rule 32.2(c) Ala. R. Crim. P., and the prohibition against successive petitions found at Rule 32.2(b) Ala. R. Crim. P., now preclude him from seeking to file a new petition to present this argument to the state courts. *See Collier v. Jones*, 910 F.2d 770 (11th Cir. 1990). For Petitioner to return to state court to seek exhaustion of this claim would be futile because these two rules preclude its consideration. Accordingly, this court is precluded from federal review of the claim as it is procedurally defaulted, unless Petitioner can show "cause and prejudice" or a "fundamental miscarriage of justice," and he has shown neither.

Alternatively, this court has previously rejected ineffective assistance challenges to convictions grounded on the assertion that inadequate compensation to counsel causes ineffectiveness. Inadequate funding of counsel appointed to represent capital defendants, as unfair as it might be to the attorneys, does not in itself amount to ineffective assistance of counsel *unless* it contributes to actual errors or shortcomings in the performance of counsel. The *Strickland* standard requires an analysis of specific errors or shortcomings by counsel.

As the Court in *Strickland* wrote:

> A convicted defendant making a claim of ineffective assistance must identify *the acts or omissions* of counsel that are alleged not to have been the result of reasonable professional judgment. The court must then determine whether, in light of all the circumstances, *the identified acts or omissions* were outside the wide range of professionally competent assistance. In making that determination, the court should keep in mind that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case.

Id. at 690 (emphasis added).

Thus, the allegation that compensation caps hindered the ability of counsel to represent a capital defendant has meaning only by reference to specific errors or shortcomings purportedly caused by inadequate defense funding. Only by examining specific errors or shortcomings can the court determine, first, whether it was an error outside the broad scope of competence expected of counsel, and second, whether the error caused real prejudice to the defendant. Consequently, as a claim of ineffectiveness divorced from analysis of particular errors or omissions, the assertion that the State of Alabama provides inadequate compensation for capital defense counsel and experts fails to state a basis for *habeas* relief, and it is due to be denied.

II.A. Trial counsel prejudiced petitioner by making unreasonable decisions during voir dire.

II.A.i. Trial counsel failed to request individual *voir dire* on juror biases related to intoxication

On page 12 of his amended habeas petition, Williams asserts that trial counsel was ineffective for failing to individually question jurors on their potential biases related to intoxication. This claim is identical to its Rule 32 predecessor, with two exceptions. The two exceptions, italicized below, are not contained in the second amended Rule 32 petition:

> Trial counsel were ineffective for failing to make a motion for individual *voir dire* to examine the prospective jurors' views about intoxication. *As the evidence at trial demonstrated, on the night of the crime, Mr. Williams had been out with friends, drinking and smoking marijuana. As a result, Mr. Williams'* intoxication was prominent in trial counsel's theory of defense and was presented to the jury as a basis for negating Mr. Williams' intent. (R. 326; 529-30). The nature of the intoxication defense called for individual *voir dire.* The prevalence of alcohol consumption and abuse in our culture leads many people to have deep convictions, accurate or not, about the effects of alcohol and other drugs and the relationship between intoxication and criminal culpability. Such deep convictions are a form of bias, and courts have recognized that a juror "may be reluctant to admit any bias in

front of his peers." *Williams v. Griswald*, 743 F.2d 1533, 1540 n.14 (11th Cir. 1984). *In a post-trial interview, Juror (A.M.) said: "That during the trial, Mr. Williams' defense attorneys did not deny their client's guilt and even used the words to the effect of 'we know he committed this crime but he was not in his right mind due to alcohol and drug use.' My personal beliefs are that drug and alcohol do not excuse an individual's actions." Juror A.M. further stated in a post-trial interview, "I am a strong proponent of the death penalty and I will always vote for the death penalty if it is an option available to me."*

> The record in this case contains a textbook example of why individual *voir dire* is necessary to determine the rationale underlying prospective jurors' thoughts and opinions. During *voir dire*, defense counsel Erskine Funderburg asked one panel, "[t]he three of you that indicated you wanted to change part of the system, what part of the system is it that you think should be changed?" (R. 138). There was no response. As courts have recognized, this is not surprising. *Williams*, 743 F.2d at 1540 n. 14. Individual *voir dire* would have allowed trial counsel to find out not only what parts of "the system" a few prospective jurors thought needed changing, but also what other relevant attitudes might have affected the prospective jurors' decision-making. Similar biases regarding

> intoxication also could have been explored and used in striking the jury.
>
> Trial counsel's unreasonable decision not to request individual *voir dire* on intoxication prejudiced Mr. Williams by depriving him of his right to make challenges for cause and informed peremptory challenges during jury selection. This deprivation violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution.

(Doc. 5, pp. 12-13) (Tab R. 41, pp. 16-17).

Again the State invokes the procedural default doctrine. Respondent's answer asserts that the Petitioner's claim is procedurally defaulted because the Rule 32 court held that it failed to comply with the specificity and full factual pleading requirement of Rule 32.6(b), which is an independent and adequate state procedural rule. (Doc. 14, p. 9). Further, Respondent argues that the factual allegation regarding Juror A.M. is undocumented, and was not presented on direct appeal or in the second amended Rule 32 petition and, therefore, is not properly before this court for review. *Id.*

The Eleventh Circuit recently held in *Borden v. Allen*, 646 F. 3d 785, 816 (11th Cir. 2011) that

> an Alabama court's consideration of the sufficiency of the pleadings concerning a federal constitutional claim contained in an Rule 32 petition necessarily entails a determination

> on the merits of the underlying claim; we cannot construe such a rule to be a state procedural bar that would preclude our review. We therefore must review the merits determination of the Court of Criminal Appeals under the deferential standards set forth in AEDPA. . . .

The court further stated that, "[e]ven if adjudications under Rule 32.6(b) were not categorically 'on the merits,'" review of the merits of a habeas petitioner's claim by a federal court is not foreclosed where the state court demonstrate that it did consider the merits of the petitioner's claim during the Rule 32 proceedings. *Id.* at 813.

The Rule 32 court in Williams' case held that this particular claim failed to satisfy the pleading requirements of Ala. R. Crim. P. 32.6(b). Because the Eleventh Circuit explicitly held in *Borden* that such rulings constitute decisions on the merits and, therefore, preclude a finding of procedural default, this courts finds that this particular claim of Williams is not procedurally defaulted.

Turning to the merits of Williams' claim, the court first notes that the state court determined that Williams' claim did not meet the specificity and full factual pleading requirements under Ala. R. Crim. P. Rule 32.6(b). Although this court has already determined that this claim has not been procedurally defaulted, the Rule 32 court's ruling on these grounds is significant. The Eleventh Circuit court stated in *Powell v. Allen,*

> [The] AEDPA limits our review to whether the state court's determination that [the petitioner] failed to plead sufficient facts in his Rule 32 petition to support a claim of ineffective assistance of counsel was contrary to or an unreasonable application of Supreme Court precedent. Thus, *we look only to the allegations in [the petitioner's] Rule 32 petition and whether those allegations sufficiently state a claim for ineffective assistance of counsel.*

602 F.3d 1263, 1273 (11th Cir. 2010) (footnote omitted) (emphasis added). Therefore, this court will only examine this claim as it was raised in Williams' Rule 32 petition, and whether the state court unreasonably applied Supreme Court precedent in holding that Williams did not sufficiently allege a claim for ineffective assistance of counsel.[19]

In doing so, the court turns to the Rule 32 court's finding. In reaching the conclusion that Petitioner had not adequately pled his claim under the standard required by Rule 32.6(b), the Rule 32 court explained:

> In Part V.A.(I), paragraphs 28-29 on pages 16-17 of Williams' second amended Rule 32 petition, he alleges that his trial counsel were ineffective for "failing to make a motion for individual voir dire to examine the prospective juror's views about intoxication and race."

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[19] The court will apply this standard to all similar ineffective assistance of counsel claims and sub-claims that the state courts dismissed on insufficient pleading grounds pursuant to Rule 32.6(b).

(Second amended petition at p. 16). The Court notes that Williams does not identify any specific juror in Part V.A.(i) that had a particular bias about intoxication or race—he merely contends his trial counsel were ineffective for not making the inquiry.

In Dobyne v. State, 805 So. 2d 733 (Ala. Crim. App. 2000), the Alabama Court of Criminal Appeals addressed a similar issue. In his Rule 32 petition:

> Dobyne contend[ed] that his trial counsel failed to conduct a "sufficiently thorough" voir dire of potential jurors on issues[.] . . . Specifically, Dobyne argues that his trial counsel was ineffective for not conducting an adequate voir dire to inquire into the prospective jurors' possible racial bias.

Id. at 751. In affirming the trial court's denial of postconviction relief, the Court of Criminal Appeals held that:

> Dobyne offers no support for his contention, other that a statement that he was entitled to such an inquiry. While it may be true that Dobyne was "entitled" to question the prospective jurors about their biases, that fact alone does not establish that counsel was ineffective for failing to conduct an inquiry.

Id. Just like Dobyne, Williams merely makes a general allegation that his trial counsel were ineffective for not making the inquiry.

> Williams fails, however, to plead any specific facts in his second amended Rule 32 petition that could have been revealed if trial counsel had requested and received permission to conduct individual voir dire. The Court finds that Part V.A.(i) fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, it is summarily dismissed.[20]

(Tab R-59 pp. 235-36).

This court finds that the state court's ruling was reasonable under *Strickland*. Although Williams's intoxication on the night of the offense was a significant part of the defense theory, without identifying specifically what facts trial counsel would have discovered through individual *voir dire* and how those undiscovered facts prejudiced Williams, the Petitioner is unable to satisfy his burden to prove that trial counsel was ineffective. The only facts Petitioner asserts was that individual *voir dire* was needed because a panel of three jurors did not respond when defense counsel asked, "what part of the system is it that you think should be changed?" (Doc. 5, p. 13). However, no facts indicate that the answer to that question posed individually would have elicited any information regarding juror bias, or that Williams was prejudiced by not having the question answered. Petitioner simply makes a factual

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[20] The court noted that on direct appeal, the Alabama Court of Criminal Appeals found that ?[t]he record does not reflect that the sentence of death was imposed as a result of influence of passion, prejudice, or any other arbitrary factor." *Williams v. State*, 795 So. 2d 753, 785 (Ala. Crim. App. 1999).

assertion that is void of any meaningful nexus to a lack of effective assistance of trial counsel.

Additionally, the trial court *did* instruct the jury on the defense of voluntary intoxication. Regardless of whether jurors had personal feelings about intoxication, the jury is obligated to decide the facts and apply the law accordingly. Nothing in the record indicates that the jury did not properly undertake its duty and follow the trial court's instructions. This claim is due to be denied.

II.A.ii. Trial counsel failed to request individual voir dire on racial attitudes

Williams alleges that his trial counsel was ineffective for failing to request individual *voir dire* on racial attitudes. Petitioner asserted this same claim at paragraphs 31-34 of his second amended Rule 32 petition in state court, with the exception that the factual allegations italicized below regarding statistics based on the race of the victim were omitted. (Tab R. 41, pp. 202-204). The claim states the following:

> Mr. Williams, who is African-American, was accused—and ultimately convicted of murdering Melanie Rowell, who was Caucasian, while raping or attempting to rape her. Especially in an interracial crime, adequate voir dire is essential to "unearth[ing] such potential prejudice in the jury pool" which could infringe on a defendant's right to a fair and impartial jury. *Jordan v. Lippman*, 763 F.2d 1265, 1275 (11th Cir. 1985). The United States

Supreme Court has held that "a capital defendant accused of an interracial crime is entitled to have prospective jurors informed of the race of the victim and questioned on the issue of racial bias." *Turner v. Murray*, 476 U.S. 28, 36-37 (1986); *Ham v. South Carolina*, 409 U.S. 524 (1973); *Rosales-Lopez v. United States*, 451 U.S.182 (1973). "Once rhetoric is put aside, it is plain that there is some risk of racial prejudice influencing a jury whenever there is a crime involving interracial violence. . . ." *Turner, supra*, 476 U.S. at 36 n.8. Because of the wide discretion entrusted to a capital sentencing jury, there is "unique opportunity for racial prejudice to operate but remain undetected." *Id.* at 35.

In Alabama, a death sentence is much more likely to result if the victim is white than if the victim is black. Nearly 75% of the people currently under sentence of death have been sentenced for crimes involving white victims although nearly 65% of all homicide victims in Alabama are black. Despite these gross disparities based on the race of the victim in Alabama and growing statistical evidence about the problem of racially biased imposition of the death penalty, Mr. Williams' trial counsel failed to challenge the racially skewed pattern of Alabama's death penalty by asking relevant questions during jury selection. Trial counsel did not ask a single question aimed at discovering prospective jurors' racial biases. Trial counsel were ineffective for failing to take advantage of the express constitutional rights to

question prospective jurors about their racial attitudes.

Trial counsel's failure to request voir dire on racial bias was especially unjustified in light of the accusation that Mr. Williams raped Ms. Rowell. Jurists have long recognized that no crime is more likely to generate discrimination than interracial rape. *See*, *e.g.*, *Furman v. Georgia*, 408 U.S. 238, 389 n.12 (1972) ("[S]tatistics suggest, at least as a historical matter, that [African-Americans] have been sentenced to death with greater frequency than whites in several States, particularly for the crime of interracial rape.") (Burger, C.J., dissenting); *id.* at 449 (discussing "substantial statistical evidence . . . tending to show a pronounced disproportion in the number of [African-Americans] receiving death sentences for rape in parts of Arkansas and elsewhere in the South") (Powell, J., dissenting).

Unjustified in the abstract, trial counsel's failure to request *voir dire* on racial attitudes becomes constitutionally unreasonable when viewed in the context of what happened at Mr. Williams' trial. During its case-in-chief, the State presented nine witnesses. The State's first exhibit, introduced through its first witness, established Ms. Rowell's appearance before she died. (R. 192). Although Mr. Williams' counsel never disputed her appearance, in an obvious effort to inflame the jury, four of the State's eight remaining witnesses gratuitously referred to Ms. Rowell during their

> testimony as a "white female." (R. 203); (R. 218, R. 223); (R. 299); (R. 440). Even the prosecutor asked a question referring to the victim as a "white female." (R. 440). This pattern of reference to race by the State's witnesses—all government employees—dispels any suggestion that race was not an issue at Mr. Williams' trial. The prejudice lies in trial counsel's failure to do anything to account for race when questioning the prospective jurors, and in the impermissible likelihood that race played a role in the jury's deliberation. As it happens, all but one of the jurors who deliberated on Mr. Williams' case were Caucasian. *See Jackson v. Herring*, 42 F.3d 1350, 1362 (11th Cir.1995) (noting that where crime has "particular racial dimensions, which would cast doubt upon a verdict returned by a racially unbalanced, unconstitutionally composed jury" courts must carefully assess Batson prejudice).

(Doc. 5, pp. 13-14) (footnote omitted) (italics added for emphasis).

The Respondent argues that this claim is procedurally defaulted because the Rule 32 court dismissed it pursuant to Rule 32.6(b), which is an adequate and independent state ground. (Doc. 14, p. 14). Respondent further asserts that the facts regarding statistics suggesting disparities in Alabama sentencings based on race, which were not included in the second amended Rule 32 petition, are not properly before this court. *Id.*

As the court discussed above, an Alabama state court decision based on Rule 32.6(b) constitutes a decision on the merits, so this claim has not been procedurally defaulted. Therefore, the court will address the merits of this claim by judging the reasonableness of the state court's decision.

In addressing this claim on collateral review, the Rule 32 court held that the claim failed to meet the pleading requirements of Rule 32.6(b):

> Williams allegations in Part V.A.(ii) are no more specific than those in Part V.A.(i). Referring to the victim as "a white female" was merely a means of identification and neither the State's witnesses nor the prosecutor placed any emphasis on the victim's or Williams' race during the trial. Further, the Alabama Court of Criminal Appeals specifically held that "[t]he record does not reflect that [Williams'] sentence of death was imposed as a result of the influence of passion, prejudice, or any other arbitrary factor." *Williams v. State*, 795 So. 2d at 784. Williams fails to identify in his second amended petition a single juror that gave any consideration to his or the victim's race when deliberating during the guilt or penalty phase of trial. The Court finds that the allegation Part V.A.(ii) fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, this allegation is summarily dismissed.

(Tab R. 59 p. 237).

This court finds that the state court's decision was a reasonable application of *Strickland*, because Williams has failed to demonstrate prejudicial error. Williams does not cite to facts that even remotely tend to show that racial prejudice was a factor in the jury decision. Instead, he makes sweeping generalization about the *possibility* of race being a discriminatory factor when the perpetrator and victim are of different races. The court also reviewed the testimony that Williams alleges demonstrates that race was an issue.

First, he cites to the direct examination of State's witness Thomas Dixon, Chief Investigator for the St. Clair County Sheriff's Department:

> Q [Prosecutor] Will you describe what you found when you entered that room?
>
> A [Chief Dixon] When I first walked into that bedroom, you could see a large bed that appeared to be the master bedroom. The headboard of the bed to the wall, which would if you were standing in the doorway facing that bed, the wall would have been to your right—the headboard would be to your right hand. Over behind that bed, between the bed and the wall beyond where I was standing, laid a body of a white female that appeared to be deceased.

(R. Tab. 8, pp. 202-203).

Next he cites to the direct examination of State's witness Gerald Wayne Burrow, former forensic scientist with the Alabama Department of Forensic Science:

> Q [Prosecutor] If you would, can you tell us what you did when you entered and what you found?
>
> A [Mr. Burrow] . . . We come to the second floor and these are the stairs continuing on up. We got to the top of the stairs and located almost to the first door, there was a child's gate that was stretched across the hallway to prevent a child from passing through and going down the stairwell. On the immediate left as you come up, there was a bedroom. In this bedroom was located a mattress and box springs that was on the floor. There was clothing and bed articles located just inside the door. Turning immediately to the left, there were other bed articles lying here. There was a pair of panties at this point. On the opposite side to the door, lying on the floor was the body of a white female. . . .

(Tab R. 8, p. 216).

Williams also cites to direct examination of State's witness Randy Wall, investigator with St. Clair County Sheriff's Department:

> Q [Prosecutor] What did you find in that bedroom?
>
> A [Mr. Wall] Upon entering that bedroom, I seen a bed the first thing with two mattresses. On the other side of it, laying in the floor was a white female, known now as Melanie Rowell.

(Tab R. 8, p. 299).

Lastly, Petitioner cites to the direct exam of State's witness Larry Huys, forensic scientist for the Alabama Department of Forensic Sciences, where both the witness and prosecutor refer to Ms. Rowell as a white female:

> A [Mr. Huys] As you entered the front door, there was a kitchen directly in front of you, and you walked into a living room or t.v. type area. There were stairs to your left. As you went up the stairs, there was a child's gate across the top stair. As you step across the gate to your left was a bedroom. The bedding was in disarray and there was a white female on the floor, deceased, in that bedroom. To your right was a child's bedroom and directly in front of you was more hallway with closet space.
>
> Q [Prosecutor] At that time, did you observe any stains on the body of the white female?

(R. Tab 8, p. 440).

As the Rule 32 court stated, the record reflects that in all of the above examples the references to the victim as a "white female" were simply a means of identification. The investigators were recounting what they found at the scene of the crime when they arrived, having no other means of identifying the victim at that time other than by her physical appearance using race and gender. Nothing in the record indicates that the witnesses or the prosecutor were attempting to inject race as an issue in their descriptions of the crime scene as they discovered it.

Finally, trial counsel made the following statements to potential jurors at the beginning of *voir dire:*

> And basically what we are looking for is anything we would consider to be a bias or prejudice. We are looking for twelve impartial people to sit on the jury in this case, and that is what all these questions are trying to help us do.

(Tab R. 4, p. 78). While this statement is not a specific question to a specific juror regarding racial bias, it did serve to put jurors on notice that their jury service required impartiality.

The court finds that this claim is due to be denied.

II.A.iii. Trial counsel failed to object to the prosecution's discriminatory peremptory strikes

In his amended habeas petition, Williams alleges for the first time that his trial counsel were ineffective for failing to object to the prosecution's discriminatory peremptory strikes and failing to file file a motion pursuant to *Batson v. Kentucky*, 476 U.S. 79 (1986). (Doc. 5, p. 16). The Respondent contends that this claim is procedurally barred because (1) it was not fairly presented as a federal claim in state court, (2) dismissal would be futile because of the statute of limitation in Rule 32.2(c), Ala. R. Crim. P., (3) dismissal would be futile because of the ban on successive petitions, pursuant to Rule 32.3(b), Ala. R. Crim. P., and (4) because it could have been but was not raised at trial or on

appeal, pursuant to Rule 32.2(a)(3) and (5). This court agrees.

The Supreme Court held that the procedural default rule applies where a claim has never been presented to the state courts. *Teague v. Lane*, 489 U.S. 288, 109 S. Ct. 1060 (1989). This claim is procedurally defaulted from federal review because it has not been presented to the state courts. Petitioner has not attempted to show "cause and prejudice" to excuse the default. Further, this claim cannot now be raised in state court because of the running of the one-year statute of limitations of Rule 32.2(c), and the ban on successive petitions, Rule 32.2(b), Alabama Rules of Criminal Procedure.

Even assuming no procedural bar, the facts presented fall short of the burden required to prove a *prima facie Batson* claim, as discussed, *supra*, in Claim I. That being the case—based on the facts presented, that Petitioner has not alleged sufficient facts to state a *Batson* claim—it could not be said that counsel was ineffective for failing to object to it. The Petitioner is not due any relief on this claim because lack of merit as well as the procedural bar.

II.A.iv. Trial counsel failed to pursue questioning about the death penalty attitudes of a juror who signaled an extraordinary willingness to impose death

In his amended habeas petition, Williams asserts that "numerous" jurors provided responses to *voir dire*

that indicated that they could not be fair and impartial. (Doc. 5, p. 18). This claim is similar to the second amended Rule 32 petition, with the exception that the second amended Rule 32 petition does not contain the first italicized paragraph, which provides some additional support of his claim:

> *"One touchstone of a fair trial is an impartial trier of fact—'a jury capable and willing to decide the case solely on the evidence before it." McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 554 (1984) (citing Smith v. Phillips, 455 U.S. 209, 217 (1982)). Numerous jurors gave responses indicating that they could not be fair and impartial to Mr. Williams. Despite this, trial counsel did not challenge them for cause. "[F]ailure to attempt to bar the seating of an obviously biased juror constitute[s] ineffective assistance of counsel of a fundamental degree." Hughes v. United States, 258 F.3d 453, 463 (6th Cir. 2001) (quoting Johnson v. Armontrout, 961 F.2d 748 (6th Cir. 1992)). "The question of whether to seat a biased juror is not a discretionary or strategic decision. The seating of a biased juror who should have been dismissed for cause requires reversal of the conviction." Id. at 463 (citing United States v. Martinez-Salazar, 528 U.S. 304, 316 (2000)). By failing to challenge these biased jurors for cause, trial counsel's performance was deficient and prejudiced Mr. Williams by denying him his constitutional rights to due process, a fair trial and to a fair and impartial jury, see Strickland, 466 U.S. 686, in violation of the Fifth, Sixth, Eighth, and*

> *Fourteenth Amendments to the United States Constitution.*
>
> During voir dire, the prosecutor asked a prospective juror (M.F.), who [was] identified as Catholic, if that affiliation led her to feel that she could not impose the death penalty under any circumstances. (R. 77). M.F. said that she could do "what needs to be done." Id. At that point, another juror (T.G.) spontaneously volunteered: "I'm Catholic too, and I have no problem with it." Trial counsel asked no questions to explore whether there was a predisposition of some kind that prompted T.G. to be so eager, and T.G. ultimately served on the jury. (CR. 104). Trial counsel's failure to explore more deeply prevented Mr. Williams from making a fully informed use of his challenges and resulted in the jury including a person with demonstrated zeal to be selected and to impose the death penalty. Because the presence of even one biased juror cannot be harmless error, prejudice under *Strickland* is presumed, and a new trial is required. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 309 (1991).

(Doc. 5, p. 19) (Italics added for emphasis). The Rule 32 court dismissed this claim on the merits; it explained:

> Trial counsel was obviously attempting to find out if M.F. opposed capital punishment because of his Catholic faith. Juror T.G. simply indicated that her Catholic faith would not prevent her from imposing death, which was exactly the type of information trial

> counsel was seeking. The Court finds nothing in T.G.'s response that would indicate any particular willingness to impose death. The Court finds that the allegation in part V.A.(iii) is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim. P.

(Tab R. 59, pp. 238-39).

The State argues that the findings and resolution of this claim on the merits by the Rule 32 court are entitled to deference under 28 U.S.C. § 2254(d), because that court's conclusion is neither contrary to, nor an unreasonable application of, existing Supreme Court precedent. (Doc. 14, p. 15). This court agrees.

Williams has failed to show that the state court's denial of this claim was contrary to or an unreasonable application of clearly established federal law, or an unreasonable determination of the facts in light of the evidence before it. Although Williams contends that "numerous" jurors gave responses that indicated that they could not be fair and impartial, Williams cites to only one example in the record regarding Juror T.G. Juror T.G.'s response that she had no opposition to the death penalty was exactly the information defense counsel sought, and was not indicative of any particular "zeal" to impose death. Further, no indication arises from Juror T.G.'s response that she could not make a fair and unbiased determination based on the evidence presented. Because trial counsel's decision was reasonable under the circumstances, the court does not need to explore the prejudice prong of the *Strickland* standard. This claim is due to be denied.

II.B. Trial counsel prejudiced Petitioner by failing to put before the jury the fact that a hair not matching Petitioner's was found on Ms. Rowell's shoulder during the crime scene investigation

At page 20 of Williams's amended habeas petition, he alleges that trial counsel was ineffective for failing to rebut the State's evidence by informing the jury that a hair not matching Williams's hair was found on the victim at the crime scene. (Doc 5, p. 20). Addressing this assertion, the court has compared the allegations made in the second amended Rule 32 petition (Tab R. 41, pp. 205-206), with the expanded legal and factual allegations proffered in support of this claim in the instant amended habeas petition. In applying the proper standards of habeas review, this court must view the state courts' disposition of the claim as it was presented to the state courts in the second amended Rule 32 petition, not as it is more fully fleshed out in the instant amended habeas petition.

Petitioner's second amended Rule 32 petition states:

> During a pre-trial hearing held September 9, 1997, the prosecutor disclosed that a hair had been found on the victim's shoulder area, and that "[t]here was a physical examination made that was inconsistent with the defendant in this case." (R. 14). On cross examination of State's witness, Wayne Burrow, trial counsel elicited an admission that the hair found on the victim's shoulder had been left off the

> physical evidence list admitted into evidence at the trial. (R. 226). Trial counsel then established on cross-examination of Larry Huys, the State's DNA expert, that a hair had been found on the victim's body but had not been tested because there was allegedly not enough DNA extracted from the root. (R. 457-58).
>
> Inexplicably, trial counsel then failed to provide the full picture to the jury. Trial counsel failed to ask Mr. Huys to explain the hair found on the victim's shoulder when the prosecutor already had admitted months earlier that the hair did not match Mr. Williams based on physical evidence. Trial counsel failed to ask Mr. Huys why a piece of physical evidence not matching Mr. Williams was left off the evidence list and lacked enough DNA to be tested when "a very minute amount" of semen and blood sample sufficed to link Mr. Williams with the crime scene. (R. 374). These failures prevented Mr. Williams from adequately confronting the witnesses against him, in violation of the Sixth and Fourteenth Amendments to the U.S. Constitution, Article I, § 6 of the Alabama Constitution, and Alabama law.

(Tab R. 41, pp. 205-206).

Denying the claim on the merits, the Rule 32 court wrote:

> On direct appeal, the Alabama Court of Criminal Appeals observed that "throughout the trial, [Williams'] defense was that he entered

> the victim's apartment with the intent to have sex with [the victim], but that he did not intend to kill her." *Williams v. State*, 795 So. 2d 763. Williams' statements to the police were consistent with his trial counsel's theory of defense. The fact that an unidentified hair was found on the victim during an autopsy would not have aided Williams' defense that he lacked the specific intent to murder the victim because he admitted being in her apartment. Further, given the other overwhelming evidence of Williams' guilt presented at trial, asking the State's DNA expert why he did not indicate on his evidence list that a hair found on the victim did not belong to Williams would have had little, if any, impeachment value. The Court finds that allegation in Part V.B. of Williams' second amended Rule 32 petition is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim. P.

(Tab R. 59, pp. 239-40).

The State argues that this claim was denied on the merits by the Rule 32 court, and that Williams has not alleged, and cannot show, that the state court decision was contrary to, or an unreasonable application of, clearly established Federal law, or resulted in and unreasonable determination of the facts in light of the evidence, pursuant to 28 U.S.C. § 2254(d). (Doc. 14, p. 17).

In light of the Rule 32 court's decision of this claim on the merits, this court's review is only to determine if the state court's decision was contrary to *Strickland*, or an unreasonable determination of the facts in light

of the evidence. The court finds that the Rule 32 court's determination was a reasonable determination of the facts in light of the evidence. Even if trial counsel had inquired further regarding the unidentified hair, no reasonable probability exists that the answers to those questions would negate the wealth of evidence presented by the State that Williams committed the offense. More importantly, no reasonable probability arises that identifying the hair as not belonging to Williams would have reduced his culpability. Therefore, this claim is due to be denied.

II.C. Trial counsel rendered ineffective assistance of counsel by not retaining necessary defense experts.

Williams's amended habeas petition alleged that trial counsel was ineffective for failing to hire defense experts to identify favorable evidence and to rebut the State's harmful evidence. Williams has combined several claims that were alleged separately on direct appeal into one claim in the amended habeas petition. This court will address each allegation separately as it was plead on direct appeal. Addressing these assertions, the court has compared the allegations made on direct appeal (Tab R. 28, pp. 86-87), with the expanded legal and factual allegations proffered in support of this claim in the instant amended habeas petition. In applying the proper standards of habeas review, this court must view the state courts' disposition of the claim as it was presented to the state courts on direct

appeal, not as it is more fully fleshed out in the instant amended habeas petition.

II.C.i. Trial counsel was ineffective for not retaining DNA experts to rebut the prosecution's evidence about the alleged DNA match found on the victim and to test the State's accuracy regarding the unidentified hair found on Rowell

In his amended habeas petition, Williams states that "trial counsel did not retain a DNA expert to challenge the State's conclusions about a match between the DNA found on the victim with Williams' DNA or to test the accuracy of the State's conclusion about the unidentified hair found on the victim." (Doc. 5, pp. 22-23). On direct appeal, Williams asserted essentially the same claim, except the direct appeal brief is more fully expanded and does not include the factual allegation regarding the unidentified hair found on Ms. Rowell's body. The claim on direct appeal states the following:

> The outcome of the trial could have been and in all probability, would have been different, if Defense Counsel had taken steps to attack the DNA evidence and to effectively impeach the testimony of the State's DNA expert. Defense Counsel did a noteworthy cross examination of the State's expert, but the expert knew more than DNA testing. The State's expert knew how to deny that there has ever been a problem with any DNA test that has ever been run.

> Every criminal defense lawyer in Alabama has a booklet or a handout which details the problem with DNA testing. These handouts reveal how test samples were reported as false positives, false negatives, nonhuman, and unclassified when the test samples were all from the same source. The State's expert knew nothing about these problems. He did not know anything about two civil cases from the Court of Civil Appeals where DNA testing mistakes had been made by the testing laboratory.
>
> A problem was that the knowledgeable Defense Counsel could not testify, and the defense did not have a defense witness who could testify. [T]he trial Court had been reasonable in approving funds for experts, and experts were available in the area.
>
> DNA was half of the evidence in this case. With an expert, this DNA test result could have been suppressed. It was ineffective assistance of counsel to go to trial without a defense expert in the field of DNA testing.

(Tab R. 28, pp. 86-87).

In addressing this claim on direct appeal, the Alabama Court of Criminal Appeals wrote:

> After reviewing the appellant's claims, we conclude that he has not satisfied his burden of proving that his counsel's performance was deficient and that that deficient performance prejudiced him. . . . [C]ounsel thoroughly cross-examined the State's DNA expert, and

> there is no indication that an additional expert would have aided the defense in this area.

Williams v. State, 795 So. 2d at 784, *cert. denied*, Ala. 2001.

The State argues that this claim is due to be denied because it was reviewed and denied on the merits, and Petitioner cannot show that the state court's denial of the claim was contrary to, or an unreasonable application of Federal law, or that the decision was based on an unreasonable determination of the facts in light of the evidence. (Doc. 14, pp. 19-20).

This finding is entitled to a presumption of correctness under 28 U.S.C. § 2254(d). This court concludes that the state court's findings are not contrary to or an unreasonable application of *Strickland*, or an unreasonable determination of the facts in light of the evidence. The state court determined that trial counsel did a reasonable cross examination of the State's DNA expert. (Tab R. 28, p. 86; *Williams*, 795 So. 2d at 784). During the lengthy cross examination of the State's DNA expert, trial counsel asked questions regarding the implications of statistical data regarding the following: the DNA match for the semen taken from Ms. Rowell's body and the blood drawn from Williams (Tab R. 8, 450-464, 467-68); the accreditation of the Alabama Department of Forensic Science (*Id.* at 464-466); and the Forensic Department's procedures regarding the chain of custody, access and storage of items obtained. (*Id.* at 466-67). Trial counsel undertook a

rigorous cross examination of the defense DNA witness, and exercised reasonable professional judgment. The Petitioner alleged no facts to demonstrate a reasonable probability that hiring a expert would have changed the outcome. Therefore, this claim is due to be denied.

II.C.ii. Trial counsel failed to retain a forensic medical expert to testify that Ms. Rowell's autopsy revealed no signs of rape

Williams' amended habeas petition alleges that trial counsel was ineffective for failing to hire a forensic pathologist or medical doctor to testify about the absence of signs of rape or attempted rape, absence of any obvious cause of death, and to buttress Williams's defense theory that Ms. Rowell died accidentally before the sexual assault. (Doc. 5, p. 23). Williams asserted a similar claim on direct appeal, but only alleged the need for a forensic expert to present testimony that there were no signs of rape or attempted rape. (Tab R. 28, p. 88). As previously stated, this court must view the state courts' disposition of the claim as it was presented to the state courts on direct appeal, not as it is more fully fleshed out in the instant amended habeas petition.

On direct appeal, the Alabama Court of Criminal Appeals concluded:

> Finally, the appellant alleges that an independent forensic expert was necessary to testify

> that the autopsy of the victim did not show that there had been a rape or an attempted rape. However, the coroner testified that, based on his examination of the victim's body, he could not determine whether anyone had raped or attempted to rape the victim. Thus, although he has made several allegations, the appellant has not shown that his attorneys performed in a deficient manner and that their allegedly deficient performance prejudiced him.

Williams v. State, 795 So. 2d at 784, *aff'd*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S. 900 (2001).

Because the state court denied the claim on the merits, the state court's finding is entitled to a presumption of correctness, pursuant to 28 U.S.C. § 2254(d). The state court's decision finds support in the trial testimony. On re-direct of the State's witness, Dr. Joseph Embry, the following testimony was given:

> Q [Mr. Willaimsom] Ms. Wilson asked if you examined the internal genitalia of Melanie Rowell. Is that correct?
>
> A [Dr. Embry] Yes.
>
> Q [Mr. Williamsom] Did you do that?
>
> A [Dr. Embry] Yes, sir.
>
> Q [Mr. Williamsom] From that examination, you said you found no injury. Is that correct?
>
> A [Dr. Embry] That's correct.

> Q [Mr. Williamsom] Does that mean there had not been sexual intercourse, or does it not mean that? Does it have any bearing on that?
>
> A [Dr. Embry] That does not rule that out.
>
> Q [Mr. Williamson] Can a sexually active female have intercourse without receiving injury to her genitalia?
>
> A [Dr. Embry] Yes.
>
> Q [Mr. Williamsom] Would you be able to tell us whether in fact she had intercourse or had not?
>
> A [Dr. Embry] No.

(Tab R. 8, pp. 475-76).

Trial counsel was not ineffective for failing to retain an expert to give the *same testimony* that the medical examiner gave. Petitioner has made no attempt to show by clear and convincing evidence that the finding is unreasonable in light of the record evidence. As such, § 2254(d) requires this court to presume it to be correct. Therefore, because the medical examiner testified in the very same manner that Petitioner alleges trial counsel was ineffective for not presenting by way of its own expert, this claim is not only meritless, but close to frivolous. This claim is due to be denied.

II.C.iii. Trial counsel ineffective for failing to retain expert to evaluate combined effects of intoxicating substances used by Williams on the day of the crime

This claim, as set out in the amended habeas petition, is virtually the same as its predecessor on direct appeal. *See* (Doc. 5, p. 24) and (Tab R. 28, p. 87). Petitioner argues that, because Williams's post-arrest statements suggested that Williams had been drinking alcohol and using marijuana and cocaine on the day of the crime, trial counsel was ineffective for failing to retain an expert to evaluate the combined effects of those substances to suppress Williams's statements or to buttress his voluntary intoxication defense. (Doc. 5, p. 24). On direct appeal, the Alabama Court of Criminal Appeals denied the claim on the merits, holding that "[Williams] has not shown what additional evidence an expert could have presented about the effects of alcohol and marijuana, and has not shown that there is a reasonable probability that such evidence would have altered the outcome of his trial." *Williams v. State*, 795 So. 2d at 784, *aff'd*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S. 900 (2001).

The State argues that the above claim was reviewed and denied on the merits by the Alabama Court of Criminal Appeals and that it is due to be denied because Williams did not allege, and cannot show, that the state court's denial of the claim was contrary to, or an unreasonable application of federal law, or that it was an unreasonable determination of the facts in

light of the evidence. (Doc. 14, pp. 19-20). This court agrees.

The state court decision is entitled to a presumption of correctness, pursuant to 28 U.S.C. § 2254. Williams has not provided any evidence that tends to show what information trial counsel was deficient in not collecting and how that information prejudiced the defendant. Petitioner has not shown that a reasonable probability that an expert's testimony regarding the combined effects of illegal substances would negate the specific and deliberate act of Petitioner on the night of the crime. Regardless of testimony an expert could have given, Petitioner's own statements, admitted into evidence, demonstrate that he was lucid enough to seek entrance to Ms. Rowell's home through a window after finding the back door locked, and to arm himself with a knife from Ms. Rowell's kitchen in preparation of committing the offense. (Tab R. 27, pp. 120, 124, and 126). Petitioner was also able to recount the events of the evening to the police once he was taken in for questioning, including describing and drawing the floor plan of Rowell's apartment. No reasonable probability exists that expert testimony could overcome the overwhelming evidence tending to show that Williams retained at least a functional level of cognizance on the night of the offense, regardless of what substances he had ingested. The state court's denial of this claim was not unreasonable, nor was trial counsel's decision to forego an expert to present testimony regarding Williams's toxicity on the night of the offense. Therefore, this claim is due to be denied.

II.D. Trial counsel prejudiced Petitioner by failing to object to improper testimony and physical evidence presented by the State

II.D.i. Trial counsel allowed the State to violate Petitioner's right to due process by admitting and commenting on a highly prejudicial knife block without requiring the State to lay a legally sufficient evidentiary foundation

This claim is identical to its second amended Rule 32 petition predecessor. *See* (Doc. 5, p. 24) and (Tab R. 40, p. 206). The entire claim reads as follows:

> During the State's direct examination of Donna Rowell, the victim's mother, the following exchange occurred:
>
> Q: I show you what is marked for identification as State's Exhibit No. 9. Would you look at that please?
>
> A: Yes.
>
> Q: Do you recognize that?
>
> A. Yes, sir.
>
> Q: What is that?
>
> A: My daughter's steak knives that she kept in her house sitting on her counter.
>
> Q: Was it in her house, on her counter on November 6, 1996?

A: Yes, sir.

Q: Is it the same one that was there?

A: Yes, sir.

Q: Was it in this condition?

A: Yes, sir.

Q: Were there five knives in there on November 6th?

A: Yes, sir.

Q: Did you actually take this and turn if over to the law enforcement people?

A: Yes, sir, I did.

Q: That's all.

(R. 192-193). This testimony failed to lay any foundation for ensuring that State's Exhibit No. 9 was trustworthy and therefore admissible. A set of steak knives is a common household item, and the testimony given by Ms. Rowell did not establish how she knew that the item marked as State's Exhibit No. 9 was the specific item that she claimed to have found in her daughter's apartment. She simply answered "yes" when asked if State's Exhibit No. 9 was the same knife set she found.

The State eventually asked the Court to admit the knife block based on the following direct testimony of Randy Wall:

Q: I show you what has been marked here as State's Exhibit No. 9 previously. Do you recognize that?

A: Yes, sir.

Q: What is that?

A: That is the knife block that was given to us that I received.

Q: Did you get this from Melanie's mom?

A: Yes, sir.

Q: Is this the same knife block that is represented in State's Exhibit No. 10 from Melanie's apartment?

A: Yes, sir.

(R. 316). The Court then admitted State's Exhibit No. 9, the knife block. (R. 316). Once the exhibit had been admitted, trial counsel objected but failed to point out the obvious lack of foundation (R. 316-17).

Trial counsel's failure to object to the admission of the knife block when no evidentiary foundation had been set out prejudiced Mr. Williams by allowing the jury to consider inadmissible, highly prejudicial physical evidence. The knife block played a main role in the prosecutor's closing arguments:

> He entered her apartment, and the first thing he did when he saw the knives on the kitchen counter, and he grabbed one

> of them. You heard that. He took one of the knives—this is the knife block that was in Melanie Rowell's apartment. There were six knives at one time, and now there are five. One is missing-one black handled knife. I submit to you the knive [sic] looks like this.
>
> (R. 490-91). The jury's consideration of this inadmissible evidence violated Mr. Williams' rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution.

(Doc. 5, p. 24; Tab R. 40, p. 206).

In examining the claim on collateral review, the Rule 32 court held that the claim was without merit:

> The testimony from the victim's mother quoted on pages 21-22 of Williams' second amended Rule 32 petition establishes the foundation for the admission of the knife block. The victim's mother testified that she recognized the knife block as the one the victim kept on her kitchen counter and stated that it was in the same condition at trial as it was the last time she saw it at the victim's apartment. (R. 191-192) *See Ex parte Works*, 640 So. 2d 1056, 1059 (Ala. 1994) (holding that "because the condition of the knife was not an issue in this case, and its authenticity was established by other means, it was not necessary to establish a chain of custody"). Obviously, trial counsel cannot be ineffective for failing to object to admissible evidence. *See*

> *Thomas v. Jones*, 891 F.2d 1500, 1505 (11 Cir. 1989) (holding that "counsel for defendant did not err in failing to object to [ ] admissible evidence"). Also, as previously stated, Williams did not dispute he entered the victim's home, "his defense was that he entered the victim's apartment with the intent to have sex with her, but that he did not intend to kill her." *Williams v. State*, 795 So. 2d at 763. The Court finds that the allegation in Part V.C.(i) of Williams' second amended Rule 32 petition is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim. P.

(Tab R. 59, pp. 240-41).

Respondent's answer to the habeas petition asserts that Williams has not alleged, and cannot show, that the Rule 32 court's denial of this claim resulted in a decision that was contrary to, or involved an unreasonable application of federal law, or that the decision was based on an unreasonable determination of the facts in light of the evidence. (Doc. 14, p. 22). This court agrees.

The Rule 32 court's decision was not objectively unreasonable. As the state court correctly noted, Williams defense at trial was that he intended only to rape her, not to kill her. In light of that defense, whether the chain-of-custody for admission of the knife block into evidence was scrupulously proven was immaterial. The link between the knife and the killing was not a substantial issue in dispute. Additionally, Williams never denied using the knife in commission of the

offense. The Petitioner's own statements admitted into evidence, and his testimony during the sentencing hearing before the trial judge, reflect that he got a black-handled knife from Rowell's kitchen counter in preparation for committing the offense. (Tab R. 27, p. 120; Tab R. 25, p. 613). Even today, the Petitioner makes no assertion that the knife admitted into evidence was tampered with or otherwise tainted in a way harmful to the defense.

Because the State properly laid the foundation for the admission of the knife block, trial counsel cannot be found to have fallen below a reasonable standard by failing to object to admissible evidence. Trial counsel's failure to object to the admission of the knife block was not unreasonable or ineffective assistance of counsel and that conclusion reached by the Rule 32 court was not contrary to federal law nor unreasonable. Therefore, this claim is due to be denied.

II.D.ii. Trial counsel allowed three State witnesses to indulge in rambling narratives in lieu of testimony

Williams alleged that trial counsel's failure to object to prejudicial narratives during the State's examination of three witnesses reflects ineffective assistance. (Doc. 5, p. 27). Williams cited as examples the testimony of Thomas Dixon (R. 210-203), Wayne Burrow (R. 216-18) and Joseph Embry (R. 470-71). Williams alleged the same claim in his second amended Rule 32 petition, but in a very abbreviated form. He

cited the same testimony as in the amended habeas petition, and alleged that it violated his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution. (Tab R. 41, p. 209). In applying the proper standards of habeas review relating to the "adequacy" of the state's procedural rule, this court must view the state court's disposition of the claim as it was presented to the state courts in the second amended Rule 32 petition, not in its expanded form presented in the instant amended habeas petition. (Tab R. 41, p. 209; Doc. 5, pp. 26-28).

Respondent contends that this claim is procedurally defaulted because the Rule 32 court denied the claim pursuant to Rule 32.6(b), Ala. R. Crim. P., which is an independent and adequate state law ground. The State's assertion is incorrect under *Borden*, as was discussed above. Because a decision based on Rule 32.6(b) constitutes a decision on the merits for purposes of federal habeas review, this claim is not procedurally defaulted, and the court will address the reasonableness of the state court's application of *Strickland.*

In denying the claim because it failed to comply with the pleading requirement of Rule 32.6(b), the Rule 32 court held the following:

> The record indicates that the three witnesses listed by Williams testified to facts within their personal knowledge based on their personal observations. Dixon and Burrow testified about the condition of the victim's apartment they observed and Embry testified about the physical condition of the

> victim's body before he performed the autopsy. Williams' attempt to support Part V.C.(ii) is to make the general assertion that his trial counsel's failure to object somehow violated his rights under the United States and Alabama Constitutions. Williams fails, however, to state in his second amended Rule 32 petition with any specificity how Dixon's, Burrow's, and Embry's answers caused him to be prejudiced. *See Stringfellow v. State*, 485 So. 2d 1238, 1243 (Ala. Crim. App. 1986) (holding that "effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made"). The Court finds that the allegations in Part V.C.(ii) of Williams' second amended Rule 32 petition fails to meet the specificity and full factual pleading requirement of Rule 32.6(b); therefore, it is summarily dismissed.

(Tab R. 59, p. 242).

This court finds that, based on the weakness of Williams' assertion, the decision of the Rule 32 court was reasonable under *Strickland.* After careful examination of the testimony of Dixon, Burrow and Embry, the court finds that the testimony was accurate in light of the other evidence presented at trial, including Petitioner's own statements. Additionally, Dixon, Burrow and Embry testified only to facts of which they had first hand knowledge. Habeas relief cannot be granted on this claim.

II.D.iii. Trial counsel ineffective for not objecting to the prosecutor using leading questions during the trial

Williams presented this allegation in his amended habeas petition as part of Claim II.D.ii., although it was presented separately in his second amended Rule 32 petition. In this claim, Williams alleges that trial counsel was ineffective because he allowed the prosecutor to repeatedly ask a "barrage of leading questions" on direct examination of the State's witnesses. (Doc. 5, p. 27). Williams also contends that "objecting to leading questions would have worked—the three times trial counsel objected to leading questions, the Court sustained the objection." This is virtually the same claim as presented during the Rule 32 appeal, except in the second amended Rule 32 petition, Williams listed all of the questions that he alleges were leading. (Tab R. 41, p. 24).

Respondent asserts that this claim is defaulted because it was insufficiently plead in state court pursuant to Rule 32.6(b), which is an independent and adequate state procedural default ground. (Doc. 14, p. 24). Respondent also alleges that this claim is a new factual allegation that was not previously plead in state court, and therefore, is not properly before this court. *Id.*

Decisions based on Rule 32.6(b) are decisions on the merits, and do not prompt procedural default. Therefore, the court will address the reasonableness of the Rule 32 court's decision under federal law. The

court also rejects the Respondent's argument that this allegation was not presented to the state courts; the Rule 32 court specifically addressed this claim. (*See* Tab R. 58, pp. 242-44).

The Rule 32 court denied this claim because it failed to meet the specificity and full factual pleading requirements of Rule 32.6(b):

> In support of Part V.C.(iii), Williams appears to have searched the record on direct appeal and listed in his second amended Rule 32 petition all the questions asked by the prosecution that could be considered leading because he lists 76 questions that, he contends, where leading and improper.
>
> The Alabama Court of Criminal Appeals has specifically held that:
>
> > "'Effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made.'" *Stringfellow v. State*, 485 So. 2d 1238, 1243 (Ala.Crim.App. 1986). 'Even though there were several instances where counsel could have objected, "that does not automatically mean that the [appellant] did not receive an adequate defense in the context of the constitutional right to counsel.' *O'Neal v. State*, 605 So. 2d 1247, 1250 (Ala. Crim.App. 1992)."
>
> *Thomas v. State*, 766 So. 2d at 876. Further, the Alabama Supreme Court has specifically

recognized that "[a] failure to object may suggest that the defense did not consider the comments to be particularly harmful." *Ex parte Payne*, 683 So. 2d 458, 465 (Ala. 1996).

Williams fails to state in his second amended Rule 32 petition with any specificity what "evidence" or information was improperly presented to the jury simply because the State may have asked some leading questions. *See Johnson v. State*, 557 So. 2d 1337, 1339 (Ala.Crim.App. 1990) (holding that "[t]rial counsel's failure to object to a leading question is not itself inadequate representation"); *see also Broadnax v. State*, 825 So. 2d 134, 182 (Ala. Crim.App. 1999) (holding that, "[while] many of the prosecutor's questions were leading, . . . the objectionable questions mainly elicited foundation information and did not result in the introduction of inadmissible evidence.") The Court has reviewed the questions listed in paragraphs 42 of Williams second amended Rule 32 petition and finds that many of the questions were asked simply to lay a foundation or proper predicate for the admission of evidence. Other questions were obviously follow-up questions that were based on a witness's previous answers. Williams' trial counsel were not ineffective simply because they did not object at every possible opportunity. *See O'Neal v. State*, 605 So. 2d 1247, 1250 (Ala.Crim.App. 1992) (quoting *Ex parte Lawleg*, 512 So. 2d 1370, 1373 (Ala. 1987), and holding that "[e]ven though there were several instances where counsel could have objected, 'that does not automatically mean that

> the [appellant] did not receive an adequate defense in the context of the constitutional right to counsel"). The Court finds that the allegation . . . fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, it is summarily dismissed.

(Tab R. 58, pp. 242-44).

This court finds the decision of the Rule 32 court reasonable under *Strickland*. Williams failed to allege any professionally unreasonable error by his trial counsel. Furthermore, after a careful examination of the record and the questions in context with the testimony, the questions of the prosecutor did not so infect the "trial with unfairness as to make the resulting conviction [or sentence] a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974)). This claim is due to be denied.

II.E. Trial counsel prejudiced Petitioner by failing to object to the State's impermissible closing argument, suggesting that Petitioner had a burden to present evidence that someone else committed the crime

A petitioner is entitled to habeas relief based on the improper comments of a prosecutor only if the comments "so infected the trial with unfairness as to make the resulting conviction [or sentence] a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S.

637, 643 (1974)). In his amended habeas petition, Williams alleged that, "[i]n closing arguments, the prosecutor suggested to the jury that Mr. Williams had an obligation to present evidence of his innocence, and that his decision not to present evidence should be weighed against him." (Doc. 5, p. 29). Petitioner alleged virtually the same claim in his second amended rule 32 predecessor (Tab R. 41, pp. 215-217), with the exception that the amended habeas petition supported the claim with Fifth and Sixth Circuit precedence. (Doc. 5, pp. 28-30).

This court must view the state court's disposition of the claim as it was presented to the state courts in the second amended Rule 32 petition. That petition stated:

> In its closing arguments, the prosecutor suggested to the jury that Mr. Williams had an obligation to present evidence, and that his decision not to present evidence should be weighed against him. (R. 493) ("If Marcus Williams didn't commit this crime, who did? What evidence is there of any other person before you that indicates someone else did it? There is none.") By implying that, in the absence of an alternative, the jury should convict Mr. Williams, the prosecutor's improper argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986). Trial counsel did not object to this violation of Mr. Williams' rights under the

Fifth and Fourteenth Amendments to the U.S. Constitution.

In this case, with three of Mr. Williams' statements admitted into evidence, a defense theory of mistaken identity would have required Mr. Williams to take the stand to deny his prior statements. By pointing out to the jury that the defense had not put forward evidence to support a theory of mistaken identity, the prosecutor in effect asked the jury to penalize Mr. Williams for not testifying. The prosecutor's comments violated Mr. Williams' rights under federal and state law. The Alabama Supreme Court has specifically held that "where there is a possibility that a prosecutor's comments could be understood by the jury as a reference to failure of the defendant to testify, Article I, § 6 [of the Alabama Constitution] is violated." *Beecher v. State*, 320 So. 2d 727, 734 (Ala. 1975); *see also Griffin v. California*, 380 U.S. 609 (1965); *Qualls v. State*, 371 So. 2d 949 (Ala. Crim. App. 1979) ("Where there has been direct comment on the defendant's failure to testify, and the trial court has not promptly acted to cure such statement, the conviction must be reversed.") (citation omitted); Ala. Code § 12-21-220 (1975) ("On the trial of all . . . criminal proceedings, the person on trial shall, at his request, but not otherwise, be a competent witness, and his failure to make such a request shall not create any presumption against him *nor be the subject of comment by counsel*") (italics addded.).

> Trial counsel prejudiced Mr. Williams by allowing the prosecutor to send the jury into deliberations with the constitutionally impermissible idea that Mr. Williams should be penalized for not testifying. This violated Mr. Williams' rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, Article I, § 6 of the Alabama Constitution, and Alabama law.

(Tab R. 41, pp. 215-217).

Holding that this allegation was without merit, and therefore denied, the Rule 32 court stated:

> In *Price v. State*, 725 So. 2d 1003 (Ala. Crim. App. 1997), the Alabama Court of Criminal Appeals held that "[t]he prosecutor ha[s] a right to comment on the strength of the evidence the State ha[s] presented and to draw any reasonable inferences from it." *See also Broadnax v. State*, 825 So. 2d at 183 (holding that "[i]t is not improper for the prosecutor to refer to the strength of the [S]tate's case." In the context of evidence presented by the State at Williams' trial, including Williams' three statements to police, the Court finds that the prosecutor's comments quoted by Williams were proper arguments concerning the strength of the State's case and not references to Williams' decision not to testify in his own defense. *See Roberts v. State*, 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997) (holding that "[a] prosecutor's closing statement must be viewed in the context of all of the evidence presented and in the contest of the complete

> closing arguments to the jury"). The Court finds that the allegation in Part V.D. is without merit; therefore, it is denied. Rule 32.7(d), Ala. R. Crim P.

(Tab R. 59, p. 30).

The Respondent argues that this claim is due to be denied because it was reviewed and denied on the merits by the Rule 32 court, and Williams has not alleged, and cannot show, that the Rule 32 court's denial was contrary to, or an unreasonable application of Federal law, or that it resulted in a decision that was an unreasonable determination of the facts in light of the evidence. (Doc. 14, p. 26).

The state court's determination of this claim on the merits is entitled to a presumption of correctness. 28 U.S.C. § 2254(d). The Petitioner has not attempted to show that the state court's decision is an unreasonable determination of the facts in light of the evidence presented. The conclusion by the Rule 32 court that Petitioner's claim was without merit is not objectively unreasonable. Taken in context, the remarks were proper arguments, presenting to the jury a summation of what the prosecution deduced the evidence tended to demonstrate. The State's pronouncement that there was no evidence that someone other than Petitioner committed the crime did not undermine the fundamental fairness of the guilt phase proceedings and was supported by the evidence. *See Drake v. Kemp*, 762 F.2d 1449, 1458 (11th Cir. 1985) ("Improper argument will only warrant relief if it renders a Petitioner's trial or

sentencing 'fundamentally unfair'"). Because the remarks were not improper, counsel's failure to object to them cannot support a claim of ineffective assistance of counsel.

Furthermore, the Supreme Court has stated, "the Fifth Amendment, in its direct application to the Federal Government and in its bearing on the States by reason of the Fourteenth Amendment, forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California*, 380 U.S. 609, 615 (1965).

The Eleventh Circuit has described the proper manner in which to evaluate a claim under *Griffin*:

> The Fifth Amendment prohibits a prosecutor from commenting directly or indirectly on a defendant's failure to testify. A prosecutor's statement violates the defendant's right to remain silent if either (1) the statement was manifestly intended to be a comment on the defendant's failure to testify; or (2) the statement was of such a character that a jury would naturally and necessarily take it to be a comment on the failure of the accused to testify. The question is not whether the jury possibly or even probably would view the remark in this manner, but whether the jury necessarily would have done so. The defendant bears the burden of establishing the existence of one of the two criteria. The comment must be examined in context, in order to evaluate the prosecutor's motive and to discern the impact of the statement. . . .

United States v. Knowles, 66 F.3d 1146 (11th Cir.1995) (citations, quotations, and footnotes omitted). See also *United States v. LeQuire*, 943 F.2d 1554, 1565 (11th Cir.1991) (same); *Solomon v. Kemp*, 735 F.2d 395, 401 (11th Cir.1984).

In applying *Griffin*, we have strictly enforced the requirement that a defendant show that the allegedly offensive comment was either manifestly intended to be a comment on the defendant's silence or that the comment naturally and necessarily related to the defendant's silence. For example, in *Knowles*, the Court considered whether a prosecutor violated *Griffin* when he pointed out problems with the defendant's defense, and then asked, "Did you ever hear an explanation for that'" 66 F.3d at 1162. The Court held that this statement did not necessarily relate to the defendant's silence, because the defendant could have presented other types of evidence to explain the inconsistency. *Id.* at 1163. Therefore, the Court concluded that:

> As such, the remark is not so much a comment on Wright's failure to testify, but rather on Wright's counsel's failure to counter or explain the [damaging evidence]. It is not error to comment on the failure of the defense as opposed to the defendant, to counter or explain the evidence.

> *Id.* at 1163 (citations and quotations omitted).
>
> Likewise, in *Solomon v. Kemp*, the prosecutor addressed the fact that the State was not sure which one of two defendants possessed which of two guns found at a crime scene, and stated: "We don't know which defendant had which gun. The only person who can tell us that is [the defendant]." 735 F.2d at 401. We held that this statement was proper under *Griffin*, stating:
>
> > We find the statement to be rather an attempt to explain why the state could not match each defendant with one specific gun and to stress that this fact was not crucial to the state's case. Although the statement was an indirect reference to petitioner's silence, taken in context it is an objective evaluation of the state of the evidence. As such, it is permissible under *Griffin*.
>
> *Id.*

Isaacs v. Head, 300 F.3d 1232, 1270-71 (11th Cir. 2002), *cert. denied*, 538 U.S. 988 (2003) (emphasis added).

Williams cannot prove his burden that the prosecutor's comments violated *Griffin*. When the comments are viewed in context, Williams has not established that the prosecutor intended to comment on Williams's failure to testify; nor has he established that either

statement was of such a character that the jury would necessarily have viewed the statements to be a comment on Williams's failure to testify. The comment was an accurate account of the evidence presented. The state court's adjudication was not contrary to, or an unreasonable application of *Strickland.* This claim is due to be denied.

IIF. Trial counsel prejudiced Petitioner by presenting the jury with inconsistent and damaging theories of defense during closing argument.

In his amended habeas petition, Williams alleged that trial counsel presented damaging defense theories in closing arguments during his guilt phase, in violation of Williams's Fifth, Sixth and Fourteenth Amendment rights. Specifically, Williams asserts that trial counsel conceded felony murder and inappropriately commented on the abuse of a corpse, by stating, "[y]ou know, you can't commit rape on someone already dead." (Doc. 5. pp. 31-32; Tab R. 41 p. 217). Petitioner asserts that these errors provided the prosecutor an opportunity to play on the jury's emotions when he stated:

> He wants you to say it can't be capital murder because she didn't get raped until she was a corpse. That is the most—the worst thing I can think of for a man to sit down and say he raped her for fifteen or twenty minutes.

Id.

This claim is the same as its second amended Rule 32 predecessor, with two significant exceptions. In the amended habeas petition, Williams argues vigorously that trial counsel failed to provide any evidence that Petitioner did not have the requisite specific intent to kill and that trial counsel was ineffective for conceding that Williams committed rape and murder. (Doc. 5, pp. 32-34). However, this court must view the state court's disposition of the claim as it was presented to the state court in the second amended Rule 32 petition, not in is expanded form as in the instant amended habeas petition.

The Rule 32 court explained:

> The Court must review trial counsel's guilt phase closing arguments in the context of all the evidence presented at Williams' trial and in the context of trial counsel's entire closing argument, not in isolation. *See Duren v. State*, 590 So. 2d 360, 366 (Ala. Crim. App. 1990) (holding that a reviewing court "must evaluate [trial counsel's statements] in the context of the entire closing argument"). In his guilt phase closing argument, trial counsel stated:
>
> > I asked you in opening, the question for you to decide in this case was how was [the victim's] life taken. That is still the question. The question is: Did this man take her life? Yeah, he did. Why was he in there? You got his statement. He went in with the intent to rape her. He was going to rape her but she died. It is in all three

> statements. She dies. She quit breathing and didn't move. It is in his statements, but in that third statement, the order somehow reverses or they try to reverse it. You know, you can't commit rape on someone already dead. They figured that out. That is why they went back for that other statement. If they get in the order it was argued to you, rape and then murder, it changes. But that is not the way it is in those first two statements and in the testimony you heard. It doesn't make the situation pleasant. Don't get me wrong. If you do the job and apply the law and apply the facts, he is guilty of murder and attempted rape. What it is he went in with the intent to rape her and she died. He didn't intend to murder her.

(R. 502-503) [(emphasis added)]. When read in the proper context, trial counsel's guilt phase closing arguments were not inconsistent. Trial counsel was attempting to explain to the jury why law enforcement took Williams' third statement—to get the facts right in order to charge him with capital murder instead of felony-murder. In the light of Williams' statements to police, trial counsel's closing argument, which attempted to convince to the jury to convict Williams of the lesser-included offense of felony-murder instead of capital murder, was entirely reasonable and a sound trial strategy. *See Strickland v. Washington*, 104 S.Ct. at 2066 (holding that [t]he reasonableness of counsel's actions may be determined or substantially influenced by the

> defendant's own statements or actions"). The Court finds that the allegation in Part V.E. is without merit and fails to state a claim or establish that a material issue of fact or law exists as required by Rule 32.7(d); therefore it is denied.

(R. Tab 59, pp. 246-47) (footnote omitted).

The Respondent contends that this claim was reached on the merits and is entitled to a presumption of correctness, pursuant to 28 U.S.C. 2254(d). The State is correct.

The state court's decision to deny the claim on the merits was not contrary to or an unreasonable application of clearly established Supreme Court precedent, nor was it an unreasonable determination of the facts in light of the evidence. Counsel made clear strategic choices not to contest that Williams entered Ms. Rowell's residence with the intent to rape her. He further attempted to inject doubt in the minds of the jury regarding the sequence of events on the night of the offense, to invoke the lesser-included offense of felony murder, thereby avoiding capital murder. In light of Petitioner's statements and other evidence presented at trial, trial counsel's defense strategy was reasonable.

Petitioner has not overcome the strong presumption of correctness afforded the state court. The state court decision was not contrary to, or an unreasonable application of *Strickland.* Therefore, this claim is due to be denied.

IIG. Trial counsel was ineffective for abandoning the plea that Petitioner was suffering from mental defect or disease.

On page 35 of his amended habeas petition, Williams alleged that although he entered pleas of not guilty by reason of insanity, not guilty by reason of mental defect or disease, and not guilty by any combination of above, his trial counsel was ineffective in abandoning those pleas before trial. (Doc. 5, p. 35). Williams further alleges that trial counsel should have obtained an independent mental health evaluation. (Doc. 5, p. 36). This same claim was presented on direct appeal, asserting essentially the same facts, but the amended habeas petition presents a substantially different and expanded format. (Tab R. 28, p. 74). This court must view the state court's disposition of the claim as it was presented to the state courts, not as it is more fully plead in the instant amended habeas petition.

In examining the claim on direct appeal, the Alabama Court of Criminal Appeals denied the claim on the merits, holding that "there is no evidence that [Williams] was suffering from a mental disease or defect." *Williams v. State*, 795 So. 2d at 784, *aff'd*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S. 900 (2001). Respondent contends that this claim should be denied because it was reviewed and denied on the merits by the Alabama Court of Criminal Appeals, and Petitioner did not allege and cannot show that the state court's decision is contrary to, or an unreasonable application of Federal law, or that it is an unreasonable

determination of the facts in light of the evidence. This court agrees.

The state court's decision was not an unreasonable determination. In light of the lack of evidence that would suggest that Williams suffered from a mental disease or illness, it cannot be said that a failure to obtain an independent mental health evaluation would have made any difference in the outcome. Williams was found competent to stand trial in his pre-trial mental evaluation. In the sentencing order, the trial court found that "based upon the report of the Department of Mental Health, the Court finds by a preponderance of evidence that defendant was not under [ ] extreme mental or emotional disturbance at the time of the offense." (Tab R. 55, p. 108). The record is simply void of any evidence that Williams suffered from mental disease or defect.

Petitioner is not due any relief on this claim.

IIH. Trial counsel's many errors resulted in a verdict so unreliable as to violate due process and created a reasonable probability that, but for the errors, the result of Petitioner's guilt-phase trial would have been different

Petitioner's final claim of ineffective assistance of trial counsel is the contention that all of trial counsel's many errors "resulted in an unacceptably 'serious risk of injustice' at Mr. Williams' trial, in violation of [his] rights under the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution." (Petition, p. 37-38). For the reasons already addressed at length above, none of Petitioner's individual allegations of ineffectiveness casts doubt on the constitutional adequacy of his trial representation. Merely combining insufficient allegations of ineffectiveness does not cause the sum to ripen into a genuine claim. As the Eleventh Circuit recently stated, because the petitioner "has not sufficiently pled facts that would establish prejudice-cumulative or otherwise-we decline to elaborate further on the concept of 'cumulative effect' for fear of issuing an advisory opinion on a hypothetical issue." *Borden*, 646 F.3d at 823.

Without a showing that he suffered prejudice as a result of some professionally unreasonable act or omission of counsel, Petitioner cannot meet the *Strickland* standard. Nor may Petitioner stitch together questionable acts or omissions by trial counsel that are factually and logically unrelated to any harm to his defense and thereby show some overarching ineffectiveness of counsel. The two-prong *Strickland* test is very clear: to prevail, Petitioner must show both a professionally unreasonable act or omission by counsel, and that such act or omission caused sufficient prejudice to the Petitioner's defense to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 687.

Because he has failed to meet that test as to his several individual claims of ineffectiveness, looking at the collection of allegations as a whole adds nothing. This claim also lacks merit.

CLAIM III. TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE OF PETITIONER'S TRIAL, THEREBY DEPRIVING HIM OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND RESULTING IN THE UNJUST AND UNCONSTITUTIONAL IMPOSITION OF THE DEATH PENALTY

A. Trial counsel's numerous guilt phase errors prejudiced Petitioner in the penalty phase well before the penalty phase had even started

Petitioner's next claim, found on page 38 of the amended habeas petition, alleges in vague and conclusory terms that his trial counsel's guilt phase error of failing to question prospective jurors about their racial attitudes during *voir dire* prejudiced him in the penalty phase. This claim is similar to its second amended Rule 32 predecessor. (Tab. R. 41, pp. 219-220). The amended habeas petition and second amended Rule 32 petition differ in that their introductory paragraphs cite different legal authority to support the same contention that Williams's constitutional rights were violated.[21]

The general substance of this claim is identical in both petitions, and states:

> Although capital cases are bifurcated, the guilt phase proceedings set the stage for the

[21] This claim also alleges that trial counsel was ineffective for failing to present and investigate mitigating evidence. This issue will be discussed in Claim IIIB, where most of those facts were pled.

penalty phase. An accused whose "opportunity to meet the case of the prosecution," [*Strickland v. Washington*, 466 U.S. 668, 685 (1984)], has been inadequate in the guilt phase due to counsel's deficiencies enters the penalty phase at a substantial disadvantage. Accordingly, trial counsel's actions and inactions during the guilt phase must be considered when evaluating trial counsel's penalty phase performance. Taking an all-encompassing approach to a claim of ineffective assistance of counsel during the mitigation phase is required not only by common sense, but also by governing law. *See e.g.*, *Lockhart v. McCree*, 476 U.S. 162, 181 (1986) (Rehnquist, J.) ("[I]t seems obvious to us that in most, if not all, capital cases much of the evidence adduced at the guilt phase of the trial will also have a bearing on the penalty phase. . . ."); *Tarver v. Hopper*, 169 F.3d 710, 715 (11th Cir. 1999) ("A lawyer's time and effort spent in preparing to defend his client in the guilt phase of a capital case continues to count at the sentencing phase."). Under *McCree* and *Tarver*, trial counsel's numerous guilt phase errors, discussed above at ¶¶ 26-48, also prejudiced Mr. Williams in the penalty phase.

In particular, trial counsel's failure to question prospective jurors about their racial attitudes during voir dire also prejudiced Mr. Williams in the penalty phase. Indeed, the U.S. Supreme Court has recognized that the sentencing proceeding is where bias is most likely to manifest itself in a jury asked to

> decide an interracial capital case. *Turner v. Murray*, 476 U.S. 28 (1986).

(Doc. 5, pp. 38-40; Tab R. 41, pp. 219-220).

Respondent asserts that this claim is barred from federal review because it was procedurally defaulted on independent and adequate state law grounds. (Doc. 14, p. 35). However, under *Borden*, a decision by an Alabama court based on Rule 32.6(b) constitutes a decision on the merits for purposes of federal habeas review. Therefore, this claim is not procedurally defaulted, and the court will now turn to the reasonableness of the decision of the Rule 32 court under federal law.

In examining this claim during the Rule 32 proceedings, the Rule 32 court stated the following:

> [Williams] contends that his counsel's alleged guilt phase errors (Part V) caused him to be prejudiced during the penalty phase of his trial. Williams fails, however, to proffer any argument as to how his trial counsel's alleged errors in the guilt phase caused him to be prejudiced in the penalty phase. The only example of alleged prejudice in Part VI.A is Williams' contention that his "trial counsel's failure to question prospective jurors about their racial attitudes during voir dire also prejudiced [him] during the penalty phase." (Amended petition at 34)
>
> This allegation is no more specific than Williams' previous allegation concerning trial counsel's failure to voir dire the jury

> concerning racial attitudes. Simply because Williams may have had the right to question prospective jurors about racial attitudes does not mean trial counsel were *per se* ineffective for failing to due so. See Dobyne v. State, 805 So. 2d 751. Williams fails to identify in his second amended Rule 32 petition one specific veniremember or juror whose "racial attitude" adversely affected Williams during voir dire or during the guilt or penalty phase of his trial. The Court finds that the bare allegation in Part VI.A of Williams' amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, it is summarily dismissed. See Boyd v. State, 2003 WL 22220330, at *6 (Ala. Crim. App. Sept. 26, 2003) (quoting Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993, and holding that "it is not the pleading of a conclusion 'which, if true, entitles the petitioner to relief."').

(Tab R. 59, p. 249). This court finds the decision of the Rule 32 court reasonable under *Strickland*, as Williams has failed to demonstrate prejudicial error by his counsel.

Furthermore, Williams attempts to incorporate all of the above ineffective assistance of counsel claims to support this claim. However, those claims were found to be without merit and, therefore, cannot support this claim. Williams offers no federal law or argument in support of the foregoing general and conclusory allegations. This court is under no obligation to "consider unsupported and undeveloped issues." *Moore v. Gibson*,

195 F.3d 1152, 1180 n. 17 (10th Cir. 1999), *cert. denied*, 530 U.S. 1208 (2000). This claim did not contain a sufficient factual basis to support it. Williams's vague assertions and unsupported conclusions are insufficient to show that counsel was deficient or that he was prejudiced. This claim is due to be denied.

III.B. Trial counsel's failure to investigate Petitioner's background prevented him from being able to present a constitutionally adequate mitigation case during the penalty phase and violated Petitioner's right to counsel under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution

Williams pleads his most extensive claim of ineffective assistance of counsel on page 40 of his amended habeas petition. He alleges that trial counsel was ineffective during the penalty phase of the trial because they failed to adequately investigate and present mitigation evidence to show that Williams should not have been sentenced to death. The mitigating evidence that Petitioner contends was not adequately investigated includes failure to (1) hire a mitigation expert; (2) collect documentary evidence; (3) conduct interviews of family and friends; (4) present evidence of Petitioner's history of abandonment, neglect, poverty, alcohol and sexual abuse; (5) investigate his mental illness; (6) show how Williams's background related to his committing capital murder; and (7) present redeeming

characteristics and call certain witnesses to testify regarding his extraordinary affection for children.

These claims are similar to those presented on direct and collateral appeal. In the amended habeas petition, however, Petitioner combined them into one claim and expanded them by presenting new factual allegations. The new factual assertions alleged for the first time in the amended habeas petition are procedurally defaulted and are, therefore, not before this court for review.

The state courts addressed Williams's mitigation claims separately. This court will do likewise.

III.B.i. Trial counsel ineffective because he failed to collect documentary evidence and hire a mitigation specialist.

First, Petitioner's entire claim in the amended habeas petition alleges that, "[u]nder prevailing professional norms, to have properly prepared for the penalty-phase of Mr. Williams' capital trial, counsel should have, *at a minimum*, collected documentary evidence chronicling Mr. Williams' life. . . .[22] (Doc. 5, p. 40). This claim is similar to its direct appeal predecessor, where the Petitioner alleges a slightly expanded version of this claim:

> A neutral person, one not an immediate family member, could have been an effective

[22] This sentence is the only reference to collecting documentary evidence in the amended habeas petition.

> way to provide information in the form of documentary evidence on behalf of Marcus Williams.
>
> As it was, the jury only heard statements from family members that had to have sounded unbelievable to them. With people evidence at the sentencing phase of the trial, the jury could have seen a documentary presentation to supplement the testimony that told an interesting and compelling picture. The result would have been a fair chance at a life sentence.

(Tab R. 28, p. 85-86).

Williams's amended habeas petition also asserts that trial counsel was ineffective for failing to hire a mitigation expert. (Doc. 5, pp. 42, 52). This claim is essentially the same as its direct appeal predecessor, where he states:

> Defense counsel did not engage the services of any expert to assist in mitigation, and did not do anything to effectively prepare for the mitigation part of the trial. There are a number of professionals available who could have gathered information, interviewed witness[es], prepared a strategy recommendation and testified at trial in a coherent and organized manner. It could have been possible to present a sufficient amount of information in a credible manner that the jury could have understood, and more importantly believed probative and relevant information about Marcus Williams. The information would

> have been delivered in the form of evidence and testimony from experts who were not biased, who had no personal interest in the outcome of the case. This is the kind of professional assistance that a number of experts routinely deliver. The trial Court had been reasonably liberal in allowing expenditures for Defense Counsel when requested.
>
> The failure to properly prepare for the sentencing phase of the trial amounted to ineffective assistance of counsel.

(Tab R. 28, pp. 84-85).

In examining both trial counsel's failure to collect documentary evidence and to hire a mitigation expert on direct appeal, the Court of Criminal Appeals wrote:

> After reviewing the appellant's claims, we conclude that he has not satisfied his burden of proving that his counsel's performance was deficient and that that deficient performance prejudiced him. Although [Williams] makes broad allegations, he has not supported them factually. For example, although he contends that counsel should have presented a mitigation expert and documentary evidence during the penalty phase of his trial, he has not alleged what additional evidence an expert could have presented or what documentary evidence existed that counsel did not present. . . . Thus, although he has made several allegations, the appellant has not shown that his attorneys performed in a deficient manner

> and that their allegedly deficient performance prejudiced him.

Williams, 795 So. 2d at 784, *aff'd*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S. 900 (2001).

Respondent argues that these claims were addressed on the merits by the state court, and that Williams cannot show that the state court's adjudication is either contrary to or an unreasonable application of federal law, or an unreasonable determination of the facts in light of the evidence. (Doc. 14, pp. 38-39). This court's own review of the record persuades it that the state court's assessment of the evidence and conclusions drawn from it are not contrary to or an unreasonable application of federal law, or not an unreasonable determination of the facts in light of the evidence.

For trial counsel to fail to present in documentary form the same evidence that was given as testimony was not unreasonable. Petitioner did not present any facts that would suggest a different outcome based on a different presentation of the same evidence. Further, no facts support that trial counsel's failure to hire a mitigation expert would have provided a different outcome. In fact, Williams's trial counsel did gather information and interview and present witnesses, much of the same things that Williams complains should have been done by an expert. These empty allegations are devoid of factual support. The *Strickland* decision very clearly mandates that courts are to presume that the actions of counsel were reasonable, and that court review of counsel's representation should be "highly

deferential." *Strickland*, 466 U.S. at 689; *Jones v. Campbell*, 436 F.3d 1285, 1293 (11th Cir. 2006). Absent some clear explanation by Petitioner about how his attorneys were deficient in presenting mitigation evidence and how the defendant was prejudiced, the court may not speculate about the facts of the case. As such, these claims do not allege facts that support a *Strickland* claim and, therefore, lack merit.

III.B.ii. Trial counsel ineffective for failing to thoroughly investigate Williams's history.

Williams also contends in his amended habeas petition that trial counsel was ineffective in failing to investigate Williams's history, including his family life, home life, drug, alcohol and sexual abuse, mental issues, and abandonment. (Doc. 5, pp. 41-45, 46-53). Addressing this assertion, the court has compared the allegations made in the second amended Rule 32 petition (Tab R. 41, Claim VIB., pp. 220-225), with the expanded legal and factual allegations proffered in support of this claim in the instant amended habeas petition.[23] In applying the proper standards of habeas review, this court must view the state courts' disposition of the claim as Petitioner presented it to the state courts in the second amended Rule 32 petition, not as

[23] The amended habeas petition provides a more detailed discussion of Williams's childhood, early home life, sexual abuse, psychological issues, abandonment and alcohol and drug use. (Doc. 5, pp. 41-65).

he more fully fleshed it out in the instant amended habeas petition.

In examining the claim during collateral appeal, the Rule 32 court wrote:

> In paragraphs 54-57 of his second amended Rule 32 petition, Williams summarizes what, he contends, trial counsel could have discovered if they had conducted a proper mitigation investigation. Williams contends trial counsel would have discovered that he lived with different family members during his life and did not meet his father until he was 14 years old. Williams contends that he felt abandoned by his mother and father. According to Williams, trial counsel failed to discover that several of Williams' family members suffered from mental illnesses. Trial counsel did not discover that a serious knee injury ended Williams' high school basketball career and that the death of his grandfather caused him to become depressed. Williams contends he attempted to better himself by joining the Job Corp, but he was thrown out because he got into a fight. According to Williams, his battle with psychological effects of child abuse and excessive drinking exacerbated his problems. (Amended petition at pp. 37-39) (FN4 In his pretrial mental evaluation, "[Williams] denied [a] history o[f] childhood sexual, emotional, or physical abuse." (Pre-trial Mental Evaluation at p. 2)
>
> Williams appears to completely ignore what his trial counsel did present in mitigation at

the penalty phase of the trial. During the penalty phase of Williams' trial, trial counsel called Williams' mother, Charlene Williams, and his aunt, Eloise Williams, to testify. Charlene testified she was unmarried and 16 years old when Williams was born. (R. 553) Charlene said that Williams had to live with her mother and aunt part of the time because she was too young to care for him. (R. 554) Charlene said that Williams lacked a male figure growing up and that Williams' father did not support him or have any kind of relationship with him. Id. Charlene indicated that Williams attended church growing up. Charlene stated that a serious knee injury ended Williams' high school sports career and that he quit school before graduating. After he hurt his knee, Charlene said that Williams "lost all hope." (R. 555) According to his mother, Williams was unable to find a job and started hanging out with "a rough crowd." (R556) Charlene stated Williams tried to "straighten up" by joining the Job Corp, but he was kicked out after he got into a fight. (R. 556, 557) Charlene said that when he returned from Job Corp that he lived with her, that he started "hanging out a lot" and that he slept all day and stayed up all night. (R. 558) Charlene indicated that Williams had never been a problem child. Id.

Williams other mitigation witness was his aunt, Eloise Williams. Eloise stated she had known Williams all his life and indicated that Williams' home life "was not very good." (R. 561) Eloise described Williams spending

time with family members and stated that "[h]e did not have a stable home." Id. Eloise said that Williams' father "was never around" and that his mother did not visit very often. (R. 562) Eloise described Williams as being "not very happy" as a child, that he was "sad and withdrawn" because he wanted to be with his mother. Id. Eloise described Williams as being a "fairly good student" that could have done better, but that he did not apply himself because "he was unhappy." (R. 564) Eloise said Williams was close to his grandfather and uncle, but that they died. Eloise stated Williams had hopes of a basketball career but a serious knee injury ended those hopes. Id. Eloise said not long before Williams murdered the victim that she noticed him change—drinking and possibly doing drugs. (R. 565) Eloise said she had talked to Williams about the murder and that he said he was sorry, had repented, and "asked the Lord to forgive him." (R. 566)

The testimony elicited by Williams' trial counsel from his mother and aunt during the penalty phase, plus Williams' statements during his pre-trial mental evaluation completely destroy Williams' allegations that "[t]rial counsel's ineffectiveness deprived [Williams] of his constitutionally protected right to put any relevant evidence before the sentencing body during a capital proceeding." (Second amended petition at p. 40) Trial counsel clearly presented substantially the same evidence that Williams now contends should have been presented in mitigation. Trial counsel is not ineffective for failing to present

> cumulative evidence. See Boyd v. State, 2003 WL 22220330, at *19 (holding that Boyd trial counsel was not ineffective for not presenting more testimony during the penalty phase because it would have been cumulative of "testimony that was actually elicited by Boyd's counsel during the penalty phase of trial"). The Court finds that Part VI.B of Williams' second amended Rule 32 petition fails to state a claim or establish that a material issue of law or fact exists as required by Rule 32.7(d); therefore, it is without merit and is denied.

(Tab R 59, p. 250).

The Respondent asserts that the state court's decision is entitled to a presumption of correctness and deference, unless it is contrary to, or an unreasonable application of federal law. (Doc. 14, p. 37). This court agrees and concludes that the state court's adjudication on the merits is not contrary to *Strickland.* Nothing indicates further cumulative evidence regarding Williams's family life, home life, problems with drugs, alcohol, mental issues, sexual abuse, and abandonment would have lead to a different outcome. In fact, during the sentencing hearing, the trial judge stated: "I have quite a bit of evidence concerning the defendant's background, his home life, and in fact, some of his family members testified to that." (Tab R. 25, p. 602).

Furthermore, courts have noted that evidence of drug and alcohol abuse "often has little mitigating value and can do as much or more harm than good in the eyes of the jury." *Crawford v. Head*, 311 F. 3d 1288,

1321 (11th Cir. 2002); *see also Haliburton v. Secretary for the Dep't of Corr.*, 342 F.3d 1233 (11th Cir. 2003). Because of the double-edged sword such evidence presents, courts give counsel great deference in the decision whether to resort to it. The state court's conclusion that counsel cannot be faulted for failing to further investigate Petitioner's family background is not an objectively unreasonable application of *Strickland*. This claim, therefore, is due to be denied.

IIIBiii. Trial counsel ineffective for failing to interview Allister Cook

In both his amended habeas petition and his second amended Rule 32 petition, Williams alleges that trial counsel was ineffective for failing to interview Alister Cook, Williams's friend, because Cook could have testified regarding Williams's alcohol consumption on the days leading up to the offense. (Doc. 5, p. 49; Tab R. 41, Claim VI.C., p. 225). The Rule 32 court does not specifically address this factual assertion. Therefore, this court must determine whether the implicit rejection of the claim was an unreasonable application of Supreme Court law.

This issue has been raised in several forms, all amounting to the same contention that Williams's use of alcohol and drugs on the night of the offense negated the intent required for capital murder. No one disputed that Williams had consumed illegal substances in the hours leading up to the offense. This court has already determined that trial counsel was not ineffective for

failing to hire an expert to testify regarding the combined effects of alcohol, marijuana and cocaine. (Claim II.B.iii). Likewise, this same testimony would serve no greater purpose if presented by a friend. Additionally, as stated above in Claim III, courts have noted that evidence of drug and alcohol abuse is a double-edged sword and trial counsel are given great deference in the decision about presenting such evidence. *See Crawford v. Head*, 311 F. 3d 1288, 1321 (11th Cir. 2002); *see also Haliburton v. Secretary for the Dep't of Corr.*, 342 F.3d 1233 (11th Cir. 2003). Petitioner has presented no facts that demonstrate that trial counsel was deficient in failing to interview and present testimony from Alister Cook.

Therefore, this court finds that trial counsel's failure to present testimony from Alister Cook regarding Williams's drug habits on the night on the offense was not objectively unreasonable. This claim is due to be denied.

IIIBiv. Trial counsel ineffective for failing to adequately interview and prepare the penalty phase witnesses

In both the amended habeas petition and the second amended Rule 32 petition, Williams also asserts that trial counsel was ineffective for failing to adequately interview and prepare Williams's mother, Charlene, and aunt, Eloise, to testify in the penalty phase. (Doc. 5, pp. 57-59; Tab R. 40, Claim VI.C.i., p. 226). These are virtually the same claims, with the

exception that the amended habeas petition is expanded to include more factual allegations and legal arguments. In applying the proper standards of habeas review, this court must view the state courts' disposition of the claim as it was presented to the state courts in the second amended Rule 32 petition, not in its expanded form in the instant amended habeas petition. In his second amended Rule 32 petition, Williams states:

> In preparation for the mitigation phase of Mr. Williams' trial, trial counsel unreasonably failed to familiarize themselves with what information the witnesses could testify to and failed to discuss lines of questioning with the witnesses. Collectively, trial counsel billed the court for less than ten hours of time that conceivably could have been spent conducting mitigation interviews and witness preparation. Mr. Williams does not suggest that trial counsel should have behaved unethically by coaching witnesses. But there is a fundamental distinction between putting words in a witness' mouth—which must not be done—and throughly interviewing a witness to learn what words will come out of the witness' mouth—which must be done. There is simply no tactical justification for trial counsel's failure to adequately interview and prepare mitigation witnesses. *See Cunningham*, 928 F.2d at 1018-19. This failure deprived Mr. Williams of his right to effective assistance of counsel, as provided by Article I, § 6 of the Alabama Constitution and the Sixth and Fourteenth

> Amendments to the United States Constitution.

(Tab R. 41, Claim VI.C.i., p. 224).

Respondent argues that this claim is procedurally defaulted because it failed to meet the requirements of Rule 32.6(b) according to the state court, but *Borden* compels this court to find that the claim has not been procedurally defaulted. Thus, the court will address the reasonableness of the Rule 32 court's decision.

In examining this claim during the Rule 32 appeal process, the Rule 32 court wrote:

> The allegation . . . is vague and non-specific. Williams fails to argue in his second amended Rule 32 petition specifically how trial counsel's preparation of his mother and aunt was deficient or indicate what questions they could have been asked that would have elicited additional mitigating evidence that would have been so compelling it could have made a difference in the outcome of the penalty phase of the trial or in his sentence. Further, Williams fails to identify . . . any additional mitigation witnesses that his trial counsel could have interviewed or could have called to testify at the penalty phase of trial. The Court finds that the allegation . . . fails to comply with the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, it is summarily dismissed.

(Tab R. 59, p. 254).

This court finds that the decision of the Rule 32 court was reasonable under *Strickland.* Petitioner does not present any evidence that tends to demonstrate that trial counsel fell below an objective standard of reasonableness, or that Petitioner was prejudiced by trial counsel's performance. Simply stating that the testimony from the mitigation witnesses was inadequate is insufficient. The burden is on the Petitioner to allege facts to support his claim. Additionally, the information that Williams contends was not presented during the penalty phase is cumulative. Petitioner's mother and aunt testified regarding Williams's unstable home life as a child, the disappointment he faced when his basketball career ended with knee injury, how he was ineligible to graduate from high school, that he joined the job corps but was dismissed from the program due to a fight, that he returned home, could not find employment, hung out with the wrong crowds, did not seem to be himself, and was drinking alcohol. Petitioner has not been able to demonstrate why additional facts regarding these same life altering events would have changed the outcome. Petitioner has not overcome that presumption that counsel performed reasonably based on the evidence presented. Therefore, Petitioner is denied relief on this claim.

III.B.v. Trial counsel failed to compile Williams's history of abuse and neglect

In his amended habeas petition, Williams also claims that trial counsel failed to discover and present material details that would have supported a

mitigation theory based on Williams's history of abuse and neglect. (Doc. 5, p. 60; *see also* pp. 45, 53). This claim included a list of family members that Williams contends were willing to testify at the penalty phase regarding Williams's history of abuse and neglect. A similar claim was presented on collateral appeal. (Tab R. 41, pp. 226-27).

Respondent answers that this claim is procedurally barred because it was dismissed on an independent and adequate state law ground. (Doc. 14, p. 40). A decision based on Rule 32.6(b) is a decision on the merits for purposes of federal habeas review, so in the absence of procedural default, this court will now examine the reasonableness of the Rule 32 court's decision.

In response to Williams' claim, the Rule 32 court wrote:

> 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, 788 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 it if does not show what the witnesses would have testified to and how that testimony might have changed the outcome") (emphasis added). Williams fails to proffer in his second amended

> Rule 32 petition what specific facts a particular witness could have testified about or argue how much testimony would have been mitigating. Indeed, Williams does not identify a single specific instance of abuse inflicted on him by a specific family member in his second amended petition. Further, even if members of Williams' family would have been willing to testify about alleged instances of abuse, the State would have been able to rebut them with Williams' own words. In his pre-trial mental evaluation report, Dr. Vonceil Smith stated that "[Williams] denied [a] history of childhood sexual, emotional, or physical abuse." Trial counsel cannot be ineffective for not presenting mitigating evidence that either does not exist or that would have been directly refuted by Williams' own statements to a mental health professional. The Court finds that the allegation . . . fails to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, it is summarily dismissed.

(Tab R. 59, pp. 255-56).

The court finds the decision of the Rule 32 court reasonable under *Strickland;* the facts of this claim fail to demonstrate a *Strickland* claim. The Rule 32 court correctly identified the inherent problems in Petitioner's claim. In his amended habeas petition, Williams spends a considerable amount of time discussing what facts regarding abuse and neglect trial counsel could have revealed had trial counsel performed an adequate investigation. However, Petitioner does not

even attempt to explain how presenting those additional cumulative facts would have changed the outcome. Even if the evidence had been fully presented to the court and jury during the sentencing phase, it is at least debatable, and therefore, objectively reasonable, that it would not have swayed the sentencing decisions.

Furthermore, evidence of childhood abuse, like that of drug and alcohol abuse, often can be a double-edged sword, perhaps doing good or perhaps doing harm. For example, in *Haliburton v. Secretary for the Dep't of Corr.*, the Eleventh Circuit Court of Appeals quoted the testimony of an attorney on the difficulty of the decision to present such evidence:

> At the state evidentiary hearing, Bailey testified that he chose not to present evidence about Haliburton's abusive background in part because such evidence "can paint an appealing picture of how your client was abused and all those factors lead up to him doing what [he] did and you may convince the jury of that absolutely; but you may also convince them that, paint a picture of Frankenstein."

342 F.3d 1233, 1244, n. 30 (11th Cir. 2003). Although *Haliburton* presented a different case with different issues, involving a different petitioner, the difficulty in deciding whether to present childhood-abuse evidence remains the same. The effect such evidence might have on the jury cannot be determined to be universally favorable. That being the case, the court cannot simply assume that if counsel had presented such evidence, it

would have had a mitigating effect; it might have had just the opposite effect. Thus, counsel's failure to present in full detail and from numerous witnesses' testimony regarding Petitioner's childhood abuse and neglect was not objectively unreasonable. Petitioner is not due relief on this claim.

II.B.vi. Trial counsel failed to investigate Williams's history of mental illness.

Williams also asserts that trial counsel failed to adequately investigate his history of mental illness as a mitigating factor. (Doc. 5, pp. 60-62; *see also* p. 45). This same claim was presented in Williams's second amended Rule 32 petition, with the exception that the Rule 32 petition was very abbreviated and alleged this claim in two sentences, as follows:

> Trial counsel failed to investigate the mental illness that pervades Mr. Williams' family. Lacking this background information, trial counsel was unable to explore the likely connection between Mr. Williams' mental health and his involvement in Ms. Rowell's death.

(Tab R. 41, Claim VI.C.iii., p. 227). In applying the proper standards of habeas review, this court must view the state courts' disposition of the claim as it was presented to the state courts in the second amended Rule 32 petition, not as it is more fully fleshed out in the instant amended *habeas* petition.

Respondent incorrectly asserts that this claim is barred from federal habeas review because the state court found it to be insufficiently pled under independent and adequate state law ground. (Doc. 14, p. 41). The court, therefore, will consider the reasonableness of the Rule 32 court's decision under federal law. The Rule 32 court stated:

> Williams has failed to identify . . . , a single member of his family that has ever suffered from any form of mental illness or argue how such a fact, even if true, might have been mitigating. Further, the pre-trial mental evaluation performed by Dr. Voceil Smith "failed to disclose signs consistent with [a] diagnosis of formal thought disorder, major affective disturbance, or severe cognitive impairment." Smith also stated that, in his opinion, the "specific acts engaged in [by Williams] required planning, forethought, and were inconsistent with acts typically attributed to individuals with severe psychiatric disturbance." (State's Exhibit B at p. 7) The Court finds that the allegation . . . fails to meet the specificity and full factual pleading requirement of Rule 32.6(b); therefore, it is summarily dismissed.

(Tab R. 59, pp. 256-57).

The decision by the Rule 32 court was reasonable. No evidence in the record supports the allegation that Williams suffered from a serious mental illness. In fact, the evidence in the record supports the opposite finding. Williams was found competent to stand trial in

the pretrial mental evaluation. Further, in the sentencing order the trial judge found "by a preponderance of the evidence that the defendant was not under the extreme mental or emotional disturbance at the time of the offense." (Tab R. 55, p. 108). No reasonable probability exists that an investigation into Williams's or his family's mental history would have changed the outcome of the penalty phase.

Under these circumstances, it was not unreasonable for trial counsel to fail to present a mental illness as a mitigating factor. This claim is without merit and due to be denied.

III.B.vii. Trial counsel failed to show that Williams's background contributed to him committing capital murder

Williams also contends that trial counsel failed to show that Williams's background contributed to his committing capital murder. (Doc. 5, p.61). This claim is very similar to its Rule 32 predecessor (Tab R. 41, p. 227), except that the amended habeas petition included additional factual allegations that are not properly before this court. In his second amended Rule 32 petition, Williams states:

> It is well known in the mental health profession that a person who commits a homicide in connection with a sexual assault typically fits a pattern. *See*, *e.g.*, Carl P. Malmquist, *Homicide, A Psychiatric Perspective* ch. 10 (American Psychiatric Press, 1996). According to

> Malmquist, many mental health professionals have suggested that three formative events are present in someone with a propensity to commit a homicide in connection with sexual assault: (1) direct physical or sexual trauma; (2) blocking of attachments that should have taken place between child and primary caretaker; (3) failure of an adult to serve as a role model. *Id.*
>
> Not everyone with those characteristics goes on to commit a homicide in connection with a sexual assault, but the point is that someone like Mr. Williams, who had all three factors present, is put at a distinct disadvantage by events that happened during his formative years. By failing to bring forth all relevant facts relating to Mr. Williams' formative years, trial counsel presented the jury with an incomplete and out-of-context picture of Mr. Williams. Trial counsel's failure resulted in the jury making its sentencing determination based on the State's unrebutted guilt-phase evidence and the brief testimony of two defense witnesses during the penalty phase. Trial counsel's unreasonable failures prejudiced Mr. Williams by depriving him of his rights under the Fifth, Sixth, and Fourteenth Amendments to the U.S. Constitution, Article I, § 6 of the Alabama Constitution, and Alabama law.

(Tab R. 41, Claim VI.C.iv., pp. 227-28).

Respondent again incorrectly asserts that this claim is precluded from federal review because it was

denied on an independent and adequate state law ground. (Doc. 14, p. 40). In the absence of procedural default, the court will address the reasonableness of the Rule 32 court's decision under federal law.

In denying this claim, the Rule 32 court wrote:

> The crux of Williams' allegation . . . appears to be that his trial counsel were somehow ineffective for not presenting a mental health expert. Williams' only support . . . is to cite the Court to a 1996 article in the American Psychiatric Press and argue that trial counsel were ineffective for failing to present evidence that Williams meets "a pattern" associated with people that commit murder during sexual assault.
>
> In Horsley v. Alabama, 45 F.3d 1486, 1495 (11th Cir. 1995), the Eleventh Circuit held:
>
> > To prove prejudice by failure to investigate and failure to produce a certain kind of expert witness, a habeas petitioner must demonstrate a reasonable likelihood that an ordinary competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced.
>
> Similarly, the Alabama Court of Criminal Appeals has 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.
>
> Thomas v. State, 766 So.2d 860, 892 (Ala. Crim. App. 1998), citing, Nelson v. Hargett, 989 F.2d 847, 850 (5th Cir. 1993).
>
> Williams fails to identify to the Court . . . by name or field of expertise **any** expert in **any** field that would have testified at trial to the purported "facts" he now alleges. . . . See Boyd v. State, 2003 WL 22220330, at *13 (holding that Boyd's claim his trial counsel failed to procure expert assistance failed to state a claim because "Boyd's petition [did] not disclose what type of expert counsel should have obtained"). The Court finds that the allegation . . . fails to meet the specificity and full factual pleading requirement of Rule 32.6(b), Ala.R.Crim.P.; therefore, it is summarily dismissed.

(Tab R. 59, pp. 42-43[24]).

This court finds the decision of the Rule 32 court reasonable; this claim is without merit, and is no different than the claim regarding trial counsel's failure to investigate Williams's mental history. This claim is another unsubstantiated allegation that cannot be the basis of habeas relief. Further, had such evidence been presented to the jury during the sentencing phase,

[24] Page 42 of the Rule 32 court's opinion is missing from the official record. Therefore, the page numbers found on the bottom of the page are used in this reference instead of the page numbers used for the record, which are at the top right-hand corner of the page.

nothing even suggests that it would have altered the outcome. Without more, this claim is due to be denied.

III.B.viii. Trial counsel failed to present Williams's redeeming characteristics

Williams also contends that trial counsel failed to develop and present his redeeming characteristics, including that he was a likeable kid, participated in competitive sports, attended church, and had an extraordinary affection for children. (Doc. 5, pp. 62-63). Williams asserts that trial counsel failed to adequately investigate potential mitigating factors, and that his "death sentence was the damning consequence of trial counsel's failure to conduct a constitutionally adequate mitigation investigation." *Id.* at p. 64. This claim is virtually the same as its second amended Rule 32 predecessor, which states:

> Trial counsel also failed to develop and present evidence about any of Mr. Williams' redeeming personal characteristics. Capital defendants are entitled to present as mitigation evidence "any aspect of a defendant's character or record." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978). Despite having this constitutionally-afforded opportunity, trial counsel failed to investigate and present any of Mr. Williams' redeeming characteristics. This failure denied Mr. Williams the right to effective assistance of counsel under Article I, § 6 of the Alabama Constitution and the Sixth and Fourteenth Amendments to the United States Constitution.

> Mr. Williams was a successful athlete and [a] popular student during his time at Ashville High School, and people accessible to trial counsel possessed a wealth of information about Mr. Williams' redeeming characteristics. Those people included the individuals listed above at ¶ 61 and the following: Larry Touart[25] (coach), Brad Williams (friend), Bernard Bozeman (friend), Alister Cook[26] (friend), Tamika Brewster[27] (friend), Susan Reynolds (friend), Terry Jones[28] (minister), and other friends and former teammates. These witnesses, and others, could have testified to the details discussed in ¶¶ 54-57 above. In addition, relatives such as Crystal Thomas and Gwen Davis would have testified about Mr. Williams extraordinary affection for children. Such testimony would have been crucial in this case, where young children were found at the crime scene. Trial counsel talked to

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[25] Respondent asserts that this claim, as it relates to Larry Touart, is procedurally defaulted because he was not mentioned in any of the previous pleadings. (Doc. 14, p. 45). That assertion is incorrect. *See* Tab R. 41, ¶ 66, p. 229.

[26] Respondent asserts that this claim, as it relates to Alister Cook, is procedurally defaulted because he was not mentioned in any of the previous pleadings. (Doc. 14, p. 43). That assertion is incorrect. *See* Tab R. 41, ¶ 66, p. 229.

[27] Respondent asserts that this claim, as it relates to Tamika Brewster, is procedurally defaulted because she was not mentioned in an of the previous pleadings. (Doc. 14, p. 43). That assertion is incorrect. *See* Tab R. 41, ¶ 66, p. 229.

[28] Respondent asserts that this claim, as it relates to Alister Cook, is procedurally defaulted because he was not mentioned in any of the previous pleadings. (Doc. 14, p. 45). That assertion is incorrect. *See* Tab R. 41, ¶ 66, p. 229.

> neither Ms. Thomas or Ms. Davis even [though] they were living in Ragland and Gadsden, respectively, during counsels' representation of Mr. Williams. Therefore, counsel decided against presenting evidence of Mr. Williams' normally high affection for children without first investigating whether such evidence was available.

(Tab R. 41, p. 228).

The Rule 32 court held that at least part of this claim was procedurally defaulted because it failed to meet the specificity and full factual pleading requirements under Rule 32.6(b) (Tab R. 258-59). However, under *Borden*, the Rule 32 court's decision constituted a decision on the merits, and the claim is not procedurally defaulted. Therefore, the court will address the reasonableness of the state court's decision under *Strickland*.

In denying this claim, the Rule 32 court wrote:

> Concerning his assertion his trial counsel should have presented testimony that he was a popular student and successful athlete in high school, Williams merely refers the Court to paragraphs 54-57 of his second amended petition and then lists the names of individual that, he contends, were willing to testify during the penalty phase. Further, Williams fails to proffer in his second amended Rule 32 petition specifically what a particular witness could have testified about or argue how such testimony would have been so mitigating it could have caused a different result at trial.

See Thomas v. State, 766 So. 2d 860, 893 (Ala.Crim.App. 1998) (holding that "[a] claim of failure of 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). The Court finds that this allegation in Part VI.C.(v) of Williams' second amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P; therefore, it is summarily dismissed.

. . . Williams contends that [Crystal] Thomas and [Gwen] Davis would have testified to "[his] extraordinary affection for children." Second petition at p. 44) Williams argues that "[s]uch testimony would have been crucial in this case, where young children were found at the scene." Id.

In Chandler v. United States, 218 F.3d at 1322, the Eleventh Circuit observed the "every reasonable trial lawyer knows, character witnesses that counsel called could be cross-examined by the Government." In Brooks v. State, 695 So. 2d 176, 181 (Ala. Crim. App. 1996), the Alabama Court of Criminal Appeals held that:

> [Brooks'] trial counsel's decision not to put on any character evidence was a strategic decision and one that was probably wise in this case—in light of the fact that there was evidence at the hearing that the state would have produced a lit [sic]

> of victim impact evidence had [Brooks] presented his character witnesses.

Further, in Jackson v. State, 791 So. 2d 979, 1026 (Ala. Crim. App. 2000), the Alabama Court of Criminal Appeals found that:

> To rebut Jackson's claim of good character, the State cross-examined one of Jackson's character witnesses regarding Jackson's prior misdemeanor assault conviction and his suspension from school for[m] carrying a gun. This cross-examination was proper both to test the witness's credibility as to his knowledge of Jackson's character and to rebut the mitigating evidence offered by [] Jackson.

The Court is aware that if Williams' trial counsel had offered evidence he had some "extraordinary" affection for children that the jury and the trial court would have been required to give it consideration. The Court is also aware that the jury and trial court would not have been required to find such evidence was actually mitigating. To state the obvious, character evidence is a two-edge sword. The same evidence that might be considered mitigating in one case could be devastating in another. Williams knew that the victim's two young children were in the house. Despite that, he entered the victim's bedroom and proceeded to rape and murdered her. Had trial counsel offered evidence that Williams had an extraordinary affection for children, this Court is confident beyond any reasonable

> doubt that the prosecution would have, at a minimum, vigorously argued to the jury that, under these circumstances of this case, it was not mitigating. Testimony in this vein would have also allowed the State to introduce victim impact evidence, including evidence of the possible psychological effects that the victim's children might suffer in the future due to being present at the same time [their] mother was brutally murdered. Williams was in no way prejudiced because this evidence was not presented to the jury during the penalty phase. The court finds this allegation is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P.

(Tab R. 59, pp. 258-59).

This court finds the decision of the Rule 32 court reasonable under federal law. Even viewing the facts sympathetically for Petitioner, Williams has not carried his burden to show that his trial counsel was deficient or how testimony regarding his high school popularity might have changed the outcome. Petitioner's aunt and mother gave testimony similar to that testimony Williams claims was not presented. Williams's mother, Charlene, testified that Williams regularly attended church as a child (Tab R 19, p. 554, line 22-24—p. 555, line 1), played football in junior high school and basketball in high school (Tab R. 19, p. 555, lines 7-11), and that he was not a problem child (Tab R. 19, p. 558, lines 21-23). Williams's aunt, Eloise, testified that Williams did not have a significant criminal history (Tab R. 19, p. 563, lines 1-2) and was not a

trouble maker growing up (*Id.*, lines 4-8). All of the information Williams complains should have been presented was presented. At best, Williams argues that the same evidence should have been presented through different witnesses. Under no circumstances can he satisfy the *Strickland* standard. Therefore, trial counsel's decisions regarding mitigating witnesses was not objectively unreasonable. This portion of this claim is without merit.

The state court's finding that trial counsel was not ineffective for failing to present to the jury Williams's extraordinary affection for children is entitled to a presumption of correctness under 28 U.S.C. § 2254. Nowhere has Petitioner attempted to show that these findings and conclusions are contrary to or an unreasonable application of *Strickland*, or that he suffered any prejudice based on counsel's failure to present such testimony. Indeed, this court finds that it was objectively reasonable that trial counsel did not present such testimony, as its mitigating value, if any, would have been greatly diminished by the State's response. This claim is due to be denied.

In summary, Petitioner is entitled to no habeas relief on the claim that he received ineffective assistance of counsel based on their failure to investigate or present mitigation evidence. Petitioner has not shown "cause *and* prejudice" to excuse the procedural defaults. This claim is meritless and due to be denied.

CLAIM IV. APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, THEREBY DEPRIVING PETITIONER OF A MEANINGFUL APPEAL

Claims for ineffective assistance of appellate counsel are analyzed under the same *Strickland* standard as is applicable to claims of ineffectiveness at trial. *Johnson v. Alabama*, 256 F.3d 1156 (11th Cir. 2001); *Clark v. Crosby*, 335 F.3d 1303 (11th Cir. 2003). In *Johnson*, the Eleventh Circuit observed:

> It is difficult to win a *Strickland* claim on the grounds that appellate counsel pressed the wrong legal arguments where the arguments actually pursued were reasonable in the circumstances. We have emphasized that even in a death penalty case, counsel must be "highly selective about the issues to be argued on appeal. . . ." *United States v. Battle*, 163 F.3d 1, 1 (11th Cir. 1998). The district court, having considered the record and [counsel's] testimony during the state post-conviction proceeding, found that [counsel] had carefully considered many of the claims now raised in appeal, but ultimately chose to pursue the claims he felt were most likely to prevail and winnow out the arguments he thought were less persuasive.

Id. at 1188.

Thus, keeping in mind the presumption of reasonableness favoring the decisions of counsel, a claim of ineffective assistance of appellate counsel will fail

unless the Petitioner can establish that counsel's choice of issues to raise on appeal was unreasonable under the circumstances. The fact that potentially meritorious issues were not raised on appeal does not establish, by itself, ineffectiveness. Rather, the court must assess whether any reasonable attorney would have chosen the issues raised in lieu of the omitted issues. If so, counsel's choice of issues cannot be second-guessed. Likewise, issues lacking merit cannot establish the requisite prejudice under the *Strickland* standard.

Turning to the allegations of this case, Petitioner contends that his appellate counsel was ineffective for failing to raise the ineffective assistance of counsel claims above. (Doc. 5, pp. 65-66). Petitioner alleged this same claim in his second amended Rule 32 predecessor (Tab R. 41, p. 239), with the exception that the amended habeas petition is expanded to include that appellate counsel was ineffective for failing to raise a *Batson* claim. (Doc. 5, p. 66).

The Rule 32 court addressed Petitioner's allegation of ineffective assistance of appellate counsel as follows:

> In Part VII, paragraph 67 on pages 44-45 of Williams second amended Rule 32 petition, he alleges that his appellate counsel were ineffective for not raising on direct appeal the allegations of ineffective assistance of trial counsel he has pleaded in his second amended Rule 32 petition. The Court has reviewed the allegations of ineffective [assistance] of trial

> counsel in Williams' second amended Rule 32 petition and finds that these allegations fail to contain specific facts that, if true, would establish trial counsel's performance was deficient and caused Williams to be prejudiced as required by Strickland. Williams' allegations he received ineffective assistance from his trial counsel either fail to meet the pleading requirement of Rule 32.6(b) or fail to state a claim as required by Rule 32.7(d), Ala.R.Crim.P. See Colbert v. State, 733 SO. 2d 901, 903 (Ala. Crim. App. 1997) (holding that "[If trial counsel was not ineffective, then appellate counsel could not have been ineffective for failing to challenge on appeal trial counsel's effectiveness"); see also Gibby v. State, 753 So. 2d 1206, 1208 (Ala.Crim. App. 1999) (holding that "[c]ounsel cannot be ineffective for failing to raise nonmeritorious claims"). The Court finds that the allegation in Part VII fails to state a claim or establish that a material issue of fact or law exists as required by Rule 32.7(d); therefore, it is denied. [The] Court further finds that Williams has failed to plead facts in his second amended Rule 32 petition sufficient to state a meritorious claim of ineffective assistance of trial or appellate counsel. Rules 32.6(b) and 32.7(d), Ala.R.Crim.P.; *see also Boyd v. State*, 2003 WL 22220330, at *6 (holding that "a Rule 32 petitioner is not automatically entitled to an evidentiary hearing on any and all claims raised in the petition").

(Tab R. 59, p. 261-62).

Respondent asserts that this claim should be denied on several grounds: (1) the state court dismissed this claim because it failed to establish a material issue of fact or law, pursuant to Rule 32.7(d), which is entitled to a presumption of correctness; (2) it was raised in the second amended Rule 32 petition, but then abandoned on appeal because Petitioner either did not brief this issue or address the court's holding; and (3) it was dismissed pursuant to Rule 32.6(b), which is an "independent and adequate" state law ground. (Doc. 14, pp. 47-48). In his brief to the Alabama Court of Criminal Appeals on denial of the second amended Rule 32 petition, Williams did include in the heading of Claim VI.A.1. that appellate counsel was ineffective, but with absolutely no argument accompanying it.[29] *See* Tab R. 50, p. 14. Williams mentioned his claim of ineffective assistance of appellate counsel in his appeal brief to the Alabama Court of Criminal Appeals in the discussion of claims that were defaulted under Rule 32.6(b), but made no specific argument regarding this claim.[30] (Tab R. 50, p. 45, n. 13). Williams

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[29] At page 14 of his appellate brief, the following heading appears, but with absolutely no ineffective assistance of appellate counsel argument accompanying it:

> 1. The Facts Pled in the Second Amended Petition Establish that Mr. Williams was Denied the Effective Assistance of Trial Counsel and **Appellate Counsel**, Therefore, Summary Dismissal Was Error.

(Tab R. 50, p. 14) (emphasis added)

[30] On page 45 of his brief to the Alabama Court of Criminal Appeals, footnote 13 reads, "The Court dismissed the following claims in Mr. Williams's Second *Amended Petition*, in part or in whole, for lack of specificity: . . . **Claim VII (ineffective**

mentioned in his appeal brief to the Alabama Court of Criminal Appeals that he received ineffective assistance of appellate counsel in his conclusion at VII, but again, with absolutely no argument. (Tab R. 50, p. 63).[31] In light of the above, the Alabama Court of Criminal Appeals stated that "Williams does not challenge the trial court's ruling as to the claims of ineffective assistance of appellate counsel" and did not address it further. (Tab R. 60, p. 7, n. 2).[32] Alabama Rule of Appellate Procedure 28(a)(7) states, in part, that a brief must contain "[a] full statement of the facts relevant to the issues presented for review, with appropriate

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assistance of appellate counsel), (C.230)." (Tab R. 50, p. 45, n. 13) (emphasis added).

[31] Page 63 of his appellate brief conclusion states: "For these reasons, Mr. Williams respectfully requests that this Court reverse the Circuit Court's denial of relief, **and find that he received ineffective assistance of counsel both at trial an on direct appeal** in violation of the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments for the Federal Constitution, the Alabama Constitution and Alabama law." (Tab. R. 50, p. 63) (emphasis added).

[32] In his brief to the Alabama Supreme Court, Williams includes his ineffective assistance of *appellate* counsel claim in his argument that all of his ineffective assistance of counsel claims were erroneously dismissed by the Court of Criminal Appeals. (Tab R. 54, pp. 12-13). At page 12 of his brief to the Alabama Supreme Court, it states, "At part VII of both the first and second Amended Petitions, Mr. Williams described a claim of ineffective assistance of appellate counsel's performance on the direct appeal of his trial. This claim referred to the seventeen prior claims of ineffective assistance of counsel and specifically noted that **none** of them had been raised in the direct appeal." (Tab R. 54, p. 12). The Alabama Supreme Court affirmed the Alabama Court of Criminal Appeals decision without an opinion.

references to the record. . . ."[33] Williams's brief on this issue failed to comply with the requirements of Rule 28(a)(7), Ala. R. App. P. As such, this claim has not been exhausted in state court. Therefore, the only state court that has ever expressly addressed the claim is the Rule 32 court, which denied the claim on the merits, and alternatively, on procedural grounds.

If a federal claim has not first been exhausted in state court, this court may also find that it is "procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile." *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (citing *Picard v. Connor*, 404 U.S. 270, 276 (1971) and *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir. 1998)). Until recently, this claim would have been deemed procedurally defaulted because it had not been exhausted, and any attempts to exhaust the claim would be futile because of the state's procedural bars on successive petitions and the statute of limitations. Rules 32.2(b) and (c), Ala. R. Crim. P. However, the Supreme Court recently held in *Martinez v. Ryan*:

> when a State requires a prisoner to raise an ineffective-assistance-of-trial-counsel claim

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[33] In *U.S. v. Gupta*, 463 F.3d 1182, 1195 (11th Cir. 2006), the Eleventh Circuit has also stated, "[w]e may decline to address an argument where a party fails to provide arguments on the merits of an issue in its initial or reply brief. Without such argument the issue is deemed waived. *See Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1573 n. 6 (11th Cir.1989) (deeming issue waived where party fails to include substantive argument and only makes passing reference to the order appealed from)."

> in a collateral proceeding, a prisoner may establish cause for a default of ineffective-assistance claim in two circumstances. The first is where the state courts did not appoint counsel in the initial-review collateral proceeding for a claim of ineffective assistance at trial. The second is where appointed counsel in the initial-review collateral proceeding, where the claim should have been raised, was ineffective under the standards of *Strickland v. Washington*, 466 U.S. 688, 104 S. Ct. 2052, 80 L.Ed. 2d 674 (1984). To overcome the default, a prisoner must also demonstrate that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit. *Cf. Miller-El v. Cockrell*, 537 U.S. 322, 123 S. Cr. 1029, 154 L. Ed. 2d 931 (2003) (describing standards for certificates of appealability to issue).

Martinez, 2012 WL 912950 at *8. Therefore, under the Court's ruling in *Martinez*, Williams has demonstrated cause to overcome any procedural default of this ineffective assistance claim.

However, *Martinez* also requires that a habeas petitioner demonstrate prejudice, or that his claim has merit; Williams has not made such a demonstration. As the Rule 32 court noted, and this court further explained above, all of Williams's ineffective assistance of counsel claims were non-meritorious, procedurally defaulted, or both. Appellate counsel's failure to raise these ineffective assistance of counsel claims, even if not the product of a strategic choice, caused no

prejudice to the defense. Consequently, this claim is due to be denied.

CLAIM V. PROSECUTOR DENIED PETITIONER A FAIR TRIAL AND SENTENCING DETERMINATION BY ENGAGING IN A CONSISTENT PATTERN OF GROSS MISCONDUCT

In his amended habeas petition, Williams combines several allegations of prosecutorial misconduct that were first presented either on direct or collateral appeal. Because the state courts addressed them separately, each claim will be discussed as it was presented to the state courts.

V.A. Prosecutor's improper comments regarding aggravating circumstances.

Petitioner first contends that the prosecutor's improper comments during guilt-phase closing arguments denied him his right to a fair trial. (Doc. 5, p. 68). This claim is substantially similar to Claim XIII, that was presented on direct appeal, which states in pertinent part:

> The State Prosecutor argued:
>
> > These are the kinds of things you can see on TV that happens somewhere else-not in Ashville, Alabama. This is a horrendous case and it deserves a capital-murder verdict.
> >
> > Marcus Williams contends that this statement in the closing argument of the State Prosecutor was more than mere

> argument. This argument was an invitation for the jury to go outside the law and the facts of this case. This was an invitation for the jury to find more aggravating circumstances than the jury was authorized by law to find.
>
> The law provides in 13A-5-49 (8) Code of Alabama, 1975 that an aggravating circumstance is:
>
> (8) The capital offense was especially heinous, atrocious, or cruel compared to other capital offenses.
>
> It has been held that "heinous" refers to a crime or act that is extremely wicked or shockingly evil; atrocious means outrageously wicked and vile; cruel means designed to inflict a high degree of pain with utter indifference of others. *Johnson v. State*, 399 So.2d 859 (Ala.Cr.App. 1979), aff'd in part and reversed in part 399 So. 2d 873 (Ala. 1981).

(Tab R. 28, pp. 65-66) (emphasis added).

In its examination of the claim on direct appeal, the Court of Criminal Appeals wrote:

> The appellant argues that the prosecutor's comment encouraged the jury to find as an aggravating circumstance that the crime was especially heinous, atrocious, or cruel compared to other capital offenses. *See* § 13A-5-49(8), Ala.Code 1975. Because he did not object to the prosecutor's comment at trial, we review this argument for plain error. *See* Rule 45A, Ala.R.App.P.

> FN During the rebuttal portion of the State's penalty phase instructions, the prosecutor referred to the crime as "horrible." (R. 579.) At the close of the trial court's instructions, the appellant asked for a curative instruction, alleging that the use of the word "horrible" implied that the especially heinous, atrocious, or cruel aggravating circumstance was present. However, the appellant subsequently withdrew the request and announced that he was satisfied with the trial court's instruction. (R. 595.)

In reviewing a prosecutor's closing argument, the standard is whether the argument "'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181, 106 S.Ct. 2464, 2471, 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.Crim.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. *Orr v. State*, 462 So. 2d 1013, 1016 (Ala.Cr.App. 1984); *Sanders v. State*, 426 So. 2d 497, 509 (Ala.Cr.App. 1982)."

Bankhead v. State, 585 So. 2d 97, 106-07 (Ala.Cr.App. 1989), aff'd in relevant part, 585 So. 2d 112, 127 (Ala. 1991), rev'd on other grounds, 625 So. 2d 1146 (Ala. 1993).

> "'During closing argument, the prosecutor, as well as defense counsel, has a right to present his impressions from the evidence, if reasonable, and may argue every legitimate inference.' *Rutledge v. State*, 523 So. 2d 1087, 1100 (Ala.Cr.App. 1987), rev'd on other grounds, 523 So. 2d 1118 (Ala. 1988) (citation omitted). Wide discretion is allowed the trial court in regulating the arguments of counsel. *Racine v. State*, 290 Ala. 225, 275 So. 2d 655 (1973). 'In evaluating allegedly prejudicial remarks by the prosecutor in closing argument, . . . each case must be judged on its own merits, *Hooks v. State*, 534 So. 2d 329, 354 (Ala.Cr.App. 1987), aff'd, 534 So. 2d 371 (Ala. 1988), cert. denied, 488 U.S. 1050, 109 S.Ct. 883, 102 L.Ed.2d 1005 (1989) (citations omitted) (quoting *Barnett v. State*, 52 Ala. App. 260, 264, 291 So. 2d 353, 357 (1973)), and the remarks

> must be evaluated in the context of the whole trial, *Duren v. State*, 590 So. 2d 369 (Ala. 1991). 'In order to constitute reversible error, improper argument must be pertinent to the issues at trial or its natural tendency must be to influence the finding of the jury.' *Mitchell v. State*, 480 So. 2d 1254, 1257-58 (Ala.Cr.App. 1985) (citations omitted). 'To justify reversal because of an attorney's argument to the jury, this court must conclude that substantial prejudice has resulted.' *Twilley v. State*, 472 So. 2d 1130, 1139 (Ala.Cr.App. 1985) (citations omitted)."

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).

> "There is no impropriety in a prosecutor's appeal to the jury for justice and to properly perform its duty. ' "We view the comments as a call for justice, not sympathy, and, thus, conclude that they are within the wide latitude allowed prosecutor's in their exhortation to the jury to discharge its duty." *Ex parte Waldrop*, 459 So. 2d 959 (Ala. 1984), cert. denied, 471 U.S. 1030, 105 S.Ct. 2050, 85 L.Ed.2d 323 (1985); *Rutledge v. State.*' *Gentry v. State*, 689 So. 2d 894, 906 (Ala.Ct.App. 1994), reversed on other grounds, 689 So. 2d 916 (Ala. 1996)."

Price v. State, 725 So. 2d 1003, 1033 (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). Finally, we presume that the jury followed the trial court's instructions. *See Taylor v. State*, 666 So. 2d 36 (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).

After reviewing the prosecutor's comment in context, we conclude that the comment was no more than a permissible appeal for justice. *See Price*, supra. Furthermore, during the penalty phase of the trial, the State informed the jury that the only aggravating circumstance it would rely on would be that the appellant committed the murder during the commission of a rape or an attempted rape. (R. 546-47, 569.) Additionally, the trial court instructed the jury as follows:

> "The aggravating circumstance that is relied upon by the State in this case is the following: That the capital offense was committed while the defendant was engaged in commission of or attempt to commit rape, robbery, burglary, or kidnaping. You may not consider any other aggravating circumstance other than the one that I have just read to you."

(R. 584) We presume the jury followed the trial court's instructions. *See Taylor*, supra. Therefore, we do not find any plain error in this regard.

Williams, 795 So. 2d at 776-77, *aff'd*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S. 900 (2001).

Respondent asserts that this claim is due to the denied because Williams cannot show that the state court's adjudication of the claim was contrary to or an unreasonable application of federal law, or resulted in an unreasonable determination of the facts in light of the evidence. (Doc. 14, p. 50). This court agrees.

In light of the pleading requirements of § 2254 and the reasoning of the Alabama Court of Criminal Appeals, the court finds that Williams has failed to show that the state court's decision was contrary to or an unreasonable interpretation of federal law, or an unreasonable interpretation of the facts in light of the evidence before it. Furthermore, reviewing the trial court's jury instruction in its entirety, this court finds that the trial court properly instructed the jury that the aggravating circumstance on which the State relied was rape, which the jury found to exist beyond a reasonable doubt. Continuing from the quoted jury instructions above, the trial judge stated:

> You may not consider in your deliberation any other aggravating circumstance other than the one that I have just read to you. The fact you have heretofore found the defendant guilty beyond a reasonable doubt of the capital offense of intentional murder during rape in the first degree establishes for the purpose of this hearing the existence beyond a reasonable doubt of the aggravating circumstance relied on by the State. Because that

> circumstance that the State relies on for aggravation, is the capital offense was committed while the defendant was engaged in the commission of or attempt to commit rape. By your verdict yesterday, you have found beyond a reasonable doubt that that circumstance does exist. So the State has proven beyond a reasonable doubt the existence of one aggravating circumstance, and that is the circumstance they rely on.

(Tab. R. 23, pp. 584-85). The jury instructions cured any improper argument. The prosecutor's closing argument did not "so infect[ ] the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471. The state court's decision was not an unreasonable application of United States Supreme Court law and thus Petitioner's claim lacks merit and is due to be denied.

V.B. Prosecutor's improper comments regarding the evidence presented

Williams argues in both his amended habeas petition and his second amended rule 32 petition that the prosecutor made improper statements that suggested that Williams should have presented evidence that someone else committed the crime and made comments that were unduly burdensome to Williams. (Doc. 5, p. 67; Tab R. 41, p. 230). Specifically, during closing arguments, the prosecutor stated, "[i]f Marcus Williams did not commit this crime, who did? What evidence is there of any other person before you that

indicates someone else did it? There is none." (Tab R. 10, p. 493). The prosecutor also commented, "[h]e wants you to say it can't be capital murder because she didn't get raped until she was a corpse. That is the most—the worst thing I can think of for a man to sit down and say he raped her for fifteen or twenty minutes." (Tab R. 12, p. 508). This substantive claim was presented as Claim VIII in Williams's second amended Rule 32 petition, (Tab R. 41, p. 230).[34] The Rule 32 court did not issue an opinion on substantive Claim VIII.

Respondent contends that this claim is procedurally defaulted because it was not raised at trial or on direct appeal, and it was abandoned during the Rule 32 appeal. (Doc. 14, p. 52). Contrary to his contention that these claims were exhausted (Tab R. 21, p. 38), Williams failed to exhaust this substantive claim in his brief to the Alabama Court of Criminal Appeals and on writ of *certiorari* review to the Alabama Supreme Court. Williams incorrectly asserts that he exhausted this claim by presenting it in the brief to the Alabama Court of Criminal Appeals (Doc 21, p. 38; *See* Tab R. 50, pp. 6, 16). However, the page cited by Williams refers only to the claim that trial counsel gave ineffective assistance for failing to object to improper comments of the prosecutor, not the substantive claim that Williams was prejudiced by the prosecutor's

[34] Rule 32 substantive Claim VIII alleging that the prosecutor denied Williams a fair trial due to improper comments contains the same grounds for relief as Rule 32 ineffective assistance of counsel Claims VD and VE, for failing to object to the same alleged improper prosecutorial comments.

improper arguments. On page 6 of his brief to the Alabama Court of Criminal Appeals, Williams states, "[d]uring the State's guilt phase closing argument, counsel failed to object to the prosecutor's comment on Mr. Williams' decision not to testify on his own behalf." (Tab R. 50, p. 6). On page 16 of the brief to the Alabama Court of Criminal Appeals, he states, "Trial counsel failed to conduct adequate cross-examinations of the State's witnesses, failed to object to irrelevant and prejudicial evidence introduced by the State, and failed to object when the prosecutor commented on Mr. Williams' decision not to testify." (Tab R. 50, p. 16). Further, Williams incorrectly asserts that he exhausted this claim by presenting it in his brief on writ of *certiorari* to the Alabama Supreme Court. (Doc 21, p. 38). However, the page cited by Williams refers only to the claim of ineffective assistance of counsel for failing to object to the prosecutor's improper comments. On page 24 of the brief to the Alabama Supreme Court, it states, "During the State's guilt phase closing argument, counsel failed to object to the prosecutor's comment on Mr. Williams' decision not to testify on his own behalf." (Doc. 21, p. 38; *See* Tab R. 54, pp. 24-25).

If a federal claim has not first been exhausted in state court, this court may also find that it is "procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile." *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (citing *Picard v. Connor*, 404 U.S. 270, 276 (1971)) and *Snowden v. Singletary*, 135 F.3d 732, 737 (11th Cir.

1998)). This claim has not been exhausted and is, therefore, procedurally defaulted as any attempts to exhaust the claim would be futile because of the state's procedural bars on successive petitions and the statute of limitations. Rules 32.2(b) and (c) Ala. R. Crim. P.

The only "cause" asserted by Petitioner for failing to raise these substantive claims on direct appeal is ineffective assistance of trial counsel Claim IID (trial counsel were ineffective in failing to object to improper testimony and physical evidence presented by the State), ineffective assistance of trial counsel Claim IIE (trial counsel prejudiced Williams by failing to object to the State's impermissible closing argument), and ineffective assistance of appellate counsel Claim IV. (Doc. 21, p. 24). The arguments are unavailing, however, because these ineffective assistance of counsel claims are themselves without merit and thus cannot be cause to excuse the default of the substantive claim.

Even if this claim were exhausted, it is without merit. Much the same issue was addressed above as Claim IIE, where Williams alleged that trial counsel were ineffective for failing to object to the prosecutor's comments when he stated, "[i]f Marcus Williams didn't commit this crime, who did? What evidence is there of any other person before you that indicates someone else did it? There is none." (*See* Doc. 5, p. 28.) This court already has concluded, in that context, that the Rule 32 court's resolution of the issue of whether the comments ran afoul of *Griffin v. California*, 380 U.S. 609, 615 (1965), was not contrary to, or an unreasonable application of Supreme Court precedent. The same is true

here. The State's argument was not improper. Thus, because the Rule 32 court's resolution of this claim was neither contrary to, nor an unreasonable application of Supreme Court law, this claim is meritless and due to be denied.

Likewise, the court finds that prosecutor's comments regarding raping a corpse and that the crime was "the worst thing" did not "so infect[ ] the trial with unfairness as to make the resulting conviction [or sentence] a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). *See* (Tab R. 12, p. 508, lines 6-11). These comments were consistent with the defense trial strategy. During the guilt phase closing arguments, trial counsel stated,

> You got his statements. She died. She quit breathing and didn't move. It is in his statements, but in that third statement, the order somehow reverses or they try to reverse it. You know, you can't commit rape on someone already dead. They figured that out. That is why they went back for that other statement. If they get [it] in the order it was argued to you, rape and then murder, it changes. But that is not the way it is in those first two statements and the testimony you heard.

(Tab R. 11, p. 502).

Finally, had the Rule 32 court addressed this claim, this court can say with reasonable certainty that the Rule 32 court would have found it to be procedurally barred because it could have been raised at trial

or on direct appeal. *See* Ala.R.Crim.P. 32.2(a)(3) and (a)(5). This claim cannot overcome any of the above hurdles and is, therefore, due to be denied.

This claim also asserted that Williams was prejudiced by the prosecutor's opening argument during the sentencing phase in which the prosecutor asserted aggravating factors of burglary and robbery, which were not at issue in this case. (Doc. 5, p. 68). This same argument is presented in Claim XIV, (Doc. 5, p. 88), that the trial court denied Williams a fair trial by allowing the prosecutor's improper opening arguments on the aggravating factors of burglary and robbery, and will be discussed *infra*.

CLAIM VI. THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY SENTENCING HIM IN VIOLATION OF THE UNITED STATES CONSTITUTION

VI.A. The trial court relied on a grossly inadequate pre-sentence report to sentence Petitioner

Williams asserts the following claim in both his amended habeas petition and his second amended Rule 32 petition, with the exception that the amended habeas petition contains an additional United State Supreme Court case quotation. The following appears, *verbatim*, in both the habeas and second amended Rule 32 petitions:

> Use of a "perfunctory" presentence investigation report that "impl[ies] little, if any attempt to subjectively evaluate" the defendant "hamstr[ings] the court's consideration of the full mosaic of [the defendant's] background and circumstances before determining the proper sentence." *Guthrie v. State*, 689 So.2d 935, 947 (Ala. Crim. App. 1996). Reliance on a perfunctory report that failed to convey the full range of Mr. Williams' employment and school history denied Mr. Williams his right to individualized sentencing that embraces the objectives of consistency and humane, focused attention to the "uniqueness of the individual." *Eddings v. Oklahoma*, 455 U.S. 104, 110 (1982). In relying on a pre-sentence report with factual misrepresentations, omissions and error, the court violated the demands of due process, *Townsend v. Burke*, 334 U.S. 736 (1948), and disregarded the "fundamental respect for humanity underlying the Eighth Amendment . . . [which] requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) (emphasis added).

(Doc. 5, pp. 69-79; Tab R. 40, p. 189).

The Rule 32 court found that this claim was procedurally barred from postconviction review because it could have been but was not raised at trial and on appeal. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P. (R Tab

59, p. 220). The Alabama Court of Criminal Appeals affirmed the ruling of the Rule 32 court. (R Tab 60, p. 17). The Alabama Supreme Court denied certiorari review. (Tab R. 61).

Respondent argues, and this court agrees, that this claim is procedurally defaulted under independent and adequate state procedural grounds, which will preclude this court's review, absent a showing of cause and prejudice to excuse the default. (Doc. 14, p. 17). Petitioner has not offered "cause and prejudice" to excuse the procedural default. This claim is, therefore, procedurally barred from this court's review.

Furthermore, Petitioner has pointed to no specific part of, or information contained in, the pre-sentence report that is erroneous or that the court can say undermines confidence in the outcome of the sentencing hearing. No evidence demonstrates that the information contained in the pre-sentence report had any illegal detrimental effect on sentencing. In fact, during the sentencing hearing before the trial judge, trial counsel asked to have information stricken from the record and the trial judge obliged:

> Ms. Wilson: Your Honor, in the Pre-Sentence report by the probation officer, there is a comment that states Mr. Williams was a confessed drug dealer. We would ask that be stricken as not being any evidence to be considered.
>
> The Court: The Court will strike that from consideration because I don't really find anywhere to plug that in other than lack of prior

> criminal activity. I don't think that would be a proper way to prove that, just by a statement of the probation officer. I will not consider that.

(Tab R. 25, p. 627-28). Trial counsel reviewed the presentence report to determine if information was erroneous or prejudicial to Williams, and the judge struck and disregarded improper information. This claim lacks merit and cannot serve as the basis for habeas relief.

VI.B. Alabama's sentencing scheme is unconstitutional.

VI.B.i. Judicial imposition of the death sentence denied Petitioner his Sixth Amendment right to a jury trial.

At pages 71 through 74 of the amended habeas petition, Williams contends that his death sentence is unconstitutional under *Ring v. Arizona*, 536 U.S. 584 (2002), because certain predicate facts necessary for the imposition of the death sentence were found by the trial judge and not the jury. (Doc. 5, p. 71). This claim is presented, *verbatim*, in the second amended Rule 32 predecessor. (Tab R. 40, pp. 190-93). The Rule 32 court held that this claim was procedurally barred, and in the alternative, without merit:

> While the Court is aware that *Ring* was not decided until after Williams' conviction had become final, nothing in the record indicates that Williams was limited in any way from

> raising any claim or motion before or during trial. Further, because Williams was sentenced to death, he could have raised any issue, whether or not it was preserved at trial, on direct appeal. Thus, the Court finds that the allegation in Part II.(B)(I) is procedurally barred from postconviction review because it could have been but was not raised at trial and because it could have been but was not raised on appeal; therefore, it is summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.
>
> Moreover, Williams concedes in his second amended Rule 32 petition that in *Ex parte Waldrop*, 859 So. 2d 1181 (Ala. 2002), the Alabama Supreme Court "interpreted *Ring* as not affecting Alabama's capital sentencing statute." (Second amended petition on p. 8 n.3) 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 cases already final on direct review." *Schriro v. Summerlin*, 2004 WL 1402732, at *7 (June 24, 2004) Thus, in addition to being procedurally barred from postconviction review, the Court finds that the allegation in Part II.B.(I) of Williams' second amended Rule 32 petition is without merit. Rule 32.7(d), Ala.R.Crim.P.

(Tab R 59, pp. 221-22).

The Alabama Court of Criminal Appeals affirmed the Rule 32 court's decision regarding the procedural

bar, and in the alternative, denied the claim on the merits:

> Williams' claims that . . . his death sentence was unconstitutionally imposed because the jury and judge did not have to find that the aggravating circumstance outweighed the mitigating circumstances beyond a reasonable doubt were also properly dismissed because they presented no material issue of fact or law which would have entitled Williams to relief. Rule 32.7(d), Ala. R. Crim. P. *Ex parte Waldrop*, 859 So. 2d 1181, 1186-90 (Ala. 2002) (rejecting the claims Williams now raises).

(Tab R 60, p. 17).

Respondent contends that this claim is procedurally defaulted because it was not raised at trial or on direct appeal, pursuant to Rule 32.2(a)(3) and (5), and because it was abandoned on appeal of the denial of the second amended Rule 32 petition. Respondent also argues that this claim is meritless because it relies on the application of *Ring*, which was decided after Williams's conviction became final. (Doc. 14, p. 54). Petitioner replied that this claim was raised at trial (*see Motion to Strike and Quash as Unconstitutional the Alabama Statutes Providing for the Imposition of the Death Penalty, and Their Application to This Case*, Tab R. 27, C. 66-67), as well as on appeal (*see* Appellant's Brief to the Court of Criminal Appeals—Tab R. 28, pp. 63-64; Appellant's Petition for Writ of Certiorari in the Alabama Supreme Court, Tab R-54, pp. 54-57). (Doc. 21, pp. 26, 40).

This court agrees that *Ring* does not apply retrospectively to Petitioner's amended habeas petition. In *Schriro v. Summerline*, 542 U.S. 348, 358 (2004), the Supreme Court flatly held: "*Ring* announced a new procedural rule that does not apply retroactively to cases already final on direct review." Petitioner's conviction became final on direct appeal when the United States Supreme Court denied his petition for writ of *certiorari* on October 1, 2001. *See Williams v. Alabama*, 122 S. Ct. 226 (2001). The United States Supreme Court announced *Ring* in 2002, after Williams's direct appeal was completed. Consequently, the holding in and rationale of *Ring* cannot be applied to Petitioner's case. *See Battle v. United States*, 419 F.3d 1292 (11th Cir. 2005) (*Ring* does not apply retroactively to cases final before it was decided); *Sibley v. Culliver*, 377 F.3d 1196 (11th Cir. 2004) (same).

Although *Ring* had not been announced at the time of Petitioner's trial and direct appeal, habeas petitioners are required to present their claims fairly to the state courts, and failure to do so in violation of a state procedural rule can result in the procedural default of a claim. To assert now the argument that Alabama's capital sentencing scheme violates due process, Petitioner was required to present that argument to the state courts according to the state's procedural requirements. The fact that *Ring* was announced later does not relieve the Petitioner of the obligation to allege and exhaust the essential nature of the claim.

For example, in *Turner v. Crosby*, 339 F.3d 1247 (11th Cir. 2003), the court of appeals rejected as

procedurally defaulted a *Ring* claim made by a petitioner whose conviction was final ten years before *Ring* was decided. The court wrote:

> Although *Ring* was decided several years subsequent to the termination of [petitioner's] state post-conviction proceedings, he was free, prior to *Ring*, to make a federal constitutional challenge to Florida's capital sentencing structure in the state courts but failed to do so. "If a defendant perceives a constitutional claim and believes it may find favor in the federal courts, he may not bypass the state courts simply because he thinks they will be unsympathetic to the claim. Even a state court that has previously rejected a constitutional argument may decide, upon reflection, that the contention is valid."
>
> *Engle v. Isaac*, 456 U.S. 107, 130, 102 S. Ct. 1558, 1573, 71 L. Ed. 2d 783 (1982) (internal footnote omitted).
>
> * * *
>
> Furthermore, to the extent that [petitioner] argues that he cannot be held to have forfeited his claim because settled law pre-*Ring* did not provide a legal basis for the claim, *see e.g.*, *Barclay*, 463 U.S. 939, 103 S. Ct. 3418, 77 L. Ed. 2d 1134 (upholding Florida's capital sentencing structure), we disagree. The United States Supreme Court has held that "cause" to excuse a procedural default may exist "where a constitutional claim is so novel that its legal basis is not reasonably available to counsel." *Reed v. Ross*, 468 U.S. 1, 16, 104

> S. Ct. 2901, 2910, 82 L. Ed. 2d 1 (1984). However, where an argument is not novel, and the "Federal Reporters [are] replete with cases involving [similar] challenges," the default is not excused. *Bousley v. United States*, 523 170 U.S. 614, 622-23, 118 S. Ct. 1604, 1611, 140 L. Ed. 2d 828 (1998). As discussed above, there have been repeated constitutional challenges to Florida's capital sentencing structure. [Petitioner's] Sixth Amendment or *Ring* claim is not novel, and, therefore, he cannot show the "cause" required to overcome the procedural bar to bringing the claim in this case.

Turner v. Crosby, 339 F.3d 1247, 1281-82 (11th Cir. 2003).

The same is true of the instant case. Petitioner remained free, prior to *Ring*, to timely make the same Sixth Amendment argument that ultimately prevailed in *Ring*, but he did not. Because he failed to preserve the claim on direct appeal, it is now procedurally defaulted, and he has not shown cause and prejudice to excuse the default.

Petitioner cannot argue that the cause for his procedural default of this claim was the ineffective assistance of either trial or appellate counsel. Although not a novel claim, *Ring* was not announced until after Petitioner's trial and direct appeal were finished. Under the *Strickland* standard, counsel are not required to anticipate changes in law to avoid being ineffective. The *Strickland* standard does not require counsel to be

clever or inventive, or to advocate a claim not yet announced in the law. Rejecting an argument that it was ineffective assistance for counsel to fail to anticipate the Supreme Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), the Eleventh Circuit wrote: "While an attorney's failure to anticipate a change in the law does not constitute ineffective assistance of counsel, attorneys routinely make arguments based on reasonable extensions of existing Supreme Court case law." *United States v. Levy*, 391 F.3d 1327, 1334 n. 3 (11th Cir. 2004). Thus, even though Petitioner was required to preserve his claim to avoid procedural default, his attorneys were not constitutionally ineffective in failing to do so under these circumstances.

Even if *Ring* could be applied to this case, Petitioner's claim is procedurally defaulted because it was not raised at trial or on direct appeal.[35] Contrary to his contention, Williams did not present this specific claim at trial or on direct appeal. The Motion to Strike and Quash and Claim XI referenced in Williams's response argue a substantially different claim; instead it asserts that Alabama's sentencing statute §13A-5-40(a)(15) is unconstitutional because Williams's sentence was applied in an arbitrary and capricious manner, in violation of *Godfrey v. Georgia*, 446 U.S. 420, 427-428, 100 S.Ct. 1759, 1764, 64 L.Ed.2d 398, 406 (1980). Petitioner has not alleged "cause and prejudice" to overcome the

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[35] Williams did exhaust this claim during the Rule 32 appeal. *See* Appellant's Brief in the Court of Criminal Appeals, Tab R.50, pp. 49-50; *see also* Appellant's Petition for Writ of Certiorari in the Alabama Supreme Court, Tab R. 54, pp. 54-57.

procedural default. Because this claim is both procedurally defaulted and meritless, it is due to be denied.

V.B.ii. The aggravating factors were not charged in Petitioner's indictment.

On pages 74-75 of the amended habeas petition, Williams alleges that Alabama's capital sentencing scheme is unconstitutional because it allows a capital defendant's sentence to be increased from life to death based on facts not charged in the indictment, and thus not found by the jury beyond a reasonable doubt. (Doc. 5, p. 74). Williams asserts, therefore, that his sentence was a violation of the well-established rule of criminal pleading, which held that "the indictment must contain an allegation of every fact that is legally essential to the punishment to be inflicted." *Apprendi v. New Jersey*, 530 U.S. 466, 490 n.15 (2000) (quoting with approval Justice Bishop's "succinct" statement of "pedigree[d]" rule in his separate opinion in *United States v. Reese*, 92 U.S. 214, 232-233 (1875)). Williams alleged this same claim, *verbatim*, in his second amended Rule 32 petition. (Tab R 40, p. 193). The Rule 32 court held that the claim was procedurally barred because it could have been, but was not, raised at trial or on appeal, pursuant to Rule 32.2(a)(3) and (a)(5), and, in the alternative, denied the claim on the merits:

> Moreover, under the facts of the Williams' case, the Court finds that the allegation in Part II.B.(ii) of Williams' second amended Rule 32 petition is without merit. The indictment returned against Williams charged him

> with intentional murder during the course of a rape or an attempted rape in violation of Section 13A-5-49(4) of the Code of Alabama (1975). (C.R. 7-8) Section 13A-5-45(e) of the Code of Alabama (1975), states in pertinent part that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for the purposes of the sentencing hearing." The only aggravating circumstance relied on by the State and considered by the jury and the trial court was that Williams committed intentional murder during the course of a rape or an attempted rape. Thus, the jury's guilt phase verdict established beyond a reasonable doubt the existence of the only aggravating circumstance considered in sentencing Williams to death. *See Ex parte Waldrop*, 859 So. 2d at 1188 (holding that "[b]ecause the jury convicted Waldrop of two counts of murder during a robbery in the first degree, Ala. Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala. Code 1975, § 13A-5-49(4), was 'proved beyond a reasonable doubt.' Ala. Code 1975, § 13A-5-45(e); Ala. Code 1975, § 13A-5-50").

(Tab R 59, p. 8). The Alabama Court of Criminal Appeals affirmed the Rule 32 court's holding. (Tab R 60, p. 17). The Alabama Supreme Court denied *certiorari* review. (Tab R 61).

Respondent asserts that this claim is procedurally barred and without merit on several grounds: (1) because it was not raised at trial or on direct appeal; (2) because Williams cannot overcome the presumption of correctness in the state court's denial of the claim on the merits; and (3) because the claim was abandoned during the Rule 32 appeal. (Doc. 14, pp. 58-59). Williams erroneously counters that this claim was raised at trial[36] (Tab. R. 27, p. 72) and on direct appeal (Tab R. 28, pp. 58-59; 71-72; 60-61).[37] Williams correctly argues that this claim was not abandoned during the Rule 32 appeal. (Doc. 21, p. 40).[38]

However, this claim is procedurally barred from this court's review because it could have been, but was not, raised at trial or on direct appeal. Petitioner has not alleged "cause and prejudice" to excuse the procedural default.

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[36] This motion to dismiss the indictment asserted reasons that do not relate to the allegation that aggravating factors must be charged in the indictment. (Tab R. 27, p. 72).

[37] Appellant's Brief on direct appeal to the Court of Criminal Appeals, Tab R. 28, Issue VII, pp. 58-59 refers to Williams's contention that no evidence proved rape; Issue XVII, pp. 71-72 refers to the prosecutor's alleged improper argument regarding the aggravating factors of robbery and burglary; Issue IX, pp. 60-61 refers to the allegation that the evidence is not sufficient to sustain a capital murder conviction because the Government failed to prove rape and particularized intent.

[38] *See* Appellant's Opening Brief in the Court of Criminal Appeals, Tab R. 50, pp. 49-50; *see also* Appellant's Petition for Writ of Certiorari in the Alabama Supreme Court, Tab R. 54, pp. 57-59.

Furthermore, Williams cannot show that the state court's decision is contrary to, or an unreasonable application of Federal law, or that it is an unreasonable application of the facts in light of the evidence. The Supreme Court in *Apprendi* explained:

> In sum, our reexamination of our cases in this area, and of the history upon which they rely, confirms the opinion that we expressed in *Jones*. Other than the fact of a prior conviction, any fact that increases the penalty for a crime *beyond the prescribed statutory maximum* must be submitted to a jury, and proved beyond a reasonable doubt. With that exception, we endorse the statement of the rule set forth in the concurring opinions in that case: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt." 526 U.S. at 252-253, 119 S.Ct. 1215 (opinion of STEVENS, J.); see also *id.*, at 253, 119 S.Ct. 1215 (opinion of SCALIA, J.).
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> * * *
>
> Finally, this Court has previously considered and rejected the argument that the principles guiding our decision today render invalid state capital sentencing schemes requiring judges, after a jury verdict holding a defendant guilty of a capital crime, to find specific aggravating factors before imposing a sentence of death. *Walton v. Arizona*, 497 U.S. 639,

> 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990); *id.*, at 709-714, 110 S.Ct. 3047 (STEVENS, J., dissenting). For reasons we have explained, the capital cases are not controlling:
>
> > "Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital *offense.* What the cited cases hold is that, once a jury has found the defendant guilty of all the elements of an offense which carries as its maximum penalty the sentence of death, it may be left to the judge to decide whether that maximum penalty, rather than a lesser one, ought to be imposed. . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on all the elements of the charge." *Almendarez-Torres*, 523 U.S., at 257, n. 2, 118 S.Ct. 1219 (SCALIA, J., dissenting) (emphasis deleted).

Apprendi v. New Jersey, 530 U.S. 466, 490 (emphasis added) (2000).

Williams's argument is without merit. The state court's decision is not contrary to *Apprendi.* The indictment charged Williams with murder made a capital offense during a rape or attempted rape. The jury, not the trial court, found Williams guilty beyond a reasonable doubt of all the elements of the crime of murder made a capital offense because committed during a rape or attempted rape. Further, the penalty imposed did not exceed the prescribed statutory maximum.

Williams, therefore, received a jury trial on all the elements that exposed him to the death penalty. This claim is due to be denied.

VI.B.iii. Any finding that aggravating factors outweighed mitigating factors is invalid because such findings were not subject to the most stringent 'beyond a reasonable doubt' standard as required for conviction of criminal offenses

Next, Petitioner argues that Alabama's capital murder sentencing scheme is unconstitutional because "[n]either the judge nor the jury is required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, as required by *Apprendi*." (Tab R. 40, pp. 10-11). Petitioner asserted this same claim *verbatim* in his second amended Rule 32 petition.

The Rule 32 court held:

> While this Court is aware that *Apprendi* and *Ring* were not decided until after Williams's conviction had become final, nothing in the record indicates that Williams was limited in any way from raising any claim or motion before or during his trial. Further, because Williams was sentenced to death, he could have raised any issue, whether or not it was preserved, on direct appeal. The Court finds that the allegations in Part II.B.(iii) are procedurally barred from postconviction review because they could have been but were not raised at trial and because they could have

> been but were not raised on direct appeal; therefore, they are summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala. R. Crim. P.

(Tab R 59, p. 9).

The Alabama Court of Criminal Appeals affirmed the Rule 32 court's decision regarding the procedural bar, and added the following:

> Williams' claims that . . . his death sentence was unconstitutionally imposed because the jury and judge did not have to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt were also properly dismissed because they presented no material issue of fact or law which would have entitled Williams to relief. Rule 32.7 (d), Ala. R. Crim. P. *Ex parte Waldrop*, 859 So. 2d 1181, 1186-90 (Ala. 2002) (rejecting the claims Williams now raises).

(Tab R 60, p. 17).

The State argues that this claim is procedurally defaulted from this court's review because the state courts correctly found that it was barred under Rules 32.2(a)(3) and (5). (Doc. 14, p. 61). This court agrees. Alternatively, the Alabama Court of Criminal Appeals addressed the claim on the merits. Petitioner has not alleged "cause and prejudice" to excuse the default.[39]

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[39] Petitioner incorrectly assert that he raised this claim at trial and on appeal. (Doc. 21, p. 27-28). However, those references are to assertions that do not correspond with this particular claim.

Even assuming no procedural bar, this claim lacks merit. As explained in *Ex parte Waldrop*, 859 So. 2d at 1187:

> Waldrop also claims that *Ring* and *Apprendi* require that the jury, and not the trial court, determine whether the aggravating circumstances outweigh the mitigating circumstances. Ala.Code 1975, §§ 13A-5-46(e), 13A-5-47(e), and 13A-5-48. Specifically, Waldrop claims that the weighing process is a "finding of fact" that raises the authorized maximum punishment to the death penalty. Waldrop and several of the amici curiae claim that, after *Ring*, this determination must be found by the jury to exist beyond a reasonable doubt. Because in the instant case the trial judge, and not the jury, made this determination, Waldrop claims his Sixth Amendment rights were violated. Contrary to Waldrop's argument, the weighing process is not a factual determination. In fact, the relative "weight" of aggravating circumstances and mitigating circumstances is not susceptible to any quantum of proof. As the United States Court of Appeals for the Eleventh Circuit noted, "While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard . . . the relative *weight* is not." *Ford v. Strickland*, 696 F.2d 804, 818 (11th Cir.1983). This is because weighing the aggravating circumstances and the mitigating circumstances is a process in which "the sentencer determines whether a defendant

eligible for the death penalty should in fact receive that sentence." *Tuilaepa v. California*, 512 U.S. 967, 972, 114 S.Ct. 2630, 129 L.Ed.2d 750 (1994). Moreover, the Supreme Court has held that the sentencer in a capital case need not even be instructed as to how to weigh particular facts when making a sentencing decision. See *Harris v. Alabama*, 513 U.S. 504, 512, 115 S.Ct. 1031, 130 L.Ed.2d 1004 (1995) (rejecting "the notion that 'a specific method for balancing mitigating and aggravating factors in a capital sentencing proceeding is constitutionally required'" (quoting *Franklin v. Lynaugh*, 487 U.S. 164, 179, 108 S.Ct. 2320, 101 L.Ed.2d 155 (1988)) and holding that "the Constitution does not require a State to ascribe any specific weight to particular factors, either in aggravation or mitigation, to be considered by the sentencer").Thus, the weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum. *See California v. Ramos*, 463 U.S. 992, 1008, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983) ("Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, . . . the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment."); *Zant v. Stephens*, 462 U.S. 862, 902, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983) (Rehnquist, J., concurring in the judgment)

("sentencing decisions rest on a far-reaching inquiry into countless facts and circumstances and not on the type of proof of particular elements that returning a conviction does").

In *Ford v. Strickland, supra*, the defendant claimed that "the crime of capital murder in Florida includes the element of mitigating circumstances not outweighing aggravating circumstances and that the capital sentencing proceeding in Florida involves new findings of fact significantly affecting punishment." *Ford*, 696 F.2d at 817. The United States Court of Appeals for the Eleventh Circuit rejected this argument, holding that "aggravating and mitigating circumstances are not facts or elements of the crime. Rather, they channel and restrict the sentencer's discretion in a structured way after guilt has been fixed." 696 F.2d at 818. Furthermore, in addressing the defendant's claim that the State must prove beyond a reasonable doubt that the aggravating circumstances outweighed the mitigating circumstances, the court stated that the defendant's argument seriously confuses proof of facts and the weighing of facts in sentencing. While the existence of an aggravating or mitigating circumstance is a fact susceptible to proof under a reasonable doubt or preponderance standard, see *State v. Dixon*, 283 So.2d 1, 9 (Fla.1973), *cert. denied*, 416 U.S. 943, 94 S.Ct. [1950], 40 L.Ed.2d 295 (1974), and *State v. Johnson*, 298 N.C. 47, 257 S.E.2d 597, 617-18 (1979), the relative *weight* is not. The process of weighing circumstances is a matter for

> judge and jury, and, unlike facts, is not susceptible to proof by either party." 696 F.2d at 818. Alabama courts have adopted the Eleventh Circuit's rationale. See *Lawhorn v. State*, 581 So.2d 1159, 1171 (Ala.Crim.App.1990) ("while the *existence* of an aggravating or mitigating circumstance is a fact susceptible to proof, the relative *weight* of each is not; the process of weighing, unlike facts, is not susceptible to proof by either party"); see also *Melson v. State*, 775 So.2d 857, 900-901 (Ala.Crim.App.1999); *Morrison v. State*, 500 So.2d 36, 45 (Ala.Crim.App.1985).
>
> Thus, the determination whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense. Consequently, *Ring* and *Apprendi* do not require that a jury weigh the aggravating circumstances and the mitigating circumstances.

Ex parte Waldrop, 859 So. 2d at 1187 (footnote omitted).

The last court to address this claim was the Court of Criminal Appeals. It affirmed the procedural default and addressed the claim on the merits, citing *Ex parte Waldrop.* This ruling is entitled to a presumption of correctness. The state court's ruling is neither contrary to, nor an unreasonable interpretation of, Federal law. This claim is barred from federal review and is due to be denied.

VI.B.iv. The jury's recommendation of a death sentence is invalid

VI.B.iv.a. The jury was told they only made a recommendation

On page 77 of his amended habeas petition, Williams asserts that Alabama's sentencing scheme is unconstitutional because jurors were informed that their penalty phase verdict was a recommendation; a "recommendation" puts jurors at risk of "not properly engaging [] in the evidence and bearing the responsibility of [their] decision," in violation of *Caldwell v. Mississippi*, 472 U.S. 320 (1985).[40] (Doc. 5, p. 77). This same claim was raised *verbatim* in Williams's second amended Rule 32 petition. (Tab R 40, pp. 11-12). The Alabama Court of Criminal Appeals affirmed the Rule 32 court, holding that the claim was procedurally defaulted because it could have been, but was not, raised at trial or on appeal. (Tab R. 59, p. 225; Tab R. 60, p. 17). The Alabama Supreme Court denied *certiorari* review. (Tab R. 61).

Respondent correctly asserts that this claim is barred from federal review because it was not raised at trial or on direct appeal. (Doc. 14, pp. 63-64). Because Williams failed to raise this claim at trial or on direct appeal, this claim is barred from federal review. Williams does not allege "cause and prejudice" for the

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[40] The Supreme Court has never ruled that Alabama's advisory jury system is unconstitutional. *See Harris v. Alabama*, 513 U.S. 504 (1995).

procedural default, but instead erroneously asserts that this issue was raised at trial and on appeal.[41]

Furthermore, "habeas corpus review exists only to review errors of constitutional dimension," and a habeas corpus petition must meet the "heightened pleading requirements [of] 28 U.S.C. § 2254 Rule 2c." *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (citations omitted.)) The Petitioner must specify all the grounds for relief available to him, state the facts supporting each ground, and state the relief requested. 28 U.S.C. § 2254 Rule 2(c)(1)(2)(3).

The burden of proof is on the habeas petitioner to establish a factual basis for the relief he seeks. *Hill v. Linahan*, 697 F.2d 1032, 1034 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549, *reh'g denied*, 714 F.2d 159 (11th Cir. 1983), *cert. denied*, 467 U.S. 1220 (1984). That burden

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[41] Williams states that this issue was raised at trial at pages 598-629 of the trial transcript. After careful review of the record, these pages of the transcript were the sentencing before the trial judge, out of the presence of the jury, and, therefore, cannot support his contention that the jury was told that they made a recommendation. (Tab R. 28). Williams also asserts that this issue was raised on appeal in his Appellant's Brief to the Alabama Court of Criminal Appeals, Tab R. 28, Claim XV, pp. 67-69, which relates to the jury being improperly charged regarding the aggravating circumstances of robbery and burglary; Claim XVII, pp. 71-72, which relates to the prosecutor's alleged improper argument regarding the aggravating circumstance of robbery and burglary; and Claims XIX-XXI, pp. 74-83, which relate to ineffective assistance not to abandon the mental disease or defect plea, that the voluntary intoxication charge was in error, and that the trial court erred when it refused the manslaughter charge—none of which raise this issue.

requires demonstrating at least *prima facie* evidence establishing the alleged constitutional violation. The mere assertion of a ground for relief, without factual support, does not satisfy Petitioner's burden of proof or the requirements of 28 U.S.C. § 2254(e)(2) and Rule 2(c), *Rules Governing § 2254 Cases in the United States District Courts*. Williams provides no identifying or contextual description of the jury being instructed as such or how many times these actions purportedly occurred. In fact, he does not even attempt to cite various pages in the record to support his contention. This claim is due to be denied as procedurally barred and without merit.

VI.B.iv. Jury's recommendation of a death sentence invalid.

VI.B.iv.b. The verdict is incapable of review as the jury's verdict form failed to specify which aggravating and mitigating factors were found

In one sentence followed by a string cite of United States Supreme Court cases, Williams alleges that, "[i]nability to review which aggravating and mitigating factors were considered violates well-established Eighth Amendment requirements that sentencing determinations are individualized in death penalty cases." (Doc. 5, p. 78). This same claim was raised *verbatim* in Williams's second amended Rule 32 petition. (Tab R. 40, p. 12). On appeal from the denial of the second amended Rule 32 petition, the Alabama Court of Criminal Appeals affirmed the Rule 32 court's holding,

concluding that the claim was procedurally defaulted because it could have been, but was not, raised at trial or on appeal. (Tab R. 59, p. 225; Tab R. 60, p. 17).

Respondent asserts, and this court agrees, that this claim is barred from federal review because it was not raised at trial or on direct appeal. (Doc. 14, pp. 63-64). Williams has not pled "cause and prejudice" to overcome the procedural default.

This claim is procedurally defaulted because it was denied under independent and adequate state law grounds and lacks merit. Williams fails to make any argument based on federal law that supports his claim. Instead, Petitioner simply cites *Zant v. Stephens*, 462 U.S. 862, 879 (2000) in support of his contention that the jury's verdict form violated his Eighth Amendment right. *Zant* specifically states:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime. See *Eddings v. Oklahoma*, 455 U.S. 104, 110-112, 102 S.Ct. 869, 874, 71 L.Ed.2d 1 (1982); *Lockett v. Ohio*, 438 U.S. 586, 601-605, 98 S.Ct.

> 2954, 2963-2965, 57 L.Ed.2d 973 (plurality opinion); *Roberts (Harry) v. Louisiana*, 431 U.S. 633, 636-637, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977); *Gregg, supra*, 428 U.S., at 197, 96 S.Ct., at 2936 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Proffitt v. Florida*, 428 U.S., at 251-252, 96 S.Ct., at 2966 (opinion of STEWART, POWELL, and STEVENS, JJ.); *Woodson v. North Carolina*, 428 U.S. 280, 303-304, 96 S.Ct. 2978, 2990-2991, 49 L.Ed.2d 944 (1976) (plurality opinion).

Zant v. Stephens, 462 U.S. at 878 (footnote omitted).

Petitioner has pointed to no facts in the record that suggest that Williams's sentence was not based on an "individualized" determination of his character, as presented during both the guilt and penalty phases, or the facts regarding the circumstances of his crime. Petitioner has failed to establish a factual basis for this claim. *See Hill v. Linahan*, 697 F.2d 1032, 1034 (11th Cir. 1983); *Corn v. Zant*, 708 F.2d 549, *reh'g denied*, 714 F.2d 159 (11th Cir. 1983), *cert. denied*, 467 U.S. 1220, 104 S.Ct. 2670, 81 L.Ed.2d 375 (1984). This claim is due to be denied.

CLAIM VII. IT WAS A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS NOT TO CONDUCT INDEPENDENT DNA TESTING OF ALL SUSPECTS BY THE DEFENDANT

Petitioner argues that the trial court violated his rights under the Fifth, Sixth, Eighth, and Fourteenth

Amendments by not allowing the defense to perform independent DNA tests on blood samples taken from other suspects. (Doc.5, p. 78). In denying this claim on the merits during the direct appeal, the Court of Criminal Appeals stated:

> At a pretrial hearing, the State indicated that, during the course of the investigation in this case, law enforcement officials had gathered blood samples from approximately 14 other suspects and had DNA tests performed on those samples. The appellant requested funds to perform an independent analysis of each of those samples. The trial court granted the defense's request for funds to have independent tests performed on his own blood, but denied the request to independently test the samples from the other suspects. The trial court explained its ruling as follows:
>
> > "I will allow you to re-run the matching sample of the defendant to the sample found on the victim. I don't believe I'm going to let you run all the other potential samples unless you show me some strong evidence. Normally, evidence that another person may have committed the offense is not admissible in the defense of an individual.
>
> The appellant did not subsequently present this request to the trial court again.
>
> > "In [*Ex parte]* Moody, [684 So. 2d 114 (Ala. 1996),] the Alabama Supreme Court defined the standard by which a trial court

must assess an indigent defendant's request for expert assistance.

> "'Although the [United States] Supreme Court has not specifically stated what "threshold showing" must be made by the indigent defendant with regard to the need for an expert, the Court refused to require the state to pay for certain experts when the indigent defendant "offered little more than undeveloped assertions that the requested assistance would be beneficial." *Caldwell v. Mississippi*, 472 U.S. 320 at 323, 105[,] S.Ct. 2633 at 2637, 86 L.Ed.2d 231 (1985). As we stated in *Dubose [v. State*, 662 So. 2d 1189 (Ala. 1995)] the Supreme Court cases of *Ake [v. Oklahoma*, 470 U.S. 68, 105 S.Ct. 1087, 84 L.Ed.2d 53 (1985)] and *Caldwell*, viewed together, seem to hold that an indigent defendant must show more than a mere possibility that an expert would aid in his defense. "Rather, the defendant must show a reasonable probability that an expert would aid in his defense and [must show that] a denial of an expert to assist at trial would result in a fundamentally unfair trial." *Dubose*, 662 So. 2d at 1192, citing *Moore v. Kemp*, 809 F.2d 702 (11th Cir.), cert denied, 481 U.S. 1054, 107 S.Ct. 2192, 95 L.Ed.2d 847 (1987).

> "'. . . .
>
> "'Based on the foregoing, we conclude that for an indigent defendant to be entitled to expert assistance at public expense, he must show a reasonable probability that the expert would be of assistance in the defense and that the denial of expert assistance would result in a fundamentally unfair trial. To meet this standard, the indigent defendant must show, with reasonable specificity, that the expert is absolutely necessary to answer a substantial issue or question raised by the state or to support a critical element of the defense. If the indigent defendant meets this standard, then the trial court can authorize the hiring of an expert at public expense.'
>
> "684 So. 2d at 119, *See also Burgess v. State*, [723] So. 2d [742] (Ala.Cr. App.1997); *MacEwan v. State*, 701 So. 2d 66 (Ala.Cr.App.1997); *Ex parte Dobyne*, 672 So. 2d 1354, 1357 (Ala. 1995), cert. denied, 517 U.S. 1169, 116 S.Ct. 1571, 134 L.Ed.2d 670 (1996)."

Finch v. State, 715 So.2d 906, 910-11 (Ala.Cr.App.1997). In this case, the trial court gave the appellant an opportunity to make such a showing, but the appellant did not satisfy his burden of proof. After independently testing his own blood, he did not show that

> there was a reasonable probability that independent DNA testing of the samples from the other suspects would aid his defense and that a denial of the opportunity to have independent DNA testing performed would result in a fundamentally unfair trial. He did not specifically show that independent testing was absolutely necessary to answer a substantial issue or question raised by the State or to support a critical element of the defense. In fact, throughout the trial, his defense was that he entered the victim's apartment with the intent to have sex with her, but that he did not intend to kill her. Therefore, the trial court did not err in denying the appellant's request to have the samples from the other suspects independently tested.

Williams, 795 So. 2d at 763.

The Petitioner did not allege, and cannot show, that the decision of the Alabama Court Criminal Appeals was contrary to, or an unreasonable application of Federal law, or an unreasonable determination of the facts in light of the evidence. For this reason, the Petitioner is not due any relief.

CLAIM VIII. THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY ALLOWING DNA EVIDENCE.

Petitioner next asserts that "[b]ecause the DNA analysis in this case was fraught with error, the jury's

consideration of the evidence violated the Eighth Amendment." (Doc. 5, p. 80).

The Court of Criminal Appeals denied this claim on direct appeal:

> Initially, we note that
>
> > "[a]t the time of the appellant's trial, § 36-18-30, Ala. Code, 1975, not *Perry*, governed the admissibility of DNA evidence. That section provides:
> >
> > > "'Expert testimony or evidence relating to the use of genetic markers contained in or derived from DNA for identification purposes shall be admissible and accepted as evidence in all cases arising in all courts of this state, provided, however, the trial court shall be satisfied that the expert testimony or evidence meets the criteria for admissibility as set forth by the United States Supreme Court in Daubert, ex ux., et al., v. Merrell Dow Pharmaceuticals, Inc., decided on June 28, 1993."
> >
> > "For DNA evidence to be admissible under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795-97, 125 L.Ed.2d 469 (1993), it must be reliable and relevant. Some factors that are germane in determining whether evidence is reliable include testimony 1) that the technique has been tested, 2)

> that the technique has been subjected to peer review and publication, 3) about the known or potential rate of error and quality controls associated with the technique, and 4) that the technique is generally accepted in the relevant scientific community. *Daubert*, 509 U.S. at 594-95, 113 S.Ct. At 2797. In determining whether DNA evidence is relevant, the trial court should decide whether the evidence will help the factfinders understand the evidence or decide a fact that is in issue. *Daubert*, 509 U.S. at 591, 113 S.Ct. At 2795. Thus, to be admissible, the DNA evidence must relate to some issue in the case."

Maples v. State, 758 So. 2d 1, 47 (Ala.Cr.App. 1999). Therefore, we will assess the admissibility of the DNA evidence under the *Daubert* standard.

In this case, Larry Huys, a forensic scientist employed by the Alabama Department of Forensic Sciences in its Birmingham laboratory, testified for the State as an expert in the field of DNA analysis. He testified about both polymerase chain reaction (PCR) matching and population frequency statistics.

Regarding the PCR method, Huys testified that his laboratory uses a three-step process to perform DNA testing. First, scientists extract the DNA from the sample and purify, or clean it. Second, they amplify, or make copies

of, ten portions of the DNA molecule that have variation. Third, they perform a visualization, using dots or blots, to read or interpret the DNA molecule. Huys also testified that, before it started using the PCR method, the department performed a series of validation steps. In fact, he testified that the scientists probably worked with the method for one year before they started using it on actual cases.

Huys testified that other forensics laboratories throughout the United States use the PCR testing method, and added that the scientists "are constantly exchanging ideas, having meetings, going to various seminars to be sure everyone in the forensic community is on the same wavelength." (R. 367.) He stated that this type of testing is also widely used in areas other than forensics.

Regarding peer review and publication, Huys testified that the National Research Council (NRC) has performed two studies about the PCR method and that its conclusions have been very complimentary. He also testified that the Technical Working Group on DNA analysis sets forth guidelines for each laboratory to follow so it will be in compliance with other forensics laboratories throughout the world. He added that one of the department's scientists is a member of the board of the Technical Working Group on DNA analysis and that the department complies with that group's guidelines. He further testified that the department has published its data in various publications and that several agencies

and scientists have scrutinized the department's testing process. Finally, he testified that the department's laboratory is accredited by the National Forensic Science Training and Research Center.

Regarding the known rate of error, Huys testified that he was not aware of any errors that had occurred in any of the DNA testing performed in the department's laboratory. He further stated that the department undergoes proficiency testing every 180 days, and added that, on nationwide proficiency tests, the results the department has obtained have been in 100 percent agreement with those obtained by other laboratories. He also testified that the department uses several quality controls to assure that the tests are performed properly, including testing blanks and known samples to detect contamination. Additionally, scientists duplicate the procedures on unknown samples to assure that they obtain the same results every time. They also process known and unknown samples on different days to avoid cross-contamination, and they use additional clean-up techniques to test for contamination. He testified that, to safeguard a sample, the sample is submitted in a sealed condition, maintained in a dry environment, and placed in a locked storage area. Finally, he testified that, in this case, the controls did not indicate that any errors had occurred during the testing process.

Finally, Huys testified that the PCR testing procedures used by the Alabama Department

of Forensic Sciences are widely accepted in the scientific community as being reliable. Also, he noted that the department complies with the guidelines the DNA Advisory Board sets forth for the entire forensics community to follow.

Regarding population frequency statistics, Huys testified that, once a scientist has a match, he looks at a series of ten genetic traits or characteristics. Using between 100 and 150 samples from the Alabama population, he determines in what proportions those traits occur. He then multiplies those proportions to determine how rare the combination of traits is in the general population. When doing such an analysis, the scientist also factors in a number that accounts for situations in which close relatives may reproduce.

Huys testified that the department compiled a database from the population within the state of Alabama, including samples from approximately 100 Caucasians and 100 black people. He explained that scientists have compared the Alabama database to other databases around the country and determined that the Alabama population is very consistent with those other populations. Regarding controls, Huys testified that the analyst who is in charge of the case would not produce the statistics independently. Rather, two analysts would calculate the statistics independently and compare their results. He stated that the resulting statistics could be published only if the two analysts

independently obtained the same result. In this case, these controls did not indicate that any error occurred in calculating the population frequency statistics. Finally, Huys testified that the statistical methods the department uses to estimate the significance of a match have been used for years, are used by other laboratories that comply with NRC requirements, and are generally accepted in the scientific community.

At the conclusion of the hearing on the admissibility of the DNA evidence, the trial court stated:

> "The court finds that the PCR testing process is reliable and generally accepted by the scientific community and the results of those tests are relevant to this case. As to the population frequency statistics, the court finds overwhelmingly throughout the country these statistics are accepted. The court takes judicial knowledge of caselaw from states all over the country-Massachusetts, Arizona, and Mississippi—that allow these results in. The question that needs to be focused on is whether these statistics are generally accepted in the scientific community. The court finds that whereas in the early '90's, there was some general debate as indicated by the report that the attorney for the defendant referred to, based on the caselaw around the country as of today's date, there is no debate as to the use of these statistics. For this court to reject

> the use of those population statistics would be in itself a decision that would probably be a vast minority of the cases. The court finds these statistics are based on valid scientific principles. The court further finds that these statistics are generally accepted principles in the community. The court finds that, based on both literature and caselaw, these are accepted by experts in the field and that the interpretation of these statistics and what they mean and the weight and credibility to be given to them are certainly jury questions. The court finds that the DNA evidence in this case and the population frequency statistics are relevant to the issues in this case based upon the location of the stains involved and the proximity to the crime scene in this case. Based upon that, the court will allow this expert to testify as to the DNA test results under the PCR system as used and the court will further allow this expert to testify as to the population frequency statistics."
>
> (R. 423-25.)

Based on the evidence presented, we conclude that the trial court did not err in admitting into evidence testimony regarding the PCR testing method and population frequency statistics. In this case, the State presented sufficient evidence to establish the reliability of the theory and techniques used in the PCR testing method and in the population frequency statistical analysis. Furthermore, in

> *Simmons v. State*, [Ms. CR-97-0768, September 17, 1999] ___ So.2d ___ (Ala.Cr.App.1999), this court took judicial notice of the reliability of the theory and techniques used in the PCR method of DNA analysis. Additionally, the DNA evidence was relevant to establishing the appellant's identity as the perpetrator of the murder, to corroborating the appellant's statements to police, and to supporting the State's theory that the appellant raped or attempted to rape the victim. Therefore, the trial court did not err in admitting into evidence testimony about the results of DNA testing.

Williams, 795 So. 2d at 769-772.

Respondent contends that this claim was not fairly presented as a federal claim in state court and is, therefore, not for review, or alternatively, that the state court's decision was not contrary to, or an unreasonable application of federal law. (Doc. 14, p. 14). The Respondent's assertion that this claim is procedurally defaulted because it was not fairly presented as a federal claim in state court and because the Alabama Court of Criminal Appeals addressed the claim in terms of state law is clearly erroneous. In his direct appeal brief, Petitioner states, "[h]is rights to due process were violated, which rights are guaranteed under the Fifth and Fourteenth Amendments of the United States [C]onstitution and of Article 1, Section 6, constitution of Alabama of 1901." Tab R-28, p. 25. Although Petitioner erroneously cites *Perry v. State*, 586 So. 2d 254 (Ala. 1991) as the controlling legal authority on the

admissibility of DNA evidence, the Court of Criminal Appeals correctly cites 36-18-30, Ala. Code 1975, which in turn cites *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S. Ct. 2786, 2795-97, 125 L.Ed.2d 469 (1993) as its controlling legal authority on DNA admissibility. Petitioner sufficiently presented this claim as a federal claim.

Regardless of whether Petitioner appropriately presented his federal claim in state court, this court finds that the state court's decision is not contrary to, nor an unreasonable application of federal law, nor an unreasonable determination of the facts in light of the evidence. Further, Petitioner did not provide any evidence tending to demonstrate that the DNA evidence was inaccurate, unreliable or not widely accepted in the scientific community, pursuant to *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589, 113 S.Ct. 2786, 2795-97, 125 L.Ed.2d 469 (1993). This claim is due to be denied.

CLAIM IX. THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY LIMITING CROSS EXAMINATION OF AN EXPERT WITNESS FOR THE STATE

Petitioner asserts that the trial court improperly limited his cross examination of the State's witness, Larry Huys, in violation of the Sixth Amendment Confrontation Clause guarantees. (Doc. 5, p. 80).

During cross examination of Larry Huys, the following exchange occurred:

> Q [Trial counsel] Are you familiar with the case of [*Cauthen v.*] *Yates*, [716 So. 2d 1256 (Ala. Civ. App. 1998)] that came out last year concerning DNA testing?
>
> A [Larry Huys] No.
>
> Q [Trial counsel] You are not familiar with a lab in Birmingham having a probability of paternity in a case, and getting independent tests run and it—
>
> Prosecutor Judge, I object to this line of questioning. He is testifying before the jury the results of some case holding such and such. If he wants to offer a copy of that—
>
> Court I'll sustain as to the form of that question.
>
> Q [Trial counsel] Are you familiar with people getting up and testifying concerning DNA evidence when it can change the next week or next month or next year—new testing could be developed?
>
> A [Larry Huys] Certainly.
>
> Q [Trial counsel] And these probabilities aren't accurate, are they?
>
> A [Larry Huys] They either go up or they go to zero. Every test you add, you would either get a much rarer statistic or it becomes an exclusion.

On direct appeal, the Alabama Court of Criminal Appeals denied his claim:

> "'"The scope of cross-examination in a criminal proceeding is within the discretion of the trial judge and it is not reviewable except for the trial judge's prejudicial abuse of discretion. . . .
>
> "'While rather wide latitude is allowed on cross-examination, the court has reasonable discretion in confining the examination to prevent diversion to outside issues.'
>
> *Steeley v. State*, 622 So.2d 421, 423-24 (Ala.Cr.App.1992), cert. quashed, 622 So.2d 426 (Ala.1993) (quoting *Beavers v. State*, 565 So.2d 688, 690 (Ala.Cr.App.1990)) (other citations omitted). Based on the record before us, we conclude that the trial court did not abuse its discretion in sustaining the State's objection to defense counsel's question. Huys stated that he was not familiar with the case to which defense counsel was referring. Thus, rather than limiting defense counsel's right to cross-examine Huys, the trial court simply prevented defense counsel from testifying as to, and questioning Huys about, the facts of a case with which Huys was not familiar. Furthermore, although the trial court sustained the prosecutor's objection as to the form of defense counsel's question, it did not prevent defense counsel from pursuing that line of questioning. In fact, defense counsel subsequently elicited testimony that DNA evidence

> may change over time and that the probabilities could change as the testing procedures become more advanced. Therefore, we do not find any plain error in this regard.

Williams v. State, 795 So. 2d at 772-73, *aff'd*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S. 900 (2001).

The Supreme Court has explained how cross-examination relates to the Confrontation Clause:

> The Sixth Amendment's Confrontation Clause provides: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." This right is secured for defendants in state as well as in federal criminal proceedings. *Pointer v. Texas*, 380 U.S. 400, 85 S.Ct. 1065, 13 L.Ed.2d 923 (1965). The Court has emphasized that "a primary interest secured by [the Confrontation Clause] is the right of cross-examination." *Douglas v. Alabama*, 380 U.S. 415, 418, 85 S.Ct. 1074, 1076, 13 L.Ed.2d 934 (1965). The opportunity for cross-examination, protected by the Confrontation Clause, is critical for ensuring the integrity of the fact-finding process. Cross-examination is "the principal means by which the believability of a witness and the truth of his testimony are tested." *Davis v. Alaska*, 415 U.S. 308, 316, 94 S.Ct. 1105, 1110, 39 L.Ed.2d 347 (1974). . . .
>
> "The primary object of the constitutional provision in question was to prevent depositions or *ex parte* affidavits . . . being used against the prisoner in lieu of a personal examination

> and cross-examination of the witness in which the accused has an opportunity, not only of testing the recollection and sifting the conscience of the witness, but of compelling him to stand face to face with the jury in order that they may look at him, and judge by his demeanor upon the stand and the manner in which he gives his testimony whether he is worthy of belief."
>
> *Mattox v. United States*, 156 U.S. 237, 242-243, [15 S.Ct. 337, 839, 39 L.Ed. 409 (1895). See also *Kirby v. United States*, 174 U.S. 47, 53, 19 S.Ct. 574, 576, 43 L.Ed. 890] (1899).
>
> * * *
>
> [T]he Confrontation Clause guarantees only "an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S., at 20, 106 S.Ct., at 294 (emphasis in original). This limitation is consistent with the concept that the right to confrontation is a functional one for the purpose of promoting reliability in a criminal trial.

Kentucky v. Stincer, 482 U.S. 730, 736-739, 107 S.Ct. 2658, 2662-64, 96 L.Ed.2d 631 (1987).

> The Eleventh Circuit has further elaborated:
>
> "A defendant's confrontation rights are satisfied when the cross-examination permitted exposes the jury to facts sufficient to evaluate the credibility of the witnesses and enables

> defense counsel to establish a record from which he can properly argue why the witness is less than reliable." *U.S. v. Baptista-Rodriguez*, 17 F.3d 1354, 1371 (11th Cir. 1994). Once a defendant has engaged in sufficient cross-examination to satisfy the Confrontation Clause, further questioning is within the trial court's discretion.

Mills v. Singletary, 161 F.3d 1273, 1288 (11th Cir. 1998).

The record makes clear that the defense had an opportunity for effective cross-examination. The fact that the trial court sustained an objection as to the form of a question does not in and of itself establish a violation of Williams's right to confrontation. Williams was not deprived of an opportunity for an effective cross examination of Huys. The evidentiary rulings did not affect the fundamental fairness of the trial. The state court's decision was not based on an unreasonable application of United States Supreme Court law.[42] Therefore, Williams has not established a right to habeas relief on this claim.

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[42] Respondent asserts that this claim was not fairly presented as a federal claim in state court. The court disagrees. In his direct appeal brief, Petitioner states: "[s]hutting off and limiting cross-examination of the State's witness is violative of the Fifth and Fourteenth Amendments, Constitution of the United States, and of Article 1, Section 6, Constitution of Alabama 1901." Tab R-28, p. 56.

CLAIM X. THERE WAS INADEQUATE EVIDENCE TO SUPPORT PETITIONER'S CAPITAL MURDER CONVICTION.

CLAIM XI. PETITIONER'S CONVICTION IS IN VIOLATION OF HIS DUE PROCESS RIGHTS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION BECAUSE THERE WAS NO PARTICULARIZED INTENT AND THUS NO CAPITAL MURDER.

CLAIM XII. THE TRIAL COURT VIOLATED PETITIONER'S RIGHT TO A FAIR TRIAL UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BY DENYING A MOTION FOR VERDICT OF ACQUITTAL.

In Claims X, XI and XII, Petitioner in essence alleges that the evidence was insufficient to support his capital conviction. Claim X asserts that the evidence was insufficient to prove rape or attempted rape based on Williams's statements of the sequence of events on the night the offense and testimony of the medical examiner. Claim XI asserts that the evidence was insufficient to demonstrate that he had the required particularized intent for murder. (Doc. 5, p. 84). Claim XII alleges that the trial court violated Williams's due process rights by denying his motion for verdict of acquittal. (Doc. 5, p. 86). These claims were presented on direct appeal as Claims VI, VII, IX and X (Tab R. 28, pp. 56-62) and were addressed by the state courts.

On direct appeal, the Alabama Court of Criminal Appeals wrote:

> The appellant also argues that the trial court erred in denying his motion for a judgment of

acquittal because the evidence was allegedly insufficient to support his conviction for capital murder. (Issues VI, VII, IX, and X in the appellant's brief to this court.) Specifically, he contends that the State did not prove that he committed a rape or an attempted rape and did not prove that he had a particularized intent to kill the victim.

> "Intentional murder becomes capital murder when the killing occurs during a rape. Section 13A-5-40, Code of Alabama 1975. 'During' is defined in the Code as meaning 'in the course of or in connection with the commission of, or in immediate flight from the commission of the underlying felony or attempt thereof.' Section 13A-5-39(2), Code of Alabama 1975. An accused is not guilty of a capital offense where the intent to commit the accompanying felony, in this case rape, was formed only after the victim was killed. *Connolly v. State*, 500 So.2d 57, 62 (Ala.Crim. App.1985), *aff'd*, 500 So.2d 68 (Ala.1986). An accompanying felony committed as a 'mere afterthought' and unrelated to the murder will not sustain a conviction of capital murder; the question of the defendant's intent at the time of the commission of the crime is usually a jury question. *See Smelley v. State*, 564 So.2d 74, 86-87 (Ala.Crim.App.1990), *cert. denied, Ex parte Green*, 564 So.2d 89 (Ala.1990); *Connolly*, supra at 63."

Padgett v. State, 668 So.2d 78, 83 (Ala.Cr. App.), cert. denied, 668 So.2d 88 (Ala.1995).

Nevertheless, "[e]ven if we were to concede that the death occurred before the rape, another doctrine stands in the way of the appellant. This court has held that if an accused had the intent to commit the underlying offense at the time he murdered and the offense is committed immediately after the murder, he is guilty of murder while committing the underlying offense, and the capital murder statute still applies. *Hallford v. State*, 548 So.2d 526, 534 (Ala.Cr.App.1988), *aff'd*, 548 So.2d 547 (Ala.), *cert. denied*, 493 U.S. 945, 110 S.Ct. 354, 107 L.Ed.2d 342 (1989). It seems to be generally understood that it is impossible to say with certainty whether intercourse immediately preceded or immediately followed the murder of a female victim."

Thompson v. State, 615 So.2d 129, 133 (Ala.Cr. App.1992), *cert. denied*, 510 U.S. 976, 114 S.Ct. 467, 126 L.Ed.2d 418 (1993). It is not necessary to show an injury to prove that a rape or an attempted rape occurred. *See Greathouse v. State*, 650 So.2d 599 (Ala.Cr.App.1994). Additionally, "'[i]ntent, . . . being a state or condition of the mind, is rarely, if ever, susceptible of direct or positive proof, and must usually be inferred from the facts testified to by witnesses and the circumstances as developed by the evidence.'" *French v. State*, 687 So.2d 202, 204 (Ala.Cr.App.1995), rev'd on other grounds, 687 So.2d 205 (Ala.1996) (quoting *McCord v.*

State, 501 So.2d 520, 528-29 (Ala.Cr.App. 1986)).

"'The question of intent is hardly ever capable of direct proof. Such questions are normally questions for the jury. *McMurphy v. State*, 455 So.2d 924 (Ala.Crim.App.1984); *Craig v. State*, 410 So.2d 449 (Ala.Crim.App.1981), cert. denied, 410 So.2d 449 (Ala.1981).' *Loper v. State*, 469 So.2d 707, 710 (Ala.Cr.App.1985). 'Where one assaults another by the use of a deadly weapon, the law will infer from that fact that he designed to accomplish the probable and natural results of his act, in the absence of proof to the contrary.' *Snipes v. State*, 364 So.2d 424, 426 (Ala.Cr.App.1978)."

Oryang v. State, 642 So.2d 989, 994 (Ala.Cr. App.1994). Further, "[i]ntent may be inferred from the use of a deadly weapon, the character of the assault, or other attendant circumstances." *DeRamus v. State*, 565 So.2d 1167, 1171 (Ala.Cr.App.1990). Finally,

> "'[i]n determining the sufficiency of the evidence to sustain the conviction, this Court must accept as true the evidence introduced by the State, accord the State all legitimate inferences therefrom, and consider the evidence in the light most favorable to the prosecution.' *Faircloth v. State*, 471 So.2d 485, 489 (Ala.Cr.App. 1984), affirmed, *Ex parte Faircloth*, [471] So.2d 493 (Ala.1985).
>
> "'. . . .

"'"The role of appellate courts is not to say what the facts are. Our role, . . . is to judge whether the evidence is *legally* sufficient to allow submission of an issue for decision to the jury." *Ex parte Bankston*, 358 So.2d 1040, 1042 (Ala.1978). An appellate court may interfere with the jury's verdict only where it reaches "a clear conclusion that the finding and judgment are wrong." *Kelly v. State*, 273 Ala. 240, 244, 139 So.2d 326 (1962). "The rule is clearly established in this State that a verdict of conviction should not be set aside on the ground of the insufficiency of the evidence to sustain the verdict, unless, after allowing all reasonable presumptions of its correctness, the preponderance of the evidence against the verdict is so decided as to clearly convince the court that it was wrong and unjust." *Bridges v. State*, 284 Ala. 412, 420, 225 So.2d 821 (1969). . . . A verdict on conflicting evidence is conclusive on appeal. *Roberson v. State*, 162 Ala. 30, 50 So. 345 (1909). "[W]here there is ample evidence offered by the state to support a verdict, it should not be overturned even though the evidence offered by the defendant is in sharp conflict therewith and presents a substantial defense." *Fuller v. State*, 269 Ala. 312, 333, 113 So.2d 153 (1959), cert. denied, *Fuller v. Alabama*, 361 U.S. 936, 80 S.Ct. 380, 4 L.Ed.2d 358 (1960).' *Granger[v. State*], 473 So.2d [1137] at 1139 [(Ala.Cr.App. 1985)].

> " . . . 'Circumstantial evidence alone is enough to support a guilty verdict of the most heinous crime, provided the jury believes beyond a reasonable doubt that the accused is guilty.' *White v. State*, 294 Ala. 265, 272, 314 So.2d 857, cert. denied, 423 U.S. 951, 96 S.Ct. 373, 46 L.Ed.2d 288 (1975). 'Circumstantial evidence is in nowise considered inferior evidence and is entitled to the same weight as direct evidence provided it points to the guilt of the accused.' *Cochran v. State*, 500 So.2d 1161, 1177 (Ala.Cr.App.1984), affirmed in pertinent part, reversed in part on other grounds, *Ex parte Cochran*, 500 So.2d 1179 (Ala.1985)."

White v. State, 546 So.2d 1014, 1017 (Ala.Cr. App.1989).

During the investigation of this case, the appellant made the following statements about his participation in the offense:

> "The night started off with a drink and smoking marijuana. I had a lot to drink and smoke this night. I was on the hill at about this time when I decided to leave and go home. It was about 10:30 pm or so. On my way home I stopped off at Russell's trailor and sat in there for a while and time passed by it was about 12:30 or 1 a.m when I left and headed home. When I crossed the ditch going into the apartments I decide to go see Melody but instead I went in through the back window.

(This occurs at about 1 or 1:30 a.m.) Once inside I grab an ordinary kitchen knife and headed upstairs. All I wanted was sex that was all I could think about at the time. About 1/3 the way up the stairs I pulled off my pants. When I went into the bedroom and stuck the knife at her neck and started undoing her shorts and by this time she jumps up and the knife I had in my hand cut her and so I panicked and she let out a little scream before she started to get loud so I cover her mouth with my hand but she bit me. So we tussle around and I finally got her to keep still by putting my hand at her neck and proceeded to remove her shorts after I got the shorts off I realized that she had stop breathing so not being in my right state of mind I had sex and ejaculated outside of the vagina. I never meant to kill those were not my intentions. I have a problem and I want help. After I did what I did I left out of the back door and let the window down. I removed her purse from the apartment there was nothing in it worth anything to me so I throw the knife and purse in the dumpster out front of the apartments this was about 2:30-3:00am. So after I went home and slept on it. I never did anything like this before, I have let drugs, alcohol, and sex ruin my life."

(C.R.124.)

"The couch was at the back window. Took screen off back window laid it on couch.

Climb through window onto a kitchen table. Saw and grabbed a knife off the counter. Proceed to go upstairs. First set of stairs. I removed my pants and shoes and went upstairs crossed over a kiddie rail or fence at top of the stairs. Just peeked in at the two kids. Went in to Melody's room stuck the knife at her neck. Proceeded remove her shorts. She awoke and jumped. The knife cut her neck I panicked we tussle off the bed onto the floor then there was no movement from her and no breathing so I had sex with her for about 15 or so minutes no condom I pulled out, shot off. When I panicked and she started to scream I grab her around her throat and proceeded to choke her that is when she stopped moving So I leave as I was leaving I grab her purse and go through it. Found nothing valuable. I leave out the back door putting my clothes back on. I let the window back down shut the door. I had the knife and purse in my hand threw both objects into dumpster in the apartments. The purse was green and black it was a flip top button in front with straps that you could wear like a back pack."

(C.R.126.) In addition, the evidence showed that the appellant left the lower half of the victim's body unclothed and left a semen stain on her stomach area. DNA testing confirmed that blood and semen found at the scene were consistent with the appellant's genetic profile. Other

> evidence found at the crime scene also corroborated the appellant's statements about the offense. Finally, the medical examiner testified that the cause of the victim's death was asphyxiation, either by smothering or strangulation, and that the other wounds inflicted upon the victim were consistent with a beating but were not the cause of death.
>
> The appellant's statements showed that he entered the victim's apartment with an intent to rape the victim and that he took a knife upstairs with him to facilitate the rape. Thus, the State presented sufficient evidence from which the jury could have reasonably concluded that the appellant raped or attempted to rape the victim and that he intentionally killed her. Accordingly, the trial court properly denied the appellant's motions for a judgment of acquittal and properly submitted the case to the jury. Finally, the evidence clearly supports the jury's verdict. Therefore, the appellant's arguments in this regard are without merit.

Williams v. State, 795 So. 2d 753, 773-77 (Ala. Cr. App. 1999), *aff'd.*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S.900 (2001).

Respondent contends that the state court's decision on the merits is entitled to a presumption of correctness. (Doc. 14). This court agrees.

The Supreme Court explained the constitutional review process to be applied to a challenge based on sufficiency of the evidence:

> [T]he critical inquiry on review of the sufficiency of the evidence to support a criminal conviction must be not simply to determine whether the jury was properly instructed, but to determine whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt. . . . [T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution. The criterion thus impinges upon "jury" discretion only to the extent necessary to guarantee the fundamental protection of due process of law.

Jackson v. Virginia, 443 U.S. 307, 318-319, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979).

Williams has presented no evidence to negate that he intended to rape and kill Rowell. Williams admitted

in his statements that he intended to rape Rowell when he broke into the house, armed himself with a knife, cut and strangled her when she resisted, and proceeded to have intercourse. The evidence in the record reasonably supports Williams's guilt beyond a reasonable doubt. The decision of the Alabama Court of Criminal Appeals was not based on an unreasonable determination of the facts presented at trial nor was it an unreasonable application of *Jackson*. Consequently, this court will deny Williams's amended habeas petition on this claim.

CLAIM XIII. THE MANNER OF EXECUTION USED BY THE STATE OF ALABAMA CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT

Williams alleges that his execution would be cruel and unusual punishment because Alabama's method of execution does not comport with evolving standards of decency. (Doc. 5, p. 88). This claim was presented only in the context of electrocution on direct appeal, and was not raised in any form on collateral review. Alabama adopted lethal injection as an alternative form of execution effective July 1, 2002, several months before Williams began collateral proceedings in state court. Because Alabama no longer uses electrocution as its primary method of capital punishment, that portion of the claim is moot.

Moreover, regarding the question of procedural default of Williams's attempt to raise lethal injection claim for the first time in his amended habeas petition,

this court agrees with the reasoning of a similarly-postured case from the Southern District of Alabama:

> [O]n July 1, 2002, the Alabama legislature amended Ala. Code § 15-18-82(a), to make lethal injection the standard method of execution in Alabama. At the time of the amendment, petitioner's appeal of the denial of his Rule 32 petition was pending in the Alabama Court of Criminal Appeals. (Doc. 10, Vol. 25 at 4866; *McGahee v. State*, 885 So.2d 191, 228 (Ala.Crim.App.2003)). In his previous Rule 32 petition, petitioner had challenged only the constitutionality of electrocution as a method of execution. However, after the amendment, lethal injection became the prescribed method of execution for petitioner; yet, petitioner did not file a second Rule 32 petition in the state court to challenge its constitutionality. *See Ala. R.Crim. P.* 32.1(e) (petition based on newly discovered material facts). Any attempt by petitioner to do so now would be barred. *See Ala. R.Crim. P.* 32.2(c) (one-year, or in some instances six months, limitations period for filing a successive petition on the basis of newly discovered material facts).

McGahee v. Campbell, 2007 WL 3025192 *11, n. 6 (S.D. Ala. February 14, 2007).

Accordingly, Williams's Eighth Amendment lethal injection claim is procedurally defaulted: he failed to challenge the current method of execution in a second Rule 32 petition in state court and any attempt to do

so now would be futile. Alternatively, the amended habeas petition is devoid of any legal or factual support for the conclusion that such a method of punishment violates the Eighth Amendment. As such, the lethal injection claim is also due to be dismissed for failure to comply with the specificity requirements governing federal pleadings. Therefore, this claim is due to be denied.

CLAIM XIV. THE TRIAL COURT VIOLATED PETITIONER'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY ALLOWING THE STATE TO PRESENT ARGUMENT ON AN AGGRAVATING CIRCUMSTANCE NOT CHARGED

Williams contends that his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated when, during closing arguments, the prosecutor improperly informed the jury that it could consider burglary and robbery as aggravating circumstances. (Doc. 5, p. 88). Williams conceded the appropriateness of the prosecutor's argument regarding rape as an aggravating circumstance.

Williams presented this same claim on direct appeal. (Tab R. 29, p. 71). In denying the claim, the Court of Criminal Appeals held that, viewed in context, the "prosecutor's comment was not misleading," and that the "trial court properly instructed that the only applicable aggravating circumstance was that the appellant committed the murder during a rape or an attempted

rape." *Williams*, 729 So. 2d 753, 781, *aff'd.*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S.900 (2001).

Respondent argues that this claim is procedurally barred from this court's review because it was not fairly presented as a federal claim in state court, and, in any event, Williams cannot overcome the presumption of correctness in the state court findings denying the claim on the merits. (Doc. 14, p. 80).

Prior to seeking relief in federal court from a state court conviction and sentence, a habeas petitioner is first required to present his federal claims to the state court by exhausting all of the State's available procedures. The purpose of this requirement is to ensure that state courts are afforded the first opportunity to correct federal questions affecting the validity of state court convictions. If a federal claim has not first been exhausted in state court, this court may also find that it is "procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile." *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (citing *Picard v. Connor*, 404 U.S. 270, 276 (1971)) and *Snowden v. Singletary*, 135 F.3d 732, 737(11th Cir. 1998)).

Petitioner has not exhausted this claim in state court because he did not make the state court aware of his *federal* allegation that the trial court's allowance of the alleged improper arguments denied him due process of law guaranteed by the Fourteenth Amendment. Dismissal to present this claim in state court would be

futile because of the statute of limitation in Rule 32.2(c), Ala. R. Crim. P., and the ban on successive petitions in Rule 32.2(b), Ala. R. Crim. P. The court, thus, finds that this claim is procedurally defaulted and Petitioner has not alleged "cause and prejudice" to excuse the procedural default.

Additionally, much the same issue was previously addressed by this court in Claim VI.B.ii., *infra*, where this court found that the prosecutor's comments regarding aggravating circumstances were not improper, and that the trial court properly charged the jury regarding the existing aggravating circumstance of rape. A petitioner is entitled to habeas relief based on the improper comments of a prosecutor *only* if the comments "so infected the trial with unfairness as to make the resulting conviction [or sentence] a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). The prosecutor's comments did not run afoul of *Darden.* The trial court did not deny Williams his right to a fair trial under federal standards. Therefore, this claim is due to be denied.

CLAIM XV. THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS TO A FAIR TRIAL AND SENTENCING BY PERMITTING OVERLY EMOTIONAL TESTIMONY AT THE SENTENCING HEARING BEFORE THE TRIAL COURT

Next, Petitioner asserts that the trial court violated Williams's rights to a fair trial and sentencing by permitting overly emotional testimony from Ms.

Rowell's mother at the sentencing hearing. (Doc. 5, p. 89). Petitioner presented this same claim on direct appeal. (Tab R. 28, p. 72). The Court of Criminal Appeals denied the claim:

> In *Payne v. Tennessee*, 501 U.S. 808, 111 S.Ct 2597, 115 L.Ed.2d 720 (1991), the United States Supreme Court held that victim impact evidence is admissible during the sentencing phase of a capital trial. "[A] prosecutor may present and argue evidence relating to the victim and the impact of the victim's death on the victim's family in the penalty phase of a capital trial." *McNair v. State*, 653 So. 2d 320, 331 (Ala. Cri. App. 1992), aff'd, 653 So. 2d 353 (Ala. 1994), cert. denied, 513 U.S. 1159, 115 S.Ct. 1121, 130 L.Ed.2d 1084 (1995). The State did not present victim impact evidence to the jury during the guilt or penalty phases of the trial. Furthermore, the record does not indicate that the victim's mother was overly emotional when presenting victim impact evidence to the trial court. Finally, the appellant concedes that his argument is contrary to current law. (Appellant's brief at p. 74.) Therefore, we do not find any plain error in this regard.

Williams, 795 So. 2d 753, 782, *aff'd.*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S.900 (2001).

The Respondent contends that this claim was not fairly presented as a federal claim in state court and, in the alternative, that the Petitioner cannot overcome the presumption of correctness of the state court

decision. (Doc. 14, p. 84). Respondent erroneously alleges that this claim is procedurally barred because it was not fairly presented as a federal claim in state court. (Doc. 14, p. 84). Petitioner states in his brief on direct appeal: "[s]uch statement is violative of the Fifth, Eight[h], and Fourteenth Amendments to the United States Constitution and of Article 1, Section 6, Constitution of Alabama of 1901" (Tab R-28, p. 74), and the Alabama Court of Criminal Appeals addressed this claim as a constitutional issue.

In *Payne*, as discussed by the Alabama Court of Criminal Appeals, the Supreme Court recognized that only where victim impact evidence or argument is unfairly prejudicial may a court prevent its use through the Due Process Clause of the Fourteenth Amendment. 501 U.S at 825, 111 S. Ct. at 2608 (citing *Darden v. Wainwright*, 477 U.S. 168, 179-183, 106 S. Ct. 2464, 2470-2472, 91 L. Ed. 2d 144 (1986)). The question then is whether the victim impact evidence introduced "so infected the trial with unfairness as to make the resulting conviction denial of due process." *Darden*, 477 U.S. at 181, 106 S.Ct. at 2471 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637, 643, 94 S.Ct. 1868, 1871, 40 L.Ed.2d 431 (1974)).

Williams complains about the testimony of Donna Rowell, the victim's mother:

Q . . . . Did Melanie have children?

A Yes, sir.

Q And those children are where now?

A They are living with us.

Q Have they been living with you since Melanie's death?

A With the exception of nine months when they were with their father.

Q How old are they now?

A Three and a half and four and a half.

Q And they are with you now? They are in your custody?

A Yes, sir.

Q They are at your home?

A Yes, sir.

Q I guess I would like to ask you how the death of Melanie—the crime that Marcus Williams has been convicted of—has impacted Melanie's family—you, the children, and her father and sister?

A I have had to go see a therapist because I have flashbacks of finding my daughter. I don't get a lot of sleep. My one daughter keeps all her windows locked and she blocks them with sticks because she is afraid. My other daughter won't go to bed at night without the t.v. on. Holidays just aren't the same. The children have also been to counseling. Kristin, the little girl, has a lot of anger. She doesn't understand a lot of things. She does understand that her mommy is gone. She cries for her almost every night. She wakes up in her bed

> between the hours of three and five wanting to know where we are. She has to have someone beside her. Little William loves his mama and misses her a lot. We are like a puzzle that was once complete, and now there is a piece missing. My husband carries a picture of Melanie around with him. He has an I.D. bracelet with her name on it. The baby will not go to bed at night without her mama's picture and William has to wear an I.D. bracelet. On holidays, they know their mommy is in heaven, but they can't understand why she can't come down and visit. I let them pick out balloons for holidays with helium in them. Little William just started learning how to print so he wrote her a letter on the balloon and they sent it up to their mommy. They put, "We love you mommy and we miss you." On the one for Easter this year, he wrote, "Please come down and see us." They are okay when they first send it up, but when it is out of sight, Kristen will cry and cry and cry and say, "I miss mommy." We love those babies. We are doing the best we can to raise them. It is just it is a little harder on us because we are older now, and I have to take a break in the middle of the day or I just can't make it. One thing we will always have of Melanie is her memories. Nothing or nobody can ever take that from us. That's all.

(Tab R. 25, pp. 604-606).

This court agrees with the Court of Criminal Appeals that the victim impact evidence did not "so infect[] the trial with unfairness as to make the

resulting conviction a denial of due process." *Darden*, 477 U.S. at 181, 106 S. Ct. at 2471. The Petitioner admitted in his statements, and, therefore, was well aware that Ms. Rowell's children were present in her house during the offense, and that those children would wake the next morning to find their mother's lifeless body. The Alabama Court of Criminal Appeals' decision that the limited testimony regarding Ms. Rowell's children and the impact of Ms. Rowell's death on her family did not operate to deny Williams a fair trial or to prejudice his substantial rights was not an unreasonable application of clearly established federal law as determined by the Supreme Court in *Payne* and *Darden*. This claim is due to be denied.

CLAIM XVI. THE TRIAL COURT'S CHARGE ON VOLUNTARY INTOXICATION VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

On page 89 of the petition, Williams alleges that the trial court's charge on voluntary intoxication violated his Fifth, Sixth, Eight, and Fourteenth Amendment rights. Specifically, he argues that the trial court's statement was confusing and misleading that, for intoxication to negate the specific intent required for a murder conviction, the intoxication must be "so great as to amount to insanity." (Doc. 5, p. 91). Petitioner first presented this claim on direct appeal. (Tab R. 28, pp. 67, 77). In denying the claim, the Alabama Court of Criminal Appeals stated:

We rejected a similar claim in *Williams v. State*, 710 So. 2d 1276, 1332 (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), stating as follows:

> "'Bankhead contends that the court's instruction requiring that the jury, in order to find a drunkenness defense applicable, had to find Bankhead insane due to intoxication, was prejudicial. We disagree. In an assault and battery case, voluntary intoxication is no defense, unless the degree of intoxication amounts to insanity and renders the accused incapable of forming an intent to injure. *Lister v. State*, 437 So. 2d 622 (Ala. Cr. App. 1983). The same standard is applicable in homicide cases. *Crosslin [v. State*, 446 So. 2d 675 (Ala. Cr. App. 1983), appeal after remand, 489 So. 2d 680 (Ala. Cr. App. 1986)]. Although intoxication in itself does not constitute a mental disease or defect within the meaning of § 13A-3-1, Code of Alabama (1975), intoxication does include a disturbance of mental or physical capacities resulting from the introduction of any substance into the body. § 13A-3-2. The degree of intoxication required to establish that a defendant was incapable of forming an intent to kill is a degree so extreme as to render it impossible for the defendant to form the intent to kill. A jury is capable of determining whether a defendant's intoxication rendered it impossible for the defendant to form a particular mental state.

> *Ex parte Bankhead*, 585 So. 2d 112, 121 (Ala. 1991).
>
> Furthermore, the appellant concedes that his argument is contrary to current law. Therefore, we do not find any plain error in the trial court's voluntary intoxication instruction.

Williams, 795 So. 2d 753, 779, *aff'd.*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S.900 (2001).

Respondent argues that the state court's decision was not contrary to, or an unreasonable application of federal law, or and unreasonable determination of the facts in light the evidence. (Doc. 14, p. 87). This court agrees.

The Eleventh Circuit Court of Appeals has set forth the habeas review standard when jury instructions are challenged:

> Federal habeas relief is unavailable "for errors of state law." *Estelle v. McGuire*, 502 U.S. 62, 67, 112 S.Ct. 475, 480, 116 L.Ed.2d 385 (1991) (quoting *Lewis v. Jeffers*, 497 U.S. 764, 780, 110 S.Ct. 3092, 3102, 111 L.Ed.2d 606 (1990)). A jury instruction that "was allegedly incorrect under state law is not a basis for habeas relief," *Id.* at 71-72, 112 S.Ct. at 482, because federal habeas review "is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Id.* at 68, 112 S.Ct. at 480. Unlike state appellate courts, federal courts on habeas review are constrained to determine only whether the challenged instruction, viewed in

> the context of both the entire charge and the trial record, "'so infected the entire trial that the resulting conviction violate[d] due process.'" *Id.* at 72, 112 S.Ct. at 482 (quoting *Cupp v. Naughten*, 414 U.S. 141, 147, 94 S.Ct. 396, 400-01, 38 L.Ed.2d 368 (1973)).

Jamerson v. Secretary for Dept. of Corrections, 410 F.3d 682, 688 (11th Cir. 2005).

Even if the instructions were erroneous, in the context of the whole charge and trial record, it did not so infect the trial so as to result in a conviction that violated due process. Further, the state court's decision was not an unreasonable application of the facts in light of the evidence. The evidence of voluntary intoxication was not great enough to warrant a finding that Petitioner was incapable of forming the necessary intent to commit a capital crime. His clear recollection of the events as recounted in the statements he made to the police belies level of intoxication profound enough to prevent him from forming an intent to commit the murder. In the absence of evidence establishing such extreme intoxication, the trial court's charge on voluntary intoxication did not result in a conviction that violated due process. Petitioner is not entitled to relief on this claim.

CLAIM XVII. THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BY REFUSING TO GIVE A MANSLAUGHTER CHARGE

At page 91 of the petition, Williams alleges that the trial court violated his constitutional rights by not instructing the jury on manslaughter as a lesser included offense. Petitioner argues that the evidence, including his statements and the fact that he was intoxicated at the time of the crime, supported giving the manslaughter charge. Petitioner presented this same claim on direct appeal. (Tab R. 28, p.79).

The Alabama Court of Criminal Appeals addressed this claim under the plain error standard because the defense did not object to it at trial. The court found that the evidence did not support a charge of manslaughter. The Alabama Court of Criminal Appeals wrote:

> Although the prosecutor, defense counsel, and the trial court discussed whether the trial court should give such a charge, defense counsel did not object when the trial court stated that it would not instruct the jury on manslaughter. Likewise, counsel did not object after the trial court had given its oral charge. Therefore, we review this contention for plain error. *See* Rule 45A, Ala. R. App. P.
>
> > "No error occurs in not giving a charge on a lesser included offense when there is no reasonable theory to support the lesser

> offense. . . . '"A trial judge may refuse to charge on a lesser included offense when it is clear to the judicial mind that there is no evidence to support the jury's being charged on the lesser included offense."'"

Williams v. State, 601 So.2d 1062, 1075 (Ala. Cr. App. 1991), aff'd, 662 So. 2d 929 (Ala.), cert. denied, 506 U.S. 957, 113 S.Ct. 417, 121 L.Ed.2d 340 (Ala. Cr. App. 1991), aff'd, 600 So. 2d 372 (Ala. 1992), cert denied, 507 U.S. 924, 113 S.Ct. 1293, 122 L.Ed.2d 684 (1993), and *Gurganum v. State*, 520 So. 2d 170, 174 (Ala. Cr. App. 1987)). When it refused to give the instruction on manslaughter, the trial court acknowledged that there was no basis for giving such an instruction because the appellant's statements showed that he entered the victim's apartment with the intent to rape her. Furthermore, during his guilt-phase closing argument, defense counsel admitted that, when the appellant entered the victim's apartment, he intended to rape her. (R. 498). However, he contended that the appellant did not intend to kill the victim. Accordingly, he argued that the appellant was guilty, at most, of murder. During its guilt-phase oral charge, the trial court instructed the jury on the lesser included offense of felony murder. Thus, if the jury believed defense counsel's contention that the appellant intended to rape but did not intend to kill the victim, it could have found him guilty of felony murder. However, there was simply no reasonable theory from the evidence to support giving an instruction on manslaughter. Moreover, we have held that

> it is not plain error for a trial court not to give an instruction on a lesser included offense when that instruction would be inconsistent with the defense's trial strategy. *See Bush v. State*, 695 So. 2d 70, 113 (Ala.Cr.App. 1995), aff'd, 695 So. 2d 138 (Ala.), cert. denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997).

Williams, 795 So. 2d 753, 778-79, *aff'd.*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 U.S.900 (2001). *See also Hopper v. Evans*, 456 U.S. 605, 611 (1982) ("Due process requires that a lesser included offense instruction be given *only* when the evidence warrants such an instruction.") (emphasis in original); *Ritter v. Smith*, 726 F.2d 1505, 1509 (11th Cir. 1984) (same).

Respondent asserts that this claim is procedurally defaulted because it was not fairly presented as a federal claim in state court, and, in the alternative, that Petitioner cannot overcome the state court decision's presumption of correctness. (Doc. 14, pp. 91-92). Respondent erroneously argues that this claim is precluded because it was not fairly presented as a federal claim in state court. (Doc. 14, p. 91.) However, in his brief on direct appeal, Williams states: "[a]s a result, Marcus Williams was wrongfully convicted under the Fifth and Fourteenth Amendments to the United States Constitution and of Article 1, Section 6, Constitution of Alabama 1901." (Tab R.28, pp. 82-83.)

The state court finding is entitled to a presumption of correctness, as it is neither "contrary to," nor an "unreasonable application of" clearly established

Supreme Court precedent. The state court's decision was not objectively unreasonable. Expressly stated in the resolution of this issue by the Alabama Court of Criminal Appeals is the finding of fact that no evidence supported giving the manslaughter charge. *Williams*, 795 So. 2d at 779. This claim is due to be denied.

CLAIM XVIII. THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY ALLOWING HIS COERCED STATEMENT INTO EVIDENCE

Williams has alleged a claim for relief based upon the admission of certain inculpatory statements. He alleges that allowing his involuntary statements into evidence violated his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution because they were induced by promises from police interrogators and were made while Williams was sleep deprived and under the influence of alcohol, marijuana and cocaine. (Doc. 5, pp. 95-96).

Before trial, Petitioner filed a motion to suppress the statements; he asserted as the basis for suppression that (1) his statements were obtained prior to Williams being informed of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966); (2) the statements were obtained after Williams requested the presence of an attorney in violation of his rights pursuant to *Miranda v. Arizona*, 384 U.S. 436 (1966); (3) the warnings given to Williams were not adequate and

the waiver of his rights was not valid; (4) Williams was seized and interrogated on less than probable cause, in violation of his Fourth and Fourteenth Amendment rights; (5) Williams did not voluntarily answer questions, but was coerced into responding; and (6) Williams statements were made because of promises of leniency by police investigators, thereby rendering them involuntary. (Tab R. 27, pp. 95-97). The trial court conducted a suppression hearing on February 24, 1999. (Tab R. 8, pp. 229-94).

At the hearing, the police investigators and Petitioner testified regarding the circumstances under which Petitioner's statements were taken. The Petitioner testified that after being arrested on November 24, 1999, as a suspect in another offense, he was informed that he was also a suspect in Ms. Rowell's case. Petitioner gave the following testimony on direct examination:

> Q Who came in and got you?
>
> A Joe Sweatt came back to the jail and got me and escorted me back over to the Sheriff's Office.
>
> Q What did he tell you?
>
> A He didn't say nothing. When I got inside the Sheriff's office, Tommy Dixon spoke up and told me they feel like I'm a suspect in another case.
>
> Q Who all was in that room?

A At that time, Joe Sweatt, Tommy Dixon and another Ashville City cop, Dennis Matthews.

Q That is all that was present?

A Yes.

Q Then what happened?

A I kept denying it and Tommy Dixon told me it would be best to go on and give a statement because they had evidence against me in another case. He would draw a picture for the Judge and make it easier on me if I speak now.

Q What did you understand Mr. Dixon's position to be at that time?

A He was the chief investigator.

Q Had he made that fact known to you?

A Yes.

Q Were there other officers present when he made those statements to you?

A Yes.

Q Did they say anything to confirm or deny the statements he was making to you?

A No.

Q What did you understand it to mean when he said he would make it easier on you?

A I understood that he would talk to the Judge and make it light on my case—a lighter sentence.

Q How long were you in there with the three of them before you told them about your involvement in this case today?

A About an hour.

Q At any point in time did you sign a statement concerning your Miranda Rights?

A Not at that time, I didn't. It was after they asked me questions.

Q How long had they asked you questions before you signed the Miranda Warning?

A About an hour.

Q This is State's Exhibit No. 7 that I have a copy of that is dated three-fifty-one p.m., you had already been questioned over an hour before you executed this statement?

A Yes.

Q Then did you go through a question and answer session after you signed that document?

A Not after he asked me to write out—make my own statement—write out my own statement.

Q Do you ever recall one of the officers writing down what you were telling them?

A Yes.

Q When was that?

A While I was talking.

Q Before this Miranda?

A Yes, before this.

Q Did you later write out a statement of your own?

A Yes.

Q That was at five-fifteen?

A Yes.

Q Is that your writing?

A Yes.

Q That is State's Exhibit No. 12?

A Yes.

Q That is your writing and that is your signature?

A Yes.

Q But did you sign a Miranda before you gave that written statement at five-fifteen?

A No.

* * *

Q On the next day, they came back and asked you for another statement, did they not?

A Yes

Q How did that come about?

A They asked me—they needed to verify some of the statements I had made the day before.

Q Who all came and told you that?

A If I recall correctly, it was Joe Sweatt and Randy Wall that came to the cell and got me.

Q Where did they take you?

A To the Sheriff's office.

Q Who all was present at that time?

A Tommy Dixon, Randy Wall and Joe Sweatt.

Q At any time either on the 24th or 25th, did anybody threaten you?

A No.

Q Threaten to harm you in any way?

A No.

Q Coerce you to do these statements?

A What do you mean coerce?

Q Did they force you to do it?

A No.

Q But now you have told us about some things you were told on the 24th. Were you promised anything on the 25th about giving that statement?

A No.

Q Did Mr. Dixon say anything to you that day or Mr. Wall or Mr. Sweatt before you gave the statement?

A No.

Q How did that come about?

A They just told me I needed to make some more statements to verify certain issues in the case.

Q Did they ask you questions or did you just sit down and give a statement?

A They asked me questions first.

Q Then what happened after they asked you questions?

A I signed another Miranda sheet.

Q What happened after you signed that Miranda sheet?

A I wrote out my statement.

(Tab R 8, pp. 263-68).

Chief investigator Thomas Dixon testified that Williams was not told that it would be better or worse for him to make a statement (Tab R 8, p. 282); that Williams was not told that a judge would be made aware of his cooperation (*Id.* at 283); and that Williams was not given any promises before making any of his statements (*Id.* at 284). The trial court denied the motion to

suppress as to Petitioner's inculpatory statements made on November 24 and 25, 1999. (Tab R. 8 at 292).

On direct appeal, Williams argued that his statements were coerced by promises made by the police investigator, making his statement involuntary and, therefore, inadmissible, citing *Rincher v. State*, 632 So. 2d 37 (Ala. Crim. App. 1993). (Tab R. 28, p. 50). In resolving this claim, the Court of Criminal Appeals wrote:

> Also, "we note that the mere promise to make cooperation known to law enforcement authorities, as opposed to a direct promise of a reduced sentence, generally is not considered an illegal inducement. In *United States v. Nash*, 910 F.2d 749, 752-53 (11th Cir. 1990), the United States Court of Appeals for the Eleventh Circuit held:
>
> > "'We find that the district court was not clearly erroneous in accepting [the officer's] testimony that he only promised to make [the defendant's] cooperation known to the United States Attorney's office and gave no guarantee of a reduced sentence. Although [the officer] told [the Defendant] that cooperating defendants generally "fared better time-wise," this statement did not amount to an illegal inducement: "telling the [defendant] in a noncoercive manner of the realistically expected penalties and encouraging [him] to tell the truth is no more than affording [him] the chance to make an informed

> decision with respect to [his] cooperation with the government."'
>
> "(Quoting *United States v. Ballard*, 586 F.2d 1060, 1063 (5th Cir. 1978)). Accord *United States v. Levy*, 955 F.2d 1098, 1105 (7th Cir. 1992) (holding that federal agent's indication to defendant that his cooperation would be reported to the United States attorney did not make defendant's confession involuntary); *United States v. Meirovitz*, 918 F.2d 1376, 1380 (8th Cir. 1990) (holding that confession was voluntary although agents had promised to inform prosecutor of defendant's cooperation); *United States v. Guerrero*, 847 F.2d 1363 (9th Cir. 1988) (holding that agent's promise to inform prosecutor of defendant's cooperation does not render a subsequent confession involuntary); *United States v. Baldachino*, 762 F.2d 170, 179 (1st Cir. 1985) (holding that an officer's promise to bring defendant's co-operation to the attention of the prosecutor did not make confession involuntary)."

Id. at 730 n.4. Finally,

> "'"[a]bsent clear error, the [circuit] court's credibility choices at suppression hearings are binding on this court." *Walker v. State*, 551 So. 2d 449, 451 (Ala. Cr. App. 1989). The standard of review of conflicting evidence at a motion to suppress a confession is whether the trial court's finding was "manifestly contrary

> to the great weight of the evidence." *Ex parte Matthews*, 601 So. 2d 52 (Ala. 1992), *cert. denied*, 505 U.S. 1206, 112 S.Ct. 2996, 120 L.Ed.2d 872 (1992). *See also Ex parte Singleton*, 465 So. 2d 443, 445 (Ala. 1995) (whether the finding was "palpably contrary to the weight of the evidence.").'
>
> "*Thompson v. State*, 611 So. 2d 476, 478 (Ala. Cr. App. 1992)."
>
> *D.M.M. v. State*, 647 So. 2d 57, 61 (Ala. Cr. App. 1994).
>
> Based on the conflicting evidence in the record before us, we conclude that the trial court did not err in admitting the appellant's statements into evidence. Accordingly, the appellant's argument is without merit.

Williams v. State, 795 So. 2d at 768-69, *aff'd.*, 795 So. 2d 785 (Ala. 2001), *cert. denied*, 534 *U.S. 900 (2001).*

This court finds that the Alabama Court of Criminal Appeals' decision is not contrary to, or an unreasonable application of Supreme Court precedent. The Supreme Court established a standard for Fifth Amendment "voluntariness" in Colorado v. Springs, 479 U.S. 564 (1987):

> A statement is not "compelled" within the meaning of the Fifth Amendment if an individual "voluntarily, knowingly and intelligently" waives his constitutional privilege. *Miranda v. Arizona*, 384 U.S. at 444, 86 S. Ct., at 1612. The inquiry whether a waiver is

coerced "has two distinct dimensions." *Moran v. Burbine*, 475 U.S. 412, 421, 106 S. Ct. 1135, 1141, 89 L. Ed. 2d 410 (1986):

> "First *the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception.* Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." *Ibid.* (quoting *Fare v. Michael C.*, 442 U.S. 707, 725, 99 S.Ct. 2560, 2572, 61 L.Ed.2d 197 (1979)).
>
> There is no doubt that Spring's decision to waive his Fifth Amendment privilege was voluntary. He alleges no "coercion of a confession by physical violence or other deliberate means calculated to break [his] will," *Oregon v. Elstad*, 470 U.S. 298, 312, 105 S. Ct. 1285, 1295, 84 L. Ed. 2d 222 (1985), and the trial court found none. His allegation that the police failed to supply him with certain information does not relate to any of the traditional indicia of coercion: "the duration and conditions of detention . . . , the manifest attitude of the police toward him, his physical and

> mental state, the diverse pressures which sap or sustain his powers of resistance and self-control." *Culombe v. Connecticut*, 367 U.S. 568, 602, 81 S. Ct. 1860, 1879, 6 L. Ed. 2d 1037 (1961) (opinion of Frankfurter, J.). Absent evidence that Spring's "will [was] overborne and his capacity for self-determination critically impaired" because of coercive police conduct, *ibid.; see Colorado v. Connelly*, 479 U.S. 157, 163-164, 107 S. Ct. 515, ___, 93 L. Ed. 2d 473 (1986), his waiver of his Fifth Amendment privilege was voluntary under this Court's decision in *Miranda*.

Spring, 479 U.S. at 573-74 (emphasis added).

Williams testified on direct and cross examination that he did not feel that he was coerced into making his statement. (Tab R 8, p. 267, lines 23-25, p. 268, line 1; p. 279, lines 9-10). Thus, the Petitioner's own testimony does not support the only factual assertion raised concerning the voluntariness of his statement.[43] The state court's finding that such an inducement did not occur is entitled to a presumption of correctness unless the Petitioner can prove otherwise by clear and convincing evidence. *See* 18 U.S.C. §§ 2254(d) and (e). This he failed to do. Therefore, the Alabama Court of Criminal Appeals' decision is not contrary to Supreme

[43] The inducement claim is the only claim actually pled by the Petitioner and considered by the court concerning Petitioner's statements.

Court law. Consequently, the Petitioner is not due any relief.

CLAIM XIX. THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY CHARGING THE JURY REGARDING AN AGGRAVATING CIRCUMSTANCE NOT INDICTED

Williams argues that the trial court violated his Fifth, Sixth, Eighth and Fourteenth Amendment constitutional rights by erroneously instructing the jury regarding aggravating circumstances. Specifically, Petitioner states that the trial court confused the jury by including in its charge the aggravating circumstances of robbery, burglary and kidnaping, when only rape should have been included. (Doc. 5, p. 100). Petitioner asserted virtually this same claim on direct appeal. (Tab R. 28, p. 67).

Respondent asserts that this claim is procedurally defaulted from this court's review for several reasons: (1) Williams did not fairly present it as a federal claim in state court; (2) dismissal to allow Williams to raise the claim would be futile because the claim would be barred by the state's ban on successive petitions and statute of limitations (Rules 32.2(b) and (c)); and (3) it could have been, but was not, raised at trial and on appeal (Rules 23.2(a)(3) and(5)). In the alternative, Respondent argues that if this court finds the claim is exhausted, then the Alabama Court of Criminal Appeals addressed the claim on the merits, and Williams

cannot show that the denial of the claim on the merits is contrary to, or an unreasonable application of federal law, or an unreasonable determination of the facts in light of the evidence. (Doc. 14, pp. 98-99).

Prior to seeking relief in federal court from a state court conviction and sentence, a habeas Petitioner is first required to present his federal claims to the state court by exhausting all of the state's available procedures. The purpose of this requirement is to ensure that state courts are afforded the first opportunity to correct federal questions affecting the validity of state court convictions. *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998). If a federal claim has not first been exhausted in state court, this court may also find that it is "procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile." *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (citing *Picard v. Connor*, 404 U.S. 270, 276 (1971)) and *Snowden v. Singletary*, 135 F.3d 732, 737(11th Cir. 1998)).

The court finds that Williams did not present this claim as a *federal* claim in state court. Therefore, this claim is procedurally defaulted from federal review and dismissal to allow exhaustion of this claim would be futile because of the ban on successive petitions and the statute of limitations. Rules 32.2(b) and (c), Ala. R. Crim. P.

Alternatively, the court finds that this claim is without merit. During the penalty phase, the trial court instructed the jury:

> The law provides a list of circumstances that may be considered by the jury as aggravating. In this case, the State relies on one aggravating circumstance. Before a jury could find an aggravating circumstance exists, you, the jury, must find beyond a reasonable doubt that aggravating circumstance does exist. The aggravating circumstance that is relied upon by the State in this case is the following: *That the capital offense was committed while the defendant was engaged in the commission of or attempt to commit rape, robbery, burglary, or kidnapping.* You may not consider in your deliberations any other aggravating circumstance other than the one that I have just read to you. The fact you have heretofore found the defendant guilty beyond a reasonable doubt of the capital offense of intentional murder during rape in the first degree establishes for the purpose of this hearing the existence beyond a reasonable doubt of the aggravating circumstance relied upon by the State. Because the circumstance that the State relies on for aggravation, *is the capital offense was committed while the defendant was engaged in the commission of or attempt to commit rape.* By your verdict yesterday, you have found beyond a reasonable doubt that that aggravating circumstance does exist. *So the State has proven beyond a reasonable doubt the existence of one*

> *aggravating circumstance, and that is the circumstance [it relies] on.*

(Tab R. 23, p. 584) (emphasis added).

Read in its entirety, the court instructed the jury first on the underlying statute that provides the authority to charge an aggravating circumstance. Second, the court explained to the jury that the aggravating circumstance of *rape* had already been found beyond a reasonable doubt. Most importantly, the trial court explained to the jury that the *only* aggravating circumstance on which the State relied was *rape.*

Much this same issue was discussed at Claim XIV. There, Petitioner complained that the prosecutor presented improper arguments regarding the aggravating factors in his opening arguments in the sentencing phase. This court concluded that the trial court properly charged the jury regarding the aggravating factor of rape, which was charged in the indictment and found by the jury beyond a reasonable doubt. The same is true here. Even if not procedurally defaulted, this claim is due to be denied as without merit.

CLAIM XX. THE TRIAL COURT VIOLATED PETITIONER'S CONSTITUTIONAL RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BY GIVING THE JURY AN IMPROPER INSTRUCTION ON THE MEANING OF "REASONABLE DOUBT"

Next, Petitioner contends that his due process rights were violated because the trial court erroneously instructed the jury on the definition of

reasonable doubt. Williams argues that the trial court used improper phrases such as "to a mathematical certainty" and "beyond a shadow of a doubt," violating the Supreme Court precedent in *Cage v. Louisiana*, 498 U.S. 39 (1990). (Doc. 5, p. 105). Petitioner raised this claim for the first time in his second amended Rule 32 petition. (Tab R. 40, p. 187). Affirming the Rule 32 court's holding, the Alabama Court of Criminal Appeals held that this claim was procedurally barred from review because it could have been, but was not, raised at trial or on direct appeal. (Tab R. 59, p. 219; Tab R. 60, p. 17).

Respondent contends that this claim is procedurally defaulted because it was not raised on direct appeal. (Doc. 14, p. 99). This court agrees. Petitioner erroneously asserts that this issue was raised at trial (Tab R.3, p. 534) and on direct appeal (Tab. R. 5, pp. 66-67). However, these references do not relate to a challenge of the trial court's improper reasonable doubt jury instruction. The trial citation is a discussion with the trial judge when trial counsel considered objecting to the jury instructions regarding rape. The direct appeal citation refers to Claims XV and XVI, that the jury was improperly charged regarding manslaughter, voluntary intoxication and aggravating circumstances.

This claim is procedurally barred from federal review, because it could have been, but was not, raised at trial or on direct appeal, pursuant to Rule 32.2(a)(3) and (5) of the Alabama Rules of Criminal Procedure. Rules 32.2(a)(3) and (5) are independent and adequate state law grounds.

Williams contends this court should consider as "cause and prejudice" to excuse the procedural default "the ineffective assistance of counsel claims to which they were linked at the Rule 32 stage." (Doc. 21, p. 29).[44] This general reference to the Rule 32 brief "patently fails to comply with Rule 2(c)." *Phillips v. Dormire*, 2006 WL 744387 at *1 (E.D. Mo. March 20, 2006) (citing *Adams v. Armontrout*, 897 F.2d 332, 333 (8th Cir. 1990)).

Alternatively, this claim is without merit. The trial court instructed the jury regarding reasonable doubt as follows:

> When the defendant comes before you ladies and gentlemen of the jury on a plea of not guilty, the defendant is presumed to be innocent. That presumption follows the defendant throughout the proceedings; and as I have told you before, it is a fact that must be weighed along with all the other evidence in the case. In this case, the burden of proving that the defendant is guilty as charged rests upon the State of Alabama. Before a conviction can be had in this case, the State must satisfy each and every juror in this case that

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[44] The court acknowledges the Supreme Court's recent holding in *Martinez*, 2012 WL 912950 at *8 that "counsel's ineffectiveness in an initial-review collateral proceeding qualifies as cause for a procedural default." That narrow rule only applies to provide cause to overcome procedural default in the instance where a petitioner did not raise an ineffective assistance of counsel claim at the fault of post-conviction counsel. The new *Martinez* rule does not apply to overcome procedural default for claims other than ineffective assistance of counsel claims.

the defendant is guilty beyond a reasonable doubt.

If the State fails to satisfy the Jury that the defendant is guilty beyond a reasonable doubt, then the defendant is entitled to an acquittal or verdict of not guilty.

You have heard beyond a reasonable doubt a lot of times in this trial. It is one of those phrases that everybody probably has some idea in their own mind about what it means. It is also a phrase that sometime the more you attempt to explain what it means, it gets even worse. It gets even fuzzier. . . . The Law says I need to make an effort to explain to you what the phrase "beyond a reasonable doubt" means. It may help you to say the doubt which would justify an acquittal, that is a verdict of not guilty—it must be an actual doubt and not a mere guess or surmise. It is not a forced doubt or hypocritical or nitpicking doubt. The reasonable doubt which would entitle an accused to an acquittal is not some fanciful, vague, conjectural or speculative doubt. It is a doubt which arises from all or part of the evidence, or from a lack of evidence; or it can arise from contradictory evidence. It is a doubt which remains after a careful consideration of the testimony. It is a doubt such as reasonable and fair minded people would entertain under the circumstances. You will observe the State is not required to convince you of the defendant's guilt beyond all doubt. **Or they are not required to convince you of the defendant's guilt to a**

> **mathematical certainty. Or they are not required to convince you of the defendant's guilt beyond a shadow of a doubt, as you sometimes here people say.** They are required to convince you of the defendant's guilt beyond a reasonable doubt.
>
> The defendant is entitled to the inferences in the evidence that may be drawn in his favor. Where two inferences may be drawn from the same fact, one being consistent with innocence, one with guilt, the defendant is entitled to the inference of innocence. The State must prove each and every element of the offense charged beyond a reasonable doubt before you could find the defendant guilty.

(Tab R.13, pp. 520-22).

Williams argues that reference to "mathematical certainty" and "beyond a shadow of a doubt" invoked "constitutionally infirmed standard[s]." (Doc. 5, p. 105). Williams likens the instruction given in the instant case to that at issue in *Cage*, and argues that his conviction should also be reversed.

In *Cage v. Louisiana*, the constitutional concern was equating "reasonable doubt" with a "substantial" doubt creating "grave uncertainty" as to the guilt of the accused. 498 U.S. 39, 111 S. Ct. 328, 112 L. Ed. 2d 339 (1990). Later in *Victor v. Nebraska*, the Supreme Court found nothing wrong with defining "reasonable doubt" in terms of "actual and substantial doubt" when those terms relate to the *existence*, rather than the *quantum*, of doubt. 511 U.S. 1 (1994).

Unlike *Cage*, and even *Victor*, the instruction in this case emphasized the high level of certainty jurors must possess for the state's evidence to meet the reasonable doubt standard of proof. Rather than undermining the reasonable doubt standard by suggesting that the doubt must be "substantial," or create a "grave uncertainty," the contested instruction taken as a whole focused the jury's attention on the high level of certainty required before the State's evidence can be said to be sufficient for a conviction. The court finds no error in the court's definitions of the reasonable doubt standard. This claim is without merit.

CLAIM XXI. PETITIONER'S RIGHT TO A FAIR AND IMPARTIAL JURY WAS VIOLATED BY JURORS' FAILURE TO TRUTHFULLY DISCLOSE ON VOIR DIRE AND A JUROR'S CONSIDERATION OF EXTRANEOUS EVIDENCE DURING DELIBERATIONS

In his amended habeas petition, Williams contends that his right to a fair and impartial jury was violated because 1) unnamed jurors failed to truthfully respond to multiple questions during voir dire, and 2) jury foreperson A.J. consulted with clergy during the trial. (Doc. 5, pp. 106-107). Williams presented the same claim in his second amended Rule 32 petition. (Tab R. 40, pp. 197-99).

XXI.A. Juror failing to respond truthfully to *voir dire*

In his amended habeas petition and second amended Rule 32 petition, the only statement of facts regarding this claim was "several jurors' failure to respond truthfully to multiple questions on voir dire." (Tab R. 40, pp. 197-198).

Respondent contends that this claim is procedurally defaulted because (1) it was abandoned on appeal from the denial of the Rule 32 petition; (2) it could have been, but was not, raised at trial or on direct appeal; and (3) it was insufficiently pled in state court, pursuant to Rules 32.3 and 32.6(b), which are independent and adequate state law grounds. (Doc. 14, pp. 100-101).

Regarding jurors failing to respond truthfully, the Rule 32 court wrote:

> The Alabama Supreme Court and the Alabama Court of Criminal Appeals have specifically held that postconviction allegations of juror misconduct are subject to the procedural bars of Rule 32.2(a), Ala.R.Crim.P. *See DeBruce v. State*, 99-1619, 2003 WL 22846752, at *4 (Ala. Crim. App. Dec. 2, 2003) (holding that a Rule 32 petitioner "must show that the claim [of juror misconduct] is not subject to the procedural default grounds contained in Rule 32.2(a)(3) and (a)(5), Ala.R.Crim.P."); *see also Ex parte Pierce*, 851 So. 2d 606 (Ala. 2000); *Ex parte Dobyne*, 805 So. 2d 763 (Ala. 2001). Williams fails to identify in his original pleading, in his first amended petition, or in

> his second amended petition a single specific juror by name. Williams also fails to identify in Part III of his second amended petition a single question these unnamed jurors failed to truthfully answer. Paragraphs 21-22 in Part III of Williams' second amended petition contains no facts that, if true, would establish that the allegations of juror misconduct could not have been raised at trial or on direct appeal. The court finds that these allegations in Part III of Williams' second amended Rule 32 petition are procedurally barred from post-conviction review because they could have been but were not raised at trial and because they could have been but were not raised on appeal; therefore, they are summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R. Crim.P. The Court further finds that these allegations of juror misconduct . . . completely fail to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

(Tab R. 59, p. 227). The Alabama Court of Criminal Appeals affirmed the Rule 32 court's holding. (Tab R. 60, p. 17). The Alabama Supreme Court denied *certiorari* review. (Tab R. 61).

As a matter of federal law, federal courts will not consider or grant habeas relief regarding claims procedurally defaulted under "independent and adequate" state procedural rules. *See Wainwright v. Sykes*, 433 U.S. 72, 85-86 (1977); *Siebert v. Allen*, 455 F.3d 1269, 1271 (11th Cir. 2006). Therefore, this court must determine whether the state's procedural rule qualifies as

"independent" and "adequate" state law grounds. The Eleventh Circuit has adopted a three-part test to determine if a state court ruling was based on adequate and independent grounds. *See Judd*, 250 F.3d at 1313. 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." *Judd*, 250 F.3d at 1313. Second, "the state court's decision must rest entirely on state law grounds and not be intertwined with an interpretation of federal law." *Ward*, 592 F.3d at 1156-57 (citing *Judd*, 250 F.3d at 1313). Third, the state procedural rule must be adequate; that is, "firmly established and regularly followed" and not applied "in an arbitrary or unprecedented fashion." *Judd*, 250 F.3d at 1313 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)).

The Rule 32 court below clearly stated that it was relying on procedural rules, citing Rules 32.2(a)(3) and (a)(5), as well as Rule 32.6(b). (Tab R. 59, pp. 226-27). As has been discussed numerous times throughout this opinion, relying on Rule 32.6(b) constitutes a decision on the merits and does not prompt procedural default. The first requirement of the *Judd* test is that not only must the state court have explicitly stated that it was relying on state procedural rules, but it must also have done so without reaching the merits of the claim. See *Judd*, 250 F.3d at 1313. This court finds that the Rule 32 court did, in fact, attempt to reach the merits of William's claim, despite its reliance on Rules 32.2(a)(3) and (5). After stating that William's claim

was subject to the procedural bars of Rule 32, it went on to address the merits of William's claim, stating that "Williams fails to identify . . . a single specific juror by name. Williams also fails to identify . . . a single question these unnamed jurors failed to truthfully answer." (Tab R. 59, p. 226). This brief analysis prevents this claim from being procedurally defaulted.

Furthermore, this court questions whether application of Rules 32.2(a)(3) and (5) limitations on collateral relief were firmly established and regularly followed at the time of Petitioner's trial and subsequent proceedings. A rule is not "firmly established" if it is novel, or one that cannot be gleaned from existing law. "Novel procedural requirements or those of whose existence the defendant could not reasonably be deemed to have been apprised, cannot be permitted to thwart review of cases seeking vindication in state courts of federal constitutional rights." *Hansbrough v. Latta*, 11 F.3d 143, 146 (11th Cir. 1994). As noted above, to have a preclusive effect in federal habeas proceedings, the state's procedural requirement must be one that a criminal defendant reasonably could know about, and, more importantly, comply with in having his claim considered.

In this case, that means that it must have been reasonably possible for Petitioner to know in 1999 that he had to present his juror-misconduct claim at trial, or on direct appeal, to comply with Rule 32.2(a)(3) and (5). While the substance of Rule 32.2(a)(3) and (5) predated Petitioner's trial (and provided as a general proposition that claims not presented at trial and on

direct appeal could not be considered in a post-conviction Rule 32 proceeding), these provisions were not *clearly* applied to the claims relating to jurors' failure to answer *voir dire* questions until 2000—one year after Petitioner's trial. Alabama law did not become reasonably clear on that point until September 1, 2000, when the Alabama Supreme Court handed down its decision in *Ex parte Pierce*, 851 So. 2d 606 (Ala. 2000).

As the Alabama Court of Criminal Appeals subsequently stated:

> The Alabama Supreme Court in *Ex parte Pierce*, 851 So. 2d 606 (Ala. 2000), recognized that a juror-misconduct claim may be procedurally barred in a Rule 32 petition. The Supreme Court stated: "Although Rule 32.1(e) [newly discovered evidence] does not preclude [the petitioner's] claim, Rule 32.2(a)(3) and (5) would preclude [the petitioner's] claim if it could have been raised at trial or on appeal." 851 So. 2d at 614.

Jenkins v. State, 972 So. 2de 165, 167 (Ala. Crim. App. 2005).

Indeed, all of the cases applying Rule 32.2(a)(3) and (5) preclusion grounds to claims that a juror failed to answer correctly during *voir dire* have been decided since 2000, even though the trials in these cases occurred much earlier. *See Ex parte Dobyne*, 805 So. 2d 763 (Ala. 2001); *Jenkins v. State*, 972 So. 2d 165 (Ala. Crim. App. 2005); *Duncan v. State*, 925 So. 2d 245 (Ala. Crim. App. 2005); *McGahee v. State*, 885 So. 2d 191, 203

(Ala. Crim. App. 2003) *cert. denied*, 885 So. 2d 230 (Ala. 2004).

Further, in each of these instances, unlike the present case, the petitioner was afforded the opportunity to try to prove by a preponderance of the evidence that it was not reasonably possible to assert the claim at trial and on appeal because the underlying facts—*i.e.*, the falsity of the juror's answers—could not be discovered sooner. In the present case, however, the Rule 32 court *denied* Petitioner's second amended Rule 32 petition without allowing him an evidentiary hearing.

In any event, this court finds that this claim is *not* procedurally defaulted, and will address whether the Rule 32 court's decision was contrary to clearly established federal law.

First, a petitioner must provide substantial evidence to meet his burden of proof to show why federal post-conviction relief should be awarded. *Douglas v. Wainwright*, 714 F.2d 1532, *reh'g denied*, 719 F.2d 406 (11th Cir. 1983), vacated on other grounds, 468 U.S. 1206 (1984) and 468 U.S. 1212 (1984), on remand 739 F.2d 531 (11th Cir. 1984). That burden is to demonstrate at least *prima facie* evidence establishing the alleged constitutional violation. The mere assertion of a ground for relief, without more factual detail, does not satisfy a petitioner's burden of proof or the requirements of 28 U.S.C. § 2254(e)(2) and Rule 2(c), Rules Governing § 2254 Cases. Williams has pled at best only bare bones facts to support his claim. Williams does not state which juror was untruthful, what questions were

answered untruthfully, and how those answers so prejudiced him as to render his conviction and sentence fundamentally unfair.

Secondly, although criminal defendants certainly have a federal constitutional right to a fair and impartial jury, including the right to receive truthful and complete *voir dire* answers from prospective jurors, the fact that a juror may fail to fully answer a *voir dire* question does not result automatically in a new trial. The United States Supreme Court established the standards to be used in analyzing such a case in *McDonough Power Equipment, Inc. v. Greenwood*, 464 U.S. 548 (1984). The Court held:

> to obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause. The motives for concealing information may vary, but only those reasons that affect a juror's impartiality can truly be said to affect the fairness of a trial.

Id. at 556.

As further elaborated by the Eleventh Circuit, the second prong of this test requires a showing of "actual bias" on the part of the juror. The Court of Appeals explained:

> We now turn to the second prong of the *McDonough* test: whether a correct response

> would have provided a valid basis for a challenge for cause. A party who seeks a new trial because of non-disclosure by a juror during voir dire must show actual bias. *United States v. Tutt*, 704 F.2d 1567, 1569 (11th Cir.), cert. denied, 464 U.S. 855, 104 S. Ct. 174, 78 L. Ed. 2d 156 (1983). Actual bias may be shown in two ways: "by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be presumed." *United States v. Nell*, 526 F.2d 1223, 1229 (5th Cir. 1976) (citations omitted).

United States v. Perkins, 748 F.2d 1519, 1532 (11th Cir. 1984).

Even assuming, therefore, that Petitioner could prove that one juror failed to answer a question truthfully, he would still be required to establish that the juror demonstrated an express admission of bias, or "such a close connection to the circumstances at hand that bias must be presumed." *See Perkins*, 748 F.2d at 1532. Because Petitioner has not shown that he was deprived of his right to an impartial jury, his claim that jurors failed to truthfully answer *voir dire* questions is meritless. This claim is due to be denied.

XXI.B. Jury foreperson A.J. consulted outside clergy

In the amended habeas petition and the second amended Rule 32 petition, the only statement of facts regarding this claim was the following: "Additionally,

the introduction of extraneous information in the deliberations in this case violated Mr. Williams' rights to due process and a fair trial. . . . For example, A.J. consulted clergy during the trial to discuss his feelings about crime and punishment in general and specifically in relation to murder." (Tab R. 40, pp. 198-99).

Regarding jury foreperson A.J. consulting outside clergy, the Rule 32 court wrote:

> Williams' only support for this allegation is his one-sentence assertion in paragraph 23 that Juror A.J. "consulted clergy during the trial to discuss his feelings about crime and punishment in general and specifically in relation to murder." (Second amended petition at p. 14) This is Williams' entire argument to the Court.
>
> In Ex parte Dobyne, 805 So. 2d 763, 767-768 (Ala. 2001), the Alabama Supreme Court reaffirmed its holding in Ex parte Pierce, 851 So. 2d 606 (Ala. 2000), regarding the pleading requirements of a postconviction juror misconduct claim. In Ex parte Pierce, the Supreme Court held that while a claim of juror misconduct brought under Rule 32.1(a), Ala.R.Crim.P., does not have to meet the requirements of newly discovered evidence under Rule 32.1(e), Ala.R.Crim.P., a petitioner does have to establish that "his claim [of juror misconduct] could not have been raised at trial or on direct appeal." Ex parte Pierce, 851 So. 2d at 614. The Alabama Supreme Court specifically held in Pierce that "Rule 32.2(a)(3) and (5) would preclude Pierce's claim [of juror

misconduct] if it could have been raised at trial or on appeal." Id.

In Ex parte Pierce, the Alabama Supreme Court found that the basis of Pierce's claim of juror misconduct was discovered during post-conviction interviews with jurors. The Supreme Court held that:

> Pierce's claim was cognizable as long as he established that the information was not known, and could not reasonably have been discovered, at trial or in time to raise the issue in a motion for new trial or on appeal.

Ex parte Pierce, 851 So. 2d at 616. Williams did not identify Juror A.J., or any other juror, in his original pleading or in his first amended Rule 32 petition. Williams fails to state in any of his postconviction pleadings the source of his information supporting his allegation of juror misconduct against Juror A.J. Williams also does not state in his second amended petition when this instance of alleged juror misconduct was actually discovered. Williams further fails to proffer any facts to the Court that, if true, would establish that this allegation could not have reasonably been discovered at trial or in time to raise the issue in a motion for a new trial or on direct appeal. See Apicella v. State, 809 So. 2d 841, 850-851 (Ala.Crim.App. 2000) (capital defendant alleged in his motion for a new trial that, prior to deliberations, a juror talked to an attorney friend about the case). There is nothing in the

record indicating that the trial court prevented Williams' trial counsel from interviewing members of the jury after his trial. In making this finding, the Court is in no way holding that a defense attorney, whether defending a capital or non-capital defendant, has any duty to conduct post-trial interviews with jurors in order to be effective. The jury returned its sentencing recommendation on February 25, 1999. The trial court sentenced Williams to death almost six weeks later on April 6, 1999. Trial counsel then had 30 days from the pronouncement of sentence to file a motion for new trial in which Williams' counsel could have included allegations of juror misconduct. Williams fails to plead any facts in his second amended petition that, if true, would establish the allegation of juror misconduct against Juror A.J. is not procedurally barred. See Boyd v. State, 746 So. 2d 346, 406 (Ala. Crim. App. 1999) (holding that "Rule 32.6(b) requires that the petition itself disclose facts relied upon in the seeking relief") (emphasis in original); see also Ex parte Clisby, 501 So. 2d 483, 488 (Ala. 1986) (holding that the summary dismissal of a death row inmate's postconviction petition was proper because the petition "[was] not sufficient on its face to enable the trial court to determine whether the petitioner is entitled to any relief")[.] Therefore, this allegation is summarily dismissed. Rules 32.2(a)(3) and (5), Ala .R. Crim. P.

(Tab R. 59, pp. 227-229) (footnote omitted). The Alabama Court of Criminal Appeals affirmed the finding that this claim was barred from consideration by Rule 32.2(a)(3) and (5). (Tab R. 60, p.17). The Alabama Supreme Court denied *certiorari* review. (Tab R. 61).

Respondent contends that this claim is procedurally defaulted under independent and adequate state law grounds, because it was not raised on direct appeal. (Tab R. 14, p. 102). However, just as this court previously discussed when it analyzed Claim XXI(A), that a petitioner must present a juror-misconduct claim at trial or on direct appeal to comply with Rule 32.2(a)(3) and (5) was not firmly established. Therefore, this court finds that this sub-claim has not been procedurally defaulted from federal review.

Even assuming no procedural default, Williams has failed miserably in providing substantial evidence to meet his burden of proof to show why federal post-conviction relief should be awarded. *See Douglas v. Wainwright*, 714 F.2d 1532, *reh'g denied*, 719 F.2d 406 (11th Cir. 1983), vacated on other grounds, 468 U.S. 1206 (1984) and 468 U.S. 1212 (1984), on remand 739 F.2d 531 (11th Cir. 1984). Williams has again pled only a bare bones allegation without any supporting evidence that is insufficient to support habeas relief.

Petitioner asserts as cause to overcome the procedural default ineffective assistance of appellate counsel. (Doc. 21, p. 25). However, the court found that claim to be without merit and, therefore, it cannot serve as cause for this defaulted claim. Without any evidentiary

or documentary support, Williams also alleges that the factual predicate underlying this claim had not presented itself during trial and on appeal. (Doc. 21, p. 26). This mere assertion void of any factual support cannot serve as "cause and prejudice" to excuse the default.

In sum, Williams' claims of juror misconduct as grounds for habeas relief are procedurally defaulted, and alternatively without merit. This claim is due to be denied.

CLAIM XXII. THE STATE FAILED TO COMPLY WITH ITS DISCOVERY OBLIGATIONS UNDER *BRADY V. MARYLAND*.

In claim XXII of his amended habeas petition, Williams contends that the State failed to comply with its discovery obligations under *Brady v. Maryland*, 373 U.S. 83 (1963). In Brady, the United States Supreme Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Id.* at 87. "Impeachment evidence, [] as well as exculpatory evidence, falls within the *Brady* rule." *United States v. Bagley*, 473 U.S. 667, 676 (1985). Evidence is material "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *Id.* at 682. Further, the *Brady* rule applies in situations "involv[ing] the discovery, after trial of information which had been known to the prosecution but unknown to the defense."

United States v. Agurs, 427 U.S. 97, 103 (1976). The Court extended *Brady* to apply to evidence "known to police investigators and not to the prosecutor." *Kyles v. Whitley*, 514 U.S. 419, 438 (1995).

Three components comprise a true *Brady* violation: "The evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). A petitioner satisfies the prejudice component if he can show a reasonable probability that his conviction or sentence would have been different had the evidence been disclosed. *Id.* at 296.

Williams asserted a *Brady* claim in his second amended Rule 32 petition. (Tab R. 40, p. 14). The entire claim is composed of only legal conclusions and is completely void of any factual basis to support a *Brady* claim. (Tab R. 40, p. 15). The amended habeas petition is virtually the same claim, with the exception that it contains some factual allegations asserted for the first time: that a statement and DNA evidence from Bothwell, a potential suspect, were not disclosed to trial counsel, in violation of *Brady.* (Doc. 5, p. 108). As stated earlier, this court must view the state court's disposition of the claim as it was presented to the state courts in the second amended Rule 32 petition—not as it is more fully fleshed out in the instant amended habeas petition.

The Rule 32 court concluded that this claim was precluded because it 1) failed to meet the specificity and full factual pleading requirement of Rule 32.6(b) because it failed to identify a "single item of exculpatory or impeachment evidence withheld or otherwise suppressed by the State;" and 2) because Williams failed to assert that his *Brady* claim was based on newly discovered evidence, it was procedurally barred because it could have been but was not raised at trial or on appeal, pursuant to 32.2(a)(3) and (a)(5). (Tab R. 59 p. 230). The Alabama Court of Criminal Appeals affirmed the procedural dismissal in the Rule 32 appeal. (Tab R. 60 p. 21). The Alabama Supreme Court denied *certiorari* review.

In its Answer, Respondent asserts that this claim is defaulted from this court's review because it was decided under Rule 32.6(b), Ala. R. Crim. P., which is an independent and adequate state law grounds. (Doc. 14, p. 103). Further, the State contends that the new facts alleged in the amended habeas petition are precluded from this court's review because they were not first properly presented to the state courts. *Id.* (*citing Teague v. Lane*, 489 U.S. 288, 297-98 (1989); *Engle v. Issac*, 456 U.S. 107, 113-14, 117, 124-25 (1982)).

While the Rule 32 court's dismissal of Williams' claim based on Rule 32.6(b)'s pleading requirements will not provide a basis for procedural default, this court finds Williams' claim has been procedurally defaulted for his failure to raise this claim at trial or on direct appeal. This ruling by the Rule 32 court was based on independent and adequate state grounds,

namely Rules 32.2(a)(3) and (a)(5) of the Alabama Rules of Criminal Procedure. (Tab R. 59, p. 230).

The court also finds that this claim is insufficiently pled under Rule 2 of the Rules Governing § 2254 Proceedings and can be summarily dismissed on that ground. Although Petitioner conclusorily alleges that the prosecution failed to reveal to him exculpatory evidence, the only evidence he identifies is barred from this court's review because it was not pled until the amended habeas petition. Even assuming the prosecutor withheld evidence regarding Bothwell's DNA, Williams does not explain *how* such evidence would have made a material difference in the outcome of the trial. Stated another way, no reasonable probability arises that the evidence relating to Bothwell would have overcome the great weight of evidence presented at trial, or in any way reduce Williams' culpability in the crime. This claim is procedurally defaulted, and without merit; it is due to be dismissed.

CLAIM XXIII. THE CUMULATIVE EFFECT OF ALL THE ABOVE LISTED ERRORS ENTITLES PETITIONER TO HABEAS RELIEF

Petitioner's final claim is that the cumulative effect of all of the errors alleged by him resulted in the denial of his constitutional rights. It cannot be true that, where none of the individual claims asserted amounts to a basis for habeas relief, the sum of them together can create a remedy.

In a somewhat different § 2241 habeas context, involving a federal prisoner's challenge to the United States Parole Commission's denial of parole, the Eleventh Circuit refused to consider the cumulative effect of multiple claims of error when none of the individual claims showed any error. *Shakur v. Wiley*, 156 Fed. Appx. 137 (11th Cir. 2005) (unpublished). The court said, "Shakur also argues on appeal that his claims of error should be reviewed cumulatively in assessing whether the Commission abused its discretion. Because we find no error as to the individual claims, we do not address his argument as to cumulative effect." Because § 2241 and § 2254 writs of habeas corpus provide the same remedy, see *Medberry v. Crosby*, 351 F.3d 1049 (11th Cir. 2003), *cert. denied*, 541 U.S. 1032 (2004); *Peoples v. Chatman*, 393 F.3d 1352 (11th Cir. 2004), this reasoning applies with equal weight to the instant action. To conclude that, while none of Petitioner's individual allegations of relief show any constitutionally prejudicial error, in combination they do, would be an incongruous finding. The law does not support such a conclusion, and Petitioner has not pointed to any authority to justify such a determination. This claim likewise is due to be denied.

Conclusion

Having now carefully reviewed the entire record, pleadings, briefs, and arguments presented, the court finds that Petitioner is not entitled to relief from his conviction or sentence. Accordingly, by separate order, the court will deny the Petitioner's request for an

evidentiary hearing, and deny his petition for habeas corpus.

DONE AND ORDERED this 12th day of April, 2012.

/s/ Karon O. Bowdre
KARON O. BOWDRE
UNITED STATES
DISTRICT JUDGE

Court of Criminal Appeals
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MEMORANDUM

CR-04-0711 St. Clair Circuit Court CC-1997-57.80

Marcus Bernard Williams v. State of Alabama

COBB, Judge.

Marcus Bernard Williams appeals from the St. Clair Circuit Court's December 13, 2004, summary dismissal of his petition for postconviction relief, which he had filed pursuant to Rule 32, Ala. R. Crim. P. In that petition, Williams had challenged his capital-murder conviction and death sentence stemming from the 1996 murder during the course of the rape of Melanie Dawn Rowell. § 13A-5-40(a) (3), Ala. Code 1975. This Court affirmed Williams's conviction and sentence, Williams v. State, 795 So. 2d 753 (Ala. Crim. App. 1999), and the Alabama Supreme Court affirmed this Court's decision, Ex parte Williams, 795 So. 2d 785 (Ala. 2001).

In this Court's opinion on direct appeal, we quoted from the trial court's sentencing order as follows:

> "The trial court prepared the following summary of the relevant facts of this case:
>
> > "'On November 6th, 1996, the defendant had been out with friends, drinking and smoking marijuana. Upon returning home that evening, the defendant's thoughts turned to a young female neighbor of his, Melanie Dawn Rowell, and his desire to have sexual relations with her.
> >
> > "'At approximately 1:00 a.m. that night, Williams attempted to enter Rowell's back door, but the door was locked. He then noticed a kitchen window beside the door. He removed the screen from the window and found

that the window was not locked. It was through that window that Williams obtained entrance to the apartment.

"'Williams proceeded through the kitchen to the stairs leading to the upstairs bedroom. Before exiting the kitchen, Williams removed a knife from a set of knives in a holder on a kitchen countertop. Part way up the stairs, knife in hand, Williams removed his pants. Upon reaching the upstairs area, Williams crossed over a 'baby gate' which protected Rowell's two children, ages 15 months and 2 years, from the stairs. Williams looked into the children's room and found them both asleep.

"'Williams then entered the room of Melanie Rowell. He climbed in bed on top of her. When he began removing Rowell's clothes, a struggle ensued. Rowell fought Williams and began screaming despite [his] being armed with a knife. Williams placed his hand over her mouth to silence her and once again attempted to remove her clothes. As Rowell continued to struggle, Williams placed his hands around her neck. Eventually Rowell ceased to struggle as Williams continued to strangle her. When she was motionless, Williams proceeded to have sexual intercourse with her

> for 15 to 20 minutes. Prior to ejaculation, Williams pulled out and ejaculated on Rowell's stomach. There was a small cut inflicted upon Rowell's throat that was determined to be post-mortem. The cause of death was asphyxia due to strangulation.
>
> "'As he left Rowell's apartment, Williams took her purse. According to his statement, he threw the purse and the knife into a dumpster outside the apartment, although a search of the dumpster the next day by law enforcement failed to find either.
>
> "'The defendant was subsequently arrested after being identified by the elderly female victim in a subsequent break-in in the Ashville area. Upon being taken into custody for that offense, the defendant gave a statement admitting his involvement in the death of Melanie Rowell.'
>
> "(C.R. 105-07.)"

795 So. 2d at 761-62.

Williams filed a pro se petition pursuant to Rule 32, Ala. R. Crim. P., on September 20, 2002, and his attorney filed an amended petition on October 17, 2003. The State moved to dismiss the petitions as untimely; the trial court dismissed the petition and the amended petition on January 14, 2004. On March 4, 2004, this Court issued an order reversing the dismissal and

remanding the cause for further proceedings. (C. 11-12.) On remand, the State filed a motion to dismiss all claims in the amended petition. (C. 28-86.) On August 10, 2004, Williams filed a motion in opposition to the State's motion to dismiss and he filed a second amended petition. (C. 141-179, 186-234.) On August 18, 2004, the State filed a motion to dismiss the second amended petition, C. 235-282, and it later filed a proposed order of dismissal, Supp. C. 216-62.[1] Williams filed a brief in opposition to the State's motion to dismiss.(C. 89-119.) He also filed objections to the State's proposed order. (Supp. C. 210-15.) On December 13, 2004, the trial court adopted the State's proposed order and summarily dismissed Williams' second amended petition. (Supp. C. 216-62.) On January 12, 2005, Williams filed a motion to reconsider the order of dismissal. (Supp. C. 264-69.) The trial court denied the motion on January 14, 2005. (C. 285.) This appeal follows.

Standard of Review

The standard of review to be applied when a petitioner appeals from a trial court's dismissal of his post-conviction is as follows:

> "Rule 32.3, Ala. R. Crim. P., states that: 'The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief.'

---

[1] A supplemental record was filed on August 18, 2005; pages from that record are designated "Supp. C. ___."

> "On direct appeal, we reviewed the guilt phase and penalty phase of Madison's trial for plain error. See Rule 45A, Ala. R. App. P. However, the plain-error standard of review does not apply to an appeal in a Rule 32 proceeding. See Ex parte Dobyne, 805 So. 2d 763 (Ala. 2001). Also, the procedural bars contained in Rule 32.2, Ala. R. Crim. P., apply to all cases, even those involving the death penalty. State v. Tarver, 629 So. 2d 14 (Ala. Crim. App. 1993). Last, 'If the circuit court is correct for any reason, even though it may not be the stated reason, we will not reverse its denial of the petition.' Reed v. State, 748 So. 2d 231, 233 (Ala. Crim. App. 1999)."

Madison v. State, [CR-05-0052, Sept. 29, 2006] ___ So. 2d ___, ___, (Ala. Crim. App. 2006).

With the foregoing principles in mind, we review Williams's claims.

I.

Williams first argues that the trial court erred in summarily dismissing the claims in the petition alleging ineffective assistance of counsel. He argues that the petition was sufficiently pleaded and that numerous issues of disputed and material fact existed.

We note, first, that summary dismissal is permitted under the provisions of Rule 32 in certain circumstances. Rule 32.7(d), Ala. R. Crim. P., states, "If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that

no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition."

Rule 32.2(a), Ala. R. Crim. P., states:

> "(a) Preclusion of Grounds. A petitioner will not be given relief under this rule based upon any ground:
>
> "(1) Which may still be raised on direct appeal under the Alabama Rules of Appellate Procedure or by posttrial motion under Rule 24; or
>
> "(2) Which was raised or addressed at trial; or
>
> "(3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or
>
> "(4) Which was raised or addressed on appeal or in any previous collateral proceeding not dismissed pursuant to the last sentence of Rule 32.1 as a petition that challenges multiple judgments, whether or not the previous collateral proceeding was adjudicated on the merits of the grounds raised; or
>
> "(5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b)."

(Emphasis added.)

The procedural bars set forth in Rule 32.2, Ala. R. Crim. P., apply to all cases, even those involving the death penalty. State v. Tarver, 629 So. 2d 14 (Ala. Crim. App. 1993). We stated recently in Davis v. State, [Ms. CR-03-2086, August 25, 2006] ___ So. 2d ___, ___ Ala. Crim. App. 2006) (opinion on application for rehearing):

> "Alabama's procedural-default bars are mandatory; they apply to every Rule 32 petition, even those involving the death penalty. See Barbour v. State, 903 So. 2d 858 (Ala. Crim. App. 2004). An Alabama court has no authority to excuse a procedurally defaulted claim. 'Alabama has never recognized any exceptions to the procedural default grounds contained in Rule 32, Ala. R. Crim. P.' Ex parte Hooks, 822 So. 2d 476, 481 (Ala. Crim. App. 2000)."

In his second amended petition, Williams raised numerous claims of ineffective assistance of trial counsel, claiming that counsel's performance was deficient during the guilt phase and the penalty phase; he also raised claims of ineffective assistance of appellate counsel. The trial court examined the claims and found that they were insufficiently pleaded, failed to state a claim, or were without merit; the court denied relief on all of the claims. Williams argues many of the claims regarding ineffective assistance of trial counsel again

on appeal and urges this Court to reverse the trial court's summary dismissal of the claims.[2]

We note that, although Williams did not raise any ineffective-assistance-of-counsel claims in his motion for a new trial following his conviction and death sentence, he did raise numerous claims of ineffective assistance of counsel on direct appeal to this Court. This Court addressed those claims as follows:

> "Finally, the appellant contends that his attorneys rendered ineffective assistance during his trial. (Issues XIX, XXII, XXIII, XXIV, XXV, and XXVI in the appellant's brief to this court.)
>
> Specifically, he contends that his attorneys:
>
> "1) erred by abandoning his plea that he was not guilty by reason of mental disease or defect;
>
> "2) erred by not presenting a mitigation expert during the penalty phase of the trial;
>
> "3) erred by not presenting documentary evidence during the penalty phase of the trial;
>
> "4) erred by not having its own DNA expert to testify at trial and to assist counsel in cross-examining the State's DNA expert;
>
> "5) erred by not having an expert testify as to the effects of marijuana and alcohol; and

---

[2] Williams does not challenge the trial court's ruling as to the claims of ineffective assistance of appellate counsel.

"6) erred by not having a forensic pathology expert testify that there was no evidence of a rape or an attempted rape.

"However, the appellant did not first present these claims to the trial court in a motion for a new trial. Therefore, we review them for plain error. See Rule 45A, Ala. R. App. P.

"'[T]o prevail on an ineffective assistance of counsel claim, a defendant must meet the two-pronged test set out by Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).

> "'"First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is unreliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."

"'Id. at 687, 104 S. Ct. at 2064.

> "'"The performance component outlined in Strickland is an objective one: that is, whether counsel's assistance, judged under 'prevailing professional norms,' was 'reasonable considering all the circumstances.'" Daniels v. State, 650 So. 2d 544, 552 (Ala.Cr.App. 1994) (quoting Strickland, 466 U.S. at 688, 104 S. Ct. at 2065). Once a defendant has identified the specific acts or omissions that allegedly were not the result of reasonable professional judgment on counsel's part, the court must determine whether those acts or omissions fall outside the wide range of professionally competent assistance. Id.

"'When reviewing a claim of ineffective assistance of counsel, we indulge a strong presumption that counsel's conduct was appropriate and reasonable.

Hallford v. State, 629 So. 2d 6 (Ala.Cr.App. 1992), cert. denied, 511 U.S. 1100, 114 S.Ct. 1870, 128 L.Ed.2d 491 (1994); Luke v. State, 484 So.2d 531 (Ala.Cr.App. 1985).

> "'"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, 104 S. Ct. at 2065 (citations omitted). See Ex parte Lawley, 512 So. 2d 1370, 1372 (Ala. 1987).

> "'And, even if an attorney's performance is determined to be deficient, the petitioner is not entitled to relief unless it is also established that "there is a reasonable probability that, but for counsel's unprofessional error, the result of the proceeding would have been different. A reasonable

> probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S.Ct. at 2068.

"'In an ineffective assistance of counsel claim, the burden is on the claimant to show that his counsel's assistance was ineffective. Ex parte Baldwin, 456 So. 2d 129 (Ala. 1984), aff'd, 472 U.S. 372, 105 S. Ct. 2727, 86 L. Ed. 2d 300 (1985).'

"McNair v. State, 706 So. 2d 828, 839 (Ala.Cr.App. 1997), cert. denied, 523 U.S. 1064, 118 S.Ct. 1396, 140 L. Ed. 2d 654 (1998).

"After reviewing the appellant's claims, we conclude that he has not satisfied his burden of proving that his counsel's performance was deficient and that that deficient performance prejudiced him. Although he makes broad allegations, he has not supported them factually. For example, although he contends that counsel should have presented a mitigation expert and documentary evidence during the penalty phase of his trial, he has not alleged what additional evidence an expert could have presented or what documentary evidence existed that counsel did not present. In addition, he has not shown what additional evidence an expert could have presented about the effects of alcohol and marijuana, and has not shown that there is a reasonable probability that such evidence would have altered the outcome of his trial. Furthermore,

> the record refutes some of his claims. First, as stated in Part VIII of this opinion, there is no evidence that he was suffering from a mental disease or defect. Second, counsel thoroughly cross-examined the State's DNA expert, and there is no indication that an additional expert would have aided the defense in this area. Finally, the appellant alleges that an independent forensic expert was necessary to testify that the autopsy of the victim did not show that there had been a rape or an attempted rape. However, the coroner testified that, based on his examination of the victim's body, he could not determine whether anyone had raped or attempted to rape the victim. Thus, although he has made several allegations, the appellant has not shown that his attorneys performed in a deficient manner and that their allegedly deficient performance prejudiced him. Accordingly, we do not find any plain error in this regard."

Williams v. State, 795 So. 2d at 783-84 (emphasis added).

In his petition for a writ of certiorari to the Alabama Supreme Court, Williams again argued that his attorneys rendered ineffective assistance. The Alabama Supreme Court addressed that issue and several others Williams raised as follows:

> "Although Williams failed to properly preserve these issues for appeal, this Court is obligated in this case to search the record for plain error. See Rule 39(k), Ala.R.App.P. Error is plain if " 'the error is so obvious that the

> failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.'" Haney v. State, 603 So.2d 368, 392 (Ala.Crim.App. 1991), aff'd, 603 So. 2d 412 (Ala. 1992), cert. denied, 507 U.S. 925, 113 S. Ct. 1297, 122 L. Ed. 2d 687 (1993) (citation omitted). The Court of Criminal Appeals thoroughly addressed and properly decided each of the issues raised on appeal, including those issues that were not properly preserved. None of the issues required reversal. Moreover, our search of the record reveals no reversible error, plain, or otherwise. Thus, we decline to address any of the specific issues raised by Williams.
>
> "We have meticulously searched the entire record for reversible error, and we have found none, plain or otherwise. We conclude that Williams received a fair trial. We have reviewed the opinion of the Court of Criminal Appeals and conclude that it adequately and properly reviewed Williams's conviction and sentence. Consequently, the judgment of the Court of Criminal Appeals affirming Williams's conviction and his sentence of death is affirmed."

Ex parte Williams, 795 So. 2d at 787-88 (footnotes omitted).

Thus, Williams had previously raised a claim of ineffective assistance of counsel, and that claim was addressed on appeal. When he raised the claim in the Rule 32 proceeding, it was being raised for the second time. This Court has previously addressed cases

presenting circumstances similar, though not identical, to those arising in the case before us. For example, in Davis v. State, [Ms. CR-03-2086, March 3, 2006] ___ ___, ___ So. 2d Ala. Crim. App. 2006), Davis's newly-appointed appellate counsel had raised ineffective-assistance-of-counsel claims in a motion for a new trial, in accordance with the procedure then required by Ex parte Jackson, 598 So. 2d 895 (Ala. 1992), and counsel raised an ineffective-assistance-of-counsel claim on appeal. Davis later filed a petition pursuant to Rule 32, Ala. R. Crim. P., and again raised allegations of ineffective assistance of counsel. The trial court denied the claim. On appeal, this Court held that Rule 32.2, Ala. R. Crim. P., mandated that we hold that Davis's ineffective-assistance-of-counsel claim was procedurally barred because it had been raised and addressed at trial:

> "According to established caselaw, Davis's ineffective-assistance-of-trial-counsel claims are procedurally barred in this Rule 32 proceeding. See also Clemons v. State, [Ms. CR-01-1355, August 29, 2003, and June 24, 2005] ___ So. 2d ___ (Ala. Crim. App. 2003) (opinion on return to remand); Brooks v. State, 929 So. 2d 491 (Ala. Crim. App. 2005); and Mason v. State, 768 So. 2d 981 (Ala. Crim. App. 1998).
>
> "We realize the harsh consequences that the application of this procedural bar has on inmates like Davis, who are incarcerated on Alabama's death row. However, this Court has no authority to modify or amend the

> procedural bars contained in Rule 32, Ala. R. Crim. P."

Davis, ___ So. 2d at ___ (footnotes omitted).

In our opinion overruling Davis's application for rehearing, we discussed further the mandatory nature of the procedural bars of Rule 32. We stated:

> "The Supreme Court adopted Rule 32, Ala. R. Crim. P., pursuant to the rule-making authority granted it by the Alabama Constitution. We must give the Supreme Court's words their plain meaning. See Nieto v. State, 842 So. 2d 748 (Ala. Crim. App. 2002). Rule 32.2(a), Ala. R. Crim. P., states: 'A petitioner will not be given relief. . . .' (Emphasis added.) Clearly, the Rule is written in mandatory terms and not in discretionary or permissive terms. The Alabama Supreme Court recently alluded to the mandatory application of Rule 32.2 in Ex parte Seymour, [Ms. 1050597, June 30, 2006] ___ So. 2d ___, ___ (Ala. 2006), when it stated:
>
> > "'Our analysis begins with the grounds for preclusion of remedy in Rule 32.2, Ala. R. Crim. P. Seymour did not raise his defective-indictment claim at trial or on direct appeal. See Rule 32.2(a)(3) and (5), Ala. R. Crim. P. Rule 32.2 thus sharply limits the scope of our review.'"

Davis v. State, [Ms. CR-03-2086, Aug. 25, 2006] ___ So. 2d ___ (Ala. Crim. App. 2006) (footnote omitted) (on application for rehearing).

Recognizing that the federal courts have different rules regarding procedural bars in habeas cases, we further stated in Davis v. State:

> "However, the federal habeas corpus statute, 28 U.S.C. § 2254 (1994), contains permissive procedural default bars – bars that may be excused if the petitioner establishes 'cause and prejudice.' As this Court has stated:
>
> > "'Although in federal court a habeas petitioner can allege that the ineffective assistance of counsel was "cause and prejudice" to excuse a procedural default, e.g., Murray v. Carrier, 477 U.S. 478, 488, 106 S. Ct. 2639, 91 L. Ed. 2d 397 (1986), Alabama state courts in postconviction proceedings do not recognize the cause and prejudice exception. We recently stated, "Alabama has never recognized any exceptions to the procedural default grounds contained in Rule 32, Ala. R. Crim. P. We have repeatedly stated that the procedural bars in Rule 32 apply equally to all cases, including those in which the death penalty has been imposed." Hooks v. State, 822 So. 2d 476, 481 (Ala. Crim. App. 2000).'
>
> "Hamm v. State, 913 So. 2d 460, 493 (Ala. Crim. App. 2002).
>
> "By stark contrast, Alabama's procedural-default bars are mandatory; they apply to every Rule 32 petition, even those involving

> the death penalty. See Barbour v. State, 903 So. 2d 858 (Ala. Crim. App. 2004). An Alabama court has no authority to excuse a procedurally defaulted claim. 'Alabama has never recognized any exceptions to the procedural default grounds contained in Rule 32, Ala. R. Crim. P.' Ex parte State, 822 So. 2d 476, 481 (Ala. Crim. App. 2000). Thus, federal cases concerning habeas corpus petitions provide no guidance on this issue."

Davis v. State, ___ So. 2d at ___ (on application for rehearing).

Furthermore, in James v. State, [Ms. CR-04-0395, April 28, 2006], we reviewed the circuit court's denial of James's Rule 32 petition. In his petition, James had raised an ineffective-assistance-of-counsel claim. We noted that, in his earlier direct appeal from his conviction and death sentence, James had raised issues of ineffective assistance of counsel; some of the allegations had also been raised in his motion for a new trial[3] and some were raised for the first time on direct appeal. We reviewed the newly-raised claims for plain error, and we reviewed the claims that had also been raised in the trial court for reversible error; we found that James had failed to prove either deficient performance or prejudice and denied him relief on appeal. James v. State, 788 So. 2d 185, 191-94 (Ala. Crim. App. 2000). Later, on appeal from the

[3] We note that the motion for a new trial was not filed pursuant to Ex parte Jackson, 598 So. 2d 895 (Ala. 1992). Ex parte Jackson was overruled in Ex parte Ingram, 675 So. 2d 863 (Ala. 1996); James was convicted on June 17, 1999.

denial of the Rule 32 petition, we determined that the ineffective-assistance-of-counsel claim James had raised in his Rule 32 petition was procedurally barred. We held:

> "Throughout his brief, the appellant argues that his trial counsel rendered ineffective assistance during the guilt and penalty phases of his trial. After the jury recommended that he be sentenced to death, he filed a pro se motion for a new trial in which he raised ineffective-assistance-of-trial-counsel allegations. After the trial court sentenced the appellant to death, newly appointed appellate counsel filed a motion for a new trial and raised an ineffective-assistance-of-trial-counsel claim. Finally, he raised and this court addressed and rejected several ineffective-assistance-of-trial-counsel grounds on direct appeal. See James, 788 So. 2d at 191-94. Therefore, the appellant's ineffective-assistance-of-trial-counsel claim is precluded pursuant to Rules 32.2(a)(2) and (a)(4), Ala. R. Crim. P., because it was raised and addressed at trial and on direct appeal. See Ex parte Ingram, 675 So. 2d 863 (Ala. 1996)."

James v. State, ___ So. 2d at ___.

Thus, the established caselaw in Alabama mandates that we hold that Williams's issues alleging ineffective assistance of trial counsel are procedurally barred from review because Williams raised allegations of ineffective assistance of counsel on direct appeal and those claims were addressed by this Court

and by the Alabama Supreme Court on certiorari review. Rule 32.2(a)(4), Ala. R. Crim. P.

As we stated in Davis v. State, [Ms. CR-03-2086, March 3, 2006], we realize that the application of the procedural bar has harsh consequences on Williams. However, we are bound by the clear language of Rule 32 and the previous caselaw interpreting and applying the procedural bars of Rule 32. Therefore, having found all of Williams's claims of ineffective assistance of trial counsel to be procedurally barred, we do not address them here.

II.

Williams also argues that the circuit court erred when it determined that several substantive claims he had asserted in support of his ineffective-assistance-of-counsel claim were procedurally barred. Specifically, Williams stated:

> "The Circuit Court determined that the following claims were procedurally barred pursuant to Rules 32.2(a)(3), (a)(5) and 32.4(a)(4), Ala. R. Crim. P.: (1) the allegation that the trial court improperly instructed the jury on the definition of reasonable doubt; (2) the allegation that the trial court relied on an inadequate presentence report; (3) the allegation that judicial sentencing in capital murder cases is unconstitutional; (4) the allegation that aggravating circumstances were not charged in the indictment; (5) the allegation that the aggravating factors and mitigating were invalid

> as not subject to the beyond a reasonable doubt standard; (6) allegation that the jury's sentencing recommendation was unconstitutional; and (7) the allegation that Mr. Williams was denied a fair trial due to juror misconduct."

(Williams's brief at p. 49, n.14.)

He also argues that he had "asserted and substantiated his claim that ineffective assistance of counsel prevented him from adequately litigating and preserving these issues at trial and on appeal." (Williams's brief at p. 50.) The trial court correctly dismissed the substantive claims because they were precluded. Williams's claims – that the trial court improperly instructed the jury on the definition of reasonable doubt, that the trial court relied on an inadequate presentence report, that judicial sentencing is unconstitutional, that the indictment against him was defective because it failed to include the aggravating circumstances relied on by the State, that his death sentence was unconstitutionally imposed because the jury and judge did not have to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt, that the jury's sentencing recommendation was invalid, and that he was denied a fair trial due to juror misconduct – could have been but were not raised at trial, and could have been but were not raised on direct appeal. Thus, summary dismissal of the claims was proper. Rule 32.2(a)(3), (a)(5), Ala. R. Crim. P. Williams's claims that judicial sentencing is unconstitutional and that his death sentence

was unconstitutionally imposed because the jury and judge did not have to find that the aggravating circumstances outweighed the mitigating circumstances beyond a reasonable doubt were also properly dismissed because they presented no material issue of fact or law which would have entitled Williams to relief. Rule 32.7(d), Ala. R. Crim. P. Ex parte Waldrop, 859 So. 2d 1181, 1186-90 (Ala. 2002) (rejecting the claims Williams now raises). Williams's claim that juror misconduct denied him a fair trial was also subject to summary dismissal because it failed to meet the requirements for specificity and a full disclosure of the factual basis for the grounds pleaded. Rule 32.6(b), Ala. R. Crim. P. Finally, Williams's claim that the indictment against him was defective because it failed to include the aggravating circumstances relied on by the State was properly dismissed because the claim could have been raised at trial and on direct appeal but it was not. Rule 32.2(a)(3), (a)(5), Ala. R. Crim. P. Furthermore, the issue Williams raised was already decided adversely to his position. Ex parte Waldrop, 859 So. 2d 1181, 1188 (Ala. 2002). Therefore, summary dismissal was proper because Williams presented no material issue of fact or law which would have entitled him to relief. Rule 32.7(d), Ala. R. Crim. P.

To the extent Williams argues that trial counsel's ineffective assistance "prevented him from adequately litigating and preserving these issues at trial and upon appeal," and that the circuit court should not have dismissed the substantive claims without an evaluation of the underlying ineffective-assistance-of-counsel

claim, we disagree. First, the substantive claims themselves were due to be dismissed because they were precluded, as discussed above. Second, to the extent Williams has attempted to link the substantive claims to a claim of ineffective assistance of counsel, he is still not entitled to review of the claims because, as we discussed fully in Part I of this memorandum, the ineffective-assistance claims are precluded; Williams raised an ineffective-assistance claim in this Court and in the Alabama Supreme Court and the claim was addressed in both Courts. Williams cites Coleman v. Thompson, 501 U.S. 722 (1991), in support of his assertion that the substantive claims should be reviewed because counsel's ineffective performance was the cause of his failure to timely raise the claims. However, as discussed fully in Part I of this memorandum, Alabama recognizes no exception to the procedural bars set out in Rule 32. Hamm v. State, 913 So. 2d 460, 493 (Ala. Crim. App. 2002).

For all of the foregoing reasons, we hold that the trial court correctly dismissed the substantive claims and that Williams is not entitled to relief on these claims on appeal.

III.

Williams next argues that the circuit court erred when it adopted the State's proposed order and dismissed portions of the second amended petition on grounds that the claims were not pleaded with sufficient specificity. Williams argues that he "objects to the

Order in its entirety – both the procedure by which the Circuit Court adopted it and its substance – the following discussion explains why some of the asserted grounds for dismissal are wrong and contrary to settled law." (Appellant's brief at p. 46.) He also argues that trial court's adoption of the State's order suggests to him that the trial court "abdicated entirely the judicial responsibility to fully and fairly decide the case" and that it "ceded responsibility for addressing the merits" of the claims Williams raised. (Appellant's brief at p. 59.)

First, as to the claims Williams discusses in his brief that, he alleges, were improperly dismissed based on lack of specificity in pleading, we note that all of the claims involve allegations of ineffective assistance of counsel. As discussed in Part I of this memorandum, those claims are precluded because Williams raised an ineffective-assistance claim on appeal and that claim was addressed by this Court and by the Alabama Supreme Court. Thus, summary dismissal of those claims was proper.

Williams's argument that the trial court erred by adopting the State's proposed order is meritless. This Court has repeatedly discussed this issue and has held contrary to the position Williams has taken here. For example, in Hamm v. State, 913 So. 2d 460, 474-75 (Ala. Crim. App. 2002), we stated:

> "The State argues, and Hamm acknowledges, that nothing in Alabama law precludes a trial court from adopting an order submitted

by one of the parties, as long as the order accurately reflects the court's findings and conclusions. E.g., Sockwell v. State, 675 So. 2d 4, 32 (Ala.Crim.App. 1993). In arguing his issue, Hamm does not cite any specific findings or conclusions in the order that are unsupported by the record or the law. Rather, he condemns the fact that the court adopted the State's proposed memorandum verbatim and argues that doing so is improper because, he says, the court should have decided the merits of the petition 'based upon its own independent judicial labors and study.' (Hamm's brief at p. 14.) We disagree with Hamm.

"This Court has previously stated:

> "'"While the practice of adopting the State's proposed findings of fact and conclusions of law is subject to criticism, the general rule is that even when the court adopts proposed findings and conclusions verbatim, the findings are those of the court and may be reversed only if clearly erroneous. Anderson v. City of Bessemer, N.C., 470 U.S. 564, 105 S. Ct. 1504, 84 L. Ed. 2d 518 (1985); Hubbard v. State, 584 So.2d 895 (Ala.Cr.App. 1991); Weeks v. State, 568 So.2d 864 (Ala.Cr.App. 1989), cert. denied, 498 U.S. 882, 111 S. Ct.

> 230, 112 L. Ed. 2d 184 (1990); Morrison v. State, 551 So.2d 435 (Ala.Cr.App. 1989), cert. denied, 495 U.S. 911, 110 S. Ct. 1938, 109 L. Ed. 2d 301 (1990)."

> "'Wright v. State, 593 So. 2d 111, 117-18 (Ala.Cr.App. 1991), cert. denied, 506 U.S. 844, 113 S. Ct. 132, 121 L. Ed. 2d 86 (1992).'

"Holladay v. State, 629 So.2d 673, 687-88 (Ala.Crim.App. 1992). See also Dobyne v. State, 805 So. 2d 733, 741 (Ala.Crim.App. 2000), aff'd, 805 So. 2d 763 (Ala. 2001).

> "We have reviewed the evidence presented to the circuit court and the order entered by the court at the conclusion of the Rule 32 proceeding. Nothing in the record causes us to doubt that the order represents the circuit court's independent judgment as to the facts and as to the application of the law to those facts. No error occurred when the circuit judge adopted the order drafted by the State."

While the circuit court adopted the proposed order soon after it was submitted by the State, we note that the second amended petition, the State's motion to dismiss and its proposed order, and Williams's brief opposing the motion to dismiss and his objections to the proposed order had all been pending in the circuit court for several months before the proposed order was adopted. We find nothing in the record or in Williams's argument on appeal that convinces us that the circuit

court failed to exercise its independent judgment as to the issues; the findings of fact and conclusions of law appear to be those of the circuit court, and we find no error in the court's adoption of the State's order.

IV.

Williams next argues that the trial court erred when it dismissed his claim that the State withheld material exculpatory evidence in violation of Brady v. Maryland, 373 U.S. 83 (1963).

In the second amended petition, Williams set out Alabama and federal caselaw regarding the State's obligation to provide discovery, and he alleged that the State had failed to provide Williams's counsel "with crucial exculpatory and impeachment evidence." (C. 199.) Williams provided no additional factual allegations in support of his claim. The trial court dismissed the claim. The court held:

> "Williams fails to identify to the Court in Part IV or any where else in his second amended Rule 32 petition a single item of exculpatory or impeachment evidence withheld or otherwise suppressed by the State. The Court finds that Part IV fails to meet the specificity and full factual pleading requirement of Rule 32.6(b); therefore, it is summarily dismissed. Moreover, the Court further finds that Williams has fails to assert in his amended Rule 32 that his Brady claim is based on newly discovered evidence; therefore, the Court finds that it procedurally barred

> from postconviction review because it could have been raised at trial and because it could have been raised on direct appeal. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.; see Boyd v. State, 913 So. 2d 1113, 1141-42 (Ala. Crim. App. 2003) (holding that Boyd's postconviction Brady claim was procedurally barred from review and failed to meet the pleading requirements of Rule 32.6(b))."

(C. 199.)

The trial court correctly analyzed and disposed of this claim and we adopt that court's findings as our own. Williams is not entitled to any relief on this claim of error.

V.

Finally, Williams argues that the trial court erred when it "summarily dismissed all of the claims raised in the Second Amended Petition without ruling on Mr. Williams's discovery motions or conducting an evidentiary hearing." (Appellant's brief at 35-36.) We disagree.

The record reflects that Williams filed a Motion for Discovery of Institutional Records, Files, and Information. (C. 120-24.) He also filed a Motion for Discovery of Prosecution Files, Records, and Information. (C. 126-39.) As Williams notes in his brief to this Court, the trial court did not rule on his motions for discovery. Because the trial court did not rule on the motions, Williams has no adverse ruling from which to appeal,

and the issue regarding discovery is not properly before us for our review. See, e.g., Boyd v. State, 913 So. 2d 1113, 1124-25 (Ala. Crim. App. 2003).

Moreover, we note that Williams's discovery requests were so broad and vague that the trial court would not have been held in error if it had denied them.

In Boyd v. State, 913 So. 2d 1113, 1124 n.5 (Ala. Crim. App. 2003), we addressed similar circumstances. We stated:

> "In Ex parte Land, 775 So. 2d 847 (Ala. 2000), the Alabama Supreme Court held that discovery is not automatic under Rule 32, Ala. R. Crim. P., and that 'good cause' is the standard by which to judge Rule 32 discovery motions. 775 So. 2d at 852. The Supreme Court cautioned that 'postconviction discovery does not provide a petitioner with a right to "fish" through official files and that it "is not a device for investigating possible claims, but a means of vindicating actual claims.'" 775 So. 2d at 852, quoting People v. Gonzalez, 51 Cal.3d 1179, 1260, 800 P.2d 1159, 1206, 275 Cal. Rptr. 729, 776 (1990). Boyd's discovery motions contained broad requests, in boilerplate language, for State files, with no attempt to relate the requests to specific claims in his Rule 32 petition."

The same is true in the case now before us. Williams alleged in the motion seeking discovery of prosecution files from 9 State agencies, including the St.

Clair County District Attorney's Office and the St. Clair County district and circuit courts, that discovery is routinely granted in Rule 32 cases and, he alleged, "There is some indication that additional discoverable material exists that was not provided to the defense." (C. 128.) (Footnote omitted.) The motion contains no additional information about why Williams believes information was withheld or what sort of information he believes is available. Similarly, in his motion for discovery of institutional files, Williams cited Ex parte Land, 775 So. 2d 847 (Ala. 2000), and other cases discussing legal principles involving discovery, and he then requested the following documents:

> "2. Any and all records pertaining to Petitioner generated or maintained by the Alabama Department of Corrections, including but not limited to disciplinary records, medical records, psychological, psychiatric, and mental health records, and any other records generated or maintained by any prison, medical facility or any other entity associated with the Alabama Department of Corrections, including but not limited to: Ashville city Jail; St. Clair County Jail; and Holman Correctional Facility.
>
> "3. Any and all records generated or maintained by any and all medical provider organizations to the Alabama Department of Corrections and St. Clair County Jails, including but not limited to Correctional Medical Services.

> "4. Any and all records generated or maintained by the Alabama Department of Mental Health and Mental Retardation pertaining to Marcus Bernard Williams.
>
> "5. Any and all documents generated or maintained. by the Alabama Board of Pardons and Paroles pertaining to Marcus Bernard Williams.
>
> "6. Any and all medical, psychological, psychiatric, or mental health records of any kind generated or maintained by any hospital, psychological, psychiatric, or mental health facility of any kind as well as any records generated or maintained by any physicians, psychologist, psychiatrist, medical or mental health provider of any kind.
>
> "7. Any and all records pertaining to Marcus Bernard Williams, generated or maintained by the Alabama Department of Human Resources, including any sub-agency or department that operates within or in conjunction with the Alabama Department of Human Resources."

(C. 121-22.)

The motion is very broad and vague and Williams made no attempt to relate any of the requests to any of the claims he raised in his Rule 32 petition. Thus, the motion for discovery of institutional files and the motion for discovery of prosecution files were "fishing expeditions" and it appeared that Williams attempted to use the discovery motions as a way to investigate

possible claims rather than to vindicate actual claims. Therefore, even if the trial court had denied these boilerplate motions for discovery, we would have found no error entitling Williams to relief.

As to Williams's claim that the trial court erred in denying post-conviction relief without holding an evidentiary hearing, we disagree. The State correctly argues that this Court has held that "a Rule 32 petitioner is not automatically entitled to an evidentiary hearing on any and all claims raised in the petition." Boyd v. State, 913 So.2d 1113, 1126 (Ala. Crim. App. 2003). This Court has also recognized:

> "'An evidentiary hearing on a [Rule 32] petition is required only if the petition is "meritorious on its face." Ex parte Boatwright, 471 So.2d 1257 (Ala. 1985). A petition is 'meritorious on its face" only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true. Ex parte Boatwright, supra; Ex parte Clisby, 501 So.2d 483 (Ala. 1986).'
>
> "Moore v. State, 502 So.2d 819, 820 (Ala. 1986)."

Bracknell v. State, 883 So. 2d 724, 727-28 (Ala. Crim. App. 2003).

For all of the reasons discussed above, Williams's petition was not meritorious on its face, and all of the

claims were due to be summarily dismissed. Therefore, the trial court did not err in denying the second amended petition without holding an evidentiary hearing. Williams is not entitled to any relief on his claims regarding the discovery motions or his claim regarding the evidentiary hearing.

For all of the foregoing reasons, we find that the judgment of the Circuit Court of St. Clair County is due to be affirmed.

AFFIRMED.

McMillan, P.J., and Baschab, Shaw, and Wise, JJ., concur.

IN THE CIRCUIT COURT OF
ST. CLAIR COUNTY, ALABAMA
ASHVILLE DIVISION

MARCUS WILLIAMS, Petitioner,	)	Case No. CC-97-57.60
v.	)	
STATE OF ALABAMA, Respondent.	)	

ORDER ADDRESSING THE ALLEGATIONS IN WILLIAMS' SECOND AMENDED RULE 32 PETITION

(Filed Dec. 13, 2004)

Having considered the pleadings filed by the parties, the pertinent portions of the record from Williams' trial, the opinions of the Alabama appellate courts, and the arguments presented by the parties, the Court makes the following findings of facts and conclusions of law.

FACTS OF THE CASE

The Court adopts the facts of the case as found by the trial court as follows:

> On November 6th, 1996 the defendant had been out with friends drinking and smoking marijuana. Upon returning home that evening, the defendant's thoughts turned to a young female neighbor of his, Melanie Dawn

Rowell, and his desire to have sexual relations with her.

At approximately 1:00 A.M. that night Williams attempted to enter Rowell's back door, but the door was locked. He then noticed a kitchen window beside the door. He removed the screen from the window and found that the window was not locked. It was through that window that Williams obtained entrance to the apartment.

Williams proceed through the kitchen to the stairs leading to the upstairs bedroom. Before exiting the kitchen Williams removed a knife from a set of knives in a holder on a kitchen counter top. Part way up the stairs, knife in hand, Williams removed his pants. Upon reaching the upstairs area, Williams crossed over a "baby gate" which protected Rowell's two children, ages 15 months and 2 years, from the stairs. Williams looked into the children's room and found them both asleep.

Williams then entered the room of Melanie Rowell. He climbed in bed on top of her. When he began removing Rowell's clothes a struggle ensued. Rowell fought Williams and began screaming despite him being armed with a knife. Williams placed his hand over her mouth to silence her and once again attempted to remove her clothes. As Rowell continued to struggle, Williams placed his hands around her neck. Eventually Rowell ceased to struggle as Williams continued to strangle

> her. When she was motionless Williams proceeded to have sexual intercourse with her for 15 to 20 minutes. Prior to ejaculation, Williams pulled out and ejaculated on Rowell's stomach. There was a small cut inflicted upon Rowell's throat that was determined to be post-mortem. The cause of death was asphyxia due to strangulation.
>
> As he left Rowell's apartment, Williams took her purse. According to his statement, he threw the purse and the knife into a dumpster outside the apartment, although a search of the dumpster the next day by law enforcement failed to find either.
>
> The defendant was subsequently arrested after being identified by the elderly female victim in a subsequent break-in in the Ashville area. Upon being taken into custody for that offense, the defendant gave a statement admitting his involvement in the death of Melanie Rowell.

(C.R. 105-107)

I. THE SUBSTANTIVE ALLEGATIONS IN WILLIAMS' SECOND AMENDED RULE 32 PETITION.

The Alabama Court of Criminal Appeals has held that "Rule 32 is not a substitute for a direct appeal." Siebert v. State, 778 So. 2d 842, 850 (Ala. Crim. App. 1999), cert. denied, 778 So. 2d 857 (Ala. 2000). "[T]he procedural bars of Rule 32 apply with equal force to all

cases, **including those in which the death penalty has been imposed**.' State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)." Boyd v. State, 746 So. 2d 364, 374 (Ala. Crim. App. 1999) (emphasis added). The Alabama Court of Criminal Appeals has specifically held that "Rule 32 makes no provision for different treatment of death penalty cases." Thompson v. State, 615 So. 2d 129, 131 (Ala. Crim. App. 1992); see also Cade v. State, 629 So. 2d 38, 43 (Ala. Crim. App. 1993). Further, the Alabama Court of Criminal Appeals has held that a circuit court should not address the merits of postconviction claims that are procedurally barred under Rule 32, ARCrP. Siebert v. State, 778 So. 2d at 846.

The United States Supreme Court has held that there is no constitutional right to postconviction review of a conviction and/or sentence. Pennsylvania v. Finley, 481 U.S. 551, 556 (1987). The Alabama Supreme Court, however, in adopting Rule 32, Ala.R.Crim.P., has provided for the review of postconviction claims, subject to the claims meeting certain minimal requirements. Rule 32.2(a), Ala.R.Crim.P., states in pertinent part:

> A petitioner will not be given relief under this rule based upon any ground:
>
> " . . .
>
> (2) Which was raised or addressed at trial; or
>
> (3) Which could have been but was not raised at trial, unless the ground for relief arises under Rule 32.1(b); or

> (4) Which was raised or addressed on appeal or in any previous collateral proceeding; or
>
> (5) Which could have been but was not raised on appeal, unless the ground for relief arises under Rule 32.1(b).

With the above rules and principles in mind, the Court will address the substantive allegations in Williams' second amended Rule 32 petition.

I.A. <u>Allegation That The Trial Court Improperly Instructed The Jury On The Definition Of Reasonable Doubt.</u>

In Part I, paragraphs three and four on pages two through four of Williams' second amended Rule 32 petition, he contends that the trial court's guilt phase jury instruction defining reasonable doubt was improper. Williams contends the trial court's use of the phases "to a mathematical certainty" and "beyond a shadow of a doubt" in its reasonable doubt instructions to the jury somehow "diminished the prosecutor's burden in [his] case and thus violated his right to due process." (Second amended petition at p. 3)

The Court finds that the allegation in Part I of Williams' second amended Rule 32 petition is procedurally barred from postconviction review because it could have been but was not raised at trial and because it could have been but was not raised on direct appeal; therefore, it is summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.

I.B. Allegations That The Trial Court Violated The United States Constitution In Sentencing Williams To Death.

In Part II of his second amended Rule 32 petition, Williams makes numerous allegations that the death sentence imposed by the trial court violates the United States Constitution. The Court will address each allegation in turn.

I.B.(1). Allegation that the trial court relied on an inadequate pre-sentence report.

In Part II.A, paragraphs five and six on pages four and five of Williams' second amended Rule 32 petition, he contends that the trial court relied on a "grossly insufficient presentence investigation report." (Second amended petition at p. 4)

The Court finds that the allegation in Part II.A is procedurally barred from postconviction review because it could have been but was not raised at trial and because it could have been but was not raised on appeal; therefore, it is summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.

I.B.(2). Allegations that Alabama's capital sentencing scheme is unconstitutional.

In Part II.B, paragraphs seven through twenty on pages five through twelve of Williams' second amended Rule 32 petition, he make numerous allegations that his death sentence "under the Alabama sentencing

scheme is unconstitutional." (Second amended petition at p. 5) The Court will address each allegation in turn.

I.B.(2).(a). Allegation that judicial sentencing in capital murder cases is unconstitutional.

In Part II.B.(i), paragraphs eight through twelve on pages five through eight of Williams' second amended Rule 32 petition, he contends that judicial sentencing in capital, murder cases is unconstitutional. Williams relies on the United States Supreme Courts holding in Ring v. Arizona, 122 S. Ct. 2228 (2002).

While the Court is aware that Ring was not decided until after Williams' conviction had become final, nothing in the record indicates that Williams was limited in any way from raising any claim or motion before or during his trial. Further, because Williams was sentenced to death, he could have raised any issue, whether or not it was preserved at trial, on direct appeal. Thus, the Court finds that the allegation in Part II.(B)(i) is procedurally barred from postconviction review because it could have been but was not raised at trial and because it could have been but was not raised on appeal; therefore, it is summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.

Moreover, Williams concedes in his second amended Rule 32 petition that in Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002), the Alabama Supreme Court "interpreted Ring as not affecting Alabama's capital sentencing statute." (Second amended petition on p. 8 n. 3)

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 cases already final on direct review." Schriro v. Summerlin, 2004 WL 1402732, at *7 (June 24, 2004) Thus, in addition to being procedurally barred from postconviction review, the Court finds that the allegation in Part II.B.(i) of Williams' second amended Rule 32 petition is without merit. Rule 32.7(d), Ala.R.Crim.P.

I.B.(2).(b). Allegation that the aggravating circumstances were not charged in Williams' indictment.

In Part II.B.(ii), paragraphs 13-15 on pages 8-10 of Williams' second amended petition, he contends that "[t]he Alabama capital scheme on its face and as applied in [his] case, violates the two clear principles established in Apprendi [v. New Jersey, 120 S. Ct. 2348 (2000)]." (Second amended petition at pp. 8-9) According to Williams, his indictment was defective because it failed to include the aggravating circumstances relied on by the State.

The Court finds that allegation in Part II.B.(ii) is procedurally barred from postconviction review because it could have been but was not raised at trial. Rule 32.2(a)(3), Ala.R.Crim.P. The Court further finds that the allegation in Part II.B.(ii) is procedurally barred from postconviction review because it was raised or addressed on direct appeal. Rule 32.2(a)(4), Ala.R.Crim.P.; Williams v. State, 795 So. 2d at 780-781.

Therefore, the allegation in Part II.B.(ii) is summarily dismissed.

Moreover, under the facts of Williams' case, the Court finds that the allegation in Part II.B.(ii) of Williams' second amended Rule 32 petition is without merit. The indictment returned against Williams charged him with intentional murder during the course of a rape or an attempted rape in violation of Section 13A-5-49(4) of the Code of Alabama (1975). (C.R. 7-8) Section 13A-5-45(e) of the Code of Alabama (1975), states in pertinent part that "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing." The only aggravating circumstance relied on by the State and considered by the jury and the trial court was that Williams committed intentional murder during the course of a rape or an attempted rape. Thus, the jury's guilt phase verdict established beyond a reasonable doubt the existence of the only aggravating circumstance considered in sentencing Williams to death. See Ex parte Waldrop, 859 So. 2d at 1188 (holding that "(b)ecause the jury convicted Waldrop of two counts of murder during a robbery in the first degree, Ala.Code 1975, § 13A-5-40(a)(2), the statutory aggravating circumstance of committing a capital offense while engaged in the commission of a robbery, Ala.Code 1975, § 13A-5-49(4), was 'proved beyond a reasonable doubt.' Ala.Code 1975, § 13A-5-45(e); Ala.Code 1975, § 13A-5-50").

I.B.(2).(c). Allegation that any finding that the aggravating factors outweighed the mitigating factors is invalid because the finding was not subject to the beyond a reasonable doubt standard.

In Part II.B.(iii), paragraphs 16-18 on pages 10-11 of Williams' second amended Rule 32 petition, he alleges that that Alabama's capital murder sentencing scheme is unconstitutional because "[n]either the judge nor the jury is required to find that the aggravating circumstances outweigh the mitigating circumstances beyond a reasonable doubt, as required by Apprendi." (Second amended petition on p. 11) (emphasis in second amended petition). Williams also contends that Ring and Apprendi "require that mitigating circumstances be disproved beyond a reasonable doubt." Id.

While the Court is aware that Apprendi and Ring were not decided until after Williams' conviction had become final, nothing in the record indicates that Williams was limited in any way from raising any claim or motion before or during his trial. Further, because Williams was sentenced to death, he could have raised any issue, whether or not it was preserved, on direct appeal. The Court finds that the allegations in Part II.B.(iii) are procedurally barred from postconviction review because they could have been but were not raised at trial and because they could have been but were not raised on direct appeal; therefore, they are summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.

I.B.(2).(d). Allegations that the Jury's sentencing recommendation was invalid.

In Part II.B.(iv)(a), paragraph 19 on pages 11-12 of Williams' second amended Rule 32 petition, he contends that the jury's death recommendation was invalid because the jurors were informed that their penalty phase verdict was a recommendation.

The Court finds that allegation in Part II.B.(iv)(a) is procedurally barred from postconviction review because it could have been but was not raised at trial and because it could have been but was not raised on direct appeal; therefore, it is summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.

In Part II.B(iv)(b), paragraph 20 on page 12 of Williams' second amended Rule 32 petition, he contends that the jury's penalty phase verdict is incapable of review because the jury's verdict form did not require the jurors to specify which aggravating and mitigating factors they found.

The Court finds that the allegation in Part II.B.(iv)(b) is procedurally barred from postconviction review because it could have been but was not raised at trial and because it could have been but was not raised on direct appeal; therefore, it is summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.

I.C. Allegations That Williams Was Denied A Fair Trial Due To Juror Misconduct.

In. Part III, paragraphs 21-23 on pages 12-13 of Williams' second amended Rule 32 petition, he alleges his right to a fair trial was violated because, according to Williams, members of his jury: 1) failed to truthfully respond to questions during voir dire and 2) considered extraneous information during deliberations.

I.C.(1). Allegation that Jurors failed to respond truthfully to trial counsel's questions during voir dire.

This allegation is in paragraphs 21-22 in Part III of Williams' second amended Rule 32 petition. The Alabama Supreme Court and the Alabama Court of Criminal Appeals have specifically held that postconviction allegations of juror misconduct are subject to the procedural bars of Rule 32.2(a), Ala.R.Crim.P. See DeBruce v. State, CR-99-1619, 2003 WL 22846752, at *4 (Ala. Crim. App. Dec. 2, 2003) (holding that a Rule 32 petitioner "must show that the claim [of juror misconduct] is not subject to the procedural default grounds contained in Rule 32.2(a)(3) and (a)(5), Ala.R.Crim.P."); see also Ex parte Pierce, 851 So. 2d 606 (Ala. 2000); Ex parte Dobyne, 805 So. 2d 763 (Ala. 2001). Williams fails to identify in his original pleading, in his first amended petition, or in his second amended petition a single specific juror by name. Williams also fails to identify in Part III of his second amended petition a single question these unnamed jurors failed to truthfully answer. Paragraphs 21-22 in

Part III of Williams' second amended petition contain no facts that, if true, would establish that the allegations of juror misconduct could not have been raised at trial or on direct appeal. The Court finds that these allegations in Part III of Williams' second amended Rule 32 petition are procedurally barred from postconviction review because they could have been but were not raised at trial and because they could have been but were not raised on appeal; therefore, they are summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P. The Court further finds that these allegations of juror misconduct in paragraphs 21-22 completely fail to the meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.

I.C.(2). Allegation that a Juror considered extraneous information during deliberations.

This allegation is in paragraphs 21 and 23 in Part III of Williams' second amended Rule 32 petition. Williams' only support for this allegation is his one-sentence assertion in paragraph 23 that Juror A.J. "consulted clergy during the trial to discuss his feelings about crime and punishment in general and specifically in relation to murder." (Second amended petition at p. 14) This is Williams' entire argument to the Court.

In Ex parte Dobyne, 805 So. 2d 763, 767-768 (Ala. 2001), the Alabama Supreme Court reaffirmed its holding in Ex parte Pierce, 851 So. 2d 606 (Ala. 2000), regarding the pleading requirements of a postconviction

juror misconduct claim. In Ex parte Pierce, the Supreme Court held that while a claim of juror misconduct brought under Rule 32.1(a), Ala.R.Crim.P. does not have to meet the requirements of newly discovered evidence under Rule 32.1(e), Ala.R.Crim.P., a petitioner does have to establish that "his claim [of juror misconduct] could not have been raised at trial or on direct appeal." Ex parte Pierce, 851 So. 2d at 614. The Alabama Supreme Court specifically held in Pierce that "Rule 32.2(a)(3) and (5) would preclude Pierce's claim [of juror misconduct] if it could have been raised at trial or on appeal." Id.

In Ex parte Pierce, the Alabama Supreme Court found that the basis of Pierce's claim of juror misconduct was discovered during postconviction interviews with jurors. The Supreme Court held that:

> Pierce's claim was cognizable as long as he established that the information was not known, and could not reasonably have been discovered, at trial or in time to raise the issue in a motion for new trial or on appeal.

Ex parte Pierce, 851 So. 2d at 616. Williams did not identify Juror A.J., or any other juror, in his original pleading or in his first amended Rule 32 petition. Williams fails to state in any of his postconviction pleadings the source of his information supporting his allegation of juror misconduct against Juror A.J. Williams also does not state in his second amended petition when this instance of alleged juror misconduct was actually discovered. Williams further fails to proffer any facts to the Court that, if true, would establish

that this allegation could not have reasonably been discovered at trial or in time to raise the issue in a motion for new trial or on direct appeal. See Apicella v. State, 809 So. 2d 841, 850-851 (Ala. Crim. App. 2000) (capital defendant alleged in his motion for new trial that, prior to deliberations, a juror talked to an attorney friend about the case). There is nothing in the record indicating that the trial court prevented Williams' trial counsel from interviewing members of the jury after his trial.[1] The jury returned its sentencing recommendation on February 25, 1999. The trial court sentenced Williams to death almost six weeks later on April 6, 1999. Trial counsel then had 30 days from the pronouncement of sentence to file a motion for new trial in which Williams' counsel could have included allegations of juror misconduct. Williams fails to plead any facts in his second amended petition that, if true, would establish the allegation of juror misconduct against Juror A.J. is not procedurally barred. 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** relied upon in seeking relief") (emphasis in original); see also Ex parte Clisby, 501 So. 2d 483, 488 (Ala. 1986) (holding that the summary dismissal of a death row inmate's postconviction petition was proper because the petition "[was] not sufficient on its face to enable the trial court to determine whether the petitioner is entitled to any relief") Therefore, this

[1] In making this finding, the Court is in no way holding that a defense attorney, whether defending a capital or non-capital defendant, has any duty to conduct post-trial interviews with jurors in order to be effective.

allegation is summarily dismissed. Rules 32.2(a)(3) and (5), Ala.R.Crim.P.

I.D. Allegations That The State Failed To Comply With Its Discovery Obligations Maryland 83 S. Ct. 1194 (1963).

In Part IV, paragraphs 24-25 on pages 14-15 of Williams' second amended Rule 32 petition, he alleges that "[t]he [S]tate failed to provide [his] trial counsel with crucial exculpatory and impeachment evidence" as required under Brady v. Maryland, 83 S. Ct. 1194 (1963). (Second amended petition at p. 14)

Williams fails to identify to the Court in Part IV or any where else in his second amended Rule 32 petition a single item of exculpatory or impeachment evidence withheld or otherwise suppressed by the State. The Court finds that Part IV fails to meet the specificity and full factual pleading requirement of Rule 32.6(b); therefore, it is summarily dismissed. Moreover, the Court further finds that Williams has fails to assert in his amended Rule 32 that his Brady claim is based on newly discovered evidence; therefore, the Court finds that it procedurally barred from postconviction review because it could have been raised at trial and because is could have been raised on direct appeal. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.; see Boyd v. State, CR-02-0037, 2003 WL 22220330, at *22 (Ala. Crim. App. Sept. 26, 2003) (holding that Boyd's post-conviction Brady claim was procedurally barred from

review and failed to meet the pleading requirements of Rule 32.6(b)).

II. ALLEGATIONS THAT WILLIAMS RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE OF HIS TRIAL.

In Part V, paragraphs 26-48 on pages 15-33 of Williams' second amended Rule 32 petition, he alleges he received ineffective assistance from his trial counsel during the guilt phase of his trial. In order to show that trial counsel was ineffective, a petitioner must show that (1) trial counsel's performance was deficient and (2) that the deficient performance prejudiced the petitioner. Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." Strickland v. Washington, 104 S. Ct. at 2064.

Judicial scrutiny of counsel's performance "must be highly deferential." Chandler v. United States, 218 F.3d 1305, 1314 (11th Cir. 2000) (en banc) "It is important to note that judicial scrutiny of an attorney's performance is appropriately highly deferential because the craft of trying cases is far from an exact science; in fact, it is replete with uncertainties and obligatory judgment calls." Chandler v. United States, 218 F.3d at 1314, n.13 (citing, Bolender v. Singletary, 16 F.3d 1547, 1557 (11th Cir. 1994)). "It does not follow that any counsel who takes an approach we would not

have chosen is guilty of rendering ineffective assistance . . . [n]or does the fact that a particular defense ultimately proved to be unsuccessful demonstrate ineffectiveness." Id. at 1314.

"[A] verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support." Strickland v. Washington, 104 S. Ct. at 2069. "[B]ecause counsel's conduct is presumed reasonable, 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." Chandler v. United States, 218 F.2d at 1315.

In Coral v. State, 2004 WL 1178422, at *6 (Ala. Crim. App. May 28, 2004), the Alabama Court of Criminal Appeals held that "the claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each subcategory is [an] independent claim that must be sufficiently pleaded." Further, in Boyd v. State, CR-02-0037, 2003 WL 22220330, at *6 (Ala. Crim. App. Sept. 26, 2003), the Alabama Court of Criminal Appeals held that:

> "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**.
>
> Thus, a Rule 32 petitioner is not automatically entitled to an evidentiary hearing on any and all claims raised in the petition. To the contrary, Rule 32.7(d), Ala. R. Crim. P., provides for the summary disposition of a Rule 32 petition:
>
> > "[i]f the court determines that the petition is not sufficiently specific [in violation of Rule 32.6(b)], or is precluded [under Rule 32.2, Ala. R. Crim. P.], or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by further proceedings . . . "

(Emphasis and parentheticals in original)

The Alabama Supreme Court, in adopting the current Alabama Rules of Criminal Procedure, has established certain basic requirements of pleading that must be met in a post-conviction petition. Rule 32.3, Ala.R.Crim.P., states:

> The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the

> burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence.

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.

Rule 32.7(d), Ala.R.Crim.P., states, in pertinent part:

> If the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings, the court may either dismiss the petition or grant leave to file an amended petition.

To be entitled to an evidentiary hearing, a petition must be meritorious on its face. The Alabama Supreme Court has held that:

> A petition for [postconviction relief] is 'meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to

> a general statement concerning the nature and effect of those facts), Thomas v. State, [274 Ala. 531, 150 So. 2d 387 (1963)]; Ex parte Phillips, 276 Ala. 282, 161 So. 2d 485 (1964); Stephens v. State, 420 So. 2d 826 (Ala. Crim. App. 1982), sufficient to show that the petitioner is entitled to relief if those facts are true.

Ex parte Clisby, 501 So. 2d 483, 486 (Ala. 1986).

With the above principles, presumptions, and rules in mind, the Court will address Williams' allegations of ineffective assistance of counsel during the guilt and penalty phases of his trial.

II.A. Allegation That Trial Counsel Were Ineffective Due To Inadequate Compensation.

In paragraphs 26-27 on pages 15-16 of Williams' second amended Rule 32 petition, he contends his trial counsel were ineffective due to the cap on compensation paid to attorneys appointed to represent indigent capital defendants in effect at the time of his trial.

In Bui v. State, 717 So. 2d 6, 15 (Ala. Crim. App. 1997), the Alabama Court of Criminal Appeals specifically held that "we reject the notion the Alabama statutory scheme of compensating attorneys in capital cases, in and of itself, denies a defendant effective representation." The Alabama Court of Criminal Appeals has further observed that:

> These limitations on compensation have withstood repeated challenges that they violate the separation of powers doctrine, constitute

> a taking without just compensation, deprive indigent capital defendants of the effective assistance of counsel, and deny equal protection in violation of the Fifth, Sixth, Eighth, and Fourteen Amendments of the United States Constitution, the Alabama Constitution, and Alabama state law. See Ex parte Smith, 698 So. 2d 219 (Ala.), cert. denied, 522 U.S. 957, 188 S. Ct. 385, 139 L.Ed.2d 300 (1997)[.]

Samra v. State, 771 So. 2d 1108, 1112 (Ala. Crim. App. 1999). Based on the law in Alabama, the Court finds that the allegation in paragraphs 2627 fails to state a claim or establish that a material issue of fact or law exists as required by Rule 32.7(d), Ala.R.Crim.P.; therefore, it is denied.

II.B. Allegations That Trial Counsel Were Ineffective During Voir Dire.

In Part V.A, paragraphs 28-35 on pages 16-20 of Williams' second amended petition, he makes numerous allegations that his trial counsel were ineffective during voir dire. The Court will address each allegation in turn.

II.B.(1). Allegation that trial counsel were ineffective for failing to request individual voir dire.

In Part V.A.(i), paragraphs 28-29 on pages 16-17 of Williams' 'second amended Rule 32 petition, he alleges that his trial counsel were ineffective for "failing to

make a motion for individual voir dire to examine the prospective juror's views about intoxication and race." (Second amended petition at p. 16) The Court notes that Williams does not identify any specific juror in Part V.A(i) that had a particular bias about intoxication or race – he merely contends his trial counsel were ineffective for not making the inquiry.

In Dobyne v. State, 805 So. 2d 733 (Ala. Crim. App. 2000), the Alabama Court of Criminal Appeals addressed a similar issue. In his Rule 32 petition:

> Dobyne contend[ed] that his trial counsel failed to conduct a "sufficiently thorough" voir dire of potential jurors on issues[.] . . . Specifically, Dobyne argues that his trial counsel was ineffective for conducting an adequate voir dire to inquire into the prospective jurors' possible racial bias.

Id. at 751. In affirming the trial court's denial of post-conviction relief, the Court of Criminal Appeals held that:

> Dobyne offers no support for his contention, other that a statement that he was entitled to such an inquiry. While it may be true that Dobyne was "entitled" to question the prospective jurors about their biases, that fact alone does not establish that counsel was ineffective for failing to conduct an inquiry.

Id. Just like Dobyne, Williams merely makes a general allegation that his trial counsel were ineffective for not making the inquiry. Williams fails, however, to plead

any specific facts in his second amended Rule 32 petition that could have been revealed if trial counsel had requested and received permission to conduct individual voir dire. The Court finds that Part V.A.(i) fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, it is summarily dismissed.[2]

II.B.(2). Allegation that trial counsel were ineffective for failing to request individual voir dire.

In Part V.A.(ii), paragraphs 31-34 on pages 17-19 of Williams' second amended petition, he again alleges that his trial counsel were ineffective for failing to question potential jurors during voir dire about racial attitudes. Williams attempts to support the allegation in Part V.A.(ii) by pointing out that four of the State's witnesses and the prosecutor referred to the victim as "a white female" on a few isolated occasions.

Williams' allegations in Part V.A.(ii) are no more specific than those in Part V.A.(i). Referring to the victim as "a white female" was merely a means of identification and neither the State's witnesses nor the prosecutor placed any emphasis on the victim's or Williams' race during the trial. Further, the Alabama

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[2] The Court notes that on direct appeal, the Alabama Court of Criminal Appeals found that "[t]he record does not reflect that the sentence of death was imposed as a result of the influence of passion, prejudice, or any other arbitrary factor." Williams v. State, 795 So. 2d 753, 785 (Ala. Crim. App. 1999).

Court of Criminal Appeals specifically held that "[t]he record does not reflect that [Williams'] sentence of death was imposed as a result of the influence of passion, prejudice, or any other arbitrary factor." Williams v. State, 795 So. 2d at 784. Williams fails to identify in his second amended petition a single juror that gave any consideration to his or the victim's race when deliberating during the guilt or penalty phase of trial. The Court finds that the allegation Part V.A.(ii) fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, this allegation is summarily dismissed.

II.B.(3). Allegation that trial counsel were ineffective for failing to ask a juror follow-up questions during voir dire.

In Part V.A.(iii), paragraph 35 on pages 19 and 20 of Williams' second amended Rule 32 petition, he alleges that his trial counsel were ineffective during voir dire for failing to ask a certain juror follow-up questions when, according to Williams, the juror "signaled an extraordinary willingness to impose death." (Second amended petition at p. 20) Williams bases his allegation on the fact that a juror stated her Catholic faith would not prevent her from imposing the death penalty.

During voir dire, the following occurred:

[Trial counsel]: . . . Somebody listed on one of the panels that they are Catholic and would refuse to impose the

death penalty under any circumstance. Is that the way you feel?

[Juror M.F.]: I think if that is what needs to be done, then it needs to be done.

[Juror T.G.]: I'm Catholic too, and I have no problem with it.

[Trial Counsel]: Thank you, that's all.

(R. 77)

Trial counsel was obviously attempting to find out if M.F. opposed capital punishment because of his Catholic faith. Juror T.G. simply indicated that her Catholic faith would not prevent her from imposing death, which was exactly the type of information trial counsel was seeking. The Court finds nothing in T.G.'s response that would indicate any particular willingness to impose death. The Court finds that the allegation in Part V.A.(iii) is without merit; therefore, it is denied, Rule 32.7(d), Ala.R.Crim.P.

II.C. <u>Allegation That. Trial Counsel Were Ineffective For Not Informing The Jury That A Hair Found On The Victim Did Not Belong To Williams.</u>

In Part V.B, paragraphs 36-37 on pages 20-21 of Williams' second amended Rule 32 petition, he contends that his trial counsel prejudiced him by not informing the jury that a hair found on the victim during an autopsy did not belong to him. Williams also alleges that his trial counsel were ineffective for not asking

the State's DNA expert why he did not include the unidentified hair on his evidence list, contending that his trial counsel's cross-examination of the State's DNA expert "prevented [him] from adequately confronting the witnesses against him." (Second amended petition at p. 21)

On direct appeal, the Alabama Court of Criminal Appeals observed that "throughout the trial, [Williams'] defense was that he entered the victim's apartment with the intent to have sex with [the victim], but that he did not intend to kill her." Williams v. State, 795 So. 2d at 763. Williams' statements to police were consistent with his trial counsel's theory of defense. The fact that an unidentified hair was found on the victim during an autopsy would not have aided Williams' defense that he lacked the specific intent to murder the victim because he admitted being in her apartment, Further, given the other overwhelming evidence of Williams' guilt presented at trial, asking the State's DNA expert why he did not indicate on his evidence list that a hair found on the victim did not belong to Williams would have had little, if any, impeachment value. The Court finds that allegation in Part V.B of Williams' second amended Rule 32 petition is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P.

II.D. Allegations That Trial Counsel Were Ineffective For Failing To Object To Alleged Improper Testimony And Physical Evidence.

In Part V.C, paragraphs 38-43 on pages 21-30 of his second amended Rule 32 petition, Williams alleges he was prejudiced by his trial counsel's failure to object to allegedly improper testimony and physical evidence presented by the State. The Court will address each allegation in turn.

II.D.(1). Allegation that trial counsel prejudiced Williams by not objecting to a knife block being admitted into evidence.

In Part V.C.(i), paragraphs 38-40 on pages 21-23 of Williams' second amended Rule 32 petition, he contends his trial counsel were ineffective for failing to object to a knife block recovered from the victim's apartment being admitted into evidence. Williams contends the knife block was admitted "[without an] evidentiary foundation." (Second amended petition at p. 23)

The testimony from the victim's mother quoted on pages 21-22 of Williams' second amended Rule 32 petition establishes the foundation for the admission of the knife block. The victim's mother testified that she recognized the knife block as the one the victim kept on her kitchen counter and stated it was in the same condition at trial as it was the last time she saw it at the

victim's apartment. (R. 191-192) See Ex parte Works, 640 So. 2d 1056, 1059 (Ala. 1994) (holding that "because the condition of the knife was not an issue in this case, and its authenticity was established by other means, it was not necessary to establish a chain of custody"). Obviously, trial counsel cannot be ineffective for failing to object to admissible evidence. See Thomas v. Jones, 891 F. 2d 1500, 1505 (11th Cir. 1989) (holding that "counsel for defendant did not err in failing to object to [] admissible evidence"). Also, as previously stated, Williams did not dispute he entered the victim's home, "his defense was that he entered the victim's apartment with the intent to have sex with her, but that he did not intend to kill her." Williams v. State, 795 So. 2d at 763. The Court finds that the allegation in Part V.C.(i) of Williams' second amended Rule 32 petition is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P.

II.D.(2). Allegation that trial counsel were ineffective for not from three State witnesses.

In Part V.C.(ii), paragraph 41 on page 24 of Williams' second amended Rule 32 petition, he contends his trial counsel were ineffective for not objecting to narrative answers from three of the State's witnesses. Williams identifies three State witnesses: police officers Thomas Dixon and Wayne Burrow, and the State's pathologist, Dr. Joseph Embry.

The record indicates that the three witnesses listed by Williams testified to facts within their personal knowledge based on their personal observations. Dixon and Burrow testified about the condition of the victim's apartment they observed and Embry testified about the physical condition of the victim's body before he performed the autopsy. Williams' attempt to support Part V.C(ii) is to make the general assertion that his trial counsel's failure to object somehow violated his rights under the United States and Alabama Constitutions. Williams fails, however, to state in his second amended Rule 32 petition with any specificity **how** Dixon's, Burrow's, and Embry's answers caused him to be prejudiced. See Stringfellow v. State, 485 So. 2d 1238, 1243 (Ala. Crim. App. 1986) (holding that "effectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made"). The Court finds that the allegation in Part V.C.(ii) of Williams' second amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, it is summarily dismissed.

II.D.(3). Allegation that trial counsel were ineffective for not objecting to the prosecutor using leading questions during the trial.

In Part V.C.(iii), paragraphs 42-43 on pages 24-30 of Williams' second amended Rule 32 petition, he contends his trial counsel were ineffective for failing to object to the prosecutor asking leading questions. In

support of Part V.C.(iii), Williams appears to have searched the record on direct appeal and listed in his second amended Rule 32 petition all the questions asked by the prosecution that could be considered leading because he lists 76 questions that, he contends, where leading and improper.

The Alabama Court of Criminal Appeals has specifically held that:

> "'[E]ffectiveness of counsel does not lend itself to measurement by picking through the transcript and counting the places where objections might be made.'" Stringfellow v. State, 485. So.2d 1238, 1243 (Ala. Crim. App. 1986). Even though there were several instances where counsel could have objected, "that does not automatically mean that the [appellant] did not receive an adequate defense in the context of the constitutional right to counsel." Ex parte Lawley, 512 So.2d 1370, 1373 (Ala. 1987). O'Neal v. State, 605 So.2d 1247, 1250 (Ala. Crim. App. 1992)."

Thomas v. State, 766 So. 2d at 876. Further, the Alabama Supreme Court has specifically recognized that "[a] failure to object may suggest that the defense did not consider the comments to be particularly harmful." Ex parte Payne, 683 So. 2d 458, 465 (Ala. 1996).

Williams fails to state in his second amended. Rule 32 petition with any specificity what "evidence" or information was improperly presented to the jury simply because the State may have asked some leading questions. See Johnson v. State, 557 So. 2d 1337, 1339 (Ala.

Crim. 1990) (holding that "[t]rial counsel's failure to object to a leading question is not of itself inadequate representation"); see also Broadnax v. State, 825 So. 2d 134, 182 (Ala. Crim. App. 1999) (holding that, "[while] many of the prosecutor's question were leading, . . . the objectionable questions mainly elicited foundation information and did not result in the introduction of inadmissible evidence"). The Court has reviewed the questions listed in paragraph 42 of Williams' second amended Rule 32 petition and finds that many of the questions were asked simply to lay a foundation or proper predicate for the admission of evidence. Other questions were obviously follow-up questions that were based on a witness's previous answer. Williams' trial counsel were not ineffective simply because they did not object at every possible opportunity. See O'Neal v. State, 605 So.2d 1247, 1.250 (Ala. Crim. App. 1992) (quoting Ex Parte Lawley, 512 So. 2d 1370, 1373 (Ala. 1987), and holding that "[e]ven though there were several instances where counsel could have objected, 'that does not automatically mean that the [appellant] did not receive an adequate defense in the context of the constitutional right to counsel"). The Court finds that the allegation in Part V.C.(iii) fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, it is summarily dismissed.

II.E. Allegation That Trial Counsel Were Ineffective For Failing To Object To Alleged Improper Statements By The Prosecutor During His Guilt Phase Closing Arguments.

In Part V.D, paragraphs 44-46 on pages 30-32 of Williams' second amended Rule 32 petition, he alleges he was prejudiced because his trial counsel failed to object during the prosecutor's guilt phase closing argument. Williams contends that "the prosecutor suggested to the jury that [Williams] had an obligation to present evidence, and that [Williams"] decision not to present evidence should be weighed against him." (Second amended petition at p. 30) Williams further contends that "the prosecutor in effect asked the jury to penalize [him] for not testifying." Id. at 31. In support of Part V.D, Williams quotes the following three sentences from page 493 of the trial record: "If Marcus Williams didn't commit this crime, who did? What evidence is there of any other person before you that indicates someone else did it? There is none." (Second amended petition at p. 30)

In Price v. State, 725 So. 2d 1003, 1031 (Ala. Crim. App. 1997), the Alabama Court of Criminal Appeals held that "[t]he prosecutor ha[s] a right to comment on the strength of the evidence the State ha[s] presented and to draw any reasonable inferences from it." See also Broadnax v. State, 825 So. 2d at 183 (holding that "[i]t is not improper for the prosecutor to refer to the strength of the [S]tate's case." In the context of evidence presented by the State at Williams' trial,

including Williams' three statements to police, the Court finds that the prosecutor's comments quoted by Williams were proper arguments concerning the strength of the State's case and not references to Williams' decision not to testify in his own defense. See Roberts v. State, 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997) (holding that "[a] prosecutor's closing statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury"). The Court finds that the allegation in Part V.D is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P.

II.F. Allegation That Trial Counsel Were Ineffective During Their Guilt Phase Closing Argument.

In Part V.E, paragraph 47 on pages 31-32 of Williams' second amended Rule 32 petition, he alleges he was prejudiced by his trial counsel's guilt phase closing argument. Williams contends his trial counsel presented an inconsistent and damaging theory during closing argument" which, according to Williams, "gave the prosecutor an unearned opportunity to play to the jury' emotions." (Second amended petition at p. 32)

The Court must review trial counsel's guilt phase closing arguments in the context of all the evidence presented at Williams' trial and in the context of trial counsel's entire closing argument, not in isolation. See Duren v. State, 590 So. 2d 360, 366 (Ala. Crim. App. 1990) (holding that a reviewing court 'must evaluate

[trial counsel's statements] in the context of the entire closing argument"). In his guilt phase closing argument, trial counsel stated:

> I asked you in opening, the question for you to decide in this case was how was [the victim's) life taken. That is still the question. The question is: Did this man take her life? Yeah, he did. Why was he in there? You got his statement. He went in with the intent to rape her. He was going to rape her, but she died. It is in all three statements. She died. She quit breathing and didn't move. It is in his statements, but in that third statement, the order somehow reverses or they try to reverse it. You know, you can't commit rape on someone already dead. They figured that out. That is why they went back for that other statement. If they get in the order it was argued to you, rape and then murder, it changes. But that is not the way it is in those first two statements and in the testimony you heard. It doesn't make that situation pleasant. Don't get me wrong. If you do the job and apply the law and apply the facts, he is guilty of murder and attempted rape. What it is he went in with the intent to rape her and she died. He didn't intend to murder her.

(R 502-503)[3] When read in the proper context, trial counsel's guilt phase closing arguments were not inconsistent. Trial counsel was attempting to explain to

[3] The underlined portions of trial counsel's argument were quoted in Williams's second amended petition.

the jury why law enforcement took Williams' third statement – to get the facts right in order to charge him with capital murder instead of felony-murder. In the light of Williams' statements to police, trial counsel's closing argument, which attempted to convince to the jury to convict Williams of the lesser-included offense of felony-murder instead of capital murder, was entirely reasonable and a sound trial strategy. See Strickland v. Washington, 104 S. Ct. at 2066 (holding that "[t]he reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions"). The Court finds that the allegation in Part V.E is without merit and fails to state a claim or establish that a material issue of fact or law exists as required by Rule 32.7(d); therefore, it is denied.

II.G. Allegation That Trial Counsel's "Many Errors" Violated Williams's Right To Due Process And A Fair Trial.

In Part V.F, paragraph 48 on page 33 of Williams' second amended Rule 32 petition, he appears to claim that the allegations of ineffective assistance of counsel previously pleaded in his second amended Rule 32 petition resulted in an unreliable verdict. Williams makes no new specific claim of ineffective assistance of counsel in Part V.F nor does he proffer any facts that could be used to support any previously pleaded claim of ineffective assistance of counsel. The Court finds that the allegations of ineffective assistance of counsel in Williams' second amended Rule 32 petition,

whether considered individually or as a whole, fail to establish that Williams' defense counsel's performance was deficient or caused him to be prejudiced in any way. The Court finds that Part V.F of Williams' second amended petition is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P.

III. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF COUNSEL DURING PENALTY PHASE OF TRIAL.

In Part VI, paragraphs 49-66 on pages 34-44 of Williams' second amended Rule 32 petition, he makes numerous allegations that he received ineffective assistance of counsel during the penalty phase of his trial. The Court will address each allegation in turn.

III.A. Allegation That Williams Was Prejudiced During The Penalty Phase Due To His Trial Counsel's Alleged Errors During The Guilt Phase Of Trial.

In Part VI.A, paragraphs 49-51 on pages 34-35 of Williams' second amended Rule 32 petition, he contends, that his trial counsel's alleged guilt phase errors (Part V) caused him to be prejudiced during the penalty phase of his trial. Williams fails, however, to proffer any argument as to how his trial counsel's alleged errors in the guilt phase caused him to be prejudiced in the penalty phase. The only example of alleged prejudice in Part VI.A is Williams' contention that his "trial counsel's failure to question prospective jurors

about their racial attitudes during voir dire also prejudiced [him] during the penalty phase." (Amended petition at p. 34)

This allegation is no more specific that Williams' previous allegation concerning trial counsel's failure to voir dire the jury concerning racial attitudes. Simply because Williams may have had the right to question prospective jurors about racial attitudes does not mean trial counsel were *per se* ineffective for failing to due so. See Dobyne v. State, 805 So. 2d at 751. Williams fails to identify in his second amended Rule 32 petition one specific veniremember or juror whose "racial attitude" adversely affected Williams during voir dire or during the guilt or penalty phase of his trial. The Court finds that the bare allegation in Part VI.A of Williams' amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, it is summarily dismissed. See Boyd v. State, 2003 WL 22220330, at *6 (Ala. Crim. App. Sept. 26, 2003) (quoting Lancaster v. State, 638 So. 2d 1370, 1373 (Ala. Crim. App. 1993, and holding that "it is not the pleading of a conclusion 'which, if true, entitles the petitioner to relief").

III.B. Allegation That Trial Counsel Failed To Adequately Investigate Or Prepare For The Penalty Phase Of Williams' Trial.

In Part VI.B, paragraphs 52-58 on pages 35-40 of Williams' second amended Rule 32 petition, he alleges that his trial counsel were ineffective in their

mitigation presentation during the penalty phase of trial. In support of this allegation, Williams contends that the United States Supreme Court held in Lockett v. Ohio, 98 S. Ct. 2954, 2964-2965 (1978), that "[i]t is constitutionally required that the trial court and jury consider 'as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.' Lockett v. Ohio, 438 U.S. 586, 604 (1978). (Amended petition at p. 35) Lockett, however, held that a sentencer in a capital case cannot be precluded **from considering** mitigating factors offered by a capital defendant, not that a sentencer **is required** to consider such factors as mitigating. Neither Williams' trial judge nor his jury was required to consider, as a mitigating circumstance, everything that Williams' trial counsel presented in the penalty phase of his trial. See Wilson v. State, 777 So. 2d 856, 892 (Ala. Crim. App. 1999) (holding that "the decision of whether a particular mitigating circumstance is proven and the weight to be given it rest with the sentencer").

In paragraphs 54-57 of his second amended Rule 32 petition, Williams summarizes what, he contends, trial counsel could have discovered if they had conducted a proper mitigation investigation. Williams contends trial counsel would have discovered that he lived with different family members during his life and did not meet his father until he was 14 years old. Williams contends that he felt abandoned by his mother and father. According to Williams, trial counsel failed

to discover that several of Williams's family members suffered from mental illnesses. Trial counsel did not discover that a serious knee injury ended Williams' high school basketball career and that the death of his grandfather caused him to become depressed. Williams contends he attempted to better himself by joining the Job Corp, but he was thrown out because he got into a fight. According to Williams, his battle with the psychological effects of child abuse and excessive drinking exacerbated his problems. (Amended petition at pp. 37-39)[4]

Williams appears to completely ignore what his trial counsel **did** present in mitigation at the penalty phase of trial. During the penalty phase of Williams' trial, trial counsel called Williams' mother, Charlene Williams, and his aunt, Eloise Williams, to testify. Charlene testified that she was unmarried and 16 years old when Williams was born. (R. 553) Charlene said that Williams had to live with her mother and aunt part of the time because she was too young to care for him. (R. 554) Charlene said that Williams lacked a male figure growing up and that Williams' father did not support him or have any kind of relationship with him. Id. Charlene indicated that Williams attended church growing up. Charlene stated that a serious knee injury ended Williams's high school sports career and that he quit school before graduating. After he hurt his knee, Charlene said that Williams "lost all

[4] In his pre-trial mental evaluation, "[Williams] denied [a] history or childhood sexual, emotional, or physical abuse." (Pretrial Mental Evaluation at p. 2)

hope." (R. 555) According to his mother, Williams was unable to find a job and started hanging out with "a rough crowd." (R. 556) Charlene stated Williams tried to "straighten up" by joining the Job Corp, but he was kicked out after he got into a fight. (R. 556, 557) Charlene said that when he returned from Job Corp that he lived with her, that he started "hanging out a lot" and that he slept all day and stayed up all night. (R. 558) Charlene indicated that Williams had never been a problem child. Id.

Williams' other mitigation witness was his aunt, Eloise Williams. Eloise stated she had known Williams all his life and indicated that Williams' home life "was not very good." (R. 561) Eloise described Williams spending time with family members and stated that "[h]e did not have a stable home." Id. Eloise said that Williams's father "was never around" and that his mother did not visit very often. (R. 562) Eloise described Williams as being "not very happy" as a child, that he was "sad and withdrawn" because he wanted to be with his mother. Id. Eloise described Williams as being a "fairly good student" that could have done better, but that he did not apply himself because "he was unhappy." (R. 564) Eloise said Williams was close to his grandfather and uncle, but that they died. Eloise stated Williams had hopes of a basketball career but a serious knee injury ended those hopes. Id. Eloise said not long before Williams murdered the victim that she noticed him change – drinking and possibly doing drugs. (R. 565) Eloise said she had talked to Williams

about the murder and that he said he was sorry, had repented, and "asked the Lord to forgive him." (R. 566)

The testimony elicited by Williams' trial counsel from his mother and aunt during the penalty phase, plus Williams' statements during his pre-trial mental evaluation completely destroy Williams' allegations that "[t]rial counsel's ineffectiveness deprived [Williams] of his constitutionally protected right to put any relevant evidence before the sentencing body during a capital proceeding." (Second amended petition at p. 40) Trial counsel clearly presented substantially the same evidence that Williams now contends should have been presented as mitigation. Trial counsel is not ineffective for failing to present cumulative evidence. See Boyd v. State, 2003 WL 22220330, at * 19 (holding that Boyd trial counsel was not ineffective for not presenting more testimony during the penalty phase because it would have been cumulative of "testimony that was actually elicited by Boyd's counsel during the penalty phase of trial"). The Court finds that Part VI.B of Williams' second amended Rule 32 petition fails to state a claim or establish that a material issue of law or fact exists as required by Rule 32.7(d); therefore, it is without merit and is denied.

III.C. Allegations That Trial Counsel Failed To Adequately Investigate Or Prepare For The Penalty Phase Of Williams' Trial.

In Part VI.C, paragraphs 59-66 on pages 40-44 of Williams' second amended petition, he makes numerous allegations that his trial counsel "failed to adequately investigate and develop mitigation evidence." (Amended petition at p. 38) The Court will address each allegation in turn.

III.C.(1). Allegation that trial counsel failed to prepare the mitigation witnesses to testify.

In Part VI.C.(i), paragraph 60 on page 41 of Williams' second amended Rule 32 petition, he alleges that his trial counsel were ineffective in their mitigation, presentation during the penalty phase of the trial. Williams contends that trial counsel failed to "adequately interview and prepare mitigation witnesses." (Amended petition at p. 41)

The allegation in Part VI.C.(i) is vague and nonspecific. Williams fails to argue in his second amended Rule 32 petition specifically how trial counsel's preparation of his mother and aunt was deficient or indicate what questions they could have been asked that would have elicited additional mitigating evidence that would have been so compelling it could have made a difference in the outcome of the penalty phase of trial or in his sentence. Further, Williams fails to identify in Part VI.C.(i) any additional mitigation witnesses that

his trial, counsel could have interviewed or could have called to testify at the penalty phase of trial. The Court finds that the allegation in VI.C.(i) fails to comply with the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, it is summarily dismissed.

III.C.(2). Allegation that trial counsel were ineffective for failing to discover and present details of Williams' alleged history of abuse and neglect.

In Part VI.C(ii), paragraph 61 on pages 41-42 of Williams' second amended Rule 32 petition, he alleges that his trial counsel were ineffective in their mitigation presentation during the penalty phase of the trial. Williams contends that his trial counsel failed to discover and present "material details" of his past to support a theory of mitigation. Williams' only attempt to support this allegation is to refer the Court to paragraphs 54-57 of his second amended Rule 32 petition and list 16 members of his family that, according to Williams, were willing to testify at the penalty phase of trial.

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). Williams fails to proffer in his second amended Rule 32 petition what specific facts a particular witness could have testified about or argue how such testimony would have been mitigating. Indeed, Williams does not identify a single specific instance of abuse inflicted on him by a specific family member in his second amended petition. Further, even if members of Williams' family would have been willing to testify about alleged instances of abuse, the State would have been able to rebut them with Williams' own words. In his pre-trial mental evaluation report, Dr. Vonciel Smith stated that "[Williams] denied [a] history of childhood sexual, emotional, or physical abuse." Trial counsel cannot be ineffective for not presenting mitigating evidence that either does not exist or that would have be directly refuted by Williams' own statements to a mental health professional. The Court finds that the allegation in Part VI.C(ii) of Williams' second amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, it is summarily dismissed.

III.C.(3). <u>Allegation that trial counsel were ineffective for failing to present evidence of the alleged history of mental illness in Williams' family.</u>

In Part VI.C.(iii), paragraph 62 on page 42 of Williams' second amended Rule 32 petition, he contends that his trial counsel were ineffective during the penalty phase for not presenting evidence of his family's alleged history of mental illness.

Williams fails to identify in Part VI.C(iii), or anywhere else in his second amended Rule 32 petition, a single member of his family that has ever suffered from any form of mental illness or argue how such a fact, even if true, might have been mitigating. Further, the pre-trial mental evaluation performed by Dr. Voceil Smith "failed to disclose signs consistent with [al diagnosis of formal thought disorder, major affective disturbance, or severe cognitive impairment." Smith also stated that, in his opinion, the "specific acts engaged in [by Williams] required planning, forethought, and were inconsistent with acts typically attributed to individuals with severe psychiatric disturbance." (State's Exhibit B at p. 7) The Court finds that the allegation in Part VI.C.(iii) of Williams' second amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b); therefore, it is summarily dismissed.

III.C.(4). Allegation that trial counsel were ineffective for failing to explain how Williams' background allegedly related to him committing capital murder.

In Part VI.C.(iv), paragraphs 63-64 on pages 42-43 of Williams' second amended Rule 32 petition, he alleges that his trial counsel were ineffective in their mitigation presentation for failing to explain to the jury the "unique circumstances" that allegedly surrounded him murdering the victim. The crux of Williams' allegation in Part VI.C.(iv) appears to be that his trial counsel were somehow ineffective for not presenting a mental health expert. Williams' only support for Part VI.C.(iv) is to cite the Court to a 1996 article in the American Psychiatric Press and argue that trial counsel were ineffective for failing to present evidence that Williams meets "a pattern" associated with people that commit murder during sexual assault.

In Horsley v. Alabama, 45 F. 3d 1486, 1495 (11th Cir. 1995), the Eleventh Circuit held:

> To prove prejudice by failure to investigate and failure to produce a certain kind of expert witness, a habeas petitioner must demonstrate a reasonable likelihood that an ordinary competent attorney conducting a reasonable investigation would have found an expert similar to the one eventually produced.

Similarly, the Alabama Court of Criminal Appeals has 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.

Thomas v. State, 766 So. 2d 860, 892 (Ala. Crim, App. 1998), citing, Nelson v. Hargett, 989 F. 2d 847, 850 (5th Cir. 1993).

Williams fails to identify to the Court in his second amended Rule 32 petition by name or field of expertise **any** expert in **any** field that would have testified at trial to the purported "facts" he now alleges in his second amended Rule 32 petition. See Boyd v. State, 2003 WL 22220330, at *13 (holding that Boyd's claim his trial counsel failed to procure expert assistance failed to state a claim because "Boyd's petition [did] not disclose what type of expert counsel should have obtained"). The Court finds that the allegation in Part VI.C.(iv) of Williams' second amended Rule 32 petition fails to meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, it is summarily dismissed.

III.C.(5). Allegation that trial counsel were ineffective for failing to present Williams' allegedly redeeming characteristics.

In Part VI.C.(v), paragraphs 65-66 on pages 43-44 of Williams' second amended Rule 32 petition, he alleges that trial counsel were ineffective for not discovering and presenting evidence of Williams' "redeeming characteristics." The only "redeeming characteristics" Williams mentions in his second amended Rule 32 petition are that he was "a successful athlete and popular student during his time at Ashville High School" and that he had "[an] extraordinary affection for children." (Second amended petition at p. 44)

Concerning his assertion his trial counsel should have presented testimony that he was a popular student and successful athlete in high school, Williams merely refers the Court to paragraphs 54-57 of his second amended petition and then lists the names of individual that, he contends, were willing to testify during the penalty phase. Further, Williams fails to proffer in his second amended Rule 32 petition specifically what a particular witness could have testified about or argue how such testimony would have been so mitigating it could have caused a different result at trial. See Thomas v. State, 766 So. 2d 860, 893 (Ala. Crim. App. 1998) (holding 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). The Court finds that this allegation in Part VI.C.(v) of Williams' second amended Rule 32 petition fails to

meet the specificity and full factual pleading requirements of Rule 32.6(b), Ala.R.Crim.P.; therefore, it is summarily dismissed.

Williams also contends his trial counsel were ineffective for not calling relatives Crystal Thomas and Gwen Davis to testify during the penalty phase. Williams contends Thomas and Davis would have testified to "[his] extraordinary affection for children." (Second petition at p. 44) Williams argues that "[s]uch testimony would have been crucial in this case, where young children were found at the scene." Id.

In Chandler v. United States, 218 F. 3d at 1322, the Eleventh Circuit observed that "every reasonable trial lawyer knows, character witnesses that counsel called could be cross-examined by the Government." In Brooks v. State, 695 So. 2d 176, 181 (Ala. Crim. App. 1996), the Alabama Court of Criminal Appeals held that:

> [Brooks'] trial counsel's decision not to put on any character evidence was a strategic decision and one that was probably wise in this case – in light of the fact that there was evidence at the hearing that the state would have produced a lit of victim impact evidence had [Brooks] presented his character witnesses.

Further, in Jackson v. State, 791 So. 2d 979, 1026 (Ala. Crim. App. 2000), the Alabama Court of Criminal Appeals found that:

> To rebut Jackson's claim of good character, the State cross-examined one of Jackson's

> character witnesses regarding Jackson's prior misdemeanor assault conviction and his suspension from school form carrying a gun. This cross-examination was proper both to test the witness's credibility as to his knowledge of Jackson's character and to rebut the mitigating evidence offered by the Jackson.

The Court is aware that if Williams' trial counsel had offered evidence he had some "extraordinary" affection for children that the jury and the trial court would have been required to give it consideration. The Court is also aware that the jury and trial court would not have been required to find such evidence was actually mitigating. To state the obvious, character evidence is a two-edge sword. The same evidence that might be considered mitigating in one case could be devastating in another. Williams knew that the victim's two young children were in the house. Despite that, he entered the victim's bedroom and proceeded to rape and murdered her. Had trial counsel offered evidence that Williams had an extraordinary affection for children, this Court is confident beyond any reasonable doubt that the prosecution would have, at a minimum, vigorously argued to the jury that, under these circumstance of this case, it was not mitigating. Testimony in this vein would have also allowed the State to introduce victim impact evidence, including evidence of the possible psychological effects that the victim's children might suffer in the future due to being present at the same time there mother was brutally murdered. Williams was in no way prejudiced because this evidence was not presented to the jury during the penalty phase.

The Court finds that this allegation is without merit; therefore, it is denied. Rule 32.7(d), Ala.R.Crim.P.

IV. ALLEGATIONS OF INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

In Part VII, paragraph 67 on pages 44-45 of Williams' second amended Rule 32 petition, he alleges that his appellate counsel were ineffective for not raising on direct appeal the allegations of ineffective assistance of trial counsel he has pleaded in his second amended Rule 32 petition. The Court has reviewed the allegations of ineffective of trial counsel in Williams' second amended Rule 32 petition and finds that these allegations fail to contain specific facts that, if true, would establish trial counsel's performance was deficient and caused Williams to be prejudiced as required by Strickland. Williams' allegations he received ineffective assistance from his trial counsel either fail to meet the pleading requirements of Rule 32.6(b) or fail to state a claim as required by Rule 32.7(d), Ala.R.Crim.P. See Tolbert v. State, 733 So. 2d 901, 903 (Ala. Crim. App. 1997) (holding that "[i]f trial counsel was not ineffective, then appellate counsel could not have been ineffective for failing to challenge on appeal trial counsel's effectiveness"); see also Gibby v. State, 753 So. 2d 1206, 1208 (Ala. Crim. App. 1999) (holding that "[c]ounsel cannot be ineffective for failing to raise nonmeritorious claims"). The Court finds that the allegation in Part VII fails to state a claim or establish that a material issue of fact or law exists as requested by Rule 32.7(d); therefore, it is denied.

V. ALLEGATIONS OF PROSECUTORIAL MISCONDUCT.

In Part VIII, paragraph 68 on pages 45-46 of Williams' second amended petition, he contends that he did not receive a fair trial because of instances of alleged prosecutorial misconduct. The Court finds that the allegations of prosecutorial misconduct in Part VIII of Williams's amended Rule 32 petition are procedurally barred from postconviction review because they could have been but were not raised at trial and because they could have been but were not raised on appeal; therefore, Part VIII is summarily dismissed. Rules 32.2(a)(3) and (a)(5), Ala.R.Crim.P.

Also, in possible attempt to raise a claim of ineffective assistance of trial counsel in Part VIII, Williams mentions in passing that "[t]rial counsel objected to almost none of this misconduct." (Second amended petition at p. 45) The Court has previously addressed these allegations of ineffective assistance of trial counsel in Part IV.E of this order. Any allegation that might be interpreted as a claim of ineffective assistance of trial counsel in Part VIII is summarily dismissed because it fails to state a claim or establish that a material issue of fact or law exists as required by Rule 32.7(d), Ala.R.Crim.P.

CONCLUSION

The Court finds that the substantive allegations in Parts I-IV and Part VIII of Williams' second amended Rule 32 petition are precluded from postconviction

review. Rules 32.2(a)(2)-(a)(5), Ala.R.Crim.P. The Court further finds that Williams has failed to plead facts in his second amended Rule 32 petition sufficient to state a meritorious claim of ineffective assistance of trial or appellate counsel. Rules 32.6(b) and 32.7(d), Ala.R.Crim.P.; see also Boyd v. State, 2003 WL 22220330, at *6 (holding that "a Rule 32 petitioner is not automatically entitled to an evidentiary hearing on any and all claims raised in the petition").

Williams' second amended Rule 32 petition is hereby DISMISSED and his request for relief from his conviction and sentence is hereby DENIED.

DONE this the 12 day of Dec 2004.

/s/ William Hereford
WILLIAM HEREFORD,
CIRCUIT JUDGE
THIRTIETH JUDICIAL CIRCUIT

cc: Marcus B. Williams, Petitioner
Joseph P. Van Heest, Counsel for Williams
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Jon B. Hayden, Counsel for the State