No. 23-682

In The
Supreme Court of the United States

STATE OF ALABAMA,
Petitioner,
v.

MARCUS BERNARD WILLIAMS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

RESPONSE TO MOTION TO EXPEDITE BRIEFING ON THE PETITION FOR A WRIT OF CERTIORARI AND FOR OTHER RELIEF AND APPENDIX

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December 29, 2023

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Contemporaneously with filing its December 21 petition for writ of certiorari, which seeks to overturn an Eleventh Circuit decision affirming a district court's grant of penalty phase relief, the State asked this Court to expedite its consideration of this case so it can be decided with *Thornell v. Jones*.[1] In doing so, the State tries to fabricate a basis for this Court's certiorari jurisdiction by arguing that *Jones* and *Williams*[2] share an identical analytical error in evaluating *Strickland*[3] prejudice, and therefore, are alike enough to be decided together and adversely to the prisoner-appellees. The State's motion should be denied for three reasons. First, the State's first question presented is jurisdictionally barred as it should have been presented over eight years ago when Mr. Williams first prevailed and well before the evidentiary hearing was held. Second, *Jones* is procedurally and substantively dissimilar from *Williams* (so much so that, if the State of Arizona prevails in vindicating district court factual findings, Mr. Williams should, too). Third, expediting *Williams* is otherwise unnecessary to achieve a timely disposition.

For starters, the State's first question presented — "Does a state-court adjudication on the merits lose its entitlement to AEDPA deference if it is affirmed on procedural grounds?"[4]— is untimely by over eight years. On June 26, 2015, the Eleventh Circuit reversed the district court's denial of penalty phase habeas relief,

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[1] Pet'r's Mot. at 1, *Alabama v. Williams*, No. 23-682 (Dec. 21, 2023) (citing *Thornell v. Jones*, 2023 WL 8605741, at *1 (Dec. 13, 2023)).
[2] *Williams v. Alabama*, 73 F.4th 900 (11th Cir. 2023).
[3] *Strickland v. Washington*, 466 U.S. 668 (1984).
[4] Cert. Pet. at i, *Alabama v. Williams*, No. 23-682 (Dec. 21, 2023).

holding that Mr. Williams' penalty phase *Strickland* claims "were not decided on the merits" under 28 U.S.C. § 2254(d).[5] It remanded for the district court to determine whether to grant an evidentiary hearing.[6] On July 10, 2015, the State sought panel rehearing and rehearing *en banc*, arguing, *inter alia*, that "[u]nder §[]2254(d), and in accordance with this Court's precedent, the [postconviction] court's decision constituted an 'adjudication on the merits' that was due deference from the district court."[7] On August 21, 2015, the Eleventh Circuit denied panel rehearing and rehearing *en banc*.[8] The latest the State could have petitioned this Court for certiorari of the issue it now presents as the first question presented was—without applying for an extension—November 20, 2015.[9] The State elected not to timely appeal. Given the finality of the determination—as the law of the case—of that issue, it makes little sense to rush consideration of this jurisdictionally barred issue.[10]

Second, *Jones* and *Williams* are nothing alike. In 1999, Mr. Williams was tried and convicted for the murder and rape of Melanie Rowell — a crime to which he confessed.[11] During the penalty-phase, the State argued that just one aggravating

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[5] *Williams v. Alabama*, 791 F.3d 1267, 1269 (11th Cir. 2015).
[6] *Id.* at 1277.
[7] App. 1, Pet. for Reh'g and Reh'g *En Banc*, *Williams v. Alabama*, No. 12-14937 (July 10, 2015).
[8] App. 51, Order Denying Reh'g and Reh'g *En Banc*, *Williams v. Alabama*, No. 12-14937 (11th Cir. Aug. 21, 2015).
[9] SUP. CT. R. 13.1.
[10] Indeed, were it the only question presented, the Clerk would not have been permitted to accept the State's petition. SUP. CT. R. 13.2 ("The Clerk will not file any petition for a writ of certiorari that is jurisdictionally out of time.").
[11] *Williams v. State*, 795 So. 2d 753, 761 (Ala. Crim. App. 1999).

circumstance existed – murder during a rape.[12] His appointed counsel presented scant evidence at sentencing, which included two ill-prepared witnesses: Charlene Williams, Mr. Williams' mother,[13] and Eloise Williams, his great-aunt.[14] The only statutory mitigating circumstance the trial court found was that Mr. Williams had no significant history of prior criminal activity.[15] Regarding non-statutory mitigation, the trial court noted "[t]he circumstances of defendant's upbringing, his problem resulting from the end of a promising athletic career, [and] his attainment of his GED after failing to graduate from high school."[16] After finding the one aggravating circumstance to outweigh the mitigators, the trial court imposed a death sentence.[17]

Alabama courts denied relief on direct appeal and during state post-conviction. As recited in the Eleventh Circuit's opinion,[18] the district court evaluated *de novo* Mr. Williams' ineffective assistance of counsel claim based on failure to investigate mitigating evidence, after a 2015 Eleventh Circuit remand for an evidentiary hearing:

> 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.
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> The district court initially denied habeas relief on all claims, and Williams appealed. We vacated the district court's order and remanded

[12] App. 53-54.
[13] App. 56-62.
[14] App. 64-70.
[15] App. 72-74.
[16] App. 75.
[17] *Id.*
[18] *Williams*, 73 F.4th at 902.

> 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.

In granting habeas relief, consistent with this Court's precedent, the district court properly considered "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding"—and "reweig[hed] it against the evidence in aggravation."[19] Added to the powerful evidence he was the victim of child rape, Mr. Williams proved more than a dozen new statutory and non-statutory mitigating circumstances, which counsel either failed to develop or even mention at trial.[20] As the district court acknowledged, "[t]he fact that Mr. Williams' case is not highly aggravated further supports a finding of prejudice in this case."[21] Of particular relevance here, the district court's reweighing analysis specifically and extensively considered the potentially aggravating implications of new mitigating evidence about Mr. Williams' traumatic response to being sexually abused during childhood.[22]

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[19] *Williams v. Alabama*, No. 1:07-CV-1276-KOB, 2021 WL 4325693, at *43 (N.D. Ala. Sept. 23, 2021), *aff'd*, 73 F.4th 900 (11th Cir. 2023); *see also Sears v. Upton*, 561 U.S. 945, 956 (2010) (per curiam) ("A proper analysis of prejudice under *Strickland* would have taken into account the newly uncovered [mitigation] evidence . . ., along with the mitigation evidence introduced during [Mr. Williams'] penalty phase trial, to assess whether there is a reasonable probability that [the petitioner] would have received a different sentence after a constitutionally sufficient mitigation investigation").

[20] *Williams*, No. 1:07-CV-1276-KOB, 2021 WL 4325693, at * 43-44.

[21] *Id.* at *51.

[22] *Id.* at *49.

On appeal, properly applying the clear error standard, the Eleventh Circuit agreed that Mr. Williams had proven both *Strickland* prongs, finding "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."[23] In conducting its *de novo* review, the Eleventh Circuit both "independently reweighed *all the available evidence*"[24] and declined to "minimize the brutality of Williams' crime[.]"[25] The majority directly responded to concerns from Judge Grant's dissent about new aggravating evidence, noting its reliance on the clear error standard which requires an appellate court to defer heavily to a district court's factual findings.[26] Having thus thoroughly considered all of the evidence—both good and bad—the Eleventh Circuit unanimously denied the State's petitions for panel rehearing and rehearing *en banc*.[27]

In contrast, *Jones* presents not only disparate facts but also a much more convoluted procedural history. Unlike *Williams*, *Jones* involves multiple aggravated homicides, with substantially more mitigating evidence and aggravating circumstances. Mr. Jones was convicted for having beaten Robert Weaver to death with a baseball bat and having also struck Weaver's seven-year-old daughter with a

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[23] *Williams*, 73 F.4th at 910.
[24] *Id.* at 911 (emphasis added).
[25] *Id.*
[26] *Id.* at 911 ("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.").
[27] *Williams v. Alabama*, 73 F.4th 900 (11th Cir. 2023), *reh'g denied* (Sep. 22, 2023).

bat before killing her by suffocation or strangulation.[28] During the same episode, Mr. Jones also tried to kill Weaver's grandmother, who later died due to bludgeoning injuries he inflicted.[29]

At sentencing, counsel for Mr. Jones called three witnesses: (1) his guilt-phase investigator to testify about an accomplice; (2) Jones's second step-father, Randy, who testified about the onset of his drug addiction, his childhood, and his developmental history; and (3) Dr. Jack Potts, a court-appointed independent forensic psychiatrist who testified extensively about Mr. Jones' traumatic social history.[30] Despite this mitigating evidence, which supported four non-statutory mitigating factors, the judge imposed a death sentence because four aggravating factors outweighed them, namely Mr. Jones: (1) "committed the offense as consideration for the receipt, or in expectation of the receipt of anything of pecuniary value"; (2) "committed the offenses in an especially heinous or depraved manner"; (3) was "convicted of one or more other homicides . . . which were committed during the commission of the offense"; and (4) killed a child younger than 15 years old.[31]

Unlike *Williams*, *Jones* also involves multiple remands to ensure compliance with this Court's precedents. After his post-conviction appeals, Mr. Jones filed a federal habeas petition, and the district court conducted an evidentiary hearing on two penalty-phase ineffective assistance of counsel claims related to counsel's failure

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[28] *Jones v. Ryan*, 52 F.4th 1104, 1109 (9th Cir. 2022), *cert. granted sub nom. Thornell v. Jones*, No. 22-982, 2023 WL 8605741 (Dec. 13, 2023).
[29] *Id.*
[30] *Id.* at 1110.
[31] *Id.* at 1112.

to hire mental health experts.[32] The district court denied both, finding Mr. Jones had not established *Strickland*'s prejudice prong because new mental health evidence was not entirely mitigating or persuasive.[33] For example, it found, accepting testimony from Arizona's post-conviction experts, that Mr. Jones did not show that he suffered from cognitive impairment, major affective disorder, or post-traumatic stress disorder.[34] But the Ninth Circuit reversed, declining to apply AEDPA and instead considering the claims *de novo.*[35] As a consequence, the Ninth Circuit held, based on its own review of the evidence, that there was a reasonable probability that, with a defense mental health expert and neuropsychological and neurological testing, the results of sentencing would have been different.[36]

In *Jones*, Arizona appeals the Ninth Circuit's most recent grant of relief on remand from a prior panel of the Ninth Circuit and this Court.[37] The question presented in *Jones* is:

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[32] *Jones* Pet. at 11, *Thornell v. Jones*, No. 22-982, 2023 WL 8605741 (Dec. 13, 2023).
[32] *Id.* at 12.
[33] *Id.* at 13.
[34] *Id.* at 12.
[35] *Id.* at 12-13.
[36] *Id.* at 15.
[37] The Ninth Circuit first decided Jones' appeal in *Jones v. Ryan*, 583 F.3d 626 (9th Cir. 2009). This Court vacated for reconsideration in light of *Cullen v. Pinholster*, 563 U.S. 170 (2011). *Jones v. Ryan*, 563 U.S. 932 (2011). *See also* *Jones v. Ryan*, No. CV-01-00384-PHX-SRB, 2018 WL 2365714, at *1 (D. Ariz. May 24, 2018), *rev'd and remanded*, 1 F.4th 1179 (9th Cir. 2021), *and rev'd and remanded*, 52 F.4th 1104 (9th Cir. 2022), which recites the subsequent history:

> Three years later, after briefing and oral argument, the Ninth Circuit vacated and deferred submission of the case pending the decision in *Dickens v. Ryan*, 740 F.3d 1302 (9th Cir. 2014) (en banc). *Jones v. Ryan*, No. 07-9900 (9th Cir. Sep. 5, 2013). Shortly after the decision, the Ninth

> Whether the U.S. Court of Appeals for the 9th Circuit violated this court's precedents by employing a flawed methodology for assessing prejudice under *Strickland v. Washington* when it disregarded the district court's factual and credibility findings and excluded evidence in aggravation and the state's rebuttal when it reversed the district court and granted habeas relief.

There, in arguing that the Ninth Circuit misapplied *Strickland*'s prejudice analysis, Arizona's certiorari petition argues that the Ninth Circuit not only failed to defer to the district court's detailed factual findings as required under the clearly erroneous standard but also failed to consider the evidence "that would have been presented had [Jones] submitted the additional mitigation evidence."[38] Also, it points out that Judge Bennett and nine other judges dissented from denying *en banc* rehearing.[39] Neither problem is present in *Williams*. Instead, the State argues the opposite: that

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> Circuit remanded Jones's case to the [district court] to consider, under *Dickens* and *Martinez v. Ryan*, 566 U.S. 1 (2012), "Jones's argument that his ineffective assistance of counsel claims are unexhausted and therefore procedurally defaulted, and that deficient performance by his counsel during his post-conviction relief case in state court excuses the default." (Doc. 240-2.).

[38] *Jones* Pet. at 20; *id.* at 28 (citing *Wong v. Belmontes*, 558 U.S. 15, 26 (2009) (per curiam)).

[39] *Id.* at 2 (arguing "[r]eview and summary reversal are warranted here, where at least ten Ninth Circuit judges believed the amended panel opinion merited en banc review. Judges Bennett and Ikuta authored dissents for those judges, with Judge Bennett stating in explicit terms that this Court should correct yet another example of the Ninth Circuit's misapplication of *Strickland* in a capital case. App. 76 ("[W]e should have taken this case en banc so that the Supreme Court, which has already vacated our judgment once, does not grant certiorari a second time and reverse us.")); *Jones* Response to BIO at 6 ("As Judge Bennett noted, this Court has 'routinely' reversed the Ninth Circuit's decisions in capital cases, including decisions resulting from the circuit's misapplication of *Strickland*.").

the Eleventh Circuit should not have deferred to the district court's fact-bound *Strickland* prejudice finding, despite the clearly erroneous standard.[40]

To summarize, Arizona and Alabama are not in lockstep seeking error correction.[41] While both complain about circuit decisions concerning penalty-phase *Strickland* claims, *Williams* and *Jones* present wholly different cases on the application of law to the facts. That reality squares with *Strickland*'s prejudice analysis which produces case-specific, fact-bound results.[42] Joint consideration of *Williams* with *Jones* would, therefore, be inappropriate. Thus, this Court should reject the State's invitation to hasten its consideration of *Williams*.

Third, even if this Court disagrees about *Williams* being an inapt comparator to *Jones*, it need not expedite its consideration of *Williams*. Nor does Mr. Williams accede to the State's proposal for expedited review, which the State argues (absent having consulted Mr. Williams' counsel) would allow this Court to "expedite briefing and hear this case alongside *Jones* this Term without any prejudice to Respondent."[43]

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[40] Cert. Pet. at 29-36, *Alabama v. Williams*, No. 23-682 (Dec. 21, 2023).
[41] *See Barnes v. Ahlman*, 140 S. Ct. 2620, 2622 (2020) (Sotomayor, J., dissenting from denial of stay) ("error correction . . . is outside the mainstream of the Court's functions and ... not among the 'compelling reasons' . . . that govern the grant of certiorari.") (quoting S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Sup. Ct. Practice § 5.12(c)(3), p. 5–45 (11th ed. 2019)); Rule 10 explicitly warns litigants that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." SUP. CT. R. 10.
[42] *Riolo v. United States*, 38 F.4th 956, 974 (11th Cir. 2022) (recognizing "ineffective-assistance claims are fact-bound . . .."); *Strickland*, 466 U.S. at 698 ("both the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.").
[43] Pet'r's Mot. at 3.

Moreover, a review of likely scenarios disproves the necessity for its proposal. For example, if this Court grants the State's motion, the following deadlines apply:

> Certiorari filed: 12/21/2023
> Brief in Opposition due: 1/25/2024
> Reply Brief due: 1/31/2024
> Distributed: 2/1/2024
> Conferenced: 2/16/2024

If, however, Mr. Williams receives a 30-day extension to file a Brief in Opposition, these dates apply:

> Certiorari filed: 12/21/2023
> Brief in Opposition due: 2/20/2024 (19th is a Federal Holiday)
> Reply Brief due: 3/5/2024
> Distributed: 3/6/2024
> Conferenced: 3/22/2024

Using the State's estimated briefing schedule for *Jones*[44] yields dates which allow for this Court to consider *Williams* in the due course of normal proceedings:

> Certiorari granted: 12/13/2023
> Appellant's Merits Brief Due: 1/29/2024 (SUP. CT. R. 25.1)
> Appellee's Merits Brief Due: 2/28/2024 (SUP. CT. R. 25.2)
> Appellant's Reply Brief Due: 3/29/2024 (SUP. CT. R. 25.3)

Based on that schedule, the earliest date the oral argument in *Jones* could happen is April 15, 2024, unless this Court expedites briefing. Therefore, contrary to the State's assertions, this Court need neither order that Mr. Williams' Brief in Opposition be filed in 30 days nor expedite consideration of *Williams*. Even if *Williams* is filed with a 30-day extension for the Brief in Opposition, this Court can conference it three weeks before argument in *Jones*.

[44] *Id.* at 4-5.

This Court should not fast-track *Williams* in service to the State's desire to achieve error correction by bootstrapping onto *Jones*, which presents different facts and procedure, especially where, as likely here, this Court will deny certiorari over this fact-bound and procedurally distinguishable matter.

Respectfully Submitted,

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Respondent's Appendices

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

MARCUS BERNARD WILLIAMS,

Plaintiff/Appellant,

v.

STATE OF ALABAMA,

Defendants/Appellees.

On Appeal from the United States District court for the Middle District of Alabama (No. 11-CV-0043)

APPELLEES' PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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July 10, 2015

No. 12-14937-P

In the UNITED STATES COURT OF APPEALS
for the ELEVENTH CIRCUIT

MARCUS BERNARD WILLIAMS,

Appellant,

v.

STATE OF ALABAMA,

Appellee.

On Appeal from the United States District Court
for the Northern District of Alabama
Case No. 1:07-cv-1276-KOB-TMP

APPLICATION FOR PANEL REHEARING AND REHEARING EN BANC

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Certificate of Interested Persons

The following is a list of all additional known judges, attorneys, persons, associations of persons, firms, partnerships, corporations, and other legal entities that have an interest in the outcome of this case, including subsidiaries, conglomerates, affiliates and parent corporations, any publicly held company that owns 10 percent or more of a party's stock, and other identifiable legal entities related to a party:

1. Austin, The Honorable Robert E. – Circuit Judge of St. Clair County;

2. Barnett, A. Vernon IV – counsel for the State of Alabama on direct appeal;

3. Brasher, Andrew L. – counsel for Respondent-Appellee;

4. Bowdre, The Honorable Karen O. – United States District Judge for the Northern District of Alabama;

5. Campbell, Donal – Respondent at federal habeas proceedings;

6. Chu, Stephen – counsel for Petitioner-Appellant;

7. Crenshaw, J. Clayton – counsel for the State of Alabama at federal habeas proceedings;

8. Davis, William Van – District Attorney, Thirtieth Judicial District, Blount County/St. Clair County, and counsel for the State of Alabama at trial;

9. Fakhimi, Morad – counsel for Mr. Williams at federal habeas proceedings;

10. Funderberg, Erskine R. – counsel for Mr. Williams at trial;

11. Ganter, Stephen – counsel for Mr. Williams at federal habeas proceedings;

12. Hayden, Jon B. – counsel for the State of Alabama at Rule 32 proceedings;

13. Hereford, The Honorable William E. – Circuit Judge of St. Clair County;

14. Hill, The Honorable James E. – Circuit Judge of St. Clair County;

15. King, Troy – Former Alabama Attorney General;

16. Lawley, James – counsel for Mr. Williams at federal habeas proceedings;

17. Miller, Kasdin E. – counsel for Respondent-Appellee;

18. Minor, Richard J. – counsel for the State of Alabama at trial;

19. Morgan, Joe W., III – counsel for Mr. Williams on direct appeal;

20. Nastrom, Karl S. – counsel for Mr. Williams at Rule 32;

21. Neiman, John C., Jr. – counsel for Respondent-Appellee;

22. Nunnelly, Michael – counsel for the State of Alabama in Rule 32 appeal;

23. Pryor, William H. – Former Alabama Attorney General;

24. Rowell, Melanie Dawn – victim;

25. Rushing, Dennis – counsel for Mr. Williams on direct appeal;

26. Schulz, Matt D. – counsel for Mr. Williams at federal habeas proceedings;

27. Smith, Leslie S. – counsel for Mr. Williams at federal habeas proceedings;

28. Speagle, Regina – counsel for the State of Alabama at Rule 32 proceedings;

29. Stokes-Hough, Keisha – counsel for Mr. Williams at federal habeas proceedings;

30. Strange, Luther – Alabama Attorney General;

31. Susskind, Randall S. – counsel for Petitioner-Appellant;

32. Thomas, Kim – Commissioner of the Department of Corrections (current);

33. Van Heest, Joseph P. – counsel for Mr. Williams at Rule 32;

34. Williams, Marcus Bernard – defendant;

35. Williamson, Lamar – counsel for the State of Alabama at trial;

36. Wilson, Tommie Jean – counsel for Mr. Williams at trial.

37. Anderson, Richard D. – Counsel for Respondent-Appellee

s/ Richard D. Anderson
Richard D. Anderson.
Assistant Attorney General

STATEMENT OF COUNSEL

I believe, based on a reasoned and studied professional judgment, that the panel decision is contrary to the following decisions of the Supreme Court of the United States and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court: *Riley v. Kennedy*, 553 U.S. 406, 425, 128 S. Ct. 1970, 1985, 170 L. Ed. 2d 837 (2008) ("A State's highest court is unquestionably "the ultimate exposito[r] of state law.")*; Eisenstadt v. Baird*, 405 U.S. 438, 442, 92 S. Ct. 1029, 1032, 31 L. Ed. 2d 349 (1972); *Groppi v. Wisconsin*, 400 U.S. 505, 507, 91 S.Ct. 490, 491, 287 L.Ed.2d 571 (1971) .

I further believe, based on a reasoned and studied professional judgment, that the panel decision is contrary to and inconsistent with the following precedents of this Circuit and that consideration by the full court is likewise necessary to secure and maintain uniformity of decisions in this Court: *Tyree v. White*, 796 F.2d 390, 392 (11th Cir. 1986); *Beverly v. Jones*, 854 F.2d 412, 416 (11th Cir. 1988).

s/Richard D. Anderson
Assistant Attorney General

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ISSUES PRESENTED FOR REVIEW

1. Did this Court Erroneously Disregard Settled Alabama Law in contradiction of United States Supreme Court and Eleventh Circuit Precedent?

2. Did this Court Erroneously Direct the District Court to Apply a *De Novo* Standard of Review?

STATEMENT OF THE CASE

Statement of the Facts

After a night of drinking and smoking marijuana, Williams decided to rape his neighbor, Ms. Rowell. Doc 12-Vol 4-Tab 26-Pg C.120.[1] Rowell was a single mother, and her two small children were asleep in her apartment. *Id.*; Doc 12-Vol 3-Tab 12-Pg R.512. Williams broke into her apartment, took a knife from the kitchen and went to Rowell's bedroom. Doc 12-Vol 4-Tab 26-Pg C.106.

During the attack, Rowell fought and screamed. *Id.* at C.106, C.120. Williams "placed his hand over her mouth" and then put "his hands around her neck," strangling her. *Id.* at C.106. Then, after Williams saw that she had "quit breathing," *id.* at C.120, Williams raped her for "15 to 20 minutes," *id.* at C.106.

[1] Citations in this brief are to the District Court docket number and page number, abbreviated as "Doc __ - Pg __." Citations to the state-court record begin with the District Court docket number for the State's Habeas Corpus Checklist, Doc 12, an index of the state-court record that was filed with the District Court. The checklist divides the state-court record by volume ("Vol"), tab ("Tab"), and page number ("Pg"), with pages from the clerk's record preceded by the letter "C." and pages from the transcript preceded by the letter "R."

He also cut her throat, stole her purse, and left. *Id.* at C.107. Williams confessed to the crime on multiple occasions. *See id.* at C.120, C.124, C.126. There was no question at trial "that he entered the victim's apartment with the intent to have sex with her." *Williams v. State*, 795 So. 2d 753, 763 (Ala. Crim. App. 1999). His sole defense was that he intended only to rape Rowell, not kill her.

Course of Proceedings and the Decision Below

Williams's trial and direct appeal

At the current stage of these proceedings, Williams is not pressing any claim relating to the jury's unanimous finding that he raped and murdered Rowell. *See* Doc 12-Vol 4-Tab 26-Pg C.9. Thus, the critical facts about his trial concern the judge's decision that Williams deserved the death penalty

In asking the jury to recommend the death penalty, the prosecution relied almost exclusively on the brutality of Williams's crime. Williams's counsel put on, through Williams's relatives, much of the evidence he now criticizes them for omitting. Counsel's presentation swayed one of the jurors, but the others agreed with the State. *See* Doc 12-Vol 3-Tab 26-Pg C.11. After the jury recommended the death sentence by an 11-1 vote, the judge convened a hearing to make the final sentencing determination. *See* Doc 12-Vol 3-Tab 25-Pg R.598-641. In a written order, he found that Williams's attorneys had established some mitigating

circumstances, but, emphasizing the enormity of Williams's crime, the court concluded that the death penalty was appropriate.

Williams's direct appeal was unsuccessful.[2] The Alabama Court of Criminal Appeals (hereinafter "ACCA") rejected Williams's various claims. *See Williams v. State ("Williams I")*, 795 So. 2d 753 (Ala. Crim. App. 1999). The Alabama Supreme Court (hereinafter "ASC"), in a published opinion, affirmed. *See Ex parte Williams ("Williams II")*, 795 So. 2d 785 (Ala. 2001).

State Postconviction Review

Williams filed a petition seeking postconviction relief in state court under Rule 32 of the Alabama Rules of Criminal Procedure. *See* Doc 12-Vol 8-Tab 40-Pg C.186. Among the arguments Williams raised was an ineffective-assistance claim based on the allegations that are the subject of this appeal. *See id.* at C.220-29. Williams's general allegation on this front was that "much mitigating evidence was not presented to the jury" at the penalty phase. *Id.* at C.222.

After receiving briefing from both sides, the Rule 32 trial court summarily dismissed Williams's petition. *See* Doc 12-Vol 11-Pg C.216-62. Along with his

[2] Williams's direct appeal was unusual because he asserted some claims for ineffective assistance of counsel. Typically, in Alabama, IAC claims are raised in the Rule 32 court. *See Ex parte Ingram*, 675 So. 2d 863, 866 (Ala. 1996). Due to Williams's failure to raise these claims in a new-trial motion before the trial court, the Court of Criminal Appeals found that it could only review those claims for plain error. *Williams I*, 795 So. 2d at 782. It found no such error, and the ASC affirmed. *Williams II*, 795 So. 2d at 787. The U.S. Supreme Court denied certiorari. *See Williams v. Alabama*, 534 U.S. 900, 122 S. Ct. 226 (2001).

other claims, the Rule 32 court also rejected Williams's allegations relating to sexual abuse. Rule 32.6(b) of the Alabama Rules of Criminal Procedure requires a petition to offer "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." ALA. R. CRIM. P. 32.6(b). The Rule 32 court dismissed Williams's claims under this rule, reasoning that his petition failed to proffer "what specific facts a particular witness could have testified about or argue how such testimony would have been mitigating." Doc 12-Vol 11-Pg C.255. The court observed that Williams had not "identif[ied] a single specific instance of abuse inflicted on him by a specific family member." *Id.* at C.255-56. The court added that "even if members of Williams's 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." *Id.* at C.256. According to a pre-trial mental evaluation, Williams had "denied" any "history of childhood sexual, emotional, or physical abuse." *Id.* (citing Doc 12-Vol 8-Tab 37-Pg C.80). The court concluded that Williams's lawyers could not have been "ineffective for not presenting mitigating evidence that either does not exist or that would have to be directly refuted by Williams' own statements to a mental health professional." *Id.* at C.256.

Rule 32 appellate proceedings

On appeal, the State defended the trial court's reasoning. *See* Doc 12-Vol 12-Tab 51-Pg 27-35. But the ACCA affirmed on procedural grounds that the State had not raised. Rule 32.2 of the Alabama Rules of Criminal Procedure says a petitioner's claim may be barred from collateral postconviction review if a petitioner raised the claim on direct review. *See* ALA. R. CRIM. P. 32.2(a)(4). Even though the State had not raised that procedural bar, the court cited it and affirmed without discussing the merits, holding that Williams's claim was barred because he had raised ineffective-assistance claims on direct appeal. *See* Doc 12-Vol 13-Tab 60-Pg 4-16. The ASC denied certiorari. *See* Doc 12-Vol 13-Tab 61.

Federal habeas review

Williams then filed a federal habeas petition under 28 U.S.C. §2254. Doc 1; Doc 5. The State defended the IAC claim at issue here on the merits, and asked the court to defer to the Rule 32 trial court's adjudication. *See* Doc 15 – Pg 5-8 n.1. The State explained that it was not relying on the ACCA's *sua sponte* invocation of the procedural bar because that ruling was contrary to the Alabama Supreme Court's later decision in *Ex parte Clemons*, 55 So. 3d 348, 356 (Ala. 2007). The State instead argued that the court could not grant Williams relief because the Rule 32 trial court's adjudication of the merits was not "contrary to" or an

"unreasonable application" of "clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. §2254(d)(1).

The District Court agreed with the State. Doc 27 – Pg 88-109. The court found that any "new factual assertions" that Williams "alleged for the first time" in his "amended habeas petition are procedurally defaulted and are, therefore, not before this court for review." *Id.* at 88. Focusing on the allegations Williams made in his Rule 32 petition, the District Court concluded that the Rule 32 trial court had reasonably dismissed his claims. *Id.* at 88-109.

On appeal, this Court concluded that the merits determination by the Rule 32 Court was not due §2254(d) deference because the Court of Criminal Appeals' application of the Rule 32.2(a)(4) bar amounted to, in this Court's view, a finding that the Rule 32 trial court did not have jurisdiction over Williams petition. As explained below, this Court's decision was incorrect.

ARGUMENT

I. This Court's Determination that the Rule 32 Court Lacked Jurisdiction Ignores Settled State Law and Conflicts with Prior Decisions of this Court and of the United States Supreme Court.

The last reasoned state court decision regarding Williams' claims of ineffective assistance of counsel was reached by the Rule 32 trial court, which summarily dismissed Williams' petition. The District Court gave proper 28 U.S.C. §2254 (d) deference to this merits determination when it denied habeas relief to

Williams. However, this Court determined that the District Court erred in deferring to the Rule 32 trial court's merits determination and that the District Court should review Williams' claims *de novo*. This Court's decision turns on a question of Alabama law that was unresolved at the time that the ACCA affirmed the dismissal of Williams' state habeas petition. *Williams v. State*, 2 So.3d 934 (Ala. Crim. App. 2006). (Table); Vol. 13, Tab R-60. Namely, whether the ACCA's application of the Rule 32.2(a) procedural bar amounted to a ruling that the Rule 32 trial court lacked jurisdiction to address the merits of Williams' claims. In deciding that it did, this Court ignored settled Alabama law and erroneously interpreted decisions by the ACCA.

It is a bedrock principle that questions of state law are best determined by state courts. When a state's highest court has settled a question of state law, that construction is binding on the federal courts. *See Riley v. Kennedy*, 553 U.S. 406, 425, 128 S. Ct. 1970, 1985, 170 L. Ed. 2d 837 (2008) ("A State's highest court is unquestionably "the ultimate exposito[r] of state law."); *Eisenstadt v. Baird*, 405 U.S. 438, 442, 92 S. Ct. 1029, 1032, 31 L. Ed. 2d 349 (1972); *Groppi v. Wisconsin*, 400 U.S. 505, 507, 91 S.Ct. 490, 491, 287 L.Ed.2d 571 (1971); *see also Tyree v. White*, 796 F.2d 390, 392 (11th Cir. 1986) ("state court construction of state law is binding on federal courts entertaining petitions for habeas relief."); *Beverly v. Jones*, 854 F.2d 412, 416 (11th Cir. 1988) ("Beverly would have this court

overturn the Alabama Supreme Court's interpretation of the statutory scheme. This we are not empowered to do...."). Nonetheless, this Court's decision violates this principle in two ways: 1) by failing to abide by the ASC's construction of Rule 32.2, Ala. R. Crim. P., and 2) by inferring what the ACCA *might* have implied about the jurisdiction of the Rule 32 court.

A. The Alabama Supreme Court has Determined that Rule 32.2(a) does not Establish a Jurisdictional Bar.

The Rule 32 trial court summarily dismissed Williams's petition. *See* Doc 12-Vol 11-Pg C.216-62. In so doing, it rejected Williams's allegations relating to the alleged failure to discover evidence of sexual abuse. Rule 32.6(b) of the Alabama Rules of Criminal Procedure requires a petition to offer "a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds." ALA. R. CRIM. P. 32.6(b). The Rule 32 trial court dismissed Williams's claims under this rule, reasoning that his petition failed to proffer "what specific facts a particular witness could have testified about or argue how such testimony would have been mitigating." Doc 12-Vol 11-Pg C.255. The court observed that Williams had not "identif[ied] a single specific instance of abuse inflicted on him by a specific family member." *Id.* at C.255-56. This Court has held that "[a] ruling by an Alabama court under Rule 32.6(b) is also a ruling on the merits," particularly when the state court "in

disposing of claims in the Amended Petition under Rule 32.6(b), necessarily considered the sufficiency of such claims, focusing in on the factors for determining whether the petition presented a case sufficient to warrant relief under *Strickland*." *Borden v. Allen*, 646 F.3d 785, 812-13 (11th Cir. 2011). Accordingly, the Rule 32 trial court's disposition amounted to an "adjudication on the merits."

On appeal, the ACCA affirmed the Rule 32 trial court, but on different grounds. Instead of addressing the Rule 32 trial court's grounds for dismissal, the ACCA noted that Williams "had previously raised a claim of ineffective assistance of counsel" and held that, consequently, "[w]hen he raised the [IAC] claim in the Rule 32 proceeding, it was being raised for the second time."[3] Vol. 13- Tab 60- p. 12. Thus, the ACCA concluded that the claims were procedurally barred under Rule 32.2(a) (4), Ala. R. Crim. P. and declined to address them. *Id*. at 16.

Despite the fact that the ACCA has never held that the imposition of the Rule 32.2(a) (4) procedural bar acts to deprive a Rule 32 court of jurisdiction; this

[3] While it has been assumed (by both this Court and the Respondent) that the ACCA's application of Rule 32.2(a) (4) was factually "incorrect," there is some basis for the ACCA's conclusion. Williams' direct appeal IAC claims were broader than their headings indicated. For instance, his claim of IAC for failure to hire a mitigation expert addressed trial counsels' general lack of "knowledge of the facts" of Williams' life, their failure to "prepare[] to conduct a mitigation defense," and contended that "the failure to properly prepare for the sentencing phase... amounted to ineffective assistance of counsel." Vol. 5-Tab 28-Pg. 83-85. Moreover, the ACCA appears to have been holding that the raising of *any* IAC claim on direct appeal foreclosed the granting of relief on *all* Rule 32 IAC claims. Vol. 13- Tab 60- p. 12.

Court engaged in a novel, but flawed, chain of reasoning to justify the application of a *de novo* standard of review to Williams' claims of ineffective assistance (hereinafter "IAC") for failure to investigate. Because there was nothing in the ACCA's decision that spoke to the question of whether the Rule 32 trial court had jurisdiction to reach the merits of Williams' claims, this Court looked instead to *Ex parte Clemons*, 55 So. 3d 348 (Ala. 2007), a case in which the Alabama Supreme Court addressed a question of first impression: "whether the State may waive the affirmative defense of the procedural bars of Rule 32.2(a) and thereby enable the trial court to entertain the proceeding on its merits." *Clemons*, 55 So. 3d at 353.

In discussing the bearing of *Clemons* on the present case, this Court held as follows:

> In reaching this decision, the court relied on *Davis v. State*, 9 So. 3d 514 (Ala. Crim. App. 2006), which taught[4] that the procedural bars set out in Alabama Rule of Criminal Procedure 32.2(a) were jurisdictional 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 meaningfully 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

[4] As explained below, this Court also misapprehended the ACCA's decision in *Davis*, which did not reach the question of jurisdiction. Certainly, *Davis* did not *hold* that 32.2(a)(4) imposed a jurisdictional bar. Moreover, as Justice Stuart's concurrence in *Clemons* points out, "Rule 32.2(a) addresses the grounds upon which a court can or cannot base its decision; it does not address the court's jurisdiction to decide." *Clemons*, 55 So.3d at 358 (*Stuart, J., concurring*).

> Appeals found itself (and necessarily, the trial court) without jurisdiction to reach the merits of Mr. Williams failure-to-investigate claims... .

Williams (emphasis added). In this passage, this Court overlooks an important fact that is determinative of the question of whether the Rule 32 trial court had jurisdiction to reach Williams' IAC claims. Namely, this Court states that the ASC "reversed course" on the question of jurisdiction. Implicit in this statement is the assertion that it was once settled Alabama law that Rule 32.2(a) imposed a jurisdictional limitation that would prevent a court from addressing the merits of a petition. But in plain fact, that was not, and never has been, settled law in Alabama. In *Clemons*, the ASC was considering a question of first impression, which is to say, the ASC could not reverse its course when it had never set one in the first place. Nevertheless, *Clemons* settled the issue by holding that "the preclusive bars of Rule 32.2(a) are nonjurisdictional in nature...." *Clemons*, 55 So. 3d at 356; *see also Ex parte James*, 61 So. 3d 352, 356 (Ala. 2009) ("As *Clemons* establishes, the preclusionary grounds of Rule 32 are affirmative defenses that must be pleaded or they are waived; the preclusionary grounds do not affect the courts' jurisdiction.") Thus, the question of whether the Rule 32 trial court had jurisdiction in this matter has been settled by the ASC. The Respondent is not aware of any doctrine that would allow this Court to look back to the ACCA's decision and essentially speculate as to what that court thought (but did not say)

about an unsettled question of state law. As the ruling of a state's highest court, construing a question of state law, the construction announced in *Clemons* is binding on this Court.

By failing to abide by the ASC's construction of Alabama law, this Court came into conflict with prior decisions of this Court and of the United States Supreme Court. *See*, *e.g., Eisenstadt*, 405 U.S. at 442; *Groppi*, 400 U.S. 507*; Tyree*, 796 F.2d at 392 ("state court construction of state law is binding on federal courts entertaining petitions for habeas relief."). In order to avoid such conflict, this Court should acknowledge that *Clemons* settled the question of jurisdiction and hold that the district court properly granted §2254 deference to the Rule 32 trial court's adjudication of the merits of Williams' IAC claims.

Moreover, Williams could have given the ASC the opportunity to address this issue in his case by challenging the ACCA's *sua sponte* application of Rule 32.2(a) (4) in a petition for writ of certiorari, as Mr. Clemons did. Had he done so, the ASC would certainly have ruled as it did in *Clemons,* which was decided only months after the ACCA issued its decision in *Williams*. By ignoring the ASC's holding in *Clemons* and engaging in unwarranted speculation regarding the meaning of the ACCA's application of the 32.2(a)(4) bar, this Court effectively, and unjustifiably, rewards Mr. Clemons' failure to present this state law question to the Alabama courts.

B. The ACCA did not Hold that the Rule 32 Trial Court Lacked Jurisdiction to Reach the Merits of Williams' Claims.

In addition to the fact that *Clemons* settled the jurisdiction question, nothing in the ACCA's opinion gives rise to an inference that the ACCA believed that either it or the Rule 32 court lacked jurisdiction.[5] Rather, the manner in which the ACCA disposed of the case argues against such an inference. When the ACCA determines that a trial court has acted beyond its jurisdiction, it generally remands the matter to the trial court with directions. *See, e.g., Smith v. State,* 852 So. 2d 185, 190 (Ala. Crim. App. 2001) ("instruct[ing] the circuit court to set aside its order modifying Smith's sentence because that order was issued without jurisdiction."); Thus, had the ACCA found that the Rule 32 trial court had no jurisdiction, it would have remanded the matter with directions to vacate the order denying relief and to dismiss the petition for want of jurisdiction. The ACCA did not do that. Instead, it found "that the judgment of the Circuit Court of St. Clair County is due to be affirmed." At bottom, the ACCA's decision cannot be read to suggest anything more than that, due to the "mandatory" nature of Rule 32.2(a), it had no authority to "**give[] relief under this rule based on**" any IAC claim. Vol. 13- Tab 60- p. 5, *quoting* Rule 32.2(a), Ala. R. Crim. P. (emphasis in original).

[5] Indeed, as a matter of more than pedantic interest, the word "jurisdiction" does not appear at any point in the ACCA's memorandum opinion.

To the extent that this Court relied on the proposition that *Davis v. State*, 9 So. 3d 514 (Ala. Crim. App. 2006), "taught that the procedural bars [in Rule 32.2(a)] were jurisdictional in nature"; this Court misapprehended the ACCA's holding in *Davis*. As with *Williams*, *Davis* did not hold that Rule 32.2(a) imposed a jurisdictional bar. Rather, the ACCA simply held that "[a]ccording to established caselaw, Davis's ineffective-assistance-of-trial-counsel claims are procedurally barred in this Rule 32 proceeding." *Davis v. State*, 9 So. 3d 514, 521-22 (Ala. Crim. App. 2006) *rev'd sub nom. Ex parte Davis*, 9 So. 3d 537 (Ala. 2007) *abrogated by Ex parte Clemons*, 55 So. 3d 348 (Ala. 2007). Only in the denial of Davis' application for rehearing did the ACCA delve into the nature of the bar, and even then it did not conclude that the bar deprived it or the Rule 32 trial court of jurisdiction. Indeed, as the ASC explained in *Ex parte Clemons*, the ACCA **did not** "characterize the Rule 32.2(a) procedural bars as jurisdictional, but merely "treated treated them as jurisdictional" for the purposes of applying them *sua sponte*.[6] *Clemons*, 55 So. 3d at 352. Thus, it cannot be fairly said that *Davis* gives rise to any inference that the ACCA's decision in *Williams* amounted to a holding that the Rule 32 trial court lacked jurisdiction to reach the merits of Williams' IAC claims.

[6] By holding that an appellate court could apply 32.2(a)(4) *sua sponte* in "extraordinary circumstances," *Clemons* made it clear that applying the bar *sua sponte* does not entail a finding of a lack of jurisdiction. *Clemons*, 55 So. 3d at 354.

II. The District Court Properly Gave 28 U.S.C. §2254 (d) Deference to the Rule 32 Trial Court's Merits Determination.

As shown above, under Alabama law, the Rule 32 trial court had jurisdiction to consider the merits of Williams' IAC claims. Under §2254(d), and in accordance with this Court's precedent, the Rule 32 trial court's decision constituted an "adjudication on the merits" that was due deference from the district court. Consequently, in this Court's recent opinion, the panel erred in concluding that the district court erred in its dismissal of Williams's petition. The Respondents respectfully request that this Court recognize settled Alabama law, reverse its determination that a *de novo* standard of review applies to Williams' claims, and affirm the district court's decision.

CONCLUSION

For the reasons discussed above, this Court should grant the instant petition for rehearing, and affirm the district court's judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 10, 2015, I served a copy of the foregoing upon counsel for the Plaintiff/Appellant via electronic mail addressed as follows:

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EXHIBIT A

[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 times because he did

[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).

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]

At a separate sentencing proceeding before the trial court, Mr. Williams testified and expressed remorse. Donna Rowell, the victim's mother, was the only

[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).

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 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

[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."

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 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.

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

C.

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]

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

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

§ 2254(d)(1) does not bar federal habeas relief," Cullen v. Pinholster, 563 U.S. ___, ___, 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 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 COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 12-14937-P

MARCUS BERNARD WILLIAMS,

Petitioner - Appellant,

versus

STATE OF ALABAMA,

Respondent - Appellee.

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

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

BEFORE: MARCUS, WILSON and MARTIN, Circuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

Bobby B. Martin

UNITED STATES CIRCUIT JUDGE

ORD-42

Excerpt of State's Closing Argument – Penalty Phase

R. 569-70

you in closing arguments and speak to you. After I sit down, the defense counsel can come before you and talk to you about aggravating and mitigating circumstances; and then we have a final opportunity to come before you. For that reason, I'll be very brief at this point. I would like to reiterate and tell you a little about what I think the evidence is going to show from what you have heard. This part of the case is what we refer to in our business sometimes as a balancing type thing. You are to consider aggravating circumstances which the State relies on in deciding whether to return a verdict of death or life without parole. The State of Alabama, by law, in the Code of Alabama, there are what we call statutory--because they are spelled out in the Statute. There are eight different aggravating circumstances that the State can rely on to return a death penalty. In this case, there is one of those we are relying on. The Judge will read it to you. It basically says that if you commit the crime of murder during the commission of rape or an attempt of a first degree rape, then that in itself is aggravating. I would submit to you Judge Austin will tell you simply by virtue of the fact that you returned a guilty verdict in this case of capital murder, then that aggravating circumstance was found by this

jury to exist, and he will charge you it does exist, and therefore you can consider it in returning a death penalty. I also expect the Judge will tell you that you may consider certain mitigating circumstances. That is circumstances that the defense will ask you to rely on to not return a death penalty, with the alternative to return a verdict of life without parole. Just like aggravating circumstances, there are some mitigating circumstances spelled out in the State Code. Judge Austin, I expect, will tell you about those. He will read them to you from the Code, and he will tell you which ones you can consider if you find them to exist. He will also tell you that anything else you want to consider that the defense may offer to you as mitigation, that you may consider. Some of the statutory ones I think that will be offered will be things such as the fact of the defendant's age and different things. I further believe when the Judge charges you as to the law that you have to apply in this sentencing phase, that he will tell you when you consider aggravating--the aggravating circumstance the State relies on--which we have one--that you weigh it against the mitigating circumstances. It is a weighing process. I think he will tell you this is not a numbers game where one aggravating is put up against one, two, three, four, five,

Penalty Phase Testimony – Charlene Williams

R. 553-59

circumstance, we submit to the Court and to the Jury the testimony and exhibits offered at trial.

THE COURT: Okay.

MR. DAVIS: Subject to rebuttal, we rest.

THE COURT: State rests. For the defendant?

MS. WILSON: We call Charlene Williams.

CHARLENE WILLIAMS

Witness called by the defendant, was sworn and testified as follows:

DIRECT EXAMINATION

BY MS. WILSON:

Q State your name, please.

A Charlene Williams.

Q Are you related to the defendant, Marcus Williams?

A Yes, I am

Q What is your relationship?

A He is my son.

Q How old is Marcus?

A Twenty-three.

Q How old were you when Marcus was born?

A Sixteen.

Q Are you married?

A No.

Q Have you ever been married?

A No.

Q While Marcus was growing up, did he reside with you?
A Part of the time.
Q Where was he 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 Do you know who Marcus's father is?
A Yes, I do.
Q Does he have a relationship with Marcus?
A No.
Q Has he ever?
A Not really.
Q While he was growing up, did you receive any support or did Marcus receive any visits from his father?
A No.
Q Did Marcus ever have a male figure that he could go fishing with or play ball with or anything like that?
A No.
Q You are aware of what Marcus is charged with. Is that correct?
A Yes.
Q While Marcus was growing up, did y'all attend church?
A Yes, we did.
Q Where did you attend?
A Grace Church of Christ.
Q Did Marcus attend regularly?

A Yes.
Q Did he graduate from high school?
A No. Two weeks before graduation, they told him that he was a half of a grade short for him to finish.
Q When was that?
A In '94.
Q While he was in high school did he participate in any sporting activity or school functions?
A Yes.
Q What was that?
A He played football in junior high and basketball.
Q Did something happen to prevent him from continuing those sports?
A In twelfth grade, he injured his knee and had to have major knee surgery.
Q And as a result, he was never allowed to play ball anymore?
A No.
Q When he left school, did Marcus appear--something happened that caused him to start acting differently?
A Maybe when he hurt his knee it was like he lost all hope.
Q Did you notice changes as far as friends and behavior?
A Some of them--mostly in his actions.
Q Was he able to find employment?

A No.

Q What did he do after he left school?

A He started hanging with a rough crowd. He decided he wanted to straighten up and he joined the Job Corp.

Q Where was he sent in the Job Corp?

A Martinville, Kentucky.

Q And he lived up there. Is that correct?

A Yes.

Q While he was in Martinville, did you receive--did you talk to Marcus?

A Yes, I did.

Q Did you have any contact with him?

A Yes.

Q Did you have any concerns about him being up there?

A Not really.

Q Did you receive letters from Marcus?

A Yes.

Q And in those letters, did everything appear to be fine or did he exhibit some behavior or make statements to you that you did not understand?

A Everything seemed to be fine in his letters. He was doing good.

Q Has Marcus ever been married?

A No.

Q Does he have any long-term girlfriends or anything

or was he living with a female?

A No.

Q Does he have any children that you know of?

A No.

Q Did you receive some letters from Marcus while he was in Kentucky asking you to take care of some family members for him?

A No.

Q Did you come to know that Marcus was using alcohol and drinking alcohol while he was up there?

A When he was up there, I didn't know what he was doing.

Q He didn't write you and tell you they had been partying or anything?

A No.

Q Did Marcus complete the program with Job Corp?

A He lacked about a month.

Q What happened?

A He got into a fight. Fighting is not allowed in Job Corp.

Q What did they do?

A They sent him home.

Q That was when?

A October 27th of '96.

Q Where did he go when he returned back to Ashville?

A He came to live with me.

Q Did he have a job or anything then?

A No. He had just got home.

Q After he returned home, did he start using drugs and alcohol?

A He started hanging out a lot.

Q Did he come home like he was suppose to or like he did before he went away?

A No.

Q Did he change as far as his daily habits at home?

A He wanted to sleep all day and stay up all night.

Q Did he ever talk to you or tell you he was considering suicide?

A No.

Q Were you concerned about him at this time?

A No.

Q Was he out interviewing for jobs?

A He said he was a couple of days.

Q Did he come back and start attending church as he had before?

A No, he didn't.

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.

Q That's all.

CROSS EXAMINATION

BY MR. DAVIS:

Q I'm Van Davis and I'm one of the D.A.'s here. How long was he up in Kentucky before he came back in the fall or November?

A Five months.

Q You say he got into a fight and they sent him home. When did he get back to Ashville?

A October 27th.

Q And he moved in with you?

A Yes, sir.

Q Where did you live at that time?

A I lived in the Ashville Apartments.

Q What number?

A 140.

Q When did you move out of No. 140?

A Not 140, but 141.

Q You were a next door neighbor to Melanie?

A Across the thing.

Q That's all.

MS. WILSON: No further questions.

(Outside hearing of the jury.)

THE COURT: Let the record reflect that the alternate juror remains in the courtroom during these proceedings.

Penalty Phase Testimony – Eloise Williams

R. 560-66

The alternate will not be allowed to participate in any deliberations at any stage unless the alternate is required to serve. The Court is keeping the alternate around and remains under all the rules previously given to the other jurors. It is out of abundance of caution that should something happens, the Court feels that the alternate at that point could still be used. I don't know of any case law one way or the other. The alternate has not been allowed to participate in any of the deliberations, nor was the alternate back in the jury room with the remainder of the jury at any time during the deliberations, but is merely sitting with the jury at this point.

(Jury in jury box)

ELOISE WILLIAMS

Witness called by the defendant, was sworn and testified as follows.

DIRECT EXAMINATION

BY MS. WILSON:

Q State your name, please.

A My name is Eloise Williams.

Q What is your address, please?

A 587 10th Street, Ashville, Alabama.

Q Are you related to the defendant, Marcus Williams?

A Yes, I am.
Q How are you related?
A I'm his aunt.
Q Have you known him all his life?
A Yes, I have.
Q Have you been around him throughout his life?
A Yes, I have.
Q Are you familiar with the nature of his home life as a small child?
A Yes, I am.
Q Tell the Jury, if you would, please, what that was like.
A As I have said before, I have known Marcus all his life. And his home life was not very good.
Q Can you describe what not very good would be?
A He was from one family to another. He stayed with me for a while--for about eight years. As a child, he was with his grandfather and sometimes with his uncle, and sometimes with his mother. He did not have a stable home.
Q His mother was very young when he was born. Is that correct?
A Yes, his mother was very young and did not know a lot about motherhood and responsibilities. She had a hard time. He was left from one place to another, you know.
Q You said for a good while he lived with you. Is that

correct?

A Yes, he did.

Q While he lived with you--well, how about his daddy? Was he around?

A His daddy was never around.

Q Did Marcus know his father?

A Yes, maybe at a later time. At the time he was with me, I never saw his father.

Q Would his mother visit often while he stayed with you?

A Well, sometimes, but not very often--just out and in.

Q Did you observe or did Marcus have a difficult time or miss his mother?

A Yes, he did.

Q Did he appear to be a happy child?

A No, he was not very happy. He was sad and withdrawn, you know. He wanted to be with his mother. He told me that.

Q He knew her circumstances?

A He knew her circumstances, that, you know, she was without work a lot of times and didn't have a place to stay at all times because her grandmother raised them, you know. It was hard for her and it was hard for him.

Q After Marcus got up in high school, did you continue to see him and know what was happening?

A Yes.

Q Do you know whether or not Marcus has any significant

criminal history?

A No, he has not had any. I followed him all the way up, you know, through school.

Q He was not a trouble-maker growing up or was always getting into trouble?

A No, he was not. He was just a withdrawn child that needed love and he didn't all the time get it. He was looking for something that you know he had not found.

Q Are you aware of any fights Marcus has been in in the past?

A Sometimes he had like a quick temper, you know. He did have a fight downtown here.

Q As a teenager?

A Yes, you know typical things that happen with teen-agers.

Q Was he arrested at that time?

A Yes, I believe he was.

Q He was a teenager?

A Yes, he was.

Q Do you know if that was disposed of or resolved?

A It was disposed of. I think he worked his time out on the community here, you know--done work in the community, picking up paper and sweeping the streets and things along that line. He worked that time out, you know.

Q Do you know if that is the only trouble he has been

in to your knowledge?

A Yes.

Q In high school, what kind of student was Marcus?

A He was a fairly good student. He could have been a lot better than what he was. He just didn't apply himself to all his possibilities because, you know, he was unhappy. He could have been an A-student if he had just pressed to that mark.

Q Was Marcus close to anyone, to your knowledge?

A He was close to his grandfather and he died. He was close to his uncle and he got killed in a fatal accident. You know, he didn't have a lot of friends. He was like a loner at times. You know, he was just depressed. I always said he needed counseling, you know.

Q After he left high school, did Marcus adjust well?

A No, he didn't. He couldn't find work and all things on that line. He got hurt in high school. I think he had ambition of being a great ballplayer. That played out when he hurt his leg and had to have surgery. He didn't have the home life he wanted. He felt like his mother didn't care, you know.

Q After he left high school, did he have his own place to live?

A No.

Q Did he have regular employment?

A Not regular, it was up and down, you know. He didn't have a car and that made it hard.

Q Are you aware of anything in particular that seemed to change Marcus as far as his habits and personality and activities?

A Yes, I began to notice he had changed--drinking, you know and maybe drugs.

Q When did this occur?

A Not long before all this other happened.

Q Does Marcus have children?

A Not that I know of.

Q Have you visited and been in contact with Marcus since he has been in jail awaiting trial on this matter?

A Yes, I have.

Q Have you visited with him there?

A Yes, I have.

Q Are you aware of any trouble he has had in jail as far as disciplinary infractions or has he gotten into trouble for misbehaving?

A No.

Q You said you have gone to visit him?

A Yes, I have.

Q Have you discussed this case with him?

A Yes, I talked to him about it. Usually when I go into the jail and talk with him, I take him spiritual books to

read, the Bible. I talk to him about turning his life to God.

Q Has he expressed to you an understanding of what has happened?

A Yes, he has. You know, he has told me he is sorry and he had repented, and he has asked the Lord to forgive him. And you know--

MR. WILLIAMSON: Judge, we object to this line of testimony. It is not proper in this hearing.

THE COURT: Overruled.

MS. WILSON: Nothing further.

MR. DAVIS: No questions, Your Honor.

MR. FUNDERBURG: Judge, that is all the witnesses we have, but we would offer State's Exhibit No. 8 from the original trial.

MR. DAVIS: That was offered at a hearing, and not in the trial.

THE COURT: Right.

MR. DAVIS: Is he offering it for the purpose of that hearing?

THE COURT: He is offering it now as an exhibit to the sentence hearing.

MR. DAVIS: Judge, I don't think that document was referred to in front of the jury.

THE COURT: No, it was not.

MR. DAVIS: I don't object to it.

Excerpt of Sentencing Order

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children in her desperate struggle in resisting the forcible rape by the defendant, intentionally caused the death of Melanie Rowell by strangling her.

Statutory Mitigating Circumstances

As to the existence or non-existence of mitigating circumstances as set forth in §13A-5-51 the Court makes the following findings:

(1) The defendant has no significant history of prior criminal activity;

The court finds that there was not a preponderance of the evidence presented to disprove the existence of this mitigating circumstance, and therefore this mitigating circumstance is found to exist.

(2) The capital offense was committed while the defendant was under the influence of extreme mental or emotional disturbance; Although this issues was not injected by the defendant, the Court finds that based upon the report of the Department of Mental Health the Court finds by a preponderance of evidence that the defendant was not under the extreme mental or emotional disturbance at the time of the offense.

(3) The victim was a participant in the defendant's conduct or consented to it; the court finds by a preponderance of the evidence that this mitigating circumstance does not exist,

(4) The defendant was an accomplice in the capital offense committed by another person and his participation was relatively minor; the court finds by a preponderance of the evidence that the defendant acted alone and that this mitigating circumstance does not exist,

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(5) The defendant acted under extreme duress or under the substantial domination of another person; the court finds by a preponderance of the evidence that the defendant acted alone and that this mitigating circumstance does not exist,

(6) The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; This issue is interjected by evidence that the defendant was under the influence of an illegal controlled substance and alcohol at the time of the offense, The Court looks to the following evidence:

The defendant's deliberateness and forethought in accomplishing the offense (e.g. after attempting to gain entry through a locked door, his presence of mind to secure a quite and covert entry through means of an open window, his presence of mind to take a knife from the victim's kitchen to perpetrate his crime, his forethought to check on whether the children were awake as witnesses).

The deliberateness and forethought of the defendant in covering up his offense by disposing of evidence after the crime,

The court also notes that the defendant's recollection of the crime in giving law enforcement officers a detailed statement concerning his participation in the crime.

The Court would further take judicial notice of the fact that subsequent to the acts of this capital murder offense, the defendant broke into the home of another female under circumstances similar to the ones in this cause. While the

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court does not consider this fact for any aggravation, the court does consider this as evidence as to the non-existence of this mitigating factor.

(7) The age of the defendant at the time of the crime. The defendant was a 21 year old adult at the time of the offense. While a 21 year old does not possess all of the judgment of someone older, a 21 year old does possess the judgment to know that breaking into the apartment of a single mother of two small children and a forcible rape at knife point is wrong and not to be tolerated by a civilized society. The killing of the victim during the course of the burglary and rape by a 21 year old adult in this case demonstrates by a preponderance of the evidence that the age of the adult defendant is not a mitigating circumstance.

Non-Statutory Mitigating Circumstances

Pursuant to §13A-5-52 the Court considers the following non-statutory mitigating circumstances urged by the defendant and suggested from the evidence.

1. The defendant' s cooperation with law enforcement: But for the defendant's cooperation the state would not have obtain sufficient evidence for a conviction. Again the Court looks to the defendant's subsequent breaking and entering of another female's house, which was, what brought the defendant to the attention of law enforcement in connection with this case. It was after the defendant's arrest in that case that the defendant made his statements. The defendant did not turn himself in during the days after this offense when law enforcement was looking for the perpetrator. The court finds by a preponderance of the evidence that this mitigating circumstance does not exist.

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2, The circumstances of defendant's upbringing, his problem resulting from the end of a promising athletic career, his attainment of his GED after failing to graduate from high school all as reported in the presentence report and testified to in testimony by his mother and aunt at the jury sentencing phase, and from the letter exhibits submitted in lieu of witness. The court finds no evidence to place these facts in dispute so these mitigating circumstances are found to exist.

3. The defendant's remorse. Based on the defendant's testimony and demeanor during his testimony, the court is not persuaded one way or another as to the defendant's remorsefulness or lack thereof. As such the court must consider the defendant's apparent remorse as a mitigating circumstance.

Weighing the Aggravating and Mitigating Circumstances

It is within the sentencing court's responsibility to establish the weight to be given mitigating circumstances and the weight to be given an aggravating circumstance. After weighing the aggravating and mitigating circumstances in this cause, the Court finds that the aggravating circumstances outweigh the mitigating circumstances.

Sentence of the Court

It is therefore **ORDERED, ADJUDGED** and **DECREED** that the defendant Marcus Bernard Williams be and is hereby sentenced to death.

It is further **ORDERED, ADJUDGED** and **DECREED** that an automatic appeal be filed pursuant to the laws of this state.