***** CAPITAL CASE *****

No. 24-____

In the Supreme Court of the United States

ULYSSES CHARLES SNEED,
Petitioner,

v.

WARDEN, HOLMAN CORRECTIONAL FACILITY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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***** CAPITAL CASE *****

QUESTION PRESENTED

By statute, a state prisoner is entitled to appeal the denial of his constitutional claims for federal habeas relief if he can show "that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). As this Court has clarified, this standard does not call for review of the merits of a prisoner's claims—indeed, it forbids it. *Id.*; *Miller-El*, 537 U.S. at 335-36. And where "a" single "circuit justice or judge" finds that this standard is met, 28 U.S.C. § 2253(c)(1), a certificate of appealability (COA) must issue and an appeal allowed.

In this capital case, after making multiple findings on the merits of petitioner's Sixth Amendment ineffective assistance claims, a single Eleventh Circuit judge ruled that he had failed to meet the COA standard. But Judge Adalberto Jordan, dissenting from the denial of reconsideration of that ruling, explained why, in light of the record, petitioner had met the standard and declared that he would grant a COA. Here, not only "could" reasonable Circuit judges "disagree" over the district court's denial of habeas relief—they *did*.

This case accordingly presents the following question on which the circuits are deeply divided and that several of this Court's members have expressly determined warrants review:

> Did the court of appeals err in denying petitioner's application for a COA as to his constitutional habeas claims where (i) a circuit judge found that the COA standard had been met and (ii) the court denied a COA based on its ruling on the merits of those claims.

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Ulysses Charles Sneed respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The Eleventh Circuit's order denying a COA is unpublished but available at 2024 WL 4472003. Its order denying petitioner's motion for reconsideration is unpublished but available at 2024 U.S. App. LEXIS 30185. Its orders denying petitioner's (i) motion to suspend Circuit Rule 22-1(C) and permit petitioner to petition for rehearing en banc and (ii) motion for reconsideration of that order are unpublished.

The district court's opinion denying habeas relief is unpublished but available at 2022 WL 3974490.

This Court's order denying the petition for a writ of certiorari concerning post-conviction relief is published at 580 U.S. 917. The Alabama Supreme Court's order denying the petition for a writ of certiorari concerning post-conviction relief is published at 227 So. 3d 460. The Alabama Court of Criminal Appeals' (ACCA) opinion denying rehearing of its affirmance of the denial of post-conviction relief is published at 222 So. 3d 379. The ACCA's opinion affirming that denial is published at 195 So. 3d 1077. The Circuit Court of Morgan County, Alabama's opinion denying post-conviction relief is unpublished.

This Court's order denying the petition for a writ of certiorari concerning petitioner's second conviction and sentence on direct appeal is published at 555 U.S. 1155. The Alabama Supreme Court's order denying the petition for a writ of certiorari concerning petitioner's second conviction and sentence on direct appeal is unpublished. The ACCA's opinion affirming petitioner's second conviction and sentence on direct appeal is published at 1 So. 3d 104. The ACCA's order denying rehearing of its affirmance is unpublished. The Circuit Court of Morgan County's orders concerning petitioner's second conviction and sentencing are unpublished.

This Court's order denying the petition for a writ of certiorari concerning the reversal and remand by the Supreme Court of Alabama of petitioner's first conviction and sentence on direct appeal is published at 531 U.S. 1183. The Alabama Supreme Court's

opinion reversing the affirmance of petitioner's first conviction and sentence on direct appeal and remanding for further proceedings is published at 783 So. 2d 863. The Alabama Supreme Court's denial of the application for rehearing of this opinion is published at 783 So. 2d 863. The ACCA's opinion affirming petitioner's first conviction and sentence is published at 783 So. 2d 841. The Circuit Court of Morgan County's orders concerning petitioner's first conviction and sentencing are unpublished.

JURISDICTION

The Eleventh Circuit issued its order denying reconsideration of its COA denial on November 26, 2024. (Pet.App.5a-12a.) On February 12, 2025, Justice Thomas extended the time to file this petition to March 26, 2025. No. 24A781. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VI provides:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. XIV provides, in relevant part:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

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28 U.S.C. § 2253 provides, in relevant part:

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

***

(c)

(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from—

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

INTRODUCTION

Postconviction habeas relief is an integral part of our criminal justice system. It safeguards fairness and prevents miscarriages of justice. In a death-penalty case, the reasons to grant a COA and authorize an appeal on the merits from the denial of habeas relief become even more compelling. An appeal should be allowed where a person's life is at stake so that not only is there an appearance of fairness, but that fairness in fact exists. Unfortunately, and indeed tragically, in numerous cases—and this is one—the COA process reflects exactly the opposite. This case raises foundational issues regarding the COA standard and the scope of an appellate court's jurisdiction in applying it. This Court's intervention is needed to rectify a manifestly erroneous and unjust COA denial.

Prisoners seeking to appeal the denial of postconviction habeas claims must first obtain a COA, which can be issued by "a circuit justice or judge[.]" 28 U.S.C. § 2253(c)(1) (the COA Statute). To obtain a COA, prisoners must show either "that 'jurists of reason could disagree with the district court's resolution of [their] constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (quoting *Miller-El v. Cockrell*, 537 U.S. 322, 327 (2003)). At this preliminary stage, courts are limited to conducting this "threshold inquiry" (*Miller-El*, 537 U.S. at 327) and, indeed, lack jurisdiction to make findings on the merits of prisoners' constitutional claims (*id.* at 336; *Buck*, 580 U.S. at 115). And in

many circuits—but not the Eleventh, which issued the decision below here—a COA issues so long as at least one circuit judge, one "jurist of reason," votes to grant one.

Here, a single Eleventh Circuit judge denied a COA based on (flawed) rulings on the merits of petitioner's Sixth Amendment ineffective assistance of counsel claims, in excess of her jurisdiction and contrary to this Court's settled precedent. The court of appeals declined to reconsider that ruling over the dissenting opinion of Judge Adalberto Jordan, who explained why he would grant a COA. The denial of a COA over a reasonable jurist's dissent aligned with the law of five other circuits (in addition to the Eleventh), but contravenes the law in four others, where a COA issues if, as here, one circuit judge says it should. The Court should grant this petition to reinforce the prohibition on merits determinations at the COA stage and resolve the division in the circuits over the effect of a judge's finding that a COA should issue. There must be one nationwide rule tracking what the COA Statute unambiguously provides: a COA should issue where "*a* circuit … judge" (emphasis added) states that he or she would grant one.

In 1993, petitioner Mr. Sneed, a 23-year-old with a deeply troubled background marked by serious mental illnesses, participated in a convenience store robbery. During the robbery, without warning, John Hardy shot and killed the store clerk. Petitioner was unarmed and did not hurt anyone. Because of his participation in the robbery, petitioner was convicted

of robbery-murder. By a vote of 7-5, a jury declined to impose the death penalty. But that decision was overridden by the sentencing judge under a statute that is constitutionally infirm, *see Hurst v. Florida*, 577 U.S. 92 (2016) (invalidating similar Florida override statute), and has since been repealed.

Petitioner's legal representation at trial and sentencing was woefully deficient by any rational measure. During the sentencing phase in particular, counsel failed to call a single family member, friend, neighbor, or the mothers of petitioner's children. These individuals were available and would have testified about the horrific physical and sexual abuse inflicted on petitioner, the severe privation he endured, his many positive character traits, and other humanizing aspects of his personality and life experience. Counsel also failed to retain and call Dr. Stanley Brodsky, a clinical psychologist, who found, following a comprehensive evaluation, that petitioner suffered from Major Depressive Disorder and post-traumatic stress disorder (PTSD) at the time of the robbery.

Despite counsel's ineffectiveness, the district court denied petitioner's habeas petition and refused to grant a COA. A single Eleventh Circuit judge declined to issue a COA as well, but only after making multiple findings on the merits of petitioner's Sixth Amendment claims. And on reconsideration, while that judge and one other maintained the COA denial was appropriate, another circuit judge dissented, explaining why he would grant a COA and how his

colleagues' denial depended on improper merits determinations.

The majority's ruling breaks sharply from this Court's precedent and the COA Statute. It also implicates a wide, and continually deepening, circuit split over whether a COA should issue where, as here, a circuit judge finds it should—a split that several members of this Court have expressly identified as one that urgently warrants review. *See Johnson v. Vandergriff*, 143 S. Ct. 2551, 2553-54 (2023) (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from the denial of application for stay and denial of certiorari); *see also Jordan v. Fisher*, 576 U.S. 1071, 1076 (2015) (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from the denial of certiorari).

The disuniformity in the circuits will continue to reign until this Court steps in. This is not hyperbole; it is proven fact. Prisoners in Eleventh Circuit-neighboring South Carolina—and more than a dozen-and-a-half other states around the country—are able to appeal if one judge decides a COA should be issued. But prisoners who are incarcerated in Alabama, Florida, Georgia, and many other states, who likewise succeed in persuading a judge they are entitled to a COA, are deprived of an opportunity to present their case on the merits.

This apparent arbitrariness is anathema to the heightened justice the Constitution demands when deciding whether the state may put a person to death. *See Turner v. Murray*, 476 U.S. 28, 35 (1986) ("'[T]he qualitative difference of death from all other

punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination'") (citation omitted). The Court should grant certiorari and insist on uniformity in the law governing COAs.[1]

STATEMENT

I. Petitioner's Traumatic Early Years, Mental Illnesses, And Positive Character Traits

At the time of the robbery, petitioner was 23 years old and had suffered a horrific early life. He was physically abused by his father and his mother's boyfriend, witnessed them abusing his mother, and, at the age of only 8 or 9, was brutally raped by a stranger. (Pet.App.29a-30a.) Learning-disabled and overweight, petitioner was routinely bullied and attempted suicide by cutting his wrists. (*Id.* at 112a, 231a-232a.)

By the time of the robbery, petitioner suffered from two major mental illnesses—"Major Depressive Disorder" and PTSD—and was addicted to drugs. (*Id.* at 111a, 172a.) He also had an extensive history of mental-health diagnoses and hospitalizations, *id.* at 29a, 112a, during which he would talk to himself, beat the walls, and yank out faucets until staff sedated

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[1] The issue of whether a COA should be granted where circuit judges in fact disagree that the underlying claims warrant appellate review is also presented in *Shockley v. Vandergriff*, No. 24-517, which is pending before this Court.

him with the antipsychotic drug Thorazine. (*Id.* at 112a.).

Despite his harsh life, petitioner was known as a polite and well-mannered person who had a gentle demeanor, displayed great concern for others, and was desperate to be accepted. (*Id.* at 225a, 227a.) Prior to this offense, he had no significant criminal history. (*Id.* at 27a.)

II. The Convenience Store Robbery

In 1993, while visiting family in Alabama, petitioner met John Hardy. (*Id.* at 150a.) One evening, after drinking and smoking marijuana, Hardy and petitioner decided to rob a convenience store so they could buy more drugs and alcohol. (*Id.*) A surveillance camera captured the robbery, which showed Hardy bursting into the store with a rifle and immediately shooting the clerk. (*Id.*) Hardy fired several additional rounds at the clerk while Mr. Sneed attempted to open the cash register. (*Id.*) The crime lasted 35 seconds. Petitioner was unarmed and did not harm anyone himself. (*Id.* at 150a-152a, 235a.)

III. After Petitioner's Robbery-Murder Conviction Is Vacated, His Counsel Fails To Call Key Witnesses On Retrial

In 1994, petitioner was indicted for the capital offense of robbery-murder, and after being tried with Hardy, he was convicted and sentenced to death. Six years later, the Alabama Supreme Court reversed the conviction on grounds that the State had improperly

introduced evidence. *Ex Parte Sneed*, 783 So. 2d 863, 869, 871 (Ala. 2000).

On retrial, the trial judge appointed counsel for petitioner who lacked experience in capital cases. Clerk's Record at 174 ¶4 in the Circuit Court of Morgan County, Alabama, *Alabama v. Sneed*, No. CC 93-1307.80, as compiled and certified for direct appeal to the Alabama Court of Criminal Appeals, *Sneed v. Alabama*, No. CR-05-2033. At the guilt phase, petitioner's counsel presented only two witnesses, including petitioner, but did not call a single lay or expert witness or present any evidence of petitioner's traumatic and abusive childhood or his positive qualities. Reporter's Transcript at 32.354-361 in the Circuit Court of Morgan County, Alabama, *Alabama v. Sneed*, No. CC 93-1307.80, as compiled and certified for direct appeal to the Alabama Court of Criminal Appeals, *Sneed v. Alabama*, No. CR-05-2033 ("R.__"). And, despite possessing evidence of petitioner's mental illnesses, counsel stated they were "*not* claim[ing that Sneed] suffered any mental disease or defect." (R.1158 (emphasis added).) The defense rested within hours, and the jury found petitioner guilty. (R.958-959.)

IV. At The Penalty Phase Of His Retrial, Counsel Again Fails To Call Key Lay Witnesses And Presents Only Limited Expert Evidence That Fails To Reflect The Severity And Timing Of Petitioner's Mental Illnesses

During sentencing, petitioner's counsel again presented two witnesses: a psychologist, Dr. Mary

Ann Rosenzweig, who spent a total of 15 minutes with petitioner and performed a few cursory tests on him; and a social worker, Ms. Jo Ann Terrell, who interviewed petitioner and some family members. (Pet.App.11a, 29a, 174a.)

Dr. Rosenzweig's limited testing suggested petitioner had PTSD symptoms and a borderline personality disorder in the six months prior to the testing. (*Id.* at 174a.) But she admitted they provided "no indication of … what [petitioner. Sneed] might have been experiencing" *at the time of the crime*. (R.1020 at 7-13.) Nor, she acknowledged, could her tests confirm a definitive diagnosis of mental illness. (Pet.App.28a.)

Ms. Terrell testified about some of petitioner's mental-health history and noted he had been treated at behavioral facilities. (*Id.* at 29a, 174a.) But as a social worker, she did not—and could not—provide a diagnosis regarding petitioner's mental health at the time of the crime.

Even though more than 10 of petitioner's family members, friends, and the mothers of his three children were able and willing, none of them were called to testify about petitioner's character, positive qualities, traumatic background—or anything else. (*Id.* at 223a-235a.) Nor did counsel call an independent psychologist, Dr. Brodsky, who, based on a comprehensive assessment of petitioner, would have testified to the major mental illnesses petitioner suffered from at the time of the crime. (*Id.* at 111a-113a.)

V. After The Trial Judge Overrides The Jury's Rejection Of The Death Penalty, Petitioner's Request For Habeas Relief Is Denied

By a 7-5 vote, the jury rejected the death penalty and recommended petitioner be sentenced to life without parole. (*Id.* at 148a.) But under Alabama's now-repealed capital-sentencing scheme, the trial judge overrode the jury's verdict and imposed the death penalty. *See id.*; Ala. Code §§ 13A-5-46(e), 13A-5-47(e) (amended 2017). To reach that ruling, the judge made a series of novel factual findings, including that the State had proven beyond a reasonable doubt that "the capital offense was especially heinous, atrocious or cruel compared to other capital offenses[,]" an aggravating factor under Alabama's sentencing scheme. (*Id.* at 26a.)

After his appeals and postconviction claims were rejected in state court, Mr. Sneed petitioned for federal habeas relief pursuant to 28 U.S.C. § 2254(d). (*Id.* at 21a, 32a.) In making his Sixth Amendment ineffectiveness claim under *Strickland v. Washington*, 466 U.S. 668 (1984), he argued that his counsel had failed to conduct an adequate mitigation investigation, failed to call any lay witnesses, and failed to retain and call clinical psychologist Dr. Brodsky. (Pet.App.98a-99a, 111a, 129a.)

The district court nevertheless denied the petition and declined to issue a COA. (*Id.* at 21a-143a.) In addressing petitioner's ineffectiveness claims, the court did not defend counsel's deficient mitigation investigation, and it acknowledged that uncalled lay witnesses would have provided relevant

testimony concerning petitioner's upbringing and positive qualities. (*Id.* at 103a-105a.) Nevertheless, the court speculated—without substantiation and despite their inadequate investigation—that counsel could have made a strategic decision to present information through Ms. Terrell instead. (*Id.* at 106a.) The court also found no prejudice because in its view, the personalized testimony from family and friends would have been cumulative of Ms. Terrell's second-hand observations. (*Id.* at 105a-106a.)

As for the failure to retain and call Dr. Brodsky, the court found that it did not rise to the level of deficient performance under *Strickland* because counsel sought funding to retain him, but the trial judge declined to provide it. (*Id.* at 117a-118a.)

VI. A Single Eleventh Circuit Judge, On Review Of The Merits, Denies Petitioner's COA Request And A Divided Panel Upholds The Denial Despite A Substantive Analysis To The Contrary In Dissent

Mr. Sneed applied for a COA in the Eleventh Circuit. (*Id.* at 1a.) He argued that a COA was warranted because reasonable jurists could debate whether he received constitutionally ineffective assistance based on counsel's failure to (1) conduct an adequate mitigation defense and call lay witnesses to support it, and (2) retain and call Dr. Brodsky. (*Id.* at 1a-3a.)

The State filed no response and a single circuit judge, Judge Elizabeth Branch, proceeded to deny a COA. (*Id.* at 1a-4a.) Addressing petitioner's

unpresented lay witness claim, she conclusively determined that "[a]ll of the [factual] information" that uncalled witnesses would have provided would have been "cumulative" of the testimony of petitioner's two experts. (*Id.* at 2a.) As for the failure to retain Dr. Brodsky, Judge Branch likewise definitively declared that, based on what the "record shows," "counsel's performance was not deficient." (*Id.* at 2a-3a.)

Petitioner moved for reconsideration of the denial, which a divided panel denied. (*Id.* at 5a-12a.) The majority—consisting of, again, Judge Branch, joined by Judge Barbara Lagoa—did not adopt Judge Branch's earlier finding that "[a]ll of the information" the uncalled witnesses would have been cumulative of what the two experts said. Instead, the majority concluded that the petitioner's lay-witness claim failed because he cited "no authority for the proposition that testimony from lay witnesses who personally knew him is necessarily more credible or compelling than the same testimony offered by expert witnesses." (*Id.* at 6a.)

On the Dr. Brodsky claim, the majority saw no issue with counsel spending their state funding on experts other than Dr. Brodsky. (*Id.* at 6a.) And without acknowledging the many material omissions from counsel's motions for further funding, the majority found "no indication that had counsel simply done more …, the additional funding" for Dr. Brodsky, a psychologist who could have testified to petitioner's mental illnesses at the time of the crime, "would have been secured." (*Id.* at 7a.)

Judge Adalberto Jordan dissented and would have granted a COA. (*Id.* at 8a-12a.) He "fear[ed]" that the majority had "essentially conducted a merits review and determined conclusively that Mr. Sneed would not succeed on his ineffective assistance of counsel claims…." (*Id.* at 8a.) Applying the threshold inquiry that was required, Judge Jordan concluded that both of petitioner's ineffective-assistance claims were at least debatable and thus deserved full appellate review on their merits.

To start with, Judge Jordan found that reasonable jurists could disagree over whether the testimony of uncalled lay witnesses "would have resonated more with the jury or the trial court if presented by family members and friends who knew him (as opposed to a dispassionate social worker merely relaying what others had told her)." (*Id.* at 9a.) That was particularly true given that "Mr. Sneed is not the typical capital defendant" but, rather, an "unarmed" participant in a robbery who received a "vote of 7-5" in favor of life even without that unpresented testimony, which would have detailed his "'grinding poverty,'" physical abuse and abandonment, an emotionally unavailable mother, and attempted suicide. (*Id.* at 8a-9a.)[2]

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[2] Judge Jordan and the majority found that petitioner abandoned an ineffectiveness claim based on unpresented lay testimony regarding petitioner's "personality/positive characteristics, learning abilities, and remorse." (*Id.* at 9a n.3 (Jordan, J., dissenting).) But unpresented lay testimony on other topics, including petitioner's traumatic upbringing, fully supports an ineffectiveness claim on

Continued on following page

Judge Jordan also found it at least debatable whether counsel's attempts to retain Dr. Brodsky were adequate. Specifically, in their funding motions, counsel: (i) failed to point out that under *Ake v. Oklahoma*, 470 U.S. 68 (1985), "a capital defendant has a Fourteenth Amendment right to an independent mental-health evaluation"; (ii) did not explain the compelling need for a mental-health diagnosis given that "two mitigating factors could only be shown by proper medical evidence" under Alabama law; (iii) "delayed" in making the funding request until "only shortly before trial"; and (iv) wasted "the limited funds they did have on non-critical experts." (Pet.App.10a-11a.)

Barred by Eleventh Circuit rules from petitioning for rehearing en banc, *see* 11th Cir. R. 22-1(c), petitioner asked the Circuit to suspend those rules and allow a petition. (Pet.App.13a.) The same panel that denied reconsideration of the single-judge COA denial also denied the motion to suspend—and a

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which reasonable jurists could disagree—as Judge Jordan concluded. The panel also had it wrong on the purported abandonment. Petitioner raised these issues in multiple postconviction pleadings, including petitioner's opening brief in the Alabama Court of Criminal Appeals, as well as in petitioner's petition for writ of habeas corpus in the U.S. District Court. *See* Brief of Appellant at 64-82, *Sneed v. Alabama*, No. CR-12-0736 (Ala. Crim. App. filed June 11, 2013); Petition Under 28 U.S.C. § 2254 for Writ of Habeas Corpus ¶¶ 12, 13, 55, 60, 66-68, 70, 74, 77-78, 81, 114-23, 133, *Sneed v. Raybon*, No. 5:16-cv-1442, 2022 U.S. Dist. LEXIS 157227 (N.D. Ala. Aug. 31, 2016).

subsequent motion for reconsideration—both over Judge Jordan's dissents. (*Id.* at 13a-14a.)

REASONS FOR GRANTING THE PETITION

As this Court has repeatedly stressed, the standard for evaluating a COA request entails a limited "threshold inquiry": whether reasonable jurists could debate the district court's resolution of a prisoner's claims for habeas relief. *Miller-El*, 537 U.S. at 327. That inquiry is one of jurisdictional significance—"until a COA has been issued federal courts of appeals lack jurisdiction to rule on the merits of appeals from habeas petitioners." *Id.* at 336. And in many circuits, the COA standard—whether reasonable jurists could debate the matter—is met where at least one, presumptively reasonable, circuit judge has found that it is. But that is not the case in the Fifth, Sixth, Eighth, Tenth, and D.C. Circuits. Nor, as this case confirms, the Eleventh.

The Eleventh Circuit's merits-based COA denial here further entrenches the deep split in the circuits on whether a COA must be issued where at least one federal court of appeals judge—here, one who has sat on the federal bench for more than a quarter-century, served for many years before that as a federal prosecutor, clerked for a Justice of this Court, and has reviewed and ruled upon numerous COA requests in one of the busiest habeas appellate courts in the country—says it should.

The importance of these issues to our criminal justice system is self-evident. This Court vigilantly enforces jurisdictional limits on the Judiciary, and it

has done so multiple times in the COA context, granting review where lower courts strayed beyond the strict confines Congress established. And as this Court's members have acknowledged, the refusal to grant a COA over a judge's vote to the contrary raises an issue of equal magnitude. *See Johnson*, 143 S. Ct. at 2553-54 (Sotomayor, J., dissenting from denial of certiorari); *Jordan*, 576 U.S. at 1076 (Sotomayor, J., dissenting from denial of certiorari).

This case is also an excellent case for resolving these issues. The divided decision below denying a COA rests unmistakably on definitive rulings on the merits of petitioner's constitutional claims. There is, moreover, no need for this Court to wait to bring uniformity to the law regarding the one-judge COA issue, where ten of the twelve circuits already have opted for one side of the issue or the other.

As things now stand, petitioner will be put to death before any federal appellate court—acting within its jurisdiction—performs a proper merits review of his substantial Sixth Amendment claims for relief from his death sentence. That is not what Congress intended, or what this Court's precedents allow, and it is, indeed, unconscionable. The death sentence here should not be carried out until the court of appeals reviews the merits of petitioner's claims and decides whether they entitle him to relief. This is not too much to ask; it is the very outcome that *Buck* demands. The petition should be granted.

I. The Decision Denying A COA Departs From This Court's Precedent And Raises Issues That Have Deeply Divided The Circuits

The court of appeals' divided ruling raises two concrete jurisdictional issues: can courts adjudicate a COA request by making merits determinations and must a COA be granted where at least one judge, after analyzing the record, believes that it should. This Court should grant review to resolve them.

A. The COA Denial Here Rests Improperly On Definitive Merits Determinations

This Court long has made clear that in determining whether to grant a COA under 28 U.S.C. § 2253(c)(2), courts must "limit [their] examination to a threshold inquiry[.]" *Miller-El*, 537 U.S. at 327. That "threshold inquiry" requires a petitioner to "'show that reasonable jurists could debate whether … the [habeas] petition should have been resolved in a different manner or that the issues presented were 'adequate to deserve encouragement to proceed further.'" *Id.* at 336 (citations omitted). While this inquiry "requires an overview of the claims in the habeas petition and a general assessment of their merits[,]" it "does not require full consideration of the factual or legal bases adduced in support of the claims." *Id.*

"In fact, the statute forbids" a "full" merits evaluation—and certainly, by extension, a definitive resolution of the underlying claims. *Id.* "When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a

COA based on its adjudication of the actual merits," however, "it is in essence deciding an appeal without jurisdiction." *Id.* at 336-37. Such an "inver[sion of] the statutory order of operations" also "place[s] too heavy a burden on the prisoner *at the COA stage*." *Buck*, 580 U.S. at 116-17 (emphasis original).

The Court has reiterated these principles on multiple occasions. Most recently, in *Buck*, it found error in the Fifth Circuit's denial of a COA, because although the court of appeals had "phrased its determination in proper terms—that jurists of reason would not debate that Buck should be denied relief—[] it reached that conclusion only after essentially deciding the case on the merits." *Id.* at 115-16 (internal citation omitted). The Fifth Circuit's jurisdictionally improper "merits determinations" were evinced by its evaluation, and definitive conclusion, that the petitioner had "'not shown extraordinary circumstances that would permit relief under Federal Rule of Civil Procedure 60(b)(6)[.]'" *Id.* at 116 (citation omitted). "But the question for the Fifth Circuit was not whether [the petitioner] had 'shown extraordinary circumstances'" to satisfy a merits burden that did not yet exist and which the petitioner had no opportunity to yet brief "in the normal course." *Id.* at 116, 117 (citation omitted). Instead, the operative question—which the Fifth Circuit failed to answer—was simply whether the district court's denial of habeas relief was "'debatable.'" *Id.* at 116 (quoting *Miller-El*, 537 at 348).

Like the Fifth Circuit in *Buck*, the court of appeals here failed to adhere to the statutory

jurisdictional limits and denied a COA based on its conclusion that petitioner's Sixth Amendment claims lacked merit. As in *Buck*, the court "phrased its determination" of petitioner's COA application "in proper terms": that "[r]easonable jurists would not find debatable" the district court's denial of his Sixth Amendment claims. (Pet.App.1a-4a.) But in substance, the court plainly analyzed—and rejected—them on the merits, exceeding its jurisdiction and contravening this Court's precedents. *See Buck*, 580 U.S. at 115-16; *Miller-El*, 537 U.S. at 336-37.

More specifically, in rejecting petitioner's ineffectiveness claim based on counsel's failure to call any lay witnesses, the single Eleventh Circuit judge made a definitive factual finding: that "[a]ll of the information … the lay witnesses would have provided concerning [Mr. Sneed's] childhood and background was introduced at the penalty phase through the testimony of his two experts." (Pet.App.2a.) She then made a conclusive legal determination in rejecting the notion "that lay witnesses who actually knew [Mr. Sneed] would have been viewed as more credible and their testimony more powerful[.]" (*Id.* at 2a.)

The judge proceeded to an ultimate merits resolution. Observing that "[c]ounsel is not constitutionally ineffective for failing to present cumulative evidence[,]"she applied that principle to the record and then definitively concluded that the uncalled witnesses' testimony here in fact would have been "cumulative…." (*Id.*; *compare with Buck*, 580 U.S. at 116 (reversing denial of COA where the court of appeals made "ultimate merits determinations" on petitioner's claims for relief instead of limiting its

examination to whether the district court's "'decision was debatable'") (citation omitted).) And although the court paid "lipservice" to the reasonable-jurist standard (*Tennard v. Dretke*, 542 U.S. 274, 283 (2004)), it did not apply that standard and determine whether a reasonable jurist could find a Sixth Amendment violation on this record.

Judge Branch followed the same flawed approach in considering petitioner's ineffectiveness claim regarding the failure to retain Dr. Brodsky. Once more, the court reached an ultimate merits conclusion that "counsel's performance was not deficient[,]" (Pet.App.2a-3a), despite the facts that—as Judge Jordan noted—petitioner's trial counsel: (i) failed to point out that under *Ake*, 470 U.S. 68, "a capital defendant has a Fourteenth Amendment right to an independent mental-health evaluation"; (ii) failed to explain the need for a mental-health diagnosis given that "under Alabama law two mitigating factors could only be shown by proper medical evidence"; (iii) "delayed the funding request[,]" making "it only shortly before trial"; and (iv) "used the limited funds they did have on non-critical experts." (Pet.App.10a-11a.)

Quite plainly, as Judge Jordan exposed, these are merits determinations forbidden by this Court's established precedent. Further, they were reached by a single judge without full briefing on the merits; without consideration of the extensive factual record; and without oral argument or the availability of en banc review.

This is, to echo what three Eleventh Circuit judges said in a similar setting, "the worst of three worlds…." *In re Williams*, 898 F.3d 1098, 1104 (11th Cir. 2018) (Wilson, J., joined by Martin and Jill Pryor, JJ., specially concurring). A single judge can deny a COA; she can do (and here did) so without jurisdiction and without "ever hear[ing] from the government before making [her] decision[,]" in an "information-devoid, nonadversarial" proceeding; and prisoners "may not bring mistakes to the court's attention through petitions for rehearing or petitions for rehearing en banc." *Id.* This is not justice or the appearance of it and certiorari should be granted to bring the Eleventh Circuit's approach to resolving COA requests in line with this Court's precedents. *See*. S. Ct. R. 10(c).

B. The COA Denial Despite A Dissent Adds To An Existing Circuit Split

The Question Presented encompasses another important (and related) issue on which the circuits are deeply divided: whether a COA must be issued where at least one circuit judge votes to issue one and explains why. Review is warranted so the Court can resolve this disagreement and make clear, consistent with the COA Statute, that a vote to grant a COA by "a circuit … judge" is sufficient to support issuance of a COA. *See* S. Ct. R. 10(a).

The COA Statute's plain text indicates that one circuit judge's determination that a COA should be issued provides the basis to grant one. *See* 28 U.S.C. § 2253(c)(1) (referring to COAs issued by "*a* circuit justice or judge") (emphasis added). If Congress had

intended to require multiple judges or a majority of a panel of judges or a court to issue a COA, it would have said so, as it does in similar contexts. *See*, *e.g.*, 28 U.S.C. § 46(c) (providing that en banc review may only be "ordered by a majority of the circuit judges of the circuit who are in regular active service"); 52 U.S.C. § 10304(a) (providing that "[a]ny action under this section shall be heard and determined by a court of three judges").

Indeed, that reasonable jurists could disagree where multiple Article III appellate judges *actually have disagreed* follows from logic and "common sense." *Johnson*, 143 S. Ct. at 2556 (Sotomayor, J., dissenting from denial of certiorari); *see also id.* at 2553 (reasoning that when judges actually "debate the merits of [a] habeas petition," that "'alone might be thought to indicate that reasonable minds could differ—*had differed*—on the resolution'" of the claim) (quoting *Jordan*, 576 U.S. at 1076) (Sotomayor, J., dissenting from denial of certiorari). Notably, in applying the similarly formulated reasonable-jurist standard that governs whether a constitutional rule applies retroactively on collateral review, this Court found "no need to guess" whether "reasonable jurists could have differed" because dissenting opinions in other cases expressed the differing views of *actual* "jurists" sitting on this Court. *Beard v. Banks*, 542 U.S. 406, 414-15 (2004).

In the Third, Fourth, Seventh, and Ninth Circuits, this straightforward logic is embraced. The Third Circuit's local rules provide that "[a]n application for a [COA] will be referred to a panel of three judges," and "if any judge on the panel is of the

opinion that the applicant has made the showing required by 28 U.S.C. § 2253, the certificate will issue." 3d Cir. L.A.R. 22.3 (2011). The Fourth Circuit's rules similarly state that a "request to grant or expand a certificate … shall be referred to a panel of three judges," and if "any judge of the panel is of the opinion that the applicant has made the showing required by 28 U.S.C. § 2253(c), the certificate will issue." 4th Cir. Loc. R. 22(a)(3) (2024).

The Seventh Circuit has interpreted its rules to require that a COA must issue where any one judge "concludes ... that the statutory criteria for a certificate have been met." *Thomas v. United States*, 328 F.3d 305, 309 (7th Cir. 2003) (interpreting Operating Procedure 1(a)(1)). And the Ninth Circuit's rules provide that the court can only deny a COA if a panel unanimously agrees to do so. *See* 9th Cir. General Order 6.2(b), 6.3(b), 6.3(g) (2024); *see also McGill v. Shinn*, 16 F.4th 666, 706 & n.14 (9th Cir. 2021) (granting COA despite majority concluding that COA should not issue).

By comparison, the Fifth, Sixth, Eighth, Tenth, Eleventh and D.C. Circuits deny COAs even when one or more of their judges conclude a COA should be issued. *See Ricks v. Lumpkin*, 120 F.4th 1287, 1291-93 (5th Cir. 2024) (Higginson, J., dissenting); *Crutsinger v. Davis*, 936 F.3d 265, 273 (5th Cir. 2019) (Graves, J., dissenting); *Wellborn v. Berghuis*, No. 17-2076, 2018 U.S. App. LEXIS 22931, at *1-2 (6th Cir. Aug. 16, 2018) (Donald, J. dissenting); *Rafidi v. United States*, No. 17-4272, 2018 U.S. App. LEXIS 21327, at *1 (6th Cir. July 31, 2018) (White, J., dissenting); *United States v. Ellis*, 779 F. App'x 570,

572 (10th Cir. 2019) (Bacharach, J., dissenting); *Melton v. Sec'y, Fla. Dep't of Corr.*, 778 F.3d 1234, 1235, 1237 (11th Cir. 2015) (Martin, J., dissenting); *Hutchinson v. Secretary, Fla. Dep't of Corr.*, No. 21-10508-P, 2021 U.S. App. LEXIS 12849, at *5 (11th Cir. Apr. 29, 2021) (Jordan, J., dissenting); *Blount v. United States*, 860 F.3d 732, 743 (D.C. Cir. 2017) (Williams, J., dissenting).

In a particularly extreme version of this position, the Eighth Circuit denies COAs even where *multiple circuit judges* would grant them. *See Shockley v. Crews*, No. 24-1024, 2024 WL 3262022, at *1 (8th Cir. Apr. 2, 2024) (Kelly, J., dissenting), *rh'g and rh'g en banc denied*, 2024 U.S. App. LEXIS 14010 (June 7, 2024) (Kelly & Erickson, JJ., dissenting), *pet. for cert. pending*, No. 24-317; *Johnson v. Vandergriff*, No. 23-2664, 2023 WL 4851623, at *1 (8th Cir. July 29, 2023), *cert. denied*, 143 S. Ct. 2551 (2023). As noted, this has prompted several members of this Court to specifically criticize the Eighth Circuit for imposing "too demanding" a standard "in assessing whether reasonable jurists could debate the merits of" a habeas petition. *Johnson*, 143 S. Ct. at 2553 (Sotomayor, J., dissenting from denial of certiorari).

In sum, ten circuits are nearly evenly divided on whether the vote of one of their members requires the grant of a COA—and their division is entrenched with no indication it will be rectified absent this Court's intervention.

* * *

The need for this Court's intervention is clear. A prisoner in Alabama and Missouri should be subject to the same appellate habeas rights as a prisoner in Pennsylvania and Oregon, in capital cases especially. *See Mackey v. United States*, 401 U.S. 667, 689 (1971) (Harlan, J., concurring in part and dissenting in part) ("Assuring every state and federal prisoner a forum in which he can continually litigate the current constitutional validity of the basis for his conviction tends to assure a uniformity of ultimate treatment among prisoners").

But in the current landscape, there is no such uniformity, and the result is not tolerable. One death-row prisoner with substantial constitutional claims will be executed despite never having received appellate review of the merits of his habeas claims, while another spared through a meritorious appeal of such claims, simply because of where they are incarcerated. That cannot be reconciled with the "vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason[.]" *Beck v. Alabama,* 447 U.S. 625, 637-638 (1980) (internal quotation marks omitted).

Ultimately, as Judge Jordan acknowledged, "[i]t may be that Mr. Sneed's claims will fail in the end[.]" (Pet.App.11a.) But we—this Court, the court of appeals, petitioner, and society as a whole—should know whether they will before the power of the state is exercised to end a man's life. If the Court grants review and ultimately rules in petitioner's favor, we will have the answer to that question one way or the other, and that is all Mr. Sneed asks for.

II. This Case Is An Excellent Vehicle For Rectifying Unpalatable Inconsistencies Infecting COA Review

This case is an excellent vehicle for resolving the systemically important Question Presented.

A. To begin with, the enforcement of congressionally enacted jurisdictional limits on the Judiciary is important in any context and indeed, the Court routinely grants certiorari to do so—including in COA disputes. *See Buck*, 580 U.S. at 115-16; *Miller-El*, 537 U.S. at 336-37; *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Such enforcement is especially important when it comes to COAs—and especially in COA disputes arising from the Eleventh Circuit. That is because, there, COA applications are almost always resolved by a single judge without the benefit of multiple-judge panel deliberation. *Infra* at 32. And, as this case illustrates, those single-judge decisions can be made without adversarial briefing, presentation of the factual and legal merits of the claims and any defenses to them, consideration of the full (and often extensive) factual record, or oral argument.

Indeed, merits arguments are out of place at the COA stage precisely because of what this Court's precedents make clear: the COA inquiry entails a limited and threshold analysis, not a full presentation on or consideration of the merits. Strict adherence to this jurisdictional bar is critically important to prevent single judges from rendering premature merits rulings without the benefit of a full presentation of the facts and relevant law or deliberation with their learned colleagues. And it is

all the more important where, as here, the habeas petitioner faces the looming prospect of execution.

Whether a COA should be granted where a single circuit judge would grant one presents an equally important threshold question. Again, several members of this Court have said so. *Johnson*, 143 S. Ct. at 2556 (Sotomayor, J., joined by Kagan and Jackson, JJ., dissenting from denial of certiorari); *Jordan*, 576 U.S. at 1076 (Sotomayor, J., joined by Ginsburg and Kagan, JJ., dissenting from denial of certiorari). In *Johnson*, three members of the Court would have granted certiorari to give "Johnson a meaningful opportunity to be heard[.]" *Id.* at 2556. Two of those three members—in addition to the late Justice Ginsburg—also would have granted review of the same issue 8 years earlier in *Jordan*, explaining that the "possibility that Jordan's claim may falter down the stretch should not necessarily bar it from leaving the starting gate." 576 U.S. at 1077.

And, once more, the fact that the decision in question comes from the Eleventh Circuit only reinforces the need for review. That circuit has adopted a range of rules and procedures that strictly circumscribe the availability of habeas relief to prisoners in Alabama, Florida, and Georgia and lead to arbitrariness in the COA process. Justice Sotomayor has described some of those constraining procedures as depicting a "troubling tableau," *St. Hubert v. United States*, 140 S. Ct. 1727, 1728 (2020) (Sotomayor, J., concurring in the denial of certiorari)—a "tableau" that the Eleventh Circuit's court's own judges have acknowledged. *See*, *e.g.*, *In re Blanc*, No. 20-11701-C, 2021 U.S. App. LEXIS 29458,

at *10 (11th Cir. Sept. 29, 2021) (Martin, J., dissenting) (criticizing Circuit's approach to "gatekeeping" function of certifying successive habeas petitions); *see also In re Williams*, 898 F.3d at 1105-06 (Martin, J., joined by Wilson and Jill Pryor, JJ., specially concurring) (criticizing Circuit's "use of rulings on prisoners' mere requests to file a second or successive application to create binding precedent" because the "job of courts of appeals in screening these motions was never meant to include merits decisions" and that practice "goes far beyond the prima facie examination called for by the statute").

In particular, apart from its rejection of the rule followed in many circuits that a COA should be granted so long as one circuit judge would grant it, the Eleventh Circuit's rules provide that COA applications are reviewed by just "a single circuit judge." 11th Cir. R. 22-1(c). Yet, on random occasions, the Circuit will sometimes empanel more than one judge to consider COA applications. *See* Julia Udell, *Certificates of Appealability in Habeas Cases in the United States Court of Appeals for the Eleventh Circuit: A Study*, (Dec. 24, 2019), https://ssrn.com/abstract=3506320. After that, rehearing en banc is not available, only a motion for reconsideration. 11th Cir. R. 22-1(c). But that motion is not subject to de novo review and it can be decided, at random, by two judges or three, and the panel can include the judge who made the original COA decision, as happened here.

In practice, these procedures produce the exact arbitrariness one would expect. The fate of COA applications in the Eleventh Circuit thus turns

largely on which judge or judges are designated to decide them. According to the above-cited study, some Eleventh Circuit judges grant fewer than 3 percent of the COAs they decide, while other judges grant over 25 percent. *See* Udell, *Certificates of Appealability*, at 9. Given the central importance of a COA, these disparities are far more than disquieting—they are manifestly unjust. This Court's review is, accordingly, needed to provide clarity in the threshold jurisdictional standard and how it should be applied.

B. This case also presents an excellent vehicle for deciding the Question Presented. First, it is cleanly presented on this record. There is no dispute that the single-judge order denying a COA was based on multiple factual, legal, and ultimate merits determinations. *Supra* at 22-25. Moreover, Judge Jordan explicitly disagreed with that ruling and stated that he would have granted a COA. And he reiterated that further review should be permitted in subsequent dissents from the panel's motion rulings.

Second, as evidenced by the decision below, lower courts continue to misapply the COA standard and exceed their jurisdiction despite this Court's clear and repeated holdings on the COA Statute's jurisdictional limits. (Pet.App.8a-9a (Jordan, J., dissenting)); *Hutchinson*, 2021 U.S. App. LEXIS 12849, at *6 (Jordan, J., dissenting); *Blount*, 860 F.3d at 743 (Williams, J., dissenting) (dissenting from denial of a COA because the "majority performs a full-blown merits review" contrary to the rule of *Buck*); *Brenner v. Irwin*, No. 23-1287, Pet. for Cert. 22 (U.S., June 6, 2024) (arguing that the court of appeals improperly

denied a COA on the basis of a merits determination in contravention of *Buck*); *Owens v. Stirling*, No. 20-975, Pet. for Cert. 24 (U.S., Jan. 15, 2021) (same); *Hanna v. United States*, No. 19-7131, Pet. for Cert. 34–35 (U.S., Dec. 23, 2019) (same); *Tharpe v. Sellers,* No. 17-6075, 583 U.S. 33 (2018), Pet. for Cert. 20-21 (same), Pet. for Cert. 24 (same); *Mansoori v. United States*, No. 17-119, 583 U.S. 872 (2017), Pet. for Cert. 7 (same). This Court thus should intervene to once clarify the controlling law and emphasize the paramount need for lower courts to adhere to it.

At the same time, no further percolation of the single-judge question would be helpful. The circuits remain deeply divided with no unification in sight. The issue is straightforward, too: if a sitting circuit judge says she would grant a COA and explains why, has the "reasonable jurist" standard been met? This Court need only say that "it has," just as the COA Statute expressly provides.

III. The COA Denial Here Was Wrong On The Record And The Law

The divided court of appeals' denial of a COA here was incorrect because petitioner made a "substantial showing of the denial of a constitutional right" as required by 28 U.S.C. § 2253(c)(2).

Here, Judge Jordan's express finding that he would grant a COA alone means the statutory COA standard was met. Article III judges nominated by the President and confirmed by the Senate are presumptively reasonable. *See Banks*, 542 U.S. at

414-15 (where members of this Court have disagreed, *a fortiori* "reasonable jurists" could disagree); *see also Blount*, 860 F.3d at 743 (Williams, J., dissenting) ("My colleagues have determined that no 'jurists of reason would find . . . debatable' whether Carlton Blount's habeas petition is timely. As a jurist formerly known as reasonable, I disagree.") (citation omitted). And where, as here, presumptively reasonable jurists disagree over whether a habeas appeal should be heard, a COA must issue, as the COA Statute dictates. *Supra* at 25-26.

Judge Jordan's conclusion is correct in light of the record and this Court's controlling Sixth Amendment precedents. Petitioner's counsel's failure to call any lay witnesses to testify at his sentencing was a plain departure from Sixth Amendment standards that prejudiced petitioner. The record establishes that the uncalled lay witnesses—including petitioner's family members, friends, and the mothers of his children—who knew petitioner personally, would have provided compelling and humanizing mitigation testimony. *Supra* at 13, 14-15, 17; *see* Pet.App.224a-235a.

Such "'[e]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background … may be less culpable[.]'" *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (citation omitted). And that evidence is particularly relevant where, as here, it depicts "severe privation," "abuse," "physical torment," an "absentee mother" and overall "excruciating life history" of the kind that Mr. Sneed experienced. *Wiggins v. Smith*,

539 U.S. 510, 535, 537 (2003); *see also Rompilla v. Beard*, 545 U.S. 374, 390-91 (2005) (granting relief where defendant's counsel failed to uncover and present substantial mitigation evidence regarding petitioner's violent and abusive "childhood" and impaired "mental health"). Yet the jury heard almost none of that evidence about petitioner—and none of it from the family, friends, and others who knew him. And there is little question that evidence "might well have influenced the jury's" and the overriding sentencing judge's "appraisal of [petitioner's] moral culpability." *Williams v. Taylor*, 529 U.S. 362, 398 (2000).

Given the substantial unpresented testimony, "jurists of reason could disagree with the denial of [petitioner's] ineffectiveness claim relating to mitigation evidence." (Pet.App.10a (Jordan, J., dissenting).) That is all the more so given the fact that petitioner "is not the typical capital defendant." (*Id.* at 8a.) He instead was convicted of felony-murder, did not participate in the killing Hardy carried out, had no firearm, and the jury voted 7-5 against sentencing him to death—a determination that an Alabama trial judge overrode under an unconstitutional and since-abrogated statute. (*Id.*)

The Eleventh Circuit's single-judge order denying a COA did not dispute that uncalled lay witnesses would have provided relevant and compelling humanizing testimony about petitioner and his upbringing. It nevertheless refused to grant a COA on grounds that the missing testimony would have been "cumulative" of evidence presented at trial because "[a]ll of the information" in that testimony supposedly

came in through the two experts Mr. Sneed's counsel called. (*Id.* at 2a.) But that merits finding cannot be squared with the record, which refutes the court's cumulativeness finding. (*Id.* at 224a-235a (Mr. Sneed's motion for reconsideration including two charts detailing the testimony the uncalled witnesses would have provided versus the minimal presentation actually given)).

The court also rejected the notion "that lay witnesses who actually knew [Mr. Sneed] would have been viewed as more credible and their testimony more powerful[.]" (*Id.* at 2a, 6a (Reconsideration Order) (same).) But it cited no authority for that conclusion, which defies common sense and itself conflicts with decisions in other circuits. *See*, *e.g.*, *Sowell v. Anderson*, 663 F.3d 783, 795 (6th Cir. 2011) (affirming grant of habeas relief and rejecting argument that missing layperson evidence would have been cumulative of expert reports because experts spoke only "in generalities that lack[] any details of the severe abuse and abject poverty" of a defendant's "formative years[,]" while lay witnesses can offer "first-hand, eyewitness accounts of specific examples of extreme poverty and abuse[,] …. specifics [that] ha[ve] far more evidentiary power than the abstractions and oblique references" often contained in expert testimony).

Further, the court of appeals failed to apply the governing Sixth Amendment standard: whether there was "a reasonable probability [petitioner] would have received a different sentence" had the uncalled lay witnesses' testimony been introduced. *Porter*, 558 U.S. at 41. Had it done so, it could not have reached

the conclusion that no reasonable jurists could find that standard met here.

Turning to counsel's failure to take reasonable steps to retain forensic psychologist Dr. Brodsky and present his assessment of petitioner's mental illness at the time of the crime, that deficiency likewise violated the Sixth Amendment. The Eleventh Circuit should have granted a COA on this claim as well. As noted, Dr. Brodsky performed an extensive mental-health assessment of petitioner and concluded that at the time of the crime, he suffered from severe, "Axis I," mental illnesses—Major Depressive Disorder and PTSD. Despite *Ake's* guarantee of a state-funded mental-health assessment, counsel did not invoke that right to secure the funding. Instead, counsel used their limited state funds on "non-critical experts"—a social worker and psychologist who spent only 15 minutes with petitioner and who admittedly provided no indication of what mental impairments he suffered at the time of the crime. (Pet.App.11a (Jordan, J., dissenting)].

Here, Dr. Brodsky's assessment plainly could have influenced the sentencing determination. *See Rompilla*, 545 U.S. at 391. As Judge Jordan noted, unlike the minimal testing Dr. Rosenzweig performed in her "15 minutes" with petitioner which involved no "evaluat[ion of] his medical records as required by *Ake* … Dr. Brodsky would have testified that Mr. Sneed 'hear[d] voices' and suffered from Depressive Disorder and PTSD." (Pet.App.11a (Jordan, J., dissenting).)

The court of appeals did not dispute the relevance or mitigating effect of Dr. Brodsky's mental-health

assessment or that it could have influenced the sentence had it been presented. Nevertheless, the court concluded that petitioner's counsel's failure to retain Dr. Brodsky was not "deficient" under *Strickland* because counsel attempted to secure funding to do so and, further, that the record somehow "refutes" petitioner's argument "that counsel's funding requests were insufficient[.]" (Pet.App.3a.) But here again, the court failed to apply the governing COA standard and determine whether "reasonable jurists" could conclude that counsel's funding requests constituted "deficient performance" under *Strickland*. Had it done so, it could not reasonably have concluded that a COA should be denied.

In analyzing the effectiveness of motions or pleadings, courts must perform a qualitative inquiry, examining whether they are supported by "relevant and necessary information," *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1268 (11th Cir. 2016), and whether they omit "a point of law that is fundamental to [the] case[.]" *Hinton v. Alabama*, 571 U.S. 263, 274 (2014). Here, as Judge Jordan noted, counsel's motions failed to point out that under *Ake*, 470 U.S. 68, "a capital defendant has a Fourteenth Amendment right to an independent mental-health evaluation." (Pet.App.10a-11a.) Counsel also failed to explain the need for a mental-health diagnosis given that "under Alabama law two mitigating factors could only be shown by proper medical evidence," which was

absent as a result of counsel's flawed performance. (*Id.*)[3]

Still further, counsel "delayed the funding request[,]" making "it only shortly before trial[,]" and "used the limited funds they did have on non-critical experts." (*Id.*) On this record, as Judge Jordan found, reasonable jurists could—in fact, did—conclude that that counsel's failure to underscore the constitutional requirement of *Ake*, articulate specifically why petitioner was entitled to an evaluation, demonstrate how a mental-health assessment was necessary to establish two potential mitigating factors, make their motions in a timely manner, or use the funds they did have on critical experts such as Dr. Brodsky, were deficient under *Strickland*.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

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[3] *See* Ala. Code § 13A-5-51(2) (under influence of extreme mental or emotional disturbance); Ala. Code § 13A-5-51(6) (substantial impairment of capacity to appreciate criminality of conduct or conform conduct to requirements of the law).

Respectfully submitted,

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March 26, 2025

APPENDIX

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APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13328

ULYSSES CHARLES SNEED,

Petitioner-Appellant,

versus

WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:16-cv-01442-LCB

ORDER

Ulysses Sneed is an Alabama prisoner on death row for the 1993 robbery-murder of a convenience store clerk. *Sneed v. State*, 1 So. 3d 104, 112 (Ala. Crim. App. 2007). He seeks a certificate of appealability ("COA"), in order to appeal the denial of three claims in his 28 U.S.C. § 2254 federal habeas petition.

In order to obtain a COA, a movant must make "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). The movant satisfies this requirement by demonstrating that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further."

Slack v. McDaniel, 529 U.S. 473, 484 (2000) (quotations omitted). He has failed to make that showing here.

Reasonable jurists would not find debatable the denial of Sneed's claim that his trial counsel was ineffective during the penalty phase for prematurely ending the mitigation investigation and failing to call lay witnesses to testify to Sneed's abusive and troubled childhood and background. All of the information Sneed argues the lay witnesses would have provided concerning his childhood and background was introduced at the penalty phase through the testimony of his two experts. Although he argues that lay witnesses who actually knew him would have been viewed as more credible and their testimony more powerful, he cites no authority for this proposition. Counsel is not constitutionally ineffective for failing to present cumulative evidence. *See Van Poyck v. Fla. Dep't. of Corrs.*, 290 F.3d 1318, 1324 n.7 (11th Cir. 2002) ("A petitioner cannot establish ineffective assistance by identifying additional evidence that could have been presented when that evidence is merely cumulative."); *Wong v. Belmontes*, 558 U.S. 15, 22–23 (2009) (holding habeas petitioner was not prejudiced by counsel's failure to call more witnesses to testify about the petitioner's troubled childhood because it was cumulative to that already presented and "adding it to what was already there would have made little difference"); *Rhode v. Hall*, 582 F.3d 1273, 1287 (11th Cir. 2009) (holding that habeas petitioner failed to establish prejudice because "[c]ounsel is not required to present cumulative evidence").

Similarly, reasonable jurists would not debate the denial of Sneed's claim that trial counsel was ineffective at the penalty phase for failing to secure mental health expert, Stanley Brodsky. The record

shows counsel requested funding for Dr. Brodsky multiple times, but the request was denied. As such, counsel's performance was not deficient. Although Sneed argues that counsel's funding requests were insufficient, the record refutes this contention.

Finally, reasonable jurists would not debate the denial of Sneed's claim that Alabama's then-in-place jury override scheme[1] violated his Sixth Amendment right to have a jury and not a judge make the relevant factual findings for a sentence of death, citing *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000). Sneed failed to point to any United States Supreme Court case in existence at the time of his 2007 direct appeal establishing that Alabama's capital sentencing scheme or its jury override statute was invalid post-*Ring*.

Furthermore, Sneed was convicted of the capital offense of robbery-murder, in violation of Ala. Code § 13A-5-40(a)(2) (1975). *See Sneed*, 1 So. 3d at 112. In Alabama, it is a statutory aggravating circumstance if "[t]he capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit . . . robbery." Ala. Code § 13A–5–49(4). Accordingly, "[a] jury's guilt-phase finding of conviction under § 13A-5-40(a)(2) necessarily includes a finding that the aggravating circumstance in § 13A–5–49(4) is present." *Lee v. Comm'r, Ala. Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013); *See* Ala. Code § 13A–5–45(e). Thus, the findings reflected in the jury's verdict alone exposed

[1] Sneed's jury returned a 7 to 5 advisory sentencing recommendation of a life sentence. *Sneed*, 1 So. 3d at 112. The trial court, however, overrode that recommendation and sentenced Sneed to death under Alabama's then-existent judicial override statute. *Id.* That statute is no longer in place.

Sneed to a range of punishment that had as its maximum the death penalty, and that is all that *Ring* and *Apprendi* require.[2]

Because Sneed failed to show that "reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong," or that the issues "deserve encouragement to proceed further," his request for a COA is DENIED. *Slack*, 529 U.S. at 484.

/s/ Elizabeth L. Branch
UNITED STATES CIRCUIT JUDGE

[2] To the extent that Sneed's argument also encompasses the position that the jury—not the judge—is required to weigh the aggravating and mitigating circumstances, reasonable jurists would not debate the denial of this claim. Nothing in *Ring* or *Apprendi* require the jury to weigh the aggravating and mitigating circumstances, and Sneed has not pointed to any other Supreme Court case to support this position. *See Lee*, 726 F.3d at 1198 (explaining that nothing in *Ring* requires a jury as opposed to a judge to weigh the aggravating and mitigating circumstances). Furthermore, the Supreme Court has since rejected this argument. *See McKinney v. Arizona*, 589 U.S. 139, 145 (2020) ("*Ring* . . . did not require jury weighing of aggravating and mitigating circumstances.").

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13328

ULYSSES CHARLES SNEED,

Petitioner-Appellant,

versus

WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:16-cv-01442-LCB

Before JORDAN, BRANCH, and LAGOA, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of the July 8, 2024, single judge order denying motion for a certificate of appealability is DENIED.

In relation to Sneed's claim that trial counsel was ineffective for failing to call lay witnesses during the penalty phase, we note that Sneed does not dispute that the jury heard testimony from his expert witnesses that Sneed's father abandoned the family when Sneed was 9, that Sneed's father was abusive, that Sneed grew up in extreme poverty, and that he had multiple alleged suicide attempts. Although Sneed

argues that lay witnesses who actually knew him would have been viewed as more credible and their testimony more powerful, he cites no authority for the proposition that testimony from lay witnesses who personally knew him is necessarily more credible or compelling than the same testimony offered by expert witnesses. Accordingly, this claim does not warrant encouragement to proceed further.

As for Sneed's second claim (upon which the dissent would grant a certificate of appealability), the dissent asserts that Sneed had a right under *Ake v. Oklahoma*, 470 U.S. 68 (1985), to a mental health evaluation, but the dissent brushes past the fact that counsel requested and obtained over $10,000 for mitigation expert assistance, which counsel used to hire Dr. Rosenzwaig, an expert in clinical and forensic psychology; a social worker who conducted a full social history workup; and a mitigation specialist. Dr. Rosenzwaig evaluated Sneed and performed a battery of psychological tests and testified regarding those results at trial.[1] The social worker also testified at length at trial regarding her findings. As for Dr. Brodsky, Sneed's counsel requested an additional $7,500 in funding—via multiple motions with supporting affidavits from the mitigation specialist as to the need for the assistance. That request, however, was denied in part—the trial court granted an additional $3,500, which was unfortunately insufficient to retain Dr. Brodsky's services.

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[1] The dissent notes that Dr. Rosenzwaig only spent 15 minutes with Sneed, implying that her testimony was based on that lone 15-minute interaction. It was not. Sneed completed a battery of psychological tests, and Rosenzwaig interpreted those results.

While counsel may not have incanted the desired language or arguments in the requests for funding that the dissent desires, counsel's motions were thorough and detailed, drew the court's attention to *Ake v. Oklahoma*, 470 U.S. 68 (1985), and were supported by an affidavit from the defense's mitigation specialist. There is no indication that had counsel simply done more in his motions, the additional funding would have been secured. Rather, the trial court made clear that it had already approved over $10,000 in funding for mitigation assistance, additional amounts were unreasonable in the court's view, and it would not approve more.[2]

Accordingly, reasonable jurists would not debate the denial of this claim.

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[2] Nevertheless, the trial court explained that if the defense felt "the need for further psychological examination," then it should notify the court, and the court would "enter an order for mental evaluation to be performed by the State." The defense declined to exercise this option, however, and Sneed does not challenge that decision.

JORDAN, Circuit Judge, Dissenting.

With respect, I dissent. I would grant Mr. Sneed a certificate of appealability on his two Sixth Amendment ineffective assistance of counsel claims: (1) that his counsel were ineffective in failing to conduct an adequate mitigation investigation or call lay witnesses at the sentencing phase; and (2) that his counsel were ineffective in failing to retain Dr. Stanley Brodsky, a forensic psychologist.

Every capital case, in its own way, involves a tragedy—the unlawful taking of an innocent life. But every capital case is also unique, and Mr. Sneed is not the typical capital defendant. First, Mr. Sneed (who was unarmed during the convenience store robbery) was not the shooter. He was convicted of felony murder and sentenced to death based on the killing of the store clerk by his co-defendant, John Hardy. Second, the jury recommended a life sentence by a vote of 7-5, only to have that recommendation overridden by the trial court. *See Sneed v. State*, 1 So.3d 104, 112–113 (Ala. Crim. App. 2007). These facts are relevant in assessing whether Mr. Sneed's ineffective assistance of counsel claims merit a COA.

I fear that the court, in denying a COA, has essentially conducted a merits review and determined conclusively that Mr. Sneed would not succeed on his ineffective assistance of counsel claims. That sort of review, as the Supreme Court has told us, is improper at this point in the proceedings. "At the COA stage, the only question is whether the applicant has shown that 'jurists of reason could disagree with the district court's resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.' This threshold question should be decided without

'full consideration of the factual or legal bases adduced in support of the claims.' 'When a court of appeals sidesteps [the COA] process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.'" *Buck v. Davis*, 580 U.S. 100, 115 (2017) (citations omitted).

With respect to the first ineffective assistance of counsel claim, the court concludes that the testimony of the uncalled lay witnesses would have been cumulative of the testimony provided by Mr. Sneed's two experts. *See* COA Denial Order at 2–3. It's true, as the court points out, that many of the facts that the uncalled lay witnesses would have testified to were covered by Mr. Sneed's experts. The lay witnesses who were not called would have testified that Mr. Sneed lived in "grinding poverty"; that his father abandoned the family when he was 9 and that his mother was emotionally unavailable; that his father started physically abusing him when he was a baby; and that he tried to kill himself after graduating from high school. *See id.* at 10–13. I agree with Mr. Sneed that there is an argument to be made—though perhaps not a winning one in the end—that certain facts would have resonated more with the jury or the trial court if presented by family members and friends who knew him (as opposed to a dispassionate social worker merely relaying what others had told her).[3]

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[3] I agree with the court that Mr. Sneed abandoned the portion of his ineffective assistance claim regarding lay witness testimony about his personality/positive characteristics, learning abilities, and remorse. He failed to challenge the omission of this testimony in his appeal before the Alabama Court of Criminal Appeals, as well as in his federal habeas petition. And we

We have granted habeas relief, and rejected the state's argument about the cumulative nature of evidence, when the testimony actually presented at trial was only a part of the mitigation mosaic that could have been but was not offered. *See, e.g., Collier v. Turpin*, 177 F.3d 1184, 1201–02 (11th Cir. 1999); *Cooper v. Secretary, Department of Corrections*, 646 F.3d 1328, 1355 (11th Cir. 2011); *Johnson v. Sec'y, DOC*, 643 F.3d 907, 936 (11th Cir. 2011); *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263, 1276 (11th Cir. 2014); *Maples v. Comm'r, Ala. Dep't of Corr.*, 729 F. App'x 817, 826–27 (11th Cir. 2018). Though the ultimate merits here may be a close call, surely these cases are enough to demonstrate that jurists of reason could disagree with the denial of the ineffectiveness claim relating to mitigation evidence. Again, Mr. Sneed was not the shooter, and in a capital case where the death penalty was imposed on a felony-murder theory and the jury recommended a life sentence by a vote of 7-5, the testimony of the lay witnesses could have made a difference. At the very least this claim deserves "encouragement to proceed further." *Buck*, 580 U.S. at 115.

Turning to the ineffectiveness claim relating to Dr. Brodsky, the court concludes that the record refutes Mr. Sneed's contention that counsel's funding requests were insufficient. That too is at least debatable.

Counsel's motion failed to point out that under *Ake v. Oklahoma*, 470 U.S. 68 (1985), a capital defendant has a Fourteenth Amendment right to an independent

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"will not consider claims not properly presented to the district court." *Wright v. Hopper*, 169 F.3d 695, 708 (11th Cir. 1999). The other aspects of his claim, however, were properly preserved.

mental-health evaluation. The motion also failed to explain that a mental-health diagnosis was critical because under Alabama law two mitigating factors could only be shown by proper medical evidence. *See* Ala. Code § 13A-5-51(2) (defendant acted under the influence of extreme mental or emotional disturbance); Ala. Code § 13A-5-51(6) (defendant suffered from a substantial impairment of the capacity to appreciate the criminality of his conduct or conform his conduct to the requirements of the law). Finally, counsel delayed the funding request; they made it only shortly before trial, and they used the limited funds they did have on non-critical experts.

Dr. Rosenzweig may have performed some psychological testing on Mr. Sneed and testified to that effect, but she did not evaluate his medical records as required by *Ake*. *See McWilliams v. Dunn*, 582 U.S. 183, 198–99 (2017). Indeed, Dr. Rosenzweig spent no more than 15 minutes total with Mr. Sneed. Dr. Brodsky would have testified that Mr. Sneed "hear[d] voices" and suffered from Depressive Disorder and PTSD. *See* Mr. Sneed's Motion for COA at 32. Given that the trial court found that neither of the statutory mental-health mitigating factors existed, Dr. Brodsky's fuller evaluation certainly could have had an impact. This is particularly so given Mr. Sneed's less culpable role in the murder. This ineffective assistance of counsel claim also warrants a COA. *See Tennard v. Dretke*, 542 U.S. 274, 287 (2004) ("impaired intellectual functioning is inherently mitigating" in a capital case even if the defendant cannot "establish[ ] a nexus to the crime").

It may be that Mr. Sneed's claims will fail in the end, but at this stage they deserve "encouragement to

proceed further." *Buck*, 580 U.S. at 115. I dissent from the court's wholesale denial of a COA to Mr. Sneed.[4]

[4] *See also Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003) (a COA analysis "forbids" a "full consideration of the factual or legal bases adduced in support of the claims").

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13328

ULYSSES CHARLES SNEED,

Petitioner-Appellant,

versus

WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:16-cv-01442-LCB

Before JORDAN, BRANCH, and LAGOA, Circuit Judges.

BY THE COURT:

Appellant's "Motion to Suspend Circuit Rule 22-1(C) and Permit Petitioner-Appellant to Petition the Court for Rehearing En Banc" is DENIED.[1]

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[1] Judge Jordan dissents and would grant the motion.

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13328

ULYSSES CHARLES SNEED,

Petitioner-Appellant,

versus

WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondent-Appellee.

Appeal from the United States District Court
for the Northern District of Alabama
D.C. Docket No. 5:16-cv-01442-LCB

Before JORDAN, BRANCH, and LAGOA, Circuit Judges.

BY THE COURT:

Appellant's motion for reconsideration of the December 30, 2024, panel order denying appellant's motion to suspend rules is DENIED.[1]

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[1] Judge Jordan would grant the motion for reconsideration and respectfully dissents.

APPENDIX E

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
NORTHEASTERN DIVISION

Case No. 5:16-cv-1442-CLM

ULYSSES CHARLES SNEED,

Petitioner,

v.

TERRY RAYBON, Warden of Holman Correctional Facility,

Respondent.

ORDER

Petitioner Ulysses Charles Sneed moves for the court to alter or amend its judgment denying his 28 U.S.C. § 2254 petition for habeas relief on his state court conviction for capital murder and death sentence. (Doc. 36). For the reasons stated within, the court DENIES Sneed's motion (doc. 36).

I. Standards of Review

1. Rule 59(e): Sneed timely filed his motion under Federal Rule of Civil Procedure 59(e), which allows a party to move to amend or alter a judgment within 28 days after entry of the judgment. *See* Fed. R. Civ. P. 59(e). "The only grounds for granting a Rule 59 motion are newly-discovered evidence or manifest errors of law or fact." *Arthur v. King,* 500 F.3d 1335, 1343 (11th Cir. 2007) (cleaned up). And "[a] Rule 59(e) motion

cannot be used to relitigate old matters, raise argument or present evidence that could have been raised prior to the entry of judgment." *Id.* (cleaned up). Indeed, "[r]econsidering the merits of a judgment, absent a manifest error of law or fact, is not the purpose of Rule 59." *Jacobs v. Tempur-Pedic Int'l, Inc.,* 626 F.3d 1327, 1344 (11th Cir. 2010).

2. Section 2254: Section 2254(d) "permits federal habeas relief only where the state courts' decisions were (1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." *Wood v. Allen,* 558 U.S. 290, 297 (2010) (quotations omitted).

II. Discussion

Sneed claims that, in its memorandum opinion, the court committed several manifest errors of law and fact related to his claims that (a) the judicial override of the jury's recommended life sentence verdict violated his Sixth Amendment right to a jury trial, and (b) his attorneys provided ineffective assistance of counsel by not calling lay witnesses during the penalty phase of trial. Sneed also contends that even if the court declines to grant habeas relief on these claims, it should at least grant a certificate of appealability. The court addresses each argument in turn.

A. Judicial Override

Sneed raises two issues based on the court's denial of his Sixth Amendment claim related to judicial override. First, Sneed says that the court inappropriately glossed over the relevance of the Supreme Court's decisions in *Hurst* and *Apprendi* to this claim.

Second, Sneed argues that the court erred in addressing only his facial challenge to judicial override and not his as-applied challenge under the Supreme Court's decision in *Ring v. Arizona,* 536 U.S. 584 (2002).

Having reviewed the parties' briefs, the record, and the relevant precedent, the court discerns no manifest error of law or fact in its analysis of the relevance of *Hurst* and *Apprendi.* As for Sneed's as-applied challenge under *Ring, Ring* didn't prohibit a judge from making findings on mitigating circumstances, from finding additional aggravating circumstances not found by the jury, or from making a life-or-death determination different from the jury's recommendation. Instead, "[t]he holding of *Ring* is narrow: the Sixth Amendment's guarantee of jury trials requires that the finding of an aggravating circumstance that is necessary to imposition of the death penalty must be found by a jury. That occurred in [Sneed's] case by virtue of the jury's capital robbery-murder verdict." *Lee v. Comm'r, Ala. Dep't of Corr.,* 726 F.3d 1172, 1198 (11th Cir. 2013); *see also Waldrop v. Comm'r, Ala. Dep't of Corr.,* 711 F. App'x 900, 923-24 (11th Cir. 2017). So the court rejects Sneed's argument that it manifestly erred in denying Sneed habeas relief on his Sixth Amendment claim related to judicial override.

B. Ineffective Assistance of Counsel

Sneed alleges the court made several manifest errors when analyzing his ineffective assistance of counsel claim related to his attorneys' failure to call lay witnesses. Sneed first argues that the court unreasonably divided his ineffective assistance of counsel claim related to lay witnesses into two subclaims: (a) a claim that counsel was ineffective for overlooking available lay witnesses in an unreasonably curtailed investigation, and (b) a claim that

counsel was ineffective for not calling known and available lay witnesses. But Sneed is the one who divided his claim this way by analyzing his claim with these subheadings in his petition: (1) Failure to Investigate and Present Mitigating Evidence from Lay Witnesses Unknown to Counsel; and (2) Failure to Investigate and Present Mitigating Evidence from Lay Witnesses Known to Counsel. (Doc. 1 at 43, 51 (underlines in original)). The court did not manifestly err by ruling on Sneed's claims, as he made them. Nor has Sneed articulated how the court's division of claims prejudiced him.

Sneed next argues that the court made a factual error about the effect of his attorneys failing to present good character evidence through lay witnesses. The Alabama Court of Criminal Appeals ("ACCA") found that trial counsel's failure to introduce evidence of Sneed's good character during the penalty phase didn't prejudice him because the State and Sneed had an agreement "that the State would not introduce evidence of [prison] disciplinary reports so long as trial counsel did not open the door to such evidence." (Doc. 26-19 at 96). The court held that this ruling wasn't an unreasonable application of law. Sneed now says that no such pretrial agreement was reached. Instead, he asserts that "the only agreement reached was that if Mr. Sneed tried to introduce evidence of his good conduct while in custody, that would open the door to evidence of disciplinary problems in prison." (Doc. 36 at 32-33 (underline in original)).

But Sneed's petition did "not dispute the existence of the character evidence agreement with the State or his prisoner disciplinary reports under § 2254(d)(2)." (Doc. 34 at 136). To be sure, while Sneed argued that the ACCA legally erred in reasoning that the good

character evidence would have opened the door to evidence of the prison disciplinary reports, (doc. 1 at 53, n.7), he didn't argue that the ACCA made a factual error in describing this pretrial agreement. And Sneed cannot use a Rule 59(e) motion to raise "new arguments or evidence that [he] could have raised before [this court's] decision issued." *Bannister v. Davis,* 140 S. Ct. 1698, 1703 (2020). So the court won't consider this argument.

Sneed's remaining arguments related to his ineffective assistance of counsel claim are arguments that the court considered and rejected in its memorandum opinion. The court has carefully reviewed Sneed's motion and the record and discerned no manifest error of law or fact in its resolution of Sneed's ineffective assistance of counsel claim. Because "[r]econsidering the merits of a judgment, absent a manifest error of law or fact, is not the purpose of Rule 59," *Jacobs,* 626 F.3d at 1344, the court will deny Sneed's motion to amend the judgment on his ineffective assistance of counsel claims.

C. Certificate of Appealability

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

336 (2003) (quotations omitted). The court finds that the claims in Sneed's § 2254 petition meet neither standard, so the court will not issue a certificate of appealability.

For these reasons, the court DENIES Sneed's motion to alter or amend the judgment (doc. 36) and will not issue a certificate of appealability.

Done and Ordered on September 18, 2023.

/s/ Corey L. Maze
COREY L. MAZE
UNITED STATES DISTRICT JUDGE

APPENDIX F

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

Case No.: 5:16-cv-1442-AKK

ULYSSES CHARLES SNEED,

Petitioner,

v.

TERRY RAYBON, WARDEN OF HOLMAN CORRECTIONAL FACILITY,[1]

Respondent.

MEMORANDUM OPINION

Ulysses Charles Sneed has petitioned for a writ of habeas corpus under Title 28 U.S.C. § 2254. *See generally* doc. 1.[2] Sneed challenges the constitutional-

[1] As a housekeeping matter and as the case caption reflects, a party substitution is appropriate in this habeas action. Specifically, the Supreme Court clarified in *Rumsfeld v. Padilla*, 542 U.S. 426, 435 (2004), that "the proper respondent [in a habeas action] is the warden of the facility where the prisoner is being held." Sneed is a death row inmate at Holman Correctional Facility where the current warden is Terry Raybon. *See* http://www.doc.state.al.us/facility?loc=33 (last visited July 15, 2022). Consequently, the court **DIRECTS** the clerk to substitute Terry Raybon, Warden of Holman Correctional Facility, for Jefferson S. Dunn—the former—and John Hamm—the current—Commissioner of the Alabama Department of Corrections, as Respondent.

[2] "Doc. ___" refers to the number assigned to each document filed in the court's electronic case filing system. The underlying state court documents are part of the habeas electronic record.

ity of his 2006 capital conviction and death sentence in the Circuit Court of Morgan County, Alabama, for the murder of a convenience store clerk, Clarence Nugene Terry, during a robbery. The jury found that Sneed was an intentional accomplice in the robbery-murder even though Sneed did not shoot Mr. Terry. The jury recommended in a 7 to 5 vote that Sneed receive a life sentence. The sentencing judge overrode that recommendation and sentenced Sneed to death. After careful consideration, the court finds that Sneed's petition is due to be denied.

I.

Before turning to the § 2254 analysis, the court provides some background information and reviews some fundamental habeas principles.

A.

Sneed has had two capital murder trials which ended in convictions and death sentences. Procedurally, as summarized by the ACCA as part of Sneed's second direct appeal:[3]

> Sneed[] was indicted for the capital offense of robbery-murder for the 1993 killing of Clarence Nugene Terry. *See* § 13A–5–40(a)(2), Ala. Code 1975. In 1995, he was tried with codefendant John Hardy, convicted of capital murder, and sentenced to death. [The ACCA]

Docs. 26; 27. Respondent manually filed "a copy of the surveillance exhibit on a CD . . . . because the electronic file size exceeds the limit for uploading documents via ECF." Doc. 33 at 1. The court has reviewed the manually filed footage of the robbery-murder. Docs. 32; 33.

[3] "ACCA," which the court uses throughout this opinion, refers to the Alabama Court of Criminal Appeals.

> affirmed his conviction and death sentence, *see Sneed v. State*, 783 So. 2d 841 (Ala. Crim. App.1999), but the Alabama Supreme Court reversed his conviction based on the erroneous admission of a redacted statement he had made to law enforcement authorities that implied that he was the sole individual involved in the shooting. *See Ex parte Sneed*, 783 So. 2d 863 (Ala. 2000).
>
> In 2006, [Sneed] was tried a second time and convicted of the capital offense of robbery-murder. After a sentencing hearing, by a vote of 7 to 5, the jury recommended that he be sentenced to imprisonment for life without the possibility of parole. The trial court overrode the jury's recommendation and sentenced [Sneed] to death. This appeal followed.

Sneed v. State (Sneed Direct II), 1 So. 3d 104, 112 (Ala. Crim. App. 2007) (footnote omitted).

B.

According to the ACCA,

> The evidence showed that, in the early morning hours of September 7, 1993, [Sneed] and Hardy entered Bud's Convenience Store in Decatur; shot and killed the clerk, Clarence Nugene Terry; and stole one of the store's cash registers. An autopsy revealed that the victim suffered seven gunshot wounds—two shots to his left cheek, one shot to his forehead, one shot to his left ear, one shot to his left eye socket, one shot to his chest, and one shot to his right hand.

Several days before the robbery-murder [Sneed] and Christopher Hines drove from Louisville, Kentucky, in Hines' vehicle to visit some of Hines' relatives in Tanner. Sometime after they arrived, they met John Hardy.

On the evening of September 6, 1993, [Sneed] and Hardy were driving around in Hines' vehicle and were drinking and smoking marijuana. Hardy suggested that they "get some money," and they drove by different convenience stores trying to locate a potential target. [Sneed] suggested that Bud's Convenience Store might be a good target because only one clerk was working in the store. They drove around the store a few times and parked on the side. Before going into the store, Hardy tore off the sleeves of his shirt and they tied a sleeve around the bottom half of their faces. The sleeves did not disguise their identities.

The entire robbery-murder was recorded on videotape and played for the jury. The tape shows that [Sneed] and Hardy entered the store with Hardy pointing a rifle and apparently shooting at the victim. The victim ran behind the counter and tried to hide, but Hardy leaned over the counter and shot him. At the same time, [Sneed] crawled under the counter and tried to open the two cash registers that were on the counter. As the victim crouched in a ball on the floor behind the counter, Hardy then walked around the counter, pointed the rifle at his head, and shot him in the head repeatedly. While this was happening, [Sneed] tried unsuccessfully to

open both of the cash registers. At one point, [Sneed] stepped over the victim's body and moved his legs out of the way to have better access to one of the cash registers. Finally, Hardy unplugged one of the registers, and [Sneed] carried it out of the store.

After they left the store, [Sneed] and Hardy went to Tanner to hide the cash register. The next morning, [Sneed], Hardy, and Hines retrieved $48 from the cash register. The manager at Bud's testified that the register that was taken had very little money in it because it was a [backup] register that had not been used on the day of the robbery-murder. After using the money to buy alcohol and gasoline, [Sneed], Hardy, and Hines returned to Louisville, Kentucky.

The investigation led law enforcement authorities to Kentucky, where they discovered Hines' vehicle, which [Sneed] and Hardy had used in the robbery-murder. [Sneed] was arrested in Kentucky and was questioned by Lieutenant Dwight Hale and Sergeant John Boyd of the Decatur Police Department. After being confronted with the videotape of the robbery-murder, [Sneed] admitted his involvement in the robbery.

[Sneed] testified in his own defense and admitted that he assisted in the robbery. However, he stated that he did not know that Hardy was going to shoot and kill the victim. Specifically, he testified:

We went in to rob. I did not intend for nobody to get killed or get hurt. That wasn't part of

> the plan. That wasn't part of the plan. We discussed robbing. That is all we did.

Sneed Direct II, 1 So. 3d at 112-13 (footnote and internal quotation marks omitted).

C.

Because many of Sneed's habeas claims challenge the effectiveness of his trial counsel's penalty-phase representation, it is imperative for the court to provide a breakdown of the sentencing order, including the reasons for the override decision, as additional background. *See* doc. 1 at 126-40.

1.

In overriding the jury's 7 to 5 recommended life sentence, doc. 26-3 at 16, the circuit court determined that the State had proven two aggravating factors beyond a reasonable doubt, doc. 1 at 131-33. One admitted aggravating circumstance—tied to the jury's guilt-phase conviction—was that Sneed "committed the capital offense while he and his accomplice were . . . robb[ing] . . . Bud's Convenience Store." Doc. 1 at 131-32. The second aggravating finding was that "the capital offense was especially heinous, atrocious or cruel compared to other capital offenses"—the so-called FIAC factor. Doc. 1 at 132; Ala. Code § 13A-5-49(8).

Under the sentencing court's HAC analysis, the capital offense "was a conscienceless and pitiless crime and . . . unnecessarily tortuous to the victim." Doc. 1 at 133. Referencing the video evidence, the circuit court noted that Hardy began shooting as he and Sneed "first entered the store." *Id.* The sentencing court pointed out that the videotape captured Mr. Terry's awareness of the lethal danger and his efforts

to protect himself, including running "behind the counter[,] trying to hide[,] and roll[ing] [his body] into a ball." *Id.* The circuit court observed that Sneed "never attempted to stop Hardy even as Hardy leaned over the counter and shot Mr. Terry in the chest." *Id.*

The sentencing court described Mr. Terry as an "unarmed and helpless [victim, who was lying] behind the counter on the floor immediately to the left of [Sneed]'s feet[,] while [Sneed] tried to open the cash registers." *Id.* The court noted that Sneed "never stopped trying to open the cash registers while Hardy was shooting Mr. Terry in the head" and remarked that Sneed "looked unfazed" by the murder in the security footage. *Id.* The court pointed out also that Sneed "kicked Mr. Terry's foot out of the way . . . to gain easier access to the second cash register." *Id.*

After summarizing the security footage, the court rejected as "false" Sneed's "claims that he did not intend anyone to die and did not know that Hardy was going to shoot anybody." *Id.* The sentencing court added that "even though [Sneed] [had] not personally commit[ted] . . . murder," the jury had determined that he "had the specific, particularized intent that [Mr.] Terry be killed during the course of the robbery." *Id.*

2.

Moving to mitigation and applying a preponderance of the evidence standard, the court found three statutory circumstances: Sneed's lack of a significant criminal history, his nontriggerman participation, and his age of twenty-three at the time of the offense. Doc. 1 at 134-37 ¶¶ 1, 4, 7. The court gave "very little weight" to the last two of these mitigating findings. *Id.* at 136-37 ¶¶ 4, 7.

Also, the court rejected two statutory mitigators that are relevant to Sneed's habeas petition. The first is related to Dr. Marianne Rosenzweig, a forensic and clinical psychologist, who had "administered psychological tests to [Sneed]" pretrial and prepared a report about those results. Doc. 1 at 134 ¶ 2. Dr. Rosenzweig testified in the penalty phase that Sneed's test "scores indicated . . . [a] 'likel[ihood] . . . of [several] psychological difficulties,'" including anxiety; insecurity with "'fears about past traumas . . . [causing] him [to] behav[e] . . . maladaptive[ly];'" and impulsivity. *Id.* Dr. Rosenzweig concluded that post-traumatic stress and borderline personality disorders were "likely psychological diagnoses for . . . Sneed" but did not confirm the existence of either mental condition fully. *Id.* at 135 ¶ 2. Dr. Rosenzweig testified also that Sneed "was not mentally retarded and that he was at least [in] the average range of intelligence or above." *Id.* The sentencing court mentioned that "[p]erhaps the trauma experienced by [Sneed] included his participation in the murder of Mr. Terry" and concluded that the "extreme mental or emotional" factor did not exist. *Id.* And the court found that Dr. Rosenzweig's testimony did not establish that Sneed "was under the influence of extreme mental or emotional disturbance" at the time of the offense under Ala. Code § 13A-5-51(2). Doc. 1 at 134 ¶ 2.

Second, the circuit court rejected Sneed's claim under Ala. Code § 13A-5- 51(6) that he had a diminished mental capacity from "using alcohol and smoking marijuana laced with cocaine prior to the murder." Doc. 1 at 136 ¶ 6. As evidence rebutting this statutory mitigator, the court noted that Sneed's statement to the police contained no mention of pre-offense drug use. *Id.* And referencing the videotape, the court found that Sneed "was cognizant and

appeared to be in full control of his physical and mental faculties." *Id.*

3.

Turning to non-statutory mitigation, the sentencing court found six non-statutory circumstances. The court concluded that testimony from Joanne Terrell, a clinical social worker, supported five mitigating categories. *Id.* at 137-38 ¶ 2. Ms. Terrell had completed a psychosocial assessment of Sneed pretrial based upon "police reports, educational and medical records, [as well as] interviews with [Sneed]" and his family members. *Id.* at 137 ¶ 2.

As summarized by the court, Ms. Terrell testified in mitigation that Sneed had experienced and witnessed "significant abuse" before reaching adulthood. *Id.* Sneed's father abused him and his mother, a man in the neighborhood raped Sneed at the age of nine, and two of his mother's boyfriends abused him from age eleven into his teenage years. *Id.* at 137-38 ¶ 2. Ms. Terrell testified that after experiencing behavioral problems at home and in school, Sneed had two weeks of emotional treatment at age twelve. *Id.* at 137 ¶ 2. Sneed visited a psychologist one month later and received a diagnosis of dysthymic disorder—a chronic form of depression. *Id.* Sneed spent time at a residential treatment center "for troubled youth" because of his behavioral and mood problems. *Id.* at 137-38 ¶ 2. Sneed "transferred to reform school from th[at] clinic." *Id.* at 138 ¶ 2. As a form of self-medication, Sneed began drinking alcohol and smoking marijuana when he was twelve years old. *Id.* Based on these incidents, Ms. Terrell opined that Sneed's "abus[ive] and trauma[tic] experience[s] . . . caused [him to have] personality deficits" and an inability to "cope with stress." *Id.*

After considering Ms. Terrell's testimony and her psychosocial assessment of Sneed, the sentencing court determined that the following non-statutory mitigators existed: One, Sneed had experienced a violent, traumatic, and physically-abusive childhood. *Id.* Two, Sneed had "witnessed severe and pervasive domestic violence of his mother." *Id.* Three, Sneed had been "raped at a young age by a virtual stranger." *Id.* Four, beginning at an early age and continuing into his twenties, Sneed had "attempted to self-medicate the damage these traumas caused . . . by . . . abus[ing] . . . drugs and alcohol." *Id.* The circuit court added that Sneed's "emotional damage" "appear[ed]" to be "resistant to mental health treatment." *Id.* And five, Sneed had exacerbated "[h]is emotional problems" with drugs and alcohol, which "led him to a life of petty crime and general instability." *Id.* The court gave these non-statutory factors "little weight in considering the appropriate sentence to impose." *Id.*

The last non-statutory factor which the court credited in favor of Sneed was the jury's recommended life sentence. *Id.* at 138-39 ¶ 3. The court gave that circumstance "moderate weight" because the jury's "vot[ing] was almost equally split." *Id.* at 139 ¶ 3.

4.

In balancing the sentencing factors, the court recognized that the nine mitigating circumstances outnumbered the two in aggravation. *Id.* at 139. But the court concluded that "the seriousness of the first aggravating circumstance and the heinousness and cruelness of the second outweigh[ed] the mitigating circumstances." *Id.*

The court followed that conclusion with its reasoning for the override decision. *Id.* at 139. The court

noted that Sneed had "purposefully chosen" Bud's Convenience Store because "only one person was working" there. *Id.* The court revisited portions of its earlier HAC analysis, including that Mr. Terry "was unarmed[,] . . . defenseless," and "gunned down without any reason" "by masked intruders." *Id.* The court added that it could "only imagine the terror" which Mr. Terry must have "felt as he dove behind the counter trying to escape." *Id.* The court discussed Sneed's involvement in the capital crime as reflected in the videotape and the jury's guilt-phase finding that he "had a particularized intent to kill even though he was not the triggerman." *Id.* at 139-40. The court expressed disbelief in Sneed's testimony and determined, to the contrary, that "all the evidence" showed that Sneed "did nothing to stop Hardy because [Sneed] did not want to stop the killing." *Id.* at 140. The court noted that Sneed "wanted the money in the cash register[] and that was all he focused on while in the store." *Id.* The court added that Sneed's "unfortunate upbringing and experiences" did not "excuse[] . . . his total lack of regard for the life of Mr. Terry." *Id.* The court concluded that Sneed's death sentence "[wa]s not disproportionate or excessive when compared to penalties imposed in similar cases." *Id.*

D.

Sneed challenged his second conviction and death sentence unsuccessfully on direct appeal to the ACCA. *See Sneed Direct II*, 1 So. 3d at 145. The Alabama Supreme Court and the United States Supreme Court denied Sneed's petitions for a writ of certiorari. *Sneed Direct II*, 1 So. 3d at 104; Doc. 26-13 at 138.

Sneed did not prevail on postconviction review under Alabama Criminal Procedure Rule 32 either. After Sneed amended his Rule 32 petition twice, the

circuit court summarily dismissed his collateral allegations without an evidentiary hearing. Doc. 26-16 at 142-65. Sneed appealed, and the ACCA affirmed. Doc. 26-19 at 70-106. Again, the Alabama Supreme Court and the United States Supreme Court denied Sneed's petitions for a writ of certiorari. Doc. 26-20 at 166; Doc. 26-21 at 148. Sneed now seeks federal habeas relief, doc. 1, and his petition is fully briefed, docs. 24; 31.

II.

"[T]he writ of habeas corpus has historically been regarded as an extraordinary remedy." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). That is especially true for habeas review of a state court conviction pursuant to 28 U.S.C. § 2254 because "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Brecht*, 507 U.S. at 633 (internal quotation marks omitted) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983), *superseded by statute on other grounds as recognized in Slack v. McDaniel*, 529 U.S. 473 (2000)). "Those few who are ultimately successful [in obtaining federal habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Fay v. Noia*, 372 U.S. 391, 440-41 (1963), *overruled on other grounds by Wainwright v. Sykes*, 433 U.S. 72 (1977), *and abrogated on other grounds by Coleman v. Thompson*, 501 U.S. 722 (1991), *holding modified on other grounds by Martinez v. Ryan*, 566 U.S. 1 (2012). "Accordingly, . . . an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final

judgment." *Brecht*, 507 U.S. at 634 (internal quotation marks omitted).

A.

Consistent with these finality and comity principles, Congress amended the preexisting habeas law under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"). AEDPA governs this court's review of Sneed's habeas claims. *See Guzman v. Sec'y, Fla. Dep't of Corr.*, 663 F.3d 1336, 1345 (11th Cir. 2011) (explaining that AEDPA applies to habeas petitions filed after April 24, 1996). When a petitioner has obtained a state-court adjudication of a constitutional claim on the merits and AEDPA applies, additional significant restrictions apply to the federal court. In particular, "AEDPA imposes a highly deferential standard for evaluating state-court rulings and demands that state-court decisions be given the benefit of the doubt." *Guzman*, 663 F.3d at 1345 (internal quotation marks omitted) (quoting *Renico v. Lett*, 559 U.S. 766, 773 (2010)). To grant habeas relief on an adjudicated claim under AEDPA, this court must find not only that the petitioner relies on a meritorious constitutional violation but also that the state court's resolution falls within an exception to § 2254(d). *See* 28 U.S.C. § 2254(d) (providing that habeas relief "shall not be granted with respect to any claim that was adjudicated on the merits in [s]tate court proceedings unless" an exception applies).

Under (d)(1), a petitioner opens the door to habeas relief if he demonstrates that a state court rejected the merits of a constitutional claim in a manner "that was contrary to, or involved 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). Under (d)(2), the petitioner must show

that a denial of constitutional relief "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in . . . [s]tate court." 28 U.S.C. § 2254(d)(2); *see also Boyd v. Allen*, 592 F.3d 1274, 1292 (11th Cir. 2010) (quoting 28 U.S.C. § 2254(d)). Periodically in this opinion, the court uses "clearly-established constitutional error," "clearly-established AEDPA error," or "AEDPA (d)(1) error" to describe § 2254(d)(1)'s clauses collectively.

The petitioner bears the burden of showing that an adjudicated issue falls within § 2254(d)(1) or (d)(2). *Woodford v. Visciotti*, 537 U.S. 19, 25 (2002) (per curiam). "[A] federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the state-court decision applied [a constitutional holding] incorrectly." *Id.* at 24-25. Additionally, "[w]here there has been one reasoned state judgment rejecting a federal claim, later unexplained orders upholding that judgment or rejecting the same claim rest upon the same ground." *Ylst v. Nunnemaker*, 501 U.S. 797, 803 (1991); *see also Wilson v. Sellers*, 584 U.S. __, 138 S. Ct. 1188, 1192 (2018) (holding that habeas courts reviewing adjudicated claims under AEDPA "should 'look through' [an] unexplained decision to the last [developed] state-court decision . . . . [and] then presume that the unexplained decision adopted the same [merits-based] reasoning").

Delving deeper into the limited exceptions to § 2254(d)'s overriding habeas bar, "clearly established Federal law" under (d)(1) encompasses Supreme Court decisions that predate "the last adjudication of [a federal claim's] merits in state court." *Greene v. Fisher*, 565 U.S. 34, 36, 40 (2011) (internal quotation marks

omitted). Stated differently, "§ 2254(d)(1) requires federal courts to focu[s] on what a state court knew and did, and to measure state-court decisions against th[e] Court's precedents *as of the time the state court renders its decision*." *Id.* at 38 (first alteration and emphasis in *Greene*) (last alteration added) (internal quotation marks omitted). Additionally, the statutory term "refers to the holdings, as opposed to the dicta, of [Supreme Court] decisions as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000) (O'Connor, J., majority opinion with respect to part II).

1.

"[T]he 'contrary to' and 'unreasonable application' clauses [of § 2254(d)(1)] are interpreted as independent statutory modes of analysis." *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006). "A state court's decision is contrary to . . . clearly established precedents [of the Supreme Court] if it applies a rule that contradicts the governing law set forth in [the Court's] cases, or if it confronts a set of facts that is materially indistinguishable from a decision of th[e] Court but reaches a different result." *Brown v. Payton*, 544 U.S. 133, 141 (2005). But as the Eleventh Circuit has noted, the Supreme Court has not limited the construction of AEDPA's "contrary to" clause to those two examples. Instead, the statutory language "simply implies that the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court." *Alderman*, 468 F.3d at 791 (internal quotation marks omitted) (quoting *Williams*, 529 U.S. at 405).

2.

As for (d)(1)'s second clause, "[t]he pivotal question is whether the state court's application of the [relevant

constitutional] standard was unreasonable." *Harrington v. Richter*, 562 U.S. 86, 101 (2011). AEDPA requires this court to give a state court "a deference and latitude that are not in operation when the case involves review under the [relevant constitutional] standard itself." *Id.* Consistent with § 2254(d)(1) deference, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Richter*, 562 U.S. at 101 (emphasis in original) (internal quotation marks omitted) (quoting *Williams*, 529 U.S. at 410).

If a state court denies a federal claim as meritless and "'fairminded jurists could disagree' on the correctness of th[at] . . . decision," then habeas relief under AEDPA's unreasonable application clause is unavailable. *Richter*, 562 U.S. at 101 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). The Supreme Court has clarified that a "rule's specificity" must factor into the unreasonableness evaluation. *Richter*, 562 U.S. at 101 (internal quotation marks omitted). "The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations." *Id.* (internal quotation marks omitted).

3.

Section 2254(d)(2) governs federal court review of state court findings of fact, and "whether a state court errs in determining the facts [under AEDPA] is a different question from whether it errs in applying the law." *Rice v. Collins*, 546 U.S. 333, 342 (2006). Section 2254(d)(2) limits the availability of federal habeas relief due to factual error unless a petitioner is able to show "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2).

This means that a petitioner may overcome AEDPA's overriding bar against habeas relief by challenging the state court factual findings underlying an adjudicated constitutional claim as unreasonably in conflict with the evidentiary record. *Wood v. Allen*, 558 U.S. 290, 293 (2010). But "a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance." *Wood*, 558 U.S. at 301. Therefore, "even if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's . . . determination.'" *Id.* (alteration in *Wood*) (quoting *Rice*, 546 U.S. at 341-42). Conversely, "when a state court's adjudication of a habeas claim result[s] in a decision that [i]s based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding, [a federal] [c]ourt is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them." *Adkins v. Warden, Holman Corr. Facility*, 710 F.3d 1241, 1249 (11th Cir. 2013) (some alterations added) (internal quotation marks omitted) (quoting *Jones v. Walker*, 540 F.3d 1277, 1288 n. 5 (11th Cir. 2008) (en banc)).

4.

Additionally, "a determination of a factual issue made by a [s]tate court shall be presumed to be correct." 28 U.S.C. § 2254(e)(1). Only with "clear and convincing evidence" may a petitioner overcome a state court's presumptively correct factual findings. *Id.* "Clear and convincing evidence entails proof that a claim is highly probable, a standard requiring more than a preponderance of the evidence but less than proof beyond a reasonable doubt." *Ward v. Hall*, 592

F.3d 1144, 1177 (11th Cir. 2010) (internal quotation marks omitted). The Supreme Court has not addressed the exact relationship between § 2254(e)(1) and § 2254(d)(2). *Wood*, 558 U.S. at 293; *see id.* at 304-05 ("[W]e leave for another day the questions of how and when § 2254(e)(1) applies in challenges to a state court's factual determinations under §2254(d)(2)."). And any overlap of AEDPA's factual provisions when considering an adjudicated constitutional claim remains unclear.[4]

As the Supreme Court has commented regarding a petitioner's ability to obtain merits-based habeas review, "If this standard is difficult to meet, that is because it was meant to be. As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings." *Richter*, 562 U.S. at 102; *see also Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable—a substantially higher threshold.").

5.

Pertinent to Sneed's petition, "AEDPA limits [the] review to whether the state court's determination that [the petitioner] failed to plead sufficient facts in his

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[4] *Compare Cave v. Sec'y, Fla. Dep't of Corr.*, 638 F.3d 739, 747 (11th Cir. 2011) ("We have not yet had an occasion to completely define the respective purviews of (d)(2) and (e)(1), and this case presents no such opportunity."), *with Newland v. Hall*, 527 F.3d 1162, 1183-84 (11th Cir. 2008) (explaining that the "review of a state court's findings of fact-to ascertain whether the court's decision was based on an unreasonable determination of facts-is circumscribed by both section 2254(d)(2) and 28 U.S.C. § 2254(e)(1)").

Rule 32 petition to support a [constitutional] claim . . . was contrary to or an unreasonable application of Supreme Court precedent." *Powell v. Allen*, 602 F.3d 1263, 1273 (11th Cir. 2010) (per curiam). Consequently, a summary dismissal of an inadequately-stated Alabama collateral claim is due deferential treatment under AEDPA. *Id.*; *see also id.* ("review[ing] the Rule 32 court's rejection of [the petitioner's constitutional] claim [under Ala. R. Crim. P. 32.6] as a holding on the merits").

6.

In his petition, Sneed pleads, in part, claims of alleged ineffective assistance by his trial counsel. In *Strickland v. Washington*, 466 U.S. 668 (1984), the Supreme Court established a two-pronged Sixth Amendment standard for evaluating the effectiveness of counsel. To prove that a conviction or sentence is unconstitutional due to ineffective assistance, "[f]irst, the defendant must show that counsel's performance was deficient." 466 U.S. at 687. "This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed [to] the defendant by the Sixth Amendment." *Id.* "Second, the defendant must show that the deficient performance prejudiced the defense." *Id.* "This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Id.* "[B]oth showings" are necessary for a petitioner to establish ineffective assistance—"a breakdown in the adversary process that renders the [conviction or sentence] unreliable." *Id.* Therefore, "the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa." *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) (citation omitted).

a.

A petitioner bears the burden of proving *Strickland*'s first prong "by a preponderance of competent evidence." *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (en banc). To establish deficient performance, a petitioner "must show that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 688. "[P]revailing professional norms" are the benchmarks for judging reasonableness. *Id.* Moreover, courts must be "highly deferential" in their "scrutiny of counsel's performance" and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.

Under the *Strickland* framework, a petitioner "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Id.* (internal quotation marks omitted). The Court observed that "countless ways [of] . . . effective assistance [exist] in any given case" and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id.* The Court cautioned that "[i]t is all too tempting for a [petitioner] to second-guess counsel's assistance after conviction or [an] adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable." *Id.* at 689. Consequently, an evaluating court must make "every effort . . . to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." *Id.*; *see, e.g.*, *Newland*, 527 F.3d at 1184 ("We review

counsel's performance 'from counsel's perspective at the time,' to avoid 'the distorting effects of hindsight.'") (quoting *Strickland*, 466 U.S. at 689). Simply put, "a petitioner must establish that no competent counsel would have taken the action that his counsel did take" to overcome the presumption that counsel's conduct fell "within the wide range of competent assistance." *Chandler*, 218 F.3d at 1315, 1317.

Further, when assessing an adjudicated ineffective assistance claim on habeas review, "it is important to keep in mind that [i]n addition to the deference to counsel's performance mandated by *Strickland*, the AEDPA adds another layer of deference" on an adjudicated claim. *Williams v. Allen*, 598 F.3d 778, 789 (11th Cir. 2010) (alteration in *Williams*) (internal quotation marks omitted) (quoting *Rutherford v. Crosby*, 385 F.3d 1300, 1309 (11th Cir. 2004)). "Thus, [a petitioner] not only has to satisfy the elements of the *Strickland* standard, but he must also show that the [s]tate court applied *Strickland* to the facts of his case in an *objectively unreasonable manner*." *Williams*, 598 F.3d at 789 (first alteration added) (internal quotation marks omitted) (first quoting *Blankenship v. Hall*, 542 F.3d 1253, 1271 (11th Cir. 2008) (emphasis added in *Blankenship*); and then quoting *Rutherford*, 385 F.3d at 1309). Because *Strickland* and § 2254(d) incorporate "'highly deferential' [standards], . . . when the two apply in tandem, review is 'doubly' so." *Richter*, 562 U.S. at 105 (citations omitted). The focus of this doubly deferential inquiry "is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard" as opposed to "whether counsel's actions were reasonable." *Id.*; *see also id.* at 101 (contrasting "whether the state court's application of the *Strickland* standard was unreasonable" under § 2254(d)(1) with "whether defense counsel's perfor-

mance fell below *Strickland*'s standard" under the Sixth Amendment). Accordingly, this "[d]ouble deference is doubly difficult for a petitioner to overcome, and it will be a rare case in which an ineffective assistance of counsel claim that was denied on the merits in state court is found to merit relief in a federal habeas proceeding." *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1268 (11th Cir. 2012) (alteration added) (internal quotation marks omitted).

b.

The burden of proof for the prejudice prong is less demanding than the performance prong's preponderance of the evidence standard. 466 U.S. at 694. To satisfy the prejudice component, a habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* "A reasonable probability is [one] sufficient to undermine confidence in the outcome." *Id.* Stated differently, "[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect." *Johnson v. Alabama*, 256 F.3d 1156, 1177 (11th Cir. 2001) (internal quotation marks omitted). But the fact that counsel's "errors had some conceivable effect on the outcome of the proceeding" is insufficient to show prejudice. *Strickland*, 466 U.S. at 693. "[W]hen a [capital] petitioner challenges a death sentence, 'the [constitutional] question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Stewart v. Sec'y, Fla. Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) (alterations added) (quoting *Strickland*, 466 U.S. at 695). If the

state court has adjudicated the prejudice prong, then a petitioner must demonstrate that the merits-based conclusion contains AEDPA error; otherwise, habeas relief is unavailable. *See Cullen*, 563 U.S. at 197-98 ("Even if his trial counsel had performed deficiently, [the petitioner] also has failed to show that the [state court] must have unreasonably concluded that [he] was not prejudiced."). Additional principles come into play when a sentencing court overrides a jury's recommended life sentence. For example, the Eleventh Circuit has observed that "[p]rejudice is more easily shown in jury override cases because of the deference shown to the jury recommendation." *Kokal v. Sec'y, Fla. Dep't of Corr.*, 623 F.3d 1331, 1350 (11th Cir. 2010) (alternation added) (internal quotation marks omitted) (quoting *Harich v. Wainwright*, 813 F.2d 1082, 1093 n. 8 (11th Cir. 1987)), *adopted on rehearing sub nom. Harich v. Dugger*, 844 F.2d 1464, 1468-69 (11th Cir. 1988) (en banc), *overruling on other grounds recognized in Davis v. Singletary*, 119 F.3d 1471, 1482 (11th Cir. 1997). In *Kokal*, the Eleventh Circuit referenced the jury's unanimous recommended death sentence in concluding that the Florida Supreme Court's rejection of the petitioner's *Strickland* mitigation claim—based on new evidence of organic brain damage—deserved AEDPA deference. 623 F.3d at 1334, 1350.

Also, "a trial judge's post-hoc statements concerning how additional evidence might have affected [the] [override] ruling are not determinative for purposes of assessing prejudice." *Williams v. Allen*, 542 F.3d 1326, 1345 (11th Cir. 2008). Rather, "an objective standard that presumes a reasonable decisionmaker" applies when assessing whether collateral evidence creates a reasonable probability of a different sentencing outcome. *Id.* (citing *Strickland*, 466 U.S. at 695).

III.

With these AEDPA principles in mind, the court turns to Sneed's claims, which number 8 in total, Claims A-H, excluding any subclaims. The court divides Sneed's claims into two sections. In section A, the court addresses Sneed's six claims unrelated to trial counsel's effectiveness—Claims E-G, D, A, and H—and the guilt-phase and penalty-phase ineffective assistance claims in section B—Claims C and B. Sneed exhausted some but not all of the claims analyzed in section A on direct review and in section B on collateral review. The court will address the habeas concepts of exhaustion, procedural default, and heightened pleading when those issues arise in a claim. Additionally, within section A, the court combines the analysis of Claims A and H into one section because of the significant overlap in Sneed's allegations.

A.

1.

Sneed alleges in Claim E that his less culpable conduct—as "a nontriggerman"—means that his death sentence is excessive under the Eighth Amendment. Doc. 1 at 106 ¶ 184. Sneed asserts statutorily that AEDPA deference does not preclude habeas relief because of clearly established constitutional and unreasonable factual error in the ACCA's denial of this claim. *See id.* at 112 ¶ 193 (citing 28 U.S.C. § 2254(d)(1)-(d)(2)). The court disagrees.

a.

Citing several Supreme Court and Alabama authorities, doc. 26-10 at 89-91, Sneed argued on direct appeal that "a death sentence for a nontriggerman

accomplice [wa]s excessive" under the Eighth Amendment. *Sneed Direct II*, 1 So. 3d at 130-31. In framing the constitutional issue, the ACCA explained that under *Enmund v. Florida*, 458 U.S. 782 (1982), a case where the defendant like Sneed was not the trigger person, a death sentence "was disproportionate" for a robbery-murder accomplice who "drove [and remained in] the getaway car." *Sneed Direct II*, 1 So. 3d at 130. The ACCA contrasted this defendant getaway driver's lack of lethal intent or expectations and minor participation in *Enmund* to the nontriggermen's "active[] involve[ment]" in the kidnapping-robbery in *Tison v. Arizona*, 481 U.S. 137 (1987), where the Supreme Court recognized that a "reckless disregard for human life . . . represents a highly culpable mental state . . . that may be . . . [factored] in[to] . . . a capital sentencing judgment when th[e] [nontriggerman's] conduct causes [a] natural, [al]though . . . not inevitable, lethal result." *Sneed Direct II*, 1 So. 3d at 131 (internal quotation marks omitted). The ACCA noted that in *Tison*, "each petitioner was actively involved in every element of the kidnapping-robbery and was physically present during the entire sequence of criminal activity culminating in the murder[s]." *Id.* (internal quotation marks omitted).

The ACCA followed its discussion of *Enmund* and *Tison* with a collection of affirmed Alabama "death sentences for nontriggerman accomplices." *Sneed Direct II*, 1 So. 3d at 131. Referencing Sneed's "active[] involve[ment] in the robbery-murder and . . . presen[ce]" throughout the offense, the ACCA denied Sneed's Eighth Amendment excessiveness claim. *Sneed Direct II*, 1 So. 3d at 131; *see id.* (concluding that "even though [Sneed] was not the triggerman," the death sentence "for his participation in the robbery-murder of the victim [wa]s not excessive").

b.

Similarly, here, Sneed alleges on habeas review that he received a disproportionate sentence under the Eighth Amendment. Doc. 1 at 106, 112 ¶¶ 184, 192. Again, Sneed bases this excessiveness claim on the nontriggerman role he played in the capital offense. *Id.* Sneed argues that the ACCA's analysis is objectively unsound under AEDPA's (d)(1)'s legal standards and (d)(2)'s factual provision.

i.

To prove that the ACCA committed clearly established error under (d)(1), Sneed relies upon *Enmund*, *Tison*, *Roper v. Simmons*, 543 U.S. 551 (2003), and several non-binding authorities. Doc. 1 at 106-07, 109 ¶¶ 184-85, 188. The excerpts favorable to Sneed from the California and Florida Supreme Court cases which he cites, *id.* at 109 ¶ 188, are beyond AEDPA's definition of clearly established law. Consequently, the court focuses on the Supreme Court decisions.

Minimally, (d)(1)'s clearly established component requires Sneed to identify Supreme Court authority with a contextual connection to his nontriggerman allegations. This threshold consideration rules out *Roper*, which prohibits capital punishment for juveniles as precedent helpful to Sneed under (d)(1). *Roper*, 543 U.S. at 568. Thus, the court will focus on *Enmund* and *Tison* which involved nontriggermen who challenged their death sentences as excessive.

In *Enmund*, "the record supported no more than the inference that [the petitioner] was the person in the car by the side of the road at the time of the killings, waiting to help the robbers escape." 458 U.S. at 788. Under Florida law, nonetheless, the accomplice driver was "a constructive aider and abettor and hence a

principal in first-degree murder upon whom the death penalty could be imposed." *Id.* Under this felony-murder construct, the petitioner's nontriggerman role and absence from the murder scene were "irrelevant to . . . challeng[ing] . . . [a] death sentence," and "whether [the petitioner] intended that the [victims] be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape" did not matter under Florida law. *Id.* The *Enmund* Court "concluded that imposition of the death penalty in these circumstances [wa]s inconsistent with the Eighth and Fourteenth Amendments." *Id.*

Sneed contends that *Enmund* "categorically exempts [him] from the death penalty because his participation and culpability [we]re too minimal." Doc. 1 at 106 (emphasis omitted). The court disagrees. Sneed's factual and legal circumstances were significantly different than the getaway driver's in *Enmund*. Factually—as the store's video surveillance reflected—Sneed was present throughout the robbery-murder and participated actively in the robbery. *See* doc. 33 (notice of manual filing of "a copy of the surveillance exhibit on a CD per Judge's order"). Thus, Sneed was unlike the getaway driver in *Enmund* who remained isolated from the crime scene.

Legally—as the *Enmund* Court noted after reviewing "the punishment at issue" in other jurisdictions—Alabama approached accomplice liability in a capital case differently than Florida. 458 U.S. at 789. Unlike Florida, an Alabama accomplice could not receive "the death penalty solely for participation in a robbery in which another robber takes [a] life." *Id.* Instead, "to be found guilty of capital murder, [an Alabama] accomplice must have had [the] intent to promote or

assist [in] the commission of the offense[,] and [the] murder must [have] be[en] intentional." *Id.* at 790 n. 7 (internal quotation marks omitted) (citing Ala. Code §§ 13A-2-23, 13A-5-40(a)(2), 13A-6-2(a)(1) (1977 and Supp. 1982)); *cf. also* doc. 26-10 at 70 (Sneed's arguing in *Sneed Direct II* that the State presented insufficient evidence "that he had the specific and particularized intent to kill Mr. Terry" as required under Alabama law).

Consistent with Alabama's format, the trial court instructed the jury on intentional murder as an accomplice and unintentional felony murder, includeing a charge on intoxication as negating intent, in the guilt phase of Sneed's case. *See* doc. 26-7 at 171-75 (instructing on intentional murder requirements when the capital defendant is a nontriggerman accomplice); *see also id.* at 177 (instruction on intoxication); Doc. 26-3 at 7 (same). After hearing all the evidence, including that Sneed was unarmed, a unanimous jury found, beyond a reasonable doubt, that Sneed had promoted or assisted in the capital offense with "a particularized intent to kill" and convicted him of robbery-murder as an accomplice. Doc. 26-7 at 172; *see also* doc. 26-3 at 15 (reflecting three guilt-phase options on the verdict form and capital murder marked). Following Sneed's capital conviction as an intentional accomplice, his case moved to the penalty phase.

Thus, Sneed's "culpable mental state," 458 U.S. at 789, was relevant to his death sentence in contrast to the unconstitutional format in *Enmund*. And nothing in *Enmund* invalidated, much less clearly so, an accomplice's death sentence under a structure like Alabama's. Consequently, Sneed has not shown with *Enmund* that the ACCA reached a contrary to or

unreasonable decision on his excessive punishment claim.

The Supreme Court revisited *Enmund* in *Tison*. The Court considered whether the death penalty was excessive for accomplices who "neither . . . specifically intended to kill the victims . . . [nor] inflicted the fatal gunshot wounds." *Tison*, 481 U.S. at 138. The *Tison* petitioners were brothers who armed their incarcerated father and his cellmate and helped them escape from prison. *Id.* at 139. Several days after the breakout, the group had vehicle problems and "decided to . . . steal a car." *Id.* at 139-40. After getting a vehicle to pullover, the armed group held the four family members from that car captive. *Id.* at 140. Eventually, the petitioners' father and his cellmate "brutally murder[ed] [the victims] with repeated blasts from their shotguns." *Id.* at 141. The petitioners "made [no] effort to help the victims" and "drove away, continuing their flight," until law enforcement eventually apprehended them. *Id.*

The State tried the petitioners for capital murder under Arizona's "accomplice liability and felony-murder statutes" and obtained convictions. *Id.* at 141-42. After weighing the aggravating and mitigating factors, the trial court "sentenced both petitioners to death." *Id.* at 143. The appellate court affirmed. Thereafter, the petitioners "collaterally attacked their death sentences in state postconviction proceedings [and] alleg[ed] that *Enmund* . . . required reversal." *Id.* The Arizona

Supreme Court understood that *Enmund* prohibited capital punishment unless an accomplice had an "intent to kill." *Tison*, 481 U.S. at 143 (internal quotation marks omitted). Still, the Arizona Supreme Court concluded that the brothers' "participation in

the events leading up to and following the murder of four [victims]" met that level of intent. *Tison*, 481 U.S. at 138. The *Tison* Court vacated the judgments holding "that the Arizona Supreme Court [had] applied an erroneous standard in making the findings required by *Enmund*." 481 U.S. at 138.

The Supreme Court did "not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty." *Id.* at 158. But the Court clarified that "major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the *Enmund* culpability requirement." 481 U.S. at 158. On the record before it, the Court expressed that "[t]he Arizona courts ha[d] clearly found that the former [requirement] existed . . . and remand[ed] for determination of the latter [requirement]."[5] *Id.*

Thus, *Tison* establishes that an active but non-shooting accomplice may receive a constitutionally valid death sentence with a mentally culpable state of reckless indifference rather than an intent to kill. *See id.* (acknowledging that a "minority of . . . jurisdictions . . . have rejected the possibility of a capital sentence [for felony murder] absent an intent to kill," but determining that such a "position [was not] constitutionally required"). This means that Sneed's pretrial statement and testimony that he had no intent to kill Mr. Terry is not dispositive of his *Enmund*-excessiveness claim. *See Tison*, 481 U.S. at 150 ("accept[ing] . . .

[5] Despite "stat[ing] the[] two requirements separately," the Court noted that "they often overlap." *Tison*, 481 U.S. at 158 n. 12; *see id.* (explaining that "even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding").

as true" the "argu[ment] . . . that the[] [petitioners] did not intend to kill as that concept has been generally understood in the common law") (internal quotation marks omitted); *cf. also* doc. 1 at 113 ¶ 194 (requesting that this court revisit *Tison*'s reckless-indifference holding and preclude Sneed's execution under the Eighth Amendment's evolving standards of decency because he had no intent to kill).

Absent from Sneed's petition is authority which clearly establishes that his continuous presence and substantial participation in the robbery-murder, knowing that Hardy had a firearm, failed to rise to a reckless indifference to Mr. Terry's life. Likewise, Sneed does not argue that Alabama's accomplice liability framework, which incorporates an intentional component, is unconstitutional under *Tison*'s refinement of *Enmund*. Thus, Sneed has not demonstrated that the ACCA's resolution of his excessive penalty claim was contrary to or unreasonable under *Tison*.

ii.

Turning to (d)(2), Sneed argues that the ACCA "gloss[ed] over the intent requirement" in denying his excessive penalty claim. Doc. 1 at 110 ¶ 190. To support his position, Sneed focuses on parts of the record which, he contends, substantiate his lack of intent to kill Mr. Terry, noting for example that "I didn't kill anybody. I just took the cash register," and that "[t]he plan . . . [was] to rob[;] . . . . no[t] . . . to kill." *See, e.g.*, *id.* (internal quotation marks omitted). As explained in the (d)(1) analysis, whether Sneed lacked a murderous intent does not resolve the blameworthy inquiry under *Tison*. Instead, Sneed's ability to prove a disproportionate punishment claim turns upon evidence, if any, that he participated minimally and acted without reckless indifference as an accomplice.

And relevant here, the ACCA determined that Sneed's active participation in the robbery-murder and presence throughout the offense were sufficient to warrant the death penalty under *Enmund* and *Tison*. Sneed's arguments to the contrary and the evidence which he cites are inapposite because they do not undermine the findings incorporated into the ACCA's decision. Consequently, Sneed has neither demonstrated that the ACCA based the denial of this Eighth Amendment claim on objectively wrong facts under (d)(2) nor overcome those presumptively correct facts with clear and convincing evidence under (e)(1), if applicable.

iii.

Sneed argues also that the Alabama Supreme Court's discussion of the video surveillance evidence in *Ex parte Sneed (Sneed ASC Direct I)*, 783 So. 2d 863 (Ala. 2000) (per curiam), establishes that the ACCA committed unreasonable factual error in *Sneed Direct II*. Doc. 1 at 111 ¶ 190. At issue here is the Alabama Supreme Court's comment that the security footage did not "capture Sneed's intent at the time [he] and Hardy entered the store." Doc. 1 at 111 ¶ 190 (internal quotation marks omitted). The comment stemmed from Sneed's appeal of his first trial where the State tried Sneed and Hardy together. *Sneed ASC Direct I*, 783 So. 2d at 865. Over Sneed's objection, the State "used [an] edited and redacted [version of a] statement," which Sneed had made about the robbery-murder. *Id.* Because Sneed's confession implicated Hardy, the State modified the document "to avoid violating Hardy's confrontation right guaranteed by the Confrontation Clause of the Sixth Amendment to the United States Constitution." *Id.*

Sneed argued on appeal that the redacted statement prejudiced his guilt-phase defense that he had no murderous intent and "violated the rule of completeness." *Id.* at 868. The Alabama Supreme Court agreed. In comparing the factual inferences from the unmodified and modified versions of Sneed's confession, *id.* at 865-68, the Court concluded "that the redaction [had] . . . made a liar out of Sneed," *id.* at 869. The Court identified several "irreconcilabl[e] inconsisten[cies]," which left the jury with an impression that Sneed "[w]as the central figure in the crime." *Id.* These "distort[ions]" included "that Sneed drove the car, obtained the murder weapon, drove past six stations looking for the easiest target, devised the means of making the masks, and induced Hardy to carry the weapon into the store." *Id.*

The Court considered next the completeness rule. Specifically, the Court evaluated whether the videotape made "the meaning of [Sneed's] redacted statement . . . clear despite the [incompleteness]." *Id.* at 869. The intent language, which Sneed seizes upon on habeas review, comes from the application of that evidentiary doctrine. In particular, the Court observed that the security footage "provided a remarkable amount of evidence" about how the offense unfolded—"Sneed . . . [neither] act[ed] alone . . . [nor] was . . . the gunman." *Id.* at 869. But the Court explained that the surveillance tape provided no information about the "events leading up to the murder" and could not "capture Sneed's intent" as he entered the store with Hardy. *Id.*

Given those evidentiary limitations, the Alabama Supreme Court determined that "the videotape . . . d[id] not overcome the distorted statement's contradiction of Sneed's defense that he lacked the specific

intent to commit murder." *Id.* Concluding that the admitted redaction had "sacrificed [Sneed's rights] . . . to accommodate the State's interest in conducting a joint trial" and caused undue prejudice, the Court granted him a new trial. *Id.* at 870-71.

As contextualized above, the videotape's inability "to capture Sneed's intent" pre-offense was an evidentiary determination distinct from the ACCA's assessment of his participation and culpable mental state under the Eighth Amendment. And Sneed has not shown how the Alabama Supreme Court's remark that prejudicial contradictions remained regarding his intent, despite the security footage, means that the ACCA relied upon objectively wrong facts to deny his disproportionate-punishment claim.[6]

c.

Turning now to Sneed's remaining allegations in Claim E, beyond seeking habeas relief under the Eighth Amendment, Sneed contends that the excessive punishment he received violates his "rights to due process [and] a reliable sentence" under the Fifth, Sixth, and Fourteenth Amendments. Doc. 1 at 112 ¶ 193. Sneed's references to due process and the Fourteenth Amendment are consistent with asserting an Eighth Amendment claim against the State through the incorporation doctrine.[7] But like his

[6] Sneed's allegations about the videotape's evidentiary limitations also do not overcome (e)(1)'s presumptively-correct factual standard on his Eighth Amendment claim.

[7] "With only 'a handful' of exceptions, th[e] [Supreme] Court has held that the Fourteenth Amendment's Due Process Clause incorporates the protections contained in the Bill of Rights, rendering them applicable to the States." *Timbs v. Indiana*, 586 U.S. __, 139 S. Ct. 682, 687 (2019) (quoting *McDonald v. Chicago*, 561 U.S. 742, 765 (2010) (plurality opinion)).

briefing on direct appeal, doc. 26-10 at 67-77, Sneed asserts but leaves undeveloped how an alleged excessive death sentence violated his Fifth, Sixth, or independent Fourteenth Amendment rights, implicating the habeas concepts of exhaustion, procedural default, and heightened pleading.

i.

"Section 2254(b) requires that prisoners must ordinarily exhaust state remedies before filing for federal habeas relief." *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). And "[a]n applicant shall not be deemed to have exhausted the remedies available [in state court] . . . if he has the right under the law of the State to raise, by any available procedure, the question presented." 28 U.S.C. § 2254(c). Exhaustion requires that a petitioner "'give the state courts one full opportunity to resolve any constitutional issues by invoking one complete round of the State's established appellate review process,' including review by the state's court of last resort, even if review in that court is discretionary." *Pruitt v. Jones*, 348 F.3d 1355, 1358-59 (11th Cir. 2003) (quoting *O'Sullivan v. Boerckel*, 526 U.S. 838, 845 (1999)). "Alabama's discretionary direct review procedures bring Alabama [habeas petitioners] within the scope of the *Boerckel* rule." *Pruitt*, 348 F.3d at 1359 (internal quotation marks omitted) (quoting *Smith v. Jones*, 256 F.3d 1135, 1140 (11th Cir. 2001)). *Boerckel* applies to Alabama's postconviction appellate review structure too. *See Pruitt*, 348 F.3d at 1359 ("Nothing in *Boerckel*'s reasoning suggests that a different rule should apply in state post-conviction appeals as opposed to direct appeals."); *id.* (concluding that petitioner had "failed to exhaust his state remedies by not petitioning the

Alabama Supreme Court for discretionary review of the denial of his state habeas petition").

The exhaustion requirement is intended to afford the state-court system the first opportunity to correct federal questions concerning the validity of criminal convictions. This means that for habeas review "[t]o be appropriate," the petitioner "must have raised these claims in state court to allow the state courts the opportunity to rule on the federal issues." *Snowden v. Singletary*, 135 F.3d 732, 735 (11th Cir. 1998). Additionally, this means that "[f]ederal courts are not forums in which to relitigate state trials." *Smith v. Newsome*, 876 F.2d 1461, 1463 (11th Cir. 1989) (internal quotation marks omitted) (quoting *Barefoot*, 463 U.S. at 887).

Moreover, "to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues. 'It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made.'" *Snowden*, 135 F.3d at 735 (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982) (per curiam)). Rather, "an issue is exhausted if 'the reasonable reader would understand [the] claim's particular legal basis and specific factual foundation' to be the same as it was presented in state court." *Pope v. Sec'y, Fla. Dep't of Corr.*, 680 F.3d 1271, 1286 (11th Cir. 2012) (alteration in *Pope*) (quoting *Kelley v. Sec'y, Fla. Dep't of Corr.*, 377 F.3d 1317, 1344-45 (11th Cir. 2004)). And "[a] failure to exhaust occurs . . . when a petitioner has not 'fairly present[ed]' every issue raised in his federal petition to the state's highest court, either on direct appeal or on collateral review." *Id.* at 1284 (last alteration

modified in *Pope*) (quoting *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2010) (per curiam)).

ii.

Linked to the doctrine of exhaustion is procedural default. For example, if a petitioner seeks habeas relief based on a mixture of exhausted and unexhausted federal claims, a district court may dismiss the petition without prejudice, *Rose v. Lundy*, 455 U.S. 509, 519 (1982), or stay the habeas action to allow the petitioner to first avail himself of his state remedies, *see Rhines v. Weber*, 544 U.S. 269, 277-78 (2005) (discussing "[s]tay and abeyance" option for mixed habeas petitions). But "if it is clear from state law that any future attempts at [state court] exhaustion would be futile" because of the state's procedural framework, then a "federal court[] may treat [that] unexhausted claim[] as procedurally defaulted, even absent a state court determination to that effect." *Bailey v. Nagle*, 172 F.3d 1299, 1305 (11th Cir. 1999) (per curiam) (citing *Snowden*, 135 F.3d at 737). This habeas doctrine, known as unexhausted procedural default,[8] avoids a game of "needless 'judicial ping-pong'" when a state procedural rule "obvious[ly]" bars a state court from considering the merits of an unexhausted federal claim. *Snowden*, 135 F.3d at 736 (citing *Coleman*, 501 U.S. at 735 n. 1). Unexhausted procedural default includes claims that a petitioner never raised or exhausted only partially in state court.

A second type of procedural default occurs when a petitioner presents his federal claim without following

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[8] *See Bailey*, 172 F.3d at 1305 ("[F]ederal courts may treat unexhausted claims as procedurally defaulted, even absent a state court determination to that effect, if it is clear from state law that any future attempts at exhaustion would be futile.").

"'independent and adequate' state procedures." *Mason*, 605 F.3d at 1119 (quoting *Wainwright*, 433 U.S. at 87). If the state court relies upon that procedural mistake to dismiss the alleged constitutional violation, then the petitioner "will have 'procedurally defaulted his claim[]' in federal court." *Mason*, 605 F.3d at 1119 (alteration added) (quoting *Boerckel*, 526 U.S. at 848). Under this strain of procedural default, "[a] state court's rejection of a petitioner's constitutional claim on state procedural grounds will generally preclude any subsequent federal habeas review of that claim." *Ward*, 592 F.3d at 1156 (alteration in *Ward*) (internal quotation marks omitted) (quoting *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001)). The court refers to this habeas scenario as state-barred procedural default.

* * * *

With these habeas concepts in mind, Sneed's vague mention of rights under the Fifth, Sixth, or free-standing Fourteenth Amendment did not exhaust those theoretical constitutional claims tied to an alleged disproportionate-death sentence in state court. Sneed's similar bare approach to presenting these same allegations on habeas review does not meet the heightened pleading requirement.[9] Thus, the court

[9] Separate from exhausting claims in state court and avoiding procedural default, a heightened pleading rule applies to a petitioner's federal habeas allegations. *See* Rule 2(c), *Rules Governing Section 2254 Cases in the United States District Courts* (requiring petitioner to "specify all the grounds for relief[,]" "state the facts supporting each ground[,]" and "state the relief requested"); *McFarland v. Scott*, 512 U.S. 849, 856 (1994) (explaining that habeas Rule 2(c) requires heightened pleading); *Mayle v. Felix*, 545 U.S. 644, 649 (2005) (contrasting that Rule 2(c) "requires a more detailed statement" with Federal Civil Pro-

denies those parts of Sneed's petition under these other amendments because of unexhausted procedural default and inadequate habeas pleading, development, and proof. In sum, Sneed neither overcomes AEDPA deference nor otherwise substantiates these allegations of an excessive punishment. Thus, the court denies Claim E.

2.

In Claim F, which overlaps with Claim E, Sneed asks this court to reevaluate *Tison*'s holding because of evolving standards under the Eighth Amendment. Doc. 1 at 113 ¶ 194. Specifically, Sneed contends that, consistent with changes in the national perspective since *Tison*, the Eighth Amendment should preclude capital punishment for accomplices who did not, or had no intent to, kill. Doc. 1 at 113 ¶ 194. Conceding in reply that he never raised this claim in state court, Sneed argues that the cause and prejudice exception applies. Doc. 31 at 49-51.

a.

A petitioner, who failed to raise a claim in state court, may overcome the prohibition against habeas review if he "can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law." *Coleman*, 501 U.S. at 750. To do so, because the standard is conjunctive, a petitioner must establish both components to obtain habeas review. *Coleman*, 501 U.S. at 750. To show cause, a petitioner must prove that "some objective factor external to the defense impeded counsel's efforts" to pursue the claim properly under state court procedures. *Murray v.*

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cedure Rule 8(a)(2)'s "short and plain statement of the claim" standard) (internal quotation marks omitted).

Carrier, 477 U.S. 478, 488 (1986). Appropriate grounds include demonstrating that "interference by officials . . . ma[de] compliance with the State's procedural rule impracticable, . . . showing that the factual or legal basis for a claim was not reasonably available to counsel[,] . . . [or attributing that procedural noncompliance to] . . . constitutionally [i]neffective assistance of counsel." *McCleskey v. Zant*, 499 U.S. 467, 494 (1991) (some alterations added) (internal quotation marks omitted) (quoting *Carrier*, 477 U.S. at 488), *superseded on other grounds by statute as stated in Banister v. Davis*, 590 U.S. __, 140 S. Ct. 1698, 1707 (2020).

As for the second component, a habeas petitioner must "show . . . actual prejudice resulting from the alleged constitutional violation." *Ward*, 592 F.3d at 1157. This standard means "not merely that the errors . . . created a *possibility* of prejudice, but that they worked to [a petitioner's] *actual* and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis in original).

b.

Sneed's cause contentions revolve around death-penalty developments post-*Tison*. For example, Sneed references a nationwide increase in "proportional sentencing" for accomplices "who lacked an intent to kill" since *Tison*. Doc. 31 at 49. Sneed mentions also the "abolished . . . practice of judicial override" in Alabama, Delaware, and Florida after the Supreme Court decided *Hurst v. Florida*, 577 U.S. 92 (2016). Doc. 31 at 50. These contentions are unavailing. To begin, Sneed cites no case authority which confirms that these developments provide him with valid cause to excuse his unexhausted procedural default.

Moreover, although a petitioner may establish cause when "a constitutional claim is so novel that its legal basis is not reasonably available to counsel," *Reed v. Ross*, 468 U.S. 1, 16 (1984), here, however, Sneed seeks to create constitutional cause in a manner that conflicts with the *Enmund-Tison* framework and this court's role on habeas review. Specifically, Sneed asks this court to: disregard binding Eighth Amendment precedent; prohibit capital punishment for non-shooting accomplices who lacked an intent to kill; and accept that untenable ruling as cause. Lower courts are bound by precedent and a district court cannot ignore binding precedent to generate constitutional cause to excuse procedural default. Therefore, the court declines Sneed's invitation, and finds, based on this record and the case law, that Sneed has not shown cause to overcome his default.

Sneed has also failed to demonstrate prejudice. Meeting the second component requires Sneed to identify a constitutional claim capable of "creat[ing] 'a reasonable probability that the result of [his] [penalty phase] would have been different.'" *Mincey v. Head*, 206 F.3d 1106, 1138 (11th Cir. 2000) (last alteration added) (quoting *Strickler v. Greene*, 527 U.S. 263 (1999)).[10] Sneed again cites "evolving capital sentencing standards, particularly in light of Alabama's prospective repeal of the override statute." Doc. 31 at 50. As Sneed implicitly recognizes by noting the

[10] The Eleventh Circuit noted in *Mincey* that the *Strickler* Court "end[ed] the debate" over whether the standard for actual prejudice was different than the reasonable probability test for *Strickland* prejudice. *Mincey*, 206 F.3d at 1147 n. 86 (11th Cir. 2000); *see id.* at 1147 ("[T]he prejudice *Strickler* requires to overcome a procedural default is the same as the prejudice *Strickland* requires to demonstrate prejudice (in the ineffective assistance context).").

"prospective repeal," Alabama's abolishment of the override provision does not benefit him retroactively. And the federal constitution does not demand that the State broaden the prospective scope of the decision to end that former practice.

Regardless, Sneed's observations about nationwide trends in capital punishment do not establish that he experienced a cognizable constitutional violation, much less, actual prejudice in his sentence. Concrete, rather than, at most, national signs supporting arguably inchoate, constitutional harm forms the bedrock of prejudice. And with only an evolving constitutional theory, Sneed is unable to demonstrate even a possibility, much less a reasonable probability, of a different sentencing outcome. Consequently, Sneed has not shown that he suffered actual prejudice on account of evolving Eighth Amendment standards or Alabama's repeal of judicial override post-*Tison*.

To close, Sneed's efforts to excuse his procedural default through cause and prejudice fail. Accordingly, the court denies Claim F because of Sneed's unexhausted procedural default.

3.

In Claim G, Sneed asserts that the sentencing court violated his constitutional rights in applying Alabama's "especially heinous, atrocious or cruel" or HAC factor as an aggravating circumstance. Doc. 1 at 116 ¶ 200 (internal quotation marks omitted); *id.* at 118-19 ¶ 205. Statutorily, Sneed argues that the state courts' objectively-flawed adjudication of this claim opens the (d)(1) and (d)(2) doors to habeas relief. Doc. 1 at 118-19 ¶ 205.

The court considers the state court history of this claim before undergoing the analysis.

a.

Sneed argued on direct review in state court that "the trial court erroneously concluded that the murder was especially heinous, atrocious, or cruel compared to other capital murders." *Sneed Direct II*, 1 So. 3d at 116-17; Doc. 26-10 at 36. Citing several Supreme Court decisions, Sneed maintained that "the application and finding of the HAC aggravating circumstance" to support his death sentence was unconstitutional. Doc. 26-10 at 37.

Sneed divided this appellate claim into two subclaims. Doc. 26-10 at 37, 42. Relevant to his habeas Claim G, Sneed argued that he should not bear responsibility "for the [p]recise [m]anner in which" Hardy murdered Mr. Terry. Doc. 26-10 at 37 (emphasis omitted); *Sneed Direct II*, 1 So. 3d at 117. Sneed identified two aspects of the penalty phase which he maintained substantiated the merits of this subclaim: erroneous jury instructions and the sentencing court's unlawful reliance on his mental state. *Id.* at 117-18; Doc. 26-10 at 37, 41.

Concerning the instructions, Sneed argued that the trial court's definition of "cruel"—i.e., that the HAC factor's disjunctive "cruel" component applied to offenses "designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering of others," doc. 26-10 at 37 (internal quotation marks omitted)—violated the principle that "one's mental state is irrelevant to the [HAC] determination," doc. 26-10 at 38. Sneed contended that "the phrases 'designed to' and 'even enjoyment of' necessarily" improperly required the jury to make "some assessment of" his or Hardy's mental state at the time of the murder. *Id.* at 37-38.

Relatedly, Sneed made several alternative arguments about the jury instructions. Sneed noted that without clarifying whose mental state mattered, "the trial court failed to channel the jury's discretion." *Id.* According to Sneed, the "vague[ly]"-worded instruction meant that "some jurors may have considered [his] mental state relevant while others . . . Hardy's." *Id.* at 39 n. 4. Because the record did not disclose "whether the jury unanimously relied upon the same set of facts in assessing this aggravator," Sneed contended that the factor was "invalid," *id.* at 39, and "should not have been considered in determining [his] sentence," *id.* n. 4.

Sneed added that assuming Hardy's mental state mattered, then the application of the HAC factor "[c]reat[ed] strict liability" for him and "violate[d] the Eighth Amendment's narrowing function." *Id.* at 39-40. Sneed argued too that, alternatively, if his mental state mattered, "no evidence . . . support[ed]" his "personal[] desire[] to inflict a high degree of pain" on Mr. Terry or have Hardy carry out the murder in a certain manner. *Id.* at 40 (internal quotation marks omitted).

In the last section of this subclaim, Sneed focused on the sentencing court's application of the HAC factor. Doc. 26-10 at 41. Sneed maintained that the sentencing court relied erroneously on his mental state to support that aggravating circumstance. *Id.* Sneed argued that the trial court's references to his "particularized intent to kill," failure to intervene on Mr. Terry's behalf, and "unfazed" look during the murder were irrelevant to the HAC assessment. *Id.* at 42.

i.

The ACCA began its analysis with Sneed's objection to applying the HAC factor to him vicariously because of Hardy's conduct. The ACCA observed that the "Alabama appellate courts ha[d] not specifically addressed" vicarious responsibility for an aggravating circumstance. *Id.* at 117. Still, citing several Alabama cases involving the HAC factor, the ACCA explained that the "focus[]" of that aggravating circumstance is "the manner of the killing and not the defendant's actual participation in the murder." *Id.*; *see, e.g.*, *Ex parte Bankhead*, 585 So. 2d 112, 125 (Ala. 1991) (similar).

The ACCA turned then to the analysis of a similar sentencing issue in *Owens v. State*, 13 S.W.3d 742 (Tenn. Crim. App. 1999). *Sneed Direct II*, 1 So. 3d at 117. In *Owens*, the Tennessee Criminal Court of Appeals considered "whether an aggravating factor [could] be applied vicariously to a defendant if he was not the actor responsible for the particular aggravating circumstance." *Sneed Direct II*, 1 So. 3d at 117 (internal quotation marks omitted) (quoting *Owens*, 13 S.W.3d at 761). The *Owens* court observed that no Tennessee court had addressed a vicarious application of the HAC factor to "a convicted murderer, who took no part in the killing . . . and was unaware . . . how it was to be accomplished." *Sneed Direct II*, 1 So. 3d at 117 (internal quotation marks omitted) (quoting *Owens*, 13 S.W.3d at 761). The *Owens* court considered many authorities, including ones from "[o]ther federal and state courts [which] ha[d] . . . addressed" death sentences based upon a vicarious application of the HAC factor. *Sneed Direct II*, 1 So. 3d at 117 n. 11 (internal quotation marks omitted) (quoting *Owens*, 13 S.W.3d at 761 & n. 11).

The *Owens* court "conclude[d] that a non-triggerman defendant c[ould] be held vicariously liable for an aggravating circumstance following an *Enmund–Tison* determination" in the guilt phase. *Sneed Direct II*, 1 So. 3d at 117 (internal quotation marks omitted) (quoting *Owens*, 13 S.W.3d at 762).

Agreeing with the outcome in *Owens*, the ACCA "likewise . . . h[e]ld that an accomplice may be held vicariously liable for the manner in which his co-defendant commits a murder." *Sneed Direct II*, 1 So. 3d at 118. The ACCA clarified that its vicarious application holding meant that "a court [could] properly apply the . . . [HAC factor] to a nontriggerman" as the sentencer did in Sneed's capital case. *Id.*

ii.

The ACCA reviewed Sneed's jury-charge contentions for plain error because he raised them "for the first time on appeal." *Id.* The ACCA found no error because the Alabama Supreme Court had "approved . . . a similar instruction" on the HAC factor in *Bankhead*. *Sneed Direct II*, 1 So. 3d at 118.[11]

b.

In his petition to this court, Sneed asserts an entitlement to habeas relief consistent with his

[11] In *Bankhead*, the appellant argued that "the trial court did not sufficiently restrict the applicability of [the HAC factor] to [his] conduct in the [stabbing death of the victim]." *Bankhead*, 585 So. 2d at 125. According to the appellant, the sentencing court's failure to limit the scope of the HAC "aggravating circumstance to [his] personal conduct . . . subverted the mandate for individualized capital sentencing." *Id.* at 124. Rejecting this contention, the Alabama Supreme Court explained that the HAC factor "emphasizes . . . the manner of the killing, not . . . the defendant's actual participation." *Id.*

collateral HAC subclaim minus the argument about the irrelevancy of an offender's mental state. *Compare* doc. 1 at 116-19 ¶¶ 200-05, *with* doc. 26-10 at 36-42. Constitutionally, Sneed alleges that the trial court's HAC "instruction, application, and finding . . . violated his rights to due process, a fair trial[,] and a reliable sentence." Doc. 1 at 118-19 ¶ 205. Sneed ties these allegedly-infringed rights loosely to the Fifth, Sixth, Eighth, and Fourteenth Amendments as he did on direct review. *Compare* doc. 1 at 119 ¶ 205, *with* doc. 26-10 at 47. But Sneed's references to channeling the jury's discretion and reserving capital punishment for the worst offenders are Eighth Amendment principles. Doc. 1 at 116-17 ¶¶ 202-03. Consequently, Sneed's HAC allegations trigger the Eighth and Fourteenth Amendments—merged under the incorporation doctrine.[12]

To support an AEDPA (d)(1) opening of extreme constitutional error, Sneed cites five Supreme Court decisions: *Maynard v. Cartwright*, 486 U.S. 356 (1988);[13] *Godfrey v. Georgia*, 446 U.S. 420 (1980) (plurality opinion);[14] *Espinosa v. Florida*, 505 U.S.

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[12] In Claim E, the court explained why Sneed's remaining allegations tied to other amendments were inadequate to support habeas relief. Consistent with that discussion, the court denies Claim G to the extent Sneed relies upon purported or unsubstantiated rights arising under the Fifth, Sixth, or freestanding Fourteenth Amendment.

[13] In *Maynard*, the Supreme Court affirmed an Eighth Amendment judgment that "the words 'heinous,' 'atrocious,' and 'cruel' did not on their face offer sufficient guidance to the jury" to apply that aggravating circumstance. 486 U.S. at 359-60.

[14] *Godfrey* involved Georgia's "'outrageously or wantonly vile, horrible and inhuman'" aggravating circumstance. The Court found "[t]here is nothing in these few words, standing alone, that

1079 (1992) (per curiam);[15] *Stringer v. Black*, 503 U.S. 222 (1992), *holding modified on other grounds by Brown v. Sanders*, 546 U.S. 212 (2006);[16] and *Roper*.[17] Doc. 1 at 116-17 ¶¶ 202-03. Accepting that some excerpts from these Eighth Amendment opinions seemingly strengthen Sneed's HAC habeas claim, the holdings—as outlined briefly in footnotes 13-17, which

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implies any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Godfrey*, 446 U.S. at 428.

[15] The *Espinosa* Court considered whether a sentencing court's "indirect weighing of an invalid aggravating factor create[d] the same potential for arbitrariness as the direct weighing of an invalid aggravating factor." 505 U.S. at 1082. The Court concluded that the Florida death sentence reached under these circumstances was unconstitutional. Specifically, the Court "h[e]ld that, if a weighing State decides to place capital sentencing authority in two actors[—the judge and an advisory jury—]rather than one," then the Eighth Amendment precludes "[]either actor . . . [from] weigh[ing] invalid aggravating circumstances." *Id. Espinosa* is not helpful here, however, because Sneed has not established that the Alabama courts based his death sentence partially upon an invalid HAC factor.

[16] Akin to *Maynard*, the *Stringer* Court faced a HAC-vagueness challenge tied to a Mississippi death sentence. *Stringer*, 503 U.S. at 226. The petitioner's case became final in state court before the Supreme Court decided *Maynard* and another invalid-factor decision, *Clemons v. Mississippi*, 494 U.S. 738 (1990). Thus, *Stringer* addressed primarily whether the habeas petitioner could rely retroactively on the invalidation principles from *Maynard* and *Clemons* "because either or both announced a new rule." *Stringer*, 503 U.S. at 225. The Supreme Court held in the petitioner's favor. *Id.* at 237. Unfortunately, nothing in *Stringer* sheds light, much less clearly establishes, the validity of Sneed's Eighth Amendment HAC challenge as a nontriggerman.

[17] *Roper* held that the Eighth Amendment prohibits "the imposition of the death penalty on juvenile offenders under 18," 543 U.S. at 568, a decision that is even more removed from Sneed's HAC allegations than the other cases he cites.

are all that matter under (d)(1)—do not. Specifically, none of these authorities confirms to what extent, if any, the application of the HAC factor in support of a nontriggerman's death sentence violates the Eighth Amendment. As such, the reliance upon them is misplaced.

Similarly, the cases which Sneed mentions in reply do not substantiate that his HAC claim meets the (d)(1) hurdle. For example, relying upon an excerpt from *Jackson v. Herring*, 42 F.3d 1350 (11th Cir. 1995), Sneed asserts that the trial court's finding of the HAC factor was "questionable." Doc. 31 at 103. The citation does not move the bar in Sneed's favor because the Eleventh Circuit did not analyze the HAC circumstance in that case. *See Jackson*, 42 F.3d at 1355 (discussing the petitioner's habeas claims).

Next, citing a collection of Eleventh Circuit cases beginning with *DeBruce v. Comm'r, Ala. Dep't of Corr.*, 758 F.3d 1263 (11th Cir. 2014), Sneed argues that the circumstances in them "were far more heinous or aggravating than those" in his capital case. Doc. 31 at 80-81. But again, the referenced decisions—as reflected in Sneed's parenthetical descriptions—do not include a constitutional analysis of the HAC circumstance. And only one decision—*Harris v. Dugger*, 874 F.2d 756, 759 n. 2 (11th Cir. 1989)—mentioned the HAC factor, but only as an uncontested aggravating finding supporting the death penalty. Thus, none of the cited authorities show that the ACCA deviated directly or unreasonably from clearly established Supreme Court precedent in rejecting Sneed's HAC challenge.

Moreover, the ACCA's analysis is consistent with the Eleventh Circuit's HAC holding in *White v.*

Wainwright, 809 F.2d 1478 (11th Cir. 1987).[18] Before discussing the HAC issue, the Eleventh Circuit found that the petitioner's participation in the offenses, as a nontriggerman, satisfied the *Enmund*—now the *Enmund-Tison* standard. *White*, 809 F.2d at 1481-84. The petitioner in *White* "urge[d] that th[e] [HAC] aggravating circumstance c[ould] [not] be . . . constitutionally applied to a non-triggerman and that such an application [would be] overbroad." 809 F.2d at 1485. "[D]isagree[ing]" with the petitioner, the Eleventh Circuit explained that "[t]he *Enmund* case represent[ed] the constitutional limitation on the imposition of the death penalty on non-shooters." *White*, 809 F.2d at 1485. Given those facts which substantiated the petitioner's "intent to use lethal force" under *Enmund*, *White*, 809 F.2d at 1484, the Circuit held that the Constitution did not preclude reliance upon the HAC factor in sentencing, *id.* at 1485. The Eleventh Circuit elaborated that "[t]he findings" from the *Enmund* assessment "indicate[d] that [the petitioner] was sufficiently involved in the[] 'especially heinous, atrocious and cruel' killings that [a] . . . death [sentence] . . . [wa]s not unconstitutionally overbroad." *Id.* Consequently, the HAC holding in *White*—which is binding on this court—forecloses Sneed from obtaining habeas relief under either clause of (d)(1).

c.

Sneed's mental state, as part of the HAC inquiry, is the focus of his (d)(2) evidentiary argument. The gist of Sneed's contention is that the ACCA based the rejection of his HAC subclaim on unreasonably-determined facts about his mental state. Doc. 1 at 118

[18] *White* predates *Tison* and AEDPA.

¶ 204. According to Sneed, "simply no evidence [existed] to support any assertion that [he] personally desired to inflict a high degree of pain or that he wanted . . . Mr. Hardy" to murder Mr. Terry in a certain manner. Doc. 1 at 118 ¶ 204. Sneed maintains that inferences about his intentions were "impossible" to draw "from Mr. Hardy's spontaneous actions," and that the State did not introduce evidence of Sneed's "wishes" or any pre-offense "understanding" about how Hardy would murder Mr. Terry. *Id.* And, in further support of his contention, Sneed notes that, in reversing his first death sentence on guilt-phase grounds, the Alabama Supreme Court discussed the videotape's inability "to capture Sneed's intent at the time [he] and Hardy entered the store." Doc. 1 at 11 ¶ 10; Doc. 31 at 13 n. 3; *see also Sneed ASC Direct I*, 783 So. 2d at 869 (discussing the security footage as inadequate to "overcome the distort[ions]" which his redacted statement created, including portraying him "as the central figure in the crime" and undermining his "defense that he lacked the specific intent to commit murder").

Sneed's factual contentions arise outside the ACCA's rationale for rejecting his HAC subclaim. More specifically, the ACCA's analysis of the HAC factor did not turn upon the sentencing court's findings about Sneed's mental state. Instead, the ACCA held that the trial court properly used the HAC factor in sentencing Sneed in light of the jury's guilt-phase finding that satisfied the *Enmund-Tison* test. Similarly, Sneed's factual contentions about his mental state are not pertinent to the ACCA's plain-error review of the HAC jury charge. Finally, in the absence of any challenge to the facts relevant to the last reasoned decision denying his HAC challenge in state

court, Sneed cannot prevail under (d)(2) on habeas review.

In sum, Sneed falls short of his AEDPA burden with his HAC allegations. Consequently, the court denies Claims G.

4.

In Claim D, Sneed argues that the jury's "[k]knowledge of [his] prior conviction and sentence destroyed his presumption of innocence and diminished the jurors' sense of responsibility." Doc. 1 at 99 ¶ 167. Sneed divides this claim into two subparts. One, Sneed faults trial counsel for failing to object to the prosecutor's "repeated[] reference[s] [to the] 'prior proceeding'" and a forensic witness's testimony about exhibits "introduced in the first trial." *Id.* at 100, 102 ¶¶ 168, 174; *Sneed Direct II*, 1 So. 3d at 114 (emphasis and internal quotation marks omitted). Two, Sneed maintains that several jurors discussed extraneous matters during deliberations, including his prior conviction and death sentence as well as the outcome of Hardy's capital case. Doc. 1 at 104 ¶ 179. Allegedly, the jury's consideration of this "extraneous evidence violate[d] [Sneed's] Sixth and Fourteenth Amendment[] [rights]." Doc. 1 at 103 ¶ 177.

a.

In response to Respondent's contention that these claims are procedurally defaulted, Sneed maintains that he asserted the same issues in his first subclaim on direct appeal to the ACCA "and again in his application for rehearing." Doc. 31 at 46. Consequently, Sneed argues that Respondent's procedural challenge of his habeas allegations "is a misstatement of law." *Id.* A review of Sneed's assertions on direct review and the contents of his habeas allegations

shows, however, that the claims are different in scope. More specifically, Sneed's allegations about trial counsel's unreasonable failure to object appear only in his habeas petition. Consequently, with respect to his newly asserted ineffective assistance claim, Sneed is the party with an unsustainable position.

i.

Sneed argued on appeal that the prosecutor's repeated remarks about the prior proceeding and the testimony, which mentioned his "first trial" directly, revealed to "the jury . . . that [he] had previously been convicted of capital murder and sentenced to death." *Sneed Direct II*, 1 So. 3d at 114. Because trial counsel "did not object to the references at trial, [the ACCA] review[ed] them for plain error." *Id.* The ACCA explained that all but one mention of the case's history referred "to a prior proceeding, in compliance with the trial court's [pretrial] instructions." *Id.* Regardless, the ACCA concluded that none "specifically informed the jury" about Sneed's capital conviction and sentence. *Id.* Thus, the ACCA ruled that the State's references to his first trial did not amount to plain error. *Id.* at 114-15.

Sneed never asserted in his appeal that trial counsel performed ineffectively by not objecting to these references contemporaneously. Doc. 26-10 at 27-32. "A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration." *Cone v. Bell*, 556 U.S. 449, 467 (2009). And in light of Sneed's failure to fairly tie these allegations to *Strickland*, on either direct or collateral review, Sneed never exhausted the ineffectiveness aspect of this habeas subclaim in state court properly. Thus, Respondent is correct that unexhausted pro-

cedural default bars Sneed's ineffectiveness allegations incorporated into this subclaim.

ii.

Alternatively, the court accepts that Sneed may seek habeas relief on issues unrelated to the alleged ineffective assistance. Even so, Sneed has not demonstrated that the ACCA's rejection of those constitutional assertions was contrary to or an unreasonable application of Supreme Court precedent. In particular, Sneed alleged on direct appeal and reasserts on habeas review that the remarks of the prosecutor and forensic witness about the prior trial violated "his rights to a fair and impartial jury, due process, presumption of innocence, and a reliable conviction and sentence." *Compare* doc. 26-10 at 32, *with* doc. 1 at 102 ¶ 175. And while the Supreme Court decisions which Sneed cites in support contain references to core principles of fairness applicable in criminal proceedings, the facts that shaped the holdings in these opinions do not overlap contextually with Sneed's allegations.[19]

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[19] *See, e.g.*, *Deutch v. United States*, 367 U.S. 456, 471 (1961) (identifying the presumption of innocence as one of several "safeguards of a fair procedure" afforded to an accused) (internal quotation marks omitted). *But see Deutch*, 367 U.S. at 457 ("review[ing] a criminal conviction for refusal to answer questions before a subcommittee of the Committee on Un-American Activities of the House of Representatives"); *Caldwell v. Mississippi*, 472 U.S. 320, 340-41 (1985) (plurality opinion) (reversing capital sentence as unreliable under the Eighth Amendment because "the State sought to minimize the jury's sense of responsibility for determining the appropriateness of death" with "focused, unambiguous, and strong" prosecutorial comments); *Caldwell*, 472 U.S. at 342 (O'Connor, J. concurring in part and in the judgment) ("[T]he prosecutor's remarks were impermissible [under the Eighth Amendment] because they were inaccurate

Additionally, the constitutional guideposts clearly established in *Caldwell* and *Romano* place the ACCA's plain-error rejection of the exhausted allegations in this subclaim well within AEDPA's sizeable deferential range. For example, the remarks Sneed challenges do not approach the harmful degree of those in *Caldwell*, which misleadingly minimized the jury's role in rendering a death sentence. *Caldwell*, 472 U.S. at 342. And Sneed's challenged references are more benign than the admitted, and later reversed, capital judgment in *Romano*, which "did not deprive petitioner of a fair sentencing proceeding." *Romano*, 512 U.S. at 13. Thus, AEPDA precludes this court from awarding habeas relief on the state-court adjudicated remainder of this habeas subclaim. 28 U.S.C. § 2254(d).

b.

The second part of Claim D maintains that several jurors discussed extraneous matters, including Sneed's prior conviction and death sentence. Doc. 1 at 104 ¶ 179. Sneed acknowledges that he presented this subclaim "for the first time" in this petition. Doc. 31 at 47. But according to Sneed, the procedural default exception discussed in Claim F—cause and prejudice—excuses his failure to exhaust that subclaim in state court.

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and misleading in a manner that diminished the jury's sense of responsibility."); *Romano v. Oklahoma*, 512 U.S. 1, 10, 13 (1994) (holding that admitted evidence of a prior, but later vacated, capital conviction and sentence in the penalty phase of an unrelated case was neither a *Caldwell*, Eighth Amendment evidentiary, nor freestanding Fourteenth Amendment Due Process violation).

i.

Sneed argues that "cause exists because trial counsel . . . were unaware the jurors had knowledge of his prior conviction at the time of his trial in 2006." Doc. 31 at 47. Sneed adds that post-conviction counsel did not discover this evidence until ten years later when they interviewed the jurors. *Id.* at 48. But Sneed does not address the opportunity his counsel had to interview the jurors earlier, asserting this claim in a post-trial motion, and satisfying the exhaustion requirement on direct review. And although, if pursued separately in state court, ineffective assistance of trial or appellate counsel may serve as cause, Sneed neither makes that argument nor offers an exhausted *Strickland* claim validating that method. For these reasons, Sneed has not established cause for the unexhausted procedural default of his jury-deliberations subclaim.

ii.

Sneed has also not demonstrated prejudice. Sneed alleges generally that the jury had knowledge of and discussed his and Hardy's capital case histories, doc. 1 at 104 ¶ 179, including that "two jurors [commented before deliberations] that . . . Sneed was guilty and deserved whatever . . . Hardy . . . had gotten," *id.* ¶ 178. Sneed contends that the extraneous information, which the jury discussed and upon which two members based a premature guilt-phase opinion, violated his right to an impartial jury under the Sixth and Fourteenth Amendments. Doc. 31 at 48.

Most of the cases which Sneed cites in support are off point. Doc. 1 at 103-06 ¶ 176-77, 182-83; Doc. 31 at

48.[20] One case, *Fullwood v. Lee*, 290 F.3d 663 (4th Cir. 2002), suggests that Sneed's allegations may have constitutional merit. The petitioner in *Fullwood* argued that he did not receive "a fair trial at his resentencing." *Id.* at 675. According to the petitioner, the jury "was subject to improper contact with third parties and considered extraneous information that the parties did not introduce at trial and the court did not provide to them." *Id.* As evidentiary support, the petitioner "relie[d] . . . upon [a] post-trial affidavit of . . . [a] [person]" who served on the resentencing jury. This juror reported several concerns she had about the second penalty-phase process. Akin to Sneed's

[20] *See, e.g.*, *In re Murchison*, 349 U.S. 133, 139 (1955) (holding that the due process clause prohibits the same trial judge from both holding a secretive contempt proceeding and presiding over the later hearing on the contempt charges); *Irvin v. Dowd*, 366 U.S. 717, 728 (1961) (vacating habeas petitioner's capital judgment under the Fourteenth Amendment because of unfairness from a "huge . . . wave of public passion [and publicity pretrial] and . . . a jury . . . in which two-thirds of the members admit[ted], before hearing any testimony, to . . . belie[ving] in his guilt"); *Remmer v. United States*, 347 U.S. 227, 228-30 (1954) (holding that an ex parte F.B.I. investigation into a reported improper communication "with a . . . juror, who afterwards became the . . . foreman" warranted a new federal trial without reference to a constitutional violation); *Frady*, 456 U.S. at 174 (concluding that "no substantial likelihood [existed that] erroneous malice instructions prejudiced [the petitioner]'s chances with the jury"); *see also Turner v. Louisiana*, 379 U.S. 466, 474 (1965) (reversing capital judgment on Fourteenth Amendment due process grounds because "two key prosecution witnesses . . . were . . . deputy sheriffs," who guarded the sequestered jurors "during the entire period of the trial"); *Schlup v. Delo*, 513 U.S. 298, 327 (1995) (announcing the actual innocence "gateway standard" to overcoming a procedurally defaulted guilt-phase claim); *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992) (discussing the actual innocence standard applicable when a petitioner argues that "he is actually 'innocent of the death penalty'").

allegations, the juror stated that "outside sources" caused the members to "bec[o]me aware" that the petitioner's first death sentence "had been reversed because of some technicality involving a mistake the trial judge had made." *Id.* (internal quotation marks omitted).

Relying on *Irvin* and *Turner*, the *Fullwood* court cautioned that the resentencing jury's extraneous knowledge of the "prejudicial information about [the history of the petitioner's] case" implicated the Sixth Amendment. *Id.* at 682. The Fourth Circuit explained that the petitioner "ha[d] made a sufficient threshold showing that these facts were extraneous, prejudicial and improperly brought to the jury's attention." *Id.* Therefore, the court sent the case back to the district court to hold an evidentiary hearing to determine whether the information "had a substantial and injurious effect or influence in determining the jury's [resentencing]." *Id.* (internal quotation marks omitted).

Sneed has not pointed to any guilt-phase authority—binding or persuasive which resembles *Fullwood*. Still, the court accepts that the Eleventh Circuit might recognize a cognizable impartial jury claim under Sneed's alleged circumstances. *See Parker v. Gladden*, 385 U.S. 363, 366 (1966) (per curiam) ("[P]etitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors."). But accepting that his allegations are sufficient to state an impartial jury claim in the guilt phase does not end the prejudice inquiry. Instead, Sneed must show that excluding the constitutionally-compromising case information from deliberations would create a reasonable probability of a non-capital conviction in a retrial.

Here, *Fullwood* does not satisfy Sneed's reasonable probability burden for several reasons. First, pro-

cedural default was not an issue in *Fullwood*. Second, the Fourth Circuit faced problems in the deliberative sentencing process beyond the jury's improper access to extraneous information. Specifically, *Fullwood* also concerned whether a third-party husband's "presumptively prejudicial" discussions with his wife (who was a juror) were designed to influence the resentencing outcome in favor of death. *Id.* at 678 (internal quotation marks omitted). Consequently, *Fullwood*'s persuasive value is minimal. And Sneed fails to identify other authorities which point to the existence of actual prejudice in the guilt-phase context of his specific impartial jury allegations.[21]

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[21] Sneed cites many cases in reply for principles fundamental to procedural default but provides no corresponding context. Doc. 31 at 47-48. Reviewing these additional authorities confirms that none involves circumstances comparable to his. *See*, *e.g.*, *Edwards v. Carpenter*, 529 U.S. 446, 455 (2000) (Breyer, J. concurring in judgment) (identifying, in addressing an unconstitutional guilty plea claim, the "situations in which an otherwise valid state ground will not bar federal claims"); *Carrier*, 477 U.S. at 497 (concluding that "procedurally defaulted discovery claim" could not support habeas relief unless "the victim's statements contain[ed] material that would establish . . . actual innocence"); *Amadeo v. Zant*, 486 U.S. 214, 228-29 (1988) (reversing judgment that procedural default barred the petitioner from pursuing his unconstitutional jury composition claim); *Reed*, 468 U.S. at 3, 20 (concluding that the petitioner's invalid jury instruction claim "was sufficiently novel . . . to excuse his attorney's failure to raise [it]" and constituted cause); *Ward*, 592 F.3d at 1152 ("conclud[ing] that an improper bailiff-jury communication during the penalty phase violated [the petitioner]'s constitutional right to a fair trial and a reliable sentence"); *McCoy v. Newsome*, 953 F.2d 1252, 1262 (11th Cir. 1992) (per curiam) (declining to review the merits of [several] . . . federal claims" because the petitioner had not met the cause and prejudice exception).

iii.

Likewise, Sneed does not address the solid incriminating evidence which underlies his conviction. Specifically, the State's guilt-phase evidence included Sneed's pre-offense selection of Bud's Convenience Store for the robbery because Mr. Terry was there alone and the security footage of the capital offense. That video was highly probative of Sneed's particularized intent to kill. The clip captured Sneed's continuing presence at the murder scene, active participation in the robbery, and unconcerned reaction to Hardy's unprovoked shooting of Mr. Terry. Thus, the strength of the State's case for conviction means that Sneed's impartial jury allegations—if cognizable—fall short of demonstrating the reasonable probability of a lesser conviction without the extraneous capital case histories. *Cf. McCoy*, 953 F.2d at 1262 ("[T]he other substantial evidence of [the petitioner]'s guilt negates any possibility of prejudice resulting from his attorney's failure to subpoena the alibi witnesses.").

iv.

Respondent argues alternatively that Sneed's tainted deliberation allegations are too vague to meet § 2254's heightened pleading requirement. Doc. 24 at 77; *cf. Brown v. Dixon*, No. 19-60704-CIV, 2022 WL 1197657, at *8 (S.D. Fla. Mar. 15, 2022) ("[A]llegations [supporting cause and prejudice] must be factual and specific, not conclusory.") (internal quotation marks omitted) (quoting *Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1061 (11th Cir. 2011)), *appeal filed* Apr. 25, 2022. Respondent challenges concretely the missing "names of the jurors [interviewed] to support this claim." Doc. 24 at 77. Sneed does not resist this independent reason for dismissal in reply. *See generally* doc. 31 at 46-49. Consistent with his silence,

Sneed has conceded Respondent's point of inadequate pleading and abandoned the claim as a basis for habeas relief. [22]

Accordingly, the court denies Claim D for these multiple reasons.

5.

Sneed contends primarily in Claim A that the sentencing court's override of the advisory life verdict violated his jury-trial guarantee under the Sixth Amendment. Doc. 1 at 18, 28-29 ¶ 44. Aligned with the Eighth Amendment's cruel and unusual punishment clause, Sneed alleges also that the override decision "was arbitrary[,] . . . fundamentally unfair, and denied [him] a fair and reliable sentencing governed by due process." *Id.* at 18 ¶ 27.

Overlapping with Claim A, Sneed alleges in Claim H that "Alabama's standardless override results in an arbitrary application of the death penalty in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments." Doc. 1 at 119 (emphasis omitted). Sneed adds that the override is unconstitutional "[f]acially, and as applied" because of "the risk that the death penalty

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[22] *See, e.g.*, *Tharpe v. Humphrey*, No. 5:10-CV-433 CAR, 2014 WL 897412, at *3 n. 4 (M.D. Ga. Mar. 6, 2014) (recognizing that merely alleging a habeas claim without developing argument constitutes abandonment), *aff'd sub nom. Tharpe v. Warden*, 834 F.3d 1323 (11th Cir. 2016); *United States v. Krasnow*, 484 F. App'x 427, 429 (11th Cir. 2012) (per curiam) ("A party abandons all issues on appeal that he or she does not 'plainly and prominently' raise in his or her initial brief." (quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 n. 8 (11th Cir. 2003)); *U.S. Steel Corp. v. Astrue*, 495 F.3d 1272, 1287 n. 13 (11th Cir. 2007) (explaining that a court need not address a "perfunctory and underdeveloped argument" that lacks legal authority or elaboration).

will be imposed in spite of factors which may call for a less severe penalty."[23] *Id.* at 119-20 ¶ 206 (internal quotation marks omitted).

In both claims, Sneed argues that the ACCA's rejection of his challenge warrants habeas relief under AEDPA's contrary to and unreasonable application clauses. *Id.* at 29, 121 ¶¶ 44, 210. Sneed contends additionally in Claim H that he meets (d)(2) of AEDPA because the ACCA supported its decision with unreasonable factual determinations. Doc. 1 at 121 ¶ 210.

As explained below, Sneed's efforts to satisfy his demanding burden under AEDPA's highly deferential design are unconvincing. Three Supreme Court decisions are the heart of Sneed's override challenge: *Apprendi v. New Jersey*, 530 U.S. 466 (2000); *Ring v. Arizona*, 536 U.S. 584 (2002); and *Hurst*. Doc. 1 at 18, 20 25 ¶¶ 27, 30-38. The court begins with a summary of these key Sixth Amendment sentencing cases.

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[23] "A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987). *See also United States v. Stevens*, 559 U.S. 460, 472 (2010) (reaffirming use of *Salerno* facial standard). Under the "more limited" as-applied approach, *Am. Fed'n of State, Cnty. & Mun. Emps. Council 79 v. Scott*, 717 F.3d 851, 863 (11th Cir. 2013), a challenger contests the application of a law "to the particular facts of [his] case," *Salerno*, 481 U.S. at 745 n. 3. "Although the boundary between these two forms of relief is not always clearly or easily demarcated, ... [courts] look to the scope of the relief requested to determine whether a challenge is facial or as-applied in nature." *Scott*, 717 F.3d at 862. "[R]elief that is quasi-facial in nature—. . . relief that reaches beyond the [challenger] in a case[—]" triggers the *Salerno* standard. *Id.*

a.

Apprendi addressed the interplay between the right to a jury trial and sentencing in a non-capital case. Determining, by a preponderance of the evidence, that the petitioner's firearm conviction was a hate crime under state law, the trial court in *Apprendi* increased the maximum prison sentence from 10 to 20 years. *Apprendi*, 530 U.S. at 468-69. The Supreme Court concluded that the State's enhancement procedure for hate crimes was "an unacceptable departure from the jury tradition" and reversed the judgment. *Id.* at 497. Thus, *Apprendi* requires a jury to find, beyond a reasonable doubt, the existence of "any fact [(but for an offender's prior convictions)] that increases the penalty for a crime beyond the prescribed statutory maximum." *Apprendi*, 530 U.S. at 490.

After *Apprendi*, the Court revisited in *Ring* Arizona's former capital sentencing framework, which had survived Sixth Amendment scrutiny in *Walton v. Arizona*, 497 U.S. 639 (1990), *overruled by Ring*, 536 U.S. at 609. Under Arizona's prior structure, a convicted defendant "could not be sentenced to death, the statutory maximum penalty for first-degree murder" without a separate judicial finding of "at least one aggravating circumstance and . . . no mitigating circumstances sufficiently substantial to call for leniency." *Ring*, 536 U.S. 592-93 (internal quotation marks omitted); *see Walton*, 497 U.S. at 649 (concluding that the Sixth Amendment does not require a state "to denominate aggravating circumstances 'elements' of the offense or permit only a jury to determine the existence of such circumstances"). Thus, the jury played no role in the pre-*Ring* Arizona capital-sentencing process. *See Walton*, 497 U.S. at 643 (explaining that "[a]fter a person ha[d] been found

guilty of first-degree murder . . . . the court alone" decided whether to impose the death penalty) (internal quotation marks omitted). Concluding that the Sixth Amendment outcome in *Walton* was incompatible with its holding in *Apprendi*, the Court overruled *Walton*. *Ring*, 536 U.S. at 609.

Ring led the Court to invalidate Florida's former capital-sentencing structure under the Sixth Amendment in *Hurst*. *Hurst*, 577 U.S. at 102. Pursuant to Florida's prior framework, "the maximum sentence a capital felon [could] receive on the basis of the conviction alone [wa]s life imprisonment." *Id.* at 95. Postconviction, a jury provided an advisory sentence based on an evidentiary hearing, and a judge held "a separate hearing . . . [to] determine whether sufficient aggravating circumstances existed to justify imposing the death penalty." 577 U.S. at 94. In the defendant's case specifically, a Florida jury found him guilty of "premediated murder[—a capital felony—] . . . for an unlawful killing during a robbery" over a lesser and non-capital charge of felony murder. 577 U.S. at 95. "A penalty-phase jury recommended [7 to 5] that . . . [the] judge impose a death sentence," 577 U.S. at 94, and "[t]he judge independently agreed," *id.* at 96.

The *Hurst* Court concluded that Florida's statutory structure overlapped with Arizona's *Ring*-deficient approach. *Hurst*, 577 U.S. at 98-99. Specifically, the petitioner's death sentence violated his "right to an impartial jury," *id.* at 102, because "the maximum punishment [the petitioner] could have received without any judge-made findings was life in prison without parole," *id.* at 99. The Court clarified that "[a] jury's mere recommendation" in favor of the death penalty "is not enough" to satisfy the constitutional requirement that "a jury, not a judge, . . . find each fact

necessary to impose a sentence of death." 577 U.S. at 94; *see also id.* at 102 (overruling prior precedent "to the extent they allow a sentencing judge to find an aggravating circumstance, independent of a jury's factfinding, that is necessary for imposition of the death penalty").

b.

Sneed argued on direct review that his death sentence was unsustainable under *Ring*. [24] *Sneed Direct II*, 1 So. 3d at 143. Sneed claimed that his punishment violated *Ring* because the jury's advisory verdict lacked specific aggravating findings and did not reflect a "unanimous[] determin[ation] that statutory aggravating circumstances were present[,] . . . [or] that the aggravating circumstances outweighed the mitigating circumstances." *Sneed Direct II*, 1 So. 3d at 143. Sneed asserted also that the trial court's decision to override the jury's advisory verdict was arbitrary—an allegation associated with the Eighth Amendment's prohibition against cruel and unusual punishments. *Sneed Direct II*, 1 So. 3d at 143.

Concerning the aggravating circumstances subclaim, the ACCA pointed to the jury's unanimous guilt-phase finding that Sneed had "committed a robbery during the . . . commi[ssion] of a murder" beyond a reasonable doubt. *Sneed Direct II*, 1 So. 3d at 143. Under Alabama's framework, the robbery-murder conviction triggered penalty-phase proceedings, transferred as an aggravating factor, and exposed Sneed to a potential death sentence. Following Alabama Supreme Court precedent, the ACCA observed that a

[24] Sneed's direct appeal proceedings began post-*Ring* and ended pre-*Hurst*. *Sneed Direct II*, 1 So. 3d at 143. Consequently, *Hurst* was not part of Sneed's Sixth Amendment override challenge.

"jury's unanimous finding of one aggravating circumstance is sufficient to satisfy *Ring*." *Sneed Direct II*, 1 So. 3d at 143 (internal quotation marks omitted) (quoting *Ex parte McNabb*, 887 So. 2d 998, 1006 (Ala. 2004)). Consequently, the ACCA disagreed with Sneed that the record on aggravating circumstances fell short of *Ring*'s Sixth Amendment capital-sentencing standard. *Sneed Direct II*, 1 So. 3d at 143.

As for Sneed's contention that the penalty-phase balancing process violated his right to a jury trial, the ACCA recognized that the Alabama Supreme Court had foreclosed that Sixth Amendment issue too. *Sneed Direct II*, 1 So. 3d at 143 (first quoting *Ex parte Hodges*, 856 So. 2d 936, 943 (Ala. 2003); and then quoting *Ex parte Waldrop*, 859 So. 2d 1181, 1190 (Ala. 2002)). Specifically, the ACCA explained that "whether the aggravating circumstances outweigh the mitigating circumstances is not a finding of fact or an element of the offense." *Sneed Direct II*, 1 So. 3d at 143 (internal quotation marks omitted). With the understanding that the balancing process does not involve determining facts, the ACCA observed that neither *Ring* nor *Apprendi* "require[s] that a jury weigh the aggravating circumstances and the mitigating circumstances." *Sneed Direct II*, 1 So. 3d at 143 (internal quotation marks omitted).

The ACCA disposed of Sneed's arbitrary override "argument" as one "without merit." *Id.* at 144. Here, the ACCA referred to *Harris v. Alabama*, 513 U.S. 504 (1995), in which the Supreme Court upheld the constitutionality of Alabama's judicial override provision under the Eighth Amendment. *Sneed Direct II*, 1 So. 3d at 143-44; *see also Harris*, 513 U.S. at 512 ("hold[ing] that the Eighth Amendment does not require the State to define the weight the sentencing

judge must accord an advisory jury verdict"); *id.* at 515 ("The Constitution permits the trial judge, acting alone, to impose a capital sentence."). The ACCA noted that *Ring* "did not invalidate [the] earlier holding in *Harris*." *Sneed Direct II*, 1 So. 3d at 143. Consequently, the ACCA rejected Sneed's arbitrary override claim. *Id.* at 144.

c.

With this background in mind, the court considers Sneed's habeas override claim and starts with the Sixth Amendment component.

i.

The gist of Sneed's Sixth Amendment habeas override allegations is that "[t]he imposition of a death sentence . . . violated [his] rights under *Apprendi*, *Ring*, and *Hurst*, in that the jury did not make the fact-finding necessary for a death sentence to be imposed." Doc. 1 at 25 ¶ 38. To overcome AEDPA deference, Sneed relies heavily upon *Hurst*.

According to Sneed, *Hurst* is "a natural and logical application of *Apprendi* and *Ring*." Doc. 1 at 22 ¶ 32. Sneed argues that the similarities between Florida's pre-*Hurst* capital sentencing structure and the application of Alabama's judicial override provision in his capital case mean that his affirmed death sentence is objectively wrong under the Sixth Amendment. But central to § 2254(d)(1)'s contrary to and unreasonable application clauses is the existence of "clearly established Supreme Court law," "at the time" of the last merits-based denial of an appealed constitutional claim. *Kilgore v. Sec'y, Fla. Dep't of Corr.*, 805 F.3d 1301, 1316 (11th Cir. 2015). Here, the ACCA reviewed Sneed's claims in his second direct appeal substantively, and the Alabama Supreme Court declined

review. Consequently, only Supreme Court precedent predating the ACCA's 2007 decision in *Sneed Direct II* qualifies as clearly established Sixth Amendment law for (d)(1) purposes. *See Greene*, 565 U.S. at 39-40 (explaining that if a state supreme court declines to hear an appeal, the date of the intermediate appellate decision is the "temporal cutoff" for clearly established Supreme Court precedent).

The court accepts for analysis purpose that *Hurst* establishes the Sixth Amendment unsoundness of Alabama's former judicial override scheme without any ambiguity. Still, such hypothetical clarity from *Hurst* did not exist until nearly ten years after *Sneed Direct II*. And because "§ 2254(d)(1) requires federal courts to . . . measure state-court decisions against th[e] [Supreme] Court's precedents as of the time the state court renders its decision," *Greene*, 565 U.S. at 38 (alterations added) (internal quotation marks and emphasis omitted) (first quoting *Cullen*, 563 U.S. at 182; and then quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)), that gap in time means that Sneed cannot rely upon *Hurst* to prove objective constitutional error occurred on direct review in state court.

Additionally, the Supreme Court has clarified that "*Hurst* do[es] not apply retroactively on collateral review." *McKinney v. Arizona*, 140 S. Ct. 702, 708 (2020) (citing *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004)). Thus, *Hurst* is beyond Sneed's reach under (d)(1) and the Supreme Court's retroactivity framework under *Teague v. Lane*, 489 U.S. 288 (1989) (plurality opinion). *See Greene*, 565 U.S. at 39 ("explain[ing] that AEDPA did not codify *Teague*, and that the AEDPA and *Teague* inquiries are distinct")

(internal quotation marks omitted) (quoting *Horn v. Banks*, 536 U.S. 266, 272 (2002) (per curiam)).[25]

ii.

The Supreme Court issued the predecessor opinions to *Hurst*—*Ring* and *Apprendi*—before the conclusion of Sneed's second direct appeal, and *Ring* was the express basis for Sneed's override claim in state court. Thus, this court must determine whether the ACCA's rejection of Sneed's Sixth Amendment override challenge was contrary to or an unreasonable application of the holdings in *Ring* and *Apprendi*.

Considering *Apprendi* first, the non-death penalty context of that decision is too dissimilar from Sneed's override claim. Specifically, *Apprendi* neither dictates an opposite outcome under (d)(1)'s first clause nor illustrates an unreasonable application in the ACCA's resolution of Sneed's override claim under (d)(1)'s second clause. Thus, *Apprendi* does not establish that the ACCA committed clearly established error under AEDPA.

As a capital-sentencing decision, *Ring* is contextually closer to Sneed's override claim. *Ring* addressed whether Arizona's capital sentencing framework which lacked any unanimous jury finding in aggravation beyond a reasonable doubt—violated the petitioner's right to a jury trial under the Sixth Amendment. The Court invalidated Arizona's exclusively judicial-

[25] Alternatively, *Hurst*'s Sixth Amendment holding falls short of showing clearly established error on the part of the ACCA akin to the *Ring* analysis below. Materially missing from the invalidated Florida and Arizona formats in *Hurst* and *Ring* was the requirement that a jury find an aggravating factor beyond a reasonable doubt unanimously before imposing the death penalty.

sentencing approach as an impermissible infringement upon the right to a jury trial.

Ring does not help Sneed because Alabama sentenced him under a materially distinguishable sentencing structure. Specifically, Alabama utilized a system that required a unanimous jury determination of an aggravating factor beyond a reasonable doubt in the guilt phase of a capital case as a prerequisite to a death sentence. Thus, *Ring* is unpersuasive as a first-clause (d)(1) authority.

Ring also does not help Sneed in the (d)(1) second-clause analysis. First, again, *Ring*'s scope does not address a capital-sentencing structure like Alabama's —one in which a jury finding in aggravation is a prerequisite to imposing the death penalty. Second, *Ring* did not consider a Sixth Amendment claim challenging judicial override or a death sentence in which a judge found an additional aggravating factor independent of a jury. And even accepting that *Ring* raises concerns about the ACCA's denial of Sneed's override claim under the Sixth Amendment, Sneed must do more than merely cast doubt on the ACCA's reasoning to benefit from (d)(1)'s second clause. Instead, Sneed must persuade this court that the ACCA's denial of this claim was so objectively wrong that no room for disagreement among fair-minded jurists exists. After all, the Court has made clear that "[a] state court's determination that a claim lacks merit precludes federal habeas relief so long as fairminded jurists could disagree on the correctness of the state court's decision." *Richter*, 562 U.S. at 101 (internal quotation marks omitted).[26]

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[26] Indeed, in a concurring opinion, Justice Scalia, "with whom Justice Thomas join[ed]," endorsed the view that *Ring*'s holding

iii.

Another Sixth Amendment authority that Sneed references is *Rauf v. Delaware*, 145 A.3d 430 (Del. 2016) (per curiam). Doc. 1 at 20 ¶ 29. The Delaware Supreme Court determined in *Rauf* that the State's "current death penalty statute violate[d] the Sixth Amendment role of the jury as set forth in *Hurst*."

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did not invalidate a death sentence with unanimous jury support on one aggravating factor beyond a reasonable doubt. *Ring*, 536 U.S. at 612; *see id.* (explaining that under *Ring* a "jury must find the existence of the *fact* that an aggravating factor existed") (emphasis in original); *id.* at 612-13 ("Those States that leave the ultimate life-or-death decision to the judge may continue to do so—by requiring a prior jury finding of [an] aggravating factor in the sentencing phase or . . . placing the aggravating-factor determination . . . in the guilt phase.").

Additionally, two dissenters in *Ring* wanted the Court to overrule *Apprendi* instead of *Walton*. *Ring*, 536 U.S. at 619, 621 (O'Connor, J. dissenting) (Rehnquist, C.J. joining). These justices "fear[ed]" the ripple effect of *Ring*'s "expan[sion] on *Apprendi*," including incentivizing petitioners to challenge their death sentences under Alabama's "hybrid sentencing scheme[]." *Ring*, 536 U.S. at 621; *id.* at 608 n. 6.

Thus, a more nuanced understanding of *Ring* reveals that Sneed relies upon an unsettled— rather than a clearly established—interpretation of that precedent to overcome AEDPA deference. In *Kilgore*, the Eleventh Circuit bolstered its AEDPA deferential analysis on the basis that the Supreme Court, in undergoing a *Teague* retroactivity assessment, had relied on dissenting opinions to demonstrate why "existing precedent" did not "dictate[] [a] holding in a case." *Kilgore*, 805 F.3d at 1311-12 (citing *Beard v. Banks*, 542 U.S. 406, 416 (2004)). Akin to *Kilgore*'s adoption of the *Beard* approach to claims requiring AEDPA deference, "the observations from [two of] [*Ring*]'s [concurring as well as two] dissenting Justices further illustrate that [Sneed's broader interpretation of *Ring*'s] holding was not clearly established in the Court's existing precedent." *Kilgore*, 805 F.3d at 1312.

Rauf, 145 A.3d at 433. To substantiate its *Hurst*-driven holding, the state supreme court provided "succinct" responses to several certified questions on the roles of the judge and jury under Delaware's invalidated capital-punishment provisions.[27] *Id.* at 433-34.

Comparable to Alabama's pre-repealed sentencing structure, Delaware required a unanimous jury finding that one aggravating circumstance existed beyond a reasonable doubt before the imposition of the death penalty. *Id.* at 433 n. 3. The jury played a non-binding role in sentencing, and the penalty proposed did not require unanimity. *Id.* at 432-33 & n. 4. In overriding a jury's recommendation, a sentencing court had the authority to consider proof of an aggravating factor, "independent of the jury." *Id.* at 434 & n. 3.

Against this backdrop, Sneed argues that the Delaware Supreme Court's Sixth Amendment analysis in *Rauf* means that the ACCA should have determined that his death sentence by judicial override was unconstitutional. Doc. 1 at 20 ¶ 29. The court disagrees. To begin, the Delaware court relied primarily on *Hurst*, and this court has explained already why *Hurst* does not qualify as clearly established law or overcome AEDPA deference under (d)(1). Moreover, the Delaware Supreme Court's nonbinding understanding of Supreme Court Sixth Amendment precedent in 2016 does not clearly establish that the ACCA applied *Ring* unreasonably to Alabama's override structure in 2007. Instead, the dissenting opinion in *Rauf* reinforces the room for fairminded disagree-

[27] One justice dissented in *Rauf*. 145 A.3d at 501-07. And in separate concurring opinions, the justices in the majority expressed their "diversity of views" on the scope of the jury-trial guarantee in death sentences. *Id.* at 433-501.

ment on whether the ACCA rejected Sneed's Sixth Amendment override claim correctly.[28]

iv.

The other Supreme Court decisions Sneed cites in support of Claim A analyze the death penalty's constitutionality under the Eighth Amendment's cruel and unusual punishments clause. *See* doc. 1 at 18 ¶ 27 (citing *Gregg v. Georgia*, 428 U.S. 153 (1976) (plurality opinion); *Godfrey*; *California v. Brown*, 479 U.S. 538 (1987), *holding modified by Boyde v. California*, 494 U.S. 370 (1990)). Consequently, these cases do not substantiate Sneed's contention that the ACCA committed clearly established Sixth Amendment error in rejecting his judicial override claim.[29]

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[28] *Cf. Rauf*, 145 A.3d at 503 (Vaughn, J. dissenting) ("*Ring* stands only for the principle that the jury must find the existence of at least one statutory aggravating factor, unanimously and beyond a reasonable doubt, in order to elevate the defendant's maximum punishment from life imprisonment to death."); *Rauf*, 145 A.3d at 505-06 (observing that if the *Hurst* Court "had intended to broaden *Ring* to require that the jury make findings of fact in the weighing process or be the actual sentencing authority, I think it would have said so more directly and more expressly").

[29] *See Gregg*, 428 U.S. at 169, 188 (holding that a death sentence "does not invariably violate the [Eighth Amendment's]" prohibition against "cruel and unusual punishments"); *id.* at 206 (concluding that Georgia's revised sentencing structure, which "focus[ed] . . . on the particularized nature of the crime and . . . characteristics of the individual defendant," addressed "[t]he [prior] basic concern" of "capricious[] and arbitrar[y]" capital punishment); *Godfrey*, 446 U.S. at 423, 433 (holding that the "broad and vague construction of the . . . aggravating circumstance [tied to a murder involving vile, tortious, depraved, or aggravated conduct] . . . violate[d] the Eighth and Fourteenth Amendments"); *Brown*, 479 U.S. at 541 (explaining that the Eighth Amendment requires a capital punishment structure which "prevent[s] . . . arbitrary and unpredictable" death sentences and permits the

These Supreme Court opinions or the additional ones Sneed includes in Claim H also do not show that the ACCA erred clearly under (d)(1) in rejecting his arbitrary override claim as an Eighth Amendment violation.[30] To begin, Sneed acknowledges that the "Supreme Court upheld Alabama's judicial override system in *Harris*" under the Eighth Amendment. Doc. 1 at 20 ¶ 30. While Sneed suggests that this court should reconsider *Harris* given the Court's later Sixth Amendment holdings in *Apprendi* and *Ring*, doc. 1 at 20-21, 119 ¶¶ 30, 206, as the ACCA explained in *Sneed Direct II*, *Harris* precludes Sneed from obtaining Eighth Amendment relief due to an allegedly arbitrary override decision, 1 So. 3d at 143-44. And nothing in *Ring* or *Apprendi* altered that Eighth Amendment landscape. *Sneed Direct II*, 1 So. 3d at 143. Consequently, the clearly established validity of Alabama's override process in *Harris* forecloses Sneed from demonstrating clearly established Eighth Amendment error on the part of the ACCA.

Likewise, the dissenting opinions in capital cases on denied petitions for a writ of certiorari Sneed

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"introduc[tion] [of] any relevant mitigating evidence"); *Brown*, 479 U.S. at 541-43 (holding that a reasonable understanding of an "instruction not to rely on 'mere sympathy'" did not "interfere[] with the jury's consideration of mitigating evidence" or "violate the provisions of the Eighth and Fourteenth Amendments").

[30] Sneed's additional authorities cited in Claim H include *Lockett v. Ohio*, 438 U.S. 586 (1978) (plurality opinion), *Maynard* and *Clemons*. Doc. 1 at 119-20 ¶¶ 206-07. The Supreme Court decided *Harris* years after *Lockett*, *Maynard*, and *Clemons*. Consequently, Sneed's reliance upon those earlier cases to overcome the override holding in *Harris* is a non-starter on AEDPA review.

references are unhelpful to his override claim under (d)(1)'s legal standards.[31] While the undersigned agrees with them, the constitutional concerns which Justices Marshall and Sotomayor expressed in *Johnson* and *Woodward* are not clearly established law under (d)(1). Thus, neither dissenting opinion overcomes the deference attached to the ACCA's rejection of his override claim.[32]

vi.

As for § 2254(d)(2)'s unreasonable factual standard, if a petitioner proves that an adjudicated claim contains a (d)(2) error, then AEDPA deference no longer constrains the habeas court's review. *Jones*, 540 F.3d at 1288 n. 5. In Sneed's case, the (d)(2) evaluation of his override challenge is straightforward. In his petition, Sneed leaves unspecified both the unreasonable factual determination and evidence which substantiates—clearly and convincingly—that fact's objective wrongfulness. 28 U.S.C. § 2254(d)(2), (e)(1).[33] Instead, Sneed simply tracks (d)(2)'s wording conclusively. Doc. 1 at 121 ¶ 210. As a result, Sneed has neither developed nor proven that the ACCA tied the denial of his override claim to an egregious (d)(2)

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[31] *See* doc. 1 at 18-19 ¶ 27 (quoting *Johnson v. Alabama*, 488 U.S. 876, 876 (1988) (Marshall, J. dissenting for Eighth Amendment reasons)); *id.* at 19-22 ¶¶ 28, 30-31 (quoting *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 406, 410-11 (2013) (Sotomayor, J. dissenting on Sixth and Eighth Amendment grounds)).

[32] For the same reasons, Sneed's reliance on Justice Breyer's concurring opinion in *Ring* to overcome AEDPA deference on his denied override claim, doc. 1 at 119 ¶ 206, is unavailing.

[33] Here, the court has combined the (e)(1) factual standard with (d)(2)'s. But as explained earlier, the Supreme Court has "not defined the precise relationship between § 2254(d)(2) and § 2254(e)(1)." *Burt v. Titlow*, 571 U.S. 12, 18 (2013).

factual error. And without the detachment of deference under (d)(1) or (d)(2), AEDPA bars this court from granting habeas relief on Sneed's adjudicated override allegations.

d.

Beyond seeking habeas relief under the Sixth and Eighth Amendments, Sneed challenges the sentencing court's override based upon "fundamental[] unfair[ness]," the absence of due process, and "violat[ions]" of the Fifth and Fourteenth Amendments. Doc. 1 at 18, 119 ¶¶ 27, 206. Sneed's references to due process and the Fourteenth Amendment are consistent with asserting Sixth and Eighth Amendment claims against the State through the incorporation doctrine. But like his briefing on direct appeal, doc. 26-10 at 121, Sneed leaves undeveloped how the override sentence violated his Fifth or independent Fourteenth Amendment rights. Thus, to the extent that Sneed seeks Fifth or free-standing Fourteenth Amendment habeas relief, the court denies those claims for lack of exhaustion, proper pleading, development, and proof.

To close, Sneed fails to detach AEDPA deference from or otherwise substantiate these override allegations.[34] Thus, the court denies Claims A and H.

B.

In Claims B and C, Sneed contends that trial counsel represented him ineffectively in the guilt and penalty phases in violation of the Sixth Amendment.

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[34] Citing mostly *Ring* and *Hurst* in reply, Sneed defends his override allegations on Sixth Amendment grounds. Doc. 31 at 7-8, 11-22. However, Sneed fails to prove clearly established legal or unreasonable factual error under (d)(1) or (d)(2). *See id.*

1.

In Claim C of his petition, Sneed asserts that trial counsel performed ineffectively because they did not pursue an intoxication defense to capital murder. Doc. 1 at 84. According to Sneed, his intoxicated state at the time of the crime—if developed properly through expert testimony—would have shown that he lacked a "specific and particularized intent to kill" Mr. Terry. Doc. 1 at 85 ¶ 139. Sneed asserts two other guilt-phase *Strickland* subclaims pertaining to trial counsel's omitted objections to alleged prosecutorial misconduct. Doc. 1 at 84 ¶ 137; *id.* at 93, 95; Doc. 31. But Sneed failed to develop these claims. For example, while Sneed discusses intoxication in the context of trial counsel's ineffective mitigation in his reply,[35] Sneed makes no effort to refute Respondent's position that the ACCA rejected his guilt-phase *Strickland* subclaims error-free under AEDPA, *cf.* doc. 31 at 51 ("The State has failed adequately to rebut Mr. Sneed's claim of ineffective assistance of counsel at the penalty phase.") (emphasis and capitalization omitted). Accordingly, as reshaped through the parties' briefing, Sneed has abandoned the pursuit of habeas relief attributable to trial counsel's alleged ineffective assistance in the guilt phase.[36] Alternatively, Sneed has not proven extreme error in the ACCA's adjudication of his guilt-phase *Strickland* subclaims. Consequently, AEDPA's overriding deference to the Alabama courts' collateral resolution of these ineffective assistance allegations precludes this court from awarding habeas relief. 28 U.S.C. § 2254(d); *see Tharpe*, 2014 WL

[35] *See, e.g.*, doc. 31 at 95 (arguing that "available expert testimony from an addiction/intoxication expert . . . would have had strong mitigating value").

[36] *See* n. 22 above.

897412, at *3 n. 4 (pointing out that obtaining habeas relief on an adjudicated claim requires a petitioner to prove an AEDPA exception under (d)(1) or (d)(2)).

2.

The court turns now to the ACCA's denial of Sneed's *Strickland* penalty-phase subclaims in Claim B—a primary focus of his petition and reply. Sneed divides Claim B into several subclaims. Specifically, Sneed faults trial counsel for overlooking available lay witnesses in an unreasonably curtailed investigation—subclaim B.1; not calling known and available lay witnesses—subclaim B.2; failing to retain available expert witnesses in the areas of mental health, addiction, and intoxication—subclaims B.3 and B.4; omitting evidence of his remorse for the offense—subclaim B.5; and not introducing governmental reports with corroborating references to his mental disorders, intoxication, and remorse—subclaim B.6.[37] Doc. 1 at 43, 51, 57, 67, 71, 76. In his last subclaim B.7, Sneed argues that the Alabama courts failed to consider the cumulative prejudicial impact of trial counsel's professional errors under *Strickland*'s reasonable probability assessment. Doc. 1 at 79.

[37] Within his guilt-phase subclaims, Sneed asserts that trial counsel should have objected to the prosecutor's view that cooperation was an unproven mitigating circumstance. Specifically, Sneed argues that trial counsel left unchallenged the prosecutor's "personal opinion" that Sneed's post-arrest confession was insufficient to show mitigating cooperation. Doc. 1 at 94 ¶ 154. Sneed does not revisit this issue in reply. *See generally* doc. 31. Consequently, Sneed has abandoned this penalty-phase subclaim—included in Claim C—as a basis for habeas resentencing relief.

a.

Consistent with his habeas allegations in subclaim B.2, Sneed alleged in his Rule 32 petition that trial counsel failed to present several known lay witnesses who could have provided helpful mitigating testimony. Doc. 26-15 at 165-176 ¶¶ 146-97. The circuit court denied these allegations, referencing mostly Alabama Criminal Procedure Rule 32.7(d)—Alabama's post-conviction summary dismissal rule—and occasionally adding Alabama Rules 32.3 and 32.6(b)—Alabama's collateral pleading rules. Doc. 26-19 at 154-58.[38] In affirming the circuit court, the ACCA referenced Sneed's abandonment of allegations, incomplete briefing under Alabama Appellate Procedure Rule 28(a)(10), and deficient pleading under Rules 32.3 and 32.6(b). Doc.26-19 at 97-101. The court discusses the scope of Rule 28(a)(10) and then addresses the ACCA's rationale in more detail below.

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[38] Under Rule 32.7(d), a circuit court "may either dismiss the petition or grant leave to file an amended petition" upon a "determin[ation] that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings." Ala. R. Crim. P. 32.7(d). Rule 32.3 addresses the parties' respective burdens and provides that "[t]he petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief" and "disproving" any defense of preclusion alleged by the State. Ala. R. Crim. P. 32.3. Finally, Rule 32.6(b) requires a petitioner to present for each Rule 32 claim "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). Consequently, "bare allegation[s]" and mere conclusions of law that a constitutional violation occurred will not "warrant any further proceedings." *Id.*

i.

Rule 28(a) governs "[b]riefs of the appellant/petitioner" and requires certain contents organized in a specific order. Ala. R. App. P. 28(a) (italics omitted). Subpart 10 of Rule 28(a) addresses the argument section of an appellate brief and describes it as "containing the contentions of the . . . petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Ala. R. App. P. 28(a)(10). Rule 28(a)(10) refers also to acceptable sources for formatting citations and states that "[c]itations shall reference the specific page number(s) that relate to the proposition for which the case is cited." *Id.*

As previously discussed in the standards of review section, state-barred procedural default applies on habeas review when three requirements are met. Here, the parties dispute satisfaction of the third requirement—whether Rule 28(a)(10) is "adequate, i.e., firmly established and regularly followed and not applied 'in an arbitrary or unprecedented fashion.'" *Ward*, 592 F.3d at 1157 (quoting *Judd*, 250 F.3d at 1313).

In *Ex parte Borden*, 60 So. 3d 940 (Ala. 2007), the Alabama Supreme Court recognized that not all applications of Rule 28(a)(10) are firmly established under Alabama law. Referencing *Borden* and other cases in his habeas reply brief, Sneed maintains that his collateral appeal brief provided notice of his arguments and supporting legal authority "in the aggregate." Doc. 31 at 37-41. Thus, Sneed contends that the ACCA's reliance upon Rule 28(a)(10) in the denial of this collateral claim will not support state-barred procedural default on habeas review. Doc. 31 at

40-41. To better understand how Alabama appellate courts apply Rule 28(a)(10), the court examines *Borden* contextually.

In *Borden*, the petitioner sought postconviction relief due to ineffective assistance of counsel. 60 So. 3d at 944. The trial court summarily dismissed those Rule 32 claims and the petitioner appealed. *Id.* In his brief to the ACCA, the petitioner alleged "22 pages of facts addressing why the trial court [had] erred." *Id.* The petitioner included also "11 pages of argument . . . [and] some 25 citations to case law, along with explanations and quotations from the cited cases." *Id.* The ACCA rejected the petitioner's appeal on the basis that his brief did not comply with Rule 28(a)(10). *Borden*, 60 So. 3d at 944. The Alabama Supreme Court granted certiorari review on whether the ACCA had "correctly held that [the petitioner] failed to comply with Rule 28(a)(10) . . . , and thereby waived his ineffective-assistance-of-counsel claims." *Borden*, 60 So. 3d at 942.

The Alabama Supreme Court reversed, holding that the petitioner's brief was compliant with Rule 28(a)(10) and that the petitioner had "not waive[d] his claims of ineffective assistance of counsel." *Borden*, 60 So. 3d at 944. In rejecting the ACCA's procedural rationale, the Alabama Supreme Court observed that "another attorney" may have briefed the argument "differently." *Id.* Still, the Court concluded that the petitioner's "brief [wa]s sufficient to apprise the [ACCA] of [his] contentions with regard to his ineffective-assistance-of-counsel claims." *Id.* The Court noted too that "waiver of an argument for failure to comply with Rule 28(a)(10) [was applicable] . . . to those cases" in which a petitioner presented "no argument" and provided "few, if any, citations to

relevant legal authority" in the brief. *Id.* The Court explained that under that noncompliant scenario, a petitioner's argument amounted to "undelineated general propositions," which thwarted meaningful appellate review. *Id.* (citing collected cases); *see, e.g.*, *Davis v. Sterne, Agee & Leach, Inc.*, 965 So. 2d 1076, 1092 (Ala. 2007) (explaining that a "lone citation to a general principle of law without specific relevance to [a claim] does not meet the requirements of Rule 28(a)(10)").

Against this backdrop, the court understands that whether an appellate court's reliance on Rule 28(a)(10) is firmly established for habeas purposes will depend on how developed the petitioner's brief is on the applicable claim. Put differently, if an appellate court denied a claim because the petitioner's brief lacked argument or contextualized authority, then that limited, but firmly-established, application of Rule 28(a)(10) will support state-barred procedural default on habeas review. But an appellate court's reliance on Rule 28(a)(10) when the petitioner gave adequate notice of his claim will fall outside the firmly-established range of application and a defense based upon state-barred procedural default will fail. *See, e.g.*, *Gaines v. Price*, No. 2:15-CV-1822-VEH-TMP, 2017 WL 2296962, at *21 (N.D. Ala. May 2, 2017) (declining to apply state-barred procedural default on habeas review because "the brief . . . sufficiently supplied facts and authority that would have allowed the [state] appellate court to address the issue on the merits"), *report and recommendation adopted*, 2017 WL 2289105 (N.D. Ala. May 25, 2017).

ii.

Turning back to the ACCA's discussion of Sneed's collateral allegations which correspond with subclaim

B.2, as a threshold matter to the Rule 28(a)(10) analysis, the ACCA divided Sneed's postconviction known-witness allegations into eight categories. Doc. 26-19 at 97. Referring to Sneed's collateral brief, the ACCA determined that Sneed had abandoned most of those categories except for "lay testimony about his unstable, impoverished, and traumatic childhood and behavioral problems." Doc. 26-19 at 97 & n. 1; *see also* doc. 26-17 at 86 (Sneed's argument for resentencing on collateral appeal). Because of Sneed's more narrow discussion of the known-witness allegations on appeal, the ACCA "deemed" "all other aspects of this claim abandoned."[39] Doc. 26-19 at 97 n. 1. Alternatively, the ACCA concluded that Sneed had waived the remaining allegations by failing to comply with Rule 28(a)(10) on those unpresented allegations. Doc. 26-19 at 97 n. 1.

The ACCA focused then on the unabandoned category of omitted testimony—Sneed's abusive childhood and troubled behavioral background from known lay witnesses. Doc. 26-19 at 97. The ACCA noted Sneed's observation in his brief that the circuit court had dismissed these allegations "largely" for cumulative evidence or lack of prejudice reasons. Doc. 26-17 at 86. The ACCA pointed out that Sneed then narrowed the scope of his Rule 32 appellate challenge to the circuit

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[39] The remaining seven categories the ACCA identified as abandoned were that Sneed:

> 2) . . . was raped as a child; 3) . . . had behavioral problems; 4) . . . ha[d] positive and endearing qualities; 5) . . . protect[ed] others; 6) . . . ha[d] artistic talents; 7) . . . [had] f[a]ll[en] in with a bad crowd; and 8) . . . ha[d] matured and found God since being in prison.

Doc. 26-19 at 97.

court's cumulative assessment based upon Ms. Terrell's testimony. Doc. 26-19 at 97.

Specifically, Sneed argued in his brief that Ms. Terrell's reference to "entries about [his] [terrible] upbringing" were not as compelling as "the first-hand testimony about his terrible upbringing that his childhood friends . . . could have provided." Doc. 26-17 at 86. To support that contention, Sneed relied upon the American Bar Association's Guidelines for the Appointment and Performance of Defense Counsel in Penalty Cases (the "Guidelines"). Doc. 26-17 at 86. Sneed mentioned additionally the Supreme Court's discussion of the Guidelines in the analysis of an ineffective mitigation investigation in *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Sneed did not raise other cumulative-evidence concerns in briefing this *Strickland* subclaim.

Against this backdrop, the ACCA concluded that even Sneed's unabandoned argument tied to prejudice "from [the] decision to present mitigating evidence through [Ms. Terrell] rather than lay witnesses . . . [did not] comply with Rule 28(a)(10)." Doc. 26-19 at 98. The ACCA noted that Sneed had not explained how trial counsel's conduct fell below the Guideline's standards or why a decision to rely upon Ms. Terrell's testimony could not have been a strategic choice. *Id.* at 100. The ACCA observed that Sneed had offered nothing to dispute the circuit court's collateral finding that "Ms. Terrell was credible and persuasive." *Id.* (internal quotation marks omitted). According to the ACCA, these gaps in Sneed's collateral brief meant that he had waived the unabandoned category of allegations under Rule 28(a)(10)'s requirements. Doc. 26-19 at 101.

"It is a dominant theme of the Supreme Court case law . . . that a federal habeas petitioner shall not be denied federal review of a federal constitutional claim on the basis of an asserted state procedural ground that is manifestly unfair in its treatment of that claim." *Spencer v. Kemp*, 781 F.2d 1458, 1470 (11th Cir. 1986) (en banc). This means that to benefit from state-barred procedural default on habeas review, Respondent bears the burden of meeting the firmly established requirement. As explained in *Borden*, Rule 28(a)(10) requires adequate—not precise—notice of an appellate claim. Given *Borden*'s holding, Respondent has not shown that the ACCA rejected the unabandoned category of this subclaim under a firmly established application of Rule 28(a)(10). Doc. 23 at 16-17 ¶ 23. This is evident by the fact that the ACCA was able to analyze this particular *Strickland* argument on the merits. Consequently, the court agrees with Sneed that he presented sufficient argument to the ACCA to prevent the application of state-barred procedural default to the unabandoned portion of this subclaim on habeas review.

iii.

Because state-barred procedural default does not apply, the court turns to the ACCA's alternative merits-based assessment. Here, the ACCA agreed with the circuit court "that counsel will not be held ineffective for failing to present cumulative evidence." Doc. 26-19 at 98. The ACCA restated some of the same points discussed in the Rule 28(a)(10) analysis, including that trial counsel may have chosen to rely solely on Ms. Terrell for strategic reasons. *Id.* at 101. The ACCA noted too that Sneed had failed to allege facts establishing *Strickland* prejudice. *Id.* These factual deficiencies, which the ACCA identified, in-

cluded allegations establishing that the "lay witnesses would have been more credible than [Ms.] Terrell or that the judge or jury failed to consider his mitigating evidence because . . . [the testimony] [came] through a social worker." *Id.*

In his habeas reply, Sneed challenges the ACCA's reliance upon cumulative evidence as a reason to affirm the circuit court's decision. *See* doc. 31 at 9 ("Respondent's primary response . . . is that there was some evidence on these issues and the omitted evidence was merely cumulative."). Sneed contends generally that the Alabama courts reached "a decision that was contrary to or involved an unreasonable application of . . . Supreme Court [precedent] and that was based on an unreasonable determination of the facts." *Id.* But Sneed has not pointed to Supreme Court decisions or evidence in the state court proceeding which substantiates his AEDPA contentions with respect to the unabandoned portion of this subclaim.

For example, Sneed does not address the alleged unreasonableness of the ACCA's *Strickland* performance point that trial counsel could have made a strategic choice to introduce information about his tumultuous upbringing and destructive behaviors through Ms. Terrell. Likewise, Sneed does not discuss why the ACCA erred unreasonably in reaching its *Strickland* prejudice conclusion. And on this record, the sentencing court's identification of five mitigating factors about Sneed's arduous life attributable to Ms. Terrell's testimony demonstrates the reasonableness of the ACCA's conclusion that no reasonable probability of a different sentencing outcome existed if lay witnesses had testified about Sneed's difficult childhood and behavioral problems. Doc. 1 at 138. Thus, Sneed has not demonstrated a right to habeas relief on

the unabandoned part of this subclaim B.2 which the ACCA addressed, alternatively, on the merits.

Returning to those allegations which the ACCA rejected as abandoned, neither party focuses on that procedural basis in the habeas filings applicable to this subclaim. Docs. 1 at 51-56 ¶¶ 76-86; 23 at 16-17 ¶ 31; 24 at 28-29; *see also, e.g.*, *Waldrop v. Johnson*, 77 F.3d 1308, 1318 (11th Cir. 1996) ("agree[ing] with the district court that th[e] claim [wa]s defaulted" on habeas review because the petitioner had abandoned it on appeal to the ACCA). Accepting that the ACCA applied abandonment in a firmly established manner, then Sneed has the burden to overcome this procedural default on habeas review, which he has failed to do. Alternatively, even if the ACCA overstepped in the application of abandonment on collateral appeal, Sneed—in his silence on habeas review—has waived a right to challenge the soundness of that procedural conclusion. Additionally, the ACCA's reliance on Rule 28(a)(10) as another procedural bar to those seven undeveloped categories in Sneed's brief falls within the firmly established scope of that state rule.[40]

For these reasons, state-barred procedural default precludes habeas relief on the remainder of this subclaim.

b.

Moving to subclaim B.6, Sneed argues that trial counsel provided ineffective assistance by failing to

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[40] *Cf. Ferguson v. Allen*, No. 3:09-CV-0138-CLS-JEO, 2014 WL 3689784, at *58 (N.D. Ala. July 21, 2014) ("Thus, the [ACCA] did not arbitrarily apply Rule 28(a)(10) to [the petitioner]'s footnote reference to all 141 pages of his Rule 32 petition."), *vacated in part on unrelated grounds*, 2017 WL 2774648 (N.D. Ala. June 27, 2017), *appeal filed* July 22, 2020.

introduce two known governmental reports, which contained "powerful mitigation evidence." Doc. 1 at 76 ¶ 124. One document "was the Outpatient Forensic Evaluation Report of Dr. Lawrence Maier, [a] licensed forensic psychologist retained by the State"—the Maier Report.[41] *Id.* at 77 ¶ 126. The other document was the 1995 Alabama Board of Pardons and Paroles' presentencing report on Sneed—the 1995 PSR.[42] *Id.* at 78 ¶ 127; Doc. 27-23 at 24-31. In response to Respondent's assertion that "Sneed did not raise [this contention] on collateral appeal" to the ACCA, doc. 23 at 26 ¶ 27; doc. 24 at 59, Sneed explains that he made "repeated[] reference[s]" to the Maier Report in his appellate brief, doc. 31 at 42.[43] Sneed adds that he referred to the 1995 PSR's documentation "of his consistent remorse," doc. 31 at 43; doc. 26-17 at 88, that the ACCA addressed both documents in the merits-based evaluation of his subclaim that trial counsel failed unreasonably to introduce evidence of his remorse, doc. 31 at 43; doc. 26-19 at 101-02, and that the ACCA never considered his "other

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[41] Sneed fails to provide a corresponding evidentiary citation to the Maier Report. And the court's search of the electronic record for the Maier Report proved unsuccessful. Based on Sneed's reply brief, the court understands that Dr. Maier addressed Sneed's competency to stand trial in the Maier Report and that "all counsel and the [circuit] court" received a copy of the document in April 1994. Doc. 31 at 96 (internal quotation marks omitted).

[42] After Sneed's second capital conviction in 2006, the Alabama Board of Pardons and Paroles prepared a new PSR. Doc. 26-3 at 24-29.

[43] *See* doc. 26-17 at 53 (discussing the Maier Report in the context of a guilt-phase *Strickland* claim); *id.* at 64, 72 (mentioning the Maier Report in support of an unreasonable investigation subclaim); *id.* at 89 n. 23, 92 (noting the Maier Report's references to Sneed's remorse).

contentions" about intoxication and mental illness as documented in the Maier Report, doc. 31 at 43. Sneed continues further that the ACCA did not "hold that [his] contentions relating to the [Maier Report and 1995 PSR] and the sub-claims they support [we]re procedurally defaulted." *Id*[44]

But missing from Sneed's references to his appellate brief is any collateral argument that trial counsel should have introduced the Maier Report or the 1995 PSR for reasons beyond his remorse. And Sneed's discussion of the Maier Report in the context of other *Strickland* subclaims did not fairly present a theory that trial counsel failed unreasonably to introduce that document for other mitigating reasons. Consequently, Respondent observes correctly that unexhausted procedural default bars habeas relief on the intoxication and mental illness portions of subclaim B.6.

c.

In subclaim B.7, Sneed asserts that the Alabama courts "disregard[ed]" Supreme Court and Eleventh Circuit precedent in analyzing *Strickland* prejudice in the penalty phase. Doc. 1 at 79 ¶ 129. Citing *Sears v. Upton*, 561 U.S. 945, 955-56 (2010) (per curiam), Sneed argues that cumulative prejudice under *Strickland*'s second prong is "a required method of judicial analysis" and "not a 'claim.'" Doc. 1 at 80 ¶ 130.

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[44] Given Sneed's reply, the court handles Respondent's defense of unexhausted procedural default in two different ways. One, part of this subclaim overlaps with subclaim B.5—trial counsel's failure to introduce the Maier Report and the 1995 PSR as evidence of his remorse. Consequently, the court will consider the issue of unexhausted procedural default with respect to these records when addressing subclaim B.5.

Sneed continues that cumulative prejudice "need not be pled" and "cannot be waived." *Id.*

In his collateral attack in state court, Sneed argued that the circuit court failed to consider cumulative prejudice in denying his Rule 32 petition and instead adopted a "piecemeal" approach. Doc. 26-17 at 36-38; *see id.* at 36 ("The circuit court refused to evaluate counsel's performance as a whole in order to make a determination as to cumulative prejudice."). Sneed cited several cases, including guilt- and penalty-phase authority. Doc. 26-17 at 37. The ACCA rejected Sneed's argument procedurally and on the merits. Doc. 26-19 at 79-81. Procedurally, the ACCA determined that Sneed had not preserved the penalty-phase argument for appellate review. Doc. 26-19 at 80. Specifically, the ACCA concluded that Sneed's Rule 32 cumulative prejudice claim in the guilt phase was "distinct" from challenging "the circuit court's handling of all [*Strickland*] claims." Doc. 26-19 at 80. The ACCA gave no explanation how Sneed could have anticipated and preserved an issue in his Rule 32 petition that arose in the circuit court's denial of that petition.

Relevant here, however, Sneed combined both his guilt- and penalty-phase claims into one cumulative-prejudice argument in his collateral appeal. Doc. 26-17 at 36-38. And Sneed has not identified where he ever presented to the ACCA the more particularized arguments about the cumulative prejudice error the circuit court made in the penalty-phase assessment of his new mitigating evidence. To that extent, unexhausted procedural default arguably applies to this subclaim. Still, the court will analyze *Strickland* prejudice consistent with the cumulative framework dictated by Supreme Court and Eleventh Circuit

precedent if Sneed shows deficient performance on his remaining penalty-phase allegations—subclaims B.1 and B.3-B.5. *See, e.g.*, *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1278 (11th Cir. 2016) (detaching AEDPA deference because the ACCA did not "consider[] what would be the combined effect of all mitigating evidence in producing a different outcome at sentencing" under clearly established *Strickland* precedent).

The court moves now to Sneed's expert witness allegations in subclaims B.3 and B.4, which the ACCA decided on the merits.

d.

In subclaim B.3, Sneed asserts that trial counsel ineffectively failed to retain a mental health expert even though "their own investigator had . . . [made that recommendation] . . . in 2003, more than two years before trial." Doc. 1 at 57 ¶ 87. Sneed identifies Dr. Stan Brodsky, "a mental health professional," as that postconviction expert. Doc. 1 at 58 ¶ 90. According to Sneed, Dr. Brodsky would have offered the following mitigating health information:

> a. Following a comprehensive mental health assessment of Mr. Sneed and based on his medical history, Mr. Sneed suffered from major mental illnesses; to wit: Post-Traumatic Stress Disorder (Chronic), and Major Depressive Disorder (Chronic), arising from a childhood history of being beaten by his father and being raped at age 9 by a stranger. . . .
>
> b. These types of illnesses negated Mr. Sneed's capacity to form a specific par-

ticularized intent to kill, which is required for capital murder.

c. The medical records of Mr. Sneed and his immediate family members ([his] mother[,] Sharon and younger brother[,] Avery) show a systemic family pattern of major mental illness in all three individuals. . . .

d. The medical records show that Mr. Sneed experienced 'hearing voices.'. . .

e. The medical records show that Mr. Sneed tried to commit suicide as a teenager. . . .

f. The medical records show that Mr. Sneed would talk to himself, beat walls, and yank out faucets until staff sedated him with the antipsychotic drug Thorazine. . . .

g. The medical records show that Mr. Sneed had significant in-patient hospitalizations: at Keller Partial Hospitalization Program (3 months), Norton's Children's Hospital (nearly one year), Cardinal Treatment Center (seven months), and the Psych unit at Humana Hospital – University of Louisville (at least two weeks).

h. Mental health professionals at the institutions diagnosed him, variously, with: borderline personality disorder, dysthymic disorder (akin to major depression), and obsessive-compulsive disorder. The assessments describe Mr. Sneed as 'anxious and depressed;' as having 'anxiety, depression;' 'evidence of depression and [an] inability to cope . . . ;' '. . . feel[ings] [of] intense insecurity and [a] lack of affection from

> others . . . ;' '. . . and . . . many unmet dependency needs."

Doc. 1 at 59-60 ¶ 91 (citations omitted). According to Sneed, the jury and the sentencing court never heard about the mitigating information contained in subparts a, c-f. *Id.* at 59 ¶ 91.

i.

In his Rule 32 petition, Sneed combined his *Strickland* mental health and addiction expert allegations. Doc. 26-15 at 182-86 ¶¶ 215-25. Additionally, Sneed incorporated into the mental health expert subclaim allegations about his mental health medical records, which formed the basis of Dr. Brodsky's mental illness opinion. *See* doc. 26-15 at 186 ¶ 224 (incorporating by reference *id.* at 176-82 ¶¶ 198 214).

The Rule 32 court summarily denied the mental health expert subclaim as refuted by the record. Doc. 26-16 at 161. In particular, the court noted that trial counsel had retained a psychologist, Dr. Rosenzweig, who testified about Sneed's mental health in the penalty phase. *Id.* For its part, the ACCA affirmed the Rule 32 court's dismissal of this subclaim using a different rationale. According to the ACCA's assessment, "[m]uch of the testimony Sneed argue[d] could have been presented by a qualified mental health expert would have been cumulative to the testimony presented during the penalty phase." Doc. 26-19 at 92. After drawing this conclusion, the ACCA acknowledged one noncumulative area—"neither Dr. Rosenzweig nor Ms. Terrell testified that Sneed was mentally ill at the time of the crime." *Id.*

Still, the ACCA rejected that allegation as pled insufficiently. *Id.* The ACCA noted that "Sneed [had] failed to plead the symptoms he suffered as a result of

PTSD at the time of the crime, how PTSD constituted an 'extreme mental or emotional disturbance' . . . , or how PTSD impaired his 'capacity . . . to appreciate the criminality of his conduct.'" *Id.* (citing Ala. Code § 13A-5-51(2), (6)). The ACCA concluded that "[t]he bulk of [this] subclaim . . . was comprised of cumulative testimony, and those portions . . . that were not cumulative were [pled] insufficiently." Doc. 26-19 at 93. The ACCA did not address *Strickland*'s deficient performance prong.[45]

ii.

Before undertaking the § 2554 analysis, the court addresses a threshold issue regarding Sneed's allegations on collateral versus habeas review. Citing Alabama caselaw, the ACCA noted that it did not consider "referenced evidence" alleged elsewhere in Sneed's Rule 32 petition in deciding the merits of this expert subclaim. Doc. 26-19 at 91 n. 8. Instead, the ACCA indicated that Sneed should have reasserted that same medical information within the subclaim pertaining to Dr. Brodsky rather than seeking collateral relief by incorporating other parts of the petition. *Id.*; *see also Coral v. State*, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), *overruled on other grounds by Ex parte Jenkins*, 972 So. 2d 159 (Ala. 2005); *Jackson v. State*, 133 So. 3d 420, 451 (Ala. Crim. App. 2009). As a result, the ACCA did not consider the impact of mitigating information that supported Dr. Brodsky's

[45] In a situation where, as here, "there is no square finding from the trial [or appellate] court about whether counsel satisfied *Strickland* performance[,] [t]he most we can say is that [the court] raised the question, but then disposed of [the petitioner]'s claim by finding that he failed to establish *Strickland* prejudice." *Kokal*, 623 F.3d at 1341-42.

mental illness opinion such as Sneed's attempted suicide and family history of mental illness.

The court respectfully disagrees with the ACCA. First, *Coral* and *Jackson* did not involve the issue of incorporating ineffective assistance allegations by reference. Second, the ACCA did not assert that Sneed violated an Alabama procedural rule by incorporating allegations about his mental health medical evidence which Dr. Brodsky reviewed. Finally, Respondent does not raise the issue that state-barred procedural default applies because of Sneed's incorporated allegations on collateral review or demonstrate the firmly established nature of such a defense. *See generally* doc. 23 at 19-20 ¶ 24; doc. 24 at 41-45. Consequently, the court will not exclude from the habeas analysis those Rule 32 allegations which Sneed incorporated—with a clear reference—on collateral review.

iii.

In reviewing Sneed's claim, the court seeks guidance from the Eleventh Circuit's *Daniel* decision in structuring the analysis. The petitioner in *Daniel*, like Sneed, challenged the ACCA's summary dismissal of his ineffective assistance allegations pertaining to the penalty phase. *Id.* at 1261. The Eleventh Circuit explained that the petitioner's habeas appeal required it to "answer two questions." *Id.* The "[f]irst[] [was] whether [the petitioner]'s second amended Rule 32 petition and its attached exhibits pleaded enough specific facts that, if proven, amount[ed] to a valid penalty phase ineffective assistance of counsel claim." *Id.* If the answer to the initial inquiry was "in the affirmative," then the second question was "whether the [ACCA]'s decision to the contrary was unreasonable under § 2254(d)." *Daniel*, 822 F.3d at 1261. Thus,

Daniel directs that the court determine first whether a petitioner's allegations are sufficient to state a *Strickland* ineffective assistance claim and, if yes, the impact of AEDPA deference.

iv.

Here, the state court record establishes unambiguously that Sneed has no viable *Strickland* subclaim tied to Dr. Brodsky because trial counsel's documented pretrial actions refute Sneed's deficient performance allegations. And no additional development through discovery or an evidentiary hearing will change this court's first prong assessment. Specifically, the crux of Sneed's deficient performance allegations is that trial counsel failed or waited unreasonably to retain Dr. Brodsky. Doc. 1 at 57 58 ¶¶ 87, 91. Sneed argues that trial counsel knew the importance of retaining Dr. Brodsky from a mitigation specialist, Cyrus T. Johnston. *Id.* at 57 ¶ 87; Doc. 26-9 at 77 ¶ 25; Doc. 26-9 at 57 ¶ 10. Sneed adds that he would have been able to show the existence of Alabama's extreme mental disturbance and diminished mental capacity mitigating factors through Dr. Brodsky's mental health assessment and expert testimony. Doc. 1 at 57-60 ¶¶ 89-91. And with those additional statutory factors in play, Sneed contends that he meets *Strickland*'s reasonable probability test.

Sneed fails to consider the context of the state court record and his ability to actually prove deficient performance. Specifically, the state court record confirms that trial counsel tried more than once with the circuit court to secure the necessary funding to retain Dr. Brodsky. In December 2004, trial counsel asked for the approval of $7,500 to hire Dr. Brodsky. Doc. 26-9 at 14-23. Within thirty days of the trial court's denial of that request, counsel moved for reconsideration.

Doc. 26-9 at 24-29, 61-62. In mid-January 2005, the trial court granted trial counsel's request partially and approved additional expert funding in the amount of $3,500. Doc. 26-9 at 63.

Trial counsel followed the partial relief with an ex parte motion to continue filed near the end of January. *Id.* at 65-72. In that requested continuance, counsel explained that they would be unable to retain Dr. Brodsky without the full $7,500. *Id.* at 71 ¶ 10. Counsel attached to their request Mr. Johnston's affidavit in which he "identifie[d] and explaine[d] the need for additional experts," including Dr. Brodsky. *Id.* at 70 ¶ 4; Doc. 26-9 at 73-85. Mr. Johnston acknowledged the existence of Ms. Terrell's psycho-social report on Sneed, doc. 26-9 at 79 ¶ 28, but maintained that "[i]t [wa]s imperative" for Sneed to "receive a comprehensive psychological evaluation" from Dr. Brodsky, *id.* at 81 ¶ 32. The court agreed to continue the trial but denied the request "for further mitigation expert assistance and money." Doc. 26-9 at 86. As reasoning, the circuit court noted its approval of $3,500, as well as the "over $10,000" approved generally "for mitigation expert assistance." *Id.* The court found that counsel's "request for more funds . . . [was] unreasonable" and stated that "no further sums [would] be approved at this time." *Id.* The court offered to "enter an order for mental evaluation to be performed by the State," if Sneed "fe[lt] the need for further psychological examination," and set a deadline for that option. *Id.*

Based on this record, trial counsel made reasonable efforts to secure the expert testimony of Dr. Brodsky. Counsel's inability to persuade the court to allow more funding does not establish deficient performance. Moreover, Sneed has not alleged that trial counsel

failed unreasonably to take advantage of another source of money that could have satisfied Dr. Brodsky's financial requirements.

As for the argument that trial counsel waited too long to respond to Mr. Johnston's "preliminary mitigation strategy" outlined in July 2003 and his repeated follow-up efforts to counsel, Sneed has not linked that alleged error to trial counsel's inability to retain Dr. Brodsky. According to the timeline which Mr. Johnston provided in his affidavit, as of December 2003, trial counsel remained hopeful that Sneed would agree to plea. Doc. 26-9 at 76 ¶ 19. And when Mr. Johnston informed trial counsel that Sneed wanted "to proceed with the experts," *id.*, counsel obtained a continuance and $3,000 to retain Ms. Terrell in February 2004. *Id.* at 77 ¶ 20.

Trial counsel followed the hiring of Ms. Terrell with motions to secure Dr. Brodsky beginning in December 2004. The circuit court reminded trial counsel in the January 2005 order applicable to Dr. Brodsky that "that the trial was reset for February 28, 2005, after receiving assurances . . . that everyone was ready" and approving expert funds for Ms. Terrell. Doc. 26-9 at 63. But, importantly for *Strickland* deficient performance purposes, the circuit court did not reduce trial counsel's requested funding for Dr. Brodsky because of an unreasonable delay. Instead, the circuit court noted that trial counsel's request was "substantially more money . . . but with another expert." *Id.* The court added that Sneed's "rights to a fair trial, due process, etc. had already been considered when prior expert assistance was approved and funds allocated." *Id.* Finally, the court emphasized that the trial would proceed as scheduled with the retention of Dr. Brodsky. *Id.*

Thus, the underlying state court documents do not show that trial counsel's alleged delay in preparing an expert motion prevented them from using Dr. Brodsky as a mental health expert. Instead, financial constraints prevented counsel from using Dr. Brodsky. Therefore, the court determines on habeas review that the state court record refutes Sneed's allegations of deficient performance with respect to Dr. Brodsky. And without cognizable deficient performance, Sneed's argument that the state courts evaluated prejudice in isolation and contrary to clearly established *Strickland* precedent in failing to consider Dr. Brodsky's anticipated mental health testimony is of no consequence.[46]

e.

The court reaches a similar deficient performance conclusion with respect to subclaim B.4, i.e., Sneed's contention that trial counsel proved ineffective by failing to secure "available expert testimony from an addiction/intoxication expert like Dr. Greg Skipper." Doc. 1 at 67 ¶ 108. Again, Sneed points to the mitigation specialist's identification of the need to retain an addiction expert and the specialist's efforts to communicate with trial counsel about that mitigating strategy as early as July 2003. Doc. 1 at 67 ¶ 108. As Sneed puts it, trial counsel disregarded "th[e] advice from their own experienced investigator" and "never asked the court for funds to hire an

[46] Thus, the court does not reach *Strickland* prejudice or the reasonableness of the ACCA's assessment of that prong given Dr. Brodsky's postconviction opinion that Sneed was mentally ill from post-traumatic stress disorder at the time of the offense versus Dr. Rosenzweig's more speculative opinion about his mental health.

addiction expert." *Id.* (internal quotation marks omitted).

This factual statement is consistent with the state court record—trial counsel did not seek expert funds to retain an addiction expert. Sneed ignores however that the trial court was unwilling to lift its prior limitation on additional expert funding for a mental health expert in February 2005. In doing so, Sneed does not allege how trial counsel could have reasonably requested funding for another expert witness given the circuit court's denial of full funding for Dr. Brodsky. Likewise, Sneed's allegations do not account for trial counsel's possible reasonable reluctance to press the trial court for more expert funding in light of prior motions and the outcome in the February 2005 order.

Consequently, Sneed's allegations do not overcome the presumption that trial counsel did not perform unreasonably in failing to move for funds to retain Dr. Skipper—an action which trial counsel could have determined was futile and even detrimental under the circumstances. And Sneed has not alleged enough to show that trial counsel's failure to file another funding motion, rather than the circuit court's concerns about excessive expert funding, was the "[b]ut for" reason Dr. Skipper was not an expert witness. Doc. 1 at 67 ¶ 108 (internal quotation marks omitted).

Because of Sneed's first prong failing on the Dr. Skipper subclaim, ending the *Strickland* analysis here is appropriate under *Daniel*. And without cognizable deficient performance, Sneed's argument that the state courts evaluated prejudice in isolation and contrary to clearly established *Strickland* precedent in failing to consider Dr. Skipper's anticipated addiction testimony is of no consequence.

f.

Sneed contends in subclaim B.5 that trial counsel provided ineffective assistance by failing to introduce available evidence of his "long-standing remorse" over Mr. Terry's murder.[47] Doc. 1 at 71 ¶ 114.

i.

Procedurally, Respondent asserts "Sneed waited until he filed his brief on collateral appeal to raise specific facts about this subclaim." Doc. 24 at 55. Citing Alabama cases, Respondent references a "well-settled" principle that "an appellate court will not consider facts or arguments raised for the first time on appeal." *Id.* According to Respondent, the gap between Sneed's limited Rule 32 allegations in his petition and the more-developed facts asserted in his collateral brief means that Sneed is precluded from relying on those newer factual assertions on habeas review. Doc. 24 at 55-56. Thus, Respondent invokes state-barred procedural default.

In its mostly merits-based decision, the ACCA mentioned one procedural issue tied to Sneed's collateral brief. Specifically, the ACCA pointed out that Sneed had identified, for the first time on appeal, a specific study which "show[ed] that jurors in capital murder cases are often moved by a defendant's genuine expression of remorse." Doc. 26-19 at 102 (internal quotation marks omitted). The ACCA noted that "Sneed's attempt to supplement his [Rule 32] pleading through his brief on appeal . . . [was

[47] The Supreme Court has noted—in a capital case involving a jury instruction challenge— that "remorse, which by definition can only be experienced after a crime's commission, is something commonly thought to lessen or excuse a defendant's culpability." *Brown*, 544 U.S. at 142-43.

improper] because . . . [he had not] included [that information] in his petition." *Id.* n. 11. But the ACCA did not exclude from consideration anything else within Sneed's brief as procedurally non-compliant.

Sneed asserts correctly that the ACCA did not rely on his "purported introduction of new facts and arguments not considered by the [circuit] court" in affirming the Rule 32 judgment. *See* doc. 31 at 41-42. This contention does not address, however, the ACCA's procedural decision to exclude Sneed's new allegation about the study on remorse in capital cases. Under these circumstances, the scope of state-barred procedural default precludes this court's consideration of Sneed's allegation about the specific study on remorse. But the other newer facts which Sneed argued in his collateral brief are before this court because the ACCA considered them without raising a procedural concern.

ii.

Turning to the merits-based reasoning on collateral review, the circuit court rejected this subclaim as pled inadequately,[48] and the ACCA affirmed. Doc. 26-19 at 101, 103. In reviewing the adequacy of Sneed's allegations, the ACCA determined that Sneed's sources of remorse (the Maier Report; the 1995 PSR; and testimony from Decatur Police Lieutenant Dwight Hale, his friends, and himself, doc. 26-15 at 187 ¶ 228) were insufficient to show "that counsel could have presented evidence that he was remorseful." Doc. 26-

[48] *See* doc. 26-16 at 161 (concluding that Sneed had failed to "plead[] specific facts indicating how he was prejudiced" by establishing how "the presentation . . . of the alleged evidence of his remorse" would have created a reasonable probability of a different sentencing outcome).

19 at 101. According to the ACCA, Sneed should have specified "what" specifically in the Maier Report and the 1995 PSR "indicated that he was remorseful." Doc. 26-19 at 102. The ACCA noted also that Sneed had "failed to plead what testimony he, his friends, or Lieutenant Hale would have provided that would have indicated that he was remorseful." *Id.*

The ACCA determined also that Sneed had failed to substantiate *Strickland* prejudice with specific studies supporting his contention that genuine remorse matters to juries. *Id.* Because of that omission, the ACCA concluded that Sneed's description of *Strickland* prejudice amounted to a "bare assertion that had the evidence of his remorse been presented, more jurors would have voted for a non-death sentence." Doc. 26-19 at 102-03. To plead prejudice adequately, the ACCA indicated that Sneed should have "allege[d] how evidence of [his] remorse would have altered the balance of mitigating circumstances and aggravating circumstances." *Id.* at 103. As another example, the ACCA added that Sneed should have "allege[d] how evidence of [his] remorse would have moved more jurors to recommend a sentence of life . . . or the judge to" accept a recommended life sentence. *Id.* The ACCA did not analyze *Strickland*'s deficient performance component.

iii.

Against this backdrop, the court addresses the merits of this subclaim. As *Daniel* instructs, the court considers first Sneed's allegations setting aside any deference owed under AEDPA.

Turning to deficient performance, most of Sneed's alleged sources of remorse lack the requisite specificity to meet the heightened pleading standard on habeas

review. With the exception of the Maier Report, Sneed contends only generally that trial counsel could have introduced evidence of his remorse. However, Sneed failed to summarize the nature of that anticipated evidence or testimony. Additionally, as shown below, the state court record and Sneed's own arguments undermine his reliance upon several categories of his alleged remorse.

(a)

In supporting this *Strickland* subclaim, Sneed argues that trial counsel performed unreasonably by failing to ask Lt. Hale about Sneed's remorse even though Lt. Hale covered that subject on direct examination. Doc. 1 at 75 ¶ 121. Specifically, Lt. Hale testified in the guilt phase that when he showed the video tape of the murder, Sneed "dropped his head and immediately started to say, 'I'm sorry, I'm sorry, I'm sorry.'" Doc. 26-6 at 127-28. And in response to Lt. Hale's question, "'Well, is that you and Hardy?'" in the video, Sneed answered, "'Yeah, that is us, but I didn't shoot anybody. I'm sorry, I'm sorry, I'm sorry.'" *Id.* at 128.

Sneed does not allege with specificity what more trial counsel could have done on cross examination in light of Lt. Hale's favorable testimony about Sneed's remorse. Likewise, Sneed has not cited any on-point authority which establishes unreasonable trial counsel error for failing to develop a witness's topical testimony, where, as here, the witness testified about that same subject at trial.

Also related to Lt. Hale's testimony, Sneed contends that trial counsel referred to Sneed's remorse "erroneously" in closing. Doc. 1 at 72 ¶ 116; *see also* doc. 26-8 at 139 ("And lastly but not least, [Sneed] had

expressed remorse. Not some, but has expressed remorse."). Allegedly, counsel's mistake enabled the prosecutor "to strengthen the State's penalty phase case by highlighting the absence of remorse evidence," including testimony directly from Sneed. Doc. 1 at 72 ¶ 116. But trial counsel did not argue that Sneed had testified about his remorse at trial. Doc. 26-8 at 139. Consequently, trial counsel's comments in closing were not erroneous but rather consistent with Lt. Hale's guilt-phase testimony about Sneed's remorse. Thus, Sneed falls short of establishing deficient performance with the remorse testimony from Lt. Hale.

(b)

Sneed alleges that unnamed "friends" could have provided testimony about his remorse. Doc. 1 at 73 ¶ 117 (internal quotation marks omitted). For the most part, Sneed fails to identify those lay witnesses' names and their expected testimony with any specificity. Doc. 1 at 73 ¶ 117; *see also* doc. 26-15 at 187-88 ¶¶ 226-29. Those key factual omissions are fatal under § 2254's heightened pleading standard.

One exception is Sneed's identification of Chuckie Reed. Doc. 1 at 74 ¶ 120. Referring to allegations made in the Rule 32 petition, in a section unrelated to the remorse subclaim, Sneed contends that he saw Mr. Reed after the crime. *Id.*; *compare* doc. 26-15 at 151 ¶ 96, *with id.* at 187-88 ¶¶ 226-29. Mr. Reed recalled that Sneed "seemed 'different and clearly devastated'" during the encounter. Doc. 1 at 74 ¶ 120. Allegedly appearing to be different post-offense as observed by a lay witness is not the equivalent of expressing remorse or regret over the victim's death. Thus, Mr. Reed's anticipated testimony does not show that trial counsel

unreasonably failed to call him as a witness available to speak of Sneed's remorse.

Alternatively, unexhausted procedural default precludes the court from considering the allegations about Mr. Reed's anticipated testimony. Specifically, Sneed did not fairly present this possible deficient performance issue—through an incorporation of allegations or otherwise—to the state courts. And Respondent has not waived—through counsel—the exhaustion requirement on this subclaim in his answer or brief. Doc. 23 at 23-26 ¶ 26; Doc. 24 at 55-59; *see also* 28 U.S.C. § 2254(b)(3) ("A State shall not be deemed to have waived the exhaustion requirement or be estopped from reliance upon the requirement unless the State, through counsel, expressly waives the requirement."). Thus, Sneed's reference to "friends" does not support *Strickland*'s deficient performance prong sufficiently on habeas review.

(c)

Sneed asserts also that he "would . . . have provided [testimony on remorse], had he been questioned about that subject on the witness stand by counsel." Doc. 1 at 73 ¶ 117. Again, Sneed has not summarized what specific testimony he would have provided. Regardless, Sneed's willingness to provide testimony about his remorse— alone—does not establish the absence of a strategic reason by counsel. After all, trial counsel could have decided that Lt. Hale's testimony proved sufficient to support Sneed's mitigating remorse and even preferable to what the jury might construe as self-serving testimony from Sneed. Thus, Sneed's willingness to provide undescribed testimony of his remorse is inadequate to establish trial counsel's deficient performance for lack of specificity and a

potential and reasonable strategic purpose in light of Lt. Hale's more neutral remorse testimony.

(d)

Sneed contends also that the Maier Report would have provided documentary evidence of his remorse. Doc. 1 at 73 ¶ 117. The court discussed the Maier Report in subclaim B.6 and noted that it is not a part of the habeas record. But regardless of that omission, Sneed has the burden to plead what anticipated information within the Maier Report would have been available for trial counsel to introduce on remorse. In that regard, Sneed cites the description of the contents, which corresponds with a different subclaim in his Rule 32 petition, to allege what Dr. Maier reported on remorse in 1994. *Compare* doc. 1 at 73-74 ¶ 118, *with* doc. 26-15 at 188-89 ¶ 232, *and* Doc. 26-15 at 187 ¶¶ 226-29. In particular, Sneed identifies the portions of the report stating that he "was exhibiting . . . remorse over what he claims to have done" and "admitt[ed] to some feelings of remorse and depression." Doc. 1 at 73-74 ¶ 118 (internal quotation marks omitted).

But, on collateral review, Sneed did not incorporate the allegations about the contents of the Maier Report by reference into his remorse subclaim. Doc. 26-15 at 187 ¶¶ 226-29. Thus, Sneed did not fairly present the Maier portion of his remorse subclaim to the state courts. And, as explained above, Respondent has not waived the exhaustion require-ment on this subclaim. Doc. 23 at 23-26 ¶ 26; Doc. 24 at 55-59. Consequently, unexhausted procedural de-fault precludes Sneed from relying upon the contents of the Maier Report to meet the heightened pleading standard on his remorse subclaim.

Alternatively, from a deficient performance standpoint, Sneed has not alleged why trial counsel's failure to introduce the Maier Report could not have been a strategic decision. Specifically, much of what Dr. Maier noted—beyond remorse might have proved detrimental to Sneed's mitigation case. For example, counsel may have concluded that "exhibiting" remorse is not the equivalent of expressing remorse such as, the testimony by Lt. Hale that Sneed said, "I'm sorry, I'm sorry, I'm sorry." Also, counsel may have concluded that Sneed's reported admission of "some remorse" would invite the court and the jury to query why he did not express "feelings of [complete] remorse" over Mr. Terry's murder. Ultimately, without allegations about the entire contents of the Maier Report in the record, Sneed has not alleged enough to overcome the presumption that trial counsel performed reasonably with respect to that document. *Cf. Dunn v. Reeves*, 594 U.S. __, 141 S. Ct. 2405, 2413 (2021) (per curiam) (recognizing that "a silent record cannot discharge a prisoner's burden" to overcome the presumption that counsel performed reasonably). Thus, Sneed's reliance on excerpts from the Maier Report—if unexhausted procedural default does not apply here—are insufficient to show that trial counsel performed unreasonably in not introducing that document in the penalty phase.

(e)

The last source of remorse which Sneed identifies is the 1995 PSR. Doc. 1 at 73 ¶ 117. Again, Sneed has not summarized what specific language supports his remorse subclaim. *Id.* Consequently, unexhausted procedural default bars habeas relief due to Sneed's failure to fairly present to the Alabama courts what specifically in the 1995 PSR supported his remorse.

With that omission, Sneed fails also to meet § 2254's heightened pleading standard applicable in this court.

Alternatively, based on the court's review of the 1995 PSR, doc. 27-23 at 24 31, the closest reference to remorse it contains is Sneed's account that "It was not supposed to be any shooting. We went in and John started shooting," doc. 27-23 at 26. Again, Lt. Hale's testimony about Sneed's "I'm sorry, I'm sorry, I'm sorry" comments is stronger than the ambiguous reference in the 1995 PSR. Also, Sneed fails to address that other parts of the 1995 PSR contain information that trial counsel understandably did not want to interject into the penalty phase, such as Sneed's record of arrests and inability "to provide child support." Doc. 27-23 at 27-28. Consequently, Sneed has not alleged adequately how trial counsel performed deficiently.

Because of Sneed's first prong failing, ending the *Strickland* analysis here is appropriate under *Daniel*. Likewise, Sneed's remorse allegations are not subject to a cumulative prejudice assessment under *Strickland*.

g.

In subclaim B.1, Sneed asserts that because trial counsel ended the mitigation investigation prematurely—over two years before trial—counsel failed to interview several lay witnesses—"the mothers of [Sneed's] three children, many other friends . . . , [and] [childhood] neighbors"—who were available to testify about mitigation in the penalty phase. Doc. 1 at 43-44 ¶¶ 63-64 (internal quotation marks omitted). Sneed's description of the testimony that these specific lay witnesses could have provided fall generally into one of four categories: his good character and gentle

nature; difficult childhood; role as a father; and gullibility and willingness to please others.

The Rule 32 court and the ACCA denied Sneed's collateral allegations that trial counsel had cut short their mitigation investigation unreasonably or caused prejudice because of any omitted mitigating evidence. Doc. 26-16 at 150-53; Doc. 26-19 at 93-97. Consistent with the *Daniel* framework, the court considers first whether Sneed has stated enough to support an ineffective mitigation investigation claim. The court begins with an examination of *Wiggins*, an AEDPA decision which Sneed argues supports the adequacy of this subclaim's allegations. Doc. 1 at 45 ¶ 65.

i.

The petitioner in *Wiggins* "argue[d] that his attorneys' failure to investigate his background and present mitigating evidence of his unfortunate life history at his capital sentencing proceedings violated his Sixth Amendment right to counsel." 539 U.S. at 514. The Supreme Court agreed. 539 U.S. at 534, 538. Analyzing the constitutional merits of deficient performance first, the Supreme Court found that "counsel abandoned their investigation of petitioner's background after having acquired only rudimentary knowledge of his history from a narrow set of sources" and failed to follow up on mitigating leads "actually discovered in [some of the petitioner's] records." 539 U.S. at 524-25; *see id.* at 525 (agreeing with the district court's assessment that "any reasonably competent attorney would have realized that pursuing these leads was necessary to making an informed choice among possible defenses, particularly given the apparent absence of any aggravating factors in petitioner's background"). The Court determined that the record from the sentencing hearing, which reflected "a halfhearted

mitigation case," was at odds with "the 'strategic decision' the state court[] . . . invoke[d] to justify counsel's limited pursuit of mitigating evidence." *Id.* at 526.

The Court faulted the state court for assuming that trial counsel's possession of "*some* information with respect to the petitioner's background" was sufficient to show that they made "a tactical choice not to present a mitigation defense." *Id.* at 527 (emphasis in original). The Court observed instead that the evaluation of an investigation under *Strickland* includes "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* The Court added that even accepting that trial counsel had "limited the scope of their investigation for strategic reasons, *Strickland* does not establish that a cursory investigation automatically justifies a tactical decision with respect to sentencing strategy." *Id.* The Court identified "the reasonableness of the investigation [offered] to support that strategy" as a mandatory part of the deficient performance assessment. *Id.*

After the constitutional analysis, the *Wiggins* Court concluded that the state court had unreasonably applied *Strickland*'s deficient performance prong. The Court found AEDPA legal error because despite agreeing with the petitioner that the "failure to prepare a social history 'did not meet the minimum standards of the profession,'" the state court stopped the *Strickland* analysis prematurely. 539 U.S. at 527 (quoting state court opinion). Specifically, the state court "did not conduct an assessment of whether the decision to cease all investigation upon obtaining the [presentence investigation and social services] records

actually demonstrated reasonable professional judgment." *Id.* The Court observed that "[t]he state court merely assumed that the investigation was adequate" even though trial counsel's "abandonment [of] their investigation at an unreasonable juncture[] ma[de] a fully informed decision with respect to sentencing strategy impossible." *Id.* at 527-28. The Court found also that the state court unreasonably "defer[red] to counsel's strategic decision not 'to present every conceivable mitigation defense,' . . . [because] counsel based this alleged choice on . . . an unreasonable investigation." *Id.* at 528 (quoting state court opinion).

In assessing deficient performance, the Court flagged a "clearly erroneous" state court assumption under § 2254(d)(2) and (e)(1) regarding the contents of the social services records. *Wiggins*, 539 U.S. at 528-29. The Court explained that "[t]his partial reliance on an erroneous factual finding further highlight[ed] the unreasonableness of the state court's decision." *Id.*

ii.

With this *Wiggins* summary in mind, the court evaluates Sneed's overriding allegation that trial counsel ended the mitigation investigation of lay witnesses unreasonably. Unlike the deficient performance assessments in subclaims B.3, B.4, and B.5, preliminarily Sneed has stated enough for this court to consider each category of omitted lay witness testimony in more detail.

Among other facts, Sneed alleges that trial counsel had "a full two and a half years before the 2006 trial" to investigate lay witnesses beyond the "preliminary [family] interviews," which Mr. Johnston had conducted in April 2003. Doc. 1 at 44 ¶ 64 (internal quotation marks omitted). According to Sneed, with

the exception of some prison guards, trial counsel did not interview any other lay witnesses, over that pretrial time period. *Id.* Sneed argues that in curtailing the investigation of additional lay witnesses prematurely, trial counsel never learned about the "powerful mitigating evidence that could have been presented to the court and jury in the sentencing phase," *id.* (internal quotation marks omitted), and that "cutting short a mitigation investigation in a capital case in this unreasonable way" is at odds with *Wiggins*, doc. 1 at 45 ¶ 65. Finally, Sneed relies also upon the Guidelines' reference to "interview[ing] friends, co-workers, acquaintances, and associates" as "fundamental . . . [to] a capital mitigation investigation." *Id.* at 43-44 ¶ 64 (internal quotation marks omitted).

iii.

Without factoring in AEDPA deference preliminarily—as *Daniel* instructs Sneed has the stronger deficient performance position. Thus, Sneed's deficient performance allegations about trial counsel's lay witness investigation are sufficient to trigger a deeper examination of the remainder of subclaim B.1. Therefore, the court must consider the impact of AEDPA and decide whether the Alabama courts' merits-based rejection of Sneed's deficient performance allegations deserve deference.

The Rule 32 court noted that "abundant documentation" reflected Sneed's trial counsel's mitigation efforts "after the 2003 calendar year." Doc. 26-16 at 150. The Rule 32 court observed too that "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence." Doc. 26-16 at 150 (internal quotation marks omitted) (quoting *Wiggins*, 539 U.S. at 533).

For its part, the ACCA pointed to specific examples of trial counsel's mitigation efforts contained in the record which occurred closer to trial. Doc. 26-16 at 94. This included trial counsel's hiring of Ms. Terrell as a mitigation expert in 2004. The ACCA noted that later that year, Ms. Terrell "provided counsel with a comprehensive report detailing the interviews with Sneed's family and the mitigation she discovered." *Id.* After Ms. Terrell submitted her report, the ACCA pointed out that trial counsel retained Dr. Rosenzweig for "possible [additional] mitigation." *Id.* The ACCA added that in 2006, trial counsel "re-ceived funds to go to Louisville, Kentucky to investigate mitigation." *Id.* Given these investigative activities, the ACCA determined that the circuit court had not erred in the finding that the record refuted Sneed's claim that trial counsel stopped investigating mitigation over two years before trial.

Missing from both state courts' analyses was Sneed's point that trial counsel had stopped investigating potential lay witnesses prematurely. As Sneed argues in reply, "[r]ather than focus on the claim asserted, the [ACCA] reformulated the claim and discussed trial counsel's other mitigation activities during the same [time] period." Doc. 31 at 33. Under these circumstances, the court agrees with Sneed that the ACCA's reliance upon the state record to refute allegations materially different from what he alleged collaterally is due no deference legally or factually under § 2254(d)(1), (d)(2), (e)(1).

iv.

The court must next consider the sufficiency of Sneed's underlying allegations about the additional mitigating evidence that trial counsel failed to discover because of a purportedly unreasonable lay

witness investigation. In particular, in subclaim B.1, Sneed identifies eight lay witnesses by name, confirms their willingness to testify on his behalf, and summarizes their anticipated testimony. Doc. 1 at 44-49 ¶¶ 64, 66-72, 74. The omitted mitigating evidence includes Sneed's reputation "among . . . friends and acquaintances" as "an endearing figure" and "a gentle giant;" his lack of aggression and unwillingness to hurt others "unprovoked," including strangers; his slowness to catch on and inability to think about the consequences of his actions; his gullibility and tendency to follow others; his desire to be loved; his impoverished and "isolat[ed]" childhood, including lack of food; his mother's depression and illnesses; his efforts to be a good father and love for his three children; and his lack of gun ownership or experience. Doc. 1 at 44-49 ¶¶ 64, 66-72 (internal quotation marks omitted).

Sneed's collateral allegations about trial counsel's unreasonable failure to discover this mitigating information from lay witnesses are comparable to subclaim B.1. *See generally* doc. 26-15 at 147-65 ¶¶ 93-145. In denying this part of Sneed's Rule 32 petition, the circuit court did not address the sufficiency of his allegations about deficient performance. Doc. 26-16 at 151-53. Instead, the circuit court focused on the adequacy of Sneed's allegations of prejudice. Doc. 26-16 at 151-53. Referencing Rules 32.3, 32.6(b), and 32.7, the circuit court found that Sneed's *Strickland* allegations failed under the second prong. Doc. 26-16 at 151-53. The circuit court did not analyze the prejudicial impact collectively but rather within categories of evidence. Doc. 26-16 at 151-53.

The ACCA affirmed the circuit court's Rule 32 judgment. Doc. 26-19 at 95. For most of the allega-

tions, the ACCA focused on prejudice. Doc. 26-19 at 94-97. The ACCA rejected Sneed's allegations "that he was a desperate, gullible follower seeking acceptance and friends and that he was immature for his age as a child" for insufficient pleading of prejudice. Doc. 26-19 at 95. The ACCA described Sneed's allegations of prejudice as "bare." *Id.* (internal quotation marks omitted).

Regarding Sneed's allegations that he "was a gentle giant, who could not be convinced to hurt others;" "was always concerned with the well[-]being of others;" and "was inexperienced with guns or violence," the ACCA pointed out that the prosecutor and trial counsel had reached an agreement about such good-character evidence. *Id.* at 95-96 (internal quotation marks omitted). Specifically, the ACCA explained that Sneed had failed to show prejudice because trial counsel's presentation of good-character evidence would have opened the door to the prosecutor's introduction of the disciplinary reports Sneed had received in prison. *Id.* at 96; *see also* doc. 26-2 at 23-193 (collecting Sneed's incident reports and disciplinary records).

The ACCA rejected Sneed's allegations "that he was a good, caring father" as "refuted by the record." *Id.* Here, the ACCA referred to Ms. Terrell's mitigation report, which summarized that Sneed had "ha[d] [no] contact with [his] twin[] [daughters] in years" and had received a letter from his older daughter in 2004. *Id.* (internal quotation marks omitted). The ACCA concluded that because "trial counsel did investigate Sneed's relationship with his children," a summary denial was proper. *Id.*

The circuit court did not address Sneed's allegations about his traumatic childhood. Doc. 26-16 at 151-53. In introducing the subclaim, the ACCA mentioned

Sneed's allegations within this category, doc. 26-19 at 93, but did not revisit that area in its analysis, *id.* at 95-96.

v.

Against this backdrop, the court moves to the habeas analysis. The court disposes of the good character and role as a father categories of undiscovered lay witness testimony quickly. The court dives deeper on the third and fourth categories—new mitigating allegations of Sneed's difficult childhood and his gullible nature.

(a)

Sneed cannot prevail on the good character category because if any prejudice resulted from trial counsel's omission of good character evidence, that amount is negligible. As the ACCA pointed out, the introduction of evidence of Sneed's good character would have allowed the prosecutor to introduce competing prisoner disciplinary reports under the parties' pretrial agreement. And with respect to Sneed's cumulative error contention, adding a negligible amount of prejudice to his prior sentencing picture of aggravators and mitigators is insufficient to create a reasonable probability of a life sentence if trial counsel had introduced good character evidence.

Even accepting that this court has made an incorrect assessment of Sneed's ability to show prejudice with his allegations of good character evidence, habeas relief is still inappropriate under AEDPA. Specifically, Sneed has not shown an unreasonable legal or factual error on the part of the ACCA. For example, Sneed has not demonstrated—with Supreme Court precedent—that the ACCA reached an unreasonable conclusion that he had not alleged adequate

prejudice because his competing prisoner disciplinary reports would negate the mitigating value of any good character evidence. *See Raheem v. GDCP Warden*, 995 F.3d 895, 932 (11th Cir. 2021) (explaining that a state-court determination "could not have been contrary to or an unreasonable application of clearly established law" when "no Supreme Court case was on point"), *cert. denied sub nom. Raheem v. Ford*, 142 S. Ct. 1234 (2022). Sneed has not demonstrated either that the ACCA committed clearly established error under the *Strickland* cumulative prejudice framework. Instead, fair-minded jurists could reasonably disagree whether opening the door to the evidence of Sneed's bad character would cancel out any appreciable mitigating value of his alleged good character evidence. And factually, Sneed does not dispute the existence of the character evidence agreement with the State or his prisoner disciplinary reports under § 2254(d)(2). Thus, habeas relief is inappropriate based upon the first category.

(b)

Moving to the second category, the record—in particular Ms. Terrell's investigation—refutes Sneed's allegations that trial counsel failed to investigate his relationships with his children. *See* doc. 26-19 at 96-97 (describing the limited contact between Sneed and his three girls). And nothing in Ms. Terrell's notes about Sneed's children suggests that trial counsel ended the investigation of that topic unreasonably or prematurely. Thus, these investigative allegations are inadequate under *Strickland*'s first prong. Alternatively, Sneed has not demonstrated that the ACCA reached an unreasonable decision that he could not establish ineffective assistance given Ms. Terrell's mitigation report. Accordingly, AEDPA deference pro-

vides a secondary basis for denying these allegations in the second category.

(c)

Any omitted allegations of Sneed's difficult childhood from lay witnesses would be cumulative to the expert witnesses' testimony on that same subject.[49] The court recognizes that the cumulative nature of evidence alone does not mean that its omission cannot show *Strickland* prejudice. Additionally, lay witness mitigating testimony may strengthen an expert witness's testimony on the same topic. Still, on this record, Sneed's allegations of prejudice tied to his childhood are inadequate as reflected in the sentencing order. As mentioned in the background section, the circuit court gave Sneed the benefit of that non-statutory mitigating factor. Doc. 1 at 138. But in the overall weighing, the sentencing court "d[id] not attribute [Sneed]'s unfortunate upbringing and experiences as excuses . . . or explanations for his total lack of regard for the life of Mr. Terry." *Id.* at 140. Thus, because of the sentencing court's reasoning contained in the override decision, Sneed's allegations that additional testimony about his difficult childhood from lay witnesses are inadequate to create a reasonable probability of a different sentencing outcome.

(d)

The court turns to the fourth category of omitted lay testimony—allegations of Sneed's gullibility and tendency to follow others, i.e., the anticipated testimony of one of his childhood friends, Keith "Toby" Jennings, and Mr. Jennings' sister, Lynetta Jennings.

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[49] AEDPA deference does not apply to the third category because the state courts did not address those allegations on the merits.

Doc. 1 at 45-46 ¶¶ 66-67. As to Mr. Jennings, the omitted testimony included that Sneed "was incapable of forming plans to rob or kill; had always been afraid of prison and . . . tried to avoid being involved in a serious crime[;] was gullible and tended to follow others[;]" and that "it was totally out of character and unthinkable for . . . Sneed to intentionally engage in the violent use of bodily harm against a mere stranger (like a store clerk), in that . . . Sneed could never be persuaded to hurt others who had not provoked him." *Id.* at 45 ¶ 66 (internal quotation marks omitted). As for Ms. Jennings, her anticipated testimony included that Sneed "was a follower, a 'hangout dude,' who must have been told by others that the robbery in Decatur would be very easy (like saying they had done it before), and that 'Charles [Sneed] just went along,' never dreaming someone would be killed." *Id.* ¶ 67 (internal quotation marks omitted).

The circuit court summarily dismissed this category for inadequate pleading, finding that Sneed's lay-witness allegations "that he was desperate for attention and a gullible follower" as a child were inadequate to show prejudice. Doc. 26-16 at 151. The ACCA affirmed, explaining that the allegations that Sneed "was a desperate, gullible follower seeking acceptance and friends and that he was immature for his age as a child" lacked facts "that would establish a reasonable probability" of a different sentencing outcome. Doc. 26-19 at 95. The ACCA continued that Sneed had offered "bare allegation[s] that prejudice had occurred without specific facts indicating how [he] was prejudiced." *Id.* (internal quotation marks omitted) (quoting *Hyde v. State*, 950 So. 2d 344, 356 (Ala. Crim. App. 2006)).

In this court's assessment—following the *Daniel* framework—some of the allegations of the omitted

testimony tied to Sneed's gullibility would open the door to the introduction of his disciplinary incidents as a prisoner. Consequently, for the same reasons discussed in the first category above, the court concludes that those parts of Sneed's gullible allegations are inadequate to show any appreciable prejudice or contribute to Sneed's claim of a cumulative *Strickland* prejudice error.

For those follower allegations more removed from Sneed's character, the court concludes that he has not provided enough detail to establish *Strickland* prejudice. Specifically, this court cannot tell from Sneed's allegations whether the impressions which Mr. and Ms. Jennings expressed about his gullibility pertained to when he was growing up in Kentucky or closer to the time of the capital offense when he was twenty-three years old. Without that temporal clarification, the court can only speculate about the potential mitigating value of the remaining alleged testimony from those omitted witnesses. Consequently, Sneed has not met the heightened pleading requirement on his allegations of *Strickland* prejudice.

And accepting that this court has made an incorrect prejudice assessment of this last category, Sneed has not demonstrated that the ACCA reached an unreasonable decision that his allegations of prejudice were too "bare" to create a reasonable probability of a different sentencing outcome. Accordingly, AEDPA deference provides an alternative basis for denying these allegations.

h.

As a final matter in this penalty-phase *Strickland* section, the court addresses the collective impact of

prejudice under subclaim B.1.[50] Accepting that the alleged lay witness testimony would strengthen Sneed's penalty-phase presentation, the new mitigation when compared to the old mitigation (and unaffected aggravation) does not "paint[] a vastly different picture" of the sentencing circumstances. *Williams*, 542 F.3d at 1342; *cf. Rompilla v. Beard*, 545 U.S. 374, 390 (2005) ("The prison files pictured [the petitioner]'s childhood and mental health very differently from anything defense counsel had seen or heard.").

Likewise, the cumulative impact of trial counsel's allegedly unreasonable penalty-phase errors in this subclaim are insufficient to create a reasonable probability of a different sentencing outcome given the reasoning behind the override decision.

Accordingly, the court denies Claim B for these multiple reasons.[51]

IV.

After applying AEDPA, de novo review, or principles of procedural default, Sneed has not shown an entitlement to habeas relief based on his allegations of constitutional error in his capital conviction and

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[50] The Alabama courts did not address Sneed's allegations of cumulative penalty-phase error on the merits. The court does not include subclaims B.2-B.6 or Sneed's relationships with his children under B.1 in this alternative analysis because the allegations in those claims are insufficient to support habeas relief under *Strickland*'s first prong or procedurally defaulted.

[51] Although to show *Strickland* pleading sufficiency Sneed cites a host of authorities, *see generally* doc. 1 at 29-32, 45, 50, 53 & n. 7, 55-56, 58 n. 8, 62, 64-66, 70-72, 75, 80-82 ¶¶ 45-51, 65, 78, 82-86, 91, 97, 102-04, 106, 112, 115, 122, 131-34; doc. 31 at 52-54, 56-59, 62-63, 67, 70 74 & n. 27, 78-81, 86-89, 91-92, 94 n. 32, 99-104, those cases are too dissimilar factually or procedurally to salvage his penalty-phase allegations on this record.

sentence. Consequently, the court denies Sneed's § 2254 petition, doc. 1, and will not hold an evidentiary hearing.[52] The court will enter a separate order consistent with this memorandum opinion.

DONE the 31st day of August, 2022.

[/s/] Abdul K. Kallon
ABDUL K. KALLON
UNITED STATES DISTRICT JUDGE

[52] *See Martinez v. Sec'y, Fla. Dep't of Corr.*, 684 F. App'x 915, 926 (11th Cir. 2017) ("[T]he district court need not conduct an evidentiary hearing if the record refutes the petitioner's factual allegations, otherwise prevents habeas relief, or conclusively demonstrates that the petitioner was not denied effective assistance of counsel." (citing *Schriro*, 550 U.S. at 474)); *see also Cullen*, 563 U.S. at 182 ("Limiting § 2254(d)(1) review to the state-court record is consistent with [Supreme Court] precedents interpreting that statutory provision.").

APPENDIX G

SUPREME COURT OF THE UNITED STATES

No. 15-9823

ULYSSES CHARLES SNEED,

Petitioner

v.

ALABAMA.

October 11, 2016, Decided

Prior History: Sneed v. State, 195 So. 3d 1077, 2014 Ala. Crim. App. LEXIS 1779 (Ala. Crim. App., Nov. 14, 2014)

Judges: Roberts, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor, Kagan.

OPINION

Petition for writ of certiorari to the Court of Criminal Appeals of Alabama denied.

APPENDIX H

IN THE SUPREME COURT OF ALABAMA

March 18, 2016

1150064

Ex parte Ulysses Charles Sneed. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Ulysses Charles Sneed v. State of Alabama) (Morgan Circuit Court: CC-93-1307.60; Criminal Appeals : CR-12-0736).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on March 18, 2016:

Writ Denied. No Opinion. Parker, J. - Moore, C.J., and Stuart, Bolin, Murdock, Main, and Bryan, JJ., concur. Shaw and Wise, JJ., recuse themselves.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Julia J. Weller, as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of record in said Court.

Witness my hand this 18th day of March, 2016.

/s/ Julia J. Weller
Clerk, Supreme Court of Alabama

APPENDIX I

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

October 16, 2015

CR-12-0736 Death Penalty

D. Scott Mitchell
Clerk

Gerri Robinson
Assistant Clerk

P.O. Box 301555
Montgomery, AL 36130-1555
(334) 229-0751
Fax (334) 229-0521

Ulysses Charles Sneed v. State of Alabama (Appeal from Morgan Circuit Court: CC93-1307.60)

NOTICE

You are hereby notified that on October 16, 2015, the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

/s/ D. Scott Mitchell
D. Scott Mitchell, Clerk
Court of Criminal Appeals

cc: Hon. Glenn Thompson, Circuit Judge
Hon. Chris Priest, Circuit Clerk
Christopher K. Walters, Attorney - Pro Hac
Henry Mitchell Johnson, Asst. Atty. Gen.

APPENDIX J

REL: 11/14/2014

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

Court of Criminal Appeals

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

MARY BECKER WINDOM
Presiding Judge

SAMUEL HENRY WELCH
J. ELIZABETH KELLUM
LILES C. BURKE
J. MICHAEL JOINER
Judges

D. Scott Mitchell
Clerk

Gerri Robinson
Assistant Clerk

(334) 229-0751
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MEMORANDUM

CR-12-0736 Morgan Circuit Court CC-93-1307.60

Ulysses Charles Sneed v. State of Alabama

WINDOM, Presiding Judge.

Ulysses Charles Sneed appeals the circuit court's summary dismissal of his petition for postconviction relief filed pursuant to Rule 32, Ala. R. Crim. P., in which he attacked his February 2006 conviction for murder made capital because the murder was committed during the course of a robbery, *see* §§ 13A-5-40(a) (2), Ala. Code 1975.[1] By a vote of 7-5, the jury recommended that Sneed receive a sentence of life in prison without the possibility of parole. The trial court, however, overrode the recommendation and sentenced Sneed to death.

On December 21, 2007, this Court affirmed Sneed's conviction and sentence. *See Sneed v. State,* 1 So. 3d 104 (Ala. Crim. App. 2007). On August 15, 2008, the Alabama Supreme Court denied his petition for writ of certiorari. Id. On January 26, 2009, the Supreme Court of the United States denied his petition for writ of certiorari. *Sneed v. Alabama,* 555 U.S. 1155 (2009).

On August 11, 2009, Sneed, through counsel, filed this, his first, Rule 32 petition, in which he raised

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[1] Sneed, along with codefendant John Hardy, was originally convicted of capital murder and sentenced to death in October 1995. On April 30, 1999, this Court affirmed Sneed's conviction and sentence. *See Sneed v. State,* 783 So. 2d 841 (Ala. Crim. App. 1999). The Alabama Supreme Court later reversed Sneed's conviction and sentence, finding that the trial court erred in admitting into evidence an edited and redacted version of a statement that Sneed had made to police officers. *See Ex parte Sneed,* 783 So. 2d 863 (Ala. 2000).

numerous claims of ineffective assistance of counsel in both the guilt and penalty phases of his trial. On December 4, 2009, the State filed a response in which it argued Sneed's claims were insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., and/or without merit. On December 22, 2009, Sneed filed an amendment to his petition containing additional claims of ineffective assistance of counsel. On January 7, 2010, the State filed a response to the claims raised in Sneed's amendment in which it argued Sneed's newly-raised claims were insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., and/or without merit. On May 7, 2010, Sneed filed a motion to strike and an answer to the State's January 2010 response. On July 25, 2011, Sneed filed a final, amended petition. On January 3, 2012, the State filed a response to Sneed's final petition in which it argued Sneed's claims were insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., and/or without merit. On December 13, 2012, the circuit court issued an order dismissing Sneed's petition. Sneed did not file a postjudgment motion in the circuit court.

In this Court's opinion on direct appeal, it set out the following facts surrounding Sneed's convictions:

> "The evidence showed that, in the early morning hours of September 7, 1993, the appellant and Hardy entered Bud's Convenience Store in Decatur; shot and killed the clerk, Clarence Nugene Terry; and stole one of the store's cash registers. An autopsy revealed that the victim suffered seven gunshot wounds—two shots to his left cheek, one shot to his forehead, one shot to his left ear, one shot to his left eye socket, one shot to his chest, and one shot to his right hand.

"Several days before the robbery-murder the appellant and Christopher Hines drove from Louisville, Kentucky, in Hines' vehicle to visit some of Hines' relatives in Tanner. Sometime after they arrived, they met John Hardy.

"On the evening of September 6, 1993, the appellant and Hardy were driving around in Hines' vehicle and were drinking and smoking marijuana. Hardy suggested that they 'get some money,' and they drove by different convenience stores trying to locate a potential target. The appellant suggested that Bud's Convenience Store might be a good target because only one clerk was working in the store. They drove around the store a few times and parked on the side. Before going into the store, Hardy tore off the sleeves of his shirt and they tied a sleeve around the bottom half of their faces. The sleeves did not disguise their identities.

"The entire robbery-murder was recorded on videotape and played for the jury. The tape shows that the appellant and Hardy entered the store with Hardy pointing a rifle and apparently shooting at the victim. The victim ran behind the counter and tried to hide, but Hardy leaned over the counter and shot him. At the same time, the appellant crawled under the counter and tried to open the two cash registers that were on the counter. As the victim crouched in a ball on the floor behind the counter, Hardy then walked around the counter, pointed the rifle at his head, and shot him in the head repeatedly. While this was

happening, the appellant tried unsuccessfully to open both of the cash registers. At one point, the appellant stepped over the victim's body and moved his legs out of the way so he could have better access to one of the cash registers. Finally, Hardy unplugged one of the registers, and the appellant carried it out of the store.

"After they left the store, the appellant and Hardy went to Tanner to hide the cash register. The next morning, the appellant, Hardy, and Hines retrieved $48 from the cash register. The manager at Bud's testified that the register that was taken had very little money in it because it was a back up register that had not been used on the day of the robbery-murder. After using the money to buy alcohol and gasoline, the appellant, Hardy, and Hines returned to Louisville, Kentucky.

"The investigation led law enforcement authorities to Kentucky, where they discovered Hines' vehicle, which the appellant and Hardy had used in the robbery-murder. The appellant was arrested in Kentucky and was questioned by Lieutenant Dwight Hale and Sergeant John Boyd of the Decatur Police Department. After being confronted with the videotape of the robbery-murder, the appellant admitted his involvement in the robbery.

"The appellant testified in his own defense and admitted that he assisted in the robbery. However, he stated that he did not know that Hardy was going to shoot and kill the victim. Specifically, he testified:

> "'We went in to rob. I did not intend for nobody to get killed or get hurt. That wasn't part of the plan. That wasn't part of the plan. We discussed robbing. That is all we did.'"

"(R. 816.)

Sneed, 1 So. 3d at 112-13.

Standard of Review

Sneed appeals the circuit court's summary dismissal of his petition for postconviction relief attacking his capital-murder conviction and sentence of death. According to Rule 32.3, Ala. R. Crim. P., Sneed has the sole burden of pleading and proving that he is entitled to relief. Rule 32.3, Ala. R. Crim. P., provides:

> "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief. The state shall have the burden of pleading any ground of preclusion, but once a ground of preclusion has been pleaded, the petitioner shall have the burden of disproving its existence by a preponderance of the evidence."

When it reviewed Sneed's claims on direct appeal, this Court applied a plain-error standard of review and examined every issue regardless of whether the issue was preserved for appellate review. See Rule 45A, Ala. R. App. P. However, the plain-error standard does not apply when evaluating a ruling on a postconviction petition, even when the petitioner has been sentenced to death. *See Ferguson v. State,* 13 So. 3d 418, 424 (Ala. Crim. App. 2008); *Waldrop v. State,* 987 So. 2d 1186 (Ala. Crim. App. 2007); *Hall v. State,*

979 So. 2d 125 (Ala. Crim. App. 2007); *Gaddy v. State,* 952 So. 2d 1149 (Ala. Crim. App. 2006). "The standard of review this Court uses in evaluating the rulings made by the trial court is whether the trial court abused its discretion." *Hunt v. State,* 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005) (citing *Elliott v. State,* 601 So. 2d 1118, 1119 (Ala. Crim. App. 1992)). However, "[t]he sufficiency of pleadings in a Rule 32 petition is a question of law. 'The standard of review for pure questions of law in criminal cases is de novo. *Ex parte Key,* 890 So. 2d 1056, 1059 (Ala. 2003).'" *Ex parte Beckworth,* [Ms. 1091780, July 3, 2013] ___ So. 3d ___, ___ (Ala. 2013) (quoting *Ex parte Lamb,* 113 So. 3d 686, 689 (Ala. 2011)).

In discussing the pleading requirements related to postconviction petitions, this Court has stated:

> "Although postconviction proceedings are civil in nature, they are governed by the Alabama Rules of Criminal Procedure. *See* Rule 32.4, Ala. R. Crim. P. The 'notice pleading' requirements relative to civil cases do not apply to Rule 32 proceedings. 'Unlike the general requirements related to civil cases, the pleading requirements for postconviction petitions are more stringent ....' *Daniel v. State,* 86 So. 3d 405, 410-11 (Ala. Crim. App. 2011). Rule 32.6(b), Ala. R. Crim. P., requires that full facts be pleaded in the petition if the petition is to survive summary dismissal. *See Daniel, supra.* Thus, to satisfy the requirements for pleading as they relate to postconviction petitions, Washington was required to plead full facts to support each individual claim."

Washington v. State, 95 So. 3d 26, 59 (Ala. Crim. App. 2012).

"The burden of pleading under Rule 32.3[, Ala. R. Crim. P.,] and Rule 32.6(b)[, Ala. R. Crim. P.,] is a heavy one. Conclusions unsupported by specificfacts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). *See Bracknell v. State,* 883 So. 2d 724 (Ala. Crim. App. 2003)."

Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

When pleading claims of ineffective assistance of counsel, this Court has stated:

> "To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' *Strickland v. Washington,* 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' 466 U.S. at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. A bare allegation that prejudice occurred without

> specific facts indicating how the petitioner was prejudiced is not sufficient."

Hyde, 950 So. 2d at 356.

> "An evidentiary hearing on a coram nobis petition [now Rule 32 petition] is required only if the petition is 'meritorious on its face.' *Ex parte Boatwright,* 471 So. 2d 1257 (Ala. 1985). A petition is 'meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true. *Exparte Boatwright, supra; Ex parte Clisby,* 501 So. 2d 483 (Ala. 1986)."

Moore v. State, 502 So. 2d 819, 820 (Ala. 1986).

Moreover, an evidentiary hearing is not necessary in every case in which the petitioner alleges claims of ineffective assistance of counsel. The Alabama Supreme Court has stated:

> "While it is true that our cases hold that a judge must conduct a hearing on a post-conviction petition that is meritorious on its face, a judge who presided over the trial or other proceeding and observed the conduct of the attorneys at the trial or other proceeding need not hold a hearing on the effectiveness of those attorneys based upon conduct that he observed."

Ex parte Hill, 591 So. 2d 462, 463 (Ala. 1991). "[A] circuit judge who has personal knowledge of the facts

underlying an allegation of ineffective assistance of counsel may summarily deny that allegation based on the judge's personal knowledge of counsel's performance." *Partain v. State,* 47 So. 3d 282, 286 (Ala. Crim. App. 2008) (citing *Ex parte Walker,* 800 So. 2d 135 (Ala. 2000)). Here, the circuit judge who presided over Sneed's postconviction proceedings was the same judge who presided over Sneed's capital-murder trial and the same judge who sentenced Sneed to death.

Last, "[t]his Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court." *Acra v. State,* 105 So. 3d 460, 464 (Ala. Crim. App. 2012).

With these principles in mind, this Court reviews the claims raised by Sneed in his brief to this Court.[2]

I.

In his brief on appeal, Sneed first raises issues with respect to the circuit court's dismissal of his petition. Specifically, Sneed argues that the circuit court erroneously a) neglected to address one of his claims; b) concluded that the rejection of an argument on direct appeal precludes the underlying issue being raised as a claim of ineffective assistance of counsel; c) utilized a piecemeal approach to his claims and failed to address cumulative prejudice; and d) dismissed claims based on personal knowledge without explaining the nature of the personal knowledge.

A.

Sneed argues that the circuit court erroneously neglected to address one of his claims. Specifically,

---

[2] Any claim that Sneed raised in his petition to the circuit court but fails to pursue on appeal is deemed abandoned. *Brownlee v. State,* 666 So. 2d 91, 93 (Ala. Crim. App. 1995).

Sneed argues that the circuit court neglected to address paragraphs 93-102 of his petition and that a remand is required to address these paragraphs. See, *generally, Gordon v. State,* 987 So. 2d 1181, 1183 (Ala. Crim. App. 2006) (holding that, when claims were sufficiently pleaded, the circuit court's failure to specifically address the claims required a remand).

In its order dismissing Sneed's petition, the circuit court listed the paragraphs in which each of Sneed's claims were raised. As noted by Sneed in his brief on appeal, the circuit court's order dismissing his petition does not specifically address paragraphs 93-102.

The omission, though, was likely intentional because Sneed does not appear to raise a claim in these paragraphs. Instead, paragraphs 93-102 appear to be a pleading of facts to support Sneed's claim that his trial counsel was ineffective for prematurely ending the investigation into mitigating evidence. (C. 345-51.) In these paragraphs, Sneed pleaded the names of various lay witnesses and their relationship to Sneed, as well as the information they could have provided had Sneed's trial counsel interviewed them. In paragraph 102, Sneed pleaded in summary that the lay witnesses would have provided information indicating,

> "that Mr. Sneed was desperate for affection and became a gullible follower, not a leader, in order to buy affection or attention; that he would consistently refuse to hurt others who had not provoked him; that he was a proud and loving father who manifested a deep concern for others; that he was unfamiliar with guns and gun violence; that he was remorseful about his role in the crime; and that he was a person who always developed

> and matured slowly for his age (he was 23 at the time of the crime)."

(C. 351.) Sneed then raised these specific claims in paragraphs 103-145 and 226-229, which were addressed by the circuit court in its order dismissing Sneed's petition. (C. 549-51, 559.)

The circuit court's order addressed all the claims raised in Sneed's petition. Therefore, this issue does not entitle Sneed to any relief.

B.

Sneed argues that the circuit court erroneously concluded that the rejection of an argument on direct appeal precludes the underlying issue being raised as a claim of ineffective assistance of counsel and that this Court should reverse and remand the circuit court's dismissal to reconsider the affected claims. Pursuant to the holding of the Alabama Supreme Court in *Ex parte Taylor,* 10 So. 3d 1075 (Ala. 2005), Sneed's argument on appeal is correct.

> "Although it may be the rare case in which the application of the plain-error test and the prejudice prong of the *Strickland[v. Washington,* 466 U.S. 668 (1984)], test will result in different outcomes, a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under *Strickland* to sustain a claim of ineffective assistance of counsel. In determining whether to grant a Rule 32 petitioner relief on an ineffective-assistance claim, a court must examine both the plain-error and prejudice standards of review."

Taylor, 10 So. 3d at 1078. As such, this Court will not rely on this finding in the instances it was applied by the circuit court. A remand is not required on this issue, however, because this Court may affirm the circuit court's dismissal if it is correct for any reason. *Hunt v. State,* 940 So. 2d 1041, 1055 (Ala. Crim. App. 2005) (citing *Reed v. State,* 748 So. 2d 231, 233 (Ala. Crim. App. 1999)).

C.

Sneed argues that the circuit court erroneously utilized a piecemeal approach to his claims and failed to address the cumulative prejudice of trial counsel's performance. This argument, however, was not first presented to the circuit court.

Indeed, Sneed pleaded in the conclusion of his issues related to the guilt phase of his trial that "[b]oth individually and together [the multiple failures of trial counsel in the guilt phase] certainly undermine confidence in the outcome of his conviction for capital murder." (C. 337.) This claim is distinct from the argument he now raises on appeal, which addresses the circuit court's handling of all the claims raised in his petition. "The general rules of preservation apply to Rule 32 proceedings." *Boyd v. State,* 913 So. 2d 1113, 1123-24 (Ala. Crim. App. 2003) (citations omitted). Sneed has failed to properly preserve this argument for appellate review. Therefore, this issue does not entitle him to any relief.

Moreover, even if this argument were properly preserved for appellate review, it would be without merit. As this Court explained in *Ex parte Bryant,* [Ms. CR-08-0405, Feb. 4, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011):

> "Bryant's reliance on the Alabama Supreme Court's opinions in *Ex parte Bryant,* 951 So.

> 2d 724 (Ala. 2002), *Ex parte Woods,* 789 So. 2d 941 (Ala. 2001), and *Ex parte Tomlin,* 540 So. 2d 668 (Ala. 1988), for the proposition that this Court must always examine the cumulative effect of alleged errors is misplaced. All of those opinions involved direct appeals from capital-murder convictions and sentences of death -- appeals that involved substantive issues that had been raised on appeal, not ineffective-assistance-of-counsel claims -- and appeals in which the plain-error rule applied. See Rule 45A, Ala. R. App. P. However, as noted above, the plain-error rule does not apply in appeals from the dismissal of Rule 32 petitions, even in cases in which the death penalty has been imposed, and Bryant's argument here is based on claims of ineffective assistance of counsel, not substantive claims.
>
> "Furthermore, it is well settled in Alabama that an ineffective-assistance-of-counsel claim is a general claim that consists of several different allegations or subcategories, and, for purposes of the pleading requirements in Rule 32.3 and Rule 32.6(b), '[e]ach subcategory is [considered] a[n] independent claim that must be sufficiently pleaded.' *Coral v. State,* 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds, *Ex parte Jenkins,* 972 So. 2d 159 (Ala. 2005)."

Bryant, ___ So. 3d at ___.

Because "[e]ach subcategory [of claims relating to counsel's effectiveness] is [considered] a[n] independent claim that must be sufficiently pleaded," *Coral,* 900 So. 2d at 1284, the circuit court did not err by treating

Sneed's claims independently. Therefore, this issue does not entitle Sneed to any relief.

D.

Sneed argues that the circuit court erroneously dismissed claims based on personal knowledge without explaining the nature of the personal knowledge. "A circuit court may summarily dismiss a Rule 32 petition without an evidentiary hearing if the judge who rules on the petition has 'personal knowledge of the actual facts underlying the allegations in the petition' and 'states the reasons for the denial in a written order.'" *Ex parte Walker,* 800 So. 2d 135, 138 (Ala. 2000) (quoting *Sheats v. State,* 556 So. 2d 1094, 1095 (Ala. Crim. App. 1989)).

Sneed's argument attacks the sufficiency of the circuit court's order dismissing his petition. As such, Sneed was required to first raise this argument in the circuit court.

> "The general rules of preservation apply to Rule 32 proceedings. See, *e.g., Robinson v. State,* 869 So. 2d 1191, 1193 (Ala. Crim. App. 2003) (holding that the appellant's claim that the circuit court erred in failing to make specific findings of fact as to all claims in the appellant's Rule 32 petition was not preserved for review, because the appellant did not first present the claim to the circuit court); *Allen v. State,* 825 So. 2d 264, 270-71 (Ala. Crim. App. 2001), aff'd, 825 So. 2d 271 (Ala. 2002) (holding, in an appeal from the denial of a Rule 32 petition, that the appellant's claim that the circuit court erred in not ruling on his motion to subpoena a transcript of his guilty plea proceedings was

> not preserved for review, because the circuit court never ruled on the motion and the appellant never objected to the circuit court's failure to rule on the motion); *Thomas v. State,* 766 So. 2d 860, 870 n.2 (Ala. Crim. App. 1998) (stating that the appellant's claim that the circuit court improperly adopted *in toto* an order drafted by the State, which allegedly failed to address several claims in the appellant's Rule 32 petition, was not preserved for review, because the appellant never objected to the circuit court's order denying his petition); *Whitehead v. State,* 593 So. 2d 126, 130 (Ala. Crim. App. 1991) (holding that the appellant's claim that the circuit court failed to make specific findings of fact relating to issues raised at an evidentiary hearing on the appellant's postconviction petition was not preserved for review, because the appellant did not raise the issue in the circuit court); *Morrison v. State,* 551 So. 2d 435, 436-37 (Ala. Crim. App. 1989) (holding that the appellant's claim that the circuit court improperly adopted the State's proposed findings of fact and conclusions of law in an order denying the appellant's postconviction petition was not preserved for review, because the appellant never objected to the circuit court's order)."

Boyd, 913 So. 2d at 1123-24. However, "[t]he record reflects that [Sneed] did not raise this issue in the circuit court, by way of postjudgment motion, or otherwise." *Broadnax,* 130 So. 3d at 1241. Therefore, Sneed's argument is not preserved for appellate review, and this issue does not entitle him to any relief.

II.

Sneed next argues that the circuit court erred by summarily dismissing his claim that counsel were ineffective for failing to hire and to present an intoxication expert to undermine the State's evidence of his intent to kill.[3] This Court disagrees.

In his petition, Sneed pleaded that there was circumstantial evidence in the record that undermined the State's evidence of Sneed's specific intent.Sneed then alleged that counsel was ineffective for failing to present testimony from an addiction expert such as Dr. Greg Skipper. According to Sneed, an addiction expert would have testified regarding Sneed's use of and addiction to drugs. From there, Sneed argued that an addiction expert would have "rejected and caused the jury to doubt" the State's evidence of Sneed's specific intent. (C. 331.) Sneed pleaded that an addiction expert would have informed the jury that Sneed "was not merely abusing drugs, but was acting under an actual addiction to drugs and alcohol at the time of the crime" and that his history of addiction and heavy ingestion of marijuana laced with cocaine in the hours before the incident disoriented his brain when he entered the convenience store. (C. 332.) According to Sneed, an addiction expert would have shown that his

[3] In his petition, Sneed raised multiple claims relating to counsel's effectiveness in failing to present evidence. On appeal, Sneed reasserts only his claim that counsel were ineffective for failing to present testimony from an addiction expert. Any claim Sneed raised in his Rule 32 petition but failed to reassert on appeal is deemed abandoned. *Brownlee,* 666 So. 2d at 93. Further, Sneed, citing *Neelley v. State,* 494 So. 2d 669 (Ala. Crim. App. 1985), specifically abandoned on appeal his claims relating to counsel being ineffective for failing to present testimony relating to his intent from a mental health expert and lay witnesses.

"ability to form a specific and particularized intent to kill was markedly decreased." (C. 332.)

The circuit court dismissed this claim as being without merit, noting that addiction to an intoxicating substance cannot legally negate intent. *See Adams v. State,* 659 So. 2d 224, 228 (Ala. Crim. App. 1994). Sneed argues on appeal that the circuit court misconstrued his claim. Sneed admits on appeal that addiction does not negate specific intent, but argues that the "actual heart of [his] claim" was that trial counsel were ineffective for failing to investigate and present evidence that his intoxication at the time of the crime negated his intent. (Sneed's brief, at 33.)

Given the pleadings, the circuit court's interpretation of Sneed's claim appears to have been reasonable. Nevertheless, even accepting Sneed's apparent recharacterization of his claim, Sneed is still not entitled to relief on this claim because it was insufficiently pleaded.

In *Smith v. State,* 756 So. 2d 892 (Ala. Crim. App. 1997), this Court recognized:

> "'While voluntary intoxication is never a defense to a criminal charge, it may negate the specific intent essential to a malicious killing and reduce it to manslaughter. § 13A-3-2, Code of Alabama (1975) (Commentary). "'When the crime charged involves a specific intent, such as murder, and there is evidence of intoxication, the trial judge should instruct the jury on the lesser included offense of manslaughter.' *Gray v. State,* 482 So. 2d 1318, 1319 (Ala. Cr. App.

1985)." *[McNeill] v. State,* 496 So. 2d 108, 109 (Ala. Cr. App. 1986).'

"[McConnico v. State,] 551 So. 2d [424,] 426 [(Ala. Crim. App. 1988)]. However, to negate the specific intent required for a murder conviction, the degree of the accused's intoxication must amount to insanity.

> "'"In an assault and battery case, voluntary intoxication is no defense, unless the degree of intoxication amounts to insanity and renders the accused incapable of forming an intent to injure. *Lister v. State,* 437 So. 2d 622 (Ala. Cr. App. 1983). The same standard is applicable in homicide cases. *Crosslin [v. State,* 446 So. 2d 675 (Ala. Cr. App. 1983)]. Although intoxication in itself does not constitute a mental disease or defect within the meaning of § 13A-3-1, Code of Alabama 1975, intoxication does include a disturbance of mental or physical capacities resulting from the introduction of any substance into the body. § 13A-3-2. *The degree of intoxication required to establish that a defendant was incapable of forming an intent to kill is a degree so extreme as to render it impossible for the defendant to form the intent to kill. ...*"

"'*Ex parte Bankhead,* 585 So. 2d 112, 121 (Ala. 1991).'

> "*Smith v. State,* 646 So. 2d 704, 712-13 (Ala. Cr. App. 1994)."

Smith, 756 So. 2d at 906 (emphasis in original).

In his petition, Sneed failed to plead any facts that, if true, would establish that he was intoxicated to the point that he could not form the intent to kill, i.e., that his intoxication rose to the level of insanity. See *Ex parte McWhorter,* 781 So. 2d 330, 342-43 (Ala. 2000) (recognizing that intoxication necessary to negate specific intent must amount to insanity). Although Sneed alleged that his brain was disoriented due to a "heavy ingestion" of marijuana laced with cocaine, he failed to plead how much marijuana and cocaine he had ingested or how long he had been ingesting drugs prior to the crime. *See Connally v. State,* 33 So. 3d 618, 622-23 (Ala. Crim. App. 2007) ("Likewise, Connally's bare allegation that he had been 'drinking heavily' on the night of the crime was not sufficient to indicate that intoxication would have been a viable defense to the murder charge. ... Connally failed to allege how much he had to drink the night of the crime, how long before the crime he had been drinking, or any other facts indicating that his alleged intoxication amounted to insanity."). Further, Sneed did not plead that an addiction expert would have testified that his degree of intoxication was so extreme that it would have been *impossible* for Sneed to form the intent to kill. Rather, Sneed pleaded that an addiction expert would have testified that "his ability to form a specific and particularized intent to kill was *markedly decreased";* that Sneed's "ability to develop murderous intent was *blurred or absent";* and that Sneed's "lengthy history of drug and alcohol abuse ... *blurred* [Sneed's] intent during the crime." (C. 332-34, emphasis added.) Sneed, however, failed to allege that his drug use rendered

him incapable of forming intent.[4] See *Mashburn v. State,* [Ms. CR-11-0321, July 12, 2013] ___ So. 3d ___, ___ (Ala. Crim. App. 2013).

Because Sneed failed to allege facts that, if true, would have established that counsel were ineffective for failing to present an expert on addiction in support of an intoxication defense, he failed to meet his burden to plead the full factual basis of this claim. See Rules 32.3 and 32.6(b), Ala. R. Crim. P.Therefore, the circuit court did not err in dismissing this claim. *See Hyde,* 950 So. 2d at 356.

Moreover, the circuit court dismissed this claim by citing its own personal knowledge.[5] On appeal, Sneed does not challenge the circuit court's holding, i.e., argue that the circuit court lacked personal

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[4] Rule 32 counsel's failure to plead that Sneed was so intoxicated that he could not have formed the intent to kill is not surprising in light of the fact that Sneed admitted that he intended to rob. See *McWhorter v. State,* 781 So. 2d 257, 269-70 (Ala. Crim. App. 1999) (recognizing that robbery is a specific intent crime; therefore, if an individual was too intoxicated to form the intent to kill, then he also would have been too intoxicated to form the intent to rob).

[5] In its sentencing order, the circuit court stated the following:

> "The defendant testified he was using alcohol and smoking marijuana laced with cocaine prior to the murder. Any evidence of drug and/or alcohol usecomes from the defendant. The defendant's written statement to the police did not mention drug use. The court finds from the evidence, including the video tape, that the defendant was cognizant and appeared to be in full control of his physical and mental faculties at the time of the murder. Therefore, any evidence of drug and/or alcohol use to establish diminished capacity is rebutted by evidence."

(T.C. 34.)

knowledge. Instead, Sneed appears to assert that this Court cannot consider the alternative holding because the circuit court's order "failed to explain what that knowledge was." (Sneed brief, at 46.) As discussed in Part I.D. of this memorandum opinion, Sneed's argument that the circuit court's order was insufficient is not preserved for appellate review. Because Sneed failed to preserve his challenge to the sufficiency of the circuit court's order and failed to challenge the actual basis of the circuit court's alternative holding, he has failed to properly challenge the alternative holding and has therefore waived review of this claim. See *Jackson v. State,* 127 So. 3d 1251, 1255-56 (Ala. Crim. App. 2010) and the cases cited therein.

III.

Sneed argues that the circuit court erred in dismissing claims II.E., II.A., II.B., II.C., and II.F., as raised in his final, amended petition.[6]

A.

In claim II.E.1., Sneed argued that trial counsel were ineffective in failing to present during the penalty phase an addiction/intoxication expert. Specifically, Sneed pleaded that an addiction/intoxication expert would have "provided background as to what addiction is, how drugs affect the brain, and how they affect judgment"; testified that Sneed was not in control at the time of the crime; and explained how his addiction affected his capacity to think rationally. (C. 382.) Also, an addiction/intoxication expert could have evaluated

[6] In addressing claim II.E., the circuit court treated the claim as raising two distinct claims, which it designated as II.E.1. and II.E.2. On appeal, Sneed has reasserted these sub-claims separately. Accordingly, this Court will address the sub-claims separately, as well.

Sneed's "current status regarding addiction and how he has recovered from it." (C. 382.) Finally, Sneed pleaded that testimony from an addiction/intoxication expert would have made the trial court's jury instruction on voluntary intoxication meaningful. The circuit court dismissed this claim based on its own personal knowledge of the facts of the case and found that the expert testimony would have been cumulative to the testimony presented.

Again, Sneed has argued on appeal that the circuit court erred by relying on its personal knowledge without explaining the nature of the personal knowledge. As discussed in Part I.D. of this opinion, this argument is not preserved for appellate review. As such, Sneed has failed to properly challenge an alternative holding of the circuit court and has therefore waived review of this claim. See *Jackson,* 127 So. 3d at 1255-56 and the cases cited therein.

Moreover, Sneed's claim was properly dismissed because it was insufficiently pleaded. Sneed generally pleaded that an addiction/intoxication expert would have provided background as to how drugs affect the brain, judgment, and Sneed's capacity to think rationally, but failed to actually plead how drugs affect the brain, judgment, and Sneed's capacity to think rationally. Instead, Sneed appears to rely on the conclusory statement that Sneed was "not in control at the time of the crime." (C. 382.) He, however, failed to plead how his addiction rendered him incapable of controlling his behavior. With respect to Sneed's "current status regarding addiction and how he has recovered from it," Sneed failed to plead how his current status -- his status well after his trial -- regarding addiction and his recovery implicates the effectiveness of trial counsel. Additionally, Sneed failed

to plead how testimony from an addiction/intoxication expert would have made the trial court's jury instruction on voluntary intoxication meaningful, or how the absence of such an expert's testimony rendered the jury instruction meaningless. Therefore, this claim was insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and the circuit court did not err in dismissing this claim. *See Hyde,* 950 So. 2d at 356; *Acra,* 105 So. 3d at 464 ("[T]his Court may affirm the judgment of the circuit court for any reason, even if not for the reason stated by the circuit court.").

Finally, this Court cannot say that the circuit court erred in finding that the testimony Sneed alleged should have been presented was cumulative to testimony presented at trial. Regarding cumulative testimony, this Court has stated:

> "'"[T]he failure to present additional mitigating evidence that is merely cumulative of that already presented does not rise to the level of a constitutional violation." *Nields v. Bradshaw,* 482 F.3d 442, 454 (6th Cir. 2007) (quoting *Broom v. Mitchell,* 441 F.3d 392, 410 (6th Cir. 2006))." *Eley v. Bagley,* 604 F.3d 958, 968 (6th Cir. 2010). 'This Court has previously refused to allow the omission of cumulative testimony to amount to ineffective assistance of counsel.' *United States v. Harris,* 408 F.3d 186, 191 (5th Cir. 2005). 'Although as an afterthought this [defendant's father] provided a more detailed account with regard to the abuse, this Court has held that even if alternate witnesses could provide more detailed testimony, trial counsel is not ineffective for

> failing to present cumulative evidence.' *Darling v. State,* 966 So. 2d 366, 377 (Fla. 2007)."

Daniel v. State, 86 So. 3d 405, 429-30 (Ala. Crim. App. 2011).

At trial, Jo Ann Terrell, a social worker with a speciality in psychiatric social work and experience teaching graduate-level courses in mental health, testified that Sneed endured numerous traumas that resulted in mental health issues. She then testified that:

> "[Sneed] attempted to self-medicate this damage that these traumas caused him by the use of drugs and alcohol at the young age of 12 years old. That is when he started. This pattern of addiction continues through his life. It appears that the emotional damage caused by the trauma was resistant to mental health treatment at all. His emotional problems which were worsened by his drug and alcohol problems led to a life of petty crime and general instability until the point of the current offense. Indirectly all of the above factors contributed to his participation in the offense of which he has been convicted."

(T.R. 1083-84.) Based on Terrell's testimony, the circuit court found, as mitigation, that Sneed began drinking alcohol and abusing drugs when he was about 12 years old. (T.C. 36.) The circuit court then found the following mitigating circumstances:

> "1. Mr. Sneed was born and grew up in a violent and traumatic environment. He was physically abused by his father, and a series of his mother's boyfriends throughout his childhood.

> "2. He witnessed the severe and pervasive domestic violence of his mother by his father and a series of her boyfriends.
>
> "3. He was likely raped at a young age by a virtual stranger and told no one of this until he was out of high school.
>
> "4. He attempted to self-medicate the damage these traumas caused him by the abuse of drugs and alcohol at a young age, (12 years old). This pattern of addi[c]tion continued throughout his life. It appears that the emotional damage caused by these traumas was resistant to mental health treatment.
>
> 5. His emotional problems which were worsened by his drug and alcohol problems led him to a life of petty crime and general instability until the point of the current offense."

(T.C. 36.)

Thus, as the circuit court found, trial counsel presented evidence indicating that Sneed was addicted to drugs and alcohol for most of his life. Sneed's addiction, coupled with mental health issues, led to a life of petty crime and to the crime for which he was convicted. Additional testimony indicating that Sneed was addicted to drugs and alcohol and that his addiction contributed to his decision to commit the offense for which he was convicted would have been cumulative.

Because the evidence Sneed claims trial counsel should have presented through an addiction/ intoxication expert was cumulative to evidence

counsel presented, the circuit court correctly found that this claim was without merit. *See Daniel,* 86 So. 3d at 429-30. Therefore, the circuit court did not err by summarily dismissing this claim. Rule 32.7(d), Ala. R. Crim. P.

B.

In claim II.E.2., Sneed argued that trial counsel were ineffective in failing to present during the penalty phase a qualified mental health expert who had comprehensively assessed Sneed's mental health. Specifically, Sneed pleaded that a qualified mental health expert who had comprehensively assessed Sneed's mental health would have testified to Sneed's mental health records, would have diagnosed Sneed as mentally ill due to post-traumatic stress disorder ("PTSD"),[7] and would have revealed to the jury mitigating evidence from Sneed's background, such as the physical and emotional abuse he suffered as a child, his father's abandonment of him, and the rape he suffered at the age of nine.[8] Sneed pleaded that had

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[7] The State argues in its brief on appeal that Sneed failed to plead the specific mental illness from which he suffered at the time of the crime. See (C. 380-84.) However, in paragraph 84, which appears to be part of a foundational pleading for Sneed's claims related to the penalty phase, Sneed pleaded that he was suffering from "a major mental illness -- Post-Traumatic Stress Disorder -- at the time of the crime." (C. 341.)

[8] In his brief on appeal, Sneed has raised additional evidence to which a qualified mental health expert could have testified. However, this evidence is not contained within claim II.E. of Sneed's final, amended petition and, as such, is not properly before this Court. *See Chambers v. State,* 884 So. 2d 15, 19 (Ala. Crim. App. 2003). To the extent some of this evidence is referenced elsewhere in Sneed's final, amended petition, it is of no avail to Sneed. "'The claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories.

a qualified mental health expert testified, the trial court would have found two statutory mitigatory related to mental illness -- §§ 13A-5-51(2) and 13A-5-51(6), Ala. Code 1975 -- to exist. The circuit court dismissed this claim as being refuted by the record.

During the penalty phase, Sneed presented the testimony of Dr. Marianne Rosenzweig, a clinical psychologist, and Terrell. Dr. Rosenzweig testified that she administered to Sneed a personality assessment test and a traumatic symptom inventory test, and that both tests suggested that Sneed suffered from PTSD and a borderline personality disorder. Terrell testified to the abuse and rape Sneed suffered as a child, and to Sneed's treatment at various mental-health facilities.

Much of the testimony Sneed argues could have been presented by a qualified mental health expert would have been cumulative to the testimony presented during the penalty phase. "Unpresented cumulative testimony does not establish that counsel was ineffective." *Boyd,* 913 So. 2d at 1139 (citing *Pierce v. State,* 851 So. 2d 558, 582 (Ala. Crim. App. 1999), rev'd on other grounds, 851 So. 2d 618 (Ala. 2002)).

Sneed is correct, though, that neither Dr. Rosenzweig nor Terrell testified that Sneed was mentally ill at the time of the crime. However, this particular aspect of his claim is insufficiently pleaded. For instance, Sneed failed to plead the symptoms he suffered as a result of PTSD at the time of his crime, how PTSD constituted an "extreme mental or emotional disturbance" at the

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Each subcategory is an independent claim that must be sufficiently pleaded.' *Coral v. State,* 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), rev'd on other grounds, *Ex parte Jenkins,* 972 So. 2d 159 (Ala. 2005)." *Jackson v. State,* 133 So. 3d 420, 451 (Ala. Crim. App. 2009).

time of his crime, or how PTSD impaired his "capacity ... to appreciate the criminality of his conduct." *See* §§ 13A-5-51(2) and 13A-5-51(6), Ala. Code 1975.

The bulk of claim II.E.2. was comprised of cumulative testimony, and those portions of the claim that were not cumulative were insufficiently pleaded. Therefore, the circuit court did not err in dismissing this claim. *See Hyde.,* 950 So. 2d at 356; *Acra,* 105 So. 3d at 464.

C.

On pages 74-78, of his brief on appeal, Sneed argues that the circuit court erroneously dismissed paragraphs 89-92 and 103-85, claims II.A., II.B., and II.C.[9] In claim II.A., Sneed alleged that counsel were ineffective for cutting short their investigation into mitigation. According to Sneed, counsel unreasonably stopped investigating mitigation two and a half years before his trial. In claim II.B., Sneed alleged that, because counsel cut short their mitigation investigation, they failed to discover and present various witnesses who would have established the following mitigation: 1) Sneed was a desperate, gullible follower seeking acceptance and friends; 2) Sneed was a "a gentle giant" and a "big teddy bear" who could not be convinced to hurt others, (C. 344-45 348); 3) Sneed was a good father who was polite and concerned with the well being of others; 4) Sneed was not experienced with

[9] On pages 65-74 of his brief, Sneed argues that the circuit court neglected to address several paragraphs in his petition. As in Part I.A. of this opinion, these paragraphs appear to be foundational pleading for the specific claims Sneed raised in the subsequent paragraphs; claims that were addressed by the circuit court in its order dismissing Sneed's petition. As such, this claim is without merit.

guns or violence; 5) and Sneed was immature for his age. In claim II.C., Sneed alleged that counsel were ineffective for failing to present testimony from the lay witnesses that they did investigate and discover. According to Sneed, these lay witnesses would have testified to Sneed's unstable, impoverished, and traumatic childhood, to his positive and endearing qualities, to his desire to protect others, and to his artistic talents. Sneed alleged that these witnesses would have testified that he was raped as a child, suffered from behavioral problems and stole things. These witnesses would have explained that Sneed was polite and concerned with others' well being, was a good person who fell in with a bad crowd, had artistic talents, and has matured and found God since being in prison. The circuit court dismissed these claims as being insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., and/or as being without merit.

1.

In claim II.A., Sneed alleged that counsel were ineffective for cutting short their investigation into mitigation. Sneed alleged that counsel failed to conduct any investigation into possible lay witnesses for mitigation after April 2003, two and a half years before Sneed's trial. The circuit court dismissed this claim because it is refuted by the record. This Court agrees.

The record establishes that trial counsel and their mitigation investigator continued to investigate mitigation well after April 2003. (T.C. 165-168; S.R. 1-82.) In fact, counsel hired Terrell as a mitigation expert after January 2004. (S.R. 1-9.) In June 2004, Terrell provided counsel with a comprehensive report detailing interviews with Sneed's family and the mitigation she discovered. After counsel hired Terrell, they hired Dr. Rosenzweig to further investigate

possible mitigation. Additionally, in January 2006, counsel moved for and was granted funds to go to Louisville, Kentucky, to investigate mitigation.

Because the record supports the circuit court's determination that Sneed's claim is refuted by the record, this Court cannot say that the circuit court erred by dismissing this claim. *See* Rule 32.7(d), Ala. R. Crim. P.; *McNabb v. State,* 991 So. 2d 313, 320 (Ala. Crim. App. 2007) (holding that "because this claim was clearly refuted by the record, summary denial was proper pursuant to Rule 32.7(d), Ala. R. Crim. P.").

2.

In claim II.B., Sneed alleged that, because counsel cut short their mitigation investigation, they failed to discover and present various lay witnesses who would have established the following mitigation: 1) Sneed was a desperate, gullible follower seeking acceptance and friends; 2) Sneed was "a gentle giant" and a "big teddy bear" who could not be convinced to hurt others, (C. 344-45 348); 3) Sneed was a good father who was polite and concerned with the well being of others; 4) Sneed was not experienced with guns or violence; and 5) Sneed was immature for his age as a child. The circuit court dismissed (1) and (4) as being insufficently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P. The circuit court dismissed claims (2) and (3) as being cumulative to estimony presented through Dr. Rosenzweig. Finally, the circuit, court dismissed claim (5) as being without merit. This Court holds that these claims were insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and/or without merit; therefore, the circuit court did not err by summarily dismissing them.

a.

Regarding Sneed's claim that counsel should have presented evidence showing that he was a desperate, gullible follower seeking acceptance and friends and that he was immature for his age as a child, Sneed failed to allege facts that would establish a reasonable probability that such evidence would have changed the outcome of his sentencing. In other words, Sneed failed to "plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Hyde,* 950 So. 2d at 356. Rather, he made "bare allegation[s] that prejudice occurred without specific facts indicating how [he] was prejudiced ...." *Id.* Accordingly, Sneed failed to meet his burden of pleading under Rules 32.3 and 32.6(b), Ala. R. Crim. P., and the circuit court did not err in summarily dismissing these claims.

b.

Sneed also failed to meet his burden to plead sufficient facts to establish his claims that counsel were ineffective for failing to investigate and present evidence indicating that: 1) Sneed was "a gentle giant" who could not be convinced to hurt others; 2) Sneed was always concerned with the well being of others; and 3) Sneed was inexperienced with guns or violence. Rule 32.3; 32.6(b), Ala. R. Crim. P. Therefore, the circuit court did not err by summarily dismissing these claims.

Prior to trial, the State produced numerous disciplinary reports regarding Sneed's behavior while incarcerated. Those reports indicated that Sneed, on different occasions, attacked various people. While

incarcerated, Sneed threatened to kill officers, attacked various officers -- knocking one unconscious -- threw urine on an inmate, and attempted to kill an inmate. Before the penalty phase, the circuit court inquired about Sneed's behavior while incarcerated. Trial counsel explained they had an agreement with the State that the State would not introduce evidence of the disciplinary reports so long as trial counsel did not open the door to such evidence.

In his petition, Sneed failed to plead how he was prejudiced by counsel not presenting lay witnesses who would have testified to his caring, kind, non-violent personality traits. Specifically, he failed to allege how the outcome of his trial would have been different had trial counsel presented this good-character evidence, which would have opened the door to the State establishing that while in prison he viciously attacked guards and inmates. *Hyde,* 950 So.2d at 356. Because Sneed failed to plead how he was prejudiced by the omission of character evidence in light of the trial proceedings, he failed to sufficiently plead the factual basis of his claims. Rules 32.3 and 32.6(b), Ala. R. Crim. P. Therefore, the circuit court did not err by summarily dismissing these claims.

c.

Further, Sneed's claim that trial counsel were ineffective for failing to investigate and present evidence indicating that he was a good, caring father is refuted by the record. Contrary to Sneed's assertion, Terrell investigated Sneed's relationship with his children. According to Terrell,

> "Charles never married. However he has three children Brittany Rene and Brent Ramone Steverson, fourteen year old twins.

> *He also has another daughter, La Shave Boyd who is eleven years old. He has not had contact with the twins in years but recently in February La Shave sent him a letter."*

(T.R. Sneed's exhibit 2.) Accordingly, trial counsel did investigate Sneed's relationship with his children and discovered that he had no relationship with two of his children and received a letter from the third child.

Consequently, Sneed's claim that counsel failed to investigate his relationship with his children is refuted by the record and without merit. *McNabb v. State,* 991 So. 2d 313, 320 (Ala. Crim. App. 2007) (holding that "because this claim was clearly refuted by the record, summary denial was proper pursuant to Rule 32.7(d), Ala. R. Crim. P."). Therefore, the circuit court did not err by summarily dismissing this claim.

3.

In claim II.C., Sneed alleged that counsel were ineffective for failing to present testimony from the lay witnesses that they did investigate and discover. According to Sneed, these lay witnesses would have testified to the following: 1) that Sneed had an unstable, impoverished, and traumatic childhood; 2) that Sneed was raped as a child; 3) that Sneed had behavioral problems; 4) that Sneed has positive and endearing qualities; 5) that Sneed protects others; 6) that Sneed has artistic talents; 7) that Sneed fell in with a bad crowd; and 8) that Sneed has matured and found God since being in prison. The circuit court dismissed these claims as being insufficiently pleaded under Rules 32.3 and 32.6(b), Ala. R. Crim. P., and/or as being without merit.

On appeal, Sneed argues only that the circuit court erroneously dismissed the portion of this claim

relating to counsel's failure to present lay testimony about his unstable, impoverished, and traumatic childhood and behavioral problems.[10] In his brief, Sneed concedes that the information lay witnesses would have provided regarding his unstable, impoverished, and traumatic childhood and his behavioral problems was cumulative to Terrell's testimony. He, however, faults counsel for presenting this testimony through a social worker as opposed to lay witnesses. The circuit court rejected Sneed's argument. Specifically, the circuit court found that "Ms. Terrell was credible and persuasive enough that [the] court found [Sneed's] violent and traumatic childhood, ... [his] history of treatment at various facilities for his behavioral problems and depression, ... [and his] likely rape to be ... mitigating circumstance[s]." (C. 553-54.) Accordingly, Sneed failed to plead sufficient facts to establish a reasonable probability that the outcome of his trial would have been different had counsel presented additional witnesses regarding these mitigating circumstances. This Court agrees.

Initially, this court notes that the circuit court correctly held that counsel will not be held ineffective for failing to present cumulative evidence. This Court has repeatedly held that "[u]npresented cumulative testimony does not establish that counsel was ineffective." *Boyd,* 913 So. 2d at 1139 (citing *Pierce,* 851

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[10] All other aspects of this claim are deemed abandoned. *Brownlee v. State,* 666 So. 2d 91, 93 (Ala. Crim. App. 1995). Further, to the extent Sneed attempts to raise any other aspects of this claim, his argument on appeal fails to comply with Rule 28(a)(10), Ala. R. App. P., which requires an "argument containing the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on."

So. 2d at 582, rev'd on other grounds, 851 So. 2d 618 (Ala. 2002)). *See also Daniel v. State,* 86 So. 3d 405, 429-30 (Ala. Crim. App. 2011). As Sneed concedes in his brief to this Court, the testimony he alleged in claim II.C. lay witnesses would have provided was cumulative to Terrell's testimony. Accordingly, the circuit court did not err by dismissing claim II.C. Rule 32.7(d), Ala. R. Crim. P.

To the extent Sneed argues that the circuit court erred in holding that "Ms. Terrell was credible and persuasive"; therefore, no prejudice resulted from counsel's decision to present mitigating evidence through her rather than lay witnesses, his argument fails to comply with Rule 28(a) (10), Ala. R. App. P. (C. 553.) Rule 28(a) (10) requires an "argument containing the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor, with citations to the cases, statutes, other authorities, and parts of the record relied on." Recitation of allegations without citation to any legal authority and without adequate recitation of the facts relied upon has been deemed a waiver of the arguments listed. *Hamm v. State,* 913 So.2d 460, 486 (Ala. Crim. App. 2002). Authority supporting only "general propositions of law" does not constitute a sufficient argument for reversal. *Beachcroft Props., LLP v. City of Alabaster,* 901 So. 2d 703, 708 (Ala. 2004) (quoting *Geisenhoff v. Geisenhoff,* 693 So. 2d 489, 491 (Ala. Civ. App. 1997)). The Alabama Supreme Court has explained:

> "We have stated that it is not the function of this court to do a party's legal research. See *Henderson[v. Alabama A & M University],* 483 So. 2d [392,] 392 [(Ala. 1986)]. Similarly, we cannot create legal arguments for a party

> based on undelineated general propositions unsupported by authority or argument. Ala. R. App. P. 28(a) (5) [now Rule 28(a) (10), Ala. R. App. P.]; *Brittain v. Ingram,* 282 Ala. 158, 209 So. 2d 653 (1968) (analyzing the predecessor to Ala. R. App. P. 28); *Ex parte Riley,* 464 So. 2d 92 (Ala. 1985)."

Spradlin v. Spradlin, 601 So. 2d 76, 78-79 (Ala. 1992). To obtain review of an argument on appeal, an appellant must provide citations to relevant cases or other legal authorities and an analysis of why those cases or other authorities support an argument that an error occurred and that the alleged error should result in reversal.

Here, Sneed's entire argument consists of the following:

> "The circuit court also summarily dismissed Paragraphs 103-185[] largely on grounds that the testimony described therein was either cumulative of that given at trial, or that it did not provide facts indicating likely prejudice. As to the latter ground, Mr. Sneed relies on the logic and language set forth above from the Eleventh Circuit's decision in *Collier [v. Turpin,* 177 F.3d 1184, 1201-02 (11th Cir. 1999)]. As to the former ("cumulative") ground, while it is true that defense witness Joanne Terrell recited entries made about Mr. Sneed's upbringing by staff at the various facilities where he was housed for behavioral/mental problems after age 12, these in no way compare to the first-hand testimony about his terrible upbringing that his childhood friends -- who lived through those times with him -- could have provided.

> Perhaps the best and most authoritative statement on this point is that of the American Bar Association, in its *Guidelines for the Appointment and Performance of Defense Counsel in Penalty Cases:*
>
> > "'Counsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for the expert's conclusion.'
>
> "Commentary to Guideline 10.7 - Investigation.
>
> "Three years before Mr. Sneed's 2006 trial, the United States Supreme Court issued *Wiqqins v. Smith,* [539 U.S. 510 (2003)], making clear that capital defense lawyers should use these Guidelines -- as guides -- in their trial preparation. In this case, however, counsel for Mr. Sneed used no lay witnesses, notwithstanding their availability and the powerful mitigating evidence they possessed."

(Sneed's brief, at 76-78.)

Aside from citations to the American Bar Association's ("A.B.A.") guidelines regarding what counsel "should ordinarily" do and to *Wiqqins,* 539 U.S. 510, for the proposition that counsel should consider those guidelines, Sneed has not cited any specific legal authority relating to the facts of his case. More importantly, Sneed has not provided any argument regarding how the facts pleaded in his petition fall within what the A.B.A. says counsel should ordinarily do. In other words, he has not argued why counsel could not have made a strategic decision to rely on Terrell's testimony in lieu of lay witnesses. Finally, Sneed provides no argument regarding why the circuit

court incorrectly held that "Ms. Terrell was credible and persuasive"; therefore, no prejudice resulted from counsel's decision to present mitigating evidence through her rather than lay witnesses. Accordingly, Sneed's argument fails to comply with Rule 28(a) (10) and does not entitle him to any relief.

Even if Sneed's argument did comply with Rule 28(a) (10), he would not be entitled to any relief. In his petition, he failed to allege any facts that, if true, would establish that counsel could not have reasonably chosen to present mitigating evidence through Terrell as opposed to lay witnesses. Other than generally stating that lay witnesses would have been better, he failed to allege how presenting mitigation through his particular lay witnesses would have been more compelling for the judge and jury. Further, he failed to allege any facts that, if true, would have established prejudice under *Strickland. Hyde,* 950 So.2d at 356. He alleged no facts indicating that lay witnesses would have been more credible than Terrell or that the judge or jury failed to consider his mitigating evidence because it was presented through a social worker. Accordingly, Sneed failed to plead this claim with the factual specificity required under Rules 32.3 and 32.6(b), Ala. R. Crim. P., and the circuit court did not err by summarily dismissing it.

D.

In claim II.F., Sneed pleaded that trial counsel were ineffective for failing to present during the penalty phase evidence of Sneed's remorse. Sneed notes that trial counsel argued during closing arguments that he was remorseful but failed to present any evidence to substantiate that assertion. Sneed pleaded that he has always been remorseful about the murder and that there was ample evidence in the record for trial

counsel to present during the penalty phase. The circuit court dismissed this claim, finding that Sneed insufficiently pleaded prejudice pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

In his petition, Sneed failed to plead any facts establishing that counsel could have presented evidence that he was remorseful. See Rule 32.6(b), Ala. R. Crim. P. According to Sneed, the following evidence was available to support his assertion that he was remorseful:

> "(a) the Outpatient Evaluation Report of the State of Alabama's licensed psychologist Dr. Maier, dated April 13, 1994; (b) the 1995 presentencing report of the Alabama Board of Pardons and Paroles; (c) the testimony of Decatur Police Lieutenant Dwight Hale (R. 692); (d) testimony from Mr. Sneed's friends; and (e) testimony on remorse Mr. Sneed would himself have provided, had he been questioned about that subject on the witness stand by trial counsel."

(C. 385.) Sneed, however, failed to plead what in Dr. Maier's report or the 1995 presentence report indicated that he was remorseful. Likewise, he failed to plead what testimony he, his friends, or Lieutenant Hale would have provided that would have indicated that he was remorseful. See *Mashburn v. State,* (Ms. CR-11-0321, July 12, 2013) ___ So. 3d ___, ___ (Ala. Crim. App. 2013) ("To sufficiently plead a claim that counsel were ineffective for not presenting evidence or not calling witnesses, a Rule 32 petitioner is required to identify the names of the witnesses, to plead with specificity what admissible testimony those witnesses would have provided had they been called to testify, and to allege facts indicating that had the witnesses

testified there is a reasonable probability that the outcome of the proceeding would have been different."); *Smith v. State,* 71 So. 3d 12, 26 (Ala. Crim. App. 2008) (holding that a claim that counsel was ineffective for failing to present testimony was insufficiently plead because the petitioner failed to plead what the omitted "testimony would have consisted of").

Further, to demonstrate prejudice, Sneed pleaded that "[s]tudies routinely show that jurors in capital cases are often moved by a defendant's genuine expressions of remorse." (C. 385.) Sneed, though, did not cite in his petition any studies supporting his assertion.[11] Beyond the "studies" mentioned by Sneed, his only other reference to prejudice is the bare assertion that had the evidence of his remorse been presented, more jurors would have voted for a non-death sentence. He failed to allege how evidence of remorse would have altered the balance of mitigating circumstances and aggravating circumstances. Nor did he allege how evidence of remorse would have moved more jurors to recommend a sentence of life without the possibility of parole or the judge to sentence Sneed to life without the possibility of parole. As a result, Sneed has failed to plead sufficient facts pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., to demonstrate that he was prejudiced by trial counsel's alleged ineffectiveness, and the circuit court did not err in dismissing this claim. See *Hyde,* 950 So. 2d at 356.

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[11] Sneed has cited one such study in his brief on appeal. However, Sneed's attempt to supplement his pleading through his brief on appeal is not properly before this Court because it was not first included in his petition in the circuit court. See *Hyde,* 950 So. 2d at 367 n.14 (citing *Bearden v. State,* 825 So. 2d 868, 872 (Ala. Crim. App. 2001)).

IV.

Sneed argues that the circuit court erred in dismissing claims I.A.1. and I.A.3.

A.

In claim I.A.1., Sneed pleaded that trial counsel were ineffective for failing to object to the district attorney's expressing his personal opinion regarding Sneed's guilt. Sneed cited multiple instances in the trial record that, he .argues, demonstrate that the district attorney committed prosecutorial misconduct by inviting the jury to substitute his judgment for its own, independent judgment. The circuit court dismissed this claim because the underlying claim had been raised on direct appeal and found not to constitute plain error. The circuit court also found that Sneed insufficiently pleaded prejudice pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., with respect to this claim.

As discussed in Part I.B., "a determination on direct appeal that there has been no plain error does not automatically foreclose a determination of the existence of the prejudice required under *Strickland* to sustain a claim of ineffective assistance of counsel." *Ex parte Taylor,* 10 So. 3d at 1078. Although it is true that this Court held on direct appeal that the underlying claim did not result in plain error, the holding went further. This Court held: "After reviewing the prosecutor's comments in context, we conclude that they were not personal comments on the appellant's guilt. Rather, they were simply *permissible comments on the evidence." Sneed,* 1 So. 3d at 140. Thus, this Court did not simply hold that Sneed failed to establish plain error. Rather, this Court held that the comments of which Sneed complained were permissible. It is well established counsel cannot be held ineffective for failing to raise

baseless objections. *Bearden v. State,* 825 So. 2d at 872 ("[C]ounsel could not be ineffective for failing to raise a baseless objection."); *Perkins v. State,* 144 So. 3d 457, 476 (Ala. Crim. App. 2012); *Smith v. State,* 71 So. 3d 12, 23 (Ala. Crim. App. 2008) (holding that "on direct appeal this Court specifically addressed the substantive issue underlying this claim and found no error, [and] [c]ounsel cannot be held ineffective for failing to raise an issue that has no merit") ; *McNabb v. State,* 991 So. 2d 313, 326 (Ala. Crim. App. 2007). As such, the circuit court did not err in dismissing this claim. *Acra,* 105 So. 3d at 464.

B.

In claim I.A.3., Sneed pleaded that trial counsel were ineffective for failing to object to the district attorney informing the jury that a grand jury had already returned an indictment against Sneed and that the district attorney had signed the indictment. The circuit court dismissed this claim as being insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P.

In *Ex parte Hardy,* 804 So. 2d 298 (Ala. 2000), the Alabama Supreme Court held that a prosecutor's reading of the indictment and informing the jury that the prosecutor had signed the indictment was not plain error, but that "[a] motion in limine to prevent such remarks followed by the remarks themselves, an apt objection by the defense, and an adverse ruling by the trial court could present this Court with an issue of substance in this regard." Id. at 307-08.

In its order dismissing Sneed's petition, the circuit court noted that *Ex parte Hardy* did not hold that comments like the ones at issue here were *per se* prejudicial, but rather that such comments were

potentially prejudicial. The circuit court then found that Sneed failed to sufficiently plead the prejudice prong of *Strickland* with respect to this claim.

Sneed's claim is comprised of a recitation of the relevant case law and the district attorney's comments regarding the indictment, followed by a conclusion that he was prejudiced by trial counsel's failure to object.

> "[T]o satisfy the burden of pleading a claim of ineffective assistance of counsel, a petitioner cannot merely allege that prejudice occurred or that there was some conceivable effect on the outcome of the trial; a petitioner must allege 'specific facts indicating *how* the petitioner was prejudiced,' i.e., how the outcome of the trial would have been different. *Hyde v. State,* 950 So. 2d 344, 356 (Ala. Crim. App. 2006). *See also Beckworth v. State,* [Ms. CR-07-0051, May 1, 2009] ___ So.3d ___, ___ (Ala. Crim. App. 2009) (upholding summary dismissal of ineffective-assistance-of-counsel claim where petitioner 'failed to allege any specific facts indicating how presentation of the evidence would have changed the result at trial'), rev'd on other grounds, [Ms. 1091780, July 3, 2013] ___ So.3d ___, ___ (Ala. 2013)."

Mashburn v. State, [Ms. CR-11-0321, July 12, 2013] ___ So. 3d ___ (Ala. Crim. App. 2013) (emphasis in original). Here, Sneed has failed to plead specific facts indicating how he was prejudiced by trial counsel's failure to object to the district attorney's comments. Therefore, this claim was insufficiently pleaded pursuant to Rules 32.3 and 32.6(b), Ala. R. Crim. P., and the circuit court did not err in dismissing this claim. See *Hyde,* 950 So. 2d at 356.

V.

Rule 32.7(d), Ala. R. Crim. P., permits a circuit court to summarily dismiss a Rule 32 petition for, among other reasons, the preclusion grounds outlined in Rule 32.2, Ala. R. Crim. P.; the petitioner's failure to plead his petition with the factual specificity required under Rule 32.6(b), Ala. R. Crim. P.; the petitioner's failure to raise a material issue of fact or law; or the petitioner's failure to state a claim upon which relief may be granted. In other words, Rule 32.7(d) authorizes circuit courts to summarily dismiss a Rule 32 petition that is not "meritorious on its face." Cf. *Duncan v. State,* 925 So. 2d 245, 256 (Ala. Crim. App. 2005).

Here, Sneed's claims were properly dismissed because he failed to meet his burden of pleading under Rules 32.3 and 32.6(b), Ala. R. Crim. P., or the claims were without merit. *McNabb,* 991 So. 2d at 333 (reaffirming that this Court "may affirm the denial of a Rule 32 petition if the denial is correct for any reason"). Therefore, the circuit court did not err by dismissing these claims without an evidentiary hearing. Rule 32.7(d), Ala. R. Crim. P.

Accordingly, the judgment of the circuit court is affirmed.

AFFIRMED.

Welch, Kellum, Burke, and Joiner, JJ., concur.

APPENDIX K

IN THE CIRCUIT COURT OF
MORGAN COUNTY, ALABAMA

CASE NO: CC 93-1307.60

ULYSSES CHARLES SNEED,

Petitioner,

vs.

STATE OF ALABAMA,

Respondent.

ORDER

This cause is before the Court on Petitioner's Petition for Relief from Conviction or Sentence Pursuant to Ala. R. Crim. P. 32. The Petitioner having tendered the required civil docketing fee, the Court will now examine the allegations contained in the Petition. Upon consideration of the Petitioner's Second Amended Petition, the State's Answer to that Petition, the relevant law, the Court's official records, and the undersigned's personal knowledge of the underlying proceedings, the Court finds that the claims asserted by the Petitioner are due to be summarily dismissed. More specifically, the Court finds as follows.

PROCEDURAL BACKGROUND

Following a trial by jury before the undersigned judge, the Petitioner was convicted of capital murder on February 3, 2006. The jury recommendation was a sentence of life imprisonment without the possibility

of parole. However, following a conscientious examination of both the aggravating and mitigating circumstances involved, this Court sentenced the Petitioner to death on May 12, 2006. The Petitioner then appealed his conviction and sentence, which were affirmed by the Alabama Court of Appeals in an opinion released December 21, 2007. The Petitioner's petition for writ of certiorari was denied by the Alabama Supreme Court on August 15, 2008, and the United States Supreme Court on January 26, 2009. The Petitioner filed this Rule 32 petition, his first, on August 11, 2009, and subsequently amended it twice.

ALLEGATIONS AND FINDINGS

The Petitioner alleges that he is entitled to relief on the grounds that the Constitution of the United States or the State of Alabama requires a new trial, a new sentencing proceeding, or other relief. More specifically, the Petitioner asserts the following claims as grounds for such relief:

I. The Petitioner was denied effective assistance of counsel at the culpability phase of his capital trial.

As with any claim for relief pursuant to Ala. R. Crim. P. 32, the Petitioner has the burden of pleading with specificity the factual basis of his claims. Ala. R. Crim. P. 32.3 and 32.6(b).

> The burden of pleading under Rule 32.3 and 32.6(b) is a heavy one. Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself. If, assuming every factual allegation in a Rule 32 petition to be true, the court cannot determine

> whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b).

Hyde v. State, 950 So.2d 344, 356 (Ala. Crim. App. 2006) (citations and internal quotations omitted).

To prevail on a claim of ineffective assistance of counsel, the Petitioner must make a two-prnged showing. Petitioner must show that trial counsel acted outside "the range of competence demanded of attorneys in criminal cases." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). In addition, Petitioner must show "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694.

Thus, to satisfy the burden of pleading a claim of ineffective assistance of counsel, Rule 32 petitioner must "'identify the specific [unprofessional] acts or omissions [counsel is alleged to have committed] . . .' [and] plead specific facts indicating that he or she was prejudiced by these acts or omissions…." *Hyde*, 950 So.2d at 156 (citations and internal quotations omitted). With this standard in mind, the Court will address the various subparts of this claim individually below.

A. Trial counsel failed to object to prosecutorial misconduct throughout the trial.

This subpart also has numerous subparts that will each be addressed in turn.

1. Trial counsel failed to object when the district attorney expressed his personal opinion on the Petitioner's guilt to the jury.

In paragraphs 19 through 25 of his Second Amended Petition, Sneed alleges that the district attorney made several prejudicial and improper remarks to the jury

that expressed the district attorney's personal opinion that the Petitioner was guilty. The Petitioner further alleges that his trial counsel were ineffective for failing to object to these remarks. The Court finds that this allegation fails to state a valid claim for relief and presents no material issue of fact or law. The Petitioner raised the underlying claim on direct appeal, and the Alabama Court of Criminal Appeals found no plain error. *Sneed v. State*, 1 So.3d 104, 138-140 (Ala. Crim. App. 2007). This issue may not now be re-litigated as an ineffective assistance of counsel claim. In addition, the Petitioner has not met his burden under the *Strickland* standard of pleading specific facts indicating that he was prejudiced by this alleged omission. *Hyde*, 950 So.2d at 156. Accordingly this claim is due to be summarily dismissed. Ala R. Crim. P. 32.7(d).

2. Trial counsel failed to object when the district attorney misled the jury on the law.

In paragraphs 26 through 34 of his Second Amended Petition, Sneed alleges that the district attorney made several statements to the jury which misstated the law of Alabama. The Petitioner further alleges that his trial counsel were ineffective for failing to object to these remarks. The Court finds that this allegation fails to state a valid claim for relief and presents no material issue of fact or law. The Petitioner raised the underlying claim on direct appeal, and the Alabama Court of Criminal Appeals found no plain error. *Sneed*, 1 So.3d at 140-142. This issue may not now be re-litigated as an ineffective assistance of counsel claim. In addition, the Petitioner has not met his burden under the *Strickland* standard of pleading specific facts to indicate that he was prejudiced by this alleged omission. *Hyde*, 950 S.2d at 156. Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

3. Trial counsel failed to object to the district attorney's use of the grand jury indictment against the Petitioner at trial.

In paragraphs 35 through 42 of his Second Amended Petition, Sneed alleges that he was prejudiced when his trial counsel failed to object to statements by the district attorney regarding the grand jury's return of the indictment against the Petitioner and the district attorney's signing of that same indictment. The Court finds that this allegation fails to state a valid claim for relief and presents no material issue of fact or law. In support of his argument, the Petitioner has directed the Court's attention to the Alabama Supreme Court's decision in *Ex parte Hardy*, 804 So.2d 298 (Ala. 2000). Specifically he has directed the Court to the portion of the opinion which states that "any statement or intimation that a grand jury returned the indictment or that the district attorney signed it is superfluous and potentially prejudicial." *Hardy*, 804 So.2d at 308. A review of the record shows that the district attorney did make statements to the effect that a grand jury returned the indictment against the Petitioner and that he signed said indictment. However, the Alabama Supreme Court did not say that such statements are *per se* prejudicial, merely that they are *potentially prejudicial*. In the context of a Rule 32 petition, allegations involving such statements must still be accompanied by specific facts indicating that the Petitioner was prejudiced by his counsel's failure to object. *Hyde*, 950 So.2d at 156. The Petitioner has not met this burden under the *Strickland* standard. Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

4. Trial counsel failed to object when the jury was informed the Petitioner had previously been tried for the underlying offense.

In paragraphs 43 through 55 of his Second Amended Petition, Sneed alleges that he was prejudiced when his trial counsel failed to object to several references, made by various parties, to a prior trial or proceeding involving the Petitioner and for the same offense. The Court finds that this allegation fails to state a valid claim for relief and presents no material issue of fact or law. The Petitioner raised the underlying claim on direct appeal, and the Alabama Court of Criminal Appeals found no plain error. *Sneed*, 1 So.3d at 114-15. This issue may not now be re-litigated as an ineffective assistance of counsel claim. In addition, the Petitioner has not met his burden under *Strickland* of pleading specific facts indicating that he was prejudiced by this alleged omission. *Hyde*, 950 So.2d at 156. Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

B. Trial counsel failed to design a defense strategy that contested the State's evidence against the Petitioner.

In paragraph 56 of his Second Amended Petition, Sneed alleges that his trial counsel failed to design an adequate strategy to contest the State's case during the guilt-phase of his trial. As to this allegation, the Court finds that the Petitioner has failed to meet his burden of pleading specific facts indicating how he was prejudiced by this alleged omission. He has not identified any specific actions that trial counsel should have taken in designing a different defense strategy and has not shown that, if trial counsel had taken these actions, there is a reasonable probability that

the outcome of his trial would have been different. *Strickland*, 466 U.S. at 694. Therefore, the Petitioner has failed to meet his burden of pleading under *Strickland* and Alabama Rules of Criminal Procedure 32.3 and 32.6(b). Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

C. Trial counsel failed to present available evidence showing the Petitioner's lack of intent to kill.

In paragraphs 57 through 65 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present available evidence showing his alleged lack of intent to kill the victim of the underlying crime. As to this allegation, the Court finds that the Petitioner has failed to meet his burden of pleading specific facts under Alabama Rule of Criminal Procedure 32.3 and 32.6(b). While the Petitioner does identify two witnesses who were allegedly available to testify concerning the Petitioner's intent at the time of the murder, he does not identify any available evidence that his trial counsel failed to present, or testimony they failed to elicit from the hypothetical witnesses, which might have established his lack of intent to kill.

Furthermore, and alternatively, as this Court noted in its Order of May 12, 2006, sentencing the Petitioner to death, "a unanimous jury found that the defendant had the specific, particularized intent at some point prior to the killing that deadly force be used against the victim. The killing was intentional and purposeful…The court finds from the evidence, including the video tape, that the defendant was cognizant and appeared to be in full control of his physical and mental faculties at the time of the murder." (Sentencing Order at 11). This, along with the

undersigned's personal knowledge of the facts of this case, lead the Court to now find that the Petitioner's trial counsel were not ineffective for failing to present allegedly available evidence of his lack of an intent to kill, whether that included any allegedly available non-testimonial evidence or testimony from the allegedly available witnesses identified in the Second Amended Petition. *Lee v. State*, 44 So.3d 1145 (Ala. Crim. App. 2009). Accordingly, this claim is due to be summarily dismissed. *Lee*, 44 So. 3d at 1158-59.

D. Trial counsel failed to present an addiction expert to negate the intent factor.

In paragraphs 66 through 68 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to call an addiction expert to testify concerning the Petitioner's addiction to drugs and alcohol in order to show that he could not "form a specific and particularized intent to kill." (Pet. at 21). As best the Court can determine, the Petitioner is alleging that an addiction to drugs and alcohol can negate the element of intent required when proving a charge of murder. This is contrary to Alabama law. Simple addiction to an intoxicating substance cannot legally negate intent in this State. *See Adams v. State*, 659 So.2d 224, 228 (Ala. Crim. App. 1994) ("The only evidence of alcohol use that would be relevant to the appellant's intoxication defense would be evidence of his intoxication at the time the crime was committed."). Accordingly, this claim fails as a matter of law and is due to be dismissed. Ala. R. Crim. P. 32.7(d).

E. Trial counsel failed to present a mental health expert to contest the State's case on intent.

In paragraphs 69 through 73 of his Second Amended Petition, Sneed alleges that his trial counsel were

ineffective for failing to present a mental health expert to contest the issue of whether the Petitioner had the requisite intent to establish a charge of murder. As best the Court can determine, the Petitioner is arguing that his trial counsel were ineffective for failing to obtain a psychological exam of the Petitioner by one Dr. Stan Brodsky, which prevented presentation of an insanity defense under Ala. Code § 13A-3-1 (1975). As to this allegation, based on the Court's own personal knowledge of the facts of this case, the Court finds it is due to be dismissed. *Lee*, 44 So.3d at 1158-59.

To begin, a defense of diminished capacity is not allowed in this State. *Neelley v. State*, 494 So.2d 669 (Ala. Crim. App. 1985). Thus, evidence of the Petitioner's mental health in order to negate the element of intent would have been unavailable absent a decision to assert an insanity defense pursuant to § 13A-3-1. Moreover, the Petitioner's mental responsibility for his crime was not at issue during the underlying proceedings. Therefore, based on the foregoing, the Petitioner's trial counsel were not ineffective for failing to obtain a mental health exam of the Petitioner by Dr. Brodsky, as the Petitioner had no right to receive a mental examination absent a demonstration that his "sanity at the time of the offense is to be a significant factor at trial." *Isom v. State*, 488 So.2d. 12 (Ala. Crim. App. 1986) (quoting *Ake v. Oklahoma*¸470 U.S. 68, 83 (1985)). Accordingly, this claim is due to be dismissed. Aa. R. Crim. P. 32.7(d).

F. Trial counsel failed to call lay witnesses who could have testified that it is unlikely that he possessed a murderous intent.

In paragraphs 74 and 75 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to call various lay witnesses to

testify about his intent at the time of the crime. As to this allegation, the Court finds that the Petitioner has failed to meet his burden of pleading. As the State points out, he has not plead any specific facts that show that the lay witnesses identified in the Petition could conceivably testify about the Petitioner's intent at the time of the commission of the underlying offense, nor has he shown that by including this testimony, the result of his trial would have been different. *Strickland*, 466 U.S. at 694. Therefore, the Petitioner has failed to meet his burden of pleading under *Strickland* and Alabama Rules of Criminal Procedure 32.3 and 32.6(b). Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

G. The cumulative effect of trial counsel's failures during the guilt phase of his trial deprived the Petitioner of his right to the effective assistance of counsel.

In paragraph 75 of his Second Amended Petition, Sneed alleges that the cumulative effect of each of his trial counsel's individual acts of ineffective assistance of counsel deprived him of his right to the effective assistance of counsel. As to this allegation, the Petitioner failed to satisfy the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. Apart from a simple assertion that the previously discussed allegations of ineffective assistance of counsel combined to "undermine confidence in the outcome of his conviction," the Petitioner did not allege any specific facts supporting his claim of cumulative ineffective assistance of counsel. (Pet. at 26). Furthermore, he has failed to establish that there is a reasonable probability that the outcome of his trial would have been different if not for the allegedly

cumulative failures of his trial counsel. *Strickland*, 466 U.S. at 694. Accordingly, this claim fails and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

II. The Petitioner was denied the effective assistance of counsel at the penalty and sentencing phases of his capital trial.

With the same standard in mind for considering an ineffective assistance of counsel claim that was previously set forth, the Court will consider each of the Petitioner's claims individually below.

A. Trial counsel unreasonably cut short their mitigation investigation in 2003.

In paragraphs 89 through 92 of his Second Amended Petition, Sneed alleges that his trial counsel unreasonably cut short their mitigation investigation, to his detriment, in 2003, over two and a half years before his trial began in 2006. As best the Court can determine, the Petitioner's sole claim is that his trial counsel's alleged failure to continue their investigation past the year 2003 into various potential lay witnesses who might contribute a mitigation defense constituted unreasonable investigation under the standard set forth by the United States Supreme Court in *Wiggins v. Smith*, 539 U.S. 510 (2003). However, this claim is refuted by the record, which contains abundant documentation of the Petitioner's defense team's efforts on his behalf after the 2003 calendar year. Moreover, "*Strickland* does not require counsel to investigate every conceivable line of mitigating evidence." *Wiggins*, 539 U.S. at 533. Therefore, as the record reflects that counsel's mitigation efforts continued well after the date the Petitioner alleges was unreasonable, this claim is due to be summarily

dismissed. Ala. R. Crim. P. 32.7(d); *See, e.g.*, *Gaddy v. State*, 952 So.2d 1149, 1151-52 (Ala. Crim. App. 2006).

B. Trial Counsel failed to discover powerful mitigating evidence.

The Court will address the subparts of this claim individually below.

1. Trial counsel failed to present mitigating evidence showing that the Petitioner was desperate for attention and a gullible follower during his childhood.

In paragraphs 103 through 120 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present mitigating evidence showing that he was desperate for attention and a gullible follower during his childhood. As to this allegation, the Court finds that the Petitioner has failed to meet his burden of pleading specific facts indicating how he was prejudiced by this alleged omission because he has failed to establish that there is a reasonable probability that the outcome of his trial would have been different based on the presentation of the allegedly mitigating evidence identified in this portion of his Petition. *Strickland*, 466 U.S. at 694. Therefore, the Petitioner has failed to meet his burden of pleading under *Strickland* and Alabama Rules of Criminal Procedure 32.3 and 32.6(b). Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

2. Trial counsel failed to present mitigating evidence showing that the Petitioner is a person who could not be convinced to hurt others.

In paragraphs 121 through 126 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present substantial mitigating evidence showing that he is the type of person who could not be convinced to hurt others. However, the record reflects that the Petitioner's trial counsel presented just this type of mitigating evidence in the form of the testimony of Dr. Marianne Rosenzweig, a licensed psychologist. (R. 1043-1044). Therefore, any additional mitigating evidence showing that the Petitioner was not the type of person who could be convinced to hurt others would have been cumulative, and "[u]npresented cumulative testimony does not establish that counsel was ineffective." *Boyd v. State*, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003); *Daniel v. State*, 86 So.3d 405 (Ala. Crim. App. 2011). In addition, the Petitioner has not shown that there is a reasonable probability that the outcome of his proceeding would have been different had this evidence been presented to judge and jury. Therefore, he has failed to state a claim of ineffective assistance of counsel under the *Strickland* standard. *Strickland*, 466 U.S. at 694. Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

3. Trial counsel failed to present mitigating evidence showing that he has concern for others.

In paragraphs 127 through 132 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present substantial mitigating evidence showing that he has concern for

others. However, the record reflects that the Petitioner's trial counsel presented just this type of mitigating evidence in the form of the testimony of Dr. Marianne Rozenzweig, a licensed psychologist. (R. 1043-1044). Therefore, any additional mitigating evidence showing that the Petitioner has concern for others would have been cumulative, and "[u]npresented cumulative testimony does not establish that counsel was ineffective." *Boyd v. State*, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003); *Daniel v. State*, 86 So.3d 405 (Ala. Crim. App. 2011). In addition, the Petitioner has not shown that there is a reasonable probability that the outcome of his proceeding would have been different had this evidence been presented to the jury. Therefore, he has failed to state a claim of ineffective assistance counsel under the *Strickland* standard. *Strickland*, 466 U.S. at 694. Accordingly, this claim fails as a matter of law and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

4. Trial counsel failed to present mitigating evidence showing that he was unfamiliar with guns and gun violence.

In paragraphs 133 through 139 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present mitigating evidence that he was unfamiliar with guns and gun violence. As to this allegation, the Court finds that the Petitioner has failed to meet his burden of pleading specific facts indicating how he was prejudiced by this alleged omission because he has failed to establish that there is a reasonable probability that the outcome of his trial would have been different based on the presentation of the allegedly mitigating evidence identified in this portion of his Petition. *Strickland*, 466. U.S. at 694. Therefore, the Petitioner has failed to

meet his burden of pleading under *Strickland* and Alabama Rules of Criminal Procedure 32.3 and 32.6(b). Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

5. Trial counsel were ineffective for failing to present mitigating evidence showing that his development was slow for his age.

In paragraphs 140 through 145 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for not presenting substantial mitigating evidence, bearing on the statutory mitigator of age, showing that his development was slow for his age. Under Alabama law, "[t]he age of the defendant at the time of the crime" is a statutory mitigator. Ala. Code. § 13A-5-51(7) (1975). However, the Court is aware of no authority allowing consideration of a developmental disability under the scope of this particular strategy provision, which simply requires a court to consider a defendant's age when sentencing someone convicted of a capital crime. Therefore, regardless of whether the Petitioner's age was a relevant mitigator during his sentencing, evidence of any alleged developmental disability would have been improperly received as part of the Court's consideration of the Petitioner's age under the statutory mitigator. Accordingly, this claim fails as a matter of law and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

C. Trial counsel were ineffective for failing to present lay witnesses during the penalty phase of the Petitioner's trial.

In paragraphs 154 through 196 of his Second Amended Petition, Sneed raised five distinct claims of ineffective assistance of counsel, which the Court will

address individually below. As an initial matter, the Court notes that the Petitioner supports these specific allegations with a citation to the ABA Guidelines for the Appointment and Performance of Defense Counsel in Penalty Cases; specifically, the instruction contained therein that "[c]ounsel should ordinarily use lay witnesses as much as possible to provide the factual foundation for [an] expert's conclusions." (Second Amen. Pet. at 51). However, whether or not the Petitioner's trial counsel followed the ABA guidelines to the letter is not dispositive of the question of his trial counsel's effectiveness. *Miller v. State*, 2011 WL 2658815, at *46 (Ala. Crim. App. 2011). The ABA guidelines exist to "provide guidance as to what is reasonable in terms of counsel's representation, [but] they are not determinative." *Jones v. State*, 43 So.3d 1258, 1278 (Ala. Crim. App. 2007). Therefore, any alleged deviation of counsel's conduct from the ABA guidelines does not automatically satisfy the Petitioner's burden of pleading under *Strickland* and the related Alabama case law. *See Miller*, 2011 WL 2658815, at *46-47. With this in mind, the Court will now turn to the Petitioner's specific claims.

1. Trial counsel were ineffective for failing to present lay witnesses to testify that he was born into difficult circumstances.

In paragraphs 154 through 173 and 183-85 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present lay witnesses to testify that he was born into difficult circumstances. However, the record reflects that the Petitioner's trial counsel did present this type of evidence during the penalty phase of his trial in the form of the testimony of Ms. Joanne Terrell, a social worker and mitigation expert. Ms. Terrell testified

extensively during the penalty phase of the Petitioner's trial about the difficult circumstances of the Petitioner's childhood discovered during her psychosocial evaluation of him. (R. 1060-1063, 1065, 1082-1084). Therefore, any additional evidence by lay witnesses concerning the Petitioner's difficult childhood would have been cumulative to that given, and "[u]npresented cumulative testimony does not establish that counsel was ineffective" *Boyd v. State*, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003); *Daniel v. State*, 86 So.3d 405 (Ala. Crim. App. 2011).

Furthermore, the testimony of Ms. Terrell was credible and persuasive enough that this Court found the Petitioner's violent and traumatic childhood to be a mitigating circumstance when considering the appropriate sentence to impose on the Petitioner. (Sentencing Order at 13). Nevertheless, the Court found that the mitigating circumstances did not outweigh the aggravating factors of the Petitioner's underlying crime. For the foregoing reasons, the Petitioner has not shown that there is a reasonable probability that the outcome of his proceeding would have been different had lay witness testimony concerning this issue been presented to judge and jury. *Strickland*, 466 U.S. at 694. Therefore, he has also failed to state a claim of ineffective assistance of counsel under the *Strickland* standard. Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

2. Trial counsel were ineffective for failing to present lay witnesses to testify that the Petitioner went to various facilities to receive treatment for his behavioral problems and depression.

In paragraphs 174 through 182 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present lay witnesses who would testify about the Petitioner's history of treatment at various facilities for his behavioral problems and depression. However, the record reflects that the Petitioner's trial counsel did present this type of evidence during the penalty phase of his trial in the form of the testimony of Ms. Joanne Terrell, a social worker and mitigation expert. (R. 1066-1071). During the penalty phase of the Petitioner's trial, Ms. Terrell testified extensively about the Petitioner's history of treatment at various schools, counseling centers, and hospitals. Therefore, any additional evidence by lay witnesses concerning the Petitioner's history of treatment would have been cumulative to that given, and "[u]npresented cumulative testimony does not establish that counsel was ineffective." *Boyd v. State*, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003); *Daniel v. State*, 86 So.3d 405 (Ala. Crim. App. 2011).

Furthermore, the testimony of Ms. Terrell was credible and persuasive enough that this Court found the Petitioner's treatment-resistant emotional damage to be a mitigating circumstance when considering the appropriate sentence to impose on the Petitioner. (Sentencing Order at 13). Nevertheless, the Court found that the mitigating circumstances did not outweigh the aggravating factors of the Petitioner's underlying crime. For the foregoing reasons, the Petitioner has not shown that there is a reasonable

probability that the outcome of his proceeding would have been different had lay witness testimony concerning this issue been presented to judge and jury. *Strickland*, 466 U.S. at 694. Therefore, he has failed to state a claim of ineffective assistance of counsel under the *Strickland* standard. Accordingly, this claim fails and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

3. Trial Counsel were ineffective for failing to present lay witnesses to testify that he was the victim of rape.

In paragraph 186 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present lay witnesses to testify about his being raped at a very young age. However, the record reflects that the Petitioner's trial counsel did present this type of evidence during the penalty phase of his trial in the form of the testimony of Ms. Joanne Terrell, a social worker and mitigation expert. During the penalty phase of the Petitioner's trial, Ms. Terrell testified about the Petitioner's rape based on information obtained during her psychosocial evaluation of him. (R. 1063-1067). Therefore, any additional evidence by lay witnesses concerning the Petitioner's victimization would have been cumulative to that given, and "[u]npresented cumulative testimony does not establish that counsel was ineffective." *Boyd v. State*, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003); *Daniel v. State*, 86 So.3d 405 (Ala. Crim. App. 2011).

Furthermore, the testimony of Ms. Terrell was credible and persuasive enough that this Court found the Petitioner's likely rape to be a mitigating circumstance when considering the appropriate sentence to impose on the Petitioner. (Sentencing Order at 13). Nevertheless, the Court found that the mitigating circumstances did not outweigh the aggravating

factors of the Petitioner's underlying crime. For the foregoing reasons, the Petitioner has not shown that there is a reasonable probability that the outcome of his proceeding would have been different had lay witness testimony concerning this issue been presented to judge and jury. *Strickland*, 466 U.S. at 694. Therefore, he has failed to state a claim of ineffective assistance of counsel under the *Strickland* standard. Accordingly, this claim fails and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

4. Trial counsel were ineffective for failing to present lay witness to testify that he was a good person who fell in with the wrong crowd.

In paragraphs 187 through 195 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present lay witness testimony that he was a good person who fell in with the wrong crowd. As to this allegation, the Court finds that the Petitioner has failed to meet his burden of pleading specific facts indicating how he was prejudiced by this alleged omission because he has failed to establish that there is a reasonable probability that the outcome of his trial would have been different based on the presentation of the particular lay witness testimony identified in this portion of the Petition. *Strickland*, 466 U.S. at 694. Therefore, the Petitioner has failed to meet his burden of pleading under *Strickland* and Alabama Rules of Criminal Procedure 32.3 and 32.6(b). Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

5. Trial counsel were ineffective for failing to present mitigation evidence to show that his faith in God while in prison changed his life.

In paragraph 196 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present mitigation evidence that his newfound faith in God while in prison caused him to mature. As to this allegation, the Petitioner failed to satisfy the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. The Petitioner did not allege any specific facts supporting this claim of ineffective assistance of counsel. Furthermore, he has failed to establish that there is a reasonable probability that the outcome of his trial would have been different based on the presentation to judge and jury of the alleged evidence of his remorse contained in this portion of his Petition. *Strickland*, 466 U.S. at 694. Accordingly, this claim fails and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

D. Trial counsel failed to present significant mitigating evidence from available medical and school records.

In paragraphs 199 through 214 of his Second Amened Petition, Sneed raises four distinct claims arising from his general allegation that his trial counsel were ineffective for failing to present mitigating evidence found in his school and medical records. The Court will address these individually below.

1. Trial counsel were ineffective for failing to present mitigation evidence that he was raised in a violent home and suffered from behavioral problems, depression, and mental illness.

In paragraphs 199 through 208 and 213-14 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for not presenting mitigation evidence that he was raised in a violent home and suffered behavioral problems, depression, and mental illness. However, the record reflects that the Petitioner's trial counsel did present this type of evidence during the penalty phase of his trial in the form of the testimony of Ms. Joanne Terrell, a social worker and mitigation expert. (R. 1060-1071, 1082-1084). During the penalty phase of the Petitioner's trial, Ms. Terrell testified extensively about the information contained in the Petitioner's medical and school records. Accordingly, this claim fails and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d). *See, e.g.*, *Gaddy v. State*, 952 So.2d 1149, 1151-52 (Ala. Crim. App. 2006).

2. Trial Counsel were ineffective for failing to present mitigation evidence to show that he was developmentally delayed.

In paragraph 209 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present mitigation evidence found in his medical and school records showing that the suffered from "developmental delays." (Second Amen. Pet. at 66). As to this allegation, the Petitioner failed to satisfy the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. The Petitioner failed to allege specific facts establishing that he did suffer from

"developmental delays." Accordingly, this claim fails and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

3. Trial counsel were ineffective for failing to present mitigation evidence that the Petitioner may have organic brain damage or post-traumatic stress disorder.

In paragraphs 84 and 210 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present mitigation evidence contained in the Petitioner's medical and school records showing that he may have "organic brain damage." (Second Amen. Pet. at 66). As to this allegation, the Petitioner failed to satisfy the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. The Petitioner filed to allege specific facts establishing that he did suffer from "organic brain damage." Accordingly, this claim fails and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

4. Trial counsel were ineffective for failing to present mitigation evidence showing that he once had a high blood lead level when treated at a hospital.

In paragraphs 211 and 212 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present mitigation evidence showing that he allegedly had a high blood lead level when once treated a children's hospital. As to this allegation, the Petitioner failed to satisfy the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) of the Alabama Rules of Criminal Procedure. The Petitioner failed to allege specific facts establishing that he did suffer from a

high blood lead level or any medical conditions associated therewith. Accordingly, this claim fails and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

E. Trial counsel were ineffective for failing to present mitigation evidence from addiction and mental health experts.

1. Trial counsel were ineffective for failing to present mitigation evidence from an addiction expert.

In paragraphs 215 through 220 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present mitigation evidence from an addiction expert. As to this allegation, the Court finds that, based on the personal knowledge of the undersigned of the underlying proceedings, Petitioner's trial counsel were not ineffective for failing to present mitigation evidence from an addiction expert. *Lee v. State*, 44 So.3d 1145 (Ala. Crim. App. 2009). As discussed previously, trial counsel did arrange for presentation of the Petitioner's history of drug and alcohol abuse during the course of the underlying proceedings. Accordingly, this claim is due to be dismissed. Ala. R. Crim. P. 32.7(d).

2. Trial counsel were ineffective for failing to present mitigation evidence from a mental health expert.

In paragraphs 221 through 225 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present mitigation evidence from a mental health expert. However, this claim is refuted by the record and, therefore, due to be dismissed. As discussed previously, at the penalty phase of his trial, trial counsel for the Petitioner called to the stand Dr. Marianne Rosenzweig, a forensic and

clinical psychologist, to testify as to the mental health of the Petitioner. Dr. Rosenzweig testified at length about her evaluation of the Petitioner's mental health. Accordingly, this claim is due to be dismissed. Ala. R. Crim. P. 32.7(d). *See, e.g.*, *Gaddy v. State*, 952 So.2d 1149, 1151-52 (Ala. Crim. App. 2006).

F. Trial counsel were ineffective for failing to present mitigation evidence showing his long standing remorse for the crime.

In paragraphs 226 through 229 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present mitigation evidence showing that he is remorseful for his crime. As to this allegation, the Court finds that the Petitioner has failed to meet his burden of pleading specific facts indicating how he was prejudiced by this alleged omission because he has failed to establish that there is a reasonable probability that the outcome of his trial would have been different based on the presentation to judge and jury of the alleged evidence of his remorse contained in this portion of his Petition. *Strickland*, 466 U.S. at 694. Therefore, the Petitioner has failed to meet his burden of pleading under *Strickland* and Alabama Rules of Criminal Procedure 32.3 and 32.6(b). Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

G. Trial counsel were ineffective for failing to present mitigation evidence contained in two reports.

The Court will address the subparts of this claim individually below.

1. Trial counsel were ineffective for filing to present mitigation evidence contained in a psychological report.

In paragraphs 230 through 234 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to present, as mitigation evidence, a psychological report prepared by Dr. Lawrence Maier, who examined the Petitioner for his competency to stand trial at some point before his first trial in 1994. As to this allegation, the Court finds that, based on the undersigned's personal knowledge of the facts underlying this claim, the Petitioner's trial counsel were not ineffective for failing to present this report as mitigation evidence. Part of the information alleged to be contained in this report is duplicative to that testified by the Petitioner's mitigation experts, Ms. Terrell and Dr. Rosenzweig, as discussed previously in this Order. As to the assessment of the Petitioner's intoxication also alleged to be contained in this report, this Court, during sentencing, found "from the evidence, including the video tape, that the defendant was cognizant and appeared to be in full control of his physical and mental faculties at the time of the murder" and specifically found that the mitigating circumstance of diminished capacity did not exist. (Sentencing Order at 11-12). This, in conjunction with the Court's personal knowledge of the facts of this case, lead to a finding that the Petitioner's trial counsel were not ineffective for failing to present the report of Dr. Maier. *Lee v. State*, 44 So. 3d 1145 (Ala. Crim. App. 2009). Accordingly, this claim is due to be dismissed. Ala. R. Crim. P. 32.7(d).

3. Trial counsel were ineffective for failing to present mitigation evidence contained in a pre-sentence report.

In paragraphs 230-31 and 233-34 of his Second Amended Complaint, Sneed alleges that his trial counsel were ineffective for failing to present evidence that is contained in the pre-sentencing report that was prepared immediately after his first trial, which allegedly shows that the Petitioner grew up in a troubled environment and was treated for depression and behavioral problems. However, the record reflects that the Petitioner's trial counsel did present this type of evidence during the penalty phase of his trial in the form of the testimony of Ms. Jonne Terrell, a social worker and mitigation expert. Ms. Terrell testified extensively about the Petitioner's troubled childhood, difficulties in school, and treatment for behavioral problems and depression. (R. 1060-1063, 1065-1071, 1082-1084). Therefore, presentation of the information contained in the earlier pre-sentencing report prepared about the Petitioner would have been cumulative to that given, and "[u]npresented cumulative testimony does not establish that counsel was ineffective." *Boyd v. State*, 913 So.2d 1113, 1139 (Ala. Crim. App. 2003); *Daniel v. State*, 86 So.3d 405 (Ala. Crim. App. 2011). Furthermore, the Petitioner has not shown that there is a reasonable probability that the outcome of his proceeding would have been different had this evidence been presented to judge and jury. *Strickland*, 466 U.S. at 694. Therefore, he has failed to state a claim of ineffective assistance of counsel under the *Strickland* standard. Accordingly, this claim fails and is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

H. Trial counsel were ineffective for failing to argue that statements informing the jurors that their penalty phase verdict was a recommendation were impermissible.

In paragraphs 235 through 241 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to argue that any statements informing the jurors that their penalty phase verdict was a recommendation were impermissible. The Court finds that this allegation fails to state a valid claim for relief and presents no material issue of fact or law. The Petitioner raised the underlying claim on direct appeal, and the Alabama Court of Criminal Appeals found no plain error. *Sneed v. State*, 1 So.3d 104, 143 (Ala. Crim. App. 2007). This issue may not now be re-litigated as an ineffective assistance of counsel claim. In addition, the Petitioner has not met his burden under the *Strickland* standard of pleading specific facts to indicate that he was prejudiced by this alleged omission. *Hyde*, 950 So.2d at 156. Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

I. Trial counsel were ineffective for failing to obtain a jury instruction that the jurors could reject a death sentence for any reason or no reason.

In paragraphs 242 through 246 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to request that the Court issue an instruction to the jurors that they could reject a death sentence without a finding of any mitigating factors. The Petitioner contends that his trial counsel allowed the Court to deliver jury instructions improper under federal constitutional law because said instructions failed to include language informing the jury

that it could return a non-death sentence without a finding of any mitigating circumstances. This argument is based on an incorrect legal premise. Federal constitutional law does not require Alabama trial court to instruct a jury that it may return a non-death sentence regardless of the mitigating and aggravating circumstances. Moreover, such an instruction would be improper under Alabama law. *See, e.g.*, *Melson v. State*, 775 So.2d 857, 896-898 (Ala. Crim. App. 2007). Therefore, the Petitioner's trial counsel could not be ineffective for failing to request such a jury instruction. *See Hall v. State*, 979 So.2d 125, 136-137 (Ala. Crim. App. 2007) ("Because a request for a jury instruction that would have been absolutely baseless, this Court cannot find that his counsel were ineffective for failing to request such a jury instruction."). Accordingly, this claim fails as a matter of law and is due to be dismissed. Ala. R. Crim. P. 32.7(d).

J. Trial counsel were ineffective for failing to object to the Court's instruction to the jury on the heinous, atrocious, or cruel aggravating circumstance.

In paragraphs 247 through 251 of his Second Amended Petition, Sneed alleges that his trial counsel were ineffective for failing to object to the Court's oral charge to the jury that contained two aggravating circumstances because the indictment returned by the grand jury against the Petitioner contained only one. The Court finds that this allegation fails to state a valid claim for relief and presents no material issue of fact or law. The Petitioner raised the underlying claim on direct appeal, and the Alabama Court of Criminal Appeal found no plain error. *Sneed*, 1 So.3d at 142-143. This issue may not now be re-litigated as an ineffective assistance of counsel claim. In addition, the Petitioner

has not met his burden under the *Strickland* standard of pleading specific facts to indicate that he was prejudiced by this alleged omission. *Hyde*, 950 So.2d t 156. Accordingly, this claim is due to be summarily dismissed. Ala. R. Crim. P. 32.7(d).

CONCLUSION

Upon consideration of the foregoing findings and conclusions, the Court is satisfied that the allegations in the Petition are not sufficiently specific, that the Petitioner has failed to state a claim for which relief can be granted, and that no material issue of fact or law exits which would entitle the Petitioner to relief pursuant to Ala. R. Crim. P. 32. No purpose would be served by an evidentiary hearing or further proceedings in this case. Accordingly, it is ORDERED AND ADJUDGED by the Court that the State's Answer to Petition is GRANTED, and the claims presented by Petitioner in his Rule 32 petition, as amended, are dismissed with prejudice.

The clerk is directed to give immediate notice to the District Attorney and counsel of record.

ORDERED and DONE on this the 13th day of December, 2012.

/s/ Sherrie W. Paler
SHERRIE W. PALER
CIRCUIT JUDGE

APPENDIX L

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 22-13328-P
[CAPITAL CASE]

ULYSSES CHARLES SNEED,

Petitioner-Appellant,

v.

JEFFERSON S. DUNN,
Commissioner, Alabama Department of Corrections,

Respondent-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
NO. 5:16-CV-1442-AKK/CLM

MOTION FOR RECONSIDERATION OF THE DENIAL OF ULYSSES CHARLES SNEED'S APPLICATION FOR A CERTIFICATE OF APPEALABILITY

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ARGUMENT

I. Mr. Sneed Is Entitled To A COA On His Claim That Counsel Was Ineffective By Failing To Conduct An Adequate Mitigation Investigation Or Call Lay Witnesses At The Sentencing Phase Of His Trial.

As Mr. Sneed carefully explained in his COA Application, reasonable jurists could debate whether his trial counsel was ineffective in violation of the Sixth Amendment for failing to conduct an adequate background investigation of possible mitigating evidence, and then failing to call any of Mr. Sneed's family members, friends, or the mothers of his children to testify at sentencing. (COA Applic. at 17-31.) Those witnesses, as the undisputed record reflects, would have provided compelling and humanizing testimony about Mr. Sneed, his troubled background, and his traumatic and extenuating life experiences—testimony that makes all the difference as related to a

death sentence, but which neither the jury nor the sentencing judge heard.

The Court denied a COA on this claim based on its finding that the uncalled lay witnesses' testimony would have been "cumulative" of the evidence presented at trial because "[a]ll of the information" in that testimony came in through the two experts Mr. Sneed's counsel called.[1] (COA Denial Order (Order) (July 8, 2024) at 2.) That assertion is a clear misapprehension of the record.

The following chart shows the facts the uncalled lay witnesses would have testified to during the sentencing phase of Mr. Sneed's trial, but which were not introduced:

Evidence Elicited at Trial	Highlights of Evidence Not Elicited
None.	Mr. Sneed is "a very good man who has repented." R32.346 ¶94.[2]
None.	Mr. Sneed has "a great sense of humor, is quiet

[1] In its Order, the Court did not deny that counsel's mitigation investigation was deficient. Nor did it dispute that the uncalled lay witnesses would have provided relevant and powerful humanizing testimony about Mr. Sneed and his upbringing.

[2] "C.___" refers to the designated page of the clerk's record in the Alabama Circuit Court, as certified for Mr. Sneed's direct appeal of his conviction. "R.____" refers to the designated page of the reporter's transcript in the Circuit Court, as certified for Mr. Sneed's direct appeal. "R32.___" refers to the designated page of the record on appeal as certified for Mr. Sneed's Rule 32 collateral appeal. For ease of reference, all cited pages in this Motion are included in the attached Addendum.

	and not at all aggressive." *Id.*
None.	Mr. Sneed looked out for and protected his friends' siblings; he was "like a big brother." R32.348 ¶95.
None.	Mr. Sneed was a "'brainiac,' read books quickly," and "had big ideas and dreams." R32.350 ¶100.
"[H]e is a person who has empathy for another ... and tends to be concerned and feels for other people." R.1043.	Mr. Sneed "had a huge heart" and was desperate for love, affirmation, and stability; he was eager to please and a follower, not a leader. It was not in Mr. Sneed's character to hurt someone. He was "a gentle giant." R32.346, 348, 351 353 ¶¶94, 96, 103-110.
None.	To get attention and please others, Mr. Sneed would do outlandish things and weird stunts and dances. He was the class clown. R32.352, 369 ¶¶106, 179.
None.	Mr. Sneed was rejected by peers and was one of few in the neighborhood who would play with Mary Anne Bishop, a mentally disabled white girl who lived across the street (Mr.

	Sneed is African-American). R32.353, 362 ¶¶109, 142.
None.	Mr. Sneed was so "widely known as a follower" that others would often take advantage and get him to do tasks they feared doing. R32.354 ¶112.
None.	Mr. Sneed "could always be counted on to help carry out the schemes concocted by others, even if he could get in trouble. The schemer only had to make the task sound easy." R32.354-355 ¶115.
None.	Mr. Sneed could not be convinced to hurt others. He grew tall and husky as a teenager and peers would try to get him to beat others up. Despite his general agreeability, Mr. Sneed would always "steadfastly refuse[]," infuriating the peers. R.32.356-357 ¶¶121-122.
None.	Only after someone would strike Mr. Sneed would he engage in a fight. R32.357 ¶123.
None.	Due to his size, Mr. Sneed played football. He would

	"apologize[] after every tackle and stopped play to help the person up." *Id.* ¶125.
None.	Mr. Sneed had great concern for others including the mothers of his children and "was a loving and proud father" to his small children. He was "exceedingly loving and supportive[,]" helping the mothers of his children "through pregnancy cravings, reading books about parenting, watching videos about the birthing process, and buying baby furniture[.]" R32.349-50, 358 ¶¶98-100, 127-28.
None.	Mr. Sneed was a polite and well-mannered person; he "respected the elder members of the community" and answered them with "Yes Sir" and "Yes Ma'am." "He ran errands [for them], carried groceries, and did other chores for [the] older people in the community who needed extra help." R32.358, 373 ¶¶129-130, 193.

None.	Mr. Sneed was fiercely protective of women. R32.359 ¶¶131-32.
None.	Mr. Sneed "never owned a gun and was unfamiliar with guns." R32.359-361 ¶¶133-139.
None.	Mr. Sneed was "slow" for his age. Even as a teenager he would watch cartoons. At age 11 he would play in the mud with his best friend Chuckie Reed, who was about 4 years old. R32.361-362 ¶¶141-42.
None.	Mr. Sneed was not merely "slow", "[t]here were certain types of reasoning that Mr. Sneed lacked completely," such as planning how to hold a job in order to make money. R32.362 ¶144.
None.	Mr. Sneed "was good at drawing and art." A relative encouraged him to go to college and become an architect. R32.373 ¶194.

As this chart demonstrates, the jury and the sentencing judge did *not* hear "all"— indeed, they heard almost *none*—of these humanizing and potentially mitigating facts from the two experts who

testified on Mr. Sneed's behalf. Had the Court correctly perceived this, it could not reasonably have denied Mr. Sneed's COA Application. Such humanizing and mitigating facts bear directly on one's moral culpability and the appropriateness of imposing a death sentence. And this Court often has granted COAs to review similar ineffectiveness claims where some evidence already had been presented. *See*, *e.g.*, *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328, 1353, 1355 (11th Cir. 2011) (granting relief and rejecting cumulativeness argument where offered testimony depicted only a "small sliver of [defendant's] volatile upbringing"); *Johnson v. Sec'y, DOC*, 643 F.3d 907, 936 (11th Cir. 2011) (granting relief where the "description, details, and depth of abuse in [defendant's] background" in the unpresented evidence "far exceeded what the jury was told"); *Maples v. Comm'r, Ala. Dep't of Corr.*, 729 F. App'x 817, 826-827 (11th Cir. 2018) (same).

The same result should follow here for the same reasons. As this Court has emphasized, the "purpose of a sentencing hearing is to provide the jury with the information necessary for it to render an individualized sentencing determination ... [based upon] the character and record of the individualized offender and the circumstances of the particular offense." *Dobbs v. Turpin*, 142 F.3d 1383, 1386-1387 (11th Cir. 1998) (internal quotations and citations omitted). Thus, as in *Collier v. Turpin*—where counsel called ten lay witnesses who knew the defendant—counsel's failure here to present "available evidence of [Mr. Sneed's] upbringing, his gentle disposition, his record of helping family in times of need, [or] specific instances of his heroism and compassion ... brought into question the reliability of the jury's determination that death was the appropriate sentence." 177 F.3d 1184, 1201-1202 (11th Cir. 1999) (granting relief); *see DeBruce v.*

Comm'r, Ala. Dep't of Corr., 758 F.3d 1263, 1276 (11th Cir. 2014) (finding prejudice where defendant's "efforts to nurse his sister while she recovered from an incapacitating stroke" were omitted); *Maples*, 729 F. App'x at 822-823 (same where omitted evidence showed that defendant was a "fun, loving brother who respected his father and did what he was told").

In fact, while the above chart makes the point, it does not even capture all of the facts the uncalled witnesses would have testified to, which went well beyond what the two experts had to say. They also would have provided extensive and detailed facts about the privation, abuse, harassment, and demeaning treatment Mr. Sneed experienced, as the following chart reveals:

Evidence Elicited at Trial	Highlights of Evidence Not Elicited
None	Mr. Sneed grew up in "grinding poverty." Neighbors often invited the Sneed children over "so they could eat." R32.349 ¶¶97-98.
None.	Mr. Sneed's mother suffered from "depression, illnesses, and lack of energy." *Id.* ¶98.
None.	Mr. Sneed's father abandoned the family when Mr. Sneed was 9, and his mother was emotionally unavailable. R32.351 ¶103.

None.	As a child, Mr. Sneed was "constantly subjected to rejection and humiliation from his peers because he was overweight, wore glasses, and came from a very poor family." His peers called him "retarded." The harassment "often drove [him] to tears." R32.351-352, 369 ¶¶104, 178.
None.	Mr. Sneed's father forced isolation upon the family, and Mr. Sneed and his siblings "were never fully accepted by the rest of the neighborhood children." R32.352 ¶105.
None.	Mr. Sneed was "teased and humiliated" by the other children in his neighborhood. R32.353 ¶109.
None.	When Mr. Sneed was two years old, he witnessed his father choking his mother. R32.367 ¶164.
Mr. Sneed's father "was very abusive to his mother." R.1060. Sneed "witnessed the severe and pervasive domestic violence to his mother	Mr. Sneed and his siblings "witnessed and heard constant yelling and fighting" between their parents. The children had to listen as their mother "screamed for help." At

by his father[.]" R.1083.	least once, Mr. Sneed's father attacked Mr. Sneed's mother with a knife. The violence scared Mr. Sneed and his siblings, who would cry, "Don't hit Mommy." Id. ¶¶165-166.
None.	Mr. Sneed's father started physically abusing Mr. Sneed when he was a baby. Mr. Sneed was beaten with a belt starting in the first grade. Mr. Sneed's father would also beat Mr. Sneed's sister with a belt. R32.367-368 ¶168.
None.	Mr. Sneed's father demanded that his wife have the children, including Mr. Sneed, "clean, quiet, and perfect, and dinner ready on the table[,]" when he arrived home from work. Mr. Sneed's father threatened that if this was not done, "God help her." R32.368 ¶169.
None.	When Mr. Sneed's father left the family, he took all the furniture with him, including the children's beds. A friend had to give Mr. Sneed's mother a spare mattress so Mr. Sneed and

	his siblings could have a place to sleep. Id. ¶172.
None.	Mr. Sneed was constantly humiliated as a child for attending a behavioral school, with the children calling him a "dummy" and "retarded." R32.369 ¶178.
None.	After Mr. Sneed graduated from high school, he tried to kill himself. R32.370 ¶181.
None.	After Mr. Sneed's father left the household, he barely provided child support, while Mr. Sneed's mother only made minimum wage. Bills "would often pile up and go unpaid for months." The electricity would be cut off. The family had no car or telephone. Dinner often consisted of "just bologna or hot dogs . . . and nothing else because that was all [the Sneed family] could afford." Sometimes, the Sneed children were sent to another family's house just so they could eat. Id. ¶183.

"When he was nine years old after the divorce his mother was working full time trying to keep the family together, so she didn't keep track of the children very well because of that." R.1063.	Mr. Sneed's mother had to work long hours, leaving the children to take care of themselves or stay with a neighbor. The long hours took a toll on her health, aggravating her diabetes. She "could not afford her diabetes medication or the healthy foods that a diabetic should eat" and had several hospital stays. R32.370¬ 371 ¶¶184-185.[3]

"Social history evidence" of this sort also "'ha[s] particular salience for a jury'" in a death-penalty case. *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1275 (11th Cir. 2016) (citations omitted). That is especially true where, as here, that evidence depicts "severe privation," "abuse," "physical torment," an "absentee mother" and overall "excruciating life history" of the kind that Mr. Sneed experienced. *Wiggins v. Smith*, 539 U.S. 510, 535, 537 (2003). And, "[g]iven the overwhelming evidence of [Mr. Sneed's] guilt, any reasonable attorney would have known ... that the sentence stage was the only part of the trial in which [Mr. Sneed] had any reasonable chance of success." *Johnson*, 643 F.3d at 932.

The unpresented evidence would have been all the more persuasive here because of the circumstances

[3] As this chart reflects, Mr. Sneed's experts mentioned in general terms the abuse and trauma inflicted on Mr. Sneed. But their "generalized description omitted the 'particularized characteristics' of [Mr. Sneed's] heavily disadvantaged background and upbringing[.]" *DeBruce*, 758 F.3d at 1276 (citation omitted).

surrounding the crime. "Many death penalty cases involve murders that are carefully planned, or accompanied by torture, rape or kidnapping." *Jackson v. Herring*, 42 F.3d 1350, 1369 (11th Cir. 1995). But none of that happened here. And in fact, Mr. Sneed did not harm anyone, was not the triggerman, was unarmed, and did not know Mr. Hardy intended to shoot anyone.

For all these reasons, and in the interests of justice, this Motion and Mr. Sneed's COA Application should be granted so the constitutionality of his death sentence can be reviewed on the merits by a panel of this Court.

II. Mr. Sneed Is Entitled To A COA On His Claim That Counsel Was Ineffective By Failing To Retain Forensic Psychologist Dr. Stanley Brodsky.

The Court also denied a COA on Mr. Sneed's ineffectiveness argument based on counsel's failure to retain Dr. Stanley Brodsky, whose comprehensive assessment of Mr. Sneed revealed that he suffered from severe, "Axis I," mental illnesses at the time of the crime. The Court found that counsel attempted to secure funding to retain Dr. Brodsky and, without explanation, found that the record "refutes" Mr. Sneed's argument "that counsel's funding requests were insufficient[.]" (Order at 3.) But here again, "reasonable jurists" could conclude that counsel's funding requests constituted "deficient performance" under *Strickland*. And the Court failed to address Mr. Sneed's alternative arguments relating to the failure to retain Dr. Brodsky.