No. _____

In the
Supreme Court of the United States

TONY BARKSDALE,

Petitioner,

v.

ATTORNEY GENERAL,
STATE OF ALABAMA, *et al*.,

Respondents.

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

APPENDICES 1 - 6
VOLUME 2

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APPENDIX 1

Decision of the U.S. District Court for the Middle
District of Alabama, December 21, 2018
Barksdale v. Dunn, No. 3:08-CV-327,
2018 WL 6731175 (M.D. Ala. 2018)

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testimony that Petitioner announced prior to the fatal shooting that he intended to "jack" someone to get a ride back to Guntersville,[274] he was prepared to shoot someone to get a ride,[275] and he preferred to shoot one person rather than two.[276] Other witnesses testified that, after fatally shooting Julie Rhodes -- twice -- Petitioner represented to multiple persons that he had purchased Julie Rhodes's vehicle,[277] refused requests to stop playing with his pistol while inside a crowded apartment,[278] and threatened to shoot Brian Hampton unless Hampton agreed to dispose of the murder weapon.[279]

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a capital defendant fled the crime scene following an intentional shooting, stabbing, or bludgeoning which left the victim still conscious but in great physical pain. Such a rule is illogical and at odds with the nature of the "heinous, atrocious, or cruel" analysis mandated by Alabama law. Furthermore, this court's independent legal research has identified no existing state or federal legal authority supporting such a rule. Moreover, a district court is precluded from adopting such a new rule in the context of this federal habeas corpus proceeding by the Supreme Court's non-retroactivity doctrine announced in *Teague v. Lane*, 489 U. S. at 310.

[274] S.F. Trial, testimony of Charles Goodson, 8 SCR 790.

[275] S.F. Trial, testimony of Jonathan David Garrison, 11 SCR 1268-69.

[276] *Id.*

[277] S.F. Trial, testimony of Jason Scott Mitchell, 10 SCR 969; testimony of Neysa Hampton Dobbs, 10 SCR 1002-03; testimony of Willie Havis, 10 SCR 1019; testimony of Brian Hampton, 10 SCR 1046.

[278] Nikisha Pieborn testified without contradiction that the Saturday after the fatal shooting she told petitioner she was pregnant, she asked Petitioner to put his gun away and stop pointing it at people in the apartment she shared with Candace Talley, but Petitioner ignored her. S.F. Trial, testimony of Nikisha Pieborn, 10 SCR 950-52.

[279] S.F. Trial, testimony of Willie Havis, 10 SCR 1031; testimony of Brian Hampton, 10 SCR 1054-55.

During his Rule 32 proceeding, Petitioner presented the state courts with additional purportedly mitigating evidence (*i.e.*, evidence not presented during trial) showing that (1) prior to his capital offense, Petitioner earned a GED and completed a small motor repair course while incarcerated for armed robbery in Virginia,[280] (2) Petitioner admitted to daily abuse of alcohol and marijuana from age fourteen,[281] (3) Lt. Col. Johnson believed Petitioner was honest, redeemable, and had many good character traits,[282] (4) Petitioner's parents were both drug abusers who occasionally fought violently in the presence of their sons,[283] and (5) Petitioner's father occasionally struck his school-age sons in the chest with sufficient force to knock them down and make them cry.[284] The foregoing additional mitigating evidence,

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[280] S.F. Rule 32 Hearing, testimony of Tommy Goggans, 17 SCR 97; testimony of Mary Archie, 18 SCR 209; testimony of Maxwell Orin Johnson, 18 SCR 248.

[281] S.F. Rule 32 Hearing, testimony of Tommy Goggans, 17 SCR 148. This testimony must be viewed in proper context. Both Petitioner's mother and Lt. Col. Johnson denied any knowledge of drug use by Petitioner. S.F. Rule 32 Hearing, testimony of Mary Archie, 18 SCR 231; testimony of Maxwell Orin Johnson, 18 SCR 267.

[282] S.F. Rule 32 Hearing, testimony of Maxwell Orin Johnson, 18 SCR 238, 241, 247, 260-62. Lt. Col. Johnson also admitted that, other than visiting Petitioner in jail following Petitioner's arrest for robbery and buying Petitioner a bus ticket to go to Alabama, he had very little contact with Petitioner after Petitioner reached high school age, until he learned Petitioner had been convicted of murder. *Id.*, 18 SCR 245-48, 262-64, 275-76.

[283] S.F. Rule 32 Hearing, testimony of Mary Archie, 17 SCR 166, 171-78, 184-92; 18 SCR 217-18, 227. She testified further that, because of her extensive drug abuse, she had very little contact with Petitioner after he left her home at age nine or ten and went to live with his father. *Id.*, 17 SCR 191-92.

[284] S.F. Rule 32 Hearing, testimony of Mary Archie, 17 SCR 178-80. She offered no testimony that she ever reported Petitioner's father to responsible child welfare or law enforcement officials for investigation of child abuse.

much of which is double-edged in nature, pales in comparison to the factual horror and moral force of the overwhelming evidence supporting all three of the aggravating factors properly before Petitioner's jury and sentencing judge at the punishment phase of trial. Moreover, Petitioner failed to present the state courts with evidence showing the first and last two of these five categories of additional mitigating evidence were reasonably available at the time of his November 1996 capital murder trial.

Likewise, Petitioner offered no evidence at his Rule 32 hearing showing his capital offense was in any way related to his drug or alcohol abuse. There was no evidence at his trial or Rule 32 hearing suggesting Petitioner was under the influence of drugs or alcohol at the time of his capital offense. There was no evidence at his trial or Rule 32 hearing suggesting Petitioner was suffering from withdrawal symptoms or an intense craving for drugs or alcohol at the time of his capital offense. There was no evidence presented at his trial or Rule 32 hearing showing Petitioner was addicted to alcohol or drugs at the time of his capital offense. Thus, in the context of Petitioner's November 1996 capital murder trial, Petitioner's naked assertion to his trial counsel that he had abused alcohol and marijuana on a daily basis since age fourteen had very little potential mitigating value.

The state trial and appellate courts reasonably concluded there was no reasonable probability that, but for the failure of Petitioner's trial counsel to more

fully investigate Petitioner's background and to present any of the evidence admitted during Petitioner's Rule 32 hearing, the outcome of the punishment phase of Petitioner's capital murder trial would have been any different.

b. Punishment Phase Closing Jury Argument

Petitioner complains that, during closing jury argument at the punishment phase of trial, his trial counsel presented only a very brief closing argument which focused almost exclusively on Petitioner's youth as a mitigating factor (a factor Petitioner deems inappropriate given the similar age of the victim), failed to adequately mention Petitioner's childhood, family background, or character, and failed to adequately explain why Petitioner was deserving of mercy.[285]

The initial portion of the prosecution's closing argument at the punishment phase of Petitioner's November 1996 capital murder trial consisted of a brief discussion (filling only five pages of the trial transcript) in which the prosecutor (1) defined aggravating and mitigating factors, (2) reminded the jury that weighing aggravating and mitigating factors was not a mathematical process, (3) identified three aggravating circumstances (*i.e.*, the fact Petitioner stood convicted of a murder committed during a robbery, the fact Petitioner had previously been convicted of a crime of violence, and the heinous, atrocious, and cruel nature of petitioner's capital

[285] Doc. # 1, at pp. 13-14, ⁋⁋ 39-40. Petitioner presented an abridged version of these same complaints in his Rule 32 petition. 15 SCR 20 (⁋ 20).

offense), (4) reminded the jury it took ten votes to recommend a sentence of death, (5) argued the evidence showed Julie Rhodes begged the Petitioner not to shoot her, (6) argued the evidence showed Petitioner shoved her out of the way and then abandoned her after shooting her, and (7) argued the Petitioner took away all of the tomorrows Julie Rhodes and her family would otherwise have enjoyed together.[286]

Petitioner's trial counsel then (1) argued to the jury that a sentence of life imprisonment without the possibility of parole was not an inviting proposition, (2) pointed out Petitioner was only eighteen years old on the date of his capital offense and only nineteen years old at the time of trial, (3) acknowledged that Julie Rhodes was also young and her death tragic, (4) argued the jury was legally obligated to consider Petitioner's youth, not as an excuse but as a mitigating factor, (5) argued that everyone, even the least of us, is protected by the law, (6) pointed out Petitioner's parents were not present in the courtroom, (7) pointed out the best Petitioner could hope for was a sentence of life without parole, and (8) asked the jury to vote for life without parole.[287]

The prosecution then swiftly concluded its closing jury argument (filling less than three pages in the trial transcript) by (1) arguing that, while Petitioner was facing, at best, life without parole, Julie Rhodes was only nineteen and "she's left

[286] S.F. Trial, 12 SCR 1426-30.

[287] S.F. Trial, 12 SCR 1430-33.

with no life at all," (2) arguing the death penalty is an expression of society's right to self-defense, (3) emphasized the state did not lightly ask the jury to consider the death penalty in this case, (3) arguing Julie Rhodes deserved better than to lose her time on this earth as a result of a decision made by the petitioner, (4) arguing Petitioner had a choice whether to take her car and leave her alive and instead chose to murder the unarmed, defenseless, nineteen year witness to his robbery, (5) urging the jury to bring their personal experiences as citizens of this country to bear when weighing the aggravating and mitigating circumstances, and (6) asking the jury to return a verdict recommending the maximum punishment for Julie's killer.[288]

(1) No Deficient Performance

While Petitioner now faults the length of his trial counsel's punishment phase closing jury argument, that argument must be viewed in proper context.[289] At the punishment phase of Petitioner's capital murder trial each party introduced a single exhibit and rested: the prosecution presented a certified copy of the judgment from Petitioner's prior conviction in Virginia for armed robbery; the defense presented a

[288] S.F. Trial, 12 SCR 1433-35.

[289] Attorney Goggans testified during Petitioner's Rule 32 hearing that (1) he believed the strongest mitigating factor available at Petitioner's trial was Petitioner's youth (age eighteen at the time of his capital offense), (2) he argued in his closing argument at the punishment phase of trial that Petitioner's youth was a mitigating factor the jury should weigh when assessing punishment, (3) he also mentioned that Petitioner's parents had not been present at Petitioner's earlier criminal proceeding in Virginia and were not present at his capital murder trial, and (4) he quoted Jesus, hoping it would resonate with the jury. S.F. Trial, 12 SCR 1433-35.

certified copy of Petitioner's birth certificate.[290] As explained above, the prosecution's closing jury argument at the punishment phase of Petitioner's trial filled less than eight full pages of the trial record; Petitioner's trial counsel's closing argument filled almost five pages.

In his closing argument at the punishment phase of Petitioner's capital murder trial, Petitioner's trial counsel argued the jury was obligated to consider Petitioner's youth as a mitigating factor, urged the jury to view a sentence of life without parole as a severe form of punishment, acknowledged that Julie Rhodes died far too young, pointed out that Petitioner apparently did not have support of his own family, and described Petitioner with a Biblical allusion as "one of the least of us" for whom the law afforded protection. The state trial court and state appellate court reasonably concluded the scope and content of Petitioner's trial counsel's closing jury argument at the punishment phase of trial fell within the broad range of professionally reasonable assistance. Petitioner's trial counsel reasonably identified the lone statutory mitigating factor applicable to Petitioner and urged the jury to give great weight to that factor. Petitioner's trial counsel cannot reasonably be faulted for failing to discuss evidence of Petitioner's background that was not in evidence and

[290] S.F. Trial, 12 SCR 1421-23.

not properly before the jury at the punishment phase of trial. Counsel's Rule 32 testimony was completely consistent with the record.

Nor can Petitioner's trial counsel reasonably be faulted for urging the jury to show compassion on Petitioner, as follows: "I have spent what, seven days in Alex City, in a courthouse and I was thinking of the answer of why is that how important it is that inside this rail we are all protected by all the laws, everybody, even the least of us, even Tony Barksdale is. Right now I'm the only one in the courtroom with him. I noted in this -- this in the State's exhibit also, apparently, that was the same situation there: Subject's parents are not present in court."[291] The state trial court and state appellate court could reasonably have believed Petitioner's allusion to the passage in the Gospel of Matthew in which Jesus described what will occur at his Second Coming was objectively reasonable. The passage in question describes how judgment will be made at the time of the Christ's return and emphasizes the need for all believers to care for "the least of these brothers and sisters of mine."[292]

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[291] S.F. Trial, 12 SCR 1432.

[292] The Biblical passage to which Petitioner's trial counsel alluded in his closing jury argument at the punishment phase of Petitioner's November 1996 capital murder trial appears in the 25th Chapter of the Gospel of Matthew. The Gospel writer quotes Jesus as follows:

> He will put the sheep on his right and the goats on his left. "Then the King will say to those on his right, 'Come, you who are blessed by my Father, take your inheritance, the kingdom prepared for you since the creation of the world. For I was hungry and you gave me something to eat, I was thirsty and you gave me something to drink. I was a stranger and you invited me in. I needed clothes and you clothed me, I was sick and you looked after me, I was in prison and you came to visit me.' "Then the righteous will answer him, 'Lord, when did we see you hungry and feed you, or thirsty and give you something to drink? When did we see

Petitioner's trial counsel could reasonably have believed the jury would understand his reference to Petitioner as "the least of us" in precisely the manner he intended it, *i.e.*, as a reminder that Christians are charged by the founder of their faith with caring for the depressed, downtrodden, and rejected members of society, including presumably those abandoned by their own families.[293]

(2) No Prejudice

For reasons similar to those discussed at length above in Section V.G.3.a.(2), the state trial court and state appellate court reasonably concluded the Petitioner's complaints about the scope and content of Petitioner's trial counsel's closing jury argument at the punishment phase of Petitioner's capital murder trial failed to satisfy either prong of the *Strickland* analysis. Likewise, for the reasons discussed above in Section V.G.3.b.(1), the state trial and appellate courts reasonably concluded the decisions by Petitioner's trial counsel to emphasize Petitioner's youth at the time of

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> you a stranger and invite you in, or needing clothes and clothe you? When did we see you sick or in prison and go to visit you?' "The King will reply, 'Truly I tell you, whatever you did for one of the least of these brothers and sisters of mine, you did for me.'"

Matthew 25:33-40 (New International Version).

[293] Thus, contrary to the argument contained in paragraph 40 of Petitioner's federal habeas corpus petition (Doc. # 1, at pp. 13-14), Petitioner's trial counsel did make an argument in his closing punishment phase jury argument that rose above the level of a naked plea for mercy. In fact, Petitioner's trial counsel made an argument for mercy premised upon Christian values and a passage of scripture most likely familiar to at least some, if not most, members of Petitioner's Alabama jury.

his capital offense and refer to Petitioner as among "the least of us" were both objectively reasonable.

c. Conclusions

The state courts could reasonably have concluded, based on the evidence presented during Petitioner's Rule 32 proceeding, that (1) Petitioner failed to establish that his mother was available and willing to testify at Petitioner's November 1996 capital murder trial, (2) there was no compelling mitigating evidence reasonably available at the time of Petitioner's November 1996 capital murder trial in the form of documents relating to Petitioner's educational, medical, mental health, social, correctional, or familial backgrounds, (3) additional investigation into Petitioner's background would not have produced any other compelling mitigating evidence reasonably available at the time of Petitioner's capital murder trial, (4) the decision by Petitioner's trial counsel not to call Petitioner's parents to testify at Petitioner's capital murder trial was objectively reasonable, (5) the decision by Petitioner's defense team not to seek inspection of Petitioner's educational, medical, mental health, social, correctional, or familial records was objectively reasonable, and (6) the decision by Petitioner's defense team not to present any witnesses who could be cross-examined about Petitioner's gang affiliation or history of drug trafficking was objectively reasonable. The state trial court and state appellate court reasonably concluded that Petitioner's complaints

about his trial counsel's alleged failure to adequately investigate Petitioner's background and present available mitigating evidence failed to satisfy either prong of the *Strickland* standard. The state trial court and state appellate court reasonably concluded that Petitioner's complaints about his trial counsel's punishment phase closing jury argument failed to satisfy either prong of the *Strickland* standard. The state trial court's and state appellate court's rejections on the merits in the course of Petitioner's Rule 32 proceeding of the ineffective assistance complaints contained in paragraphs 38 through 44 of Petitioner's federal habeas corpus petition were neither contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's trial and Rule 32 proceeding.

Finally, in the alternative and after *de novo* review, the alleged deficiencies in the performance of Petitioner's trial counsel set forth in paragraphs 33 through 46 of Petitioner's federal habeas corpus petition all fail to satisfy the prejudice prong of the *Strickland* standard. There is simply no reasonable probability that, but for the failure of Petitioner's trial counsel to present and argue any or all of the evidence Petitioner actually introduced during his Rule 32 hearing that the outcome of the punishment phase of Petitioner's capital murder would have been any different.

Petitioner's *Wiggins* claim does not satisfy the prejudice prong of the *Strickland* standard.

4. *De Novo* Review of New Complaints

In paragraphs 45 and 46 of his federal habeas corpus petition for the first time, Petitioner argues his trial counsel rendered ineffective assistance by failing to (1) request the assistance of an expert to (a) investigate the possibility that Petitioner was exposed to toxic chemicals *in utero* in the water supply at Camp Lejeune and (b) furnish testimony linking Petitioner's exposure to such chemicals with unidentified developmental problems and Petitioner's subsequent actions and (2) request the assistance of an expert to investigate and furnish testimony addressing (a) the fact Petitioner was shuttled as a young boy between two dysfunctional parents and was, at times functionally abandoned by both parents and (b) the effects of those experiences on Petitioner. Petitioner alleges no specific facts showing what potentially mitigating or otherwise beneficial evidence could have been discovered (and presented to the jury) at the time of Petitioner's November 1996 capital trial had his defense team made requests for the assistance of experts on the effects of *in utero* exposure or exposure as an infant to toxic chemicals in drinking water at Camp Lejeune or growing up in an unstable family environment.

a. No Prejudice

As explained above, complaints about uncalled witnesses are disfavored because they tend to be highly speculative in nature. *See Price v. Allen*, 679 F.3d at 1325 (holding conclusory assertion that a mental health expert could have testified to a connection between the abuse the defendant suffered as a child and his subsequent actions failed to satisfy prejudice prong of the *Strickland* standard). Petitioner does not allege any specific facts showing that any evidence was reasonably available to Petitioner's trial counsel in November 1996 showing that Petitioner suffered any deleterious effects from exposure to alleged toxic chemicals in the drinking water at Camp Lejeune during the two years he resided there. Petitioner's mother testified at Petitioner's Rule 32 hearing that he grew up without exhibiting any drug, alcohol, or educational problems.[294] Petitioner presented the

[294] S.F. Rule 32 Hearing, testimony of Mary Archie, 18 SCR 231. Ms. Archie did testify that Petitioner experienced headaches, poor circulation, and anemia but she could not recall when that happened. *Id.*, 18 SCR 183, 219. More significantly, she did not testify that any of those health problems required Petitioner to be hospitalized or treated with anything beyond a brief period of prescription medication. Even more significantly, Ms. Archie did not identify any developmental deficits Petitioner exhibited while growing up. Instead, she emphasized that Petitioner did well in school and in his athletic endeavors. *Id.*, 17 SCR 199-200, 209, 231. Lt. Col. Johnson likewise described Petitioner (whom he met when Petitioner was age nine or ten), as a mature, smart, articulate young man who was both a good student and a good athlete. S.F. Rule 32 Hearing, testimony of Maxwell Orin Johnson, 18 SCR 241. Ms. Archie also testified that (1) she separated or divorced Petitioner's father when Petitioner was around age two to four, (2) she had custody of Petitioner until he was nine or ten, (3) at that point, Petitioner went to live with his father and stepmother, and (4) thereafter she had very little contact with Petitioner. S.F. Rule 32 Hearing, testimony of Mary Archie, 17 SCR 163-65, 184, 191, 200; 18 SCR 218, 231. In short, neither Ms. Archie nor Lt. Col. Johnson offered any testimony that would have supported the theory that Petitioner was negatively impacted - physically, emotionally or mentally - by either

state trial court with no medical records documenting any medical issues Petitioner experienced or any developmental deficits Petitioner displayed during childhood. Petitioner presents this court with no documentation, nor any fact-specific allegations, suggesting that any records or other information existed in November 1996 showing Petitioner had ever experienced any developmental, medical, emotional, psychological, or mental health problems that could be traced to either his exposure to toxic chemicals (*in utero* or otherwise) at Camp Lejeune or his parents' divorce, his transition at age two to his mother's sole custody, and then his transfer to his father's sole custody around age nine or ten.[295]

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exposure to toxic chemicals at Camp Lejeune or virtue of his parents' divorce and his living from about age two to age nine or ten with his mother and then going to live with his father.

Ms. Archie also testified that she abused drugs while pregnant with Petitioner. *Id.*, 17 SCR 171-72. She did not testify, however, that she ever observed any behavior on the part of Petitioner suggesting that he suffered from fetal alcohol syndrome or fetal alcohol effects. Nor has Petitioner alleged any facts in this or any other court showing that he suffered from fetal alcohol syndrome or fetal alcohol effects.

[295] Thus, Petitioner has alleged no specific facts in this court showing that, at the time of his November 1996 capital trial, any evidence was reasonably available showing Petitioner suffered from any deleterious effects of (1) his parents' divorce, (2) his movement to his mother's sole custody when Petitioner was around age two, or (3) his movement to his father's home when Petitioner was around age nine or ten. Moreover, Petitioner has failed to allege any facts showing that, at the time of his November 1996 capital murder trial, any evidence was reasonably available showing he "had been shuttled between two dysfunctional parents" who at times functionally abandoned him. Petitioner does not allege that he was ready and willing to testify about those matters at the punishment phase of his November 1996 trial or that either of his parents were reasonably available in November 1996 to testify that Petitioner suffered any negative impact as a result of his two custodial transfers between his parents identified by his mother, *i.e.*, at age two and then at age nine or ten.

In short, Petitioner fails to clothe his naked assertion with any facts whatsoever, by now a familiar pattern. After independent, *de novo* review, there is no reasonable probability that, but for the failure of Petitioner's trial counsel to obtain expert investigations into either Petitioner's exposure to toxic chemicals at Camp Lejeune or the potentially negative impact on Petitioner of his parents' divorce and his subsequent transfers of custody between them, the outcome of the punishment phase of Petitioner's November 1996 capital murder trial would have been any different.

b. No Deficient Performance

Attorney Goggans testified without contradiction during Petitioner's Rule 32 hearing that he was aware through his conversations with Petitioner that Petitioner was born at Camp Lejeune and his parents divorced not long after Petitioner's birth.[296] Petitioner alleges no facts, however, showing that this information, standing alone, should have alerted attorney Goggans to the need for exploration through experts of the possibility of the deleterious effects of Petitioner's exposure to toxic chemicals at Camp Lejeune or growing up as a child of divorce. As explained above, clairvoyance is not a required attribute of effective representation. *Smith v. Singletary*, 170 F.3d at 1054. "The defense of a criminal case is not an undertaking

[296] S.F. Rule 32 Hearing, testimony of Tommy Goggans, 17 SCR 95, 104.

in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited time and resources." *Smith v. Collins*, 977 F.2d at 960. Petitioner has failed to allege any specific facts showing that, based upon the information reasonably available to Petitioner's trial counsel at the time of trial (through attorney Goggans' interviews of Petitioner and Petitioner's parents), it was objectively unreasonable for Petitioner's trial counsel not to pursue expert investigation into either the deleterious effects of Petitioner's exposure to toxic chemicals at Camp Lejeune or growing up as a child of divorce.

On the contrary, Petitioner has identified no information reasonably available to Petitioner's defense team at the time of Petitioner's 1996 capital murder trial suggesting that investigation into either of these two subjects might reasonably have led to the discovery of mitigating or otherwise beneficial evidence or information. All the evidence presented during Petitioner's Rule 32 hearing suggests that Petitioner's defense team was never alerted to any childhood medical, mental health, developmental, psychological, or other problems that might have been caused by Petitioner's exposure to toxic chemicals at Camp Lejeune or Petitioner's allegedly dysfunctional family. It is undisputed that Petitioner denied any history of medical or mental health problems.

Under these circumstances, and after *de novo* review of the entire record, Petitioner's complaints about his trial counsel's failure to seek expert investigations

into Petitioner's exposure to toxic chemicals at Camp Lejeune and possible negative reaction to his parents' divorce (and his subsequent transfers of custody between his parents at ages two and nine or ten) fail to satisfy the first prong of the *Strickland* standard.

c. Conclusions

Upon independent, *de novo* review, Petitioner's complaints in paragraphs 45 and 46 about the performance of his trial counsel fail to satisfy either prong of the *Strickland* standard and do not warrant federal habeas corpus relief.

H. Failure to Challenge the Heinous, Atrocious, or Cruel Aggravating Factor

1. Overview of the Complaints

Petitioner argues in paragraphs 47 through 50 of his federal habeas corpus petition that his trial counsel (1) should have intensely cross-examined Garrison at trial regarding his account of the events at the crime scene on December 1, 1995, (2) argued that Garrison's trial testimony describing events at the crime scene were inaccurate, (3) mounted a "solid argument to exclude the evidence" of Julie Rhodes's suffering after Petitioner shot her -- twice, and (4) sought a limiting jury instruction forbidding the jury from speculating on the level of her suffering.[297]

[297] Doc. # 1, at pp. 16-17, ⁋⁋ 47-50. In his Rule 32 petition, Petitioner presented a claim that the state trial court erred when it found Petitioner's capital offense was heinous, atrocious, and cruel. 15 SCR 48-49. This claim, however, focused on the trial court's conduct and did not "fairly present" the state trial court with an ineffective assistance claim. Petitioner complained for the first time about his trial counsel's failure to challenge the "especially heinous, atrocious, or cruel" aggravating factor in his brief on appeal from the denial of his Rule 32 petition. 20 SCR (Tab R-

2. *De Novo* Review

This court addressed at great length the first of these four complaints in Section V.E. above. For the same reasons discussed at length above in Sections IV.D. and V.E., Petitioner's complaint that his trial counsel failed to adequately cross-examine prosecution witness Garrison fails to satisfy either prong of the *Strickland* standard. Petitioner's complaint that his trial counsel failed to argue adequately against Garrison's credibility fails for virtually identical reasons. For the reasons discussed in Section V.E. above, there is no reasonable probability that, but for the failure of Petitioner's trial counsel to argue against Garrison's credibility, the outcome of either phase of Petitioner's capital murder trial would have been any different.

Not previously addressed is Petitioner's argument that his trial counsel should have presented a "solid argument to exclude the evidence" of Julie Rhodes's suffering or requested a jury instruction limiting the jury's consideration of the evidence in the record showing she was conscious and aware of her impending

46), at pp. 47-49. The Alabama Court of Criminal Appeals held that "because Barksdale did not allege anywhere in his petition that his counsel was ineffective for not adequately investigating and arguing against the aggravating circumstances, this claim is not properly before this Court for review and will not be considered." 23 SCR (Tab R-58), at p. 31. Thus, the complaints contained in paragraphs 47-50 of Petitioner's federal habeas corpus petition are unexhausted and, therefore, will be reviewed under a *de novo* standard of review. Title 28 U.S.C. § 2254(b)(2) authorizes this court to deny relief on an unexhausted but meritless claim. *Bell v. Cone*, 543 U. S. 447, 451 n.3 (2005); *Loggins v. Thomas*, 654 F.3d 1204, 1215 (11th Cir. 2011).

fatality. Petitioner does not identify any legal authority to support his positions that the evidence showing Julie's suffering (such as the eyewitness testimony to her statements about her own condition shortly after the shooting, the heroic efforts taken by medical professionals to attempt to preserve her life, and the medical examiner's testimony concerning the scope of her injuries) was properly subject to an objection seeking to exclude same from evidence or a motion requesting an instruction limiting the jury's consideration of such evidence. As explained in Sections IV.D. and V.E. above, this court is aware of no legal authority supporting Petitioner's contentions.[298] Petitioner's trial counsel cannot reasonably be faulted

[298] On the contrary, as explained in Sections IV.D. and V.E. above, Alabama's definition of "especially heinous, atrocious, or cruel" focuses a capital sentencing jury's attention, in part, on the intensity, duration, and conscious awareness of the pain (both physical and mental) suffered by a capital murder victim prior to their demise. Excluding evidence of these very matters, or limiting the jury's consideration of such evidence, flies in the face of Alabama's definition of this statutory aggravating factor. Thus, the new rule advocated by Petitioner runs directly contrary to the legal definition of "especially heinous, atrocious, or cruel" as that term has been defined by Alabama's courts:

> In *Ex parte Kyzer*, this Court held that the standard applicable to the "especially heinous, atrocious, or cruel" aggravating circumstance under § 13A-5-49(8), Ala. Code 1975, is that the crime must be one of "those conscienceless or pitiless homicides which are unnecessarily torturous to the victim." The appellant's assertion that the murder was not unnecessarily torturous to the victim because he did not intentionally inflict prolonged pain upon the victim is without merit. It is not, as the appellant argues, incumbent upon the State to prove that he inflicted savagery or brutality upon the victim, or that he took pleasure in having committed the murder. *It is necessary that the State present evidence that the victim suffered some type of physical violence beyond that necessary or sufficient to cause death. Additionally, to support this aggravating factor, the time between at least some of the injurious acts must be an appreciable lapse of time, sufficient enough to cause prolonged suffering and the victim must be conscious or aware when at least some of the additional or repeated violence is inflicted.*

for failing to urge a motion to exclude or to request a limiting jury instruction that found no basis in existing state or federal law; trial counsel is not required to urge a meritless argument or to make a futile motion. *See Knowles v. Mirzayance*, 556 U. S. 111, 125 (2009) (defense counsel is not required to assert a defense he is almost certain will lose); *Pinkney v. Sec'y, DOC*, 876 F.3d 1290, 1297 (11th Cir. 2017) ("an attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief"), *cert. filed May 18, 2018 (no. 17-9566)*; *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d 1278, 1299 (11th Cir. 2014) (holding "a lawyer is not ineffective for failing to raise a meritless argument" (quoting *Diaz v. Sec'y, Dep't of Corr.*, 402 F.3d 1136, 1142 (11th Cir.), *cert. denied*, 546 U. S. 1064 (2005))), *cert. denied*, 136 S. Ct. 68 (2015).

There is no reasonable probability that but for the failures of Petitioner's trial counsel to attempt either to exclude the evidence of Julie's suffering or to seek an instruction limiting the jury's consideration of such evidence, the outcome of the

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Barksdale v. State, 788 So. 2d at 907-08 (citations omitted and emphasis added). Moreover, Petitioner's proposed new rule (which would make consideration of such evidence dependent upon the defendant's physical presence (or absence) from the victim's side) is a bizarre proposition.

As explained above, a state court's determination of a matter of state law binds a federal habeas court. *See Bradshaw v. Richey*, 546 U.S. at 76 ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). The Alabama Court of Criminal Appeals' conclusion in Petitioner's direct appeal regarding the nature and scope of the definition of "especially heinous, atrocious, or cruel" under Alabama law binds this court in this federal habeas corpus proceeding.

punishment phase of Petitioner's capital murder trial would have been any different. Any such motion to exclude or request for a limiting jury instruction would have been futile and meritless. *See Butts v. GDCP Warden*, 850 F.3d 1201, 1204 (11th Cir. 2017) (failure of appellate counsel to raise a meritless claim did not prejudice defendant), *cert. denied*, 138 S. Ct. 925 (2018); As explained in Sections IV.D. and V.E. above, the evidence establishing the severe pain and anguish Julie Rhodes suffered in the hours immediately after Petitioner shot her -- twice -- was overwhelming and compelling. It was also clearly admissible and subject to full consideration by the jury at the punishment phase of Petitioner's capital murder trial in connection with the "especially heinous, atrocious, or cruel" aggravating factor. Petitioner has identified no legal basis for excluding this evidence or limiting the jury's consideration of this evidence when deliberating at the punishment phase of Petitioner's trial. Petitioner did not suffer "prejudice" within the meaning of the second prong of the *Strickland* standard by virtue of his trial counsel's failure to move to exclude (or to request an instruction limiting the jury's consideration of) evidence of Julie's Rhodes's suffering.

3. Conclusions

Upon *de* novo review, Petitioner's complaints in paragraphs 47 through 50 of his federal habeas corpus petition fail to satisfy either prong of the *Strickland* standard and do not warrant federal habeas corpus relief.

I. Failure to Challenge Prior Conviction as an Aggravating Factor

1. Overview of the Complaints

In paragraphs 51 through 57 of his federal habeas corpus petition, Petitioner argues that his trial counsel rendered ineffective assistance by (1) failing to object on unspecified grounds to the admission of a certified copy of a judgment reflecting Petitioner's Virginia armed robbery conviction, (2) encouraging the jury to believe Petitioner had been armed and committed the Virginia robbery, (3) failing to conduct any investigation into the circumstances of that offense, (4) failing to contact petitioner's former counsel in Virginia, (5) failing to read the witness statement of the Virginia robbery victim, Oscar Cervantes, (6) failing to seek and read the records from Petitioner's robbery, trial, and confession, (7) failing to question anyone about whether Petitioner had been the gunman during the robbery, (8) failing to present evidence showing petitioner was a mere "decoy" or "lure" for a robbery actually committed by Petitioner's older brother and another older individual, (9) failing to ask about the facts of the Virginia robbery case before agreeing to stipulate to Cervantes' testimony, (10) failing to call and cross-examine Cervantes regarding Petitioner's "minor role" in the Virginia robbery, (11) failing to examine "the

Virginia files," and (12) failing to present expert testimony regarding the malfunction of the murder weapon.[299]

2. *De Novo* Review

As above, *de novo* review of the record from Petitioner's Rule 32 hearing is required. Upon such review, it is painfully obvious that Petitioner's arguments are naive at best and disingenuous at worst. Here are the reasons -- repetitious, but repeated for purposes of *de novo* review -- in admittedly agonizing detail:

a. No Deficient Performance

The uncontradicted, sworn testimony of attorney Goggans establishes that attorney Goggans interviewed Petitioner and examined documents reflecting that Petitioner confessed, and pleaded guilty, to a charge of armed robbery in Virginia. Petitioner has failed to allege any facts showing there was any arguable legal basis to exclude evidence of Petitioner's Virginia conviction from the jury's consideration at the punishment phase of Petitioner's capital murder trial. Attorney Goggans also testified, again without contradiction, that he was well aware that Petitioner had not

[299] Doc. # 1, at pp. 17-19, ¶¶ 51-57. As was true with regard to Petitioner's other complaints about his trial counsel's failures to challenge the other aggravating circumstances relied upon by the prosecution, Petitioner failed to present any of these complaints in his Rule 32 petition. Instead, after failing to seek leave to amend his Rule 32 petition, Petitioner asserted these ineffective assistance complaints for the first time in his brief on appeal challenging the denial of his Rule 32 petition. 20 SCR (Tab R-46), at pp. 49-52. The Alabama Court of Criminal Appeals concluded that "because Barksdale did not allege anywhere in his petition that his counsel was ineffective for not adequately investigating and arguing against the aggravating circumstances, this claim is not properly before this Court for review and will not be considered." 23 SCR (Tab R-57), at p. 31.

been the gunman during the robbery in Virginia. Attorney Goggans did not view that fact, standing alone as significantly diminishing Petitioner's moral blameworthiness because, under Alabama law, one who aids and abets is as guilty as a principal. Attorney Goggans also testified without contradiction that, after interviewing the victim of the Virginia armed robbery, he did not want the victim to testify in front of Petitioner's jury because the victim was prepared to identify Petitioner as a participant in a robbery that attorney Goggans believed had involved some degree of planning, and testimony highlighting the frightening circumstances the victim experienced during the Virginia robbery would only serve to remind the jury that Petitioner's fatal shooting of Julie Rhodes had taken place during a robbery. For these reasons, attorney Goggans testified that he preferred to have a copy of the judgment of conviction admitted into evidence, rather than to have the jury watch a live witness identify Petitioner as one of the men who robbed him.

After careful *de novo* review, there is no fault in attorney Goggans' strategic decision-making, including his decision to stipulate to the admission of Petitioner's judgment of conviction from Virginia, rather than to have the prosecution call Oscar Cervantes to testify live before the jury; that decision was objectively reasonable. Petitioner alleges no specific facts, much less presents any affidavits or properly authenticated documents, showing there was any information contained in any of the records reasonably available to Petitioner's trial counsel in November 1996 showing

that the victim of Petitioner's Virginia robbery could furnish any mitigating testimony beyond the fact that Petitioner had not actually held a gun during the Virginia robbery.

For a number of reasons, this court independently concludes that it was objectively reasonable for Petitioner's trial counsel to avoid presenting testimony and argument emphasizing the fact Petitioner had not held a gun during the Virginia robbery. First, the efficacy of Petitioner's proposed argument at Petitioner's November 1996 capital murder trial was dubious at best. An argument by Petitioner's trial counsel suggesting Petitioner was somehow less morally culpable than his accomplices in the Virginia robbery (because Petitioner did not hold a gun during that robbery) would not logically have reduced Petitioner's moral blameworthiness or culpability in connection with Petitioner's subsequent fatal shooting of Julie Rhodes.

Second, after discussing the Virginia robbery with Petitioner, reading documentation concerning the offense, and talking with the victim of the Petitioner's prior offense, attorney Goggans concluded the Virginia robbery had involved a degree of planning. Thus, attorney Goggans could have reasonably believed that, regardless of whether Petitioner held a gun during the Virginia robbery, presenting the jury with the details of the Virginia robbery would show that Petitioner's prior offense in Virginia involved a degree of planning and Petitioner's involvement in

the Virginia robbery went beyond that of a typical accomplice in other types of robberies, *i.e.*, that Petitioner's role as "lure" or "decoy" in the Virginia robbery was substantial and significant. Attorney Goggans could reasonably have believed that evidence showing Petitioner served as the "lure" or "decoy" in the Virginia robbery could have been viewed by the jury as indicating a level of deviousness on Petitioner's part.

Third, Petitioner's trial counsel could reasonably have foreseen that advancing a jury argument premised upon a showing that Petitioner did not carry a gun during the Virginia robbery could prove harmful to Petitioner. The prosecution could have responded by pointing out that Petitioner did not carry a gun during the Virginia robbery (where the victim walked away from the robbery alive) and contrasting the outcome of that offense with the Petitioner's capital offense (in which Petitioner carried a gun and the victim died a torturous, painful death). The prosecution could have responded to Petitioner's evidence showing that he did not carry a gun during his Virginia robbery by arguing this fact permitted a reasonable inference that Petitioner fatally shot Julie Rhodes -- twice -- for the very purpose of preventing her from ever testifying against Petitioner.[300] In fact, the prosecution did

[300] It is not difficult to imagine the type of devastating counter-argument an aggressive prosecutor could have made at the punishment phase of Petitioner's capital murder trial had Petitioner's trial counsel attempted to present evidence and argue that Petitioner's moral culpability in connection with his Virginia armed robbery offense was somehow less than that of Petitioner's co-defendants because Petitioner had not carried a gun during the Virginia robbery. Petitioner's prosecutor could legitimately have argued that such evidence permitted reasonable

make a somewhat similar argument in its closing punishment phase jury argument at Petitioner's capital murder trial.[301] Pointing out the fact Petitioner did not carry a weapon during his Virginia robbery would have furnished an even stronger prosecutorial argument that Petitioner murdered Julie Rhodes to prevent her from ever being a witness against him (as Oscar Cervantes had been in connection with Petitioner's Virginia robbery case). It was objectively reasonable for Petitioner's

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inferences that Oscar Cervantes (the victim in the Virginia armed robbery) would not have been alive to testify at Petitioner's 1996 capital murder trial if Petitioner, rather than Petitioner's older brother, had held the gun during the Virginia armed robbery.

Had Petitioner's trial counsel insisted on having Mr. Cervantes testify as to the details of the Virginia armed robbery, the prosecution could legitimately have (1) asked him to describe in detail for the jury exactly what it felt like to be robbed at gunpoint by Petitioner's older brother, (2) argued that Cervantes' testimony showed it was the Petitioner who lured Mr. Cervantes to the isolated location where the robbery occurred, and (3) argued Petitioner did the exact same thing to Julie Rhodes, *i.e.*, directed her to a relatively isolated location where Petitioner robbed and fatally shot her. Furthermore, evidence showing that Oscar Cervantes had lived to testify against Petitioner and Petitioner's older brother would have permitted the prosecution to argue at Petitioner's capital murder trial (as a reasonable inference from the evidence) that Petitioner fatally shot Julie Rhodes because he did not want her to live to testify against him.

The foregoing hypothetical jury arguments would have been permissible inferences, reasonably drawn from the evidence actually introduced during Petitioner's capital murder trial; the information concerning the details of Petitioner's Virginia robbery given to attorney Goggans by Mr. Cervenates (about which attorney Goggans testified without contradiction during Petitioner's Rule 32 hearing); and the evidence showing Petitioner had not carried a gun during the Virginia robbery. Most of the foregoing hypothetical prosecutorial arguments paraphrase the arguments the prosecution actually made at the close of the punishment phase of Petitioner's capital murder trial. Petitioner's trial counsel could reasonably have concluded that emphasizing the similarities and critical distinctions between the facts of Petitioner's Virginia robbery and Petitioner's robbery/murder of Julie Rhodes could prove harmful to Petitioner at the punishment phase of trial by inviting prosecutorial counter-arguments arguments similar to those set forth above.

[301] 12 SCR 1434-35 (arguing Petitioner murdered Julie Rhodes because she was "the witness to his robbery" and pointing out the Petitioner could have let her go and taken her vehicle but chose not to do so).

trial counsel to avoid walking into the potential minefield now urged by Petitioner's federal habeas counsel.[302] The decision by Petitioner's trial counsel not to present evidence focusing the jury's attention on the fact Petitioner did not carry a weapon during the Virginia robbery, which decision attorney Goggans made after interviewing Petitioner, reviewing relevant documents, and speaking face-to-face with the victim of the Virginia robbery, was precisely the type of strategic decision this court may not second-guess in a federal habeas corpus proceeding. *See Marshall v. Sec'y, Fla. Dep't of Corr.*, 828 F.3d 1277, 1290 (11th Cir. 2016) ("Strategic

[302] Additionally, the record now before this court, which includes attorney Goggans' uncontradicted, sworn testimony explaining his strategic reasons for not introducing evidence detailing the circumstances of Petitioner's Virginia offense, refutes Petitioner's naked assertions in his federal habeas corpus petition that attorney Goggans made no effort to investigate the circumstances of Petitioner's Virginia offense. Attorney Goggans testified without contradiction during Petitioner's Rule 32 hearing that he discussed with Petitioner the Virginia robbery. Attorney Goggans testified in the same proceeding that he reviewed documents addressing Petitioner's Virginia conviction. Attorney Goggans also testified that he spoke with the victim of Petitioner's Virginia robbery and decided he did not want this witness to testify before Petitioner's jury. Attorney Goggans testified that he was well aware of the fact the Petitioner had not carried a gun during the Virginia robbery but, instead, had acted merely to lure the robbery victim to the place where Petitioner's older brother committed the actual robbery. Petitioner does not deny any of these portions of attorney Goggans' testimony.

Petitioner does not allege any facts, or offer an affidavit or properly authenticated records, showing Petitioner told attorney Goggans anything during their pretrial conversations that would have suggested to attorney Goggans that contacting Petitioner's criminal defense counsel from Virginia or reviewing any of the records from Petitioner's Virginia criminal proceeding would have furnished any helpful information in addition to, or different from, the information about the Virginia robbery that Petitioner actually conveyed to attorney Goggans or which attorney Goggans gained from interviewing the victim of the Virginia robbery. Attorney Goggans could have reasonably relied upon the information about the Virginia robbery conveyed to him by Petitioner and the information he learned through review of the documents in the prosecution's file concerning Petitioner's Virginia offense. Likewise, Petitioner alleges no facts showing it was unreasonable for attorney Goggans to rely upon the information related to attorney Goggans by the victim of the Virginia robbery.

choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable" (quoting *Strickland v. Washington*, 466 U. S. at 690)).

b. No Prejudice

Furthermore, and after independent *de novo* review, Petitioner's complaints in paragraphs 51 through 57 fail to satisfy the prejudice prong of the *Strickland* standard. The burden to prove prejudice requires the petitioner to show there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U. S. at 694. Petitioner complains that attorney Goggans failed to (1) contact Petitioner's Virginia defense counsel, (2) read all of the available documentation concerning Petitioner's confession, trial, and conviction, (3) read Oscar Cervantes' witness statement, and (4) examine unidentified information in "the Virginia files." Yet Petitioner alleges no specific facts showing what potentially helpful information attorney Goggans would have gleaned from these sources above and beyond the information about Petitioner's Virginia offense that he had already actually obtained from interviewing Petitioner, interviewing Oscar Cervantes face-to-face, and reviewing the records concerning Petitioner's Virginia offense found in the prosecution's case file. Petitioner presented the state court and presents this court with no affidavit from Petitioner's former Virginia defense counsel (detailing any undiscovered

information about Petitioner's Virginia offense); no affidavit from Oscar Cervantes (explaining what testimony helpful to Petitioner he could have given at Petitioner's November 1996 capital murder trial); or no properly authenticated documents reasonably available in November 1996 showing that attorney Goggans could have discovered any new or different information concerning Petitioner's Virginia offense through additional investigation.

Conclusory and speculative assertions such as those contained in paragraphs 51 through 57 of Petitioner's federal habeas corpus petition do not satisfy the prejudice prong of the *Strickland* standard. *See Price v. Allen*, 679 F.3d at 1325 (holding conclusory assertion that a mental health expert could have testified to a connection between the abuse the defendant suffered as a child and his subsequent actions failed to satisfy prejudice prong of the *Strickland* standard). *Cf. Bennett v. Fortner*, 863 F.2d 804, 809 (11th Cir. 1989) (holding petitioner who attempted to circumvent a finding of procedural default with a showing that his trial counsel was ineffective in failing to procure a psychiatric examination of the defendant failed to show "actual prejudice" where Petitioner did not present the federal habeas court with copies of the medical records the petitioner claimed would have justified the psychiatric examination). There is no reasonable probability that, but for the failure of Petitioner's trial counsel to call Oscar Cervantes to testify at trial or to cross-

examine Cervantes if called by the prosecution, the outcome of the punishment phase of Petitioner's capital murder trial would have been any different.

For the reasons discussed at length above in Section V.D., Petitioner's complaint in paragraph 57 of his federal habeas corpus petition about his trial counsel's failure to present evidence showing the murder weapon malfunctioned at the time Petitioner fatally shot Julie Rhodes -- twice -- fails to satisfy either prong of the *Strickland* standard.[303] Petitioner has failed to allege any facts showing there was any identifiable witness (lay or expert) available at the time of Petitioner's November 1996 capital murder trial who was willing to testify that the murder weapon misfired -- twice -- while being manually unloaded by Petitioner. Petitioner's speculative assertions that such a witness could have been procured and

[303] Only an episode of *The Twilight Zone* would postulate a robbery scene in which the perp pulls a gun on a robbery victim with the intent of "unloading" it in the victim's presence, whereupon said gun accidentally discharges -- twice, no less -- from two different positions above the hapless victim, followed by days of the Petitioner's fascinated gunplay with the same defective weapon allegedly in the presence of, and to the discomfort and consternation of, numerous witnesses. Add to the mix a suggested ingestion of toxic water at Camp Lejeune as an infant and the jury has the recipe to give the Petitioner a pass. Not so. Petitioner presents ineffective assistance allegations that test the limits of not just credulity but rationality. Worse, these spurious allegations wasted the court's time and resources.

Petitioner presented the Rule 32 court and presents this court with no evidence establishing (1) Petitioner was ever exposed to toxic chemicals at Camp Lejeune, (2) the murder weapon could misfire while being unloaded in the manner described by Petitioner, (3) the murder weapon could misfire a second time in the manner described by Petitioner, or (4) any potential defense witness identified by Petitioner to his defense team was reasonably available at the time of trial who could have testified about Petitioner's background without being subject to cross-examination about Petitioner's gang affiliation and history of drug trafficking.

testified in a manner beneficial to the defense are insufficient to satisfy the prejudice prong of the *Strickland* standard. *See Harris v. Commn'r, Ala. Dep't of Corr.*, 874 F.3d at 691 (allegations in a habeas petition must be factual and specific, not conclusory); *Price v. Allen*, 679 F.3d at 1325 (holding conclusory assertion that a mental health expert could have testified to a connection between the abuse the defendant suffered as a child and his subsequent actions failed to satisfy prejudice prong of the *Strickland* standard).

3. Conclusions

Upon *de* novo review, Petitioner's complaints in paragraphs 51 through 57 of his federal habeas corpus petition fail to satisfy either prong of the *Strickland* standard and do not warrant federal habeas corpus relief.

J. Failure to Timely Raise *Batson* Objection

1. The Complaint

Petitioner argues in paragraphs 58 through 63 of his federal habeas petition that his trial counsel rendered ineffective assistance by failing to raise a timely *Batson* challenge to the prosecution's use of peremptory strikes against two of the three black *males* in the jury venire.[304] In contrast, in his Rule 32 petition, he argued his trial counsel rendered ineffective assistance by failing to raise a *Batson* challenge

[304] Doc. # 1, at p. 19-20, ¶¶ 58-63. The facts Petitioner alleges in support of this claim of ineffective assistance are vastly different from the facts Petitioner alleged in support of his cryptic analogous claim in his Rule 32 petition.

after the state used its peremptory challenges to strike two of the six black members of the jury venire (with no differentiation between the genders of those venire members).[305]

2. State Court Disposition

The state trial court summarily dismissed this claim in its Order issued January 6, 2003, holding that Petitioner's ineffective assistance claim failed to allege sufficient facts to entitle him to relief and Petitioner's recitation of the number of black members of the jury venire struck by the prosecution, without more, was insufficient to establish a *prima facie* case of racial discrimination in violation of the Supreme Court's holding in *Batson*.[306] On appeal from the denial of Petitioner's Rule 32 petition, the Alabama Court of Criminal Appeals affirmed, holding (as did the trial court) that a mere recitation of the number of black venire members struck by the prosecution was insufficient to establish a *prima facie* case of racial discrimination in jury selection and insufficient to establish ineffective assistance by Petitioner's trial counsel.[307]

[305] 15 SCR 12, ¶ 24.

[306] 15 SCR 159-61; 23 SCR (Tab R-56), at pp. 159-61.

[307] 22 SCR (Attachment B to Tab R-51), at pp. 11-14; 23 SCR (Tab R-58), at pp. 11-14.

3. Clearly Established Federal Law

In *Batson v. Kentucky*, 476 U. S. 79 (1986), the United States Supreme Court extended the equal protection principle barring the purposeful exclusion of Blacks from criminal jury service to the prosecution's use of peremptory challenges during petit jury selection. *See Batson v. Kentucky*, 476 U. S. at 89 ("the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."). *Batson* provides a three-step process for a trial court to use in adjudicating a claim that a peremptory challenge was based on race: first, the defendant must make out a *prima facie* case of discriminatory jury selection by the totality of the relevant facts concerning a prosecutor's conduct during the defendant's own trial; second, once the defendant makes the *prima facie* showing, the burden shifts to the State to come forward with a race-neutral explanation for challenging jurors within the arguably targeted class; finally, the trial court must determine if the defendant established purposeful discrimination by the prosecution. *Foster v. Chatman*, 136 S. Ct. 1737, 1747 (2016); *Snyder v. Louisiana*, 552 U. S. 472, 476-77 (2008); *Miller-El v. Dretke*, 545 U. S. 231, 239 (2005); *Batson v. Kentucky*, 476 U. S. at 94-98.

4. AEDPA Review of Claim Fairly Presented in Rule 32 Petition

The state trial court's and state appellate court's summary dismissal of this ineffective assistance claim (as inadequately pleaded) in the course of Petitioner's Rule 32 proceeding constituted a rejection of that claim on the merits. Dismissal of a claim for failure to satisfy Alabama Rule of Criminal Procedure 32.6(b) constitutes a ruling on the merits, which does not give rise to a procedural default or foreclose federal habeas review of a federal constitutional claim. *See Frazier v. Bouchard*, 661 F.3d at 524-26 (holding dismissal of ineffective assistance claim for failure to allege sufficient facts was a ruling on the merits of the *Strickland* claim and did not procedurally default or otherwise bar federal habeas review of the claim); *Borden v. Allen*, 646 F.3d at 815-16 ("an Alabama court's consideration of the sufficiency of the pleadings concerning a federal constitutional claim contained in a Rule 32 petition necessarily entails a determination on the merits of the underlying claim; we cannot construe such a rule to be a state procedural bar that would preclude our review"); *Powell v. Allen*, 602 F.3d at 1272-73 (Alabama court's summary dismissal of federal constitutional claims under Rule 32.6(b) should be reviewed as a holding on the merits).

a. No Deficient Performance

The only fact alleged in Petitioner's Rule 32 petition in support of his ineffective assistance claim premised upon a potential *Batson* violation was that the

prosecution struck two of six black members of Petitioner's jury venire.[308] When considering whether an objector has made a *prima facie* case as a first step in the *Batson* analysis, a court must consider all relevant circumstances which include, but are not limited to: (1) a prosecutor's pattern of strikes against black jurors included in the venire; (2) the prosecutor's questions and statements during voir dire examination; (3) the failure of the prosecutor to ask meaningful questions to the struck jurors; (4) the subject matter of the case, *i.e.*, whether it is racially or ethnically sensitive; and (5) evidence of past discrimination in jury selection.[309] *Madison v.*

[308] The record establishes that the prosecution exercised peremptory challenges against twenty-one members of the jury venire, two of whom were black males (venire members 72, 134), sixteen of whom were white females (venire members 48, 61, 89, 92, 103, 112, 113, 116, 155, 172, 173, 174, 197, 205, 210, 212), and three of whom were white males (venire members 128, 149, 168). 4 SCR 685-89. The defense peremptorily struck twenty-one venire members, one of whom was a black male (venire member 66), eight of whom were white females (venire members 54, 77, 85, 87, 90, 114, 179, 203), and twelve of whom were white males (venire members 86, 118, 126, 129, 141, 147, 176, 184, 191, 198, 208, 215). Petitioner's jury consisted of three black females (venire member 139, 170, 206), two white females (venire members 185, 195), and seven white males (venire members 57, 99, 125, 148, 163, 181, 187).

Petitioner alleged no additional facts showing a *prima facie* case of racially discriminatory intent by the prosecution. This case is easily distinguishable from *Madison v. Commn'r, Ala. Dep't of Corr.*, 677 F.3d 1333 (11th Cir.), *cert. denied*, 568 U. S. 1019 (2012). In *Madison*, the defendant pointed out that, in addition to the prosecution striking six of the thirteen black members of the jury venire, there was evidence in the record showing (1) the prosecution failed to ask any questions to three of the challenged jurors, (2) the case involved racially sensitive subject matter, and (3) the district attorney's office in question had previously been found to have engaged in discriminatory jury selection, including a prior criminal trial of the same defendant. *Id.*, 677 F.3d at 1339.

[309] Among the other considerations a trial court may examine in determining whether an objector has satisfied the burden of establishing a *prima facie* case of racial discrimination in jury selection is whether the defendants are the same race or ethnicity as the jurors whom the prosecution allegedly struck for improper, race-based, reasons. *United States v. Hill*, 643 F.3d 807, 840 (11th Cir. 2011), *cert. denied*, 566 U. S. 970 (2012).

Commn'r, Ala. Dep't of Corr., 677 F.3d 1333, 1337 (11th Cir.), *cert. denied*, 568 U. S. 1019 (2012). Petitioner alleged no facts in his Rule 32 petition addressing any of these considerations, and presented no evidence of such in the hearing.

It is well settled that numbers alone are insufficient to establish a *prima facie* case of racial discrimination in jury selection; the defendant must make a *prima facie* case by showing the totality of the relevant facts gives rise to an inference of discriminatory purpose. *See, e.g., United States v. Hill*, 643 F.3d 807, 838-40 (11th Cir. 2011) (the *prima facie* case determination is not to be based on numbers but is to be made in light of the totality of the circumstances (citing *Johnson v. California*, 545 U. S. 162, 168 (2005)), *cert. denied*, 566 U. S. 970 (2012). "[A] defendant satisfies the requirements of *Batson's* first step by producing evidence sufficient to permit the trial judge to draw an inference that discrimination has occurred." *Johnson v. California*, 545 U. S. at 170.

Among the factors the Eleventh Circuit has instructed reviewing courts to consider in determining whether a *prima facie Batson* claim has been established are (1) whether members of the relevant racial or ethnic group served unchallenged on the jury, (2) whether the striker struck all of the relevant racial or ethnic group from the venire, or at least as many as the striker had strikes, (3) whether there is a substantial disparity between the percentage of jurors of a particular race or ethnicity struck and the percentage of their representation on the venire, and (4) whether there

is a substantial disparity between the percentage of jurors of one race or ethnicity struck and the percentage of their representation on the jury. *United States v. Ochoa-Vasquez*, 428 F.3d 1015, 1044-47 (11th Cir. 2005), *cert. denied*, 549 U. S. 952 (2006). Consideration of these purely statistical factors does not support a finding of a *prima facie Batson* claim here. First, three of the six black members of the Petitioner's jury venire actually served on his jury. Second, the prosecution struck only two of the six black members of the jury venire despite exercising twenty-one peremptory strikes. Third, the percentage of black jurors (3/12 or 25%) was actually higher than the percentage of black venire members on the panel (6/54 or 11%). Finally, the percentage of black jurors (3/12 or 25%) was higher than the percentage of the black venire members struck peremptorily (3/42 or 7%).

In view of the foregoing discussion and legal authorities, Petitioner's trial counsel could reasonably have concluded that asserting a *Batson* challenge based on the prosecution's use of only two of its twenty-one peremptory strikes against black members of the jury venire would, in light of the manner in which the prosecutor conducted himself during voir dire, likely be insufficient to establish a *prima facie* case under *Batson*. Petitioner alleged no facts in his Rule 32 petition showing there was anything suspicious or racially insensitive about the manner in which the prosecutor questioned the panels of the jury venire the parties examined during voir dire. Petitioner alleged no facts in his Rule 32 petition suggesting the district

attorney's office prosecuting Petitioner's capital murder charge had a demonstrated history of racial discrimination in jury selection. Likewise, there was no allegation in Petitioner's Rule 32 petition that Petitioner's offense was in any way racially motivated or tinged with any hint of racially discriminatory motive that would have made the offense racially sensitive.

The prosecution had the means (twenty-one available peremptory strikes) to strike all or a majority of the black venire members from the Petitioner's petit jury but chose instead to exercise only two of its peremptory strikes against any of the six black venire members. Petitioner's trial counsel could reasonably have believed the prosecutor's exercise of just two of the prosecution's twenty-one peremptory strikes against the six black members of the jury venire, in the absence of any other demonstrated indication of racially discriminatory motivation on the part of the prosecution, would be insufficient to establish a *prima facie* case under *Batson*. Trial counsel are not required to make futile or meritless objections or motions. *See Knowles v. Mirzayance*, 556 U. S. at 125 (defense counsel is not required to assert a defense he is almost certain will lose); *Pinkney v. Sec'y, DOC*, 876 F.3d at 1297 ("an attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief"); *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d at 1299 (holding "a lawyer is not ineffective for failing to raise a meritless argument"); *United States v. Curbelo*, 726 F.3d 1260, 1267 (11th Cir.

2013) ("it goes without saying that counsel is not ineffective for failing to file a meritless suppression motion"), *cert. denied*, 571 U.S. 1150 (2014).

Given the dearth of factual allegations suggesting the prosecution behaved in a racially discriminatory manner during jury selection, the state trial court and state appellate court reasonably concluded during Petitioner's Rule 32 proceeding that Petitioner's conclusory complaint about his trial counsel's failure to raise a timely *Batson* objection failed to satisfy the first prong of the *Strickland* standard.

b. No Prejudice

For similar reasons, the state trial court and state appellate court reasonably concluded Petitioner's complaint about his trial counsel's failure to raise a timely *Batson* challenge failed to satisfy the prejudice prong of the *Strickland* standard. The state trial and appellate courts reasonably concluded there was no reasonable probability that, but for the failure of Petitioner's trial counsel to assert a timely *Batson* challenge, the outcome of either phase of Petitioner's capital murder trial would have been any different, because there was no such failure. *See Green v. Georgia*, 882 F.3d 978, 987 (11th Cir. 2018) (counsel's failure to make a futile objection did not prejudice defendant within the meaning of *Strickland*). Petitioner's bare assertion in his Rule 32 petition that the prosecution used two of its peremptory strikes against six of the black members of his jury venire was unaccompanied by

any other factual allegations suggesting a racially discriminatory motivation on the part of the prosecution during jury selection.

The state trial and appellate courts reasonably concluded Petitioner's conclusory complaint about the prosecution striking two unidentified black venire members failed to establish a *prima facie* case under *Batson*. More importantly, in so holding, the state trial court and state appellate court also reasonably concluded Petitioner's ineffective assistance complaint failed to satisfy the prejudice prong of the *Strickland* standard.

c. Conclusions

The state trial and state appellate courts' rejection on the merits during Petitioner's Rule 32 proceeding of Petitioner's conclusory ineffective assistance complaint about his trial counsel's failure to raise a timely *Batson* objection was neither contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial and Rule 32 proceedings.

5. *De Novo* Review of New Factual Allegations

In his federal habeas corpus petition, for the very first time, Petitioner argues additional facts he failed to present to the state courts in support of his complaint about his trial counsel's failure to raise a timely *Batson* challenge. Specifically,

Petitioner alleges that (1) two venire members the prosecution struck peremptorily were black males who had demographic characteristics (age and occupation) similar to three unidentified white male venire members against whom the prosecution did not exercise peremptory strikes, (2) these three unidentified white males later served on Petitioner's jury,[310] and (3) these facts demonstrate a *prima facie* case of purposeful discrimination.[311] As another verse of the same song, Petitioner offers not a clue as to which three of these white males had the same or similar characteristics as the two black males struck by the state. As explained above, after the state trial court reviewed and ruled on all requests for excuses and the parties' challenges for cause, the percentage of black venire members remaining on Petitioner's jury venire was about eleven percent (6/54). This percentage was significantly less than the twenty-five percent (3/12) of the jury at Petitioner's trial that was black. No rational inference can be drawn that the record now before this court to show the prosecution's actions during voir dire and jury selection evidenced a desire to discriminate against the black members of Petitioner's jury venire.

[310] As explained above, Petitioner's jury consisted of seven white males, two white females, and three black females. Petitioner offers this court no clue as to which three white male members of his jury he claims had similar demographic characteristics to the two black male venire members the prosecution struck with peremptory challenges.

[311] Doc. # 1, at p. 20, ⁋⁋ 62-63.

For reasons similar to those discussed at length above in Section V.J.4.a., after *de novo* review, even in light of Petitioner's new factual allegations, it was objectively reasonable for Petitioner's trial counsel not to raise a *Batson* challenge to the prosecution's use of two of its twenty-one available peremptory strikes against black members of the Petitioner's jury venire.[312]

Petitioner's conclusory allegations of alleged similarities between the demographic characteristics of three unidentified white members of his jury and the two black members of the jury venire whom the prosecution struck peremptorily might arguably have had some relevance to the third step in the *Batson* analysis, *i.e.*, determining the credibility of a prosecutor's proffered race-neutral justification for exercising a peremptory strike against a particular venire member. But a prima facie case has to be made first and here, there is none.

Upon *de novo* review, there is no reasonable probability that, but for the failure of Petitioner's trial counsel to raise a timely *Batson* challenge, the outcome of either phase of Petitioner's capital murder trial would have been any different. As

[312] The list of venire members that follows the parties' strike lists at 6 SCR 686-89 indicate the race of the venire members. This list contains the birthdate and race of each venire member but is blank with regard to their occupations. Initially, the trial court reviewed requests by venire members to be excused and screened the entire jury venire for individuals who had personal knowledge of the circumstances of Petitioner's offense or who personally knew the victim, the Petitioner, or any of the potential trial witnesses and who might, therefore, have a disqualifying bias. S.F. Trial, 6 SCR 254-92. The trial judge then instructed the remaining venire members to identify themselves by stating their name, place of residence, and occupation and their marital status, their spouse's name, their spouse's occupation. S.F. Trial, 6 SCR 299-316; 7 SCR 317.

were true of Petitioner's factual allegations in his Rule 32 petition, Petitioner has failed to allege any specific facts in this court showing a reasonable probability that, even if Petitioner's trial counsel had raised a timely *Batson* challenge, Petitioner's trial counsel could have established a *prima facie* case of racial discrimination by the prosecution in the use of peremptory challenges. Under these circumstances, Petitioner's cryptic new factual allegations in his federal habeas corpus petition supporting his complaint about his trial counsel's failure to assert a timely *Batson* challenge fail to satisfy either prong of the *Strickland* standard. Paragraphs 58 through 63 of Petitioner's federal habeas corpus petition do not warrant federal habeas corpus relief and potentially violate *Rule 11(b)(1), (b)(2), & (b)(3), Fed.R.Civ.P.*

K. Failure to Timely Raise *J.E.B.* Objection

1. The Complaint

Petitioner argues in paragraphs 64 through 67 of his federal habeas corpus petition that his trial counsel should have raised a timely objection pursuant to the Supreme Court's holding in *J.E.B. v. Alabama*, 511 U. S. 127 (1994), to the prosecutor's exercise of sixteen of the prosecution's peremptory challenges against female members of the jury venire.[313]

[313] Doc. # 1, at pp. 21-22, ¶¶ 64-67.

2. State Court Disposition

Petitioner argued in his Rule 32 petition that his trial counsel rendered ineffective assistance by failing to object to the prosecution's gender discrimination in its use of peremptory challenges, and failing to argue the prosecution's use of sixteen of its twenty-one (and twelve of its first thirteen) peremptory challenges against women constituted a *prima facie* case of gender discrimination.[314] The state trial court summarily dismissed this ineffective assistance complaint in its Order issued January 6, 2003, concluding Petitioner had failed to allege sufficient facts to make out a *prima facie* case of gender discrimination by the prosecution.[315] On appeal from the denial of Petitioner's Rule 32 petition, the Alabama Court of Criminal Appeals agreed, holding Petitioner's recitation of mere statistics reflecting the number of female jury venire members peremptorily struck by the prosecution, without more, failed to establish a *prima facie* case of gender discrimination.[316]

3. Clearly Established Federal Law

In *J.E.B. v. Alabama*, a case arising from an Alabama paternity and child support lawsuit, the Supreme Court extended its holding in *Batson* to forbid gender

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[314] 15 SCR 12-13. Later in his Rule 32 petition, the Petitioner also argued a cryptic claim asserting a substantive violation of his rights under the Supreme Court's holding in *J.E.B. v. Alabama*, 511 U. S. 127 (1994). 15 SCR 35.

[315] 15 SCR 161; 23 SCR (Tab R-56), at p. 15.

[316] 23 SCR (Tab R-58), at pp. 12-14.

discrimination in the exercise of peremptory challenges by a state actor. *See J.E.B. v. Alabama*, 511 U. S. at 130-31 ("Intentional discrimination on the basis of gender by state actors violates the Equal Protection Clause, particularly where, as here, the discrimination serves to ratify and perpetuate invidious, archaic, and overbroad stereotypes about the relative abilities of men and women.").

> Discrimination in jury selection, whether based on race or on gender, causes harm to the litigants, the community, and the individual jurors who are wrongfully excluded from participation in the judicial process. The litigants are harmed by the risk that the prejudice that motivated the discriminatory selection of the jury will infect the entire proceedings. The community is harmed by the State's participation in the perpetuation of invidious group stereotypes and the inevitable loss of confidence in our judicial system that state-sanctioned discrimination in the courtroom engenders.

J.E.B. v. Alabama, 511 U. S. at 139 (citation omitted). "As with race-based *Batson* claims, a party alleging gender discrimination must make a prima facie showing of intentional discrimination before the party exercising the challenge is required to explain the basis for the strike." *Id.*, 511 U. S. at 144-45.

4. AEDPA Review of Claim Fairly Presented in Rule 32 Petition

A party making a *J.E.B.* challenge bears the burden of proving a *prima facie* case of gender discrimination by showing that the totality of the relevant facts gives rise to an inference of discriminatory purpose. *Trawick v. Allen*, 520 F.3d 1264, 1266 (11th Cir.), *cert. denied*, 555 U. S. 1033 (2008). When a federal habeas petition asserts a claim of ineffective assistance of counsel, AEDPA review is "doubly

deferential," because counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *Woods v. Etherton*, 136 S. Ct. 1149, 1151 (2016); *Burt v. Titlow*, 571 U. S. 12, 22 (2013) (quoting *Strickland v. Washington*, 466 U. S. at 690).

a. No Deficient Performance

For reasons similar to those discussed in detail above in Section V.J.4.a., Petitioner's trial counsel could have reasonably concluded that a timely objection to alleged prosecutorial gender discrimination in connection with the use of peremptory challenges would be a futile act. Petitioner did not allege any facts in his Rule 32 petition showing (1) a suspicious pattern of prosecution strikes against female members of the jury venire,[317] (2) the prosecution treated female members of the

[317] While the prosecutor did exercise sixteen of the prosecution's twenty-one peremptory challenges against female members of Petitioner's jury venire (venire members 48, 61, 89, 92, 103, 112, 113, 116, 155, 172, 173, 174, 197, 205, 210, 212), the prosecution also peremptorily struck two black males (venire members 72, 134), and three white males (venire members 128, 149, 168). The prosecution did not exercise peremptory challenges against any of the three black females who served on Petitioner's jury (venire members 139, 170, 206), the two white females who served on Petitioner's jury (venire members 185, 195), or the eight white females peremptorily stricken by the defense (venire members 54, 77, 85, 87, 90, 114, 179, 203). Thus, while the prosecution used sixteen of its twenty-one peremptory challenges to strike female members of the jury venire, the prosecution failed to exercise peremptory challenges against thirteen other female members of the jury venire, including three black females and two white females who eventually served as jurors at Petitioner's capital murder trial.

Moreover, the victim of Petitioner's capital offense was a white female. The only female venire members the prosecution peremptorily struck were also white females. Petitioner's trial counsel could reasonably have concluded that, for the prosecution to strike female venire members simply *because* they were female would have been counterintuitive. Petitioner's trial counsel could reasonably have believed the prosecution would expect female jurors to be more empathetic and sympathetic to the plight of a female victim murdered by a male assailant than male jurors. Petitioner's trial counsel could reasonably have anticipated the trial judge would be skeptical of a defense complaint of alleged prosecutorial gender discrimination against female venire members

jury venire differently from male members of the venire during voir dire questioning,[318] (3) Petitioner's offense was gender sensitive,[319] or (4) there was any

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(*i.e.*, the prosecution's use of peremptory challenges to strike white female venire members) in a criminal murder case in which the victim was a white female. Petitioner's trial counsel could reasonably have concluded the foregoing statistics would be insufficient, standing alone and in light of the circumstances of Petitioner's trial, to establish a *prima facie* case of gender discrimination by the prosecution.

[318] As was true for the prosecution's questioning of black members of petitioner's jury venire, this court independently reviewed the record from Petitioner's voir dire proceedings and finds no evidence of any difference in the way the prosecution questioned female, as opposed to male, members of the jury venire. Likewise, as explained above, the prosecution (1) directed the vast majority of its questions to panels or subgroups of the panels of the jury venire, not to individual members of each twelve-person panel examined by the trial court, prosecution, and defense counsel and (2) the vast majority of questions the prosecution asked addressed the venire members addressed their views on the death penalty, their familiarity with the facts of the Petitioner's case, or their familiarity with potential trial witnesses. 7 SCR 365-490. This court was unable to discern even a single instance in which the prosecution questioned any female venire member differently than the way the prosecution questioned male venire members about the same or similar subjects.

Petitioner did not allege any facts in his Rule 32 petition suggesting the prosecutor questioned female members of the jury venire any differently than the prosecutor questioned other members of the jury venire. Nor did Petitioner allege any facts showing the prosecution failed to direct questions to female members of the jury venire whom the prosecution later struck peremptorily. On the contrary, the manner in which the trial judge structured voir dire and the manner in which the prosecutor questioned the panels of venire members belies any contention the prosecution engaged in discriminatory questioning of the venire. In most cases, the prosecutor's questions were addressed to the entire panel of twelve venire members or to subgroups of each panel that included multiple venire members of both genders. Thus, there was very little opportunity for discriminatory questioning during voir dire at Petitioner's capital murder trial.

[319] While Petitioner is a male and his victim was female, Petitioner alleged no facts in his Rule 32 petition suggesting Petitioner chose his victim based upon her gender or that there was any gender-based animus displayed by either Petitioner or his victim during the brief time they were in contact prior to the fatal shooting. Neither Petitioner nor Julie Rhodes were alleged by any witness to have made any sexist or gender-insensitive remarks in each other's presence. On the contrary, prosecution witness Garrison testified without contradiction at trial that (1) Petitioner stated that he was willing to shot someone to get a car to drive back to Guntersville and (2) he preferred to shoot only one person, rather than two. S.F. Trial, testimony of Jonathan David Garrison, 11 SCR 1267-69. The testimony at Petitioner's capital murder trial also showed Petitioner and his companions received a ride from (but did not attempt to rob) a pair of individuals shortly before getting a ride from Julie Rhodes. *Id.*, testimony of Jonathan David Garrison, 11 SCR 1267; testimony of Kelli Simpson, 9 SCR 866-72; testimony of Jason Sims, 9 SCR 872-77.

evidence the same district attorney's office that prosecuted Petitioner had a history of gender discrimination during jury selection. The state trial court and state appellate court both reasonably concluded Petitioner's complaint about his trial counsel's failure to raise a timely *J.E.B.* challenge to the prosecution's use of sixteen peremptory challenges to strike female members of the Petitioner's jury venire did not rise to the level of objectively unreasonable representation. *See United States v. Hill*, 643 F.3d at 838-40 (holding a *prima facie Batson* claim must be supported by something more than statistics; it must also be premised on facts showing a reasonable inference of racial discrimination in the use of peremptory challenges).

Examination of the matters identified by the Eleventh Circuit in *United States v. Ochoa-Vasquez*, discussed above, is far from compelling. Five females actually served on Petitioner's jury, including three black females. The prosecution used sixteen of its twenty-one peremptory strikes against female members of Petitioner's jury venire but did not strike any of the five female jury venire members who later served on Petitioner's jury (*i.e.*, venire members 139, 170, 185, 195, 206) or any of the eight female members of the jury venire peremptorily struck by the defense (*i.e.*, venire members 54, 77, 85, 87, 90, 114, 179, 203). The percentage of females on

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Thus, it was reasonable for the jury and trial court to infer that the reason Petitioner chose to rob Julie Rhodes was not that she was female but the fact she happened to be alone in her vehicle when she agreed to give Petitioner and his companions a ride. Petitioner alleged no facts in his Rule 32 petition suggesting his fatal shooting of Julie Rhodes was in any way a product of any gender animus or otherwise related to Julie Rhodes's gender.

Petitioner's jury venire (29/54 or about 54%) was higher than the percentage of females on Petitioner's jury (5/12 or about 43%) but not significantly so. Sixty nine percent of the total peremptory strikes used by both parties (29/42) removed female members of the jury venire and only forty-three percent of the Petitioner's jury (5/12) was female. Ultimately, however, Petitioner's jury was only one female shy of being equally balanced between male and female. More importantly, Petitioner alleged no facts in his Rule 32 petition suggesting there was any basis other than statistics to urge a claim of gender discrimination by the prosecution during jury selection. Statistical evidence is merely one factor which the court examines in evaluating a *Batson* claim and it is not necessarily dispositive. *Cochran v. Herring*, 43 F.3d 1404, 1412 (11th Cir. 1995), *modified on denial of rehearing*, 61 F.3d 20 (11th Cir. 1995), *cert. denied*, 516 U. S. 1073 (1996).

The state courts reasonably concluded Petitioner's trial counsel could have believed a timely *J.E.B.* challenge based solely upon statistical information would be insufficient to establish a *prima facie* case of gender discrimination by the prosecution in jury selection. Counsel are not required to undertake actions they reasonably believe would be futile. *See Knowles v. Mirzayance*, 556 U. S. at 125 (defense counsel is not required to assert a defense he is almost certain will lose); *Pinkney v. Sec'y, DOC*, 876 F.3d at 1297 ("an attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have

gotten his client any relief"); *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d at 1299 (holding "a lawyer is not ineffective for failing to raise a meritless argument"); *United States v. Curbelo*, 726 F.3d at 1267 ("it goes without saying that counsel is not ineffective for failing to file a meritless suppression motion"). The state trial and appellate courts reasonably concluded Petitioner's complaint about his trial counsel's failure to assert a timely *J.E.B.* objection to the prosecution's use of its peremptory challenges to strike female members of the jury venire failed to satisfy the deficient performance prong of the *Strickland* standard.

b. No Prejudice

For reasons similar to those discussed above in Section V.J.3.b., the state trial court and state appellate court reasonably concluded the Petitioner's complaint about his trial counsel's failure to assert a timely *J.E.B.* objection to the prosecution's use of peremptory challenges to strike female members of Petitioner's jury venire failed to satisfy the prejudice prong of the *Strickland* standard. In his Rule 32 proceeding Petitioner presented the state trial court and state appellate court with no facts to support his *J.E.B.*-based ineffective assistance complaint, beyond the number of female venire members peremptorily struck by the prosecution. As explained above, purely statistical arguments complaining a party's use of peremptory challenges disproportionately impacted venire members of one race or gender are problematic, at best. The state trial court and state appellate court reasonably concluded there

was no reasonable probability that, but for the failure of Petitioner's trial counsel to make a timely *J.E.B.* objection to the prosecution's use of its peremptory strikes to remove sixteen white females (the same race and gender as Julie Rhodes) from the jury pool, the outcome of either phase of Petitioner's capital murder trial would have been any different.

c. Conclusions

The state trial and state appellate courts' rejection on the merits during Petitioner's Rule 32 proceeding of Petitioner's conclusory ineffective assistance complaint about his trial counsel's failure to raise a timely *J.E.B.* objection was neither contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial and Rule 32 proceedings.

5. *De Novo* Review of New Factual Allegations

In his federal habeas corpus petition, for the very first time Petitioner argues additional facts he failed to present to the state courts in support of his complaint about his trial counsel's failure to raise a timely *J.E.B.* objection. More specifically, Petitioner alleges (1) the prosecution used 76% (16/21) of its peremptory challenges against female members of the jury venire, (2) most of the female venire members struck by the prosecution were demographically indistinguishable (except for their

gender) from the men in the jury venire, (3) four of the female venire members struck by the prosecution worked or had worked for the same employer as eleven of the men in the jury venire,[320] and (4) four of the women struck by the prosecution gave answers during voir dire suggesting that they would be inclined to impose the death penalty if they determined a defendant committed an intentional killing.[321] The last three of these conclusory allegations may have had relevance to the third prong of *Batson/J.E.B.* analysis but offer little of substance in support of a *prima facie* case.

For very practical reasons, even under a *de novo* standard of review, this court's evaluation of the performance of Petitioner's trial counsel must be deferential. Like the trial judge, Petitioner's trial counsel had the opportunity to observe first-hand the demeanor exhibited by the prosecutor while he questioned Petitioner's jury venire and to see how the prosecutor interacted with both female and male members of the jury venire during jury selection. This court's review of the dry record from Petitioner's voir dire furnishes little guidance as to the many subtle nuances of interpersonal communication, such as the prosecutor's facial

[320] Petitioner does not identify which four of the sixteen female venire members struck by the prosecution he claims worked for the same employer as eleven of the men in the jury venire. Nor does Petitioner allege any specific facts showing whether the prosecution exercised peremptory strikes against any of those eleven unidentified male members of the jury venire.

[321] Petitioner does not identify which four of the sixteen female venire members struck by the prosecution he claims gave answers during voir dire suggesting they would be inclined to impose a death sentence if they concluded a defendant committed an intentional killing.

expression, body language, and tone of voice, to which Petitioner's trial counsel was a witness. Thus, in evaluating the objective reasonableness of the decision by Petitioner's trial counsel not to raise a timely *J.E.B.* objection, this court must indulge a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Woods v. Daniel*, 135 S. Ct. 1372, 1375 (2015) (quoting *Strickland v. Washington*, 466 U. S. at 689). The burden to show counsel's performance was deficient rests squarely on the Petitioner. *Burt v. Titlow*, 571 U. S. 12, 22-23 (2013) (citing *Strickland v. Washington*, 466 U. S. at 687).

The prosecution used sixteen of its twenty-one peremptory strikes to remove approximately fifty-five percent (16/29) of the female venire members. Still, five women served as jurors at Petitioner's capital murder trial. The unchallenged presence of jurors of a particular gender on a jury substantially weakens the basis for a *prima facie* case of discrimination in the peremptory striking of jurors of that gender. *Trawick v. Allen*, 520 F.3d at 1269; *Central Alabama Fair Housing Center, Inc. v. Lowder Realty Co., Inc.*, 236 F.3d 629, 638 (11th Cir. 2000). While the ultimate composition of the jury does not nullify the possibility of gender discrimination, it is a significant factor in the highly deferential review federal appellate courts afford federal district courts that have addressed Equal Protection challenges to the use of peremptory challenges. *United States v. Tokars*, 95 F.3d 1520, 1534 (11th Cir. 1996), *cert. denied*, 520 U. S. 1151 (1997).

Petitioner has alleged no facts suggesting the prosecution questioned female members of the jury venire in a manner different from the way the prosecution questioned males on the jury venire. Nor has Petitioner alleged any facts showing a history of racial or gender discrimination within the office of the district attorney that prosecuted Petitioner. Petitioner's jury was only one female shy of being equally balanced between men and women. The difference between the percentage of women on Petitioner's jury venire (54%) and the percentage of women on Petitioner's jury (43%) was not a substantial disparity. Not every petit jury will identically reflect the gender composition of the jury venire from which it was selected. All sixteen of the prosecution's peremptory challenges against female members of Petitioner's jury venire removed potential jurors who shared their gender and race with the victim of Petitioner's capital offense.

For the foregoing reasons, as well as the reasons set forth above in Section V.K.4., this court independently concludes after *de novo* review that Petitioner's ineffective assistance complaint about his trial counsel's failure to assert a timely *J.E.B.* objection fails to satisfy either prong of the *Strickland* standard. Petitioner's trial counsel could have reasonably concluded a timely *J.E.B.* objection supported by only the conclusory facts contained in Petitioner's federal habeas corpus petition was unlikely to prevail or even satisfy the requirements for a *prima facie* showing of discriminatory intent by the prosecution. There was nothing objectively

unreasonable with the decision by Petitioner's trial counsel not to raise a timely *J.E.B.* objection. Furthermore, this court concludes there is no reasonable probability that, but for the failure of Petitioner's trial counsel to make a timely *J.E.B.* objection, the outcome of either phase of Petitioner's capital murder trial would have been any different.

Petitioner's additional factual allegations in his federal habeas corpus petition do not warrant a different result than that reached by the state trial and appellate courts that reviewed Petitioner's abridged version of this same ineffective assistance claim in the course of Petitioner's Rule 32 proceeding. Paragraphs 64 through 67 of Petitioner's federal habeas corpus petition do not warrant federal habeas corpus relief.

L. Failure to Raise Fair Cross-Section Challenge to Jury Venire

1. The Complaint

Petitioner argues in paragraphs 68 through 69 of his federal habeas corpus petition that his jury venire failed to adequately represent a "fair cross-section of the community," *i.e.*, that the fifty-four venire members remaining after the trial court granted the venire members' requests for excuses from jury service and ruled on the

parties' challenges for cause "did not reflect the demographic realities of Tallapoosa County."[322]

2. State Court Disposition

Petitioner argued in his Rule 32 petition that his trial counsel rendered ineffective assistance by failing to (1) challenge the racial composition of the 54-member jury pool from which his petit jury was selected (11% black) as under-representative of the black population of Tallapoosa County (36% black) and (2) move the trial court to examine the jury selection process to determine if there existed a *prima facie* case for race discrimination in the Tallapoosa County jury pool selection process.[323] The state trial court summarily dismissed his ineffective assistance complaint in its Order issued January 6, 2003 because Petitioner's trial counsel could reasonably have concluded that attacking the system used in Tallapoosa County to randomly draw potential jurors from State driver's license lists would likely be futile, and Petitioner failed to allege specific facts sufficient to support a finding of a violation of the constitutional right to have his jury selected from a fair cross-section of the community or a violation of Petitioner's Equal Protection rights.[324] On appeal from the denial of Petitioner's Rule 32 petition,

[322] Doc. # 1, at p. 22, ⁋⁋ 68-69.

[323] 15 SCR 10-12.

[324] 15 SCR 158-59; 23 SCR (Tab R-56), at pp. 158-59.

Petitioner once more relied exclusively on the disparity between the percentage of the black population of Tallapoosa County (alleged to be 36%) and the percentage of black venire members (6/54 or about 11%) in the jury venire from which his petit jury was selected (after the trial court ruled on requests by potential jurors to be excused).[325] The Alabama Court of Criminal Appeals upheld the state trial court's summary dismissal of this ineffective assistance complaint, holding Petitioner failed to allege any facts showing a systemic under-representation of blacks on Tallapoosa County jury pools generally, or a violation of either his Sixth Amendment right to have his jury selected from a fair cross-section of the community or his Equal Protection rights.[326]

3. Clearly Established Federal Law

"The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the community." *Berghuis v. Smith*, 559 U. S. 314, 319 (2010) (citing *Taylor v. Louisiana*, 419 U. S. 522, 527-28 (1974)). To make out a *prima facie* violation of the Sixth Amendment's fair cross-section requirement, a criminal defendant must show that (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which the juries are

[325] 20 SCR (Tab R-46), at pp. 74-75.

[326] 22 SCR (Attachment B to Tab R-51), at pp. 14-17; 23 SCR (Tab R-58), at pp. 14-17.

selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this under-representation is due to systematic exclusion of the group in the jury-selection process. *Berghuis v. Smith*, 559 U. S. at 319 (citing *Duren v. Missouri*, 439 U. S. 357, 364 (1979).[327]

The Supreme Court has also long held that the Equal Protection Clause of the Fourteenth Amendment prohibits racial discrimination by the State in jury selection. *Miller-El v. Dretke*, 545 U. S. 231, 238 (2005); *Strauder v. West Virginia*, 100 U. S. 303, 308-09 (1880). In order to establish a *prima facie* case for an equal protection violation in the context of jury selection, the defendant must show (1) an identifiable group constituting a recognizable, distinct class, has been singled out for different

[327] Contrary to Petitioner's arguments in his federal habeas corpus petition, this analysis necessarily applies to the composition of the entire jury pool from which a jury is drawn (*i.e.*,, the qualified jury wheel), not to the composition of a particular jury venire *after* requests for discharge, deferral, or other grounds for disqualification have been addressed by the trial court. *See, e.g.*, *United States v. Carmichael*, 560 F.3d 1270, 1280 (11th Cir. 2009) ("The percentage of the distinct group of the population in the appropriately challenged portion of the jury selection process was, in this case, the percentage of African Americans summoned from the 2001 wheel."), *cert. denied*, 558 U. S. 1128 (2010); *United States v. Grisham*, 63 F.3d 1074, 1078-79 (11th Cir. 1995) (holding that, to examine the second element of a fair cross-section claim, the court must compare the difference between the percentage of the distinctive group among the population eligible for jury service and the percentage of the distinctive group on the qualified jury wheel), *cert. denied*, 516 U. S. 1084 (1996); *United States v. Rodriguez*, 776 F.2d 1509, 1511 (11th Cir. 1985) ("Assessing the fairness and reasonableness of a group's representation requires a comparison between the percentage of the 'distinctive group' on the qualified jury wheel and the percentage of the group among the population eligible for jury service in the division."); *United States v. Tuttle*, 729 F.2d 1325, 1327 (11th Cir. 1984) (comparing the percentage of blacks in the general population of those counties comprising the Atlanta division of the northern district of Georgia with the percentage of blacks on the master wheel of jurors for that division), *cert. denied*, 469 U. S. 1192 (1985).

treatment under the laws, as written or as applied; (2) the group has been substantially under-represented on jury venires over a significant period of time; and (3) there has been purposeful discrimination against the under-represented group, which is established by a showing that the selection procedure for jurors is susceptible of abuse or not racially neutral. *Castaneda v. Partida*, 430 U. S. 482, 494 (1977).

4. AEDPA Review

The state trial court and state appellate court both reasonably concluded Petitioner's ineffective assistance claim failed to satisfy either prong of the *Strickland* standard. Both state courts correctly ruled that Petitioner alleged no facts showing that there has ever been under-representation of black venire members in Tallapoosa County in any case other than his own, any systematic exclusion of black citizens from Tallapoosa County jury venires was responsible for the under-representation of black citizens on his jury venire, or the system employed in Tallapoosa County to draw potential jurors into jury pools was not race-neutral or was susceptible to abuse as a tool of discrimination. *See United States v. Davis*, 854 F.3d 1276, 1295-96 (11th Cir.) (recognizing the *prima facie* tests for fair cross-section and equal protection claims are "virtually identical," and holding, in the context of jury selection, that a fair cross-section claim must be supported by a showing of systemic exclusion of the under-represented group, and an equal

protection claim must be supported by a showing the jury venire was selected under a practice providing an opportunity for discrimination), *cert. denied*, 138 S. Ct. 379 (2017). Petitioner alleged no facts before the state courts in his Rule 32 proceeding showing the under-representation of black citizens on his jury venire was the product of systemic exclusion of black citizens from Tallapoosa County jury venires, or the system employed in Tallapoosa County to select potential jurors for jury pools was either susceptible to abuse as a tool of discrimination or otherwise not race-neutral.

Petitioner also failed to allege any specific facts showing there has ever been any under-representation of black citizens on Tallapoosa County jury venires other than his own. Thus, Petitioner failed to allege any facts in his Rule 32 proceeding showing there has been a substantial under-representation of black citizens on Tallapoosa County jury wheels over a significant period of time. *See Castaneda v. Partida*, 430 U. S. at 494-95 (evidence showed significant under-representation of Mexican-Americans on jury venires over an eleven-year period). Where a defendant relies exclusively on under-representation of an identifiable group on his own jury venire, the defendant must also identify something about the jury selection wheel that was subject to abuse.[328] Petitioner alleged no facts in his Rule 32 proceeding

[328] The Supreme Court's holdings in *Batson*, *J.E.B.*, and their progeny effectively circumscribe the discretion of prosecutors and defense counsel with regard to how they employ their peremptory challenges. The use of peremptory challenges in a manner that is either racially or gender discriminatory is no longer allowed by any party, period.

suggesting Tallapoosa County's method for selecting potential jurors (identified by the state trial court as random selection from the State's driver's license list) was in any way susceptible to abuse in furtherance of discrimination.

Finally, Petitioner alleged no facts showing there was anything erroneous or discriminatory (much less systemically exclusionary) in the way the state trial court ruled on the requests by members of Petitioner's 215-member initial jury venire to be excused from jury service or in the way the trial court ruled on the parties' respective challenges for cause. Under those circumstances, the proper focus of any fair cross-section or equal protection challenge to Petitioner's jury venire should have been on the entire jury pool of 215 venire members called to serve as potential jurors at Petitioner's trial (the qualified jury wheel), not just the 54 venire members who remained after the exercise of challenges for cause and the trial court's rulings on requests to be excused.[329] Petitioner alleged no facts showing any under-representation of any identifiable group existed within the 215-member jury wheel prior to the trial court's rulings on the potential jurors' requests to be excused or the parties' challenges for cause.

Petitioner's trial counsel could reasonably have concluded that there was no basis for arguing that a substantial under-representation of black citizens on jury

[329] *See* note 327.

venires had taken place in Tallapoosa County over a significant period of time; that there was nothing about Tallapoosa County's system for calling potential jurors that was subject to abuse or discriminatory manipulation; and that there had been no systemic exclusion of black citizens from Tallapoosa County jury venires. Likewise, the state trial court and state appellate court reasonably concluded during Petitioner's Rule 32 proceeding that Petitioner had failed to allege any facts showing a reasonable probability that, but for Petitioner's trial counsel's failure to assert fair cross-section or equal protection challenges to the composition of Petitioner's jury venire, the outcome of either phase of Petitioner's capital murder trial would have been any different. Simply put, the state trial and appellate courts both reasonably concluded any fair cross-section or equal protection challenge to the racial composition of Petitioner's jury venire would be futile. *See Green v. Georgia*, 882 F.3d at 987 (counsel's failure to raise futile challenge to state criminal statute did not prejudice the defendant). Accordingly, the state trial and appellate courts reasonably concluded Petitioner's complaints about his trial counsel's failure to assert fair cross-section or equal protection challenges to the composition of Petitioner's jury venire failed to satisfy either prong of the *Strickland* standard.

5. Conclusions

The state trial and state appellate courts' rejection on the merits during Petitioner's Rule 32 proceeding of Petitioner's ineffective assistance complaint

about his trial counsel's failure to raise fair-cross-section and equal protection challenges to the racial composition of Petitioner's jury venire was not contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial and Rule 32 proceedings. Paragraphs 68-69 of Petitioner's federal habeas corpus petition do not warrant federal habeas relief.

M. Failure to Object to Prosecutorial Jury Argument at Punishment Phase

1. The Complaint

Petitioner argues in paragraphs 70 through 73 of his federal habeas corpus petition that his trial counsel rendered ineffective assistance by failing to present any mitigating evidence at the punishment phase of trial other than Petitioner's birth certificate, arguing that Petitioner's age (18) at the time of the capital offense was a mitigating circumstance (thereby inviting the prosecution to reply by pointing out Julie Rhodes was only nineteen years old when she was murdered), failing to object when the prosecution argued in reply that, while Petitioner was only eighteen and facing, at best, the prospect of a sentence of life without parole, Julie Rhodes was

only nineteen years old when she died and had no chance to live beyond that age, and failing to object to the prosecution's argument calling Petitioner "a bad guy."[330]

2. State Court Disposition

As explained at length above in Section V.G.3.b., Petitioner's trial counsel pointed to an enlarged copy of Petitioner's birth certificate and argued at the punishment phase of trial that the jury should consider Petitioner's relative youth (age eighteen at the time of his crime) as a mitigating factors when weighing the mitigating and aggravating factors and making its sentencing recommendation (which he urged should be life without parole).[331] In response, the prosecution began his rebuttal argument as follows:

> There's a certificate for Julie on file now, too, and it is a death certificate. Barksdale is eighteen and best he's looking at, as Mr. Goggans said, is life without patrol [sic]. Julie was nineteen and she's left with no life at all.[332]

Petitioner complained in his Rule 32 petition about his trial counsel's failure to object when the prosecution noted, in response to Petitioner's closing argument, that Julie Rhodes was only nineteen when she was murdered.[333] The state trial court

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[330] Doc. # 1, at pp. 22-23, ⁋⁋ 70-73.

[331] The full text of Petitioner's trial counsel's closing punishment phase jury argument appears at S.F. Trial, 12 SCR 1430-33.

[332] S.F. Trial, 12 SCR 1433.

[333] 15 SCR 29-30.

summarily dismissed this ineffective assistance claim in its Order issued January 6, 2003, concluding the prosecutor's argument noting Julie Rhodes's age was a proper rebuttal to the defense's argument concerning Petitioner's age.[334] On appeal from the denial of Petitioner's Rule 32 petition, the Alabama Court of Criminal Appeals held that the failure of Petitioner's trial counsel to object to the prosecution's argument did not prejudice Petitioner because the comments were not so prejudicial as to warrant a reversal.[335]

Petitioner also complained in his Rule 32 petition about his trial counsel's failure to object when the prosecution allegedly "mocked" Petitioner and "essentially fabricated evidence" by suggesting Petitioner was a "bad guy."[336] The state trial court summarily dismissed this complaint in its Order issued January 6, 2003, concluding this complaint of ineffective assistance lacked merit because the prosecutor's jury argument consisted of permissible inferences from the evidence.[337] The Alabama Court of Criminal Appeals subsequently held the prosecutor's remarks

[334] 15 SCR 177-78; 23 SCR (Tab R-56), at pp. 31-32.

[335] 22 SCR (Attachment B to Tab R-51), at pp. 26-29; 23 SCR (Tab R-58), at pp. 26-29.

[336] 15 SCR 30-31.

[337] 15 SCR 179-80; 23 SCR (Tab R-56), at pp. 33-34.

in question were wholly proper summations of the evidence or inferences reasonably drawn from the evidence and not subject to objection under state law.[338]

3. Clearly Established Federal Law

As explained at length above in Section IV.I.3., both Alabama and federal courts generally recognize four areas of jury argument as proper: (1) summation of the evidence; (2) inferences reasonably drawn from the evidence; (3) replies or answers to opposing counsel's argument; and (4) pleas for law enforcement and justice.

4. AEDPA Review of Claims Fairly Presented in Rule 32 Petition

a. Comparing Julie's Age With Petitioner's

The state trial and appellate courts reasonably concluded the decision by Petitioner's trial counsel not to object to the prosecution's rebuttal argument that Julie Rhodes was only nineteen at the time of her murder was objectively reasonable because the prosecution's rebuttal argument was proper under state law and did not prejudice Petitioner.[339] The state courts' conclusion that the prosecution's rebuttal argument was proper under state law binds this court's federal habeas corpus analysis. *See Bradshaw v. Richey*, 546 U.S. at 76 ("We have repeatedly held that a

[338] 22 SCR (Attachment B to Tab R-51), at pp. 23-26; 23 SCR (Tab R-58), at pp. 23-26.

[339] Alternatively, this court independently concludes after *de novo* review that this ineffective assistance complaint fails to satisfy either prong of the *Strickland* standard.

state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Loggins v. Thomas*, 654 F.3d at 1228 ("Alabama law is what the Alabama courts hold that it is.").

There was nothing objectively unreasonable in the decision by Petitioner's trial counsel not to object to the prosecution's rebuttal argument. Petitioner's trial counsel clearly invited this reply by emphasizing in his own punishment phase closing argument Petitioner's age at the time of the capital offense. The prosecution's rebuttal argument was a wholly appropriate response to Petitioner's trial counsel's closing punishment phase jury argument.

Likewise, the state appellate court reasonably concluded Petitioner was not "prejudiced" within the meaning of *Strickland* by the failure of Petitioner's trial counsel to object to the prosecution's rebuttal jury argument. The Alabama Court of Criminal Appeals' conclusion that the prosecution's rebuttal argument did not rise to the level of reversible error under state law also binds this federal habeas court. *Bradshaw v. Richey*, 546 U.S. at 76; *Loggins v. Thomas*, 654 F.3d at 1228. Because the prosecution's rebuttal argument did not constitute reversible error under applicable state law, the failure of Petitioner's trial counsel to object did not "prejudice" Petitioner within the meaning of the *Strickland* standard. *See Pinkney v. Sec'y, DOC*, 876 F.3d at 1297 ("an attorney will not be held to have performed

deficiently for failing to perform a futile act, one that would not have gotten his client any relief"); *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d at 1299 (holding "a lawyer is not ineffective for failing to raise a meritless argument").

The state trial and state appellate courts' rejection on the merits during Petitioner's Rule 32 proceeding of Petitioner's ineffective assistance complaint about his trial counsel's failure to object to the prosecution's rebuttal jury argument at the punishment phase of trial noting Julie Rhodes's age at the time of her murder (and comparing same to Petitioner's age) was neither contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial and Rule 32 proceedings. Paragraphs 70 through 73 of Petitioner's federal habeas corpus petition do not warrant federal habeas corpus relief.

b. Suggestion Petitioner was a "Bad Guy"

Petitioner also complained in his Rule 32 petition about his trial counsel's failure to object to the prosecution's jury argument suggesting the Petitioner carried and brandished a weapon and behaved in a manner intended to create the impression he was "a bad guy." Petitioner repeats this cryptic complaint in a footnote in his

federal habeas corpus petition.[340] The initial problem with this ineffective assistance complaint is that the complained of prosecutorial jury argument actually took place at the guilt-innocence phase of trial, not during the punishment phase of trial.[341] The

[340] Doc. # 1, at p. 23 n.3.

[341] During closing jury argument at the guilt-innocence phase of trial, after discussing the extensive testimony of multiple witnesses establishing the Petitioner's and his companions' desire to gain access to a car to return to Guntersville, the prosecution argued as follows, without objection:

> The point of all of that is this. It is clear, it is clear, I submit to you, crystal clear, it is clear beyond a reasonable doubt that their goal from the moment they became carless in Sylacauga was to get another car and get back to Guntersville. Now, I don't contend nor do I have to prove that from the moment they wrecked the car in Sylacauga he decided right then to rob somebody and go back to Guntersville. But, as the day wore on, Mr. Barksdale's situation became, in his mind, a little more earnest, a little more desperate, and he was willing to do whatever it took when it came down to it. And, you heard the statements of the various witnesses. With Lambert he goes to Gretchen Young's apartment over near the college, he askes several other people, looking for rides back to Guntersville.
>
> Now, in this whole time, and I think it is clear at this point, I might as well point it out now, that the leader of this trio from Guntersville is Tony Barksdale. That's clear from the evidence that Garrison and Hillburn [sic], these two guys, that had only known Barksdale a few days when this occurred, other people were involved in this case, in this is [sic] rogues gallery from Guntersville, that had known Hillburn [sic] and Garrison for years, some of them, but not him, not him, but for some reason get with him, and they are running around, up to no good on a Friday night, and they ended up here stranded, no place to go, no place to stay, no way home with a gun, a bad attitude, and two guys for his audience. They go right along with him. I'm bad guy. I'm bad guy. Yes. I drive around Alabama in the middle of the night in stolen cars. I wreck cars. I lie about whose car I have wrecked. I persuade people to take me hither and yon, all over everywhere, and I wear a nine millimeter semi-automatic weapon with two clips. The gun on one side, the clip on the other in a shoulder holster, shoulder holster, now. I'm a bad guy. And I'm playing with the weapon, and I'm showing this weapon, and I'm dropping the clips, and I am chambering rounds, and I'm putting the clip back in and I am wiping the weapon off, and I even wipe the bullets off. And, I show it to this person, and I point it at that person, and I can't wait to use it. I'm itching to use it. Now, isn't that clear from the evidence, ladies and gentlemen, that we have in this case. All of those factors coupled with a person, who, for whatever reason, harbors the willingness to do it and the kind of conscience, or lack of conscience, that permits him, when he crosses paths completely fortuitously, sadly, for Julie

state trial court and state appellate court both concluded the prosecutorial argument in question was wholly proper, as it constituted either a summation of the evidence or reasonable inferences drawn from the evidence. The state trial and appellate courts' conclusions that the prosecutor's jury arguments in question were proper under state law binds this federal habeas court. *Bradshaw v. Richey*, 546 U.S. at 76; *Loggins v. Thomas*, 654 F.3d at 1228.

Furthermore, having independently reviewed the entire record from the guilt-innocence phase of Petitioner's capital murder trial, the state trial court and state appellate court both reasonably concluded there was no legitimate basis for an objection to the prosecutorial argument in question. All of the prosecutorial jury argument identified by Petitioner in his Rule 32 petition as allegedly objectionable consisted of little more than either accurate summations of, or reasonable inferences drawn from, the evidence presented at the guilt innocence phase of Petitioner's capital murder trial. The state trial and appellate courts reasonably concluded that this ineffective assistance complaint failed to satisfy either prong of the *Strickland* standard. *See Pinkney v. Sec'y, DOC*, 876 F.3d at 1297 ("an attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief"); *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d

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> Rhodes, somebody like Julie Rhodes, and he pumps two slugs in her with no more thought than if he were swatting a fly.

S.F. Trial, 12 SCR 1336-37.

at 1299 (holding "a lawyer is not ineffective for failing to raise a meritless argument"). The evidence of Petitioner's guilt was overwhelming. The prosecutorial jury argument in question merely summarized or drew reasonable inferences from the extensive evidence of Petitioner's conduct on December 1, 1995 and the days that followed.

The state trial and state appellate courts' rejection on the merits during Petitioner's Rule 32 proceeding of Petitioner's ineffective assistance complaint about his trial counsel's failure to object to the prosecution's guilt-innocence phase jury argument suggesting Petitioner was "a bad guy" was neither contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial and Rule 32 proceedings. Paragraphs 70 through 73 of Petitioner's federal habeas corpus petition do not warrant federal habeas corpus relief.

5. *De Novo* Review of New Complaint

Petitioner argues in his federal habeas corpus petition for the first time that his trial counsel rendered ineffective assistance by emphasizing at the punishment phase of trial Petitioner's age as a mitigating circumstance: "Why he thought that such an

approach might win their sympathy when the victim was his nearly exact contemporary is not known."[342]

During Petitioner's Rule 32 hearing, attorney Goggans testified without contradiction that he believed Petitioner's youth was the biggest mitigating factor in Petitioner's favor and he argued in his closing punishment phase jury argument that the jury should consider Petitioner's youth and lack of life experience, and resulting lack of judgment, when recommending sentence.[343] Petitioner's trial counsel argued as follows at the punishment phase of trial:

> As you can see from this enlargement of this exhibit, Tony Barksdale was born on May 2, 1977. He was eighteen years when this happened. He was young. So was Julie Rhodes. She was young, too. Too young to die. No one should be murdered. It is even more tragic when it is someone that is young.
>
> Tony Barksdale's age is not an excuse. It is not an excuse. I'm not offering it to you as an excuse. But, what I am offering is that under the law, it is a mitigating factor for what you folks see as appropriate punishment: Death or life in prison without the possibility of parole.
>
> On the street sometimes the law doesn't protect us. We all know that. But inside the bar here, inside this bar, the law rules. Inside that bar the protection of the law must be applied. For an ordered society the laws must be applied equally to everyone regardless of race, color, creed, national origin, or age. The law must be applied to everyone.
>
> Now, I urge you to consider all the things that Mr. Clark suggested you consider also. But, I also ask you to also consider this right here on May 2, 1977. Tony Barksdale is only eighteen years old. He is only nineteen as he sits here right now. Now at the age of forty-one -- at the age of eighteen, I was thinking I had control of the whole world. I knew everything. But when you hit forty-one, and you have

[342] Doc. # 1, at pp. 22-23, ¶ 71.

[343] S.F. Rule 32 Hearing, testimony of Tommy Goggans, 17 SCR 108-09, 136-37.

> had some more experience, you kind of wish you had half the judgment and sense that you thought you had back then. And I ask you to consider this under the law, which is under the law, a mitigating circumstance in this case. It is not an excuse in this case, but it is a factor, a strong factor, which indicates that the appropriate punishment is life without the possibility of parole.[344]

Having independently reviewed the entire record from Petitioner's capital murder trial, it was objectively reasonable for Petitioner's trial counsel to present evidence of Petitioner's age and to make the foregoing closing jury argument at the punishment phase of Petitioner's trial. It was objectively reasonable for Petitioner's trial counsel to present evidence and argument in support of a statutory mitigating circumstance applicable to his client. The jury could have reasonably concluded the Petitioner's capital offense reflected an extremely poor level of judgment, a level of judgment understandable in a person barely old enough to be legally an adult. Moreover, after *de novo* review, there is no reasonable probability that, but for Petitioner's trial counsel presenting evidence of Petitioner's age and arguing Petitioner's youth must be considered as a mitigating circumstance, the outcome of the punishment phase of Petitioner's capital murder trial would have been any different.

Petitioner's trial counsel reasonably concluded that emphasizing Petitioner's youth, and accompanying lack of experience and good judgment, was the strongest

[344] S.F. Trial, 12 SCR 1430-32.

approach available likely to secure a life sentence for Petitioner. When viewed in the light of the evidence of Petitioner's gang involvement and history of drug trafficking that Petitioner's own father and others knowledgeable of Petitioner's background could have furnished the jury, the strategic decision by Petitioner's trial counsel to rely on Petitioner's youth in mitigation of Petitioner's moral blameworthiness was objectively reasonable and did not "prejudice" Petitioner within the meaning of the *Strickland* standard. The argument contained in paragraph 71 of Petitioner's federal habeas corpus petition does not warrant federal habeas corpus relief.

N. Failure to Object to Erroneous Punishment Phase Jury Instructions

1. Overview of the Complaints

Petitioner complains in paragraphs 74 through 101 of his federal habeas corpus petition that his trial counsel rendered ineffective assistance by failing to object to erroneous punishment-phase jury instructions, specifically to: the trial court's erroneous instruction that the jury could not consider a mitigating circumstance unless it was "reasonably satisfied" the circumstance had been established;[345] the trial court's failure to instruct the jury that it could recommend a sentence of death only if the aggravating circumstances outweighed the mitigating

[345] Doc. # 1, at pp. 24-25, ¶¶ 75-81.

circumstances;[346] the trial court's erroneous instruction that it had to unanimously agree on the existence of a mitigating circumstance;[347] and the trial court's failure to define the term "life without parole."[348]

2. Clearly Established Federal Law

As explained above in Section IV.C.2., the standard for reviewing the propriety of jury instructions at the punishment phase of a capital murder trial is "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence." *Boyde v. California*, 494 U. S. at 380.

3. Burden of Proof on Mitigating Circumstances

a. State Court Disposition

During its instructions to the jury at the punishment phase of trial, the state trial court advised the jury without objection at various points as follows:

> Let me just simply tell you that the burden of proof is on the State to prove the aggravating circumstances beyond a reasonable doubt. And, that's the same definition of reasonable doubt that I gave you during the guilt phase.
>
> Now, the defendant does not have the burden of proving mitigating circumstances beyond a reasonable doubt. The defendant,

[346] Doc. # 1, at pp. 25-26, ¶¶ 82-85.

[347] Doc. # 1, at pp. 26-28, ¶¶ 86-95.

[348] Doc. # 1, at pp. 28-29, ¶¶ 96-101.

for you to accept them and consider, only has to offer mitigating circumstances which reasonably satisfy you of the truth of it.[349]

* * *

Our law, and I'm rather proud of it, has set some standards that have to be met. And so, in effect, I'm going to ask you to follow those standards. Your judgment and determination is up to you. So, I'm going to try to instruct you a little bit further about the issues here of aggravating circumstances and mitigating circumstances and weighing them to decide what your recommendation is going to be. And, I have already told you before that the burden of proof is on the State to prove the aggravating circumstances beyond a reasonable doubt. Any that they don't prove beyond a reasonable doubt, you don't consider. If you are not reasonably satisfied of the existence of mitigating circumstances, you won't consider that either. But, after you have decided what aggravating circumstances exist under those standards, then you have to weigh them as they impact on your recommendation.[350]

* * *

Now, let's look over on the other side of the ledger. Most anything, most anything really, should be taken in consideration when it comes to the question of imposing the death penalty. We just do not do it lightly. Death is different.

Certainly, as the defense has suggested, you can take into consideration the age of the defendant. You can also take into consideration the fact, for whatever weight you wish to give it, that he was not the only one involved, if that be a fact and you heard them. You could also, of course, take into consideration the fact of any punishment which the evidence has shown any of the rest of them received. So, most anything could be used or considered by you, if you are reasonably satisfied it is true, with regard to the mitigation.[351]

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[349] S.F. Trial, 12 SCR 1423-24.

[350] S.F. Trial, 12 SCR 1436-37.

[351] S.F. Trial, 12 SCR 1440-41.

Petitioner argued in his Rule 32 petition that his trial counsel rendered ineffective assistance by failing to object when the trial court instructed the jury at the punishment phase of trial that it should only consider those mitigating circumstances which the jury was "reasonably satisfied" had been established by the evidence.[352] Petitioner argued the trial court's instruction that the jury had to be "reasonably satisfied" of the existence of a particular mitigating circumstances before weighing that circumstance against the aggravating circumstances was inconsistent with *Ala. Code §13A-5-45(g).*[353]

During Petitioner's Rule 32 proceeding, the state trial court concluded in its Order issued January 6, 2003 that the punishment phase jury instructions were erroneous insofar as they suggested the defendant bore the burden of proof on establishing the existence of any mitigating circumstance but that the error was harmless, in part because the prosecution proved two aggravating factors, *i.e.*, the fact Petitioner's capital offense occurred during the course of a robbery and the heinous, atrocious, or cruel nature of Petitioner's offense, while the mitigating

[352] 15 SCR 22-24.

[353] Section 13A-5-45(g) of the Alabama Code provides as follows:
The defendant shall be allowed to offer any mitigating circumstance defined in Sections 13A-5-51 and 13A-5-52. When the factual existence of an offered mitigating circumstance is in dispute, the defendant shall have the burden of interjecting the issue, but once it is interjected the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence.

evidence put forth by the defense was "minimal."[354] The Alabama Court of Criminal Appeals likewise recognized the trial court's punishment phase jury instructions were erroneous under state law but held, as did the trial court in Petitioner's Rule 32 proceeding, that any such error was harmless because (1) the evidence supported three aggravating circumstances and the evidence in mitigation was "minimal and weak"; (2) the trial court's sentencing order showed it gave the mitigating evidence proper consideration; and (3) therefore, the failure of Petitioner's trial counsel to raise a timely objection did not "prejudice' Petitioner within the meaning of the *Strickland* standard.[355]

b. AEDPA Review

As explained at length above in Section IV.C.3.a., there was no genuine factual dispute at the punishment phase of Petitioner's capital murder trial over the existence of mitigating circumstances showing that Petitioner was only eighteen years old at the time of the offense, others were involved in the same offense, and one of Petitioner's co-defendants had received a sentence of life imprisonment with the possibility of parole. The trial court expressly instructed the jury it could consider each of those mitigating factors.[356] The prosecution made no effort to

[354] 15 SCR 171-72; 23 SCR (Tab R-56), at pp. 25-26.

[355] 22 SCR (Attachment B to Tab R-51), at pp. 51-55; 23 SCR (Tab R-58), at pp. 51-55.

[356] S.F. Trial, 12 SCR 1440-41.

challenge the factual accuracy of either the evidence Petitioner's trial counsel presented at the punishment phase of trial or anything Petitioner's trial counsel argued during closing jury argument at the punishment phase of trial.

Despite its erroneous description of the burden of proof applicable to mitigating circumstances, the trial court's punishment phase jury instructions correctly advised the jury to consider anything the defense presented in mitigation and to weigh the mitigating circumstances against the aggravating circumstances the prosecution had established beyond a reasonable doubt. Under these circumstances, there is no reasonable likelihood that the jury applied the erroneous punishment phase jury instructions in a way that prevented the jury's consideration of constitutionally relevant evidence. *Boyde v. California*, 494 U. S. at 380. For the reasons discussed at length above in Section IV.C.3.a., the state trial and appellate courts both reasonably concluded this ineffective assistance complaint failed to satisfy the "prejudice" prong of the *Strickland* standard.

c. Conclusions

The state trial and state appellate courts' rejection on the merits during Petitioner's Rule 32 proceeding of Petitioner's ineffective assistance complaint about his trial counsel's failure to object to the trial court's erroneous punishment phase jury instructions regarding the burden of proof applicable to mitigating circumstances was neither contrary to, or involved an unreasonable application of,

clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial and Rule 32 proceedings. Paragraphs 75 through 81 of Petitioner's federal habeas corpus petition do not warrant federal habeas corpus relief.

4. Failure to Instruct on What to do if Evidence Equally Balanced

a. State Court Disposition

At the punishment phase of Petitioner's capital murder trial, the trial court instructed the jury without objection as follows:

> Once you unanimously agree to consider this aggravating factor or this mitigating factor, then it is your duty to weigh them, weigh them, with a view to determining do the aggravating factors outweigh the mitigating factors? And, if ten of you agree, then you could recommend the death penalty. Unless ten of you agree, you can't. And, then you weigh them and you look at them and say way, well, in my view the mitigating factors might outweigh the aggravating factors. If seven of you feel that way, then your recommendation ought to be life without parole. Obviously, there could be disagreement. And, I'm going to tell you that you should attempt to resolve it, talk about it, vote on it, and discuss it. You have got the same foreperson that you always had.[357]

Petitioner argued in his Rule 32 petition that the trial court's punishment phase jury instructions failed to advise the jury that the applicable Alabama statute[358]

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[357] S.F. Trial, 12 S CR 1424-25.

[358] Section 13A-5-46(e) of the Alabama Code provides as follows:
After deliberation, the jury shall return a verdict as follows:
(1) If the jury determines that no aggravating circumstances as defined in Section 13A-5-49 exist, it shall return a verdict of life imprisonment without parole;

requires the jury to recommend a sentence of life without parole if the mitigating and aggravating circumstances are equally balanced.[359] The state trial court concluded this ineffective assistance complaint satisfied neither prong of the *Strickland* standard because the trial court's punishment phase jury instructions correctly advised the jury it could return a recommendation of death only if it concluded the aggravating circumstances outweighed the mitigating circumstances, and this implicitly meant an equal balance of those circumstances required a recommendation of life without parole.[360] The Alabama Court of Criminal Appeals affirmed, concluding there was nothing erroneous with the trial court's jury instructions in this regard, that any objection raised to the instructions on this ground would have been baseless, and that Petitioner's trial counsel did not render deficient performance by failing to make such a baseless objection.[361]

> (2) If the jury determines that one or more aggravating circumstances as definied in Section 13A-5-49 exist but do not outweigh the mitigating circumstances, it shall return a verdict of life imprisonment without parole;
> (3) If the jury determines that one or more aggravating circumstances as defined in Section 13A-5-49 exist and that they outweigh the mitigating circumstances, if any, it shall return a verdict of death.

[359] 15 SCR 24-25.

[360] 15 SCR 172-74; 23 SCR (Tab R-56), at pp. 26-28.

[361] 22 SCR (Attachment B to Tab R-51), at pp. 55-57; 23 SCR (Tab R-58), at pp. 55-57.

b. AEDPA Review

The state trial court's and state appellate court's determination during Petitioner's Rule 32 proceeding that the trial court's punishment phase jury instructions were not erroneous under applicable state law (for failing to instruct the jury expressly on what to do if the mitigating and aggravating circumstances were equally balanced) binds this federal habeas court. *Bradshaw v. Richey*, 546 U. S. at 76; *Loggins v. Thomas*, 654 F.3d at 1228. Given the absence of any error in this aspect of the Petitioner's punishment phase jury instructions, the failure of Petitioner's trial counsel to make an objection of the type now urged by Petitioner does not satisfy either prong of the *Strickland* standard. *See Green v. Georgia*, 882 F.3d at 987 (counsel's failure to make a futile objection did not prejudice defendant within the meaning of *Strickland*); *Pinkney v. Sec'y, DOC*, 876 F.3d at 1297 ("an attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief"); *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d at 1299 (holding "a lawyer is not ineffective for failing to raise a meritless argument").

c. Conclusions

The state trial and state appellate courts' rejection on the merits during Petitioner's Rule 32 proceeding of Petitioner's ineffective assistance complaint about his trial counsel's failure to object to the trial court's failure to instruct the jury

expressly on what to do if the mitigating and aggravating circumstances were equally balanced was neither contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial and Rule 32 proceedings. Paragraphs 82 through 85 of Petitioner's federal habeas corpus petition do not warrant federal habeas corpus relief.

5. Failure to Correctly Cure Erroneous Instruction on Unanimity

a. Absence of State Court Disposition

As explained at length above in Section IV.C.1, the trial court erroneously instructed the jury at the punishment phase of trial that it had to unanimously agree on what mitigating circumstances existed before it could consider particular mitigating circumstances. Petitioner's trial counsel timely objected to the error and requested the trial court issue a corrective instruction. The prosecutor agreed with Petitioner's trial counsel on the need to correct the trial court's erroneous instruction. The trial court attempted to correct its earlier instruction but Petitioner's trial counsel requested additional clarification. The trial court concluded its instructions to the jury by informing them "Mitigating doesn't have to be unanimous."[362]

[362] S.F. Trial, 12 SCR 1436-48.

Petitioner complained in his Rule 32 petition that the trial court's punishment phase jury instruction erroneously required the jury to unanimously agree on particular mitigating circumstances before considering and weighing those circumstances against the aggravating circumstances.[363] Petitioner did not, however, frame this complaint as one of ineffective assistance by his trial counsel. In fact, Petitioner's Rule 32 petition did not criticize his trial counsel's performance in timely objecting to the trial court's *Mills* error and in requesting multiple curative instructions. Thus, this ineffective assistance claim is unexhausted and subject to *de novo* review in this court. *See Porter v. McCollum*, 558 U. S. at 39 (holding *de novo* review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts failed to address this prong of the *Strickland* analysis); *Rompilla v. Beard*, 545 U. S. at 390 (holding *de novo* review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice).

b. *De Novo* Review

As explained at length above in Section IV.C.1., Petitioner's trial counsel timely objected to the trial court's erroneous punishment phase jury instruction

[363] 15 SCR 40-42.

advising the jury that it had to unanimously agree on what particular evidence constituted mitigating circumstances before it could weigh those mitigating circumstances against the aggravating circumstances. The prosecution agreed with defense counsel that the trial court's instruction was erroneous and joined in the request for a curative jury instruction. When the trial court's ensuing instruction failed to properly cure the earlier error, Petitioner's trial counsel requested an even more specific curative instruction and the trial court informed the jury "Let me just make it clear: Mitigating doesn't have to be unanimous."[364]

Petitioner complains for the first time in his federal habeas corpus petition that his trial counsel rendered ineffective assistance by failing to request even further curative instructions from the trial court, arguing the trial court's curative instructions were ambiguous and insufficient to cure the *Mills* error. Petitioner does not, however, explain in any rational manner what additional curative instructions his trial counsel should have requested.

As this court explained at length above in Section IV.C.3.b., while admittedly less than pristine, the state trial court's remedial instructions were sufficient to alert the jury to the fact the jury need not unanimously agree upon a particular mitigating circumstance before weighing that mitigating circumstance against the aggravating

[364] S.F. Trial, 12 SCR 1447-48.

circumstances established by the evidence. "In evaluating the instructions, we do not engage in a technical parsing of this language of the instructions, but instead approach the instructions in the same way that the jury would--with a 'commonsense understanding of the instructions in the light of all that has taken place at the trial.'" *Johnson v. Texas*, 509 U. S. at 368; *Boyde v. California*, 494 U. S. at 381. Viewed in the context of the entire trial, the failure of Petitioner's trial counsel to request even further curative instructions was objectively reasonable.

Petitioner identifies no other mitigating circumstances properly before the jury at the punishment phase of his capital murder trial that he believes his jury was unable to consider adequately in light of the allegedly defective punishment phase jury instructions. Nor is there a reasonable likelihood the jury applied the challenged instruction in a way that prevented the jury's consideration of constitutionally relevant evidence. *Boyde v. California*, 494 U. S. at 380. Under these circumstances, there is no reasonable probability that, but for the failure of Petitioner's trial counsel to request an unspecified additional curative instruction addressing the trial court's *Mills* error, the outcome of the punishment phase of Petitioner's capital murder trial would have been any different.

c. Conclusions

After independent, *de novo* review, Petitioner's conclusory complaint about his trial counsel's failure to request unspecified additional curative instructions to

correct the trial court's *Mills* error satisfies neither prong of the *Strickland* standard. Paragraphs 86 through 95 of Petitioner's federal habeas corpus petition do not warrant federal habeas corpus relief.

6. Failure to Define "Life Without Parole"

a. State Court Disposition

During the charge conference at the punishment phase of Petitioner's capital murder trial, the following exchanges took place:

> MR. GOGGANS: This is a somewhat different subject, but while we are here on the record. You mentioned just now my proposed requested charge in the penalty phase of life without parole means that he won't get out. The Court might be willing to charge life without parole under presently existing law. I just started thinking about that. I think I'm right the way I proposed it. Rather than saying presently existing law, which could possibly lead some jurors to think that next week it might get changed and he'd get out, I rather you not give it at all that way.
>
> THE COURT: You don't want it? You withdraw it?
>
> MR. GOGGANS: I would rather you give it as I submitted it.
>
> THE COURT: I'm not going to give it as submitted because I think there is always the possibility the State may change this law. I have always thought that.
>
> MR. GOGGANS: I would rather nothing than as proposed by the Court, with all respect to the Court.
>
> THE COURT: I'm going to refuse it without that. If you want to withdraw it, I won't give it at all.
>
> MR. GOGGANS: I don't want to withdraw it as I did it, it is just I would rather you tell them nothing than as you said you would amend it.
>
> THE COURT: Well, I'm going to tell them what I said I was going to tell them, unless you don't want me to tell them anything regarding that.
>
> MR. GOGGANS: I would rather have nothing.

> THE COURT: You'd rather have nothing at all. Okay. Then, we will consider that charge, requested charge twelve, is withdrawn. There will be no reference to it whatsoever.[365]

Petitioner complained in his Rule 32 petition about his trial counsel's failure to object to the trial court's insistence on amending the defense's proposed jury charge defining life without parole and argued his trial counsel should have accepted the trial court's proposed additional language rather than to withdraw the definition entirely.[366] The state trial court summarily dismissed this ineffective assistance claim in its Order issued January 6, 2003, concluding it was objectively reasonable for the Petitioner's trial counsel to withdraw the requested definition of "life without parole" because the trial court's punishment phase jury charge referred to life without parole as simply "life without parole."[367]

On appeal from the denial of Petitioner's Rule 32 petition, the Alabama Court of Criminal Appeals concluded that (1) both the proposed definition of "life without parole" requested by the Petitioner and the modified version of that definition proposed by the trial court were erroneous under applicable state law; (2) Petitioner's trial counsel was not ineffective for failing to object to the trial court's refusal to give a legally erroneous definition of "life without parole"; and (3) because both

[365] S.F. Trial, 12 SCR 1416-18.

[366] 15 SCR 25-26.

[367] 15 SCR 174; 23 SCR (Tab R-56), at p. 28.

Petitioner's trial counsel and the trial court emphasized during the punishment phase of trial that a term of life imprisonment without the possibility of parole meant life without parole, it was objectively reasonable for Petitioner's trial counsel not to request a legally erroneous version of the definition of "life without parole."[368]

b. AEDPA Review

Petitioner's reliance on the Supreme Court's holding in *Simmons v. South Carolina*, 512 U. S. 154 (1994), in support of his contention that his trial counsel's proposed definition of "life without parole" was constitutionally mandated, is misplaced. In *Simmons*, a plurality of the Supreme Court, with three judges concurring separately, held that a defendant had been unconstitutionally sentenced to death in a trial in which the capital sentencing jury was not informed that, under applicable state law, a term of life imprisonment meant a term of life imprisonment without the possibility of parole:

> Three times petitioner asked to inform the jury that in fact he was ineligible for parole under state law; three times his request was denied. The State thus succeeded in securing a death sentence on the ground, at least in part, of petitioner's future dangerousness, while at the same time concealing from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment meant life without parole. We think it is clear that the State denied petitioner due process.

Simmons v. South Carolina, 512 U. S. at 162 (footnote omitted).

[368] 22 SCR (Attachment B to Tab R-51), at pp. 57-60; 23 SCR (Tab R-58), at pp. 57-60.

In sharp contrast to the facts in *Simmons*, the Petitioner's trial court in its punishment phase jury instructions repeatedly made clear that the sentencing options available to Petitioner's jurors were death and a term of life imprisonment without the possibility of parole.[369] The prosecutor also explained during closing jury argument that the jury's sentencing options were death and life without parole.[370] Petitioner's trial counsel repeatedly emphasized during closing punishment phase jury argument that the jury had to choose between recommending death and life without the possibility of parole.[371] Under these circumstances, the holding in *Simmons* has no application to Petitioner's capital murder trial.

The state appellate court's holding in Petitioner's Rule 32 proceeding that *both* of the definitions of "life without parole" requested by Petitioner's trial counsel and proposed by the state trial court were legally erroneous under applicable Alabama law binds this court in this federal habeas corpus proceeding. *Bradshaw v. Richey*, 546 U.S. at 76; *Loggins v. Thomas*, 654 F.3d at 1228. The failure of Petitioner's trial counsel to object to the trial court's refusal to give a legally erroneous definition of "life without parole" and the failure of Petitioner's trial counsel to agree to the state trial court's equally legally erroneous definition of "life

[369] S.F. Trial, 12 SCR 1425, 1442.

[370] S.F. Trial, 12 SCR 1433.

[371] S.F. Trial, 12 SCR 1430-33.

without parole" did not cause the performance of Petitioner's trial counsel to fall below an objective level of reasonableness and did not "prejudice" Petitioner within the meaning of the *Strickland* standard. *See Green v. Georgia*, 882 F.3d at 987 (counsel's failure to make a futile objection did not prejudice defendant within the meaning of *Strickland*); *Pinkney v. Sec'y, DOC*, 876 F.3d at 1297 ("an attorney will not be held to have performed deficiently for failing to perform a futile act, one that would not have gotten his client any relief"); *Bates v. Sec'y, Fla. Dep't of Corr.*, 768 F.3d at 1299 (holding "a lawyer is not ineffective for failing to raise a meritless argument").

The state appellate court reasonably concluded in the course of Petitioner's Rule 32 proceeding that Petitioner's complaints about his trial court's conduct vis-a-vis both the defense's proposed definition of "life without parole" and the state trial court's proposed definition of "life without parole" failed to satisfy either prong of the *Strickland* standard. Petitioner's trial counsel cannot reasonably be faulted for either failing to continue to urge a legally erroneous definition of "life without parole" or refusing to agree to the state trial court's submission of an equally legally erroneous definition of the same term. The state appellate court reasonably concluded there was no reasonable probability that, but for the failure of Petitioner's trial counsel to insist on the submission of a legally erroneous definition of "life

without parole," the outcome of the punishment phase of Petitioner's capital murder trial would have been any different.

c. Conclusions

The state trial and state appellate courts' rejection on the merits during Petitioner's Rule 32 proceeding of Petitioner's ineffective assistance complaint about his trial counsel's failures to object to the trial court's refusal to give Petitioner's proposed definition of "life without parole" and to agree to the trial court's proposed definition of "life without parole" was neither contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial and Rule 32 proceedings. Paragraphs 96 through 101 of Petitioner's federal habeas corpus petition do not warrant federal habeas corpus relief.

VI. INEFFECTIVE ASSISTANCE BY APPELLATE COUNSEL

A. The Claim

Petitioner argues in paragraphs 102-03 of his federal habeas corpus petition that his state appellate counsel rendered ineffective assistance in violation of his Sixth Amendment right to counsel by failing to raise grounds for relief on direct

appeal challenging the prosecution's improper use of its peremptory challenges to discriminate against members of the jury venire based upon their race and gender.[372]

B. State Court Disposition

Petitioner argued in his Rule 32 petition that his state appellate counsel rendered ineffective assistance by failing to present grounds for relief on direct appeal complaining about a host of alleged errors committed by the trial court, as well as the prosecution's abuse of its peremptory challenges to discriminate against both black and female members of the Petitioner's jury venire.[373] The state trial court summarily dismissed this ineffective assistance complaint in its Order issued January 6, 2003, concluding that (1) appellate counsel are not constitutionally required to advance all possible grounds for relief on appeal; (2) Petitioner's complaints about alleged gender and racial discrimination by the prosecution during jury selection were supported by mere statistics insufficient to establish a *prima facie* claim under either *Batson* or *J.E.B.;* and (3) Petitioner's state appellate counsel acted in an objectively reasonable manner in selecting the issues actually included in Petitioner's brief on direct appeal.[374] On appeal from the denial of Petitioner's Rule 32 petition, the Alabama Court of Criminal Appeals affirmed the dismissal of this

[372] Doc. # 1, at p. 30, ⁋⁋ 102-03.

[373] 15 SCR 56-58.

[374] 15 SCR 192-96.

ineffective assistance complaint, concluding the trial court correctly held Petitioner failed to allege sufficient facts in his Rule 32 petition in support of his claim of ineffective appellate counsel to avoid summary dismissal, and Petitioner failed to allege sufficient facts in support of his *Batson* and *J.E.B.* claims to establish a *prima facie* case of racial or gender discrimination by the prosecution during jury selection.[375]

C. The Clearly Established Constitutional Standard

The same two-pronged standard for evaluating ineffective assistance claims against trial counsel announced in *Strickland* applies to complaints about the performance of counsel on appeal. *See Smith v. Robbins*, 528 U. S. 259, 285 (2000) (holding a petitioner arguing ineffective assistance by his appellate counsel must establish both his appellate counsel's performance was objectively unreasonable and there is a reasonable probability that, but for appellate counsel's objectively unreasonable conduct, the petitioner would have prevailed on appeal); *Raleigh v. Sec'y, Fla. Dep't of Corr.*, 827 F.3d 938, 957 (11th Cir. 2016) ("The *Strickland* standard for ineffective assistance of counsel governs claims of ineffective assistance of appellate counsel."), *cert. denied*, 137 S. Ct. 2160 (2017). Thus, the standard for evaluating the performance of counsel on appeal requires inquiry into

[375] 22 SCR (Attachment B to Tab R-51), at pp. 63-67; 23 SCR (Tab R-58), at pp. 63-67.

whether appellate counsel's performance was deficient, *i.e*., whether appellate counsel's conduct was objectively unreasonable under then-current legal standards, and whether appellate counsel's allegedly deficient performance "prejudiced" petitioner, *i.e*., whether there is a reasonable probability that, but for appellate counsel's deficient performance, the outcome of petitioner's appeal would have been different. *Smith v. Robbins*, 528 U. S. at 285; *Hittson v. GDCP Warden*, 759 F.3d 1210, 1262 (11th Cir. 2014), *cert. denied*, 135 S. Ct. 2126 (2015). Appellate counsel who files a merits brief need not and should not raise every non-frivolous claim but, rather, may select from among them in order to maximize the likelihood of success on appeal. *Smith v. Robbins*, 528 U. S. at 288; *Jones v. Barnes*, 463 U. S. 745, 751 (1983). The process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail is the hallmark of effective appellate advocacy. *Smith v. Murray*, 477 U. S. 527, 536 (1986); *Jones v. Barnes*, 463 U. S. at 751-52.

Where, as in Petitioner's case, appellate counsel presented, briefed, and argued, albeit unsuccessfully, one or more non-frivolous grounds for relief on appeal and did not seek to withdraw from representation without filing an adequate *Anders* brief, the defendant must satisfy *both* prongs of the *Strickland* test in connection with his claims of ineffective assistance by his appellate counsel. *See Roe v. Flores-Ortega*, 528 U. S. 470, 477, 482 (2000) (holding the dual prongs of *Strickland* apply to complaints of ineffective appellate counsel and recognizing, in cases involving

"attorney error," the defendant must show prejudice); *Smith v. Robbins*, 528 U. S. at 287-89 (holding petitioner who argued his appellate counsel rendered ineffective assistance by failing to file a merits brief must satisfy both prongs of *Strickland*).

D. AEDPA Review of Complaint Asserted in State Habeas Court

For the reasons discussed at length above in Sections V.J. and V.K., the state trial court and state appellate court reasonably concluded it was objectively reasonable for Petitioner's state appellate counsel not to include *Batson* and *J.E.B.* claims as part of Petitioner's direct appeal from his capital murder conviction and sentence of death. To reiterate, this court concludes, just as did the state trial and appellate courts in the course of Petitioner's Rule 32 proceeding, that Petitioner's state appellate counsel, just like Petitioner's trial counsel, could reasonably have believed there was insufficient evidence to satisfy the requirements for *prima facie* showings of racial and gender discrimination by the prosecutor during jury selection. Appellate counsel are not required to present every non-frivolous claim available. *See Overstreet v. Warden*, 811 F.3d 1283, 1287 (11th Cir. 2016) ("Appellate counsel has no duty to raise every non-frivolous issue and may reasonably weed out weaker (albeit meritorious) arguments."); *Brown v. United States*, 720 F.3d 1316, 1335 (11th Cir. 2013) ("An attorney is not required under the Constitution or the *Strickland* standards to raise even non-frivolous issue on appeal." (citing *Jones v. Barnes*, 463 U. S. at 754)), *cert. denied*, 135 S. Ct. 48 (2014).

Moreover, because Petitioner's trial counsel chose not to raise timely objections predicated on *Batson* or *J.E.B.*, the state appellate court's standard of review of those claims would necessarily have been circumscribed. *See Ex parte Bohannon*, 222 So. 3d 525, 535 (Ala. 2016) (Because no objection was made at trial to trial court's failure to limit prosecution's questioning of defense character witness, review of the issue was for plain error and holding "plain error" means "error that is so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings - the plain error standard applies only where a particularly egregious error occurred at trial and that error has or probably has substantially prejudiced the defendant), *cert. denied*, 137 S. Ct. 831 (2017); *Gaddy v. State*, 698 So. 2d 1100, 1130 (Ala. Crim. App. 1995) (holding in the absence of any objection, a defendant's complaint that he was absent during a post-trial hearing must be analyzed under the plain error rule), *aff'd*, 698 So. 2d 1150 (Ala. 1997), *cert. denied*, 522 U. S. 1032 (1997). Petitioner's state appellate counsel could reasonably have concluded that asserting *Batson* or *J.E.B.* claims on direct appeal was unlikely to garner success because the state appellate courts would necessarily review those claims under the deferential plain error standard.

Likewise, for the reasons discussed at length above in Sections V.J. and V.K., the state trial and appellate courts reasonably concluded these same ineffective assistance complaints about the performance of Petitioner's state appellate counsel

failed to satisfy the prejudice prong of the *Strickland* standard: Petitioner alleged insufficient facts in his Rule 32 petition to establish a *prima facie* case of racial or gender discrimination. The state trial and appellate courts reasonably concluded during Petitioner's Rule 32 proceeding there was no reasonable probability that, but for the failure of Petitioner's state appellate counsel to assert *Batson* or *J.E.B.* claims on direct appeal, the outcome of Petitioner's direct appeal would have been any different.

E. Conclusions

The state trial and state appellate courts' rejection on the merits during Petitioner's Rule 32 proceeding of Petitioner's ineffective assistance complaints about his state appellate counsel's failure to present on direct appeal claims of racial and gender discrimination by the prosecution during jury selection was neither contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the Petitioner's state trial and Rule 32 proceedings. Paragraphs 102 through 103 of Petitioner's federal habeas corpus petition do not warrant federal habeas corpus relief.

VII. REQUEST FOR EVIDENTIARY HEARING

Petitioner requests an evidentiary hearing.[376] Insofar as Petitioner's claims in this federal habeas corpus proceeding were disposed of on the merits during the course of Petitioner's direct appeal or Rule 32 proceeding, Petitioner is not entitled to a federal evidentiary hearing to develop new evidence attacking the state appellate or state habeas court's resolution of Petitioner's claims. Under the AEDPA, the proper place for development of the facts supporting a claim is the state court. *See Harrington v. Richter*, 562 U. S. 86, 103 (2011) ("Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding."); *Hernandez v. Johnson*, 108 F.3d 554, 558 n.4 (5th Cir.) (holding the AEDPA clearly places the burden on a petitioner to raise and litigate as fully as possible his federal claims in state court), *cert. denied*, 522 U. S. 984 (1997).

Where a petitioner's claims have been rejected on the merits, further factual development in federal court is effectively precluded by virtue of the Supreme Court's holding in *Cullen v. Pinholster*, 563 U. S. 170 181-82 (2011):

> We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking

[376] Doc. # 1, at p. 60, ¶ 224((d).

> language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.*, the record before the state court.

Thus, petitioner is not entitled to a federal evidentiary hearing on any of his claims which were rejected on the merits by the state courts, either on direct appeal or during Petitioner's Rule 32 proceeding.

With regard to the new factual allegations and new legal arguments Petitioner failed to fairly present to the state courts, and for which this court has undertaken *de novo* review, Petitioner is likewise not entitled to an evidentiary hearing. In the course of conducting *de novo* review, this court has assumed the factual accuracy of all the specific facts alleged by Petitioner in support of his claims for relief, including the factual accuracy of all the new potentially mitigating information Petitioner identified in his pleadings in this court in support of his multi-faceted ineffective assistance claims. As explained at length above in Section V, even when the truth of all of Petitioner's new factual allegations supporting his ineffective assistance claims is assumed, Petitioner's ineffective assistance claims still do not satisfy the prejudice prong of the *Strickland* standard.

Furthermore, as explained above, even assuming the truth of all the new factual allegations Petitioner presents in support of his federal habeas claims, after *de novo* review, none of Petitioner's claims warrant federal habeas corpus relief. In light of these assumptions, Petitioner is not entitled to an evidentiary hearing. *See*

Schriro v. Landrigan, 550 U. S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."); *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d 1299, 1318-19 (11th Cir. 2016) ("We emphasize that the burden is on the petitioner in a habeas corpus proceeding to allege sufficient facts to support the grant of an evidentiary hearing and that a federal court will not blindly accept speculative and inconcrete claims as the basis upon which a hearing will be ordered.") (quoting *Dickson v. Wainwright*, 683 F.2d 348, 351 (11th Cir. 1982)); *Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d 1057, 1060 (11th Cir. 2011) (the burden is on the petitioner to establish the need for an evidentiary hearing), *cert. denied*, 565 U. S. 1120 (2012). If a habeas petition does not allege enough specific facts that, if they were true, would warrant relief, the petitioner is not entitled to an evidentiary hearing. *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d at 1319; *Chavez v. Sec'y, Fla. Dep't of Corr.*, 647 F.3d at 1060. Where a petitioner fails to allege sufficient facts to satisfy the prejudice prong of the *Strickland* standard, it is unnecessary to hold an evidentiary hearing to resolve disputed facts relating to the allegedly deficient performance of trial counsel. *Bester v. Warden*, 836 F.3d 1331, 1339-40 (11th Cir. 2016), *cert. denied*, 137 S. Ct. 819 (2017). For the reasons discussed at length above, Petitioner has failed to satisfy this standard.

While Petitioner does allege many new *facts* in support of his unexhausted ineffective assistance claims, Petitioner did not proffer any new *evidence* supporting those unexhausted claims. There is no need for an evidentiary hearing in federal court where a federal habeas petitioner fails to proffer any evidence he would seek to introduce at a hearing. *See Chandler v. McDonough*, 471 F.3d 1360, 1363 (11th Cir. 2006) (holding no evidentiary hearing necessary in federal habeas proceeding where the district court took as true the factual assertions underlying the ineffective assistance claim and the petitioner failed to proffer any additional evidence), *cert. denied*, 550 U. S. 943 (2007). "[I]f a habeas petition does not allege enough specific facts that, if they were true, would warrant relief, the petitioner is not entitled to an evidentiary hearing." *Jones v. Sec'y, Fla. Dep't of Corr.*, 834 F.3d at 1319. "The allegations must be factual and specific; conclusory allegations are simply not enough to warrant a hearing." *Id.* "Moreover, a petitioner seeking an evidentiary hearing must make a 'proffer to the district court of any evidence that he would seek to introduce at a hearing.'" *Id.* "A §2254 petitioner is not entitled to an evidentiary hearing if he fails to 'proffer evidence that, if true, would entitle him to relief.' " *Hamilton v. Sec'y, Fla. Dep't of Corr.*, 793 F.3d 1261, 1266 (11th Cir. 2015), *cert. denied*, 136 S. Ct. 1661 (2016). Because Petitioner failed to make a valid proffer of any new evidence in support of his unexhausted claims, he is not entitled to an evidentiary hearing to develop that evidence in this court.

VIII. CERTIFICATE OF APPEALABILITY

Under the AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under Section 2254, the petitioner must obtain a Certificate of Appealability ("CoA"). *Miller-El v. Johnson*, 537 U. S. 322, 335-36 (2003); 28 U.S.C. §2253(c) (2). A CoA is granted or denied on an issue-by-issue basis. *Jones v. Sec'y, Fla. Dep't of Corr.*, 607 F.3d 1346, 1354 (11th Cir.) (no court may issue a CoA unless the applicant has made a substantial showing of the denial of a constitutional right and the CoA itself "shall indicate which specific issue or issues satisfy" that standard), *cert. denied*, 562 U. S. 1012 (2010); 28 U.S.C. §2253(c)(3).

A CoA will not be granted unless the petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U. S. 274, 282 (2004); *Miller-El v. Johnson*, 537 U. S. at 336; *Slack v. McDaniel*, 529 U. S. 473, 483 (2000); *Barefoot v. Estelle*, 463 U. S. 880, 893 (1983). To make such a showing, the petitioner need *not* show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard v. Dretke*, 542 U. S. at 282; *Miller-El v. Johnson*, 537 U. S. at 336. This court is required to issue or deny a CoA when it enters a final Order such as this one adverse to a federal habeas

petitioner. *Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts*.

The showing necessary to obtain a CoA on a particular claim is dependent upon the manner in which the District Court has disposed of a claim. "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Johnson*, 537 U. S. at 338 (quoting *Slack v. McDaniel*, 529 U. S. at 484). In a case in which the petitioner wishes to challenge on appeal this court's dismissal of a claim for a reason not of constitutional dimension, such as procedural default, limitations, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* whether this court was correct in its procedural ruling. *See Slack v. McDaniel*, 529 U. S. at 484 (when a district court denies a habeas claim on procedural grounds, without reaching the underlying constitutional claim, a CoA may issue only when the petitioner shows that reasonable jurists would find it debatable whether the claim is a valid assertion of the denial of a constitutional right, and the district court's procedural ruling was correct).

Reasonable minds could not disagree with the conclusions that (1) during the course of Petitioner's Rule 32 proceeding the state courts reasonably rejected on the merits all of Petitioner's conclusory complaints about the performance of his trial counsel and state appellate counsel; (2) when reviewed under a *de novo* standard of review, all of Petitioner's new factual allegations supporting his ineffective assistance claims fail to satisfy the prejudice prong of the *Strickland* standard;[377] (3) the state appellate and state habeas courts reasonably rejected on the merits (a) Petitioner's Double Jeopardy claims, (b) Petitioner's complaints about the trial court's jury instructions, (c) Petitioner's complaints about the prosecution's jury

[377] Petitioner pleaded one set of facts in support of his ineffective assistance claims in his Rule 32 petition. Then, in his brief appealing the denial of his Rule 32 petition, Petitioner raised a host of completely new ineffective assistance claims, as well as a plethora of new facts supporting the ineffective assistance claims the state trial court denied in the course of summarily dismissing Petitioner's Rule 32 petition. Finally, when Petitioner reached this court, he once again asserted a number of wholly unexhausted ineffective assistance claims, as well as alleged a host of new facts supporting his previously asserted (but perhaps not completely exhausted) ineffective assistance claims. Faced with a record containing shifting factual allegations and myriad potential procedural default issues, for the reasons discussed at length above in note 89, this court undertook AEDPA review of those claims the state courts denied on the merits and *de novo* review of those claims (and new factual allegations) which Petitioner failed to fairly present to the state courts on direct appeal or in the course of his Rule 32 proceeding. *See, e.g.*, Sections V.D., V.G., V.J., V.K., V.M. above. This court also undertook *de novo* review of claims Petitioner failed to fairly present to the state courts during his Rule 32 proceeding, *i.e.*, claims Petitioner presented for the first time in his appellate brief challenging the denial of his Rule 32 petition. *See, e.g.*, Sections V.E., V.F., V.H., V.I. above. This court did so, rather than expend scarce judicial resources resolving myriad, complex, multi-layered procedural default issues because it was more analytically straight-forward (and easier) to deny on the merits Petitioner's meritless ineffective assistance claims, and as Justice Alito suggested in *Smith v. Texas*, 550 U. S. at 324 (Alito, J., dissenting), the parties and the public are more likely to be better served if the decision to deny Petitioner's federal habeas corpus petition is based on the merits instead of what may be viewed as a legal technicality.

arguments at both phases of trial, and (d) Petitioner's complaints about the manner in which the state trial court considered Petitioner's mitigating evidence of his youth; (4) Petitioner's complaints about allegedly erroneous procedural, evidentiary and substantive law rulings during Petitioner's Rule 32 proceeding do not furnish independent bases for federal habeas corpus relief; and (5) Petitioner's new factual allegations and new legal theories asserted in this court in support of his claims do not warrant federal habeas relief under a *de novo* standard of review and do not warrant a federal evidentiary hearing. Petitioner is not entitled to a CoA on any of his claims for federal habeas corpus relief.

IX. ORDER

Accordingly, it is hereby **ORDERED** that:

1. All relief requested in Petitioner's original federal habeas corpus petition (Doc. # 1), as supplemented by his briefs in support (Docs. # 45, 50, 57, 59), is **DENIED.**

2. Petitioner's request for an evidentiary hearing[378] is **DENIED.**

3. All other pending motions are **DISMISSED** AS MOOT.

4. Petitioner is **DENIED** a Certificate of Appealability on all of his claims.

[378] Doc. # 1, at p. 60, ⁋ 224(d).

5. By separate Show Cause Order, Petitioner's counsel will be directed to explain why sanctions should not be imposed in light of the potential violations of *Rule 11, Fed.R.Civ.P.*, identified above in Petitioner's original petition.

DONE this 21st day of December, 2018.

/s/ W. Keith Watkins
CHIEF DISTRICT JUDGE

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

TONY BARKSDALE, AIS No. 0000z611, Petitioner, v. JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections, Respondent.	)	CASE NO. 3:08-CV-327-WKW

FINAL JUDGMENT

In accordance with the prior proceedings, opinions, and orders of the court, it is the ORDER, JUDGMENT, and DECREE of the court that judgment is ENTERED in favor of Respondent Jefferson S. Dunn, Commissioner, Alabama Department of Corrections, and against Petitioner Tony Barksdale, as follows: all relief requested in Petitioner's original federal habeas corpus petition (Doc. # 1), as supplemented by Petitioner's briefs in support (*i.e.*, Docs. # 45, 50, 57, 59), is **DENIED**; Petitioner is **DENIED** a Certificate of Appealability on all of his claims.

The Clerk of the Court is DIRECTED to enter this document on the civil docket as a final judgment pursuant to Rule 58 of the Federal Rules of Civil Procedure.

DONE this 21st day of December, 2018.

/s/ W. Keith Watkins
CHIEF DISTRICT JUDGE

APPENDIX 2

Decision of the U.S. District Court for the Middle
District of Alabama, February 11, 2020
Barksdale v. Dunn, No. 3:08-CV-327
2020 WL 698278 (M.D. Ala. 2020)

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

TONY BARKSDALE, AIS No. 0000z611, Petitioner, v. JEFFERSON S. DUNN, Commissioner, Alabama Department of Corrections, Respondent.	))))))))))))	CASE NO. 3:08-CV-327-WKW [WO]

ORDER DENYING RULE 59(e) MOTION

Before the court is Petitioner's motion, filed pursuant to Rule 59(e) of the Federal Rules of Civil Procedure, to alter or amend the judgment, denying Petitioner a writ of habeas corpus and a certificate of appealability (CoA) (Doc. # 64), and Respondent's response (Doc. # 69). As grounds for his Rule 59(e) motion, Petitioner asserts that the court's Memorandum Opinion and Order contains "manifest errors of law or fact" that must be corrected "to prevent manifest injustice." (Doc. # 64 at 1.) Briefly, Petitioner contends that (1) he received ineffective assistance of counsel (IAC) at both the guilt and penalty phases of trial and (2) the court, in reaching the contrary conclusion that his counsel was constitutionally effective at both phases of trial, incorrectly interpreted the record and disregarded binding precedent.

Petitioner requests the court to reconsider its Memorandum Opinion and Order of December 21, 2018, and grant the relief sought in the petition. In the alternative, Petitioner requests a CoA permitting him to present all claims raised in his 28 U.S.C. § 2254 habeas petition to the U. S. Court of Appeals for the Eleventh Circuit.

For the reasons set forth below, Barksdale is entitled to no relief from the judgment.

I. BACKGROUND

The facts and circumstances of Barksdale's capital offense and the procedural history of this case, in both the state courts and this court, are set forth in detail in the Memorandum Opinion and Order entered December 21, 2018 (Doc. # 62). In that opinion, the court (1) concluded that the state trial and appellate courts reasonably rejected on the merits myriad claims Petitioner raised on direct appeal and in his Rule 32 proceeding, (2) rejected on the merits after *de novo* review the new claims Petitioner asserted in his pleadings in this court, and (3) concluded that Petitioner was not entitled to a CoA. (Doc. # 62.)

When viewed in the light most favorable to the jury's guilty verdict, the evidence at Petitioner's trial showed that on December 1, 2005, Petitioner and his companions, Jonathan David Garrison and Kevin Hilburn, (1) stole a Ford Taurus motor vehicle in Guntersville, Alabama, (2) attempted to drive this stolen vehicle to

Alexander City, Alabama, (3) wrecked the vehicle near Sylacauga, Alabama, and (4) hitched a ride to Alexander City. Wanting to return to Guntersville that same day, Petitioner, who was armed, indicated he would shoot someone if necessary to get a ride to Guntersville. Thereafter, the trio encountered the driver of a gray Maxima, Julie Rhodes. She agreed to give them a ride across town, but not to Guntersville. Petitioner directed her to drive into a neighborhood and stop. She complied, at which time Petitioner shot her twice. Still alive, Julie Rhodes was pushed out of the car by Petitioner. Petitioner and his companions then drove her vehicle to Guntersville. Julie ultimately died from her gunshot wounds. (Doc. # 62, at 2–7.)

II. STANDARD OF REVIEW

The only grounds for granting a Rule 59(e) motion in the Eleventh Circuit are newly discovered evidence or manifest errors of law or fact. *Metlife Life & Annuity Co. of Conn. v. Akpele*, 886 F.3d 998, 1008 (11th Cir. 2018); *Arthur v. King*, 500 F.3d 1335, 1343 (11th Cir. 2007). A Rule 59(e) motion cannot be used to relitigate old matters or to submit argument or evidence that could have been raised prior to entry of judgment. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1344 (11th Cir. 2010) (citing *Arthur*, 500 F.3d at 1343).

III. ANALYSIS

A. Ineffective Assistance of Trial Counsel

Barksdale's Rule 59(e) motion is premised on his continuing argument that his trial counsel, Thomas M. Goggans, was ineffective for a multitude of reasons at both the guilt and penalty phases of his trial.[1] While his habeas petition alleged specific instances of ineffective assistance in each trial phase, Barksdale argues, for the first time in his Rule 59(e) motion, that trial counsel was generally ineffective during both phases. Barksdale appears to suggest that the court failed to consider his claim that Goggans's overall performance was ineffective. Because Barksdale did not raise this generic claim of ineffective assistance of counsel in his federal habeas petition, he is entitled to no relief on this claim. Barksdale's other arguments are addressed and rejected below.

1. Failure to investigate

Barksdale asserts that the court erred in concluding that Goggans's investigation in preparation for both the guilt and penalty phases of his trial met the constitutional standard. Barksdale submits that not only was Goggans's

[1] Petitioner appears to question the court's use of the term "defense team" in the Memorandum Opinion and Order. The court is cognizant that Goggans, a solo practitioner at the time of Barksdale's trial, was his only trial counsel, as the record clearly reflects. "Defense team" includes the administrative support staff (*e.g.*, secretarial, paralegal, runner, *etc.*) who customarily assist a lawyer, be it a solo practitioner or a group of attorneys in a law firm. In the court's experience, a solo practitioner operating a law practice with no administrative support staff would be an anomaly.

investigation woefully inadequate, it was, for all practical purposes, essentially no investigation.

To support his argument, Barksdale relies on *Strickland* and its progeny, *Williams v. Taylor*, 529 U. S. 362, (2000); *Wiggins v. Smith*, 539 U. S. 510 (2003); and *Rompilla v. Beard*, 545 U. S. 374 (2005). Barksdale also relies on more recent Eleventh Circuit cases cited in his supplemental briefs filed in 2016 (Docs. # 57, 59), *viz*., *Daniel v. Ala. Dep't of Corr.*, 822 F.3d 1248 (11th Cir. 2016); *Cooper v. Sec'y, Dep't of Corr.*, 646 F.3d 1328 (11th Cir. 2011); *Johnson v. Sec'y, Dep't of Corr.*, 643 F.3d 907 (11th Cir. 2011); and *Ferrell v. Hall*, 640 F.3d 1199 (11th Cir. 2011). He submits that the court failed to consider the Eleventh Circuit's application of *Strickland* and its progeny to claims that factually resemble Petitioner's and in which the Eleventh Circuit held that counsel had rendered ineffective assistance of counsel. Petitioner also points to *State v. Gamble*, 63 So. 3d 707 (Ala. Ct. Crim. App. 2010), a case where counsel offered no mitigating evidence at the penalty phase and was found to be ineffective, and *Ex parte Gissendanner*, ___ So. 3d ___, No. 1160762, 2019 WL 101611 (Ala. Jan. 4, 2019). Barksdale urges that in view of these cases, it should be clear that Goggans, too, was ineffective. However, when analyzing an IAC claim, the court must look to clearly established federal law, "as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d). The Eleventh Circuit and Alabama state court cases cited in Barksdale's supplemental briefs, while

informative, are not controlling authority. Evaluating Barksdale's IAC claims, the court was guided primarily by *Strickland*, the landmark 1984 Supreme Court decision that established the standard for evaluating an IAC claim. *Strickland* was the controlling case at the time of Barksdale's trial in 1996, and *Strickland* remains the gold standard for measuring IAC claims. The Eleventh Circuit decisions that have followed in the wake of *Strickland* did not, and of course cannot, evolve or modify the *Strickland* standard.

Contrary to Barksdale's assertion, Goggans did conduct a pre-trial investigation. In addition to obtaining information from Barksdale, Goggans also talked to Barksdale's mother, Mary Archer, as summarized in the court's Memorandum Opinion and Order (Doc. # 62, at 169). However, at that time, Ms. Archer was uncooperative. Goggans had trouble keeping her on the telephone; she was of little, if any, assistance to Goggans. She provided Goggans with virtually none of the useful information she disclosed at Barksdale's Rule 32 hearing. (*See* Doc. # 62 at 171–76.)

Goggans also spoke with Petitioner's father, who likewise was not a great source of useful information about Barksdale. Petitioner's father simply told him that Barksdale had a pattern of lying as a means of getting himself out of trouble. Based on the telephone conversations Goggans had with Barksdale's father, Goggans concluded there was no reason for Barksdale's father to testify at either

phase of Barksdale's trial. (Doc. # 62, at 170.) Further, Barksdale's father disclosed no information to Goggans that opened any leads to the discovery of mitigating evidence.

Barksdale, too, provided Goggans with little useful information to assist Goggans in developing a strong mitigating case. For example, he never told Goggans that he had a medical or mental health condition and denied any history of either condition. Barksdale also told Goggans that he had a good relationship with his family and said he recalled no significant events that adversely affected him during his adolescent years. Barksdale informed Goggans that he had used marijuana and alcohol daily since age fourteen, but he did not suggest that the use of these substances might have resulted in a mental disease or defect. (Doc. # 62, at 170–71.)

Barksdale also failed to advise Goggans of his relationship with the Maxwell Johnson family and that (1) he and Johnson's son were friends in junior high school and played basketball together, (2) he had lived with the Maxwell Johnson family while in school in 1987–89, and (3) Maxwell Johnson became sort of a surrogate father to him. Barksdale provided Goggans with no information to put Goggans on notice of Maxwell Johnson's existence; thus, Goggans had no knowledge of Johnson at the time he conducted his pre-trial investigation. (*See* Doc. # 62, at 182.)

Goggans conducted an investigation for mitigating evidence prior to Barksdale's trial but discovered little that was helpful and much that was harmful. Goggans's investigation was not deficient; the sources to which he turned for mitigating evidence or possible leads to mitigating evidence unfortunately did not result in much mitigating evidence at the time. Barksdale's claim that Goggans was ineffective for failure to investigate rises or falls based on the *Strickland* standard. When Goggans's performance as to his investigation is measured by *Strickland*, his performance passes constitutional muster, for all the reasons detailed in the Memorandum Opinion and Order (Doc. # 62).

2. Ineffectiveness During the Guilt Phase

Barksdale submits this court erred in rejecting his claim that Goggans was ineffective during the guilt phase of his trial because Goggans failed to show that the victim's murder was accidental and failed to adequately cross-examine prosecution witness Jonathon David Garrison. The court addressed at length these same two claims in the Memorandum Opinion and Order, explaining why these claims raised in his federal habeas petition were without merit. (*See* Doc. # 62 at 132–46, 147–62.)

Barksdale presents no newly discovered evidence to support these claims of ineffective assistance, and he has not shown that the court's reasoning for rejecting these claims of ineffective assistance was attributable to any manifest errors of law

or fact.[2] In short, the arguments Barksdale makes in his Rule 59(e) motion in respect to these ineffective-assistance claims are nothing more than rehashing the same arguments he made in support of these claims in his habeas petition. Barksdale is entitled to no relief on these claims as he is attempting to relitigate old matters in this Rule 59(e) motion. *See Arthur*, 500 F.3d at 1343 ("A Rule 59(e) motion cannot be used to relitigate old matters, raise new argument or present evidence that could have been raised prior to the entry of judgment.").

3. Ineffectiveness During the Penalty Phase

a. Deficient performance

Barksdale rehashes his argument that Goggans's performance was deficient during the penalty phase. He points to Goggans's stipulation that Barksdale had been convicted of a prior crime of violence, an armed robbery in Virginia, when he was sixteen years old. Barksdale also argues that Goggans failed to humanize him to the jury and that, during closing argument, Goggans obliquely and improperly invoked Biblical scripture by referring to Barksdale as "the least of us."

Each of these claims of Goggans's alleged ineffectiveness is addressed in the Memorandum Opinion and Order. First, it was objectively reasonable for Mr.

[2] Barksdale correctly notes the court's error in stating that Peterman was a prosecution witness, when, in fact, he was a defense witness. However, the court's misstatement as to Peterman has no impact on the court's evaluation of Peterman's testimony or on the court's conclusion that Barksdale presented no evidence that the gun accidentally discharged twice. Regardless of label, Peterman's testimony speaks for itself.

Goggans to conclude, after he had investigated the details of the Virginia conviction, that having the jury hear testimony from the victim, Oscar Cervantes, about the robbery was not a wise course of action and that a stipulation would be less damaging to Barksdale. (*See* Doc. # 62, at 232–38.) Strategic decisions made "after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Strickland*, 466 U. S. at 690.

Second, as to Barksdale's argument that Goggans was ineffective for failing to humanize him to the jury, Barksdale overlooks the fact that at the time of his trial in 1996, Goggans had no knowledge of the information that surfaced during Barksdale's Rule 32 evidentiary hearing about (1) Barksdale's alcoholic mother, who also used drugs frequently[3], and Barksdale's violent, abusive father, indicating that Barksdale grew up in a dysfunctional family, (2) his living with the Maxwell Johnson family for a period of time when he was in junior high school, and (3) Maxwell Johnson having become somewhat of a surrogate father to him. This information would have been useful to humanize Barksdale, but Goggans was unaware of it. As detailed *supra*, neither Barksdale's parents nor Barksdale provided

[3] Barksdale points out that at his Rule 32 hearing, his mother testified that the reason she did not go to court with Barksdale in Virginia was that: "I was stoned. I was high and didn't know about it. . . . I mean, you know, somebody again could have told me about it and I just forgot. I stayed high a lot." (Doc. # 64, at 20 n.15.) Barksdale fails to explain how his mother, in this condition, could have been of any help whatsoever at the time of trial.

Goggans with this information or much else that Goggans could have used in developing mitigating evidence.

Had Goggans known (1) of Mary Archer's extensive drug and alcohol use, (2) that Barksdale's father also was prone to drunken behavior and violent, abusive outbursts, (3) of Barker's alleged abuse to which Barksdale's father subjected his mother, and (4) that Barksdale grew up in an arguably dysfunctional family setting, he might have used this information to develop mitigating evidence. Barksdale knew all this, but makes no suggestion he ever disclosed it to Goggans. This information only surfaced post-trial during Barksdale's Rule 32 hearing.

"[T]he duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 545 U. S. at 382–83; *Everett v. Sec., Fla. Dep't of Corr.*, 779 F.3d 1212, 1250 (11th Cir. 2015). Given what Goggans knew prior to Barksdale's trial, his performance was not deficient. And this court already has rejected Barksdale's claim that his attorney failed to investigate and present mitigating evidence (Doc. # 62, at 185–213), and Barksdale has not shown that this analysis contains any manifest errors of law or fact.[4]

[4] Goggans testified at the Rule 32 hearing that, based on his conversations with Barksdale's mother and father, they would have been risky witnesses. (17 SCR 144.) For that reason, he elected not to call them at trial, an objectively reasonable decision he made after his investigative

Third, the cases on which Barksdale relies to argue that Goggans was ineffective during closing argument by describing Barksdale as one of "the least of us" — *Romine v. Head*, 253 F.3d 1349, 1368 (11th Cir. 2001); *Fontenot v. State*, 881 P.2d 69, 85 (Okla. 1994); *Long v. State*, 883 P.2d 167, 177 (Okla. 1994) — do not entitle him to relief for two reasons. Those cases concern a *prosecutor's* reference to biblical scripture during closing argument and say nothing about defense counsel's reference to scripture in order to evoke the jury's sympathy. Additionally, the cases are not Supreme Court decisions. Barksdale has not shown that the state court's determination that counsel's actions were objectively reasonable in referring to scripture during closing argument was contrary to or an unreasonable application of Supreme Court authority. *See* 28 U.S.C. § 2254(d); (Doc. # 62, at 216–18.) Barksdale failed to establish that counsel's performance was deficient and that he was prejudiced by counsel's penalty-phase closing argument when he referred to Barksdale as "the least of us." (*See* Doc. # 62, at 215–18.) And, in his present filing, Barksdale has not shown that the court's analysis of this IAC claim contains a manifest error of law or fact.

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discussions with them. Even so, Barksdale criticizes Goggans for not encouraging them to attend his trial, implying that Goggans was ineffective by that conduct. This argument is a non-starter because (1) Barksdale cites no authority for this speculative proposition; (2) Barksdale ignores his mother's Rule 32 hearing testimony that she could not afford to fly to Alabama to attend Barksdale's trial (17 SCR 230); and (3) even if Barksdale's parents had attended Barksdale's trial as spectators, it is sheer speculation that the jury would have known about their attendance and/or that it would have made any difference to the jury.

b. Prejudice

Barksdale also recycles his argument that he was prejudiced in numerous respects by Goggans's deficient performance during the trial's penalty phase. These claims of prejudice were thoroughly addressed and rejected in the court's Memorandum Opinion and Order. (*See* Doc. # 62 at 203–13, 226–30, 231–41.) In the retelling, the claims are still meritless. *See Arthur*, 500 F.3d at 1343.

4. The state court's resolution of Barksdale's IAC claims

Barksdale is not entitled to relief on his repeated arguments that the state court's resolution of his IAC claims was objectively unreasonable, procedurally improper, and entitled to no deference. Here, Barksdale focuses on the Rule 32 court's order denying his Rule 32 petition, arguing that it impermissibly adopted *verbatim* the prosecutor's proposed order.

This claim, as well as others that pointed to the Rule 32 court's alleged errors of state law, was rejected. As to these claims, Barksdale did not "furnish an arguable basis for federal habeas corpus relief." (Doc. # 62, at 40.)

B. <u>Certificate of Appealability (CoA)</u>

If Barksdale's Rule 59(e) motion is denied, he requests, in the alternative, that the court issue a CoA permitting him to proceed with these same claims on appeal. (Doc. # 64, at 35.)

In Section VIII. of the Memorandum Opinion and Order, the court explained the requirements necessary for a petitioner to be entitled to a CoA on some or all issues. (*See* Doc. # 62, at 313–16.) Barksdale's Rule 59(e) motion does not establish any reason why he is entitled to a CoA on any issue raised in his habeas petition.

IV. CONCLUSION

For the reasons stated above, Barksdale is not entitled to relief on his Rule 59(e) motion. Based on consideration of the arguments made in Barksdale's Rule 59(e) motion and Respondent's response, it is ORDERED as follows:

1. Petitioner's Rule 59(e) motion to reconsider, alter, or amend judgment (Doc. # 64) is DENIED.

2. Petitioner's request for a Certificate of Appealability from the Memorandum Opinion and Order entered on December 21, 2018 (Doc. # 62) and from the denial of his Rule 59(e) motion (Doc. # 64) is DENIED.

DONE this 11th day of February, 2020.

/s/ W. Keith Watkins
UNITED STATES DISTRICT JUDGE

APPENDIX 3

Decision of the U.S. Court of Appeals for the
11th Circuit, June 29, 2020
Barksdale v. Attorney General, State of Alabama, et al.,
Docket No. 20-10993-P (11th Cir. 2020)

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 20-10993-P

TONY BARKSDALE,

Petitioner - Appellant,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondents - Appellees.

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

ORDER:

Tony Barksdale, an Alabama death row inmate, seeks to appeal the district court's orders denying his 28 U.S.C. § 2254 petition and his Rule 59(e) motion. He has filed an application for a COA in this Court raising eight issues. Because Barksdale has not made "a substantial showing of the denial of a constitutional right," 28 U.S.C. § 2253(c)(2), I am denying his application.

I. FACTS

Barksdale fatally shot 19-year Julie Rhodes in December 1995. The trial court described the facts of his crime this way:

> On Thursday night [November 30, 1995], [Tony] Barksdale, [Jonathan David] Garrison, and [Kevin] Hilburn were together in the Guntersville area. Barksdale wanted to go to Alexander City, so very early Friday morning they stole a car in Guntersville and headed for Alexander City. About seven o'clock in the morning they wrecked the car near Sylacauga, but were able to obtain a ride from someone in the neighborhood, who took them to Alexander City. Throughout most of the day, they visited or came in contact with persons with whom Barksdale was acquainted, and asked several of them to take them to Guntersville. No one would. During that afternoon, they made many attempts to flag down vehicles belonging to strangers, but few would stop. Finally one person gave them a ride as far as a local shopping center. They approached several people without success. One acquaintance testified that Barksdale said he would "jack" somebody to get back to Guntersville. Several others testified to seeing him with a gun. Barksdale had the gun when the three left Guntersville, and he was the only one armed. Barksdale told the other two that he would shoot someone in order to get a ride back to Guntersville, and he would rather shoot one than two.
>
> The victim, 19-year-old Julie Rhodes, worked at a store in the shopping center. As she was returning in her old Maxima automobile from her supper break to the parking area, Barksdale flagged her down and the three of them got in the car with the victim. Barksdale was seated in the backseat. He gave Julie directions to drive in the neighborhood, and to turn into a "dead-end" street and stop. Garrison and Hilburn got out and ran behind a nearby shed. The Maxima moved along the street past several houses, turned into a driveway, backed out, and came back down the street. Two shots were fired by Barksdale and the car stopped. Barksdale pushed Julie out of the car and told Garrison and Hilburn to get in. They went to some place in Alexander City and disposed of some things that were in the car and then drove back to Guntersville. Barksdale still had the gun and displayed it to several people. All of

> them were arrested several days later and the automobile and pistol were recovered.
>
> Desperately seeking help and trying to escape, Julie managed to get to some nearby houses. Someone heard her screams and she was discovered lying in the yard of a house, bleeding profusely. Medics were called and she was transported to a local hospital for emergency treatment and then transported by helicopter to Birmingham. She was dead on arrival in Birmingham. She was shot once in the face and once in the back. She was bleeding to death and went into shock. She was fearful and was trying to escape her assailant and expressed several times to various people, including medical personnel, that she was going to die. She was correct.

Barksdale v. State, 788 So. 2d 898, 901–02 (Ala. Crim. App. 2000) (quotation marks omitted).

The police arrested Barksdale, Garrison, and Hilburn several days after Rhodes' death. Id. at 902. They recovered Rhodes' car and Barksdale's gun. Id. At the time he committed the crime, Barksdale was 18 years old. Barksdale v. Dunn, No. 3:08-cv-327, 2018 WL 6731175, at *8 n.57 (M.D. Ala. Dec. 21, 2018).

II. PROCEDURAL HISTORY

A Tallapoosa County grand jury indicted Barksdale on three counts of capital murder. Id. at *3. Count 1 charged him with intentionally causing Rhodes' death by shooting her in the course of stealing her vehicle by force and while armed with a deadly weapon. Id. at *3 n.24. Count 2 charged him with intentionally causing Rhodes' death by using a deadly weapon while she was in a

vehicle. Id. Count 3 charged him with intentionally causing Rhodes' death by using a deadly weapon while within or from a vehicle. Id.[1]

The case went to trial. The prosecution's theory was that Barksdale killed Rhodes in order to steal her car. It called 73 witnesses, including people who were in the area at the time of the shooting, law enforcement officers who responded to or investigated the crime, forensic scientists, a doctor who treated Rhodes, people who were with Barksdale before and after the shooting, and Garrison, who agreed to testify against Barksdale as part of his plea agreement. Id. at *3–7; COA App. at 15 n.6. The defense admitted that Barksdale shot Rhodes, but it argued that the shooting was accidental. Doc. 20-13 at 44. It presented two witnesses: the former owner of the murder weapon who testified about its poor condition, and a firearms expert who also testified about its poor condition. Docs. 20-11 at 177–86; 20-12 at 191–98.[2]

[1] Hilburn, who was with Barksdale at the time of the crime, died before the jury returned the indictment. Doc. 62 at 8; COA App. at 16. Garrison, who was also with Barksdale at the time of the crime, was indicted on the same three counts as Barksdale, but he pleaded guilty to the lesser count of murder shortly before their joint trial was scheduled to begin. Doc. 62 at 8. He received a life sentence with the possibility of parole. Id. at 8–9. As part of his plea deal, he agreed to testify against Barksdale. Id. at 9.

[2] The district court wrongly states that the defense called only one witness, the firearms expert. Barksdale, 2018 WL 6731175, at *7. That error probably occurred because the other defense witness, the former owner of the murder weapon, was called out of turn. Doc. 20-11 at 177.

At the close of evidence Barksdale filed a motion for acquittal on Count 3 of the indictment, which charged him with intentionally causing Rhodes' death by using a deadly weapon while within or from a vehicle. Barksdale, 2018 WL 6731175, at *7. The trial judge granted it. Id.[3] The jury returned a guilty verdict on Counts 1 and 2. Id. at *8. The penalty stage began immediately. Both parties waived opening argument, and other than re-offering all of the same evidence that was already introduced and admitted, the prosecution presented only a redacted version of a certified copy of Barksdale's judgment of conviction from Virginia on a charge of robbery. Id. The defense also offered only a single document: a certified copy of Barksdale's birth certificate. Id. After closing arguments, the jury recommended by an 11-1 vote to impose the death penalty for each count. Id.

The trial court held a sentence hearing where both parties told the court that they had no additional evidence to present and focused their arguments primarily on whether Barksdale's offense qualified as "heinous, atrocious, and cruel." Id. Almost a month later, the trial court issued a sentencing order adopting the jury's sentencing recommendation and imposing a sentence of death. Id. The trial court

[3] It its order denying Barksdale's federal habeas petition, the district court stated: "Given the overwhelming evidence at trial showing Julie Rhodes was shot while she was inside her vehicle by a weapon fired inside her vehicle, there was no logical reason for the state trial court to strike . . . count three." Id. at *7 n.52.

made clear in that order it would have imposed the sentence even if the jury had not recommended death. COA App. at 40.

The Alabama Court of Criminal Appeals affirmed Barksdale's convictions and sentence. Barksdale, 788 So. 2d at 915. The Alabama Supreme Court denied certiorari, Ex parte Barksdale, 788 So. 2d 915 (Ala. 2000), as did the United States Supreme Court, Barksdale v. Alabama, 532 U.S. 1055 (2001).

On May 22, 2002, Barksdale filed a Rule 32 (collateral attack) petition in state court asserting nineteen claims, many of which contained numerous sub-claims. Docs 20-16; 62 at 27. The state collateral trial court summarily dismissed or denied all but two of his claims, finding that they were procedurally barred, insufficiently pleaded, or clearly meritless. Docs 20-26 at 39–91; 62 at 28. The court held an evidentiary hearing on the remaining two claims. Doc. 20-26 at 92. In the first, Barksdale asserted that his trial counsel rendered ineffective assistance by failing to investigate and present mitigating evidence. Id. In the second, he asserted that his counsel rendered ineffective assistance by failing to object to alleged emotional displays by the victim's family in front of the jury. Id. After the evidentiary hearing, the court denied relief on both claims. Id. at 126. It concluded that the first one failed on the merits and that Barksdale had failed to present any evidence in support of the second one. Id. at 93–126. The Court of

Criminal Appeals affirmed the trial court's denial of Barksdale's Rule 32 petition. Id. at 127–203. The Alabama Supreme Court denied certiorari. Id. at 205.

On May 2, 2008, Barksdale filed in the district court a 28 U.S.C. § 2254 petition asserting 32 claims. Doc. 1. More than ten years later, on December 21, 2018, the district court issued a 317-page order denying each of Barksdale's claims on the merits, denying his request for an evidentiary hearing, and denying him a COA. Barksdale, 2018 WL 6731175, at *108–10.

Barksdale then filed a Rule 59(e) motion to alter or amend the judgment. Doc. 64. He focused on two issues: (1) the district court's rejection of his ineffective assistance of trial counsel claims, and (2) the district court's decision to deny him a COA on all of his claims. Id. at 1–2. The district court denied the Rule 59(e) motion. Doc. 74. On March 11, 2010, Barksdale filed an NOA to appeal the district court's orders denying his federal habeas petition and his Rule 59(e) motion. Doc. 75. On April 20, 2020, he filed the application for a COA that is before me.

III. STANDARDS OF REVIEW

A. The COA Standard

This Court may grant an application for a COA "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Where the petitioner seeks a COA on a claim that the district court

denied on the merits, he must show "that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." Slack v. McDaniel, 529 U.S. 473, 484 (2000). He does not have to show, however, that "he will ultimately succeed on appeal." Lamarca v. Sec'y, Dep't of Corr., 568 F.3d 929, 934 (11th Cir. 2009). As the Supreme Court has put it, "[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate." Miller-El v. Cockrell, 537 U.S. 322, 342 (2003).

Where the petitioner seeks a COA on a claim that the district court dismissed on procedural grounds, the petitioner must show "that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." Slack, 529 U.S. at 484. Each component of the required showing "is part of a threshold inquiry, and a court may find that it can dispose of the application in a fair and prompt manner if it proceeds first to resolve the issue whose answer is more apparent from the record and arguments." Id. at 485.

B. The AEDPA Standard

The state courts rejected many of Barksdale's claims on the merits. Those claims are subject to AEDPA. See Nance v. Warden, GDP, 922 F.3d 1298, 1300–01 (11th Cir. 2019). Under AEDPA, federal habeas relief is barred unless the state

court's rejection of the claims was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). This court reviews the last reasoned state court decision when conducting its analysis. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018). In this case, that is in most instances the Alabama Court of Criminal Appeals' decision affirming the state collateral trial court's denial of Barksdale's Rule 32 petition. Doc. 20-26 at 127–203.

A state court's decision is "contrary to" clearly established federal law only "if the court arrived at a conclusion opposite to the one reached by the Supreme Court on a question of law or the state court confronted facts that are 'materially indistinguishable' from Supreme Court precedent but arrived at a different result." Ferrell v. Hall, 640 F.3d 1199, 1223 (11th Cir. 2011) (quoting Williams v. Taylor, 529 U.S. 362, 405 (2000)). And a state court's decision involves an "unreasonable application" of clearly established federal law only if it is "so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." Harrington v. Richter, 562 U.S. 86, 102 (2011). In other words, "if some fairminded jurists could agree with the state court's decision, although others might disagree, federal habeas relief

must be denied." Hill v. Humphrey, 662 F.3d 1335, 1346 (11th Cir. 2011) (en banc) (quotation marks omitted).

C. How The COA Standard Combines With The AEDPA Standard

Where the district court has denied habeas relief after the state courts denied a claim on the merits, the COA question is not whether reasonable jurists could find the merits of the claim debatable. Applying that standard to the COA determination in that circumstance would be wrong. It would be wrong because the issue sought to be appealed is not whether the constitutional claim had merit, but instead whether the state court decision that it did not have merit is due to be rejected under the demanding standards of AEDPA deference.

In other words, the COA standard applies to the issue on appeal from the district court's denial of habeas relief, not to the issue that was before the state court for decision in the first place. And the issue before the district court and on appeal from its denial of relief is whether every reasonable jurist would reject the state courts' decision on the claim. Only if no reasonable jurist could agree with the state court decision was the district court wrong to deny federal habeas relief on that claim.

So overlaying the COA standard with the AEDPA deferential standard, the COA question is this: Could a reasonable jurist find debatable the proposition that no reasonable jurist at all could agree with the state courts that the claim lacked

merit? If any reasonable jurist could find the rejection of the claim debatable, the state court judgment rejecting it cannot be disturbed in a federal habeas proceeding. And if a state court judgment rejecting a claim cannot be disturbed in federal habeas, a COA cannot be granted to permit appellate review of the district court's denial of relief.

D. Procedural Bar Standards

The state courts rejected some of Barksdale's claims on procedural grounds. This Court is barred from considering those claims at all unless Barksdale can show one of three things: (1) that the procedural ruling was not an "independent and adequate state ground" for rejecting the claim, (2) cause and prejudice, or (3) that our failure to consider the claim will result in a fundamental miscarriage of justice. See Cone v. Bell, 556 U.S. 449, 465 (2009); Coleman v. Thompson, 501 U.S. 722, 750 (1991).

Barksdale did not raise some of his federal habeas claims in state court at all, and his state court remedies are no longer available.[4] "Procedural default bars

[4] Because his direct appeal proceedings ended 19 years ago, his Rule 32 petition proceedings ended 12 years ago, and none of his claims are of the type that may be permissibly raised in a successive petition under Alabama Rule of Criminal Procedure 32.2(b), any claim he failed to raise in state court is procedurally defaulted. Rule 32.2(b) states: "A successive petition on different grounds shall be denied unless (1) the petitioner is entitled to relief on the ground that the court was without jurisdiction to render a judgment or to impose sentence or (2) the petitioner shows both that good cause exists why the new ground or grounds were not known or could not have been ascertained through reasonable diligence when the first petition was heard, and that failure to entertain the petition will result in a miscarriage of justice."

federal habeas review when a habeas petitioner has failed to exhaust state remedies that are no longer available." Butts v. GDCP Warden, 850 F.3d 1201, 1211 (11th Cir. 2017); see 28 U.S.C. § 2254(b)(1)(A). There are two exceptions to that bar: (1) cause and prejudice or (2) that our failure to consider the claim will result in a fundamental miscarriage of justice. See Butts, 850 F.3d at 1211. This Court may skip over the procedural default issue entirely if it denies (but not if it grants) the claim on the merits. See 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."); Loggins v. Thomas, 654 F.3d 1204, 1215 (11th Cir. 2011) ("When relief is due to be denied even if claims are not procedurally barred, we can skip over the procedural bar issues, and we have done so in the past."). This Court reviews de novo those claims if it chooses to review them. See Conner v. GDCP Warden, 784 F.3d 752, 767 & n.16 (11th Cir. 2015).

Finally, to the extent Barksdale failed to raise a claim in the district court, this Court may not consider it on appeal. See, e.g., Ferguson v. Sec'y for Dep't of Corr., 580 F.3d 1183, 1193 (11th Cir. 2009) (explaining that in habeas cases we "do not consider issues or arguments raised for the first time on appeal"); Smith v. Sec'y, Dep't of Corr., 572 F.3d 1327, 1352 (11th Cir. 2009) (declining to consider habeas petitioner's argument because it was "not fairly presented" to the district

court); Davis v. Terry, 465 F.3d 1249, 1252 n.3 (11th Cir. 2006) (holding that because the petitioner "did not raise [an] argument in his habeas petition," the "argument was not considered by the district court and will not be considered here"); Wright v. Hopper, 169 F.3d 695, 708 (11th Cir. 1999) ("We will not consider claims not properly presented to the district court and which are raised for the first time on appeal."); Provenzano v. Singletary, 148 F.3d 1327, 1329 n.2 (11th Cir. 1998) ("Because [petitioner] did not raise the claim below, we do not consider it."); Mills v. Singletary, 63 F.3d 999, 1008 n.11 (11th Cir. 1995) ("The law in this circuit is clear that arguments not presented in the district court will not be considered for the first time on appeal."); Waters v. Thomas, 46 F.3d 1506, 1524 n.5 (11th Cir. 1995) (en banc) (declining to consider an argument that the petitioner did not raise in the district court).

IV. DISCUSSION

The claims that Barksdale raises in his application for a COA can be divided into four categories: (1) ineffective assistance of counsel claims, (2) Eighth Amendment claims, (3) Sixth Amendment sentencing claims, and (4) a ghostwriting claim. We address each in turn.

A. The Ineffective Assistance Of Counsel Claims

1. Procedural Issues

Barksdale raised in his Rule 32 petition many, but not all, of the ineffective assistance claims contained in his COA application. Doc. 20-16 at ¶¶ 8–77. The state trial court ruled that all but two of the ineffective assistance claims he raised were procedurally barred or not supported by sufficient factual allegations, so it summarily dismissed or denied them. Doc. 20-26 at 42–76. Later, after holding an evidentiary hearing, the court denied his remaining two claims: (1) that counsel was ineffective for failing to investigate and present mitigating evidence at the penalty stage and (2) that counsel failed to object to alleged emotional displays by the victim's family in front of the jury. Id. at 92–126. The Court of Criminal Appeals affirmed the state trial court's decisions. Doc. 20-26 at 131–89.

The Court of Criminal Appeals' decision affirming the state trial court's summary rejection of many of Barksdale's ineffective assistance claims for failure to plead sufficient facts is considered a ruling on the merits of those claims for purposes of AEDPA. The rejection of a claim for failure to satisfy Alabama Rule of Criminal Procedure 32.6(b), which is what occurred here in many instances, constitutes a ruling on the merits that does not give rise to a procedural default or foreclose federal habeas review of a federal constitutional claim. See Frazier v. Bouchard, 661 F.3d 519, 524–26 (11th Cir. 2011); Borden v. Allen, 646 F.3d 785,

815–16 (11th Cir. 2011). It follows that we examine "the ineffective assistance of counsel allegations that were before the Court of Criminal Appeals under the standards set forth by AEDPA" if they were dismissed for failure to plead sufficient facts. Borden, 646 F.3d at 815.

2. Strickland and AEDPA

A petitioner must show deficiency and prejudice to state a valid ineffective assistance of counsel claim. Strickland v. Washington, 466 U.S. 668, 687 (1984).

To show deficiency, Barksdale must prove that his counsel's representation "fell below an objective standard of reasonableness." Wiggins v. Smith, 539 U.S. 510, 521 (2003) (quotation marks omitted). The petitioner bears the burden of showing this, and he must overcome a strong presumption that the conduct of his trial counsel falls within a wide range of reasonable professional assistance. Strickland, 466 U.S. at 687–91. Courts are extremely deferential in scrutinizing the performance of counsel and make every effort to eliminate the distorting effects of hindsight. See Wiggins, 539 U.S. at 523 (holding that the proper analysis under the first prong of Strickland is an objective review of the reasonableness of counsel's performance under prevailing professional norms, which includes a context-dependent consideration of the challenged conduct as seen from the perspective of counsel at the time). "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of

circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." Bobby v. Van Hook, 558 U.S. 4, 7 (2009) (quoting Strickland, 466 U.S. at 688–89). The Supreme Court has instructed us that we must "strongly presume[ ]" that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. Strickland, 466 U.S. at 690. And it has added to that instruction this one:

> Federal habeas courts must guard against the danger of equating unreasonableness under Strickland with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied Strickland's deferential standard." Id. (emphasis added). If so, the petition must be denied. It preserves authority to issue the writ in cases where there is no possibility fairminded jurists could disagree that the state court's decision conflicts with this Court's precedents. It goes no further.

Harrington, 562 U.S. at 102.

To show prejudice, Barksdale must establish that his counsel's errors were so serious that they deprived him of a fair trial or sentence proceeding, or in other words, one whose result is reliable. Strickland, 466 U.S. at 686–87. That occurs only if there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. And "reasonable probability" means "a probability sufficient to undermine confidence in the outcome." Id.

3. Guilt Stage Ineffective Assistance Claims

Barksdale claims that his trial counsel, Thomas M. Goggans, was ineffective during the guilt stage because he: (1) failed to adequately investigate and present exculpatory evidence; (2) failed to adequately cross-examine the State's witnesses, in particular one witness: Garrison; (3) failed to obtain or use Hilburn's police statement to cross-examine Garrison; and (4) botched the direct examination of his own expert witness regarding whether the murder weapon's discharge was accidental. COA App. at 15–16. None of his arguments in support of those claims meet the AEDPA standard for granting a COA.

a. *The Accidental Shooting Theory Ineffectiveness Claim*

In his Rule 32 petition, Barksdale brought what amounts to at least two, and arguably three, claims asserting that his trial counsel failed to adequately investigate and present exculpatory evidence. Doc. 20-16 at ¶¶ 26–33. The first of those claims is that Goggans failed to adequately investigate the accidental shooting theory of defense and settled for hiring a substandard gun expert and having the previous gun's owner testify, which Barksdale says is "tantamount to launching no defense at all." Id. ¶¶ 26–29.

In affirming the trial court's dismissal of this ineffective assistance claim, the Court of Criminal Appeals held that Barksdale "failed to allege how calling those [two defense] witnesses prejudiced his defense." The court pointed out that

Barksdale "included no facts whatsoever in his petition regarding the crime or the State's evidence against him," and did not allege who else could have offered more helpful testimony for the defense, or what that more helpful testimony would have been. Doc. 20-26 at 144–47.

In his federal habeas petition Barksdale raised this ineffective assistance claim. Doc. 1 at ¶¶ 10–21. The district court concluded that the state court did not unreasonably apply federal law when it held that Goggans was not deficient in investigating the accidental shooting theory or when it held that Barksdale was not prejudiced by how that theory was presented, including by his direct examination of the gun expert. Barksdale, 2018 WL 6731175, at *47–52.

The district court was right. There was overwhelming evidence that Barksdale fired the murder weapon. Docs. 20-26 at 57–61; 20-16 at 19–20 (describing how, among other things, Barksdale told the police about how he committed the crime, claiming he "didn't mean to do it"). From his police interviews through his brief to the Court of Criminal Appeals in his Rule 32 appeal, Barksdale never denied being the one who shot the victim to death (as described in his brief to the Court of Criminal Appeals in his Rule 32 appeal):

> From his arrest until today, Tony Barksdale has had a single explanation of what happened in Julie Rhodes's car on December 1, 1995. He said that he took the 9-millimeter pistol from his pocket to empty it, because he did not want to be carrying a loaded gun on the long walk from Charlotte Lane to the Knollwood Apartments. The mechanism jammed. He did not know that there was a live round in the

> chamber. The gun fired as he was trying to retrieve bullets from the magazine manually. The second shot was a knee-jerk reaction to the first. The killing was an accident. That is and has always been Tony Barksdale's explanation of how Julie Rhodes was shot.

Doc. 20-21 at 52–53 (emphasis added).

Given what his client had stated from the beginning, Goggans conducted a reasonable investigation into the best (indeed the only) defense available: an accidental shooting theory.[5] He hired a gun expert to testify about how the gun was in bad condition. Doc. 20-26 at 55–57. He had the former owner of the gun testify about the weapon's poor condition as well. Id. (noting that the former owner talked about how the gun was of "poor quality" and the gun's safety tended to move from safe to fire on its own). Presenting that evidence allowed Goggans to argue in closing, with factual support, that the gun was "junk" and that an accidental discharge was quite possible given its condition and Barksdale's lack of gun safety discipline. Doc. 20-13 at 36–38. Barksdale has not created enough of a doubt about Goggans' performance to justify issuance of a COA on this claim, even if he had shown prejudice, which he hasn't.

[5] The Court of Criminal Appeals addressed only the prejudice prong of Strickland on this issue, so we must look through it to the state trial court's reasoned decision on deficiency in the collateral proceeding. Wilson, 138 S. Ct. at 1192; see also Hammond v. Hall, 586 F.3d 1289, 1330 (11th Cir. 2009). But even if no deference were due the state trial court's deficiency holding in these circumstances, federal habeas relief would still be due to be denied on the deficiency prong under de novo review.

Even assuming performance deficiency, Barksdale's request for a COA on this claim fails for lack of prejudice. The Court of Criminal Appeals' affirmed the denial of state collateral relief for this claim on prejudice grounds, and that decision is due AEDPA deference. Barksdale has never specified anything different that Goggans, given the evidence, could or should have done that would have caused his accidental shooting theory to succeed in getting him acquitted on the murder charge. Except for one thing. In a contention he treats as a separate claim, Barksdale argues that Goggans rendered ineffective assistance by failing to ask his firearms expert one more question. Because Barksdale treated that contention as a claim separate from this one, I will treat it as a separate claim in the next paragraph, below. For present purposes, suffice it to say that he has failed to show that no reasonable jurist could agree with the Court of Criminal Appeals' holding on the prejudice prong of this ineffective assistance of counsel claim, or this part of this ineffective assistance of counsel claim if it is just a part. He is not entitled to a COA.

Turning now to the related claim, Barksdale contends that Goggans failed to adequately examine his own firearms expert, Joe Shirey, who testified that the murder weapon was defective. Barksdale argues that Goggans should have also asked Shirey another question about the firearm jamming, which Barksdale says caused a live round to be left in the firing chamber. COA App. at 16. The specific

question he should have asked, according to Barksdale, is whether when Shirey attempted to withdraw the magazine from the pistol's chamber during his examination of the firearm, it jammed, leaving a live round in the firing chamber.

Barksdale raised this argument in his Rule 32 petition. Doc. 20-16 at ¶¶ 26–29. The state collateral trial court found that Goggans' questioning of Shirey was reasonable because Shirey's testimony was good for Barksdale and established that the weapon was in poor shape and could have accidently discharged. Doc. 20-26 at 56–57. The trial court also ruled that Barksdale did not plead any facts that would establish prejudice. Id. at 55. The Court of Criminal Appeals affirmed the trial court on prejudice grounds, holding that Barksdale did not plead any facts indicating how calling Shirey prejudiced him, or what other specific steps his counsel should have taken in investigating and presenting the accidental discharge defense. Id. at 144–47.

Barksdale does not explain, in either his Rule 32 petition or in his COA application, how the additional question would have significantly changed the defense's accidental discharge presentation given the testimony that was already before the jury that the weapon had many issues, including jamming. Based on the evidence he had presented, Goggans was able to argue in closing that the firearm

"is a piece of junk . . . . This gun is such a piece of junk . . . . There was evidence that when he tested it that it jammed after being fired." Doc. 20-13 at 36.[6]

Barksdale raised this one-more-question claim in his federal habeas petition. Doc. 1 at ¶¶ 11–12. After reviewing it de novo, the district court concluded that Barksdale had "failed to allege any specific facts showing that . . . Shirey . . . would have offered any testimony beneficial to [him]" if he had been examined more thoroughly by [Goggans]." Barksdale, 2018 WL 6731175, at *49–50. Given the record, reasonable jurists would not find the district court's conclusion "debatable or wrong." Slack, 529 U.S. at 484.

b. *The Other Defenses Ineffectiveness Claims*

Barksdale also claims that Goggans rendered ineffective assistance by failing to investigate defenses other than accidental shooting. He asserted in the state collateral trial court proceeding, for example, that Goggans should have obtained Barksdale's medical records or hired a medical expert to testify about his possible mental or neurological condition. Doc. 20-16 at ¶¶ 30–33. The trial court summarily dismissed both of those parts of that claim because they were insufficiently pleaded. Doc. 20-26 at 55–61. Barksdale did not include in his

[6] Recall that it is undisputed Barksdale shot the victim not once but twice, making the accidental shooting defense an extremely long shot in any event, regardless of how much evidence the defense put in about the possibility of the gun jamming.

appeal to the Court of Criminal Appeals the dismissal of either of those two claims. Id. at 187.

In his COA application, Barksdale tries to expand his claims to cover the entire guilt stage investigation. COA App. at 15–16. The attempt to raise in here even more claims that were not contained in his state court Rule 32 petition or in his appeal from its denial fails. All of these new claims are procedurally defaulted, and Barksdale makes no effort to show that any exception applies. So they are barred. See Butts, 850 F.3d at 1211; supra note 4. And to the extent he is trying to raise claims that he did not raise in the district court, we may not consider them. See supra pages 12–13 (citing cases holding that we will not consider an issue the petitioner failed to raise in the district court).

And even if those procedural bars could be put aside, which they can't, and his other lines of defense claims were addressed, Barksdale would fare no better. For example, Barksdale's claim that Goggans should have hired an expert to testify that he had a neurological or mental disorder that causes him to black out is based on the fact that when discussing the murder, Barksdale told the police "[i]t seems like I just keep blacking out." Doc. 20-16 at 19. But as the state collateral trial court noted, Barksdale described to the police not just the crime but the details of it, belying any possibility he had blacked out. See Doc. 20-26 at 59 ("Barksdale's statement to the police contains Barksdale's description of the crime, indicating his

memory of the events that occurred."). And other than his self-serving statement to the police, no evidence of any kind of medical condition causing blackouts existed then or now. Barksdale never told Goggans that he had any medical or mental health conditions, and when Goggans interacted with him Barksdale did not display or indicate in any way that he was suffering from any mental health issues. Id. at 109. And even Barksdale's Rule 32 attorneys could not find any helpful records concerning his mental health. Id. at 108, 167.

For those reasons, the state collateral trial court explained that the trial judge would not have approved funds for a mental health expert to present a black out defense, and as a result, Goggans' decision not to pursue further investigation on that issue was reasonable. Id. at 59. The court also concluded that Barksdale could not show prejudice because he did not adequately allege any facts showing that further investigation would have helped — he did not allege any facts to support his contention that he suffers from a neurological condition. Doc. 20-26 at 57–61. Because no reasonable jurist would doubt that reasonable jurists could agree with the state collateral trial court's decision of this claim, Barksdale is not entitled to a COA on this claim.

c. *Ineffectiveness Regarding Cross-Examinations & the Hilburn Police Statement*

Barksdale next contends that his trial counsel failed to (1) adequately cross examine the State's witnesses, including Garrison, and (2) obtain or use Hilburn's

police statement to impeach Garrison. He did not raise either claim in his Rule 32 petition. He did raise part of this claim in his Rule 32 appeal, arguing that the cross-examination of Garrison was inadequate. Doc. 20-21 at 55–57. But the Court of Criminal Appeals held that this claim was not properly before it because Barksdale had not raised it in his Rule 32 petition. Doc. 20-26 at 155–57, 197; Barksdale, 2018 WL 6731175, at *53. Barksdale offers no reason in his COA application why that procedural bar was not an independent and adequate state ground for rejecting the claim. He does not assert cause or prejudice. And he does not argue that there will be a miscarriage of justice if we do not review the claims. So we are barred from reviewing them. See Cone, 556 U.S. at 465; Coleman, 501 U.S. at 750.[7]

The same is true of his claims about the alleged inadequate cross-examination of other State witnesses and the failure to obtain or use Hilburn's police statement to impeach Garrison. He did not raise those claims in his Rule 32 petition so they are procedurally defaulted. See supra note 4. That means this Court cannot grant habeas relief on any of them unless he can show cause and prejudice or that there would be a fundamental miscarriage of justice if the Court

[7] The district court reached the merits and concluded that this argument failed to satisfy either prong of the Strickland standard. Barksdale, 2018 WL 6731175, at *53–58. If I were to reach the merits, I would find the district court's analysis and conclusion correct.

did not review the claims. See Smith v. Jones, 256 F.3d 1135, 1138 (11th Cir. 2001). But Barksdale doesn't even address the fact that his claims are procedurally defaulted, let alone argue that either of the exceptions to procedural default applies.

4. Penalty Stage Ineffective Assistance Claims

Barksdale argues that Goggans was ineffective at the penalty stage because: (1) he performed "no investigation into his client's past"; (2) he failed to obtain the public records of Barksdale's earlier conviction (which the State introduced) and, as a result, allowed the jury to believe Barksdale had committed an act of violence or threatened the victim of that crime with a weapon; (3) he failed to investigate any potential mitigator beyond age; (4) he failed to investigate any of the aggravators upon which the State intended to rely; (5) his mitigation submission to the jury was inadequate, as it lasted only one minute; and (6) his five-minute closing argument to the jury at the penalty stage was ineffective. COA App. at 16–17.

Barksdale raised arguments (1), (3), (5), and possibly (6) in a section of his Rule 32 petition titled "Trial Counsel Was Ineffective for Failing to Investigate and Present Mitigating Evidence At the Penalty Phase of Mr. Barksdale's Trial." Doc. 20-16 at ¶¶ 35–48 (failure to investigate and present mitigating evidence at the penalty stage, inadequate mitigation submissions and closing arguments), ¶ 45

("Indeed, in the penalty phase, counsel . . . gave a closing argument that takes up less than four pages of trial transcript.").

The state collateral trial court broke that section into two parts: investigation and presentation of mitigating evidence. After holding an evidentiary hearing, it found that Barksdale's ineffective investigation claim failed on both the deficiency prong and the prejudice prong. Doc. 20-26:115–16. And it found that his ineffective presentation claim failed on the prejudice prong. Id. at 125. He raised all of the same issues in his Rule 32 appeal. The Court of Criminal Appeals affirmed. On the investigation claim it held that Barksdale had not shown deficiency or prejudice. Id. at 171. On the presentation claim, it concluded that the trial court was correct that Barksdale did not suffer any prejudice. Id. at 175–77.

Barksdale raised his penalty-stage ineffective assistance arguments in his federal habeas petition. Doc. 1 at ¶¶ 38–57. The district court concluded that the Court of Criminal Appeals' decision that there was no deficiency or prejudice was not contrary to or an unreasonable application of clearly established federal law. Barksdale, 2018 WL 6731175, at *59–77. Reasonable jurists would not find the district court's conclusion "debatable or wrong," Slack, 529 U.S. at 484, especially given the deferential review AEDPA mandates.

a. *Investigation of Barksdale's Past*

Barksdale claims that his trial counsel failed to adequately investigate his past when crafting a mitigation strategy. Barksdale argued in his Rule 32 petition that Goggans should have spoken more to Barksdale's parents; spoken to Barksdale's "godfather" Maxwell Johnson; obtained medical, mental health, and education records; and hired a psychologist to examine him. Doc. 20-16 at 20–24.

But Goggans did contact both of Barksdale's parents multiple times. Doc. 20-26 at 164–66. It is undisputed that his mother was uncooperative. See id. Barksdale has never explained how Goggans could forced her to cooperate. And the information Goggans learned from Barksdale's parents was not helpful (for example, Barksdale's father talked about how Barksdale was a liar who was involved with gangs), which is why Goggans didn't present testimony from them. Doc. 20-26 at 166. Barksdale never explained what Goggans could have done to transform two unfavorable witnesses into favorable ones. Id. at 165–66, 171.

Barksdale never mentioned to Goggans his "godfather" Maxwell Johnson, and Barksdale has not explained how Goggans could have learned about him. Id. at 166–67, 171. As to the medical and other records Goggans supposedly should have looked into, Barksdale did not explain what helpful records Goggans could have found. Id. at 171. Indeed, his Rule 32 counsel themselves did not locate any useful medical or mental health records. Id. at 167.

For all those reasons, reasonable jurists would not doubt that a fairminded jurist could agree with the Court of Criminal Appeals' decision that Goggans conducted a reasonable penalty stage investigation. Id. at 168, 170–71. And the same is true about the Court of Criminal Appeals' decision that Barksdale failed to show prejudice. Id. at 109 n.7, 162–63, 171–72. As a result, he is not entitled to a COA on this claim. Slack, 529 U.S. at 484.

b. *Public Records of Prior Conviction*

Barksdale next alleges that Goggans was ineffective for failing to obtain public records of his earlier robbery conviction (which the State introduced during the penalty stage), and as a result, the jury was allowed to believe Barksdale had committed an act of violence or threatened the victim of that crime with a weapon.

Barksdale did not raise this claim in his Rule 32 petition. On direct appeal of his Rule 32 petition, the Court of Criminal Appeals denied the claim because he had not raised it in his Rule 32 petition. Doc. 20-26 at 155–57. Barksdale argued that it was contained in the section titled "Trial Counsel was Ineffective For Failing to Investigate and Present Mitigation Evidence at the Penalty Phase of Mr. Barksdale's Trial." Id.; Doc. 20-16 at 20 (emphasis added). But the Court of Criminal Appeals correctly pointed out that the section Barksdale relied on concerned only mitigators. Doc. 20-26 at 155–56. Barksdale offers no argument as to why this independent and adequate state ground does not bar his claim. He

does not assert cause or prejudice. And he does not argue that there will be a miscarriage of justice if this Court does not review the claim. So it is barred. See Cone, 556 U.S. at 465; Coleman, 501 U.S. at 750.[8]

c. *Other Mitigating Circumstances*

Barksdale also alleges that his trial counsel was ineffective for failing to investigate other mitigating circumstances. He raised this claim in his Rule 32 petition. Doc. 20-16 at ¶¶ 35–48. The state collateral trial court denied it, and the Court of Criminal Appeals affirmed, concluding that Goggans' performance was neither deficient nor prejudicial. Doc. 20-26 at 168–71. The Court of Criminal Appeals' reasoning was the same for Barksdale's claim about the general investigation into his past. Goggans did conduct an adequate investigation into statutory and nonstatutory mitigators. Id. at 168. He was aware of Barksdale's drug use but made a reasonable strategic decision not to use it and instead to focus on his youth. Id. at 162–63, 168–71. Barksdale said he had no mental health issues and Goggans had no reason to suspect otherwise. Id. at 171. Because Barksdale did not offer sufficient evidence showing that Goggans' investigation was unreasonable or that it prejudiced him, reasonable jurists would not doubt that

[8] The district court reached the merits and concluded that this argument failed to satisfy either prong of the Strickland standard. Barksdale, 2018 WL 6731175, at *81–84. If I were to reach the merits, I would conclude that reasonable jurists would not find the district court's assessment of this claim "debatable or wrong." Slack, 529 U.S. at 484.

reasonable jurists could find the state court decision correct. Slack, 529 U.S. at 484.

d. *Investigating Aggravators*

Barksdale claims that Goggans failed to investigate the aggravating circumstances relied on by the State. He did not include this claim in his Rule 32 petition. As a result, when he tried to raise the claim on appeal, the Court of Criminal Appeals rejected it for that reason. Doc. 20-26 at 155–56. Barksdale argued that it was contained in the section titled "Trial Counsel was Ineffective For Failing to Investigate and Present Mitigation Evidence at the Penalty Phase of Mr. Barksdale's Trial." Id.; Doc. 20-16 at 20 (emphasis added). But the Court of Criminal Appeals correctly pointed out that the section Barksdale relied on concerned only mitigators. Doc. 20-26 at 155–56. Barksdale offers no argument as to why this independent and adequate state ground does not bar his claim. He does not assert cause or prejudice. And he does not argue that there will be a miscarriage of justice if we do not review the claim. So it is barred. See Cone, 556 U.S. at 465; Coleman, 501 U.S. at 750.[9]

[9] It is also debatable if Barksdale even raised this issue in his federal habeas petition, but this order sets that issue aside given his clear failure to show why the procedural bar should be excused. In his federal habeas petition he did argue that the state courts improperly prevented him from presenting his failure to investigate and challenge the state aggravating circumstances claim. Doc. 1 at ¶¶ 119–62. The district court concluded that his argument was not cognizable in a federal habeas proceeding because "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions" and "defects in state collateral proceedings do not provide a basis for federal habeas relief." Barksdale, 2018 WL 6731175 at

e. *Submission of Mitigating Evidence*

Barksdale also alleges that his trial counsel failed to adequately submit mitigating evidence to the jury. He raised this claim in his Rule 32 petition. The trial court denied it. Doc. 20-26 at 116–25. The Court of Criminal Appeals affirmed, concluding that Goggans made a reasonable strategic decision to focus on Barksdale's age given the evidence he had. Id. at 163–64, 170–71. A fairminded jurist could agree with the court's conclusion about Goggans' presentation of mitigating evidence given that Barksdale's youth was the strongest mitigator Goggans had to work with. See Harrington, 562 U.S. at 102. And to the extent Barksdale argues that Goggans should have presented more mitigating evidence and that he was prejudiced by the failure to do so, that argument fails for the same reasons that his argument claiming a failure to investigate mitigating circumstances fails.

f. *Penalty Stage Closing Argument*

Barksdale alleges that his trial counsel was ineffective in presenting closing argument at the penalty stage. It is questionable whether Barksdale adequately raised this issue in his Rule 32 petition because he only briefly referenced it. Doc.

*14. No reasonable jurist could find the district court's assessment of the argument "debatable or wrong." Slack, 529 U.S. at 484; see Estelle v. McGuire, 502 U.S. 62, 67 (1991) ("We have stated many times that federal habeas corpus relief does not lie for errors of state law. Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.") (quotation marks omitted).

20-16 at 17. The state courts did not explicitly address it. But even if this Court reviews his contention de novo, it fails for the reasons given by the district court:

> [T]he scope and content of Petitioner's trial counsel's closing jury argument at the punishment phase of trial fell within the broad range of professionally reasonable assistance. Petitioner's trial counsel reasonably identified the lone statutory mitigating factor applicable to Petitioner and urged the jury to give great weight to that factor. Petitioner's trial counsel cannot reasonably be faulted for failing to discuss evidence of Petitioner's background that was not in evidence and not properly before the jury at the punishment phase of trial. Counsel's Rule 32 testimony was completely consistent with the record.

Barksdale, 2018 WL 6731175, at *76; see also id. (noting that "the least of us" was a reasonable argument theme given the circumstances because "Petitioner's trial counsel could reasonably have believed the jury would understand his reference to Petitioner as 'the least of us' in precisely the manner he intended it, i.e., as a reminder that Christians are charged by the founder of their faith with caring for the depressed, downtrodden, and rejected members of society, including presumably those abandoned by their own families") (footnotes omitted). For these reasons, this claim fails, and Barksdale is not entitled to a COA on it.

B. The Eighth Amendment Claims

Barksdale raises three Eighth Amendment claims in his application. First, he contends that Alabama's capital sentencing scheme is unconstitutional because it allows the judge to impose the death penalty without a unanimous jury recommendation. COA App. at 32–34. Second, he contends that the trial court

committed constitutional error when it rejected his request to instruct the jury about "what meaning" to assign to age as a mitigating circumstance. Id. at 34–36. And third, he contends that trial court made a Caldwell v. Mississippi, 472 U.S. 320 (1985), error by telling the jurors that they would not make the "ultimate decision" about his sentence. Id. at 36–37. There are three independently adequate reasons to deny Barksdale a COA on these claims.

1. Barksdale Didn't Raise These Claims in His Federal Habeas Petition

First, Barksdale did not raise any of these Eighth Amendment claims in his habeas petition. Because he did not raise any of them in his petition, this Court cannot consider any of them or grant a COA on them. See supra pages 12–13 (citing cases holding that this Court will not consider an issue the petitioner failed to raise in the district court).

2. Barksdale Didn't Raise These Claims in State Court

Second, Barksdale also did not raise any of these Eighth Amendment claims on direct appeal or in his Rule 32 petition. As a result, all three claims are procedurally defaulted. See supra note 4. That means this Court cannot grant federal habeas relief on any of them unless he can show cause and prejudice or that there would be a fundamental miscarriage of justice if this Court did not review the claims. See Smith, 256 F.3d at 1138. But Barksdale doesn't even address the fact

that his claims are procedurally defaulted, let alone argue that either of the exceptions to procedural default applies.

3. Barksdale's Claims Lack Merit

Even aside from the procedural problems with Barksdale's claims, none of them have any arguable merit.

a. *The Non-unanimous Jury Recommendation Claim*

In his first of these claims, Barksdale asserts that Alabama's capital sentencing scheme is unconstitutional because it permits a judge to impose the death penalty without a unanimous jury recommendation. Specifically, he argues that because Alabama is the only state left that permits a non-unanimous jury recommendation, it has failed to keep up with the "evolving standards of decency that mark the progress of a maturing society." COA App. at 33 (quoting Atkins v. Virginia, 536 U.S. 304, 311–12 (2002)). This claim is without merit.

The Supreme Court has repeatedly held that the Constitution does not require a jury, as opposed to a judge, to make the ultimate decision about whether to sentence a defendant to death. See McKinney v. Arizona, 140 S. Ct. 702, 707 (2020) ("[I]mportantly, in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range."); id. ("[A]s

Justice Scalia explained, the 'States that leave the ultimate life-or-death decision to the judge may continue to do so.'") (citation omitted); Spaziano v. Florida, 468 U.S. 447, 460 (1984) (rejecting claim that Florida's capital sentencing scheme violated the Eighth Amendment because it authorized the judge to decide whether to impose death), overruled in non-relevant part by Hurst v. Florida, 136 S. Ct. 616 (2016); Proffitt v. Florida, 428 U.S. 242, 252–53 (1976) (same). If the Constitution does not require the jury to make the ultimate life-or-death decision, the Constitution does not require a unanimous jury recommendation when the State chooses to include the jury in an advisory fashion.

b. *The Meaning of "Age" Jury Instruction Claim*

In his second Eighth Amendment claim, Barksdale argues that the trial court erred by rejecting his request to instruct the jury about "what meaning" to assign to age as a mitigating circumstance. COA App. at 34–36. Although he does not specifically describe the instruction he asked the trial court to give, he discusses the Supreme Court's decisions in Graham v. Florida, 560 U.S. 48 (2010), Roper v. Simmons, 543 U.S. 551 (2005), Thompson v. Oklahoma, 487 U.S. 815 (1988), and Eddings v. Oklahoma, 455 U.S. 104 (1982). And he says that "[i]t has now been a decade and a half since the Supreme Court concluded that, in light of the susceptibility of young people to immature and irresponsible behavior [and because] their irresponsible conduct is not as morally reprehensible as that of an

adult, a capital sentence for a person under the age of 18 at the time of the offense violates the Constitution." COA App. at 35 (citation and quotation marks omitted). This claim is without merit.

To begin, all of the cases that Barksdale cites and the principle that he extracts from them are about juveniles — those under 18 years of age when they committed capital murder. See Graham, 560 U.S. at 53; Roper, 543 U.S. at 556; Thompson, 487 U.S. at 819; Eddings, 455 U.S. at 105. But Barksdale was not a juvenile when he murdered Julie Rhodes. He was 18 years and six months old. COA App. at 35. And the Supreme Court has been clear that its precedent about juveniles does not cover 18-year-olds. See Roper, 543 U.S. at 574 ("Drawing the line at 18 years of age is subject, of course, to the objections always raised against categorical rules. . . . [H]owever, a line must be drawn."); see also Graham, 560 U.S. at 74–75 ("Because the age of 18 is the point where society draws the line for many purposes between childhood and adulthood, those who were below that age when the offense was committed may not be sentenced to life without parole for a nonhomicide crime.") (quotation marks omitted) (alteration in original). To the extent that the juvenile age decisions individually or collectively require a special jury instruction, Barksdale was not entitled to it.

When discussing mitigating circumstances, the court told the jury that it could "take into consideration the age of the defendant." Barksdale, 2018 WL

6731175, at *100. Because the trial court told the jury that it could take Barksdale's age into account, there is no likelihood that the instructions prevented the jury from considering Barksdale's age.

c. *The Caldwell Claim*

In his third Eighth Amendment claim, Barksdale contends that the trial court erred under Caldwell v. Mississippi, 472 U.S. 320 (1985), because (1) "the trial judge told the jurors that they would not be the ones making the 'ultimate decision' as to his sentence," (2) "[t]he closing arguments and the trial court's instructions reiterated numerous times that the jury was going to offer only 'a recommendation,' not an actual sentence," and (3) "the State's closing argument explicitly referred to the jury's recommendation as 'advisory.'" COA App. at 36–37. This claim is also utterly without merit.

In Caldwell, the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." 472 U.S. at 328–29. Although the jury in Caldwell had the ultimate authority to impose the defendant's sentence, this Court has held that Caldwell applies to advisory juries too. See Mann v. Dugger, 844 F.2d 1446, 1454–55 (11th Cir. 1988) (en banc) see also Harich v. Dugger, 844 F.2d 1464, 1472–74 (11th Cir. 1988) (en banc). But this Court has also made clear that

"references to and descriptions of the jury's sentencing verdict . . . as an advisory one, as a recommendation to the judge, and of the judge as the final sentencing authority are not error under Caldwell" so long as those references and descriptions are accurate statements of the law. Davis v. Singletary, 119 F.3d 1471, 1482 (11th Cir. 1997).

The statements that Barksdale complains of here were accurate statements of Alabama law. See Ala. Code § 13A-5-46(a), (e) (1975) (stating that the penalty stage jury "shall return an advisory verdict," which it "recommend[s]" to the trial court); id. § 13A-5-47(e) (explaining that "[w]hile the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court"). For that reason, his claim is clearly foreclosed by binding precedent.

C. The Sixth Amendment Sentencing Claims

Barksdale claims that his death sentence is unconstitutional under the Supreme Court's decisions in Apprendi v. New Jersey, 530 U.S. 466 (2000), Ring v. Arizona, 536 U.S. 584 (2002), and Hurst v. Florida, 136 S. Ct. 616 (2016). He makes two arguments.

1. Aggravating Factors

Barksdale first argues that it is "debatable" whether the jury made any findings on aggravating factors because "[t]he sentencing form merely indicated the jury's non-unanimous recommendation for death" and "did not disclose any

findings regarding the three aggravating factors the State attempted to prove." COA App. at 39. According to him, that means "it is not known whether one or more members were unpersuaded by any of the proffered aggravators." Id.[10]

Barksdale raised this claim in his Rule 32 petition; the state collateral trial court dismissed it as "procedurally barred as it could have been but was not raised at trial or on direct appeal." Docs 20-16 at 68–70; 20-26 at 90. The Court of Criminal Appeals affirmed on an alternative ground. Doc. 20-26 at 193. It concluded that because Barksdale's claim relied on Apprendi and Ring, and "it is well settled that Apprendi and Ring do not apply retroactively on collateral review," the "summary denial of [his] claim was proper." Id. (citing Hall v. State, 979 So.2d 125, 177 (Ala. Crim. App. 2007) (citing Supreme Court and Alabama cases holding that Apprendi and Ring do not apply retroactively under federal and state law)).

In his federal habeas petition, Barksdale argued that the state courts committed error by dismissing his claim. See Barksdale, 2018 WL 6731175, at *11 n.69; Doc. 1 at ¶¶ 194–95. His petition is not clear what that alleged error was, other than that he could not have defaulted on his claim "as Apprendi was

[10] There were three aggravating factors: (1) Barksdale was previously convicted of a felony involving the use or threat of violence to the person; (2) the capital offense was committed while the defendant was engaged or was an accomplice in the commission of, or an attempt to commit, robbery; and (3) the murder was especially heinous, atrocious or cruel. The prosecution and defense stipulated to the prior felony conviction that established the first of those. Doc. 20-26 at 7–8.

decided five years after his sentence." Id. ¶ 194. There are three possibilities. First, Barksdale might have been saying that the Court of Criminal Appeals misinterpreted state procedural bar law. The district court concluded that such an argument was not cognizable in a federal habeas proceeding because "[i]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Barksdale, 2018 WL 6731175, at *14. Second, Barksdale might have been saying that the state collateral proceedings were defective for permitting his claim to be procedurally barred. The district court concluded that such an argument was not cognizable in a federal habeas proceeding because "defects in state collateral proceedings do not provide a basis for federal habeas relief." Id. Finally, Barksdale might have been arguing that the Court of Criminal Appeals misinterpreted federal law regarding the retroactive application of Ring and Apprendi. But that argument fails because Ring and Apprendi do not apply retroactively under federal law. See Schriro v. Summerlin, 542 U.S. 348 (2004).

In his COA application, Barksdale fails to explain how reasonable jurists could conclude that the district court's holding was debatable or wrong. See Slack, 529 U.S. at 484. Nor can he do so. See Estelle, 502 U.S. at 67 ("We have stated many times that federal habeas corpus relief does not lie for errors of state law. Today, we reemphasize that it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions.") (quotation marks

omitted); Gissendaner v. Comm'r, Ga. Dep't of Corr., 794 F.3d 1327, 1333 (11th Cir. 2015) (explaining that there is "a long line of Supreme Court decisions holding that a violation of state procedural law does not itself give rise to a due process claim"); Jamerson v. Sec'y for Dep't of Corr., 410 F.3d 682, 688 (11th Cir. 2005) ("Federal habeas relief is unavailable for errors of state law.") (quotation marks omitted); Williams v. Turpin, 87 F.3d 1204, 1206 n.1 (11th Cir. 1996) ("[A] federal habeas court cannot review perceived errors of state law.").

And, in any event, after concluding that Barksdale's claim was procedurally barred, the state collateral trial court stated "solely as a secondary ground" that his claim would fail on the merits. Doc. 20-26 at 91. The court explained that "[i]n Alabama, at least one statutory aggravating circumstance must be proven in order for death to be the maximum punishment authorized by law," and "[b]y finding Barksdale guilty of a murder during the course of a robbery, the jury found the necessary fact required to authorize death under Alabama law." Id.; see Ala. Code § 13A-5-45(e) ("[A]ny aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing.").

This Court's decision in Lee v. Commissioner, Alabama Department of Corrections, 726 F.3d 1172 (11th Cir. 2013), is dispositive. In that Alabama

capital case, the jury convicted the defendant of capital murder "during a robbery in the first degree." Id. at 1197–98 (quotation marks omitted). Because of that verdict, this Court concluded that the jury also "necessarily" found the statutory aggravating factor of committing capital murder while "engaged in the commission of . . . robbery." Id. (quotation marks omitted). And because the jury's guilt-stage finding of conviction necessarily included a finding of an aggravating circumstance, we held that the state court's decision rejecting the claim was not contrary to or an unreasonable application of Ring or any other Sixth Amendment case. Id. at 1198. In doing so, we explained that "nothing in Ring — or any other Supreme Court decision — forbids the use of an aggravating circumstance implicit in a jury's verdict." Id.

So even if this Court were to overlook the procedural problem with Barksdale's claim, address the merits under a de novo standard of review, and pretend that Ring and the other Sixth Amendment cases that he relies on do apply retroactively to him, he still would not be entitled to a COA on this claim.

2. Trial Court's Treatment of the Jury Recommendation

In his second Sixth Amendment sentencing argument, Barksdale claims that "the trial court wholly disregarded the jury's sentencing recommendation and made independent sentencing-related findings of fact." COA App. at 40. Specifically, the trial court stated:

> The Court has considered the recommendation of the jury, but has not given it great weight. In fact, if the Court has found that it did not meet the criteria described by law, it would not hesitate to decide otherwise. This Court is not the least concerned with public opinion or what a jury might determine without the benefit of the various factors which this Court must consider in sentencing, including matters which the jury did not hear, and the reports of other decisions in like cases.

Id.

This claim, like so many of the others, has procedural problems. First, Barksdale did not raise it on direct appeal or in his Rule 32 petition. Doc. 20-16. And because his direct appeal and Rule 32 proceedings ended years ago, and this claim cannot be raised in a second or successive Rule 32 petition under Alabama law, it is procedurally defaulted. See supra note 4. That means this Court cannot address it unless he shows cause and prejudice or that there would be a fundamental miscarriage of justice if we did not decide the claim. See Smith, 256 F.3d at 1138. But once again, Barksdale does not acknowledge this procedural bar problem or argue that any exception to the bar applies.

Second, Barksdale did not raise this claim in his habeas petition. Doc. 1. That means this Court may not consider it. See supra pages 12–13.

Even if this claim were properly before this Court, it still would not merit a COA. Just this term, the Supreme Court reiterated that nothing in its Sixth Amendment precedent requires a jury to weigh the aggravating and mitigating circumstances at all, let alone requires a judge to give weight or deference to the

jury's recommendation. See McKinney, 140 S. Ct. at 707 (explaining "in a capital sentencing proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision"). And the Supreme Court also made clear that it has "carefully avoided any suggestion that it is impermissible for judges to exercise discretion — taking into consideration various factors relating both to offense and offender — in imposing a judgment within the range prescribed by the statute." Id. (emphasis and quotation marks omitted). McKinney disentitles Barksdale to a COA on this claim.

D. The Ghostwriting Claim

In Barksdale's Rule 32 proceedings, the state trial judge adopted verbatim two dispositive orders drafted by attorneys for the State. The first order dismissed all of the counts of the original Rule 32 petition but two, for which it scheduled an evidentiary hearing. Doc. 20-26 at 39–91. The second order, entered after the hearing, denied those two claims. Id. at 92–126. Barksdale argues that the state trial judge's wholesale adoption of the prosecution's proposed findings of fact and conclusions of law proffered by attorneys for the State violated his rights under the Due Process Clause. COA App. at 41–47.

Barksdale raised part of this claim when appealing the denial of his Rule 32 petition: he challenged the trial court's adoption of the state's proposed order

denying his two claims after the evidentiary hearing, but not the first order dismissing most of his claims. Docs. 20-21 at 80–82; 20-26:202 n.14. And his Rule 32 claim did not mention the Due Process Clause. The Court of Criminal Appeals denied Barksdale's claim on the merits, holding that courts are allowed to adopt the State's proposed order when denying a Rule 32 petition and such an order will not be reversed as long as its findings of fact and conclusions of law are not clearly erroneous. Doc. 20-26:202.

Barksdale raised in his federal habeas petition the argument that adopting both orders verbatim denied him "a fair opportunity to have his State habeas petition heard by a neutral tribunal." Doc. 1:47–48. The district court ruled that he was alleging an error of state law, and that it was "not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Barksdale, 2018 WL 6731175, at *14.

One could interpret Barksdale's argument to the district court as raising a Due Process Clause argument about ghostwriting (he explicitly makes it a due process argument in his COA application). To the extent he raised a federal issue, and setting aside for now the procedural default problems, his claim would fail even under de novo review. We have already stated that a state court's verbatim adoption of the prosecution's proposed order does not give rise to a constitutional violation. See Rhode v. Hall, 582 F.3d 1273, 1281 n.4 (11th Cir. 2009) (explaining

that had the petitioner asked for a COA on the argument that the district court should have granted habeas relief "because the state habeas court adopted the State's proposed order verbatim," we would have denied his request because "[t]he state habeas court's verbatim adoption of the State's facts would not rise to 'a substantial showing of the denial of a constitutional right'") (emphasis omitted).

Our precedent also forecloses any argument that every ghostwritten state court decision is not entitled to AEDPA deference. We have held that a state court's verbatim adoption of the prosecution's proposed order is entitled to AEDPA deference as long as (1) both parties "had the opportunity to present the state habeas court with their version of the facts" and (2) the adopted findings of fact are not "clearly erroneous." Id. at 1282; see also Jones v. GDCP Warden, 753 F.3d 1171, 1183 (11th Cir. 2014) (rejecting petitioner's ghostwriting argument because the state court "requested that both [petitioner] and the State prepare proposed orders").

Both of those conditions are met in this case. Here, as in Rhode, "the record clearly reflects that both [petitioner] and the State had the opportunity to present the state habeas court with their version of the facts." 582 F.3d at 1282. The state court permitted both parties to submit their own proposed orders and respond to the other side's proposed orders. See Docs. 20-21 at 81–82 (discussing how both parties presented their own proposed orders on evidentiary hearing claims); 20-16

at 138–42 (Barksdale arguing to the state court that the State's proposed order dismissing most claims should be rejected). So the state court's "findings of fact are still entitled to deference" unless Barksdale can show those facts to be clearly erroneous. Rhode, 582 F.3d at 1282. And in the six-and-a-half pages Barksdale spends on this issue in his COA application, he does not point to a single incorrect factfinding contained in either Rule 32 order. Nor does he point to a case contradicting Rhode or Jones.

For all of those reasons he is not entitled to a COA on this issue.

V. CONCLUSION

Because Barksdale has failed to identify any claim that meets the standard for granting a COA, his motion for certificate of appealability is DENIED.

CIRCUIT JUDGE

APPENDIX 4

Decision of the U.S. Court of Appeals
for the 11th Circuit, September 7, 2022 (granting limited COA)
Barksdale v. Attorney General, State of Alabama, et al.,
Docket No. 20-10993-P

In the

United States Court of Appeals

For the Eleventh Circuit

No. 20-10993

TONY BARKSDALE,

Petitioner-Appellant,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 3:08-cv-00327-WKW-CSC

ON MOTION FOR RECONSIDERATION OF THE DENIAL OF APPLICATION FOR A CERTIFICATE OF APPEALABILITY

Before LAGOA, and ED CARNES, Circuit Judges.

ORDER:

Before us is Petitioner-Appellant Tony Barksdale's amended motion to reconsider the denial in full of a certificate of appealability (COA), which was entered by order of a single judge of this Court on June 29, 2020, in Barksdale's appeal from the district court's denial of his 28 U.S.C. § 2254 petition.[1] The motion to reconsider is granted in part.

The claims that are involved in this appeal, the district court's rulings, the applicable law and record facts, Barksdale's contentions, and other matters involving the issues arising from those claims are discussed in the previously entered, single-judge order denying a COA. We will not reiterate them here. We will,

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[1] The initial order denying the application for a COA was entered by a single judge, as permitted by Federal Rule of Appellate Procedure 22(b)(2) and 11th Circuit Rule 22-1(c). As also permitted by Rule 22-1(c), petitioner filed a motion for reconsideration of that denial, which went to the panel. Thereafter, one of the three judges who was on the panel retired from judicial service. Petitioner later filed an amended motion for reconsideration of the denial of a COA, which also went to the panel. That is the motion before us now, and it is being ruled on by quorum, as permitted by 28 U.S.C. § 46(d) ("A majority of the number of judges authorized to constitute a court or panel thereof, as provided in paragraph (c), shall constitute a quorum.").

however, revise or correct that earlier order's statement of the COA standard, and we will apply the correct standard here. As a result, and we will also modify the result to grant a COA on the claim of ineffective assistance of counsel at the sentence stage.

A COA may issue "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). That inquiry "is not coextensive with a merits analysis," and in deciding whether a COA should issue a court of appeals may not rule on the merits of the case. *Buck v. Davis*, 137 S. Ct. 759, 773–74 (2017). "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.'" *Id.* at 773 (quoting *Miller–El v. Cockrell,* 537 U.S. 322, 327 (2003)).

This threshold question should be decided without "full consideration of the factual or legal bases adduced in support of the claims." *Miller–El*, 537 U.S. at 336. Deciding the merits of a claim in ruling on an application for a COA "place[s] too heavy a burden on the prisoner at the COA stage," *Buck*, 137 S. Ct. at 774 (emphasis omitted), and § 2253(c) forbids doing it, *Miller–El*, 537 U.S. at 336. It's too heavy a burden at the threshold because "a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail." *Buck*, 137 S. Ct. at 774 (quoting *Miller–El,* 537 U.S. at 338).

Where a district court has denied a constitutional claim not only for lack of merit but also on procedural bar grounds, a petitioner must also show that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The same strictures that apply to the application of the COA standard to merits denials also apply to denials of claims based on procedural bar holdings. Courts of appeal are not to collapse the issue of whether the district court's procedural ruling is debatable with the issue of whether it is correct. If jurists of reason could disagree with a district court's procedural ruling, as well as its substantive ruling, a COA should be granted on the claim.

Accordingly, we vacate the parts of the June 29, 2020 order that concluded the claims for which Barksdale seeks a COA lack merit or that the procedural bar holdings of the district court were correct. Applying the proper COA standard, we conclude instead that Barksdale has not shown that jurists of reason could disagree with or find debatable or deserving of encouragement to proceed further any of the claims and issues for which he is seeking a COA, except for one. Jurists of reason could disagree with or find debatable or deserving of encouragement to proceed further his ineffective assistance of counsel regarding sentencing claim. Only that claim. We will grant a COA for it alone.

Petitioner's motion for reconsideration is granted to the extent that we have reconsidered whether a COA should be granted under the correct standard as to each of the claims for which he

seeks one. Having done that, we deny a COA for all of those claims except the ineffective assistance of counsel regarding the sentence claim. For that claim alone, a COA is granted. As to all of the other claims, a COA is denied.[2]

This Court's review of the district court's judgment will be restricted to the sentence stage ineffective assistance of counsel claim, and in any brief petitioner files hereafter he may not argue any other claim or issue. He may not, for example, argue his claim of ineffective assistance of counsel at the guilt stage. *Newland v.*

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[2] The claims relating to the trial and sentence proceeding for which petitioner sought a COA are that: he received ineffective assistance of counsel at the guilt stage; he received ineffective assistance of counsel at the penalty stage; the trial judge unconstitutionally determined that aggravating circumstances outweighed mitigating ones and that a death sentence was warranted "without regard to the jury's findings of fact"; a "proper jury instruction on age as a mitigating circumstance" was unconstitutionally denied; and a capital sentence was imposed without a unanimous jury recommendation. Petitioner's Application for a Certificate of Appealability at 9–10.

The petitioner also asked for a COA on a claim that related solely to the state court collateral proceeding. As his COA application phrased it:

> In the State habeas proceedings, the adoption of the prosecution's proposed findings of fact and conclusions of law in their entirety, coupled with other evidence that the judge did not reach independent determinations but simply accepted whatever the Attorney General put in front of him, also demonstrated that Petitioner was denied his right to a constitutionally proper collateral review.

Id. at 10.

Hall, 527 F.3d 1162, 1166 n.4 (11th Cir. 2008) (A COA granted on the issue of sentencing stage ineffective assistance does not cover any guilt stage ineffective assistance claim or issue); *see also Spencer v. Sec'y, Dep't of Corr.*, 609 F.3d 1170, 1180 (11th Cir. 2010) ("It is abundantly clear that 'our review is restricted to the issues specified in the certificate of appealability.'"); *Hodges v. Att'y Gen., State of Fla.*, 506 F.3d 1337, 1340–41 (11th Cir. 2007) (explaining that "there would be little point in Congress requiring specification of the issues for which a COA was granted if appellate review was not to be limited to the issues specified.") (quoting *Murray v. United States*, 145 F.3d 1249, 1250 (11th Cir. 1998)); *Rivers v. United States*, 777 F.3d 1306, 1308 n.1 (11th Cir. 2015) (Claims outside the scope of the COA "are not at issue" in the appeal.); *Murray*, 145 F.3d at 1250–51 (Consistent with prior decisions, "and with the obvious import of § 2253(c)(3), we hold that in an appeal brought by an unsuccessful habeas petitioner, appellate review is limited to the issues specified in the COA.").

We have formally stricken parts of a petitioner's brief that addresses claims or issues not covered by the COA. *See Hodges*, 506 F.3d at 1340–41 (striking the part of a petitioner's brief addressing an issue for which no COA was granted because the petitioner had "flout[ed] the clear COA order limiting the issues that could be briefed on the merits"); *Castillo v. United States*, 816 F.3d 1300, 1306 (11th Cir. 2016) (striking the portions of the petitioner's briefs that addressed an issue beyond the scope of the COA).

Claims and issues other than the one specified in the COA will not be addressed or decided by this Court. *Presnell v. Warden*, 975 F.3d 1199, 1227 n.54 (11th Cir. 2020) (refusing to consider on appeal an ineffective assistance of counsel issue different from the one for which a COA had been granted); *Jones v. Sec'y, Fla. Dep't of Corr.*, 906 F.3d 1339, 1341 n.1 (11th Cir. 2018) (refusing to consider the petitioner's issue of equitable tolling since the COA was granted only on the issue of statutory tolling, because "our review is cabined by the COA, so that argument is not properly before us"); *Griffith v. United States*, 871 F.3d 1321, 1329 n.8 (11th Cir. 2017) (refusing to consider "several other contentions" that are "beyond the scope of the COA"); *Denson v. United States*, 804 F.3d 1339, 1341 n.1 (11th Cir. 2015) ("Because this issue is outside the scope of the COA, we do not address it."); *Jordan v. Sec'y, Dep't of Corr.*, 485 F.3d 1351, 1356 (11th Cir. 2007) ("[W]e will not decide any issues involving the actual innocence claim because the law of this circuit prohibits consideration of any issue that was not specified in the COA order."); *Diaz v. Sec'y for Dep't of Corr.*, 362 F.3d 698, 702 (11th Cir. 2004) ("Because the COA in this case was limited to the question of whether equitable tolling enlarged the time period for filing, and not whether an actual innocence claim could equitably toll the statute of limitations, we do not address this issue.").

In conclusion, a certificate of appealability is GRANTED on the sentence stage ineffective assistance of counsel claim and is DENIED on all of the other claims and issues.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

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September 07, 2022

Steven Marc Schneebaum
Steven M. Schneebaum, PC
1776 K ST NW STE 800
WASHINGTON, DC 20006

Appeal Number: 20-10993-P
Case Style: Tony Barksdale v. Attorney General, State of Ala, et al
District Court Docket No: 3:08-cv-00327-WKW-CSC

Electronic Filing
All counsel must file documents electronically using the Electronic Case Files ("ECF") system, unless exempted for good cause. Although not required, non-incarcerated pro se parties are permitted to use the ECF system by registering for an account at www.pacer.gov. Information and training materials related to electronic filing are available on the Court's website.

The enclosed order has been ENTERED.

Appellant's brief is **due 40 days** from the date of the enclosed order.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: David L. Thomas
Phone #: (404) 335-6171

MOT-2 Notice of Court Action

APPENDIX 5

Decision of the U.S. Court of Appeals for the
11th Circuit, May 24, 2024 (after briefing and argument)
Barksdale v. Attorney General, State of Alabama, et al.,
Docket No. 20-10993-P; 2024 WL 2698399

[DO NOT PUBLISH]

In the United States Court of Appeals

For the Eleventh Circuit

No. 20-10993

TONY BARKSDALE,

Petitioner-Appellant,

versus

ATTORNEY GENERAL, State of Alabama, COMMISSIONER, Alabama Department of Corrections, WARDEN, Holman Correctional Facility,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 3:08-cv-00327-WKW-CSC

Before WILSON, JORDAN, and LAGOA, Circuit Judges.

PER CURIAM:

Tony Barksdale was sentenced to death in 1996 for murder. Since the conclusion of his direct-appeal proceedings, he has unsuccessfully sought post-conviction relief in the state and federal courts.

We granted a limited certificate of appealability to determine whether trial counsel was ineffective at the penalty phase of Mr. Barksdale's capital murder trial. With the benefit of oral argument and for the reasons set forth below, we affirm the district court's denial of habeas corpus relief on the ineffective assistance claim.

I

In November of 1996, an Alabama jury found Mr. Barksdale guilty of capital murder. By an 11-to-1 vote, the jury recommended that he be sentenced to death, and the trial court imposed that sentence. We recount the events that led to the conviction and sentence, as well as the evidence adduced at the state post-conviction proceedings.

A

The facts underlying Mr. Barksdale's conviction were described by the Alabama Court of Criminal Appeals (ACCA) on direct appeal. *See Barksdale v. State*, 788 So. 2d 898, 901–02 (Ala. Crim. App. 2000). We summarize those facts below.

On the evening of November 30, 1995, Mr. Barksdale—who was then 18 years old—and two friends, Jonathan Garrison and Kevin Hilburn, decided to go on a road trip from Guntersville, Alabama, to Alexander City, Alabama, where Mr. Barksdale had previously lived. In the early hours of the next morning, the three stole a vehicle in Guntersville. After wrecking the vehicle in nearby Sylacauga, they hitchhiked the remainder of the trip toward their destination. When they arrived in Alexander City, they spent the day meeting with acquaintances of Mr. Barksdale's. By nightfall, however, they did not have a way to return to Guntersville. Following several failed attempts to flag down vehicles, one person agreed to drive them as far as a local shopping center.

The victim, 19-year-old Julie Rhodes, worked at that shopping center. At 5:45 p.m., Ms. Rhodes went home for her dinner break, leaving in her silver Nissan. As she returned 45 minutes later to begin her next shift, Mr. Barksdale flagged her down and entered her vehicle along with Mr. Garrison and Mr. Hilburn. Mr. Barksdale—whom multiple witnesses testified was carrying a gun that day—directed Ms. Rhodes to drive around the neighborhood and proceed into a dead-end street. At this point, Mr. Garrison and Mr. Hilburn exited the vehicle and ran behind a nearby shed. As Ms. Rhodes attempted to reverse the vehicle out of the dead-end street, Mr. Barksdale, still inside, shot her twice: once in the back and once in the face. Mr. Barksdale then forced Ms. Rhodes out of the vehicle and ordered his friends to re-enter. The three proceeded back to Guntersville in the stolen vehicle belonging to Ms. Rhodes.

In the meantime, Ms. Rhodes—who was still alive—attempted to seek help and managed to reach a nearby house. A resident of the area heard her screams and discovered her lying in the yard of a house, bleeding profusely. Ms. Rhodes received emergency treatment at a local hospital and was then airlifted to Birmingham, Alabama. But she succumbed to her gunshot wounds on the way there.

B

A Tallapoosa County grand jury indicted Mr. Barksdale on three counts of capital murder and the case proceeded to trial. Thomas M. Goggans represented Mr. Barksdale at both the guilt and penalty phases. At trial, the state argued that Mr. Barksdale had shot and killed Ms. Rhodes in order to steal her vehicle and return to Guntersville. The state called 73 witnesses, including police officers, forensic scientists, the doctor who had provided emergency treatment to Ms. Rhodes, Mr. Garrison (who agreed to testify as part of a plea deal), and persons who were in the area at the time of the shooting. *See Barksdale v. Dunn*, 2018 WL 6731175, at *3–7 n.57 (M.D. Ala. Dec. 21, 2018).

Mr. Goggans conceded that Mr. Barksdale had shot Ms. Rhodes but asserted that the shooting was accidental. *See id.* at *7. Mr. Goggans presented a single witness for the defense: a firearms expert who testified about the gun's poor condition. *See id.*

At the close of the evidence, the trial court granted Mr. Barksdale's motion for acquittal on Count 3 of the indictment, which charged him with intentionally causing Ms. Rhodes' death

by using a deadly weapon while within or from a vehicle. *See id.* The jury found Mr. Barksdale guilty on the remaining two counts—intentionally causing Ms. Rhodes' death by shooting her while stealing her vehicle and armed with a deadly weapon, and intentionally causing her death by using a deadly weapon while she was in a vehicle. *See id.* at *8.

At sentencing, the state pursued the death penalty against Mr. Barksdale and sought to prove three aggravating factors: first, that the homicide was committed in connection with a robbery; second, that the homicide was heinous, atrocious, and cruel; and third, that Mr. Barksdale had a previous conviction for a crime of violence (robbery) when he lived in Virginia. *See* Ala. Code § 13A-5-49.

Mr. Goggans presented a very limited defense during the penalty phase. He did not call any witnesses, nor did he try to rebut any of the state's three aggravators. Mr. Goggans only offered a previously introduced exhibit—Mr. Barksdale's birth certificate—and rested his case. He did not present any mitigators other than Mr. Barksdale's age. During his closing argument, Mr. Goggans relied exclusively on the fact that Mr. Barksdale was 18 years old at the time of the crime and asked the jury to spare his life, making references to passages in the Bible. *See* Doc. 20-13 at 107–08, 115–18; *see also* Doc. 20-18 at 137.

The jury, by a vote of 11-to-1, recommended a sentence of death for Mr. Barksdale. The trial court imposed that sentence, finding that the state's three aggravators—which had been proven

beyond a reasonable doubt—substantially outweighed the defense's one mitigator. *See* Doc. 20-5 at 192–201. On direct appeal, the ACCA affirmed, and Mr. Barksdale's petitions for a writ of certiorari to the Alabama Supreme Court and the United States Supreme Court were both denied. *See Barksdale v. State*, 788 So. 2d at 915; *Ex parte Barksdale*, 788 So. 2d 915 (Ala. 2000); *Barksdale v. Alabama*, 532 U.S. 1055 (2001).

C

Mr. Barksdale timely sought post-conviction relief pursuant to Rule 32 of the Alabama Rules of Criminal Procedure, asserting 19 different claims. *See* Doc. 20-16 at 8. The Rule 32 court summarily dismissed all but two of his claims, and set an evidentiary hearing for those claims. As relevant here, one of those claims was that Mr. Goggans had rendered ineffective assistance by failing to investigate and present mitigating evidence during the penalty phase. *See* Doc. 20-16 at 151.[1]

At the evidentiary hearing, Mr. Barksdale called four witnesses: Mr. Goggans; Mary Archie, his mother; Maxwell Johnson, a retired Marine Lieutenant Colonel who had previously housed Mr. Barksdale as a teenager; and Ernest Lee Conner, Jr., a North Carolina trial attorney specializing in capital post-conviction cases. *See* Doc. 20-18 at 2. Mr. Barksdale did not testify.

[1] We set out only the evidence relevant to the ineffective assistance of counsel claim before us.

Mr. Goggans offered testimony regarding his trial strategy at the penalty stage. On direct examination, Mr. Barksdale's counsel asked Mr. Goggans about his attempts to gather information regarding Mr. Barksdale's robbery conviction in Virginia. *See id.* at 89–92, 132–34. Mr. Goggans acknowledged that he never investigated the previous conviction. Specifically, Mr. Goggans had failed to contact Mr. Barksdale's public defender in Virginia, read the victim's statement, or investigate whether Mr. Barksdale had used a firearm during the robbery—a fact which the state relied on to prove the crime-of-violence aggravator beyond a reasonable doubt. *See* Doc. 20-13 at 113 (prosecutor arguing at closing that Mr. Barksdale had been previously convicted for a crime of violence).

When asked whether he had read Mr. Barksdale's confession as to the robbery, Mr. Goggans answered: "I'm not sure that I did . . . It's possible that I did, but probably not." Doc. 20-18 at 91. Mr. Goggans recalled "talking to the [victim] who was brought down to [the courthouse]" and who "indicate[d] that he recognized Tony [Barksdale]." *Id.* at 90–92. But Mr. Goggans could not recall asking Mr. Barksdale whether he had been the gunman in the robbery and his "recollection [was] that somehow he was not the one who actually had the gun[.]" *Id.* Mr. Goggans said that "there were a number of people involved" in the robbery, indicating that Mr. Barksdale had not acted alone. *See id.*

On cross-examination, Mr. Goggans testified that he had spoken to the robbery victim "in the back of th[e] courtroom"

during the trial, and that the victim "said that he . . . recognized Tony [Barksdale] from having been there." *Id.* at 131–32. Mr. Goggans explained that his decision to not contest the state's crime-of-violence aggravator was a strategic choice given the risk associated with having the victim testify against Mr. Barksdale before the jury at the penalty phase. Because he "thought a certified copy [of the robbery conviction] was going to probably come in no matter what," Mr. Goggans asserted that "we would be better off just going with the [certified copy] than putting on a live witness." *Id.* at 131–33.

With respect to Mr. Barksdale's family, Mr. Goggans claimed that he called Mr. Barksdale's mother, Ms. Archie, multiple times before trial and that she was uncooperative each time. *See id.* at 93–95. Mr. Goggans asserted that it "would be very risky" to place an uncooperative witness on the stand, and therefore made a strategic decision to not have her testify at the trial. *See id.* at 142–144. Critically, he could not recall (and the fee declaration from the trial court record does not reflect) any attempt to contact anyone other than Mr. Barksdale's parents as potential mitigation witnesses. *See* Docs. 20-6 at 5–11, 20-18 at 89–93.

Regarding Mr. Barksdale's father, Mr. Goggans testified that on the few occasions he spoke with him, his father said that his son "had gotten involved with gangs and selling drugs" and that "when he got in trouble . . . he would try to lie his way out of it." Doc. 20-18 at 96–97, 159.

At the evidentiary hearing, Ms. Archie testified that Mr. Barksdale's childhood was marked by an absence of adult supervision due to her rampant addiction to crack cocaine. *See* Docs. 20-18 at 162, 20-19 at 35. She denied, however, that her children ever saw her using drugs. *See* Doc. 20-18 at 185. She also testified that Mr. Barksdale's father had physically abused her twice in front of her children and had physically abused Mr. Barksdale when he was as young as six, on at least four separate occasions, by punching him in the chest. *See id.* at 180–81. On at least one occasion, she sought refuge at the women's shelter with her two children to escape the abuse at home. *See id.* at 176.

Ms. Archie maintained that, during Mr. Barksdale's trial, she tried contacting Mr. Goggans multiple times and that he often failed to return her calls. *See* Doc. 20-19 at 16–17. She testified that in her limited conversations with Mr. Goggans, he never asked if there were relatives or friends willing to provide information on Mr. Barksdale that might have served as mitigating evidence. *See id.* at 14.

Mr. Johnson, Mr. Barksdale's "father figure," testified that he had originally met Mr. Barksdale through his own son, who was Mr. Barksdale's middle school classmate. *See id.* at 38–39. After learning that Mr. Barksdale had a difficult situation at home, he welcomed him into his house for "several weeks if not a couple of months." *Id.* at 39. Mr. Johnson testified that during this time he learned that Mr. Barksdale had "a very difficult background [and] unhappy home life [with] parents screaming at each other" and that

he was aware of "physical violence [and] verbal abuse" by his parents. *See id.* at 42–43. Mr. Johnson also noted that Mr. Barksdale had expressed appreciation as an adolescent for the care received during this time away from home. *See id.* at 45. He was aware of Mr. Barksdale's difficulties with the law, explaining that he had been "very, very sad" when he learned of his involvement in the Virginia robbery. *See id.* at 47. Mr. Johnson testified that he had never met either of Mr. Barksdale's parents prior to the murder conviction. *See id.* at 49–50.

Finally, Mr. Conner, Jr., a North Carolina trial attorney with experience in capital post-conviction litigation, testified as to the professional standards that apply to defense counsel in such cases. He opined that Mr. Goggans' representation of Mr. Barksdale fell far below what the Sixth Amendment required for effective assistance of counsel. *See generally id.* at 85–201.

At the Rule 32 hearing, Mr. Barksdale introduced the offense/incident and pre-sentence investigation reports from his Virginia robbery case. *See* Rule 32 Exh. 21, 23. According to the incident report, the victim attempted to deliver pizza to an apartment before learning that the resident there had not placed the order. Mr. Barksdale then approached the victim, "asking where the pizzas were being delivered[.]" *Id.* at 2. Two more men showed up shortly thereafter—one of whom pointed a gun at the victim and demanded that he hand over the pizzas and money. *See id.* According to the report, the victim identified Tyrone Barksdale,

Mr. Barksdale's older brother, as the gunman. *See id.* at Supplement 4.

The Rule 32 court denied Mr. Barksdale's ineffective assistance of counsel claim as to the penalty phase on the merits. As relevant here, the Rule 32 court concluded that Mr. Goggans' failures to investigate and present mitigating evidence did not constitute unconstitutionally deficient performance and had not prejudiced Mr. Barksdale under *Strickland v. Washington*, 466 U.S. 668 (1984). *See Barksdale*, 2018 WL 6731175, at *10.

In 2007, the ACCA affirmed the denial of Mr. Barksdale's Rule 32 petition. *See Barksdale v. State*, 14 So. 3d 196 (Ala. Crim. App. 2007); Doc. 20-26 at 127. The ACCA ruled that Mr. Barksdale's post-conviction counsel did not properly allege that Mr. Goggans failed to investigate and rebut the state's three aggravators and had thus forfeited the ineffectiveness claim. *See id.* at 157. With respect to Mr. Barksdale's claim that Mr. Goggans had failed to adequately investigate and present mitigating evidence at the penalty stage, the ACCA affirmed on the same grounds as the Rule 32 court, and also concluded that Mr. Barksdale's post-conviction counsel had failed to sufficiently plead this issue in the initial Rule 32 brief. *See id.* at 177.

Mr. Barksdale then filed a federal habeas corpus petition, asserting 32 different claims. *See Barksdale*, 2018 WL 6731175, at *11 n.69. The district court denied relief on each claim and also denied a certificate of appealability. We initially denied a certificate of appealability. *See Barksdale v. Att'y Gen. of Alabama*, 2020 WL

9256555 (11th Cir. June 29, 2020). Mr. Barksdale then moved for reconsideration. In September of 2022, we granted Mr. Barksdale's amended motion to reconsider the denial of his motion for a certificate of appealability, limited to one issue: whether Mr. Goggans had rendered ineffective assistance at the penalty phase of the capital murder trial.

II

A district court's denial of a habeas corpus petition under 28 U.S.C. § 2254 is subject to *de novo* review. *See Ward v. Hall*, 592 F.3d 1144, 1155 (11th Cir. 2010). Because Mr. Barksdale filed his petition after April 24, 1996, however, this appeal is governed by the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), which "establishes a highly deferential standard for reviewing state court judgments." *Parker v. Sec'y, Dep't. of Corr.*, 331 F.3d 764, 768 (11th Cir. 2003). Under AEDPA, a federal court may grant a writ of habeas corpus only if the state court's determination of a federal claim was (1) "contrary to, or involved an unreasonable application of, clearly established Federal law," or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). The phrase "clearly established Federal law" encompasses only the holdings of the Supreme Court of the United States "as of the time of the relevant state-court decision." *Williams v. Taylor*, 529 U.S. 362, 412 (2000).

A state court's determination is "contrary to" clearly established federal law "if the state court arrives at a conclusion

opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the Supreme Court] has on a set of materially indistinguishable facts." *Id.* at 413. A state court's determination is "an unreasonable application" of clearly established federal law "if the state court identifies the correct governing legal principle from [the Supreme Court's] decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Reasonableness is an objective standard, and a federal court may not issue a writ of habeas corpus simply because it concludes in its independent judgment that the state court was incorrect. *See id.* at 410. *See also Woods v. Donald*, 575 U.S. 312, 316 (2015) ("[A]n unreasonable application . . . must be objectively unreasonable, not merely wrong; even clear error will not suffice.") (citation and internal quotation marks omitted).

Under § 2254(d)(2), we presume that a state court's factual findings are correct unless rebutted by clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1); *Pye v. Warden*, 50 F.4th 1025, 1034–35 (11th Cir. 2022) (en banc). "This deference requires that a federal habeas court more than simply disagree with the state court before rejecting its factual determinations. Instead, it must conclude that the state court's findings lacked even fair support in the record." *Rose v. McNeil*, 634 F.3d 1224, 1241 (11th Cir. 2011) (citations omitted).

Finally, our review of the evidence is limited to what both parties presented at the trial and the state post-conviction proceeding. *See Shinn v. Ramirez*, 596 U.S. 366, 378 (2022) (A federal

habeas court's review of a state court judgment is "highly circumscribed" and is "based solely on the state-court record[.]").

With these principles in mind, we address Mr. Barksdale's ineffective assistance claim.

III

Mr. Barksdale contends that Mr. Goggans rendered ineffective assistance at the penalty phase in three ways. First, he argues that Mr. Goggans "conducted next to no investigation of facts, potential witnesses, or evidence relevant to mitigation of punishment." Appellant's Br. at 2. Second, he argues that Mr. Goggans failed to "develop, and therefore to present, a mitigation case at trial." *Id.* Third, he argues that Mr. Goggans "allowed the aggravating factors relied upon by the State . . . to go entirely unaddressed and unrebutted." *Id.* As relevant here, one of the matters that Mr. Barksdale contends warranted further investigation and could have led to a different outcome is his Virginia robbery conviction, which the state used as a prior crime-of-violence aggravator. *See id.* at 4, 14–15.

As a general matter, these claims present "mixed question[s] of law and fact subject to *de novo* review." *Williams v. Allen*, 542 F.3d 1326, 1336 (11th Cir. 2008) (citation and internal quotation marks omitted). But, as noted above, claims adjudicated on the merits by a state court are entitled to deference under AEDPA.

A

The Sixth Amendment entitles criminal defendants to the "effective assistance of counsel"—that is, representation that does

not fall "below an objective standard of reasonableness" relative to "prevailing professional norms." *Strickland*, 466 U.S. at 686–88. That standard is necessarily flexible, as "[n]o particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Id.* at 688–89. To that end, the relevant question is whether counsel's conduct was "outside the wide range of professionally competent assistance." *Id.* at 690. Putting AEDPA aside for the moment, we describe what a successful ineffective assistance of counsel claim entails.

To prevail on his ineffective assistance of counsel claim, Mr. Barksdale must establish two things. First, he must demonstrate that "counsel's representation fell below an objective standard of reasonableness." *Id.* at 688. Second, he must establish 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.

With respect to performance, courts review counsel's conduct in a "highly deferential" manner and "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689. To overcome the *Strickland* presumption, Mr. Barksdale must demonstrate that "no competent counsel would have taken the action that his counsel did take." *Chandler v. United States*, 218 F.3d 1305, 1315 (11th Cir. 2000) (en banc). In other words, if "some

reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial," *Waters v. Thomas*, 46 F.3d 1506, 1512 (11th Cir. 1995) (en banc), then Mr. Barksdale cannot establish deficient performance.

With respect to prejudice, Mr. Barksdale must show a "reasonable probability that, absent [Mr. Goggans'] errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Pooler v. Sec'y, Fla. Dep't of Corr.*, 702 F.3d 1252, 1270 (11th Cir. 2012) (citation and internal quotation marks omitted). In a state such as Alabama, where a jury at the time of Mr. Barksdale's conviction could recommend a death sentence by a 10-to-2 vote (and here, one juror recommended a life sentence), the question is whether there is "a reasonable probability that at least [two more jurors] would have struck a different balance." *Wiggins v. Smith*, 539 U.S. 510, 537 (2003).

A "reasonable probability" is one that is "sufficient to undermine confidence [in the sentence]," and does not require a showing that "counsel's deficient conduct more likely than not altered the outcome of [the petitioner's] penalty proceeding." *Porter v. McCollum*, 558 U.S. 30, 44 (2005) (quoting *Strickland*, 466 U.S. at 693–94). Nevertheless, the likelihood of a "different result must be substantial, not just conceivable." *Harrington v. Richter*, 562 U.S. 86, 111–12 (2011). To assess the probability of a different outcome, courts consider "the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in

the habeas proceeding—and reweigh it against the evidence in aggravation." *Porter*, 558 U.S. at 41 (citation omitted and alterations adopted).

B

Mr. Barksdale challenges Mr. Goggans' performance at the penalty phase, arguing that he failed to (1) investigate certain facts and witnesses relevant to mitigation, (2) develop and present a mitigation case, and (3) address and rebut the state's aggravating factors.

In rejecting the ineffectiveness claim presently before us, the Rule 32 court ruled, and the ACCA affirmed, that Mr. Goggans "gathered background information from Barksdale and his parents 'discovering little that was helpful and much that was harmful.'" Doc. 20-26 at 167. The ACCA also expressly rejected Mr. Barksdale's argument that Mr. Goggans failed to live up to the Supreme Court's reasonable investigation standard set out in *Rompilla v. Beard*, 545 U.S. 374 (2005). *See* Doc. 20-6 at 169. The ACCA explained that there was "'room for debate' about Mr. Goggans' actions" and affirmed the Rule 32 court's conclusion that "his investigative actions were reasonable 'under prevailing professional norms.'" Doc. 20-26 at 170–71.

Notably, a court "may decline to reach the performance prong of the ineffective assistance test if convinced that the prejudice prong cannot be satisfied." *Waters*, 46 F.3d at 1510. Indeed, the Supreme Court has explained that "there is no reason . . . to address both components of the inquiry if the

defendant makes an insufficient showing on one." *Strickland*, 466 U.S. at 697. *See, e.g., Frazier v. Bouchard*, 661 F.3d 519, 532 (11th Cir. 2011) (declining to analyze the performance prong where petitioner "[could not] make the requisite showing of prejudice under *Strickland*'s second prong"). Because we conclude that Mr. Barksdale cannot satisfy the prejudice prong of the ineffective assistance standard, we need not and do not examine whether Mr. Goggans' performance was deficient.

C

With regard to the prejudice prong of *Strickland*, the Rule 32 court held, and the ACCA affirmed, that "the aggravating circumstances clearly outweigh[ed] the mitigating circumstances presented at trial and at the evidentiary hearing," thus failing to establish prejudice. *See* Doc. 20-26 at 177. Applying AEDPA deference, we conclude that the ACCA's ruling as to prejudice was reasonable. *See Pye*, 50 F.4th at 1041–42 (under AEDPA, the question as to prejudice is whether the decision of the state court "was 'so obviously wrong that its error lies beyond any possibility of a fairminded disagreement'" and not what the federal court would have concluded about prejudice). *See also Brown v. Davenport*, 596 U.S. 118, 120 (2022) ("AEDPA asks whether *every* fairminded jurist would agree that an error was prejudicial[.]").

First, the aggravating factors—especially the heinous, atrocious, and cruel nature of Ms. Rhodes' murder—are well-established in the record. The agony endured by Ms. Rhodes from the moment she was shot twice by Mr. Barksdale until she died is

undeniable, and the jury found beyond a reasonable doubt that this aggravating factor had been proven.

Second, a portion of the evidence presented at the Rule 32 hearing that could purportedly overcome or minimize the state's aggravators was a potential double-edged sword. *See, e.g., Ponticelli v. Secretary*, 690 F.3d 1271, 1296 (11th Cir. 2012) (holding that the Florida Supreme Court reasonably applied *Strickland* by concluding that the petitioner suffered no prejudice when the mitigating evidence presented in the state post-conviction proceeding could open the door to additional damning evidence).

For example, the evidence presented by Mr. Barksdale at the Rule 32 hearing about his prior robbery conviction in Virginia was not overwhelming and could have very well done more harm than good. Any testimony by the victim to the jury would have presented a serious challenge for Mr. Barksdale regardless of who was holding the gun during the robbery. As noted by the district court, "presenting the jury with the details of the Virginia robbery would show that [Mr. Barksdale's] prior offense in Virginia involved a degree of planning and [his] involvement . . . could have been viewed by the jury as indicating a level of deviousness on [his] part." *Barksdale*, 2018 WL 6731175, at *82. And that level of planning could have been seen as similar to what Mr. Barksdale did when he flagged down Ms. Rhodes.

Third, the evidence concerning abuse suffered by Mr. Barksdale during his childhood was not overwhelming. A defendant's upbringing, background, and character are relevant

because of the long-standing societal belief that "defendants who commit criminal acts that are attributable to a disadvantaged background . . . may be less culpable than defendants who have no such excuse." *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989). Because we are operating under the constraints of AEDPA, any credibility assessments made by the Alabama courts as to witness testimony are presumed correct.

The Rule 32 court noted a conflict in the testimony of Ms. Archie and Mr. Goggans in terms of the latter's efforts to contact the former while Mr. Barksdale was facing trial. The Rule 32 court noted that Ms. Archie admitted to having "made an inconsistent statement earlier that she had only spoken to [Mr. Goggans] once." Doc. 20-26 at 165. But because neither the Rule 32 court nor the ACCA resolved the conflict in the testimony, we place the same weight on the testimony of both witnesses. Although Ms. Archie recounted four instances of physical abuse against Mr. Barksdale by his father, her testimony did not reveal highly traumatic incidents of systematic physical, emotional, or verbal abuse in the household. Additionally, because Mr. Barksdale lived with his father—who did not testify at the Rule 32 hearing—from age 10, Ms. Archie was unable to shed much light on his upbringing past his middle school years. *See* Doc. 20-18 at 201. The only relevant testimony Ms. Archie provided from this period was that Mr. Barksdale felt "disgusted" at being forced to quit sports and instead having to care for his grandmother after school. *See* Doc. 20-19 at 2.

Fourth, Mr. Johnson's testimony at the Rule 32 hearing also did not help Mr. Barksdale much. Mr. Johnson testified that he took care of Mr. Barksdale, his son's classmate, for an undefined period of time, ranging from "several weeks" to "a couple of months" when he was 12 years old. *See* Doc. 20-19 at 39. Yet Mr. Johnson did not provide many details about Mr. Barksdale's life at home. Besides a conclusory statement that Mr. Barksdale endured abuse as a child, Mr. Johnson could not recount specific instances or details. *See id.* Mr. Johnson also conceded that he had only had "sporadic" contact with [Mr. Barksdale] past the age of 12 and had not learned about his death sentence until two years after the conviction. *See id.* at 67, 72. This lack of contact, spanning years, undermines Mr. Barksdale's contention that Mr. Johnson was a significant figure in his life whose testimony about him could have swayed two or more jurors to reach a different conclusion.

Moreover, both the Rule 32 court and the ACCA expressly stated that they "did not find [Mr. Johnson] to be a very credible witness" due to inconsistencies in his testimony. *See* Doc. 20-26 at 119, 173. Mr. Barksdale has not shown that this credibility determination lacked support in the record. *See Rose*, 634 F.3d at 1241.

Fifth, Mr. Barksdale's argument that Mr. Goggans should have searched for psychological, medical, and educational records, *see* Appellant's Br. at 30, is undermined by the fact that, at the Rule 32 hearing, post-conviction counsel presented no such evidence. The potential mitigating evidence here, therefore, is much weaker

than in cases like *Sears v. Upton*, 561 U.S. 945 (2010), upon which Mr. Barksdale relies. *Sears* was heard by the Supreme Court on direct appeal from state post-conviction review and thus was not a case governed by AEDPA's deferential standard. It was also decided after the ACCA's decision in this case. But even if *Sears* applied, the differences in mitigation evidence are worth highlighting. In *Sears*, post-conviction counsel presented evidence showing that the defendant suffered sexual abuse at the hands of an adolescent male cousin; that his mother referred to her children as "little mother f***ers"; and that he was "severely learning disabled and . . . severely behaviorally handicapped" as a result of "significant frontal lobe abnormalities." *See* 561 U.S. at 948–52. There is no similar evidence here.

Another Supreme Court case, this one applying AEDPA deference, leads us to the same conclusion. In *Williams*, the Court concluded that the defendant was prejudiced when defense counsel omitted critical mitigating evidence at sentencing. *See* 529 U.S. at 396–97. The evidence included a description of severe mistreatment, abuse, head injuries, and neglect during the defendant's early childhood, as well as testimony that he was "borderline mentally retarded" and failed to advance in school beyond the sixth grade. *See id.* at 370, 396. Taken together, the Court reasoned that this additional evidence "might well have influenced the jury's appraisal of his moral culpability." *Id.* at 398. The Court held that the Virginia Supreme Court had unreasonably applied *Strickland* not only by mischaracterizing the performance prong, but by equally failing to evaluate the totality of the available

mitigation evidence adduced at state post-conviction proceedings, which "may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case." *Id.* Ultimately, the Court held that because of Virginia's unreasonable application of federal law, "Williams' constitutional right to the effective assistance of counsel as defined in *Strickland* . . . was violated." *Id.* at 399.

Mr. Barksdale did not present any records from his childhood or adolescence—whether medical, psychological, or educational—that would likely sway the jurors to not recommend a death sentence. As explained in *Strickland*, there is no prejudice—even without AEDPA deference—when the new mitigating evidence "would barely have altered the sentencing profile presented" to the decisionmaker. *See* 466 U.S. at 700.

We conclude that the ACCA's ruling that Mr. Barksdale was not prejudiced by Mr. Goggans' performance at the penalty phase was not contrary to, and did not involve an unreasonable application of, clearly established federal law. Nor was it based on an unreasonable determination of the facts in light of the evidence presented. *See* § 2254(d).

IV

The district court's denial of Mr. Barksdale's habeas corpus petition is affirmed.

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

David J. Smith
Clerk of Court

For rules and forms visit
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May 24, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-10993-P
Case Style: Tony Barksdale v. Attorney General, State of Ala, et al
District Court Docket No: 3:08-cv-00327-WKW-CSC

Opinion Issued
Enclosed is a copy of the Court's decision issued today in this case. Judgment has been entered today pursuant to FRAP 36. The Court's mandate will issue at a later date pursuant to FRAP 41(b).

Petitions for Rehearing
The time for filing a petition for panel rehearing is governed by 11th Cir. R. 40-3, and the time for filing a petition for rehearing en banc is governed by 11th Cir. R. 35-2. Except as otherwise provided by FRAP 25(a) for inmate filings, a petition for rehearing is timely only if received in the clerk's office within the time specified in the rules. **A petition for rehearing must include a Certificate of Interested Persons and a copy of the opinion sought to be reheard.** See 11th Cir. R. 35-5(k) and 40-1.

Costs
No costs are taxed.

Bill of Costs
If costs are taxed, please use the most recent version of the Bill of Costs form available on the Court's website at www.ca11.uscourts.gov. For more information regarding costs, see FRAP 39 and 11th Cir. R. 39-1.

Attorney's Fees
The time to file and required documentation for an application for attorney's fees and any objection to the application are governed by 11th Cir. R. 39-2 and 39-3.

Appointed Counsel
Counsel appointed under the Criminal Justice Act (CJA) must submit a voucher claiming compensation via the eVoucher system no later than 45 days after issuance of the mandate or the filing of a petition for writ of certiorari. Please contact the CJA Team at (404) 335-6167 or

cja_evoucher@ca11.uscourts.gov for questions regarding CJA vouchers or the eVoucher system.

Clerk's Office Phone Numbers

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Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

OPIN-1 Ntc of Issuance of Opinion

APPENDIX 6

Decision of the U.S. Court of Appeals for the
11th Circuit, October 16, 2024 (denying rehearing)
Barksdale v. Attorney General, State of Alabama, et al.,
Docket No. 20-10993-P

In the
United States Court of Appeals
For the Eleventh Circuit

No. 20-10993

TONY BARKSDALE,

Petitioner-Appellant,

versus

ATTORNEY GENERAL, STATE OF ALABAMA,
COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS,
WARDEN, HOLMAN CORRECTIONAL FACILITY,

Respondents-Appellees.

Appeal from the United States District Court
for the Middle District of Alabama
D.C. Docket No. 3:08-cv-00327-WKW-CSC

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

Before WILSON, JORDAN, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. FRAP 35. The Petition for Panel Rehearing also is DENIED. FRAP 40.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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David J. Smith
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October 16, 2024

MEMORANDUM TO COUNSEL OR PARTIES

Appeal Number: 20-10993-P
Case Style: Tony Barksdale v. Attorney General, State of Ala, et al
District Court Docket No: 3:08-cv-00327-WKW-CSC

The enclosed order has been entered on petition(s) for rehearing.

See Rule 41, Federal Rules of Appellate Procedure, and Eleventh Circuit Rule 41-1 for information regarding issuance and stay of mandate.

Clerk's Office Phone Numbers

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Case Administration:	404-335-6135	Capital Cases:	404-335-6200
CM/ECF Help Desk:	404-335-6125	Cases Set for Oral Argument:	404-335-6141

REHG-1 Ltr Order Petition Rehearing