No. _____

IN THE

Supreme Court of the United States

KENNETH EUGENE SMITH,

Petitioner,

—v.—

JEFFERSON DUNN, COMMISSIONER,
ALABAMA DEPARTMENT OF CORRECTIONS,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTIONS PRESENTED

1. Under *Waddington v. Sarausad*, 555 U.S. 179 (2009), when a conviction requires that the State prove beyond a reasonable doubt that the defendant had a specific intent to commit a crime does a general jury instruction on accomplice liability relieve the State of that burden in violation of the defendant's due process rights under the Fourteenth Amendment?

2. Does a death sentence violate the Sixth and Fourteenth Amendments when the trial judge overrides the jury's general sentencing verdict for life imprisonment without the possibility of parole that does not specify whether the jury found at least one aggravating circumstance?

3. Does a death sentence violate the Eighth and Fourteenth Amendment right to an individualized sentencing determination when the trial judge overrides a jury's sentencing verdict for life imprisonment without the possibility of parole based on the same rationale the trial judge later offers to justify overriding the jury's sentencing verdict in a different case involving a different defendant and different facts?

4. Did the Court of Appeals err in denying Petitioner a certificate of appealability on these issues?

PARTIES TO THE PROCEEDING

Petitioner is Kenneth Eugene Smith. Respondent is Jefferson Dunn, the Commissioner of the Alabama Department of Corrections. Because no petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6

RELATED PROCEEDINGS

Trial and Direct Appeal

State v. Smith, Colbert County, No. CC-89-1149 (Nov. 14, 1989)

Smith v. State, Ala. Crim. App., No. CR-89-1290 (Sept. 18, 1992)

Retrial and Direct Appeal

State v. Smith, Colbert County, No. CC-89-1149 (May 21, 1996), amended sentencing order (Sept. 25, 1997)

Smith v. State, Ala. Crim. App., No. CR-97-0069 (Dec. 22, 2000)

Ex parte Smith, Ala. Sup. Ct., No. 1000976 (Mar. 18, 2005)

Smith v. Alabama, S. Ct. No. 04-10643 (Oct. 3, 2005)

State Post-Conviction Proceedings

Smith v. State, Jefferson County, No. CC 1989-1149-60 (July 13, 2011)

Smith v. State, Ala. Crim. App., No. CR 07-1412 (Feb. 7, 2014)

Smith v. State, Ala. Sup. Ct., No. 1130536 (Aug. 22, 2014)

Federal Habeas Review

Smith v. Dunn, N.D. Ala., No. 2:15-cv-0384-AKK (Sept. 12, 2019)

Smith v. Comm'r, Ala. Dep't of Corr., 11th Cir., No. 19-14543-P (Apr. 6, 2021), *reh'g denied* (May 19, 2021)

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

PAGE(S)

Cases

PAGE(S)

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Kenneth Eugene Smith respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Eleventh Circuit affirming the denial of Mr. Smith's Petition for a Writ of Habeas Corpus under 28 U.S.C. § 2254 ("Petition") is attached as Appendix B and is reported at 850 F. App'x 726. Pet. App. 2a. The Eleventh Circuit's order granting in part and denying in part Mr. Smith's motion for a certificate of appealability under 28 U.S.C. § 2253 is attached as Appendix C and is not reported. Pet. App. 13a. The order of the United States District Court for the Northern District of Alabama dismissing Mr. Smith's Petition is attached as Appendix D and is not reported. Pet. App. 15a. The order of the Circuit Court of Colbert County sentencing Mr. Smith to death despite the jury's 11-1 general sentencing verdict for life imprisonment without the possibility of parole is attached as Appendix G. Pet. App. 281a.

JURISDICTION

The district court dismissed Mr. Smith's Petition and entered judgment on September 12, 2019. Pet. 15a. The Eleventh Circuit affirmed the district court's dismissal of the Petition on April 6, 2021. Pet. 2a. The same court denied Mr. Smith's timely motion for rehearing on May

19, 2021. Pet App. 1a. By order dated March 19, 2020, this Court extended the deadline for filing a petition for certiorari to 150 days from the date of the lower court order denying a timely petition for rehearing. By order dated July 19, 2021, this Court rescinded its March 19, 2020 order but only for cases where the lower court order denying a timely petition for rehearing was issued on or after July 19, 2021. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Sixth Amendment to the United States Constitution provides, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." U.S. Const. amend. VI.

The Eighth Amendment to the United States Constitution provides: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides, in relevant part: "No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . ." U.S. Const. amend. XIV, § 1.

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

> (c)(1) Unless a circuit justice or judge issues a certificate of appealability, an

appeal may not be taken to the court of appeals from—

> (A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or
>
> (B) the final order in a proceeding under section 2255.

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

28 U.S.C. § 2254 provides, in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly-established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

INTRODUCTION

The Court should grant certiorari to resolve a conflict between the Eleventh Circuit and the Third and Sixth Circuits. *See* S. Ct. R. 10(a). Jury instructions that relieve the State of its burden to prove every fact necessary to constitute a crime violate a defendant's due process rights under the Fourteenth Amendment. *See Sandstrom v. Montana*, 442 U.S. 510, 521; *In re Winship*, 397 U.S. 358, 364 (1970). To succeed on such a claim, a habeas petitioner must show that "the instruction was ambiguous and . . . [that] there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." *Waddington v. Sarausad*, 555 U.S. 179, 190–91 (2009).

Applying that standard, the Third Circuit has held "that when a specific intent instruction is required, a general accomplice instruction lessens the state's burden of proof and is therefore violative of due process." *Tyson v. Superintendent Houtzdale SCI*, 976 F.3d 382, 394 (3d Cir. 2020). And, the Sixth Circuit has affirmed a habeas petitioner's claim that a state trial court's jury instructions on accomplice liability violated his due process rights because "there was nothing in the jury instructions to convey the principle that an accomplice need act with the same mens rea as the principal offender in order to be found guilty as a complicitor." *Langford v. Warden, Ross Correctional Institution*, 593 F. App'x 422 (6th Cir. 2014), *vacated*, 576 U.S. 1049 (2015), *aff'd on remand*, 665 F. App'x 388 (6th Cir. 2016).

On comparable facts, the Eleventh Circuit reached a contrary decision when it denied Mr. Smith's motion for a certificate of appealability. Mr. Smith was charged with capital murder. Under Alabama law, to obtain a conviction on that charge, the State was required to prove beyond a reasonable doubt that Mr. Smith had a specific intent to kill. The critical disputed issue at Mr. Smith's trial was whether the State had satisfied that burden. The State proceeded on a complicity theory that Mr. Smith aided and abetted a codefendant who inflicted the fatal stab wounds because there was no forensic or physical evidence that Mr. Smith had done that. Over Mr. Smith's objection, the state trial court's complicity instruction failed to distinguish between the mental state necessary for a capital murder conviction—specific intent—and the mental states necessary for a conviction on one of the lesser included crimes that the jury also considered. And when the jury asked for clarification of the difference between capital murder and one of the lesser included offenses—the difference being the mens rea necessary for conviction—the trial court repeated the same ambiguous jury instruction. The Court should grant certiorari to resolve the conflict between the Eleventh Circuit and the Third and Sixth Circuits regarding application of the *Waddington* standard.

This Court also should grant certiorari to decide important federal questions arising from the state trial court's override of the jury's 11 to 1 general sentencing verdict for life imprisonment without the possibility of parole. *See* S. Ct. R. 10(c). The Eleventh Circuit's decision to deny Mr. Smith a

certificate of appealability on his claim that his death sentence violates his Sixth and Fourteenth Amendment jury trial right is inconsistent with *Ring v. Arizona*, 536 U.S. 584 (2002).

Although Mr. Smith's jury found him guilty of murder for pecuniary gain and murder for a pecuniary gain also is an aggravating circumstance under Alabama law, the trial court repeatedly instructed the jury that they were not bound to find that aggravating circumstance in the penalty phase and that the determination whether the State had proved an aggravating circumstance beyond a reasonable doubt was for the jury to decide. The jury's general sentencing verdict does not disclose any supporting findings. And when, as was the case at the time of Mr. Smith's trial in Alabama, the "[t]he trial court *alone*," is responsible for making the findings that make a defendant death-eligible, a resulting death sentence violates the defendant's Sixth and Fourteenth Amendment jury trial right even if a jury determination "'necessarily included a finding of an aggravating circumstance.'" *Hurst v. Florida*, 577 U.S. 92, 100 (2016) (emphasis in original).

The Eleventh Circuit's decision to deny Mr. Smith a certificate of appealability on his claim that his death sentence violates his Eighth and Fourteenth Amendment right to an individualized sentencing determination is inconsistent with *Lockett v. Ohio*, 438 U.S. 586 (1978). The trial judge's use of the same justification to override Mr. Smith's jury's sentencing verdict as he used to justify overriding the jury sentencing verdict in a different case involving a different defendant and different facts deprived Mr. Smith of the

particularized "'consideration of [his] character and record . . . and the circumstances of [his] particular offense,'" which is "'a constitutionally indispensable part of the process of inflicting the penalty of death.'" *Id.* at 604 (citation omitted).

STATEMENT OF THE CASE

On April 7, 1988, Mr. Smith was indicted in Colbert County, Alabama for the capital murder of Elizabeth Dorlene Sennett for a pecuniary or other valuable consideration in violation of Ala. Code § 13A-5-40(a)(7). T.C. 65–66.[1] The trial court transferred venue of the trial to Jefferson County due to prejudicial pretrial publicity in Colbert County. P.C. 839–40. Mr. Smith was convicted of capital murder and sentenced to death in November 1989. T.C. 124–30. His conviction and death sentence were overturned because the State had exercised its peremptory challenges to prospective jurors based on their race. *See Smith v. State*, 620 So. 2d 732 (Ala. Crim. App. 1992); *Smith v. State*, 620 So. 2d 727 (Ala. Crim. App. 1992); *Smith v. State*, 588 So. 2d 561 (Ala. Crim. App. 1991).

A. Mr. Smith's Retrial

At Mr. Smith's 1996 retrial, the State sought to prove that "Charles Sennett [the victim's

[1] "T.R. __" refers to the designated page of the reporter's transcript in the state trial court, as compiled and certified for Mr. Smith's direct appeal. "T.C. __" refers to the designated page of the clerk's record in the state trial court, as compiled and certified for Mr. Smith's direct appeal. "P.C. __" refers to the designated page of the clerk's record in the state trial court, as complied and certified for Mr. Smith's post-conviction appeal.

husband] had recruited Billy Gray Williams, who in turn recruited Smith and John Forrest Parker, to kill his wife." Pet. App. 229a.[2] Mr. Smith's "defense at trial was that he participated in the assault of Elizabeth Sennett but that he did not intend to kill her." Pet. App. 234a. Under Alabama law, "the only form of murder that will support a conviction for the capital offense . . . is intentional murder; neither reckless murder nor felony murder will suffice." *Starks v. State*, 594 So. 2d 187, 193 (Ala. Crim. App. 1991); *see also* Ala. Code §§ 13A-5-40(b), 13A-6-2(a)(1). Thus, the critical issue at trial was whether the State proved beyond a reasonable doubt that Mr. Smith had a specific intent to kill. Absent such evidence, the jury could not convict Mr. Smith of capital murder as distinct from one of the lesser included crimes on which the jury was charged: murder while acting with extreme indifference to human life, felony murder, and manslaughter.

The State's evidence did not show that Mr. Smith was the principal in the killing. The State did not submit any blood, fingerprint or other forensic or physical evidence that tied Mr. Smith to the fatal stab wounds. The knife that inflicted the fatal stab wounds belonged to Mr. Smith's codefendant, John Forrest Parker. Indeed, during a colloquy with the trial court outside the presence of the jury, the District Attorney acknowledged that he "never at any point implicated that he [Mr. Smith] did any of

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[2] In separate trials, Mr. Williams was convicted and sentenced to life imprisonment without parole and Mr. Parker was convicted and sentenced to death. *See id.* nn. 2, 3.

the stabbing." Pet. App. 333a. And in its amended sentencing order, the trial court stated: "Presumably the knife was used by John Forrest Parker." Pet. App. 284a. Given the lack of evidence that Mr. Smith inflicted the fatal stab wounds, the State relied on a complicity theory that he had aided and abetted Mr. Parker and, thus, was responsible for Elizabeth Sennett's death.

Under Alabama law, "A person is legally accountable for the behavior of another constituting a criminal offense, if, with the intent to promote or assist the commission of the offense: (1) He procures, induces or causes such other person to commit the offense; or (2) He aids or abets such other person in committing the offense . . . ." Ala. Code 13A-2-23. To ensure that the jury understood that a capital murder conviction required it to find that the State had proved beyond a reasonable doubt that Mr. Smith had a specific intent to kill even under the State's complicity theory, Mr. Smith requested the following complicity instruction:

> A person is legally accountable for the behavior of another person constituting a crime if, with intent to promote or assist the commission of the crime he either:
>
> 1. procures, induces or causes such other person to commit the crime; or
>
> 2. aids or abets such other person in committing the crime.
>
> In order to find that Kenneth Smith is guilty of capital murder as an accomplice to that crime, you must find not only that

> he aided and abetted John Parker but you must also find that Kenneth Smith specifically intended that Mrs. Sennett be killed. If you find that Kenneth Smith intended that Mrs. Sennett be hurt or that another crime be committed, you can find Mr. Smith guilty of felony murder, but you cannot find him guilty of capital murder. Kenneth Smith can only be guilty of capital murder if you conclude beyond a reasonable doubt that he shared a specific intent and purpose to take Elizabeth Sennett's life.

Pet. App. 350a. Mr. Smith also requested that the trial court expressly instruct the jury that it could not impute Mr. Parker's intent to Mr. Smith:

> I have already instructed you in the elements of capital murder and will shortly explain to you the elements of various related offenses. With respect to capital murder in particular a person commits that offense if and only if he causes the death of a person, and in performing the act or acts which cause the death of that person, he intended to kill that person. He must act with the purpose to take a life and the intent must be real and specific. The state must prove an intent to kill beyond a reasonable doubt for capital murder.
>
> A person acts intentionally when it is his purpose to cause the death of another person. He must have a conscious purpose to cause the end result and a desire to bring it about. It will not suffice for you

> to find that he intended to commit a crime or that John Parker intended to kill. You must find that Kenneth Smith himself specifically intended the death of Mrs. Sennett.
>
> If you find that the state has failed to prove beyond a reasonable doubt an intentional murder, as I have explained that term, then you cannot find the defendant guilty of capital murder.

Pet. App. 348a. & n.4 (citing among other authorities *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *In re Winship*, 397 U.S. 358 (1970)).

The trial court rejected Mr. Smith's proposed instructions. Instead, after instructing the jury on the elements of capital murder, including that the defendant must have acted "with the intent to cause the death of another person," Pet. App. 311a, the trial court gave the jury a complicity instruction that failed to inform the jury that even under a complicity theory, a capital murder conviction requires a finding that Mr. Smith had a specific intent to kill and failed to inform the jury that it could not impute Mr. Parker's intent to Mr. Smith:

> In order to prove the defendant guilty of a particular crime it is not necessarily required that the state prove that the defendant himself personally committed the acts which constitute the crime. Instead in certain circumstances, the law makes a defendant responsible for the criminal act of another. More specifically the law provides that a defendant is responsible for the criminal act of another

> person if the defendant intentionally procured, induced or caused the other person or persons to commit the acts. Or if the defendant intentionally aided and abetted another person or persons commission of the act. The words aid and abet include all assistance rendered by acts or words of encouragement or support.
>
> I further charge you that if you find a murder of the intentional killing type, as I have defined that term for you, of Elizabeth Dorlene Sennett was committed by some person other than the defendant, the Defendant Kenneth Eugene Smith is guilty of that intentional killing type of murder if but only if you find beyond a reasonable doubt either that the Defendant, Kenneth Eugene Smith, intentionally procured, induced or caused the other person or persons to commit the murder and that the Defendant Kenneth Eugene Smith, intentionally aided or abetted the other person or persons' commission of the murder.
>
> Only if you are convinced beyond a reasonable doubt either or both of those situations exist as a fact can you find the defendant Kenneth Eugene Smith, guilty of the intentional killing murder which he did not personally commit.

Pet. App. 312a–313a.

During deliberations, the jury requested additional clarification on "the differences listed between capital murder and murder while acting

with extreme indifference to human life, definitions/elements." Pet. App. 334a. The jury's question went to the heart of the defense strategy and the critical legal issue: the only difference between those charges was that to convict Mr. Smith of capital murder, the jury was required to find that he had the specific intent to kill, while to convict him of murder while acting with extreme indifference to human life, the jury was only required to find that he "recklessly engage[d] in conduct which create[d] a grave risk of death to a person other than himself." Pet. App. 314a. In response to the jury's request, the trial court repeated the instructions the court previously had given the jury on the elements of capital murder and the lesser included offenses, including the complicity instruction. Pet. App. 335a–341a. Mr. Smith again requested that the trial court instruct the jury on the operation of complicity principles in the specific context of the capital murder charge:

> One other matter, Your honor, is that I think in giving your complicity instruction, you may have led the jury to believe that the gravamen of capital murder is -- can be made up by the fact that John Parker had an intent to kill and I would just ask that they be instructed briefly and simply that they cannot convict for capital murder unless they find that Kenneth Eugene Smith had a specific and real intent to kill.

Pet. App. 342a. The court denied that motion. *Id.*

On April 29, 1996, the jury returned a general verdict of capital murder. Pet. App. 305a.

B. Mr. Smith's Sentence

Under then-existing Alabama law, the trial judge was permitted to instruct the jury that its guilt phase verdict established the aggravating circumstance that the murder had been committed for pecuniary gain. *See* 13A-5-45(e) ("any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentence hearing"); Ala. Code § 13A-5-49(6) (an "aggravating circumstance" includes "[t]he capital offense was committed for pecuniary gain"). But the trial court did not do that in Mr. Smith's case even though murder committed for pecuniary gain was the only aggravating circumstance urged by the State. *See* Pet. App. 296a–297a ("The aggravating circumstance which you may consider in this case if you find from the evidence that it is—that it has been proven beyond a reasonable doubt is as follows: that the capital offense was committed for pecuniary gain.").

Instead, during the penalty phase jury instructions, the trial court repeatedly told the jury that its guilt phase verdict did not mandate any outcome in the penalty phase and that it was "for the jury alone to determine" whether the State had met its burden to establish the alleged aggravating circumstance beyond a reasonable doubt.

> If the jury is not convinced beyond a reasonable doubt based upon the evidence that one or more such aggravating circumstances exist, then the jury must

> recommend that the defendant's punishment be life imprisonment without parole regardless of whether there are any mitigating circumstances in the case. Pet. App. 296a.
>
> The fact that I instruct you on such aggravating circumstance or define it for you does not mean that the circumstance has been proven beyond a reasonable doubt in this matter. *Id.*
>
> Whether any aggravating circumstance which I instruct you on or define for you has been proven beyond a reasonable doubt . . . is for the jury alone to determine. *Id.*
>
> You may not consider any aggravating circumstance other than the one recognized by law which I have already instructed you on. And you may not consider the aggravating circumstance unless you are convinced by the evidence beyond a reasonable doubt of the existence of that aggravating circumstance in this case. Pet. App. 297a–298a.
>
> If you should find that the aggravating circumstance has not been proven beyond a reasonable doubt to exist in this case, then you must return a verdict recommending that the defendant's punishment be life imprisonment without parole. Pet. App. 298a.

The trial court further instructed the jury that a verdict of life imprisonment without the

possibility of parole could be based on one of two alternatives: "If after a careful consideration of all of the evidence in this case you determine that the mitigating circumstances outweigh any aggravating circumstances that exist or you are not convinced beyond a reasonable doubt and to a moral[] certainty that at least one aggravating circumstance does exist, then your verdict would be to recommend punishment of life imprisonment without parole . . . ." Pet. App. 303a. The trial court's penalty phase instructions plainly left the jury to determine whether the State had proved an aggravating circumstance beyond a reasonable doubt during the jury's penalty phase deliberations without regard to its guilt phase verdict.

After considering additional evidence presented during the penalty phase and after receiving the trial court's instructions, the jury returned a general verdict by a vote of 11 to 1 that Mr. Smith be punished by life imprisonment without the possibility of parole. Pet. App. 292a. Mr. Smith would have received that punishment if he were tried today. Pet. App. 3a n.1.[3] At the time of

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[3] In 2017, Alabama amended its capital sentencing scheme to repeal trial judges' authority to override jury capital sentencing determinations but only prospectively. *See* Ala. Code § 13A-5-47.1. The legislature did so at least in part due to concern that this Court would find the statute in effect when Mr. Smith was sentenced unconstitutional. *See* Kent Faulk, Alabama Gov. Kay Ivey signs bill: Judges can no longer override juries in death penalty cases, Birmingham Real-Time News (Apr. 11, 2017), https://www.al.com/news/birmingham/2017/04/post_317.html ("'I'm glad to be stripped of this power,' Jefferson County Bessemer Cutoff Circuit Judge David Carpenter told AL.com Tuesday. 'Also, this is long overdue. Our

Mr. Smith's trial, however, since repealed Alabama law permitted the trial court to override the jury's sentencing verdict based on the trial court's findings of aggravating and mitigating circumstances and the trial court's weighing of them. *See* Ala. Code § 13A-5-47(d), (e) (1975).

The trial court overrode the jury's sentencing verdict by order dated May 1996 and amended on September 25, 1997. Pet. App. 281a. The trial court found one aggravating circumstance (murder for pecuniary gain). Pet. App. 285a. On the other side of the ledger, the trial court found six mitigating circumstances: (1) Mr. Smith's age (twenty-two at the time of the crime); (2) he had "no significant history of prior criminal activity;" (3) he "appeared to be remorseful for what he had done, and he gave a voluntary confession;" (4) his "good conduct in jail; and in counseling others including family members;" (5) he was "neglected and deprived in his early childhood;" and (6) "the jury's recommendation is a mitigating factor." Pet. App. 287a–289a. The trial court discounted the jury's recommendation as a mitigating factor because "the jury was allowed to hear an

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Capital Murder sentencing statute would eventually have been struck down by the U.S. Supreme Court.'"); Kent Faulk, 2 legislators file bills to halt judicial override in Alabama death penalty cases, Birmingham Real-Time News (Dec. 22, 2016), https://www.al.com/news/birmingham/2016/12/2_legislators_file_bills_to_ha.html ("'The Supreme Court of the United States has made it very clear they do not like this practice,' [Sen. Dick] Brewbaker [sponsor of the Senate legislation] said. 'There's just no reason to wait for the Supreme Court to force our hand,' he said. . . . 'I think it is inevitable that our sentencing scheme is going to be overturned,' [Rep. Chris] England [sponsor of the House legislation], who is a lawyer, said Thursday.").

emotional appeal from the defendant's mother." Pet. App. 289a. And the trial court found "a reasonable basis for enhancing the jury's recommendation sentence" because "this was a murder for hire and the defendant had the opportunity to reflect and withdraw[] from his actions; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired." Pet. App. 290a.

The trial judge's stated reasons for overriding the jury's sentencing verdict are nearly identical to those the same trial judge offered for overriding the jury's sentencing verdict in a different case involving a different defendant and different facts. There, the trial court discounted the jury's sentencing verdict because "the Jury was allowed to hear an emotional appeal from the defendant's wife" and ultimately found "a reasonable basis for enhancing the jury's recommendation of life imprisonment without parole" because "this was a murder of a[n] adult man and his young son during a robbery, and the defendant had the opportunity to reflect and withdraw from his actions and chose not do so; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired." P.C. 904.

Several years later, the trial judge explained his decision to override the jury verdicts for life sentences in the two cases (both of which had been transferred from Colbert County due to prejudicial pretrial publicity) to a reporter: "I thought they deserved the death penalty the way the crimes were. . . . Some people serving on juries

especially on these cases have never been in court before and they don't want the responsibility to sentence someone to death." P.C. 908.

C. Mr. Smith's Direct Appeal and Postconviction Proceedings

On direct appeal, the Alabama Court of Criminal Appeals rejected Mr. Smith's claim that the trial court's complicity instruction violated his Fourteenth Amendment due process rights because "the trial court, on more than one occasion, instructed the jury that it must find a specific or particularized intent on the defendant's part before the jury could convict a defendant of capital murder." Pet. App. 268a. On federal habeas, the district court held that the state court decision was not contrary to or an unreasonable application of *Sandstrom* and *Winship*. Pet. App.131a–133a.

As for the trial court's override of the jury's sentencing verdict, on direct appeal, the Alabama Court of Criminal Appeals "agree[d] with the trial court's findings in this case." Pet. App. 279a.[4] In

[4] On rehearing, Mr. Smith cited this Court's then recent decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), which established the principle that the Sixth Amendment requires juries, not judges, to find facts that subject a defendant to increased punishment, and which had been decided after the Court of Criminal Appeals affirmed his conviction and sentence. And, after this Court decided *Ring v. Arizona*, 536 U.S. 584 (2002) and while his petition for certiorari was pending in the Alabama Supreme Court, Mr. Smith successfully moved to file supplemental authority to explain that Alabama's requirement that the trial court find the existence of an aggravating circumstance to impose a death sentence violated *Ring*. Pet. App. 69a.

his state postconviction proceeding, the Alabama Court of Criminal Appeals held that Mr. Smith's claim that the trial court's override of the jury's general sentencing verdict was procedurally barred because it had been raised on direct appeal and, alternatively, rejected the claim on the merits because "the jury unanimously determined by its guilty verdict on the charge of murder for pecuniary or other valuable consideration, . . ., the overlapping aggravating circumstance that the murder was committed for pecuniary gain." Pet. App. 166a–168a. The Court of Criminal Appeals did not address the trial court's penalty phase jury instructions, which informed the jury that the determination of whether the State had proved an aggravating circumstance was for the jury alone to decide; the trial court did not inform the jury that it already had found that fact. On federal habeas review, the district court held that the state court decision was not contrary to or an unreasonable application of *Ring* and was not an unreasonable determination of the facts. Pet. App. 73a–75a.

On direct appeal, the Alabama Court of Criminal Appeals rejected Mr. Smith's Eighth Amendment challenge to his death sentence on the ground that the trial judge weighed the evidence differently than the sentencing jury and, in his post-conviction proceeding, the same court rejected the same claim considering the post-trial evidence submitted by Mr. Smith on the same ground. Pet. App. 170a–171a, 279a. The district court held that the state court decision was not contrary to or an unreasonable application of federal law and did not involve an unreasonable determination of the facts. Pet. App. 63a–66a.

The Eleventh Circuit denied Mr. Smith's motion for a certificate of appealability to the extent he sought to appeal from the denial of his claim that the trial court's complicity instruction violated his Fourteenth Amendment due process rights and from the denial of his claims that the trial court's override of the jury's general sentencing verdict violated his Sixth, Eighth and Fourteenth Amendment rights. Pet. App. 13a.

REASONS FOR GRANTING THE PETITION

I. The Court Should Grant the Petition to Resolve a Conflict Among the Circuits About the Application of *Waddington*

It is clearly established that the "Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). It also is clearly established that jury instructions that have "the effect of relieving the State of its burden of proof of [defendant's] state of mind" are constitutionally invalid. *See Sandstrom v. Montana*, 442 U.S. 510, 521 (1979).

In *Waddington v. Sarausad*, this Court held that a habeas petitioner seeking to establish that a jury instruction violated his Fourteenth Amendment due process rights under *Winship* and *Sandstrom* must show both that "the instruction was ambiguous and . . . [that] there was 'a reasonable likelihood' that the jury applied the instruction in a way that relieved the State of its burden of proving every element of the crime beyond a reasonable doubt." 555 U.S. 179, 190–91 (2009) (quoting *Estelle v. McGuire*, 502 U.S. 62, 72

(1991)). The Eleventh Circuit's decision below is in conflict with decisions of the Third and Sixth Circuits concerning the application of that standard.

In *Bennett v. Graterford SCI*, the Third Circuit granted habeas relief because the state trial court's jury charge violated the petitioner's due process rights. 886 F.3d 268 (3d Cir. 2018). There, like Alabama's capital murder statute, "[f]irst degree murder in Pennsylvania requires that each defendant have the specific intent to kill" and "[a]n accomplice or conspirator cannot be convicted of first degree murder based on the specific intent to kill of the principal." *Id.* at 274. While the state trial court correctly "instructed the jury that first degree murder is an intentional killing," its "instructions on conspiracy and accomplice liability were deficient, or at the least ambiguous and inconsistent" because they "repeatedly suggested that the jury could convict [the defendant] of first degree murder based upon the shooter's specific intent to kill." *Id.* at 286–87. The Third Circuit "conclude[d] that the trial court's jury instructions relieved the Commonwealth of its burden of proving that [the defendant] had the specific intent to kill, in violation of his right to due process under the United States Constitution." *Id.* at 288; *see also Tyson v. Superintendent Houtzdale SCI*, 976 F.3d 382, 394 (3d Cir. 2020) (holding "that when a specific intent instruction is required, a general accomplice instruction lessens the state's burden of proof and is therefore violative of due process").

Likewise, in *Langford v. Warden, Ross Correctional Institution,* the Sixth Circuit affirmed habeas relief because the state trial

court's accomplice liability instruction violated the defendant's due process rights. 593 F. App'x 422 (6th Cir. 2014), *vacated*, 576 U.S. 1049 (2015), *aff'd on remand*, 665 F. App'x 388 (6th Cir. 2016). There, the defendant was charged as an accomplice to murder under Ohio law, which requires that "'[t]o support a conviction for complicity, . . . the evidence must show . . . that the defendant shared the criminal intent of the principal.'" *Id.* at 427 (citation omitted). The court held that ambiguous jury instructions on accomplice liability violated the defendant's due process rights because "there was nothing in the jury instructions to convey the principle that an accomplice need act with the same mens rea as the principal offender in order to be found guilty as a complicitor" even though the trial court properly instructed the jury that it was required to find "'that the State has proved beyond a reasonable doubt that . . . the defendant purposely caused the death of another'" to convict the defendant of murder. *Id.* at 429. The court further held that "the state court [contrary] decision is an unreasonable application of Supreme Court law, even when viewing the jury instructions in their entirety, given the instructions' failure to include any language informing the jury about the required mens rea." *Id.*

On comparable facts, however, the Eleventh Circuit denied Mr. Smith's motion for a certificate of appealability on his claim that the state trial court's complicity instruction violated his due process rights under the Fourteenth Amendment by relieving the State of its burden to prove beyond a reasonable doubt that he had the specific intent to kill, which was a required element of

capital murder. The trial court rejected Mr. Smith's request to instruct the jury that a capital murder conviction even under an accomplice therapy required the jury to "find not only that he aided and abetted John Parker but . . . also . . . that Kenneth Smith specifically intended that Mrs. Sennett be killed." Pet. App. 350a; *see also* Pet. App. 348a. Instead, the trial court instructed the jury that "the law provides that a defendant is responsible for the criminal act of another person if the defendant intentionally procured, induced or caused the other person or persons to commit the acts." Pet. App. 312a

As in the foregoing authorities and as the district court below found, the trial court's complicity instruction was ambiguous. Pet. App. 132a. The complicity instruction did not distinguish between the mens rea—specific intent—required to support a capital murder conviction and the mens rea required to support a conviction on the lesser included offenses of murder while acting with extreme indifference to human life, felony murder, and manslaughter.[5]

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[5] In stark contrast are the instructions at issue in *Thomaston v. Coleman*, No. 10-0957, 2011 WL 7102567, at *8 (E.D. Pa. June 17, 2011) where the court denied a claim that an allegedly ambiguous jury instruction on complicity denied a habeas petitioner's due process rights. In that case, the trial court instructed the jury that: "In the event that you find someone other than [Petitioner] actually shot and killed any and all of the victims—whether [Petitioner] killed the victim is in question in this case—and in the further event that you find [Petitioner] an accomplice with regard to the killing in this case, then if you have determined that the actual killer committed an act of murder of the first degree, you may not find [Petitioner]

Nor did the complicity instruction inform the jury that it could not impute Mr. Parker's intent to Mr. Smith.

Moreover, there is a reasonable likelihood that the jury applied the instruction to relieve the State of its obligation to prove beyond a reasonable doubt that Mr. Smith had a specific intent to kill to support its capital murder charge. That was the central disputed fact issue at trial. The State did not submit any physical or forensic evidence to establish that Mr. Smith was responsible for the victim's fatal wounds. Both the District Attorney and the trial court acknowledged that Mr. Smith was not implicated in that. Pet. App. 284a, 333a. And, because "the jury's verdict was a general one, . . . we have no way of knowing that [Mr. Smith was not convicted on the basis of the unconstitutional instruction." *Sandstrom*, 442 U.S. at 526.

The jurors' request for clarification on "the differences listed between capital murder and

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guilty of murder of the first degree as an accomplice unless and until you are satisfied beyond a reasonable doubt that he shared the specific intent to kill that the actual killer had." *Id.* And when the jury sought clarification of the accomplice and first-degree murder instructions, the court explained: "You could not find [Petitioner] under Pennsylvania law as an accomplice or as a co-conspirator liable for their acts to the extent of a first degree murder unless you independently found that he had the same specific intent at the time of the killing as the shooter. That would be as to the degree of guilt. If he didn't have the specific intent to kill required for first degree murder that the shooter had, it is a lesser grade of criminal homicide than first degree murder . . . ." *Id.* Those jury instructions parallel the instructions that Mr. Smith proposed and the trial court rejected.

murder while acting with extreme indifference to human life, definitions/elements" is further evidence that the jury was confused by the mens rea elements of the crimes on which they were charged. Pet. App. _a. But the trial court again denied Mr. Smith's motion that it clarify the complicity instruction by informing the jury "briefly and simply that they cannot convict for capital murder unless they find that Kenneth Eugene Smith" had a specific and real intent to kill." Pet. App. 342a. Instead, the trial court repeated the same instructions that the jury had asked to be clarified. Pet. App. 335a–342a. In doing so, the trial court failed its obligation "[w]hen a jury makes explicit its difficulties . . . [to] clear them away with concrete accuracy." *Bollenbach v. United States*, 326 U.S. 607, 612–13 (1946).

Under the *Waddington* standard, the trial court's complicity instruction invited the jury to convict Mr. Smith of capital murder on a complicity theory absent a finding beyond a reasonable doubt that Mr. Smith had a specific intent to kill, thereby relieving the State of its burden to prove an essential element of capital murder. Like Alabama, many state laws distinguish degrees of murder by the mens rea element necessary to obtain a conviction.[6] This Court should grant certiorari to resolve the conflict between the Eleventh Circuit and the

[6] For example, Kansas, Louisiana, Missouri, Ohio, and Pennsylvania all require the State to prove specific intent as a required element to obtain a capital murder conviction. *See* Kan. Stat. § 21-5401(a); La. Rev. Stat. § 14:30(A); Mo. Rev. Stat. § 565.020(1); Ohio Rev. Code § 2903.01; 18 Pa. Cons. Stat. §§ 1102(a)(1), 2502(a).

Third and Sixth Circuits and provide guidance on this important issue that arises frequently.

II. The Court Should Grant the Petition to Resolve an Important Federal Question About the Sixth Amendment Jury Trial Right in Capital Cases

The Eleventh Circuit also decided an important question of federal law in conflict with decisions of this Court. Specifically, the Eleventh Circuit's denial of Mr. Smith's motion for a certificate of appealability on his claim that the trial court's override of the jury's 11 to 1 general sentencing verdict for life without parole violated his Sixth and Fourteenth Amendment jury trial right conflicts with this Court's decision in *Ring v. Arizona*, 536 U.S. 584 (2002).

It is clearly established that the "right to trial by jury guaranteed by the Sixth Amendment . . . encompassed . . . the factfinding necessary to put [a criminal defendant] to death." *Ring*, 536 U.S. at 609. In particular, the "determination of "any fact on which the legislature conditions an increase in [a capital defendant's] maximum punishment" is constitutionally entrusted to juries, not judges. *Id.* at 589. *Ring* followed from this Court's previous holding in *Apprendi v. New Jersey*, 530 U.S. 466 (2000)—a case involving a noncapital crime—that juries, not judges, must find facts that increase a defendant's sentence.

Most recently, this Court reiterated that "[t]he Sixth Amendment requires a jury, not a judge, to find each fact necessary to impose sentence of death" when the Court held that Florida's capital sentencing scheme—which, like Alabama's, provided for a nonbinding jury advisory verdict

before sentencing based on judicial factfinding[7]—violated the Sixth Amendment. *Hurst v. Florida*, 577 U.S. 92, 94 (2016). Significantly, in so holding, this Court rejected Florida's argument that its capital sentencing scheme satisfied the Sixth Amendment because "when Hurst's sentencing jury recommended a death sentence, it 'necessarily included a finding of an aggravating circumstance'" consistent with the trial court's jury instructions. *Id.* at 99 (citation omitted). That did not satisfy the Sixth Amendment because, under Florida's scheme, "[t]he trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Id.* at 100 (emphasis in original).

The jury's general penalty phase verdict, Pet. App. 292a, does not disclose which of the alternative bases on which it was instructed—the absence of an aggravating circumstance or the presence of mitigating circumstances that outweighed the aggravating circumstances, Pet. App. 303a—supported its recommendation by a vote of 11 to 1 that Mr. Smith receive a life

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[7] *See Harris v. Alabama*, 513 U.S. 504, 508–09 (1995) ("Alabama's capital sentencing scheme is much like that of Florida. Both require jury participation in the sentencing process but give ultimate sentencing authority to the trial judge.") (citation omitted); *Hurst v. Florida*, No. 14-7505, Brief of *Amicus Curiae* Alabama and Montana in Support of Respondent at 4 ("States like Florida and Alabama responded to *Furman* by creating hybrid systems under which the jury recommends an advisory sentence, but the judge makes the final sentencing decision.") (citation omitted).

sentence. Consequently, there is no way to determine that, in the penalty phase, the jury found the fact—an aggravating circumstance—necessary to make Mr. Smith death eligible. The jury's general verdict in the guilt phase also does not contain an explicit jury finding of an aggravating circumstance. Pet. App. 305a. While the jury's verdict in the guilt phase of "capital murder" contains an implied finding that the murder at issue was committed for pecuniary gain, which is an aggravating circumstance under Alabama law, the trial court declined to instruct the jury that they were bound by any such finding in the penalty phase. To the contrary, the trial court repeatedly instructed the jury that it was responsible for determining whether the State had proved that beyond a reasonable doubt. Pet. App. 296a–298a.

Furthermore, as *Hurst* made clear, under *Ring* when "[t]he trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are sufficient mitigating circumstances to outweigh the aggravating circumstances,'" the Sixth Amendment jury trial is not satisfied merely because there is another jury determination that "'necessarily included a finding of an aggravating circumstance.'" *Hurst*, 577 U.S. at 100 (emphasis in original). The Alabama statute under which Mr. Smith was sentenced plainly placed the responsibility for finding an aggravating circumstance in "[t]he trial court *alone*." *Id.*

> (e) In deciding upon the sentence, *the trial court shall determine whether the aggravating circumstances it finds to exist* outweigh the mitigating circumstances it

> finds to exist, and in doing so the trial court shall consider the recommendation of the jury contained in its advisory verdict . . . . While the jury's recommendation concerning sentence shall be given consideration, it is not binding upon the court.

Ala. Code § 13A-5-47(e) (1975) (emphasis added).

This Court should grant certiorari to resolve the important question of whether a defendant can be sentenced to death by the trial court where the jury's sentencing verdict does not expressly include evidence that the jury found an aggravating circumstance beyond a reasonable doubt.

III. The Court Should Grant the Petition to Resolve an Important Federal Question About the Eighth Amendment Right to Individualized Sentencing in Capital Cases

The Eleventh Circuit decided another important federal issue in conflict with this Court's decisions that the Eighth and Fourteenth Amendments require that a capital defendant receive an individualized sentencing determination. *See Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976).

This Court has "emphasized the special importance of fair procedure in the capital sentencing context" because "'death is a different kind of punishment from any other which may be imposed in this country.'" *Lankford v. Idaho*, 500 U.S. 110, 125 (1991) (quoting *Gardner v. Florida*,

430 U.S. 349, 357 (1977) (plurality op.)). For that reason, "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." *Gardner*, 430 U.S. at 358.

One way in which the "special importance of fair procedure" manifests is the clearly established principle that "'in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (citation omitted); *see Woodson v. North Carolina*, 428 U.S. 280, 303 (1976) (capital sentencing scheme "must allow the particularized consideration of the relevant aspects of the character and record of each convicted defendant before the imposition of a sentence of death"). The requirement that "the sentencing authority . . . focus on the particularized circumstances of the crime and the defendant" seeks "to minimize the risk that the death penalty [will] be imposed on a capriciously selected group of offenders." *Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

Justices of this Court previously have recognized that "[b]y permitting a trial judge's view to displace that of a jury representing a cross-section of the community, Alabama's sentencing scheme [in effect when Mr. Smith was sentenced] has led to curious and potentially arbitrary outcomes." *Woodward v. Alabama*, 571 U.S. 1045, 134 S. Ct. 405, 409 (2013) (Sotomayor,

J., dissenting from denial of certiorari). "In many cases, judges have [overridden jury sentencing verdicts] without offering a meaningful explanation for the decision to disregard the jury's verdict." *Id.* This case presents a paradigmatic example of such an arbitrary outcome without a meaningful explanation for the trial court's decision to disregard the jury's verdict.

That the trial court's sentencing determination failed to provide Mr. Smith with the individualized sentencing determination to which the Eighth and Fourteenth Amendments entitled him is demonstrated by the nearly identical sentencing order issued by the same trial judge overriding a jury sentencing verdict for life without parole in another case involving a different defendant and different facts. *See Ex parte Ferguson*, 830 So. 2d 970, 971 (Ala. 2001); *compare* Pet App. 289a–290a *with* P.C. 904. The trial court effectively used a form order to sentence Mr. Smith. That is the antithesis of the individualized sentencing determination that the Eighth and Fourteenth Amendments mandate.

The trial judge's subsequent public statement confirms the point.[8] One would not even know from the trial court's statement that any evidence concerning Mr. Smith's character was presented during the penalty phase of his trial. The trial judge said that he sentenced Mr. Smith to death

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[8] In seeking election to his judicial office before presiding over Mr. Smith's trial, the trial judge advertised that he was "[t]he only candidate that has sentenced jury convicted criminals to prison" and "[t]he only candidate who has been tough on crime in serving the people of Colbert County." P.C. 834; P.C. 837.

based on "the way the crime[]" was. P.C. 908. In other words, the trial judge considered the nature of the crime to the exclusion of evidence concerning Mr. Smith's character and background that was presented during the penalty phase and that the sentencer was required to consider under the Eighth and Fourteenth Amendments.

Equally without basis is the trial judge's speculation that "[s]ome people serving on juries especially on these cases have never been in court before and they don't want the responsibility to sentence someone to death." *Id.* Determining whether jurors are capable of following instructions in considering the death penalty in capital cases is the work of voir dire. *See Lockhart v. McCree*, 476 U.S. 162, 173 (1986) (holding "that the Constitution does not prohibit the States from 'death qualifying' juries in capital cases"). Once jurors are empaneled and sworn, they are presumed to do so. *See Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) ("[W]e must assume that juries for the most part understand and faithfully follow instructions.'") (citation omitted)).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 18, 2021

APPENDIX

Appendix A

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14543-P

KENNETH EUGENE SMITH,

Petitioner-Appellant,

—versus—

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL STATE OF ALABAMA,

Respondents-Appellees.

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

BEFORE: WILSON, JILL PRYOR, and GRANT, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by Kenneth Eugene Smith is DENIED.

ORD-41

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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850 Fed.Appx. 726 (Mem)

This case was not selected for publication in West's Federal Reporter. See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also U.S. Ct. of App. 11th Cir. Rule 36-2.

KENNETH EUGENE SMITH,

Petitioner-Appellant,

—v.—

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL STATE OF ALABAMA,

Respondents-Appellees.

No. 19-14543

(April 6, 2021)

Appeal from the United States District Court
for the Northern District of Alabama,
D.C. Docket No. 2:15-cv-00384-AKK

Attorneys and Law Firms

Robert Grass, Jeffrey H. Horowitz, Arnold & Porter Kaye Scholer, LLP, New York, NY, Andrew Burns Johnson, Bradley Arant Boult Cummings, LLP, Birmingham, AL, for Petitioner - Appellant

Richard Dearman Anderson, Alabama Attorney General's Office, Montgomery, AL, for Respondents - Appellees

Before WILSON, JILL PRYOR, and GRANT, Circuit Judges.

Opinion

PER CURIAM:

In 1996, Kenneth Smith was convicted of capital murder for his involvement in the killing of Elizabeth Sennett in her Colbert County, Alabama, home. After the penalty phase of Smith's trial, the jury recommended by vote of 11 to 1 that he receive a life sentence without the possibility of parole. The trial judge overrode the jury's verdict and sentenced Smith to death.[1] Smith petitioned the district court for a writ of habeas corpus, arguing ineffective assistance of trial counsel. The district court denied relief, and Smith now appeals.

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[1] If Smith's trial had occurred today, he would not be eligible for execution because, in 2017, Alabama amended its capital-sentencing scheme prospectively to repeal trial judges' authority to override capital jury sentencing determinations. *See* Ala. Code. § 13A-5-47 (2017).

I.

Reverend Charles Sennett, a minister in the Church of Christ, recruited Billy Williams, who in turn recruited Smith and John Parker, to kill his wife, Elizabeth.[2] In return, Sennett agreed to pay Williams, Smith, and Parker $1,000 each. The plan was to kill Elizabeth in the Sennetts' home and stage her killing as a burglary gone wrong. On March 18, 1988, Smith and his accomplices killed Elizabeth as planned, and Smith took a video cassette recorder (VCR) from the Sennett's home. Smith kept the VCR in his Lauderdale County, Alabama, home.

Captain Ronnie May of the Colbert County Sheriff's Department was the lead investigator on the case. His department received a call from an anonymous informant about Elizabeth Sennett's murder. Among other things, the informant told investigators that Smith had obtained the VCR from the Sennetts' and it was now located in Smith's home. Captain May, along with Investigator Charles Ford of the Lauderdale County Sheriff's Department, obtained a search warrant from the Lauderdale County Circuit Court. The court issued the warrant directed "TO ANY SHERIFF OF THE STATE OF ALABAMA." Investigator Ford's signature appears on the warrant.

Captain May, as well as a team of law-enforcement officers from the Lauderdale County Sheriff's

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[2] Sennett was involved in an affair, had incurred substantial debts, and had taken a large insurance policy out on Elizabeth. One week after the murder, when the murder investigation started to focus on him as a suspect, Sennett committed suicide.

Department, the Florence Police Department,[3] and the Lauderdale County District Attorney's Office, executed the search warrant. Captain May discovered the VCR, but no additional evidence was found. After the search, Captain May took Smith to the Colbert County Sheriff's Department, where he read Smith his *Miranda* rights.[4] Captain May then interrogated Smith. During the course of the interrogation, Smith provided a statement regarding his involvement in the killing of Elizabeth Sennett.

At trial, Smith was convicted of capital murder and sentenced to death. But on remand from the Alabama Court of Criminal Appeals, the trial court overturned Smith's conviction and sentence, and ordered a new trial on the basis that the state had exercised its peremptory challenges to prospective jurors based on their race.

Prior to retrial, Smith's counsel moved to suppress the VCR and his custodial statement on the ground that the search violated his federal and state constitutional rights because the officers continued searching Smith's home after finding the VCR, even though the warrant was issued for the VCR only. Trial counsel also argued that the search warrant was based on information provided by an anonymous informant who had acted as the state's agent in conducting a warrantless search of Smith's home. The court denied Smith's motion. Trial counsel did *not* argue that the search warrant was facially invalid under Alabama law, which requires that a search warrant be "directed to the sheriff or to any

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[3] The city of Florence, Alabama, is located in Lauderdale County.

[4] *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966)

constable of the county," Ala. Code § 15-5-5, rendering the VCR and Smith's subsequent custodial statement inadmissible under Alabama's exclusionary rule.

At retrial, the state introduced, and the trial court admitted into evidence, both the VCR and Smith's custodial statement. Other than that, the State had little evidence supporting its case against Smith. The jury convicted Smith of capital murder. At the penalty phase, the jury rendered a verdict by a vote of 11 to 1 that Smith receive a sentence of life imprisonment without the possibility of parole. The trial court amended the sentencing order and imposed the death penalty.

Smith filed a petition for relief in the state circuit court, which he later amended. Among other things, he alleged that his trial counsel rendered ineffective assistance by failing to challenge the facial validity of the search warrant that led to the state's recovery of the VCR and ultimately to the custodial statement. The court dismissed the amended petition. The Alabama Court of Criminal Appeals reversed. *Smith v. State*, 160 So. 3d 40, 51–52 (Ala. Crim. App. 2010). On remand, the circuit court found that Smith's claim for ineffective assistance of counsel was precluded because it had been previously raised. On appeal, the Alabama Court of Criminal Appeals affirmed. Smith filed a petition for writ of certiorari in the Alabama Supreme Court, which the court denied.

Next, Smith filed a petition for writ of habeas corpus in the District Court for the Northern District of Alabama. *Smith v. Dunn*, 2019 WL 4338349, at *1 (N.D. Ala. Sept. 12, 2019). Smith made several claims, including ineffective assistance of counsel because his trial counsel did not challenge the search

warrant as facially invalid under Alabama law. *Id.* at *26. The district court denied all of Smith's claims and dismissed the petition with prejudice. *Id.* at *52. It denied the ineffective-assistance claim on the basis that Smith could not establish prejudice because, even if the search warrant was invalid on its face under Alabama law, that would not constitute a Fourth Amendment violation, and, in any event, Alabama law did not require that the search warrant be directed to a sheriff or constable of the issuing county. *Id.* at *26.

This court granted Smith a certificate of appealability on the single issue of whether the district court erred in holding that Smith was not prejudiced by his trial counsel's failure to object to the validity of the search warrant even though it was directed to *any* sheriff of the state of Alabama. We review de novo the district court's order denying Smith's petition. *Daniel v. Comm'r, Ala. Dep't of Corr.*, 822 F.3d 1248, 1258 (11th Cir. 2016).

II.

The right to counsel is a fundamental right, assuring the fairness and legitimacy of the criminal justice system. *Gideon v. Wainwright*, 372 U.S. 335, 343–44, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963). The Sixth Amendment guarantees criminal defendants "the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). "The essence of an ineffective-assistance claim is that counsel's unprofessional errors so upset the adversarial balance between defense and prosecution that the trial was rendered unfair and the verdict rendered suspect." *Kimmelman v. Morrison*, 477 U.S. 365, 374, 106 S.Ct. 2574, 91

L.Ed.2d 305 (1986). To prevail on an ineffective-assistance claim, the defendant must satisfy the two-pronged *Strickland* test: (1) that trial counsel's performance was deficient, and (2) that the deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687, 104 S.Ct. 2052. A demonstration of the second prong—prejudice—is made through a showing 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, 104 S.Ct. 2052.

Smith argues that he was prejudiced because his trial counsel failed to challenge the warrant as facially invalid under Alabama law. He explains that, since the language of the warrant violated sections 15-5-5 and 15-5-7 of the Alabama Code, the VCR and his subsequent statement to the police should have been suppressed. Had that evidence been suppressed, Smith contends, the State would not have been able to secure a conviction because those two pieces of evidence were crucial to the state's case.

However, Smith is only right about having been prejudiced if there is a reasonable probability that he would have prevailed on that challenge. *See Bolender v. Singletary*, 16 F.3d 1547, 1573 (11th Cir. 1994) ("[I]t is axiomatic that the failure to raise nonmeritorious issues does not constitute ineffective assistance."); *cf. Kimmelman*, 477 U.S. at 375, 106 S.Ct. 2574 ("Where defense counsel's failure to litigate a Fourth Amendment claim competently is the principal allegation of ineffectiveness, the defendant must also prove that his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence in order to demonstrate actual prejudice."). With that in

mind, we consider the merit of Smith's claim that the evidence should have been suppressed because the warrant plainly violated Alabama law.

III.

Alabama law governing the issuance of a search warrant provides:

> If the judge or the magistrate is satisfied of the existence of the grounds of the application or that there is probable ground to believe their existence, he must issue a search warrant signed by him and directed to the sheriff or to any constable of the county, commanding him forthwith to search the person or place named for the property specified and to bring it before the court issuing the warrant.

Ala. Code § 15-5-5. Alabama law governing the execution of a search warrant provides: "A search warrant may be executed by any one of the officers to whom it is directed, but by no other person except in aid of such officer at his request, he being present and acting in its execution." Ala. Code § 15-5-7. Read together, "[t]hese statutes dictate that the 'sheriff' or a 'constable' of the particular 'county' in which the warrant is issued will execute the warrant." *Rivers v. State*, 406 So. 2d 1021, 1022 (Ala. Crim. App. 1981) (per curiam).

The issuing court directed the warrant to search Smith's Lauderdale County home to all sheriffs of the state of Alabama, many of whom—i.e., all those outside of Lauderdale County—were not authorized to execute search warrants in Lauderdale County. Smith maintains that the language in the warrant

directing unauthorized law-enforcement agents to search Smith's home is a direct violation of the plain language of the statutes, especially in light of the Alabama Court of Criminal Appeals' decision in *Rivers*, 406 So. 2d 1021. In *Rivers*, the court invalidated a warrant directed to "Any [State Alcoholic Beverage Control (ABC)] Enforcement Agent." *Id.* at 1021. ABC agents are not among those authorized under sections 15-5-5 and 15-5-7 to execute search warrants without specific authorization from county law-enforcement officials. *Id.* at 1022. Therefore, "[s]ince the warrant was directed to 'any ABC agent' rather than a county official and was executed by ABC agents without the authority of county officials, the evidence procured under [the] search should not have been admitted at trial." *Id.* at 1023.

Smith contends that, likewise, since the warrant to search his home was directed to unauthorized officials outside of Lauderdale County, the evidence obtained through that search was inadmissible. The difference, though, between Smith's case and *Rivers*, is that in *Rivers* the warrant was directed *only* to unauthorized law-enforcement agents. And *only* the unauthorized agents in *Rivers* executed the warrant without the assistance or specific authorization from county officials. Here, the warrant was directed to a class of law-enforcement agents *including* those authorized. Even more, it can be inferred from the record that, because Investigator Ford went to the issuing court to obtain the warrant and signed the warrant, he was the officer designated to execute it. *See Usery v. State*, 668 So. 2d 919, 921 (Ala. Crim. App. 1995) ("[B]ecause Agent Brown applied for the warrant, we can infer from the record that he was the officer designated to execute it."). Additionally, the

agents authorized to search Smith's home—Investigator Ford and his team from the Lauderdale County Sheriff's Department—took part in executing the search warrant.[5] All this to say that the warrant was directed to authorized county officials, who in turn executed the warrant. Consequently, we cannot find that the warrant to search Smith's home conflicts with *Rivers* or the requirements under sections 15-5-5 and 15-5-7 of the Alabama Code.

To be sure, the Alabama Court of Criminal Appeals has explained that sections 15-5-5 and 15-5-7 "are to be strictly construed for both the issuance and execution of search warrants in general." *Rivers*, 406 So. 2d at 1022. At the same time, the court has made clear that it "will not invalidate a search warrant by interpreting it in a hypertechnical rather than a common sense manner." *Usery*, 668 So. 2d at 922 (internal quotation marks omitted). This helps explain why Alabama courts have routinely upheld warrants directed to general classes of law-enforcement officers and have found none to be invalid on that basis. *E.g.*, *id.* at 921 (warrant directed "TO ANY LAW ENFORCEMENT OFFICER WITHIN THE STATE OF ALABAMA"); *Meade v. State*, 390 So. 2d 685, 688 (Ala. Crim. App. 1980) (warrant directed "TO ANY SHERIFF, CONSTABLE OR LAWFUL OFFICER OF THE STATE OF ALABAMA"); *Haynes v. State*, 50 Ala.App. 96, 277 So. 2d 372, 375 (Ala. Crim. App. 1973) (warrant directed

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[5] This fact highlights another difference between Smith's case and *Rivers*: There, the unauthorized ABC agents' "efforts could have been validated had they notified the proper county officials and obtained their assistance," but the agents did not do so. *Rivers*, 406 So. 2d at 1023. Here, even if the warrant was directed to unauthorized officials, Investigator Ford's assistance in executing the search warrant validated the effort. *See id.*

"TO ANY SHERIFF OR LAWFUL OFFICER OF THE STATE OF ALABAMA"). Alabama courts have never required that, under sections 15-5-5 and 15-5-7 of the Alabama Code, search warrants be directed to particular officers. Alabama's caselaw binds our decision, and instructs that the general language of the warrant to search Smith's home conformed with Alabama's statutory requirements.

In any event, we note that even if the warrant violated Alabama law, the evidence would have been admissible pursuant to the good-faith exception to the exclusionary rule. The good-faith exception applies when an officer acting in objective good faith has obtained a search warrant from a court and acted within its scope. *United States v. Leon*, 468 U.S. 897, 920, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). The warrant—which neither the Colbert County nor the Lauderdale County law-enforcement agents had reason to believe was defective—directed law enforcement to search for the VCR, which is all that they obtained from the search. Accordingly, Smith does not have a meritorious claim that the VCR and subsequent statement were inadmissible because the warrant to search his home was facially invalid under Alabama law.

In sum, because Smith's claim that the warrant is facially invalid lacks merit under Alabama law, we find that Smith has not satisfied the prejudice prong of the *Strickland* test. Consequently, we must agree with the district court that he has not shown ineffective assistance of counsel, and affirm.

AFFIRMED.

Appendix C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 19-14543-P

KENNETH EUGENE SMITH,

Petitioner-Appellant,

—versus—

COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, ATTORNEY GENERAL STATE OF ALABAMA,

Respondents-Appellees.

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

ORDER:

Appellant Kenneth Eugene Smith's Motion for a Certificate of Appealability is GRANTED IN PART AND DENIED IN PART. The Court GRANTS a certificate of appealability on the following issue:

> "Did the district court err in holding that the petitioner was not prejudiced, under *Strickland v. Washington,* 466 U.S. 668, 104 S. Ct. 2052 (1984), by his trial counsel's

> failure to attack the validity of a search warrant issued for the petitioner's home, even though the warrant was directed to "any Sheriff of the State of Alabama?"

We will issue a certificate of appealability "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). "A petitioner satisfies this standard by demonstrating 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." *Miller-El v. Cockrell,* 537 U.S. 322, 327, 123 S. Ct. 1029, 1034 (2003); *see Slack v. McDaniel,* 529 U.S. 473,484, 120 S. Ct. 1595, 1604 (2000). Reasonable jurists could disagree about whether Smith was prejudiced by his trial counsel's failure to seek suppression of the search warrant issued to "any Sheriff of the State of Alabama" under Ala. Code § 15-5-5. *See Lambrix v. Sec'y, Fla. Dep't. of Corr.,* 851 F.3d 1158 (11th Cir. 2017).

Smith's motion for a certificate of appealability is therefore GRANTED as to the above issue, and in all other respects DENIED.

/s/ Charles R. Wilson
UNITED STATES CIRCUIT JUDGE

Appendix D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA,
SOUTHERN DIVISION

2019 WL 4338349
Only the Westlaw citation is currently available.

KENNETH EUGENE SMITH,

Petitioner,

—v.—

JEFFERSON DUNN, COMMISSIONER, ALABAMA DEPARTMENT OF CORRECTIONS, and STEVE MARSHALL, ATTORNEY GENERAL, STATE OF ALABAMA,

Respondents.

CASE NO. 2:15-cv-0384-AKK

Signed 09/12/2019

Attorneys and Law Firms

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Richard D. Anderson, Office of the Attorney General, Montgomery, AL, for Respondents.

MEMORANDUM OPINION

ABDUL K. KALLON, UNITED STATES DISTRICT JUDGE

Kenneth Eugene Smith has petitioned for a writ of habeas corpus under 28 U.S.C. § 2254, challenging his 1996 capital murder conviction and death sentence in an Alabama state court. Smith alleges that a variety of constitutional violations require reversal of his conviction and/or sentence. The parties have fully briefed Smith's claims. After careful consideration of the record, the pleadings, and the applicable provisions of 28 U.S.C. § 2254, the court finds that Smith has not shown that he is due an evidentiary hearing on any of his claims, and he is not entitled to habeas relief. Accordingly, Smith's petition is due to be denied.

I. PROCEDURAL HISTORY

On April 7, 1988, Smith was indicted in the Colbert County Circuit Court on one count of capital murder for the death of Elizabeth Dorlene Sennett. Vol. 1, Tab 3 at 65-66.[1] The indictment charged that Smith intentionally killed Mrs. Sennett by beating her and stabbing her with a knife, for pecuniary consideration of one thousand dollars, in violation of Alabama Code § 13A-5-40(a)(7). *Id.* at 65. After a trial in Jefferson County, Alabama, due to a venue transfer because of

[1] References to the record are designated "(Vol. ___)." The court will list any page number associated with the court record by reference to the number in the upper right hand corner of the page, if available. Otherwise, the page number will correspond with the number at the bottom of the page. Additionally, citations to the record will include an easily identifiable tab number close to the cited material where available.

"wide publicity in the newspaper, television and radio media," Vol. 40 at 839-40, a jury convicted Smith of capital murder in November 1989. Vol. 1, Tab 3 at 125. The jury recommended a death sentence by a vote of 10 to 2, *id.* at 126, which the trial judge accepted and sentenced Smith to death, *id.* at 130.

The Alabama Court of Criminal Appeals overturned Smith's conviction in 1992, due to a violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). *Smith v. State*, 588 So. 2d 561 (Ala. Crim. App. 1991), *on return to remand*, 620 So. 2d 727 (Ala. Crim. App. 1992), *on return to second remand*, 620 So. 2d 732 (Ala. Crim. App. 1992). Smith was retried again in Jefferson County and convicted once again in April 1996. Vol. 1, Tab 2 at 26. This time, the jury recommended by a vote of 11 to 1 a sentence of to life imprisonment without the possibility of parole. Vol. 1, Tab 3 at 114. However, the trial court overrode the jury's recommendation and sentenced Smith to death. *Id.* at 31-37.

The Alabama Court of Criminal Appeals affirmed Smith's conviction and death sentence, and denied his application for rehearing. *Smith v. State*, 908 So. 2d 273 (Ala. Crim. App. 2000). The Alabama Supreme Court initially granted Smith's certiorari petition on June 4, 2003, but subsequently quashed the writ, as having been improvidently granted. *Ex parte Smith*, 908 So. 2d 302 (Ala. 2005). The United States Supreme Court denied Smith's petition for a writ of certiorari. *Smith v. Alabama*, 546 U.S. 928 (2005).

Smith timely filed a Rule 32 petition in the Jefferson County Circuit Court to vacate his conviction and sentence, Vol. 31, Tab 55 at 245-328, and amended the petition three months later, Vol. 32, Tab 57 at 428-520. The state responded, Vol. 36, Tab 74, and, in

September 2007, the trial court entered a joint consent order setting a schedule for discovery, for the filing of additional pleadings, and for a status conference, Vol. 32, Tab 59. The court indicated that it would enter a schedule for discovery and an evidentiary hearing after it ruled on Smith's discovery motion and the state's motion for partial dismissal. Vol. 32, Tab 59 at 529. Smith then filed a motion for discovery, Vol. 32, Tab 60, and the state filed a motion for partial dismissal, seeking summary disposition of many of the claims raised in the amended petition, Vol. 32, Tab 61. Thereafter, the state responded to Smith's motion for discovery,[2] and Smith filed an opposition to the motion for partial dismissal. Vol. 32, Tab 63 at 588 - Vol. 33 at 617; Vol. 32, Tab 62. Ultimately, the trial court denied Smith's motion for discovery and summarily denied his Rule 32 petition, Vol. 30, Tab 51 and Tab 52 at 9-55, and subsequently denied Smith's motion for reconsideration, Vol. 33, Tab 64 at 620-30; Vol. 33, Tab 65 at 667-69. On December 17, 2010, the Alabama Court of Criminal Appeals reversed the trial court and remanded the case to the trial court to address the allegations in Smith's amended Rule 32 petition.[3] *Smith v. State*, 160 So. 2d 40 (Ala. Crim. App. 2010).

On remand, Smith filed a motion for discovery and an evidentiary hearing, Vol. 37, Tab 76 at 346-79, and the trial court granted the motion for discovery, Vol. 36, Tab 72 at 102-03. The trial court also entered an

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[2] In its response, the state acknowledged that Smith was entitled to discovery of many of the documents he requested. Vol. 32, Tab 63 at 588 - Vol. 33 at 617

[3] In its order summarily denying the Rule 32 petition, the trial court addressed the claims in Smith's original Rule 32 petition rather than the claims in the amended petition.

order directing Smith to "elaborate further" on several of his claims, and allowing him to "submit any affidavits that he may choose in support of each of his claims ... in lieu of testimony in support of" those claims. Vol. 36, Tab 72 at 100-01. Smith complied, and filed a memorandum elaborating on his claims, along with four affidavits and numerous exhibits. Vol. 38, Tab 78 - Vol. 39, Tab 82. Thereafter, the state responded to Smith's request for an evidentiary hearing and the memorandum, Vol. 37, Tab 75, and Smith filed a reply further elaborating on his claims, Vol. 40, Tab 84. The trial court issued its return to remand, again denying Smith's petition. Vol. 36, Tab 73 at 104-48.

On February 10, 2012, the Court of Criminal Appeals remanded the case again "because the trial court failed to comply with Rule 32.9, Ala. R. Crim. P., when it summarily dismissed some of the claims on which it had already permitted Smith to present evidence." *Smith v. State*, 160 So. 3d 40, 53 (Ala. Crim. App. 2012). The court directed the trial court to "make specific findings relating to each material issue of fact presented on those claims involving the hair and the afghan on which the trial court permitted Smith to present evidence." *Id.* at 54. And, in response, the trial court issued its second return to remand, again denying the relief. Vol. 43, Tab 90. The Court of Criminal Appeals found that the trial court had made adequate fact findings as to one of the three claims, but not to the other two, and remanded the case again. Vol. 43, Tab 94.

On December 12, 2012, the trial court issued its third return to remand on the remaining claims. Vol. 43, Tab 96. The Court of Criminal Appeals affirmed the trial court, Vol. 44, Tab 100, and overruled Smith's application for rehearing, Vol. 45, Tab 102.

After the Alabama Supreme Court denied Smith's petition for writ of certiorari, Vol. 46, Tab 104, Smith filed a § 2254 petition in this court. Doc. 1. Thereafter, Respondents filed an answer and brief, docs. 21, 25, and Smith replied, doc. 31.

II. THE OFFENSE OF CONVICTION

In its opinion on direct appeal, the Court of Criminal Appeals summarized the evidence in the case:

> The State's evidence tended to show the following. On March 18, 1988, the Reverend Charles Sennett, a minister in the Church of Christ, discovered the body of his wife, Elizabeth Dorlene Sennett, in their home on Coon Dog Cemetery Road in Colbert County. The coroner testified that Elizabeth Sennett had been stabbed eight times in the chest and once on each side of the neck, and had suffered numerous abrasions and cuts. It was the coroner's opinion that Sennett died of multiple stab wounds to the chest and neck.
>
> The evidence established that Charles Sennett had recruited Billy Gray Williams, who in turn recruited Smith and John Forrest Parker, to kill his wife. He was to pay them each $1,000 in cash for killing Mrs. Sennett. There was testimony that Charles Sennett was involved in an affair, that he had incurred substantial debts, that he had taken out a large insurance policy on his wife, and that approximately one week after the murder, when the murder investigation started to focus on him as a suspect, Sennett committed suicide. Smith detailed the following in his confession to police:

About one month prior to March 18, 1988, I was contacted by Billy Williams. Billy came over to my house and we talked out on the front porch. It was late afternoon. Billy said that he knew someone that wanted somebody hurt. Billy said that the person wanted to pay to have it done. Billy said the person would pay $1500 to do the job. I think I told Billy I would think about it and get back with him. Billy lives at the corner of Tuscaloosa Street and Cypress Street near the telephone company. Billy drives a red and white Thunderbird. Billy and I are good friends. Billy and I talked about this several times before I agreed to do it. I had already talked with John Parker about helping me.

I think I first met Charles Sennett about two weeks prior to the murder. Billy arranged the meeting. At the time I met Mr. Sennett I did not know who he was. I did not ask his name and he did not ask what my name was. Mr. Sennett told me that he wanted somebody taken care of. Mr. Sennett said that the person would be at home, that they never had any visitors. Mr. Sennett said that the house was out in the country. At that time I just listened to his proposal and told him I would get back with him. When we talked we sat in Mr. Sennett's truck in front of Billy's apartment. I gave him my phone number.

Mr. Sennett called me a couple of times to see if I had made a decision. Sometime between the Monday prior to the murder and the Thursday prior to the murder, Mr. Sennett learned that John and I would do what he wanted. I met with Mr. Sennett on Tuesday prior to the murder in the coffee[house] at ECM. At this meeting Mr.

Sennett drew me a diagram of his house and told me that his wife and he would be out of town on Wednesday, to go down to the house and look around. By the time Sennett and I met at ECM I had learned through conversations with him that it was his wife that he wanted killed and the price agreed was $1,000 each – excuse me – $1,000 each for Billy Williams, John Parker and I.

The next meeting was on Thursday prior to the murder in front of Billy's apartment again. Billy, Mr. Sennett and I sat in Mr. Sennett's silver car and talked. I don't recall what time it was exactly. I think it was in the morning. At this meeting Sennett gave me $200 and showed us the rest of the money. Two hundred dollars was for anything we needed to do the job. John Parker sat in my car while Billy and I talked with Mr. Sennett. The murder was supposed to look like a burglary that went bad. This was Mr. Sennett's idea. Sennett told me to take whatever I wanted from the house. It was agreed for John and I to do the murder and then come back to Billy's apartment – to Billy's house – excuse me – and get the rest of our money. This meeting only lasted a short while. Sennett told us that he would be gone from 8:30 until noon. Then on 3/18 of '88 ... Friday, John and I got together around 8:30. We were in John's car, a Pontiac Grand Prix, gold. John drove to Muscle Shoals, then I drove down to the Sennett house. John had brought a black handle survival knife and a black holster. At this time we still did not know how we were going to kill Mrs. Sennett.

John and I got to the Sennett house around 9:30, I think. I parked at the back of the house near a little patio that led into the house. I went to a

door to the left of the car. I think there was a white freezer nearby. I knocked on the door and Mrs. Sennett came to the door. I told Mrs. Sennett that her husband had told us that we could come down and look around the property to see about hunting on it. Mrs. Sennett asked my name. I told her I was Kenny Smith. She went to the phone and called her husband and came back and told us it was okay to look around.

John and I looked around the property for a while then came back to the house. John and I went back to the door. We told Mrs. Sennett we needed to use the bathroom and she let us inside.

I went to the bathroom nearest the kitchen and then John went to the bathroom. I stood at the edge of the kitchen talking with Mrs. Sennett. Mrs. Sennett was sitting at a chair in the den. Then I heard John coming through the house. John walked up behind Mrs. Sennett and started hitting her. John was hitting her with his fist. I started getting the VCR while John was beating Mrs. Sennett. John hit Mrs. Sennett with a large cane and anything else he could get his hands on. John went into a frenzy. Mrs. Sennett was yelling just stop, we could have anything we wanted.

As John was beating up Mrs. Sennett, I messed up some things in the house to make it look like a burglary. I took the VCR out to the car.

The last place I saw Mrs. Sennett she was lying near the fireplace covered with some kind of blanket. I had gone outside to look in the storage buildings when I saw John run out to the pond and throw some things in it. I also took a small stereo from the house – "also," is the last word.

> I don't know what brand it was or where in the house I got it. The VCR was a Samsung. I got it from under the TV set in the den. When John got back to the car we drove back to Billy's apartment to get our money.
>
> On the way back John told me that he had stabbed her once in the neck. I never stabbed Mrs. Sennett at all. When John and I got to Billy's, we were given $900 a piece. Billy gave us the money.
>
> At the time of the murder I never [knew] Charles Sennett's name or his wife's. It was only when it came out in the newspaper that I learned the name of the lady that was killed and Charles Sennett.
>
> I took the Samsung VCR home with me. The last time I saw the stereo it was in John's car. It was around noon when we got to Billy's apartment. Then on 3/31/88 – ... Thursday – my house was searched by investigators and they found the VCR. I was brought to the Colbert County Courthouse where I was advised of my rights. After being advised of my rights, I gave Investigator May this written statement.

Smith's statement to police was corroborated at trial. Donald Buckman, a friend of Smith's, testified that Smith approached him about one week before the murder and asked him if he would be interested in participating in beating someone up in exchange for money. Another witness, Brent Barkley, testified that Smith told him that he had been hired to beat up someone. Barkley also stated that he saw Smith on the evening of the murder and that Smith's hand was "bruised and wrapped." There was also testimony

that Smith had in his possession a large amount of money immediately after the murder.

Smith's defense at trial was that he participated in the assault of Elizabeth Sennett but that he did not intend to kill her. Counsel in opening statement stated the following:

> [Smith] agreed with Sennett to go beat Elizabeth Dorlene Sennett, to rough her up, to make it look like a robbery for fast cash. That is the terms they used. It was not to kill Mrs. Sennett. It was not to take her life. As shameful and as vile, it was nothing more or nothing less than to beat her up and to take [sic]. And that plan, what they agreed to – and you will hear evidence of this – that as evil as that plan was, that is all it was.

Smith, 908 So. 2d at 279-81 (alterations in original) (footnotes omitted).

III. THE SENTENCE

The trial court issued a sentencing order immediately following the sentencing hearing. Vol. 1, Tab 3 at 31-37. Thereafter, the trial court amended the sentencing order to set "out the things that the Court considered in sentencing the defendant" and "refine" the sentencing order, noting that:

> The Court considering the aggravating circumstances as set out and enumerated in § 13A-5-49 of the Code of Alabama, as amended:
>
> (A) the Court finds from the evidence introduced at the trial and re-introduced at the punishment hearing before the jury that the defendant, Kenneth Eugene Smith, committed the murder for pecuniary gain, namely for the sum of $1,000. The court finds that said defendant was, in fact, paid

that sum for said intentional killing. The court finds that this is an aggravating circumstance pursuant to § 13A-5-49(6) of the Code of Alabama, as amended, and the Court has considered said aggravating circumstance.

The Court finds that the defendant was not a person under sentence of imprisonment; therefore, the Court does not consider the aggravating circumstance listed in Section 13A-5-49(1), Code of Alabama, the Court finding that said aggravating circumstance does not exist in this case.

The Court finds the defendant was not previously convicted of another capital murder, nor previously convicted of a felony involving the use or threat of violence to the person; therefore, the Court does not consider the aggravating circumstance listed in Section 13A-5-49(2), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

The Court finds that the defendant did not knowingly create a great risk of death to many persons, therefore, the Court does not consider the aggravating circumstance listed in Section 13A-5-49(3), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

The Court finds that this offense was not committed while the defendant was engaged or was an accomplice in the commission of or an attempt to commit, or flight after committing, or attempting to commit rape, robbery, burglary or kidnapping, therefore, the Court does not consider the aggravating circumstance listed in Section 13A-5-49(4), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

The Court does not find that the offense was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody, therefore the Court does not consider the aggravating circumstance listed in Section 13A-5-49(5), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

The Court does not find that the offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; therefore, the Court does not consider the aggravating circumstance listed in Section 13A-5-49(7), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

The Court does not find that the offense was especially heinous, atrocious or cruel compared to other capital offenses, therefore the Court does not consider the aggravating circumstance listed in Section 13A-5-49(8), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

(B) The Court now proceeds to consider the mitigating circumstances as set out and enumerated in § 13A-5-51 of the Code of Alabama, as amended, and other mitigating circumstances proved at the punishment hearing before the jury.

The Court finds 2 statutory mitigating circumstances in this cause and that is the age of the defendant at the time of the commission of the crime in that he was 22 years of age. However, the Court does find from the evidence that the defendant was normal and not retarded, had attended high school and worked several jobs, was married and had one (1) minor child.

The Court further finds that the defendant had no significant history of prior criminal activity.

The Court further finds as to a non-statutory mitigating certain factors, that the defendant appeared to be remorseful for what he had done, and he gave a voluntary confession. However, the defendant did not turn himself in to the police and at the time of his arrest in his home in Florence, Alabama, there was found in his home a VCR that was the property of the victim with blood still on it.

The Court further finds as a non-statutory mitigating [factor], the defendant's good conduct in jail; and in counseling others including family members.

During his tenure in the Colbert County Jail, Tuscumbia, Alabama, he warned a jail-guard of an impending breakout of jail by other inmates. The jail-guard, Alton Hankins, testified to this. While in prison with the Board of Corrections, he has adjusted and upgraded his education and counseled other people.

The Court further finds as a non-statutory mitigating factor that the defendant was neglected and deprived in his early childhood.

The Court further finds that the capital offense was not committed while the defendant was under the influence of extreme mental or emotional disturbance, accordingly the Court does not consider the mitigating circumstance listed in Section 13A-5-51(2), Code of Alabama, the Court finding that said mitigating circumstance does not exist in this case.

The Court further finds from the evidence that the victim was not a participant in the defendant's conduct or consented to it; therefore, the Court

finds that the mitigating circumstance listed in Section 13A-5-51(3), Code of Alabama, does not exist and the Court does not consider it.

The Court does not find from the evidence that the defendant was an accomplice in a capital offense committed by another person and that his participation was relatively minor. The Court finds from the evidence in this case that the defendant, Kenneth Eugene Smith, and John Forrest Parker both killed the victim by beating and hitting her with different objects and stabbing her while the victim was pleading with them. Therefore, the Court finds that the mitigating circumstance listed in Section 13A-5-51(4), Code of Alabama, does not exist and the court does not consider it.

The Court does not find from the evidence that the defendant acted under extreme duress or under the substantial domination of another person; therefore, the Court finds that the mitigating circumstance listed in Section 13A-5-51(5), Code of Alabama, does not exist and the Court does not consider it.

The Court does not find from the evidence that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; the Court had evidence before it regarding the defendant's actions during and after the murder of Elizabeth Dorlene Sennett which demonstrate[s] that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired. The defendant's actions in throwing away the murder weapons after the killing, his attempting to make it look like a

burglary, and other evidence that was presented, is all evidence that the defendant at the time in question appreciated that his conduct was criminal, and that he might be apprehended and for that reason did what he could to avoid apprehension. Accordingly, the Court finds that the mitigating circumstance listed in Section 13A-5-51(6), Code of Alabama, does not exist and the Court does not consider it.

The Court does find that the jury's recommendation is a mitigating factor and the Court has consider[ed] said mitigating factor at this sentence hearing. However, the jury was allowed to hear an emotional appeal from the defendant's mother. The Court does not find that the defendant's problems during his childhood is a mitigating factor.

Also, there was evidence presented to the jury that the husband of the victim was the instigator of the killing of his wife, but the fact that the victim's husband conspired with the defendant and his co-defendants to kill his wife does not make this defendant any less culpable and is not a mitigating factor.

The Court has also considered the Presentence Investigation Report as set out in Section 13A-5-47, Code of Alabama, as amended, in determining a sentence in this cause.

The Court having considered the aggravating circumstances and the mitigating circumstances, finds that the aggravating circumstances due to the nature of the crime and the defendant's involvement in it outweighs the mitigating circumstances presented, and the mitigating factor that the jury recommended a sentence of life without parole and

the vote was eleven (11) for life and one (1) for death.

The Court does find that there is a reasonable basis for enhancing the jury's recommend[ed] sentence for the reasons stated herein that this was a murder for hire and the defendant had the opportunity to reflect and withdrawn [sic] from his actions and chose not to do this; he was paid for his actions; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired. Therefore, on this 21st day May, 1996, with the defendant, Kenneth Eugene Smith being present, and having been convicted by a jury of capital murder and the Court having weighed the aggravating circumstances against the mitigating circumstances and factors, and the Court having found that the aggravating circumstances outweigh the mitigating circumstances and factors;

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED by the Court, and it is the judgment of the Court, and the sentence of law that the defendant, Kenneth Eugene Smith, suffer death by electrocution. The Sheriff of Jefferson County, Alabama is directed to deliver Kenneth Eugene Smith to the custody of the Director of the Department of Corrections and the designated executioner shall, at the proper place for execution of one sentenced to suffer death by electrocution, cause a current of electricity of sufficient intensity to cause death in the application and continuance of such current to pass through the said Kenneth Eugene Smith until the said Kenneth Eugene Smith is dead. May God have mercy on you!

> **DONE AND ORDERED** this 25th day of September, 1997.

Vol. 6, Tab 4 at 1092-97.

IV. THE SCOPE OF FEDERAL HABEAS REVIEW

"The habeas statute unambiguously provides that a federal court may issue the writ to a state prisoner 'only on the ground that he is in custody in violation of the Constitution or law or treaties of the United States.'" *Wilson v. Corcoran*, 562 U.S. 1, 5 (2010) (quoting 28 U.S.C. § 2254(a)). As such, this court's review of claims seeking habeas relief is limited to questions of federal constitutional and statutory law. Claims that turn solely upon state law principles fall outside the ambit of this court's authority to provide relief under § 2254. *See Alston v. Department of Corrections*, 610 F. 3d 1318, 1326 (11th Cir. 2010).

A. Exhaustion of State Court Remedies: The First Condition Precedent to Federal Habeas Review

A habeas petitioner is required to present his federal claims to the state court and to exhaust all of the procedures available before seeking relief in federal court. 28 U.S.C. § 2254(b)(1); *Medellin v. Dretke*, 544 U.S. 660, 666 (2005). That requirement ensures that state courts are afforded the first opportunity to address federal questions affecting the validity of state court convictions and, if necessary, correct violations of a state prisoner's federal constitutional rights. As the Eleventh Circuit has explained:

> In general, a federal court may not grant habeas corpus relief to a state prisoner who has not exhausted his available state remedies....

> Exhaustion of state remedies requires that the state prisoner "fairly presen[t] federal claims to the state courts in order to give the State the opportunity to pass upon and correct alleged violations of its prisoners' federal rights." *Duncan v. Henry*, 513 U.S. 364, 365 (1995) (citing *Picard v. Connor*, 404 U.S. 270, 275-76 (1971)) (internal quotation marks omitted). The Supreme Court has written these words:
>
> > [T]hat the federal claim must be fairly presented to the state courts.... it is not sufficient merely that the federal habeas applicant has been through the state courts.... Only if the state courts have had the first opportunity to hear the claim sought to be vindicated in a federal habeas proceeding does it make sense to speak of the exhaustion of state remedies.
> >
> > *Picard*, 404 U.S. at 275, 92 S. Ct. at 512....
>
> Thus, to exhaust state remedies fully the petitioner must make the state court aware that the claims asserted present federal constitutional issues. "It is not enough that all the facts necessary to support the federal claim were before the state courts or that a somewhat similar state-law claim was made." *Anderson v. Harless*, 459 U.S. 4, 5-6, 103 S. Ct. 276, 277, 74 L. Ed. 2d 3 (1982) (citations omitted).

Snowden v. Singletary, 135 F.3d 732, 735 (11th Cir. 1998).

B. The Procedural Default Doctrine: The Second Condition Precedent to Federal Habeas Review

1. General principles

It is well established that if a habeas petitioner fails to raise his federal claim in the state court system at the time and in the manner dictated by the state's procedural rules, the state court can decide the claim is not entitled to a review on the merits. Stated differently, "the petitioner will have procedurally defaulted on that claim."[4] *Mason v. Allen*, 605 F.3d 1114, 1119 (11th Cir. 2009). Generally, if the last state court to examine a claim states clearly and

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[4] The so-called "procedural default" doctrine states as follows:

> In habeas, the sanction for failing to exhaust properly (preclusion of review in federal court) is given the separate name of procedural default, although the habeas doctrines of exhaustion and procedural default "are similar in purpose and design and implicate similar concerns," *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 7 (1992). *See also Coleman v. Thompson*, 501 U.S. 722, 731–732, 111 S. Ct. 2546 (1991). In habeas, state-court remedies are described as having been "exhausted" when they are no longer available, regardless of the reason for their unavailability. *See Gray v. Netherland*, 518 U.S. 152, 161, 116 S. Ct. 2074, 135 L. Ed. 2d 457 (1996). Thus, if state-court remedies are no longer available because the prisoner failed to comply with the deadline for seeking state-court review or for taking an appeal, those remedies are technically exhausted, *ibid.*, but exhaustion in this sense does not automatically entitle the habeas petitioner to litigate his or her claims in federal court. Instead, if the petitioner procedurally defaulted those claims, the prisoner generally is barred from asserting those claims in a federal habeas proceeding. *Id.*, at 162, 116 S. Ct. 2074; *Coleman, supra*, at 744–751, 111 S. Ct. 2546.

Woodford v. Ngo, 548 U.S. 81, 92-93 (2006).

explicitly that the claim is barred because the petitioner failed to follow state procedural rules, and that procedural bar provides an adequate and independent state ground for denying relief, then federal review of the claim also is precluded by federal procedural default principles. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Cone v. Bell*, 556 U.S. 449, 465 (2009) ("[W]hen a petitioner fails to raise his federal claims in compliance with relevant state procedural rules, the state court's refusal to adjudicate the claim ordinarily qualifies as an independent and adequate state ground for denying federal review."). And, the Supreme Court defines an "adequate and independent" state court decision as one that "rests on a state law ground that is *independent* of the federal question and adequate to support the judgment." *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)) (emphasis in *Lee*). The questions of whether a state procedural rule is "independent" of the federal question and "adequate" to support the state court's judgment, so as to have a preclusive effect on federal review of the claim, "is itself a federal question." *Id.* (quoting *Douglas v. Alabama*, 380 U.S. 415, 422 (1965)).

To be considered "independent" of the federal question, "the state court's decision must rest solidly on state law grounds, and may not be 'intertwined with an interpretation of federal law.' " *Judd v. Haley*, 250 F.3d 1308, 1313 (11th Cir. 2001) (quoting *Card v. Dugger*, 911 F.2d 1494, 1516 (11th Cir. 1990)). An example of intertwining would be when "the State has made application of the procedural bar depend on an antecedent ruling on federal law, that is, on the determination of whether federal constitutional error has been committed." *Ake v. Oklahoma*,

470 U.S. 68, 75 (1985). Stated differently, if "the state court must rule, either explicitly or implicitly, on the merits of the constitutional question" before applying the state's procedural rule to a federal constitutional question, then the rule is not independent of federal law. *Id.*

To be considered "adequate" to support the state court's judgment, the state procedural rule must be both "firmly established and regularly followed." *Lee v. Kemna*, 534 U.S. at 375 (quoting *James v. Kentucky*, 466 U.S. 341, 348 (1984)). The rule must be "clear [and] closely hewn to" by the state for a federal court to consider it as adequate. *James*, 466 U.S. at 346. That does not mean that the state's procedural rule must be rigidly applied in every instance, or that occasional failure to do so will render the rule inadequate. "To the contrary, a [state's] discretionary [procedural] rule can be 'firmly established' and 'regularly followed' – even if the appropriate exercise of discretion may permit consideration of a federal claim in some cases but not others." *Beard v. Kindler*, 558 U.S. 52, 60-61 (2009). The adequacy requirement means only that the procedural rule "must not be applied in an *arbitrary or unprecedented fashion*." *Judd*, 250 F.3d at 1313 (emphasis added).

Thus, in summary, if the procedural rule is not firmly established, or if it is applied in an arbitrary, unprecedented, or manifestly unfair fashion, it will not be considered adequate, and the state court decision based upon such a rule can be reviewed by a federal court. *Card*, 911 F.2d at 1517. Conversely, if the rule is deemed adequate, the decision will not be reviewed by this court.

2. Overcoming procedural default

Generally, there are three circumstances in which an otherwise valid state-law ground will *not* bar a federal habeas court from considering a constitutional claim that was procedurally defaulted in state court: (1) where the petitioner demonstrates that he had good "cause" for not following the state procedural rule, and, that he was actually "prejudiced" by the alleged constitutional violation; or (2) where the state procedural rule was not "firmly established and regularly followed"; or (3) where failure to consider the petitioner's claims will result in a "fundamental miscarriage of justice." *See Edwards v. Carpenter*, 529 U.S. 446, 455 (2000) (Breyer, J., concurring).[5]

a. The "cause and prejudice" standard

"A federal court may still address the merits of a procedurally defaulted claim if the petitioner can show cause for the default and actual prejudice resulting from the alleged constitutional violation." *Ward v. Hall*, 592 F.3d 1144, 1157 (11th Cir. 2010)

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[5] *See, e.g., Coleman*, 501 U.S. at 749-50 (holding that a state procedural default "will bar federal habeas review of the federal claim, unless the habeas petitioner can show cause for the default and prejudice attributable thereto, or demonstrate that failure to consider the federal claim will result in a fundamental miscarriage of justice") (citations and internal quotation marks omitted); *Murray v. Carrier*, 477 U.S. 478, 496 (1986) ("[W]here a constitutional violation has probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default."); *Smith v. Murray*, 477 U.S. 527, 537 (1986) (same); *Davis v. Terry*, 465 F.3d 1249, 1252 n.4 (11th Cir. 2006) ("It would be considered a fundamental miscarriage of justice if 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'") (citations omitted).

(citing *Wainwright v. Sykes*, 433 U.S. 72, 84-85 (1977)) (emphasis added). This so-called "cause and prejudice" standard is framed in the conjunctive, and a petitioner must prove both parts.

i. "Cause"

To show "cause," a petitioner must prove that "some objective factor external to the defense impeded counsel's efforts" to raise the claim in the state courts. *Carrier*, 477 U.S. at 488. "Objective factors that constitute cause include '"interference by officials"' that makes compliance with the State's procedural rule impracticable, and 'a showing that the factual or legal basis for a claim was not reasonably available to counsel.'" *McCleskey v. Zant*, 499 U.S. 467, 493-94 (1991) (citations omitted). And, while "[a]ttorney error [on direct review] that constitutes ineffective assistance of counsel" has long been accepted as "cause" to overcome a procedural default, the constitutional ineffectiveness of post-conviction counsel on collateral review generally will not support a finding of cause and prejudice to overcome a procedural default. *Coleman*, 501 U.S. at 754. This is the case because "[t]here is no right to counsel in state post-conviction proceedings." *Id.* at 752 (citing *Pennsylvania v. Finley*, 481 U.S. 551 (1987); *Murray v. Giarratano*, 492 U.S. 1 (1989)).[6]

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[6] But, in two recent landmark cases, the Supreme Court extended *Coleman* by deciding that, as a matter of equity, and, under specific, limited circumstances, errors by counsel on post-conviction collateral review could establish the necessary "cause" to overcome a procedurally defaulted claim. In the first such case, *Maples v. Thomas*, 565 U.S. 266 (2012), the Court found that post-conviction counsel's gross professional misconduct (e.g., abandonment of the petitioner) severed the agency relationship between counsel and the petitioner and, thus, established the necessary "cause" to overcome a procedural

ii. "Prejudice"

A habeas petitioner must show also that he was actually "prejudiced" by the alleged constitutional violation. This entails showing "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *United States v. Frady*, 456 U.S. 152, 170 (1982) (emphasis added). If the "cause" is of the type described in *Martinez v. Ryan*, then the reviewing court should consider whether the petitioner can demonstrate "that the underlying ineffective-assistance-of-trial-counsel claim is a substantial one, which is to say that the prisoner must demonstrate that the claim has some merit." *Martinez*, 566 U.S. at 12-15 (citing for comparison *Miller-El v. Cockrell*, 537 U.S. 322 (2003) (describing standards for certificates of appealability to issue)).

b. The "fundamental miscarriage of justice" standard

In a "rare," "extraordinary," and "narrow class of cases," a federal court may consider a procedurally defaulted claim in the absence of a showing of "cause" for the default if *either*: (a) a fundamental miscarriage of justice "has probably resulted in the conviction of one who is actually innocent," *Smith*, 477 U.S. at 537-38 (quoting *Carrier*, 477 U.S. at 496); or (b) the petitioner shows "by clear and convincing

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default. *Id.* at 281. And, in *Martinez v. Ryan*, 566 U.S. 1 (2012), the Court held that post-conviction counsel's failure to raise an ineffective assistance of trial counsel claim at an initial review collateral proceeding could serve as the necessary "cause" to overcome the procedural default of that type of claim when the state prohibits it from being raised during the direct review process. *Id.* at 11-12.

evidence that[,] but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty," *Schlup*, 513 U.S. at 323-27 & n.44 (quoting *Sawyer v. Whitley*, 505 U.S. 333, 336 (1992)).

C. The Statutory Overlay: The Effect of the Antiterrorism and Effective Death Penalty Act of 1996 on Habeas Review

The writ of habeas corpus "has historically been regarded as an extraordinary remedy." *Brecht v. Abrahamson*, 507 U.S. 619, 633 (1993). That is especially true when federal courts are asked to engage in habeas review of a state court conviction pursuant to 28 U.S.C. § 2254, where "[t]he role of federal habeas proceedings, while important in assuring that constitutional rights are observed, is secondary and limited. Federal courts are not forums in which to relitigate state trials." *Id.* (quoting *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983)). "Those few who are ultimately successful [in obtaining federal habeas relief] are persons whom society has grievously wronged and for whom belated liberation is little enough compensation." *Fay v. Noia*, 372 U.S. 391, 440-41 (1963). "Accordingly, ... an error that may justify reversal on direct appeal will not necessarily support a collateral attack on a final judgment." *Brecht*, 507 U.S. at 634.

Congress legislated these principles in the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), which amended preexisting habeas law,[7] and included several provisions requiring

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[7] Smith filed his petition after AEDPA became law. *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996). Accordingly, the habeas statutes as amended by AEDPA apply to the claims asserted in this case. *See Id.* § 107(c), 110 Stat. at 1226; *McNair*

federal courts to give even more deference to state court determinations of federal constitutional claims.

1. 28 U.S.C. § 2254(e)(1)

Section 2254(e)(1) requires district courts to presume that a state court's factual determinations are correct, unless the habeas petitioner rebuts the presumption with clear and convincing evidence. *See* 28 U.S.C. § 2254(e)(1). Section 2254(e)(1) "modified a federal habeas court's role in reviewing state prisoner applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693 (2002) (citing *Williams v. Taylor*, 529 U.S. 362, 403-04 (2000)). The deference that attends state court findings of fact pursuant to § 2254(e)(1) applies to all habeas claims, regardless of their procedural stance. Thus, a presumption of correctness must be afforded to a state court's factual findings, even when the habeas claim is being examined *de novo*. *See Mansfield v. Sec'y, Dep't of Corr.*, 679 F.3d 1301, 1313 (11th Cir. 2012). And, the presumption of correctness also applies to habeas claims that were adjudicated on the merits by the state court and, therefore, those claims are subject to the standards of review set out in 28 U.S.C. § 2254(d)(1) or (d)(2) discussed in the following section.

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v. Campbell, 416 F.3d 1291, 1297 (11th Cir. 2005) (applying AEDPA to habeas petitions filed after Act's effective date); *Hightower v. Schofield*, 365 F.3d 1008, 1013 (11th Cir. 2004) (same). *See also Martin v. Hadix*, 527 U.S. 343, 356 (1999) (discussing retroactivity of AEDPA amendments to § 2254).

2. 28 U.S.C. § 2254(d)

"By its terms § 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to the exceptions in §§ 2254(d)(1) and (d)(2)." *Harrington v. Richter*, 562 U.S. 86, 98 (2011). It does not matter whether the state court decision contains a lengthy analysis of the claim, or is a summary ruling "unaccompanied by explanation." *Id.* Further, the "backward-looking language" of the statute requires an examination of the state court decision on the date rendered. *Cullen v. Pinholster*, 563 U.S. 170 (2011). That is, "[s]tate court decisions are measured against [the Supreme] Court's precedents as of 'the time the state court renders its decision.' " *Id.* at 182 (quoting *Lockyer v. Andrade*, 588 U.S. 63, 71-72 (2003)). Finally, "review under § 2254(d)(1) [and (d)(2)] is limited to the record that was before the state court that adjudicated the claim on the merits," *id.* at 181, and a federal habeas court conducting 2254(d) review should not consider new evidence "in the first instance effectively *de novo*," *id.* at 182.

A closer look at the separate provisions of 28 U.S.C. § 2254(d)(1) and (d)(2) reveals that when a state court has made a decision on a petitioner's constitutional claim, habeas relief cannot be granted unless it is determined that the state court's adjudication of the claim either:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).[8] The "contrary to" and "unreasonable application" clauses of § 2254(d) are "independent statutory modes of analysis." *Alderman v. Terry*, 468 F.3d 775, 791 (11th Cir. 2006) (citing *Williams*, 529 U.S. at 405-07).[9] When considering a state court's adjudication of a petitioner's claim, therefore, the habeas court must not conflate the two.

a. The meaning of § 2254(d)(1)'s "contrary to" clause

A state court determination can be "contrary to" clearly established Supreme Court precedent in at least two ways:

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[8] Section 2254(d)(1)'s reference to "clearly established federal law, as determined by the Supreme Court of the United States" has been interpreted by the Supreme Court as referencing only "the holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state-court decision." *Williams*, 529 U.S. at 412 (O'Connor, J., majority opinion) (emphasis added); *see also, e.g., Carey v. Musladin*, 549 U.S. 70, 74 (2006) (same); *Osborne v. Terry*, 466 F.3d 1298, 1305 (11th Cir. 2006) (same); *Warren v. Kyler*, 422 F.3d 132, 138 (3rd Cir. 2005) ("[W]e do not consider those holdings as they exist today, but rather as they existed as of the time of the relevant state-court decision.") (internal quotation marks and citation omitted).

[9] *See also Williams*, 529 U.S. at 404 (O'Connor, J., majority opinion) ("Section 2254(d)(1) defines two categories of cases in which a state prisoner may obtain federal habeas relief with respect to a claim adjudicated on the merits in state court. Under the statute, a federal court may grant a writ of habeas corpus if the relevant state-court decision was either (1) '*contrary to* ... clearly established Federal law, as determined by the Supreme Court of the United States,' or (2) *'involved an unreasonable application of* ... clearly established Federal law, as determined by the Supreme Court of the United States.'") (emphasis added).

> First, a state-court decision is contrary to this Court's precedent if the state court arrives at a conclusion opposite to that reached by this Court on a question of law. Second, a state-court decision is also contrary to this Court's precedent if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to ours.

Williams, 529 U.S. at 405. *See also, e.g., Brown v. Payton*, 544 U.S. 133, 141 (2005) (same); *Early v. Packer*, 537 U.S. 3, 8 (2002) (*per curiam*) (same); *Putman v. Head*, 268 F.3d 1223, 1240-41 (11th Cir. 2001) (same). But, as the Eleventh Circuit has noted, the majority opinion in *Williams* does not limit the construction of § 2254(d)(1)'s "contrary to" clause to the two examples set forth above. Instead, the statutory language "simply implies that 'the state court's decision must be substantially different from the relevant precedent of [the Supreme] Court.'" *Alderman*, 468 F.3d at 791 (quoting *Williams*, 529 U.S. at 405).

b. The meaning of § 2254(d)(1)'s "unreasonable application" clause

A state court's determination of a federal constitutional claim can result in an "unreasonable application" of clearly established Supreme Court precedent in either of two ways:

> First, a state-court decision involves an unreasonable application of this Court's precedent if the state court identifies the correct governing legal rule from this Court's cases but unreasonably applies it to the facts of the particular state prisoner's case. Second, a

> state-court decision also involves an unreasonable application of this Court's precedent if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.

Williams, 529 U.S. at 407. But, "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." *Id.* at 410 (emphasis in original). A federal habeas court "may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law *erroneously or incorrectly*. Rather, that application must also be unreasonable." *Id.* at 411 (emphasis added). In other words, "a federal habeas court making the 'unreasonable application' inquiry should ask whether the state court's application of clearly established federal law was objectively unreasonable," and not whether the state court "correctly" applied Supreme Court precedent *Id.* at 409.[10]

To demonstrate that a state court's application of clearly established federal law was "objectively unreasonable," the habeas petitioner "must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that

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[10] *See also, e.g., Bell*, 535 U.S. at 694 (observing that the "focus" of the inquiry into the reasonableness of a state court's determination of a federal constitutional issue "is on whether the state court's application of clearly established federal law is objectively unreasonable," and stating that "an unreasonable application is different from an incorrect one"); *Harrington v. Richter*, 562 U.S. 86, 100-103 (2011) (same).

there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington*, 562 U.S. at 103. Stated another way, if the state-court's resolution of a claim is debatable among fairminded jurists, it is not objectively unreasonable.

c. The meaning of § 2254(d)(2)'s clause addressing an "unreasonable determination of the facts in light of the evidence presented in the state court proceeding"

Title 28 U.S.C. § 2254(d)(2) "imposes a 'daunting standard – one that will be satisfied in relatively few cases.'" *Cash v. Maxwell*, 565 U.S. 1138, 132 S. Ct. 611, 612 (2012) (Sotomayor, J., respecting denial of certiorari) (quoting *Maxwell v. Roe*, 628 F.3d 486, 500 (9th Cir. 2010)). As the Supreme Court has noted,

> in related contexts, "[t]he term 'unreasonable' is no doubt difficult to define." *Williams v. Taylor*, 529 U.S. 362, 410, 120 S. Ct. 1495, 146 L. Ed. 2d 389 (2000). It suffices to say, however, that a state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance. *Cf. Id.*, at 411, 120 S. Ct. 1495.

Wood v. Allen, 558 U.S. 290, 301 (2010). Therefore, "even if '[r]easonable minds reviewing the record might disagree' about the finding in question, 'on habeas review that does not suffice to supersede the trial court's ... determination.'" *Id.* (quoting *Rice v. Collins*, 546 U.S. 333, 341-42 (2006)) (alteration in original). Conversely, "when a state court's adjudication of a habeas claim result[s] in a decision that [i]s based on an unreasonable determination of the facts in light of the evidence presented in the state court

proceeding, this Court is not bound to defer to unreasonably-found facts or to the legal conclusions that flow from them." *Adkins v. Warden, Holman Correctional Facility*, 710 F.3d 1241, 1249 (11th Cir. 2013) (quoting *Jones v. Walker*, 540 F.3d 1277, 1288 n.5 (11th Cir. 2008) (*en banc*)).

d. Evaluating state court factual determinations under 28 U.S.C. § 2254(d)(2) and (e)(1)

As set out previously, 28 U.S.C. § 2254(d)(2) regulates federal court review of state court findings of fact. That provision limits the availability of federal habeas relief on any claims that are grounded in a state court's factual findings, unless the findings were "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(2). Moreover, § 28 U.S.C. § 2254(e)(1) provides that factual determinations made by a state court are "presumed to be correct," and that the habeas petitioner bears "the burden of rebutting the presumption of correctness by clear and convincing evidence." *See* 28 U.S.C. § 2254(e)(1). But, "no court has fully explored the interaction of § 2254(d)(2)'s 'unreasonableness' standard and § 2254(e)(1)'s 'clear and convincing evidence' standard." *See Cave v. Sec'y, Dep't of Corr.*, 638 F.3d 739, 744-45 (11th Cir. 2011) (quoting *Gore v. Sec'y, Dep't of Corr.*, 492 F.3d 1273, 1294 n.51 (11th Cir. 2007)). Still, federal habeas courts "must presume the state court's factual findings to be correct unless the petitioner rebuts that presumption by clear and convincing evidence." *Ward v. Hall*, 592 F.3d 1144, 1177 (11th Cir. 2010) (citing § 2254(e)(1); *Parker v. Head*, 244 F.3d 831, 835-36 (11th Cir. 2001)). And, § 2254(e)(1) "commands that for a writ to issue because the state court made an 'unreasonable

determination of the facts,' the petitioner must rebut 'the presumption of correctness [of a state court's factual findings] by clear and convincing evidence.'" *Ward*, 592 F.3d at 1155 (alteration in original).

D. The Burden of Proof and Heightened Pleading Requirements for Habeas Petitions

Federal habeas "exists only to review errors of constitutional dimension." *McFarland v. Scott*, 512 U.S. 849, 856 (1994). Further, "[w]hen the process of direct review ... comes to an end, a presumption of finality and legality attaches to the conviction and sentence." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). Two consequences flow from those fundamental propositions: (1) the habeas petitioner bears the burden of overcoming the presumption of "legality" that attaches to the state court conviction and sentence, and of establishing a factual basis demonstrating that federal post-conviction relief should be granted,[11] and (2) the habeas petitioner must meet "heightened pleading requirements."[12] The mere assertion of a ground for relief, without sufficient factual detail, does not satisfy either the petitioner's burden of proof under 28 U.S.C. § 2254(e)(1), or the requirements of Rule 2(c) of the *Rules Governing Section 2254 Cases in the United States District Courts*, which requires a state prisoner to "specify all the grounds for relief available to the petitioner," and to then "state the facts supporting each ground." Rule 2(c)(1) and (2), *Rules Governing*

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[11] *See, e.g.*, 28 U.S.C. § 2254(d) and (e)(1); *Hill v. Linahan*, 697 F.2d 1032, 1036 (11th Cir. 1983) ("The burden of proof in a habeas proceeding is always on the petitioner.") (citing omitted).

[12] *McFarland v. Scott*, 512 U.S. at 856; *Borden v. Allen*, 646 F.3d 785, 810 (11th Cir. 2011) (holding that Section 2254 requires "fact pleading," and not merely "notice pleading").

Section 2254 Cases in the United States District Courts. *See also* 28 U.S.C. § 2242 (stating that an application for writ of habeas corpus "shall allege the facts concerning the applicant's commitment or detention").

In short, a habeas petitioner must include in his statement of each claim sufficient supporting facts to justify a decision for the petitioner if the alleged facts are proven true. *See, e.g., Blackledge v. Allison*, 431 U.S. 63, 75 n.7 (1977) (observing that a habeas petition must "state facts that point to a 'real possibility of constitutional error'") (quoting Advisory Committee Notes to Rule 4 of the *Rules Governing Section 2254 Cases in the United States District Courts*). In addition, "[c]itation of the controlling constitutional, statutory, or other bases for relief for each claim also should be stated." 1 Randy Hertz & James S. Liebman, *Federal Habeas Corpus Practice and Procedure* § 11.6, at 654 (5th ed. 2005). As another district court has held:

> It is not the duty of federal courts to try to second guess the meanings of statements and intentions of petitioners. Rather the duty is upon the individual who asserts a denial of his constitutional rights to come forth with a statement of sufficient clarity and sufficient supporting facts to enable a court to understand his argument and to render a decision on the matter.

Nail v. Slayton, 353 F. Supp. 1013, 1019 (W.D. Va. 1972).

E. Ineffective Assistance of Counsel Claims[13]

The "benchmark" standard for determining ineffective assistance is well-established. The question is whether a trial or appellate attorney provided representational assistance to a state prisoner that was so professionally incompetent as to create issues of federal constitutional proportions. In other words, the court asks "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result." *Strickland v. Washington*, 466 U.S. 668, 686 (1984). If an objective answer to that question is "yes," then counsel was constitutionally ineffective. *Strickland* requires that the issue be approached in two steps:

> *First, the defendant must show that counsel's performance was deficient.* This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. *Second, the defendant must show that the deficient performance prejudiced the defense.* This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

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[13] An introduction to ineffective assistance of counsel claims is included here because of the relationship between such claims – which are governed by a highly deferential standard of constitutional law – and 28 U.S.C. § 2254(d), which is itself an extremely deferential standard of habeas review.

Id. at 687 (emphasis added). A petitioner must satisfy both parts of the *Strickland* standard. *Chandler v. United States*, 218 F.3d 1305, 1313 (11th Cir. 2000) (*en banc*). And, "[b]ecause both parts of the test must be satisfied in order to show a violation of the Sixth Amendment, the court need not address the performance prong if the defendant cannot meet the prejudice prong, or vice versa." *Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000) (citation omitted).

1. The performance prong

"The burden of persuasion is on the petitioner to prove by a preponderance of the evidence that counsel's performance was unreasonable." *Stewart v. Sec'y, Dep't of Corr.*, 476 F.3d 1193, 1209 (11th Cir. 2007) (citing *Chandler*, 218 F.3d at 1313). To satisfy this prong, the petitioner must prove that counsel made errors so serious that counsel was not functioning as the counsel guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. The standard for gauging attorney performance is "reasonableness under prevailing professional norms." (*Id.* at 688). "The test of reasonableness is not whether counsel could have done something more or different," but whether counsel's performance "fell within the broad range of reasonable assistance at trial." *Stewart*, 476 F.3d at 1209 (citing *Chandler*, 218 F.3d at 1313). Furthermore, courts must "recognize that 'omissions are inevitable, but, the issue is not what is possible or 'what is prudent or appropriate, but only what is constitutionally compelled.'" *Id.* (quoting *Burger v. Kemp*, 483 U.S. 776, 794 (1987)). And, because the Sixth Amendment does not guarantee a defendant the very best counsel or the most skilled attorney, "[t]he test has nothing to do with what the best lawyers would have done. Nor is

the test even what most good lawyers would have done. We ask only whether some reasonable lawyer at the trial could have acted, in the circumstances, as defense counsel acted at trial." *White v. Singletary*, 972 F.2d 1218, 1220 (11th Cir. 1992).

The reasonableness of counsel's performance is judged from the perspective of the attorney at the time of the alleged error and in light of all the circumstances.[14] "Under this standard, there are no "absolute rules" dictating what reasonable performance is or what line of defense must be asserted." *Michael v. Crosby*, 430 F.3d 1310, 1320 (11th Cir. 2005). To the contrary, "[a]bsolute rules would interfere with counsel's independence – which is also constitutionally protected – and would restrict the wide latitude counsel have in making tactical decisions." *Id.* (citations omitted). Judicial scrutiny of counsel's performance must be "highly deferential," because representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. *See Strickland*, 466 U.S. at 697. Indeed, reviewing courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Id.* at 689.[15] "Based on this strong

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[14] *See, e.g., Johnson v. Alabama*, 256 F.3d 1156, 1176 (11th Cir. 2001) (giving lawyers "the benefit of the doubt for 'heat of the battle' tactical decisions"); *Mills v. Singletary*, 161 F.3d 1273, 1285-86 (11th Cir. 1998) (noting that *Strickland* performance review is a "deferential review of all of the circumstances from the perspective of counsel at the time of the alleged errors").

[15] As the Court noted,

> It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has

presumption of competent assistance, the petitioner's burden of persuasion is a heavy one: 'petitioner must establish that no competent counsel would have taken the action that his counsel did take.'" *Stewart*, 476 F.3d at 1209 (quoting *Chandler*, 218 F.3d at 1315) (emphasis added). "Even if many reasonable lawyers would not have done as defense counsel did at trial, no relief can be granted on ineffectiveness grounds unless it is shown that *no reasonable lawyer, in the circumstances, would have done so.*" *Rogers*, 13 F.3d at 386 (emphasis added).

2. The prejudice prong

"A petitioner's burden of establishing that his lawyer's deficient performance prejudiced his case is also high." *Van Poyck v. Florida Department of Corrections*, 290 F.3d 1318, 1322 (11th Cir. 2002). The petitioner "must affirmatively prove prejudice, because '[a]ttorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial.'"

> proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; *that is, the defendant must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy*. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.

Strickland, 466 U.S. at 689 (emphasis added) (citations and internal quotation marks omitted)

Gilreath v. Head, 234 F.3d 547, 551 (11th Cir. 2000) (quoting *Strickland*, 466 U.S. at 693) (alteration in original). "It is not enough for the [habeas petitioner] to show that the errors had some conceivable effect on the outcome of the proceeding." *Strickland*, 466 U.S. at 693. Instead, to prove prejudice, the habeas petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* at 694; *see also Williams*, 529 U.S. at 391 (same). When that standard is applied in the context of the death sentence itself, "'the question is whether there is a reasonable probability that, absent the errors, the sentencer ... would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.'" *Stewart*, 476 F.3d at 1209 (quoting *Strickland*, 466 U.S. at 695). To satisfy high standard, a petitioner must present competent evidence proving "that trial counsel's deficient performance deprived him of 'a trial whose result is reliable.'" *Brown v. Jones*, 255 F.3d 1272, 1278 (11th Cir. 2001) (quoting *Strickland*, 466 U.S. at 687). In other words, "[a] finding of prejudice requires proof of unprofessional errors so egregious that the trial was rendered unfair and the verdict rendered suspect." *Johnson*, 256 F.3d at 1177 (citations omitted).

3. Deference accorded state court findings of historical fact and decisions on the merits when evaluating ineffective assistance of counsel claims

State court findings of historical fact made in the course of evaluating a claim of ineffective assistance of counsel are subject to a presumption of correctness under 28 U.S.C. § 2254(d)(2) and (e)(1). *See, e.g.,*

Thompson v. Haley, 255 F.3d 1292, 1297 (11th Cir. 2001). To overcome a state-court finding of fact, the petitioner bears the burden of proving contrary facts by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1). And, a federal habeas court may grant relief on a claim of ineffective assistance of counsel only if the state-court determination involved an "unreasonable application" of the *Strickland* standard to the facts of the case. *Strickland* itself, of course, also requires an assessment of whether counsel's conduct was professionally unreasonable. Those two assessments cannot be conflated into one. *See Harrington*, 562 U.S. at 101-02. Thus, habeas relief on a claim of ineffective assistance of counsel can be granted with respect to a claim actually decided by the state courts only if the habeas court determines that it was "objectively unreasonable" for the state courts to find that counsel's conduct was not "professionally unreasonable." As the *Harrington* Court explained:

> "Surmounting *Strickland's* high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. [356], [371-372], 130 S. Ct. 1473, 1485, 176 L. Ed. 2d 284 (2010). An ineffective-assistance claim can function as a way to escape rules of waiver and forfeiture and raise issues not presented at trial, and so the *Strickland* standard must be applied with scrupulous care, lest "intrusive post-trial inquiry" threaten the integrity of the very adversary process the right to counsel is meant to serve. *Strickland*, 466 U.S., at 689-690, 104 S. Ct. 2052. Even under *de novo* review, the standard for judging counsel's representation is a most deferential one. Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of materials outside the record, and interacted with the client, with

> opposing counsel, and with the judge. It is "all too tempting" to "second-guess counsel's assistance after conviction or adverse sentence." *Id.*, at 689, 104 S. Ct. 2052; *see also Bell v. Cone*, 535 U.S. 685, 702, 122 S. Ct. 1843, 152 L. Ed. 2d 914 (2002); *Lockhart v. Fretwell*, 506 U.S. 364, 372, 113 S. Ct. 838, 122 L. Ed. 2d 180 (1993). The question is whether an attorney's representation amounted to incompetence under "prevailing professional norms," not whether it deviated from best practices or most common custom. *Strickland*, 466 U.S., at 690, 104 S. Ct. 2052.
>
> Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both "highly deferential," *Id.*, at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), and when the two apply in tandem, review is "doubly" so, *Knowles [v. Mirzayance*], 556 U.S., at [125], 129 S. Ct. at 1420 [(2009)]. The *Strickland* standard is a general one, so the range of reasonable applications is substantial. 556 U.S., at [123], 129 S. Ct. at 1420. 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.

Harrington, 562 U.S. at 105 (alterations added); *see also Premo v. Moore*, 562 U.S. 115, 121-23 (2011).

V. SMITH'S CLAIMS

Claim A. Whether The Trial Court Violated Smith's Sixth, Eighth, and Fourteenth Amendment Rights by Overriding the Jury's Life Verdict and Sentencing Him to Death

On May 2, 1996, following the penalty phase of Smith's trial, the jury recommended by a vote of 11 to 1 that the court sentence Smith to life imprisonment without the possibility of parole. Vol. 1, Tab 3 at 114. The trial court subsequently overrode the jury's recommendation and sentenced Smith to death. *Id.* at 31-37; Vol. 19, Tab 34 at 1413. Smith alleges that the trial court violated his Eighth and Fourteenth Amendment rights by failing to base its sentencing determination on the individualized circumstances of Smith's character and crime, and violated his Sixth and Fourteenth Amendment rights by making factual findings constitutionally entrusted to the jury. Doc. 1 at 11.

1. The Trial Court's Override of the Jury's Life Verdict

"The major requirement of the penalty phase of a [capital] trial is that the sentence be individualized by focusing on the particularized characteristics of the individual." *Armstrong v. Dugger*, 833 F.2d 1430, 1433 (11th Cir. 1987) (citing *Eddings v. Oklahoma*, 455 U.S. 104, 112 (1982); *Gregg v. Georgia*, 428 U.S. 153, 199 (1976)) (alteration added). Indeed, the "Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence

less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (footnotes omitted).[16] Relevant here, Smith claims that the trial court's sentencing determination was unconstitutional because it failed to give him the individualized consideration required by the Eighth and Fourteenth Amendments. Doc. 1 at 12. He argues that although the trial court found one aggravating circumstance in contrast to six mitigating circumstances, the trial court "focused exclusively on the nature of the crime to the exclusion of the mitigating evidence that [he] presented during the penalty phase" in concluding that the aggravating circumstance of murder for hire outweighed the mitigating circumstances. Doc. 1 at 13. To Smith, this establishes that the trial court "abandoned the principle that '[t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing [on] the particularized characteristics of the defendant,' and failed to give [him] the individualized consideration to which he was constitutionally entitled." *Id.* (quoting *Cunningham*

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[16] *See also Woodson v. North Carolina*, 428 U.S. 280, 304 (1976) ("[I]n capital cases the fundamental respect for humanity underlying the Eighth Amendment ... requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death."); *Gregg v. Georgia*, 428 U.S. 153, 197, 199 (1976) (holding that "in order to minimize the risk that the death penalty would be imposed on a capriciously selected group of offenders," the sentencer is required to consider the circumstances of the crime and the characteristics of the individual defendant); *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937) ("For the determination of sentences, justice generally requires ... that there be taken into account the circumstances of the offense together with the character and propensities of the offender.").

v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991)). The record belies Smith's contention.

(a) The Jury's Recommendation as a Mitigating Factor

In the amended sentencing order, the trial court stated:

> The Court does find that the jury's recommendation is a mitigating factor and the Court has consider[ed] said mitigating factor at this sentence hearing. However, the jury was allowed to hear an emotional appeal from the defendant's mother. The Court does not find that the defendant's problems during his childhood is a mitigating factor.

Vol. 6, Tab 4 at 1095-96 (alteration added). Smith argues that this indicates the trial court did not give appropriate weight to the jury's recommendation for a life sentence, discounting it instead because the jury heard a purported improper "emotional appeal," which the trial court never explained, and testimony to which the state never objected to during the penalty phase.[17] But Smith never presented this

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[17] As Smith puts it,

> The trial court did not provide a single example or one citation to the record to illustrate this purportedly improper influence. Nor could the trial court. As summarized above, Linda Smith testified about Mr. Smith's family background and character. *See* Vol. 17, Tab R-27 at 1096-1142. While her testimony was compelling mitigation, it was neither prejudicial nor inflammatory.... The State never moved to strike Linda Smith's testimony in whole or in part on the ground that it was inflammatory or prejudicial or for any other reason.

contention to the state courts. Instead, he argued on direct appeal only that the trial judge's "reference to the jury's sentence as a 'mitigating factor' ... improperly minimized the weight of the jury's recommendation," doc. 29-1 at 13, and that he was adversely affected when the trial judge disregarded the advisory function of the jury because "a thorough consideration of the recommendation would have clarified [his] other mitigating circumstances," *id.* at 15.[18] Therefore, because Smith made no argument

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> All of Linda Smith's testimony was admissible and properly considered by the jury. It also should have been considered by the trial court. In fact, the jury and the trial court were constitutionally required to consider that testimony. By refusing to consider Linda Smith's admissible testimony and further citing it as a basis to disregard the jury's recommendation for a life without parole sentence, the trial court deprived Mr. Smith of his Eighth and Fourteenth Amendment right that the sentencer "not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett*, 438 U.S. at 604 (emphasis by Court); ...).

Doc. 31 at 43-45 (footnotes omitted).

[18] In denying that claim, the Court of Criminal Appeals found that:

> Smith argues that the trial court minimized the jury's role in sentencing by his reference to the jury's recommendation as a "mitigating factor."
>
> It is clear from a review of the sentencing order that the trial court considered the jury's recommendation. The trial court stated: "The Court does find that the jury's recommendation is a mitigating factor and the Court has considered said factor at this sentencing hearing."
>
> Moreover, we do not agree with Smith that the trial court erred in finding the jury's recommendation to be a nonstatutory mitigating factor. The Supreme Court recently

concerning his mother's testimony on appeal, it is procedurally barred from review by this court.[19]

To the extent Smith is raising the actual claim he raised on direct appeal – that the trial court minimized the jury's role in sentencing by referring to the jury's recommendation as a mitigating factor – he has not established that the Alabama Court of Criminal Appeals' conclusion that the trial court properly considered and weighed the aggravating and mitigating circumstances is contrary to or an unreasonable application of Supreme Court precedent or that it is based on an unreasonable determination of the facts.

(b) Smith's Age as a Mitigating Factor

Smith also argues that the trial court discounted its finding that his age was a mitigating factor, and challenges the Court of Criminal Appeals' finding on

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> approved a trial court's finding that the jury's recommendation was a mitigating circumstance. *See Ex parte Burgess*, 811 So. 2d 617 (Ala. 2000). *See also, Carroll v. State*, 852 So. 2d 801 (Ala. Crim. App. 1999)....

Smith, 908 So. 2d at 299.

[19] Smith also challenges – for the first time in his reply brief – the trial court's statement that "there was evidence presented to the jury that the husband of the victim was the instigator of the killing of his wife, but the fact that the victim's husband conspired with the defendant and his co-defendants to kill his wife does not make this defendant any less culpable and is not a mitigating factor." Doc. 31 at 45 (quoting Vol. 6, Tab 4 at 1096). This argument is not properly before the court. "As we repeatedly have admonished, '[a]rguments raised for the first time in a reply brief are not properly before a reviewing court.'" *Herring v. Secretary, Dep't of Corrections*, 397 F.3d 1338, 1342 (11th Cir. 2005). *See also* Rules Governing Habeas Corpus Cases Under Section 2254, Rule 2(c) (2008) ("The petition must ... specify all the grounds for relief available to the petitioner[.]").

this issue. Relevant here, the state appellate court addressed this claim on direct appeal, finding that the trial court ruled appropriately.[20] But, Smith maintains that the court erred because there was purportedly "no basis for the trial court to diminish the mitigating force of Mr. Smith's youth ..." Doc. 31 at 46. To Smith, the Court of Criminal Appeals' finding that the trial court properly considered his age in the context of other facts was contrary to and an unreasonable application of *Lockett*, *Woodson*, and *Gregg*. But, as the state appellate court ruled, although the trial court found Smith's age to be a mitigating circumstance, the trial court gave it little weight in light of other factors that pointed to Smith's mental maturity. And, in considering Smith's age and other factors relevant to his mental maturity, the trial court fulfilled its constitutional obligation, consistent with *Lockett*, *Woodson*, and *Gregg*, to

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[20] The relevant entry from the court states,

> First, Smith argues that the trial court erred in not adequately considering his age as a mitigating factor. However, this argument is not supported by the trial court's order.....
>
> Smith contends that the order states that the trial court took into account, in not considering age to be a mitigating factor, the fact that the Smith was not mentally retarded. However, it is clear that the judge considered Smith's mental maturity. A consideration of the mental maturity of an individual necessarily would take into account whether the individual is mentally retarded. This was an appropriate consideration for the trial court in determining whether Smith's age was a statutory mitigating circumstance. Certainly, the fact that Smith had held several jobs, had a steady relationship and had a child as a result of that relationship was more than sufficient for the trial court to find that Smith's age, though mitigating, was entitled to little weight.

Smith, 908 So. 2d at 299-300.

individualize Smith's sentence by focusing on Smith's particularized characteristics. As such, the court's conclusion was not contrary to, or an unreasonable application of Supreme Court precedent, or an unreasonable determination of the facts.

(c) The Trial Court's Weighing of Mitigating and Aggravating Circumstances

Next, Smith challenges the following finding by the trial court in its sentencing order:

> The Court does find that there is a reasonable basis for enhancing the jury's recommend[ed] sentence for the reasons stated herein that this was a murder for hire and the defendant had the opportunity to reflect and withdrawn [sic] from his actions and chose not to do this; he was paid for his actions; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired.

Doc. 1 at 15 (quoting Vol. 6, Tab 4 at 1096) (alterations added). Smith claims that this order shows that in justifying its determination that the aggravating circumstance outweighed the mitigating circumstances, the trial court only focused on the aggravating circumstances.

Smith raised this issue unsuccessfully on direct appeal when he argued that the trial court's amended sentencing order reflects that the trial court considered "improper," "non-statutory" aggravating evidence. Doc. 29-1 at 10-12. As the Court of Criminal Appeals put it in denying Smith's claim, under Alabama law, "the weight to be attached to the aggravating and the mitigating evidence is strictly

within the discretion of the sentencing authority." *Smith*, 908 So. 2d at 298-99. Smith argues that the court's conclusion was contrary to and an unreasonable application of *Lockett*, *Woodson*, and *Gregg* because:

> In effect, the trial court sentenced Mr. Smith to death because he committed a murder for hire and by treating the absence of a mitigating circumstance as another aggravating circumstance ... Under the trial court's reasoning, every defendant convicted of murder for pecuniary gain would be sentenced to death regardless of any evidence concerning that defendant's individual background, character, and circumstances, contrary to clearly established federal law that a capital sentencing scheme can neither impose a mandatory death sentence for particular crimes nor limit the sentencer's consideration of mitigating factors.

Doc. 31 at 48. But, as the Court of Criminal Appeals concluded, however, the trial court properly exercised its sentencing authority in placing more weight than the jurors on the murder for hire aspect of the case. And, in doing so, the trial court gave Smith the individualized sentencing consideration required by the Constitution. As such, the state appellate court's conclusion was not contrary to, or an unreasonable application of Supreme Court precedent, and was not based on an unreasonable determination of the facts.

(d) Evidence Post-Dating Smith's Sentence

Finally, Smith claims that post-sentencing evidence confirms that the trial court failed to give the constitutionally required consideration to his individualized circumstances. Doc. 1 at 21-22. Smith

cites first to a "nearly identical" sentencing order in another capital case that the trial judge issued, noting that the trial court's "effective" use of a "form order" is the antithesis to the individualized determination required by the Constitution. Doc. 31 at 50. Second, Smith cites to comments the trial judge made to the *Gadsden Times* several years after his trial in which the trial judge discussed his decision to override the juries' advisory verdicts in Smith's and in the other case: "'I thought they deserved the death penalty the way the crimes were,' [Judge] Tompkins said. 'Some people serving on juries especially on these cases have never been in court before and they don't want the responsibility to sentence someone to death.'" Doc. 1 at 22 (quoting Vol. 40 at 908). Smith maintains that these comments illustrate that that the trial judge based his sentence solely on "'the way the crimes were' to the exclusion of the individualized consideration that the Constitution mandates." *Id.* at 22.

Smith unsuccessfully raised this claim in his Rule 32 petition. In affirming the trial court's denial of the claim, the Court of Criminal Appeals noted that the circuit court heard evidence on this issue, rejected Smith's contention that the quoted language established that Judge Tompkins, the sentencing judge, acted improperly, and that "[n]one of the evidence [Smith] presented ... establishes that the trial court's sentencing decision was based on political pressure, improper considerations of aggravating and mitigating circumstances, or that it was otherwise in violation of Smith's constitutional rights." Vol. 45, Tab 102 at 19 - 22.[21]

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[21] Although neither court specifically mentioned the portion of this claim comparing Smith's sentencing order with the sentencing order from the other case, Smith raised the claim

Contrary to Smith's contention, the Court of Criminal Appeals' finding is not an unreasonable determination of the facts and did not result in a decision that is contrary to or an unreasonable application of clearly established Supreme Court precedent. Doc. 1 at 23. Neither the similarity of the sentencing order in Smith's case with the order in the other capital case, nor the trial judge's comment in the *Gadsden Times* lends merit to the contention that the trial judge failed to consider Smith's particularized characteristics in sentencing him to death. And, there is no evidence to indicate that the trial judge failed to give Smith the individualized consideration required by the Constitution. Therefore, the Court of Criminal Appeals' finding that the evidence does not support a claim that the trial court's sentencing decision was "based on political pressure, improper considerations of aggravating and mitigating circumstances, or that it was otherwise in violation of Smith's constitutional rights" was not unreasonable.

2. Alabama's Capital Sentencing Scheme

Smith challenges next Alabama's judicial override system, contending that Alabama's capital sentencing scheme denied him the individualized consideration of his character and the particular circumstances of his crime because it allowed the trial judge to reject the jury's recommended sentence. Doc. 1 at 17-22. As Smith puts it, Alabama's elected judges face political pressure to override jury recommendations for a life sentence and to impose death sentences instead. *Id.*

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in his amended Rule 32 petition and on appeal from the denial of that petition. Vol. 38, Tab 78 at 439-40; Vol. 42, Tab 86 at 29-30. Thus, this court assumes for purposes of this memorandum opinion that the state courts considered it as part of the entire claim.

Smith raised this claim for the first time in his amended Rule 32 petition, and the Court of Criminal Appeals found it procedurally barred "because it could have been raised at trial or on appeal, but it was not." Vol. 45, Tab 102 at 20. Consequently, the state argues that Smith is barred from raising the claim in this court.

In response, Smith makes no arguments related to cause or prejudice, and argues only about a purported miscarriage of justice.[22] But, to overcome the procedural default of this claim with the miscarriage of justice exception, Smith must show "by clear and convincing evidence that but for constitutional error, no reasonable juror would find him *eligible* for the

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[22] Smith states:

> As Respondents concede, claims are not procedurally barred when a fundamental miscarriage of justice would result. *See* Resp. Br. at 18; *Sawyer v. Whitley*, 505 U.S. 333, 339 (1992). That would result where the federal court declines to hear a claim that would establish the petitioner's "actual innocence" of the death penalty, requiring him to "show, by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Id.* at 336; *see also Johnson v. Singletary*, 991 F.2d 663, 668 (11th Cir. 1993) (petitioner must show "but for the alleged constitutional error, the sentencing body *could not* have found *any* aggravating factors and thus the petitioner was ineligible for the death penalty" (emphasis by Court)).
>
> Mr. Smith's claim is not based on the exclusion of mitigating evidence, which would not satisfy that standard. *See Sawyer*, 505 U.S. at 347. It is based on the fact that the trial court – the sentencing body – could not have found Mr. Smith eligible for the death penalty because, in the circumstances here, the Eighth and Fourteenth Amendments barred the court from overriding the jury's advisory life verdict. Accordingly, the Court should consider Mr. Smith's claim.

Doc. 31 at 57.

death penalty under [state] law." *Sawyer v. Whitley*, 505 U.S. 333, 348 (emphasis added); *see also Dretke v. Haley*, 541 U.S. 386, 388 (2004). Here, however, Smith argues that the trial court could not have found him eligible for a death sentence because the court committed constitutional errors in overriding the jury's recommended sentence of life without parole. Unfortunately for Smith, in Alabama, the trial judge's role in weighing aggravating and mitigating circumstances to make the final sentencing decision does not affect Smith's eligibility for the death penalty. Instead, a defendant in Alabama is eligible for the death penalty if "at least one aggravating circumstance as defined in Section 13A-5-49 exists." Ala. Code § 13A 5-45(f). In this case, Smith's eligibility for the death penalty stemmed from his underlying conviction of murder for pecuniary gain, which is an aggravating circumstance under Alabama law. *See* Ala. Code § 13A-5-49(6). Accordingly, Smith cannot use the miscarriage of justice exception to overcome the procedural default of this claim.

3. Violation of Ring v. Arizona

As his final contention of alleged error by the trial court, Smith argues that the court violated *Ring v. Arizona*, 536 U.S. 584 (2002), when it rejected the jury's recommendation for life without parole. Doc. 1 at 23-29. Smith argues that, consistent with *Ring's* holding, a jury, rather than a judge, must determine "any fact on which the legislature conditions an increase in [a capital defendant's] maximum punishment," and, therefore, his jury should have been required to find beyond a reasonable doubt both that an aggravating circumstance existed and that the aggravating circumstance outweighed the

mitigating factors. Doc. 31 at 26-28 (quoting *Ring*, 536 U.S. at 466).

The state argues incorrectly that the *Ring* claim is procedurally barred. Just six weeks after the Supreme Court decided *Ring*, Smith raised this issue on August 6, 2002, in a Motion for Leave to File Supplemental Authority while his direct appeal was pending on a petition for certiorari. Doc. 29-2. The Alabama Supreme Court initially granted the petition, but quashed the writ two years later as having been improvidently granted. *Ex parte Smith*, 908 So. 2d 302 (Ala. 2005). Thereafter, Smith raised his *Ring* claim in his Rule 32 petition, Vol. 32, Tab 57 at 490-94, and the trial court dismissed the claim as precluded by Rule 32.2(a)(4) of the Alabama Rules of Criminal Procedure and also denied the claim on the merits, Vol. 36, Tab at 139-42. On appeal from the denial of his Rule 32 petition, the Court of Criminal Appeals affirmed, finding the claims procedurally barred under "Rule 32.2(a)(4), Ala. R. Crim. P., because they were raised or addressed on appeal." Vol. 45, Tab 102 at 18. This finding is the basis for the state's contention that the *Ring* claim is procedurally barred.

The state ignores, however, that the Court of Criminal Appeals overlooked that, although Smith raised the claim on direct appeal within days of the *Ring* decision, the Alabama Supreme Court declined to address Smith's claims when it denied his petition for certiorari. A denial of a writ of certiorari is not a decision on the merits. *See Ex parte McDaniel*, 418 So. 2d 934, 935 (Ala. 1982). Therefore, because Smith raised this issue immediately after the Supreme Court decided *Ring* and never had the merits of the claim considered, the state courts' holding that the claim was procedurally barred was improper.

Turning now to the merits of Smith's claim, in *Ring*, the Supreme Court extended to death penalty cases its ruling in *Apprendi v. New Jersey*, 530 U.S. 466, 490 (2000), that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *See Ring*, 536 U.S. at 584. In doing so, *Ring* held that aggravating circumstances used to justify an increase in the maximum punishment from life imprisonment to death become "the functional equivalent of an element of a greater offense," and must be found by a jury. *Id.* at 609.[23] Thereafter, in *Hurst v. Florida*, 136 S. Ct. 616 (2016), the Court applied *Ring* to find Florida's capital sentencing scheme unconstitutional,[24] holding that in light of *Ring*, Florida's former death penalty scheme violated the defendant's Sixth Amendment right to an impartial jury because it "required the judge alone to find the existence of an aggravating circumstance" to impose the death penalty. *Hurst*, 136 S. Ct. at 624. Under Florida law, life imprisonment was the maximum sentence a defendant convicted of first degree murder could receive on the basis of his conviction alone. *Id.* at 620. A death sentence could be imposed only if an additional sentencing

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[23] The holding in *Ring* does not apply retroactively to cases that were already final on direct appeal when the Court announced *Ring*. *Schriro v. Summerlin*, 542 U.S. 348, 358 (2004). *Ring* applies to Smith's case because his direct appeal was still pending before the Alabama Supreme Court when *Ring* was decided.

[24] Because Smith's conviction became final on direct appeal before the *Hurst* decision, the court discusses *Hurst* "only to the extent it reflects an application and explication of the Supreme Court's holding in *Ring*." *Waldrop v. Comm'r, Alabama Dep't of Corr.*, 711 F. App'x 900, 923 n.6 (11th Cir. 2017).

proceeding resulted in "findings by the court that such person shall be punished by death." *Id.*

The additional sentencing proceeding in Florida was a hybrid proceeding "in which [a] jury render[ed] an advisory verdict but the judge ma[de] the ultimate sentencing determinations." *Id.* (quoting *Ring*, 536 U.S. at 608, n.6) (alterations added). First, state law required the sentencing judge to hold an evidentiary hearing before the jury, then the jury rendered an "advisory sentence" without specifying the factual basis for its recommendation. *Id.* Finally, the sentencing judge, notwithstanding the jury's recommendation, independently weighed the aggravating and mitigating circumstances and rendered the sentence of death. *Id.* And, although the judge was required to give the jury's recommendation "great weight," the sentence was required to reflect the judge's "independent judgment about the existence of aggravating and mitigating factors." *Id.* The Court found that this capital sentencing scheme violated *Ring* because it "required the judge alone," and not the jury, "to find the existence of an aggravating circumstance." *Id.* at 624.

Alabama, like Florida, also bifurcates the guilt and penalty phases of capital trials. *See* Ala. Code § 13A-5-45. After a defendant is convicted of a capital offense, the trial court conducts a separate sentencing hearing to determine the defendant's sentence. *See* Ala. Code § 13A-5-45(a). A defendant may not be sentenced to death unless "at least one aggravating circumstance as defined in 13A-5-49 exists." Ala. Code § 13A-5-45(f). Certain capital offenses, like the murder for pecuniary gain for which Smith was convicted, have a built-in aggravating circumstance that corresponds to one of the aggravating circumstances listed in § 13A-5-49. *Compare* Ala.

Code § 13A-5-40(a)(7) (listing as a capital offense "murder done for pecuniary or other valuable consideration or pursuant to a contract or for hire") *with* Ala. Code § 13A-5-49(6) (listing as an aggravating circumstance that the "capital offense was committed for pecuniary gain"). Alabama law provides that when a defendant is convicted of such a capital offense, "any aggravating circumstance which the verdict convicting the defendant establishes was proven beyond a reasonable doubt at trial shall be considered as proven beyond a reasonable doubt for purposes of the sentencing hearing." Ala. Code § 13A-5-45(e).

The sentencing hearing usually occurs before the same jury that convicted the defendant. At the time of Smith's conviction and sentencing, Alabama law required the jury to "hear the evidence and arguments of both parties, deliberate, and return an advisory verdict recommending either life imprisonment without parole (if it determined that no aggravating circumstances existed, or that the aggravating circumstances did not outweigh the mitigating circumstances) or death (if it determined that one or more aggravating circumstances existed, and that they outweighed the mitigating circumstances)." *Waldrop v. Comm'r, Alabama Dep't of Corr.*, 711 F. App'x 900, 922 (11th Cir. 2017) (citing the pre-2017 version of Ala. Code § 13A-5-46(e)). After receiving the jury's advisory verdict, the court would then "independently determine the appropriate sentence." *Id.* (citing the pre-2017 version of Ala. Code § 13A-5-47(a)). "If the court found that at least one aggravating circumstance existed, and that they outweighed any mitigating circumstances, it could impose a death sentence, notwithstanding a contrary

jury recommendation." *Id.*; *see also* Ala. Code § 13A-5-47(e) (pre-2017 version).[25]

Turning again to the specific contentions here, the court notes that, although it found Smith's *Ring* claim procedurally barred, the Court of Criminal Appeals addressed the merits of the *Ring* claim in an alternative holding, finding that the jury's convicted smith of a crime with an aggravating circumstance:

> As the circuit court correctly noted, the jury in Smith's case unanimously determined by its guilty verdict on the charge of murder for pecuniary or other valuable consideration, § 13A-5-40(a)(7), Ala. Code 1975, the overlapping aggravating circumstance that the murder was committed for pecuniary gain, § 13A-5-49(6), Ala. Code 1975. "Therefore, the findings in the jury's verdict alone exposed [Smith] to a range of punishment that had as its maximum the death penalty. This is all *Ring* and *Apprendi [v. New Jersey*, 530 U.S. 466, (2000),] require." *Waldrop*, 859 So. 2d at 1188.

Vol. 45, Tab 102 at 18-19 (alterations in original). The court's decision was not contrary to or an unreasonable application of *Ring*, and was not an unreasonable determination of the facts. Smith became death-eligible when the jury convicted him of murder for pecuniary gain, which is also an aggravating circumstance under Ala. Code § 13A-5-49(6). As explained above, Alabama law requires the

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[25] In 2017, Alabama amended its capital sentencing laws. *See* S.B. 16, 2017 Leg., Reg. Sess. (Ala. 2017). Under the new sentencing scheme, the jury's sentence recommendation is binding on the court. *See* Ala. Code § 13-A-5-47(a) (2017) ("Where a sentence of death is not returned by the jury, the court shall sentence the defendant to life imprisonment without parole.").

existence of only one aggravating circumstance for a defendant to be death-eligible, which the jury found when it found Smith committed murder for pecuniary gain by returning a guilty verdict. *See* 13A-5-45(e). Thus, every fact that made Smith death-eligible was found by the jury, beyond a reasonable doubt, at the guilt phase of his trial. That is what *Ring* requires.

Smith argues also that *Ring* requires the jury – not the judge – to weigh the aggravating and mitigating factors. Doc. 31 at 34-37. This contention is unavailing. To begin, the Eleventh Circuit foreclosed this argument when it held that "[n]othing in *Ring* – or any other Supreme Court decision – forbids the use of an aggravating circumstance implicit in a jury's verdict" and that "*Ring* does not foreclose the ability of the trial judge to find the aggravating circumstances outweigh the mitigating circumstances." *Lee v. Comm'r, Alabama Dep't of Corr.*, 726 F.3d 1172, 1198 (11th Cir. 2013). Also, the Court of Criminal Appeals rejected Smith's argument, noting that the jury's verdict alone made Smith death-eligible. Vol. 45, Tab 102 at 19. This conclusion is not "so unreasonable that no 'fairminded jurist' could agree with the conclusion." *Waldrop*, 711 F. App'x at 923 (citing *Harrington v. Richter*, 562 U.S. 86, 101 (2011)). In fact, it is consistent with Justice Scalia's explanation of the holding in *Ring*:

> What today's decision says is that the jury must find the existence of the fact that an aggravating factor existed. Those states that leave the ultimate life-or-death decision to the judge may continue to do so – by requiring a prior jury finding of aggravating factor in the sentencing phase or, more simply, by placing the aggravating-factor

> determination (where it logically belongs anyway) in the guilt phase.

Ring, 536 U.S. at 612-13 (Scalia, J., concurring). And, as the Eleventh Circuit has explained, the Alabama Court of Criminal Appeals' application of *Ring* is also consistent with *Hurst*, which held that "the Sixth Amendment does not allow the trial court 'to find an aggravating circumstance, *independent of a jury's factfinding*, that is necessary for imposition of the death penalty.'" *Waldrop*, 711 Fed. App'x at 924 (quoting *Hurst*, 136 S. Ct. at 624) (emphasis in original).

To close, the Court of Criminal Appeals' rejection of Smith's *Ring* claim was not contrary to or an unreasonable application of *Ring* and was not based on an unreasonable determination of the facts. Thus, Smith is not entitled to relief.

Claim B. Whether Trial Counsel Violated Smith's Sixth and Fourteenth Amendment Rights by Rendering Constitutionally Ineffective Assistance

Smith contends that his trial counsel's performance fell below "an objective standard of reasonableness" and that counsel failed to make the trial "a reliable adversarial testing process." Doc. 1 at 30 (quoting *Strickland*, 466 U.S. at 688). He adds that none of their errors can be construed as part of a "sound trial strategy," and that their performance "undermine[d] confidence in the outcome" of his trial. *Id.* (quoting *Strickland*, 466 U.S. at 689, 694). Consequently, Smith alleges that a reasonable probability exists that a jury would not have convicted him of capital murder or that the trial court would not have sentenced him to death if counsel had rendered constitutionally adequate assistance. Doc. 1 at 30.

1. Ineffective Assistance of Counsel in the Guilt Phase

Smith argues that counsel's performance fell below an objective standard of reasonableness during the guilt phase of his trial for a variety of reasons, each discussed below.

a. The Suppression Hearing

As his first contention of alleged ineffective assistance, Smith challenges counsel's performance related to the suppression of evidence. Counsel filed a "Motion to Suppress Tangible Evidence and Statements as the Fruits of an Unlawful Search and Illegal Arrest," Vol. 2 at 362-76, and the trial court held a hearing on the motion on June 27, 1994 and again on April 12, 1996, Vol. 9, Tab 6; Vol. 10, Tab 7- Vol. 11 at 385. The trial court denied the motion, and admitted at trial Smith's statement, over counsel's objections. Vol. 45, Tab 102 at 30. Smith claims that counsel rendered ineffective assistance by unreasonably failing to establish that the state recovered the victim's VCR through an unlawful search and obtained Smith's custodial statement in violation of his constitutional rights. Doc. 1 at 31.

Generally, a petitioner may not seek habeas relief for Fourth Amendment violations. *Stone v. Powell*, 428 U.S. 465, 494 (1976). However, a petitioner may bring a Sixth Amendment ineffective assistance of counsel claim arising from a Fourth Amendment issue if the purported failure to adequately litigate the alleged Fourth Amendment violation is the basis for the ineffectiveness claim. *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986). To do so, petitioner must satisfy the first prong of *Strickland* – that counsel were deficient – and demonstrate actual prejudice, i.e. "prove that his Fourth Amendment claim is

meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Id.*

(1) The Search of Smith's Home

A Lauderdale County circuit judge issued a search warrant for Smith's home, based on an affidavit executed by Captain Ronnie May of the Colbert County Sheriff's department.[26] Vol. 8 at 1599 - Vol. 9 at 1605. The authorities searched Smith's home that same day, Vol. 8 at 1599, and found the VCR that the assailants had stolen from the victim's home, Vol. 10, Tab 7 at 191-92 and Vol. 11 at 227-35. After finding the VCR, Captain Ronnie May read Smith his *Miranda* rights and Smith agreed to accompany Captain May to the sheriff's station, Vol. 11 at 235-43, where Smith ultimately confessed to his participation in the murder and to stealing the VCR, Vol. 23 at 297-304.

Smith alleges that the search warrant was invalid on its face and execution, and based on information from an anonymous informant acting as an agent of the state. Doc. 1 at 32-34. Smith raised these claims in his Amended Rule 32 petition, Vol. 32, Tab 57 at 441-446, which the trial court summarily denied, Vol. 30, Tab 52 at 18-20, and the Court of Criminal Appeals affirmed. Vol. 45, Tab 102 at 33-34. In affirming the trial court, the court found that Smith was not entitled to relief because "the claims regarding the search were raised by trial counsel and rejected, and were also rejected on appeal." Vol. 45, Tab 102 at 33. However, Smith did not argue at trial or on direct appeal that the search warrant was invalid on its face

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[26] The murder occurred in Colbert County, but Smith's home was in Lauderdale County.

or execution. He raised this specific challenge for the first time in his Rule 32 proceedings as part of his ineffective assistance of counsel claim. Because the Court of Criminal Appeals based its decision on the mistaken belief that the state courts had already addressed the merits of the Fourth Amendment claim underlying this ineffective assistance of counsel claim, this court will review these two claims *de novo*.

(a) Warrant Invalid on its Face

As his first contention of error related to the search warrant, Smith argues:

> The search warrant that led to the recovery of the VCR was invalid on its face. Alabama law requires that a search warrant be "directed to the sheriff or constable of the county." Ala. Code § 15-5-5. This statute has been strictly construed under state law. But the search warrant issued in Lauderdale County was directed to "ANY SHERIFF OF THE STATE OF ALABAMA."

Doc. 1 at 32. Thus, Smith contends that the search of his home violated the Fourth and Fourteenth Amendments, and his attorneys proved ineffective for failing to challenge the warrant on that basis. *Id.* To succeed on this claim, Smith must prove that counsel's failure to challenge the search warrant on this issue was objectively deficient, that his "Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman*, 477 U.S. at 375. Smith cannot meet this threshold.

The Fourth Amendment, which is applicable to the states through the Fourteenth Amendment, guarantees the right to be free from unreasonable searches

and seizures, mandating that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. But, "'whether or not a search is reasonable within the meaning of the Fourth Amendment,' ... has never 'depend[ed] on the law of the particular State in which the search occurs." *Virginia v. Moore*, 553 U.S. 164, 172 (2008) (alterations in original) (quoting *California v. Greenwood*, 486 U.S. 35, 43 (1988)). Although states may impose more stringent requirements than the Constitution, "state restrictions do not alter the Fourth Amendment's protections." *Id.* at 176. "[I]t is not the province of the Fourth Amendment to enforce state law." *Id.* at 178. Thus, even assuming that the discrepancy between the language in Ala. Code § 15-5-5 and the language on the search warrant violates Alabama law, the Fourth Amendment is not implicated.

Furthermore, Smith has not established a violation of Ala. Code § 15-5-5, which requires that a search warrant be "directed to the sheriff or to any constable of the county." The defect in the *Jones v. State*, 306 So. 2d 45, 46-47 (Ala. 1975), case Smith cites, doc. 31 at 59, stemmed from the fact that the warrant was "not directed to any officer whatever." *Jones*, 306 So. 2d at 47. That was not the case here. Indeed, Alabama courts have routinely upheld the validity of search warrants directed to law enforcement officers, even when those warrants do not track the statutory language word for word.[27] For these reasons, Smith is

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[27] *See, e.g.*, *Little v. Gaston*, 232 So. 3d 231, 235 (Ala. Civ. App. 2017) (upholding warrant addressed to "any sheriff, deputy, and/or municipal officer or duly sworn law enforcement officer of the state"); *Palmer v. State*, 426 So. 2d 950, 953 (Ala.

unable to demonstrate prejudice by counsel's failure to raise this issue during his trial. *See Kimmelman*, 477 U.S. at 375.[28]

(b) Warrant Invalid in its Execution

Smith argues also that the search warrant was invalid in its execution because Captain May, a Colbert County law enforcement officer, executed it in Lauderdale County, in purported violation of Ala. Code § 15-5-7. Doc. 1 at 32.[29] To succeed on this claim, Smith must prove that counsel's failure to raise this issue was objectively deficient, that the claim is meritorious, and that there is a reasonable probability that the verdict would have been different

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Crim. App. 1983) (upholding warrant issued to "any Sheriff, Deputy and/or Municipal Police"); *Hicks v. State*, 437 So. 2d 1344, 1345 (Ala. Crim. App. 1982) (upholding warrant directed to "the Chief of Police or any police officer of the City of Birmingham, Alabama" rather than "any sheriff, deputy sheriff, or constable"); and *Meade v. State*, 390 So. 2d 685, 688, 692 (Ala. Crim. App. 1980) (upholding warrant directed "[t]o Any Sheriff, Constable or Lawful Officer of the State of Alabama").

[28] Because Smith must satisfy both parts of the *Strickland* test to show a violation of the Sixth Amendment, the court need not address the performance prong. *See Holladay v. Haley*, 209 F.3d 1243, 1248 (11th Cir. 2000).

[29] More specifically, Smith maintains that:

> Alabama law requires that a "search warrant may be executed by any one of the officers to whom it is directed, but by no other person except in aid of such officer at his request, he being present and acting in its execution." Ala. Code § 15-5-7. These Alabama statutory provisions "dictate that the 'sheriff' or a 'constable of the particular county' in which the warrant is issued will execute the search warrant." *Rivers v. State*, 406 So.2d 1021, 1022 (Ala. Crim. App. 1981). As a Colbert County official executed the search warrant in Lauderdale County, the search warrant was invalid under § 15-5-7.

Doc. 1 at 32.

absent the excludable evidence. *See Kimmelman*, 477 U.S. at 375. Smith cannot meet this threshold.

As previously discussed, this claim relies solely on a violation of state law as it is premised on the contention that the execution of the search warrant in Lauderdale County by a Colbert County law enforcement officer violates Alabama Code § 15-5-7. The Fourth Amendment is not implicated by that state law violation. *See Moore*, 553 U.S. at 172. Moreover, Smith has not established a violation of § 15-5-7, which provides that "[a] search warrant may be executed by any one of the officers to whom it is directed, but by no other person except in aid of such officer at his request, he being present and acting in its execution." To Smith, this statute dictates "that the 'sheriff' or a 'constable of the particular county' in which the warrant is issued will execute the warrant." Doc. 31 at 60 (quoting *Rivers v. State*, 406 So. 2d 1021, 1022 (Ala. Crim. App. 1981)). But, the search warrant was directed to "Any Sheriff of the State of Alabama," and it was based on the affidavit of Captain May, an investigator with Colbert County Sheriff's department. Vol. 8 at 1599 - Vol. 9 at 1605. And Captain May, along with Lauderdale County Sheriff's officials, executed the warrant, Vol. 10, Tab 7 at 191-92, and a Lauderdale County Sheriff's investigator, who was part of the search, returned the warrant afterwards, Vol. 8 at 1599. Therefore, even assuming that Captain May was not authorized to execute the warrant in Lauderdale County, the participation of Lauderdale County investigators in the execution of the warrant puts the search in compliance of Ala. Code § 15-5-7. As such, Smith's ineffective assistance of counsel claim lacks merit because Smith is unable to demonstrate the requisite prejudice. *See Kimmelman*, 477 U.S. at 375.

(c) Warrant Invalid Because it Was Based on Information from an Anonymous Informant

Finally, Smith claims that the search warrant was invalid because it was "procured based on information obtained by police improperly and illegally from informant '569S,' who searched [his] home at the behest of the police, when the police themselves could not lawfully enter." Doc. 1 at 34.[30] Counsel raised this contention in a motion to suppress, Vol. 2 at 362-76, which the trial court denied after two hearings, Vol. 9, Tab 6; Vol. 10, Tab 7 - Vol. 11 at 385. Counsel challenged the ruling on direct appeal, Vol. 25, Tab 36 at 39-49, and the Court of Criminal Appeals affirmed the trial court, finding

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[30] Specifically, Smith claims that:

> When 569S contacted the police, they gave her the Crimestoppers' telephone number, told her what kind of additional information they required to proceed with the investigation, and established a routine whereby 569S contacted them daily to report additional information. ([Vol. 10, Tab 7 at] 79-82, 156-58; [Vol. 9, Tab 6 at] 19-20.) During their conversations, 569S named the alleged perpetrators, their girlfriends, and identified their cars and homes. But she was unable to provide detailed information about a VCR that she claimed was in Mr. Smith's home. ([Vol. 10, Tab 7 at] 111-12, 145-46.) The police told 569S that they needed more information about the VCR ([Vol. 10, Tab 7 at] 149-50), and that they were aware that she intended to return to the house. ([Vol. 10, Tab 7 at] 151-52, 164.)
>
> Thereafter, 569S returned to Mr. Smith's house and contacted the police with additional information about the VCR, including that it was manufactured by Samsung, was a front loader, and that it did not have a remote control. ([Vol. 10, Tab 7 at] 165-66.) The police obtained a warrant to search Mr. Smith's home based on the information supplied by 569S.

Doc. 1. at 34 (alterations added).

that "[t]he record shows that caller 569S was not encouraged to enter Smith's house – she did so of her own free will.... The informant was acting as a private citizen; therefore, Smith's Fourth Amendment protections were not violated." *Smith*, 908 So. 2d at 286-89.

As part of his contention of alleged error, Smith argues that he is raising a different Fourth Amendment claim, contending that "his ineffective assistance of counsel claim is based on trial counsel's failure to investigate and present evidence [that was available to them but was not used at the suppression hearing or on direct appeal] that would have permitted them to establish that the informant acted as an agent of the State." doc. 31 at 62 (alteration added). He argues that:

> At the suppression hearing, Captain May, the lead investigator from the Colbert County Sheriff's Department on Mr. Smith's case, produced the notes taken by law enforcement officers during the course of the investigation. ([Vol. 10, Tab 7 at] 50-51.) Trial counsel failed to question Captain May at the suppression hearing with those, which indicate that law enforcement officers knew of and acquiesced in the informant's search of Mr. Smith's home and that the informant's purpose was to assist law enforcement efforts, rather than to further her own ends. Among other things, those notes indicate that the investigators asked the informant when she would be able to go to Mr. Smith's house.

Doc. 1 at 35 (alteration added).

Smith unsuccessfully raised this claim in his Rule 32 petition and on appeal from the denial of that petition. In affirming the trial court, the Court of Criminal Appeals again found that Smith was not entitled to relief because "the claims regarding the search were raised by trial counsel and rejected, and were also rejected on appeal." Vol. 45, Tab 102 at 33. However, as Smith notes, he raised this specific Fourth Amendment challenge for the first time in his Rule 32 proceedings as part of his ineffective assistance of counsel claim. Therefore, because the state appellate court based its decision on the mistaken belief that the state courts had already addressed the merits of this claim, this court will review the claim *de novo*.

At issue here is Smith's contention that his trial counsel failed to question law enforcement officers about notes which "would have established that, contrary to the testimony at the suppression hearing, law enforcement officers encouraged the anonymous informant to enter Mr. Smith's home and to obtain specific information that was critical to their investigation." Doc. 1 at 35. The state produced the notes in question to defense counsel at the suppression hearing. Vol. 10, Tab 7 at 50-51. However, those notes were not marked as exhibits, *id.* at 51, and this court has not found them in the record, nor has Smith directed the court to the relevant portion of the record where those notes are located. This means the court is left only with Smith's assertion that the notes "indicate that the investigators asked the informant when she would be able to go to Mr. Smith's house." Doc. 1 at 35.

Smith argues that if counsel had discovered that investigators asked the informant this question, counsel would have proved that the warrant was

invalid, and successfully suppressed evidence of the VCR and Smith's statement. *Id.* To succeed on this claim, Smith must prove that counsel's failure to question law enforcement officers about the notes was objectively deficient, that his "Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence." *Kimmelman*, 477 U.S. at 375. Smith cannot show that counsel's failure to question Captain May about the contents of the investigatory notes meets the objectively deficient showing because, as Smith concedes, his counsel in fact questioned Captain May extensively on this issue. Vol 10, Tab 7 at 29-112, 145-194; Vol. 11 at 195-267; Vol. 9, Tab 6 at 4-18, 31-34, 38-40.

Captain May testified on direct examination at the suppression hearing that in his first conversation with the Crimestoppers informant, the informant asked him what type of information Captain May needed. Vol. 10, Tab 7 at 80. Captain May testified that he told her he needed the exact names of the people involved, where they lived, what kind of cars they drove, if they had taken anything from the crime scene, and the location of any stolen items. *Id.* at 80-81. He also testified that he knew that Investigator Miller asked the informant to provide more information concerning the VCR, that the informant stated she would try to re-enter Smith's house to obtain the information, and that the informant "had not obtained any kind of authorization ... to go back into the house." *Id.* at 149, 152-53. Captain May later repeated that he understood that the only way law enforcement would obtain information about the VCR was for the informant to return to the house, and "that she was going to" do so. *Id.* at 164. And, on

redirect examination, Captain May added that although he knew that the informant planned to return to Smith's house, he had no idea how she re-entered the house. Vol. 9, Tab 6 at 19, 37.

Despite this line of questioning, Smith argues that counsel proved ineffective due to their failure to question Captain May about the contents of the investigatory notes, especially as it pertains to the entry that "the investigators asked the informant when she would be able to go [back] to Mr. Smith's house." Doc. 1 at 35. As Smith puts it, this line of questioning "would have established that, contrary to the testimony at the suppression hearing, law enforcement officers encouraged the anonymous informant to enter Mr. Smith's home and to obtain specific information that was critical to their investigation." *Id.* Even accepting Smith's contention that the notes contained such an entry, questioning Captain May about whether law enforcement asked the informant when she would return to Smith's house would not have aided the defense's case for suppression. Captain May had already testified that when he first spoke to the informant, he explicitly instructed her on the type of information that he needed, that he knew Investigator Miller had asked the informant to provide more information about the VCR in Smith's home, and that he knew the informant planned to return to Smith's home to gather more information. Based on this testimony that Captain May provided, additional questioning about whether law enforcement asked the informant when she would return to Smith's house to obtain more information would not have aided the defense in its attempt to establish that the officers "knew of and acquiesced in the informant's search." Thus, it was not unreasonable for counsel not to question Captain

May about that portion of the notes. Therefore, Smith's ineffective assistance of counsel claim on this issue fails.

(2) The Custodial Statement

Smith claims that trial counsel failed to adequately challenge his custodial statement which he contends the state obtained in violation of Article 1, Section 6 of the Alabama Constitution. Doc. 1 at 36-40. He alleges that counsel should have established facts related to the circumstances surrounding his custodial statement[31] and the alleged waiver of his *Miranda* rights,[32] and that counsel should have argued that Smith's intoxication and his medical condition rendered his statement involuntary.[33] *Id.* at

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[31] Smith claims that:

> After Mr. Smith was read his *Miranda* rights, Mr. Smith asked the arresting officer, Captain Ronnie May, whether he needed an attorney. Captain May simply read Mr. Smith his Miranda rights again. Mr. Smith again asked whether he needed an attorney. Captain May again simply repeated his *Miranda* rights to Mr. Smith. Captain May never made any attempt to clarify Mr. Smith's request. Only after Captain May repeatedly ignored Mr. Smith's questions as to whether he needed an attorney, did Captain May purport to obtain a waiver of Mr. Smith's *Miranda* rights. Captain May then proceeded to interrogate Mr. Smith.

Doc. 1 at 37.

[32] Smith claims that Captain May coerced his statement by telling Smith others had implicated him; by assuring Smith that he knew Smith did not commit the murder and that he could only help him if Smith talked to him; by suggesting that Smith could go home if he cooperated; and by promising to speak to the prosecutor on Smith's behalf if he cooperated. Doc. 1 at 37-38.

[33] Smith claims that at the time of the interrogation, he was under the influence of alcohol and Valium and that he was experiencing severe migraine headaches. (Doc. 1 at 38). He adds that despite counsel's knowledge of his "medical condition,"

37-38. Allegedly, the failure to raise these challenges prejudiced Smith because his statement was the most critical evidence against him, it provided the lens through which the state asked the jury to view all the evidence, and, without it, a reasonable probability existed of an acquittal. *Id.* at 39-40.

Smith unsuccessfully raised this claim in his amended Rule 32 petition, and the Court of Criminal Appeals affirmed the trial court, finding in part "that Smith did not satisfy the specificity and full factual pleading requirements of Rule 32.3 and Rule 32.6(b)," and that "Smith failed to allege any facts indicating whether trial counsel were aware of, but disregarded the circumstances that he now says counsel should have presented to the trial court to secure suppression of the statement, or whether trial counsel were unaware of the circumstances because they failed to conduct a sufficient investigation to discover them." Vol. 45, Tab 102 at 29-31. Next, the court noted that given counsel's "vigorous challenge to the admission of the statement in the trial court, and ... it would be possible, if not probable, that counsel were aware of these additional circumstance but chose to seek suppression based on what they believed to be grounds that had a greater chance for success, and that the failure to allege these additional allegations was a matter of trial strategy." *Id.* Finally, the court found that to the extent Smith is claiming "that trial counsel failed to present these grounds because they were unaware of them, Smith failed to make that allegation, and he failed to plead any facts showing the scope of trial counsel's

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counsel failed to consult a medical expert and submitted no evidence regarding Smith's "condition" at the suppression hearing or during the trial.

investigation and what additional investigation he believed counsel should have made to discover the alleged facts." *Id.*

The Court of Criminal Appeals' finding that Smith insufficiently pleaded this claim is a ruling on the merits. *See Borden v. Allen*, 646 F.3d 785, 812-13 (11th Cir. 2011). Therefore, this court "must review the merits determination of the Court of Criminal Appeals under the deferential standards set forth in AEDPA." *Id.* at 816. Specifically,

> AEDPA limits [this court's] review to whether the state court's determination that [Smith] failed to plead sufficient facts in his Rule 32 petition to support a claim of ineffective assistance of counsel was contrary to or an unreasonable application of Supreme Court precedent. Thus, we look only to the allegations in [Smith's] Rule 32 petition and whether those allegations sufficiently state a claim for ineffective assistance of counsel.

Powell v. Allen, 602 F.3d 1263, 1273 (11th Cir. 2010); *see also Cullen v. Pinholster*, 563 U.S. 170, 181 (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."). And, additional allegations raised in a federal habeas petition are not considered in reviewing the reasonableness of a state court's resolution of a claim. *Powell*, 602 F.3d at 1273 n.8. Rather, this court must evaluate only whether the Court of Criminal Appeals' determination that Smith's ineffective assistance of counsel claim failed to satisfy the specificity and full factual pleading requirements of Rules 32.3 and 32.6(b) was contrary to, or involved an unreasonable

application of, clearly established Federal law. *See Borden*, 646 F.3d at 817-18.

Smith made no allegation in his amended Rule 32 petition that counsel were aware of the alleged circumstances surrounding his custodial statement, that he was coerced into waiving his *Miranda* rights, or that he was intoxicated or rendered incapable of consent by a migraine headache when he signed the waiver.[34] Vol. 32, Tab 57 at 437-41. Further, Smith did not allege that he informed counsel about the alleged irregularities leading up to his statement, and he did not indicate what counsel could have done to discover the facts underlying these claims. *Id.* Because Smith failed to allege facts to establish that counsel's performance was deficient, the Court of Criminal Appeals' determination that he failed to sufficiently plead this claim was not contrary to, or an unreasonable application of *Strickland*, nor did it involve an unreasonable determination of the facts in light of the evidence presented.

b. The Forensic Evidence

The defense strategy at trial consisted of trying "to establish that Mr. Smith's intent was to intimidate the victim so that she did not disclose her husband's philandering, but that he did not intend to kill and, therefore, was not guilty of capital murder." Vol. 38, Tab 80 at 459. Smith contends that, because his counsel conceded that Smith was present at the crime scene, challenging the forensic evidence proved critical to show that he "neither killed [the victim]

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[34] Smith did allege that counsel were aware that he suffered migraine headaches, but made no allegation that he told counsel he was suffering from a headache at the time of the statement. Vol. 32, Tab 57 at 440.

nor intended to do so and, therefore, was not guilty of capital murder." Doc. 1 at 41. Allegedly, trial counsel proved ineffective due to their failure to investigate and challenge the forensic evidence necessary to negate Smith's specific intent to kill. *Id.* at 40-44. As Smith puts it, although the state never presented any forensic evidence to show that Smith ever struck or stabbed the victim, *id.,* and, despite Smith never indicating to law enforcement that he ever struck the victim, counsel "unreasonably and inexplicably conceded in both his opening and closing arguments that Mr. Smith struck the victim," *id.* at 42. This "unnecessary and unreasonable concession had the unfortunate effect both of confirming Mr. Smith's custodial statement and suggesting that he had concealed information to downplay his role," and "bolstered the prosecutor's improper suggestion that Mr. Smith had lied in his custodial statement when he denied stabbing or striking" the victim. *Id.*

Moreover, Smith argues that counsel exacerbated the error further by unreasonably failing to establish that the wounds to the victim's head were not fatal. Apparently, during the initial trial, "Dr. Emily Ward, the State's pathologist, testified that the cause of [the victim's] death was the stab wounds to her chest," but testified at the retrial "that it was possible that the victim's head wounds could have been fatal." Doc. 1 at 42-43. As Smith sees it, "[i]n light of trial counsel's unreasonable concession that Mr. Smith struck the victim, it was especially important ... for the jury to understand which of the victim's wounds were fatal." *Id.* And, this purported failure to investigate and challenge the forensic evidence prejudiced Smith because "[t]he question of the precise role that Mr. Smith played ... was critical to a determination of

whether he had the specific intent to kill necessary for a capital murder victim." *Id.* at 43.

The Court of Criminal Appeals affirmed the trial court's summary dismissal of this claim, finding that Smith "made a variety of allegations" regarding the purported "fail[ure] to adequately investigate and challenge the State's forensic evidence," but that Smith's allegations "were all conclusory and general." Vol. 45, Tab 102 at 36-38. In particular, as to the contentions regarding the failure to cross Dr. Ward about her new testimony related to the head wounds, the state appellate court held Smith "failed to provide any specific facts regarding the cross-examination trial counsel conducted, what additional questions should have been asked of the witness, how the witness would have answered those questions, and how the result of the trial would have been different if counsel had conducted that cross-examination." *Id.*

Smith argues that the appellate court's decision was based on an unreasonable determination of the facts because he "specifically alleged what trial counsel should have done and how the result of the trial would have been different." Doc. 31 at 68.[35] But, that

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[35] More specifically, Smith argues that:

> First, Mr. Smith alleged that the State did not present any forensic evidence to support a theory that Mr. Smith stabbed or struck the victim, which was a critical fact in light of the defense strategy to show that Mr. Smith neither killed nor intended to do so and, therefore, was not guilty of capital murder. But trial counsel failed to point that out to the jury. Moreover, despite the lack of supporting forensic evidence, trial counsel unreasonably and inexplicably conceded in both his opening and closing arguments that Mr. Smith struck the victim. *See* Vol. 15, Tab R-15 at 552 ("and my client hits the woman, too, and you will see evidence of that"); Vol. 16, Tab R-19 at 929 ("He [Mr. Smith] did hit her ... eight times in the

Smith raised these issues in his amended Rule 32 petition does not mean he is due to prevail. To begin, although Smith alleged in the petition that the state "did not present any forensic evidence to support the theory that Mr. Smith struck or stabbed the decedent," Vol. 32, Tab 57 at 449, he did not argue in the petition that his counsel rendered ineffective assistance by failing to argue the lack of forensic evidence to the jury, doc. 31 at 69. Therefore, this court cannot consider this argument in reviewing the reasonableness of the state court's resolution of this claim. *See Powell*, 602 F.3d at 1273 n.8.

Next, Smith alleges correctly that he argued in his amended Rule 32 petition that, notwithstanding the lack of supporting forensic evidence, counsel unnecessarily and unreasonably conceded that he "struck the decedent," and that this concession "bolstered the prosecutor's improper suggestion that Mr. Smith had lied in his custodial statement when he denied stabbing or striking the decedent." Vol. 32, Tab 57 at 449-50. However, Smith never specifically alleged in the petition that counsel were deficient for undertaking this approach as the defense strategy. Rather, his argument appeared to be that in light of this strategy, counsel's failure to adequately challenge the forensic evidence was even more crucial to his case. In any event, Smith has not identified how counsel could

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> back he struck her"). Trial counsel's unnecessary and unreasonable concession had the unfortunate effect of both confirming Mr. Smith's custodial statement, which did not indicate that he hit Mrs. Sennett, and suggesting that he concealed information to downplay his role. It also bolstered the prosecution's improper suggestion that Mr. Smith had lied in his custodial statement when he denied stabbing or striking Mrs. Sennett.

Doc. 31 at 69 (alteration in original).

have shown that a lack of forensic evidence proved he never hit the victim or lacked the intent to kill necessary for a capital conviction. Further, he has not indicated how such a showing would have affected the outcome of the trial, especially in light of Smith's confession to being at the murder scene, and several of his friends corroborated his confession at trial.[36]

Smith further claims correctly that he "specifically alleged [in his amended Rule 32 petition] that Dr. Ward testified inconsistently at the first and second trials and that his '[t]rial counsel unreasonably failed

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[36] Smith's former neighbor Ralph Robinson testified that when he saw Smith after the murder, Smith became upset and confessed to being involved, telling Robinson they went to the victim's house because they were supposed to beat her up. Vol. 16 at 759-68.

Donald Buckman testified that a week or so before the murder, Smith told him he knew where they "could make some fast money." *Id.* at 779. When Buckman asked for details, Smith said "he knew this person that needed somebody beat up" and that he "needed somebody else to go with him because he did not want to go by himself." *Id.* Smith explained that he was supposed to "just go down, you know, maybe whoop the lady up and take a few things out of the house and make it look like a robbery." *Id.* at 780. And Buckman added that when he saw Smith the night after the murder, Smith's hand was "swelled up," "puffed out on top like around – you know, around the knuckles and stuff," *id.* at 788, that when he saw a VCR in Smith's house, Buckman became suspicious and stated "man, don't tell me you-all went down there and did like you said you were going to do," *id.* at 790, and that Smith replied, "yeah, we did," *id.*

Another friend, Brent Barkley, testified that during the month before the murder, he had a series of conversations with Smith, during which Smith told him that someone had approached him and had paid him "some money" to "beat somebody up." *Id.* at 809-10. Mr. Barkley further testified that the night after the murder, he noticed that Smith "had quite a substantial bit of money," and that Smith's hand was "bruised and wrapped." *Id.* at 810-13.

to impeach Dr. Ward with her prior testimony.' " Doc. 31 at 69-70. But, as the Court of Criminal Appeals found, he "failed to provide any specific facts regarding the cross-examination trial counsel conducted, what additional questions counsel should have asked Dr. Ward, how Dr. Ward would have answered those questions, and how the result of the trial would have been different if counsel had conducted that cross-examination." Vol. 45, Tab 102 at 37. This finding was not based on an unreasonable determination of the facts. Moreover, Dr. Ward actually testified that although the head wounds were potentially fatal, "Mrs. Sennett died of multiple stab wounds of the chest and neck." Vol. 15, Tab 16 at 709. In other words, it is not exactly clear what counsel could have asked Dr. Ward to show that, as Dr. Ward testified, the victim died of the wounds to her chest and neck and not from the head wounds.

The Alabama Court of Criminal Appeals' denial of this claim was not based upon an unreasonable determination of the facts and it was not contrary to or an unreasonable application of *Strickland*.

c. Contamination of the Crime Scene

Smith claims that counsel unreasonably failed to establish that the state contaminated evidence from the crime scene. Doc. 1 at 44-48. Allegedly, the state mishandled the physical evidence, exposing it to contamination and compromising the reliability of the evidence – in particular, the officers purportedly failed to properly wrap, transport, or store the afghan covering the victim, creating the potential for the loss of trace evidence; failed to properly package or label hair samples from the scene; and failed to appropriately label known hair samples from the suspects and Kenneth *Ray* Smith – a man who was

not involved in the murder, making it unclear if the hair samples came from the petitioner Kenneth Eugene Smith, or from Kenneth *Ray* Smith. *Id.* at 44-45. Allegedly, counsel could have used this evidence in plea negotiations to give the state a "powerful incentive to consider a deal," or during the trial to cast doubt on the "critical issue" of his intent; and at the penalty stage to argue against a death sentence in light of the state's failure to live up to "high standards" for handling evidence. *Id.* at 47-48. And if counsel had "investigated and utilized such evidence," a reasonable probability purportedly existed that the jury would not have convicted Smith of capital murder and/or the judge would not have sentenced him to death. *Id.* at 48.

There is one major flaw with Smith's contention – i.e. the state did not use this evidence at the trial.[37] And, because the state did not use any of the allegedly contaminated evidence at the trial, Smith was not prejudiced by counsel's failure to argue that the state mishandled the evidence. As such, the Court of Criminal

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[37] As the Court of Criminal Appeals noted in affirming the trial court:

> There are many reasons supporting the circuit court's denial of this claim. First and foremost, the State did not present any evidence at the *second* trial about the afghan or the hairs recovered from it. Smith's claims regarding the alleged mishandling of physical evidence and misidentification of the hair recovered from the afghan have no relevance to the evidence actually presented at the trial that resulted in conviction and death sentence he now seeks to have set aside. Therefore, even if evidence was mishandled or misidentified and even if trial counsel unreasonably failed to discover the alleged errors, as Smith claimed, Smith has failed to show that any of those alleged errors had any effect on the outcome of the proceeding.

Vol. 45, Tab 102 at 40.

Appeals' denial of this claim was not contrary to or an unreasonable application of *Strickland*, nor was it based upon an unreasonable determination of the facts.

d. Hearsay Evidence

Prior to the second trial, counsel "stipulated with the district attorney that counsel would not require the state to call every witness who performed ministerial acts in connection with the chain of custody of the evidence." Doc. 1 at 48. Under the stipulation, Captain May testified that Glenn Brown, a laboratory analyst with the Department of Forensic Sciences in Huntsville, found human blood in the stolen VCR found in Smith's home. Vol. 16 at 830-31. Smith alleges that this testimony was inflammatory hearsay and was "used to cover the gaping hole in the State's case, *i.e.,* the lack of physical evidence connecting Mr. Smith to the crime." Doc. 1 at 49. Allegedly, counsel unreasonably failed to object to this testimony and "it was critical for trial counsel to cross-examine Mr. Brown so that the jury understood the results of his testing and, in particular, that his results did not connect that blood stain to the crime scene." *Id.*[38] And, the decision by counsel purportedly prejudiced Smith by "leaving unchallenged an inference that the victim's blood was found on the VCR." *Id.*

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[38] Smith also argues that counsel should have objected to this testimony on the basis that Glenn Brown, who performed the forensic testing, did not fall within the stipulation as someone "who performed ministerial acts in connection with the chain of custody of evidence." Doc. 1 at 49. Because Smith did not raise this claim in his amended Rule 32 petition, *see* Vol. 32, Tab 57 at 453-54, this court may not consider it now in reviewing the reasonableness of the state court's resolution of the claim. *See Powell*, 602 F.3d at 1273 n.8.

The trial court rejected this claim, and the Court of Criminal Appeals affirmed, finding, in part, that:

> Smith has presented no evidence to prove that the decision was not a matter of trial strategy or that the strategy was unreasonable, ...
>
> Furthermore, Smith failed to meet his burden of proving that there is a reasonable probability that the result of his trial would have been different but for counsel's alleged errors. Smith failed to prove that, if counsel had not entered into the stipulation, the evidence about human blood being discovered on the VCR would not have been admitted. At Smith's first trial, a serologist testified that he had analyzed the blood and determined it was human but of unknown type. Smith has presented nothing to prove that the serologist would not have testified to the same facts again at the second trial, thus placing the same evidence before the jury....

Vol. 45, Tab 102 at 46-47.

The court agrees that Smith cannot prove the requisite prejudice. While Smith maintains that if counsel had raised an hearsay objection, "they would have been able to counteract the inference that the victim's blood was on the VCR, which prejudicial inference the State argued to the jury and the trial court accepted in the sentencing order," doc. 31 at 78, he overlooks that Captain May clearly testified that although Brown had located human blood on the VCR, there was insufficient blood found "for him to type it," Vol. 16 at 830. In other words, Captain May did not state or imply that the state found the victim's blood on the VCR, and testified only that it was human blood. Smith has not indicated how further questioning of Brown could have prevented the jury from inferring that the blood came from the

victim. Thus, the state court's adjudication of this claim was not contrary to or an unreasonable determination of the facts, and it was not based on an unreasonable determination of the facts.

e. Intent to Kill

Smith's friend Donald Buckman testified that early one morning, Smith and Parker stopped by to see Buckman, that Smith asked if Buckman knew where Smith could get a .38 or .45 caliber gun, and if Buckman wanted to go with them "to do the job." Vol. 16 at 781-85. Buckman testified also that he declined the invitation and that he told Smith he did not know where he could obtain a gun. *Id.* at 784-85. The state relied, in part, on Buckman's testimony to successfully oppose the motion for acquittal based on lack of intent to kill.[39] And, in its closing argument, the state also relied on Buckman's testimony to point out that

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[39] The prosecutor stated:

> Judge, I will just say this, that the evidence of the intent to kill is corroborated. It's evidence of a circumstantial nature. All of the testimony with regard to the defendant looking for a weapon, looking for a gun, the conversations that he had with people that he tried to recruit to help him. And even though the defense's theory is that there was an intent only to harm Mrs. Sennett or beat Mrs. Sennett, that is inconsistent with someone looking for a .38 or .45 caliber gun to commit the act with. You don't beat a person with a gun. You shoot and you shoot to kill a person with a gun. There was money advanced for that purpose and we hear testimony from Donald Buckman with regard to looking for such a weapon on the very day which Mrs. Sennett was killed. The defendant in his own statement, if you look at what it said there after the initial conversations about what they were going to do to Mrs. Sennett, there is an indication that he knew that they were going to kill Mrs. Sennett not simply injure her or beat her in some way.

Vol. 16. at 872-73.

"It was the defendant, Kenny Smith, as opposed to John Forrest Parker who inquired of Donald Buckman, can you get me a gun or can you get us a gun? Anywhere from a .38 to a .45," and to argue "What did they need a gun for if they were not going to kill her? ... What did they need a gun for if they were not going to take this woman's life? That is evidence of the defendant's intent." *Id.* at 892-97.

Smith contends that the visit to Buckman occurred on a different day than the murder, and that Smith's girlfriend, Ranae Bryant, "could have testified that Mr. Smith had been looking to purchase a gun for a long period of time prior to the events at issue and for lawful reasons unrelated to those events." Doc. 1 at 50. Therefore, Smith claims that counsel "unreasonably failed to establish those facts and to move in limine to exclude Mr. Buckman's highly prejudicial testimony," to effectively cross Buckman, and to call Bryant and other witnesses to establish "that the conversation about which Mr. Buckman testified did not occur on the day of the crime and had nothing to do with the crime." *Id.* To further compound the purported error, Smith argues that counsel unreasonably and inexplicably conceded in the closing argument that Smith asked Buckman if he knew where Smith could get a gun on the day of the murder. *Id.* Allegedly, because the state argued that Buckman's testimony was critical evidence of Smith's intent, a reasonable probability exists that if trial counsel had effectively challenged Buckman's testimony, the jury would not have convicted Smith of capital murder. *Id.* at 50-51.

Smith unsuccessfully raised this claim in his amended Rule 32 petition, and in affirming the trial court the Court of Criminal Appeals found that "Smith failed to allege any facts that would tend to

indicate the grounds on which counsel could have successfully objected to Buckman's testimony; he failed to include any facts showing the cross-examination trial counsel conducted and how counsel used Buckman's testimony in his closing argument; and he failed to identify specifically how he was prejudiced by counsel's alleged specific performance." Vol. 45, Tab 102 at 47-48. Smith argues that the court's decision was based on an unreasonable determination of the facts because he alleged in his amended Rule 32 petition "that trial counsel 'failed to rebut' and 'fail[ed] to challenge' Mr. Buckman's testimony that the convers[at]ion occurred on the day of the crime." Doc. 31 at 79 (citing Vol. 32, Tab 57 at 454-55) (alteration in original). But this is different from offering any facts to indicate the basis upon which counsel could have moved *in limine* to exclude Buckman's testimony, or even that counsel knew that Buckman would testify that Smith asked him on the day of the murder about obtaining a gun, or what further questions counsel could have asked Buckman to get him to change his testimony regarding when the conversation occurred. In any event, counsel in fact asked Buckman on cross if he could have been mistaken about the date Smith and Parker came to his house, and if that occasion was the first time Smith had asked him about a gun. Vol. 16 at 793-95. Buckman answered that, to the best of his knowledge, he believed he had the right date and that it was indeed the first time Smith had asked him about a gun. *Id.* Counsel also elicited testimony from Buckman that Smith never indicated that he or his cohorts planned to kill the victim. *Id.* at 795-97. What more, if anything, counsel could have done on cross are not matters to be assessed through the "distorting effects of hindsight." *Strickland*, 466 U.S. at 698.

Rather, the court must "evaluate the conduct from counsel's perspective at the time" of the trial. *Id.* And, here, Smith has offered only conclusory allegations that his conversation with Buckman about the gun occurred on a different date and that his girlfriend "could" have testified that Smith had tried to buy a gun for legitimate purposes "for a long period of time" before the murder. These contentions fall short of meeting his burden.

Likewise, Smith's contention related to alleged prejudice is unavailing. Smith contends that "he was prejudiced because his intent was the critical issue at trial, and the State used Mr. Buckman's testimony as unrebutted evidence in support of its argument that Mr. Smith had an intent to kill." Doc. 31 at 79. Again, however, Smith offered nothing more than this conclusory allegation to support his contention of prejudice related to counsel's purported failure to somehow prevent Buckman from testifying that Smith asked him about a gun on the day of the murder.[40] As noted previously, counsel crossed Buckman extensively and Smith has failed to offer any specifics on what else counsel could have done.

The Court of Criminal Appeals' adjudication of this claim was not contrary to or an unreasonable application of *Strickland*, nor was it based upon an unreasonable determination of the facts.

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[40] "during closing [arguments,] counsel was forced to explain the testimony by making the improbable argument that the inquiry about a gun was consistent with counsel's theory that the crime was a planned assault." Doc. 31 at 79. However, because Smith did not make this argument in his amended Rule 32 petition, this court may not consider it now in reviewing the reasonableness of the state court's resolution of the claim. *See Powell*, 602 F.3d at 1273 n.8.

f. Statements That the Crime Involved Capital Murder

Smith takes issue with statements his trial counsel made in opening argument – i.e. "what happened to [Mrs. Sennett] to be sure it was a capital murder," Vol. 15, Tab 15 at 541, – and in closing, i.e. "[t]here was a capital murder at Mrs. Sennett's house on the 18th of March ... [b]ut that capital murder had nothing to do with Kenny Smith's state of mind," Vol. 16, Tab 19 at 906. Counsel followed both statements by arguing that Smith was not guilty of capital murder because he lacked the intent to kill. Vol. 15, Tab 15 at 542-43; Vol. 16, Tab 19 at 906.

Smith claims counsel acted unreasonably by referring to the crime as capital murder "because counsel conceded that Mr. Smith committed a crime that day, and Mr. Smith was the only defendant that the jury could hold responsible for what counsel conceded was a capital murder." Doc. 1 at 51. Allegedly, counsel's statements confused the jury by basing the defense on distinguishing between capital murder for which specific intent is an element and other crimes for which it is not, as evidenced by the jury's note during deliberations that stated: "We need the differences listed between capital murder and murder while acting with extreme indifference to human life, definition/elements." *Id.* at 51-52 (quoting Vol. 17, Tab 21 at 1001-02). And, "[b]ecause trial counsel argued that Mr. Parker had stabbed Mrs. Sennett and that the crime constituted 'capital murder' and did not object when the prosecutor linked Mr. Parker's actions and intent to Mr. Smith, there is a reasonable probability that the jury concluded that Mr. Smith also was guilty of capital murder even if the jury did not believe that Mr. Smith had the specific intent necessary to support such a

conviction." *Id.* at 52. Moreover, "the prejudice to Mr. Smith from trial counsel's repeated references to 'capital murder' and concession that Mr. Parker had committed 'capital murder' were purportedly exacerbated by trial counsel's failure to object when the prosecutor repeatedly imputed Mr. Parker's actions and intent to Mr. Smith." *Id.*

The Court of Criminal Appeals affirmed the trial court's summary dismissal of this claim, noting that "the claim included only conclusory allegations of deficient performance and prejudice," that "[t]he trial court [correctly] dismissed the claim because Smith did not plead any facts that would indicate that he was prejudiced by counsel's reference to the crime as a capital murder," and that "Smith failed to allege any facts indicating the context in which trial counsel referred to the crime as a 'capital murder,' he did not allege any facts to show that counsel's use of the term was unreasonable, and he did not allege any facts indicating how the references prejudiced him." Vol. 45, Tab 102 at 49-50. Smith alleges that the court's decision is an unreasonable determination of the facts because counsel's references to capital murder confused the jury due to Smith's pursuit of a defense based on distinguishing capital murder from lesser crimes and the state following counsel's concession that a capital murder had occurred by imputing Parker's intent to Smith. Doc. 31 at 80. But, as the state court noted, Smith offers no facts to support his contentions. Therefore, the Court of Criminal Appeals' determination that Smith's conclusory allegations were insufficient to satisfy the pleading requirements of Rule 32 was neither contrary to nor an unreasonable application of *Strickland* and it was not based upon an unreasonable determination of the facts.

g. Failure to Mount a Defense

Smith challenges next counsel's failure to "call any witnesses or submit any evidence in a defense case," arguing that:

> 163. Trial counsel did not call pathology or forensic expert witnesses to explain that the forensic evidence did not support the State's theory of the crime. Nor did trial counsel call witnesses who would have testified about Mr. Sennett's history of infidelity, spousal abuse, and mental instability, including Mr. Sennett's paramour and Mrs. Sennett's counselor. Trial counsel did not call an expert in police procedure to testify that the search warrant and Mr. Smith's custodial statement were obtained in violation of proper police procedure.
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> 164. Trial counsel also did not call witnesses to rebut Mr. Buckman's testimony that Mr. Smith was looking to purchase a gun on the day of the crime. That conversation did not take place on the day of the crime. In addition, Mr. Smith had been looking to purchase a gun prior to the events at issue and for lawful reasons unrelated to those events. There were witnesses available, including Ranae Bryant, who would have testified to those facts. But defense counsel failed to call them to rebut Mr. Buckman's testimony.
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> 165. Mr. Smith was prejudiced by trial counsel's unreasonable failure to put on a defense case because critical evidence was not addressed and the State was able to encourage the jury to draw inferences that were not warranted by the true facts. Had trial counsel done an adequate investigation and put on a defense case, there is a reasonable probability that Mr. Smith would not have been convicted of capital murder.

Id. at 52-53.

The Court of Criminal Appeals affirmed the trial court's summary denial of this claim, finding the claim "vague and conclusory" and involved "unnamed 'pathology or forensic expert witnesses,' and an unnamed 'expert in police procedure,'" and that "Smith named or vaguely identified other witnesses that he said trial counsel should have called ... but he failed to plead any specific facts about how the failure to present their testimony resulted in prejudice to him." Vol. 45, Tab 201 at 50. To Smith, the rejection of the claim is an unreasonable determination of the facts because he "not only named witnesses who trial counsel should have called, but also pleaded facts about how the failure to call them prejudiced him." Doc. 31 at 81. While Smith may be correct that he alleged counsel should have called "pathology or forensic expert witnesses" to "explain that the forensic evidence did not support the state's theory of the crime," he failed to identify who would have testified as expert witnesses, what they would have testified about, or how the failure to present such testimony prejudiced the defense. Similarly, although Smith alleged that counsel failed to call "an expert in police procedure," he did not indicate who might have testified as an expert in police procedure that the search warrant and Smith's custodial statement were obtained in violation of "proper police procedure," what their testimony would have been, or how the failure to present such testimony prejudiced the defense.

And, as for the contention that counsel should have called Mr. Sennett's paramour and his counselor to testify about the Sennetts' marital issues, again, Smith failed to allege what their testimony would have been and how the failure to present such

testimony prejudiced the defense. Finally, although Smith makes the conclusory allegation that Ranae Bryant and Buckman's nephew would have testified that Smith's conversation with Buckman about a gun "did not occur on the day of the crime and had nothing to do with the crime," he has offered nothing to indicate that either of them had direct knowledge of the conversation, that they were available to testify, or details of what testimony they were prepared to offer, and Smith offered no specific facts to indicate how their absence prejudiced the defense.

For all these reasons, the Court of Criminal Appeals' adjudication of this claim was not contrary to nor an unreasonable application of *Strickland* and it was not based upon an unreasonable determination of the facts.

h. Failure to Object to Prosecutorial Misconduct

Smith also challenges his trial counsel's purported unreasonable failure to object when the prosecutor "repeatedly engaged in highly improper and prejudicial misconduct." Doc. 1 at 54. More specifically, Smith cites the following conduct by the prosecutor:

1. The prosecutor stated that Smith watched "movies on Mrs. Sennett's VCR that still had her blood splattered all over it," doc. 1 at 54-55,[41]

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[41] In context, the prosecution made the following argument in its rebuttal closing statement:

> Now [defense counsel] talks about [Smith] being so upset, so upset and so torn up over what happened to Elizabeth Sennett, what happened out there at that residence on Coon Dog Cemetery Road on the 18th, so upset that he could not play cards, but he could bring that bloody VCR into his house and he could sit there and play tapes and watch movies on

notwithstanding the fact that Captain May had testified that the amount of blood on the VCR was insufficient to determine the blood type, i.e. to whom it belonged, *id.* at 55 (citing Vol. 16 at 830). As Smith puts it, this statement conveyed the impression that the prosecution had knowledge of evidence that was not offered at trial, and "induced the jury to trust the prosecutor's judgment as to the source of the blood on the VCR rather than the jury's own view of the forensic evidence (or lack of forensic evidence) presented during the trial." *Id.*;

2. The prosecutor argued, without objection, that Smith was an "instigator" and "active leader" in the murder, even though the defense's theory of the crime contended that Mr. Sennett "instigated a murder for hire." Doc. 1 at 56;[42]

Mrs. Sennett's VCR that still had her blood splattered all over it. And he tells you that it was never, never Kenneth Smith's intent for that woman to die. Well, what did he do to stop it? He had every opportunity when he was out there in that house and he saw John Forrest Parker with that knife. If he did not intend for that woman to die, why didn't he say, stop, John, we have already beat her up? This isn't the plan. He never did that. He never took one step toward stopping what happened that day.

Vol. 17, Tab 20 at 946-47 (alterations added).

[42] In context, the prosecution argued the following in its closing statement:

And I said to you awhile ago that you can't shift the responsibility in this case for what Kenny Smith did to someone else. He was a leader. He was an instigator in this thing. Maybe down the line somewhere, maybe he did not get it kicked off like Charles Sennett did, maybe he did not deliver the money like Billy Williams did, but he was in there as an active leader in this thing right up to the very end. And why do I say that? Who was it that Billy Williams talked to first? It's right here in the statement. He first talked to

3. The "prosecutor argued that certain words and phrases, such as 'hurt' and 'beat up,' ... in Mr. Smith's custodial statement (written by Captain May), were merely euphemisms for murder." *Id.*[43]; and

4. The prosecutor repeatedly expressed his personal opinions concerning the evidence and the credibility of witnesses by saying, in part, that "Defendants are going to tell their story in the light most favorable to themselves. They always do. And I submit to you that's what the defendant has tried to do here, ...," Vol. 16, Tab 18 at 900), and that Smith's statement was the most reliable and appropriate way to take a statement, even though Captain May had testified that "he violated his own

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Kenny Smith. Billy Williams who was the direct line back to Charles Sennett talked to Kenny Smith about a month prior to this incident taking place.

Vol. 16, Tab 18 at 894-95.

[43] In context, during the state's closing argument, the prosecution argued:

Also, he says in his statement on page 4 that at the time he and John Forrest Parker were going out there, he says "at this time we still did not know how we were going to kill Mrs. Sennett." Talking about killing. Now, they may have started out using euphemisms, but as they get on in the statement, talking about what happened that day and what occurred they use the – he uses the word "kill," he uses the word "murder," which I submit to you was his intent all along.

Vol. 16, Tab 18 at 892-93. Smith argues that counsel should have objected to this argument because:

Nothing in evidence suggested that Mr. Smith had ever used those or any other words as euphemisms for murder. In fact, three State witnesses, Ralph Earl Robinson, Donald Larry Buckman, and William Brent Barkley, each testified that Mr. Smith had only mentioned "beating up" someone in a robbery.

Doc. 1 at 56.

> procedures by taking a statement from Mr. Smith with no one else present."[44] Doc. 1 at 57.

Smith asserts that trial counsel's failure to object to these purported instances of prosecutorial misconduct permitted the jury to reach a verdict "based on a warped view of the facts." Doc. 1 at 56. Likewise, he claims that counsel's failure to object to the prosecutor's personal opinions allowed the prosecution to "bolster parts of Mr. Smith's custodial statement that were favorable to the State's case while disparaging parts that were not consistent with the State's case." *Id.* at 58. Allegedly, a reasonable probability existed that the jury would not have convicted Smith of capital murder if counsel had objected. *Id.*

A prosecutorial misconduct claim requires a showing that the challenged remarks were improper and that they prejudicially affected Smith's substantial rights. *See Sexton v. Howard*, 55 F.3d 1557, 1559 (11th Cir. 1995). It is not enough that the comments were "offensive," "improper," "undesirable or even universally condemned," *Darden v. Wainwright*, 477 U.S. 168, 181 (1986), and "[p]roper arguments, regardless of their impact on the outcome of the case, do not render a trial unfair," *Spivey v. Head*, 207 F.3d 1263, 1276 (11th Cir. 2000). Relevant here, closing arguments are meant to "assist the jury in analyzing, evaluating and applying the evidence." *United States v. Pearson*, 746 F.2d 787, 796 (11th Cir. 1984). While a defendant may disagree, in general, a prosecutor may comment

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[44] Captain May testified that when conducting witness interviews, he "tr[ies] to have two people in the room, if possible." Vol. 16 at 854 (alteration added). This is different than Smith's contentions that Captain May "violated his own procedures by taking a statement from Mr. Smith with no one else present."

on the evidence and express the conclusions she believes a jury should draw from that evidence. *See United States v. Johns*, 734 F.2d 657, 663 (11th Cir. 1984). For this reason, improper comments by a prosecutor require a new trial only if they "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden*, 477 U.S. at 181 (quoting *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974)). Moreover, "[c]laims of prosecutorial misconduct are fact-specific inquiries which must be conducted against the backdrop of the entire record." *United States v. Hall*, 47 F.3d 1091, 1098 (11th Cir. 1995). And, "[i]mproper statements during argument can be cured by clear and accurate jury instructions." *Johnson v. Alabama,* 256 F.3d 1156, 1185 (11th Cir. 2001).

Turning to the specifics here, Smith alleges that counsel should have objected during the state's closing argument and rebuttal closing argument, when the prosecutor argued facts that were not in evidence and expressed his personal opinions concerning the evidence. Doc. 1 at 54-57. Smith unsuccessfully raised these claims in his amended Rule 32 petition, Vol. 32, Tab 57 at 465-71, and in affirming the trial court, the Court of Criminal Appeals stated as follows:

> Smith alleged the specific statements that he believed constituted prosecutorial misconduct, but he failed to plead any facts indicating the context in which those statements were made. Smith did not allege specific facts in his amended petition regarding the crime and the State's evidence or the defense theory, and he did not plead any facts regarding the prosecutor's entire argument to show the context in which the allegedly improper arguments arose. Smith also did not plead any

> facts to show that, if counsel had objected to the allegedly improper conduct, that the trial court would have sustained the objections, or that the result of the proceeding would have been different. Additionally, Smith alleged only in a conclusory and general way that he was prejudiced by trial counsel's failure to object to some of these prosecutorial comments, but he failed to plead any facts indicating how he was prejudiced. As the claims were pleaded, it is impossible for this Court to determine whether Smith would be entitled to relief, even if the allegations were true. *See Bracknell v. State*, 883 So. 2d 724 (Ala. Crim. App. 2003)....
>
> We note, too, that the trial court instructed the jury repeatedly that the arguments of counsel were not evidence. Jurors are presumed to follow the trial court's instructions. *Calhoun v. State*, 932 So. 2d 923, 962 (Ala. Crim. App. 2005). We have carefully reviewed the arguments Smith now claims trial counsel should have objected to, and the context in which those comments were made. We agree with the finding of the circuit court: "Each statement by the prosecutor complained of herein falls within the right of the prosecutor to draw and argue reasonable inferences from the evidence, and the failure to object thereto does not amount to ineffective assistance of counsel." (C. 126.)

Vol. 45, Tab 102 at 52-54 (alteration in original) (footnote omitted).

The Court of Criminal Appeals' dismissal of these claims as insufficiently pleaded is not unreasonable. Smith made only general allegations in his amended Rule 32 petition, singling out instances of alleged prosecutorial misconduct without addressing them in

the context of the entirety of the prosecution's closing argument or the rest of the trial. Further, Smith made no allegation that his trial was rendered fundamentally unfair by counsel's failure to object to the alleged instances of prosecutorial misconduct, that the court would have sustained counsel's objections, or that the jury would have rendered a different verdict if counsel had objected to these statements. Finally, he made only a conclusory allegation that he suffered prejudice as a result of counsel's failure to object to these arguments.

Further, the Court of Criminal Appeals' alternative holding is not unreasonable. Viewed in context of the trial as a whole, and the context of the entirety of the state's closing arguments, the comments were not improper. Rather they were comments based upon the evidence that the prosecutor used to illustrate the state's theory that Smith had the requisite intent to kill the victim. And, significantly, even assuming the comments were improper, the trial court instructed the jury on multiple occasions that arguments or statements made by the attorneys were not evidence and should not be considered as such. Vol. 14, Tab 13 at 518; Vol. 16, Tab 18 at 889; Vol. 17, Tab 21 at 962. Jurors are presumed to follow the court's instructions, *see Richardson v. Marsh*, 481 U.S. 200, 211 (1987), and "improper statements during argument can be cured by clear and accurate jury instructions," *Johnson*, 256 F.3d at 1185.

Considered in the context of the entire trial, the prosecutor's comments neither rendered the trial fundamentally unfair, nor infected the trial with such unfairness that the resulting conviction amounted to a denial of due process. And, because the underlying claims of prosecutorial misconduct lack merit, trial

counsel were not ineffective for failing to object to the alleged misconduct.

2. Ineffective Assistance of Counsel in the Penalty Phase

Smith claims also that counsel provided ineffective assistance at the penalty phase based on a purported conflict of interest. This contention centers on testimony at the penalty phase that Smith provided information to one of his jailers that may have saved that individual's life. Specifically, counsel for Smith called one of the guards at the county jail where Smith was held in pretrial custody. Vol. 17, Tab 27 at 1057-96. The guard testified that Smith gave him a note saying "something was about to happen, he did not know what or when, but something was up." *Id.* at 1071-72. After receiving the note, the guard became suspicious of two other prisoners at the jail. *Id.* at 1072-74. Smith later told the guard that he could not "stand by and let it happen again," *id.* at 1075, that the other two prisoners were constantly talking about what was going to happen, and that Smith "did not know exactly if it was going to be like day or night when it was going to happen," *id.* at 1075-76. Subsequently, the guard found a knife made from a tube of toothpaste, a shank razor, and a rope made from bed sheets in or around the cell shared by the other two inmates. *Id.* at 1078-83. The guard testified that although he does not know what the two inmates had planned to do with the knife and rope, he believes that Smith saved him from a violent attack, *id.* at 1085, and that neither of the two inmates ever knew how Smith had helped him out, and that Smith never asked for any favors in exchange for the information he gave the guard, *id.* at 1087.

The defense also called James Aiken, an expert in correctional issues, who testified that he had reviewed Smith's prison records and met with the guard in question. Vol. 18 at 1274-1308. Aiken testified that Smith had a good record in custody and opined that it would be appropriate to house Smith in a maximum security prison rather than death row. *Id.* at 1283-99. He added that his "meeting with [the guard] and learning what had happened and the information that Mr. Smith had given him, the warnings" influenced his professional opinion as to "how [Smith] ought to be classified and whether or not he pose[d] a risk of violence to others in the institution." *Id.* at 1294.

The state aggressively cross-examined the guard and Aiken, repeatedly challenged the existence and seriousness of the plot against the guards at the jail, and elicited both to admit that they had no proof of an actual plot against the guard. Vol. 17, Tab 27 at 1090, 1092; Vol. 18 at 1305-06. Based on these cross examinations, Smith argues that his counsel did not push back because one of his attorneys also represented one of the co-conspirators in the alleged plot against the guard. Doc. 11 at 4. Smith contends that his lawyer "learned of the incident when he was informed that the details of the plot discussed by [the guard] would be used against [the inmate in question] at his trial." *Id.* As Smith puts it,

> The focus of the prosecution's cross-examination of [the guard] and Mr. Aiken illustrates trial counsel's irreconcilable conflict of interest. Eliciting any further details on the seriousness of ... [the] plot to rebut the prosecution's arguments at the penalty and sentencing phases of Mr. Smith's trial would have been contrary to the interests of [the inmate at issue], another of [counsel's] clients. Indeed, trial

> counsel already had been informed that the plot, which Mr. Smith had revealed, would be used against [the inmate at issue] in the course of his capital murder trial. In his closing remarks, trial counsel was forced to concede that "whether there was actually an attempt to do any of those things, whether or not events went beyond the line of the attempt and but for the intervention of [the guard] would have succeeded either against [the guard] himself or the guards, we will never know. We will never know that."

Doc. 11 at 5. As for prejudice, Smith argues that "[a]llowing the prosecution to downplay the seriousness of the plot ... undermined the credibility of Mr. Smith's expert on his likely future behavior, and diminished the significance of Mr. Smith's post-incarceration conduct, ..." and that "[b]ecause the trial court determined that the mitigating factors presented by the defense were outweighed by a single aggravating factor, and Mr. Smith's conduct while in prison was central to trial counsel's mitigation strategy, [counsel's] conflict prejudiced Mr. Smith by making it impossible to give appropriate weight to the mitigation evidence." *Id.* at 5-6.

Smith unsuccessfully raised this claim in his amended Rule 32 petition, and the Court of Criminal Appeals affirmed the trial court, finding in part "that Smith failed to satisfy his burden to plead a clear and specific statement of the grounds for relief, including a full disclosure of the factual basis for those grounds" and that "[t]he circuit court correctly held that Smith failed to include anything beyond general allegations that a conflict existed and he pleaded no facts regarding any additional actions counsel would have taken or evidence he would have presented if he had not been under an alleged conflict of interest."

Vol. 45, Tab 102 at 57-58.[45] Smith alleges that this decision is contrary to or an unreasonable application of federal law and is based upon an unreasonable determination of the facts. Doc. 33-1 at 4. But a review of the amended Rule 32 petition indeed shows that Smith made only general, conclusory allegations that a conflict existed. Smith offered no facts regarding any additional actions counsel could have taken or the evidence counsel could have presented but for the alleged conflict of interest. Thus, the Court of Criminal Appeals' dismissal of these claims as insufficiently pleaded is not unreasonable.

Alternatively, this claim fails on the merits. "Where a constitutional right to counsel exists, our Sixth Amendment cases hold that there is a correlative right to representation that is free from conflicts of interest." *Wood v. Georgia*, 450 U. S. 261, 271 (1981). "Ineffective assistance of counsel claims in the conflict of interest context are governed by the standard articulated by the Supreme Court in *Cuyler v. Sullivan*, 446 U.S. 335, 100 S. Ct. 1708, 64 L. Ed. 2d 333 (1980)." *Reynolds v. Chapman*, 253 F.3d 1337, 1343 (11th Cir. 2001). Under the two-part *Cuyler* test, to establish that an attorney is constitutionally ineffective due to a conflict of interest, a petitioner must demonstrate that the attorney had an actual conflict of interest, and that the conflict adversely affected her performance. *Cuyler*, 446 U.S. at 348-49. Prejudice for *Strickland* purposes is presumed under the *Cuyler* test, but only if the petitioner "demonstrates that counsel 'actively represented

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[45] The state court's dismissal of this claim based upon Rule 32.6(b) of the Alabama Rules of Criminal Procedure constitutes a ruling on the merits for AEDPA purposes. *See Frazier v. Bouchard*, 661 F.3d 519, 526-27 (11th Cir. 2011).

conflicting interests' and that 'an actual conflict of interest adversely affected his lawyer's performance.'" *Burger v. Kemp*, 483 U.S. 776, 783 (1987) (quoting *Strickland v. Washington*, 466 U. S. at 692). But the conflict must be actual and not merely speculative, as the mere possibility of a conflict does not violate the Sixth Amendment. *Cuyler*, 446 U.S. at 348-49. To show that an actual conflict exists, the petitioner must "point to specific instances in the record to suggest an actual conflict or impairment of their interests," and "must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client but harmful to the other. If he did not make such a choice, the conflict remained hypothetical." *Smith v. White*, 815 F.2d 1401, 1404 (11th Cir. 1987). And, if a petitioner establishes the existence of an actual conflict of interest, *Cuyler* requires next that the petitioner show that the conflict adversely affected the representation he received. To do so,

> a habeas petitioner must satisfy three elements. First, he must point to some plausible alternative defense strategy or tactic [that] might have been pursued. Second, he must demonstrate that the alternative strategy or tactic was reasonable under the facts. Because prejudice is presumed, the petitioner need not show that the defense would necessarily have been successful if [the alternative strategy or tactic] had been used, rather he only need prove that the alternative possessed sufficient substance to be a viable alternative. Finally, he must show some link between the actual

> conflict and the decision to forgo the alternative strategy of defense. In other words, he must establish that the alternative defense was inherently in conflict with or not undertaken due to the attorney's other loyalties or interests.

Freund v. Butterworth, 165 F.3d 839, 860 (11th Cir. 1999) (alterations in original) (citations and quotations omitted).

Turning now to the specifics here, for the actual conflict of interest prong, Smith argues that counsel failed to elicit "further details on the seriousness of [the] plot to rebut the prosecution's arguments" because the details would have been contrary to the interests of counsel's other client. Doc. 33-1 at 5. While Smith implies that "further details on the seriousness of [the] plot" were available to counsel, and that counsel purportedly did not elicit those details due to his loyalty to his other client, Smith failed to plead any facts to support such a finding. The record shows that the guard testified that Smith warned him of an impending plot by the other two prisoners, but that the guard could not give actual details about the plot because it never materialized. In other words, there is no evidence that further details concerning the plot existed that counsel or anyone else could have uncovered.

As for the adversely affected prong, this prong requires Smith to point to a plausible alternative defense strategy or tactic that counsel could have pursued and he must demonstrate that the alternative strategy was reasonable under the facts. *See Freund*, 165 F.3d at 860. Smith failed to make this showing. In fact, it appears that counsel made

the best use of the limited facts available to portray Smith as a model prisoner.

To close, Smith has failed to establish the existence of an actual conflict of interest or that the alleged conflict adversely affected counsel's performance.

Claim C. Whether The Prosecution Violated Smith's Fifth and Fourteenth Amendment Rights by Failing to Comply with its Discovery Obligations under *Brady v. Maryland*

Smith claims that the prosecution violated *Brady v. Maryland*, 373 U.S. 83 (1963), by destroying and by failing to disclose evidence. In *Brady*, the Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." *Brady*, 373 U.S. at 87. A *Brady* violation requires a showing that: "(t)he evidence at issue must be favorable to the accused, either because it is exculpatory, or because it is impeaching; that evidence must have been suppressed by the State, either willfully or inadvertently; and prejudice must have ensued." *Strickler v. Greene*, 527 U.S. 263, 281-82 (1999). "[T]here is no suppression, and thus no *Brady* violation, if either the defendant or his attorney knows before trial of the allegedly exculpatory information." *Felker v. Thomas*, 52 F.3d 907, 910 (11th Cir. 1995). "The prejudice or materiality requirement is satisfied if 'there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" *Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320,1334 (11th Cir. 2012) (quoting *United States v. Bagley*, 473 U.S. 667, 682 (1985)).

Materiality is determined by asking whether the government's evidentiary suppressions, viewed cumulatively, undermine confidence in the guilty verdict. *See Kyles v. Whitley*, 514 U.S. 419, 434, 436-37 & n. 10 (1995).

At issue here are Smith's contentions that the state destroyed an "audiotaped conversation with an anonymous informant" and failed to inform him that a "forensic investigator had determined that a hair consistent with the known hair of Kenneth Ray Smith – not Petitioner Kenneth Eugene Smith – had been recovered from the crime scene." Doc. 1 at 62. The court addresses each contention in turn.

1. Audiotape of Conversation with Anonymous Informant

The Alabama Court of Criminal Appeals found the following facts concerning the anonymous caller:

> The record reflects that after Sennett's murder, the State offered a $10,000 reward for information concerning Sennett's death. Capt. Ronnie May of the Colbert County Sheriff's Department testified that an anonymous caller contacted the Crime-stoppers program telephone number for the sheriff's department and said that she had information about the Sennett murder. She told police that she wanted to remain anonymous and that she would not give any information unless she did not have to disclose her name or testify at trial. She was assigned a number, 569S, and told to give the police this number whenever she called. May testified that the caller told police that three people – Smith, Parker, and Williams – were involved in the murder, she gave their

> addresses, the makes of their cars, and said that a VCR that had been taken from the Sennett's house was in Smith's house and that Parker had a knife. She said that Smith participated in the murder and that he did so for money and that Parker actually stabbed Sennett. May said that Caller 569S telephoned police several times to relay information. During the last telephone conversation she told police the identification number of the VCR stolen and gave a description of it to police. May stated that he then applied for a warrant to search Smith's house. May further testified that the police never knew the caller's identity.

Smith, 908 So. 2d at 284-85 (footnote omitted).

Ricky Miller, an investigator for the Colbert County District Attorney's office, testified at the June 27, 1994 suppression hearing that he spoke with the anonymous informant on the phone several times, Vol. 11 at 277, and that he taped one of the conversations "as a way of keeping up with what they said," but subsequently erased the tape "once [he] transferred [the content] to the form". *Id.* at 278. Smith claims that the state should have preserved and disclosed to him the tape recorded conversation because the "informant provided exculpatory information to the investigators, including that Mr. Parker – not Mr. Smith – stabbed Mrs. Sennett." Doc. 1 at 62. He contends that the destruction of the recording violated *Brady* and prejudiced him by depriving him of important evidence that he did not stab the victim. *Id.* at 63. But, this claim, which Smith raised for the first time in his amended Rule 32 petition, is procedurally barred from review in this court. As the trial court noted when it summarily

dismissed the claim, Smith could have raised this claim at trial or on direct appeal, and, in light of his failure to do so, it was "precluded pursuant to 32.2(a)(3 & 5), Alabama Rules of Criminal Procedure." Vol. 36, Tab 73 at 137.[46] Claims barred under Rules 32.2(a)(3) and (a)(5) of the Alabama Rules of Criminal Procedure are procedurally barred from habeas review in this court. *Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1335 (11th Cir. 2012) (citing *Brownlee v. Haley*, 306 F.3d 1043, 1066 (11th Cir. 2002) ("The district court correctly determined that the claims ... are procedurally defaulted under Rules 32.2(a)(3) and (5) because they were not raised either at trial or on appeal.") and *Holladay v. Haley*, 209 F.3d 1243, 1254 & n. 9 (11th Cir. 2000) (finding claims dismissed under Rule 32.2(a)(5) to be procedurally defaulted in federal court)).

Smith challenges this conclusion by maintaining that the state courts incorrectly found that his claim was procedurally barred. As Smith puts it, he "did raise

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[46] Smith arguably raised this claim in a footnote in his brief on appeal from the denial of his Rule 32 petition in which he referenced two audiotapes. Vol. 42, Tab 86 at 59-60, n.13 (alteration added). Smith has not raised a claim concerning a second audio tape recording in this court. Doc. 31 at 92 ("Mr. Smith's *Brady* claim in this Court is not premised on the existence of additional audiotaped conversations with the informant." In any event, based on this footnote, the Alabama Court of Criminal Appeals questioned "whether Smith's argument in his brief satisfies the requirement of Rule 28(a)(10), Ala. R. App. P." However, the court ultimately held that Smith's *Brady* claim was procedurally barred "by Rule 32.2(a)(3) and Rule 32.2(a)(5) because it could have been raised at trial and on appeal, but was not." Vol. 45, Tab 102 at 10-11. And, Smith "did not allege that the evidence was not known to him in time to raise the issue in a post-trial motion or on appeal." (Vol. 45, Tab 102 at 11).

the State's destruction of an audiotaped conversation with the informant in his *Brady* claim on direct appeal" when he stated in his brief supporting his petition for a writ of certiorari that the state "did record at least one telephone conversation with [the anonymous caller], but destroyed that tape and neglected to make any others, preventing the defense from hearing her voice." Doc. 31 at 91 (quoting Vol. 28, Tab 42 at 36). Mentioning the issue on appeal is not akin to actually litigating the claim below. And, indeed, Smith failed to raise in his brief to the Court of Criminal Appeals the claim concerning the destruction of the tape recording. Vol. 25, Tab 36 at 31-38. Instead, Smith claimed on direct appeal only that the state had a duty to discover the identity of the anonymous informant and disclose her name to him, *id.*, and the sentence in Smith's brief in support of his certiorari petition was part of the argument in support of this contention.

Alternatively, a finding that the single sentence in the certiorari petition was sufficient to raise the issue does not help Smith. To begin, Smith waived the claim by failing to include it in his brief to the Court of Criminal Appeals, and a party cannot raise an issue to a higher court he never raised below. In that respect, the Court of Criminal Appeals finding that he did not raise the claim at trial or on direct appeal was correct, and the claim is barred from review in this court. Moreover, the claim fails also, as the Court of Criminal Appeals found, based on Smith's failure to plead sufficient facts to support a *Brady* claim:

> Smith's petition discloses that he was aware at trial that an investigator had erased one audiotape. The trial record clearly indicates that Smith was well aware that law enforcement authorities had many conversations

> with the informant, and also that he was aware of the substance of the conversations with the informant. Smith pleaded no facts about the alleged contents of the second audiotape, or how disclosure of the audiotape would probably have led to a different result at trial or at sentencing. Thus, Smith did not plead sufficient facts to support a *Brady* claim, and the claim was properly dismissed.

Vol. 45, Tab 102 at 10-11.

To prove a *Brady* violation, Smith must show that the evidence was favorable to him, either because it is exculpatory or because it is impeaching; that it was suppressed by the state, either willfully or inadvertently; and that prejudice ensued. *See Boyd v. Comm'r, Ala. Dep't of Corr.*, 697 F.3d 1320, 1334-35 (11th Cir. 2012). As Smith puts it, because "[a] critical aspect of the defense strategy for the guilt/innocence and penalty phases was to establish that Mr. Parker – not Mr. Smith – inflicted the fatal stab wounds," the destruction of the tape deprived him of "important evidence to establish that fact." Doc. 1 at 63. Allegedly, "[t]he informant's evidence would have been critical at the culpability phase because it bears on Mr. Smith's intent, which is a necessary element of capital murder." Doc. 31 at 90 (citations omitted). But prejudice is established "only if the suppressed information is itself admissible evidence or would have led to admissible evidence." *Spaziano v. Singletary*, 36 F.3d 1028, 1044 (11th Cir. 1994). The tape recording of the anonymous Crimestoppers phone call is inadmissible hearsay – Smith would have offered it for the truth of the matters alleged by the caller, i.e. that Smith did not stab the victim. And, Smith has identified no admissible evidence that could have come from the

recording. To the extent Smith contends he could have used the tape to identify the anonymous caller, her testimony concerning who inflicted the fatal stab wounds on the victim would also have been inadmissible hearsay as there is no evidence that the caller had first hand knowledge of the crime itself.

Smith cannot establish that the destruction of the tape recording prejudiced him in violation of *Brady*. Thus, the Court of Criminal Appeals' dismissal of the claim was neither contrary to, nor an unreasonable application of *Brady*.

2. Willful Ignorance of Identity of Anonymous Informant

Smith also argues – for the first time in his reply brief – that the state violated *Brady* by "remain[ing] willfully ignorant of the informant's identity." Doc. 31 at 88. "[A]rguments raised for the first time in a reply brief are not properly before a reviewing court." *Herring v. Secretary, Dep't of Corrections*, 397 F.3d 1338, 1342 (11th Cir. 2005) (quoting *United States v. Coy*, 19 F.3d 629, 632 n. 7 (11th Cir. 1994)). Moreover, on direct appeal, Smith unsuccessfully claimed that the police had a duty to discover the identity of the anonymous caller and to provide that information to him. As the Court of Criminal Appeals found, however, "there is absolutely no evidence that any *Brady* violation occurred," and that Smith cannot establish the relevant test to show a *Brady* violation "because there is no dispute that the State did not know the identity of the anonymous caller." *Smith*, 908 So. 2d at 286. Additionally, as discussed above, any evidence the anonymous caller might have offered at trial concerning who stabbed the victim would have been inadmissible hearsay. Thus, Smith is also unable to prove that he suffered any prejudice

by not knowing the identity of the caller. Therefore, the Court of Criminal Appeals' finding that no *Brady* violation occurred was not unreasonable.

3. Hair Found at the Crime Scene

Smith also pleads a *Brady* violation related to a forensic report concerning hair found at the crime scene. Specifically, investigators found the victim partially covered with a blue and white afghan. Vol. 15, Tab 16 at 574. During the investigation, Colbert County Investigator Doug Hargett sent blood, hair, and saliva samples of Smith and the other two suspects (John Forrest Parker and Billie Gray Williams) to the Alabama Department of Forensic Science for serology testing. Vol. 39, Tab 81 at 696. A couple of days later, Hargett also sent hair samples from the victim's husband and a Kenneth *Ray* Smith "for the purpose of elimination." *Id.* at 700. Thereafter, a criminalist from that department, John Kilbourn, examined the evidence from the crime scene, including the blue and white afghan, and prepared a five-page report detailing the evidence he examined and his conclusions. *Id.* at 675-679. On the first page, Kilbourn noted that the report pertained to "[the victim], John Forrest Parker, suspect[,] Kenneth Eugene Smith, suspect[, and] Billie Gray Williams, suspect." *Id.* at 675 (alterations added). On page two, Kilbourn noted that he had received for analysis "[t]hree sealed envelopes each containing a known head hair sample and identified as containing hair from Kenneth E. Smith, Billie G. Williams and John F. Parker." *Id.* at 676 (emphasis added). On page five of the typed report, he noted that he had also received the "[k]nown head hair of [the victim's husband]" and the "[k]nown head hair of Kenneth Smith." *Id.* at 679. At some point, someone added "Ray" in handwriting between Kenneth and Smith.

Id. Finally, in the results section of his trace evidence report, Kilbourn found:

> Hairs recovered from the cap (item 8) were similar in many characteristics to the known head hair of Kenneth Eugene Smith. These possibly could have come from this individual. One hair also recovered from the afghan was noted to be consistent with the known hair of Kenneth Smith.
>
> None of the other questioned hairs recovered from the scene were found to be similar to the known hair of the suspects.

Id.

Based on the contention that the second Kenneth Smith referenced in the report is Kenneth Ray Smith, Smith claims that the prosecution violated *Brady* by failing to produce the trace evidence report and to inform him that "the known hair of Kenneth Ray Smith was consistent with a hair on the afghan." Doc. 1 at 65. He argues, in part, that the report was exculpatory because, "[a]ccording to the State's theory of the case Kenneth Ray Smith had no connection to the crime or the Sennetts," and that "[t]he presence of his hair at the crime scene could only mean that the evidence was mishandled or contaminated, which would have been critical to Mr. Smith's defense at every phase of the proceeding." Doc. 31 at 93. And, as to prejudice, Smith claims that if he had "known that forensic analysts had determined that a hair on the afghan was consistent with the known hair of Kenneth Ray Smith, he would have used that information affirmatively in all phases of [his]trial." *Id.* at 94.

Smith unsuccessfully raised this claim in his amended Rule 32 petition, and the Court of Criminal Appeals affirmed the trial court, finding that:

> [T]he circuit court correctly held that Smith failed to prove that Kenneth Ray Smith's hair was, in fact, on the afghan, ... He failed to prove the origin of the trace evidence report with the handwritten notation presented to the Rule 32 court that, Smith says, was produced and then suppressed by the State, and he failed to prove who wrote on the report. Furthermore, Smith did not prove that the State suppressed any evidence, and ... one of Smith's trial attorneys, testified by affidavit that he was shown a copy of the marked report that postconviction counsel represented to him was recently produced by the Alabama Department of Forensic Sciences. Smith continues to acknowledge several significant points in his briefs on return to remand: he does not know who made the notation on the trace evidence report, when the person made the notation and why the person made it, and he admits that the notation only "suggests" that someone at the Department of Forensic Sciences made it.... By his own arguments, Smith demonstrates that he has failed to prove that the State suppressed any material evidence.
>
> Even if Kenneth Ray Smith's hair had been found on the afghan and the State had suppressed that evidence, and we do not find either of those points to have been proven by Smith, there is no reasonable probability that the result of the trial would have been different, ... The presence of another person's hair would not negate Smith's participation in the crime; that participation was thoroughly established by Smith's own confession, in addition to direct and circumstantial evidence of

> Smith's active planning of and participation in the brutal murder-for-hire....

Vol. 45, Tab 102 at 13-17(footnotes omitted). Smith disagrees with this decision – contending that it is contrary to or an unreasonable application of *Brady* and an unreasonable determination of the facts. Doc. 31 at 95

To prove that the state's failure to produce Kilbourn's report violated *Brady*, Smith must show that the report was favorable to him; that it was suppressed by the state; and that he suffered prejudice. *See Boyd*, 697 F.3d at 1334-35 (11th Cir. 2012). Smith cannot make the prejudice showing because, even assuming that the report indeed indicated that the hair found on the afghan belonged to Kenneth *Ray* Smith rather than Smith and that the state suppressed the report, Smith cannot show a "reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). After all, in addition to concluding that "one hair also recovered from the afghan was noted to be consistent with the known hair of Kenneth Smith," the report found also that hairs "similar in many characteristics to the known head hair of Kenneth *Eugene* Smith" were found on a cap that was found at the crime scene. Furthermore, Smith confessed to being at the crime scene and to taking part in the crime. Thus, any evidence of the presence of a hair from Kenneth Ray Smith on the afghan would not have negated Smith's participation in the crime. And, to the extent that Smith is contending that the presence of Kenneth Ray Smith's hair at the victim's home established that the state mishandled or contaminated the forensic evidence from the crime

scene, this argument is unavailing because no forensic evidence was admitted at the trial.

To close, no reasonable likelihood exists that evidence that the state found a hair from Kenneth Ray Smith at the crime scene would have affected the jury's judgment. Thus, the Court of Criminal Appeals' finding that Smith failed to prove the elements of a *Brady* claim was neither contrary to, or an unreasonable application of *Brady*, nor was it based on an unreasonable determination of the facts.

Claim D. Whether The Trial Court's Complicity Instruction Violated Smith's Sixth, Eighth, and Fourteenth Amendment Rights by Relieving the State of its Burden to Prove That He Had a Specific Intent to Kill

Based on Alabama law, which requires a showing of a "particularized intent to kill" for a conviction of capital murder as an accomplice, *see Ex parte Raines*, 429 So. 2d 1111, 1112 (Ala. 1982), Smith challenges the trial court's complicity instruction. More specifically, Smith claims the court "erroneously instructed the jury that it could find [him] guilty of capital murder under a theory that effectively eliminated the State's burden to prove beyond a reasonable doubt that he had the requisite specific intent to kill." Doc. 1 at 66. This contention is unavailing because, as the Court of Criminal Appeals found, "the trial court, on more than one occasion, instructed the jury that it must find a specific or particularized intent on the defendant's part before the jury could convict a defendant of capital murder." *Smith*, 908 So. 2d at 297. Smith argues that the state appellate court's decision is an unreasonable application of *In re Winship*, 397 U.S. 358 (1970) and

Sandstrom v. Montana, 422 U.S. 510 (1979).[47] Doc. 31 at 104. In *Winship*, the Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." 397 U.S. at 364. In *Sandstrom*, the Court held that a jury instruction violates the Due Process Clause if it relieves the state of "the burden of proof enunciated in *Winship* on the critical question of petitioner's state of mind." 422 U.S. at 521.

When reviewing an "ambiguous" instruction, this court must examine "whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way that violates the Constitution." *Estelle v. McGuire*, 502 U.S. 62, 72 (1991) (internal quotation marks omitted). The standard requires courts to look at the challenged jury instruction as a whole and to avoid strained readings. *See Jones v. United States*, 527 U.S. 373, 391 (1999) ("We previously have held that instructions that might be ambiguous in the abstract can be cured when read in conjunction with other instructions.") (citations omitted). Consistent with this charge, the court has reviewed the trial court's entire instructions to the jury and is satisfied that the complicity instruction was constitutionally sufficient. In the charge, the trial court made it clear that the jury needed to find that Smith had a specific intent to kill before it could

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[47] Smith also asserts that the finding is an unreasonable application of *Schad v. Arizona*, 501 U.S. 624 (1991), because the trial court effectively instructed the jury on two separate offenses and it is impossible to tell whether the jury unanimously agreed that he was guilty of one or the other. Doc. 1 at 70-72; Doc 31 at 101-03. This claim, which Smith did not present in state court, is barred from review in this court.

convict Smith of capital murder under any theory. Thus, the Court of Criminal Appeals' decision was not an unreasonable application of *Winship* or *Sandstrom*.

Claim E. Whether The Trial Court Violated Smith's Rights under the Fourth, Fifth, and Fourteenth Amendments by Admitting His Custodial Statement, Which Was the Fruit of an Unlawful Search and Unlawful Arrest

Smith challenges the admission of the search warrant a Lauderdale County circuit judge issued for the residence of Renea Bryant in Florence to look for a Samsung video cassette recorder, Model VT-311TQ, serial number 7020101324, stolen from the murder scene. Vol. 8 at 1599. Captain May and Lauderdale County Investigator Charles Ford found the VCR during the search. Vol. 8 at 1599 and Vol. 11 at 227-35. After finding the VCR, Captain May read Smith, who was present during the search, his *Miranda* rights and Smith agreed to accompany Captain May to the sheriff's office, Vol. 11 at 235-43, where Smith confessed to his participation in the murder and to stealing the VCR. Vol. 23 at 297-304. Smith now contends that the state recovered the VCR through an unlawful search, and that his custodial statement was the result of an unlawful arrest. Doc. 1 at 72.

1. **Whether The Search Warrant Was Invalid Because it Was Obtained Based on Information Provided by an Anonymous Informant Who Conducted a Warrantless Search of Smith's Home as an Agent of the State**

Smith first claims that the search warrant was "procured based on information obtained by police improperly and illegally from informant '569S,' who

searched Mr. Smith's home at the behest of police, when the police themselves could not lawfully enter." *Id.* at 73. Smith contends that the anonymous informant acted as an agent of the state, making her warrantless entry into his home illegal, and the warrant based on information she obtained in his home invalid. *Id.* at 75. He claims that the court should have excluded evidence of the VCR and the custodial statement obtained as a direct result of the search. *Id.*

Trial counsel raised this claim in a pretrial motion to suppress. Vol. 2 at 362-76. The trial court denied the motion. Vol. 9, Tab 6; Vol. 10, Tab 7 - Vol. 11 at 385. Counsel then raised the claim on direct appeal after Smith's conviction. Vol. 25, Tab 36 at 39-49. The Court of Criminal Appeals denied the claim on the merits, finding, based on the evidence, that the informant acted as a private individual and "of her own free will." *Smith*, 908 So. 2d at 289. "[W]here the State has provided an opportunity for full and fair litigation of a Fourth Amendment claim, a state prisoner may not be granted federal habeas corpus relief on the ground that evidence obtained in an unconstitutional search or seizure was introduced at his trial." *Stone v. Powell*, 428 U.S. 465, 494 (1976) (footnotes omitted). "An 'opportunity for full and fair litigation' means just that: an opportunity. If a state provides the processes whereby a defendant can obtain full and fair litigation of a fourth amendment claim, *Stone v. Powell* bars federal habeas corpus consideration of that claim whether or not the defendant employs those processes." *Caver v. State of Ala.*, 577 F.2d 1188, 1192 (5th Cir. 1978). "'[F]ull and fair consideration' in the context of the Fourth Amendment includes 'at least one evidentiary hearing in a trial court and the availability of meaningful appellate review when there are facts in dispute, and full consideration by an

appellate court when the facts are not in dispute.'" *Bradley v. Nagle*, 212 F.3d 559, 565 (11th Cir. 2000) (quoting *Caver*, 577 F.2d at 1191).

The state trial court afforded Smith an evidentiary hearing on the motion to suppress. Vol. 9, Tab 6; Vol. 10, Tab 7. And when Smith challenged the ruling, the state appellate court issued a reasoned decision, finding that Smith's Fourth Amendment rights were not violated because the informant was acting as a private citizen. *Smith*, 908 So. 2d at 286-89. Despite this, Smith contends that he was not provided an opportunity for full and fair litigation of this claim because the Court of Criminal Appeals misapplied federal constitutional law in reaching its decision. Doc. 1 at 76. But *Stone* applies even if a state court errs in its Fourth Amendment analysis. As the Fifth Circuit held in *Swicegood v. State of Alabama*,

> If this argument [that the state denied the petitioner a fair hearing by misapplying federal constitutional law] were correct, the federal courts would consider the merits of fourth amendment habeas cases whenever the state courts erred in their fourth amendment analysis and would refuse to consider the merits of those cases in which the state courts were correct. That, of course, is federal habeas review of state court fourth amendment decisions, precisely what *Stone* forbids. If the term "fair hearing" means that the state courts must correctly apply federal constitutional law, *Stone* becomes a nullity.

577 F.2d 1322, 1324 (5th Cir. 1978).[48] Therefore, even if Smith is correct, *Stone* still bars this court from considering his claim because he received a full and fair opportunity to litigate this claim in state court.

2. Whether The Search Exceeded the Scope of the Warrant

Smith contends also that the search leading to his statement and recovery of the VCR exceeded the scope of the warrant because law enforcement searched his entire home for evidence in general even though the warrant only specified the VCR. Docs. 1 at 77-78; 31 at 108-09. Again, Smith received an opportunity to argue this claim in the hearing on his motion to suppress, Vol. 9, Tab 6; Vol. 10, Tab 7, and on direct appeal, where the Court of Criminal Appeals found that the "police did not exceed the scope of the warrant." *Smith*, 908 So. 2d at 289.[49] Put simply, the state courts fully and fairly considered this claim. Therefore, because Smith received a full and fair opportunity to litigate this claim in state court, *Stone* precludes this court from reviewing the state court's decision.

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[48] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the Eleventh Circuit Court of Appeals adopted as binding precedent all decisions of the Fifth Circuit decided before October 1, 1981.

[49] In issuing this finding, the state appellate court noted, in part, that:

> The record reflects that, when executing the search warrant, officers entered the home and did an initial security search to determine the location of its occupants. May testified that the VCR was recovered within 10 minutes after the search began. Police did open several drawers in the home. Immediately upon recovering the VCR police discontinued their search. The VCR was the only item taken during the search.

Smith, 908 So. 2d at 289.

3. Whether Smith's Custodial Statement Resulted from an Unlawful Arrest in Lauderdale County by a Colbert County Law Enforcement Officer Outside His Jurisdiction

Finally, Smith asserts that the trial court should have suppressed his statement because it resulted from an illegal unlawful arrest in Lauderdale County by a Colbert County law enforcement officer, in violation of Ala. Code §§ 15-10-1[50] and 15-10-70. Docs. 1 at 78-82; 31 at 109-11. Again, Smith received a hearing on his motion to suppress his custodial statement. Vol. 9, Tab 6; Vol. 10, Tab 7. And, the Court of Criminal Appeals also rejected his claim finding that Sec. 15-10-70 "has no application to the arrest in this case because Smith was arrested by officers from the county where the crime occurred," and that officers from Smith's own county were also involved in the search which was the result of a search warrant issued by a judge in Lauderdale County. *Smith*, 908 So. 2d at 291-92. The court found also that "§ 15-10-1 has been superceded by the adoption of Rule 3.3 [of Ala. R. Crim. P]," which "provides that '[t]he arrest warrant shall be directed to and may be executed by any law enforcement officer within the State of Alabama,' " and "effectively did away with the requirement that an official may make a legal arrest only in the county or municipality in which the officer is employed." *Id.* Therefore,

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50 Ala. Code § 15-10-1 provides:

An arrest may be made, under a warrant or without a warrant, by any sheriff or other officer acting as sheriff or his deputy, or by any constable, acting within their respective counties, or by any marshal, deputy marshal or policeman of any incorporated city or town within the limits of the county.

because the state courts afforded Smith an opportunity, even if Smith is correct that the Court of Criminal Appeals applied "an incorrect legal standard" in denying this claim, *Stone* still applies and bars this court from reviewing the state court's decision. *Swicegood*, 577 F.2d at 1324.

Claim F. Whether The Trial Court's Violated Smith's Rights under the Sixth and Fourteenth Amendments by Admitting Evidence about Charles Sennett's Suicide

The prosecution's theory at trial was that the victim's husband, Charles Sennett, hired Smith and two other men to kill his wife. Vol. 14, Tab 14 at 526. During the opening, the prosecution mentioned that Mr. Sennett "took his own life by shooting himself in the chest" a week after the murder. Vol. 15 at 536. Defense counsel objected, in part, on prejudice,[51] and argued also that reference to the suicide was the "most powerful consciousness of guilt that could possibly be." *Id.* at 538. The prosecution countered

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[51] The full objection stated:

> I object to the reference to the Reverend Sennett's suicide, self-inflicted gun shot wound pursuant to the Fifth, Sixth, Eights and Fourteenth Amendments, Section 6 of the Alabama Constitution and the Alabama Rules of Evidence. That was an assertive act. It was not to convey facts. It makes a statement. It was not committed in the course or pursuant to any conspiracy. There is no way I can cross examine those inferences of guilt and either for [sic] object to any reference to this event that has no probative value with respect to the charged offense in the indictment. It has absolutely no link to my client's ability or state of mind and it's highly prejudicial. I would also like the record to reflect a continuing objection to the introduction of any evidence – obviously now the horse is out of the barn and it is too late to shut the door.

Vol. 14, Tab 14 at 536-37.

that it would offer evidence of the suicide only to "address the question of where is Charles Sennett," why he would not testify at the trial, and not as an inference of Smith's guilt. *Id.* at 537-38. As a result, the trial court overruled Smith's objection. *Id.* at 538. Counsel objected again when Captain May testified during the trial that he last saw Mr. Sennett after Mr. Sennett had shot himself at his son's home, and that Mr. Sennett subsequently died at the hospital. *Id.* at 681-82.

Smith argues that Captain May's testimony was inadmissible hearsay because it was "nonverbal conduct asserting Mr. Sennett's guilt in planning the murder of his wife," doc. 1 at 83, and that the admission of this testimony violated the Confrontation Clause, *id.* at 111-13. To the extent Smith is arguing that testimony concerning the suicide of Mr. Sennett was inadmissible hearsay, "it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991). Rather, "federal courts my intervene in the state judicial process only to correct wrongs of a constitutional dimension." *Wainwright v. Goode*, 464 U.S. 78, 83 (1983). Because this claim is not cognizable on habeas review, it is due to be denied.

To show the requisite constitutional dimension, Smith argues that the trial court's admission of this testimony violated his right to confrontation under *Crawford v. Washington*, 124 S. Ct. 1354 (2005) and *Bruton v. United States*, 391 U.S. 123 (1968). Doc. 31

at 111-13.[52] Smith contends that the Court of Criminal Appeals' resolution of this issue is contrary to or an unreasonable application of *Bruton*. Doc. 31 at 113.[53] Specifically, he argues that Mr. Sennett's

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[52] In *Bruton*, the Supreme Court held that the trial court's admission of a co-defendant's confession implicating the defendant in a joint trial violated the defendant's right of cross-examination under the Confrontation Clause of the Sixth Amendment. *Bruton*, 391 U.S. at 131, 136-37. In *Crawford*, the Court held that the Confrontation Clause permits "[t]estimonial statements of witnesses absent from trial ... only where the declarant is unavailable, and only where the defendant has had a prior opportunity to cross-examine." *Crawford*, 541 U.S. 36 at 52.

[53] In denying this claim on direct appeal, the Alabama Court of Criminal Appeals held:

> However, evidence of Sennett's suicide was not hearsay. "Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter." *Bryant v. State*, [Ms. CR–98–0023, November 19, 1999] —— So. 2d ——, —— (Ala. Crim. App. 1999), quoting *James v. State*, 723 So. 2d 776, 779 (Ala.Crim.App.), *cert. denied*, 723 So. 2d 786 (Ala. 1998).
>
> Without considering other aspects of hearsay, evidence of Charles Sennett's suicide was not offered for the truth of the matter asserted. The State argued at trial that it was offering this evidence to explain Charles Sennett's absence in the investigation and trial. Smith further admits in his brief that there are many reasons why someone might commit suicide and there were several possible explanations in this case.
>
> Moreover, Smith has failed to show any prejudice. Smith argued that evidence of the suicide tended to show his guilt and therefore should not have been admitted at trial. Smith's attorney, in opening statement, devoted much of his remarks to discussing Sennett's guilt and the fact that he had a particularized intent to kill his wife. Smith admitted Charles Sennett's participation in the murder for hire. Based on the record here, admitting evidence of Sennett's suicide did not

suicide was "nonverbal conduct asserting his guilt in planning his wife's murder," *id.* at 112, and that "because Mr. Smith allegedly had been hired by Mr. Sennett, the jury could infer Mr. Smith's guilt from Mr. Sennett's suicide," and that he "had no opportunity to cross-examine [Mr. Sennett]." *Id.* at 113. This argument is unavailing because, in the absence of any evidence as to why Mr. Sennett killed himself, Smith cannot establish that Mr. Sennett's suicide was "nonverbal conduct asserting [Smith's] guilt." *See United States v. Goodman*, 605 F.2d 870, 883 (5th Cir. 1979) ("Appellants' claim that Herbert Goodman's suicide is tantamount to a confession is unfounded in the absence of any evidence of why he committed such an act."). And, Smith's "argument that [Mr. Sennett's] suicide deprived [Smith] of [his] right to confront witnesses [was] unfounded, because there was no showing that [Mr. Sennett] would have taken the stand to testify" if he were alive. *Id.*

Moreover, even assuming that Mr. Sennett's suicide amounted to a confession and deprived Smith of the right to cross-examine him, Smith is entitled to no relief. *Bruton* excludes "only those statements by a non-testifying defendant which directly inculpate a co-defendant." *United States v. Beale*, 921 F.2d 1412, 1425 (11th Cir. 1991). "[A]dmission of a codefendant's statement is not error under *Bruton* where the statement 'was not incriminating on its face, and became so only when linked with evidence introduced later at trial.' " *United States v. Joyner*, 899 F.3d 1199, 1207 (11th Cir. 2018) (quoting *United States v. Arias*, 984 F.2d 1139, 1142 (11th Cir. 1993)). Thus,

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amount to reversible error. *See Richardson v. State*, 690 S.W.2d 22 (Tex. App. 1985).

Smith, 908 So. 2d at 293.

for *Bruton* to apply, Mr. Sennett's suicide must be "clearly inculpatory standing alone." *Id.* (quoting *United States v. Satterfield*, 743 F.2d 827, 849 (11th Cir. 1984)), *cert. denied*, 471 U.S. 1117 (1985). Smith has failed to make this showing, and consequently the Court of Criminal Appeals' denial of this claim was neither contrary to, nor an unreasonable application of *Bruton*.

Likewise, Smith's claim that the Court of Criminal Appeals' resolution of this issue was based on an unreasonable determination of the facts also fails. Doc. 31 at 113. Smith challenges the portion of the court's opinion that "Smith was not prejudiced by the admission of evidence of Mr. Sennett's suicide because 'Smith's attorney, in opening statement, devoted much of his remarks to discussing Sennett's guilt and the fact that he had a particularized intent to kill his wife' and 'Smith admitted Charles Sennett's participation in the murder for hire.'" *Id.* He argues that this finding was unreasonable because:

> Mr. Smith's attorney told the jury that Mr. Smith "agreed with Sennett to go beat Elizabeth Dorlene Sennett, to rough her up, to make it look like a robbery for fast cash," and "with respect to Mr. Smith the terms, the terms never changed." Vol. 15, Tab R-15 at 548. The critical issue was not Mr. Sennett's intent; it was Mr. Smith's. And the admission of evidence of Charles Sennett's suicide absent the opportunity to cross-examine him about the plan originally posed to Billy Williams and through him, to Mr. Smith, prejudiced Mr. Smith.

Id. at 114.

Title 28 U.S.C. § 2254(d)(2) allows habeas petitioners to avoid the bar to habeas relief on claims adjudicated

on the merits by showing that the state court's decision was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." However, "[i]t does not repeal the command of § 2254(a) that habeas relief may be afforded to a state prisoner 'only on the ground' that his custody violates federal law." *Wilson v. Corcoran*, 562 U.S. 1, 6 (2010). Because the admission of testimony about Mr. Sennett's suicide does not violate federal law, Smith is not entitled to habeas relief on this claim even assuming that the trial court's findings of fact on this issue were unreasonable.

Claim G. Whether Alabama's Method of Execution Constitutes Cruel and Unusual Punishment in Violation of the Eighth and Fourteenth Amendments

Smith alleges that Alabama's lethal injection protocol unconstitutionally "inflicts unnecessary pain on people on whom it is imposed." Doc. 1 at 87. Allegedly, injection of the second and third drugs used in Alabama's three-drug protocol is "excruciatingly painful," and that if the first drug in the protocol does not render the inmate unconscious, "administration of the combination of the second and third drugs paralyzes the inmate and forces him to experience the excruciating pain of his own agonizing death while rendering him unable to express his pain by any means." *Id.* at 85. This claim is not cognizable in this habeas corpus case: "[f]ederal habeas corpus law exists to provide a prisoner an avenue to attack the fact or duration of physical imprisonment and to obtain immediate or speedier release." *Valle v. Sec'y, Fla. Dep't of Corr.*, 654 F.3d 1266, 1267 (11th Cir. 2011). In contrast, a death row inmate's challenge to the state's method of execution attacks "the means by

which the state intends to execute him, which is a circumstance of his confinement." *McNabb v. Comm'r, Ala. Dep't of Corr.*, 727 F.3d 1334, 1344 (11th Cir. 2013). "For that reason, '[a] § 1983 lawsuit, not a habeas proceeding, is the proper way to challenge lethal injection procedures.' " *Id.* (quoting *Tompkins v. Sec'y, Dep't of Corr.*, 557 F.3d 1257, 1261 (11th Cir. 2009)). *See also Glossip v. Gross*, 135 S. Ct. 2726, 2738 (2015) ("[A] method-of-execution claim must be brought under § 1983 because such a claim does not attack the validity of the prisoner's conviction or death sentence.") (citing *Hill v. McDonough*, 547 U.S. 573, 576 (2006)). Because this claim is not cognizable in a federal habeas corpus action, it is due to be denied.

VI. CONCLUSION

For all these reasons, and after careful review, the court concludes that Smith's petition, doc. 1, and his motion for an evidentiary hearing, doc. 32, are due to be denied. A separate order will be entered.

DONE and ORDERED this 12th day of September, 2019.

Appendix E

Rel: 02/07/2014

Court of Criminal Appeals
State of Alabama
P.O. Box 301555
Montgomery, AL 36130-1555

MARY BECKER WINDOM
Presiding Judge
SAMUEL HENRY WELCH
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MEMORANDUM

CR-07-1412
Jefferson Circuit Court CC-89-1149.61

Kenneth Eugene Smith v. State of Alabama

On Application for Rehearing

WELCH, Judge.

This Court's memorandum of March 22, 2013, is withdrawn, and the following memorandum is substituted therefor.

Kenneth Eugene Smith was convicted and sentenced to death for the capital murder of Elizabeth Dorleen Sennett. Smith's conviction and sentence were affirmed by this Court. Smith v. State, 908 So. 2d 273 (Ala. Crim. App. 2000). The Alabama Supreme Court granted certiorari review but later quashed the writ of certiorari as having been improvidently granted. Ex parte Smith, 908 So. 2d 302 (Ala. 2005). The United States Supreme Court denied review. Smith v. Alabama, 546 U.S. 928 (2005). Smith then filed a petition pursuant to Rule 32, Ala. R. Crim. P., and he raised numerous grounds for relief from his conviction and sentence. Smith filed an amended Rule 32 petition. The circuit court summarily dismissed Smith's petition, and Smith appealed to this Court. This Court reversed the judgment and remanded the case because the circuit court failed to address the claims in the amended petition. Smith v. State, [Ms. CR-07-1412, Dec. 10, 2010] ___ So. 3d ___ (Ala. Crim. App. 2010). On remand, the circuit court allowed Smith to present evidence by affidavit for a few claims he had raised in the amended petition. The circuit court then entered an order summarily dismissing or denying all of the claims in the amended petition. Compelled by Rule 32.9, Ala. R. Crim. P., that requires a circuit court to make findings of fact as to each material issue of fact presented, and by Ex parte McCall, 30 So. 3d 400

(Ala. 2008), we remanded the case a second time, and ordered the circuit court to comply with those requirements. Smith v. State, [Ms. CR-07-1412, Feb. 10, 2012] ___ So. 3d ___ (Ala. Crim. App. 2012) (opinion on return to remand). The circuit court submitted a return to second remand on March 15, 2012. We remanded the case by order on November 29, 2012, for the trial court to make fact findings as to certain claims it had failed to address on return to second remand. The circuit court submitted a return to third remand on January 3, 2013, and has substantially complied with our directions. The case is now before this Court for final review of the circuit court's judgment. We have reviewed and will now address all claims raised by Smith in his briefs to this Court that were not already resolved by our previous remands of the case.

Standard of Review

Smith is appealing the circuit court's dismissal of his postconviction petition. Rule 32.3, Ala. R. Crim. P., provides that the petitioner has "the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." Rule 32.6(b), Ala. R. Crim. P., sets forth the pleading requirements for postconviction petitions:

> "The petition must contain a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the factual basis of those grounds. A bare allegation that a constitutional right has been violated and mere conclusions of law shall not be sufficient to warrant any further proceedings."

With regard to the satisfaction of the pleading requirements, this Court has held:

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

Boyd v. State, 913 So. 2d 1113, 1125 (Ala. Crim. App. 2003). "If, assuming every factual allegation in a Rule 32 petition to be true, a court cannot determine whether the petitioner is entitled to relief, the petitioner has not satisfied the burden of pleading under Rule 32.3 and Rule 32.6(b). See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003)." Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

"[W]hen the facts are undisputed and an appellate court is presented with pure questions of law, [our] review in a Rule 32 proceeding is de novo." Ex parte White, 792 So. 2d 1097, 1098 (Ala. 2001). When the facts are disputed and the circuit court in a postconviction proceeding resolves those disputed facts, this Court generally reviews whether the circuit court abused its discretion when it denied the petition. E.g., Hunt v. State, 940 So. 2d 1041, 1049 (Ala. Crim. App. 2005). However, in Ex parte Hinton,

[Ms. 1110129, Nov. 9, 2012] ___ So. 3d ___ (Ala. 2012), the Alabama Supreme Court reversed this Court's judgment after it applied the abuse-of-discretion standard of review to the circuit court's findings in a Rule 32 proceeding. Hinton had argued, "'Alabama law is well-settled that where a trial court does not receive evidence ore tenus, but instead makes its judgment based on the cold trial record, no presumption of correctness applies to the trial court's conclusions and the appellate court must review the evidence de novo.' Hinton's brief, at p. 6." ___ So. 3d at ___. The Alabama Supreme Court agreed, and held:

> "In the present case, the circuit court did indeed base its determination that [the witness] was qualified to testify as an expert upon the 'cold trial record.' As a result, it was in no better position than was an appellate court to make the determination it made. Accordingly, the Court of Criminal Appeals erred in applying the abuse-of-discretion standard of review. We reverse its judgment and remand the case to the Court of Criminal Appeals for it to apply a de novo standard of review in reviewing the circuit court's judgment that [the witness] was qualified to testify as a firearms-identification expert."

___ So. 3d at ___.

As in Ex parte Hinton, the circuit court here did not receive evidence ore tenus. The circuit court received evidence on a few claims, but the evidence was in the form of affidavits. Therefore, the circuit court was in no better position than is this Court in making any necessary factual determinations and, based on Ex parte Hinton, we will review de novo the

judgment of the circuit court. See also Padgett v. Conecuh County Comm'n, 901 So. 2d 678, 685 (Ala. 2004)("[A]s to issues of law, or 'where there are no disputed facts and where the judgment is based entirely upon documentary evidence, no ... presumption of correctness applies; our review is de novo.' Alfa Mut. Ins. Co. v. Small, 829 So. 2d 743, 745 (Ala. 2002).").

Further, this Court has recognized:

> "'[T]here exists a long-standing and well-reasoned principle that we may affirm the denial of a Rule 32 petition if the denial is correct for any reason.' McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007). That general rule is limited only by due-process constraints that 'require some notice at the trial level, which was omitted, of the basis that would otherwise support an affirmance, such as when a totally omitted affirmative defense might, if available for consideration, suffice to affirm a judgment.' Liberty Nat'l Life Ins. Co. v. University of Alabama Health Servs. Found., P.C., 881 So. 2d 1013, 1020 (Ala. 2003). In the context of Rule 32 proceedings, 'the language of Rule 32.3 [placing the burden on the State to plead any ground of preclusion in Rule 32.2] ... has created the narrow due-process constraint discussed in Liberty National,' McNabb, 991 So. 2d at 334, by making the preclusions in Rule 32.2 affirmative defenses and prohibiting this Court from sua sponte applying those preclusions for the first time on appeal. See Ex parte Clemons, 55 So. 3d 348 (Ala. 2007). Thus, although the preclusions in Rule 32.2 "'apply with equal

> force to all cases, including those in which the death penalty has been imposed,'" Nicks v. State, 783 So. 2d 895, 901 (Ala. Crim. App. 1999) (quoting State v. Tarver, 629 So. 2d 14, 19 (Ala. Crim. App. 1993)), only if those affirmative defenses are asserted by the State or found by the circuit court may this Court apply them on appeal."

Bryant v. State, [Ms. CR–08–0405, Feb. 4, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011).

Finally, we note that Rule 32.7(d), Ala. R. Crim. P., authorizes a circuit court to summarily dismiss a Rule 32 petition

> "[i]f the court determines that the petition is not sufficiently specific, or is precluded, or fails to state a claim, or that no material issue of fact or law exists which would entitle the petitioner to relief under this rule and that no purpose would be served by any further proceedings …."

I.

Smith argues in Part I of his brief on return to first remand that the circuit court erred when it permitted him to present evidence only on a limited number of his claims, and he says this Court should reverse the circuit court's judgment and remand the case for an evidentiary hearing on all of his claims. This section of Smith's brief does not comply with the requirements of Rule 28(a)(10), Ala. R. App. P.

> "Rule 28(a)(10), Ala. R. App. P., requires that an argument contain 'the contentions of the appellant/petitioner with respect to the issues presented, and the reasons therefor,

> with citations to the cases, statutes, other authorities, and parts of the record relied on.' '[W]e are not required to consider matters on appeal unless they are presented and argued in brief with citations to relevant legal authority.' Zasadil v. City of Montgomery, 594 So. 2d 231, 231 (Ala. Crim. App. 1991). 'When an appellant fails to cite any authority for an argument on a particular issue, this Court may affirm the judgment as to that issue, for it is neither this Court's duty nor its function to perform an appellant's legal research.' City of Birmingham v. Business Realty Inv. Co., 722 So. 2d 747, 752 (Ala. 1998). Failure to comply with Rule 28(a)(10) has been deemed a waiver of the issue presented. See, e.g., Hamm v. State, 913 So. 2d 460, 486 (Ala. Crim. App. 2002)."

C.B.D. v. State, 90 So. 3d 227, 239 (Ala. Crim. App. 2011). This Court has previously applied Rule 28(a)(10) when reviewing postconviction judgments in capital cases. See, e.g., Washington v. State, [Ms. CR-07-1351, April 27, 2012] ___ So. 3d ___ (Ala. Crim. App. 2012); McWhorter v. State, [CR-09-1129, Sept. 30, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011); Bryant v. State, [Ms. CR-08-0405, Feb. 4, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011).

Smith's one-page argument on this issue consists of a general allegation that all of his claims were sufficiently pleaded and that, therefore, he was entitled to a full evidentiary hearing on all of his claims. He cites no legal authority, and he does not include any citation to the record to identify even one specific claim that, he says, was improperly dismissed, nor does he explain why the circuit court's judgment as to any specific claim was in error.

Smith's argument on this issue does not comply with Rule 28(a)(10), and it is deemed to be waived.

II.

Smith argues in Part II of his brief on return to first remand that, with respect to the claims on which the circuit court permitted him to submit evidence, he was deprived of due process because he was not permitted to subpoena material witnesses, including the district attorney and the judge who tried the case, and compel them to testify under oath. Specifically, Smith argues, "Due process and Rule 32 guaranteed him the right to subpoena material witnesses, including adverse witnesses who were formerly employed by the State, and compel their testimony through cross-examination in support of his claims. See Chambers v. Mississippi, 410 U.S. 284, 195 (1973)." (Smith's brief on first return to remand, at p. 38.) Smith further argues that the United States Constitution forbids application of a rule of evidence that denies a criminal defendant his or her right to present a complete defense, citing Holmes v. South Carolina, 547 U.S. 319 (2006). Chambers and Holmes are irrelevant here because Smith is no longer a criminal defendant presenting a defense, but is a convicted capital murderer in a postconviction proceeding. Smith "is a convicted capital murderer who, in Rule 32 proceedings, is a civil petitioner with the burden of proving that he is entitled to relief on the grounds alleged in the petition he filed." McGahee v. State, 885 So. 2d 191,229 (Ala. Crim. App. 2003). The State in a Rule 32 proceeding does not present "adverse witnesses" as it did in the criminal prosecution against Smith, therefore, Smith's

argument about being denied his constitutional right to cross-examine adverse witnesses has no merit.[1]

Smith also asserts that Rule 32, Ala. R. Crim. P., requires that he be afforded the opportunity to compel evidence from witnesses at a hearing, but he has provided no legal authority supporting that assertion. To the contrary, Alabama courts have repeatedly held that a postconviction petitioner is not entitled to an evidentiary hearing in all cases. For example, in Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003), Boyd argued that the circuit court had erred when it dismissed his petition without holding an evidentiary hearing, and this Court stated:

> "As this court has previously noted:
>
> > "'"An evidentiary hearing on a [Rule 32] petition is required only if the petition is 'meritorious on its face.' Ex parte Boatwright, 471 So. 2d 1257 (Ala. 1985). A petition is 'meritorious on its face' only if it contains a clear and specific statement of the grounds upon which relief is sought, including full disclosure of the facts relied upon (as opposed to a general statement concerning the nature and effect of those facts) sufficient to show that the petitioner is entitled to relief if those facts are true. Ex parte

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[1] Smith argued in other portions of his briefs to this Court that the circuit court denied his right to "cross-examine" material or "adverse" witnesses at an evidentiary hearing, (Smith's brief on return to first remand, at pp. 34, 40; Smith's reply brief on return to first remand, at p. 13), and those arguments are equally unavailing.

> Boatwright, supra; Ex parte Clisby, 501 So. 2d 483 (Ala. 1986)."
>
> "'Moore v. State, 502 So. 2d 819, 820 (Ala. 1986).'
>
> "Bracknell v. State, 883 So. 2d 724, 727-28 (Ala. Crim. App. 2003)."

913 So. 2d at 1125. See also Jackson v. State, [Ms. CR-06-1026, May 25, 2012] ___ So. 3d ___ (Ala. Crim. App. 2012) ("Neither this Court nor the Alabama Supreme Court have ever held that an evidentiary hearing must be conducted on every postconviction petition that raises a claim of ineffective assistance of counsel. Such a requirement would burden an already overburdened judiciary.").

Rule 32.9(a), Ala. R. Crim. P., provides, in relevant part:

> "Unless the court dismisses the petition, the petitioner shall be entitled to an evidentiary hearing to determine disputed issues of material fact, with the right to subpoena material witnesses on his behalf. The court in its discretion may take evidence by affidavits, written interrogatories, or depositions, in lieu of an evidentiary hearing, in which event the presence of the petitioner is not required, or the court may take some evidence by such means and other evidence in an evidentiary hearing."

(Emphasis added.) When we initially remanded this cause, this Court specifically mentioned Rule 32.9(a), Ala. R. Crim. P., and noted that the circuit court had the discretion to take evidence by means other than holding an evidentiary hearing, if it determined that any of the claims were sufficiently pleaded and

meritorious on their face. Smith v. State, ___ So. 3d at ___. The circuit court exercised its discretion and permitted Smith to present evidence by means other than holding an evidentiary hearing in this case on the few claims that the circuit determined Smith had pleaded with sufficient specificity.

Moreover, as the State has correctly pointed out in its brief on return to first remand, Smith did not submit any motions in the circuit court in which he requested the court to compel testimony from any specific material witness, nor did he file any pleading in the circuit court alleging that any material witness had been contacted and was unwilling to provide an affidavit.

Finally, to the extent Smith argues that, because the circuit court did not hold an evidentiary hearing, he was denied the constitutional right to cross-examine adverse, material witnesses, we note, again, that a postconviction petitioner is a civil litigant and that he has the burden of proof. The right of confrontation and the right of compulsory process guaranteed by the Sixth Amendment of the United States Constitution and made applicable to the states by the Fourteenth Amendment are rights guaranteed in criminal prosecutions. Smith's criminal prosecution in this case was the retrial that ended more than a decade ago with his conviction and sentence of death.

Smith is not entitled to relief on this claim of error.

III.

A.

In footnote 13 of his brief on return to first remand Smith argues that the circuit court erred when it dismissed his claim that the State had violated Brady

v. Maryland by failing to produce audiotapes of recorded conversations between investigators and the anonymous informant, and when it ignored the fact that the existence of a second audiotape was not disclosed to trial counsel. He argues that dismissal was improper because the claim could not have been raised at trial or on appeal. Although we question whether Smith's argument in his brief satisfies the requirement of Rule 28(a)(10), Ala. R. App. P., we hold that summary dismissal of the claim was proper.

The Alabama Supreme Court recently held in Ex parte Beckworth, [Ms. 1091780, July 3, 2013] ___ So. 3d ___ (Ala. 2013), that a claim that a petitioner's constitutional rights were violated under Brady may be alleged under Rule 32.1(a), Ala. R. Crim. P., and need not meet the elements of a claim of newly discovered material facts under Rule 32.1(e). It is unclear from the petition whether Smith's claim was based on an alleged violation of his constitutional rights or whether it was based on a claim of newly discovered evidence, Rule 32.1(e), Ala. R. Crim. P. Under either theory, the claim was insufficiently pleaded and due to be dismissed. Smith's petition discloses that he was aware at trial that an investigator had erased one audiotape. The trial record clearly indicates that Smith was well aware that law enforcement authorities had many conversations with the informant, and also that he was aware of the substance of the conversations with the informant. Smith pleaded no facts about the alleged contents of the second audiotape, or how disclosure of the audiotape would probably have led to a different result at trial or at sentencing. Thus, Smith did not plead sufficient facts to support a Brady claim, and the claim was properly dismissed.

If Smith had intended to plead the claim as a constitutional claim it was precluded by Rule 32.2(a)(3) and Rule 32.2(a)(5) because it could have been raised at trial and on appeal, but was not. Smith alleged that tapes should have been preserved and disclosed to him, but he did not allege that the evidence was not known to him in time to raise the issue in a post-trial motion or on appeal. We addressed a similar claim in Davis v. State, [Ms. CR-10-0224, Aug. 30, 2013] ___So. 3d ___ (Ala. Crim. App. 2013), and held:

> "Although Davis claimed that the allegedly withheld evidence 'was not known by [him] or his counsel at the time of trial and sentencing or in time to file a post-trial motion[,]' Davis did not allege that the evidence could not have been discovered in time to raise the issue on direct appeal. Accordingly, Davis's Brady claim is procedurally barred by Rule 32.2(a)(5), Ala. R.Crim.P., and the circuit court did not err by summarily dismissing it. See Rule 32.7(d), Ala.R.Crim.P. See Rule 32.7(d), Ala. R. Crim.P."

Davis v. State, ___ So. 3d at ___.

Summary dismissal of Smith's claim, as a constitutional claim, was proper.

B.

Smith next argues in Part VI of his brief on return to first remand that the trial court erred when it denied the claim alleging that the State violated Brady v. Maryland, 373 U.S. 83 (1963), when it failed to provide him with a trace evidence report that, he

says, called into question the testimony of John Kilbourn, the forensic analyst who testified at Smith's first trial, that one of Smith's hairs was found on the afghan that had been placed over the victim's body during the assault. Smith raised a Brady claim in his amended petition, and the circuit court permitted him to present evidence related to the claim during the proceedings on initial remand.[2] The circuit court denied the claim and held that Smith failed to prove by a preponderance of the evidence that the State had committed a Brady violation.

Smith alleged in the amended petition, in relevant part:

> "213. The State collected hairs from the afghan that was found covering Mrs. Sennett at the scene of the crime. At Mr. Smith's first trial, John Kilbourn, a criminalist employed by the State, testified that 'one of the hairs [removed from the afghan] was found to be consistent with the known hair of Kenneth E. Smith ....' Tr. (11/1/89) at 539-40. Thus at

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[2] This claim was not adequately pleaded. Smith failed to present any facts to support the conclusory allegations that the State withheld exculpatory evidence, and he failed to plead sufficient facts to establish a claim of newly- discovered evidence, Rule 32.1(e), Ala. R. Crim. P. If the circuit court had summarily dismissed the claim based on the pleading deficiencies, we would have affirmed the judgment. However, because the circuit court permitted Smith to present evidence on the claim, it was required to make findings of fact as to each of the material issues on which it allowed evidence to be presented. Ex parte McCall, 30 So. 3d 400 (Ala. 2008). We continue to "urge the Alabama Supreme Court to consider amending Rule 32.9(d) so that in future cases, this Court has the discretion to determine whether a remand is necessary." Johnson v. State, 976 So. 2d 1052, 1053 (Ala. Crim. App. 2007) (Wise, J., dissenting).

the first trial, through Dr. Kilbourn's testimony, the State represented that it had found a hair on the afghan taken from the crime scene that was consistent with Mr. Smith's at the scene of the crime.

"214. On information and belief, the hair found on the afghan was not consistent with Mr. Smith's known hair and the State knew that. During the initial stages of their investigation, the police interrogated a suspect whose name was Kenneth Ray Smith and took a hair sample from him. Doug Hargett sent that hair sample, referred to as the hair sample from 'Kenneth Smith,' to Mr. Kilbourn on April 8, 1988. Trace Evidence Report, May 9, 1988.

"215. The police took a hair sample from Kenneth Eugene Smith on March 31, 1988. Mr. Smith's hair sample, referred to as the hair sample from 'Kenneth E. Smith,' was sent to Mr. Kilbourn on April 5, 1988. Trace Evidence Report, May 9, 1988.

"216. Mr. Kilbourn reported in his Trace Evidence Examination Report that: 'One hair recovered from the afghan was noted to be consistent with the known hair of Kenneth Smith.' Trace Evidence Examination Report, May 9, 1988 (emphasis added)).

"217. Thus, the hair on the afghan supposedly was found to be consistent with that of Kenneth Ray Smith – not Kenneth Eugene Smith. On information and belief, the State knew prior to Mr. Smith's retrial that the hair found on the afghan was not consistent with that of Mr. Smith, as the

> State had represented at the first trial. That was critical exculpatory information because it was consistent with Mr. Smiths' defense that he was not near Mrs. Sennett when she was killed."

(C. 488-89.)

Smith's argument on appeal is that the State suppressed material evidence -- that one of the hairs found on the afghan was consistent with Kenneth Ray Smith rather than the petitioner, Kenneth Eugene Smith, and the evidence casts doubt on the verdict. He bases his argument, first, on what he contends is an ambiguity in the results of hair comparisons in the trace evidence report about which criminalist John Kilbourn testified at Smith's first trial and, second, on a copy of the typed trace evidence report that has a handwritten notation that, he contends, was newly discovered and identifies the hair on the afghan as being consistent with Kenneth Ray Smith's hair.

It is important to note that John Kilbourn did not testify at Smith's second trial. Therefore, arguments about Kilbourn's testimony and the marked and unmarked trace evidence reports are not related to any testimony from Kilbourn at Smith's second trial that resulted in the conviction Smith is challenging in this postconviction proceeding. That being said, we affirm the trial court's ruling on this issue, because Smith failed to establish a Brady claim under Rule 32.1(e), Ala. R. Crim. P.

To prove a Brady violation, Smith had to show that the prosecution suppressed evidence that was favorable to Smith and that the evidence was material to Smith's guilt or to punishment. Brady v. Maryland, 373 U.S. 83, 87 (1963). "The evidence is

material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." United States v. Bagley, 473 U.S. 667, 682 (1985). Because Smith raised this claim as "newly discovered evidence," he had to plead and prove the requirements set out in Rule 32.1(e), Ala. R. Crim. P.

Rule 32.1(e), Ala. R. Crim. P., provides that a petitioner may seek relief from a conviction or sentence on the ground that newly discovered material facts exist if:

> "(1) The facts relied upon were not known by the petitioner or the petitioner's counsel at the time of trial or sentencing or in time to file a posttrial motion pursuant to Rule 24, or in time to be included in any previous collateral proceeding and could not have been discovered by any of those times through the exercise of reasonable diligence;
>
> "(2) The facts are not merely cumulative to other facts that were known;
>
> "(3) The facts do not merely amount to impeachment evidence;
>
> "(4) If the facts had been known at the time of trial or of sentencing, the result probably would have been different; and
>
> "(5) The facts establish that the petitioner is innocent of the crime for which the petitioner was convicted or should not have received the sentence that the petitioner received."

Rule 32.3, Ala. R. Crim. P., provides, "The petitioner shall have the burden of pleading and proving by a preponderance of the evidence the facts necessary to entitle the petitioner to relief." "A postconviction Brady claim raised in a Rule 32 petition must meet all five prerequisites of 'newly discovered evidence' in Rule 32.1(e), Ala. R. Crim. P." McWhorter v. State, [Ms. CR-09-1129, Sept. 20, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011). (Emphasis added.)

The circuit court reviewed the evidence proffered by Smith and held that Smith failed to prove a Brady violation. As the lower court correctly determined, any alleged ambiguity in the reference in the original trace evidence report to "Kenneth Smith" and "Kenneth E. Smith" or Kenneth Eugene Smith" was clarified during Kilbourn's testimony at the first trial, a portion of which Smith provided as evidence in support of his Brady claim. Smith asserted in his briefs and memoranda in the circuit court, and continues to assert on appeal that the State suppressed evidence that Kenneth Ray Smith's hair was found on the afghan. However, the circuit court correctly held that Smith failed to prove that Kenneth Ray Smith's hair was, in fact, on the afghan, he merely assumed this to be true based on alleged ambiguities in the report with the handwritten notation. He failed to prove the origin of the trace evidence report with the handwritten notation presented to the Rule 32 court that, Smith says, was produced and then suppressed by the State, and he failed to prove who wrote on the report. Furthermore, Smith did not prove that the State suppressed any evidence, and Palmer Singleton, one of Smith's trial attorneys, testified by affidavit that he was shown a copy of the marked report that postconviction counsel represented to him was recently produced by the

Alabama Department of Forensic Sciences.[3] Smith continues to acknowledge several significant points in his briefs on return to remand: he does not know who made the notation on the trace evidence report, when the person made the notation and why the person made it, and he admits that the notation only "suggests" that someone at the Department of Forensic Sciences made it. He further acknowledges that it is not certain that the marked report casts doubt on Kilbourn's testimony at the first trial, only that it might have done so. By his own arguments, Smith demonstrates that he has failed to prove that the State suppressed any material evidence.[4]

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[3] The circuit court does not specifically discuss the marked copy of the trace evidence report, but the court stated in its order that it considered all of Smith's proffered evidence.

[4] In the reply brief filed on return to first remand, Smith disingenuously states, "The evidence shows that the document 'was produced recently by the Alabama Department of Forensic Sciences in connection with Mr. Smith's postconviction proceedings.' Supp. C. 460." (Smith's reply brief on return to first remand, at p. 15.) The citation provided, however, is to Singleton's affidavit, in which Singleton states that postconviction counsel showed him a copy of the report and represented to him that it was produced recently by the State. In the brief Smith filed on return to second remand, he more boldly states that "a recently produced copy of the Trace Evidence Report establishes that someone at the Forensics Department made the handwritten notation 'Ray' between the words 'Kenneth' and 'Smith' on the last page of the Trace Evidence Report ...." (Smith's brief on return to second remand, at p. 16.)(Emphasis added.) Smith did not present any evidence proving where the copy of the report with the handwritten notes originated, who wrote on the copy, and what the notations meant. He presented only the hearsay statement in Singleton's affidavit that one of Smith's postconviction counsel had represented to him that the document was provided by the State. Smith's statements in briefs about the origin and meaning of the notations far exceed any proof he provided in circuit court.

Even if Kenneth Ray Smith's hair had been found on the afghan and the State had suppressed that evidence, and we do not find either of those points to have been proven by Smith, there is no reasonable probability that the result of the trial would have been different, as he was required to do to prove this claim. The exhibit with the notation would not have established that Smith was "innocent of the crime for which [he] was convicted or should not have received the sentence that [he] received," Rule 32.1(e)(5), Ala. R. Crim. P. The presence of another person's hair would not negate Smith's participation in the crime; that participation was thoroughly established by Smith's own confession, in addition to direct and circumstantial evidence of Smith's active planning of and participation in the brutal murder-for-hire of Elizabeth Dorleen Sennett.

Because Smith failed to present facts necessary to prove all of the prerequisites necessary to establish a Brady/newly-discovered-evidence claim, he failed to sustain his burden of proof. Rule 32.3, Ala. R. Crim. P. The trial court did not err when it denied this claim.

IV.

Smith argues that the circuit court erred when it failed to grant him relief on his claims that his death sentence exceeds the maximum sentence authorized by law. Smith alleged in his amended petition: (1) that the imposition of the death sentence in his case violated Ring v. Arizona, 536 U.S. 584 (2002), because the jury determined that the conditions necessary for the imposition of the death penalty were not met, and because there was no way to be sure that the jurors unanimously found the existence of one aggravating

circumstance; (2) that Alabama's capital sentencing scheme denied him the individualized consideration of his character and the particular circumstances of the crime to which he was constitutionally entitled, in part because Alabama's capital sentencing scheme encourages Alabama's elected judges to override jury recommendations of life imprisonment without the possibility of parole, and the trial judge in this case faced substantial political pressure to sentence Smith to death; (3) that the trial court denied him the individual sentencing consideration to which he was entitled when it ignored the mitigating circumstances it found to exist and did not adequately explain its determination that the single aggravating circumstance outweighed the mitigating circumstances it found, and that, therefore, its sentencing determination was arbitrary and capricious; and (4) Alabama's method of execution -- lethal injection -- constitutes cruel and unusual punishment.

A. Smith's claims alleging that the trial court's override of the jury's recommended verdict, in violation of Ring v. Arizona, raised in Claim IV of the amended petition, were precluded by Rule 32.2(a)(4), Ala. R. Crim. P., because they were raised or addressed on appeal. Smith acknowledged in his pleadings in the circuit court and acknowledges in his briefs on appeal to this Court that he fully presented this issue on certiorari review in the Alabama Supreme Court. Therefore, the circuit court correctly dismissed the claims as precluded. Thomas v. State, 766 So.2d 860, 963 (Ala. Crim. App. 1998), aff'd, 766 So. 2d 975 (Ala. 2000), overruled on other grounds by Ex parte Taylor, 10 So. 3d 1075 (Ala. 2005).

The circuit court also held that the claims warranted no relief because they did not raise a material issue of law or fact as required by Rule 32.7,

Ala. R. Crim. P., citing Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2003). We agree with the circuit court. The Alabama Supreme Court has stated:

> "Ex parte Waldrop, 859 So. 2d 1181, 1187-88, 1190 (Ala. 2003), recognizes that Ring, as applied to the Alabama statutory scheme, forecloses the trial court from imposing a death sentence unless the jury has unanimously found beyond a reasonable doubt the existence of at least one § 13A-5-49 aggravating circumstance. Citing and quoting the second sentence of § 13A-5-45(e) and the first sentence of § 13A-5-50, Ex parte Waldrop holds that, if the indictment charges the defendant with a capital offense which, as defined by the applicable subsection of § 13A-5-40(a) (§ 13A-5-40(a)(2) robbery-murder in Ex parte Waldrop), already includes one of the § 13A-5-49 aggravating circumstances (§ 13A-5-49(4) murder during a robbery in Ex parte Waldrop), then a guilty verdict on that charge in the guilt phase of the trial satisfies the requirement of Ring, as applied to the Alabama statutory scheme, for a unanimous jury finding beyond a reasonable doubt of the existence of at least one aggravating circumstance to support a death sentence. 859 So. 2d at 1187-88, 1190."

Ex parte McGriff, 908 So. 2d 1024, 1037 (Ala. 2004).

As the circuit court correctly noted, the jury in Smith's case unanimously determined by its guilty verdict on the charge of murder for pecuniary or other valuable consideration, § 13A-5-40(a)(7), Ala. Code 1975, the overlapping aggravating circumstance that

the murder was committed for pecuniary gain, § 13A-5-49(6), Ala. Code 1975. "Therefore, the findings in the jury's verdict alone exposed [Smith] to a range of punishment that had as its maximum the death penalty. This is all Ring and Apprendi [v. New Jersey, 530 U.S. 466, (2000),] require." Waldrop, 859 So. 2d at 1188.

We affirm the circuit court's dismissal of Claim IV of the amended petition.

B. Smith alleged in Claim V of the amended petition that his sentence exceeded the maximum authorized by law because, he said, Alabama's sentencing scheme denied him individualized consideration of his character and the circumstances of his crime. Specifically, he alleged in Claim V.A. that Alabama's judges are under political pressure to override jury recommendations of life imprisonment without the possibility of parole, and that the trial judge in this case faced substantial political pressure to sentence him to death because the case was tried outside of Colbert County, where the crime occurred. He further alleged, in Claim V.B., that his sentence exceeded the maximum authorized by law because the trial court's sentencing determination resulted in the arbitrary and capricious imposition of the death penalty because the trial court ignored the mitigating circumstances it found to exist and did not adequately explain its determination that the single aggravating circumstance outweighed the mitigating circumstances it found. Smith alleged that a portion of his claims were based on newly discovered evidence -- comments the trial judge made in the media years after Smith's trial. On initial remand from this Court the circuit court permitted Smith to present evidence to prove the allegations that the trial judge had failed to properly consider mitigating

circumstances and acted under public pressure when he overrode the jury's recommended sentence.

Smith then presented numerous exhibits, including newspaper articles and editorials about the death penalty, newspaper articles about certain elections in Colbert County, documents prepared by the Equal Justice Initiative of Alabama, and parts of the record from Smith's first and second trials. One exhibit was a 2004 article in a Gadsden, Alabama, newspaper about a legislative proposal in the Alabama Senate that, if passed, would have given final sentencing authority to the jury in capital cases. The articles included comments or quotations from several Alabama judges and attorneys about the bill or about jury verdict override in capital cases in general. The judge who presided over Smith's retrial, Hon. N. Pride Tompkins, who was then retired from the bench, was one of judges quoted. The article stated that Judge Tompkins had imposed a death sentence following a jury recommendation of life imprisonment without the possibility of parole in two cases, one of which was Smith's case. The article mentioned the two cases and stated that Judge Tompkins said, "'I thought they deserved the death penalty the way the crimes were' .... 'Some people serving on juries especially on these cases have never been in court before and they don't want the responsibility to sentence someone to death.'" Dana Beyerle, Bill Would Give Future Juries More Influence, The Gadsden Times, Feb. 20, 2004, at A6. Smith's allegation appears to be that the second sentence quoted above indicates that Judge Tompkins sentenced Smith to death based on the political pressure he faced as an elected judge, rather than on a consideration of Smith's character and record and

the circumstances of the offense, as constitutionally required.

To the extent Smith's amended petition raised a claim that Alabama's sentencing scheme denied him an individual determination of his sentence, that claim was due to be dismissed because it could have been raised at trial or on appeal, but it was not. Rule 32.2(a)(3) and (a)(5), Ala. R. Crim. P.[5] To the extent Smith's amended petition raised a claim that, in reaching its sentencing determination, the trial court failed to properly consider and weigh the evidence of aggravating and mitigating circumstances and the jury's recommended verdict, this claim is dismissed because it was raised at trial, Rule 32.2(a)(2), Ala. R. Crim. P., and because it was addressed on appeal, Rule 32.2(a)(4), Ala. R. Crim. P.; Smith v. State, 908 So. 2d 273, 297-300 (Ala. Crim. App. 2000).

To the extent Smith's petition alleged that newly-discovered evidence established that the trial court judge did not properly consider mitigating evidence and that the death sentence was the result of political pressure, the trial court considered Smith's proffered evidence and denied the claims. The court held:

> "After considering the evidence submitted and arguments of counsel, it is the further finding of this Court that the Petitioner's claim that the Trial Judge ignored a mitigating factor and acted under public pressure are not proven. Even if we are to assume that the later statement attributed

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[5] We recognize that the circuit court dismissed this claim for a different reason, we may nonetheless affirm the circuit court's summary dismissal on this ground. McNabb v. State, 991 So. 2d 313, 333 (Ala. Crim. App. 2007).

> to the Trial Judge to be true it does not rebut the findings set forth in the Trial Court's written order and does not show that the Trial Judge ignored a mitigating factor. The written findings set forth by the Trial Court were subjected to review through direct appeal."

(July 20, 2011, order on return to first remand, at pp. 40- 41.)

Smith argues on appeal that the circuit court erred because it considered allegations regarding Judge Tompkins' comments in The Gadsden Times article as a separate claim, rather than considering those comments along with the other evidence submitted in support of his claim regarding the judge's allegedly improper sentencing decision. We disagree. Smith's claims regarding Alabama's sentencing scheme and the trial court's imposition of the death sentence in this case included some issues that had been raised at trial and on direct appeal, and the circuit court correctly dismissed those claims. As to the allegations about the trial court's sentencing decision being the result of political pressure, to the extent those allegations were based on the article in The Gadsden Times, the circuit court's order indicates that it considered all of the evidence Smith submitted, including evidence from reports and documents that were not, in fact, newly discovered.

We find no error in the circuit court's ruling on this issue, and we affirm this portion of the court's judgment. Smith failed to meet the burden of proving by a preponderance of the evidence the facts necessary to entitle him to relief. Rule 32.3, Ala. R. Crim. P. None of the evidence he presented in support of this claim establishes that the trial court's

sentencing decision was based on political pressure, improper considerations of aggravating and mitigating circumstances, or that it was otherwise in violation of Smith's constitutional rights. Smith is entitled to no relief on this claim.

C. Smith alleged in Claim VI of his amended petition that his death sentence exceeded the maximum authorized by law because the method of execution Alabama uses is unconstitutional. In its order on return to remand the circuit court summarily dismissed the claim, citing Rule 32.7(d), Ala. R. Crim. P., and stating that the issue of whether lethal injection constitutes cruel and unusual punishment has been considered and rejected by Alabama appellate courts.

We affirm the dismissal of this claim, but do so on grounds other than those on which the trial court relied. Review of the amended petition establishes that Smith failed to satisfy the requirements of Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P., because he failed to plead any specific facts in his amended petition that, if true, would establish that Alabama's method of lethal injection violates the Eighth Amendment or the Alabama Constitution. Smith's allegations in the amended petition about Alabama's lethal injection protocol are based on "information and belief" only. (C. 501.) Those allegations amount to speculation or, at best, hearsay, not facts. The conclusions drawn in the amended petition are, therefore, not supported by any facts. "Conclusions unsupported by specific facts will not satisfy the requirements of Rule 32.3 and Rule 32.6(b). The full factual basis for the claim must be included in the petition itself." Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006). Therefore summary dismissal of this claim was proper. Although the circuit court

did not dismiss the claim for lack of specificity, we may nonetheless affirm the circuit court's judgment if it is correct for any reason. McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007).

Moreover, we agree with the circuit court that Smith's claim was due to be summarily dismissed because it failed to state a claim for which relief could be granted. Rule 32.7(d), Ala. R. Crim. P. "[I]n Ex parte Belisle, 11 So. 3d 323 (Ala. 2008), the Alabama Supreme Court, relying on the United States Supreme Court's decision in Baze v. Rees, 553 U.S. 35, 128 S. Ct. 1520, 170 L. Ed. 2d 420 (2008), held that Alabama's method of performing lethal injection was constitutional." Washington v. State, 95 So. 3d 26, 69 (Ala. Crim. App. 2012). See also Whatley v. State, [Ms. CR-08-0696, Dec. 16, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2012)("We reiterate that Alabama's method of execution is neither cruel nor unusual and does not violate the Eighth Amendment to the United States Constitution."); Stanley v. State, [Ms. CR-06-2236, April 29, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011)(citing cases addressing challenges to Alabama's method of performing lethal injection).

Smith is due no relief as to this issue, and the circuit court's summary dismissal of this claim was proper.[6]

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[6] In the brief Smith submitted following the return to first remand, he raised new allegations about what he claims is "the protocol currently used by the State to administer lethal injection," (Smith's brief, at p. 77), but those additional allegations were not presented to the trial court. We cannot consider allegations that are raised for the first time on appeal. E.g., McNabb v. State, 991 So. 2d 313 (Ala.Crim. App. 2007).

V.

Smith argues that the circuit court erred when it failed to grant relief on the allegations of ineffective assistance of counsel he raised in his amended petition. Smith alleged in Claim I of the amended petition that he did not receive effective assistance of counsel at the guilt phase of his trial, and he raised numerous subclaims about counsel's performance in that phase. Smith alleged in Claim II that he did not receive effective assistance of counsel at the penalty phase of his trial, and he raised numerous subclaims about counsel's performance. The circuit court summarily dismissed many of these allegations after determining that they were not pleaded with sufficient specificity or failed to state a claim for relief. The court permitted Smith to present evidence by way of affidavit on Claim I.D.2. and Claim I.D.3., alleging that trial counsel were ineffective for failing to adequately challenge the police investigation relating to the afghan that had been placed over the victim's body during the assault, and alleging that trial counsel were ineffective for failing to object to hearsay testimony about a blood stain on the VCR found in his house. The court denied the claims, finding that Smith failed to prove deficient performance or prejudice.

A. Introduction

Judge N. Pride Tompkins presided over Smith's first and second trials. Smith was represented at his 1996 retrial by Palmer Singleton, Charlotta Norby, Chris Johnson, and Stephen Bright. Norby and Johnson were thereafter appointed to represent Smith during proceedings on Smith's motion for a new trial. Norby, Singleton, and Johnson then represented Smith on direct appeal. Smith is

represented in the Rule 32 proceedings by new counsel.

The standards regarding pleading and proof of claims of ineffective assistance of counsel are well established, and they were recently summarized in Daniel v. State, 86 So. 3d 405 (Ala. Crim. App. 2011):

> "For a petitioner to establish a claim of ineffective assistance of counsel he must show: (1) that counsel's performance was deficient; and (2) that he was prejudiced by the deficient performance. See Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984).
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> > "'Judicial scrutiny of counsel's performance must be highly deferential. It is all too tempting for a defendant to second-guess counsel's assistance after conviction or adverse sentence, and it is all too easy for a court, examining counsel's defense after it has proved unsuccessful, to conclude that a particular act or omission of counsel was unreasonable. Cf. Engle v. Isaac, 456 U.S. 107, 133–34, 102 S. Ct. 1558, 71 L. Ed. 2d 783 (1982). A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's

> conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action "might be considered sound trial strategy." See Michel v. Louisiana, [350 U.S. 91], at 101 [(1955)]. There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.'

"Strickland, 466 U.S. at 689 (citations omitted). As the United States Supreme Court further stated:

> "'[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.'

"Strickland, 466 U.S. at 690–91.

"The requirements for pleading claims of ineffective assistance of counsel were set out in Hyde:

> "'To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must "identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment," Strickland v. Washington, 466 U.S. 668, 690, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." 466 U.S. at 694, 104 S. Ct. 2052, 80 L. Ed. 2d 674. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient.'
>
> "950 So. 2d at 356. '[T]he claim of ineffective assistance of counsel is a general allegation that often consists of numerous specific subcategories. Each subcategory is an independent claim that must be sufficiently pleaded.' Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), rev'd on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005)."

86 So. 3d at 415-16.

B. Claims Related to the Guilt Phase

Smith alleged that his trial counsel failed to provide him with the effective assistance of counsel, and he argues on appeal that the circuit court erred when it dismissed a majority of the claims. We examine Smith's arguments in turn.

1. Smith argues that the circuit court erred when it dismissed Claim 1.A. of the amended petition in which he alleged that defense counsel in his first trial were ineffective when they forced him to testify during the penalty phase against his wishes and without giving him prior notice or the time to prepare for the testimony. Smith further alleged that he was prejudiced by counsel's action because, he says, the prosecutor at the first trial was able to elicit several answers on cross-examination that were prejudicial to him and because the trial judge was influenced by Smith's testimony when the judge presided over the second trial. He argues that there is a reasonable probability that the outcome of his first and second trials would have been different if he had not been forced to testify. The circuit court dismissed the claim, holding, in part, that Smith failed to state a claim for which relief could be granted and he failed to plead sufficient facts necessary to support his claim for relief.

Summary dismissal of this claim was proper. First, Smith failed to state a material issue of fact or law upon which relief could be granted. Smith's allegations relate to the actions of trial counsel in his first trial, although that conviction was overturned and this proceeding relates to his challenge of the conviction and sentence following his second trial, at which he was represented by different counsel. Smith did not offer any legal basis for his claim, and we are

not aware of any legal basis for a post-conviction claim challenging the conduct of different trial counsel at a previous trial. When a petitioner fails to state a valid claim for relief or fails to state a material issue of fact or law upon which relief could be granted, summary dismissal is permitted pursuant to Rule 32.7(d), Ala. R. Crim. P. McWhorter v. State, [Ms. CR-09-1129, Sept. 30, 2011] ___ So. 3d ___ (Ala. Crim. App. 2011). Even if Smith's allegations regarding the actions of counsel at his first trial stated a valid claim, Smith failed to plead the claim with sufficient specificity to satisfy the requirements of Rule 32.3 and Rule 32.6(b). Smith failed to identify any facts supporting his claim. He made bare and conclusory allegations of deficient performance and prejudice, but he provided no facts underlying either prong of the ineffective-assistance-of-counsel claim. Smith alleged only that "several answers" elicited by the prosecutor at the first trial were "severely prejudicial," and that "[o]n information and belief, Judge Tompkins was influenced at Mr. Smith's second trial by his testimony at the first trial," (C. 433), without providing any actual facts in support of his assertions. Therefore, summary dismissal of Claim I.A. was proper and is due to be affirmed.

2. Smith argues that the circuit court erred when it dismissed Claim I.B. of his amended petition, in which he alleged that trial counsel were ineffective for failing to seek Judge Tompkins's recusal at the second trial on the grounds that the judge had heard Smith's testimony at the first trial and had imposed a death sentence, and "a reasonable person would question Judge Tompkins' impartiality" at the second trial. (C. 435.) Smith alleged that, if counsel had moved to recuse Judge Tompkins, there is a reasonable possibility that the outcome of his second

trial would have been different. In its answer to the amended petition, the State alleged that Smith failed to plead sufficient facts to satisfy the pleading requirements of Rule 32. The trial court dismissed the claim after it determined that Smith failed to plead any facts showing any bias or prejudice by the judge that warranted his recusal, and that Smith failed to plead any facts alleging deficient performance or prejudice.

"'All judges are presumed to be impartial and unbiased,' Woodall v. State, 730 So. 2d 627, 638 (Ala. Crim. App. 1997), aff'd in pertinent part, rev'd on other grounds, 730 So. 2d 652 (Ala. 1998), and '[t]he burden i[s] on the party making a motion to recuse to establish that the trial judge is biased or prejudiced against the defendant.' Stallworth v. State, 868 So. 2d 1128, 1140 (Ala. Crim. App. 2001)." Carruth v. State, 927 So. 2d 866, 873 (Ala. Crim. App. 2005). To disqualify a judge because of bias, the party seeking recusal must prove that the alleged bias is of a personal, nonjudicial, nature. Ex parte Whisenhant, 555 So. 2d 235, 238 (Ala. 1989); Ex parte Large, 501 So. 2d 1208, 1210-11 (Ala. 1986). "A trial judge need not recuse himself solely on the ground that he was the 'same trial judge who had heard the case and imposed the death penalty' in a defendant's prior trial. Ex parte Whisenhant, 482 So. 2d 1241, 1245 (Ala. 1983)." Ex parte Whisenhant, 555 So. 2d at 238. We agree with the circuit court that summary dismissal of this claim was proper because Smith failed to satisfy the specificity and full factual pleading requirements of Rule 32.3 and Rule 32.6(b), because he failed to allege sufficient facts indicating any personal bias warranting recusal by the trial judge, and he failed to allege any facts that, if true, would have supported a showing of prejudice as a

result of trial counsel's failure to file a motion to recuse. The circuit court held:

> "This Court finds that the State's position is well taken and that the Petitioner has failed to satisfy his burden of pleading deficient performance or prejudice. The mere possibility that a bias on the part of the trial judge might exist, while unsupported by any substantial fact, is insufficient to warrant the trial judge's recusal. Because the Petitioner failed to properly plead the existence of any evidence establishing a bias or prejudice on the part of the trial judge, anywhere in the entire proceeding, his claim is due to be denied. This claim denied pursuant to Rule 32.3, Rule 32.6 and Rule 32.7 (d), Alabama Rules of Criminal Procedure."

(Record on return to first remand, at C. 64.)

Because Smith failed to allege sufficient facts in his petition that would indicate that a motion to recuse the trial judge was warranted or would have been granted, he failed to plead sufficient facts to indicate that his trial counsel were ineffective for not filing a motion to recuse the trial judge. Summary dismissal of this claim was proper.

3. Smith argues that the circuit court erred when it dismissed Claims I.C.1.-I.C.3., in which he alleged that trial counsel were ineffective because they failed to adequately investigate and prepare for the hearing on a motion to suppress.

(a) Smith alleged in Claim I.C.1. that trial counsel did not adequately challenge the admissibility of his inculpatory statement that, he said, was obtained

without clarification of his ambiguous statement about whether he needed an attorney, was coerced, and was involuntary because it was made while he was under the influence of alcohol and Valium and was suffering from migraine headaches and depression. The State alleged in its answer that Smith failed to plead sufficient facts to show that, if trial counsel had presented the allegations offered in the amended petition, his statement would have been suppressed. The circuit court dismissed the claims after finding that Smith did not satisfy the specificity and full factual pleading requirements of Rule 32.3 and Rule 32.6(b). We agree.

Review of the record from Smith's trial discloses that Smith filed motions to suppress his inculpatory statement, and the trial court held a suppression hearing. Smith argued in the trial court as grounds for the suppression of his confession that it was the fruit of an illegal search, and that the illegal search induced him to confess and rendered his statement involuntary. He further alleged in a motion to suppress that the fact that he received Miranda warnings before he confessed did not bar suppression of the statement because, he alleged, he "had every reason to believe that the officers who informed him of his Miranda rights would show as little respect for the Fifth Amendment as they had for the Fourth Amendment when they violated the sanctity of his home just a short time earlier." (Trial record, C. 938.) The trial court denied the motions to suppress, and Smith's statement was admitted at trial, over Smith's objections. On direct appeal Smith argued that the trial court had erred when it admitted his confession into evidence, and he cited as grounds that he confessed to the crime only after the police arrested him unlawfully at his home without a warrant, and

that he was unlawfully arrested at his Lauderdale County home by officers from the county where the crime was committed -- Colbert County. This Court noted at the beginning of its discussion of the claims Smith raised: "It appears from the record that Smith voluntarily accompanied law-enforcement officers and that he was not under arrest when he went to the police station to answer questions." Smith v. State, 908 So. 2d at 290. We then held that no error occurred as a result of the trial court's decision to admit the confession into evidence. See also Marshall v. State, 992 So. 2d 762, 768 (Ala. Crim. App. 2007) ("Of course, a person may voluntarily accompany officers to the police station and that 'person's decision [will not] support a conclusion that that person is under arrest [for Fourth Amendment purposes].' (citing Smith v. State, 797 So. 2d 503, 529 (Ala. Crim. App. 2000)."). Thus, the alleged Miranda violations raised in Smith's Rule 32 petition are not supported by the record, and Smith failed to plead a valid claim of ineffective assistance of counsel based on those allegations.

First, as the State and the trial court correctly noted, and as discussed above, this Court in its opinion on direct appeal stated that it appeared that Smith was not under arrest when he went to the police station to answer questions, and the procedural safeguards of Miranda v. Arizona, 384 U.S. 436 (1966), which apply only to custodial interrogations, would not have prohibited admission of Smith's statement. Smith's characterization of his statement as "custodial" was merely a conclusory allegation that is not supported by any specific facts. See also Beckworth v. State, [Ms. CR-07-0051, May 1,2009] ___ So. 3d ___, ___ (Ala. Crim. App. May 1, 2009) ("An allegation that is refuted by the record fails to state a

claim and does not establish that a material issue of fact or law exists as required by Rule 32.7(d). McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007); Duncan v. State, 925 So. 2d 245 (Ala. Crim. App. 2005).").

Furthermore, Smith failed to allege any facts indicating whether trial counsel were aware of, but disregarded, the circumstances that he now says counsel should have presented to the trial court to secure suppression of the statement, or whether trial counsel were unaware of the circumstances because they failed to conduct a sufficient investigation to discover them. In light of the fact that counsel presented a vigorous challenge to the admission of the statement in the trial court, and that they challenged the admission of the statement on appeal, it would be possible, if not probable, that counsel were aware of these additional circumstances but chose to seek suppression based on what they believed to be grounds that had a greater chance for success, and that the failure to allege these additional allegations was a matter of trial strategy, but Smith failed to allege why that was not the case. Alternatively, if Smith's theory is that trial counsel failed to present these grounds because they were unaware of them, Smith failed to make that allegation, and he failed to plead any facts showing the scope of trial counsel's investigation and what additional investigation he believed counsel should have made to discover the alleged facts. In either case, the allegations Smith made in the amended petition do not satisfy the full factual pleading requirements of Rule 32, and they were properly summarily dismissed for this reason.

Smith further failed to plead sufficient facts to show that, even if counsel had presented the

arguments raised in the petition, the statement would have been suppressed and the result of the trial would have been different. As to the first part of the claim, Smith's allegations indicate that he made, at most, an equivocal reference to an attorney, and that Captain May fulfilled his duty to clarify the meaning of that statement before he questioned Smith. Thompson v. State, 97 So. 3d 800, 809-810 (Ala. Crim. App. 2011). As to the second part of the claim, Smith has pleaded conclusory allegations that Captain May coerced Smith's statement and made assurances to him that he would speak to the prosecutor about Smith's cooperation, he did not plead any facts to show the context of these alleged statements, that is, when during the questioning Captain May allegedly made the comments and whether Smith, who had prior experience with the criminal justice system, had the capacity to resist the pressure or whether his will was overborne by any implied promise or coercion that, he says, was created by Captain May's statements. See McLeod v. State, 718 So. 2d 727 (Ala. 1998)(stating that whether a defendant's statement was voluntary depends on examination of the totality of the circumstances, including the defendant's personal characteristics and experience with the criminal justice system, and stating that a mere promise to make cooperation known to authorities is generally not considered an illegal inducement). As to the third part of the claim, wherein Smith alleged that counsel were ineffective for failing to present evidence at the suppression hearing or at trial to show that he was under the influence of alcohol and Valium when he confessed and that had a history of migraine headaches, Smith failed to provide a specific factual basis for the

allegations.[7] The bare allegation that he was intoxicated was not sufficient to indicate that his statement was involuntary as a result, and the bare allegation that he suffered from migraine headaches was not sufficient to establish a claim that he was suffering from a migraine headache when he confessed, and that the headache rendered his confession involuntary. Further, Smith's allegation that trial counsel should have retained an expert to explain how the intoxication and headache rendered his statement involuntary is insufficiently pleaded because it lacks the identification of any expert who would have testified, it fails to indicate the substance of any relevant, admissible testimony that the expert would have given, and it lacks any specifically-pleaded facts indicating how the result of the proceeding would have been different if the unidentified expert had testified. Daniel v. State, 86 So. 3d 405, 425-26 (Ala. Crim. App. 2011)(claim that counsel was ineffective for failing to present expert testimony was not sufficiently pleaded because Daniel failed to identify, by name, the expert who would have testified, or the content of the expected testimony).

Finally, although Smith's statement about his involvement in the murder was prejudicial, there was additional overwhelming evidence of Smith's guilt apart from that statement, including corroborating testimony from witnesses Smith spoke to before and after the crime, forensic evidence at the scene, and

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[7] Trial counsel argued in a motion to suppress that Smith's statement had been involuntary based, in part, on "the affects of long and short term substance impairment," and that Smith"had been dependent on alcohol for over 10 years; he had been abusing controlled substances since dropping out of high school." (Trial Record, C. 519-21.)

the fact that the victim's blood-stained VCR was recovered from Smith's residence. Even if the statement had been excluded, there is no reasonable probability that the result of the proceeding would have been different.

For all of the foregoing reasons, Claim I.C.1. was due to be summarily dismissed, and we affirm the trial court's judgement as to this claim.

(b) Smith alleged in Claim I.C.2. that trial counsel unreasonably failed to adequately investigate the circumstances surrounding the search of his home and failed to present certain arguments at the suppression hearing. He alleged, specifically, that the search warrant that led to the recovery of the victim's VCR was invalid on its face, and was unlawfully executed by an officer outside the county in which it was executed. He further alleged that trial counsel's performance was deficient because they failed to determine the identity of the confidential informant and that, had they done so, they could have proven that the search warrant was illegal because it resulted from improper State action -- using the informant as an agent of the State. The circuit court dismissed the claim, and we affirm its judgment.

The State and the circuit court correctly noted that the issues regarding the validity of the search warrant and the legality of the search, including the allegation that the confidential informant was acting as a State agent, were raised in the trial court at the suppression hearing and they were rejected. The claims were raised again on appeal, and this Court considered and rejected them. Smith v. State, 908 So. 2d at 284-92. Because the claims regarding the search were raised by trial counsel and rejected, and were also rejected on appeal, no material issue of fact

or law existed that would have entitled Smith to relief on those claims, and they were properly summarily dismissed. Rule 32.7(d), Ala. R. Crim. P.

The allegations regarding trial counsel's failure to investigate and discover the identity of the confidential informant are not sufficiently specific and were properly dismissed on this ground. Smith offered nothing other than general and conclusory assertions that counsel should have tried to locate the confidential informant and that inquiries from counsel "likely would have led to the discovery of the informant's identity." (C. 444.) Smith failed to allege any specific facts regarding the investigation counsel did perform, nor did he plead any facts indicating what additional actions reasonable counsel would have undertaken and that those investigative efforts reasonable counsel would have undertaken would have led to the discovery of the name of the confidential informant. Smith failed to allege that the confidential informant had, in fact, been located. Smith also failed to allege any specific facts that the confidential informant would have testified to that would have been relevant to support his motion to suppress his statement, and he did not allege any specific facts indicating how the discovery of the confidential informant's identity would have changed the result at trial. Finally, Smith did not allege any facts indicating that trial counsel's failure to conduct additional investigation of the confidential informant's identity was not the result of reasonable trial strategy, which would have been necessary to plead this claim sufficiently, especially given the fact that counsel vigorously pursued the information from the State by filing a variety of motions in the trial court.

For all of the foregoing reasons, we hold that the trial court did not err when it dismissed this claim.

(c) Smith argues that the circuit court erred when it dismissed Claim I.C.3., in which he alleged that counsel rendered deficient performance because they unreasonably failed to move to suppress evidence concerning a blood stain on the VCR that had been taken from the victim's home and was recovered from Smith's residence because, he said, there was no evidence indicating whose blood it was, and they failed to object to the prosecutor's argument that the blood came from the victim. The circuit court dismissed this claim on the ground that it failed to state a claim for which relief could be granted because Smith failed to allege that, had counsel filed a motion to suppress the evidence, the motion would have been granted. The court also held that the prosecutor could legitimately infer that the victim's blood was on the VCR.

We agree with the circuit court that the claim was due to be dismissed because it was not pleaded with sufficient facts to satisfy the full fact pleading requirements of Rule 32.3 and Rule 32.6(b). Smith presented a general allegation in his amended petition that the evidence was "unfair, irrelevant and highly prejudicial, and he cited to Rules 402 and 403, Ala. R. Evid., but those general and conclusory statements fail to provide the full disclosure of the factual basis to support the claim. Most notably, Smith failed to allege any facts indicating that the blood was not the victim's. He also failed to allege facts showing that there is a reasonable probability that the result of the proceeding would have been different if counsel had moved to suppress the evidence. A bare allegation that prejudice occurred without specific facts indicating how the petitioner

was prejudiced is not sufficient." See, e.g., Hyde v. State, 950 So. 2d 344, 355-56 (Ala. Crim. App. 2006). The claim was also due to be dismissed because it did not raise a material issue of fact or law that would have entitled Smith to relief. See Rule 32.7(d), Ala. R. Crim. P. Smith acknowledged in the amended petition that the victim's VCR was found in his home, and it had human blood on it. The fact that human blood stains were found on the victim's VCR that was recovered in his house was relevant, probative, and admissible. "The question of admissibility of evidence is generally left to the discretion of the trial court, and the trial court's determination on that question will not be reversed except upon a clear showing of abuse of discretion," Ex parte Loggins, 771 So. 2d 1093, 1103 (Ala. 2000), and Smith failed to plead any facts that would show that the blood-stain evidence would have been suppressed but for counsel's failure to argue for suppression.

As to Smith's claim that trial counsel's performance was deficient because they did not object when the prosecutor argued to the jury that the blood on the VCR was the victim's, we hold that, even if counsel's performance was deficient, Smith failed to plead any facts showing that the result of the proceeding would have been different if they had objected.

"'A prosecutor may argue every legitimate inference from the evidence "and may examine, collate, [sift] and treat the evidence in his own way."'" Woodward v. State, [Ms. CR–08–0145, December 16, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011). '[S]tatement of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' Bankhead v. State, 585

So. 2d 97, 106–07 (Ala. Crim. App. 1989)." The comment Smith says counsel should have objected to was made during the prosecutor's reply to trial counsel's closing argument:

> "Now, [trial counsel] talks about [Smith] being so upset, so upset and so torn up over what happened to Elizabeth Sennett, what happened out there at that residence on Coon Dog Cemetery Road on the 18th, so upset that he could not play cards, but he could bring that bloody VCR into his house and he could sit there and play tapes and watch movies on Mrs. Sennett's VCR that still had her blood splattered all over it. And he tells you that it was never, never Kenneth' Smith's intent for that woman to die. Well, what did he do to stop it?"

(Trial Record, R. 946.)

An objection by trial counsel to that isolated comment in the context of the prosecutor's reply argument might have been sustained, but there is no reasonable possibility that a sustained objection would have changed the result of Smith's trial. Smith has failed to plead a claim for which relief was due to be granted.

For all of the foregoing reasons, summary dismissal of this claim was proper.

4. Smith argues that the circuit court erred when it summarily dismissed Claim I.D. of his amended petition, in which he alleged that trial counsel were ineffective because they failed to adequately investigate and challenge the State's case.

(a) Smith alleged in Claim I.D.1. of his amended petition that trial counsel were ineffective because

they failed to adequately investigate and challenge the State's forensic evidence. He made a variety of allegations, but they were all conclusory and general, and they failed to include the sufficient factual basis necessary to satisfy the pleading requirements of Rule 32.3 and Rule 32.6(b), Ala. R. Crim. P. For example, Smith alleged in paragraph 72:

> "Trial counsel unreasonably failed to investigate and challenge the forensic evidence in support of their trial strategy to negate Mr. Smith's specific intent to kill. Because trial counsel conceded that Mr. Smith was at the crime scene, challenging the forensic evidence was a critical trial strategy to show that Mr. Smith neither killed the decedent nor intended to do so, and therefore, was not guilty of capital murder. Trial counsel failed to effectively cross-examine Dr. Emily Ward, the pathologist who testified on behalf of the State, and to retain and consult with defense forensic experts to make that showing. Effective cross-examination of Dr. Ward, supported by a readily available competent forensic pathologist, would have demonstrated that the head wounds would not have caused decedent's death. Dr. Ward herself testified at the first trial that she couldn't tell if the decedent would have died absent the stab wounds. Trial counsel's failure to challenge the forensic evidence was unreasonable and amounted to ineffective assistance of counsel."

(C. 448.)

As to this particular allegation, Smith failed to allege the specific facts necessary to support a claim

for relief. He failed to provide any specific facts regarding the cross- examination trial counsel conducted, what additional questions should have been asked of the witness, how the witness would have answered those questions, and how the result of the trial would have been different if counsel had conducted that cross- examination. Similarly, Smith failed to identify the name of any "defense forensic experts" who would have been available at the time of trial, nor did he put forth any facts to show how consultation with those experts would have changed the result of the trial. Smith pleaded only general and conclusory allegations, and the claim was properly dismissed. Rule 32.6(b), Ala. R. Crim. P. See Beckworth v. State, [Ms. CR–07–0051, May 1, 2009] ___ So. 3d (Ala. Crim. App. 2009) (a claim that counsel is ineffective for failing to call witnesses is not sufficiently pleaded if the witness is not identified by name).

The remaining allegations about the forensic evidence that Smith made in this claim were equally general and conclusory, lacking any specific facts necessary in the pleading of a claim for postconviction relief. The trial court's summary dismissal was proper.

In addition to various allegations regarding counsel's alleged deficiencies with regard to challenges to the forensic evidence, Smith also alleged that trial counsel were ineffective because they failed to elicit from the chief investigating officer, Captain May, that he believed that Smith's codefendant, not Smith, had stabbed the victim. Smith failed to put forth any legal theory upon which trial counsel could have elicited this testimony and, in fact, there is none because the opinion testimony would have been inadmissible. E.g., Naylor v. State,

[Ms. CR-10-1540, May 25, 2012] ___ So. 3d ___ (Ala. Crim. App. 2012). Therefore, the claim was properly dismissed because it failed to state a claim for which relief could be granted.

(b) In Claim I.D.2. Smith alleged that trial counsel unreasonably failed to challenge the police investigation, and made general assertions that the police mishandled all of the physical evidence and compromised its reliability. He also alleged that trial counsel failed to review forensic reports, discover "police errors," and effectively challenge the evidence collected and reveal through cross-examination "the biased investigation conducted by the police." (C. 452.) The circuit court permitted Smith to present evidence by way of affidavit in support of this claim.[8] Smith presented affidavits from the following witnesses in support of this claim: Louis M. Natali, a professor of law at Temple University School of Law; Palmer Singleton, one of Smith's trial attorneys; and Ralph Robert Tressel, a forensic investigator and consultant. He also presented several documents, including investigative and forensic reports, in

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[8] This claim was not adequately pleaded. Smith failed to present any facts to support the conclusory allegations of deficient performance, and he failed to plead any facts that would indicate how he was prejudiced by the alleged errors. If the circuit court had summarily dismissed the claim based on the pleading deficiencies, we would have affirmed the judgment. However, because the circuit court permitted Smith to present evidence on the claim, it was required to make findings of fact as to each of the material issues on which it allowed evidence to be presented. Ex parte McCall, 30 So. 3d 400 (Ala. 2008). We continue to "urge the Alabama Supreme Court to consider amending Rule 32.9(d) so that in future cases, this Court has the discretion to determine whether a remand is necessary." Johnson v. State, 976 So. 2d 1052, 1053 (Ala. Crim. App. 2007) (Wise, J., dissenting).

support of the claim. The circuit court denied the claim, holding that Smith failed to prove either deficient performance or prejudice. Specifically, the circuit court determined that the testimony from Professor Natali was based on incorrect information regarding the hair found on the afghan, that Singleton's testimony as to his failure to discover the alleged mishandling or contamination of the physical evidence was biased and not believable, and that Tressel's testimony about how the evidence should have been handled and did not prove that counsel rendered ineffective assistance of counsel.

Smith now argues that the circuit court's ruling is due to be reversed because, he says, the court's analysis of the evidence he submitted in support of the claim was faulty. He continues to argue that the afghan that covered the victim was mishandled by investigators and might have been contaminated; that hair samples from Kenneth Eugene Smith and Kenneth Ray Smith were mishandled and that the hair found on the afghan that covered the victim was consistent with Kenneth Ray Smith's hair, and that counsel unreasonably failed to investigate and discover the alleged mishandling and contamination of the evidence. He further argues that, if counsel had discovered the alleged mishandling of evidence and if he had found that a hair belonging to Kenneth Ray Smith had been recovered from the afghan, counsel would have used the evidence at all stages of the trial.

There are many reasons supporting the circuit court's denial of this claim. First and foremost, the State did not present any evidence at the second trial about the afghan or the hairs recovered from it. Smith's claims regarding the alleged mishandling of physical evidence and misidentification of the hair

recovered from the afghan have no relevance to the evidence actually presented at the trial that resulted in conviction and death sentence he now seeks to have set aside. Therefore, even if evidence was mishandled or misidentified and even if trial counsel unreasonably failed to discover the alleged errors, as Smith claimed, Smith has failed to show that any of those alleged errors had any effect on the outcome of the proceeding.

Second, in order to evaluate Smith's claim that trial counsel did not do enough investigation, "'we first look at what the lawyer did in fact.' Chandler v. United States, 218 F.3d 1305, 1320 (11th Cir. 2000). '[B]efore we can assess the reasonableness of counsel's investigatory efforts, we must first determine the nature and extent of the investigation that took place....' Lewis v. Horn, 581 F.3d 92, 115 (3d Cir. 2009)." Smith v. State, [Ms. CR-08-0638, Sept. 30, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011). Although Smith was represented by several attorneys at his second trial, he presented an affidavit from only one attorney, Palmer Singleton, who stated he had acted as lead counsel and that he had not investigated the possibility that evidence had been contaminated, mishandled, or tampered with, and that it had been his duty to do so. As to Singleton's allegation, we note:

> "After an adverse verdict at trial even the most experienced counsel may find it difficult to resist asking whether a different strategy might have been better, and, in the course of that reflection, to magnify their own responsibility for an unfavorable outcome. Strickland, however, calls for an inquiry into the objective reasonableness of counsel's

> performance, not counsel's subjective state of mind. 466 U.S., at 688."

Harrington v. Richter, 131 S. Ct. 770, 790 (2011).

Smith presented no evidence about the investigation actually conducted by Singleton or any of the other attorneys who represented him at trial. Smith did not prove that reasonable counsel, based on the circumstances of this case, would have investigated the possibility of evidence tampering or contamination, and he did not prove that one of his other attorneys did not, in fact, conduct such an investigation. Counsel's competence is presumed, and Smith had the burden to prove otherwise.

> "An ambiguous or silent record is not sufficient to disprove the strong and continuing presumption. Therefore, 'where the record is incomplete or unclear about [counsel]'s actions, we will presume that he did what he should have done, and that he exercised reasonable professional judgment.' [Williams v. Head, 185 F.3d 1223, 1228 (11th Cir. 1999)]."

Chandler v. United States, 218 F.3d 1305, 1315 n.15 (11th Cir. 2000).

The evidence presented by Smith indicates that trial counsel focused some of their investigative efforts on the forensic evidence they expected to be used at Smith's retrial. Exhibit 3 to Singleton's affidavit is an April 29, 1994, letter to Dr. Larry Miller, a forensic expert whose opinion Singleton sought in the case, and whom trial counsel apparently considered hiring as an expert, and Exhibit 6 contains Singleton's notes based on two telephone interviews with Dr. Miller about his

expertise and his review of the forensic evidence in Smith's case. Singleton's letter to Dr. Miller stated, in relevant part:

> "I have attached an abstract from the forensic evidence offered at Mr. Smith's first trial. There were four critical areas: forensic pathology testimony offered to establish the mode and specific cause of death; testimony dealing with finger print enhancement efforts; blood analysis; and hair identification.
>
> "I would appreciate it if you could review the abstract. We are interested in two questions: did the forensic work in this case conform to standards within the field such that it should even have been admitted; was expert opinion testimony on hair comparison based on an acceptable, reliable and accurate method."

(C. 569, record on return to first remand.) It is clear that trial counsel were evaluating the forensic evidence, particularly the hair comparison.

Although Singleton stated in his affidavit that Attorney Norby suffered a serious medical condition and was unable to provide substantial assistance leading up to and during the 1996 trial, that single statement, in light of the entire record, does not prove that Norby or one of the other attorneys appointed in the case did not conduct any additional investigation into the forensic evidence. The record reflects that Norby had a long-standing attorney-client relationship with Smith; she began representing him during the successful appeal following Smith's conviction in the first trial. When two local attorneys were appointed to represent Smith on retrial, Norby filed a motion

requesting the trial court to vacate its appointment of those attorneys and to appoint her to represent Smith. In support of the motion, Norby stated that she had been representing Smith for over two years, had an established attorney-client relationship with him, and had "become very familiar with the many factual and legal issues in [the] complex capital case." (C. 321, retrial record.) The two appointed attorneys filed a motion to withdraw, citing Norby's previous successful representation of Smith, and Smith's desire to have Norby appointed as his counsel. The trial court vacated its previous order, and appointed Norby and Singleton to represent Smith.

Norby suffered a serious medical condition in January 1995, and, as a result, Singleton filed a motion to continue the trial that had been scheduled to begin in April 1995. He alleged in the motion that Smith would be prejudiced if the case were litigated without Norby:

> "A. Ms. Norby has a long-standing attorney-client relationship with Mr. Smith. She has been counsel of record since the direct appeal in this matter and successfully advocated the claim that resulted in Mr. Smith's retrial. In the course of her representation, Ms. Norby and Mr. Smith have developed a professional tie based on trust and confidence that is essential to the defense of a capital case. [Citation omitted.]
>
> "B. Ms. Norby is familiar with and has mastered the legal and factual complexities connected with the prosecution of Mr. Smith. This is important for two reasons. One, the case has a long and complicated history involving numerous prior proceedings, legal

claims and issues. Two, the facts upon which Mr. Smith's liability is alleged to rest are themselves intricate. (The prosecution contends that the homicide upon which this case is based was the product of a conspiracy involving four individuals.)

"C. While undersigned co-counsel has been appointed to represent Mr. Smith along with Ms. Norby, Ms. Norby has continued to assume primary responsibility for the defendant's representation. This includes substantive contact with the client. (Outside of court, Mr. Singleton has spoken with Mr. Smith on only two occasions; and each time he was with Ms. Norby.) More to the point, Ms. Norby has always assumed sole oversight of the development of penalty phase investigation and issues pertaining to mitigating circumstances. (Not the least of which are outstanding motions pertaining to funds to secure expert assistance to investigate and develop penalty phase evidence concerning Mr. Smith's life history and mitigating circumstances connected with the offense and offender.)

"D. While he is an experienced trial lawyer, Mr. Singleton is not a member of the Alabama bar. Ms. Norby has been a member in good standing of the Alabama State Bar since 1991. Indeed, without Ms. Norby's association, undersigned counsel is barred from representing Mr. Smith. Rule VII, Rules Governing Admission to the State Bar."

(C. 908-09, retrial record.) (Emphasis added.)

The trial was continued on Smith's motion. The retrial of the case began in April 1996, and the record reflects that Norby participated in the trial. Finally, the documents trial counsel submitted for payment of fees associated with the second trial indicates that Singleton claimed 444.75 hours for out-of-court work on the case; Norby claimed 293 out-of-court hours. Norby also sought payment for 38 in-court hours. Thus, her actual participation in Smith's defense was anything but minimal.

Smith has failed to prove what steps his trial attorneys actually took; he failed to prove any additional steps that reasonable trial counsel would have taken in preparing for the case; he failed to prove that Singleton nor any of the other trial counsel unreasonably failed to take those additional steps; he failed to prove that those additional steps would have revealed any relevant, admissible evidence; and, with one exception, he failed to prove that any additional evidence was, in fact, discovered, and he failed to identify that evidence.

Postconviction counsel apparently have obtained a copy of a forensic report with a handwritten notation on it, but Smith failed utterly to prove who made the notation on the document and when he or she made it, that the document was in existence and discoverable at the time of Smith's trial, and that it undermined any of the proof at Smith's trial. He also failed to prove that competent counsel would have discovered the document before trial, and how competent counsel would have used that evidence at trial.[9]

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[9] Because Smith alleged that the State withheld this evidence of mishandling and misidentification of the hair analysis, it would appear to be inconsistent to argue that reasonable investigative efforts would have revealed the evidence.

In summary, Smith failed to establish that the performance of all his trial attorneys was so unreasonable with regard to the investigation and presentation of any alleged evidence of contamination or mishandling of the physical evidence that no competent counsel would have performed as trial counsel did in this case. See Miller v. State, 99 So. 3d 349, 370 (Ala. Crim. App. 2011), citing Grayson v. Thompson, 257 F.3d 1194, 1216 (11th Cir. 2001).

Furthermore, Smith failed to present any evidence to prove that there was "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland, 466 U.S. at 694.

We have thoroughly reviewed the entire record in this proceeding, along with portions of the record in the first trial, and the entire record of proceedings in the second trial. We agree with the circuit court that Smith failed to sustain his burden of proving that he was denied the effective assistance of counsel pursuant to Strickland v. Washington, 466 U.S. 668 (1984); Rule 32.3, Ala. R. Crim. P. Smith proved neither the deficient-performance prong nor the prejudice prong, and denial of the claim is due to be affirmed.

(c) Smith alleged in Claim I.D.3. that trial counsel were ineffective because, before Smith's retrial and based on an understanding that the witnesses were available and there were no known credibility changes, they stipulated with the State that counsel would not require the State to call every chain-of-custody witness who performed ministerial acts. He also alleged that, as a result of the stipulation, the State was permitted to present "critical forensic evidence through Captain May," without cross-

examination of the witnesses who had performed the testing. (C. 453.) He alleged, too, that trial counsel unreasonably failed to object to the introduction of the critical hearsay evidence.[10] The circuit court determined that Smith failed to meet the burden of proving that he was denied the effective assistance of counsel, and the court denied the claim. The circuit court failed to make findings of fact in support of its judgment, even though this Court remanded the cause twice for that court to make findings of fact. Smith requests that we remand the case to the circuit court again for fact-findings. We decline to do so. Another remand of this case would be contrary to both the interests of justice and the efficient use of judicial resources, and would only unnecessarily prolong these proceedings. As noted earlier in this memorandum, our review of the circuit court's judgment is de novo because the circuit court did not receive any evidence ore tenus. Therefore, the record before us allows for a complete review of the claim and of the circuit court's judgment denying the claim.

We agree with the circuit court that the claim is due to be denied. Smith's main argument on appeal is that trial counsel unreasonably stipulated with the district attorney that the State would not have to call every witness who performed ministerial acts in the chain of custody and that, as a result, Captain May was able to testify without objection that human blood was found on the victim's VCR that was recovered in Smith's residence, even though Captain

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[10] This claim was not adequately pleaded. Smith failed to present any facts to support the conclusory allegations of deficient performance, and he failed to plead any facts that would indicate how he was prejudiced by the alleged errors. If the circuit court had summarily dismissed the claim basedon the pleading deficiencies, we would have affirmed the judgment.

May did not conduct the testing or write the forensic report. In support of his argument, Smith relies on Bullcoming v. New Mexico, 131 S. Ct. 2705 (2011), and Melendez-Diaz v. Massachusetts, 129 S. Ct. 2527 (2009), holding that the Confrontation Clause bars admission of laboratory results without testimony from the analyst, unless there was a prior opportunity for cross-examination and the analyst was unavailable. Those cases do not apply here. The trial of this case was held in 1996, more than a decade before those cases decided. Those cases, and Crawford v. Washington, 541 U.S. 36 (2004), from which those cases arose, constituted a major change in the law regarding admission of laboratory results and records. Trial counsel's failure to forecast changes in the law is not held to be ineffective assistance. E.g., Hooks v. State, 21 So. 3d 772, 786 (Ala. Crim. App. 2008).

More to the point, the trial record reflects that trial counsel and the prosecutor entered into the stipulation to streamline the retrial of this case by reducing the number of witnesses, thus indicating that stipulation was a matter of trial strategy.

> "A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time. Because of the difficulties inherent in making the evaluation, a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance "

Strickland v. Washington, 466 U.S. 668, 689 (1984). Having made the stipulation, there was no need for trial counsel to object to Captain May's testimony about the presence of human blood on the VCR. Smith has presented no evidence to prove that the decision was not a matter of trial strategy or that the strategy was unreasonable, and he has thus failed to sustain his burden of proving that counsel's performance was deficient. Ray v. State, 80 So. 3d 965, 995 (Ala. Crim. App. 2011).

Furthermore, Smith failed to meet his burden of proving that there is a reasonable probability that the result of his trial would have been different but for counsel's alleged errors. Smith failed to prove that, if counsel had not entered into the stipulation, the evidence about human blood being discovered on the VCR would not have been admitted. At Smith's first trial, a serologist testified that he had analyzed the blood and determined it was human but of unknown type. Smith has presented nothing to prove that the serologist would not have testified to the same facts again at the second trial, thus placing the same evidence before the jury. Because Smith also failed to prove that he suffered prejudice as a result of counsel's performance, he has failed to satisfy either prong of the Strickland test, and the circuit court's denial of this claim on those grounds is due to be affirmed.

(d) Smith argues that the circuit court erred when it summarily dismissed Claim I.D.4. of the amended petition, in which he alleged that trial counsel performed deficiently when they failed to challenge evidence from which the State argued the jury could infer that he had the intent to kill. Smith alleged that trial counsel should have challenged the statement from Smith's friend, Donald Buckman, in which

Buckman said that Smith had asked him on the morning of the murder if he knew where Smith could buy a gun. The trial court dismissed the claim on the ground that Smith failed to plead sufficient facts to allege either deficient performance or prejudice. We agree with the trial court. Smith failed to allege any facts that would tend to indicate the grounds on which counsel could have successfully objected to Buckman's testimony; he failed to include any facts showing the cross- examination trial counsel conducted and how counsel used Buckman's testimony in his closing argument; and he failed to identify specifically how he was prejudiced by counsel's alleged specific performance. Because Smith failed to satisfy the pleading requirements of Rule 32.6(b), summary dismissal of the claim was proper. See, e.g., Daniel v. State, 86 So. 3d 405 (Ala. Crim. App. 2011); Boyd v. State, 913 So. 2d 1113 (Ala. Crim. App. 2003).

(e) Smith argues that the trial court erred when it dismissed Claim I.D.5., in which Smith alleged that trial counsel rendered ineffective assistance of counsel because they failed to investigate other persons who may have been responsible for the crime. Smith also alleged in this claim that counsel failed to discover that the evidence was inconsistent with the State's theory that Smith and/or his codefendant stabbed the victim. In this claim Smith also made allegations about the victim's husband, such as that he had physically abused his wife and threatened to kill her, was involved in an adulterous relationship, and was indebted to people he feared. The circuit court dismissed the claim, and stated that Smith had failed to meet his burden of pleading the claim with sufficient specificity.

On appeal, Smith argues that, in fact, he pleaded that Dr. McKinley, the surgeon who treated the victim, would have explained to the jury that codefendant Parker's knife would not have caused the stab wound. That is the only specific fact Smith pleaded with regard to this claim, however. He did not plead any facts about the investigation trial counsel conducted, what specific additional investigative efforts they reasonably should have made and who their investigative efforts should have focused on, what those efforts would have disclosed, what witnesses would have been available to testify at trial about the existence of another perpetrator, and how the result of the trial would have been different if counsel had conducted additional investigation, especially in light of the fact that Smith confessed to taking part in the murder. Because Smith failed to satisfy the requirements necessary to sufficiently plead a postconviction claim of ineffective assistance of counsel, the claim was due to be dismissed on that ground, and we affirm the trial court's dismissal. Rule 32.6(b), Ala. R. Crim. P.

Although we affirm the dismissal of the claim on the ground that it was not pleaded with specificity, we note that, to the extent Smith's claim is that the trial counsel failed to investigate whether the victim's husband, Charles Sennett, might have committed the murder, the trial record belies that claim. During the cross-examination of the chief investigator, trial counsel asked numerous detailed questions about the husband's adultery, reports of his abuse of and threats against the victim, his questionable business dealings, and about certain aspects of the physical evidence at the scene. Thus, trial counsel clearly investigated the possibility that the victim's husband had been responsible for the victim's murder, and

they placed before the jury the certain evidence in support of that theory. Therefore, to the extent Smith intended to plead that counsel were ineffective because they failed to investigate whether Charles Sennett might have killed his wife, he failed to state a claim for which relief could be granted. "An allegation that is refuted by the record fails to state a claim and does not establish that a material issue of fact or law exists as required by Rule 32.7(d). McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007); Duncan v. State, 925 So. 2d 245 (Ala. Crim. App. 2005)." Beckworth v. State, [Ms. CR-07-0051, May 1, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009).

(f) Smith argues that the circuit court erred when it summarily dismissed Claim I.D.6. of the amended petition, in which he alleged that trial counsel's performance was deficient because he repeatedly told the jury that this crime was a "capital murder." He alleged that if counsel had not told the jury that a capital murder had been committed, there was a reasonable likelihood that Smith would not have been convicted of capital murder. The trial court dismissed the claim because Smith did not plead any facts that would indicate that he was prejudiced by counsel's reference to the crime as a capital murder. We agree that Smith failed to plead specific facts to satisfy Rule 32.3 and Rule 32.6(b). Smith failed to allege any facts indicating the context in which trial counsel referred to the crime as a "capital murder," he did not allege any facts to show that counsel's use of the term was unreasonable, and he did not allege any facts indicating how the references prejudiced him. Summary dismissal was proper because the claim included only conclusory allegations of deficient performance and prejudice; it was not pleaded with

the specificity necessary to satisfy the pleading requirements of Rule 32.

(g) Smith argues that the circuit court erred when it summarily dismissed Claim I.D.7., in which he alleged that trial counsel's performance was deficient because they failed to put on a defense case. The circuit court held that the claim was not pleaded with the specificity required by Rule 32.3 and Rule 32.6(d). We agree. Smith made only vague and conclusory allegations that trial counsel did not present testimony from unnamed "pathology or forensic expert witnesses," and an unnamed "expert in police procedure." (C. 458-59.) The failure to identify the names of the witnesses constituted a failure to plead the full factual basis in support of the claim. See Beckworth v. State, [Ms. CR-07-0051, May 1, 2009] ___ So. 3d ___, ___ (Ala. Crim. App. 2009).

In other parts of this claim Smith named or vaguely identified other witnesses that he said trial counsel should have called -- "Mr. Sennett's paramour and decedent's counselor" and "Ranae Bryant and Mr. Buckman's nephew" -- but he failed to plead any specific facts about how the failure to present their testimony resulted in prejudice to him. Because Smith failed to meet the specificity and full factual pleading requirements of Rule 32.6(b), summary dismissal of the claim was proper, and the circuit court's judgment is due to be affirmed. Smith v. State, 71 So. 3d 12, 25-26 (Ala. Crim. App. 2008).

5. Smith next argues that the circuit court erred when it dismissed Claim I.E. of his petition in which he alleged that trial counsel were ineffective because they failed to establish adequately that he had a history of migraine headaches and addiction to drugs and alcohol, that he was intoxicated on the day of the

crime, and that he was intoxicated and experiencing a migraine headache on the day he was arrested and confessed to the crime. He alleged that this evidence was relevant to show that he did not have the specific intent to commit capital murder, and to assist the jury in determining the weight to give his confession. The circuit court summarily dismissed the claim, finding that Smith had not pleaded any facts indicating the degree of his intoxication, and he did not allege that any additional information on his impairment was available.

We agree that summary dismissal was proper. Smith failed to plead any specific facts regarding his alleged addiction to alcohol and drugs, or regarding his history of migraine headaches, and he did not plead with specificity how these alleged impairments affected him on the day of the crime or the day he was arrested. Smith also failed to plead any specific facts indicating the evidence trial counsel did present, how trial counsel should have discovered additional evidence, or how the presentation of the additional evidence on these alleged impairments would have changed the result of the proceedings.

> "To sufficiently plead an allegation of ineffective assistance of counsel, a Rule 32 petitioner not only must 'identify the [specific] acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment,' Strickland v. Washington, 466 U.S. 668, 690 (1984), but also must plead specific facts indicating that he or she was prejudiced by the acts or omissions, i.e., facts indicating 'that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'

> 466 U.S. at 694. A bare allegation that prejudice occurred without specific facts indicating how the petitioner was prejudiced is not sufficient."

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

As discussed above, Smith failed to identify any specific facts indicating deficient performance or prejudice. Summary dismissal of the claim was proper.

6. Smith next argues that the circuit court erred when it summarily dismissed Claims I.F.1. - 1.F.5. of the amended petition in which he alleged that trial counsel were ineffective because they failed to object to several instances of what Smith referred to as the prosecutor's "egregious misconduct." (C. 461.) Smith alleged that counsel had failed to object when the prosecutor: (1) shifted the burden of proof to him; (2) referred to him and codefendant Parker collectively as "they," and suggested that Parker's actions and intent could be imputed to him; (3) suggested that the jury could also convict Smith for conspiracy to commit murder based on his actions leading up to the murder; (4) argued facts not in evidence; and (5) offered his own opinion during closing argument and bolstered witnesses's credibility. The circuit court dismissed the claim, holding that Smith failed to plead the prejudice prong of the claim with the specificity required by Rule 32.3 and Rule 32.6(b), and holding that Smith did not state a claim for relief. Summary dismissal of these claims was proper.

> "This court has stated that '[i]n reviewing allegedly improper prosecutorial comments, conduct, and questioning of witnesses, the task of this Court is to consider their impact

> in the context of the particular trial, and not to view the allegedly improper acts in the abstract.' Bankhead v. State, 585 So. 2d 97, 106 (Ala. Crim. App. 1989), remanded on other grounds, 585 So. 2d 112 (Ala. 1991), aff'd on return to remand, 625 So. 2d 1141 (Ala. Crim. App. 1992), rev'd on other grounds, 625 So. 2d 1146 (Ala.1993). See also Henderson v. State, 583 So. 2d 276, 304 (Ala. Crim. App.1990), aff'd, 583 So.2d 305 (Ala. 1991). 'In judging a prosecutor's closing argument, the standard is whether the argument "so infected the trial with unfairness as to make the resulting conviction a denial of due process."' Bankhead, 585 So. 2d at 107, quoting Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed. 2d 144 (1986) (quoting Donnelly v. DeChristoforo, 416 U.S. 637 (1974)). 'A prosecutor's statement must be viewed in the context of all of the evidence presented and in the context of the complete closing arguments to the jury.' Roberts v. State, 735 So. 2d 1244, 1253 (Ala. Crim. App. 1997), aff'd, 735 So. 2d 1270 (Ala. 1999). Moreover, 'statements of counsel in argument to the jury must be viewed as delivered in the heat of debate; such statements are usually valued by the jury at their true worth and are not expected to become factors in the formation of the verdict.' Bankhead, 585 So. 2d at 106."

Ferguson v. State, 814 So. 2d 925, 945–46 (Ala. Crim. App. 2000) (emphasis added), aff'd, 814 So. 2d 970 (Ala. 2001), quoted in Moody v. State, 95 So. 3d 827, 848-49 (Ala. Crim. App. 2011).

Smith alleged the specific statements that he believed constituted prosecutorial misconduct, but he failed to plead any facts indicating the context in which those statements were made. Smith did not allege specific facts in his amended petition regarding the crime and the State's evidence or the defense theory, and he did not plead any facts regarding the prosecutor's entire argument to show the context in which the allegedly improper arguments arose. Smith also did not plead any facts to show that, if counsel had objected to the allegedly improper conduct, that the trial court would have sustained the objections, or that the result of the proceeding would have been different. Additionally, Smith alleged only in a conclusory and general way that he was prejudiced by trial counsel's failure to object to some of these prosecutorial comments, but he failed to plead any facts indicating how he was prejudiced. As the claims were pleaded, it is impossible for this Court to determine whether Smith would be entitled to relief, even if the allegations were true. See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003). Therefore, Smith failed to allege sufficient facts in his petition indicating that the prosecutor's comments were improper, or that he was prejudiced by trial counsel's failure to object to the comments.[11]

Even if Smith had pleaded this claim with sufficient specificity to satisfy the requirements of Rule 32.3 and Rule 32.6(b), we would uphold

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[11] We note that, although Smith alleged in his amended petition that, in the instances in which trial counsel objected to the prosecutor's arguments, counsel were ineffective for failing to pursue the issues on appeal, he does not raise this argument in his briefs to this Court. Therefore, he has abandoned that portion of his claim and wedo not address it. Nicks v. State, 783 So. 2d 895, 905 (Ala.Crim. App. 1999).

summary dismissal of the claim because it was meritless on its face.

> "'The relevant question is whether the prosecutor's comments "so infected the trial with unfairness as to make the resulting conviction a denial of due process."' Darden v. Wainwright, 477 U.S. 168, 181, 106 S. Ct. 2464, 2471, 91 L. Ed.2d 144 (1986), quoting Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868, 40 L. Ed. 2d 431 (1974). Comments made by the prosecutor must be evaluated in the context of the whole trial. Duren v. State, 590 So. 2d 360, 364 (Ala. Cr. App.1990), aff'd, 590 So. 2d 369 (Ala. 1991)."

Simmons v. State, 797 So. 2d 1134, 1162 (Ala. Crim. App. 1999).

"A prosecutor may argue every legitimate inference from the evidence 'and may examine, collate, [sift] and treat the evidence in his own way.'" Woodward v. State, [Ms. CR–08–0145, December 16, 2011] ___ So. 3d ___, ___ (Ala. Crim. App. 2011). We note, too, that the trial court instructed the jury repeatedly that the arguments of counsel were not evidence. Jurors are presumed to follow the trial court's instructions. Calhoun v. State, 932 So. 2d 923, 962 (Ala. Crim. App. 2005). We have carefully reviewed the arguments Smith now claims trial counsel should have objected to, and the context in which those comments were made. We agree with the finding of the circuit court: "Each statement by the prosecutor complained of herein falls within the right of the prosecutor to draw and argue reasonable inferences from the evidence, and the failure to object thereto does not amount to ineffective assistance of counsel." (C. 126.)

For all of the foregoing reasons, we affirm the circuit court's summary dismissal of this claim.

7. Smith argues that the trial court erred when it dismissed Claim I.G. of his amended petition, in which he alleged that trial counsel were ineffective because they failed to object to the jury instruction regarding his right not to testify. Smith alleged in the petition that trial counsel should have objected to the instruction because it invited the jurors to speculate about why he did not testify, and, citing Wilson v. United States, 149 U.S. 60, 66 (1893), he alleged that the instruction failed to inform the jurors that there are reasons an accused might not testify, even if he is innocent. The circuit court dismissed the claim, holding that it failed to state a claim for relief, and that the instruction given by the trial court was a correct statement of the law. Summary dismissal of this claim was proper.

First, we hold that Smith failed to plead the claim with the specificity required to satisfy Rule 32.3 and Rule 32.6(b). Although he pleaded some facts in support of the claim, such as a few phrases from the jury instruction that Smith says counsel should have objected to, Smith failed to plead the complete factual basis for the claim. The claim did not include the entire instruction, even though the law is well established that, when reviewing a trial court's instructions, the charge must be considered as a whole, and the challenged portions must be considered in context. E.g., Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011). Additionally, Smith did not allege or plead any facts indicating that counsel's failure to object was not a matter of trial strategy, and he alleged only in a conclusory and general way that he was prejudiced by trial counsel's failure to object to some of the jury instruction, but he

failed to plead any facts indicating how he was prejudiced. Thus, the claim was due to be dismissed because Smith failed to comply with the pleading requirements of Rule 32. Although lack of specificity was not the reason for the circuit court's summary dismissal of this claim, and although the State did not assert in its answer the claim's lack of specificity, we may nonetheless affirm the circuit court's judgment on this ground. McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007).

Furthermore, an objection from trial counsel as to the form of the instruction would have been quite unexpected, since the instruction the trial court gave was the one defense counsel had requested in writing, and which the trial court accepted and agreed to give. (C. 110, supp. trial record filed Oct. 22, 2010.) Thus, an objection to the instruction would not have been sustained. Smith did not allege in his Rule 32 petition that trial counsel were ineffective for requesting this jury instruction. We note, moreover, that the jury instruction, taken as a whole, adequately instructed the jury that it was not to draw any adverse inferences from Smith's failure to testify, and that there existed many reasons other than guilt that a defendant might not testify. Blackmon v. State, 7 So. 3d 397 (Ala. Crim. App. 2005).

Summary dismissal of this claim was proper.

8. Smith argues that the trial court erred to reversal when it summarily dismissed Claim I.H. of the amended petition in which he alleged that trial counsel were ineffective because they failed to object to the trial court's jury instructions that, he said, improperly suggested that the jury could impute Parker's intent and actions onto Smith. The circuit court summarily dismissed the claim, finding that

Smith failed to state a claim for relief because the jury instruction on intent was a correct statement of the law.

Summary dismissal of this claim was proper because Smith failed to plead this claim with sufficient specificity. The claim did not present the entire instruction to which he alleged counsel should have objected, even though the law is well established that, when reviewing a trial court's instructions, the charge must be considered as a whole, and the challenged portions must be considered in context. E.g., Albarran v. State, 96 So. 3d 131 (Ala. Crim. App. 2011). Additionally, Smith did not allege or plead any facts indicating that counsel's failure to object was not a matter of trial strategy, and he alleged only in a conclusory and general way that he was prejudiced by trial counsel's failure to object to the jury instruction, but he failed to plead any facts indicating how he was prejudiced. Thus, the claim was due to be dismissed for the failure to comply with the pleading requirements of Rule 32. Although lack of specificity was not the reason for the circuit court's summary dismissal of this claim, and although the State did not assert in its answer the claim's lack of specificity, we may nonetheless affirm the circuit court's judgment on this ground. McNabb v. State, 991 So. 2d 313 (Ala. Crim. App. 2007).

Although we uphold the dismissal of the claim on the ground that it was not sufficiently pleaded, we note, too, that the underlying claim regarding the allegedly erroneous jury instruction on intent was raised on appeal, and it was addressed and rejected by this Court because, we held, the court's oral charge to the jury made it clear that, in order to find Smith guilty of capital murder, it had to find that Smith possessed a real and specific intent to kill.

Smith v. State, 908 So. 2d 273, 296-97 (Ala. Crim. App. 2000). Because the jury instruction was proper, any objection by trial counsel would have been baseless, and counsel will not be held ineffective for failing to raise a baseless objection. Wilkerson v. State, 70 So. 3d 442, 468 (Ala. Crim. App. 2011), quoting Bearden v. State, 825 So. 2d 868, 872 (Ala. Crim. App. 2001).

9. Smith argues that the circuit court erred when it summarily dismissed Claim I.I. of the amended petition, in which he incorporated Claim IV of the amended petition -- alleging that his death sentence violated Ring v. Arizona, 536 U.S. 584 (2002), and Apprendi v. New Jersey, 530 U.S. 466 (2000), and he alleged that, if counsel failed to raise a Ring/Apprendi claim on appeal, they were ineffective for failing to do so. The circuit court summarily dismissed the claim, holding:

> "[T]he Petitioner has failed to state a claim of ineffective assistance of counsel inasmuch as the Supreme Court of Alabama has held that the Alabama Sentencing Statute does not violate Ring. Any alleged failure to raise this issue by trial counsel on direct appeal would not support a claim for ineffective assistance of counsel. Counsel cannot be found ineffective for failing to raise a meritless issue at trial or on direct appeal."

(C. 129, return to first remand.)

We agree with the circuit court's holding on this issue, and affirm the court's summary dismissal of this claim. See Ex parte Waldrop, 859 So. 2d 1181 (Ala. 2002).

C. Claims Related to the Penalty Phase

Smith next argues that the circuit court erred to reversal when it summarily dismissed claims that he was denied the right to the effective assistance of counsel at the penalty phase of his trial. Smith raised numerous claims, and we examine each in turn.

1. Smith first argues that the circuit court erred when it summarily dismissed Claim II.A. of the amended petition that he was permitted to file under seal. That claim alleged that his lead trial attorney, Singleton, labored under a conflict of interest. The circuit court held, and we agree, that Smith failed to satisfy his burden to plead a clear and specific statement of the grounds for relief, including a full disclosure of the factual basis for those grounds. Rule 32.6(b), Ala. R. Crim. P. The circuit court correctly held that Smith failed to include anything beyond general allegations that a conflict existed and he pleaded no facts regarding any additional actions counsel would have taken or evidence he would have presented if he had not been under an alleged conflict of interest. As the claim was pleaded, it is impossible for this Court to determine whether Smith would be entitled to relief, even if the general allegations pleaded were true. See Bracknell v. State, 883 So. 2d 724 (Ala. Crim. App. 2003). Therefore, Smith failed to allege sufficient facts in his petition indicating counsel was under a conflict of interest or that the alleged conflict adversely affected his performance. Morever, we note that Smith was represented at trial by several attorneys, and he has not alleged that all of them were burdened by the same conflict of interest. For this additional reason, Smith failed to plead a claim for which relief could be granted, and summary dismissal was due.

We affirm the circuit court's summary dismissal of the sealed claim.

2. Smith next argues that the circuit court erred to reversal when it summarily dismissed Claim II.B. of his amended petition, in which he alleged that trial counsel were ineffective because they failed to present expert evidence regarding the impact of his background and his dependency on drugs and alcohol. We disagree.

Smith alleged in the amended petition that, although trial counsel had presented testimony and argument about Smith's family history and his substance abuse, counsel failed to provide an expert witness to "explain the total picture, place the evidence in context, and support this critical argument." (C. 478.) He further alleged, "Psychologists were available who would have testified concerning the impact of Mr. Smith's family history and substance dependency. But trial counsel did not pursue such testimony or retain such an expert." (C. 478.) Smith failed to identify by name any of the experts who could have testified, he failed to identify the substance of the expected testimony of the unnamed experts, and he failed to identify how the testimony would have changed the result of the penalty phase of Smith's trial. Smith thus failed to comply with the full-fact pleading requirement of Rule 32.6, Ala. R. Crim. P. We affirm the circuit court's summary dismissal of the claim for relief. See Jackson v. State, [Ms. 06-1026, May 25, 2012] ___ So. 3d ___ (Ala. Crim. App. 2012) (claim of ineffective assistance of counsel not sufficiently pleaded because petitioner failed to identify expert by name).

3. Smith next argues that the circuit court erred when it summarily dismissed Claim II.C. of the

amended petition in which he alleged that trial counsel were ineffective because they failed to provide any direct testimony or expert testimony about Smith's history of substance abuse. The circuit court dismissed the claim for failure to satisfy the pleading requirements of Rule 32.6(b). We agree with the circuit court. Although Smith identified the names of some of the lay witnesses who, he said, could have testified about Smith's substance abuse or its impact on his life, he did not plead any specific facts indicating the substance any testimony those witnesses might have given or any facts indicating how the failure to present that testimony resulted in prejudice to his case. Furthermore, Smith alleged that "other family, friends and acquaintances" were available to testify about this issue, but he failed to provide the names of any of the witnesses, and he failed to provide any facts regarding the substance of their testimony or how that testimony would have changed the outcome of the penalty phase of his trial. Smith also alleged, "Trial counsel also did not offer any expert to place Mr. Smith's alcohol and/or drug dependency into context, or to detail the effects they may have had on his life and decisions even though such experts were available." (C. 479.) These vague allegations of deficient performance and prejudice do not satisfy the full- fact pleading requirements of Rule 32. Smith failed to identify any expert witness by name who would have testified at Smith's trial, he failed to plead any specific facts indicating the substance of the testimony those witnesses might have given, and he failed to plead any facts indicating how the failure to present that testimony resulted in prejudice to his case. As a result, summary dismissal was proper. Daniel v. State, 86 So. 3d 405, 425-26 (Ala. Crim. App. 2011).

4. Smith next argues that the circuit court erred to reversal when it summarily dismissed Claim II.D. of his amended petition, in which he alleged that trial counsel were ineffective because they presented certain evidence to the trial judge at the final sentencing hearing regarding writings on a blackboard in the jury room that one of Smith's trial attorneys observed after the jury's penalty-phase deliberations. The circuit court dismissed the claim, finding that Smith failed to state a claim for relief, he failed to plead sufficient facts to support the claim, and that he could not satisfy the burden of proving deficient performance or prejudice. We affirm the circuit court's summary dismissal on the ground that Smith failed to meet the requirements of full- fact pleading that are necessary to plead a valid claim of ineffective assistance of counsel.

Smith failed to allege any facts indicating that he was prejudiced by counsel's actions. He pleaded no facts indicating that, if counsel had not presented testimony about the chalkboard writings, the result of the proceeding would have been different. Because Smith presented only a bare, speculative allegation that prejudice occurred, without specific facts indicating how he was prejudiced, the circuit court correctly dismissed the claim based on the pleading deficiency. Hyde v. State, 950 So. 2d 344, 356 (Ala. Crim. App. 2006).

5. Smith next argues that the circuit court erred when it summarily dismissed Claim II.E. of the amended petition, in which he alleged that trial counsel were ineffective because they instructed him not to testify at the final sentencing hearing and that "he was prevented from making any additional expressions of regret." (C. 482.) The circuit court dismissed the claim because, it said, Smith failed to

plead sufficient facts to indicate that the outcome of his case would have been different if he had testified at the final sentencing hearing or had given a statement at allocution. We agree. Smith alleged only that if he had not been prevented from speaking at the sentencing hearing, there was a reasonable probability that the result of his trial would have been different. This vague claim, unsupported by any facts, failed to satisfy the full-fact pleading requirements of Rule 32. Not only did Smith fail to plead any facts to support the allegation of prejudice, Smith also failed to plead with specificity any facts indicating what statement he would have made to the court and how that statement was any different than the evidence already available to the court. Trial counsel had clearly placed evidence and argument about Smith's remorse before the trial court because the trial court found Smith's remorse to be a nonstatutory mitigating circumstance, and this Court agreed with the trial court's sentencing findings. Smith v. State, 908 So. 2d 273, 301-02 (Ala. Crim. App. 2000). Because Smith failed to satisfy the pleading requirements of Rule 32.3 and Rule 32.6(b), summary dismissal of the claim was proper.

VI.

Smith argues that the circuit court denied him due process when it failed to provide him "the opportunity to present evidence on all of his ineffective assistance of counsel claims in their proper context." (Smith's brief on return to first remand, at p. 41.) The basic premise of Smith's argument is that the circuit court erred when it permitted him to present evidence only on certain of his allegations of ineffective assistance of counsel because, he says, he was entitled to present evidence on all of his specific claims of

ineffective assistance of counsel and to have the circuit court consider the cumulative effect of those alleged errors.

> "Neither this Court nor the Alabama Supreme Court have ever held that an evidentiary hearing must be conducted on every postconviction petition that raises a claim of ineffective assistance of counsel. Such a requirement would burden an already overburdened judiciary. '"An evidentiary hearing on a coram nobis petition [now Rule 32 petition] is required only if the petition is 'meritorious on its face." Ex parte Boatwright, 471 So. 2d 1257 (Ala. 1985).' Moore v. State, 502 So. 2d 819, 820 (Ala. 1986)."

Jackson v. v. State, [Ms. CR-06-1026, May 25, 2012]___ So. 3d ___, (Ala. Crim. App. 2012).

To the extent Smith is arguing he was entitled to present evidence on every allegation of ineffective assistance of counsel so that the circuit court could perform what he contends was the court's obligatory analysis of the cumulative effect of the alleged errors, this claim fails. Although Smith presents a discussion of federal cases in which the court applied a cumulative-effect analysis to claims of ineffective assistance of counsel, he has provided no Alabama authority requiring or applying a cumulative-effect analysis. To the contrary, Alabama courts have held that each claim in Rule 32 petition, including subcategories of ineffective-assistance-of-counsel claims, must be sufficiently pleaded. Coral v. State, 900 So. 2d 1274, 1284 (Ala. Crim. App. 2004), overruled on other grounds, Ex parte Jenkins, 972 So. 2d 159 (Ala. 2005).

Moreover,

> "[a] cumulative-effect analysis does not eliminate the pleading requirements established in Rule 32, Ala. R. Crim. P. An analysis of claims of ineffective assistance of counsel, including a cumulative-effect analysis, is performed only on properly pleaded claims that are not summarily dismissed for pleading deficiencies or on procedural grounds. Therefore, even if a cumulative-effect analysis were required by Alabama law, that factor would not eliminate [the petitioner's] obligation to plead each claim of ineffective assistance of counsel in compliance with the directives of Rule 32."

Taylor v. State, [Ms. CR–05–0066, October 1, 2010] ___ So. 3d ___, (Ala. Crim. App. 2010), quoted in Jackson v. State, [Ms. CR-06-1026, May 25, 2012] ___ So. 3d ___, ___ (Ala. Crim. App. 2012).

A majority of Smith's allegations of ineffective assistance of counsel were summarily dismissed. With regard to the few claims on which Smith presented evidence, he failed to meet his burden of proving deficient performance and prejudice. As demonstrated above, none of Smith's individual claims of deficient performance or prejudice have any merit, and therefore we have nothing to accumulate, even if we were to perform a cumulative-effect analysis.

Therefore, Smith is not entitled to relief on this claim of error.

VII.

Smith argues that the circuit court erred when it summarily dismissed "the remainder" of his claims on the grounds that they were not pleaded with sufficient specificity or they were procedurally barred, and he argues that the claims were sufficiently pleaded and were not procedurally barred. (Smith's brief on first return to remand, at pp. 74- 75.) Smith discusses and presents legal argument as to only two claims -- a claim that counsel were ineffective for failing to object to hearsay evidence (Claim I.D.3.), and a claim that lethal injection constitutes cruel and unusual punishment (Claim VI). We have addressed those two claims in previous portions of this memorandum, and have resolved them adversely to Smith.

Apart from the two claims discussed above, Smith has not referred specifically to any other claim that, he says, was improperly dismissed; Smith has not provided any citation to the circuit court's order dismissing any specific claim; and he has provided no citation to parts of the record or to any legal authority in an attempt to explain why he believes the circuit court's judgment as to any specific claim was in error. However, Smith incorporated by reference the arguments he made in his opening and reply briefs as to "those claims," and argues that he pleaded the claims sufficiently and that they are not procedurally barred. In the initial brief Smith filed with this Court, Smith argued in Issue X that the circuit court had erred when it dismissed Claims III.A., Claim III.C., and Claims VII through XV on grounds that they were precluded by Rule 32.2(a)(2) and Rule 32.2(a)(4), Ala. R. Crim. P. Smith conceded in his initial brief that all of those claims had been raised at trial and on appeal,

but he requested that this Court reconsider the issues in the interests of justice. (Smith's initial brief, at p. 104.) In the initial brief, as in his brief on return to first remand, Smith presented no argument, legal authority, or citation to any part of Smith's trial or postconviction proceedings to support his request that this Court reconsider any of the precluded issues, and there is no legal authority supporting his request for that reconsideration. We have considered the arguments in all of Smith's briefs as to the trial court's summary dismissal of claims other than those already discussed in this memorandum opinion, and we can only conclude that, even considered together, the arguments do not comply with Rule 28(a)(10), Ala. R. App. P. See McNabb v. State, 991 So. 2d 313, 317 (Ala. Crim. App. 2007) ("'It is not the job of the appellate courts to do a party's legal research. Nor is it the function of the appellate courts to "make and address legal arguments for a party based on undelineated general propositions not supported by sufficient authority or argument."' Pileri Indus., Inc. v. Consolidated Indus., Inc., 740 So. 2d 1108, 1110 (Ala. Civ. App. 1999) (citations omitted)."). Smith is not entitled to review of, or relief on, this claim of error.

Conclusion

For the foregoing reasons, we affirm the circuit court's judgment denying Smith's amended petition.

APPLICATION FOR REHEARING OVERRULED; MEMORANDUM OF MARCH 22, 2013, WITHDRAWN; MEMORANDUM SUBSTITUTED; AFFIRMED.

Windom, P.J., and Kellum, Burke, and Joiner, JJ., concur.

Appendix F

COURT OF CRIMINAL APPEALS OF ALABAMA

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908 So.2d 273

CR–97–0069.

Dec. 22, 2000.

Rehearing Denied Feb. 23, 2001.

Kenneth Eugene SMITH

v.

STATE

Attorneys and Law Firms

Christopher M. Johnson, Charlotta Norby, and Palmer Singleton, Atlanta, Georgia, for appellant.

William H. Pryor, Jr., atty. gen., and Kathryn D. Anderson, asst. atty. gen., for appellee.

Opinion

McMILLAN, Judge.

The appellant, Kenneth Eugene Smith, was convicted of murdering Elizabeth Dorlene Sennett for a pecuniary or other valuable consideration, an offense defined as capital by § 13A–5–40(a)(7), Ala.Code 1975. The jury, by a vote of 11 to 1, recommended that Smith be sentenced to life imprisonment without the possibility of parole. The trial court, pursuant to

authority granted by § 13A–5–47(e), Ala.Code 1975, overrode the jury's recommendation and sentenced Smith to death.[1]

The State's evidence tended to show the following. On March 18, 1988, the Reverend Charles Sennett, a minister in the Church of Christ, discovered the body of his wife, Elizabeth Dorlene Sennett, in their home on Coon Dog Cemetery Road in Colbert County. The coroner testified that Elizabeth Sennett had been stabbed eight times in the chest and once on each side of the neck, and had suffered numerous abrasions and cuts. It was the coroner's opinion that Sennett died of multiple stab wounds to the chest and neck.

The evidence established that Charles Sennett had recruited Billy Gray Williams,[2] who in turn recruited Smith and John Forrest Parker,[3] to kill his wife. He

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1 This appeal is from Smith's second conviction for capital murder. Smith's first conviction was reversed on appeal because of a *Batson v. Kentucky,* 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), violation. *Smith v. State,* 588 So.2d 561 (Ala.Crim. App.1991), after remand, 620 So.2d 727 (Ala.Crim.App.), on remand, 620 So.2d 732 (Ala.Crim.App.1992). Smith was retried in April 1996 and again convicted of capital murder.

2 Billy Gray Williams was also convicted for the capital murder of Elizabeth Sennett. He was sentenced to life imprisonment without the possibility of parole. His conviction was affirmed by this Court. Williams v. State, 565 So.2d 1233 (Ala.Crim.App.1990).

3 John Forrest Parker was also convicted of capital murder and sentenced to death by electrocution. His conviction was affirmed on direct appeal. Parker v. State, 587 So.2d 1072 (Ala.Crim.App.1991), on remand, 610 So.2d 1171 (Ala.Crim.App.), aff'd, 610 So.2d 1181 (Ala.1992), cert. denied, 509 U.S. 929, 113 S.Ct. 3053, 125 L.Ed.2d 737 (1993). The denial of his petition for postconviction relief was also affirmed by this Court, without an opinion. Parker v. State, 768 So.2d 1020

was to pay them each $1,000 in cash for killing Mrs. Sennett. There was testimony that Charles Sennett was involved in an affair, that he had incurred substantial debts, that he had taken out a large insurance policy on his wife, and that approximately one week after the murder, when the murder investigation started to focus on him as a suspect, Sennett committed suicide. Smith detailed the following in his confession to police:

> "About one month prior to March 18, 1988, I was contacted by Billy Williams. Billy came over to my house and we talked out on the front porch. It was late afternoon. Billy said that he knew someone that wanted somebody hurt. Billy said that the person wanted to pay to have it done. Billy said the person would pay $1500 to do the job. I think I told Billy I would think about it and get back with him. Billy lives at the corner of Tuscaloosa Street and Cypress Street near the telephone company. Billy drives a red and white Thunderbird. Billy and I are good friends. Billy and I talked about this several times before I agreed to do it. I had already talked with John Parker about helping me.
>
> > "I think I first met Charles Sennett about two weeks prior to the murder. Billy arranged the meeting. At the time I met Mr. Sennett I did not know who he was. I did not ask his name and he did not ask what my name was. Mr. Sennett told me that he wanted somebody taken care of. Mr. Sennett said that the person would be at home, that they never had any visitors. Mr. Sennett said that the house was out in the country. At

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(Ala.Crim.App.1999) (table), cert. denied, 780 So.2d 811 (Ala.1999) (table).

that time I just listened to his proposal and told him I would get back with him. When we talked we sat in Mr. Sennett's truck in front of Billy's apartment. I gave him my phone number.

"Mr. Sennett called me a couple of times to see if I had made a decision. Sometime between the Monday prior to the murder and the Thursday prior to the murder, Mr. Sennett learned that John and I would do what he wanted. I met with Mr. Sennett on Tuesday prior to the murder in the coffee[house] at ECM. At this meeting Mr. Sennett drew me a diagram of his house and told me that his wife and he would be out of town on Wednesday, to go down to the house and look around. By the time Sennett and I met at ECM I had learned through conversations with him that it was his wife that he wanted killed and the price agreed was $1,000 each—excuse me—$1,000 each for Billy Williams, John Parker and I.

"The next meeting was on Thursday prior to the murder in front of Billy's apartment again. Billy, Mr. Sennett and I sat in Mr. Sennett's silver car and talked. I don't recall what time it was exactly. I think it was in the morning. At this meeting Sennett gave me $200 and showed us the rest of the money. Two hundred dollars was for anything we needed to do the job. John Parker sat in my car while Billy and I talked with Mr. Sennett. The murder was supposed to look like a burglary that went bad. This was Mr. Sennett's idea. Sennett told me to take whatever I wanted from the house. It was agreed for John and I to do the murder and then come back to Billy's apartment—to Billy's house—excuse me—and get the rest of our money. This meeting only lasted a short while. Sennett told us that he

would be gone from 8:30 until noon. Then on 3/18 of '88 ... Friday, John and I got together around 8:30. We were in John's car, a Pontiac Grand Prix, gold. John drove to Muscle Shoals, then I drove down to the Sennett house. John had brought a black handle survival knife and a black holster. At this time we still did not know how we were going to kill Mrs. Sennett.

"John and I got to the Sennett house around 9:30, I think. I parked at the back of the house near a little patio that led into the house. I went to a door to the left of the car. I think there was a white freezer nearby. I knocked on the door and Mrs. Sennett came to the door. I told Mrs. Sennett that her husband had told us that we could come down and look around the property to see about hunting on it. Mrs. Sennett asked my name. I told her I was Kenny Smith. She went to the phone and called her husband and came back and told us it was okay to look around.

"John and I looked around the property for a while then came back to the house. John and I went back to the door. We told Mrs. Sennett we needed to use the bathroom and she let us inside.

"I went to the bathroom nearest the kitchen and then John went to the bathroom. I stood at the edge of the kitchen talking with Mrs. Sennett. Mrs. Sennett was sitting at a chair in the den. Then I heard John coming through the house. John walked up behind Mrs. Sennett and started hitting her. John was hitting her with his fist. I started getting the VCR while John was beating Mrs. Sennett. John hit Mrs. Sennett with a large cane and anything else he could get his hands on. John went into a frenzy. Mrs. Sennett was

yelling just stop, we could have anything we wanted.

"As John was beating up Mrs. Sennett, I messed up some things in the house to make it look like a burglary. I took the VCR out to the car.

The last place I saw Mrs. Sennett she was lying near the fireplace covered with some kind of blanket. I had gone outside to look in the storage buildings when I saw John run out to the pond and throw some things in it. I also took a small stereo from the house—'also,' is the last word.

"I don't know what brand it was or where in the house I got it. The VCR was a Samsung. I got it from under the TV set in the den. When John got back to the car we drove back to Billy's apartment to get our money.

"On the way back John told me that he had stabbed her once in the neck. I never stabbed Mrs. Sennett at all. When John and I got to Billy's, we were given $900 a piece. Billy gave us the money.

"At the time of the murder I never [knew] Charles Sennett's name or his wife's. It was only when it came out in the newspaper that I learned the name of the lady that was killed and Charles Sennett.

"I took the Samsung VCR home with me. The last time I saw the stereo it was in John's car. It was around noon when we got to Billy's apartment. Then on 3/31/88—in parenthesis, Thursday—my house was searched by investigators and they found the VCR. I was brought to the Colbert County Courthouse where I was advised of my rights. After being advised of

> my rights, I gave Investigator May this written statement."

Smith's statement to police was corroborated at trial. Donald Buckman, a friend of Smith's, testified that Smith approached him about one week before the murder and asked him if he would be interested in participating in beating someone up in exchange for money. Another witness, Brent Barkley, testified that Smith told him that he had been hired to beat up someone. Barkley also stated that he saw Smith on the evening of the murder and that Smith's hand was "bruised and wrapped." There was also testimony that Smith had in his possession a large amount of money immediately after the murder.

Smith's defense at trial was that he participated in the assault of Elizabeth Sennett but that he did not intend to kill her. Counsel in opening statement stated the following:

> "[Smith] agreed with Sennett to go beat Elizabeth Dorlene Sennett, to rough her up, to make it look like a robbery for fast cash. That is the terms they used. It was not to kill Mrs. Sennett. It was not to take her life. As shameful and as vile, it was nothing more or nothing less than to beat her up and to take [sic]. And that plan, what they agreed to—and you will hear evidence of this—that as evil as that plan was, that is all it was."

Standard of Review

Smith has been sentenced to death. Pursuant to Rule 45A Ala.R.App.P., this Court must review the record of the trial proceedings to determine if there is plain error. Rule 45A states:

> "In all cases, in which the death penalty has been imposed, the Court of Criminal Appeals shall notice any plain error or defect in the proceedings under review, whether or not brought to the attention of the trial court, and take appropriate appellate action by reason thereof, whenever such error has or probably has adversely affected the substantial right of the appellant."

As this Court stated in *Jackson v. State,* 791 So.2d 979, 991–92 (Ala.Crim.App.2000):

> "'Plain error' has been defined as error 'so obvious that the failure to notice it would seriously affect the fairness or integrity of the judicial proceedings.' *Ex parte Womack,* 435 So.2d 766, 769 (Ala.), cert. denied, 464 U.S. 986, 104 S.Ct. 436, 78 L.Ed.2d 367 (1983), quoting *United States v. Chaney,* 662 F.2d 1148, 1152 (5th Cir.1981). 'To rise to the level of plain error, the claimed error must not only seriously affect a defendant's "substantial rights," but it must also have an unfair prejudicial impact on the jury's deliberations.' *Hyde v. State,* 778 So.2d 199 (Ala.Cr.App.1998). This court has recognized that '"the plain error exception to the contemporaneous-objection rule is to be 'used sparingly, solely in those circumstances in which a miscarriage of justice would otherwise result.'"' *Burton v. State,* 651 So.2d 641, 645 (Ala.Cr.App.1993), aff'd, 651 So.2d 659 (Ala.1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995), quoting *United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 1046, 84 L.Ed.2d 1 (1985) (quoting in turn, *United States v. Frady,* 456 U.S. 152, 163, 102 S.Ct. 1584, 1592, 71 L.Ed.2d 816 (1982))."

While the failure to object does not bar our review in a death penalty case, it weighs against any claim of prejudice. *Ex parte Kennedy,* 472 So.2d 1106 (Ala.), cert. denied, 474 U.S. 975, 106 S.Ct. 340, 88 L.Ed.2d 325 (1985).

Guilt–Phase Issues

I.

Smith argues that his constitutional rights were violated by the district attorney's refusal to enter into good-faith plea negotiations. Specifically, Smith argues that the district attorney wrongfully allowed the victim's family to have input in whether the State would negotiate a plea agreement with Smith.

Initially, we observe that the only mention of Smith's entering a guilty plea is contained in the motion for a new trial, which states as follows:

> "Mr. Smith's rights to equal protection, due process, and a reliable determination of sentence, pursuant to Article I, Sections 1, 6, 8, 11, and 15 of the Alabama Constitution, the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and other applicable law, were violated by the District Attorney's refusal to enter into good faith plea negotiations with the defense, by the prosecutor's unfair and discriminatory plea bargaining policies, and by the prosecutor's improper delegation of prosecutorial responsibility. Mr. Smith's sentence of death must be set aside and a sentence of life in prison without the possibility of parole must be entered."

At the motion hearing Smith made no mention of this contention. The record contains no other reference to any attempted plea negotiations or any reference as to why these alleged attempts failed. As this Court has often stated:

> "'This court is bound by the record and not by allegations or arguments in brief reciting matters not disclosed by the record.' *Webb v. State,* 565 So.2d 1259, 1260 (Ala.Cr.App.1990). See also *Acres v. State,* 548 So.2d 459 (Ala.Cr.App.1987). Further, we cannot predicate error from a silent record. *Owens v. State,* 597 So.2d 734 (Ala.Cr.App.1992); *Woodyard v. State,* 428 So.2d 136 (Ala.Cr.App.1982), aff'd, 428 So.2d 138 (Ala.), cert. denied, 462 U.S. 1136, 103 S.Ct. 3120, 77 L.Ed.2d 1373 (1983)."

Whitley v. State, 607 So.2d 354, 361 (Ala.Crim. App.1992). See also *Taylor v. State,* 808 So.2d 1148, 1177 (Ala.Crim.App.2000).

Moreover, as the United States Supreme Court stated in *Weatherford v. Bursey,* 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977), "[t]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial. It is a novel argument that constitutional rights are infringed by trying the defendant rather than accepting his plea of guilty." See also *Ex parte Pfalzgraf,* 741 So.2d 1118 (Ala.Crim.App.1999), and *Murray v. State,* 494 So.2d 891 (Ala.Crim.App.1986).

II.

Smith argues that the trial court committed reversible error in refusing to strike for cause prospective juror E.K. on the basis that he indicated during voir dire that he thought the death penalty

should be imposed more often. Smith further argues that E.K. should have been struck because he stated that he did not consider age to be a mitigating factor. We note that Smith used his first peremptory strike to remove E.K. from the venire.

A review of the record reflects that E.K. indicated during general voir dire questioning that he thought that the death penalty should be imposed more frequently. Because of that answer E.K. was individually voir dired, in chambers, by the defense and prosecution. E.K. was questioned in depth about his views regarding capital punishment and indicated, on more than one occasion, that he could set aside his personal views and follow the law as instructed by the court. He also said that he would be fair to the defense.

This Court in *Pressley v. State,* 770 So.2d 115, 127 (Ala.Crim.App.1999), aff'd, 770 So.2d 143 (Ala.2000), stated:

> "The 'original constitutional yardstick' on this issue was described in *Witherspoon v. Illinois,* 391 U.S. 510, 88 S.Ct. 1770, 20 L.Ed.2d 776 (1968). Under *Witherspoon,* before a juror could be removed for cause based on the juror's views on the death penalty, the juror had to make it unmistakably clear that he or she would automatically vote against the death penalty and that his or her feelings on that issue would therefore prevent the juror from making an impartial decision on guilt. However, this is no longer the test. In *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985), the United States Supreme Court held that the proper standard for determining whether a veniremember should be excluded for cause because of opposition to the death penalty is

> whether the veniremember's views would "'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath.'"'"

The thorough voir dire of this juror indicates that his views on capital punishment would not interfere with his duty as a juror. The trial court correctly denied Smith's strike for cause of E.K.

Moreover, any possible error was harmless based on the United States Supreme Court's recent holding in *United States v. Martinez–Salazar,* 528 U.S. 304, 120 S.Ct. 774, 145 L.Ed.2d 792 (2000). In *Martinez–Salazar,* the Court held that a defendant's right to an impartial jury is not violated when a trial court fails to grant a strike for cause of a juror who is ultimately removed from the venire by the use of a peremptory strike. See *Evans v. State,* 794 So.2d 411 (Ala.2000). The jury did not recommend that Smith be sentenced to death. The jury, by a vote of 11 to 1, recommended that Smith be sentenced to life imprisonment. According to *Martinez–Salazar,* Smith was not denied his right to an impartial jury; moreover he was not prejudiced.

III.

Smith argues that the trial court erred in allowing into evidence photographs of the crime scene and autopsy that were, he argues, unduly gruesome and unnecessarily prejudicial.

This identical issue was addressed by this Court after Smith's original conviction for capital murder. In that opinion, we stated:

> "'Photographs are admissible into evidence within the discretion of the trial judge and will

be reviewed on appeal only to determine if there has been an abuse of that discretion. *Fletcher v. State,* 291 Ala. 67, 277 So.2d 882 (1973).

"'Photographs are admissible if they tend to prove or disprove some disputed or material issue, to illustrate or elucidate some other relevant fact or evidence, or to corroborate or disprove some other evidence offered or to be offered. *Baldwin v. State,* 282 Ala. 653, 213 So.2d 819 (1968). The fact that a photograph is gruesome is not grounds to exclude it as long as the photograph sheds light on issues being tried. *Magwood v. State,* 494 So.2d 124 (Ala.Cr.App.1985), aff'd, *Ex parte Magwood,* 494 So.2d 154 (Ala.1986), cert. denied, *Magwood v. Alabama,* 479 U.S. 995, 107 S.Ct. 599, 93 L.Ed.2d 599 (1986).

"'Some of the photographs in issue here depicted wounds to the back and neck area of the deceased. The State argues that the photographs were credible evidence for the jury to view in order to determine whether a pocketknife or a larger knife that was found at the scene could have inflicted the depicted wounds. Based on the record, we agree.

"'....

"'... [P]hotographs depicting the character and location of wounds on a deceased's body are admissible even though they are cumulative and are based on undisputed matters. *Magwood[v. State],* 494 So.2d [124] 141 [(Ala.Cr.App.1985)]. The fact that a photograph is gruesome is not grounds to exclude it as long as the photograph sheds light on issues being tried. *Id.* Also a photograph may be gruesome and ghastly, but

> this is not a reason to exclude it as long as the photograph is relevant to the proceedings, even if it tends to inflame the jury. *Id.*'
>
> "*Ex parte Bankhead,* 585 So.2d 112 (Ala.1991)."

Smith v. State, 588 So.2d 561, 579–80 (Ala.Crim. App.1991), on remand, 620 So.2d 727 (Ala.Crim. App.), on remand, 620 So.2d 732 (Ala.Crim. App.1992). We agree with this court's earlier determination that the photographs corroborated Smith's confession and that they were relevant and admissible.

IV.

Smith argues that the prosecution violated *Brady v. Maryland,* 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), by failing to disclose the name of the confidential informant who aided police in the investigation of the case. He further asserts that police had a duty to obtain the informant's identity.

The record reflects that after Sennett's murder, the State offered a $10,000 reward for information concerning Sennett's death. Capt. Ronnie May of the Colbert County Sheriff's Department testified that an anonymous caller contacted the Crimestoppers program telephone number for the sheriff's department and said that she had information about the Sennett murder. She told police that she wanted to remain anonymous and that she would not give any information unless she did not have to disclose her name or testify at trial. She was assigned a number, 569S, and told to give the police this number whenever she called. May testified that the caller told police that three people—Smith, Parker, and Williams—were involved in the murder, she gave

their addresses, the makes of their cars, and said that a VCR that had been taken from the Sennett's house was in Smith's house and that Parker had a knife. She said that Smith participated in the murder and that he did so for money and that Parker actually stabbed Sennett. May said that Caller 569S telephoned police several times to relay information. During the last telephone conversation she told police the identification number of the VCR stolen and gave a description of it to police.[4] May stated that he then applied for a warrant to search Smith's house. May further testified that the police never knew the caller's identity.

Smith argued at trial that the police had a duty to discover the identity of this caller and to give this information to defense counsel. However, as the Court of Appeals of Nebraska stated in *State v. Brown,* 5 Neb.App. 889, 567 N.W.2d 307 (1997):

> "*People v. Callen,* 194 Cal.App.3d 558, 239 Cal.Rptr. 584 (1987), involved a 'Crimestoppers' program in which an anonymous caller provided the license plate number of a vehicle involved in a robbery. In *Callen,* the police did not know the person's identity, and the defendant's motion to compel disclosure was denied. The defendant's motion to dismiss, claiming denial of a substantial right by virtue of police conduct which allowed a witness to remain unidentified, was also denied. The defendant's conviction was affirmed on appeal after the court concluded that the police did not have a duty to determine and disclose the informant's identity. It reasoned:

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[4] This information had not been disclosed to the media.

> "'Such an investigatory burden would not only be onerous and frequently futile, it would destroy programs such as Crimestoppers by removing the guarantee of anonymity. Anonymity is the key to such a program. It is the promise of anonymity which allays the fear of criminal retaliation which otherwise discourages citizen involvement in reporting crime. In turn, by guaranteeing anonymity Crimestoppers provides law enforcement with information it might never otherwise obtain. We are satisfied the benefits of a Crimestoppers-type program—citizen involvement in reporting crime and criminals—far outweigh any speculative benefits to the defense arising from imposing a duty on law enforcement to gather and preserve evidence of the identity of informants who wish to remain anonymous.'

"*Id.* at 563, 239 Cal.Rptr. at 587.

"The *Callen* court indicated that this was the proper result even in the event that the informant was a percipient witness. It was careful, however, to distinguish cases involving Crimestoppers-type tipsters from those involving informants employed by police, taking direction from police, or having any face-to-face contact with police.

"*People v. Siegl,* 914 P.2d 511 (Colo.App.1996), involved a 'Crimestoppers' report from an anonymous caller. The informant in *Siegl* told police that she had been in the defendant's house, and that she had smelled a strong odor of marijuana, and that the defendant's tenant had told her the defendant and the tenant grew marijuana in the house. After verifying some of the information, police obtained a search warrant for the house, and the defendant was charged with

> possession and cultivation of controlled substances. Before trial, the defendant sought a court order requiring the State to disclose the informant's identity. Following in camera hearings, the defendant's motions in this regard were denied. On appeal, the defendant asserted that the court erred in refusing to require the State to disclose the identity of the alleged anonymous informant to help him prepare his defense. Noting that disclosure of informants was committed to the sound discretion of the trial court, the *Siegl* court concluded that 'the trial court did not abuse its discretion in considering the fact that the Crimestoppers' informant was unknown to the police and in concluding that such anonymity served an important public interest which outweighed the defendant's request for disclosure.' *Id.* at 516. Thus, it upheld the court's denial of the defendant's request for disclosure."

Police are not obligated to disclose the name of an anonymous caller who contacts a Crimestoppers program telephone number. To make such a requirement would defeat the purpose of such a program.

Moreover, there is absolutely no evidence that any *Brady* violation occurred. In order to establish a *Brady* violation, the party alleging the violation must show: (1) that the prosecution suppressed evidence; (2) that the evidence suppressed was favorable to the accused; and (3) that the evidence was material. See *Kinder v. State,* 515 So.2d 55 (Ala.Crim.App.1986). Smith cannot satisfy this test because there is no dispute that the State did not know the identity of the anonymous caller.

V.

Smith argues that the trial court erred in denying his motion to suppress evidence, specifically, the VCR recovered from his home as the result of the execution of a search warrant. Smith argues that the VCR should have been suppressed because, he says, the informant who told police where the VCR was located was acting as an agent of the State when she entered the home. He further asserts that the search was unlawful because, he says, police exceeded the scope of the warrant.

A.

Smith argues that police encouraged informant 569S to search Smith's home for the VCR stolen during the course of the murder; therefore, he argues, 569S became an agent for the State when she searched his home and his Fourth Amendment rights were violated.

First, we must determine if the informant was acting as an agent of the State when she entered Smith's home. The test to be applied was discussed by the Alabama Supreme Court in *Ex parte Hilley,* 484 So.2d 485, 490 (Ala.1985), where the court stated:

> "Mere antecedent contact between [the informant] and police did not make [the informant] an agent of the police. *United States v. Lambert,* 771 F.2d 83, 89 (6th Cir.1985); *Singleton v. State,* 48 Ala.App. 157, 160, 262 So.2d 772, 775 (1971), cert. denied, 288 Ala. 751, 262 So.2d 776 (1972).
>
> "First, the police must have instigated, encouraged, or participated in the search. Second, the individual must have engaged in the search with the intent of assisting the police in their investiga-

tion. *Lambert,* 771 F.2d at 89; *Black,* 767 F.2d at 1339; *United States v. Howard,* 752 F.2d 220, 227 (6th Cir.1985)."

Alabama does not have many opinions applying this test, so we have looked to other jurisdictions for guidance. The United States Court of Appeals for the Seventh Circuit stated in *United States v. Feffer,* 831 F.2d 734, 737–39 (7th Cir.1987):

"Though individuals have a fourth amendment right to be free from unreasonable searches and seizures by the government, purely private searches are not subject to constitutional restrictions. *Walter v. United States,* 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980); *Burdeau v. McDowell,* 256 U.S. 465, 41 S.Ct. 574, 65 L.Ed. 1048 (1921). 'The exclusionary rules were fashioned "to prevent, not repair," and their target is official misconduct.' *Coolidge v. New Hampshire,* 403 U.S. 443, 488, 91 S.Ct. 2022, 2049, 29 L.Ed.2d 564 (1971) (quoting *Elkins v. United States,* 364 U.S. 206, 217, 80 S.Ct. 1437, 1444, 4 L.Ed.2d 1669 (1960)). A difficult issue arises, however, once the government is contacted by a private searcher. The government may not do, through a private individual, that which it is otherwise forbidden to do. Accordingly, if in light of all the circumstances a private party conducting a search must be regarded as an instrument or agent of the government, the fourth amendment applies to that party's actions. *Coolidge,* 403 U.S. at 487, 91 S.Ct. at 2048.

"....

"In addressing this issue, the district court followed the approach taken by the Ninth Circuit in *United States v. Walther,* 652 F.2d 788 (9th Cir.1981). Though specifically declining to define a standard,

> *id.* at 791, the *Walther* court approached the 'instrument or agent' issue by considering both whether the government knew of and acquiesced ... and whether ... the search [was conducted] ... for the purposes of assisting the government.
>
> "....
>
> "... [T]wo critical factors in the 'instrument or agent' analysis are whether the government knew of and acquiesced in the intrusive conduct and whether the private party's purpose for conducting the search was to assist law enforcement efforts or to further her own ends. The court's analysis must be made on a case-by-case basis and in light of all the circumstances. Nevertheless, it is the movant's burden to establish by a preponderance of the evidence that the private party acted as a government instrument or agent."

"To effect such a transformation, a defendant must prove some exercise of governmental power over the private entity, such that the private entity may be said to have acted on behalf of the government rather than for its own, private purposes. *Coolidge,* 403 U.S. at 488, 89, 91 S.Ct. at 2049." *United States v. Koenig,* 856 F.2d 843, 849–50 (7th Cir.1988).

> "While a certain degree of governmental participation is necessary before a private citizen is transformed into an agent of the state, de minimis or incidental contacts between the citizen and law enforcement agents prior to or during the course of a search or seizure will not subject the search to fourth amendment scrutiny. The government must be involved either directly as a participant or indirectly as an encourager of the private citizen's actions before we deem

> the citizen to be an instrument of the state...."

United States v. Miller, 688 F.2d 652, 657 (9th Cir.1982), quoting *United States v. Walther,* 652 F.2d 788 (9th Cir.1981). The Supreme Court of Hawaii also noted that an indication that an informant is acting for the state is the fact that the police actively recruited the informant. See *State v. Boynton,* 58 Haw. 530, 574 P.2d 1330 (1978).

Capt. May testified at the motion hearing that on March 29, 1988, he received a telephone call from an unidentified female; the caller said that she wanted to provide information on the Sennett murder, but that she wanted to remain anonymous. May told her to call the Crimestoppers telephone number. She did. During the initial conversation, the caller asked May what the police were looking for in regard to the investigation. May said that the police needed to know the names and addresses of the parties involved and any information about objects taken from the scene of the murder. The caller immediately called the Crimestoppers number and spoke with Investigator Miller. She was assigned the number 569S. This informant told Miller that three people where involved in the murder—Smith, Parker, and Williams—and that the missing VCR, which had been mentioned in a local newspaper article, was in Smith's house. She also told Miller that Parker had taken a knife to Sennett's home and stabbed Elizabeth Sennett. Miller, attempting to corroborate the information, asked the informant for more specific information about the VCR. Miller did not tell 569S to enter Smith's home, nor did he encourage her to do so. The caller told Miller that she would try to get more information. Miller told the informant to call back daily if she had any new information. On

March 30, 1988, 569S called and gave police additional information about the missing VCR. She described the VCR, providing the make and model. May testified that the informant was not told to enter Smith's house. The following occurred during the motion hearing to disclose the identity of the confidential informant:

"Q [Prosecutor]: Did you ever ask her to make an entry into his home to try to get the information for you?

"A [Capt. May]: No, sir, I did not.

"Q: Did you ever ask her to go out and interview witnesses?

"A: No, sir, I did not.

"Q: Did you ever direct her specifically to do any acts to obtain information?

"A: No, sir.

"Q: Did you have an idea from what she told you as to how she was getting the information she was getting to you?

"A: I just figured as a friend of the family she was talking to them at some point in time.

"Q: Did you ever at any point during the investigation or during the time she was supplying you information, ask or request that she go out and interview the defendant?

"A: No, sir.

"Q: Or any family member?

"A: No, sir.

"Q: Did you ever at any point ask her to do anything that you personally felt that you could not legally do yourself?

"Mr. Singleton [defense counsel]: I am going to object to that as self-serving, conclusory.

"The Court: Overruled.

"Q: Well, let me ask it this way: You know that there are certain things that you can't legally do during the course of an investigation, is that correct? Even though it might be beneficial to you for the investigation, you know you can't make an illegal entry into a house?

"A: Yes, sir.

"Q: And you know that you can't commit some crime in order to obtain information, isn't that correct?

"A: Yes, sir.

"Q: Did you, to your knowledge, ask her to do anything of an unlawful nature in order to obtain information for you?

"A: No, sir, I did not.

"Q: And as far as her coming to the point where she was an informant and providing information to you, did you do anything initially to seek her out or locate her or to get her to talk, initially?

"A: No, sir."

The record shows that caller 569S was not encouraged to enter Smith's house—she did so of her own free will. Smith failed to meet his burden of establishing that the informant was acting as an agent for the state. See *Feffer*. The informant was

acting as a private citizen; therefore, Smith's Fourth Amendment protections were not violated.

B.

Smith also argues that the VCR should have been suppressed because, he says, the police exceeded the scope of the search warrant during its execution. The search warrant reads as follows:

> "Proof by affidavit having been made before me this day by Ronnie May, an Investigator for the Colbert County Sheriff's Department, Colbert County, Alabama, that he has probable cause for believing and that he does believe that there is currently contained in the residence of Renea Bryant [Smith's common-law wife] located at 306 North Royal Avenue, Florence, Alabama, a Samsung Video Cassette Recorder, Model VT–311TQ, Serial Number 7020101324.
>
> "You are therefore commanded to make an immediate search of the above described residence, between the hours of sunrise and sunset, for said videocassette recorder, and if you find the same or any part thereof to bring it forthwith before the Lauderdale County, Alabama District Court."[5]

The record reflects that, when executing the search warrant, officers entered the home and did an initial security search to determine the location of its occupants. May testified that the VCR was recovered within 10 minutes after the search began. Police did open several drawers in the home. Immediately upon

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[5] Smith and Bryant lived together at Royal Street with their two-year-old son.

recovering the VCR police discontinued their search. The VCR was the only item taken during the search.

> "A search is unreasonable and violates the protections of the Fourth Amendment if it exceeds the scope of the authorizing warrant. U.S. Const. Amend. IV; see *Long v. State,* 532 S.W.2d 591, 596 (Tex.Crim.App.1975). While the scope of the search warrant is governed by its terms, the search may be as extensive as is reasonably required to locate items described in the warrant. U.S. Const. Amend. IV; *Haynes v. State,* 475 S.W.2d 739, 741–42 (Tex.Crim.App.1971). If the scope of the search is challenged because of the location where the items were found, the officer must show that he was properly in the place where the item was found, either on basis of the search warrant or under the authority of an exception to the warrant requirement. *Snider v. State,* 681 S.W.2d 60, 62–62 (Tex.Crim.App.1984); *Swink v. State,* 747 S.W.2d 53, 54 (Tex.App.—Texarkana 1988, no writ)."

DeMoss v. State, 12 S.W.3d 553, 558 (Tex.App.1999). See also *United States v. Wuagneux,* 683 F.2d 1343 (11th Cir.1982), cert. denied, 464 U.S. 814, 104 S.Ct. 69, 78 L.Ed.2d 83 (1983) and *United States v. Rettig,* 589 F.2d 418, 423 (9th Cir.1978) ("The question is whether or not the search that was conducted was confined to the authorization given by the magistrate. In determining whether or not a search is confined to its lawful scope, it is proper to consider both the purpose disclosed in the application for a warrant's issuance and the manner of its execution.").

The warrant stated that police were authorized to search Smith's home for the VCR and "any part thereof," e.g., a remote. Police did not exceed the scope of the warrant.[6]

VI.

Smith argues that the trial court erred in allowing his confession to be received into evidence. He cites several grounds in support of this contention.

A.

Smith initially argues that his confession should have been suppressed because, he says, police arrested him at his home without a warrant.

During the suppression hearing Capt. May testified that when the police recovered the VCR in Smith's home, he turned to Smith, read him his *Miranda* rights and asked him to go to the police station to talk about where he had gotten the VCR. He said that Smith indicated that he would go and Renea Bryant, Smith's common-law wife, said that she wanted to go with him to the police station. May said that he told her to contact someone to come and watch their child. Police waited approximately 20 minutes for someone to come to the residence to take care of the child.

It appears from the record that Smith voluntarily accompanied law-enforcement officers and that he was not under arrest when he went to the police station to answer questions.

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[6] We note that during Smith's first trial he did not challenge the search of the house and seizure of the VCR.

Even if we were to conclude that Smith was under arrest when the VCR was recovered, the arrest was lawful and there was probable cause for the arrest; therefore, it did not render Smith's statement inadmissible. As this Court stated in *Parker,* 587 So.2d at 1088, the case involving Smith's codefendant:

> "The appellant maintains that his warrantless arrest at this home was illegal because it was without probable cause. He also argues that because his arrest was illegal, his subsequent statement was inadmissible.
>
> "In *Williams v. State,* 565 So.2d 1233, 1236 (Ala.Cr.App.1990), this Court found that there was probable cause to arrest the appellant's accomplice. 'The information obtained from the anonymous telephone informant and corroborated by the sheriff's department satisfied the totality-of-the-circumstances test for determining probable cause set out in *Illinois v. Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (1983).' *Williams,* 565 So.2d at 1235. The facts supplying the probable cause for the arrest of Williams, Smith, and the appellant are virtually identical.
>
> "We find that, based on the specific facts presented in this case, the corroboration of the anonymous telephone informant supplied probable cause for this particular appellant's arrest. See *Alabama v. White,* 496 U.S. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990).
>
> "In determining the legality of the appellant's arrest, this Court need not decide whether the appellant was actually arrested inside his home or whether any warrantless arrest of the appellant at this home constituted a violation of *Payton v. New*

> *York,* 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). The statements of the appellant were given to Investigator May at the county courthouse. In *New York v. Harris,* 495 U.S. 14, 110 S.Ct. 1640, 1644–1645, 109 L.Ed.2d 13 (1990), the United States Supreme Court held that 'where the police have probable cause to arrest a suspect, the exclusionary rule does not bar the State's use of a statement made by the defendant outside of his home, even though the statement is taken after an arrest made in the home in violation of *Payton*.' Therefore, the appellant's statements at the courthouse would have been admissible even if this Court were to accept the appellant's argument that he was arrested without a warrant inside his residence."

Smith also argues that his confession should be suppressed because the search of his home was executed without a warrant. Smith's argument is premised on the erroneous conclusion that the search warrant was unlawful because the informant was a state agent. As we discussed in Part V of this opinion, the informant was not acting as a state agent; thus, the Fourth Amendment was not implicated by the informant's actions.

Also, we have reviewed the affidavit in support of the issuance of the search warrant in this case. The affidavit, which consists of six typed pages, is very detailed. It consists of all of the information that the police had been given by caller 569S. The warrant was supported by probable cause. *Parker,* 587 So.2d at 1088.

B.

Smith also argues that his confession should be suppressed because, he says, it was obtained in violation of Alabama law. Smith argues that his arrest by Colbert County law enforcement officers in Lauderdale County, violated § 15–10–70, Ala.Code 1975. Section 15–10–70 states:

> "When any person charged with the commission of any offense *is arrested in any county other than that in which he is triable* by an officer of the county in which he is arrested, such arresting officer shall immediately commit him to a jail or guardhouse nearest to the place of arrest, and the sheriff of such county shall at once notify the sheriff of the county in which such person is triable of the fact of such arrest and confinement."

(Emphasis added.) Here, Smith was not arrested by officers in Lauderdale County—the county of his residence. He was arrested by officers of the county where the crime occurred—Colbert County. This section has no application to the arrest in this case because Smith was arrested by officers from the county where the crime occurred. Section 15–10–70 applies to those situations where a person is arrested in a county other than where the crime occurred.

We note that May was not acting alone when he went to the Smith home to execute the search warrant. The search warrant reflects that the warrant was issued in Lauderdale County by a circuit judge for that county. See Rule 3.7(iv), Ala.R.Crim.P. The record also shows that the VCR was recovered by Investigator Charles Ford of the Lauderdale County Sheriff's Department.

Smith also argues that his arrest was unlawful because, he says, he was arrested by a Colbert County officer outside of Colbert County. He cites § 15–10–1 in support of this contention. This issue was addressed by this Court in *Larry Reynold Smith v. State,* 727 So.2d 147 (Ala.Crim.App.1998), and determined adversely to the appellant in that case. As the *Smith* court stated:

> "Historically, officers who could arrest someone in their official capacity without a warrant were limited to the political subdivision of the state where the officer was employed. *Ex parte Wallace,* 497 So.2d 96 (Ala.1986); § 15–10–1, Ala.Code. However, in January 1991, the Alabama Rules of Criminal Procedure became effective. These rules were promulgated by the Alabama Supreme Court, pursuant to its rulemaking authority, and were intended to make the practice and procedure for criminal proceedings uniform throughout the state. See Rule 1.1, Ala.R.Crim.P. As concerns any conflict, the rules generally supersede any earlier enacted statutory provision. *Prince v. State,* 623 So.2d 355 (Ala.Cr.App.1992); § 12–1–1, Ala.Code, 1975.
>
> "Specifically applicable here, Rule 3.3(a), Ala.R.Crim.P., provides that '[t]he arrest warrant shall be directed to and may be executed *by any law enforcement officer within the State of Alabama.*' (Emphasis added.) This rule effectively did away with the requirement that an official may make a legal arrest only in the county or municipality in which the officer is employed. As Justice Maddox noted: 'Allowing a "law enforcement officer" to execute a warrant "within the State of Alabama" is a major change in prior practice, in that under § 15–10–1 those officers authorized to

> make arrests could be made only "within the limits of the county." ... [T]he Committee determined that the definition of "law enforcement officer" should be a "functional definition." See Committee Comments to Rule 3.3.' H. Maddox, *Alabama Rules of Criminal Procedure,* Author's Comments, § 3.3 (1990)."[7]

Smith, 727 So.2d at 158. As noted in *Smith,* § 15–10–1 has been superseded by the adoption of Rule 3.3; therefore, Smith's arrest was lawful.

VII.

Smith argues that the trial court erred in allowing his statement to be sent to the jury room during deliberations. May testified that he wrote out Smith's confession to police, that Smith read May's rendition, and that Smith then signed the statement. Smith's signed statement was read to the jury during trial and was admitted into evidence.

Rule 22.1, Ala.R.Crim.P., lists the materials that a jury is permitted to take to the jury room. This section states, "Within the exercise of its discretion, the court may permit the jurors, upon retiring for deliberation, to take with them exhibits, writings, and documents that have been received into evidence." This is also specifically provided for in § 12–16–14, Ala.Code 1975. *McElroy's Alabama Evidence* states:

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[7] Smith was arrested in 1988, before the adoption of Rule 3.3, Ala.R.Crim.P., which provides that an arrest warrant may be executed by any law-enforcement officer in the state. However, Rule 1.5, Ala.R.Crim.P., provides: "These rules shall govern all criminal proceedings, without regard to when the proceeding was commenced."

> "It is the customary, almost invariable, trial court practice to permit the jury, on their retirement to deliberate on the case, to take to the jury room an exhibit which has been placed in evidence. It is provided statutorily that: 'All instruments of evidence and depositions read to the jury may be taken out by them on their retirement.' This statute has been interpreted as not requiring ordinarily that an item of demonstrative evidence be taken to the jury room, but, rather, as investing the trial court with measurable discretion to allow or disallow it to go to the jury room. It has been held, for example, that the trial judge has the discretion to allow or disallow a deposition, written testimony or a tape recording to be taken by the jury on retirement."

McElroy's Alabama Evidence, § 10.04(1) (5th ed.1996).

The record reflects that after the jury had retired but before the exhibits and verdict forms were sent to the jury room, defense counsel objected and asked the trial court to exclude Smith's confession from the exhibits that were being sent to the jury room. A discussion ensued, and the trial court denied Smith's request.

The trial court committed no error. We believe that excluding Smith's confession from all of the other exhibits sent to the jury room would have unduly emphasized it. The trial court did not abuse its discretion here.

VIII.

Smith argues that evidence of Sennett's suicide should have been excluded because, he argues, it was

hearsay evidence that indicated Sennett's consciousness of guilt. He also argues in brief, "The danger in admitting the evidence here was that the jury might readily, albeit improperly, infer from Charles Sennett's admission that Mr. Smith was also guilty of the crime."

However, evidence of Sennett's suicide was not hearsay. ""'Hearsay evidence is testimony in court, or written evidence, of a statement made out of court, the statement being offered as an assertion to show the truth of matters asserted therein, and thus resting for its value upon the credibility of the out-of-court asserter."'" *Bryant v. State,* [Ms. CR–98–0023, November 19, 1999] —— So.2d ——, —— (Ala.Crim.App.1999), quoting *James v. State,* 723 So.2d 776, 779 (Ala.Crim.App.), cert. denied, 723 So.2d 786 (Ala.1998).

Without considering other aspects of hearsay, evidence of Charles Sennett's suicide was not offered for the truth of the matter asserted. The State argued at trial that it was offering this evidence to explain Charles Sennett's absence in the investigation and trial. Smith further admits in his brief that there are many reasons why someone might commit suicide and there were several possible explanations in this case.

Moreover, Smith has failed to show any prejudice. Smith argued that evidence of the suicide tended to show his guilt and therefore should not have been admitted at trial. Smith's attorney, in opening statement, devoted much of his remarks to discussing Sennett's guilt and the fact that he had a particularized intent to kill his wife. Smith admitted Charles Sennett's participation in the murder for hire. Based on the record here, admitting evidence of

Sennett's suicide did not amount to reversible error. See *Richardson v. State,* 690 S.W.2d 22 (Tex.App.1985).

Lastly, we agree with the New Jersey Supreme Court, which said, in *State v. Feaster,* 156 N.J. 1, 68–69, 716 A.2d 395, 428–29 (1998):

> "We find Mills's [accomplices's] suicide to be relevant information properly presented to the jury. In *State v. Mann,* 132 N.J. 410, 421–23, 625 A.2d 1102 (1993), we observed that a defendant's attempted suicide is generally admitted into evidence....
>
> "Unlike *Mann,* this case implicates the suicide of an alleged accomplice and not a defendant's attempt at suicide. The State notes that Mills was not being charged with any crime at the time of his death. Nevertheless, we are satisfied that *Mann's* conclusion that a defendant's attempted suicide may be relevant in some circumstances is applicable in this context. See *Commonwealth v. Gibson,* 547 Pa. 71, 688 A.2d 1152, 1166 n. 30 (1997) (validating prosecutor's mention of co-defendant's suicide, because evidence establishing that suicide had been presented), cert. denied, 522 U.S. 948, 118 S.Ct. 364, 139 L.Ed.2d 284 (1997).
>
> "....
>
> "Having determined that evidence of Mills's suicide was relevant, we also conclude that the information did not unduly prejudice defendant. Under N.J.R.E. 403, relevant evidence may be excluded in the trial court's discretion if its probative value is substantially outweighed by the risk of undue prejudice. Defendant argues that the suicide, because it may have indicated Mills's guilty

> conscience, unfairly tarnished defendant in view of the likelihood that the jury would transfer that consciousness of guilt to him. We recognize the plausibility of that inference. However, an equally plausible inference to be drawn from Mills's suicide is that Mills's role in the murder was more significant than the State suggested, thereby lessening the culpability of defendant. Thus, two inferences, one prejudicial to defendant and the other beneficial, could have been drawn from the evidence of Mills's suicide. In view of the substantial evidence presented at trial linking defendant to the crime, we perceive that any prejudice occasioned by the negative inference was minimal. Therefore, taking into account the obvious relevance of the testimony concerning Mills's suicide, we are unable to conclude that the probative value of that evidence substantially was outweighed by the risk of undue prejudice."

IX.

Smith argues that the trial court's and the prosecutor's reference in the guilt phase of the proceedings to punishment prejudiced him.

A.

Smith argues that the trial court prejudiced him by giving the following jury instruction:

> "Capital offense is an offense for which the punishment is either life imprisonment without parole or death. It provides that if a defendant is convicted of a capital offense additional proceedings will be held to determine whether his punishment is to be life imprisonment without parole or death.

> But you are not to concern yourself at this time with any issue of punishment. Instead the only determination you are to make at this time is whether the state has proven beyond a reasonable doubt that the defendant is guilty of the capital offense as it is written out in the indictment or some lesser included offense or offenses which I will instruct you on about later in this charge."

R. 958–59.

This instruction is virtually identical to the pattern jury instruction found in *Alabama Pattern Jury Instructions* and an instruction that this Court has upheld. *Dill v. State,* 600 So.2d 343 (Ala.Crim.App.1991), aff'd, 600 So.2d 372 (Ala.1992), cert. denied, 507 U.S. 924, 113 S.Ct. 1293, 122 L.Ed.2d 684 (1993).

B.

Smith argues that it was unlawful for the prosecutor to comment on the "impact of the jury's guilt phase determination on sentencing," during the voir dire examination of the jury.

Smith's argument must fail. In a capital case, both the prosecution and the defense have a right to know a juror's views on the death penalty. A prospective juror should be excused from the venire if the juror's views on the death penalty will hinder the ability to follow the instructions of the trial court. *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985). The prosecutor did not prejudice Smith by mentioning during the voir dire examination of the

prospective jurors that a capital offense is an offense punishable by death.

X.

Smith argues that the trial court committed reversible error in failing to instruct the jury that "independent corroboration of Mr. Smith's custodial statement to law enforcement officials was required to prove the corpus delicti of capital murder for pecuniary gain."

We have addressed this issue and determined it adversely to Smith. In *Bush v. State,* 695 So.2d 70, 120 (Ala.Crim.App.1995), aff'd, 695 So.2d 138 (Ala.), cert. denied, 522 U.S. 969, 118 S.Ct. 418, 139 L.Ed.2d 320 (1997), we stated:

> "In a footnote to his brief in his discussion of this issue, the appellant contends that the trial court erred in failing to instruct the jury that it could not convict him absent sufficient evidence to corroborate his confession with respect to each element of the charged offense. This issue was not raised in the trial court. No charge pertaining to the corroboration of the confessions was requested, and no objection was raised to the court's jury charge on this ground. Thus, we review this contention under the plain error rule.
>
> > "'[I]t is the province of the judge to determine whether there is testimony sufficient to make it appear prima facie that the offense has been committed. The evidence on which the judge acts may not necessarily establish the corpus delicti. It may be, and often is, conflicting and contradictory. In such case, the credibility of the

> witnesses and the sufficiency of the entire evidence are for the ultimate decision of the jury.'
>
> "*McDowell v. State,* 238 Ala. 101, 105, 189 So. 183, 185 (1939); Gamble, supra, § 304.01. Here, we have found that the state presented evidence sufficient not only to prove the corpus delicti of murder committed during the course of a robbery or an attempted robbery, but also to make out a prima facie case to be submitted to the jury. The fact that the trial court did not instruct the jury on the law of corpus delicti, under the circumstances here, did not constitute error, much less plain error."

Likewise, we find that there was sufficient evidence to corroborate Smith's confession. The trial court committed no error in failing to instruct the jury on this point of law.

XI.

Smith argues that the trial court's instructions on the lesser offense of felony murder were misleading and incomplete.

When reviewing a trial court's instruction we apply the following standard:

> "'A trial court has broad discretion in formulating its jury instructions, providing those instructions accurately reflect the law and the facts of the case. *Raper v. State,* 584 So.2d 544 (Ala.Cr.App.1991). We do not review a jury instruction in isolation, but must consider the instruction as a whole, *Stewart v. State,* 601 So.2d 491 (Ala.Cr. App.1992), aff'd in relevant part, 659 So.2d 122 (Ala.1993), and we must evaluate instructions like a reasonable juror may have

> interpreted them. *Francis v. Franklin,* 471 U.S. 307, 105 S.Ct. 1965, 85 L.Ed.2d 344 (1985); *Stewart v. State.*'"

Griffin v. State, 790 So.2d 267, 332 (Ala.Crim. App.1999), quoting *Ingram v. State,* 779 So.2d 1225, 1258 (Ala.Crim.App.1999). "This court has consistently held that a trial court's oral charge to the jury must be viewed in its entirety and not in 'bits and pieces.' *Parks v. State,* 565 So.2d 1265 (Ala.Cr. App.1990); *Williams v. State,* 538 So.2d 1250 (Ala.Cr.App.1988); *Lambeth v. State,* 380 So.2d 923 (Ala.), on remand, 380 So.2d 925 (Ala.Cr.App.1979), writ denied, 380 So.2d 926 (Ala.1980)." *Smith v. State,* 585 So.2d 223, 225 (Ala.Crim.App.1991).

Smith argues that the trial court erred in its instruction on felony murder. Smith's felony-murder charge was based on the underlying felony of assault in the first degree. Though neither party raised the issue, we note that this Court recently held that "felonious assaults that result in the victim's death merge with the homicide and therefore cannot serve as an underlying felony for purposes of the felony-murder rule." *Barnett v. State,* 783 So.2d 927, 930 (Ala.Crim.App.2000). Thus, as a matter of law Smith could not be convicted of felony murder.

As we more recently stated, we refuse to find error in an instruction that, as a matter of law, should not have been presented to the jury. See *McGriff v. State,* 908 So.2d 961 (Ala.Crim.App.2000).

Moreover, Smith erroneously argues that the trial court's instruction was misleading because, he says, the court's complicity instruction implied that Smith did not have to have a specific intent to kill to be convicted of capital murder. However, the trial court's charge read, in part:

"If you are convinced beyond a reasonable doubt that the defendant, Kenneth Eugene Smith, committed the crime of murder of the intentional killing type of Elizabeth Dorlene Sennett and that the defendant committed the crime of murder of the intentional killing type for pecuniary or valuable consideration or pursuant to a contract or for hire as alleged in the indictment, then it would be your duty to find the defendant guilty of the capital offense charged in the indictment. The two components of the capital offense are that the defendant, Kenneth Eugene Smith, committed the crime of murder of the intentional killing type and that such murder of the intentional killing type was committed by the defendant for pecuniary or valuable consideration or pursuant to a contract or for hire.

"A defendant commits murder of an intentional killing type if with intent to cause the death of another person, he causes the death of that other person or of another person.

"The person acts intentionally with respect to a result or to a conduct when his purpose is to cause that result or to engage in that conduct.

"The defendant must intentionally as opposed to negligently, accidentally, or recklessly cause the death of the deceased in order to invoke the capital statute. The intent to kill must be real and specific in order to invoke the capital statute.

"In order to prove the defendant guilty of a particular crime, it is not necessarily required that the state prove that the defendant himself personally committed the acts which constitute the crime. Instead, in certain circumstances the law makes a defendant responsible for the criminal act

> of another. More specifically the law provides that a defendant is responsible for the criminal acts of another person if the defendant intentionally procured, induced, or caused the other person or persons to commit the acts or if the defendant intentionally aided and abetted another person or person's [in the] commission of the act. The words 'aid and abet' include all assistance rendered by acts or words of encouragement or support.
>
> "I further charge you that if you find that a murder of the intentional killing type, as I have defined that term for you, of Elizabeth Dorlene Sennett was committed by some person other than the defendant, the defendant, Kenneth Eugene Smith, is guilty of that intentional killing type of murder if but only if you find beyond a reasonable doubt either that the defendant, Kenneth Eugene Smith, intentionally procured, induced, or caused the other person or person to commit the murder and that the defendant, Kenneth Eugene Smith, intentionally aided or abetted the other person or person's commission of the murder. Only if you are convinced beyond a reasonable doubt that either or both of those situations exist as a fact can you find the defendant, Kenneth Eugene Smith, guilty of the intentional killing murder, which he did not personally—which he did not personally commit."

As is evidenced by the above excerpt from the court's oral charge to the jury, the trial court, on more than one occasion, instructed the jury that it must find a specific or particularized intent on the defendant's part before the jury could convict a defendant of capital murder.

Moreover, the instructions were similar to the pattern jury instructions on complicity. The Alabama

Supreme Court has recognized that "[i]t is the preferred practice to use the pattern jury instructions in a capital case." *State v. Hagood,* 777 So.2d 214, 219 (Ala.Crim.App.1999).[8]

Nor, do we agree with Smith's assertion, made during oral argument before this Court, that the trial court's placement of the complicity instruction, immediately after its capital murder instruction, confused the jury and led it to believe that it could apply complicity only to the capital murder charge. At the two instances where the trial court gave a complicity instruction, the trial court prefaced its instruction with the following: "In order to prove the *defendant guilty of a particular crime*...." The trial court did not state that complicity applied only to capital murder; indeed its instructions do not even imply such a proposition.

Smith also argues that the trial court failed to distinguish between the intent necessary to commit capital murder and the intent necessary to commit felony murder. We have thoroughly examined both the original jury instructions and the supplemental instructions given to the jury. The trial court followed the pattern jury instructions in giving its instructions on the elements of the two convictions. In regard to the capital murder conviction, the trial court, on more than one occasion, instructed the jury that to be

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[8] The Supreme Court has cautioned that there will be instances when the giving of a pattern jury instruction may constitute plain error, i.e., where the instruction was misleading or inapplicable to the facts in a given case. See *Ex parte Wood,* 715 So.2d 819 (Ala.), cert. denied, 525 U.S. 1042, 119 S.Ct. 594, 142 L.Ed.2d 536 (1998). We do not have that situation here. No one disputes the fact that a complicity instruction was necessary in this case.

convicted of capital murder the accused must have a specific or particularized intent to kill. In regard to the felony-murder instruction, the trial court instructed the jury that the intent necessary was the intent to commit the underlying felony—not the intent to commit murder. Clearly, the jury was instructed concerning the difference between capital murder and felony murder.

Penalty–Phase Issues

XII.

Smith argues that the trial court's sentence of death should be vacated because, he says, the trial court ignored mitigating factors, failed to consider the jury's recommendation of life imprisonment without parole, and failed to consider certain nonstatutory mitigating circumstances that, he argues, were proven to exist.[9]

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[9] The record reflects that the trial court amended its original sentencing order. Rule 29, Ala.R.Crim.P., states:

> "Clerical mistakes in judgments, orders, or other parts of the record, and errors arising from oversight or omission may be corrected by the court at anytime of its own initiative or on the motion of any party and after such notice, if any, as the court orders. During the pendency of an appeal or thereafter, such mistakes may be so corrected by the trial court. Whenever necessary, a transcript of the record as corrected may be certified to the appellate court in response to a writ of certiorari or like writ, in conformity with Rule 10(f), A.R.App.P."

Here, the trial court corrected its original order to rectify some omissions from the original order. The trial court had the authority to so amend the order.

A.

Smith first argues that the trial court erred in considering as aggravating evidence that, by statutory definition, was not aggravating. He asserts that because the trial court stated in its order that the "aggravating circumstance*s* outweigh the mitigating circumstances" (emphasis added) it is clear that the trial court considered more than one aggravating circumstance. However, it is clear from reviewing the order and the trial court's instructions to the jury that this was merely a typographical error in the order.

The trial court, in its order, tracked the list of aggravating circumstances and found only one aggravating circumstance present in the case. The trial court stated the following in its order:

> "The Court finds from the evidence introduced at the trial and reintroduced at the punishment hearing before the jury that the defendant, Kenneth Eugene Smith, committed the murder for pecuniary gain, namely for the sum of $1,000.00. The Court finds that said defendant was, in fact, paid that sum for said intentional killing. The Court finds that this is an aggravating circumstance pursuant to Section 13A–5–49(6) of the Code of Alabama, as amended, and the Court has considered said aggravating circumstance."

Also, the trial court in its instructions to the jury stated that only one aggravating circumstance was to be considered in the case. "Trial judges are presumed to follow their own instructions, and they are presumed to know the law and to follow it in making

their decisions." *Ex parte Slaton,* 680 So.2d 909, 924 (Ala.1996), cert. denied, 519 U.S. 1079, 117 S.Ct. 742, 136 L.Ed.2d 680 (1997).

Smith also argues that the following portion of the trial court's order reflects that it considered inappropriate aggravating evidence:

> "The Court does find that there is a reasonable basis for enhancing the jury's recommendation sentence for the reasons stated herein that this was a murder for hire and the defendant had the opportunity to reflect and withdraw from his actions and chose not to do this; he was paid for his actions; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired."

Clearly, the above-quoted portion of the order reflects that the trial court placed more weight on the fact that this was a case of murder for hire than did the jurors. The weight to be attached to the aggravating and the mitigating evidence is strictly within the discretion of the sentencing authority. As this Court stated in *Bush,* 695 So.2d at 94, quoting *Clisby v. State,* 456 So.2d 99, 101 (Ala.Crim.App.), on remand, 456 So.2d 102 (Ala.Crim.App.1983), aff'd, 456 So.2d 105 (Ala.1984), cert. denied, 470 U.S. 1009, 105 S.Ct. 1372, 84 L.Ed.2d 391 (1985):

> "'[T]he sentencing authority in Alabama, the trial judge, has unlimited discretion to consider any perceived mitigating circumstances, and he can assign appropriate weight to particular mitigating circumstances. The United States Constitution does not require that specific weights be assigned to different aggravating and mitigating circum-

> stances. *Murry v. State,* 455 So.2d 53 (Ala.Cr.App.1983), rev'd on other grounds, 455 So.2d 72 (Ala.1984). Therefore, the trial judge is free to consider each case individually and determine whether a particular aggravating circumstance outweighs the mitigating circumstances or vice versa. *Moore v. Balkcom,* 716 F.2d 1511 (11th Cir.1983). The determination of whether the aggravating circumstances outweigh the mitigating circumstances is not a numerical one, but instead involves the gravity of the aggravation as compared to the mitigation.'"

B.

Smith argues that the trial court minimized the jury's role in sentencing by his reference to the jury's recommendation as a "mitigating factor."

It is clear from a review of the sentencing order that the trial court considered the jury's recommendation. The trial court stated: "The Court does find that the jury's recommendation is a mitigating factor and the Court has considered said factor at this sentencing hearing."

Moreover, we do not agree with Smith that the trial court erred in finding the jury's recommendation to be a nonstatutory mitigating factor. The Supreme Court recently approved a trial court's finding that the jury's recommendation was a mitigating circumstance. See *Ex parte Burgess,* 811 So.2d 617 (Ala.2000). See also, *Carroll v. State,* 852 So.2d 801 (Ala.Crim.App.1999). As this Court stated in *Carr v. State,* 640 So.2d 1064, 1074 (Ala.Crim.App.1994):

> "The trial court's sentencing order reflects that the court gave 'consideration to the recommendation of

> the jury in its advisory verdict that the defendant be sentenced to life without parole.' R. 65. The court, however, after independently weighing the aggravating and mitigating circumstances, determined that the aggravating circumstance outweighed the mitigating circumstances and chose not to accept the jury's recommendation. Constitutional and statutory provisions require no more."

"The trial court must consider the jury's sentencing recommendation, but that recommendation is not binding." *Ex parte Roberts,* 735 So.2d 1270 (Ala.), cert. denied, 538 U.S. 939, 120 S.Ct. 346, 145 L.Ed.2d 271 (1999). The trial court followed the law. It considered the jury's recommendation but chose to override it. The court weighed the aggravating and the mitigating circumstances. The trial court complied with its legal obligation.

XIII.

Smith further argues that the trial court failed to consider certain mitigating evidence.

A.

First, Smith argues that the trial court erred in not adequately considering his age as a mitigating factor. However, this argument is not supported by the trial court's order. The order states:

> "The Court finds 2 statutory mitigating circumstances in this cause and that is the age of the defendant at the time of the commission of the crime in that he was 22 years of age. However, the Court does find from the evidence that the defendant was

> normal and not retarded, had attended high school and worked several jobs, was married and had one (1) minor child."

The trial court found Smith's age to be a mitigating circumstance; however, it is clear that the court assigned it little weight in its analysis.

Smith contends that the order states that the trial court took into account, in not considering age to be a mitigating factor, the fact that the Smith was not mentally retarded. However, it is clear that the judge considered Smith's mental maturity. A consideration of the mental maturity of an individual necessarily would take into account whether the individual is mentally retarded. This was an appropriate consideration for the trial court in determining whether Smith's age was a statutory mitigating circumstance. Certainly, the fact that Smith had held several jobs, had a steady relationship and had a child as a result of that relationship was more than sufficient for the trial court to find that Smith's age, though mitigating, was entitled to little weight.

B.

Smith also argues that the trial court erred in not finding as a mitigating circumstance that Smith had a difficult childhood. However, Smith's assertion is not supported by the record. The trial court stated the following in its order:

> "The Court further finds as a non-statutory mitigating factor, that the defendant was neglected and deprived in his early childhood."

The trial court did state later in the order that it did not find that Smith's childhood was a mitigating

factor. However, the trial court has corrected its order to reflect that it did find Smith's childhood to be a mitigating factor but that it gave that mitigating circumstance little weight. The weight to attach to a mitigating circumstance is within the province of the sentencer. See *Bush,* supra.

XIV.

Last, as required by § 13A–5–53, Code of Alabama 1975, this Court will address the propriety of Smith's conviction for capital murder and his sentence to death by electrocution. Smith was indicted and convicted of murder defined as capital by § 13A–5–40(a)(7), i.e., murder done for "a pecuniary or other valuable consideration or pursuant to a contract or for hire."

The record reflects that Smith's sentence was not imposed under the influence of passion, prejudice, or any other arbitrary factor. Section 13A–5–53(b)(1).

Smith argues that the trial court did not adequately evaluate the aggravating circumstances and the mitigating circumstances and that its order is deficient for that reason. We do not agree. The record shows that the trial court found that only one aggravating factor had been proven—that the murder was done for a pecuniary gain. The fact that this aggravating factor is also an element of the capital offense does not make this finding unlawful. This Court has approved of the practice of "double counting," that is, counting an element of the offense as an aggravating circumstance. See *Burton v. State,* 651 So.2d 641 (Ala.Crim.App.1993), aff'd, 651 So.2d 659 (Ala.1994), cert. denied, 514 U.S. 1115, 115 S.Ct. 1973, 131 L.Ed.2d 862 (1995). The court reviewed all

the evidence offered in mitigation and found the following statutory mitigating evidence:

> "The Court now proceeds to consider the mitigating circumstances as set out and enumerated in Section 13A–5–51 of the Code of Alabama, as amended, and other mitigating circumstances proved at the punishment hearing before the jury.
>
> "The Court finds 2 statutory mitigating circumstances in this cause and that is the age of the defendant at the time of the commission of the crime in that the was 22 years of age. However, the Court does find from the evidence that the defendant was normal and not retarded, had attended high school and worked several jobs, was married and had one (1) minor child.
>
> "The Court finds the defendant had no significant history of prior criminal activity.
>
> "....
>
> "The Court further finds that the capital offense was not committed while the defendant was under the influence of extreme mental or emotional disturbance, accordingly the Court does not consider the mitigating circumstance listed in Section 13A–5–51(2), Code of Alabama, the Court finding that said mitigating circumstance does not exist in this case.
>
> "The Court further finds from the evidence that the victim was not a participant in the defendant's conduct or consented to it; therefore, the Court finds that the mitigating circumstance listed in Section 13A–5–51(3) Code of Alabama, does not exist and the Court does not consider it.

"The Court does not find from the evidence that the defendant was an accomplice in a capital offense committed by another person and that his participation was relatively minor. The Court finds from the evidence in this case that the defendant, Kenneth Eugene Smith, and John Forrest Parker both killed the victim by beating and hitting her with different objects and stabbing her while the victim was pleading with them. Therefore, the Court finds that the mitigating circumstance listed in Section 13A–5–51(4), Code of Alabama, does not exist and the Court does not consider it.

"The Court does not find from the evidence that the defendant acted under extreme duress or under the substantial domination of another person; therefore, the Court finds that the mitigating circumstance listed in Section 13A–5–51(5), Code of Alabama, does not exist and the Court does not consider it.

"The Court does not find from the evidence that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; the Court had evidence before it regarding the defendant's actual actions during and after the murder of Elizabeth Dorlene Sennett which demonstrate that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired. The defendant's actions in throwing away the murder weapons after the killing, his attempting to make it look like a burglary, and other evidence that was presented, is all evidence that his conduct was criminal, and that he might be apprehended and for that reason did what he could to avoid apprehension. Accordingly,

> the Court finds that the mitigating circumstance listed in Section 13A–5–51(6), Code of Alabama, does not exist and the Court does not consider it."

The trial court found the following nonstatutory mitigating evidence:

> "The Court further finds as to a non-statutory mitigating [circumstances], that the defendant appeared to be remorseful for what he had done, and he gave a voluntary confession. However, the defendant did not turn himself in to the police and at the time of his arrest in his home in Florence, Alabama, there was found in his home a VCR that was property of the victim with blood still on it.
>
> "The Court further finds as a non-statutory mitigating [circumstance], the defendant's good conduct in jail; and in counseling others including family members.
>
> "During his tenure in the Colbert County Jail, Tuscumbia, Alabama, he warned a jail-guard of an impending breakout of jail by other inmates. The jail-guard, Alton Hankins, testified to this. While in prison with the Board of Corrections, he has adjusted and upgraded his education and counseled other people.
>
> "The Court further finds as a non-statutory mitigating factor, that the defendant was neglected and deprived in his early childhood."

The trial court weighed the aggravating and the mitigating circumstances, overrode the jury's recommendation of life imprisonment without parole, and sentenced Smith to death. We agree with the trial court's findings in this case; his findings are more than adequately supported by the record. The trial court's order is not deficient.

Pursuant to § 13A–5–53(b)(2), this Court must independently weigh the aggravating circumstances and the mitigating circumstances to determine the propriety of Smith's death sentence. After an independent weighing, this Court is convinced, as was the trial court, that Smith's sentence of death is the appropriate sentence in this case.

Section 13A–5–53(b)(3) also provides that we must address whether Smith's sentence was disproportionate or excessive when compared to the penalties imposed in similar cases. Smith's sentence, when compared, is neither disproportionate or excessive. See *Griffin v. State,* 790 So.2d 267 (Ala.Crim.App.2000); *Sockwell v. State,* 675 So.2d 4 (Ala.Crim.App.1993), aff'd, 675 So.2d 38 (Ala.1995), cert. denied, 519 U.S. 838, 117 S.Ct. 115, 136 L.Ed.2d 67 (1996); and *Parker v. State,* 587 So.2d 1072 (Ala.Crim.App.1991), on remand, 610 So.2d 1171 (Ala.Crim.App.), aff'd, 610 So.2d 1181 (Ala.1992), cert. denied, 509 U.S. 929, 113 S.Ct. 3053, 125 L.Ed.2d 737 (1993).

Last, we have searched the entire record for any error that may have adversely affected Smith's substantial rights and have found none. Rule 45A, Ala.R.App.P.

Smith's conviction and sentence of death by electrocution are due to be, and are hereby, affirmed.

AFFIRMED.

LONG, P.J., and COBB, BASCHAB, and FRY, JJ., concur.

Appendix G

IN THE CIRCUIT COURT
OF JEFFERSON COUNTY, ALABAMA

AMENDED ORDER

No. CC 89-1149

STATE OF ALABAMA,

—v.—

KENNETH EUGENE SMITH,

Defendant,

WHEREAS, this cause came before the Court on the motion for New Trial on the 25th day of August; 1997, at which time the defendant present with his attorneys and the prosecutor being present, and after the motion for new trial was heard the prosecutor made a motion for the Court to amend the sentence order of the Court of May 21, 1996, and the Court having considered the same, the Court does amend said sentence which does not make any changes but only sets out the things that the Court considered in sentencing the defendant and refines the sentence order. The Court has previously ruled on the motion for new trial by separate order. The Court does now amend the sentence as follows:

The defendant in this case, Kenneth Eugene Smith, was charged by indictment of the Grand Jury of the

Circuit Court for the 31st Judicial Circuit of Alabama, in and for Colbert County, Alabama, with the capital offense of murder for a pecuniary or valuable consideration pursuant to the provisions of the Code of Alabama, 1975, as amended, Section 13A-5-40(a) (7).

This case came on to be tried before the Court and a jury of twelve men and women duly impaneled and sworn as required by law beginning on Tuesday, April 23, 1996 and continuing until its conclusion on May 1, 1996. The makeup of the jury was as follows Seven (7) black females, four (4) black males, and one (1) white female. The jury after hearing the evidence and the Court's oral charge as to the applicable law, including the lesser included offenses of murder where there is extreme indifference to human life as set out in Section 13A-6-2(a)(3) and felony murder during an assault in the first degree as set out in Section 13A-2(a)(3) of the Code of Alabama, then retired to deliberate and upon the consideration of the law and evidence found the defendant guilty of the capital murder as charged in the indictment. The verdict was unanimous in finding the defendant guilty of the capital offense as charged in the indictment and not of any lesser included offenses.

The Court announced the jury's verdict on Friday, April 26, 1996, and on April 29, 1996, commenced a sentence hearing before the same jury pursuant to Section 13A-5-45 of the Code of Alabama, 1975, as amended. After hearing the evidence during the punishment phase and hearing, the jury was again charged as to the applicable law, advising said jury that if mitigating circumstances outweighed the aggravating circumstances then the punishment would be life imprisonment without eligibility for parole, but if the aggravating circumstances outweighed the mitigating circumstances, the verdict

would be death. After due deliberations, the jury returned a verdict affixing the defendant's punishment at life imprisonment without parole, the verdict being one (1) for death and eleven (11) for life imprisonment without parole. The Court then announced the jury's verdict, and set the 21st day of May, 1996 at 9:00 a.m. for further hearing as mandated by Section 13A-5-47 of the Code of Alabama, 1975, as amended. At said hearing the defendant, his trial attorneys, and the district attorney were present and ready to proceed. The defendant's attorney introduced defendant's exhibits #lA, 1B, 1C, and 1D. Also called one witness to testify after which the district attorney and the defendant's attorney made closing arguments.

FINDING OF FACT

The Court finds from the evidence introduced at trial that the defendant, Kenneth Eugene Smith, and his friend John Forrest Parker, who the defendant recruited and persuaded to assist him prior to March 18, 1988, did on that date after being paid an advance of $200.00 by Charles Sennett, the husband of the victim, Elizabeth Dorlene Sennett, went to the home of said victim in rural west Colbert County, Alabama with the intent to kill the said Elizabeth Dorlene Sennett.

The Court further finds that the total contract amount for the killing was $1,000.00.

The Court further finds that the defendant, Kenneth Eugene Smith, and John Forrest Parker drove to the Sennett home and gained entrance to said home where the victim, Elizabeth Dorlene Sennett was present and alone, under the pretext that they were there at the invitation of the victim's husband, Charles Sennett, to

hunt on their land and they wished to come into the home to use the bathroom.

The Court further finds that while the defendant, Kenneth Eugene Smith, and John Forrest Parker were in the Sennett home they attacked the victim, Elizabeth Darlene Sennett, by beating her with their fists and other objects such as a poker, walking cane, fireplace tongs, and stabbing her 10 times with a survival knife. These objects are admitted into evidence in the case. Presumably the knife was used by John Forrest Parker. These objects of evidence and others were found by law enforcement officers in the pond near the Sennett home.

The Court further finds from the evidence that at the time the victim was being attacked by the defendant, Kenneth Eugene Smith, and John Forrest Parker, the victim, Elizabeth Dorlene Sennett was yelling to just stop and they could have anything they wanted, but they continued the beating and stabbing.

The Court further finds that the defendant, Kenneth Eugene Smith, and John Forrest Parker messed up the Sennett home to make it look like a burglary, which was in accordance with their plan and they took from the Sennett home a VCR and stereo.

The Court further finds from the evidence that the defendant, Kenneth Eugene Smith, and John Forrest Parker sometime after the murder were paid by Billy Williams the balance of the money for the killing.

The Court further finds from the evidence that when defendant, Kenneth Eugene Smith, was arrested at his home in Florence, Alabama, also found there was a VCR, the same VCR from the Sennett home which still had blood on it from the killing in the Sennett home.

The Court further finds the jury's recommendation of life without parole at a vote of eleven (11) for life and one (1) for death is a mitigating factor and the Court has considered it at this sentence hearing, and also the exhibits admitted being defendant's exhibits 1A, B, C, and D, and the testimony of Christopher Johnson.

The defendant was asked after the closing arguments if he had anything to say before sentence is imposed and he said no on advice of his attorney.

The Court considering the aggravating circumstances as set out and enumerated in Section 13A-5-49 of the Code of Alabama, as amended:

(A) The Court finds from the evidence introduced at the trial and reintroduced at the punishment hearing before the jury that the defendant, Kenneth Eugene Smith, committed the murder for pecuniary gain, namely for the sum of $1,000.00. The Court finds that said defendant was, in fact, paid that sum for said intentional killing. The Court finds that this is an aggravating circumstance pursuant to Section 13A-5-49(6) of the Code of Alabama, as amended, and the Court has considered said aggravating circumstance.

The Court finds that the defendant was not a person under sentence of imprisonment; therefore, the Court, does not consider the aggravating circumstance listed in Section 13A-5-49(1), Code of Alabama, the Court finding that said aggravating circumstance does not exist in this case.

The Court finds the defendant was not previously convicted of another capital murder, nor previously convicted of a felony involving the use or threat of violence to the person; therefore, the Court does not consider the aggravating circumstances listed in Section 13A-5-49(2), Code of Alabama, the Court

finding that said aggravating circumstance does not exist.

The Court finds that the defendant did not knowingly create a great risk of death to many persons, therefore, the Court does not consider the aggravating circumstance listed in Section 13A-5-49(3), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

The Court finds that this offense was not committed while the defendant was engaged or was an accomplice in the commission of or an attempt to commit, or flight after committing, or attempting to commit rape, robbery, burglary or kidnapping, therefore, the Court does not consider the aggravating circumstance listed in Section 13A-5-49(4), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

The Court does not find that the offense was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody, therefore the Court does not consider the aggravating circumstance listed in Section 13A-5-49(5), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

The Court does not find that the offense was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws; therefore the Court does not consider the aggravating circumstance listed in Section 13A-5-49(7), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

The Court does not find that the offense was especially heinous, atrocious or cruel compared to other capital offenses, therefore the Court does not

consider the aggravating circumstance listed in Section 13A-5-49(8), Code of Alabama, the Court finding that said aggravating circumstance does not exist.

(B) The Court now proceeds to consider the mitigating circumstances as set out and enumerated in Section 13A-5-51 of the Code of Alabama, as amended, and other mitigating circumstances proved at the punishment hearing before the jury.

The Court finds 2 statutory mitigating circumstances in this cause and that is the age of the defendant at the time of the commission of the crime in that he was 22 years of age. However, the Court does find from the evidence that the defendant was normal and not retarded, had attended high school and worked several jobs, was married and had one (1) minor child.

The Court finds the defendant had no significant history of prior criminal activity.

The Court further finds as to a non-statutory mitigating certain factors, that the defendant appeared to be remorseful for what he had done, and he gave a voluntary confession. However, the defendant did not turn himself in to the police and at the time of his arrest in his home in Florence, Alabama, there was found in his home a VCR that was the property of the victim with blood still on it.

The Court further finds as a non-statutory mitigating, the defendant's good conduct in jail; and in counseling others including family members.

During his tenure in the Colbert County Jail, Tuscumbia, Alabama, he warned a jail-guard of an impending breakout of jail by other inmates. The jail-guard, Alton Hankins, testified to this. While in

prison with the Board of Corrections, he has adjusted and upgraded his education and counseled other people.

The Court further finds as a non-statutory mitigating factor, that the defendant was neglected and deprived in his early childhood.

The Court further finds that the capital offense was not committed while the defendant was under the influence of extreme mental or emotional disturbance, accordingly the Court does not consider the mitigating circumstance listed in Section 13A-5-51(2), Code of Alabama, the Court finding that said mitigating circumstance does not exist in this case.

The Court further finds from the evidence that the victim was not a participant in the defendant's conduct or consented to it; therefore, the Court finds that the mitigating circumstance listed in Section 13A-5-51(3), Code of Alabama, does not exist and the Court does not consider it.

The Court does not find from the evidence that the defendant was an accomplice in a capital offense committed by another person and that his participation was relatively minor. The Court finds from the evidence in this case that the defendant, Kenneth Eugene Smith, and John Forrest Parker both killed the victim by beating and hitting her with different objects and stabbing her while the victim was pleading with them. Therefore, the Court finds that the mitigating circumstance listed in Section 13A-5-51(4), Code of Alabama, does not exist and the Court does not consider it.

The Court does not find from the evidence that the defendant acted under extreme duress or under the substantial domination of another person; therefore,

the Court finds that the mitigating circumstance listed in Section 13A-5-51(5), Code of Alabama, does not exist and the Court does not consider it.

The Court does not find from the evidence that the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired; the Court had evidence before it regarding the defendant's actual actions during and after the murder of Elizabeth Dorlene Sennett which demonstrate that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired. The defendant's actions in throwing away the murder weapons after the killing, his attempting to make it look like a burglary, and other evidence that was presented, is all evidence that the defendant at the time in question appreciated that his conduct was criminal, and that he might be apprehended and for that reason did what he could to avoid apprehension. Accordingly, the Court finds that the mitigating circumstance listed in Section 13A-5-51(6), Code of Alabama, does not exist and the Court does not consider it.

The Court does find that the jury's recommendation is a mitigating factor and the Court has consider said mitigating factor at this sentence hearing. However, the jury was allowed to hear an emotional appeal from the defendant's mother. The Court does not find that the defendant's problems during his childhood is a mitigating factor.

Also, there was evidence presented to the jury that the husband of the victim was the instigator of the killing of his wife, but the fact that the victim's husband conspired with the defendant and his co-defendants to

kill his wife does not make this defendant any less culpable and is not a mitigating factor.

The Court has also considered the Presentence Investigation Report as set out in Section 13A-5-47, Code of Alabama, as amended, in determining a sentence in this cause.

The Court having considered the aggravating circumstances and the mitigating circumstances, finds that the aggravating circumstances due to the nature of the crime and. the defendant's involvement in it outweighs the mitigating circumstances presented, and the mitigating factor that the jury recommended a sentence of life without parole and the vote was eleven (11) for life and one (1) for death.

The Court does find that there is a reasonable basis for enhancing the jury's recommendation sentence for the reasons stated herein that this was a murder for hire and the defendant had the opportunity to reflect and withdrawn from his actions and chose not to do this; he was paid for his actions; that the defendant's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was not substantially impaired. Therefore, on this 21st day of May, 1996, with the defendant, Kenneth Eugene Smith, being present and having been convicted by a jury of capital murder and the Court having weighed the aggravating circumstances against the mitigating circumstance and factors, and the Court having found that the aggravating circumstances outweigh the mitigating circumstances and factors.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED by the Court, and it is the judgment of the Court, and the sentence of law that the defendant, Kenneth Eugene Smith, suffer death by electrocution.

The Sheriff of Jefferson County, Alabama is directed to deliver Kenneth Eugene Smith to the custody of the Director of the Department of Corrections and the designated executioner shall, at the proper place for execution of one sentenced to suffer death by electrocution, cause a current of electricity of sufficient intensity to cause death in the application and continuance of such current to pass through the said Kenneth Eugene Smith until the said Kenneth Eugene Smith is dead. May God have mercy on you!

DONE AND ORDERED this the 25th day of September 1997.

s/ N. Pride Tompkins
Circuit Judge

CC: Gary Alverson✓
Christopher Johnson✓
Polly Conradi - ORIGINAL✓
Director, Board of Corrections✓
Sheriff of Jefferson County, Alabama✓

Appendix H

CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. CC 89-1149

THE STATE OF ALABAMA

—v.—

KENNETH EUGENE SMITH

WE THE JURY RECOMMEND THAT THE DEFENDANT, KENNETH EUGENE SMITH

BE PUNISHED BY LIFE IMPRISONMENT WITHOUT PAROLE.

THE VOTE IS AS FOLLOWS:

11 FOR LIFE WITHOUT PAROLE.

1 FOR DEATH.

s/Marvin N. Giles
FOREPERSON

Appendix I

CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA

STATE OF ALABAMA

—versus—

KENNETH SMITH

May 1st, 1996

9:12 a.m.

Transcript Pages 1344 to 1361

made a part of the record so the numbers I'm referring to will make sense; is that right?

THE COURT: What you gave me?

MR. JOHNSON: Yes.

THE COURT: Yes.

MR. JOHNSON: That will be part of the the record.

MR. ALVERSON: Mark it as an exhibit.

THE COURT: Do you want me to just pull them out of here and give them to you?

MR. JOHNSON: Sure.

THE COURT: Which ones were they?

MR. JOHNSON: The ones we are objecting to are Number 27. We object that that has not been given. And Number 28.

THE COURT: I will give you those two, 27 and 28.

MR. JOHNSON: That is right.

THE COURT: I will go ahead and sign them. Just mark them as a Court exhibit whatever the next one is.

Bring the jury in.

(Open court.: Jury present.)

THE COURT: Ladies and gentlemen of the jury, it is my duty again to instruct you with respect to the law that you should apply. In our country the death penalty is never mandatory regardless of how serious the murder. In charging you I want to remind you of the instructions I gave you previously concerning the basic law in defining the term reasonable doubt and moral certainty as well as your duties and functions as jurors.

If anyone feels that it is necessary, I will recharge you as to each and every one of those principles of law. I will not charge you as to the principles of law on the capital offense charged in the indictment because that question at this point is settled due to the fact that by your verdict you have found this defendant guilty of a capital offense.

Now, because I'm giving instructions to you does not mean that you are to assume as true any question of fact referred to any these instructions. Instead, it is left to you to determine what the facts are and what the recommended sentence should be. The law of this state provides that the punishment for the capital offense for which you have convicted this defendant is

either death by electrocution or life imprisonment without eligibility for parole. Life imprisonment without parole means the defendant will spend the rest of his life in prison. It is the law of this state that if you sentence the defendant to life imprisonment without parole, he will never be paroled. The law also provides that whether death or life imprisonment without parole should be imposed upon the defendant depends on whether any aggravating circumstances exist and if so whether the aggravating circumstances or circumstance outweigh the mitigating circumstances.

An aggravating circumstance is a circumstance specified by law which indicates or tends to indicate that the defendant should be sentenced to death. A mitigating circumstance is any circumstance that indicates or tends to indicate that the defendant should be sentenced to life imprisonment without parole instead of death.

The issue at this sentence hearing concerns circumstances of aggravation and circumstances of mitigation that you should consider and weigh against each other in deciding what the proper punishment is in this case. In making your recommendations concerning what the punishment should be, you must determine whether any aggravating circumstance exists and if so you must determine whether any mitigating circumstance or circumstances exist.

In making your determination concerning the existence of aggravating and mitigating circumstances, you should consider the evidence presented at this sentence hearing. You should also consider any evidence that was presented during the guilt phase of the trial that is relevant to the existence -- to the

existence of any aggravating or mitigating circumstance.

The law of this state provides a list of aggravating circumstances which may be considered by the jury in recommending punishment if the jury is convinced beyond a reasonable doubt from the evidence that one or any of such aggravating circumstance exists in this case.

At the sentence hearing the state shall have the burden of proving beyond a reasonable doubt the existence of any aggravating circumstances.

The same definitions that I have given you concerning reasonable doubt applies to this matter, also. If the jury is not convinced beyond a reasonable doubt based upon the evidence that one or more such aggravating circumstance exist, then the jury must recommend that the defendant's punishment be life imprisonment without parole regardless of whether there are any mitigating circumstances in the case.

Of the list of aggravating circumstances provided by law there is one circumstances which you may consider in this case if you are convinced beyond a reasonable doubt and to a morale certainty based on this evidence that such circumstance does exist.

The fact that I instruct you on such aggravating circumstance or define it for you does not mean that the circumstance has been proven beyond a reasonable doubt in this matter.

Whether any aggravating circumstance which I instruct you on or define for you has been proven beyond a reasonable doubt based on the evidence in this matter is for the jury alone to determine. The aggravating circumstance which you may consider in this case if you find from the evidence that it is -- that

it has been proven beyond a reasonable doubt is as follows: that the capital offense was committed for pecuniary gain.

Now, as I have stated to you before, the burden of proof is on the state to convince each of you beyond a reasonable doubt as to the existence of any aggravating circumstance considered by you in determining what punishment is to be recommended in this case. This means that before you can consider recommending -- that the defendant's punishment be death each and every one of you must be convinced beyond a reasonable doubt based on the evidence that at least one aggravating circumstance exists.

In deciding whether the state has proved beyond a reasonable doubt the existence of any given aggravating circumstance, you should bear in mind the definition I gave you as to reasonable doubt.

The evidence upon which a reasonable doubt about an aggravating circumstance may be based is both the evidence you heard in the guilt stage of the trial and the evidence you have heard in this sentence hearing.

The defendant does not have to disprove anything about an aggravating circumstance. The burden is wholly upon the state to prove such a circumstance beyond a a reasonable doubt.

A reasonable doubt about an aggravating circumstance may arise from all of the evidence, from any part of the evidence, or from a lack or failure of the evidence. You may not consider any aggravating circumstance other than the one recognized by law which I have already instructed you on. And you may not consider the aggravating circumstance unless you are convinced by the evidence beyond a reasonable

doubt of the existence of that aggravating circumstance in this case.

If you should find that the aggravating circumstance has not been proven beyond a reasonable doubt to exist in this case, then you must return a verdict recommending that the defendant's punishment be life imprisonment without parole.

Some of the mitigating circumstances which the defense contends are in issue and which are for you to determine whether or not the evidence supports includes as a matter of law you may consider the age of the defendant at the time of the crime as a mitigating circumstance. In taking age into account you should consider all of the ways in which age effects two different aspects of the case. You may consider age as a factor in -- as a factor in effecting how and why Kenneth Eugene Smith did what he did when he was 22 years of old excuse me, 22 years old. You may also consider Kenneth Smith's age at the present as an appropriate consideration in gauging the severity of a sentence of life in prison without possibility of parole. A sentence of life in prison without possibility of parole carries a different meaning and severity for someone who is 30 years old than for someone who is older.

As a matter of law, you may consider that Mr. Smith has no significant history of prior criminal activity. As a matter of law, you may consider Mr. Smith's behavior and actions in prison. Good conduct in prison may be relevant if it shows that Mr. Smith will not pose a threat to prison staff or other inmates if sentenced to life imprisonment without possibility of parole. Good conduct in prison may also be relevant if it shows that Kenneth Smith has since his crime genuinely transformed himself from a person

capable of capital murder to a person capable of service and sacrifice.

Any risk of mitigating circumstances cannot and does not limit your deliberations. You are free to and should consider any aspects of the crime or of Kenneth Smith's background and life as mitigating.

Evidence has been offered concerning Mr. Smith's behavior in prison, his religious faith and practice, his family background and continuing family relationships and other circumstances of his life. You may consider such evidence and any other evidence in determining the existence and weight of mitigating circumstances.

Mitigating circumstances shall include any aspects of a defendant's life and any of the circumstances of the offense that the defendant offers as a basis for a sentence of life imprisonment without possibility of parole instead of death by electrocution. Mitigating circumstances are those facts or circumstances which do not -- which do not constitute a justification or excuse for murder but which in fairness should be considered in deciding between the punishment of life imprisonment without possibility of parole and death by electrocution.

You may consider all evidence in mitigation. The weight you give to any particular mitigating circumstance is a matter for your moral and legal judgment. However, you may not refuse to consider any evidence in litigation and thereby give it no weight. The weight it is to be given, however, is a matter solely for your discretion and judgment.

A mitigating circumstance considered by you should be based on the evidence you have heard. When the factual existence of an offered mitigating circumstance

is in dispute, the state shall have the burden of disproving the factual existence of that circumstance by a preponderance of the evidence. The burden of disproving it by a preponderance of the evidence means that you are to consider that the mitigating circumstance does exist unless taking the evidence as a whole it is more likely than not that mitigating circumstance does not exist. Therefore, if there is a factual dispute of the existence of a mitigating circumstance, then you should find your -- you should find and consider that mitigating circumstance unless you find the evidence is such that it is more likely than not that the mitigating circumstance did not exist. Only an aggravating circumstance must be proven beyond a reasonable doubt and to a morale certainty that such an aggravating circumstance did exist.

Unlike aggravation with mitigation you are not required to unanimously agree in order to consider evidence mitigating. Instead each of you must independently consider any evidence of mitigating circumstances and determine the weight it is to be accorded. You may not exclude mitigating circumstances from your consideration simply because as a jury you do not unanimously agree about one circumstance or a combination of circumstances.

In reaching your finding concerning the aggravating and mitigating circumstances in this case and in determining what to recommend that the punishment in this case should be, you must avoid any influence of passion or prejudice or any other arbitrary factor. Your deliberations and verdict should be based upon the evidence you have seen and heard and the law on which I have instructed you. There is no room for the influence of passion or prejudice or any other arbitrary factors. While it is your duty to follow the instructions which the Court has given you, no statement, question,

ruling, remark or other expression that I have made at any time during this trial either during the guilt phase or during this sentence hearing is intended to indicate any opinion of what the facts are or what the punishment should be. It is your responsibility to determine the facts and recommend the punishment and in doing so you should not be influenced in any way by what you may imagine to be my views on such subject. The process of weighing aggravating and mitigating circumstances against each other in order to determine the proper punishment is not a mechanical process. Your weighing of the circumstances against each other should not consist of merely adding up the number of aggravating circumstances and comparing that number to the total number of mitigating circumstances. The law of this state recognizes that it is possible in at least some situations that one aggravating circumstance might outweigh a large number of mitigating circumstances. The law of this state also recognizes that it is possible in at least some situations that a large number of aggravating circumstances might be outweighed by one mitigating circumstance. In other words, the law contemplates that different circumstances may be given different weights or values in determining the sentence in a case. And you the jury are to decide what weight or value is to be given to a particular circumstance in determining the sentence in light of all of the other circumstances in this case. You must do that in the process -- in the process of weighing the aggravating circumstances against the mitigating circumstances.

In order to bring back a verdict recommending the punishment of death at least ten of your number must vote for death. In other words, a verdict for death must be either unanimous or eleven for death and one for life without parole or ten for death and

two for life without parole. Any number less than ten cannot recommend the death penalty. In order to bring back a verdict recommending a sentence of life imprisonment without parole, there must be a concurrence of at least seven of your number for that sentence. In other words, in order for a verdict to be returned recommending imprisonment for life without parole, it must be either unanimous or eleven for life without parole and one for death or ten for life without parole and two for death or nine for life without parole and three for death or eight for life without parole and four for death or seven for life without parole and five for death. Any number less than seven cannot recommend life with without parole. The fact that the determination of whether ten or more of you can agree to recommend a sentence of death or seven or more of you can agree to recommend the sentence of life imprisonment without parole can be reached by a single ballot should not influence you to act hastily or without due regard to the gravity of these proceedings. You should hear and consider the views of your fellow jurors. Before you vote you should carefully weigh, sift and consider the evidence and all of it realizing that a human life is at stake and you should bring to bear your best judgment on the sole issue which is before you. That issue is whether the defendant should be sentenced to life imprisonment without parole or death.

In addition to the recommendation of either death or life imprisonment without parole, your verdict form must be contain -- let me state that again. In addition to the recommendation of either death or life imprisonment without parole, your verdict form must contain the numerical vote, not who voted in which way, but the actual count.

Now, ladies and gentlemen of the jury, if after a careful and fair consideration of all of the evidence in this case you are convinced beyond a reasonable doubt and to a moral certainty that at least one aggravating circumstance does exist and you are convinced that the aggravating circumstance outweighs the mitigating circumstances, your verdict should be "We the jury recommend the defendant, Kenneth Eugene Smith, be punished by death. The vote is as follows" -- then you would specify the vote and your foreman should sign the verdict of the jury as foreperson. I have a verdict form for that.

If after a careful consideration of all of the evidence in this case you determine that the mitigating circumstances outweigh any aggravating circumstances that exist or you are not convinced beyond a reasonable doubt and to a morale certainty that at least one aggravating circumstance does exist, then your verdict would be to recommend punishment of life imprisonment without parole and the form of your verdict would be, "We, the jury recommend that the defendant, Kenneth Eugene Smith, be punished by life imprisonment without parole." The vote is as follows -- and I have a verdict form for that. I said the vote is as follows and you will specify the vote and the verdict would have to be signed by the foreperson.

Before you begin your deliberations in the jury room you will again have with you the exhibits that have been admitted and pencils and paper.

Anything from attorneys at this time?

MR. JOHNSON: Yes, sir, Your Honor. One small matter. May I approach?

THE COURT: Yes.

(The following bench conference was held outside the hearing of the jury.)

MR. JOHNSON: We just renew the objection made to the statement exhibit going to the jury that was previously made before the guilt phase of this trial.

MR. ALVERSON: I just state the same grounds. It is admissible. It has been

Appendix J

CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA

No. CC 89-1149

THE STATE OF ALABAMA,

—v.—

KENNETH EUGENE SMITH,

WE THE JURY FIND THE DEFENDANT, KENNETH EUGENE SMITH GUILTY OF CAPITAL MURDER.

s/Marvin N. Giles
FOREPERSON

Appendix K

CIRCUIT COURT
TENTH JUDICIAL CIRCUIT OF ALABAMA

STATE OF ALABAMA

—versus—

KENNETH SMITH

April 29, 1996

10:00 a.m.

VOLUME V

Transcript Pages 956 to 1016

all of the evidence, carefully consider all of the evidence in this case and you will see, I think, what the defendant is guilty of. He is guilty of capital murder and nothing else. Thank you.

MR. SINGLETON: May I approach very briefly?

THE COURT: Yes.

(At the bench the following occurred.)

MR. SINGLETON: I objected on burden shifting. I would also reference the Court expressly to ex parte --

COURT REPORTER: Judge Tompkins, I can't hear him.

THE COURT: She can't hear you now.

MR. SINGLETON: Can I reserve time after the Court's instructions?

THE COURT: Yes.

MR. SINGLETON: Thank you.

THE COURT: Ladies and gentlemen of the jury, we are now at the point where it is the Court's obligation to charge you with respect to the law that you shall apply in this case.

Before I begin, I would like to thank each one of you for your kindness, for your patience, and for your attentiveness throughout this trial and I have observed that.

Now, the defendant in this case is Kenneth Eugene Smith and he is charged in the indictment with murder in violation of Section 13A-5-40 (A) (7) of the Alabama Code which offense is classified under the code as capital murder. I will read the indictment to you.

The grand jury of said county charged before the finding of this indictment Kenneth Eugene Smith alias Kenneth E. Smith whose name is otherwise unknown to the grand jury than as stated did intentionally cause the death of Elizabeth Dorlene Sennett by beating her and stabbing her with a knife for pecuniary or other valuable consideration; to wit, one thousand dollars in violation of Section l3A-5-40 (A) (7) of the Code of Alabama against the peace and dignity of the State of Alabama. Signed by the District Attorney, Gary W. Alverson.

The Court will define for you in the course of this charge the material elements contained in this offense. The charge of capital murder as written out in the indictment also includes the lesser included

offenses of murder while acting with extreme indifference to human life and murder during an assault in the first degree and manslaughter.

In the course of these instructions, I will define for you each of the elements both of the charge written out in the indictment and of the lesser included offenses which are not written out in the indictment, but which are included in the charge as written out in the indictment.

Capital offense is an offense for which the punishment is either life imprisonment without parole or death. It provides that if a defendant is convicted of a capital offense additional proceedings will be held to determine whether his punishment is to be life imprisonment without parole or death. But you are not to concern yourself at this time with any issue of punishment. Instead the only determination you are to make at this time is whether the state has proven beyond a reasonable doubt that the defendant is guilty of the capital offense as it is written out in the indictment or some lesser included offense or offenses which I will instruct you on about later in this charge.

Now, the defendant has on arraignment entered a plea of not guilty. The defendant says he is not guilty of any charge contained in the indictment. In coming before you, a jury of his peers, and upon his plea of not guilty, the defendant is presumed to be innocent of the charges against him. This presumption remains with him throughout every stage of the trial and during your deliberations on the verdict and is not overcome unless from all of the evidence from the case you are convinced beyond a reasonable doubt that the defendant is guilty of a specific and particular charge.

The presumption of innocence with which the defendant enters the trial is a fact in the case which must be considered with all of the evidence and is not -- and is not to be disregarded by you.

The state has the burden of proving the guilt of a specific or a particular charge of the defendant beyond a reasonable doubt and this burden remains on the state throughout the case. The defendant is not required to · prove his innocence.

Unless the state so satisfies you of the defendant's guilt of a specific and particular charge beyond a reasonable doubt and to a moral certainty, then the defendant is entitled to an acquittal.

Now, the phrase reasonable doubt is self-explanatory and efforts to define it do not always clarify the term. But it may help you some to say that the doubt which will justify an acquittal must be a reasonable doubt and not a mere possible doubt. A reasonable doubt is not a mere guess or surmise and it is not a capricious doubt. If after considering all of the evidence in this case, you have an abiding conviction of the truth of the charge, then you are convinced beyond a reasonable doubt and you may convict the defendant.

The reasonable doubt which entitles an accused to an acquittal is not a mere fanciful, vague, conjectural or speculative doubt, but a reasonable doubt arising from the evidence and remaining after a careful consideration of the testimony such as reasonable, fair-minded and conscientious men and women would entertain under all of the circumstances.

Now, you will observe that the state is not required to convince ·you of the defendant's guilt beyond all

doubt, but simply beyond all reasonable doubt and to a moral certainty.

If after comparing and considering all of the evidence in this case, your minds are left in such a condition that you cannot say you have an abiding conviction to a moral certainty of the defendant's guilt, then you are not convinced beyond a reasonable doubt and the defendant would be entitled to an acquittal.

The indictment in this case is not any evidence against the defendant. It is merely the formal method under our Constitution by which a defendant is accused of a crime and placed on trial. It provides no proof, no presumption nor inference that the defendant is guilty of the offense or any lesser included offense charged therein.

In determining what the true facts are in the case, you are limited to the evidence that has been presented from the witness stand as opposed to matters that have been stated by the attorneys in the course of the trial. What the attorneys have said both for the state and for the defendant is not evidence in the case. And what they have argued to you at various points in the trial is not evidence. They have a right and they have a duty at the appropriate time in the trial to comment on the evidence and to draw reasonable inferences from the evidence as they argue their respected positions to you. What they say is not evidence and you should put what they say in a proper category in your thinking and it should not be in the evidence category. Just as the indictment in this case should not be in the evidence category.

As I have told you, the defendant Kenneth Eugene Smith is charged in the indictment with having committed a capital offense. As I have told you, a

capital offense is an offense for which the punishment is either life imprisonment without parole or death. I, also, told you the law provides that if the defendant is guilty by capital offense additional proceedings will be held to determine the punishment, but you are not to concern yourself at this time with any issue of punishment. The only issue that you are to determine at this time is whether the state has proven beyond a reasonable doubt that the defendant is guilty of the capital offense or some lesser included offense which I will instruct you on later.

If you are convinced beyond a reasonable doubt that the defendant, Kenneth Eugene Smith, committed the crime of murder of the intentional killing type of Elizabeth Dorlene Sennett and that the defendant committed the crime of murder of the intentional killing type for pecuniary or other valuable consideration or pursuant to a contract or for hire as alleged in the indictment, then it will be your duty to find the defendant guilty of the capital offense charged in the indictment.

The two components of the capital offense are that the Defendant, Kenneth Eugene Smith, committed the crime of murder of the intentional killing type and that such murder of the intentional killing type was committed by the defendant for pecuniary or other valuable consideration or pursuant to a contract or for hire.

A defendant commits murder of the intentional killing type if with the intent to cause the death of another person, he causes the death of that other person or another person. A person acts intentionally with respect to a result or to a conduct when his purpose is to cause that result or to engage in that conduct. The defendant must intentionally as

opposed to negligently, accidentally or recklessly cause the death of the deceased in order to invoke the capital statute. The intent to kill must be real and specific in order to invoke the capital statute.

In order to prove the defendant guilty of a particular crime it is not necessarily required that the state prove that the defendant himself personally committed the acts which constitute the crime. Instead in certain circumstances, the law makes a defendant responsible for the criminal act of another. More specifically the law provides that a defendant is responsible for the criminal act of another person if the defendant intentionally procured, induced or caused the other person or persons to commit the acts. Or if the defendant intentionally aided and abetted another person or persons commission of the act. The words a.id and abet include all assistance rendered by acts or words of encouragement or support.

I further charge you that if you find a murder of the intentional killing type, as I have defined that term for you, of Elizabeth Dorlene Sennett was committed by some person other than the defendant, the Defendant Kenneth Eugene Smith is guilty of that intentional killing type of murder if but only if you find beyond a reasonable doubt either that the Defendant, Kenneth Eugene Smith, intentionally procured, induced or caused the other person or persons to commit the murder and that the Defendant Kenneth Eugene Smith intentionally aided or abetted the other person or persons' commission of the murder.

Only if you are convinced. beyond a reasonable doubt that either or both of these situations exist as a fact can you find the defendant, Kenneth Eugene

Smith, guilty of the intentional killing murder which he did not personally commit.

A person who is guilty of the crime of murder of the intentional killing type, as that term has been defined for you, because of these principles has committed that crime the same as if he had personally done the killing himself provided that you are further satisfied from the evidence beyond a reasonable doubt and to a moral certainty that such intentional killing murder was committed by the defendant for pecuniary or other valuable consideration or pursuant to a contract for hire, apply these principles of legal accountability for the acts of another in this case. If you are convinced beyond a reasonable doubt that the defendant committed the crime of murder or the intentional killing type of Elizabeth Dorlene Sennett by the means alleged in the indictment and that the defendant committed such murder of the intentional killing type for pecuniary or other valuable consideration or pursuant to a contract or for hire, all components of the offense would have been proven and you may convict the defendant guilty of the capital offense charged in the indictment.

On the other hand, again applying these principles if you are not convinced beyond a reasonable doubt that the defendant committed the crime of murder of the intentional killing type of Elizabeth Dorlene Sennett by the means alleged in the indictment or if you are not convinced by the evidence beyond a reasonable doubt that the murder of the intentional killing type committed by the defendant was committed for pecuniary or other valuable consideration or pursuant to a contract or for hire, then the defendant cannot be convicted of a capital

offense. The killing must be intentional, of the intentional type. The intent must be real and specific.

As I said, included in the capital offense as charged in the indictment is the lesser included offenses of murder while acting with extreme indifference to human life and murder during an assault in the first degree and manslaughter, and I will define those for you.

If you find that the state has failed to prove the capital offense, you may consider the lesser included offenses that I will read to you and the first one will be murder while acting with extreme indifference to human life.

A person commits the crime of murder if he causes the death of another person and in performing the act or acts which caused the death of that person he recklessly engages in conduct which creates a grave risk of death to a person other than himself which under the circumstances manifest extreme indifference to human life. To convict the state must prove beyond a reasonable doubt each of the following elements of murder.

First, that Elizabeth Dorelene Sennett is dead. Second, that the defendant, Kenneth Eugene Smith, caused the death of Elizabeth Dorlene Sennett by beating and stabbing her. And, third, that in committing the acts which caused the death of Elizabeth Dorlene Sennett the defendant acted with extreme indifference to human life. A person acts with extreme indifference to human life if under the circumstances the actor recklessly engages in conduct which creates a grave risk of death to a person other than himself.

A person acts recklessly with respect to that conduct when the actor is aware of a substantial and unjustifiable risk that a result will occur but consciously disregards that substantial and unjustifiable risk. The risk of death to another person -- excuse me -- the risk of death to another must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in a situation. If you find from the evidence that the state has proved beyond a reasonable doubt each of the above elements of the offense of murder as charged as I have defined it for you, then you shall find the defendant guilty of murder while acting with extreme indifference to human life.

If you find that the state has failed to prove beyond a reasonable doubt any one or more of the elements of the offense of murder, as I have defined it for you, then you cannot find the defendant guilty of murder while acting with extreme indifference to human life and you may consider the lesser included offense of murder during an assault in the first degree and I will define that for you.

A person commits the crime of murder if he commits assault in the first degree and in the course of the crime or in furtherance of the crime he causes -- he causes the death of any person.

To convict the state must prove, beyond a reasonable doubt each of the following elements of murder. First, that Elizabeth Dorlene Sennett is dead. Second, that the defendant or John Parker caused the death of Elizabeth Dorlene Sennett by stabbing her and beating her. And, third, that in committing the acts which caused the death of Elizabeth Dorlene Sennett the defendant or John

Parker was acting in the course of and in furtherance of the crime of assault in the first degree.

I will define what assault in the first degree is. A person commits the crime of assault in the first degree if he causes serious physical injury to another person and he does so with intent to do so and by means of a deadly weapon or a dangerous instrument.

As to assault in the first degree, serious physical injury is physical injury which creates a substantial risk of death or which causes serious or protractive disfigurement, protracted impairment of health or protracted loss or impairment of the function of body organ. A deadly weapon may be a firearm or anything manifestly designed, made or adapted for the purpose of inflicting death or serious physical injury. And such term includes but is not limited to a pistol, a rifle, a shot gun, a knife, a dagger, club, blackjack, and so on. It even mentions metal knuckles in the code section.

If you find from the evidence that the state has proven beyond a reasonable doubt each of the above elements of the offense of murder during an assault in the first degree as charged then you shall find the defendant guilty of murder.

If you find that the defendant -- excuse me. If you find that the state has failed to prove beyond a reasonable doubt any one or more of the elements of the offense of murder during an assault in the first degree, then you cannot find the defendant guilty of murder during an assault in the first degree and you may consider the lesser included offense of manslaughter.

A person commits the crime of manslaughter if he recklessly causes the death of another person. To convict the state must prove beyond a reasonable doubt each of the following elements of manslaughter. First, that Elizabeth Dorlene Sennett is dead. Second, that the defendant, Kenneth Eugene Smith, recklessly caused the death of Elizabeth Dorlene Sennett by beating her and stabbing her. A person acts recklessly with respect to a result or .to a circumstance when he is aware of and conscientiously disregards substantial and unjustifiable risk that the result will occur or that the circumstance exist. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

If you find from the evidence that the state has proven beyond a reasonable doubt each of the above elements of the offense of manslaughter as charged, then you shall find the defendant guilty of manslaughter. If you find that the state has failed to prove beyond a reasonable doubt of any one or more of the elements of the offense of manslaughter, then you cannot find the defendant guilty of manslaughter.

I further charge you that you are specifically cautioned against permitting the character of the charges to affect your minds in arriving at your verdict. You must permit only the evidence in this case to enter into your findings and deliberations.

Intoxication of the defendant whether voluntary or involuntary may be considered by you whenever it is relevant to negate an element of the offense charged such as intent. There is evidence in this case tending to show that Mr. Smith may have been intoxicated prior to and at the time of the alleged commission of

the offense of which he is charged. Intoxication is not in itself a defense to a charge of crime, but the fact -- but the fact, if it is a fact, that Mr. Smith may have been intoxicated at the time of the commission of the offense, may negate the existence of a state of mind that is an essential element of the offense. In order for intoxication to constitute a defense to the crime charged against Mr. Smith, you must find by clear and convincing evidence that as a result of intoxication Kenneth Smith was unable to appreciate the nature and quality of his act or was unable to appreciate the wrongfulness of his acts.

Now, ladies and gentlemen of the jury, all twelve of you must agree before you can reach any verdict in this case and your verdict must be the verdict of. each and every juror. You are the sole judges as to the weight that should be given to all of the testimony in the case. The judge's duty is to decide the law and the jury's duty is to determine the facts. I have no opinion as to the facts of this case and I don't want you to think from anything that I have said in this charge or otherwise or in any ruling that I have made that I think one way or the other about the facts of this case.

You take the testimony of the witnesses together with all proper -- with all proper and reasonable inferences and apply your common sense and in an impartial and honest way determine what you believe to be the truth.

It's for you to determine the credibility of the witnesses who testify. To do so you will have to first determine the truthfulness and honesty of the witnesses and then the weight to be given to their testimony. You should give the testimony of each witness such weight as in your judgment it is fairly

entitled to receive. You are the sole judges of the credibility of the witnesses and if there is any conflict in their testimony, your function is to resolve the conflict and to determine -- and determine the truth. In determining the credibility of the witness and the weight to be given to his or her testimony, you may and should consider the following: the conduct and demeanor of the witness while testifying. His or her frankness or lack of frankness while testifying. The reasonableness or unreasonableness of his or her testimony. The witness's knowledge of the facts to which he or she is testifying. The accuracy of the witness's recollection and the degree of intelligence shown by the witness. You should also take into consideration the character and appearance of the witness at trial and any bias she or he has shown in her or his testimony in determining -- in determining the credit to be given to her or his testimony.

If your believe any material part of the evidence of any witness was willfully false, you may disregard all or part of the testimony of such witness.

You have, also, heard expert testimony. As a rule a witness is not permitted to testify based on opinion; however, based on training and experience an expert in a particular field may state an opinion as to relevant and material matters in which he or she professes to be an expert. You are not bound by the opinion of of an expert, if you should decide that the opinion is not based upon sufficient education or experience or if you should conclude that the education or experience or if you should conclude the reason given in your support of the opinion are not sound or that the opinion is outweighed by other evidence, you may disregard the opinion in whole or in part. In other words, you should consider the expert's testimony in connection with the other

evidence in the case and give it such weight as in your judgment it is fairly entitled to receive.

Kenneth Eugene Smith did not testify in this matter and there are many reasons why an accused may not testify. He may be nervous or afraid. He may be inarticulate. He may be poorly educated. He may choose to rest on his right to remain silent and put the government to its burden of proof. You are absolutely not to draw any: adverse inference from the fact that the defendant did not testify. The right to not testify is fundamental and constitutionally protected. It is a part of the important principle of law that an accused is never required to prove his innocence. A defendant has absolutely no burden to introduce any evidence whatsoever. You must decide whether or not the prosecution has proved the crime or crimes charged beyond a reasonable doubt based solely on the evidence before you. The fact that the defendant did not testify is absolutely not to be considered by you in your deliberations.

Evidence has been introduced that Kenneth Smith made a statement to a sheriff's deputy while in custody concerning the crime charged. You should weigh such evidence carefully as you would any other evidence and consider all the circumstances surrounding the alleged statement in deciding whether Mr. Smith made it and what weight to give it. In examining the circumstances of the statement, you may consider -- you may consider whether it was made by Mr. Smith freely and voluntarily with an understanding of the nature of the statement. You may consider the conversations, if any, between the police and Mr. Smith including whether Mr. Smith was advised of his rights, the time and place that the alleged statement occurred, the length of time that Mr. Smith was questioned, who was present, the

physical and mental condition of Mr. Smith, and all other circumstances surrounding the making of the statement including the age, disposition, education, experience, character, intelligence of Kenneth Smith. In short, you should give Mr. Smith's statement such weight as you feel it deserves under all the circumstances.

And some of the witnesses in the case are police officers and you may not give more weight to the testimony of a witness simply because he or she is a police officer. You must judge the. testimony of such witnesses in the same manner as you would any other witness.

Also, the weight you give to the evidence should not be determined by the number of witnesses testifying on either side. You should consider all of the facts and circumstances in evidence to determine which, if any, of the witnesses is worthy of belief.

Now, ladies and gentlemen of the jury, there is one count contained in the indictment charging the defendant with the offense of a capital murder as I have defined that offense for you. You must consider the evidence as to the charge and determine whether the defendant has been proved guilty of the offense charged beyond a reasonable doubt. If you find from your consideration of all of the evidence that the state had proved each of the necessary elements of the offense charged beyond a reasonable doubt, then your verdict may be that you find the defendant guilty of the offense of capital murder as charged in the indictment, and I have a verdict form for that.

If on the other hand from your consideration of the evidence or any part thereof or the lack of evidence you are not convinced that the state has proved each of the essential elements of the offense of capital

murder beyond a reasonable doubt, then you must find the defendant not guilty of the offense of capital murder as charged in the indictment and at which time you may consider the lesser included offense of murder while acting with extreme indifference to human life. And if you find from your consideration of all of the evidence that the state has proved each of the necessary elements of the offense of murder while acting with extreme indifference to human life, then your verdict would be that you find the defendant guilty of the offense of murder while acting with extreme indifference to human life and I have a verdict form for that.

If on the other hand, from your consideration of the evidence or any part thereof or the lack of evidence, you are not convinced that the state had proved each of the essential elements of the offense of murder while acting with extreme indifference to human life, then you must find the defendant not guilty of that offense at which time you may consider the offense of murder during an assault in the first degree.

And if you find from your consideration of all of the evidence that the state has proved each of the necessary elements of the offense charged beyond a reasonable doubt, then your verdict will be that you find the defendant guilty of the offense of murder during an assault in the first degree. However, if on the other hand, from your consideration of the evidence or any part thereof or the lack of evidence, you are not convinced that the state has proved each of the essential elements of the offense of murder during an assault in the first degree, then you must find the defendant not guilty of this offense at which time you may consider the lesser included offense of manslaughter. And if you find from your consideration of all of the evidence that the state has

proved each of the necessary elements of the offense of manslaughter beyond a reasonable doubt, then your verdict would be that you find the defendant guilty of the offense of manslaughter and I have a verdict form for that.

Now, ladies and gentlemen of the jury, after a full and fair consideration of all of the evidence in this case you are not convinced beyond a reasonable doubt and to a moral certainty that the defendant is guilty of any charge as charged in the indictment -- that is, the capital offense or any lesser included offenses and if you should so find, you shall find him not guilty, and I have a verdict form for that.

After you receive these instructions you will be given the forms for recording your verdict and you will have with you pencils and papers, you will have all of the exhibits with you and one of these verdicts is what you should return to the Court. There are four verdict forms, only one of them is to be used. You will be taken by the bailiff to the jury room where you will begin your deliberations. When you have reached a verdict in the case, complete one of the verdict forms in the form given to you and one of your number is to be selected and designated by you as the foreperson. That person is to sign the verdict form.

Excuse me just a second.

Upon retiring to the jury room, you will begin your deliberations and the verdict you reach must represent the considered judgment of each juror. Your verdict with regard to each offense must be unanimous. Unanimity means that each and every one of you must agree that the prosecution has proved or not proved the specific incident or incidence which are the basis for the charge. Before returning a verdict of capital murder or any other offense,

therefore, you must all agree as to proof of the existence or nonexistence of the specific incident or incidence and mental states at issue. In other words, it's not enough that each of you conclude that one or more or some incident has been proved or not proved. A patchwork verdict is no verdict at all. Rather you must reach agreement as to what this defendant did or did not do and did or did not intend. You must reach such agreement concerning the acts charged and whether they do or do not establish beyond a reasonable doubt each and every element of capital murder or any other specific offense you consider.

Your duty as jurors is to consult with one another and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment.

Each of you must decide the case for consideration of the evidence with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence solely because of the opinion of your fellow jurors or for the mere purpose of returning a verdict.

When you have reached a verdict, please knock on the door, it would be necessary for you to return into court to give your verdict.

Can I see the attorneys at the bench?

THE COURT: I think I told you there were four verdict forms, there are five verdict forms and you just need to use one.

(The following bench conference held outside the hearing of the jury.)

MR. ALVERSON: I was just going to correct you, there are five instead of four.

MR. JOHNSON: Your Honor, we have one objection to the charge, which is that you stated "your duty," it wouid be "your duty to convict" on one occasion during the charge in defining -- instructing the jury about the offenses and the elements associated with the offenses. We would ask for a correction to be made.

MR. ALVERSON: You did say that one time.

(Open court.)

THE COURT: Ladies and gentlemen of the jury, if I may have said "it is your duty to convict," I intended to say "you may convict." I do not intend to say, " it' s your duty to convict" on any matter. It's completely up to you. You may do that.

At time, this time -- Anything else?

(No response)

THE COURT: I guess you realize there are fourteen of you. Only twelve of you go to the jury room. We have two alternates and I ask these two people to please keep your seats, Marilda Holcomb and Mary Johnson. The rest of you go to the jury room.

Can you help take the exhibits?

COURT CLERK : Yes, sir.

MR. JOHNSON: Your Honor?

THE COURT: Just a minute.

MR. JOHNSON: You have one matter to take up outside the presence of the jury.

THE COURT: Okay. Let me get the exhibits back to the jury room.

MR. JOHNSON: With respect to the exhibits, Your Honor.

THE COURT: Okay. Do you want to do it right here?

MR. SINGLETON: We ask that the jury go to the jury room.

THE COURT: Okay. We will bring the exhibits and the pencils and paper and the verdict forms to you. If you would, go to the jury room, do not begin discussing this case until all of the exhibits and everything is brought to you. That will be just a few minutes.

The alternates keep your seats, please.

(Jury excused to the jury room.)

THE COURT: Let the record show we are outside the presence of the jury.

MR. JOHNSON: I think in an abundance of caution, Your Honor, we ought to be outside the presence of the alternates as well.

THE COURT: Okay.

MR. JOHNSON: If possible.

THE COURT: I will ask you to go back in the room back here -- can you come around?

(The alternates not present in the courtroom.)

(Brief pause.)

THE COURT: Let the record show that the alternates are out of the presence of the jury -- out of the court at this time.

MR. JOHNSON: Your Honor, the issue we wish to raise is to ask that Mr. Smith's statement -- custodial statement to Ronnie May not be sent back to the jury room and the grounds for that are this: that statement as being written on paper and being in the jury room it is likely to be given more weight than other statements Mr. Smith made and it is not entitled to that extra weight.

In addition, I would note that the record, the transcript of the cross examination of Mr. May is not going back to the jury room nor or any other statements that were made. And since that statement by being present without having the other statements also present violate Mr. Smith's rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution and their Alabama counterparts, so we would ask that that one exhibit not go back to the jury room.

THE COURT: Anything from the state?

MR. ALVERSON: Your Honor, I think it's admissible. It has been introduced into evidence. It has been received into evidence and I think that the jury should have an opportunity to see it as it was more than just simply testimony, it was a statement that was taken on the 31st of March. It was submitted to the defendant for him to give his approval to and it is a piece of real evidence not just testimony like some testimony that was given in court.

MR. JOHNSON: Let's see. At its heart, Your Honor, it has credibility because it's a statement of the defendant and there are other statements of the defendant which the inference could easily be drawn that those are entitled to a great deal of credibility. For example, the statement made by Mr. Smith in

tears to Mr. Robinson, it is an abundant indices of the reliability of that statement given that it was made under the stress of emotion and for all of those other statements not to be back in the jury room where they can pour over every word while this statement alone is given that special privilege, unduly gives the custodial statement the weight that it is not entitled to receive.

THE COURT: That motion is denied.

Anything else?

MR. SINGLETON: Can I go ahead and make the record on the two objections that were brought up in the course of the closing argument?

THE COURT: Go ahead.

MR. SINGLETON: The first one dealt with Mr. Alverson's reference to the st;atement -- and I think it is on page 6, I'm not really sure -- "I never stabbed her or hit her." At that time I objected and referred the Court to a couple of cases, Napue vs Illinois which appears in 360 US 264.

THE COURT: Excuse me just a minute. Let's wait -- Let's get the jury started before we go into all of these motions.

MR. SINGLETON: Sure.

THE COURT: I will ask the clerk and the court reporter, can both of you-all carry what is there back to the jury room and take pencils and paper and the verdict forms with you? And one of the lady's left a book in there, if you will just bring that back, one of the alternates.

(Brief pause.)

THE COURT: I would like to thank Ms. Johnson and Ms. Holcomb for being alternates. And when this other jury is through serving, I am going to tell you what I am going to tell them, even though you did not serve as a juror. I would like to thank everyone that was involved in this case for your consideration. I will advise you of some privileges as jurors. No juror can be required to talk about the discussions that occurred in the jury room except by court order. I know you-all have not discussed it, but you have opinions or your thinking, you don't have to talk to anyone about. For many centuries our society has relied upon juries for consideration of difficult cases and · we have recognized for hundred of years that a jury's deliberations, discussions and votes shall remain their private affairs as long as they wish it. Even though you are not doing that, just how you feel about this case, you can keep it to yourself, if you want to. The law gives you a privilege not to speak about the jury's work, about how you feel about this case.

Although, you are at liberty to speak to anyone about your thinking on this case or your opinions, you are also at liberty to refuse to speak to anyone about it. A request may come from those who are simply curious or from those who might seek to find fault · with you. It will be up to you to decide whether to preserve your privacy as a juror, but I do ask you not to talk to anyone about this case until the conclusion of this case. After then it is up to you. You are welcome to leave and she will tell you something about --

(Alternate jurors comply with the Court's instruction.)

(Alternates excused.)

(Exhibits carried to the jury room.)

THE COURT: Okay. Is there something else you want to put on the record?

MR. SINGLETON: There are: two points in the course of the state's rebuttal argument that are reserved, at this time I want to make a record, first having to deal with reference to the statement evidence and on a particular page the words "I didn't stab her, I didn't hit her." At that point directly after citing to that evidence, the state asserted that "we don't know if that is accurate or not, we don't know if it is reliable or not." I have no question with the prosecution -- or no problem with the prosecution arguing the hilt out of "he hit her, he hit her, he hit her." I have real problems with the prosecution arguing that under view of the evidence, Kenneth Smith is the stabber, that he actually held Government's Exhibit 32 in his hand at any point that the injuries to Mrs. Sennett were inflicted.

In support of that objection, I tender Captain May's running narrative of the investigation in this case and I ask that it be denominated as a defense exhibit -- I think we are up to 4 at this point -- in support of the motion

The legal significance is this, we all remember Captain May's testimony from the last go-around on the motion to suppress where he talked about his custodial interrogation of the codefendant in this case, Parker. And how he described quite dramatically Parker's confession to having that knife, to taking it up there that day, and to using it. As Captain May described it and testified to the last time, he was interrogating Parker, he come to the end of that interrogation, he felt that Parker had left something out and that something was that he

Parker was the stabber and Captain May confronted him directly with that. At that point according to Captain May's testimony from the last suppression hearing, Parker dropped to his knees and as I recall, said, "my God, help me, my God." I asked Captain May at that point -- and this is a man who has got, as I recall, twenty-seven years of investigator's. experience, the lead homicide investigator in the county, certainly the lead detective on this case -- what he interrupted that act of going on his knees followed by a religious explanation to be, and Captain May said that John Forrest Parker was the stabber, that there was no doubt in his mind, that he was the individual and not Kenneth Smith who held State's Exhibit 32 on March the 18th, 1988.

Based on that there are two legal issues that evolve. We all know that the district attorney's job is to do justice under Verger vs United States, 297 U.S. We all know that when that duty comes into conflict with the reliability standard, where the prosecution knowingly commits itself to a version of facts upon which culpability rests, that it's not accurate, the due process is implicated and the case that stands for that beyond the Verger decision itself is Napue vs Illinois, And that decision can be found at 360 U.S. 264.

I submit Defense Exhibit 4 in support of the proposition, as well as incorporate the testimony from the last suppression hearing, that even suggesting to this jury that there is a possibility that Kenny Smith is the stabber for furthering the proof standards were violated.

Now, why that particular matters in this state is that you all unlike the federal courts have said Napue matters to us so much that even when there is

a risk that we violate the reliability principle through negligence, we find that under our state law the constitution has been violated. And I think that is a clear import of ex parte Frazier to be found at 562, Southern 2nd, 560, Alabama in 1989. As well as ex parte Gingo to be found at 650, Southern 2nd, 1237, Alabama 1992. That is that toxic waste case where there is no question about it, the government did not set out to be commit perjury, they did not set out to intentionally and deliberately mislead the jury, but they did it by omission by failing to preserve toxic .materials that were relevant to the criminal charge. And the Alabama courts spoke loud and clear. And they, as I recall, even talked about Napue and talked about Brady and talked about this is our state law and under the state law even where the reliability problems arise from negligence, it's untenable, we are not going to let it in our courtrooms. But I would offer that exhibit at this time and if it could be admitted solely in support of this motion. And then if I could address very briefly the second point.

When I objected to the burden shifting at the point during rebuttal argument when the prosecution stated that there had been no evidence to counter the intent, specific intent to take Elizabeth Dorlene Sennett's life, this is a case where there is a custodial statement and a nontestifying defendant, and my position for the record is that that shifts the burden of proof, that it is a direct invitation and indirect for the jury to speculate about the client's silence and I simply cite the Court to two cases ex parte Wilson, and I don't. know the cite to that, but it's the Shep Wilson case, and Windsor versus State, and that appears at 593 Southern 2nd, 87, Alabama Court of Criminal Appeals, 1991.

MR. ALVERSON: Let me just respond, first of all, by saying if Mr. Singleton says that I implicated in any way that the defendant, Kenneth Smith, did any of the stabbing then he either was not sitting in the same courtroom I was or he did not hear the same argument that I heard myself give.

I never at any point implicated that he did any of the stabbing. I have never changed the philosophy or theory of the case. When I was addressing -- if he had listened to the totality of the statement made in the context that it was made in, I was talking about the question of hitting her, whether or not that was the truth or not. And it was said in the context where I was questioning whether or not he had told the truth when he said he did not hit her. And I did not say not the first thing about whether or not he had stabbed her or not or whether or not that was the truth that he did not stab her. Now, he may make some strange interpretation of it, but I think if the Court looks at the record, they will see what I said and it is quite plainly. And what I said about there being no evidence to support his theory, I was talking about Mr. Singleton's theory, not anything that the defendant said or did not say.

THE COURT: Anything else?

MR. ALVERSON: I said that there was no evidence to support the theory that this crime was done or this whole episode took place just for the purpose of beating Mrs. Sennett. And that was not a comment on the defendant's failure to take the stand and it does not violate any of those provisions that he cited.

THE COURT: Anything else?

MR. SINGLETON: No.

THE COURT : I have .already ruled on that. Anything else?

MR. SINGLETON: No.

THE COURT: Court is adjourned for right now until the jury returns a verdict.

(Jury deliberations.)

(Open court.)

THE COURT: Let the record show we are outside the presence of the jury. The defendant is here with his attorney. The district attorney is present and the jury has sent out a note to the Court asking a question which reads: We need the differences listed between capital murder and murder while acting with extreme indifference to human life, definition slash elements.

Anything from the attorneys?

MR. SINGLETON: Request for supplemental instruction at the critical stage of the trial, we move that the Court reinstruct on the charged offense and all lesser related offenses plus the Court's prior instruction on culpability.

THE COURT: Anything from the state?

MR. ALVERSON: No, sir. That is fine.

THE COURT: Let the record show it is 5:15 in the evening. I'm going to ask, also, if the jury wants to go home now and come back in the morning --

MR. ALVERSON: No, no.

THE COURT: -- if they are tired.

MR. SINGLET'ON: No.

MR. ALVERSON: No, don't do that.

THE COURT: If they are, if they request that, I'm going to let them go home. Bring the jury in, please.

MR. ALVERSON: Let's let them deliberate awhile a longer. They have asked an important question.

THE COURT: Well, I will have to read all of this again. It is going to take a little while just to read all of this.

Please, bring them in.

(Jury present.)

THE COURT: Ladies and gentlemen of the jury, you have sent a note to me asking me to, I guess, to define for you the differences listed between capital murder and murder while acting with extreme indifference to human life. You have asked for the definition of those. Who is the foreman?

FOREMAN GILES: (Indicating).

THE COURT: What is your name, please?

FOREMAN GILES: Marvin Giles.

THE COURT: Is that what you are asking?

FOREMAN GILES: Yes, sir.

THE COURT: Okay. I'm going to read to you all of the capital murder and all the lesser included offenses, that will be murder while acting with extreme indifference to human life, murder while committing assault in the first degree and manslaughter. Do you understand? Do you-all understand? I will just read all of them to you.

I have told you that the only issue that you are to determine at this time is whether the state has proven beyond a reasonable doubt that the defendant

is guilty of the capital offense or some lesser included offense which I will instruct for you later.

If you are convinced beyond a reasonable doubt that the defendant, Kenneth Eugene Smith, committed the crime of murder of the intentional killing type of Elizabeth Dorlene Sennett and that the defendant committed the crime of: murder of the intentional killing type for pecuniary or valuable consideration or pursuant to a contract or for hire as alleged in the indictment, then it would be your duty to find the defendant guilty of the capital offense charged in the indictment. The two components of the capital offense are that the defendant, Kenneth Eugene Smith, committed the crime of murder of the intentional killing type and that such murder of the intentional killing type was committed by the defendant for pecuniary or valuable consideration or pursuant to a contract or for hire.

A defendant commits murder of an intentional killing type if with intent to cause the death of another person, he causes the death of that other person or of another person.

The person acts intentionally with respect to a result or to a conduct when his purpose is to cause that result or to engage in that conduct.

The defendant must intentionally as opposed to negligently, accidentally or recklessly cause the death of the deceased in order to invoke the capital statute. The intent to kill must be real and specific in order to invoke the capital statute.

In order to prove the defendant guilty of a particular crime, it is not necessarily required that the state prove that the defendant himself personally committed the acts which constitute the crime.

Instead, in certain circumstances the law makes a defendant responsible for the criminal act of another. More specifically the law provides that a defendant is responsible for the criminal act of another person if the defendant intentionally procured, induced or caused the other person or persons to commit the acts or if the defendant intentionally aided and abetted another person or person's commission of the act. The words aid and abet include all assistance rendered by acts or words of encouragement or support.

I further charge you that if you find that a murder of the intentional killing type, as I have defined that term for you, of Elizabeth Dorlene Sennett was committed by some person other than the defendant, the defendant, Kenneth Eugene Smith, is guilty of that intentional killing type of murder if but only if you find beyond a reasonable doubt either that the defendant, Kenneth Eugene Smith, intentionally procured, induced or caused the other person or person to commit the murder and that the defendant, Kenneth Eugene Smith, intentionally aided or abetted the other person or person's commission of the murder. Only if you are convinced beyond a reasonable doubt that either or both of those situations exist as a fact can you find the defendant, Kenneth Eugene Smith, guilty of the intentional killing murder; which he did not personally -- which he did not personally commit.

A defendant who is guilty of the crime of murder of the intentional killing type, as that term has been defined for you, because of these principles has committed that crime the same as if he had personally done the killing himself, provided that you are further satisfied from the evidence beyond a reasonable doubt and to a morale certainty that such intentionally killing murder was committed by the

defendant for pecuniary or valuable consideration or pursuant to a contract or for hire. Apply these principles of legal accountability for the acts of another in this case if you are convinced beyond a reasonable doubt that the defendant committed the crime of murder of the intentionally killing type of Elizabeth Dorlene Sennett by the means alleged in the indictment. And that the defendant committed such murder of the intentional killing type for the pecuniary or valuable consideration or pursuant to a contract or for hire, all components of the offense would have been proven and you may convict the defendant of the capital offense charged in the indictment.

On the other hand, again, applying these principles if you are not convinced beyond a reasonable doubt that the defendant committed the crime of murder of the intentional killing type of Elizabeth Dorlene Sennett by the means alleged in the indictment or if you are not convinced by the evidence beyond a reasonable doubt that the murder of the intentional killing type committed by the defendant was committed for a pecuniary or valuable consideration or pursuant to a contract or for hire, then the defendant cannot be convicted of the capital offense charged in the indictment. The killing must be intentional, of the intentional type, the intent must be real and specific.

Included in the capital offense as charged in the indictment is the lesser included offense of murder while acting with extreme indifference to human life; also, murder while committing an assault in the first degree and manslaughter.

As to murder while acting with extreme indifference to human life. A person commits the crime of murder

if he causes the death of another person and in performing the act or acts which caused the death of that person, he recklessly engages in conduct which creates a grave risk of death to a person other than himself, which under the circumstances manifest extreme indifference to human life.

To convict, the state must prove beyond a reasonable doubt each of the following elements of murder. First, that Elizabeth Dorlene Sennett is dead. Second, that the defendant, Kenneth Eugene Smith, caused the death of Elizabeth Dorlene Sennett by beating and stabbing her. And, third, that in committing the acts which caused the death of Elizabeth Dorlene Sennett the defendant acted with extreme indifference to human life. A person acts with extreme indifference to human life if under the circumstances the actor recklessly engages in conduct which creates a grave risk of death to a person other than himself. A person acts recklessly with respect to that conduct when the actor is aware of a substantial and unjustifiable risk that a result will occur but consciously disregards that substantial and and unjustifiable. risk. The risk of death to another must be of such nature and degree that the failure to perceive it constitutes a gross deviation from the standard of conduct that a reasonable person would observe in a situation.

If you find from the evidence that the state has proved beyond a reasonable doubt each of the above elements of the offense of murder, as I have defined for you, then you should find the defendant guilty of murder while acting with extreme indifference to human life.

If you find from the evidence that the state has failed to prove beyond a reasonable doubt any one or

more of the elements of the offense, then you cannot find the defendant guilty of murder while acting with extreme indifference to human life. In that event, you may consider the the lesser included offense of murder while committing an assault in the first degree. I will define that for you.

A person commits the crime of murder if he commits assault in the first degree and in the course of the crime or in furtherance of the crime, he is committing an assault in the first degree he or another participant causes the death of any person. To convict the state must prove beyond a reasonable doubt each of the following elements of murder.

First, that Elizabeth Dorlene Sennett is dead. Second, that the defendant or John Parker caused the death of Elizabeth Dorlene Sennett by beating her -- by beating and stabbing her. And, third, that in committing the acts which caused the death of Elizabeth Dorlene Sennett the defendant or John Parker was acting in the course of or in furtherance of an assault in the first degree. I will define for you in assault the first degree.

A person commits the crime of assault in the first degree if he causes serious physical injury to another person and he does so with intent to do so by means of a deadly weapon or dangerous instrument.

If you find from the evidence that the state has proved beyond a reasonable doubt each of the above elements of the offense of murder, as I have defined it for you as charged, then you shall find the defendant guilty of murder while committing an assault in the first degree. If you find that the state has failed to prove beyond a reasonable doubt any one or more of the elements of the offense of murder while committing an assault in first degree, then you

cannot find the defendant guilty of murder at which time you may consider the lesser included offense of manslaughter.

A person commits the crime of manslaughter if he recklessly causes the death of another person. To convict the state must prove beyond a reasonable doubt each of the following elements of manslaughter. First, that Elizabeth Dorlene Sennett is dead. Second, that the defendant, Kenneth Eugene Smith, recklessly caused the death of Elizabeth Dorlene Sennett by stabbing and beating her. A person acts recklessly with respect to a result or to a circumstance when he is aware of or conscientiously disregards a substantial and unjustifiable risk that the result will occur or that the circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.

If you find from the evidence that the state has proved beyond a reasonable doubt each of the above elements of the offense of manslaughter as charged, then you should find the defendant guilty of manslaughter. If you find that the state has failed to prove beyond a reasonable doubt any one or more of the elements of the offense of manslaughter, then you cannot find the defendant guilty of manslaughter.

Those are all of the offenses that I have read to you including the definitions of those.

Anything from the attorneys?

(Bench conference held outside the hearing of the jury.)

MR. ALVERSON: You did the same thing you did last time, you said "duty" instead of "may" again on the first one.

(Open court.)

THE COURT: . Ladies and gentlemen of the jury, sometimes I misstate some things. I think I said "it was your duty to convict" on each one of those charges. I did not mean to say that. I should have said "you may convict." You may convict of capital murder. You may convict of murder where there is extreme indifference to human life. Or you may convict for murder where there is assault in the first degree. Or you may convict for manslaughter. Or you may find the defendant not guilty of all of the offenses. I'm not saying it is your duty to do any of those. I'm just saying you may do that.

(Bench conference outside the hearing of the jury.)

MR. JOHNSON: One other matter, Your honor, is that I think in giving your complicity instruction, you may have led the jury to believe that the gravamen of capital murder is -- can be made up by the fact that John Parker had an intent to kill and I would just ask that they be instructed briefly and simply that they cannot convict for capital murder unless they find that Kenneth Eugene Smith had a specific and real intent to kill.

MR. ALVERSON: Judge, you stated that twice.

THE COURT: Anything else?

MR. ALVERSON: No.

THE COURT: I am going to deny that motion.

(Open court.)

THE COURT: I ask you now to go to the jury room to continue your deliberations.

And the note the jury gave to me, I am going to mark it as Court's Number 1, Exhibit Number 1.

MR. JOHNSON: I believe, Your Honor, there might already be a Court's Exhibit Number 1 relating to the voir dire.

THE COURT: Well, I will mark it Court's Exhibit A, if there is such.

(Jury excused.)

(Jury deliberations continued.)

(Jury present.)

THE COURT: Ladies and gentlemen of the jury, have you reached a verdict?

FOREMAN GILES: Yes, we have, Your Honor.

'l'HE COURT: Mr. Giles, have you got it? If you will hand it to me, please.

(Foreman complies.)

THE COURT: Is this your verdict: We

Appendix L

IN THE CIRCUIT COURT OF JEFFERSON COUNTY ON CHANGE OF VENUE FROM COLBERT COUNTY STATE OF ALABAMA

DEFENDANT'S AMENDED REQUEST TO CHARGE

No. CC 89-1149

STATE OF ALABAMA,

—v.—

KENNETH EUGENE SMITH,

Defendant,

KENNETH EUGENE SMITH, through counsel, pursuant to Rule 21, Ala.R.Crim.P., moves this court to instruct the jury on the following matters at the conclusion of the guilt-innocence phase of trial. Each request is based on Article I, Sections l, 6, 8, 11 and 15 of the Alabama Constitution, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constiution, as well as the supplemental authorities set forth with individual proposed instructions and any supplemental points and authorities filed with or cited during argument to the court.

1. Presumption of Innocence

2. Reasonable Doubt: As set forth in the Administrative Office of the Courts, Pattern Jury Instructions, 3d ed. 1994 at I.8.

3. Charge Not Evidence

4. Nature of Charges

5. Lesser Related Offenses In General: As set forth in the Administrative Office of the Courts, Pattern Jury Instructions, 3d ed. 1994 at I.6.

6. Murder for Pecuniary or other Valuable Consideration: Capital Murder, Ala.Code §13A-5-40(a)(7). As set forth in the Administrative Office of the Courts, Pattern Jury Instructions, 3d ed. 1994 at 5-86.

7. Elements of the Offenses: Culpability
   (A) Mental State
   (B) Intent

8. Felony Murder, Ala. Code §13A-6-2(a)(3): As set forth in the Administrative Office of the courts, Pattern Jury Instructions, 3d ed. 1994 at 6-5, restricted to a killing in the course of an assault in the first degree.

9. Murder -- Extreme Indifference to Human Life Ala. Code §13A-6-2(a)(2): As set forth in the Administrative Office of the Courts, Pattern Jury Instructions, 3d ed. 1994 at 6-3.

10. Manslaughter, Ala. Code §13A-6-3(a)(l): As set forth in Administrative Office of the Courts, Pattern Jury Instructions, 3d ed. 1994 at 6-11.

11. Intoxication Negating Intent

12. Parties -- complicity

13. Mere Presence at the Scene of Crime

14. Corroboration
15. Confessions and Admissions: Substantive Evidence
16. Admissions to Third Parties
17. Credibility of Witnesses
18. Impeachment
19. Impeachment By Proof of Conviction of a Crime: Witness
20. Where a Defendant Does Not Testify
21. Police Officer Testimony
22. Expert Testimony and Evidence
23. Number of Witnesses
24. Missing Evidence
25. Juror unanimity

Respectfully submitted,

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CERTIFICATE Of' SERVICE

I certify that a true and accurate pleading and any supporting documents were served on opposing counsel via hand in open court April 29, 1996

s/_____

(B) Intent[4]

I have already instructed you in the elements of capital murder and will shortly explain to you the elements of various related offenses. With respect to capital murder in particular a person commits that offense if and only if he causes the death of a person, and in performing the act or acts which cause the death of that person, he intended to kill that person. He must act with the purpose to take a life and the intent must be real and specific. The state must prove an intent to kill beyond a reasonable doubt for capital murder.

A person acts intentionally when it is his purpose to cause the death of another person. He must have a conscious purpose to cause the end result and a desire to bring it about. It will not suffice for you to find that he intended to commit a crime or that John Parker intended to kill. You must find that Kenneth Smith himself specifically intended the death of Mrs. Sennett.

lf you find that the state has failed to prove beyond a reasonable doubt an intentional murder, as I have explained that term, then you cannot find the defendant guilty of capital murder.

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[4] Points and Authorities: Sandstrom v. Montana, 442 U.S. 510 (1979); In re Winship, 397 U.S. 358 (1970); Ala. Code §13A-5-40(b) and 13A-6-2(a)(l); Ex parte Raines, 429 So.2d 1111, 1112 (Ala. 1982); Ex parte Kyzer, 399 So.2d 330, 335 (Ala. 1981) (intentional killing is gravamen of all capital offenses); Bankhead v. State, 585 So.2d 97, 102 (Ala.Cr.App. 1989) ("A death sentence is authorized in Alabama only if the appellant has some specific intent to kill the victim."); Connolly v, State, 500 So.2d 62 (Ala.Cr.App. 1985), aff'd, 500 So.2d 68 (1986) ("(I]n a prosecution for a capital offense, the felony-murder doctrine has no place in securing a conviction of the offense charged.").

Accepted: _____

Rejected: ✓ Covered in General charge

Modified: _____

Withdrawn: _____

* * * * *

8. Murder: Felony Murder[5]

A person commits the crime of murder if he commits assault in the first degree, as I will later define the term, and in the course of the crime he or another participant causes the death of any person.

You may find Kenneth Smith guilty of felony murder if you find that the evidence shows beyond a reasonable doubt the following elements of that offense:

1. That Elizabeth Sennett is dead;

2. That Kenneth Smith or John Forrest Parker caused the death of Elizabeth Sennett by the acts of beating and stabbing her; and

3. That in committing the acts which caused the death of Elizabeth Sennett, Kenneth Smith or John Parker were acting in the course of and in furtherance of the crime of assault in the first degree.

I will define the felony of assault in the first degree for you.

Accepted: ✓

Rejected: _____

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[5] Points and Authorities: Ala. Code §13A-6-2-(a)(J): Administrative Office of the courts, Pattern Jury Instructions, 3d ed. 1994 at 6-5.

Modified: _____

Withdrawn: _____

* * * * *

12. Parties -- Complicity[10]

A person is legally accountable for the behavior of another person constituting a crime if, with intent to promote or assist the commission of the crime he either:

1. procures, induces or causes such other person to commit the crime; or

2. aids or abets such other person in committing the crime.

In order to find that Kenneth Smith is guilty of capital murder as an accomplice to that crime, you must find not only that he aided and abetted John Parker but you must also find that Kenneth Smith specifically intended that Mrs. Sennett be killed. If you find that Kenneth Smith intended that Mrs. Sennett be hurt or that another crime be committed, you can find Mr. Smith guilty of felony murder, but you cannot find him guilty of capital murder. Kenneth smith can only be guilty of capital murder if you conclude beyond a reasonable doubt that he shared a specific intent and purpose to take Elizabeth Sennett's life.

Accepted: _____

Rejected: ✓ covered in General charge

Modified: _____

Withdrawn: _____

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[10] Points and Authorities: Ala.Code §13A-2-23; Administrative Office of the courts, Pattern Jury Instructions, 3d ed. 1994 at 2-19.

* * * * *

13. Mere Presence at the scene of a Crime[11]

Mr. Smith's mere presence at the scene of the crime while John Parker killed Mrs. Sennett is not sufficient for you to convict him of capital murder. In order to convict Kenneth Smith of capital murder, you must find that he intended the murder to be committed, in other words that he specifically intended that Elizabeth Sennett be killed, and that he aided and abetted John Parker in killing Mrs. Sennett.

Accepted: _____

Rejected: ✓ [ILLEGIBLE]

Modified: _____

Withdrawn: ✓

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[11] Points and Authorities: Sandstrom v. Montana, 442 U.S. 510 (1979); In re Winship, 397 U.S. 358 (1970); Ala. Code §13A-5-40(b) and l3A-6-2(a)(l): Hardeman v. State, 651 So.2d 59 (Ala.Cr.App. 1994); Beady y. State, 574 So.2d 894 (Ala.er.App. 1990); Greer v. State. 563 So.2d 39 (Ala.er.App. 1990); Lewis v. State, 456 So.2d 413 (Ala.er.App. 1984); Ex parte Baines, 429 So.2d 1111, 1112 (Ala. 1982); Ex parte Kyzer, 399 So.2d 330, 335 (Ala. 1981) (intentional killing is gravamen of all capital offenses); Bankhead v. State, 585 So.2d 97, 102 (Ala.er.App. 1989) ("A death sentence is authorized in Alabama only if the appellant has some specific intent to kill the victim."); Connolly v. State, 500 So.2d 62 (Ala.er.App. 1985), aff'd. 500 So.2d 68 (1986) ("[I]n a prosecution for a capital offense, the felony- murder doctrine has no place in securing a conviction of the offense charged."); Ala.stat.Ann Sec. 13A-2-3 (Requirements for criminal liability in general).